

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI**

श्री महावीर सिंह, उपाध्यक्ष एवं एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos: **879, 880, 881, 882, 1254, 1255 &
1256/Chny/2017**

निर्धारण वर्ष / Assessment Years: 2001-02, 2002-03, 2003-04, 2004-05,
2010-11, 2011-12 & 2012-13

Deputy Commissioner of Income
Tax,
Corporate Circle -4(1),
Chennai.

Malladi Drugs &
v. Pharmaceuticals Limited,
No. 9, G.S.T. Road,
St. Thomas Mount,
Chennai – 600 016.

[PAN:AAACM 5031A]

आयकर अपील सं./ITA Nos: **1257, 1258 & 1259/Chny/2017**

निर्धारण वर्ष / Assessment Years: 2010-11, 2011-12 & 2012-13

Malladi Drugs & Pharmaceuticals
Limited,
No. 9, G.S.T. Road,
St. Thomas Mount,
Chennai – 600 016.

v. Deputy Commissioner of Income
Tax,
Corporate Circle -4(1),
Chennai.

[PAN:AAACM 5031A]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

Assessee by : Shri. Vikram Vijayaraghavan, Advocate

Revenue by : Shri. AR.V. Sreenivasan, Addl. CIT

सुनवाई की तारीख/Date of Hearing : 09.11.2021

घोषणा की तारीख/Date of Pronouncement : 22.12.2021

आदेश / O R D E R

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

These cross appeals filed by the assessee and the
Revenue are directed against the orders passed by the learned

Commissioner of Income Tax (Appeals) -8, Chennai dated 25.01.2017 and 20.03.2017 and pertains to assessment years 2001-02 to 2005-06, 2007-08 and 2009-10 to 2012-13, respectively. Since, facts are common and issues are identical, for the sake of convenience these appeals were heard together and are being disposed off by this common order.

2. The Id. DR at the time of hearing submitted that there is a delay of 03 days in filing appeals in ITA Nos. 879, 880, 881 & 882/Chny/2017 for assessment years 2001-02 to 2004-05, before the Tribunal for which necessary petition for condonation of delay along with affidavit has been filed explaining the reasons for delay in filing the appeals. The Id.DR further submitted that the order of the learned CIT(A) vide ITA Nos. 102 & 101/2005-06, 102 & 101/2006-07, 100/2007-08 & 210/2010-11 was received on 07.02.2017. The Revenue has filed appeals before this tribunal on 11.04.2017. However, due date for filing appeals falls on 08.04.2017 being Saturday, next working day will be Monday i.e., 10.04.2017, and further submitted that as the appeals

have to be filed for four assessment years, the delay is due to non-availability of records. As soon as the records were traced, appeal papers were prepared and the same was submitted with a delay of 3 days and prayed for condonation of delay. The Ld. AR opposed condonation of delay. Having heard both sides, we are of the considered view that reasons given by the assessee for not filing the appeals within the time allowed under the Act comes under reasonable cause as provided under the Act for condonation of delay and hence, delay in filing of above appeals are condoned and appeals filed by the Revenue are admitted for adjudication.

ITA No: 879/Chny/2017 for the AY 2001-02:

3. The first issue that came up for consideration from ground no. 2 of Revenue appeal for assessment year 2001-02 is disallowance of interest on belated payment of non compete fees. The fact with regard to impugned dispute are that the assessee has paid interest on belated payment of non compete fee amounting to Rs. 20,35,552/-. The assessee has claimed deduction towards delay in payment of said non-compete fees on the ground that as per terms and conditions of contract entered into between the parties, the assessee shall required

to pay amount towards non-compete fees within certain time period. However, due to delay in payment of such non-compete fee, it has paid interest. Therefore, the AO opined that it is in the nature of compensatory in nature and thus not allowable as deduction u/s. 37(1) of the Income Tax Act, 1961 (herein after 'the Act').

4. The Ld. DR submitted that Ld. CIT(A) erred in deleting disallowance of interest paid on non-compete fees without appreciating the fact that said expenditure is capital in nature and not to be allowed as revenue expenditure by specific legislative mandate vide section 28(va) as held by the Hon'ble Apex Court in the case of Guffic Chem Ltd reported in 332 ITR 602.

5. The Ld. AR on the other hand supporting order of the Ld. CIT(A) submitted that the issue is covered in favour of the assessee by the decision of ITAT, Chennai Benches in assessee's own case for assessment year 2000-01 in ITA No. 2/Mds/2005, where an identical issue had been considered by the tribunal and held that liability to pay interest was

contractual obligation and thus, the same would be revenue in nature.

6. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We find that the Ld. CIT(A) has deleted additions made by the AO towards disallowance of interest paid on belated payment of non-compete fees by following the decision of ITAT, Chennai Benches in assessee's own case for assessment year 2000-01 in ITA No. 2/Mds/2005, where it was clearly held that liability to pay interest was contractual obligation and thus, the same is allowable expenditure u/s. 37(1) of the Act. The fact remains unchanged. The Revenue fails to bring on record any contrary judgments to counter findings of the Ld. CIT(A). Hence, we are inclined to uphold the findings of the Ld. CIT(A) and reject the ground taken by the Revenue.

7. The next issue that came up for consideration from ground no. 3 of Revenue appeal is disallowance of sales promotion expenses. The facts with regard to the impugned dispute are that the assessee has claimed deferred revenue

expenditure of Rs. 4,87,325/- being 1/5th of total expenditure incurred for marketing expenses for product launch at Rs. 25,09,897/-. The AO has disallowed deferred revenue expenditure on the ground that, except as provided for amortization of expenses u/s. 35D, 35DD etc, no deduction can be allowed to other expenses. Before the Ld. CIT(A), assessee had made alternate plea and argued that in case the earlier expenditure cannot be allowed as deduction then expenditure incurred during the relevant financial year should be allowed in full because the same is incurred wholly and exclusively for the business of the assessee. The Ld. CIT(A) rejected arguments of the assessee towards amortization of deferred revenue expenditure pertains to financial year 1999-2000 relevant to assessment year 2000-01. However, allowed total expenditure incurred for the assessment year 2000-01 by holding that once expenditure incurred is wholly and exclusively for the purpose of business then said expenditure needs to be allowed in the year of payments.

8. The Ld. DR submitted that Ld. CIT(A) has erred in allowing relief to the assessee by directing the AO to allow the

claim of sales promotion expenses of Rs. 25,09,897/- in total, without appreciating the fact that said claim was not made before the AO by filing revised return as required under the law in terms of a ratio laid down by the Hon'ble Supreme Court in the case of Goetz India Ltd reported in 284 ITR 323 (SC)(2006).

9. The Ld. AR for the assessee on the other hand supporting the order of the Ld. CIT(A) submitted that once expenditure is incurred wholly and exclusively for the purpose of business then the same needs to be allowed in the year in which such expenditure was incurred irrespective of method of accounting followed by the assessee, to account such payment in the books of accounts of the assessee.

10. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. There is no dispute with regard to the fact that the assessee has incurred sales promotion expenses for marketing a product. The only dispute is with regard to the manner in which such expenditure was claimed while computing income

from business. The assessee was claiming deduction for sales promotion expenses over a period of product by debiting 1/5th of such expenditure every year to P&L account in the books of accounts. However, deduction in full has been claimed in respect of total expenditure incurred in the statement of total income. It is a well settled principle of law by the decision of Hon'ble Supreme Court in the case of Taparia Tools Limited vs JCIT, 372 ITR 605 (SC), wherein it was held that there is no estoppel against the law and the Income Tax Act, enables and entitles the assessee to claim the entire expenditure in the manner it is claiming. In this case, the assessee has claimed deduction for sales promotion expenses in the year of incurring such expenditure even though said expenditure has been amortized over a period of 5 years in the books of accounts. The Ld. CIT(A) has allowed deduction claimed by the assessee towards expenditure incurred in the impugned assessment year by holding that once it has admitted fact that expenditure has been wholly and exclusively incurred for the purpose of business, then the same needs to be allowed as deduction as and when such expenditure has been incurred for the purpose of business. To this extent, we do not find any infirmity in the

findings recorded by the Ld. CIT(A). As regard the ground taken by the Revenue in light of the decision of the Hon'ble Supreme Court in the case of Goetz India Ltd, (supra), we are of the considered view that restrictions imposed by the Hon'ble Supreme Court on the powers of Assessing Officer does not extend to the powers of appellant authority. The appellant authority itself entitles to admit any new claim even though such claim was not made before the AO by filing revised return of income. Therefore, we are of the considered view that there is no error in the reasons given by the Id. CIT(A) to entertain fresh claim made by the assessee in so far as deduction of total expenditure incurred for sales promotion activities. For all these reasons, we do not find any reason to interfere with the findings recorded by the Ld. CIT(A) and hence, we reject ground taken by the Revenue.

11. The next issue that came up for consideration from ground no. 4 of Revenue appeal is exclusion of excise duty/sales tax from total turnover for the purpose of computation of deduction u/s. 80HHC of the Act. The AO had considered excise duty and sales tax as a part of total

turnover. According to AO, excise duty and sales tax is part of total turnover because as per provisions of section 145A of the Act, excise duty/sales tax shall be routed through P&L account as a part of turnover. Therefore, he had recomputed entitlement of deduction u/s. 80HHC of the Act by including excise duty/sales tax as part of turnover. On appeal, the Id. CIT(A) has directed the AO to re-compute deduction u/s. 80HHC by excluding excise duty/sales tax by following the decision of Hon'ble Supreme Court in the case of Lakshmi Machine Works 290 ITR 667 (SC).

12. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We find that the Hon'ble Supreme Court in the case of Lakshmi Machine Works vs CIT, (Supra) had considered an identical issue and held that excise duty/sales tax are not included in total turnover in the formula contended in section 80HHC(3) of the Act. The Id. CIT(A) after considering relevant facts and also by following the ratio laid down by the Hon'ble Supreme Court has directed the AO to exclude excise duty/sales tax from total turnover for computation of

deduction u/s. 80HHC. The fact remains unchanged. The Revenue fails to bring on record any contrary judgments to support its arguments. Therefore, we are inclined to uphold the findings of the Ld. CIT(A) and reject ground taken by the Revenue.

13. The next issue that came up for consideration from ground no. 5 of the Revenue appeal is exclusion of DEPB license fees received from Government of India for computation of deduction u/s. 80HHC of the Act. The AO excluded DEPB license fee, for computation of deduction u/s. 80HHC of the Act, on the ground that export incentive enumerated u/s. 28(iia), 28(iib) and 28(iic) does not cover DEPB license and therefore, excluded the same for the purpose of computation of deduction u/s. 80HHC by holding that they are in the nature of other income, but not profit derived from export activity. The Ld. CIT(A) by relying on the decision of Apex Court judgment in the case of Topman Exports vs CIT (342 ITR 49)(SC), directed the AO to include amount received under DEPB license for computation of deduction u/s. 80HHC of the Act.

14. The Ld. DR submitted that Ld. CIT(A) erred in holding that DEPB is covered under export incentives and hence, same is allowable as deduction u/s. 80HHC of the Act. The Ld. DR further submitted that the Ld. CIT(A) has erred in relying on the decision of the Hon'ble Apex Court in the case of Topman Exports vs CIT (supra) which was delivered much later than the assessment order under consideration and hence, not applicable to the instant case.

15. The Ld. AR for the assessee on the other hand supporting the order of the Ld. CIT(A) submitted that the issue is squarely covered in favour of the assessee by the decision of Hon'ble Supreme Court in the case of Topman Exports vs CIT (supra), where the Supreme Court clearly held that profit from sale of DEPB license is allowable for deduction u/s. 80HHC of the Act.

16. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We find that the issue is squarely covered in favour of the assessee by the decision of the Hon'ble Supreme Court in

the case of Topman Exports vs CIT (supra), where the Hon'ble Supreme Court clearly held that profit from transfer of DEPB license is entitled for deduction u/s. 80HHC of the Act. The Ld. CIT(A) after considering relevant facts, and also by following the decision in the said case has directed the AO to re-compute deduction u/s. 80HHC of the Act by considering profit from sale of DEPB license. We do not find any error or infirmity in the order of the Ld. CIT(A) and hence, we are inclined to uphold findings of the Ld. CIT(A) and reject grounds taken by the Revenue.

17. In the result, appeal filed by the Revenue for assessment year 2001-02 is dismissed.

ITA No. 880/Chny/2017 for AY 2002-03

18. The first issue that came for consideration from ground no. 1 of Revenue appeal is disallowance on employees' contribution to PF and ESI deposited on or before due date prescribed under Income Tax Act, 1961. The AO disallowed PE/ESI contribution on the ground that same cannot be allowed as deduction u/s. 43B of the Act. The Ld. CIT(A) has

deleted addition made by the AO by following the decision of Hon'ble High Court in the case of CIT vs Industrial Security & Intelligence India Pvt Ltd in TCA No. 585 & 586 of 2015 dated 24.07.2015.

19. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. Admittedly, the issue of deduction towards belated payments of employees' contribution to PF and ESI remitted beyond due date specified under respective Acts, but paid on or before due date for filing return of income u/s. 139(1) of the Act is squarely covered in favour of the assessee by the decision of Hon'ble High Court of Madras in the case of CIT vs Industrial Security & Intelligence India Pvt Ltd, (supra), where the Hon'ble High Court by following the decision of the Hon'ble Supreme Court in the case of CIT vs Atom Extrusions Ltd, reported in 319 ITR 306, held that if the assessee had deposited employees' contribution towards PF and ESI after the due date as prescribed under relevant Act, but before the due date for filing return of income under the Income tax Act, no disallowance could be made in view of the provisions of

section 43B as amended by Financial Act, 2003. In this case, the Ld. CIT(A) has recorded categorical finding that the assessee has paid employees' contribution to PF and ESI on or before due date for filing return of income and thus, deleted addition made by the AO. We do not find any error in the reasons given by the Ld. CIT(A) to delete addition made towards disallowance of employees' contribution to PF and ESI. Hence, we are inclined to uphold the finding of the Ld. CIT(A) and reject the ground taken by the Revenue.

20. The next issue that came up for consideration from ground no. 2 of Revenue appeal is exclusion of profit on sale of DEPB license for computation of deduction u/s. 80HHC of the Act. An identical issue had been considered by us in ITA No. 879/Chny/2017 for assessment year 2001-02 in preceding para no. 16 in page 12. The reasons given by us in preceding Para no. 16 shall *mutatis mutandis* apply to this appeal, as well. Therefore, for similar reason we are inclined to uphold the finding of the Ld. CIT(A) and reject ground taken by the Revenue.

21. In the result, the appeal filed by the Revenue in ITA No. 880/Chny/2017 for assessment year 2002-03 is dismissed.

ITA No. 881/Chny/2017 for AY 2003-04:

22. The first issue that came up for consideration from ground no. 2 of Revenue appeal is exclusion of excise duty/sales tax from total turnover for computation of deduction u/s. 80HHC of the Act. An identical issue had been considered by us in ITA No. 879/Chny/2017 for assessment year 2001-02 in preceding para no. 12 on page 10. The reasons given by us in preceding Para no. 12 shall *mutatis mutandis* apply to this appeal, as well. Therefore, for similar reason we are inclined to uphold the finding of the Ld. CIT(A) and reject ground taken by the Revenue.

23. The next issue that came up for consideration from ground no. 3 of Revenue appeal is re-computation of deduction u/s. 80HHC of the Act based on book profits. The AO has computed deduction u/s. 80HHC of the Act while computing book profit u/s. 115JB of the Act by taking into account profits and gains from business computed after

making certain adjustments. The Ld. CIT(A) has directed the AO to re-compute deduction u/s. 115JB by taking into account book profit by following the decision of Hon'ble Supreme Court in the case of Ajanta Pharma Ltd vs CIT reported in 327 ITR 305 (SC).

24. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We find that this issue is squarely covered in favour of the assessee by the decision of Hon'ble Supreme Court in the case of Ajanta Pharma Ltd vs CIT, (supra), where the Hon'ble Supreme Court has clearly held that for the purpose of computing book profit, in terms of section 115JB, net profit as shown in profit and loss account have to be reduced by amount of profits eligible for deduction u/s. 80HHC and not by amount of deduction u/s. 80HHC of the Act. The Ld. CIT(A) after considering relevant facts and has also by following the decision of the Hon'ble Supreme Court in the case of Ajanta Pharma Ltd vs CIT (supra) has directed the AO to re-compute book profit in accordance with law laid down by the Hon'ble Supreme Court in the case of Ajanta Pharma Ltd vs CIT

(supra). The facts remain unchanged. The Revenue has failed to bring on record any contrary decisions to support its arguments to exclude only eligible deduction u/s. 80HHC for the purpose of computing book profit u/s. 115JB of the Act. Hence, we are inclined to uphold the finding of the Ld. CIT(A) and reject ground taken by the Revenue.

25. In the result, the appeal filed by the Revenue in ITA NO. 881/Chny/2017 for assessment year 2003-04 is dismissed.

ITA No. 882/Chny/2017 for AY 2004-05:

26. The first issue that came up for consideration from ground no. 2 of Revenue appeal is exclusion of excise duty/sales tax from total turnover for computation of deduction u/s. 80HHC of the Act. An identical issue had been considered by us in ITA No. 879/Chny/2017 for assessment year 2001-02 in preceding para no. 12 in page 10. The reasons given by us in preceding Para no. 12 shall *mutatis mutandis* apply to this appeal, as well. Therefore, for similar reason we are inclined to uphold the finding of the Ld. CIT(A) and reject ground taken by the Revenue.

27. The next issue that came up for consideration from ground no. 3 of Revenue appeal is exclusion of forex gain for the purpose of computation of deduction u/s. 80HHC of the Act. The AO has excluded foreign exchange gain arising from export sales as treasury income and has no direct nexus with the business of the undertaking. The Ld. CIT(A) has allowed relief to the assessee by relying on the decision of the Bombay High Court in the case of CIT vs Amber Exports (India) (326 ITR 455) (Bom.) by holding that exchange rate difference pertains to exports made in earlier years is part of sale proceeds relatable to export and eligible for deduction u/s. 80HHC of the Act.

28. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The Hon'ble High Court of Bombay in the case of CIT vs Amber Exports (supra) has considered an identical issue and held that amount received by way of exchange rate fluctuation cannot be considered to be any other receipt as stipulated in clause (baa) of the Explanation to section

80HHC(4C) and hence, receipt by way of exchange fluctuation is includable in the total turnover of the assessee for computing deduction u/s. 80HHC of the Act. The Ld. CIT(A) after considering relevant facts and also by following the decision of the Hon'ble Bombay High Court in the case of CIT vs Amber Exports (India) (supra), directed the AO to include foreign exchange gain as part of the turnover for computing deduction u/s. 80HHC of the Act. There is no error in the reason given by the Ld. CIT(A) to delete additions made by the AO and hence we are inclined to uphold the finding of the Id. CIT(A) and reject ground taken by the Revenue.

29. In the result, the appeal filed by the Revenue in ITA No. 882/Chny/2017 for assessment year 2004-05 is dismissed.

ITA Nos: 1254 to 1256/Chny/2017 and ITA Nos. 1257 to 1259/Chny/2017 for AYs 2010-11 to 2012-13:

30. The first issue that came up for consideration from ground no. 1 of assessee appeal for assessment years 2010-11 to 2012-13 is notional interest income in respect of loans

advanced to sister concern. The facts with regard to impugned dispute are that the assessee company has advanced loan to sister concern namely Malladi Project Management Centre Pvt. Ltd at certain rate of interest. The assessee has recognized interest up to the financial year 2007-08 and has accounted interest @ 9% on loans. However, for the assessment year 2010-11 to 2012-13, the assessee has not charged any interest. Therefore, the AO called upon the assessee to explain as to why interest on loans shall not be charged. In response, it was submitted that there was a uncertainty with respect to the realization of interest as the debtor company was not having any operations and therefore, interest was not recognized. The AO, however was not convinced with the explanation furnished by the assessee and according to him, when the assessee has advanced loans to sister concern and has recognized interest on a particular rate for few years, there is no reason for not charging interest on said loans for impugned assessment years, unless assessee proves that the loans are neither bad nor written off by the assessee, or change in terms and conditions of sanction of

loan to sister concern. Therefore, he has worked out interest @ 9% and added back to the total income.

31. Being aggrieved by the assessment order, the assessee preferred an appeal before the Ld. CIT(A). Before the Ld. CIT(A), the assessee reiterated its arguments made before the AO and submitted that there is an uncertainty in respect of interest on loans, due to adverse business conditions and hence, no interest has been accounted in books of accounts for the assessment years 2010-11 to 2012-13. The Ld. CIT(A) after considering relevant submissions of the assessee and also by following certain judicial precedents including the decision of Hon'ble Rajasthan High Court in the case of Jaipur Electro (P) Ltd vs CIT (1997) 223 ITR 535 (Raj), upheld additions made by the AO towards estimation of interest on loans advanced. The relevant findings of the Ld CIT(A) are under:

"4.2. Interest Income A.Ys. 2010-11 to 2012-13)

The Assessing Officer observes that the appellant has been consistently disclosing interest income from a loan advanced to its sister concern namely, Malladi Projects Management Centre Pvt. Ltd. (MPMCPL), but no income was admitted for the assessment years 2010-11 to 2012-13 by the appellant,. Since the debt has neither gone bad nor written off by the appellant, the Assessing officer estimated interest income for the assessment years 2010-11

to 2012-13 and brought the same to tax for the assessment years under consideration as follows:

Asst. years	Amount (Rs.)
2010-11	65,68,403
2011-12	65,66,244
2012-13	65,64,084

In contrast, the appellant submits that there was uncertainty with respect to the interest income as the debtor-company was not having any operations and therefore no interest income was recognized since the recovery of de doubtful. The appellant further contended that principal Rs.6,56,31,866/- was recovered from the sister concern as under:

Date	Amount
27.04.2015	1,20,00,000
16.10.2016	3,50,00,000
17.06.2016	31,31,866
24.06.2016	50,00,000
30.06.2016	1,05,00,000

As rightly pointed out by the Assessing Officer, neither the loan has gone bad nor has the appellant written off the debt in their books of account. A mere uncertainty would not make the accrued income notional for the purposes of taxation. The fact that the appellant is in a position to recover substantial part of the loan itself proves that the advance made to the sister concern has not turned into a bad loan. Alternatively, to be an allowable expenditure under section 37(1), the money paid away must be (a) paid out wholly and exclusively for the purpose of the trade or profession; and further (b) must not be; (i) capital expenditure; (ii) personal expense; or (iii) an allowance of the character described in sections 30 to 36. See CIT v. Indian Molasses Co. (I) Ltd. [1970] 78 ITR 474 (SC) / J.K. Cotton Mfrs. v CIT 1975] 101 ITR 221 (SC) / Sasoon J. David & Co. (P.) Ltd. v. CIT [1979] 3 JTR 261 (SC)].

As far as the appellant's reliance on the doctrine of the businessman being best judge of business expediency is concerned, it is pertinent here to refer to the observations made by the Hon'ble High Court of Rajasthan in the case of Jaipur Electro (P.) Ltd vs. CIT [1997] 223 ITR 535 (Raj) wherein it was declared as follows:

The general principle underlying section 37(1) is that an expenditure which is found to have been wholly and exclusively made or laid out by a businessman for purposes of his business, is to be allowed. There can hardly be any dispute on the proposition that the businessman is the best Judge to determine the business expediency and, therefore, when he claims to have incurred a certain expenditure for business expediency, his version should ordinarily be accepted. This principle, however,

does not debar the assessing authorities to enquire and investigate as to whether such expenditure was actually incurred by the businessman and if incurred whether the same was incurred wholly and exclusively for business consideration. The doctrine that the businessman is the best Judge of business expenditure does not affect the right, nay, duty of the assessing authorities to know whether it was incurred for business purposes and not for other extraneous considerations,

In view of the above, I am unable to agree with the contention of the appellant that the no interest income in a real sense has accrued to the appellant. Therefore, the interest income estimated by the Assessing Officer for the A.Ys. 2010-41 to 2012- 13 is sustained. The appellant fails on this ground."

32. The Ld. AR for the assessee submitted that the Ld. CIT(A) erred in sustaining the additions made on notional interest in respect of loans advanced to sister concern without appreciating fact that there was uncertainty on realization of interest due to adverse business conditions and hence, the assessee has taken a decision not to charge interest. In this regard, relied upon the decision of Hon'ble Supreme Court in the case of Godhra Electric Supplu Co Ltd vs CIT 225 ITR 746 (SC). The assessee has also relied upon the decision of the Hon'ble Supreme Court in the case of CIT vs Reliance Industries Ltd 307 CTR 121 (SC), CIT vs Hotel Savera 229 ITR 795 (Mad) and S.A. Builders Vs CIT(A) 288 ITR 1(SC).

33. The Ld. DR, on the other hand supporting the order of the Ld. CIT(A) submitted that the assessee has not made any

reasons for not charging interest on loans given to sister concern, when assessee itself has charged interest on said loans up to certain period. Therefore, the AO as well as the CIT(A) rightly charged interest on said loans and hence the order should be upheld.

34. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. Admittedly, the assessee had given loans to sister concern Malladi Project Management Centre Pvt Ltd., and has charged 9% interest on said loans upto assessment year 2009-10. The assessee has recognized interest on loans given to sister concern in its books of accounts upto assessment year 2009-10, however, not charged any interest from assessment year 2010-11 and up to assessment year 2012-13. The assessee had not given any valid reason for not charging interest except stating that there is an uncertainty in realization of interest due to adverse business conditions of the borrower, but said claim was not substantiated. The assessee neither bring on record any evidence to prove that the loans given to sister concern has become bad debts nor

justified for not charging interest on said loan with any other evidences including change in facts and circumstances for the impugned period when compared to period for which interest was charged. If you consider reasons given by the assessee for not charging interest, i.e., uncertainty in realization of interest, we find that it is not sufficient ground for allowing benefit to the assessee, more particularly when the assessee itself has charged interest up to a particular period. Insofar as various case laws relied upon by the assessee including Hon'ble Supreme Court in the case of Godhra Electric Supplu Co Ltd vs CIT (supra) we find that those case laws are rendered under different set of facts and has no application to facts of present case. The Ld. CIT(A) after considering relevant facts has rightly confirmed additions made by the AO towards estimation of interest on loans given to sister concern. Hence, we are inclined to uphold the finding of the Id. CIT(A) and reject the ground taken by the assessee for the assessment years 2010-11 to 2012-13.

35. In the result, the appeals filed by the assessee in ITA Nos. 1257, 1258 & 1259/Chny/2017 for assessment years 2010-11 to 2012-13 are dismissed.

36. The next issue that came up for consideration from ground no. 1 of Revenue appeal for assessment year 2010-11 to 2012-13 is disallowance of foreign agency commission u/s. 40(a)(i) of the Act, for non deduction of tax at source u/s. 195 of the Act. The AO has disallowed export commission paid to foreign agency u/s. 40(a)(i) of the Act, for non-deduction of tax at source u/s. 195 of the Act, by holding that as per definition of section 9 of the Income Tax Act, commission falls under the definition of fee for technical services and hence, any commission paid to foreign agents for which TDS has not been deducted cannot be allowed as deduction u/s. 40(a)(i) of the Act. It was the contention of the assessee before the AO that export commission paid to foreign agents is not taxable in India, because none of the foreign agents have permanent establishment in India and further, commission paid for rendering services outside India is not in the nature of fees for technical services and thus, the question of TDS u/s. 195 of

the Act does not arise and consequently, disallowance cannot be made u/s. 40(a)(i) of the Act.

37. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The assessee has paid export commission to foreign agents for rendering services outside India in connection with export sales. The AO has accepted the fact that the assessee has paid export commission to foreign agents. The AO never disputed the fact that foreign agents rendered services outside India and further they do not have any permanent establishment in India. However, according to AO, commission paid to foreign agents is in the nature of fees for technical services and falls within the definition of fees for technical service as defined u/s. 9 of the Act. We have gone through the reasons given by the AO in light of arguments advanced by the assessee and we ourselves do not subscribe to the reasons given by the AO for the simple reason that what is paid by the assessee to foreign agents is simple commission for rendering service outside India in connection with export sales made by the assessee. It is a well settled principle of

law that commission paid for rendering service outside India in connection with export sales cannot be treated as fees for technical services within the provisions of section 9 of the Act. Further, it is also an admitted legal position that when a non-resident agent operates outside India and no part of his income arises in India, then any payment to a non-resident would not be subject to tax in India and thus, no requirement of deduction of tax at source on said payments. This legal position is clarified by the CBDT vide its Circular no. 23 of 786. Further, the Jurisdictional High Court of Madras in the case of CIT vs Faizan Shoes Ltd 367 ITR 155 (mad) had considered an identical issue and held that commission paid to non-resident agent will not fall within the definition of fees for technical services, when the non-resident agent was engaged by the assessee to procure export orders and paid commission for such services. The Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh vs CIT 239 ITR 587 (SC), held that any person making payment to a non-resident would be liable to deduct tax only when the payment so made is chargeable to tax under the Income Tax Act. The Hon'ble Apex Court, in another decision in the case of GE India

Technology Centre Pvt. Ltd. vs CIT 327 ITR 426 (SC), held that if payment made to non-resident is not taxable in India, then, no tax is to be deducted u/s. 195 of the Act. In this case, on perusal of facts available on record, it was very clear that commission paid by the assessee to non-resident for procuring export orders is neither accrued in India nor taxable u/s. 9 of the Act as fees for technical services. Further, the business profits of a non-resident cannot be taxed in India unless such non-resident have permanent establishment in India. It was not the case of the AO that foreign agents have permanent establishment in India. Therefore, we are of the considered view that export commission paid to foreign agents cannot be disallowed u/s. 40(a)(i) of the Act, for non deduction of tax at source u/s. 195 of the Act. The Ld. CIT(A) after considering relevant facts has rightly deleted additions made by the AO. Hence, we are inclined to uphold the findings of the Ld. CIT(A) and reject ground taken by the Revenue for assessment years 2010-11 to 2012-13.

38. The next issue that came up for consideration from ground no. 2 of the Revenue appeal for assessment year

2010-11 is disallowance of foreign exchange fluctuation loss. The AO observed that as per the notes to the accounts, an amount of Rs. 1,83,56,000/- has taken as an exceptional item being reversal of certain collections wrongly accounted to exchange gain in the previous years. The AO has made additions towards reversal of certain entries to foreign exchange gain account on the basis of report issued by an auditor u/s. 44AB of the Act. It was an explanation of the assessee before the AO that it is reversal of a wrong entry made during the financial year 2007-08 to foreign exchange gain account and the same has been rectified by reversal of entry by debiting to foreign exchange fluctuations loss account and thus, the same cannot be disallowed.

39. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We find that the Ld. CIT(A) has recorded categorical finding that the assessee had added back this item of expenditure as prior period expense being part of inadmissible items in the computation of total income for the assessment year 2010-11. The Ld. CIT(A) further recorded factual finding that once assessee itself has disallowed said item of

expenditure by holding that it does not pertain to year under consideration, then no addition can be made towards said expenditure. Fact remains unchanged. The Revenue fails to bring on record any evidence to counter findings of fact recorded by the Ld. CIT(A). Hence, we are inclined to uphold the findings of the Ld. CIT(A) and reject ground taken by the Revenue.

40. The next issue that came up for consideration from ground no. 2 of Revenue appeal for assessment year 2011-12 and 2012-13 is disallowance u/s. 14A of the Act. The AO has disallowed a sum of Rs. 33,56,200/- and Rs. 19,53,575/- u/s. 14A r.w.r. 8D for the assessment years 2011-12 & 2012-13, respectively. It was the contention of the assessee that when there is no dividend income earned for the relevant assessment year, then no disallowance could be made in respect of expenditure relatable to said exempt income.

41. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The Id. CIT(A) has recorded categorical findings that

the assessee had not earned exempt income for both assessment years. The Ld. CIT(A) further noted that there is no exempt income for relevant assessment year, then no disallowance can be made in respect of expenditure relatable to said exempt income. The findings recorded by the Ld. CIT(A) was supported by the decision of Hon'ble Madras High Court in the case of Redington (India) Ltd vs Addl. CIT (97 CCH 219). It was further supported by the decision of the Hon'ble Supreme Court in the case of CIT vs Chettinad Logistics (2018) 102 CCH 180. The sum and substance of the ratios laid down by Hon'ble High Court and Hon'ble Supreme Court are that section 14A of the Act can only be triggered, if the assessee seeks to square off expenditure against income which does not form part of the total income under the Act. In other words, if no exempt income for the relevant assessment year, then no disallowance can be made by the AO towards expenditure u/s. 14A r.w.r. 8D of the Act, for assessment years 2011-12 & 2012-13. The CIT(A) after considering relevant facts has rightly deleted addition made by the AO u/s. 14A of the Act. Hence, we are inclined to uphold the findings of the Id. CIT(A) and reject the ground taken by the Revenue.

42. In the result, appeal filed by the Revenue in ITA Nos. 1254, 1255 & 1256/Chny/2017 for assessment years 2010-11 to 2012-13 are dismissed.

43. As a result, appeals filed by the assessee in ITA Nos. 1257, 1258 & 1259/Chny/2017 and appeals filed by the Revenue in ITA Nos. 879, 880, 881, 882, 1254, 1255 & 1256/Chny/2017 are dismissed.

Order pronounced in the court on 22nd December, 2021 at Chennai.

Sd/-
(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /Vice President

Sd/-
(जी. मंजुनाथ)
(G. MANJUNATHA)
लेखासदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 22nd December, 2021

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

- | | | |
|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्था/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF |