

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "J", MUMBAI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 2305/Mum/2017(Assessment year : 2012-13)

Yash Jewellery Pvt Ltd, Unit No. 603 & 604, Block No.1, SEEPZ-SEZ, SEEPZ++, Andheri (East), Mumbai-400096 PAN : AAACY2834 R	Vs	ACIT-11(3)(2), Room No. 427, 4 th Floor, Aayakar Bhawan, M.K. Road, Mumbai.
APPELLANT		RESPONDEDNT

Appellant by	Smt. Arati Vissanji Advocate
Respondent by	Shri Udol Raj Singh CIT-DR
Date of hearing	05 -02-2020
Date of pronouncement	22-04-2020

ORDER

PER PAWAN SINGH, JUDICIAL MEMEBR :

1. This appeal by assessee is directed against the assessment order dated 31.01.2017 passed u/s 143(3) read with section (r.w.s.) 144C (13) of Income tax Act (Act), passed in pursuance of direction of dispute resolution penal (DRP-2) dated 21.11.2016 for assessment year 2012-13. The assessee has raised the following grounds of appeal:-

- (1) On the facts and circumstances of the case and in law, the learned AO and the honourable DRP respectively, erred in passing impugned assessment order under section 143(3) read with section 92 CA and 144C(13) of the income tax Act, which is illegal and bad in law.
- (2) On the facts and circumstances of the case and in law, the learned AO and DRP respectively, ought to have held that-

- 2.1 Since the appellant enjoyed deduction under section 10AA and shifting of profits is not possible, Transfer Pricing adjustment of ₹ 18,29,473/-on account of notional interest for delay in realisation of debts from AEs is not required to be made by relying on the decision of the Income Tax Appellate Tribunal Mumbai in ITA No. 7513/M/2010 in case of Tata consultancy services Ltd.
- 2.2 Without prejudice to the above and in the alternative, if at all adjustment on account of notional interest for delay in realisation of debts from AEs is required to be made, then the same should not be considered as an independent international transaction but should be imputed in computing operating margin. Accordingly, the revised margin to have been determined at 13.90 % and since the same is higher than the average margin of the comparables (3.33%), adjustment of ₹ 18,29,473/- ought to have not been made.
- 2.3 No part of interest expenditure is inadmissible under section 14A read with rule 8D(2)(ii) of the rules. Accordingly, interest of ₹ 1,44,46,409/-disallowed under Sec14A read with rule 8D(2)(ii) should be deleted in its entirety.
- 2.4 No part of management and administrative expenditure is inadmissible under section 14A read with rule 8D2(ii) of the rules. Accordingly, Rs.23,75,867/- disallowed under section 14A read with rule 8 D(2)(iii) should be deleted in its entirety.
- 2.4.1without prejudice to the above and in alternate, the disallowance of management and administrative expenditure should be restricted to an amount much lower than ₹ 23,75,862/-.
- 2.5 inadmissible expenditure, if any, under section 14A of the act quantified by invoking Rule 8D should not be added in computing book profit under section 115 JB of the Act.
- 2.6 disallowance of additional interest of Rs. 55,62,481/-under section 36(1)(iii) of interest free advances granted to certain parties by applying notional rate of interest ought to have not been made.

Additional grounds of appeal

1. On the facts and circumstances of the case and in law, the AO and DRP ought to have held that
 - (i). Interest income and on fixed deposits placed with the bank of Rs. 11,91,242/- is eligible for deduction under section 10AA and accordingly, the same should have been included in computing eligible profit for determining deduction under section 10AA.
 - (ii) as and when any sum out of total unrealised export turnover of ₹ 1,51,49,589/- is realised, then, the same should be considered as a part of export turnover and the deduction under section 10 AA should be amended accordingly.
2. Brief facts of the case are that assessee company engaged in the business of manufacturing and sale of studded jewellery. The assessee has set up a unit in SEEPZ, in an Andheri (East) Mumbai. For the year under consideration, while filing return of income the assessee reported international transaction with its Associated Enterprises (AE), consequent upon reporting of international transaction the assessing officer made a reference to the transfer pricing officer (TPO) for computation of arms length price (ALP) of international transaction disclose by assessee with its AEs. The TPO in its order dated 29th January 2016 accepted the International transaction entered by assessee with its AE at ALP. However, the TPO proposed upward adjustment of Rs. 4,10,11,388/- on account of notional interest for delay in realisation of debts for sales made to AE s. Accordingly, the TPO in its order dated 29.01.2016 passed under section 92CA(3) of the Act suggested upward adjustment of Rs. 4.10 crore in the following manner;.

Description	Amount (Rs.)
Deemed interest calculated by the assessee vide submission dated 17 January 2016 @ 2.739%	2,61,84,194/-
On the basis of ALP interest @ 4.29%	$2,61,84,194/2.739*4.29 = 4,10,11,388$
Adjustment proposed	4,10,11,388

3. On receipt of report of TPO the assessing officer past draft assessment order under section 143(3) rws 144C(1) on 29th March 2016. The assessing officer while passing the assessment order noted that the assessee has made huge investment for earning tax free income. No suo moto disallowance was made by assessee. On show cause the assessee explained that no interest disallowance is required as investment is made from its own fund. Further, the assessee has not made any other expenses in making investment and that no disallowance under section 14A is required. The assessing officer invoke the provisions of Rule 8D and made disallowance of ₹ 1,68,22,270 /- under section 14A. The assessing officer also noted that the assessee has shown advances recovered in cash or in-kind of ₹ 8.62 crore as on 31st March 2012. The amounts include advances given to Jaya trading of Rs. 2.05 crore. The assessee made suo moto disallowance of ₹ 20.48 lakhs on account of interest attributable to interest free advances at the rate of 3.23% of such advances. On the basis of disallowance made in earlier assessment years at the rate of 12% the assessee was issued show cause notice as to why same disallowance be not made against the assessee. The assessee filed its detailed reply as

recorded by the assessing officer in para 6.1 of the assessment order. In reply the assessee contended that it has sufficient interest free surplus funds and that the suo-moto disallowance is made to avoid protracted litigation with the revenue. After considering the reply of the assessee the assessing officer worked out disallowance of the rate of 12% of interest on interest free advances given by assessee and after giving the set off of suo moto disallowance the assessing officer worked out difference of Rs. 55,62,481/- . Thus, while passing the assessment order the assessing officer made addition/disallowances under section 14A as well as under section 36(1)(iii). The copy of draft assessment was served upon the assessee.

4. The assessee exercised its option for filing of objection before dispute resolution panel (DRP). Besides raising objection on TP adjustment, disallowance under section 14A, 36(1)(iii), the assessee also objected for not allowing deduction on interest income under section 10AA. The assessee also raised objection that unrealised export turnover was excluded from export turnover for computing deduction under section 10AA. The DRP after considering the objection of the assessee directed the TPO/assessing officer to calculate deemed interest at the rate 2.78% till 31 March 2012. However on the disallowance under section(s) 14A and 36 (1)(iii) and denial on deduction under section 10AA by the order of assessing officer

was sustained. On receipt of direction of DRP the assessing officer passed final assessment order under section 143 (3) read with section 144C (13) dated 31st January 2017. Further, aggrieved by the addition made/ sustained in the assessment order the assessee has filed present appeal before Tribunal.

5. We have heard the submission of the learned authorised representative (AR) for the assessee and the learned department representative (DR) for the revenue and perused the material available on record. At the outset of hearing the learned AR of the assessee submits that Ground No. 1 is general may be dismissed as not pressed. Considering the submission of learned AR of the assessee ground No. 1 is general and needs no specific adjudication and dismissed as not pressed.
6. Ground No. 2.1 relates to rejection of contention of the assessee that no Transfer Pricing adjustment (TP adjustment) can be made as the assessee enjoy the deduction under section 10AA and the shifting of the profit is not possible. The ld. AR for the assessee fairly submitted that this ground of appeal is against the assessee and may be dismissed as such. Considering the fairness of learned AR of the assessee this ground of appeal is dismissed.
7. Ground No.2.2 relates to adjustment on account of notional interest in computing operating margin of the assessee instead of considering as an independent international transaction. The learned AR of the assessee

submits that this ground of appeal is covered in favour of assessee in assessee's own case for assessment year 2009-10 in ITA No. 915/Mum/2014 dated 15 January 2016, wherein similar grounds of appeal is remitted back to the file of AO/TPO for verification and determining the ALP of similar transaction. The learned AR further submits that she also rely upon the subsequent decision of Tribunal in Agilisys IT Services India Private limited in ITA No. 1145/Mum/2014 dated 31 October 2016.

8. On the other hand the learned DR for the revenue supported the order of lower authorities.
9. We have considered the submission of the parties and perused the material of label on record. We have noted that on similar grounds of appeal the Tribunal in assessee's own case for assessment year 2009-10 has restored back the issue to the file of AO/TPO with the following directions;

10. We have considered the submissions of the parties and perused the materials on record as well as the decisions cited at the Bar. There is no dispute to the fact the margin shown by the assessee for international transactions with A.E. is reasonably higher than the margin shown by the comparable companies. It is also not disputed that in some instances credit facilities provided by the assessee to its AE extended beyond the period of 180 days. As far as providing such extended credit facility is concerned, it comes within the scope and ambit of international transaction as defined u/s 92B of the Act as held in a number of judicial precedents. Therefore, we have to proceed on the basis that extended credit facility to AE is an international transaction.

11. Having held so, we have to examine whether the adjustment to ALP made by the TPO and upheld by the DRP on account of such extended credit facilities is valid or not. As stated earlier, the margin shown by the assessee of international transaction with its AE is at 13.67% on cost and at entity level is 8.9% on cost. Even including foreign exchange fluctuation, the margin of the assessee at entity level is 8.94% on cost. Thus, as could be seen the margin shown by the assessee is reasonably higher than the average margin of the comparable companies selected by the assessee as well as TPO himself. That being the case, it is to be seen whether separate adjustment is still required on account of extended credit facilities. It is the contention of the ld. counsel before us that considering the margin shown by the assessee no separate adjustment can be made on account of credit facility as element of interest for delayed payment is subsumed in the higher margin charged by the assessee. Per contra, it is the contention of the department that assessee has not proved through documentation that interest component for delayed payment has been factored in, in the price charged. After analysing the facts on record, we find that assessee has provided extended credit facilities as far as realisation of export receivables to both A.E and non-A.E. without charging interest. While credit facilities to non-A.Es have never exceeded 180 days, in case of A.E. in some instances it has exceeded 180 days and even more than a year. However, before concluding that a tangible benefit has been passed on to the A.E. as a result of such extended credit facility, margin of both the transactions viz. A.E. and non-A.E. have to be seen. If there is considerable difference between the margin of A.E. transaction with that of non-A.E. then it needs to be examined whether higher margin charged to A.E. takes care of the extended credit period for realisation of export sale proceeds. In the present case, undisputedly, the margin of A.E. transaction is relatively higher than the margin of comparables brought on record both by assessee and the TPO. That being the case, it is all the more necessary to examine assessee's claim that cost involved due to delay in realisation of export receivables from A.E. was factored in while fixing the price of international transaction with A.E. However, in our view, assessee has to establish such claim through proper documentary

evidence which, as it appears, have not been examined by Transfer Pricing Officer or DRP, nor they are before us.

12. The next issue which arises is whether allowing extended credit period to A.E. should be considered as an independent international transaction for benchmarking or should be aggregated with other international transactions with A.E. for determining ALP. It is evident from material on record as well as order of the Transfer Pricing Officer, assessee has benchmarked the price charged for international transactions with A.Es applying TNMM by aggregating all transacts viz., both purchase and sale. TPO has also not found fault with the aforesaid approach of the assessee. Therefore, in our view, credit facility allowed to A.E. cannot be considered on standalone basis for benchmarking but has to be aggregated to all international transactions with A.E. for determining arm's length price. More so, because as per rule 10A(d) all closely linked transactions with A.Es have to be aggregated and clubbed together for transfer pricing. In the present case, there is no dispute that extended credit period to A.E. for realisation of sale proceeds is directly related to and arising out of the sale transaction. Therefore, sale transaction with A.E. and resultant extended credit period for realisation of sale proceeds are two sides of a coin, hence, closely linked transactions. Thus, in terms with the statutory provisions the transaction relating to extra credit period to A.E has to be aggregated with the sale transactions for determining ALP. The Tribunal, Mumbai Bench, in M/s. Goldstar Jewellery Ltd. (supra) while considering identical issue held as under.

"The first issue raised by the assessee is whether the aggregate period extended by the assessee to the AE which is more than the average credit period extended to the non-AE would constitute international transaction. We are of the view that after the insertion of explanation to section 92B(1), the payment or deferred payment or receivable or any debt arising during the course of business fall under the expression international transaction as per explanation. Therefore, in view of the expanded meaning of the international transaction as contemplated under clause (i) (e) of explanation to section 92B(1), the delay in realization of dues from the AE in comparison to non-AE would certainly falls in the ambit of international transaction. However, this transaction of allowing

the credit period to AE on realization of sale proceeds is not an independent international transaction but it is a closely linked or continuous transaction along with sale transaction to the AE. The credit period allowed to the party depends upon various factors which also includes the price charged by the assessee from purchaser. Therefore, the credit period extended by the assessee to the AE cannot be examined independently but has to be considered along with the main international transaction being sale to the AE. As per Rule 10A(d) if a number of transactions are closely linked or continuous in nature and arising from a continuous transactions of supply of amenity or services the transactions is treated as closely linked transactions for the purpose of transfer pricing and, therefore, the aggregate and clubbing of closely linked transaction are permitted under said rule. This concept of aggregation of the transaction which is closely linked is also supported by OECD transfer pricing guidelines. In order to examine whether the number of transactions are closely linked or continuous so as to aggregate for the purpose of evaluation what is to be considered is that one transaction is follow-on of the earlier transaction and then the subsequent transaction is carried out and dependent wholly or substantially on the earlier transaction. In other words, if two transactions are so closely linked that determination of price of one transaction is dependent on the other transaction then for the purpose of determining the ALP, the closely linked transaction should be aggregated and clubbed together. When the transaction are influenced by each other and particularly in determining the price and profit involved in the transactions then those transactions can safely be regarded as closely linked transactions. In the case in hand the credit period extended to the AE is a direct result of sale transaction. Therefore no question of credit period allowed to the AE for realization of sale proceeds without having sale to AE. The credit period extended to the AE cannot be treated as a transaction stand alone without considering the main transaction of sale. The sale price of the product or service determined between the parties is always influenced by the credit period allowed by the seller. Therefore, the transaction of sale to the AE and credit period allowed in realization of sale proceeds are closely linked as they are inter linked and the terms and conditions of sale as well as the price are determined based on the totality of the transaction and not on individual and separate transaction. The approach of the TPO and DRP in analyzing the credit period allowed by the assessee to the AE without considering the main international transaction being sale to the AE will give distorted result by disregarding the price charged by the assessee from AE. Though extra period allowed for realization of sale proceeds from the AE is an international transaction, however, for the purpose of determining the ALP, the same has to be clubbed or aggregated with the sale transactions with the AE. Even by considering it as an independent transaction the same has to be compared with the internal CUP available in the shape of the credit allowed by the assessee to non AE. When the

assessee is not making any difference for not charging the interest from AE as well as non-AE then the only difference between the two can be considered is the average period allowed along with outstanding amount. If the average period multiplied by the outstanding amount of the AE is at arm's length in comparison to the average period of realization and multiplied by the outstanding from non AEs then no adjustment can be made being the transaction is at arm's length. The third aspect of the issue is that the arm's length interest for making the adjustment. Both the TPO and DRP has taken into consideration the lending rates, however, this is not a transaction of loan or advance to the AE but it is only an excess period allowed for realization of sales proceeds from the AE. Therefore, the arm's length interest in any case would be the average cost of the total fund available to the assessee and not the rate at which a loan is available. Accordingly, we direct the Assessing Officer/TPO to re-do the exercise of determination of ALP in terms of above observation."

13. Similar view has also been expressed by the Tribunal, Mumbai Bench, in case of Tecnimount ICB House (supra). In fact, in case of Kusum Healthcare Pvt. (supra), the Tribunal, Delhi Bench, held that if ALP of the main sale transaction computed under TNMM is accepted, no separate adjustment on account of outstanding receivables can be made. However, it needs to be mentioned, in case of Kusum Healthcare (supra), assessee demonstrated that impact of extended credit period on working capital was factored in the pricing / profitability. The decision of IGate Computer Softwares Ltd. v/s Addl. CIT is factually distinguishable as in that case assessee itself has considered the extended credit facility as a separate international transaction. Thus, taking into consideration, the principle laid down as above we are of the view that transaction relating to extended credit period provided to A.E. is required to be aggregated with other international transactions for computing ALP and cannot be done separately. For doing so rate of interest has to be on the basis of LIBOR+ basis point and not domestic PLR. As in the present case, TPO himself has worked out LIBOR rate of 2.69% same can be considered. As, neither the department nor the assessee has undertaken this exercise. We remit this issue to the file of the AO/TPO for verifying this aspect and determining the ALP of international transaction with A.E. after affording full opportunity to the assessee to establish its case. This ground is allowed for statistical purposes."

10. Considering the decision of tribunal in assessee own case on similar grounds of appeal, we deem it appropriate to restore the issue to the file of AO/TPO to pass the order afresh by following the order of earlier year. The assessing officer /TPO is also directed to consider the decision of tribunal in Agilisys IT Services India Private Limited (supra) before passing the order. Needless to order that before passing the order the AO/TPO shall grant opportunity of hearing to the assessee. In the result this ground of appeal is allowed for statistical purpose.
11. Ground No. 2.3 to 2.4 relates to disallowance under section 14A. The learned AR of the assessee submits that during the relevant period the assessee has not and any exempt income. Therefore, there is no question of making any disallowance under section 14A. The learned AR further submits that in assessee's own case for assessment year 2010-11 and 2011-12 and further in 2014- 15 , the Tribunal held that where no exempt income is earned by assessee, the provision of section 14A is not attracted. The learned AR also relied upon the decision of honourable Apex Court in case of Pr.CIT Versus GVK Project and Technical Services Ltd 264 Taxman 76.
12. On the other hand the learned AR for the revenue supported the order of lower authorities.

13. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have noted that the assessing officer, without ascertaining the fact whether the assessee has earned exempt income during the relevant financial year or not proceeded to make the disallowance under section 14A. Now, it is settled legal position that in absence of any exempt income reported by assessee, disallowance could not be made under section 14A. It has been held so by Hon'ble Apex court while affirming the decision of Hon'ble Delhi High Court in CIT Versus GVK Project and Technical Services Ltd reported, viz [2019] 106 taxmann.com 180(Delhi). Considering the settled position of law we direct the assessing officer to delete the disallowance under section 14A read with Rule 8D. In the result these grounds of appeal are allowed.
14. Ground No. 2.5 relates to adding the disallowance under section 14A in computing book profit under section 115JB. The learned AR of the assessee submits that this ground of appeal is also covered in favour of assessee by the decision of Special Bench of the Delhi Tribunal in ACIT versus Vireet Investment P Ltd (165 ITD 27).
15. On the other hand the learned DR for the revenue supported the order of lower authorities.

16. We have considered the submission of the parties and perused the order of lower authorities and deliberated on the decisions cited by learned AR of the assessee. We have noted that assessing officer made the additions of disallowance while computing the book profit under section 115 JB. The Special Bench of the Delhi Tribunal in ACIT versus Vireet investment P (supra) held that computation under clause (f) of Explanation 1 to section 115JB(2), is to be made without resorting to computation as contemplated under section 14A read with Rule 8D. Therefore, respectfully following the decision of Special Bench of the Delhi Tribunal, we direct the assessing officer to make fresh computation of book profit under section 115JB by following the decision in ACIT versus Vireet investment P (supra). In the result this ground of appeal is also allowed.

17. Ground No. 2.6 relates to disallowance of additional interest under section 36(1)(iii). The learned AR of the assessee submits that similar addition was made against the assessee for assessment year 2010-11 and 2011-12 and again 2014-15, however, on appeal before learned Commissioner (Appeals) the assessee was granted relief and on further appeal by the revenue before Tribunal, the appeals of revenue for all the years were dismissed, the copy of the decisions of Tribunal are placed on record. The learned AR for the assessee submits that the assessee has its own sufficient interest free funds

available with the assessee and no borrowed fund were utilised for making advances to various companies. The huge reserve and surplus of the assessee are in far excess of the advances given by the assessee. The assessee made suo moto disallowance only to avoid the protracted litigation. The learned AR for the assessee submits that the copy of the financial statement is placed on record.

18. On the other hand the learned DR for the revenue supported the order of lower authorities.
19. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have also deliberated on various decision of Tribunal in assessee's own case for assessment year 2010-11, 2011-12 and 2014-15 in ITA No.6228 & 62283/Mum/2017 and 6284/Mum/2017 respectively. We have also gone through the financial statement of the assessee on 31st March 2012. The assessee is having share application money including reserve and surplus of ₹ 177.42 crore as on 31st March 2012. The assessee has advanced ₹ 6.19 crore only during the relevant financial year. The assessing officer during the assessment made disallowance on the advance given to Jaya trading of ₹ 2.05 crore. We have further noted that the assessing officer made similar addition /disallowances for assessment year 2010 - 11 and in 2011 – 12. However, on appeal before

learned CIT (A) the additions /disallowance under section 36(1)(iii) was deleted. On further appeal by the revenue before the Tribunal, vide ITA No.6228& 62283/Mum/2017, the coordinate bench affirmed the order of learned CIT(A). For appreciation of the relevant part of the order is extracted below;

“3. The facts in brief are that during the course of assessment proceedings, the AO observed that assessee has paid interest on the borrowed funds while giving the interest free advances of Rs.6,04,77,159/- out of total advances of Rs.17,10,95,433/- as on 31.03.2011. The AO also noticed that assessee has suo moto disallowed a sum of Rs.1,06,32,804/- on account of interest attributable to interest free advances @ 3.23%. The assessee submitted before the AO that the suo-moto disallowance was made to avoid litigation with the department. The assessee submitted that the rate of disallowance of interest @ 3.23% p.a. was calculated after giving weightage to the interest free funds available to the assessee and therefore the rate of disallowance as proposed by the AO at 12% is not justified. However the AO after rejecting the contentions of the assessee applied a rate of 12% p.a. and after making allowance of suomoto disallowance made net addition to the extent of Rs.2,88,69,872/- to the income of the assessee in the assessment framed u/s 143(3) of the Act dated 28.02.2014.

4. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee after taking into account the contentions raised by the assessee in the appellate proceedings by observing and holding as under:

“Under this Ground of Appeal the Appellant has disputed disallowance of Interest amounting to Rs. 2,88,69,872/- I have considered the rival submissions and find that the Assessing Officer (AO) has disallowance the same by holding that the Appellant had not furnished details of Interest paid The Assessing Officer therefore disallowed interest at rate of 12% attributable to interest free advances granted out of interest bearing funds taken by the Appellant Accordingly the Assessing officer worked out disallowance of Rs. 3,95,02,676/- Thereafter the Assessing Officer added Rs. 2,88,69,872/-after deducting Rs. 1,06,32,804/- already disallowed suo motto by the appellant finally the Assessing

officer calculated the disallowance of Rs. 2,88,69,872/- (3,95,02,676-1,06,32,804). On the other hand the Appellant contended that this suo motto disallowance of Rs. 1,06,32,804/- was worked out by adapting weighted average cost of borrowing at the rate of 3.23%. The Appellant therefore further contended that notional rate of 12% adopted by Assessing Officer was erroneous. I Therefore find that the Assessing Officer has wrongly adopted notional rate of interest accordingly, I direct the Assessing Officer to delete the disallowance of Rs. 2,88,69,872/- in respect of interest attributable to V interest free advances, Accordingly Ground No. 1 Succeeds.”

5. After hearing both the parties and perusing the material on record the written submissions of the Department, we observe from page No.13 of the paper book which contained the summarized position of assessee's own funds and borrowed funds in a tabular form right from 2007-08 to 2010-11 that interest free funds in the form of share application money pending allotment of shares and reserve and surpluses were Rs.177,02,42,970/- whereas the borrowings in the form of secured and unsecured loans were Rs.112,33,06,967/- while interest free advances given were Rs.6,04,77,159/-. We find merits in the contentions of the Ld. A.R. that the case of the assessee is squarely covered by the decision of the Jurisdictional High Court in the case of HDFC Bank Ltd Vs CIT (2014)366 ITR 505 (Bom) wherein it has been held that no disallowance is to be made where the interest free funds were available with the assessee are more than the interest free advances. We further notice that assessee has made suo-moto disallowance of 3.23% p.a. after giving weightage to the interest free funds available with the assessee. In the earlier year also , the assessee has worked out the disallowance at average cost of the funds which worked out to 4.01% by drawing our attention to page No.4 to 9 of the paper book wherein the detailed calculations have been given. We, therefore, do not find any infirmity or illegality in the order passed by Ld. CIT(A) which otherwise appears to be a very reasoned and speaking order. Accordingly, we are inclined to uphold the order of Ld. CIT(A) by dismissing the ground raised by the Revenue.”

20. Further in appeal for AY 2014-15 in ITA No. 6284/Mum/2017, on similar grounds of appeal raised by the revenue, the Tribunal passed the following order;

10. We have considered the submission of the parties and have gone through the orders of authorities below. The Assessing Officer made the disallowance of interest expenses on the basis of earlier years and disallowed the interest @ 12% attributable to interest free advances of Rs. 4,06,28,000/- and accordingly worked out the disallowance of Rs. 48,75,360/- after deducting the suo-moto disallowance of Rs. 15,51,990/-. The Assessing Officer worked out the disallowance of Rs. 33,23,370/-. During the first appellate stage, the assessee made the similar submission as made before us and contended that the assessee made suo-moto disallowance of Rs. 15,51,990/- by adopting weightage average cost of borrowing @ 3.82%, however, the Assessing Officer adopted the disallowance of interest rate @ 12% which is erroneous. The Id CIT(A) accepted the contention of the assessee and concluded that the assessing officer wrongly adopted the notional rate of interest and directed the assessing officer to delete the entire disallowance made by assessing officer.
11. The Id. CIT(A) granted the relief to the assessee without discussing the facts related with the issue. We have seen that during relevant period the assessee has given advances of Rs. 4,06,28,000/-. There is no dispute about the amount of advances paid by the assessee to four parties. Before us the assessee has filed details of the advances and the interest disallowed, which we have summarized below;

Sr No.	Name of party	Amount of advance	Interest disallowed
1	Shilpraj Developers	1,45,00,000/-	5,53,900/-
2	Jaya Trading	2,05,00,000/-	7,83,100/-
3	Catwalk	30,00,000/-	1,14,600/-
4	Astorio Agro & Allied Industries	26,28,000/-	1,00,390/-
	Total	4,06,28,000/-	15,51,990/-

12. The assessee has also filed the furnished the working of the average cost of borrowing in the hands of the assessee, wherein has shown the average cost of the borrowing at 3.82%. The assessee has offered the disallowance @ 3.82%. Considering the peculiar facts of the case for the year under consideration, we

find that the assessee has offered the disallowance of Rs. 15,51,990/-, which is reasonable keeping in view that the assessee has sufficient interest free funds available with it. Therefore, we affirm the order of the Id CIT(A). The Hon'ble Bombay High Court in Reliance Utility and Power Ltd. (supra) held that if the assessee owned sufficient interest free fund available no disallowance under section 36(1)(iii) is warranted. Therefore, considering the ratio of decision in Reliance Utility and Power Ltd. no further disallowance of interest expenses @ 12% as adopted by Assessing Officer is permissible. Therefore, we direct the Assessing Officer to delete the disallowances of Rs. 3323370/- worked out by Assessing Officer. Thus, the ground no.3 of appeal raised by revenue is also failed. No contrary material or law is brought to our notice to take other view. In the result the ground No.3 of the appeal of revenue is dismissed”

13. Considering the consistent order of the Tribunal in assessee's own case on similar disallowance and the fact that the assessee has sufficient interest free funds in the form of reserve and surplus, we do not find any justification for further disallowance by AO under section 36(1)(iii), in addition to the suo-moto disallowance made by the assessee. No contrary facts or law is brought to our notice. In the result this ground of appeal is allowed.
14. Additional Ground No.1 (i) relates to inclusion of interest income on the fixed deposits in the bank for eligible deduction under section 10AA. The learned AR of the assessee submits that this ground of appeal is also covered in fear of assessee by the decision of the Tribunal in assessee own case for assessment year 2010-11 and 2011-12. The learned AR submitted that similar addition was made by assessing officer for those preceding two

assessment years. However, on appeal before learned Commissioner (Appeals) the additions were deleted. On further appeal by revenue before the Tribunal the order of learned Commissioner (Appeals) was affirmed. Thus, the issue is squarely covered in favour of assessee. The learned AR of the assessee submits that there is no variation of fact the assessee and similar interest income as an assessment year 2010-11 and in 2011-12.

15. On the other hand the learned AR for the revenue supported the order of authorities below.
16. We have considered the submission of both the parties and perused the order of lower authorities. We have also deliberated on the decision of Tribunal in assessee's own case for assessment year 2010-11 and 2011-12 ITA No. 6288 & 6283/Mum/2017 and find that on similar set of fact the assessee was held as eligible for inclusion of interest income for deduction under section 10AA. We have noted that in assessee's own case for preceding two assessment years the Tribunal has passed the following order;

“ 9. After hearing both the parties and perusing the material on record the written submissions of the Department, we observe that assessee has deposited a FDR with the bank for availing credit facilities which was a precondition for sanctioning of the credit facilities on which assessee has earned Rs.9,32,534/- and the said interest was claimed as part of the profit for the purpose of deduction under section 10AA of the Act. The Ld. CIT(A) allowed the appeal of the assessee on the ground that interest income has direct nexus with the primary business activity of the assessee and eligible for deduction under

section 10AA of the Act. We also find that the similar issue has been decided by the Hon'ble Karnataka High Court in the case of CIT & ors. Hewlett Packard Global Soft Ltd. (2018) 403 ITR 453 (Karn) (FB) wherein it has been held as under:

“37. On the above legal position discussed by us, we are of the opinion that the respondent-assessee was entitled to 100 per cent exemption or deduction under section under section 10A of the Act in respect of the interest income earned by it on the deposits made by it with the banks in the ordinary course of its business and also interest earned by it from the staff loans and such inter-business and also interest earned by it from the staff loans and such interest income would not be taxable as “income from other sources” under section 56 of the Act. The incidental activity of parking of surplus funds with the banks or advancing of staff loans by such special category of assessee’s covered under section 10A or 10B of the Act is integral part of their export business activity and a business decision taken in view of the commercial expediency and the interest income earned incidentally cannot be de-linked from its profits and gains derived by the undertaking engaged in the export of articles as envisaged under section 10A or section 10B of the Act and cannot be taxed separately under section 56 of the Act.

10. The assessee submitted before us that the facts of the case as decided by the Hon'ble Karnataka High Court (supra) in the aforesaid case the surplus funds were put in the FDR whereas the assessee’s case stands on better footing on the ground that FDR was placed with the bank as a precondition for sanctioning the credit facilities for the purpose of business eligible for deduction u/s 10AA of the Act. We, therefore, do not find any defect or infirmity in the order of Ld. CIT(A) and uphold the same by dismissing the ground raised by the Revenue.”

17. Considering the decision of the tribunal in assessee’s own case for preceding assessment year, wherein no variation of fact is brought to notice nor any contrary law is shown to us. Therefore, respectfully following the decision of Tribunal, we direct the assessing officer to include the interest income as

eligible for deduction under section 10AA. In the result this ground of appeal is allowed.

18. Additional Ground No.1(ii) relates to considering the unrealised export turnover of Rs. 1.51 Crore, on recovery for considering export turnover for deduction under section 10AA. The learned AR for the assessee submits that on similar ground of appeal the coordinate bench allowed similar relief in case of Dania Ore Jewellery Pvt Ltd Vs ITO (ITA No. 7635/Mum/2014 dated 03.01.2018). The ld. AR for the assessee submits that considering the aforesaid decision the AO may be directed to treat the unrealised export turn over for deduction under section 10AA.

19. On the other hand the ld. DR for the revenue submits supported the order/direction of DRP.

20. We have considered the submission of both the parties and perused the order of lower authorities. We have also deliberated on the decision of Tribunal in Dania Ore Jewellery Pvt Ltd Vs ITO (supra). We have noted that the AO while passing draft assessment order has not stated/ mentioned anything about unrealised export turnover/ sales of Rs. 1.51 Crore. On raising objection before DRP, it was directed that it cannot sit in the judgement over the issue relating to the future years.

21. The Coordinate bench of Tribunal, in Dania Ore Jewellery Pvt Ltd Vs ITO (supra), while referring the decision of Jurisdictional High Court in Gems and Jewellery India Ltd (330 ITR 175 Bom) passed the following order; –

“We find that the issue before us, including the unrealized export turnover has been dealt by the Tribunal in the case of Neeru Jewels P. Ltd.(supra)as under:

"3.Rival contentions have been heard and record perused. Facts in brief are that assessee company is engaged in business of manufacturing and export of diamond studded jewellery. Its claim for deduction u/s.10A was restricted by CIT(A) to the extent of receipt of foreign exchange upto 30-9-2008. It was argued by Id. AR that RBI has already issued circular in respect of units situated in SEZ(Special Economic Zone), relaxing the realisation to the exports proceeds. Reliance was also placed on the decision of coordinate bench in the case of Tara Jewels Exports Pvt. Ltd., ITA No.662/Mum/2012, dated 29-1-2014, wherein it was held that after the RBI have clarified that it has not stipulated any time period for the realisation of sale proceeds for SEZ units,it can only be considered as having allowed and indefinite period for the same. Consequently, it cannot be said that the condition of [Section 10A](#) was not satisfied.

4. We have considered rival contentions and found that deduction u/a.10A was restricted to the extent of export receipts realised upto 30-9- 2008. The assessee company is situated In SEZ, the RBI, the Competent Authority, u/s.10A(3) of the Act had vide its Circular bearing A.P. -(DIR Series) Circular No:91 dated 1st April, 2003 relaxed the realization of export proceeds, which reads as under:

"In terms of para II(c) of AP (DIR Series) Circular No.28 dated March 30, 2001, units situated in Special Economic Zones have been permitted to realise and repatriate to India the full value of goods or software within a period of twelve months from the date of export. It has now been decided to remove the stipulation of twelve months or extended

period thereof for realization of export proceeds. Accordingly, there shall be no prescription of any time limit for realization of exports made by units in SEZs. However, the units in SEZs will continue to follow the GR/PP/SOFTEX export procedure outlined in Part B of Annexure to A.P.(DIR Series) Circular No.12 dated September 9, 2000 as amended from time to time.

Further, we found that the Tribunal, Mumbai Bench, in the case of [ACIT vs. Tara Jewels Exports Pvt. Ltd.](#) in ITA No.662/Mum/2012 for A.Y. 2003-04 dated 29th January, 2014 held as under (page - 9):

"Once, therefore, the RBI has clarified that it has not stipulated any time period for the realization of the sale proceeds for the SEZ units, as the assessee. it can-only be considered as having allowed an indefinite time period for the same. Consequently, it cannot be said that the condition of [section 10A\(3\)](#) is' not satisfied. The objection of the Revenue is, in our view, not valid."

In view of the above, we restore the matter back to the file of AO for re-computing eligible deduction after considering the RBI Circular and also considering the decision of coordinate bench as discussed above.

We find that in the case of Gems and Jewellery India Ltd.(supra),the Hon'ble Bombay High Court has held as under:

"7. The export turnover, in the numerator must have the same meaning as the export turnover which is a constituent element of the total turnover in the denominator. The Legislature has provided a definition of the expression "export turnover" in Explanation 2 to section 10A by which the expression is defined to mean the consideration in respect of export by the undertaking of articles, things or computer software received in, or brought into India by the assessee in convertible foreign exchange but so as not to include inter alia freight, telecommunication charges or insurance attributable to the delivery of the articles, things or software outside India. Therefore in computing the export turnover the Legislature has made a specific exclusion of freight and insurance charges.

8. *The submission which has been urged on behalf of the Revenue is that while freight and insurance charges are liable to be excluded in computing export turnover, a similar exclusion has not been provided in regard to total turnover. The submission of the Revenue, however, misses the point that the expression "total turnover" has not been defined at all by Parliament for the purposes of section 10A. However, the expression "export turnover" has been defined. The definition of "export turnover" excludes freight and insurance. Since export turnover has been defined by Parliament and there is a specific exclusion of freight and insurance, the expression "export turnover" cannot have a different meaning when it forms a constituent part of the total turnover for the purposes of the application of the formula. Undoubtedly, it was open to Parliament to make a provision to the contrary. However, no such provision having been made, the principle which has been enunciated earlier must prevail as a matter of correct statutory interpretation. Any other interpretation would lead to an absurdity. If the contention of the Revenue were to be accepted, the same expression viz. "export turnover" would have a different connotation in the application of the same formula. The submission of the Revenue would lead to a situation where freight and insurance, though it has been specifically excluded from "export turnover" for the purposes of the numerator would be brought in as part of the "export turnover" when it forms an element of the total turnover as a denominator in the formula. A construction of a statutory provision which would lead to an absurdity must be avoided."*

Respectfully following the above we restore the issue to the file of the AO for fresh adjudication, who would decide it after affording a reasonable opportunity of hearing to the assessee and after considering the above /Judgment/order of the Court/Tribunal. Ground no is decided in favour of the assessee, in part.”

22.Considering the decision of the coordinate bench of Tribunal Dania Ore Jewellery Pvt Ltd Vs ITO (supra), we restore this ground of appeal to the file of AO for considering the claim of the assessee afresh and pass the order in accordance with law after considering the aforesaid order of the order. Needless to order that before passing the order the AO shall grant opportunity of hearing to the assessee. In the result this ground of appeal is allowed for statistical purpose.

23.In the result the appeal of the assessee is partly allowed.

Order pronounced in the open court on 22nd day of April 2020.

Sd/-

Sd/-

(Shamim Yahya)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

(PS self)

Mumbai, Dt : 22 April, 2020

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Asstt. Registrar, ITAT, Mumbai