IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)

ITA No. 983/MUM/2018
Assessment Year: 2012-2013

The Dy. Commissioner of Income Tax – 14(1)(2), Room No. 475, 4th Floor, Aayakar Bhavan, Maharashi Karve Road, Mumbai - 400020	**Vs.**	M/s Foods & Inns Limited, Dulwich Mansion, 3rd Floor, 224, Tardeo Road, Mumbai - 400007 PAN: AAACF0521C
(Appellant)		**(Respondent)**

Revenue by : Shri Rajeev Gubgotra (DR)
Assessee by : Shri Nitin V. Kulkarni (AR)

Date of Hearing: 07/08/2019
Date of Pronouncement: 30/09/2019

O R D E R

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 09.11.2017 passed by the Commissioner of Income Tax (Appeals)-22 (for short 'the CIT(A), Mumbai, for the assessment year 2012-13, whereby the Ld. CIT(A) has allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. The brief facts of the case are that the assessee company engaged in the business of manufacturing and exporting of fruit powder, egg powder, canned and aseptic fruit pulp, canned vegetable and pickles, filed its return of income for the assessment year under consideration declaring loss of Rs.10,60,77,421/-. The AO completed the assessment u/s 143(3) of the Act and after making various disallowances/ additions, determined the total loss at Rs.8,29,11,579/- under the normal provisions of the Act and Rs. 6,45,06,902/- under section 115JB of the Act. The assessee challenged the assessment order passed by the AO before the Ld. CIT(A). The Ld. CIT(A) after

hearing the assessee allowed the appeal of the assessee and deleted the additions made by the AO. Against the said findings of the Ld CIT(A), the revenue is in appeal before the Tribunal.

3. The revenue has challenged the impugned order passed by the Ld. CIT(A) on the following effective grounds:-

1. *"Whether in law and on the facts of the instant case, was the CIT (A) right in justifying that the assessee has option to offer exempt income as taxable.*
2. *"Whether in law and on the facts of the instant case, was the CIT (A) right in endorsing the presumption of own interest free funds thereby overlooking the changed law w.e.f 2007-08 followed by introduction of rule 8D in 2008-09 that provides for a method of calculation as a result of which there would be no need to rely on any presumption of own funds.*
3. *Whether in law and on the facts of the instant case, was the CIT (A) justified in holding that exempt income earned is must for making disallowance u/s 14A.*
4. *Whether in law and on the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition made by the AO amounting to Rs. 14,96,160/- on account of corporate guarantee commission without appreciating fact whether the assessee has charged reasonable rate of corporate guarantee commission based on creditworthiness & circumstances of beneficiary?*
5. *Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) is correct in law in deleting disallowance of loss of foreign exchange by holding the same is not speculative loss but was allowable as business loss?"*

4. Vide Ground No 1to 3, the revenue has challenged the action of the Ld. CIT(A) in deleting the addition made by the AO on account of disallowance made u/s 14A read with Rule 8D. The Ld. departmental representative submitted before us that the assessee earned dividend amounting to Rs. 51,301/-however, not shown any expenditure for earning dividend income.

During the assessment proceedings, the assessee failed to explain as to why disallowance should not be computed u/s 14A read with Rule 8D of the Act and further failed to establish its claim by adducing cogent and convincing evidence. Since, the AO had computed the disallowance as per the provisions of the Act and the Income Tax Rules, the Ld. CIT(A) ought to have confirmed the disallowance computed u/s 14A read with rule 8D of the Income Tax Rules.

5. On the other hand, the Ld. counsel for the assessee submitted that this issue is covered in favour of the assessee by the order of the Tribunal passed in assessee's case for the assessment year 2011-12. Since, the order passed by the Ld. CIT(A) is based on the findings of the Tribunal, there is no merit in this ground of appeal of the revenue.

6. We have heard the rival submissions of the parties and carefully perused the relevant material on record including the decision of the coordinate Bench rendered in assessee's case ITA No 4577/Mum/2015 for the assessment year 2011-12. The coordinate Bench of the Tribunal has decided the identical issue in favour of the assessee. The relevant portion of the order passed by the Ld. CIT (A) reads as under:

> *"4.4 I have considered the facts of the case and the appellant's submissions. I find that the Hon'ble ITAT in its order dated 07.08.2017 in ITA No. 4577/Mum/2015 for A.Y. 2011-12 had observed and held as under:-*
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> *"3. We have heard both the Counsel and perused the records. We find that the Assessing Officer's reliance upon the decision of the Special Bench of ITAT in the case of Cheminvest Ltd. (supra) is misplaced. The said decision was reversed by the Hon'ble Delhi High Court. We find that the Hon'ble jurisdictional High Court has also followed the same proposition in the case of Pr.CIT v. Ballarpur Industries Ltd. TA No.51 of 2016). The Hon'ble High Court has held as under.*
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>> *"By this income tax appeal the appellant - Department challenges the orders of the Commissioner of Income Tax and the Income Tax Appellate Tribunal, Nagpur. On hearing the learned Counsel for the Department and on perusal of the impugned orders, it appears that both the Authorities have recorded a clear finding of fact that there was no exempt income earned by the assessee. While holding so, the Authorities relied on judgment of the Delhi High Court in Income Tax Appeal No. 749/2014, which holds*

> *that the expression "does not form part of the total income" in Section 14A of the Income Tax Act, 1961 envisages that there should be an actual receipt of the income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. The Income Tax Appellate Tribunal held that the provisions of Section 14A of the Income Tax Act, 1961 would not apply to the facts of this case as no exempt income was received or receivable during the relevant previous year. It is not the case of the Assessing Officer that any actual income was received by the assessee and the same was includible in the total income. In the facts of the case. the Authorities held that since tile investments made by the assessee in the sister concerns were not the actual income received by the assossee, they could not have been included in the total income. The findings of facts recorded by both the Authorities do not give rise totally substantial question of law. Since no substantial question of law arises in this income tax appeal, the income tax appeal is dismissed with no order as to costs."*

4. From the above it is clear that the Hon 'ble jurisdictional High Court also has uphold the decision that when no dividend income is claimed, disallowance u/s 14A is not permissible. Hence, the authorities below's 'reliance upon the Special Bench decision in the case of Cheminvest Ltd. and the CBOT Circular are misplaced. Hence, we find that the appeal by the Revenue itself is misplaced. Furthermore, we note that the learned CIT (A) has held that since the assessee has adequate surplus funds, no disallowance of interest should be done. The learned CIT(A) has directed 0.5°/o disallowance of the investments. Since we have already held that no disallowance was called for ill case as no exempt income is claimed, we set aside the orders of the authorities below and decide the issue in favour of the assessee."

7. The Ld. CIT(A) has decided this issue in favour of the assessee following the decision of the coordinate Bench rendered in assessee's own case for the assessment year 2011-12. The revenue has not pointed out any material change in the facts of the present case. Since, the findings of the Ld. CIT(A) are in accordance with the decision of the coordinate Bench discussed above, we do not find any reason to interfere with the findings of the Ld. CIT(A). Hence, we uphold the decision of the Ld. CIT(A) and dismiss ground No 1 to 3 of the revenue's appeal.

8. Vide ground No 4 the revenue has challenged the Action of the Ld CIT(A) in deleting the addition made by the AO on account of corporate guarantee commission. The Ld DR relying on the findings of the AO submitted that the assessee received guarantee commission of Rs. 4,98,20/- from M/s. Finns Frozen Foods (India) Ltd. as the assessee company had executed corporate guarantee in favour of Bank of Maharashtra and charged commission @0.75%. The commission charged by the assessee company is not reasonable in view of the fact that Allahabad Bank charges commission @3% of guarantee amount up to Rs. 10 crore. Since, the commission charged by the assessee company was not reasonable, the AO had rightly estimated @ 3% of the amount of guarantee.

9. On the other hand, the Ld. counsel for the assessee supporting the findings of the Ld. CIT(A), submitted that this issue is covered in favour of the assessee by the order of the Tribunal in assessee's own case for the assessment year 2011-12. Since, the Ld. CIT(A) has decided this issue in favour of the assessee by following the decision of the Tribunal rendered in assessee's case, there is no merit in this ground of appeal of the revenue.

10. We have carefully perused the material on record in the light of the rival contention of the parties. As pointed out by the Ld. counsel for the assessee, the coordinate Bench has decided the identical issue in favour of the assessee in assessee's own case ITA No. *ITA No. 4577/Mum/2015 and CO. No.87/Mum/2017 for A.Y. 2011-12* by upholding the findings of the first appellate authority vide which the Ld. CIT(A) had deleted the addition of the difference between 0.75% and 3% of the total amount of guarantee. The findings of the Ld. CIT(A) read as under:-

> *"5.3 I have considered the facts of the case and the appellant's submissions. I find that the Hon'ble ITAT in its order dated 07.08.2017 in ITA No. 4577/Mum/2015 and CO. No.87/Mum/2017 for A.Y. 2011-12 has decided the issue in favour of the appellant by holding as under:*

> *"6. We have heard both the Counsel and perused the records. We find that the assessee in this case has executed corporate guarantee in favour of Bank of Maharashtra to M/s. Finns Frozen Foods India Limited and charged guarantee commission at 0.75%. However, the Assessing Officer has referred to Allahabad Bank rate of 3% and held that the same was the prevailing market rate and hence added the difference. As against the above, the assessee has referred to the rate of State Bank of India and the learned CIT (A) has relied upon case laws from ITAT where0.5% charge for guarantee commission by ICICI Bank was held to be reasonable. We find that in the background of these facts, it cannot be said that the assessee has not charged prevailing rate and hence on the facts and circumstances of the case 0.75% guarantee commission charged is held to be adequate. Hence, addition of notional income by the Assessing Officer has rightly been deleted by the learned CIT (A). Hence, we uphold the order of the learned CIT(A)."*

Respectfully following the above decision of the Hon'ble ITAT in the appellant's own case, the addition of Rs.14,96,160/- on account of Corporate Guarantee Commission is deleted. This ground of appeal is allowed.

11. The Ld. CIT(A) has decided the issue in question by following the decision of the Tribunal rendered in assessee's case referred above. The revenue has not pointed out any change in the facts and the circumstances of the present case. We, therefore do not find any reason to interfere with the findings of the Ld. CIT(A) which is in accordance with the decision of the coordinate Bench. Hence, we uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue and further direct the AO to delete the addition.

12. Vide ground No 5 the revenue has challenged the Action of the Ld CIT(A) in deleting the addition made by the AO on account of loss of foreign exchange by holding that the questioned transaction is not a speculative loss but is allowable as business loss u/s 37 of the Act. The Ld DR strongly supporting the findings of the AO submitted that since the assessee had claimed the hedging losses of foreign exchange forward contracts as business losses without justifying its claim, the Ld.CIT(A) ought to have confirmed the addition made by the AO.

On the other hand, the Ld. counsel for the assessee supporting the findings of the Ld. CIT(A), submitted that this issue is covered in favour of the assessee by the order of the Tribunal in assessee's own case for the assessment years 2009-10 and 2010-11. Since, the Ld. CIT (A) has decided this issue in favour of the assessee by following the decision of the Tribunal rendered in assessee's case, there is no merit in this ground of appeal of the revenue.

13. We have carefully perused the material on record in the light of the rival contention of the parties. As pointed out by the Ld. counsel for the assessee, the coordinate Bench has decided the identical issue in favour of the assessee in assessee's own case *1262/Muni/2011, 6629/Muni/2012 and 6271/Mum12014 for A.Y.s 2009-10 & 2010-11* by upholding the findings of the first appellate authority vide which the Ld. CIT(A) had deleted the addition made by the AO, rejecting the claim of the assessee. The findings of the Ld. CIT(A) read as under:-

> *"6.3 I have considered the facts of the case and the appellant's submissions. I find that the Hon'ble ITAT in its combined order dated 07.06.2016 in ITA Nos. 1262/Muni/2011, 6629/Muni/2012 and 6271/Mum12014 for A.Y.s 2009-10 & 2010-11 has discussed the issue at length and decided the issue in favour of the appellant by observing and holding as under:*
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> *"5.3.1 We have heard the rival submissions and perused and carefully considered the material on record including the judicial pronouncement referred to in the orders of the authorities below. Form the fact on record, it is not disputed that the assessee is engaged in the manufacture and export of processed food products such as fruit pulp and other allied items, for which it was receiving export sales proceeds from abroad in foreign exchange currencies. We find from the record that the learned CIT (A), after examination of the matter, found that the assessee had entered into foreign exchange forward contracts with banks only to safeguard itself and hedge against the exposure risks in future fluctuation in the exchange rates of foreign currency to be received by it as export sole proceeds. It is seen that these foreign exchange forward contracts entered into with banks from time to time iii the relevant periods under consideration. were made against confirmed export orders and export of goods by the assessee.*

5.3.2 In our view the AO's findings to the contrary that the aforesaid foreign exchange losses suffered by the assessee are speculative in nature was factually flawed as it was based on a factually incorrect assumption that the assessee not being dealer in foreign exchange, its forward contracts were only for foreign exchange which were settled without delivery thereof. The RB1 has permitted importers and exporters to enter into foreign exchange forward contracts with the banks in respect of its export orders. In the case on hand the assessee entered into foreign exchange export contracts with banks to the extent of its export orders; which means every foreign exchange forward contract is against a specific export order. in this factual matrix, it is clear that the assessee did not deal in foreign exchange, but entered into foreign exchange forward contract with banks to safeguard itself against possible foreign exchange losses on account of export sale proceeds to be received.

5.3.3 We concur with the view of the learned CIT (A) in the impugned order that the facts and circumstances of the case establish that the proviso (a) to section 43(5) of the Act is squarely applicable in the case on hand since the foreign exchange forward contracts entered into by the assessee with banks, in the course of its manufacturing and export business of fruit pulp and allied items, were in order to safeguard itself against possible future foreign exchange tosses on account of exports sale proceeds receivable, due to fluctuation in price of different commodities and which contracts were backed by confirmed export orders for dealing of goods manufactured or traded by it. These transactions were not speculative in nature and the resultant foreign exchange losses were consequently not speculative losses but allowable business losses. Such contracts are directly from and incidental to the assessee's business of manufacture and export of fruit pulp and allied products and therefore, in our view, do not represent speculative transactions. Therefore, the concept of delivery and non- delivery thereof is of no consequence and is irrelevant in the context of the facts of the case on hand. As long as the aforesaid transactions of foreign exchange forward contracts are concerned, they are directly linked with the assessee's business of manufacture and export of twit pulp and allied items, in our considered view, by no stretch of imagination can they be classified as 'speculative business'.

5.3.4 We find that the issue on hand is squarely covered in favour of the assessee by the decision of the Hon'ble Bombay High; Court in the case of CIT vs. BadridasGauridu (P) Ltd. (2003) 261 ITR 256 (Bom):

> *"The assessee had entered into forward contracts with the Banks in respect of foreign exchange. Some of these contracts could not be honoured by the assessee for which it had to pay some amount which was debited to the P & L account. The assessee claimed the same as business loss being payment on account of cancellation of forward booking of forex with the banks in respect of exports orders. Finally, when the issue came up for consideration the Hon'ble Bombay High Court held as under: -*
> *The assessee was not a dealer in foreign exchange. The assessee was a cotton exporter. The assessee was an export house. Therefore, foreign exchange contracts were booked only as incidental to the assessee's regular course of business. The Tribunal has recorded a categorical finding to this effect in its order. The Assessing Officer has not considered these facts. Under Section 43(5) of the Income-tax Act, "speculative transaction" has been defined to mean a transaction in which a contract for the purchase or sale of a commodity is settled otherwise than by the actual delivery or transfer of such commodity. However, as stated above, the assessee was not a dealer in foreign exchange. The assessee was an exporter of cotton. In order to hedge against losses, the assessee had booked foreign exchange in the forward market with the bank. However, the export contracts entered into by the assessee for export of cotton in some cases failed. In the circumstances, the assessee was entitled to claim deduction in respect of Rs. 13.50 lakhs as a business loss. This matter is squarely covered by the judgment of the Calcutta High Court. with which we agree, in the case of CIT v. SoorajmullNagarmull (1981)22 CTR Cal) 8: (1981) 129 ITR 169 (Cal)".*
> *5.3.5 Taking into account the facts and circumstances of the case as discussed above and the judicial pronouncement referred to (supra), we are of the considered view that the orders of the learned CIT (A) for assessment years 2009-10 and 2010-11 holding that foreign exchange losses of 16,72,65,011/- and 6,53,06,057/- for assessment year's 2009- 10 and 2010-11 respectively were business losses and directing the AO to allow the same calls for no interference from us and we therefore confirm an uphold the same. Consequently, Revenue's grounds No. 1(a) and (b) for A. Y. 2009-10 and ground No. 2 for A. Y. 2010-11 are dismissed."*

Respectfully following the above decision of the Hon'ble ITAT in the appellant's own case, the disallowance of Rs. 2,03,90,644/- on account of foreign exchange is deleted. This ground of appeal is allowed."

14. The Ld. CIT(A) has decided the issue in question by following the decision of the Tribunal rendered in assessee's case referred above. The revenue has not pointed out any change in the facts and the circumstances of the present case. We, therefore do not find any reason to interfere with the findings of the Ld. CIT(A) which is in accordance with the decision of the coordinate Bench. Hence, we uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue and further direct the AO to delete the addition.

In the result, appeal filed by the revenue for assessment year 2012-2013 is dismissed.

Order pronounced in the open court on 30th September, 2019.

Sd/- *Sd/-*

(RAJESH KUMAR) (RAM LAL NEGI)
ACCOUNTANT MEMBER JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 30/09/2019

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**