आयकरअपीलीयअधिकरण,राजकोटन्यायपीठ,राजकोट।

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT
BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER&
MS. MADHUMITA ROY, JUDICIAL MEMBER

Sr. No.	ITA No.	Asstt. Year	Name of Appellant	Name of Respondent
1.	27/Rjt/2016	2012-13	Deputy Commissioner of Income-tax, Circle-1(2), Rajkot	M/s. DML Exim Pvt. Ltd. 405, Embassy Tower, Jawahar Road, Opp. Public garden Rajkot
2.	360/Rjt/2015	2011-12	Deputy Commissioner of Income-tax, Circle-1(2), Rajkot	M/s. DML Exim Pvt. Ltd. 405, Embassy Tower, Jawahar Road, Opp. Public garden Rajkot
3.	315/Rjt/2015	2011-12	M/s. DML Exim Pvt. Ltd. 405, Embassy Tower, Jawahar Road, Opp. Public garden Rajkot	The Assistant Commissioner of Income Tax, Circle-5, Rajkot

(अपीलार्थी/**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थीओरसे/ **Appellant by :**	Shri M. N. Maurya, CIT DR
प्रत्यर्थीकीओरसे/**Respondent by:**	Shri M. J. Ranpura, AR

सुनवाईकीतारीख/ **Date of Hearing**	25/02/2020
घोषणाकीतारीख /**Date of Pronouncement**	28/07/2020

आदेश / O R D E R

PER MADHUMITA ROY, JUDICIAL MEMBER:

In this bunch of appeals two appeals were filed by the Revenue against the orders dated 30.10.2015 & 14.05.2015 passed by passed by the Ld. CIT(A)-1, Rajkot for A.Ys. 2012-13 & 2011-12 respectively and the

assessee has come up against the order dated 14.05.2015 for A.Y. 2011-12 and passed by passed by the Ld. CIT(A)-1, Rajkot all under sections 143(3) of the Income Tax Act, 1961(hereinafter referred to as "the act") for A.Ys. 2011-12 & 2012-13 respectively.

ITA No. 27/Rjt/2016 A.Y. 2012-13 is taken as the lead case.

2. The Ground No. 1 relates to deletion of disallowance made on account of contract cancellation amounting to Rs. 2,80,05,500/-.

The appellant, a private limited company engaged in the business of trading of agricultural products, building construction and generation of power/energy, has filed its return of income declaring income of Rs. 23,96,84,200/- on 08.09.2012.

During the course of assessment proceeding it was found that the appellant has paid an amount of Rs. 2,80,05,500/- as contract cancellation charges to various foreign parties and the same was in the nature of payment being made for non-fulfillment of the contractual terms and conditions resulting in settlement of contracts at a price which is lower than pre-determined price as a result of which the appellant had to make payment in terms of the contract. The assessee submitted the complete details on these contact including the relating details for the year under appeal as well for earlier two years, as also the arbitration award of International Cotton Association Ltd. However, the Ld. AO held that cancellation of transactions caused on account of non-delivery within the specified time the surplus/deficit so generated leading to payment or receipt of money acquired the colour of speculation profit/loss. The transactions are arranged in such a way as to reduce the profit. The Ld. AO held that as per provision of Sec. 73(1) loss of speculation business or activity cannot be set off

against the profit generated from regular business and upon holding the contract cancellation charges of Rs. 2,80,05,500/- as speculation loss he ultimately disallowed the same. In appeal the same is allowed and addition was deleted by the Ld. CIT(A). Hence, the instant appeal before us.

3. At the time of hearing of the instant appeal the Ld. AR appearing for the assessee took us to the details annexed to the Paper Book regarding the contract cancellation charges of the assessee company which we have carefully gone through. We have also perused the sales contract entered into by and between the assessee and the other parties annexed to the Paper Book filed before us.

4. The case of the assessee is this that it is in the business of export of cotton and other agricultural products to various countries and while procuring the export orders the appellant enters into contract proforma invoice with the proposed purchasers of the foreign country specifying therein the terms of the contract of goods, the time period of supply and the rate. Failure of the terms of contract though results in more loss the same dispute is settled with the proposed buyer by paying the cancellation charges or by getting the details as the case may be. Therefore, the contract cancellation charges are in the nature of payment for failure to oblige contractual terms and conditions resulting in settlement of contracts at a price of lower than pre-determined price and thus the appellant had to make payment as per terms of contract. The cancellation of the contract was in respect of supply of goods in which the appellant deals. It is the appellant who knows his business and he knows when to enter into a contract and when to exit. Taking into consideration this particular aspect of the matter the Ld. CIT(A) justified such cancellation of contracts by the appellant which according to him a part and parcel of the regular export business.

Disallowance of such contract cancellation payment holding it speculative in nature by the AO has, therefore, been directed to be deleted.

Having regard to the entire aspect of the matter we find no ambiguity in the order passed by the Ld. CIT(A) who took into consideration of the order passed by the First Appellate Authority whereby and whereunder disallowance of cancellation charges for non-deduction of TDS in respect of the immediate preceding order was deleted which according to us is just and proper so as to warrant interference. We, thus, find no merit in the ground of appeal preferred by the Revenue and thus the same is hereby deleted.

5. Ground No.2 relates to disallowance of Rs. 9,73,33,826/- being export commission paid to non-resident agents, u/s. 40(a)(ia) on the ground of non-deduction of TDS.

The case of the Revenue is this that the person making payment to the non-resident would be liable to be deducted tax under Section 194H of the Act if the payment so dischargeable to tax under the Act in view of the crucial expression is 'any other sum chargeable under the provision of this Act' under section 195(1) of the I.T. Act. The case of the assessee is this that disallowance under section 40(a)(ia) r.w.s. 194H would come into play when the payer has not deducted the tax at source on the sum paid/credit in the account of a resident. Ultimately the Ld. AO came to a conclusion that as per amended provision of Sec. 195(1) of the Act the appellant is liable to deduct tax at source on the commission payment to the non-resident agents. Since the appellant failed to deduct TDS under 194H on the said payment, the expenses have been disallowed as business expenditure in view of the provision of Sec. 40(a)(ia) of the Act.

6. At the time of hearing of the instant appeal Ld. DR relied upon the order passed by the Ld. AO.

7. On the other hand, the Ld. Counsel appearing for the assessee submitted before us that the AO himself has accepted the fact that the payment of commission is made to non-resident by referring to 195(1) of the Act. It was further pointed out that the respondent had paid commissions on foreign parties for rendering services for soliciting customers for its export business activities. Such particular fact has not been considered by the Ld. AO in its proper perspective and the assessee has been made liable to deduct tax at source u/s. 194H of the Act. He has further relied upon the judgment passed by the Co-ordinate Bench in ITA No. 573/Rjt/2014 for A.Y. 2010-11 where the similar disallowance has been deleted. Reliance was also placed on the decision passed by the Hon'ble Gujarat High Court in the Pr. Commissioner of Income Tax vs. MGM Exports in Tax Appeal No. 309 of 2018.

8. We have heard the parties, and perused the relevant materials available on records.

Section 195 of the Act clearly provides that unless the income is liable to be taxed in India there is no obligation to withhold the taxes in India. Further, the basic condition under Section 9 of the Act with respect to income accruing and arising in India namely connection with the property in India or control and management vested in India, are not satisfied in the present case. The commission expenses paid on export sales to a non-resident admittedly for services rendered outside India is not coming under the purview of Sec. 40(a)(ia) of the Act. It is relevant to mention that the 'commission' simpliciter is not fees for technical services under Section 9(1)(vii) of the Act and same being the nature of business

income for recipient of income/payee/non-resident, is not taxable in India in view of Sec. 9(1)(i) in the case of absence of business connection in India.

9. In this respect, we have considered the judgment passed by the Hon'ble Co-ordinate Bench in ITA No. 573/Rjt/2014 in assessee's own case for A.Y. 2010-11; while dealing with the identical issue upon making the following observation such disallowance was deleted. The following observation is as follows:-

> *"2. To adjudicate on this appeal, only a few material and undisputed facts need to be taken note of. During the assessment proceedings, the Assessing Officer noted that the assessee has deducted tax under section 194C from the payment aggregating to Rs.67,84,807/- to the Customs House Agents whereas according to the Assessing Officer, tax was deductible under section 194J. The Assessing Officer was thus of the view that there was a short deduction of tax at source from these payments. It was in this backdrop he came to the conclusion that there was failure to deduct tax at source from payments to the Customs House Agents and accordingly the same is to be disallowed under section 40(a)(ia) of the Act. Aggrieved by the disallowance so made, the assessee carried the matter in appeal before the ld. CIT(A). It was, inter alia, contended by the assessee that the disallowance under section 40(a)(ia) cannot be resorted to in the case of short deduction of tax at source, even if any and, therefore, the impugned disallowance is unsustainable in law. Reliance was placed on Hon'ble High Court of Calcutta in the case of CIT vs. S.K. Tekriwal, 260 CTR 73. Accepting these arguments, learned CIT(A) deleted the impugned disallowance and justified his stand as follows :- "7. While holding that the payments made to CHAs are liable for tax deduction at source u/s. 194J of the IT Act, 1961, the issue at hand is whether the assessing officer is justified to disallow the entire payment made to CHAs at Rs.67,84,807/- u/s. 40(a)(ia) of the IT Act, 1961 on the ground that the appellant has deducted the tax on the impugned payments u/s. 194C @ 2% as against stipulated deduction of tax @ 10% u/s. 194J of the IT Act, 1961. The assessing officer has not made any notable discussion on this issue. However, on the other hand, the authorized representative has cited the judgement of Hon'ble High Court of Calcutta in the case of CIT vs. S.K. Tekriwal 260 CTR 0073, wherein it has been held that "Expenses are not liable to be disallowed u/s 40(a)(ia) on account of short deduction of tax at source". The relevant paragraph of the judgement is reproduced hereunder for the sake of brevity: "We are of the view that the provisions of section 40(a)(ia) of the Act has two limbs one is where, inter alia, assessee has to deduct tax and the second where after deducting tax, inter alia, the assessee has to pay into Government Account. There is nothing in the said section to treat, inter alia, the assessee as defaulter where there is a shortfall in deduction. With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not*

as required by or under the Act, but the facts is that this expression, on which tax is deductible at source under chapter XIVV-B and such tax has not been deducted or, after deduction has not been paid on or before the due date specified in sub-section (1) of section 139. This section 40(a)(ia) of the Act refers only to the duty to deduct tax and pay to government account. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payment falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s. 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act." 8. Apart from the above citation, the authorised representative has cited the following judgements to buttress his arguments that the disallowance u/s. 40(a)(ia) is not warranted when the tax deduction at sources was incorrectly me under a different section which resulted in the shortfall. · Hon'ble ITAT Delhi 'E' Bench in the case of Glaxo Smithkline Consumer Healthcare Ltd. vs. ITO 12 SOT 221 (Delhi) · Hon'ble Bombay High Court in the case of CIT vs. Jivanlal Lalloobhai& Co. 206 ITR 548 (Bom) · Hon'ble ITAT, Mumbai "B" Bench in the case of ACIT vs. Merchant Shipping Services (P) Ltd. 129 ITD 109 (Mumbai) · Hon'ble ITAT Mumabi in the case of DCIT vs. Chandabhoy & Jassobhoy 49 SOT 448 (Mumbai) 9. Respectfully following the above judgement, I am also of the view that in a case like this, where the appellant has deducted tax at source in respect of the payments made to CHAs @ 2% under section 194C, when it is required to be made @10% u/s. 194J of the IT Act, 1961, the provisions of section 40(a)(ia) of the IT Act, 1961 cannot be made applicable. As held by the Hon'ble High Court of Calcutta in the above referred case that if there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payment falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s. 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act. Therefore, the disallowance made by the assessing officer cannot be sustained. The addition made at Rs.67,84,807/- on account of disallowance of payments made to CHAs u/s. 40(a)(ia) of the IT Act, 1961 stands deleted. This ground of appeal is allowed." 3. Aggrieved by the relief so granted by the ld. CIT(A), the Assessing Officer is in appeal before us. 4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. We are not inclined to disturb the very well reasoned conclusions arrived at by the ld. CIT(A) as he has explained at length a binding judicial precedent for the proposition that a short deduction of tax at source, even if any, cannot be visited with the disallowance under section 40(a)(ia) of the Act. Therefore, the disallowance was unsustainable in law and the ld. CIT(A) was quite justified in deleting the impugned disallowance. We approve and uphold the erudite and well reasoned stand taken by the ld. CIT(A) and decline to interfere in the matter."

Apart from that we have further considered the appeal preferred by the Revenue against the order passed by the Co-ordinate Bench in allowing the appeal. We have further considered the judgment passed by the Hon'ble

Jurisdictional High Court in the matter of Pr. Commissioner of Income Tax vs. MGM Exports in Tax Appeal No. 309 of 2018. The relevant portion whereof is as follows:-

> *"6. The second issue relates to the addition made by the Assessing Officer of a sum of Rs. 5.05 lacs under section 40(a)(ia) of the Income Tax Act, 1961 on the ground that the assessee had not deducted tax at source on foreign commission payments. The Tribunal however, recorded that the non-resident agent of the assessee was operating at his own level and no part of the income arose or accrued in India.*
>
> *7. In the recent order in Tax Appeal No. 290 of 2018, we had dealt with similar situation making following observations:*
>
> *"It can thus be seen that while confirming the order of CIT [A], the Tribunal relied on judgment of the Supreme Court in the case of G.E India Technology Centre P. Limited vs. Commissioner of Income-Tax &Anr., reported in [2010] 327 ITR 456 (SC). In such judgment, it was held and observed that C/TAXAP/309/2018 ORDER the most important expression in Section 195 [1] of the Act consists of the words, "chargeable under the provisions of the Act". It was observed that, "..A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the Act." Counsel for the Revenue, however, drew our attention to the Explanation 2 to sub-section [1] of Section 195 of the Act which was inserted by the Finance Act of 2012 with retrospective effect from 1st April 1962. Such explanation reads as under :-*
>
> *Explanation 2 - For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has -*
>
> *[i] a residence or place of business or business connection in India; or [ii] any other presence in any manner whatsoever in India.*
>
> *It is indisputably true that such explanation inserted with retrospective effect provides that obligation to comply with subsection [1] of Section 195 would extend to any person resident or non-resident, whether or not non-resident person has a residence or place of business or business connections in India or any other persons in any manner whatsoever in India. This expression which is added for removal of doubt is clear from the plain language thereof, may have a bearing while ascertaining whether certain payment made to a non-resident was taxable under the Act or not. However, once the conclusion is arrived that such payment did not entail tax liability of the payee under the Act, as held by the Supreme Court in the case of GE India Technology Centre*

P. Limited [Supra], sub-section [1] of Section 195 of the Act would not apply. The fundamental principle of deducting tax at source in C/TAXAP/309/2018 ORDER connection with payment only, where the sum is chargeable to tax under the Act, still continues to hold the field. In the present case, the Revenue has not seven seriously contended that the payment to foreign commission agent was not taxable in India.

Tax Appeal is therefore dismissed."

8. In the result, Tax Appeal is dismissed."

Further that we have considered the judgment passed by the Co-ordinate Bench in the case of ACIT vs. Rimtex Industries in ITA No. 315/Rjt/2013 as relied upon by the Ld. AR and the judgment passed by the Hon'ble Apex Court in the case of Ishikawajima Harima Heavy Industries Ltd. (2008) 288 ITR 408 (SC).

10. We find that the ratio laid down by all the above judgments holding that when the commission has been paid to foreign parties for rendering services admittedly abroad for soliciting customers for its export business activities, the appellant is not liable for short deduction of tax at source and therefore disallowance made on this score under Section 40(a)(ia) is not permissible. Hence, keeping in mind such judicial precedent we find no infirmity in the order passed by the Ld. CIT(A) in deleting the disallowance made by the Ld. AO under Section 40(a)(ia) of the Act holding that such commission is not fees for technical services under Section 9(1)(vii) of the act and the same being in nature of business income for recipient of income/payee/non-residents is not taxable in India in terms Sec. 9(1)(i) in the absence of business connection in India, so as to warrant interference. We, therefore, find no merit in the issue raised by the Revenue. Hence, the same is dismissed.

11. The next ground relates to deletion of disallowance of foreign exchange fluctuation of Rs. 46,28,828/-.

During the course of assessment proceeding from the final accounts it was gathered that under the head administration / general expenses, the assessee has claimed other general administrative expenses at Rs. 1,21,09,315/-, the details whereof were also furnished before the authorities below. From the details it was further found that the general administrative expenses included the fluctuation in foreign currency at Rs. 46,28,828/- The assessee explained his claim before the AO which was accepted by the Ld. AO to the extent that the dollar bookings made in advance and set off against dollar remittances as hedging transaction. However, dollar bookings not set off against dollar remittances arising from exports has not been accepted to be framed as hedging by the Ld. AO as there is booking in excess of the actual remittance accepted to be receipt, which according to the Ld. AO falls under the scope and purview of speculation. He, therefore, added Rs. 46,28,828/- in respect of the claim of fluctuation in foreign exchange considering the same as speculation with a rider that assessee can set off his speculation loss against the speculation income as provided by the Act. In appeal the Ld. CIT(A) deleted such addition relying upon the judgment passed by the Jurisdictional High Court in the case of CIT vs. Panchmahal Steel Ltd. Hence, the instant appeal before us.

12. At the time of hearing of the instant appeal the Ld. DR relied upon the order passed by the Ld. AO.

13. On the other hand, the Ld. Counsel appearing for the assessee submitted before us that the issue is squarely covered by the judgment passed by the Hon'ble Jurisdictional High Court in the case of CIT vs. Panchmahal Steel Ltd.

14. We have heard the respective parties, we have also perused the relevant materials available on record including the orders passed by the authorities below. It appears that the assessee made the following submission before the Ld. AO:-

> *"Normally when we confirm any export sale contract, to prevent any future loss due to change in exchange rates we book (hedge) dollars from our Banker Oriental Bank of Commerce where we have document discounting limits. Latter on we submit the documents for collection/discount against this dollar booking contracts.*
> *Firstly we only sales the dollars and never purchase dollars. After dollar booking we give sales documents for collection/discount. Before the expiry of the contract if we cannot submit the documents then the unutilized part of contract is settled by the bank.*
>
> *Thus the forward contracts done by us are only one sided and only for the purpose of hedging and not the purpose of doing any speculative gain or loss.*
>
> *Thus if we book dollar for latter period then we get more rate i.e. we get premium as per RBI & Banking premium rules.*
>
> *Similarly if we give the documents against future period of booking then the bank get back the premium of the same and this charges they debit to our account under the head of Forward Contract early delivery charges. Thus the forward contract early delivery charges paid by us are just return back of excess premium which we get at the time of booking of dollar. This amount is not at all speculative but it is routine practice and part and partial of the banking and export business transactions."*

Though in spite of the same the AO termed the dollar bookings, which was not set off against the dollar remittance, as speculation and not hedging since there is booking in excess of the actual remittance accepted to be received. However, as we find from the records while allowing the claim of the assessee the Ld. CIT(A) observed as follows:-

> *"7.2 I have perused the assessment order and the written submission filed by the ld. AR.*
>
> *The AO vide para 7 of the assessment order had held that the fluctuation in foreign currency arose on account of the dollar bookings by way of advance contracts entered into by assessee with the banks against which the realization of dollar at the time of export is adjusted and the extent of the unutilized dollar booked in advance by the assessee with the bank which remained outstanding at the end of the month, was closed by the bank by crediting/debiting the assessee's account to the extent of the unused dollar left behind out of the dollar booking for want of export realization, is speculative I nature. According to the AO,this settlement is done on a month to month basis by the ban and there is no squaring up of transactions by way of actual realization of dollar. On the other hand, the ld. AR submitted that, in the*

appellant's export business, there is always a risk of fluctuating foreign currency at the time of realization of sale proceeds. Therefore in order to hedge against the loss, the appellant enters into forward contracts with its bank and tries to minimize the risk on account of fluctuation in foreign exchange against the future export sales realization. It is also seen that, forward contracts are extensively used to get export receivables hedged against adverse currency movements. The ld. AR also admits that, such contracts are only executed against the export receivables and these facts are clearly mentioned in the said contract. So it can be said that the transactions involved in these contracts have direct nexus with the export of specific merchandise and export receivables. The appellant's ld. AR also brought on record the large fluctuation in foreign currency during the relevant financial year, in order to justify the appellant's action of currency hedging. This is summarized supra, in the written submission. As per this chart, there is variation of upto 10 USD between May 2011 and December, 2011.

I find substantial force in the above contention of the ld. AR . It is also seen that the issue is now squarely covered by the decision of the Hon. Gujarat High Court in the case of CIT vs. Panchmahal Steel ltd. where it relied upon its own decision in the case of Friends and Friends Shipping P. Ltd., wherein it was held that though the assessee is not a dealer in foreign exchange, it entered into forward contracts with banks for the purpose of hedging the loss due to fluctuation in foreign exchange while implementing the export contracts. The transactions in foreign exchanges were incidental to the assessee's regular course of business and the loss was thus not a speculative loss under section 43(5) but was incidental to the assessee's business and allowable as such. Thus, the hedging of currency is incidental to the appellant's business and the same is therefore held as allowable business expenditure. The disallowance made by the AO is therefore directed to be deleted."

Thus, from the above it appears that it is specific observation made by the Ld. CIT(A) that though the assessee is not a dealer in foreign exchange it had entered into forward contracts with banks for the purpose of hedging the loss due to fluctuation of foreign exchange while implementing the export contracts. Such transaction in foreign exchanges were truly identical to the assessee's regular course of business and hence the loss is not a speculative one under Section 43(5) of the Act; the same is incidental to the assessee's business and hence allowable. We, therefore, taking into consideration the entire aspect of the matter find no infirmity in the order passed by the Ld. CIT(A) in deleting the addition made by the Ld. AO on the premise that hedging of currency is incidental to appellant's business and thus the same is allowable business expenditure, in the present facts and circumstances of the case so as to warrant interference. We, thus, find no

merit in the case made out by the Revenue. Hence, the order is passed in the affirmative i.e. in favour of the assessee and against the Revenue.

15. This ground of appeal relates to deletion of disallowance of Rs. 6,02,976/- under Section 14 A of the Act.

16. The brief facts regarding the issue is this that during the course of assessment proceeding upon perusal of the final accounts and the balance sheet it was found that the assessee made investments which are likely to generate exempt income which will not form part of the gross total income . No expenses, however, were activated by the assessee towards earning of this income.

17. The assessment proceeding was finalised upon making disallowance of Rs. 6,02,976/- out of the interest expenses of Rs. 9,90,30,159/- by invoking the provision of Sec. 14 A r.w.r 8D of the Income Tax Act, 1961. This particular disallowance was made on the contemplation that the appellant may receive income not chargeable to tax from the investment of Rs. 63,25,000/- as appearing in the balance sheet. However, the same was deleted by the First Appellate Authority before the appellate proceeding.

18. At the time of hearing of the instant appeal Ld. DR relied upon the order passed by the Ld. AO.

19. On the other hand, the Ld. Counsel appearing for the assessee submitted before us that the provision of sub- Section 1 of Sec. 14 A of the Act has not been complied with by recording satisfaction as to the correctness of the claim of the assessee in respect of such expenditure in relation to the income which does not form part of the total income under the Act, the addition made thereof by the Ld.AO is bad in law and deletion

of the same made by the Ld. CIT-(A) cannot be questioned. He therefore prays for dismissal of the appeal preferred by the Revenue.

We have heard the submissions made by the respective parties. We have also perused the relevant materials available on record.

20. The case of the assessee before the 1st appellate authority is this that since without recording satisfaction as contemplated in sub-section 1 of Sec. 14 of the Act, the Ld. AO proceeded to made disallowance under Section 14 A by applying provision of Rule 8D and as such the same is not permissible in the eyes of law and thus not sustainable. It appears that the Ld. CIT-A relying upon the series of judgements deleted the addition made by the Ld.AO in view of the particular fact that the Ld.AO has not made any observation and/or deliberation by recording satisfaction so as to the correctness of the claim of the assessee in respect of the expenditure in relation to income which does not form part of the total income under the Act which is a precondition for applying the method under Section 14A r.w.r 8D for disallowing the expenses. The judgement passed by the Hon'ble Jurisdictional High Court in the case of CIT vs. Gujarat State Fertilisers and Chemicals Ltd. reported in 2013, 36 taxman.com 557 was also considered by the Ld. CIT-A where it was held that where the assessee had more funds than investment in shares and borrowed funds were not proved to be used for sale, disallowance of 10% of exempt dividend income was unsustainable. Apart from that the order passed by the Co-ordinate Bench in the case of Torrent Power Ltd. vs. DCIT 2013, 33 taxmann.com 287 was also taken care of by the Ld. CIT-A. The operative for portion of the same is as follows:-

> *"If no expenditure is incurred in relation to exempt income, no disallowance can be made under section 14A."*

The order passed by the Mumbai Bench in Raj Shipping Agencies Ltd. vs. Additional CIT, reported in 2013, 30 taxmann.com 347 was also considered by the Ld. CIT-A. The relevant portion whereof is reproduced hereinbelow:-

> *"Expenditure incurred in relation to income not includible in total income [Conditions precedent] - Assessment year 2008-09 - Whether Assessing Officer has to examine accounts of assessee first and then if he is not satisfied with correctness of claim, only he can invoke rule 8D -Held, yes - Whether further, disallowance under section 14A required finding of incurring of expenditure and where it was found that for earning exempted income no expenditure had been incurred, disallowance under section 14A could not stand - Held, yes - Whether where Assessing Officer had not recorded any satisfaction with reference to accounts of assessee or claim that no expenditure was incurred, invocation of rule 8D for disallowing expenditure under section 14A on estimation/presumptive basis did not arise - Held, yes"*

In fact, we find that in the absence of any material or basis to hold that interest expenditure directly or indirectly was attributable for earning dividend income, the decision of the Ld. CIT-A cannot be said to be incorrect particularly taking into consideration the fact of non-recording of satisfaction as envisaged under sub-section 1 of Sec. 14 of the Act. Hence, we do not find any merit in the issue raised by the Revenue and therefore the same is dismissed.

ITA No. 360/Rjt/2015 A.Y. 2011-12(Department's Appeal):-

21. The first ground of appeal basically relates to deletion of disallowance of export commission of Rs. 21,60,87,454/- under Section 40(A)(ia) of the Act.

22. The identical issue has already been dealt with by us in ITA No. 27/Rjt/2016 for A.Y. 2012-13 and in the absence of any changed

circumstances the same shall apply mutatis mutandis. Hence, this ground of appeal preferred by the Revenue is also dismissed.

23. The next ground of appeal relates to deletion of disallowance made on account of contract cancellation charges amounting to Rs. 10,04,33,270. The identical issue has already been dealt with by us in ITA No. 27/Rjt/2016 for A.Y. 2012-13 and in the absence of any changed circumstances the same shall apply mutatis mutandis. Hence, this ground of appeal preferred by the Revenue is also dismissed.

ITA No. 315/Rjt/2015 A.Y. 2011-12(Assessee's Appeal):-

24. The sole ground of the assessee in this appeal relates to the confirmation of disallowance of bad debt/forfeiture of advance of Rs. 60,07,108/-. The assessee prays otherwise.

The brief facts leading to the issue is this that during the course of assessment proceeding, upon verification of the copies of accounts of the parties it was found that bad debt of Rs. 60,07,105 pertains to one M/s. Manjeet Cotton Pvt. Ltd. was written off. Such amount represents advances made by the assessee to the said M/s. Manjeet Cotton Pvt. Ltd. According to the Ld. AO the assessee was not eligible for claim advances of Rs. 60,07,105/- in view of the provision of Sec. 36(1)(vii) and 36(2)(i) of the Act. Hence the same was ultimately disallowed which was, in turn, confirmed by the First Appellate Authority. Hence, the instant appeal before us.

25. We have heard the submissions made by the respective parties. We have also perused the relevant materials available on record.

It is the case of the assessee that the advance paid to the said Manjeet Cotton Pvt. Ltd. was forfeited by it due to failure of taking delivery of cotton within a stipulated time as agreed upon orally. In default, forfeiture of some advances would prevail as also the condition of such agreement. Further that, during the previous year total 23.88 crores were advances to the said private limited company before taking deliveries of cotton. Notwithstanding regular advances towards purchases of cotton, the assessee was not able to advance towards purchases as agreed with the said company and therefore material worth of Rs. 60 lakhs were not ultimately supplied by the said company to the appellant. In spite of due diligence of the assessee, the same was not supplied thereby the advance of Rs. 60 lakhs have been forfeited by the said Manjeet Cotton Pvt. Ltd. According to the assessee, this is nothing but a business loss and not bad debts as provided in Sec. 36(1)(vii) of the Act and therefore the same is not hit by sub-section 2 of Sec. 36 of the Act. Forfeiture of advances being a loss is having a direct nexus with the operation of the business and such loss is incidental to the appellant as also the case made out by the appellant before us. On this aspect the appellant relied upon the judgment passed by the Bombay High Court in the case of Narandas Mathuradas & Co. vs. CIT reported in 35 ITR 461.

26. On the other hand, the case of the Revenue is this that such a claim is not allowable in terms of the provision 36(1)(vii) and 36(2)(i) of the Act. According to the Revenue in order to claim a bad debt the twin conditions to be fulfilled i.e. the amount is written off as the bad debts in the books of account of the assessee and such bad debts or part thereof has been taken into consideration in income of the assessee's previous year in which the amount of bad debt or part whereof is written off or of an earlier year. Such condition, however, was not fulfilled by the assessee as of the case made

out by the Revenue. Furthermore, the appellant makes advances which is a current asset and is of capital outflow and when the same is forfeited resulting in a capital loss it directly affects the balance sheet. Hence, the same cannot be set off a revenue loss against the legitimate income.

27. We have also considered the judgment passed by the Hon'ble Bombay High Court in the case of Narandas Mathuradas &Co. vs. CIT reported in 35 ITR 461. While dealing with the identical issue the Hon'ble Court was pleased to observe as follows:-

> *"3. Therefore, we must approach this question not from any technical point of view, but from the broad commercial aspect of the matter, and what we have really to decide is whether in arriving at the profits and gains of a business carried on by the assessee it would be permissible to him to deduct this particular loss in order to arrive at the true profits of the business. It should be borne in mind that this expenditure is not claimed as any specific allowance falling under sub-section (2) of section 10. The contention of the assessee is that this is a trading loss and the true profits of his business which are subject to tax cannot be ascertained unless this deduction is permitted to him.*
>
> *4. The argument of Mr. Joshi is that this deposit was made by the assessee not for the purpose of earning profits built for the purpose of obtaining a business which would make it possible to earn profits. In other words, his contention is that the payment of this deposit is antecedent to and de hors the business which the assessee carried on and which yielded profits to him. Apart from authorities to which we shall presently turn, the contention does not seem to be tenable. This is not a case where the assessee makes this deposit in order to acquire a business, nor is this a case where an amount is deposited as a sort of a temporary investment yielding interest, the deposit being necessary in order that the assessee should be permitted to carry on a particular business. The assessee already has his business. His businesses to sell various commodities and in the course of this business, not de hors it,*
> *he submits a tender to the railway company. It is one of the terms of the tender that he must make the deposit. Therefore the making of the deposit is incidental to the business which he is carrying on. This is not a case where it is suggested that the assessee committed a breach of the contract fraudulently or that he deliberately failed to discharge his obligation under the contract. The failure to deliver the goods to the railway company was incidental to the business. It is something which would happen in any business and which would happen to any businessman. Therefore, looking at the matter on principle and from a broad point of view that we have suggested, it seems to us that this is a trading loss and the assessee is entitled to deduct it from his profits in order that the assessable profits can be ascertained.*
>
> *5. The two authorities on which Mr. Joshi relied are both decisions of the Privy Council, and as will be noticed, the facts in those two cases were entirely different. The first is Tata Hydro-Electric Agencies Ltd. v. Commissioners of Income-tax. That is the well known case and it is in the context of the facts there that the Privy Council said at page 209 :*

"Their Lordships recognise and the decided cases show how difficult it is to discriminate between expenditure which is and expenditure which is not, incurred solely for the purpose of earning profits or gains."

6. Now, in the first place, the Privy Council was not considering the case of a trading loss. The Privy Council was considering a specific allowance claimed under the provisions of section 10 (2) of the Income-tax Act, and even in deciding that the Privy Council felt difficulty, and were not made in the process of earning profits. They did not arise out of any transactions in the conduct of their business. That the assessees had to make those payments no doubt affected the eliminated yield in money to them for their business but the is not the statutory criterion. The obligation to make these payments was undertaken by the assessees in consideration of their acquisition of the right and opportunity to earn profits, that is, of the right of conduct the business, and not for the purpose of producing profits in the conduct of the business. Now, this according to Mr. Joshi is the criterion and the ratio. Assuming that is the criterion and the ratio, surely that is not applicable to the facts before us. How can it possible be said in this case that this deposit was made by the assessee in order to acquire the right to conduct the business and not for the purpose of producing profits in the conduct of the business ? The business was already being carried on by the assessee. This was a transaction in that business. It is in order to put through that transaction that the deposit was necessary.

7. The second case referred to by Mr. Joshi is Commissioner of Income-tax v. Motiram Nandram. In that case the assessees were carrying on business of cloth, yarn and money-lending and they wanted to start a new business and for that purpose they deposited with an oil company Rs. 50,000. In consideration of that the assessees were appointed organizing agents of the oil company for five years for a particular area. They were to recommend the selling agents and the sales were to be conducted by these selling agents, but the assesses were to receive certain commission on all goods sold by the selling agents within the area and also on all sales effected in the area by the company. The deposit was to yield interest at 7 per cent. Part of the deposit was repaid and then the company went into liquidation, and the assessees claimed the part of the deposit which was lost to them and that claim was rejected by the Privy Council. Now, in the first place, the Privy Council took the view that the deposit was made by the assessees for the purpose of being permitted to engage in a business and that must be considered to be a purpose of securing an enduring benefit of a capital nature. Therefore, on the facts of that case where the assessees were launching upon a new business and they could only start this business by making this deposit, the Privy Council observed that by making the deposit they were getting a capital asset of an enduring nature, the capital asset being the business. Mr. Joshi says that in this case also by making the deposit the assessee is obtaining a business. But that is not correct. It is true that under the Income-tax law even a single venture may be business, but his is not a case of a single venture. As we have pointed out before, it is in the course of the business which the assessee had been carrying on that it entered into this particular transaction. So this is neither a case of acquiring a new business, nor acquiring a joint nature. Further, at page 138 Sir George Rankin, who delivered the judgment of the Privy Council, points out that the deposit of Rs. 50,000 may be looked upon as a temporary investment because it yielded interest while it remained with the oil company. That feature is also absent in the case before us. Nobody can suggest that the deposit was made by the assessee as a temporary investment with the railway company. It was expressly made as an earnest; as security for carrying out the particular contract. Their Lordships also say

that a deposit must be considered in relation to the Particular business, and when we look upon his deposit and the relation it has to the
business of the assessee, it is clear that the deposit was made not for the purpose of acquiring any capital asset of an enduring nature or acquiring a new business, but it was made solely for the purpose of earning profits in the course of the business. The Privy Council also points out that the question that should be posed is - "what is the object of the expenditure ?" - and they proceed to answer that question by saying - "it must be answered from the stand-point of the assessee at the time the deposit was made." From the point of view of the assessee in this case there cannot be the slightest doubt that the deposit was looked upon as a business expenditure and if the deposit was forfeited it was a business loss.

8. The result is that we must answer the question submitted to us in the affirmative. The Commissioner to pay the costs.

9. Question answered in the affirmative."

Thus, it appears that such loss was incurred in the character of trader and during the ordinary course of business. If there is direct and proximate nexus between the business operation and the loss, or it is incidental to it, then the loss is deductible since without the business operation and doing all that is incidental to it, no profit can be earned, which is also the view of the Hon'ble Court as we find from the judgment cited above. Hence, taking into consideration the entire aspect of the matter in our considered view the same is business loss and not bad debts as provided in Sec. 36(1)(vii) and hence the loss is not hit by sub-section 2 of section 36 of the Act. Such forfeiture of advance is a business loss having a direct nexus with the operation of the business and is incidental to the business carried too and hence allowable. We, therefore, delete the addition made by the authorities below. This ground of appeal is, thus, allowed.

28. In the combined results,

(i) ITA No. 27/Rjt/2016- Department's Appeal is dismissed.

(ii) ITA No. 360/Rjt/2015- Department's Appeal is dismissed.

(iii) ITA No. 315/Rjt/2016- Assessee's Appeal is Allowed.

29. Before parting we would like to make certain observation relating to the issue cropped up under present scenario of Covid-19 pandemic as to whether when the hearing of the matter was concluded on 25.02.2020 the order can be pronounced today i.e. on 27.07.2020. The issue has already been discussed by the Co-ordinate Bench in the case of DCIT vs. JSW Ltd. (ITA Nos. 6264 & 6103/Mum/2018) pronounced on 14.05.2020 in the light of which it is well within the time limit permitted under Rule 34(5) of the Appellate Tribunal Rules, 1963 in view of the following observations made therein:

"7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 8th January 2020, this order thereon is being pronounced today on the day of 14th May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

> *(5) The pronouncement may be in any of the following manners :—*
> *(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.*
> *(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.*
> *(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.*

8. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)] wherein Their Lordships had, inter alia, directed that "We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the Benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile(emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment". In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.

9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on

account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly", and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the corona virus "should be considered a case of natural calamity and FMC (i.e. force majeure clause) may be invoked, wherever considered appropriate, following the due procedure…". The term 'force majeure' has been defined in Black's Law Dictionary, as 'an event or effect that can be neither anticipated nor controlled' When such is the position, and it is officially so notified by the Government of India and the Covid-19

epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)], Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly". The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view,

even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case."

30. On the basis of the observation made in the aforesaid judgment we exclude the period of lockdown while computing the limitation provided under Rule 34(5) of the Income Tax (Appellate Tribunal) Rule 1963. Order is, thus, pronounced in the open court.

31. In the combined results,

(i) ITA No. 27/Rjt/2016- Department's Appeal is dismissed.

(ii) ITA No. 360/Rjt/2015- Department's Appeal is dismissed.

(iii) ITA No. 315/Rjt/2016- Assessee's Appeal is Allowed.

This Order pronounced in Open Court on	**28/07/2020**

Sd/-
(WASEEM AHMED)
ACCOUNTANTMEMBER

Sd/-
(MADHUMITA ROY)
JUDICIALMEMBER

Dated 28/07/2020

Tanmay Datta, Sr. PS *TRUE COPY*

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

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

आदेशानुसार/BY ORDER,

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