IN THE INCOME TAX APPELLATE TRIBUNAL DELHI BENCH 'F', NEW DELHI

BEFORE MS SUSHMA CHOWLA, VICE PRESIDENT AND SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER

(THROUGH VIDEO CONFERENCING)

ITA No.614/Del/2006 (for Assessment Year 2004-05)
And
ITA No.84/Del/2010 (for Assessment Year 2004-05)

Punjab National Bank HO Accounts & Taxation Deptt. HO : 5-Sansad Marg, New Delhi – 110 001. PAN No. AAACP 0165 G	Vs.	DCIT Circle - 14(1) New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri K. Sampath, Adv.
Revenue by	Shri Amit Jain, Sr. D.R.

Date of hearing:	29/09/2020
Date of Pronouncement:	15/10/2020

ORDER

PER ANIL CHATURVEDI, AM:

Both the appeals filed by the assessee are directed against the order dated 27.12.2005 & 19.10.2009 of the Commissioner of Income Tax (A)-XVII, New Delhi relating to Assessment Year 2004-05 passed in quantum appeal and penalty appeal respectively.

2. We first proceed to decide the quantum appeal in appeal No 614/Del/2006 for AY 2004-05. The relevant facts as culled from the material on records are as under:

3. Assessee is a bank who filed its return of income for A.Y. 2004-05 on 29.10.2004 declaring income of Rs.1726,89,81,014/- The assessee thereafter on 20.12.2004 revised the return of income wherein the income was revised to Rs.1725,35,08,969/-. The case was selected for scrutiny and thereafter assessment was framed u/s 143(3) vide order dated 15.02.2005 and the total income was determined at Rs.2096,09,70,902/-. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who vide order dated 27.12.2005 (Appeal No.173/2004-05) granted partial relief to the assessee. Aggrieved by the order of CIT(A), assessee is now before us and has raised the following grounds of appeal:

1. ***"That the order is against the law and facts of the case.***
2. *That the learned Commissioner of Income Tax (Appeals) was not justified in confirming the action of Assessing Officer of treating the profit of Rs.2,36,66,250/- as Business Income instead of Capital Gain.*
3. *That the learned Commissioner of Income Tax (Appeals) was not justified in confirming the action of Assessing Officer for not allowing the benefit of the carry forward loss of capital loss amounting to Rs.402,87,40,991/-.*
4. *That the learned Commissioner of Income Tax (Appeals) was not justified in not directing the Assessing Officer to consider the claim of the income of those infrastructure projects where*

notifications are issued by the relevant Govt. authorities at a later date when they are produced by the assessee with retrospective effect amounting to Rs.38,31,28,642/-.

5. *That the learned commissioner of income tax (Appeals) was not justified in estimating the expenditure attributable to exempt income @ 10% of the total exempt income. It is prayed that the additions being unwarranted be deleted.*

6. *That the Learned Commissioner of Income Tax (Appeals) was not justified in confirming the additions made by Assessing Officer in the case of loss in investment amounting to Rs.2,71,36,824/-. It is prayed that the additions being unwarranted be deleted.*

7. *That the learned Commissioner of Income Tax (Appeals) was not justified in confirming the action of Assessing Officer in disallowance of expenditure of Rs.4,70,178/- as penalty. It is prayed, the same may be allowed.*

8. *That the learned Commissioner of Income Tax (Appeals) was not justified in disallowing an amount of Rs.4,331/- treating payment of Rs.21,657/- in contravention of section 40A(3) of Income Tax Act 1961. It is prayed, the same may be allowed.*

9. *That the above grounds of appeal are independent and without prejudice to one another.*

Your appellant craves leave to add, alter, amend or delete any of the grounds of appeal at the time of hearing."

4. Before us, Ld AR submitted that ground No 1 being general needs no separate adjudication. He thereafter submitted that Ground No 2 and ground No 3 are interconnected. Ground No. 2 is with respect to the action of AO of treating the profit of Rs.2,36,66,250/- as Business Income instead of a Capital Gain and Ground No.3 is with respect to not allowing the benefit of the carry forward loss of capital loss. He submitted that in case the

issue of ground No 2 (wherein the profits earned on sale of HTM securities is held to be on capital account) then in Ground No 3. Assessee is seeking its carry forward as capital loss. In view of the aforesaid submission of Ld AR, we proceed to dispose of ground nos. 2 & 3 together.

5. AO noticed that in the revised return of income assessee had considered Rs.2,36,66,260/- being the profit on sale of Securities (HTM Category) as not taxable under the head of Business but had offered it to tax under the head of Long Term Capital Gains. AO noted that the assessee is a bank and one of the business activities undertaken by it was purchase and sale on various kinds of securities. He noted that bank has been offering the income on sale and purchase of such securities as Business Income over so many years but in the year under consideration, assessee was taking a plea that the income was on Capital Gain account. The submission of the assessee of the income to be on capital account was not found acceptable to AO. He therefore, held the profit on sale of Securities as Business Income instead of Capital Gain and also disallowed the claim of carry forward as capital loss. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who upheld the order of AO. Aggrieved by the order of CIT(A), assessee is now before us.

6. Before us Learned AR reiterated the submission made before the AO and CIT(A) and further submitted that assessee had decided to treat the HTM Securities which were proposed to be held till maturity as per capital. He therefore, submitted that the profit being treated as for capital. He submitted that the assessee being a Government undertaking the decision was taken after obtaining necessary approvals of the concerned authorities. He further submitted that the assessee reserves a right to treat any part of securities as stock in trade or as investments. He therefore submitted that the lower authorities were not justified in their action. He thereafter fairly submitted that identical issue arose in assessee's own case in A.Y. 2006-07 wherein the Tribunal vide order dated 16.03.2018 in ITA No.3843/Del/2010 had dismissed the ground of the assessee. He pointed to the relevant findings of the Tribunal which are reproduced in the synopsis that has been filed. He therefore, submitted that the issue be decided accordingly.

7. As far as ground No 3 is concerned, he submitted that in case in ground no 2, if the profits on the sale of investment in HTM Categories are held to be on account of capital gain, then the gains should be allowed to be set off against the carry forward capital loss.

8. Learned DR on the other hand supported the order of AO and CIT(A) and submitted that on identical issue the Co-ordinate Bench of Tribunal in earlier year has decided the issue against the assessee and there are no change in the facts in the year under consideration. He therefore submitted that the order of CIT(A) be upheld.

9. We have heard the rival submissions and perused the material available on record. The issue in ground No 2 is with respect to the treatment of profit on sale of HTM Securities. It is the plea of the assessee that the securities being held on capital account, the profit earned be held to be of capital in nature whereas the Revenue has treated the same to be business income. We find that identical issue arose in the assessee's own case in A.Y. 2006-07 and the Co-ordinate Bench of Tribunal decided the issue against the assessee. While deciding the issue against the assessee, the co-ordinate bench of the tribunal in para 7 of the order (ITA No 3843/Del/2010 order dtd 16.3.2018) also observed that the "*assessee has treated these securities as stock-in-trade and claimed deduction of loss arising out of the valuation of securities at the year end on the basis of cost or market price whichever is lower basis from the business income.*"

10. Before us, assessee has not placed any material on record to demonstrate that the aforesaid decision of the Tribunal in

assessee's own case for A.Y 2006-07 has been set aside/ overruled/ stayed by higher judicial forum. We therefore, following the decision of the Co-ordinate bench in assessee's own case and for similar reasons find no reason to interfere with the order of CIT(A) **thus the ground of appeal of the assessee is dismissed.**

11. As far as ground No 3 is concerned, before us, Learned AR submitted that ground no.2 & 3 are interconnected and in the event the profit on the investment in HTM Categories is held to be on account of capital gain then the gain be allowed to be set off against the carry forward capital loss. Since we have held the profit earn on sale of securities which are held to be HTM Category to be on business account, **the ground No 3 of the assessee claiming for set off against carry forward capital loss is dismissed.**

12. Ground No.4 is with respect to the claim of assessee of the income from infrastructure project has been exempt u/s 10(23G).

13. AO noted that assessee had claimed income of Rs.100,19,00,066/- as exempt u/s 10(23G). AO noted that assessee had not filed any evidence to show that the enterprises

listed in the table in Para – 3 were notified by Central Govt. for the purpose of section 10(23G). He accordingly denied the claim of aggregating to Rs.44,67,23,817/- u/s 10(23G). Aggrieved by the order of AO, assessee carried the matter before the CIT(A). Before CIT(A), assessee filed the notifications issued from the Infrastructure Projects (R.S. Infrastructure Ltd., Swarna Tollways Pvt. Ltd. & M/s. Tata Tele Services Maharashtra Ltd.). CIT(A) noted that the notifications with respect to the aforesaid three companies to be valid for AY 2004-05 and accordingly held the assessee to be entitled to exemption u/s 10(23G) aggregating to Rs.6,35,95,175/-. He accordingly granted the relief to that extent and confirmed the action of AO to the extent of denial of exemption aggregating to Rs. 38,31,28,642/- as the assessee could not produce any evidence about it being qualifying for exemption. Aggrieved by the order of CIT(A), assessee is now before us.

14. Before us, Learned AR reiterated the submissions made before the lower authorities and further submitted that the receipt of approval for the various infrastructure project by different companies from CBDT is a continuing exercise and delay occurs due to the time taken by the CBDT in assessing and certifying the applicant units. He submitted that subsequent to the order passed by the CIT(A), assessee has received certain more notifications showing the projects to be approved u/s

10(23G) and therefore the matter may be remitted to the file of AO for verification. He submitted that identical issue arose in A.Y 2005-06 and the Hon'ble Tribunal had restored the issue to the file of the AO with a direction to consider the assessee's claim for exemption on the basis of certificates produced by the assessee. He therefore submitted that following the order of tribunal in assessee's own case for AY 2005-06, similar directions be issued to the AO.

15. Learned DR on the other hand supported the order of lower authorities and submitted that in the absence of the relevant notifications, the lower authorities was fully justifying in denying the claim of exemption. He thus supported the order of lower authorities.

16. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the claim of exemption u/s 10(23G) of the Act. We find that before the lower authorities, to the extent the assessee could produce the relevant notifications and the documents, the claim of the assessee for exemption u/s 10(23G) was allowed. Before us, it is AR's contention that it has received further notifications entitling the assessee to exemption u/s 10(23G) and therefore the matter be remitted to AO with necessary directions.

We find that identical issue arose in assessee's own case in AY 2005-06 (ITA No 2047 & 2873/Del/2007 order dtd 25.10.2011) wherein the issue was set aside by the Co-ordinate Bench of Tribunal by observing as under:

> *"10. We have heard both the sides and perused the records. The assessee's claim for exemption under Section 10(23G) was based on the certificates issued by the enterprises to whom the moneys have been lent. Those enterprises have made applications to the Government for claiming exemption under Section 10(23G), which the Government had not disposed off in time. That is why, even before the learned CIT(A), certain new certificates were filed. Learned CIT(A), in our view, has rightly directed the granting of exemption under Section 10(23G) of the Act in respect of interest on such bonds whose certificate of exemption was filed before him. The assessee has now pleaded before us that new certificates have also been received after the disposal of the appeal by the CIT(A) and he has sought for rectification of the above in the light of these certificates. We, therefore, after having gone through these submissions and material placed on record, think it fit in the interest of justice to set aside this issue to the file of the Assessing Officer with a direction to consider the assessee's claim for exemption under Section 10(23G) on its merits on the basis of the certificates that it may now produce in respect of the addition that was sustained by the learned CIT(A). If the assessee, for any reason, is not able to produce such certificates when the Assessing Officer is giving effect to, the Assessing Officer is free to confirm the addition to that extent. This issue is, therefore, to be treated as allowed for statistical purposes."*

17. Since the facts of case in the year under consideration and that for A.Y 2005-06 are identical, we therefore, following the order of Co-ordinate Bench in assessee's own case for A.Y 2005-06 (supra) and for similar reasons restore the issue to the file of

AO. Thus the **ground of appeal of the assessee is allowed for statistical purposes**.

18. Ground No.5 is with respect to disallowance of expenses u/s 14A.

19. AO noted that assessee had claimed Rs.242,0870,611/- as exempt income and had suo motto held Rs.15,36,844/- as expenses attributable in terms of section 14A of the Act. Assessee was asked to show-cause as to why proportionate expenses in relation to tax free income earned by the Bank following the Assessment order for A.Y. 2003-04 not be disallowed. Assessee made the submissions which were not found acceptable to AO. AO noted that assessee has not established any specific linkage on non-interest bearing funds being invested for acquisition of tax free bonds and securities. He thereafter by following the computation method followed by the AO while finalizing the assessment for A.Y. 2003-04, worked out the disallowance u/s 14A at Rs.174,72,56,149/-. Aggrieved by the order of AO, assessee carried the matter before the CIT(A). CIT(A) noted that in the appellate order for A.Y 2001-02 to 2003-04, 10% of the exempt income has been held to be reasonable expenditure for earning exempt income. He accordingly following the appellate orders for AY 2001-02 to 2003-04 held that disallowance u/s 14A

be made to the extent of Rs.2,03,77,420/-. He thereafter and after giving credit of suo motto disallowance of Rs.15,36,844/- made by the Assessee, held that disallowance u/s 14A be restricted to Rs.1,88,40,576/-. Aggrieved by the order of CIT(A) assessee is now before us.

20. Before us, Learned AR reiterated the submissions made before the AO and CIT(A) and further submitted that assessee makes investments in terms of the mandatory directions of the Reserve Bank of India for SLR/SDR and such other purpose as issued from time to time. He further submitted that all these investments have been treated as stock-in-trade as per the prevailing bank practice. He submitted that provisions of disqualification u/s 14A would not apply to stock-in-trade. He further submitted that in view of the decision of Hon'ble Apex Court in the case of Maxopp Investment Ltd. vs CIT (2018) 402 ITR 640 (SC) there is no question of disallowance u/s 14A for the tax free earnings for securities held by Banks. He further submitted in assessee's own case in ITA No 4253 and 2236/Del/2011 and 2406/Del/2013 and 2469/Del2014 order dtd 09.01.2019, ITA No. 1519/Del/2016 order dtd 28.11.2018 addition has been deleted. He further submitted that even in A.Y 2012-13 the issue has been decided in assessee's favour. He therefore, submitted that following the orders of Hon'ble Tribunal

in Assessee own case, the matter be decided. The Ld DR on the other hand supported the orders of lower authorities.

21. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to disallowance u/s 14A of the Act. We find that CIT(A) by following the orders of first appellate authorities had restricted the disallowance to the extent of 10% of the exempt income. We find that identical issue arose before the Tribunal in Assessee's own case in earlier years. The Co-ordinate Bench of Tribunal following the order of Tribunal in assessee's own case in ITA Nos. 4253 & 2236/Del/2011, ITA Nos. 1788 & 4722/Del/2012, ITA Nos. 2406/Del/2013, ITA No. 2469/Del/2014 for Assessment Years 2006-07 to 2010-11 dated 09.01.2019 as under:

> *"8. We have carefully perused the decision in the case of Maxopp Investment Ltd versus CIT (2018) 91 taxman.com 154 (SC) wherein the Hon'ble Apex Court considered two cases wherein the question of predominant intent of investment in shares was pleaded, though on different facts, on the ground that the objective of investing in shares was not to earn the dividend income, but to either retain controlling interest over the company in which the investment was made or to earn the profit from trading in shares. The question was whether the disallowance under section 14A of the Act could be invoked in the cases where exempt income was earned from shares held as "trading assets" or "stock in trade". The first case relates to Maxopp investment Ltd and the second case relates to the case of State Bank of Patiala. In the case of Maxopp investment Ltd., the assessee company is in the business of finance, investment and was dealing in shares and securities; that they held the shares and securities, partly as investments on the "capital account" and partly as "trading assets" for the purpose*

of acquiring and retaining control over its group companies, primarily Max India Ltd.; and that the profits resulting on the sale of shares held as trading assets were duly offered to tax as business income of the assessee. In the case of State Bank of Patiala the assessee has exempt income in the form of dividend was earned by the bank from securities held by as stock in trade. The Hon'ble Supreme Court was considering the question that has arisen under varied circumstances where the shares/stocks were purchased by a company for the purpose of gaining control over the said company or as "stock in trade", though incidentally income is also generated in the form of dividends as well.

9. It was argued before the Hon'ble Apex Court that though incidentally income was also generated in the form of dividends, the dominant intention for purchasing the shares was not to earn the dividend income but to acquire and retain the controlling business in the company in which shares were invested, or for the purpose of trading in the shares as business activity. After considering the entire case law on this aspect in the light of the peculiar facts involved in both the matters, the Hon'ble Apex Court vide paragraph No. 39 and 40 held as follows:-

> *39) In those cases, where shares are held as stock-in-trade, the main purpose is to trade in those shares and earn profits therefrom. However, we are not concerned with those profits which would naturally be treated as 'income' under the head 'profits and gains from business and profession'. What happens is that, in the process, when the shares are held as 'stock-in-trade', certain dividend is also earned, though incidentally, which is also an income. However, by virtue of Section 10 (34) of the Act, this dividend income is not to be included in the total income and is exempt from tax. This triggers the applicability of Section 14A of the Act which is based on the theory of apportionment of expenditure between taxable and non-taxable income as held in Walfort Share and Stock Brokers P Ltd. case. Therefore, to that extent, depending upon the facts of each case, the expenditure incurred in acquiring those shares will have to be apportioned.*
>
> *40) We note from the facts in the State Bank of Patiala cases that the AO, while passing the assessment order, had*

already restricted the disallowance to the amount which was claimed as exempt income by applying the formula contained in Rule 8D of the Rules and holding that section 14A of the Act would be applicable. In spite of this exercise of apportionment of expenditure carried out by the AO, CIT(A) disallowed the entire deduction of expenditure. That view of the CIT(A) was clearly untenable and rightly set aside by the ITAT. Therefore, on facts, the Punjab and Haryana High Court has arrived at a correct conclusion by affirming the view of the ITAT, though we are not subscribing to the theory of dominant intention applied by the High Court. It is to be kept in mind that in those cases where shares are held as 'stock-in-trade', it becomes a business Activity of the assessee to deal in those shares as a business proposition. Whether dividend is earned or not becomes immaterial. In fact, it would be a quirk of fate that when the investee company declared dividend, those shares are held by the assessee, though the assessee has to ultimately trade those shares by selling them to earn profits. The situation here is, therefore, different from the case like Maxopp Investment Ltd. where the assessee would continue to hold those shares as it wants to retain control over the investee company. In that case, whenever dividend is declared by the investee company that would necessarily be earned by the assessee and the assessee alone. Therefore, even at the time of investing into those shares, the assessee knows that it may generate dividend income as well and as and when such dividend income is generated that would be earned by the assessee. In contrast, where the shares are held as stock-in-trade, this may not be necessarily a situation. The main purpose is to liquidate those shares whenever the share price goes up in order to earn profits. In the result, the appeals filed by the Revenue challenging the judgment of the Punjab and Haryana High Court in State Bank of Patiala also fail, though law in this respect has been clarified hereinabove.

10. It is, therefore, clear from the above observations of the Hon'ble Apex Court that depending upon the facts of each case, the expenditure incurred in acquiring the shares will have to be apportioned. Hon'ble Apex Court held that the Tribunal and the Hon'ble High Court of Punjab and Haryana arrived at a correct

conclusion by setting aside the disallowance under section 14A of the Act in respect of the dividend earned on the shares held as stock in trade, because such shares were held during the business activity of the assessee and it is only by a quirk of fate that when the investee company declared dividend, those shares were held by the assessee, though the assessee has to ultimately trade those shares by selling them to earn profits.

11. Hon'ble Apex Court made clear distinction of this case from the case of Maxopp investment Ltd where the assessee knew that whenever dividend would be declared by the investee company such dividend would necessarily be earned by the assessee and assessee alone, and it would be in the common knowledge of the assessee that such shares would generate dividend income as well as and when such dividend income is generated that would be earned by the assessee only. Hon'ble Apex Court in unequivocal terms held that in contrast, where the shares are held as stock in trade, this may not be necessarily a situation and the main purpose was to liquidate those shares whenever the share price goes up in order to earn profits. Hon'ble Apex Court, therefore, while rejecting the theory of dominant purpose in making investment in shares- whether it was to acquire and retain controlling interest in the other company or to make profits out of the trading activity in such shares - clearly made a clear distinction between the dividend earned in respect of the shares which were acquired by the assessee in their exercise to acquire and retain the controlling interest in the investee company, and the shares that were purchased for the purpose of liquidating those shares whenever the share price goes up, in order to earn profits. It is, therefore, clear that though not the dominant purpose of acquiring the shares is a relevant for the purpose of invoking the provisions under section 14 A of the Act, the shares held as stock in trade stand on a different pedestal in relation to the shares that were acquired with an intention to acquire and retain the controlling interest in the investee company.

12. Further, it is brought to our notice that in assessee's own case in ITA No.1519/Del/2016 and 7106/Del/2017 for the assessment year 2012-13, a coordinate bench of this Tribunal considered the arguments on either side and reached the conclusion that, insofar as the assessee bank is concerned section 14A of the Act has no application in view of the above law laid

down by the Hon'ble Apex Court in the case of Maxopp investments Ltd, (supra).

13. We, therefore, while respectfully following the above decision, hold that no addition in case of the assessee under section 14-A is sustainable. Hence, ground of appeal of assessee is allowed and the ground of appeal of the Revenue is dismissed."

22. Before us, Revenue has not pointed to any distinguishing feature in the facts of the case under consideration and that of earlier years. Further, Revenue has also not placed any material on record to demonstrate that the order of the Tribunal in Assessee's own case cited hereinabove has been set aside/ over ruled or stayed by higher judicial forum. We therefore following the decision of the Co-ordinate bench in assessee's own case dated 09.01.2019 and for similar reasons hold that no disallowance u/s 14A is called for in the present case. We therefore direct the deletion of addition made u/s 14A. **Thus the ground of appeal of the assessee is allowed.**

23. Ground No.6 is with respect to loss on investment amounting to Rs. 2,71,36,824/-.

24. During the course of assessment proceedings, AO noticed that assessee had claimed deduction of Rs.2,71,36,824/- being

the depreciation/ loss on investments. The assessee was asked to justify the claim of deduction and why the same not be considered to be of notional in nature. Assessee made the submission and further *inter alia* submitted that it has been following the RBI guidelines of valuation loss in value of investment and therefore submitted that the claim on loss of investment be allowed. The submissions of the assessee were not found acceptable to AO. AO was of the view that the provision of loss were of notional in nature and therefore not allowable. He accordingly disallowed the claim on loss. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who upheld the order to AO. Aggrieved by the order of CIT(A), assessee is now before us.

25. Before us, Learned AR reiterated the submissions made before the lower authorities and further submitted that identical issue arose in assessee's own case in earlier years and the Co-ordinate Bench of Tribunal in ITA No.2469/Del/2011 and 4241/Del/2010 order dated 09.01.2019 decided the issue in assesse's favour. He pointed to the relevant findings of the tribunal. He therefore submitted that following the order for earlier year, the issue be decided. Ld DR on the other hand did not controvert the submissions of Ld AR but however supported the order of lower authorities.

26. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to disallowing the loss on investment by holding it to be notional in nature. We find that identical issue arose in assessee's own case in ITA No 2469/Del/2011 order dated 09.01.2019 wherein the Coordinate Bench of Tribunal noted as under:

> *"26. We have gone through the record and perused the order dated 16/03/2018 in ITA No. 4241/Del/2010 in assessee's own case, wherein after considering the case law on this aspect including the decision of the Hon'ble Apex Court in the case of UCO Bank vs. CIT 240 ITR 355 (SC) and the Master Circular of the RBI on the aspect of valuation of investments applicable to all banks prescribed in case of acquisition cost of securities classified under HTM category and also the order dated 25/10/2011 of a coordinate bench of this Tribunal in assessee's own case for the assessment year 2000-06 in ITA No. 2873/Del/2007, the Tribunal held that,-*
>
> > *"….. We find that the Tribunal in the AY 2005-06 vide order dated 25.10.2011 held as under:-*
> >
> > > *"The next dispute in the Revenue's appeal relates to the deletion of disallowance of depreciation in investment of Rs. 48,82,82,014/-.*
> > >
> > > *We have heard both the sides and find that the issue is fully covered by the earlier years' orders right from AY 2001-01 to 2004-05. The learned CIT(A) has only followed the principle laid down by the Apex Court in the case of UCO Bank – 240 ITR 355. In the light of the aforesaid binding decision of the Apex Court, we do not*

find any infirmity in the order of CIT(A). The same is dismissed.

35. The learned DR could not point out any specific error in the order of the learned CIT(A). He also could not bring any material on record to show that the order of the Tribunal for AY 2005-06 was varied in appeal before any higher authorities. Hence, we find that no good reasons to interfere with the orders of learned CIT(A) which is confirmed…"

27. It is not the case of the revenue also that there is any change of facts involved in the present appeal from those involved in ITA 2873/Del/2007 or ITA No. 3843 and 4241/Del/2010 so that this Tribunal can take a different view. In the absence of any change of facts and circumstances, we find it difficult to take a different view in the assessee's own case for a subsequent year, from the view that was taken consistently quite for a long time. We, therefore, respectfully following the decisions above find that there is no reason to interfere with the findings of the Ld. CIT(A) on this aspect and the same needs to be upheld. We therefore do not find any merits in the appeal of the revenue on this ground and the same is accordingly dismissed."

27. Before us, Revenue has not pointed to any distinguishing feature in the facts of the case under consideration and that of earlier years. Further, Revenue has also not placed any material on record to demonstrate that the order of the Tribunal in Assessee's own case cited hereinabove has been set aside/ over ruled or stayed by higher judicial forum. We therefore, following the decision of the Co-ordinate bench in assessee's own case dated 09.01.2019 and for similar reasons hold that the AO was

not justified in disallowing the claim of loss. We therefore direct the AO to allow the claim of loss. **Thus the ground of appeal of the assessee is allowed.**

28. Ground No.7 is with respect to disallowance of Rs.4,70,178/- on account of penalty.

29. AO noted that in the tax audit report, it was pointed by the tax auditor that sum of Rs.4,70,178/- has been debited to Profit and Loss account which is in nature of penalty. Assessee was asked to show-cause as to why the same not be disallowed. AO noted that no specific reply was received by the assessee. He therefore disallowed Rs.4,70,178/-. Aggrieved by the order of AO, assessee carried the matter before the CIT(A). CIT(A) upheld the action of AO. Aggrieved by the order of CIT(A), assessee is now before us.

30. Before us, Learned AR submitted that though the nomenclature used is penalty but it has been incurred during the normal course of business and are for minor irritants like delay in providing services etc. He submitted that these payments have been charged by RBI as deterrent for administrative lapses and have been incurred in the normal course of business activities

and are to be treated as wholly and exclusively for the purpose of business and therefore it needs to be allowed as an expense. Learned DR on the other hand, supported the order of AO and CIT(A) and further pointed to the table reproduced by the CIT(A) and submitted that the amounts cannot be considered to be on account of technical aberration. He thus supported the order of lower authorities.

31. We have heard the rival submissions and perused the material available on record. The issue in the present case is with respect to disallowance of Rs. 4,70,178/-. From the table of the details of Rs 4,70,178/- reproduced by the CIT(A) in para 9.3 of the order, it can be seen that it is on *inter alia* on account of fine by consumer forum, penalty by District Consumer, Payment on account of deposit of cheque pertaining to saving account treated as NRI account etc. Before us, apart from general submissions, no material has been placed by the Learned AR to demonstrate that the payments are on account of technical aberration and are not in the nature of fines. Further, no fallacy in the finding of CIT(A) has been pointed before us. Considering the totality of the aforesaid facts, we find no reason to interfere in the order of CIT(A) and **thus the ground of appeal of the assessee is dismissed.**

32. Next ground is with respect to disallowance under section 40A(3).

33. AO noted that tax auditor in the tax audit report has pointed to a sum of Rs.21,657/- being paid in contravention of Section 40A(3) and therefore only 20% of payment needs to be disallowed. He accordingly made the disallowance of 20% of the payment made. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who upheld the order of AO by noting the fact that no provision under Rule 6DD has been shown which would necessitate allowance of expenses. Aggrieved by the order of CIT(A), assessee is now before us.

34. Before us, Learned AR submitted that the same was paid by the Branch Office at Barajol in North East region in cash to the contractor on account of urgency to the contractor due to non availability of clearing facility in North East State. He submitted that the genuineness of the payment is not in doubt and considering the scale of activities, the disallowance be deleted. Learned DR on the other hand, supported the order of AO.

35. We have heard the rival submissions and perused the material available on record. The issue in the present ground is

with respect to disallowance u/s 40A(3) for being the payment made in cash. It is assessee's submission that the payment was paid by the Branch in North East region to the Contractor on account of urgency and due to non availability of clearing facilities available in North East States. The aforesaid submission of the assessee has not been controverted by Revenue. Further the amount of expenditure which has been incurred in contravention of the provisions of s. 40A(3) is very small as compared to the total expenses of the Assessee. The expenditure has not been found to be bogus or not genuine. We find that Hon'ble Apex Court in the case of Attar Singh Gurmukh Singh vs ITO [1991] 191 ITR 667 (SC) has observed that the payment by crossed cheque or crossed bank draft is insisted upon to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of income from undisclosed sources. The terms of section 40A(3) are not absolute. Consideration of business expediency and other relevant factors are not excluded. Genuine and bona fide transactions are not taken out of the sweep of the section. Considering the totality of the facts cited herein above and following the aforesaid decision of Hon'ble Apex Court, we are of the view that no disallowance of the expenses is called for. **Thus the ground of appeal of the assessee is allowed.**

36. **In the result, appeal of the assessee is partly allowed.**

ITA No.84/Del/2010 for A.Y. 2004-05

37. We now take up assessee's appeal in ITA No. 84/Del 2010 for A.Y 2004-05.

38. This appeal is against the levy of penalty of Rs.21,99,05,618/- levied u/s 271(1)(c) of the Act.

39. AO in the penalty order dated 29.08.2008 noted that following additions were made by the AO and which were also confirmed by the CIT(A) and the ITAT has dismissed the appeal of the Assessee for want of COD:

1.	Infrastructure Project claimed u/s 10(23G)	38,31,28,642
	Expenses on exempt income u/s 14A	20,22,37,352
2.	Loss on investment	2,71,36,829
3.	Disallowance of penalty	4,70,178
4.	Payment in Contravention of Section 40A(3)	4,331
	Total	**61,29,77,332**

40. AO in the penalty order thus concluded that assessee had furnished inaccurate particulars of income cited hereinabove and accordingly levied penalty of Rs.21.99 crores u/s 271(1)(c) of the Act.

41. When the matter was carried before the CIT(A), CIT(A) noted that penalty was leviable in respect of wrong claim made under section 10(23G) stated at Sr. No. 1 of the aforesaid table and on account of penalty mentioned at Sr. No. 3 of the aforesaid table. With respect to other additions stated in the table cited herein above, he held that those additions did not amount to either concealment of income or of furnishing inaccurate particulars of income. He accordingly directed the AO to re-compute the penalty in accordance with the findings in the order. Aggrieved by the order of CIT(A) assessee is now before us and has raised following grounds:

> *"1. That the order is against the facts and legally unsustainable and must be quashed.*
>
> *2. That on facts and in the circumstances of the case and in law the authorities below erred in levying a penalty under section 271(1)(c) of Income tax Act 1961 on the alleged ground of furnishing inaccurate particulars of income. The action being most arbitrary, palpably erroneous and grossly unlawful must be quashed with directions for appropriate relief to the appellant. "*

42. Before us, Learned AR submitted that the assessee has made all the necessary disclosure before the authorities. He thereafter pointing to the assessment order submitted that in the assessment order no satisfaction about the nature of default i.e. whether assessee has filed inaccurate particulars of income or

has concealed the income has been recorded by the AO. He submitted that in the penalty order, the AO has held it to be case of furnishing of inaccurate particulars of income. He submitted that in the absence of clear satisfaction recorded by AO, no penalty u/s 271(1)(c) can be levied by the AO. He therefore, submitted that penalty levied by the AO and confirmed by the CIT(A) be deleted. The Learned DR on the other hand, supported the order of AO and CIT(A) and further relied on the decision in the case of MAK Data Pvt. Ltd. Vs. CIT reported in 358 ITR 593 (SC) and Zoom Communication (P.) Ltd. reported in 191 Taxman 179 (Delhi) and thus supported the order of lower authorities.

43. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect of levy of penalty u/s 271(1)(c) of the Act. The penalty has been upheld for denial of claim for exemption u/s 10(23G) and payment of penalty. We find that in the body of the assessment order, no satisfaction has been recorded by the AO as to whether it is the case of furnishing of inaccurate particulars of income or the case of concealment of income. Thereafter, in the penalty order passed u/s 271(1)(c) of the Act, AO held that assessee had concealed the income. It is a settled law that while levying penalty for concealment, the AO has to record satisfaction and thereafter come to a finding in respect of one of the limbs, which is specified under section 271(1)(c) of the Act. The first step

is to record satisfaction while completing the assessment as to whether the assessee had concealed its income or furnished inaccurate particulars of income. Thereafter, notice u/s 274 read with Section 271(1)(c) of the Act is to be issued to the assessee. The Assessing Officer thereafter has to levy penalty under Section 271(1)(c) of the Act for non-satisfaction of either of the limbs. While completing the assessment, the Assessing Officer has to come to a finding as to whether the assessee has concealed its income or furnished inaccurate particulars of income. The Hon'ble Bombay High Court in CIT Vs. Shri Samson Perinchery reported in (2017) 392 ITR 4 (Bom) held that where initiation of penalty is one limb and the levy of penalty is on other limb, then in the absence of proper show cause notice to the assessee, there is no merit in levy of penalty.

44. In the present case, as noted hereinabove, it is seen that the AO has not recorded any satisfaction in the assessment order but had levied penalty for concealment of income. Considering the aforesaid facts in the light of the decision of Hon'ble Bombay High Court in the case of Samson Perinchery (supra), we are of the view that in the present case the basic condition for levy of penalty has not been fulfilled and that the penalty order suffers from non-exercising of jurisdiction power of AO and therefore penalty order cannot be upheld. We accordingly set aside the

penalty order passed by AO. **Thus, the grounds of assessee are allowed.**

45. In the result, the appeal of the assessee is allowed.

46. In the combined result, assessee's appeal in ITA No.614/Del/2006 is partly allowed and ITA No.84/Del/2010 is allowed.

Order pronounced in the open court on 15.10.2020

Sd/-	**Sd/-**
(SUSHMA CHOWLA)	**(ANIL CHATURVEDI)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Priti Yadav, Sr.PS

Date:- 15.10.2020

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI