IN THE INCOME TAX APPELLATE TRIBUNAL, NAGPUR BENCH, NAGPUR

BEFORE SHRI SANDEEP GOSAIN, JM & SHRI ARUN KHODPIA, AM

ITA No. 328/NAG/2014
Assessment Year: 2008-2009

The ACIT Circle-7, Nagpur	Vs.	M/s.Newquest Corporation Ltd. (now known as M/s. Avantha Holding Ltd. Ballalrpur Paper Mills P.O. Ballarpur, Distt. Chandrapur
PAN No.:AABCB 6134 E		
Appellant		Respondent

ITA No. 329 & 330/NAG/2014
Assessment Year: 2009-2010 & 2010-11

The ACIT Circle-7, Nagpur	Vs.	M/s. Avantha Holdings Ltd (earlier known as Newquest Corporation Ltd) Ballalrpur Paper Mills P.O. Ballarpur, Distt. Chandrapur
PAN No.:AABCB 6134 E		
Appellant		Respondent

Revenue by :ShriPiyushKolhe (CIT-DR)
Assessee by: Shri K.P. Dewani (Adv.)

Date of Hearing: 18/04/2022
Date of Pronouncement: 28/06/2022

ORDER

PER: SANDEEP GOSAIN, J.M.

These three appeals have been filed by the Department against three different orders of the ld. CIT(A)-II, Nagpur dated 26-03-2014, 28-03-2014 and 31-03-2014 for the assessment years 2008-09, 2009-10 and 2010-11

respectively. The grounds of appeal raised by the Department in different assessment years are as under:-

Assessment Year 2008-09

"1. Whether on the facts and in all the circumstances of the case and in law the ld.CIT(A) is correct in allowing assessee's claim of long term capital loss of Rs.10,73,94,634/- on sale of shares of IBILT Tech Ltd. without appreciating the fact that the transaction of sale of shares is a sham transactions?

2. Whether on the facts and in the circumstances of the case and in law the ld. CIT(A) is correct in allowing assessee's claim of Brand Development expenses of Rs.4,33,70,349/- without appreciating the fact that the same brings into existence benefit of enduring in nature and hence amounts to capital expenditure?

3. Whether on the facts and in the circumstances of the case and in law the ld. CIT(A) is correct in allowing assessee's claim of Brand Development expenses of Rs.4,33,70,349/- without appreciating the fact that the expenditure incurred is not wholly and exclusively for the purpose of assessee's business but also relates to assessee's group companies?

4. Whether on the facts and in the circumstances of the case and in law the ld. CIT(A) is correct in allowing assessee's claim of interest expenditure of Rs.4,40,000/- without appreciating the fact that the assessee failed to prove nexus of interest free funds with interest free advances made?

5. Whether on the facts and in the circumstances of the case and in law the ld. CIT(A) is correct in allowing assessee's claim of expenses of Rs.50,48,041/- without deduction of tax at source at the prescribed rate without appreciating the fact that non-deduction of tax at source at the prescribed rate is a default within the meaning of Chapter XVII-B of the I.T. Act for disallowance u/s 40(a)(ia) of the I.T. Act?

Assessment Year 2009-10

1. Whether on the facts and in the circumstances of the case and in law the ld. CIT(A) was right in allowing assessee's claim of long term capital loss of Rs.8,65,68,734/- on sale of its investment without appreciating the facts that this transaction was a part of business activity of the assessee and the purpose of the transaction was strategic rearrangement of investments among all the group companies?,

2. Whether on the facts and in the circumstances of the case and in law the ld. CIT(A) was right in allowing assessee's claim of long term capital loss of Rs.8,65,68,734/- on sale of its investment without appreciating the fact that mere showing of shares under investment do not tantamount to investment surplus on sale of which would be capital gains.?

3. Whether on the facts and in the circumstances of the case and in law the ld. CIT(A) was right in allowing assessee's claim of Brand Development expenses of Rs.6,96,73,647/- without appreciating the fact that the same brings into existence benefit of enduring in nature and hence amounts to capital expenditure?

3. Whether on the facts and in the circumstances of the case and in law the ld. CIT(A) was right in allowing assessee's claim of Brand Development expenses of Rs.6,96,73,647/-/- without appreciating the fact that the expenditure incurred is not wholly and exclusively for the purpose of assessee's business but also relates to assessee's group companies.?

Assessment year 2010-11l

1. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is right in allowing assessee's claim of Brand Development expense of Rs 18,87,44,142/- without appreciating the fact that the same brings into existence benefit of enduring in nature and hence amounts to capital expenditure?

2 Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is right in allowing assessee's claim of Brand Development expense of Rs 18,87,44,142/- without appreciating the fact that the expenditure incurred is not wholly and exclusively for the purpose of assessee's business but, also relates to assessees group companies?

3. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is right in deleting addition of Rs. 1,51,54,918/- being gain/ loss on foreign exchange fluctuation holding it a capital receipt without appreciating the fact that assessee company itself credited the amount as revenue receipt treating the same as revenue receipt. Whether the assessee has shown fluctuation as a capital receipt in earlier year is not relevant. The Id. CIT(A) has relied on the decision in the case of Triveni Engineering Works Ltd. Vs CIT and Sutlej Cotton Mills Ltd Vs. CIT wherein it was decided that where profit or less arises to an assessee on account of appreciation or depreciation in the value of foreign exchange currency held by it, on conversion into another currency, such profit or less would ordinarily be trading profit or loss if the foreign exchange currency is held by the assessee on revenue account of a trading asset or as part of circulating capital in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or less would be of capital nature. In the present case the assessee has gained profit due to trading receipts in foreign currency appreciating due to fluctuation in Exchange rate. The appreciation is in the trading receipts. Therefore, the gain is on the revenue account?

4. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is right in deleting disallowance of premium payable on zero percent fully redeemable non-convertible marketable debentures of Rs. 3,63,01,370/- without appreciating the fact that the same does not amount to the expenditure. Since it is not at all payable by the assessee on ZCNCD. Secondly since this premium amount was not claimed in return of income as per decision of Hon'ble SC in the case of Goetze (India) Ltd .Vs CIT 157 Taxman 1(SC), the same is not allowable for deduction?.

5. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is right in entertaining the claim of assessee in respect of premium payable on Zero Coupon Non Convertible Debentures for the first time disregarding provision under sec. 251(a) of the IT Act which empowers Id. CIT(A) only to confirm, reduce, enhance or annul the assessment and cannot admit claim of the assessee for the first time. Also the decision of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. (229 ITR 383) does not vest any power to CIT(A) to entertain claim for the first time ?.

6. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is right in allowing assessee's claim of long term capital loss of Rs. 1,78,70,639/- on sale of its investment without appreciating the fact that this transaction was a part of business activity of the assessee and the purpose of the transaction was strategic rearrangement of investments among all the group companies ?

2.1 First of all, we take up the appeal of the Revenue for the assessment year 2008-09 for adjudication of its grounds of appeal.

3.1 Apropos Ground No. 1 of the Revenue, brief facts of the case are that the AO during the course of assessment proceedings noticed that the assessee had claimed long term capital loss of Rs.17,00,65,580/-. In one of the transaction, the assessee sold 9.26 Crores worth of shares of IBILT Technology Limited for Re.1/- resulting into CG loss of Rs.10,73,94,634/- for which the assesee was asked to submit explanation for the transaction. The reply submitted by assessee is reproduced by the AO in his assessment order as under:-

"The assessee company had entered into a Joint Venture Agreement with one Mr. Ashok Tiwari under the name and style as I-BILT Technologies Ltd. was incorporated under 50/50 ownership. I-BILT Technologies Ltd. was engaged in providing information technology (hereinafter referred to as "IT") related solutions to various companies including Ballarpur Industries Ltd. and its affiliates and subsidiaries (hereinafter referred to as "BILT"). Thus, these IT related services including Facility Management Service and Engineering Consultancy Services and Professional Services were rendered by the Company to BILT & its associate companies. However, the aforesaid Joint Venture business felt apart sometime in the year 2007. Consequently, an agreement was entered into between Mr. Ashok Tiwari (who was

having 50% shares) and the assessee company (50% shares) to the extent as follows:-

1. The assessee company was required to sell all the shares (50%) held by the assessee company to Mr. Ashok Tiwari. Thus, Mr. Ashok Tiwari became 100% owner of all the assets & liabilities of M/s. I-BILT Technologies Ltd.

2. Besides the transfer of shares to Mr. Ashok Tiwari, assessee company had to discharge the debt Rs.7 Crore owed to a Bank.

3. Whereas, part of the second part i.e. assessee company was allowed to take over all the business i.e. business contract with Ballarpur Industries Ltd. and its group companies, affiliates and subsidiaries.

In short, the assessee company was allowed to take over the business contract (mainly with BILT) and its associates whereas Mr. Ashok Tiwari has been allowed to hold 100% shares in I-BILT Technologies Ltd. and to carry on business by procuring new business contract.

From the above, it is clear that business contract secured by I-BILT has been passed on to the assessee company whereas the assessee company has transferred the entire shares held by it to Mr. Ashok Tiwari at a Re.1/- against cost of shares of Rs.9,26,00,000/- being the face value of said shares. This is besides the financial responsibility to repay the debt Rs.7 Crore owed to a Bank. As a result, the assesee company has suffered cash loss of Rs.9,26,00,000/ as per accounts whereas loss as per IT Rules reported in the statement attached herewith.

Thus, we repeat that the assessee company had managed the fund for repayment of debt by transferring the ''acquired business" to Newquest Process Outsourcing Pvt. Ltd at a price of Rs.7 Crore.

From a detailed review of the aforesaid financial arrangement, one can easily ascertain that the net loss suffered by the assessee company is loss Rs.9,26,00,000/- on transfer of shares owned by the assessee in I-BILT."

The AO thus had gone through the documents submitted by the assessee company and observed that one entity was created by outsourcing a part of the business process to it. The AO further noted that assessee after making value addition to the entity; circumstances were made out to severe the relationship and in the purported settlement of the relationship huge quantity of the shares were transferred to other party resulting into a loss. The Bank liability of Rs.7 Crore was also discharged by the assessee. According to the AO, the complete transaction is a make believe story which indicates a case of accumulating business losses and at the same time building up capital of other party. The AO thus observed that normally a prudent businessman would not indulge into such a deal. The AO thus disallowed the claim of capital loss on this account amounting to Rs.10,73,94,634/- as sham transaction and added the same to the income of the assessee company.

3.2 In first appeal, the ld.CIT(A) has deleted the disallowance made by the AO by observing at para 5.1 to 5.5 of his order as under:-

> ''5. I have carefully considered the facts of the case and the written submissions of the appellant. I have also perused tripartite agreement entered into by the appellant with Shri Ashok Tiwari and M/s Newquest Outsourcing Pvt. Ltd. which is the 100% subsidiary company of the appellant. The appellant was holding 50% investment in share of IBILT at a cost of Rs. 9.26 crores. The said investment has been duly recorded and shown in the balance sheet of the appellant. The said tripartite agreement was required to be entered into by the appellant with Shri Ashok Tiwari in view of the certain differences in the management and also because of joint venture business was falling apart. In pursuance to the said agreement Shri Ashok Tiwari took over the entire activity of MILT Technologies and for this the appellant company was required to sell its entire share holdings (500/o) to Shri Ashok Tiwari who then therefore became 100% owner of the asset and liability of IBILT. As per the terms of the agreement the appellant was further required to discharge a debt of Rs. 7 crore owed by IBILT to bank. Also pursuance to the said agreement the

appellant became the owner of the business division, which was consisted of almost entire business of the IBILT. The appellant transferred the said business division to M/s Newquest Outsourcing Pvt. Ltd. and in turn the said subsidiary company was to discharge the said liability of Rs. 7 crore which was owed by IBILT company. Thus in effect the appellant company incurred a loss of Rs, 9.26 crore on transfer of share owed by it in IBILT.

5.1 It is important to note that the shares held by the appellant company have been transferred to Shri Ashok Tiwari in terms of an agreement executed by the appellant company with Shri Ashok Tiwari and that the said Shri Ashok Tiwani is not related to the appellant in any manner. The said agreement has obviously been entered into on account of bonafide management considerations and is an agreement between two unrelated parties. The Ld. AO has disallowed the said loss merely on the basis of the fact that the said transaction has resulted in a loss to the appellant and has held it to be sham. The Ld. AO has not brought on record any material or evidence to establish that the said transaction is not real or is bogus in any manner. It is settled proposition of law that apparent is real and the onus to prove that the apparent is not the real is on the party who claims it to be so. It is for this reason that the onus was on the Ld. AO to establish that the said transaction is a sham transaction and for this she should have established the same by bringing on record legal evidence to show that the transfer of shares was sham. However, no such evidence what so ever has been brought on record by the Ld. AO.

5.2 The appellant on the other hand has produced an agreement between the said parties. The fact of purchase and sale of shares are duly reflected in the return of income and in the balance sheet of the appellant over the years. It is also a fact that legal transaction executed between assessee company and Shri Ashok Tiwari has been effected and presently the company IBILT is under the control of Shri Ashok Tiwari and the shares Al lich were earlier held by the appellant are now no more the assets of the appellant out are the assets of Shri Ashok Tiwari. There is no basis to come to the conclusion ,:hat the said transaction is sham, contrived or bogus.

5.3 As stated in the submission of the appellant, the word 'sham' has been defined as "being good in appearing but false infact", The Ld. AO has not sought to clarify as to what is the falsity invoked the transaction entered into by the appellant. None of the transaction entered ir.to by the appellant are illegal or done with intention of defrauding revenue. It .5.: in such a context that it has been held in the case of AzadiBachaoAndolan, reported in 263 ITR 706 (SC), that the word 'sham' cannot be used as magic Mantras or catch all phrases to nullify the effect of a legal situation. The relevant portion of the order in case of Alok Ferro Alloys Ltd. (supra) wherein the above pronouncement of the honorable Apex Court is referred to is reproduced hereunder:-

> ".. If the transactions a-e not illegal or done with sole intensions of defrauding the revenue, scch venture cannot be treated as falling within the scope of decision in the case of McDowell (cited supra). In the case of DCIT vs. KashyapSweetners (k) Ltd. (cited supra), wherein the Tribunal, Indore Bench, while relying upon C4.e observation of the Hon''le Supreme Court in

the case of AzadiBachaoAndolan, reported in 263 ITR 706 (SC) observed as under:

> ‘’The court finds that notwithstanding a series of legal steps taken by an assessee, the intended legal results has not been achieved, the court ,night be justified in overlooking the intermediate steps, but it is not permissible for the court to treat the intervening legal step as non est based upon some hypothetical assessment of the real motive of the assessee. An act which is otherwise valid in- law cannot be treated as non est merely on the basis of some under lying motive supposedly resulting in some economic detriment or prejudice to the national interest. While commenting on the words 'sham' and 'device', it was observed that "these words are not intended to be used as magic Martros or catch all phrases to defect or nullify the effect of a legal situation..."

5.4 Clearly the genuineness of the transaction of share cannot be doubted only for the reason that it results in a loss and may therefore give some benefit in the taxation of the appellant. There is no evidence brought on record to establish that the transaction is contrived with the intention to evade tax. Thedecision of purchase and sale of share by the appellant company has to be viewed from the point of view of a businessman and not from subjective standard of the assessing authority. The findings of Hon'ble ITAT, Nagpur Bench, in the case of Alok Ferro Alloys Ltd. (supra) are squarely applicable in the case of the appellant where,on identical facts it was stated as under:

> "The shares which are sold by assessee company is not disputed by A.O. as well the consideration received. The disallowance of loss only for the reason that it results into avoidance of tax cannot be approved. We are of the opinion that the genuineness of transaction of shares cannot be doubted, only for the reason that it reduces the burden of taxation and such a conclusion in our view is unjustified. There is no evidence on record to show that at the time of purchase the assessee had any intention to incur loss on shares. The transactions are through proper banking channel and genuineness of the same cannot be doubted. The decision of purchase and sale of shares has to be viewed from the point of view of businessman and not form the subjective standards of revenue. The various decisions relied upon by the counsel of assessee fully supports the case of assessee.
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> 15. Considering the facts brought on record, we are of the view that it is difficult to hold, the only intention of the assessee was to purchase loss and thereby cause loss to exchequer. The assessee's adventure may be in bad taste and it ultimately resulted in a loss. But that is not sole test for allowing or not allowing a deduction."

5.5 The appellant is a juristic person and on account of loss in investment has lost entire sum of Rs.9.26 crores and hence it would be illogical to conclude that theappellant has entered into an transaction merely to save his tax. Considering the above totality of facts it is held that the disallowance of loss in the case of the

appellant is unjustified and is therefore hereby deleted. These grounds aretherefore allowed.''

3.3 During the course of hearing, the ld. DR supported the order of the AO and submitted that ld. CIT(A) has erred in deleting the disallowance made by the AO in the case of the assessee as the complete transaction is a make believe story and such transaction is a sham transaction.

3.4 On the other hand, the ld. AR relied upon the order of the ld. CIT(A) and submitted that the AO has not accepted the claim of assessee by observing that it is make believe transaction without finding any fault in the legal documents placed on record before him. The transaction of share transfer is with unrelated party and in terms of legal agreement dated 28-09-2007. The ld. AR further submitted that the assessee company alongwithShri Ashok Tiwari was holding investment in I-BILT Technology Services which was rendering Technology Services to various companies of BILT Group. The I-BILT Technology Company was enjoying loan facility in security given by the assessee company and the assessee company got its security released and also the business of I-BILT Technology Services was transferred to subsidiary of assessee company. The shares held by the assessee company as investment were transferred to Shri Ashok Tiwari in terms of the Agreement dated 28-09-2007. The ld. AR further submitted that the observation of the AO as to discharge of bank liability of Rs.7 Crore by the assessee company is factually incorrect which is discharged by the subsidiary company and

business is received by the subsidiary company. The ld. AR of the assessee further submitted that legal agreement is a Management decision for commercial consideration and transaction is with unrelated party. The AO did not bring on record to show that transaction of sale of shares is not genuine and decision of purchase and sale of shares is to be considered from the point of view of businessman and not subjective standard of Revenue Officer. The ld. AR relied on following case laws:-

1. CIT vsDaulat Ram Rawatmal (1973) 87 ITR 349 (SC)
2. CIT vs Sales Magnesite Pvt. Ltd.(1995) 214 ITR 1 (Bom)
3. CIT vs Motor Industries Co. Ltd. (1997) 214 ITR 112 (Ker.)

3.5 The ld. AR further submitted that purchase & sale of shares are not disputed. The loss suffered by the assessee had been claimed to be carried forward and there is no revenue advantage to assessee for the year under consideration as loss has claimed to be carried forward. The ld. AR of the assessee thus submitted that the company is a juristic person and has lost entire investment of Rs.9.26 crores. The ld. AR of the assessee relied on the decision of ITAT Nagpur Bench decision in the case of Alok Ferro Alloys Pvt. Ltd. (ITA No. 30/Nag/1998 order dated 24-02-2006) and further submitted that ld. CIT(A) has rightly granted relief to the assesee by relying on the decision of ITAT,Nagpur Bench (supra).

3.6 We have heard both the parties and perused the materials available on record. It is noted by the AO during the course of assessment proceedings

that the assessee had incurred long term capital loss of Rs.10,73,94,634/- in respect of shares of I-BILT Technologies for which the ld. AR of the assesse submitted that the assesse had entered into a joint venture with one Shri Ashok Tiwari in the name and style as I-BILT Technologies Ltd. which was incorporated under 50/50 ownership. The said I-BILT technology was engaged in providing information technology related solutions to various companies including Ballarpur Industries Ltd. and its affiliates & subsidiaries. The AO also noted in the assessment order that due to certain differences in the management the said joint venture business fell apart in 2007 and consequently an agreement was entered into between the assessee company and Mr. Ashok Tiwari and M/s. Newquest Outsourcing Pvt. Ltd. by virtue of which the assessee company was required to sell of its share in the said company to Shri Ashok Tiwari for a consideration of Re.1/-. The assessee was also required to discharge a debt of Rs.7 Crore owed to a bank. The AO examined the agreement and the transaction entered into by the assessee in respect of the said shares of I-BILT and the AO concluded that an entity was created by outsourcing a part of the business process to it and after making value addition to the entity, circumstances were made out to sever the relationship and in the purported settlement of relationship, huge quantity of the shares were transferred to other party resulting into a loss and the bank liability of Rs.7 Crore was also discharged by the assessee. The AO thus felt that this complete transaction is a make believe story and points towards a

case of accumulating business losses and at the same building up capital of other party which a normal businessman would not indulge in it. Thus the AO treated the entire transaction as a sham transaction and added an amount of Rs.10,73,94,634/- to the income of the assessee. It is noted that the ld. CIT(A) relied on the decision of ITAT, Nagpur Bench in the case of Alok Ferro Alloys Ltd. (supra) holding that the issue in question is squarely covered by the decision of ITAT Nagpur Bench (Supra) and deleted the addition made by the AO by observing at para 5.5 of his order as under:-

> ''5.5 The appellant is a juristic person and on account of loss in investment has lost entire sum of Rs.9.26 crores and hence it would be illogical to conclude that the appellant has entered into an transaction merely to save his tax. Considering the above totality of facts it is held that the disallowance of loss in the case of the appellant is unjustified and is therefore hereby deleted. These grounds are therefore allowed.''

We have also gone through the decisions relied upon by the ld. AR of the assessee and arguments advanced by both the parties but found that the issue in question is squarely covered by the decision of ITAT Nagpur in the case of Alok Ferro Alloys Ltd (supra). We after perusing the evidence on record find that learned CIT(A) has dealt with the facts and evidence on record extensively while granting relief in the case of appellant. Detailed order passed by the CIT(A) indicating reason for deleting the addition has been reproduced in the paragraphs hereinabove. We are in agreement with the findings and reasoning recorded by CIT(A) deleting the addition in the case of appellant. It is settled position of law that apparent is real in

terms of judgment of Hon'ble Apex Court in the case of CIT vsDaulat Ram Rawatmull reported at 87 ITR 349(SC). Sale transaction of shares is in terms of legal agreement placed on record. Appellant has given sufficient reasons to explain the transaction of sale of shares for business consideration with unrelated party. It is equally settled by Hon'ble Jurisdictional High Court that transaction has to be considered from the point of view of businessman and not from subjective standard of Revenue. Transaction of sale of share is corroborated by legal documents which have not been faulted or found to be false or incorrect. On above undisputed factual position disallowance of long term capital loss on sale of shares is unjustified. Considering the totality of facts and circumstances and evidence on record we find no merit in appeal of revenue. Thus Ground No. 1 of appeal of Revenue is dismissed.

4.1 Apropos Ground No. 2 and 3 of the Revenue, brief facts of the case are that the AO during the course of assessment proceedings noticed the Brand Development Expenses of Rs.4,33,70,349/- grouped under various heads like Trade Mark & Logo Expenses whose details are as under:-

S.N.	Description	Amount
1.	Advertisement	25,00,000
2.	Trademark & Log Expenses	63,51,659
3.	Business Development Expenses	30,00,000
4.	Professional Charges	1,98,32,518
5.	Rent of property at London	1,16,86,172
	Total	4,33,70,349

During the course of the assessment proceedings, the assessee was asked by the AO to explain the allowability of the above expenditure for which the assessee filed following explanation.

> ''We had initiated restructuring exercise to create a set of Group Holding Companies to support our long term goals. Through this exercise, we have focused on streamlining and consolidating a number of functions and activities. We have now (year 2009-10) completed the exercise and the Scheme for such consolidation of companies have also (2009-10) been filed now with various High Courts. This company has set its new goal to create an appropriate organization structure in order to support the objectives. The primary objectives of creating Avantha Holdings Limited include:-
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> (i) Hold shares of the Group Companies as Long term Investment.
> (ii) As a major equity holder, provide strategic business direction to the operating companies.
> (iii) Work in concert with the Board of Directors of each of the companies.
> (iv) Leverage access to funds for growth, explanation, acquisition, new ventures etc.
> (v) Deploy Group governance practices
> (vi) Strengthen Avantha Brand and goodwill
> (vii) Provide strategic oversight to top level talent
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> Organization structure is a platform of larger strategy and the means in achieving the goal to evolve the desired structures. It is imperative that the assessee company will continue to provide a framework to implement various policies and decisions of the Avantha Management Board. In rendering corporate support service, various functions will continue to observe arm's length distance from the operating entities and will exercise transparency in its dealings. Several Corporate functions will now form part of the Avantha Holdings Ltd., include Group Finance, Corporate Affairs, Group Governance, Group Human Resource, Strategy and Business Development, Group Corporate Communication and CSR. As these functions consolidate as corporate functions, the details of their roles and activities shall be framed in due course. Accordingly, Avantha Holdings has

already started now (year 2009-10) in entering into an agreement with various companies under its aegis as ‘’right to use of Avantha Group Brand, Logo and other material.” Further the agreement would also cover other aspects like (1) usage of Corporate Office of Avantha Group for companies such as Crompton Greaves Ltd. (2) providing of intellectual capital/ services from Avantha Group (3) usage of expertise areas of Avantha group like Risk Management , Finance, Secretarial, Legal etc. etc.

Further from a detailed study of the investment schedules, you will find out that operation of the Avantha Group extended from paper to power and from Bangalore (India) to Europe/USA through its constituent member such as Crompton Greaves, Global Green Company,Sabah Forest (under BGPPL)

Considering the above said background, the assessee company had incurred expenditure for the development of its brand and logo beginning from this assessment year. In this connection, we would request youto refer details of trade mark, logo and other expenses Rs.3,16,84,177/- grouped under various heads such as

(i) Trade Mark, Logo and other expenses
(ii) Business Development Expenses
(iii) Advertisement expenses
(iv) Professional charges

This is besides rent for property at London included under the grouping ‘Rent’. As regard Trade Market, Logo Expenses, we are inclosing herewith copies of agreement(s) with two major parties i.e. DMA Branding Division of Alia Creative Consultant Ltd. and Image Public Relation PvtLtd.. As regards income in terms of Brand Equity and business promotion agreement with several constituents, we are enclosing herewith copies of agreement with M/s. Biltech Building Elements Ltd. and M/s. SolariesChemtech Ltd.

Considering total circumstances as mentioned above, you will no doubt agree that income cannot arise in vacua i.e. without there being an exploitation of source i.e. expenditure. Thus, exploitation i.e. expenses is an originating cause and an important issue because such exploitation has resulted in source of income by the subsequent years. In short, assessee had exploited the source of income by way of incurring expenditure

being an income earning element and this element i.e. expenses itself is in the nature of revenue and nothing else."?

In layman's language, the assessee has stated that Avantha Holdings has developed da logo/website and related activities for propagation and brand building,. For that purpose, the above expenses were laid out. An analysis of the above expenses prove the same. Trademark and logo expenses account for Rs.63.51 lakhs they cover various facets of the work including design, regisrtration of the log and trade mark and other related activities. Business development expenditure connects to a grant of Rs.30lakhs to CII which will associate the brand at national and international level at CII Forum. Advertisement expenses are incurred on contribution of Rs.25 lakhs to Women Golf Association of India and Professional charges of Rs.1.98 crores incurred on Fees of Professional Consultants.

The AO considered the explanation of the assessee and noted that in Laymen's language the assessee has stated that Avantha Holdings has developed a logo/websites and related activities for propagation and brand building. For that purpose the above expenses were laid out. The AO noted the trade mark and logo expenses account forRs.63.51 lakhs and they cover varies facets of the work including design, registration of the logo and trade mark and other IPR related activities. The AO further noted that the business development expenditure connects to a grant of Rs.30 Lakhs to CII which will associate the brand at National and International level at CII Forum. Advertisement expenses are incurred on contributions of Rs.25 Lakhs to Women Golf Association of India and Professional Charges of Rs.1.98 crores are incurred on fees for professional consultants. The AO further observed that the assesee is creating capital asset like Brand, Logo, Trademark and goodwill etc. and the expenditure incurred towards it will be treated as a

capital expenditure. The AO thus noted that the activity of the assessee is of 'Brand Building which is capital assets and thus the AO disallowed the expenditure of Rs.4,33,70,349/- incurred as purely a capital nature and added the same to the income of the assessee.

4.2 In first appeal, the ld. CIT(A), deleted the additions made by the AO by observing at para 7 to 7.10 of his order, as under:-

> ''7. I have carefully considered the facts of the case and the written submissions of the appellant. I find substantial force in the submissions made by the appellant. It is to be noted that the appellant has incurred the various expenses I for the purposes of conduct of day-to-day business activities by the appellant to generate revenue. The appellant is carrying out multifarious activities which include manufacturing and sale of spirulina food and food grade, undertaking painting contracts, material management agency, investment and trading in unit of mutual funds, long term strategic investments in Indian and foreign companies etc. The total turnover of the appellant is in the range of above Rs. 30 crore. It is important to note that the Ld. AO has not doubted the genuineness of the expenditure and has neither come to conclusion that the claim of expenditure is inflated. The Ld. AO while making the disallowance has come to the conclusion that the entire expenditure is purely capital and hence cannot be allowed to the appellant.
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> 7.1. With regard to the expenditure of Rs.25 lacs that has been incurred by the appellant towards the sponsorship expenses for Women Golf Association of India evidently the appellant has not acquired any benefit of enduring nature. The appellant being the sponsor of tournament does not derive any enduring benefits. As discussed in subsequent judicial pronouncements, expenses incurred for sponsoring a tournament has been held to be revenue expenditure and have to be allowed. Similarly the professional expenses incurred amounting to Rs. 198.32 lacs are in the nature of expenses which have been incurred for obtaining technical services during the course of day to day activities of business and have been used by assessee to generate revenue and no capital asset or benefit of enduring nature has come to the appellant. The said expenditure is revenue in nature and has to be held to be allowable. The expenditure of Rs. 63.51 lacs for advertisement, trade mark and logo expenses have been incurred by assessee is in the course of carrying on business and are in the nature of allowable business expenditure. Similarly the business development expenditure of Rs.30 lacs is on account of business development expenses. The aforesaid sum has been paid by assessee to Confederation of Indian Industries (CII) at national level of which assessee is one of the member. As the appellant is a member of the said association the said expenditure is revenue expenditure as no capital asset or benefit of enduring nature. In view of the above facts the expenditure incurred of Rs. 30 lacs is allowable business expenditure. The above conclusions are based on various judicial pronouncements on similar facts and are discussed in subsequent paragraphs.

7.2 In the case of Godrej Tea Ltd , Mumbai vs Department Of Income Tax the Mumbai bench of the honorable ITAT (ITA No. 6424/Mum/2007)the issue of expenses incurred on brand promotion has been decided in favour of the appellant. In the said case, the assessee company was engaged in the business of manufacturing and selling tea and other products. During the course of assessment it was interalia observed by the Assessing Officer that the assessee has incurred heavy expenditure on brand promotion amounting to Rs.6,82,43,142/- of which 45,70,112/- was debited to the P&L A/c. for the year under consideration. The balance expenditure of Rs.6,36,73,030/- has been deferred over a period of 3 years as deferred revenue expenditure. However, in its return, the assessee company has claimed the entire expenditure incurred on brand promotion as allowable expenses. In such facts, it was held as under:-

> ''.....we are of the view that the expenditure incurred by the assessee on brand promotion are allowable as revenue expenditure. Accordingly, we are inclined to uphold the finding of the Id. CIT(A) in deleting the disallowance made by the AO. The grounds taken by the revenue are, therefore, rejected."

7.3 In the case of Commissioner of Income Tax vs Lake Palace Hotel and Motels, 293 ITR 281 (Raj), the issue was regarding the allowability8 of expenses incurred for sponsorship of State Polo Club Tournament by providing Mewar OMS Polo Trophy. The sponsorship were held to be allowable as under:-

> ''6. Coming to Question No. 1, it may be noticed that the assessee has claimed a deduction of Rs.1,50,000 by way of expenses incurred on sponsorship of State Polo Club tournament by providing Me war OMS Polo Trophy. The AO has opined that the activity of sports and the assessee's business have no connection and, therefore, the sponsorship of the tournament is not fully associated with the business promotion of the assessee so as to fall within Section 10(2)(xv) of the IT Act. The Tribunal, however, found that the sponsorship of the tournament by the assessee was purely motivated by business interest of the assessee inasmuch as the sponsorship of tournament carries high potential advertisement value for the business of the assessee and the activity is thus part of the business of the assessee. Sponsorship and holding of a tournament by awarding a trophy of one's trade name is an activity which number of persons witness and the display of the business name as well as the name of the trophy attached with the assessee's name provides enough advertisement value in promoting the business of the assessee.
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> 7. We are of the opinion that the conclusion reached by the Tribunal in considering the sponsorship of the polo club tournament by holding Mewar OMS Polo Trophy by way of advertisement expenses to promote the business of the assessee was a finding correctly reached by the Tribunal. The fact is now so much well established in the commercial world that a judicial notice can be taken thereof that all major tournaments world over are sponsored by one or the other business houses purely to further their business interest. This is an activity of business promotion through advertisement which the sponsoring of the tournaments carries with it.

8. If any precedent is needed, the decision rendered by the Delhi High Court in CIT v. Delhi Cloth & General Mills Co. Ltd. may be noticed wherein the assessee company was running a number of mills. The assessee company was also organising all India tournaments in hockey and football. The question arose whether the expenditure incurred by the assessee company in organising and sponsoring such sports tournaments could be allowed as business expenditure in terms of Section 10(2)(xv) of the Indian IT Act of 1922. Section 10(2)(xv) of the Act of 1922 is corresponding section of Section 37 of the IT Act, 1961. In the aforesaid decision, the Delhi High Court upheld the Tribunal's finding that by holding the tournament the assessee got publicity for its business and the reports in the newspapers went a long way to make the assessee a household word and also provided opportunity to the employees of the mills to participate and witness such tournaments which was an amenity very necessary in modern times and thus holding the tournament was helpful to the business interest of the assessee.

9. It is no gainsaying that sponsoring of a tournament in which the display of

10. We are in agreement with the Tribunal's finding that the expenses incurred by the assessee in sponsoring the trophy had the ingredient of advertisement of its business and, consequently, the assessee's claim to deduction as expenses wholly and exclusively incurred for the purpose of its business is justified."

7.4 The Gauhati High Court in a recent judgement (May, 2013) in the case of Commissioner of Income-tax v Williamson Tea (Assam) Ltd. (supra) examined the allowability of expenses related to sponsoring programs and to fund infrastructural additions. It was held as under:

"24. In so far as the deletion of disallowance of Rs. 9,00,000 on account of publicity expenses is concerned, the learned Tribunal, in its order, noted that the respondent company had paid Rs. 5,00,000 to Bengal Club Ltd. for sponsoring programmes and to fund infrastructural additions to celebrate the 175th year of the club. The respondent company further paid Rs. 3,00,000 to Anand Bazar Patrika Ltd. for sponsoring the Centenary Celebrations of Cotton College at Guwahati. The respondent company paid Rs. 2,00,000 for sponsoring the State Level National Children Science Congress in Assam. The disallowance of Rs. 9,00,000 was on the ground that the abovementioned expenditures were for non-business purposes and it was, rather, in the nature of donation.

25. While considering the above aspect of the appeal, it needs to be borne in mind that it was submitted, before the learned Tribunal, that the managing director of the respondent company was a member of the Bengal Club and he had spent Rs. 5,00,000 for sponsoring the programmes of the club. Sponsoring of a programme of the nature aforesaid, obviously, leads to advertisement and wider acknowledgment of the respondent company and its products. Such an expenditure cannot but be regarded as having been incurred for the purpose of augmentation of income of the respondent

company. In short, the said sum of Rs. 5,00,000 ought to have been allowed as an expenditure incurred in the interest of the business of the respondent company. The expenditure, incurred in connection with sponsoring of the Centenary celebrations of Cotton College, at Guwahati, by Anand Bazar Patrika Ltd. and the sponsoring the State Level National Children Congress in Assam, were also allowable, because the respondent company's banners, as sponsors of the events, were displayed at the said functions. Therefore, the said expenditure were held by the Tribunal to be wholly and exclusively incurred in connection with the business. While allowing the respondent company's claim, the learned Tribunal relied on a decision of the Calcutta High Court, in Assam Brook Ltd. case (supra), wherein a sum of Rs. 5,00,000 was paid by the assessee to a dub...,

27. In view of the above propositions of law, we are of the considered view that it is for the assessee (respondent company in the present case) to decide where and in what manner publicity of its business is to be done and what benefit it will derive for its business by making such publicity. Consequently, we do not find any infirmity in the order of the Income-tax Appellate Tribunal, while deleting the disallowance on account of publicity expenses.

28. In the result and for the reasons discussed above, we do not find any merit in the present appeal. This appeal is, therefore, dismissed."

7.5 The Delhi High Court in the case of Addl. Commissioner Of Income-Tax vs Delhi Cloth And General Mills Co. .(144 ITR 280 Delhi) answered the question as whether the expenditure incurred by the assessed in sponsoring a football tournament was an allowable deduction under Section 37 of the Income-tax Act, 1961. It was held as under:

"For the purpose of satisfying the test whether, the expenditure is in connection with the business it is not necessary that the expenditure must be connected and co-related to any particular brand which is dealt with by a large group as D.C.M. The fact that the name of D.C.M. gets advertised because of the holding of the tournament would naturally mean that a large number of people would become familiar with the name of D.C.M. The publicity to the brands of D.C.M. is inherent in the publicity of the name of D.C.M. Obviously if a business house dealing with a large number of goods spends money on such items of sport it has to be on behalf of the parent organisation and could not be relatable to any particular product sold by it, nor in law it is so necessary in order to claim the business expenses. Advertisements by D.C.M. would inevitably carry advertisements for all the products put out by the D.C.M. There is no merit in this contention. Dismissed."

7.6 In the case of A.C.I.T., V/s. M/s GetitInformediary Ltd., ITA no.450/Del./2012, the ITAT Delhi Bench examined the issue of allowability of expenses incurred for brand building. The assessee, engaged in the business of publishing of telephone directory with yellow pages, claimed a sum of Rs. 37,03,788/- towards deferred revenue expenses. To a query by the AO, the assessee replied that it incurred expenditure in the FY 2002-03 on advertisement and brand

building to build its brand 'GETIT and the expenditure was amortised and treated as deferred revenue expenditure. However, the AO did not accept the submissions of the assessee disallowed the amount. On appeal, it was decided asunder:

''5.4 I have carefully considered the submissions made on behalf of the appellant company and the findings recorded by the ld. AO. On consideration, I find that the issue of deferred revenue expenditure on account of advertisement and brand building has come up before the Hon'ble IT AT, Delhi for the A Y 2003-04 in the assessee's own case. In the order dated 15.03.2011, the Hon'ble ITAT has allowed the claim of the appellant company with the following observations:-

"6. We have carefully considered the rival submissions in the light of the material placed before us. The details of expenditure incurred by the assessee are filed at pages 14-28 of the paper book. As per para 5.2 of Schedule 21, the following note relevant to the impugned issue was filed by the assessee:-

"5.2 During the year company has spent Rs.44,734,823/- on advertisement & brand building expenses to build its brand "GETIT" in the yellow pages segment of the business. Out of the above a sum of Rs.14,815, 150/- is spent on brand building expenses, of which a sum of Rs. 3,703,787/- has been charged during the year and the balance of Rs.11,111,363/- has been carried as miscellaneous expenditure to be charged over a period of next three years."

7. As it can be seen from the above note, the total expenses of the assessee on advertisement and brand building were incurred at Rs.4,47,34,823/- and out of the said total amount, a sum of Rs.1,48,15,150/- was segregated by the assessee on account of expenses incurred for brand building. The nature of these expenditure as was seen from the details was almost like advertisement expenditures. The other expenditures have been treated by the Assessing Officer on advertisement as no disallowance has been made in this regard. It has not been brought on record as to how these expenditures can be said to be giving enduring benefit to the assessee and how they are different from the other expenses claimed by the assessee under the head "Advertisement" which have been treated by the department being in the nature of revenue. It also has not been brought on record that by incurring such expenditure, the assessee had acquired any fixed capital asset. If it is so, then, it cannot be said that such expenditure was incurred by the assessee on account of capital which has given any enduring benefit to the assessee. The assessee in its prudence may have claimed those expenditures in four years, but the nature of these expenditures is not in the capital field. The ratio of the decision relied upon by the learned AR in the case of ITO vs. Spice Communications Ltd. (supra) is applicable to the present case. The relevant observations from the said decision of the Tribunal are reproduced below:-

> " It is not in dispute that the assessee is in the business of providing cellular mobile services under its own self-generated brand "Spice" since 1997. The assessee's business of providing cellular mobile services is undoubtedly a highly competitive business, and assessee has to provide services in a competent environment. This is also not in dispute that the assessee has incurred expenditure towards advertisement and promotion in course of carrying on its business activities. The Assessing Officer has allowed 90 percent of the expenses as revenue expenditure and allocated

10 percent towards capital by observing that 10 percent of expenses have been incurred towards brand building, The Assessing Officer has not been able to justify as to how the 10 percent of the total advertisement and sales promotion expenses can be allocated towards capital expenditure when the assessee has not acquired any brand from any outside party. The expenditure on advertisement and sales promotion constituted expenditure incurred on press advertisement, hoardings, neon signs, brochures, etc. The press advertisements could not be considered as capital asset acquired by the assessee. Similarly, putting hoardings and neon signs could not also be considered on capital field. The expenditures do not lead to create any capital asset to the assessee. Even there is no benefit of enduring nature so to treat the expenses as capital expenditure. Since by incurring expenditure on advertisement and sales promotion, the assessee has not acquired any fixed capital asset, but these expenditures were incurred for earning better profits, and for facilitating assessee's operation of providing cellular mobile services, there exist direct nexus between the advertisement and sales promotion expenses and the carrying out of the business activity of the assessee. We, therefore, do not find any justification in interfering with the order of the CIT(A) in deleting the disallowance of 10 percent of expenses towards advertisements and sales promotion incurred by the assessee for smooth functioning and carrying on assessee's business effectively, proficiently and profitability. The order of the CIT (A) is, thus, upheld on this issue.

8. It is observed from the order of the CIT (A) that he has upheld the addition on the ground that these expenditures being in the nature of brand building will result in enduring benefit to the assessee and, therefore, he is in agreement with the views of the Assessing Officer. If the ratio of the aforementioned decision is seen, in the case also brand revenue expenditures were considered to be revenue expenditure. It will depend upon the nature of expenditure incurred by the assessee and not the nomenclature given by the assessee. The nature of these expenditures are not capital as they are expenditures incurred by the assessee on advertisement which is an allowable expenditure.

9. In view of the above discussion, we find no justification in the addition of the aforementioned amount to the income of the assessee which is hereby deleted."

5.4.1 The aforesaid finding of the Hon'ble ITAT have been upheld by the Hon'ble Delhi High Court in terms of their order dated 08.09.2011 as under:-

"The question which is raised in this appeal is as to whether the expenditure on advertisement was to be treated a capital or revenue in nature. The ITAT has held it to be revenue expenditure. In Hindustan Coca Cola, this court has already held that such an expenditure would be revenue expenditure.

We, therefore, do not find any merit in the appeal. No question of law arises. The appeal is hereby dismissed."

5.5 In view of the aforesaid fact-situation and respectfully following the judgments of the Hon'ble ITAT and the Hon1ble High court, I hold that the AD was not justified in disallowing the claim of deferred revenue expenses of Rs.37037881-. It is directed

that the claim of the appellant company may be allowed as revenue expenditure and consequential relief may be granted.

5 The Revenue is now in appeal before us against the aforesaid findings of the Id. CIT(A). The Id. DR merely supported the order of the AO

6. We have heard the Id. DR and gone through the facts of the case. As is apparent from the afore cited facts, the assessee distributed the advertisement expenses towards brand building over a period of four years viz. FYs 2002-03 to 2005-06 and claimed the same as revenue expenditure. There is nothing to suggest that the expenditure is of capital nature. In ACIT vs. AshimaSyntex Ltd., 310 ITRSP 1(SB, Ahmedabad) in identical circumstances, it was observed that the concept of deferred revenue expenditure is essentially an accounting concept and alien to the Act. The relevant provisions of the Act recognise only capital or revenue expenditure. Deferred revenue expenditure denotes expenditure for which a payment has been made or a liability incurred, which is essentially revenue in nature but which for various reasons like quantum and period of expected future benefit etc. is written off over a period of time e.g. expenditure on advertisement, sales promotion etc. Though the nature of such expenditure is revenue, keeping in view the fact that the benefits arising therefrom are expected to be derived over a period of time, stretching sometimes over several accounting years, the assessees have been amortising the same over the expected time period over which the benefits are likely to accrue therefrom. Accordingly, only a proportion of such expenditure is amortised in the Profit and Loss Account but an appropriate adjustment is made in the computation of income, claiming the entire as allowable revenue expenditure in terms of provisions of section 37 (1) of the Act. The expenditure which is treated as deferred revenue in the books, almost in all cases comprises of items, the benefits derived wherefrom are ephemeral and transitory in nature in as much as these are incurred as a part of a continuous process and need to be expended in order to generate and increase the brand recall and sustain it in the minds of customers. Moreover, the deferred revenue expenditure is essentially revenue in nature and the decision to treat the same as deferred revenue only represents a management decision taken in view of the magnitude of the expenditure involved. For the purpose of allowability of any expenditure under the Act, what is material is the classification between the capital and revenue and the same does not recognise of any concept of deferred revenue expenditure. In the instant case, even in the preceding year, similar claim of expenses has been allowed by the ITAT and upheld by the Hon'ble jurisdictional High Court. In a number of judgments viz. Amar Raja Batteries Ltd, v. Asstt.CIT [2004] 91 ITD 280 (Hyd.), it.CIT v. Modi Olivetti Ltd. [2005] 4 SOT 859 (Delhi), Asstt.CIT v. Medicamen Biotech Ltd. [2005] 1 SOT 347 (Delhi), Hero Honda Motors Ltd. v. it.CIT [2005] 3 SOT 572 (Delhi) and Charak Pharmaceuticals v. it. CIT [2005] 4 SOT 393 (Mum.), it has been affirmed that where any expenditure is treated as a deferred revenue expenditure, it presupposes that the concerned expenditure, creating benefit is in the revenue field and is a revenue expenditure, but considering its enduring benefits as well as the fact that it does not result in the creation of any new asset or advantage of enduring nature in the capital field, the same is required to be treated distinctly from capital expenditure. However, where any identifiable capital asset, tangible or intangible comes into existence as a result of the amount expended, the same will have to be treated as a capital expenditure and depreciation allowable thereon as per the prescribed rules and procedures under the Income-tax Act. In the instant case, indisputably,

advertisement expenses towards brand building are revenue in nature nor any material has been placed before us by the Revenue, suggesting that any tangible or intangible asset has been created by the assessee. In the light of view taken by the Honiblejurisdictionl High Court in their decision dated 8.9.2011 in the assessee's own case as also by the Special Bench in the aforesaid decision in AshimaSyntex Ltd.(supra), we do not find any merit in the ground raised by the Revenue. Therefore, ground No. 1 in the appeal of the Revenue is dismissed.

7.7 Similarly in the case of Pane Biscuits Pvt. Ltd, Mumbai vs Department Of Income Tax. The Mumbai ITAT Bench (I.T.A. No. 5320/Mum/2006, I.T.A. No. 5321/Mum/2006, I.T.A. No. 1412/Mum/2006 & I.T.A. No. 2802/Mum/2007), the Id. AO noted that the assessee has incurred an expenditure of Rs. 16.88 crores on publicity and brand advertising and fifty percent of this expenditure amounting to Rs. 8.44 crores has been debited in the books of accounts and the balance 50% was claimed in the computation of income. On said facts it was held as under:-

"38. We have carefully considered the submissions of the rival parties and perused the material available on record. We find that the facts are not in dispute in as much as the assessee has incurred expenditure of Rs. 16.88 crores on publicity and brand advertising and out of it the assessee has debited 50% of total expenditure i.e. 8.44 crores in its books of accounts andbalance expenditure of Rs. 8,44,41,448/- has been claimed in the computation of income filed along with return of income. The A.0 in view of the entries recorded in the books of accounts treated the balance expenditure of Rs.8,44,41,448/- as deferred revenue expenditure and allowed only Rs. 8.44 cores as debited in the books of accounts. On appeal Id. CIT(A) observed that there is no dispute that the impugned advertisement expenditure is revenue in nature and the expenditure is laid out wholly and exclusively for the purpose of business and that the only dispute is where the entire expenditure is to be allowed as deduction during the year or it is to be allowed in two years as per treatment given in the books of accounts, relied on certain decisions held that the entire advertisement expenditure is allowable in this year and hence deleted the disallowance made by the AO...

46. Applying the ratio of aforesaid legal position to the facts of the present case we are of the view that making of an entry or absence of an entry does not determine the allowability or otherwise of the item of expenditure and the same can not be considered to be a factor adverse, if the expenditure is otherwise of allowable nature. It is not the case of the revenue that the expenditure incurred by the assessee on publicity and brand advertising are not revenue in nature or have not been incurred wholly and exclusively for the purpose of business. There is nothing to suggest that with this expenditure, any asset tangible or intangible, has been created. There is no law under the Act to say that the revenue expenditure is deferred revenue expenditure. The A.0 himself admitted the portion of expenditure debited in the P&L Account as revenue expenditure. This being so, we are of the view that the expenditure incurred by the assessee on publicity and brand advertising are allowable as revenue expenditure. Accordingly, we are inclined to uphold the finding of the Id. CIT(A) in deleting the disallowance made by the AO. The ground taken by the revenue is, therefore, rejected."

7.8 Also in the case of Fine Jewellery (India) Ltd. v/s Assistant Commissioner of Income-tax (supra), with regard to expenses related to brand building, it has been held as under:

"10. Even from the facts of the case it is seen that the expenditure incurred by the assessee is not creating any enduring benefit of an asset but is rather helping the assessee in augmenting its sales and resultantly its profit. Even if it is presumed that the building of brand image of "Nirvana" is giving advantage of enduring benefit to the assessee, still it would be on revenue account as there is no creation of a tangible or intangible asset of enduring nature to the assessee. The hon'ble Supreme Court in the case of Empire Jute Co. Ltd. v. CIT [1980] 124 JTR 113 Taxman 69 (SC), has held that no tests for distinguishing between capital and revenue expenditure is paramount or conclusive. There is no all-embracing formula which can provide a ready solution to the problem, whether it is a capital expenditure or revenue expenditure. Their Lordships have held that even tests of enduring benefit at times gets failed as not each and every advantage of enduring nature can be of capital field. The most celebrated observations of their Lordships on this account are reproduced herein below (headnote) :

> "There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading 'operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit, is therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case."

11. Further such a payment has also to be seen from the context of business necessity or expediency also. If the outgoing expenditure is so intricately related to carrying on or the conduct of the business that it may be regarded as integral part of the profit-earning process and not for an acquisition of anasset or a right of the permanent character, the possession of which is condition of the carrying on of the business, the expenditure may beregarded as revenue expenditure.

12. Thus, from the facts of the case we do not find that these expenses incurred by the assessee has resulted in any kind of addition or augmentation of any profit-making asset. Thus the view taken by the Assessing Officer is prima facie correct view and, therefore, we do not find any reason to hold that such an order is erroneous or it is prejudicial to the interests of the Revenue. Thus the conclusion drawn by the learned Commissioner of Income- tax in the impugned order is not tenable both in law and on facts and accordingly we cancel the impugned order passed under section 263. In the result, the grounds taken by the assessee are allowed and the appeal of the assessee is also treated as allowed.

13. In the result, the appeal filed by the assessee is allowed."

7.9 Thus it is seen that the expenses incurred for advertisement, brand building and logo/trade mark and for professional services are so intricately related to carrying on or the conduct of the business that they have to be regarded as integral part of the profit-earning process and not for an acquisition of an asset or a right of permanent character and are in the nature revenue expenditure and hence held to be allowable.

7.10 With regard to the expenditure incurred in respect of rent at Rs.116.86 lacs. Sufficient evidence has been brought on record by the appellant to establish that the said property is being used for the purpose of its business. The said property situated in UK and is being used for marketing of products of the appellant in various areas of Europe and expenses incurred on rent are allowable business expenses and cannot be considered to be expenditure in capital nature. The various purposes for which the said property was put to use were submitted before the ld. AO during assessment proceedings. No evidence has been brought on record to establish that the said expense is bogus or inflated. The expenditure incurred on rent has to be allowed as business expenditure in terms of provisions of section 30 of I.T. Act 1961. The expenses incurred on rent for the premises used for the purpose of business by no stretch of imagination can be considered to be expenditure in the nature of capital expenditure. The rent expenditure is therefore held to be allowable in terms of provisions of section 30 of I.T. Act 1961.''

4.3 During the course of hearing, the ld. DR relied on the order of the AO and submitted that the ld. CIT(A) has erred in allowing the above expenditure.

4.4 On the other hand, the ld.AR of the assessee submitted that following nature of expenses are clubbed as Brand Development Expenses.

S.N.	Description	Amount
1.	Advertisement	25,00,000
2.	Trademark & Log Expenses	63,51,659
3.	Business Development Expenses	30,00,000
4.	Professional Charges	1,98,32,518
5.	Rent of property at London	1,16,86,172
	Total	4,33,70,349

The ld. Further submitted that the assessee company caries out multifarious activities including manufacturing and sale of Spirulina Food, Painting Contracts, Material Management Agency and Long Term Investment in Indian

and Foreign Companies. The ld. AR of the assessee further submitted that nature of expenditure itself signifies to be in the nature of Revenue Expenditure and the assessee company provides Material Management Consultancy, Corporate Services and use of Corporate Logo by Group Companies. The Advertisement expenses of Rs.25 lakhs is towards sponsorship of Tournament organized by Women Golf Association of India. Professional expenses at Rs.198.32 lacs are incurred for obtaining technical service on the day to day basis. Business development expenses of Rs.30 lakhs is paid to Confederation of India Industries of which assessee is Member. Rent of Rs.116.86 lacs is incurred for use of premises for the purpose of business. Rs.69.51 lacs is incurred for Advertisement Logo and Trade Mark making. The ld. AR further submitted that all the expenses are clearly revenue expenses and assessee has not acquired any capital asset or benefit of enduring nature. The ld. AR submitted that following decisions cited hereunder are squarely applicable in the case of the assessee.

1. CIT vs Asian Paints (India) Ltd. (2016) 243 Taxman 348 (Bom.)
2. Hon'ble Delhi High Court Order in the case of Seagrm Distilleries (P) Ltd. (ITA No. 224/2016 dated 06-04-2016)
3. CIT vsWillamson Tea (Assam) Ltd. (2013) 355 ITR 323 (Gau)
4. CIT vs Lake Palace Hotels & Motels (P)Ltd (2007) 293 ITR 281 (Raj)
5. Rajasthan Spinning & Weaving Mills Ltd.(2005) 274 ITR 463 (Raj)

6. CIT vs Delhi Cloth & General Mills Co. Ltd. (1978) 115 ITR 659 (Del)
7. CIT vsModi Olivetti Ltd. (2013) 94 DTR 398 (All.)
8. Empire Jute Co.Ltd. vs CIT 124 ITR 001 (SC)
9. FineJewellery (India) Ltd. Vs ACIT (2012)19 ITR (Trib) 746 (Mumb)

Thus, the ld. AR supported the order of the ld,CIT(A) and submitted that the ld. CIT(A) has rightly deleted the additions made by the AO.

4.5 We have heard both the parties and perused the materials available on record. From the available records, it is noted that the AO during the course of assessment proceedings made the addition of Rs.4,33,70,349/- under different heads mentioned hereinabove which has been deleted by the ld. CIT(A) during the course of hearing before him giving detailed findings in his order that the expenses incurred for advertisement, brand building and logo/trade mark and for professional services are related to carrying on the business and they have been regarded as integral part of the profit earning process and not for an acquisition of an asset. Thus such expenditure are in the nature of revenue expenditure and they are allowable expenditure. The ld. CIT(A) further allowed the expenditure of Rs.116.86 lacsin respect of rent by holding that sufficient evidence had been brought on record by the assesse to establish that the said property is being used for the purpose of its business. The Department has not brought on record any adverse evidence that such expenses are bogus and inflated. Thus, the ld. CIT(A) allowed this expenditure in terms of provision of Section 30 of the I.T. Act. Taking into

consideration the above facts and circumstances of the case, we find that the Department has not filed any supporting evidence/ rebuttal against the written submission ld. AR of the assessee except arguing that the ld. CIT(A) has erred in deleting the above expenditure. We find on perusal of evidence on record that learned CIT(A) has dealt with the facts and evidence on record extensively while granting relief in the case of appellant. Detailed order passed by the CIT(A) indicating reason for deleting the addition has been reproduced in the paragraphs hereinabove. We are in agreement with the findings and reasoning recorded by CIT(A) deleting the addition in the case of appellant. The nature of expenses clubbed as brand development expenses clearly depict that expenditure incurred is in the nature of allowable revenue expenditure. It has not been disputed by A.O. that expenditure incurred by assessee is in the course of carrying on activity of business. A.O. has differed with appellant by observing that expenditure incurred is in the nature of capital expenditure. Details of expenses on record clearly depict that they are in the nature of revenue expenditure incurred in the course of day to day activity of business. Each of expenditure claimed is allowable business expenditure in terms of various judicial precedents relied upon by the Counsel of appellant and observed hereinabove. Recent decision of Hon'ble Madras High Court in the case of MRF Ltd. vs DCIT, Chennai reported at 280 Taxman 439 dated 29th March'2021 fully supports the case of assessee. Relevant observation

of judgment of Hon'ble Madras High Court are reproduced hereunder for ready reference.

> 16. The said decision was approved by the Hon'ble Supreme Court in Hero Cycles (P.) Ltd. v. CIT[2016] 236 Taxman 447[2015] 63 taxmann.com 308/379 ITR 0347 wherein it was held that once it was established that there was nexus between expenditure and purpose of business, Revenue could not justifiably claim to put itself in the arm-chair of a businessman or in the position of Board of Directors and decide how much was reasonable expenditure.
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> 17. Thus, in the light of the above legal position, it is not for the Assessing Officer to decide what would be good for the assessee in promoting its business and therefore, decision cannot be arrived at by the Assessing Officer based on his own personal perceptions and it should be left to the decision of the assessee, who is the best person, who knows that what would be best for his business activity.
>
> 22. Further, the CIT(A) rightly took note of the decision in Delhi Cloth & General Mills Co. Ltd. (supra) by observing that the power of the Revenue is confined only to examine the purpose of genuineness of the expenditure and not the expediency or the quantum.

Expenditure incurred on development of brand in respect to existing activity of business is clearly allowable business expenditure and cannot be considered as capital expenditure as concluded by A.O. Conclusion of A.O. is rightly reversed by CIT(A) for detailed reasons indicated in the appellate order. Considering the totality of facts and circumstances and evidence on record we find no merit in appeal of revenue.Thus Ground Nos. 3 & 4 of the Department are dismissed.

5.1 Apropos Ground No. 4 of the Revenue, brief facts of the case are that the assessee had advanced a sum of Rs.37 lacs as interest free loan/ advance to M/s. Thapar Polytechnic, Patiala, Punjab. The AO noted that the loan

remained outstanding for the entire year. According to the AO, the interest component on the same loan is worked out at Rs.4,44,000/-@ 12% p.a. which the AO added back to the income of the assessee company.

5.2 In first appeal, the ld. CIT(A) deleted the addition of Rs.4,44,000/- by observing at para 12 of his order as under:-

> ''12. I have carefully considered the facts of the case and the written submission of the appellant. It is a fact that the appellant is having share capital reserves and surplus amounting to Rs. 127.60 crores as on 31.3.2003. The said fact is evident from the perusal of the balance sheet of the appellant. No evidence has been brought on record by the Ld. AO to establish that any interest has been received or is receivable in respect of the advances made by the appellant. If there are any interest free fund available with the appellant sufficient to meet its investment and at the same time the appellant has also raised a loan, it can be presumed that the investment made were from interest free funds available. In view of the decision of the Hon'ble Bombay High Court in the case of Reliance Utilities and Power Ltd. reported 313 ITR 340, the addition made in respect of notional interest of Rs. 444000/- is hereby deleted. These grounds are therefore allowed.''

5.3 During the course of hearing, the ld.DR supported the order of the AO and submitted that the ld. CIT(A) has erred in deleting the interest amount of Rs.4,44,000/- worked out by the AO against the interest free loan/advance to M/s. Thapar Polytechnic, Patiala.

5.4 On the other hand, the ld. AR of the assesse supported the order of the ld. CIT(A) and submitted that the assessee had share capital and reserves & surplus to the tune of Rs.127.60 Crores which is sufficient to explain Rs.37 lacs as interest free advance. Thus the ld. AR submitted that the ld. CIT(A) has rightly deleted the addition.

5.5 After hearing both the parties and perusing the materials available on record, we find that the assesseehad share capital and reserve surplus to the tune of Rs.127.60 crores which is sufficient for the assessee to explain loan/advance of Rs.37 lacs to M/s.Thapar Polytechnic, Patiala as interest free advance. It is also noted that the AO has not brought on record any adverse evidence on the issue in question. Respectfully following judicial precedent relied upon by the learned CIT(A), we hold that addition made by the AO was unjustified. In this view of the matter, we find no reason to interfere with the order of the ld.CIT(A). Thus Ground No.4 of the Revenue is dismissed.

6.1 Apropos Ground No. 5 of the Revenue, brief facts of the case are that the AO during the course of assessment proceedings observed that the assessee had short deducted TDS as per the Schedule XIV submitted alongwith the audit report. The AO thus noted that the proportionate disallowance of expenditure representing short fall is worked out at Rs.50,48,041/- u/s 40(a)(ia) of the Act which the AO added to the income of the assessee.

6.2 In first appeal, the ld. CIT(A), has deleted the addition of Rs.50,48,041/- made by the AO u/s 40(a)(ia), in view of the decision of Hon'ble Kolkata High Court in the case of CIT vsd S.K. Tekriwal (2014) 361 ITR 432 (Kol).

6.3 During the course of hearing, the ld. DR relied on the order of the AO and submitted that the ld. CIT(A) has erred in deleting the addition of Rs.50,48,041/-.

6.7 On the other hand, the ld. AR supported the order of the ld.CIT(A) on the issue in question.

6.8 After hearing both the parties and perusing the materials available on record, we find that the ld. CIT(A) has deleted the addition of Rs.50,48,041/- u/s 40(a)(ia) of the Act in view of the decision of Hon'ble Kolkata High Court in the case of CIT vs S.K. Tekriwal (supra). Similar view has been taken by ITAT Mumbai Bench in the case of DCIT vs M/s.Chandabhoy&Jassobhoy (ITA No.20/Mum/2010 dated 08-07-2011). In this view of the matter, we concur with the findings of the ld. CIT(A) on the issue in question. Thus Ground No. 5 of the Revenue is dismissed.

7.0 In the result, the appeal of the Department for the A.Y. 2008-09 is dismissed.

8.0 Now we take up the appeal of the Department for the A.Y. 2009-10 for adjudication.

9.1 Apropos Ground No. 1 and 2 of the Department, brief facts of the case are that the AO made an addition of Rs.8,65,68,734/- treating it as business

loss. The ld. CIT(A) considering all the aspects of the case allowed this ground of the assesseeby observing at para 5 to 6 of his order as under:-

> ''5. It is seen that the said issue already stands covered in favour of the appellant in view of the judgement of Hon'ble ITAT, Nagpur Bench in appellant's own case for AY 2004-05 and the relevant extract of the judgement has already reproduced in Para C above in the appellant submission. The Hon'ble ITAT has held that appellant has been showing the said shares as investment in its books of account and not in stock in trade and that the surplus shares arising on sale of share was a long term capital gain which had been so accepted by the revenue authority in earlier years and that therefore, there was no justification for not accepting the explanation for short term capital gain. It is important to note that the above judgement was given by the Hon'ble ITAT in the context of multiple transactions wherein lot of shares were held for a very short period of time while in the year under consideration, the appellant has entered into a limited number of transactions and has held the shares for years.
>
> 5.1 The Hon'ble ITAT also relied on the case of GopalPurohitvs JCIT 20 DTR 99 (supra) wherein it has been held that the appellant's claim for short term and long term capital gain from the transaction in shares have been allowed on identical facts in earlier assessment years and that therefore the same could not be disallowed in the year under consideration only because the transaction conferred certain benefits of the appellant. It is further stated in the said judgement that modus operandi of appellant is the same and therefore, the appellant's claim deserves to be accepted by the following rule of consistency. Following the said decision of GopalPurohitvs JCIT (supra), the Nagpur Bench of ITAT has given relief to the appellant in AY 2004-05.
>
> 5.2 Even during the year under consideration, it is evident that shares which have been sold by the appellant have been consistently shown as investment in its books of accounts over the years. This fact has not been refuted by the ld. AO. As a matter of fact the ld.AO explicitly states that the said shares have been shown as investment in the books of the appellant. It is also a fact that most of these shares have been held by the appellant for the last several years. In any case, each of the

shares has been held in a period of more than 1 year as the entire profit/loss is claimed to be long term. It is also un-refuted fact that the appellant took delivery of each and every share and the appellant has not undertaken any transaction in future and optic segment. It is also important to note that the total sales that have recorded during the year under consideration are in 13 scrips only and as stated by the ld. AO, only 15 transactions have been entered into by the appellant In the year under consideration. It is also a fact that in the immediately preceding year similar transactions have been treated by the ld. AO to be assessable under the head capital gains. As stated by the appellant, in AY 2008-09 loss/profit arising on profit of sale of share were determined under the head ''Capital Gain''. Since the facts during the year under consideration remained identical, there is no reason to assess the profit/los arising on sale of shares under the head income from business.

6. Considering the above totality of facts and the judgement of the Hon'ble ITAT in the appellant own case, the loss arising on sale of shares ought to be brought to tax under the head capital gains and consequently the action of the ld.AO in treating the loss of Rs.1,21,49,434/ - as loss as part of appellant's business income is hereby deleted. Accordingly, the long term capital loss as claimed by the appellant amounting to Rs.8,65,68,734/- is directed to be deleted. This ground is therefore allowed.

9.2 We have heard both the parties and perused the materials available on record. In this case, it is noted that the AO made an addition of Rs.8,65,86,734/- treating the long term capital loss as a business loss. However, the ld. CIT(A) taking into consideration the decision of ITAT Nagpur in assessee's own case for the assessment year 2004-05, held that it is a covered issue. The ld. CIT(A) in his order mentioned that the shares which have been sold by the assessee have been consistently shown as investment in its books of account over the year and this fact has not been refuted by the

AO and it is also a fact that most of these shares have been held by the assessee for the last several years. To this effect, the ld. CIT(A) has relied on the decision in the case of GopalPurohitvs JCIT 20 DTR 99 and further observed that ITAT Nagpur Bench has given the relief to the assessee in view of decision of GopalPurohitvs JCIT (supra). It is also pertinent to mention that in the immediately preceding year, similar transaction had been treated by the AO to be assessable under the head capital gains. In this view of the matter, we concur with the findings of the ld. CIT(A) on the issue in question. Thus, Ground Nos. 1 and 2 of the Department are dismissed.

10.1 Apropos Ground 2 and 3 of the Department wherein the ld. CIT(A) had allowed the assessee's claim of Brand Development Expenses of Rs.6.96.73.647/-.

10.2 After hearing both the parties and perusing the materials available on record, the Bench finds that this issue has been decided by this Bench in the case of the assessee for the assessment year 2008-09. Thus the decision taken by this Bench in the case of the assesse for the assessment year 2008-09 shall apply mutatis mutandis in the case of the assessee for the assessment 2009-10. Thus ground no. 3 and 4 of the Revenue are dismissed.

11.0 In the result, the appeal of the Revenue for the Assessment year 2009-10 is also dismissed.

12.0 Now we further take up the appeal of the Revenue for the Assessment Year 2010-11 for adjudication.

13.1 Apropos Ground 1 and 2 of the Department wherein the ld. CIT(A) had allowed the assessee's claim of Brand Development Expenses of Rs.18,87,14,142/-.

13.2 After hearing both the parties and perusing the materials available on record, the Bench finds that this issue has been decided by this Bench in the case of the assessee for the assessment year 2008-09. Thus the decision taken by this Bench in the case of the assesse for the assessment year 2008-09 shall apply mutatis mutandis in the case of the assessee for the assessment 2010-11. Thus ground no. 1 and 2 of the Revenue are dismissed.

14.1 Apropos Ground 3 of the Department, brief facts of the case are that the AO during the course of assessment proceedings observed that the assessee company has declared income of Rs.171,21,213/- as income from Exchange Rate Fluctuation for the year under consideration. The assessee company claimed deduction thereof in the computation of income by treating the same as capital receipt. The AO asked the assesse to justify the claim of deduction of Rs.1,71,21,213/-. However, the assesee vide its letter dated 16-08-2011 had pointed out that the details are mentioned in the Schedule II as ''Other Income" annexed to audited financial statement. The

assesseecompany booked the Exchange Rate Fluctuation (net) at Rs.1,51,54,918/- and the working of the same is hereunder:-

Exchange fluctuation on ECB loan	Amount
Gain	1,71,21,213
Loss	(19,66,295)
Total (Net)	1,51,54,918

The AO noted that the assessee company itself had credited the amount as revenue receipt. The AO was satisfied that the amount of Rs.1,71,21,213/- received on account of exchange fluctuation is revenue receipt. The assesseebefore the AO had argued that the loss computed on exchange rate fluctuation in immediately preceding year be allowed in A.Y. 2010-11. The AO did not accept the request of the assessee company as the assessee company did not accept the stand of the Department and it is in appeal before the ld. CIT(A). According to the AO, the assessee's claim that income by way of gain on foreign exchange fluctuation is a capital receipt which is not acceptable and thus the claim of the assessee company was denied by the AO and the AO made an addition of Rs.1,51,54,918/-.

14.2 In first appeal, the ld,.CIT(A) has allowed the addition of Rs.151.54 lacs made by the AO by observing at para 7 to 8 of his order as under:-

> "7. I have carefully considered the facts of the case and the submission of the appellant. In the given set of facts, it is evident that the gain/loss on foreign exchange fluctuation is a capital receipt. It is also a fact that loss on account of foreign exchange fluctuation in the immediately8 preceding year was not claimed by the appellant in the return of income itself. Thus, the AO having not allowed the foreign exchange fluctuation loss in the immediately preceding year ought not to

have assessed foreign exchange fluctuation gain as revenue income at the hands of assessee in previous year under consideration.

7.1 In any case, it has been held in the case of Triveni Engineering Works Ltd. vs. CIT (supra) as under:-

> The law has been declared by the Supreme Court in Stitlef Cotton Mills Ltd. Vs. CIT 1978 CTR (SC) 155: (1979) 116 ITR 1 (SC) that where profit or less arises to an assessee on account of appreciation or depreciation in the value of foreign exchange currency held by it, on conversion into another currency, such pro/it or less would ordinarily be trading profit or loss if the foreign exchange currency is held by the assessee on revenue account of a trading asset or as part of circulating capital in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or less would be of capital nature."

8. Considering the above facts and clear legal position, the addition made of Rs. 151.54 lacs, being net foreign exchange fluctuation gain, is directed to be deleted. This ground is therefore allowed.

14.3 During the course of hearing, the ld. DR relied on the order of the AO and prayed that the ld. CIT(A) has erred in deleting the addition of Rs.1,51,54,918/- made by the AO on account of foreign exchange fluctuation.

14.4 On the other hand, the ld. AR of the assessee relied on the order of the ld. CIT(A) and submitted that the assessee has made external commercial borrowing for acquisition of capital asset. The loss arising on account of foreign exchange fluctuation at Rs.3,57,69,667/- was not claimed/ allowed while determining income from business in immediately preceding year (A.Y. 2009-10). The AO in the assessment year 2010-11 has assessed the gain on foreign exchange fluctuation on external commercial borrowing as revenue receipt and contrary to treatment has been given by him in A.Y. 2009-10. The ld. AR of the assessee further submitted that the observation of the AO that

matter in respect to loss arising on foreign exchange fluctuation in imediately8 preceding year is pending in appeal is factually incorrect. No ground of appeal raising dispute of assessment of Foreign Exchange Fluctuation in appellate proceedings. The ld. AR of the assessee further submitted that the loss arising on fluctuation in immediately preceding year at Rs.357.69 lacs which was higher than the gain in foreign has not been allowed as deduction in immediately preceding year i.e. A.Y. 2009-10. On same analogy, gain on foreign exchange fluctuation cannot be brought to tax in the assessment year under consideration being capital receipt not chargeable to tax. To this effect, the ld. AR of the assesse relied on following decisions.

1. Gati Limited Vs ACIT (ITA No. 1467/Hyd/2017 dated 20-06-2018 – ITAT Hyderabad)
2. Triveni Engineering Works Ltd. vs CIT (1985) 156 ITR 202 (Delhi)
3. Padamjeep Pulp & Paper Mills Ltd.vs CIT, 210 ITR 97 (Bom.)

Thus the ld. AR of the assessee prayed that the ld. CIT(A) has rightly deleted the addition made by the AO.

14.5 We have heard both the parties and perused the materials available on record. It is noted that the AO made an addition of Rs.1,51,54,919/- on account of foreign exchange fluctuation gain. The ld. CIT(A) taking into consideration the factual position as well as the decision of Hon'ble Delhi High

Court in the case of TriveniEngineerng Works vs CIT(A) (supra) deleted the addition made by the AO by observing as under:-

> 8. Considering the above facts and clear legal position, the addition made of Rs. 151.54 lacs, being net foreign exchange fluctuation gain, is directed to be deleted. This ground is therefore allowed.

It is also noted that the ld. AR of assessee during the course of hearing prayed that the matter in respect of loss arising on foreign exchange fluctuation in immediately preceding year is pending in appeal is factually incorrect and no ground of appeal raising dispute of assessment of foreign exchange fluctuation is in appellate proceedings. It is noted that ld. CIT(A) has rightly deleted the addition in view of the decision of Hon'ble Delhi High Court in thecase of Triveni Engineering Works Ltd. vs CIT(Supra). We on perusing evidence on record find that learned CIT(A) has dealt with the facts and evidence on record extensively while granting relief in the case of appellant. Detailed order passed by the CIT(A) indicating reason for deleting the addition has been reproduced in the paragraphs hereinabove. We are in agreement with the findings and reasoning recorded by CIT(A) deleting the addition in the case of appellant. It is well settled that foreign exchange fluctuation in respect to capital asset is neither allowable as loss not it can be brought to tax as gain. In the case of assessee it is noted that in respect to same loan loss arising on account of foreign exchange fluctuation at Rs.3,57,69,667/- was not claimed/allowed while determining income from business in immediately preceding year. The above fact is

evident from the assessment order and computation of income for Asstt. Year 2009-10 placed on record. Gain in respect to same transaction on same parity of reasoning cannot be brought to tax. The addition made by A.O. is not justified and has been correctly deleted by CIT(A). Considering the totality of facts and circumstances and evidence on record we find no merit in appeal of revenue.Thus Ground No. 3 of the Revenue is dismissed.

15.1 Apropos Ground Nos. 4 & 5 of the Department, brief facts of the case are that the AO during the course of assessment proceedings noticed that the assessee company has claimed year's premium at Rs,.3,63,01,370/- on fully redeemable non-convertible zero coupon debentures. The AO noted that this amount was neither debited to P&L account nor the same has been claimed in computation of income in the return filed by the assessee as admissible u/s 37 of the Act. The AO noted that the assessee has filed the Offer document of the Scheme for issue of 50 Full Redeemable Non-convertible Zero Coupon Debentures of Rs.10 Crores each aggregating to Rs.500 Crores. The Debentures were issued in the month of March, 2010 which has been issued and allotted in dematerialized form on private placement basis as they are listed in stock exchange. Maturity date is 12th Sept. 2012 and effective yield of fixed redemption premium to maturity is 13.25% annually. As per assessee, premium of Rs.3,63,01,370/- was accrued on bonds as computed at the close of the year. According to the AO, the claim of the assessee company is not

acceptable as the expenditure laid out is interest/ premium on debenture which will be due for redemptions on 12-09-2012. Thus according to the AO, the expenditure is allowed as deduction when such expenditure becomes payable or paid and this expenditure will actually become due on redemption of debentures on 12-09-2012 and it cannot be assumed to be expenditure for the years. According to the AO, the premium is payable in the nature of interest. Section 40(a)(ia) of the I.T. Act has its own role to play for the purpose of allowance under the Act. The AO thus rejected the claim of the assessee amounting to Rs.3,63,01,370/- as the assessee company has not deducted the tax in this year. The AO thus relied on the decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs CIT (2006) 157 Taxman 1(SC) and the AO further held that the amount cannot be allowed for the fact that the same was not claimed by the assessee in the return of income. Hence, the AO made an addition of Rs.3,63,01,370/- in the hands of the assessee company.

15.2 In first appeal, the ld. CIT(A) has deleted the addition of Rs.363.01 lacs by allowing the claim of deduction in respect of zero % fully redeemable non-convertible debentures. The relevant observation of the ld. CIT(A) at para 10 & 11 are as under:-

> "10. I have carefully consideredthe facts of the case and the submission of the appellant. It is evident that the premium is allowable revenue expenditure since the appellant is following mercantile system of accounting and premium relating toyear under consideration has to be allowed as deduction during the year itself.

Thepremium which stands accrued for the year ending 31/03/2010 has been computed at Rs.363.01 lacs and is an allowable business expenses.

10.1 However one of the reasons for denying the same is the fact that the same was claimed for the first time in the course of assessment proceedings. I see merit in the submission of the appellant that the findings given in the case of Goetze (India) Ltd. (supra) are applicable only in respect to claim 'made before A.O. In theaforesaid decision reference is made to the decision of Apex Court in the case of National Thermal Power Co. Ltd reported at 229 ITR 383 and it: has been held thatthe said decision does not impinge on the power of tribunal u/s 254 of I T Act, 1961. The perusal of the decision of the Apex Court in the case of National Thermalin the case of CIT Vs. Jain Parabolic Spring Ltd. Reported at 6 DTR 235(Del), after considering the decision of Apex Court in the case Goetze India Ltd reported at 284 ITR 323, has dismissed the appeal of the revenue wherein CIT(A) has accepted the claim raised in the appeal for the first time although no claim was made in the return before AO. The ratio as laid down by the Hon'ble Delhi High Court squarely applies to the facts in the case of appellant.

10.1 With regards to the contention of the La% AO that the said claim cannot be entertained in view of the provisions of section 40(a)(ia), there is merit in the submission made by the appellant that the said convertible debentures are freely tradable and it is riot possible to identify the payee to whom premium is to be paid at the time of redemption and consequently the mechanism of deduction of tax cannot be put into practice as the identity of the person in whose name TDS is to be made cannot be ascertained. The above contention of the appellant gets supports from the findings given in the case of Industrial Development Bank of India Vs. ITO (supra) wherein it has been held that when the tax deductor cannot ascertain the beneficiary of credits, the tax deduction mechanism cannot be put into service. The relevant portion of the findings of the Hon'ble Mumbai ITAT is reproduced as under:-

> "We agree with the merits of the stand so taken by the CDBT. The deduction of tax at source can only be effected when payee is known. As far as the situation before us is concerned, the regular return bonds being transferable on simple endorsement and delivery and the relevant registration date being a date subsequent to the closure of books of account, the assessee could not have ascertained the payees at the point of time when 'the provision for interest accrued but not due was made. Accordingly, no tax was required to be deducted at source in respect of the provision for interest payable made by the assessee which reflected provision for 'interest accrued but not due' in a situation where the ultimate recipient of such 'interest accrued but not due' could not have been ascertained at the point of time whenthe provision is made. In the present case, interest to such bondholders is to be paid as are registered with the assessee -company as on 15th May, 1994 but there could riot have been any method of ascertaining, as at the time of making the provision for 'interest accrued but not due', i.e., on 31st March, 1994, as to who will be registered bondholders as on 15th May, 1994. It is also important to bear in mind that taxes were duly deducted at source at the time of payment, i.e., on 9th June, 1994 and that there is no loss of revenue as such. In the light of these discussions, we hold that the assessee did not have any liability to deduct

tax at source, in respect of provision for interest accrued but not due' in respect of regular return bonds made on 31st March 1994.When there was no obligation to deduct tax at source, there cannot be any question of levy of penalty or interest. . The appellant, therefore, must succeed."

11. The facts in the case of the appellant are almost identical. Also, in the case of the appellant, it is important to note that the deduction of TDS has been properly made at the time redemption on 12.09.2012 and there has been due compliance in respect of TDS provisions. Considering the above facts and clear legal position as stated above, the Ld. AO is directed to allow the claim of deduction in respect to premium on Zero % fully redeemable non-convertible debenture amounting to Rs. 36301370/-. These grounds are therefore allowed.''

15.3 During the course of hearing, the ld DR relied on the order of the AO and submitted that premium is the nature of interest. Section 40(a)(ia) of the Act has its own role to play for the purpose of allowance under the Act.

15.4 On the other hand, the ld. AR of the assessee relied on the order of the ld. CIT(A).. The ld. AR of the assesse submitted that assessee has claimed deduction in respect of premium accrued for the year under consideration. The claim of the assessee is in terms of law laid down by Apex Court in the case of Maderas Industrial Investment Corporation Ltd. vs CIT, 225 ITR 802 wherein it is concluded by the Hon'ble Apex Court that *Discount on debenture is revenue expenditure allowable proportionately over the life of the debentures".* The ld. of the assessee also relied on the decision of ITAT Hyderabad Bench in the case of Gati Limited (ITA No. 1467/Hyd/17 dated 20-06-2018). The ld. AR further submitted that the convertible debentures were transferrable before the date of maturity and the entire premium was to be paid on 12-09-2012. The bounds could be transferred by delivery and therefore, the ultimate payee of premium could not be identified as bonds

may undergo transfer in between the date of previous year ending and the date of maturity. Payee of the premium was not identifiable and hence it was not possible to deduct TDS in respect to premium accrued upto the end of accounting year. The assessee has deduced and paid TDS at the time of payment of Bonds on12-09-2012 and no disallowance is made u/s 40(a)(ia) of the Act. To this effect, the ld. AR of the assesse relied on following decisions.

1. Industrial Development Bank of India vs ITO (ITAT, Mumbai 'H" Bench in ITA No.6439/Mum/1997 dated 31st July 2006 wherein the Bench concluded that *tax can be deducted at source only when payee is known and identifiable; regular return bonds issued by the assessee being transferable by simple endorsement and delivery and the relevant registration date being a date subsequent to the closure of books of account, assessee could not have ascertained that identity of the payees at the point of time when the provision for interest accrued but not due' was made by it and therefore, no tax was required to be deducted at source u/s 193 of the Act.",*
2. UCO Bank vs Union of India &Ors, 369 ITR 335 (Delhi) wherein the Hon'ble Court held that *Expression 'Payee" u/s 194A of the Act would mean the recipient of the income whose account is maintained by the person paying interest. In the present case, although the FD is made in the name of the Registrar General, the account represent funds which are in the custody of this Court and the Registrar General is neither the recipient of the amount credited to that account nor the interest accruing thereon. Therefore, the Registrar General cannot be considered as a 'Payee" for the purpose of Section 194A of the Act.*

15.5 We have heard both the parties and perused the materials available on record. In this case the AO during the course of assessment proceedings noticed that the assessee company has claimed year's premium amounting to

Rs.3,63,01,370/- on fully redeemable non-convertible zero coupon debentures which was rejected by the AO holding that the assessee has not deducted tax in this year. The AO further observed that the amount cannot be allowed for the fact that the same was not claimed in the return of income for which the AO relied on the decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs CIT (2006) 157 Taxman 1 (SC). We on perusing the evidence on record find that learned CIT(A) has dealt with the facts and evidence on record extensively while granting relief in the case of appellant. Detailed order passed by the CIT(A) indicating reason for deleting the addition has been reproduced in the paragraphs hereinabove. We are in agreement with the findings and reasoning recorded by CIT(A) deleting the addition in the case of appellant. It is settled proposition of law that claim of expenditure made before A.O. if denied for not having been claimed in the return can be considered and allowed by Learned CIT(A) in the course of appellate proceedings. This proposition is in terms of law laid down by the Hon'ble Jurisdictional High Court in the case of Pruthvi Brokers and Shareholders (P) Ltd. reported at 349 ITR 0336 (Bom.). The Hon'ble Jurisdictional High Court has rendered the judgment after duly considering the judgment of Hon'ble Apex Court in the case of M/s. Goetze (India) Ltd. relied upon by A.O. In view of above considering the claim of assessee and allowing deduction in the appellate proceedings by CIT(A) cannot be faulted. On merits allowability of deduction is covered in favour of

assessee in terms of judgment of Hon'ble Apex Court in the case of M/s Madras Industrial Investment Corporation Ltd. reported at 225 ITR 802(SC). The learned departmental representative has not contravened the submission of appellant in the course of hearing before Tribunal. The direction of Hon'bleCIT(A) to allow accrued premium as deduction for computing the income from business on issue of nonconvertible debenture cannot be faulted. The nonconvertible debentures are transferable by delivery and thus payee of debenture remains not identifiable till the date of redemption on 12/09/2012. In the absence of payee being identifiable it is not possible to deduct tax at source under the provisions of Income Tax Act 1961. Payment of premium and payee being not identifiable there is no obligation to deduct tax at source u/s 194A of I.T. Act 1961. In the absence of obligation to deduct tax at source provisions of section 40(a)(ia) of I.T. Act 1961 cannot be invoked. The reasons for disallowance given by A.O. is unjustified and has correctly being held by CIT(A) to be not a valid reason for not allowing the claim of deduction. It is also noted that at the time of date of redemption due compliance of tax deducted at source has been made by appellant. On above undisputed factual position relief granted by CIT(A) in the case of appellant cannot be faulted. Considering the totality of facts and circumstances and evidence on record we find no merit in appeal of revenue. Thus Ground No. 4 and 5 of the Revenue are dismissed.

16.1 Apropos Ground No. 6 of the Department, brief facts of the case are that the assessee company during the year has sold its investments to the following companies.

1. Salient Knowledge Solutions Ltd.
2. Content Service & Publishing Pvt. Ltd.
3. Global Green CompanyLtd

The total consideration received on sale of shares held by the company as investment in these companies was amounting to Rs.4,98,36,446/-. The shares were acquired by the company in earlier years for a total consideration of Rs.5,22,01,446/-. These investments were held for a period exceeding 12 months. Accordingly, the assessee claimed indexation on the long term assets and had declared income from capital gains at Rs.(-) 1,78,70639/-. The Loss is mainly on account of indexation availed by the assessee. The AO noted that one of the main business activities of the assessee is ''Long term, strategic investments in India and Foreign Companies etc. '' In view of the business of the assessee being strategic investments in companies, the AO asked the assessee to explain as to why the income/loss arising out of sale of its investment should not be treated under the business head since this dis-investment/ sale is part of its business activity i.e. investments in long term strategic investments. However, the assessee submitted its explanation that it did not hold these shares as stock in trade so as to treat it under business head. The AO however, treated the loss suffered by the assesseecompay on sale of shares as business loss and not the capital loss. The AO thus further

observed that the facts of the case in A.Y. 2010-11 are the same as in A.Y. 2009-10. Following the order of the AO for the A.Y. 2009-10, loss on sale of share was treated as business loss for this year also.

16.2 In first appeal, the ld. CIT(A), accepted the long term capital loss as claimed by the assessee amounting to Rs.1,78,70,639/- by observing at para 13 to 14 of his order as under:-

> "13. It is seen that the said issue already stands covered in favour of the appellant in view of the judgment of the Hon'ble ITAT, Nagpur Bench in appellant's own case for AY 2004-05 and the relevant extract of the judgment has already been reproduced in Para D above in the appellant's submission. The Hon'ble ITAT has held that appellant has been showing the said shares as investment in its books of account and not as stock in trade and that the surplus arising on sale of share was a long term capital gain which had been so accepted by the revenue authority in earlier years and that therefore there was no justification for not accepting the explanation for short term capital gain. It is important to note that the above judgment was given by the Hon'ble ITAT in the context of multiple transactions wherein several shares were held for a very short period of time while in the year under consideration, the appellant has entered into a limited number of transactions and has held the shares for years.
>
> 13.1 The Hon'le ITAT also relied on the case of GopalPurohit vs. JCIT 20 DTR 99 (supra) wherein it has been held that the appellant's claim for short term and long term capital gain from the transaction in shares have been allowed on identical facts in earlier assessment years and that therefore the same could not be disallowed in the year under consideration only because the transaction conferred certain benefits on the appellant. It is further stated in the said judgment that modus operandi of appellant is the same and therefore the appellant's claim deserved to be accepted by following rule of consistency. Following the said decision of GopalPurohitvs JCIT (supra), the Nagpur Bench of ITAT has given relief to the appellant for AY 2004-05
>
> 13.2 Even during the year under consideration it is evident that shares which have been sold by the appellant have been consistently shown as investment in its books of account over the years. This fact has not been refuted by the Ld. AO. As a matter of fact the Ld. AO explicitly states that the said shares have been shown as investment in

the books of the appellant. It is also a fact that most of these shares have been held by the appellant for the last several years. In any case, each of the shares has been held for a period of more than 1 year as the entire profit/loss is claimed to be long term. It is also un-refuted fact that the appellant took delivery of each and every share and the appellant has not undertaken any transaction in future and options segment. It is also important to note that the total sales that have recorded during the year under consideration are in 3 scrips only. It is also a fact that in the earlier years similar transactions have been treated by the Ld. AO to be assessable under the head capital gains. As stated by the appellant, in AY 200809 loss/profit arising on profit of sale of share was determined under the head "Capital Gain". Since the facts during the year under consideration remained identical, there is no reason to assess the profit / loss arising on sale of shares under the head income from business.

14. Considering the above totality of facts and the judgment of the Hon'ble ITAT in the appellant's own case, the loss arising on sale of shares ought to be brought to tax under the head capital gains and consequently the action of the Ld. AO in treating the loss as part of appellant's business income is hereby deleted. Accordingly the long-term capital loss as claimed by the appellant amounting to Rs. Rs.1,78,70,639/- is directed to be accepted. This ground is therefore allowed."

16.3 During the course of hearing, the ld. DR relied on the order of the AO and prayed that the ld. CIT(A) erred in deleting the addition made by the AO.

16.4 On the other hand, the ld. AR of the assessee supported the order of the ld. CIT(A).

16.5 We have heard both the parties and perused the materials available on record. It is not imperative repeat the facts of the case as similar issue has been decided by this Bench in the case of the assesee for the A.Y. 2009-10 (supra). Hence, the decision taken therein shall apply mutatis mutandis in the appeal of the assesse for the A.Y. 2010-11 also. Thus the Ground No. 6 of the Department is dismissed.

17.0 In the result, the above mentioned appeals of the Department are dismissed.

Order pronounced in the Open Court on 28th June, 2022

Sd/- Sd/-

(ARUN KHODPIA) (SANDEEP GOSAIN)
Accountant Member Judicial Member

Nagpur
Dated:- 28 /06/2022

*Mishra
Copy of the order forwarded to:

1. The Appellant- The ACIT, Circle-7 Nagpur.
2. The Respondent- M/s. M/s. Newquest Corporation Ltd. (Now known as M/s.Avantha Holdings Ltd., Chandrapur)
3. CIT
4. The CIT(A)
5. DR, ITAT, Nagpur
6. Guard File (ITA No. 509/Nag/2014)

By order,

Sr. Private Secretary