IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH MUMBAI

BEFORE SHRI MAHAVIR SINGH, JM
&
SHRI M.BALAGANESH, AM

ITA No.2687/Mum/2011
(**Assessment Year : 2007-08**)
ITA No.1738/Mum/2013
(**Assessment Year : 2009-10**)
&
ITA No.1739/Mum/2013
(**Assessment Year : 2008-09**)

M/s. National Stock Exchange of India Ltd., C-1, Block-G, Exchange Plaza, Bandra Kurla Complex Bandra (East) Mumbai – 400 051	Vs.	Addl. CIT, Rg. 7(1) Aaykar Bhavan Mumbai – 400 020
PAN/GIR No.AAACN1797L		
	..	**(Respondent)**

ITA No.1751/Mum/2011
(**Assessment Year : 2007-08**)

Addl. CIT, Rg. 7(1) Aaykar Bhavan Mumbai – 400 020	Vs.	M/s. National Stock Exchange of India Ltd., C-1, Block-G, Exchange Plaza, Bandra Kurla Complex Bandra (East) Mumbai – 400 051
PAN/GIR No.AAACN1797L		
	..	**(Respondent)**

Assessee by	Shri Percy Pardiwala & Shri Sukhsagar Syal
Revenue by	Shri Chowdhary Arun Kumar Singh
Date of Hearing	**14/08/2019**
Date of Pronouncement	**16/10/2019**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

These Cross appeals in ITA Nos.2687/Mum/2017, ITA No.1738/Mum/2013, 1739/Mum/2013 & 1751for A.Y.2007-08, 2009-10 & 2008-09 respectively arise out of the order by the ld. Commissioner of Income Tax (Appeals)-13, Mumbai in appeal Nos.CIT(A)-13/Addl.CIT 7(1)/175/09-10, CIT(A)-13/Addl.CIT 7(1)/284/2011-12, CIT(A)-13/Addl.CIT 7(1)/211/2010-11 & CIT(A)-13/Addl.CIT-7(1)/175/09/10 respectively dated 02/12/2010, 07/12/2012, 5/12/2012 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 02/12/2009, 29/12/2011 & 22/12/2010 respectively by the ld. Addl. Commissioner of Income Tax, Range 7(1) (hereinafter referred to as ld. AO). Since, the issues involved are identical in all these appeals, they are taken up together and disposed off by this common order for the sake of convenience.

ITA No. 2687/Mum/2011 – Asst Year 2007-08 – Assessee Appeal

2. The Ground Nos. 1(a) and (b) raised by the assessee are challenging the disallowance u/s 14A of the Act read with Rule 8D of the Rules.

2.1. We have heard the rival submissions and perused the materials available on record. We find that the assessee company is engaged in the business of running a stock exchange. The main object of the assessee company is to facilitate, promote, assist, regulate and manage in public interest, dealings in securities of all kinds and to provide specialized advanced, automated and modern facilities for trading, clearing and settlement of securities and to ensure trading in a transparent, fair and

open manner. During the year under consideration, the assessee claimed an amount of Rs 27,42,86,081/- comprising of interest on tax free bonds of Rs 9,32,86,760/- and dividend income of Rs 18,09,99,321/- as exempt u/s 10 of the Act in the return of income. We find that the assessee made suo moto disallowance of expenses u/s 14A of the Act computed at 0.1% of exempted income as expenditure attributable to earning of tax free income. The ld AO adopted the computation mechanism provided in Rule 8D(2) of the Rules and made the following disallowance :-

Under Rule 8D(2)(i) consisting of amount disallowed by Assessee in the return of income	2,74,286
Under Rule 8D(2)(iii)	2,65,23,192
Total Disallowance	2,67,97,478

2.2. We find that the ld CITA reduced the quantum of disallowance u/s 14A of the Act by directing the ld AO to consider the average value of investments by applying a particular formula and directed to apply 0.5% of such investments and work out the disallowance.

2.3. We find that the year under consideration is Asst Year 2007-08, for which year, the computation mechanism provided in Rule 8D(2) of the Rules cannot be made applicable as it was introduced only with effect from 24.3.2008 relevant to Asst Year 2008-09 and was held to be prospective in operation by the decision of Hon'ble Jurisdictional High Court in the case of Godrej & Boyce Manufacturing Co Ltd reported in 328 ITR 81 (Bom). We find that the Hon'ble Calcutta High Court in the case of *CIT vs M/s R.R.Sen & Brothers P Ltd in GA No. 3019 of 2012 in ITAT NO. 243 of 2012 dated 4.1.2013* had held as under:-

" The assessee did not show any expenditure incurred by him for the purpose of earning the money which is exempted under income tax. The tribunal has computed expenditure at 1% of such dividend income, which, according to them, is the thumb rule applied consistently. We find no reason to interfere.

The appeal is dismissed."

2.4. Respectfully following the judicial precedent, we direct the ld AO to disallow 1% of exempt income and work out the disallowance u/s 14A of the Act accordingly after reducing the amount already disallowed by the assessee in the return of income. Hence the Ground Nos. 1(a) and 1(b) raised by the assessee are partly allowed.

3. The Ground No. 2 raised by the assessee is challenging the disallowance of Rs 1,29,52,157/- being the proportionate amortized amount of lease premium paid to Bombay Metropolitan Regional Development Authority in respect of leasehold land.

3.1. We have heard the rival submissions. We find that similar issue was subject matter of adjudication by this tribunal in the case of IOT Infrastructure & Energy Services Ltd (formerly Indian Oil Tanking Limited) in ITA Nos. 1901 & 2585/Mum/2009 for Asst Year 2004-05 ; ITA Nos. 3477 & 3241/Mum/2009 for Asst Year 2005-06 ; ITA No. 2208/Mum/2010 for Asst Year 2006-07 ; ITA No. 7035/Mum/2010 for Asst Year 2007-08 and ITA No. 7430/Mum/2011 for Asst Year 2008-09 dated 17.5.2013 wherein it was held as under:-

"19. As regards the premium and other charges paid in respect of leasehold land, the Id. Counsel for the assessee has submitted that although a similar issue has been decided by the- Tribunal against the assessed in A.Y. 1999-2000, the decision of Hon'ble Gujarat High Court in the case of Sun Pharmaceuticals Ind. reported in (2 010) 3 2 9 IT R 479 rendered subsequently on a similar issue is in favour of the assessee. A perusal of the judgment passed by the Hon'ble Gujarat High Court in the said case shows that the Tribunal in that case had found on

> *analysis of the relevant lease agreement that the land in question was not acquired by the assessee. The lease Deed was registered because as per the Registration Act it was compulsory to do so. There was no change in the ownership of the land and the lease rent payable was very nominal. Keeping in view all these facts, it was held by the Tribunal that the benefit accrued to the assessee was only in the nature of an advantage for carrying on the business by paying nominal rent of the land and by obtaining the land on lease, the capital structure of the assessee did not undergo any change. Keeping in view all these findings of fact recorded by the Tribunal, which were not specifically disputed by the Revenue, the Hon'ble Gujarat High Court did not find any infirmity in the order of the Tribunal deleting the disallowance made on account of lease rent paid by the assessee to GIC treating the same as Revenue expenditure. In our opinion, before the ratio of the decision of Hon'ble Gujarat High Court in the case of Sun Pharmaceuticals Ind. Ltd. (supra) is applied in the present case, the relevant facts are required to be verified, we therefore restore this issue to the file of the A.O. for deciding the same afresh in the light of the decision of Hon'ble Gujarat High Court in the case of Sun Pharmaceuticals Ind. Ltd. (supra) after verifying the relevant facts. Ground No. 4 & 5 of the assessee's appeal are accordingly treated as allowed for statistical purpose."*

3.2. Respectfully following the same, we restore this issue to the file of ld AO for deciding the issue in the light of decision of Hon'ble Gujarat High Court in the case of Sun Pharmaceuticals India Ltd reported in 329 ITR 479 (Guj) . Accordingly, the Ground Nos. 2(a) to 2(d) raised by the assessee are allowed for statistical purposes.

4. The Ground No. 3 raised by the assessee is with regard to disallowance of lease premium to the extent of Rs 63,10,678/- being included in the maintenance expenses of Rs 2,05,42,418/- pertaining to let out properties which was already added back by the assessee in the computation of income.

4.1. The brief facts of this issue are that the assessee apart from collecting rental income also collected some maintenance charges from let out portions from the licensees as per the terms of leave and license

agreements entered into with the parties. The assessee submitted that this maintenance charges collected is over and above the normal rental charges that were collected from the licensees. The assessee further submitted that the maintenance charges were collected as per the separate clause provided in the leave and license agreement wherein the assessee is entitled to collect the same towards provision of certain facilities such as security , common usage etc. The assessee pleaded that maintenance charges, recovered as separate charges, were towards other facilities provided by the assessee company and the said charges were over and above the rental charges as per the terms of the agreement and amounted to reimbursement / recovery of expenses actually incurred by the assessee company. The assessee adjusted the recovery of these maintenance charges with the actual expenditure incurred thereon by crediting to the concerned expenditure account. The ld AO however disregarded the contentions of the assessee and proceeded to treat the maintenance charges collected as income from house property by placing reliance on the decision of Hon'ble Supreme Court in the case of Shambhu Investment (P) Ltd vs CIT reported in 120 Taxman 70 (SC). The assessee submitted that the said decision is factually distinguishable and also brought out the factual differences on record. The assessee placed reliance on certain decisions in support of its facts of the case. However, the contentions of the assessee were not appreciated by the lower authorities.

4.2. We have heard the rival submissions and perused the materials available on record. We find that the assessee had incurred maintenance charges of Rs 2,05,42,418/- and had recovered maintenance charges to the tune of Rs 1,68,61,573/- and the net maintenance charges of Rs 36,80,845/- has been disallowed by the assessee under the head income

from business in the computation of income. The maintenance charges expenditure was incurred in relation to providing the facilities and other services to the licensees from whom the maintenance charges were recovered. We find that the assessee had tried to give a different treatment for rental income, which is offered under the head income from house property and for maintenance charges recovered, which is offered under the head income from business. It would be pertinent to look into the details of maintenance expenses on let out property together with the treatment given by the assessee with regard to the same and details of maintenance charges recovered , which are as under:-

National Stock Exchange of India Ltd F.Y. : 2006-07				
A.Y. : 2007-08				
Details of Maintenance Expenses on Let out property				
EXPENSES	*F.Y. 06-07*	*Area covered (sq.ft)*	*Area Rented out*	*Expenses on Let out Property Amt. (Rs.)*
Lease Premium Amortization	*12,952,157.53*	*322222.73*	*156996.5*	*6,310,678.08*
Ground Lease Rent Land Revenue Charges	*9,060,000.00 89,372.00*	*322222.73 322222.73*	*156996.5 156996.5*	*4,414,302.65 43,544.71*
Plumbing System - 0& M Chgs Electrical System - O& M Chgs	*1,272,090.00 1,366,666.00*	*322222.73 322222.73*	*156996.5 156996.5*	*619,800.25 665,880.50*
Elevators- O& M Chgs HVAC System – O & M Chgs	*1,136,894.33 2,625,465.50*	*322222.73 322222 73*	*156996.5 156996.5*	*553,928.88 1,279,205.22*
Fire Fighting System - O&M Chgs 'Building Autom System- O & M Chgs	*661,783.00 108,216.00*	*322222.73 322222. 73*	*156996.5 156996.5*	*322,440.45 52,726.07*

Fire Detection System-O& M Chgs Facade Cleaning System- 0& M Chgs	*65,667.00 1,694,682.00*	*322222.73 322222 73*	*156996.5 156996.5*	*31,994.92 825,699.70*
DG Set- O&M Chgs Insurance	*266,905.00 2,248,076.72*	*322222.73 322222.73*	*156996.5 1569965*	*130,044.09 1,095,330.14*
Security Charges Agency Commission charges for -Oracle India P. Ltd. Security Charges(Chennai)	*5,108,030.00 1,394,061.00 417,830.00*	*322222.73 1519000*	*156996.5 2565.00*	*2,488,784.81 1,394,061.00 70,55523*
Property Tax (Chennai) Housekeeping (Chennai}	*260,596.00 1,181,073.00*	*15190.00, 15190.00*	*2565.00 2565.00*	*44,004.53 199,437.28*
Total Expenses	*41,909,565.08*			*20,542,418.50*
Details of Maintenance Recovery Party		*Amt. (Rs.)*		
Intel Technology India Pvt. Ltd. CA (India) Technologies Pvt- Ltd.		*776,203.00 1,589,28400*		
NCDEX Oil & Natural Gas Corporation Ltd		*3,712,533,00 8,352,512.00*		
Securities and Exchange Board of India Oracle India Pvt Ltd. Canara Bank		*752,792, 00 1,492,640.00 185,609.00*		
		16,85,1,573.00		

4.2.1. We find that the ld AO had disallowed the lease amortization premium of Rs 1,29,52,157/- as a separate line item while computing the income from business. From the above table, it could be safely concluded that a sum of Rs 63,10,678/- being the lease premium amortization is

included in the total maintenance charges of Rs 2,05,42,418/- which was debited by the assessee in the profit and loss account. We find that a sum of Rs 63,10,678/- is only the amortised portion of Rs 1,29,52,157/-. Since the issue of disallowance of lease amortization premium of Rs 1,29,52,157/- has been restored back to the file of ld AO supra, we deem it fit and appropriate, in the interest of justice and fairplay, to restore this issue also to the file of ld AO for denovo adjudication in accordance with law. Needless to mention that the assessee be given a reasonable opportunity of being heard. We find that the ld AR had vehemently argued before us that the ld AO had made disallowance twice. All these arguments could be advanced by the assessee before the ld AO in the set aside proceedings. The assessee is also at liberty to adduce fresh evidences, if any, in support of its various contentions. Accordingly, the Ground No. 3 raised by the assessee is allowed for statistical purposes.

5. The Ground Nos. 4(a) to 4 (d) are with regard to the treatment of maintenance charges recovered together with rental income and consequentially taxing the same under the head income from house property.

5.1. We have heard the rival submissions. We find that the ld AR had vehemently argued before us regarding the treatment of this issue in various assessment years and also by placing reliance on various judicial decisions. Per Contra, the ld DR argued that this issue has been set aside to the file of ld CITA in assessee’s own case for the Asst Years 2004-05 and 2005-06 by this tribunal. We have already restored the issue of lease amortization premium of Rs 1,29,52,157/- which admittedly is included in the total maintenance charges expenditure of Rs 2,05,42,418/- as could be evident from the table reproduced in previous grounds supra. As all

these issues are interlinked with each other, we deem it fit and appropriate, in the interest of justice and fairplay, to restore this issue also to the file of ld AO for denovo adjudication in accordance with law. Needless to mention that the assessee be given a reasonable opportunity of being heard. We find that the ld AR had made several arguments with regard to the impugned issue but we refrain to give any opinion on such arguments and all arguments made by the ld AR are left open to be stated before the ld AO afresh. The assessee is also at liberty to adduce fresh evidences, if any, in support of its various contentions. Accordingly, the Ground Nos. 4(a) to 4(d) raised by the assessee are allowed for statistical purposes.

6. The Ground No. 5 raised by the assessee is with regard to the rate of depreciation on computer software.

6.1. We have heard the rival submissions. It is not in dispute that the assessee had made investment in purchase of software by way of lumpsum investment which would give enduring benefit. We find that the lower authorities had granted depreciation for the same at the rate of 25% by holding that the purchase of software amounts to acquisition of intangible assets in the form of rights / licences. Accordingly they had rejected the claim of higher rate of depreciation of the assessee at 60%. We find this issue has already been decided in favour of the assessee by this tribunal in assessee's own case for the Asst Year 2005-06 in ITA No. 3114 & 3047 /Mum/2009 dated 30.12.2011 wherein this tribunal by placing reliance on the Special Bench decision in the case of Amway India Enterprises vs DCIT reported in 111 ITD 112 had allowed depreciation at the rate of 60% on computer software. Respectfully following the same,

we direct the ld AO to grant depreciation at the rate of 60%. Accordingly, the Ground No. 5 raised by the assessee is allowed.

7. The Ground No. 6 raised by the assessee is with regard to the disallowance of claim of deduction u/s 28 / 37(1) of the Act in the sum of Rs 58,23,274/- towards amounts written off as irrecoverable as trading / business loss.

7.1. The brief facts of this issue are that the ld AO observed that during the year, the assessee had written off bad debts of Rs 72,26,009/- in its books, the details of which were furnished. From the said details, the ld AO observed that the said sum admittedly included the following two sums :-

a) Deposit paid to Municipal Corporation of Greater Bombay -	4,07,920/-
b) Deposit paid to Goodhope Advisory Services Pvt ltd for a flat at Kolkata	- 54,15,354/-
	58,23,274/-

The ld AO observed that these two items were never considered as income in terms of section 36(2) of the Act. He noted that Rs 4,07,920/- was paid as 'Debris removal deposit and security deposit towards permission for provision of temporary monsoon protection shed at the premises' and Rs 54,15,354/- was towards 'deposit for premises written off'. The assessee was asked to clarify as to how the write off of the aforesaid two items would be eligible for deduction as bad debts. The assessee gave a detailed explanation in this regard as under:-

"BKC Debris Written Off- Rs 4,07,920

The assessee during the previous year relevant to the captioned assessment year has written off deposits - BKC Debris amounting to Rs. 3,33,000/-. The assessee

had also written off a deposit of Rs. 61200/-given to Municipal Corporation of Greater Mumbai for obtaining permission for temporary monsoon protection sheds at Exchange Plaza. The said deposits were given under the understanding that on removal of the debris / monsoon shed, the said security deposit would be refunded. However even after persistent follow up with the Municipal authorities, the deposit amounts were not refunded. Considering the business expediency, the management had decided to write off the said deposits in the books of accounts in the captioned assessment year. Further, similar deposits aggregating to Rs. 13720/- for erecting temporary monsoon protection sheds every year, at the rented premises of the assessee at Trade World are also written off as the same is not recoverable from the Municipal authorities. Details of the same are enclosed at Annexure4(b).

It is submitted that the above deposits were given in the ordinary course so to ensure smooth running of the business. However, the same are still not recoverable inspite of possible efforts. The assessee has lost the hope of recovering these deposits, hence, these deposits were written off in the Profit & Loss Account being irrecoverable as 'Business Loss' in the ordinary course of its business.

Since these deposits were given wholly and exclusively for the business purpose which could not be recovered, hence they are allowable under section 28 and 37(1) of the Income Tax Act, 1961 as business loss.

Good hope Advisory Services Pvt. Ltd. (GASPL) - Rs. 5415354/-

The assessee company had entered into renewable business service agreement with the party for part of premises at 1st floor, Ideal Plaza, Sarat Bose Road, Kolkatta, where the assessee company had its office. Against the said premises, assessee company had given a security deposit. The agreement period for this premises was from December 1, 2000 to November 30, 2005. After the termination of the agreement, GASPL failed to take back the possession of the premises and return the refundable security deposit of the assessee.

Further, GASPL was in the practice of adjusting the gross rent payable (inclusive of TDS) by the assessee against the security deposit However, the assessee company had deducted TDS of Rs. 4,14,943/- from such rent payable to the said party, which it has paid to the central Government and had issued them the TDS certificate. Accordingly, the assesses has debited a sum of Rs. 414943/- towards such excess rent wrongly adjusted by the .said party against Security Deposit, Thereafter, the board of directors of the assesses company at its 80th meeting held on 28.04.2006 approved to surrender the said premises belonging to the above party and further decided to recover Rs. 84,45,054/- as full and final settlement, (copy of the board's resolution and approval note is enclosed at Annexure4(c)).

Thus, the balance amount of Rs.50,00,785/- (1,34,45,839 - 84,45,054) and Rs. 4,14,943/- (TDS deducted wrongly adjusted by the party) has been written off in the books of accounts of the assessee. It is submitted that Rs. 54,15,728/- represents amount irrecoverable from the party which has been incurred in the

> *course of carrying business and hence the same is allowable as business loss / expenditure u/s. 28 / u/s. 37(1)".*

7.2. The ld AO addressed the aforesaid issue in the context of provisions of bad debts u/s 36(1)(vii) of the Act and observed that the aforesaid two items were not in the nature of income in terms of section 36(2)(i) of the Act and hence they cannot be granted deduction on write off as bad debts u/s 36(1)(vii) of the Act. Later the ld AO observed that since the deposits paid were capital in nature, the write off of the same due to irrecoverability would only result in capital expenditure and hence cannot be allowed as deduction u /s 37(1) of the Act. With these observations, he disallowed the sum of Rs 58,23,274/- in the assessment. The action of the ld AO was upheld by the ld CITA. Aggrieved, the assessee is in appeal before us.

7.3. We have heard the rival submissions. At the outset, we find that the assessee had given certain deposits as detailed supra in the ordinary course of its business. It is not in dispute that those deposits became irrecoverable despite several efforts taken by the assessee. It is not in dispute that these deposits were actually written off as irrecoverable in the books of the assessee and claimed as deduction in the return of income. We find that the genuineness of the aforesaid deposits paid to the parties in the ordinary course of business of the assessee company was never disputed by the revenue. Hence we hold that the said write off of deposits paid in the ordinary course of business would be allowable as a trading / business loss u/s 28 of the Act. We find that the ld AR had rightly placed reliance on the decision of the Hon'ble Jurisdictional High Court in the case of I.B.M. World Trade Corporation vs CIT reported in 186 ITR 412 (Bom) . The question raised before the Hon'ble Bombay High Court is as under:-

"Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in disallowing the amount of Rs. 1,08,088 having been written off during the previous year as a deduction in arriving at the taxable income of the company on the grounds that the same did not fall under the provisions of any section, viz. Section 28 and/or Section 36 and/ or Section 37 of the Income-tax Act, 1961 ?"

The facts of the case before the Hon'ble Bombay High Court are as under:-

"2. The assessee-company is a non-resident company. It is engaged in the business of manufacture of accounting and computing machines which are sold or given on hire and of giving services in respect of the same. The assessment year involved is 1965-66. The assessee-company entered into an agreement with one Mr. Sunder Waney, the landlord of the premises, on March 2, 1969 (1960). The landlord undertook to construct a factory together with a garage and a two-room flat on the plot of land situated at Kurla and to grant a lease of the said premises to the assessee-company for a period of ten years renewable for a further period of five years at the option of the assessee-company for the compensation fixed in the agreement. Three more agreements were entered into by the assessee-company with the said landlord in this connection from time to time. In order to facilitate speedy construction, the assessee-company, by one of these agreements, advanced a total sum of Rs. 99,888 to the landlord till 1963. As the landlord became insolvent, the entire amount of Rs. 1,08,088 inclusive of interest and the principal amount advanced was written off by the assessee-company.

3. The assessee claimed the aforesaid amount of Rs. 1,08,088 as a business loss. The claim was disallowed by the Income-tax Officer and the disallowance was confirmed by the Appellate Assistant Commissioner who, inter alia, observed that the agreement had nothing to do with the current business of the assessee and related to a capital project and in connection with the setting up of a new factory."

The decision rendered by the Hon'ble Bombay High Court is as under:-

"10. We have carefully gone through the statement of the case and the annexures, particularly the four agreements dated March 2, 1960, March 24, 1961, June 7, 1962, and October 23, 1962, entered into between the assessee and the landlord of the premises in question. It is seen that the assessee is carrying on the business of manufacturing

accounting and computing machines. It is also selling them as well as hiring them and also giving service after sales. The factory premises, as the clause relied upon by Shri Dastur, viz., Clause IX(i)(j) of the agreement dated March 2, 1960, and Clause (2) of the agreement dated October 23, 1962, clearly indicated, was being acquired for its existing business. Moreover, as pointed out by Shri Dastur, the Income-tax Appellate Tribunal has rejected the claim of the assessee for a reason other than this reason. Accordingly, we proceed on the assumption that the factory premises were being acquired by the assessee on lease for the purpose of its existing business.

11. The lease was going to be initially for a period of ten years. There was, of course, a clause for renewal at the option of the assessee for a further period of five years. In view of this court's decision in Richardson Hindustan Ltd. v. CIT [1988] 169 ITR 516, in which, following the earlier decisions in CIT v. Hanftst Pharmaceutical Ltd. [1978] 113 ITR 877, CIT v. Bombay Cycle and Motor Agency Ltd. [1979] 118 ITR 42 and CIT v. Cinceita Private Ltd. [1982] 137 ITR 652, this court held that the period of lease was not of much relevance and that the expenditure incurred for acquiring premises on lease was allowable as a business deduction, we hold that the amounts advanced by the assessee for the purpose of acquiring the factory on lease is an advance for the purpose of the assessee's business.

12. The question that arises for consideration is whether the fact that in the present case the amounts have been advanced to the landlord in pursuance of the agreement before the execution of the lease deed would make any difference. In our opinion, it will not. It is not disputed that the assessee required factory premises for its business and that it did not get a ready factory for that purpose. It took a business decision to enter into agreements with the landlord who owned the land which did not have the factory shed and other structures required by the assessee. The landlord expressed difficulty in constructing the factory building and other structures. The assessee, in pursuance of other agreements entered into, advanced moneys which were in the beginning to be adjusted against the future rents, but subsequently were agreed to be refunded to the assessee on a fixed date. It is true that if the landlord had failed to construct the factory building and other structures as agreed to, the agreements would have fallen through and there was no penalty clause as such. However, one cannot get away from the fact that all this was done by the assessee with a view to acquire the factory premises on lease. The mere fact that the factory would be ready in a year or so would not make any difference.

13. We are in agreement with Shri Dastur that the principles in this regard are laid down by the Supreme Court in its judgment in CIT v.

Mysore Sugar Co. Ltd. [1962] 46 ITR 649. The relevant observations in this case have already been noted by us earlier in Empire Jute Co. Ltd. v. CIT . Apart from the fact that this court had already held that the length of the lease agreement is not very material for the purpose of determining the nature of the expenditure incurred on lease agreements, the Supreme Court has clearly laid down in Empire Jute Co. Ltd. [1980] 124 ITR 1, that even assuming that a lease for a period of 10, 15 or 20 years would amount, to an advantage of enduring nature, it is not that every advantage of enduring nature would result in a capital outlay. What is required to be seen is whether the advantage of enduring nature is in the capital field. As the acquisition of premises on lease would not ordinarily be in the capital field, we have no hesitation in holding that the moneys advanced by the assessee in pursuance of these agreements to the landlord for the purposes of and in connection with the acquisition of the premises on lease were for the purpose of business. Naturally, therefore, when such advances are lost to the assessee, the loss would be a business loss and not a capital loss. The decisions relied upon by Dr. Balasubramanian, according to us, have no bearing on the question involved herein. In the Supreme Court decision, the question was of a third party's liability to pay estate duty and the discharge by an assessee. It was obviously a purpose unconnected with the business of the assessee. The other two decisions, viz., Uttar Bharat Exchange Ltd. v. CIT [1965] 55 ITR 550 (Punj) and Taj Mahal Hotel v. CIT [1967] 66 ITR 303 (AP) refer to the expenditure incurred by an assessee on alterations and additions made by an assesses in leasehold premises. No doubt, such expenditure was held to be of capital nature. We fail to understand how those decisions have any bearing on the point in issue before us.

14. Having regard to the above discussion, the question posed before us is answered in the affirmative and in favour of the assessee. No order as to costs."

7.3.1. Similar view was rendered by the co-ordinate bench of this tribunal in the case of Abbott Healthcare (P) Ltd vs Additional CIT reported in (2019) 104 taxmann.com 143 (Mumbai- Trib) dated 30.1.2019 wherein the undersigned was the Author. The relevant operative portion of the said order is as under:-

"52. We have heard the rival submissions. It is not in dispute before us that the said rental deposit / lease deposit was paid by the assessee for taking the premises on lease for the purpose of business of the assessee. The payment of said lease deposit was to the tune of Rs.41.65 lakhs by the assessee to the concerned landlord. It is not in dispute that the

> *assessee had vacated the said leased premises in a peaceful manner. The ld. DRP had taken note of various email correspondences and various actions taken by the assessee for recovering the rental deposit from the landlord after vacating the said leased premises. We find that the assessee had categorically stated that the said leased deposits were indeed written off in the books for the financial year 2009-2010 relevant to the assessment year 2010-2011. This fact remained uncontroverted by the Revenue before us. Hence, we hold that when the lease deposit was paid for the purpose of business, and when the said lease deposit become irrecoverable, despite having efforts from the side of the assessee and when there is a categorical finding by the ld. DRP that the landlord had suffered major losses on account of acquisition of excessive real estate, which eventually led to wound up his business, the irrecoverability of the deposit paid by the assessee stands duly proved. The assessee had also duly written off the said irrecoverable deposit in its books. We also find that the ground raised by the Revenue itself is patently wrong inasmuch as the Revenue is expecting the assessee to comply with the conditions of section 36(2) of the Act by offering the income in the hands of the assessee in earlier years. The ground also suggests that the assessee had made claim u/s 36(1)(vii) of the Act, which in the instant case is not claimed by the assessee. The assessee has claimed deduction only u/s 28 of the Act after duly satisfying the conditions laid down for such claim. Hence, the Ground No.1 raised by the Revenue deserves to be dismissed on this count itself. Hence, in our considered opinion, the same is allowable as deduction u/s 28 of the Act, which have been rightly deleted by the ld. DRP, which does not require any interference. Accordingly, Ground No.1 raised by the Revenue is dismissed."*

7.3.2. In view of our aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we direct the ld AO to grant deduction towards the business deposits written of as irrecoverable in the sum of Rs 58,23,274/- . Accordingly, the Ground No. 6 raised by the assessee is allowed.

8. In the result, the appeal of the assessee in ITA No. 2687/Mum/2011 for Asst Year 2007-08 is partly allowed for statistical purposes.

ITA No. 1751/Mum/2011 – Asst Year 2007-08 – Revenue Appeal

9. The only issue to be decided in this appeal is as to whether the ld CITA was justified in deleting the disallowance of depreciation of rs 2,44,59,550/- on equipments of VSAT network in the facts and circumstances of the case.

10. We have heard the rival submissions. We find that the ld CITA had placed reliance on the orders passed by his predecessor in assessee's own case on the impugned issue for the Asst Years 2001-02 to 2005-06 and deleted the disallowance made by the ld AO. We find that this tribunal in assessee's own case for the Asst Year 2002-03 in ITA Nos. 3321 & 4045/Mum/2006 dated 30.12.2011 had decided this issue in favour of the assessee wherein this tribunal had placed reliance on the orders passed for the Asst Years 1997-98 , 2001-02 and 2003-04 in assessee's own case on the impugned issue. Hence we do not find any infirmity in the order of the ld CITA in this regard. Accordingly, the grounds raised by the revenue are dismissed.

11. In the result, the appeal of the revenue in ITA No. 1751/Mum/2011 for Asst Year 2007-08 is dismissed.

ITA No. 1739/Mum/2013 – Asst Year 2008-09 – Assessee Appeal

12. Both the parties fairly agreed before us that the Ground Nos. 2(a) to 2(d) raised by the assessee for this asst year is similar to the Ground Nos. 2(a) to 2(d) raised by the assessee for the Asst Year 2007-08 and hence the decision rendered thereon would apply with equal force for Asst Year 2008-09 also except with variance in figures. Accordingly, the Ground

Nos. 2(a) to 2(d) raised by the assessee are allowed for statistical purposes.

13. Both the parties fairly agreed before us that the Ground Nos. 3(a) to 3(e) raised by the assessee for this asst year is similar to the Ground Nos. 4(a) to 4(d) raised by the assessee for the Asst Year 2007-08 and hence the decision rendered thereon would apply with equal force for Asst Year 2008-09 also except with variance in figures. Accordingly, the Ground Nos. 3(a) to 3(e) raised by the assessee are allowed for statistical purposes.

14. The Ground Nos. 1(a) to 1(c) raised for the Asst Year 2009-10 is with regard to the disallowance u/s 14A of the Act read with Rule 8D of the Rules.

14.1. We have heard the rival submissions. We find that the assessee had earned tax free income being dividend from mutual funds and equity shares amounting to Rs 18,76,27,624/- and claimed the same as exempt u/s 10 of the Act in the return of income. We find that the assessee had made suo moto disallowance of Rs 2,14,67,000/- u/s 14A of the Act read with Rule 8D of the Rules in the return of income. We find that before the ld AO , the assessee had submitted that the amount disallowed u/s 14A of the Act in the sum of Rs 2,14,67,000/- in the return of income was excessive and that the correct amount of disallowance would only be Rs 1,55,93,916/- and requested for adoption of the revised figure of disallowance u/s 14A of the Act while completing the assessment. This disallowance was worked out by the assessee based on the salary of certain top executives of the assessee company together with certain indirect expenses attributable for investment activity. We find that the ld

AO did not heed to the request of the assessee to disallow the revised sum of Rs 1,55,93,916/- as it would go below the returned income of the assessee and accordingly did not make any disallowance in the assessment. In other words, the disallowance suo moto made by the assessee in the return of income u/s 14A of the Act in the sum of Rs 2,14,67,000/- was retained in the assessment. We find that before the ld CITA, the assessee had further sought to reduce the amount of disallowance u/s 14A of the Act read with Rule 8D(2)(iii) of the Rules to Rs 32,41,762/- . We find that the ld CITA however upheld the action of the ld AO in retaining the disallowance figure u/s 14A of the Act to Rs 2,14,67,000/-. We find that the assessee had revised the computation of disallowance u/s 14A of the Act twice which had not been considered at all by the lower authorities. We are inclined to accept to the arguments of the ld AR that the revised claim of the assessee cannot be ignored merely on the ground that the same , if entertained, would result in reduction of returned income. It is well settled that there is no estoppel against the statute. Since the grievance of the assessee had not been adjudicated by the lower authorities by proper findings on facts and figures in the manner known to law, we deem it fit and appropriate, in the interest of justice and fairplay, to restore this issue to the file of ld AO for denovo adjudication in accordance with law. Needless to mention that the assessee be given a reasonable opportunity of being heard. We find that the ld AR had made several arguments with regard to the impugned issue but we refrain to give any opinion on such arguments and all arguments made by the ld AR are left open to be stated before the ld AO afresh. The assessee is also at liberty to adduce fresh evidences, if any, in support of its various contentions. Accordingly, the Ground Nos. 1(a) to 1(c) raised by the assessee are allowed for statistical purposes.

15. In the result, the appeal of the assessee in ITA No. 1739/Mum/2013 for Asst Year 2008-09 is allowed for statistical purposes.

ITA No. 1738/Mum/2013 – Asst Year 2009-10 – Assessee Appeal

16. Both the parties fairly agreed before us that the Ground Nos. 2(a) to 2(d) raised by the assessee for this asst year is similar to the Ground Nos. 2(a) to 2(d) raised by the assessee for the Asst Year 2007-08 and hence the decision rendered thereon would apply with equal force for Asst Year 2008-09 also except with variance in figures. Accordingly, the Ground Nos. 2(a) to 2(d) raised by the assessee are allowed for statistical purposes.

17. Both the parties fairly agreed before us that the Ground Nos. 3(a) to 3(e) raised by the assessee for this asst year is similar to the Ground Nos. 4(a) to 4(d) raised by the assessee for the Asst Year 2007-08 and hence the decision rendered thereon would apply with equal force for Asst Year 2008-09 also except with variance in figures. Accordingly, the Ground Nos. 3(a) to 3(e) raised by the assessee are allowed for statistical purposes.

18. Both the parties fairly agreed before us that the Ground Nos. 1(a) to 1(c) raised by the assessee for this asst year is similar to the Ground Nos. 1(a) to 1(c) raised by the assessee for the Asst Year 2008-09 and hence the decision rendered thereon would apply with equal force for Asst Year 2009-10 also except with variance in figures. Accordingly, the Ground Nos. 1(a) to 1(c) raised by the assessee are allowed for statistical purposes.

19. The ld DR stated that there is no appeal preferred by the revenue for the Asst Year 2009-10 to this tribunal.

20. In the result, the appeal of the assessee in ITA No. 1738/Mum/2013 for Asst Year 2009-10 is allowed for statistical purposes.

21. TO SUM UP:

ITA NO.	AY	APPEAL BY	RESULT
ITA No. 2687/Mum/2011	2007-08	Assessee	Partly Allowed for statistical Purposes
ITA No. 1751/Mum/2011	2007-08	Revenue	Dismissed
ITA No. 1739/Mum/2013	2008-09	Assessee	Allowed for statistical Purposes
ITA No.1738/Mum/2013	2009-10	Assessee	Allowed for statistical Purposes

Order pronounced in the open court on this 16/10/2019

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 16/10/2019

KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai