

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER) AND
SHRI SANDEEP SINGH KARHAIL (JUDICIAL MEMBER)**

**ITA No. 1858/MUM/2020
Assessment Year: 2014-15**

Sheth Creators Private Limited,
Upper Basement, Site Office,
Vasant Oasis, CTS No. 345A/1 to
3, 345A 5, Makwana Road,
Andheri East,
Mumbai-400059.

PAN No. AAPCS 2976 M

Appellant

Vs. Dy. CIT, Central Circle-4(2),
19th Floor, Air India Building,
Nariman Point,
Mumbai-400021.

Respondent

**ITA No. 2012/MUM/2020
Assessment Year: 2014-15**

Dy. CIT, Central Circle-4(2),
Room No. 1918, 19th Floor,
Air India Building,
Nariman Point,
Mumbai-400021.

Appellant

Vs. M/s Sheth Creators Private Limited,
1203 & 1204 Hallmark Business
Plaza, 12th floor, Sant Dyaneshwar
Marg, Kala-Nagar, Bandra (East),
Mumbai-400051.

PAN No. AAPCS 2976 M

Respondent

**ITA No. 2620/MUM/2019
Assessment Year: 2015-16**

Sheth Creators Private Limited,
101-A & 1202, 1st & 12th floor,
Hallamark Business Plaza, Near
Gurunanak Hospital, Sant
Dyaneshwar Marg, Kalanagar,

Vs. Dy. CIT, Central Circle-4(2),
18th Floor, Air India Building,
Nariman Point,
Mumbai-400021.



Bandra (E),
Mumbai-400051.

PAN No. AAPCS 2976 M
Appellant

Respondent

ITA No. 3696/MUM/2019
Assessment Year: 2016-17

Sheth Creators Private Limited,
101-A & 1202, 1st & 12th floor,
Hallamark Business Plaza, Near
Gurunanak Hospital, Bandra (E),
Mumbai-400051.

Vs.

Dy. CIT, Central Circle-4(2),
19th Floor, Air India Building,
Nariman Point,
Mumbai-400021.

PAN No. AAPCS 2976 M
Appellant

Respondent

ITA No. 1857/MUM/2020
Assessment Year: 2017-18

Sheth Creators Private Limited,
Upper Basement, Site Office,
Vasant Oasis, CTS No. 345A/1 to
3, 345A 5, Makwana Road,
Andheri East,
Mumbai-400059.

Vs.

Dy. CIT, Central Circle-4(2),
19th Floor, Air India Building,
Nariman Point,
Mumbai-400021.

PAN No. AAPCS 2976 M
Appellant

Respondent

Assessee by : Mr. K. Gopal, AR
Revenue by : Mr. Hoshang B. Irani, DR

Date of Hearing : 27/07/2022
Date of pronouncement : 12/08/2022



ORDER

PER OM PRAKASH KANT, AM

Out of the above captioned appeals, the first two appeals are cross-appeals by the assessee and the Revenue against the order dated 10/09/2020 of the Ld. Commissioner of Income-tax (Appeals) -52 Mumbai [in short 'the Ld. CIT(A)'] for assessment year 2014-15. The remaining three appeals by the assessee are directed against three separate orders dated 27/03/2019; 26/04/2019 and 10/09/2020 passed by the Ld. CIT(A) for assessment year 2015-16; 2016-17 and 2017-18 respectively. As common issue-in-dispute are involved in these appeals, same were heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

2. First, we take up the appeal of the assessee for assessment year 2015-16, as the Ld. CIT(A) has followed his finding in 2015-16 for other assessment years.



2.1 The grounds raised by the assessee in assessment year 2015-16 are reproduced as under:

“1. Confirming Disallowance of Rs.44,34,562/- on account of 20% Depreciation claimed on Helicopter :

1.1. Commissioner of I.T. (A) erred in confirming disallowance of Rs. 44,34,562/- on account of 20% depreciation claimed on helicopter out of disallowance of 50% Depreciation made by A.O. without appreciating the fact that the helicopter was not used for personal purpose.

1.2. Commissioner of I.T. (A) erred in not appreciating the fact that the helicopter was only and exclusively used for the purpose of business.

2. Addition u/s. 2(24)(x) r.w.s. 36(1)(va) for delay in payment of PF & ESIC of Rs.3,02,607/- :

2.1. The Ld. AO erred in making an addition on account of delay in payment of PF & ESIC of ₹3,02,607/- without appreciating the fact that the appellant has deposited the employees' contribution to PF & ESIC before filing of income tax return due as per Section 139(1) of the I.T. Act.

2.2. The Ld. AO erred in not appreciating the fact that the Hon'ble Supreme Court in case of Alom Extrusion Ltd. 319 ITR 306 has held that if the employees contribution to PF & ESIC is paid before the filing of IT return than there would not be any disallowance under Section 2(24)(x) r.w.s. 36(1)(va) of I.T. Act.



3. Additional Disallowance U/s 14A of Rs.19,52,896/- :

3.1. Commissioner of I.T. (A) erred in law and fact by confirming additional disallowance u/s. 14A of Rs. 19,52,896/- over and above disallowance suo moto offered by the assessee of ₹21,32,592/- (equal to dividend income) without appreciating the fact that the investment was made in Liquid fund scheme India bulls mutual fund on short term basis hence section 14A is not applicable and accordingly no disallowances is to be made u/s 14A of the income tax Act.

3.2. Without prejudice above, even if the disallowances is to be made is to be restricted to the exempt income received which the appellant has already disallowed in filed the return of income.

4. The appellant prays that:

a. Disallowance of Rs. 44,34,562/- on account of 20% Depreciation claimed on Helicopter may be deleted.

b. Addition made u/s.2(24)(x) r.w.s. 36(1)(va) for delay in payment of PF & ESIC of Rs.3,02,607/- may be deleted.

c. To delete the Additional disallowance of Rs. 19,52,896/- made u/s. 14A r.w. Rule 8D. d. To allow the claim of the appellant that disallowance u/s 14A read with rule 8D should be calculated by considering all facts stated in grounds of appeal & Rule should not be applied automatically.

e. The Appellant plead before Honorable ITAT to add, alter or amend any or all grounds of appeal before or at the time of hearing.”



3. The briefly stated facts of the case are that the assessee filed its return of income on 01/11/2015 declaring total income of ₹1,14,61,700/-. The return of income filed by the assessee was selected for scrutiny and the statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In the assessment completed under section 143(3) of the Act on 31/10/2017 the Assessing Officer made additions/disallowances and assessed total income under regular provisions of the Act at ₹2,08,45,550/- and computed book profit under section 115 JB of the Act at ₹52,25,837/-. Since the tax on the book profit was less than the normal assessed income, therefore, tax was computed on the assessed income under regular provisions.

4. On further appeal, the Ld. CIT(A) allowed part relief. Aggrieved with the additions/disallowance sustained by the Ld. CIT(A), the assessee is in appeal before the Tribunal, raising the grounds as reproduced above.



5. Before us, the assessee has filed a paperbook containing pages 1 to 130.

6. In the ground No. 1, the assessee has challenged disallowance of ₹44,34,562/- for depreciation at the rate of 20% on the helicopter, sustained by the Ld. CIT(A).

7. The facts qua the issue in dispute are that the assessee claimed to be engaged in the business of construction and real estate. The assessee claimed depreciation of ₹2,21,72,810/-, on a helicopter, which was purchased by the Association of Person (AOP) namely M/s Varna Aviation, in which assessee is one of the four members. The other members of the AOP are, M/s Piramal Enterprises Private Limited, M/s Real Gold Developers LLP and M/s Serum Institute of India Ltd. The Members of the AOP entered into an memorandum of understanding (MOU), on 24/02/2011, according to which each member shall own one fourth of the said helicopter and were required to share the operation and maintenance cost as per the



terms mentioned in Memorandum. The assessee failed to produce logbook maintained in respect of various trips undertaken by the helicopter. Thus, the Assessing Officer concluded that the assessee could not demonstrate use of the helicopter for wholly and exclusively for the purpose of the business, therefore, he disallowed 50% of the depreciation claimed by the assessee on helicopter as for personal use of the helicopter, which was worked out to ₹1,10,86,405/-. The Assessing Officer relied on the decision of the Tribunal, Pune Bench in the case of **Avinash Bhosale (ITA No. 1542/PN/08 and Poonawala Finvest & Agro P. Ltd. (ITA No. 370/PN/2010).**

8. Before the Ld. CIT(A), the assessee contended that

- (i) the helicopter was purchased for facilitating the trips of the directors/partners of co-owners for their businesses, attend business meetings, conferences etc. The assessee used helicopter for going to Pune, Nasik and Aurangabad



etc. for identifying land and also for the business meetings.

- (ii) the co-owners have funded the acquisition of the helicopter on the equal basis and accordingly share of cost of helicopter of ₹11,54,83,388/- was shown under the fixed assets and depreciation has been claimed thereon. No depreciation has been claimed by the AOP on the helicopter.
- (iii) The disallowance of depreciation at the rate of 50% by the Assessing Officer on the presumption that same was used for personal purpose by the directors was not justified as the helicopter was operated from Mumbai-Sangali, Nagpur-Nanded; Mumbai -Aurangabad etc, which are not the places where the person go for personal trip.

8.1 The assessee filed a copy of the logbook of the helicopter as additional evidence, which was forwarded by the Ld. CIT(A) to the



Assessing Officer. The Assessing Officer in his remand report pointed out discrepancies in the details of travelling supplied during the assessment proceeding and the logbook provided during the remand proceeding. Further the Ld. Assessing Officer pointed out that name of the persons who travelled in various trips were not provided in the logbook produced in remand proceeding and therefore he was unable to ascertain the purpose of the trips and the passengers for establishing business use of the helicopter. The Ld. Assessing Officer also pointed out that other assessee engaged in the same business, having almost same volume, were not incurring any such type of the expenses. In view of the observations, he concluded that the assessee failed to establish the depreciation expenses as incurred wholly and exclusively for the purpose of the business of the assessee.

8.2 The assessee in the rejoinder submitted that though there was multiple projects in earlier years, however in the year under



consideration due to change in regulation for development, partners in joint ventures, unsuccessful closure of land transactions etc. the assessee could not have any project. The assessee mentioned name of the few properties, the transactions in respect of which could not be closed. Regarding name of passengers in the logbook, it was submitted that same was maintained by the pilot as per the aviation norms prescribed by the director general of civil aviation, wherein it was not mandatory to mention the name of the passenger in the logbook, therefore assessee was unable to provide name of the passengers who travelled. The assessee also relied on the decision of the Tribunal in the case of the assessee for assessment year 2013-14, wherein the Tribunal has upheld the finding of the Ld. CIT(A) that no trips were undertaken for personal purpose by the assessee.

8.3 In background of the above facts, the Ld. CIT(A), restricted the disallowance of depreciation to 20% of the depreciation claimed by the assessee as against 50% depreciation disallowed by the



Assessing Officer. The relevant observation of the Ld. CIT(A) are reproduced as under:

“5.6 The assessment order, remand report as well as the rejoinder to the remand report have been duly considered. There is some merit in the claim of the assessee that the element of personal use is not present considering that the helicopter trips undertaken are not to places which are tourist destinations. However, there is also merit in the contention of the AO that in absence of the names of the passengers, it is not possible to ascertain as to whether the trips have been undertaken solely and exclusively for the purpose of the business of the assessee. The assessee contends that as per DGCA guidelines, it is not mandatory to mention the names of the passengers in the log book which is to be maintained by the pilot. However, since, the assessee wants to claim depreciation on helicopter on the ground that it was used wholly and exclusively for the purpose of its business, the onus was on the assessee to maintain the names of the passengers who had undertaken the various helicopter trips. As regards the reliance of the assessee on the decision of the FAA for A.Y. 2013-14 which has been upheld by the Hon'ble ITAT deleting the entire disallowance made by the AO out of depreciation on helicopter, it is noted that the FAA, in course of the appellate proceedings, had duly examined the log book of the relevant year before concluding that the element of non-business/personal use, is not existent. Moreover, the FAA in his order has specifically noted that the decision for the said year cannot be said to have laid a precedent considering that the same



has been arrived at after factual verification of the log-book maintained for the relevant year.

5.7 It is observed that the Hon'ble ITAT, Pune, has dealt with this issue in the cases of Avinash Bhosale (supra) and Poonawala Finvest & Agro P.Ltd. (supra) wherein disallowance of 1/7th of the aircraft expenses has been upheld. Similarly, in the case of Kirloskar Oil Engine (supra), the Hon'ble ITAT, Pune has upheld the disallowance of aircraft expenses to the extent of 15%. There is some merit in the contention of the assessee that there is no element of personal use since the trips have not been undertaken to tourist destinations. However in absence of the names of the passengers who have undertaken the helicopter trips, it cannot be fully ascertained as to whether the assessee has used the helicopter wholly and exclusively for the purpose of its business. Therefore, it will meet the ends of justice if 20% of the assessee's claim of depreciation on helicopter is disallowed as related to non-business purposes. Accordingly, Ground No. 1 of the appeal is partly allowed."

9. Before us the Ld. counsel of the assessee relied on the submissions made before the Ld. CIT(A) including the order of the Tribunal in the case of the assessee for 2013-14. Whereas the Ld. DR submitted that in assessment year 2013-14, the logbook was provided and on the basis of which the Ld. CIT(A) concluded that there was no personal trip by the assessee, but in the year under



consideration details of the passenger travels is not available and therefore lower authorities are justified in sustaining disallowance of depreciation on helicopter.

10. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. It is undisputed that the helicopter has been purchase in the name of AOP M/s Varna Aviation, having four members including the assessee. The said AOP did not claim depreciation on the helicopter. It is the four co-owners who claimed respective share of the depreciation in their books of accounts including the assessee. There is no dispute as far as claim of ownership vis-à-vis the depreciation. The only dispute is whether the helicopter was put to use wholly and exclusively for the purpose of the business. The Tribunal in assessment year 2013-14 in ITA No. 5450/Mum/2016 upheld the order of the Ld. CIT(A) deleting the disallowance of 50% depreciation made by the Assessing Officer, observing as under:



“8. We have heard the rival submissions of both the parties and perused the material on record. We find that the purchase of helicopter and its use in the business was not disputed by the AO but observed that there might be some personal use of helicopter and thus making disallowance of 50% of depreciation without any basis which is nothing but a conclusion drawn on the basis of presumption, conjunctures and surmises. On the other hand, the Ld. CIT(A) has taken a very correct and reasoned view of the matter after calling for and examining the necessary records primarily the helicopter's technical log book recording the finding of facts that no trips were taken for personal trips by the assessee. Thus there is no violation of rule 46A by the Id CIT(A) as he has co extensive powers to call for the records and examine the same in order to decide the matter before him. Accordingly, ground No.1 & 2 are dismissed.”

10.1 The assessee has also filed a copy of the order of the Ld. CIT(A) for assessment year 2013-14, which is available on page 9 to 18 of the paperbook. The relevant finding of the Ld. CIT(A) is reproduced as under:

“7. I have considered the facts of the case, submissions and contentions of the assessee as also the order of the AO. It appears that the AO has disallowed the claim towards depreciation on the grounds that the assessee has not been able to prove that asset has been used wholly and exclusively for business purposes. The AO in this regard has also relied upon ITAT Pune judgment in case of Avinash Bhosale in ITA no 1524/08. I have considered the entire



gamut of facts. During the year the assessee company made an Association of Person (AOP) in the name of M/s. Varva Aviation along with M/s. Piramal Enterprises Pvt.Ltd., M/s. Real Gold Developers Ltd. and M/s. Serum Institute India to purchase a helicopter, as the assessee had to frequently travel to Nashik, Pune and Aurangabad for business purposes. The memorandum of understanding for purchasing a helicopter on co-ownership basis and for sharing its operation & maintenance cost was entered between the parties on 24th February, 2011 and was amended on 23rd October, 2012. The co-owners agreed to fund the acquisition of the helicopter on equal basis and also to share the operational expenses on equal basis. Therefore, the share of assessee in the cost of helicopter is Rs. 11,54,83,388/-, which was shown under the head Fixed Assets and depreciation was claimed accordingly. It also appears that M/s. Varva Aviation had not claimed any depreciation on the helicopter in its books of account and income tax return filed by it. The assessee had submitted before the AO that the helicopter was used only for business purposes. More particularly during the year under consideration the helicopter was operated from Delhi-Jaipur, Jaipur- Indore, Indore-Aurangabad and Baramati which are not the places where any person would go for personal trip. Apart from this the helicopter was also used for Pilot training etc. Therefore assumption made by the AO that the helicopter was used for personal purpose appears to be incorrect. The assessee in this regard also produced aircraft technical log book' of helicopter containing precise details of use of helicopter flying time and flying hours and destinations etc. This logbook has been duly signed by the pilot flying the helicopter. From the records it appears that the helicopter has flown between Pune and Mumbai. These are not the



places where the assessee would like to go for personal visits. On many occasions it has flown for pilot training, maintenance and ground etc. A few flights are in nature of ferrying the helicopter from place of purchase. None of the flight appears to be of personal nature. Therefore I am not in a position to agree with the Ld AO that the asset was not used for business purposes. The AO in this regard also relied upon the Hon'ble Pune ITAT judgment in case of Avinash Bhosale wherein disallowance of depreciation to the extent of 30% was confirmed on account of personal use of chopper etc. However the facts of the present case are slightly different. In the instant case, from perusal of logbook it does not look like that the helicopter was used for any non business purposes or personal purposes. Therefore I am of the view that no disallowance is called for in respect of depreciation on the facts of the present case. Consequently the ground taken by the assessee is allowed."

10.2 Thus the Tribunal in assessment year 2013-14 has decided the issue on the facts of that particular year, and held that there was no personal use of the helicopter. Therefore, in the year under consideration, we have to examine personal use of helicopter.

10.3 The assessee has claimed depreciation on helicopter within the provisions of section 32 of the Act. The section 32 (1) has prescribed that in respect of depreciation of building, machinery, plant or



furniture, being tangible asset, which are owned, wholly or partly by the assessee and used for the purpose of the business or profession deduction shall be allowed percentage on the written down value as prescribed under Rule 5(1) and Appendix-I of Income-tax Rules, 1962. Under the rules, the assessee has claimed (1/4th) one fourth share of the depreciation on the helicopter.

10.4 The section 38(2) of the Act prescribe that where any building, machinery, plant or furniture is not exclusively used for the purpose of the business or profession, then depreciation under section 32 shall be restricted to fair proportionate part thereof, which the Assessing Officer may determine having regard to the user of such building machinery plant or furniture for the purpose of business or profession.

10.5 The Tribunal in the case of **Avinash Nivrutti Bhosale (supra)** also invoking section 38(2) of the Act, held in principle that Assessing Officer is under obligation to determine the fair



proportion having regard to the use of such machinery and for that purpose reliable data has to be supplied either by the assessee or to be garnered by the Assessing Officer. The relevant finding of the Tribunal is reproduced as under:

“10. We have heard the parties and perused the orders and the paper books made available to us. Undisputed facts are that the assessee used both Bell helicopter as well as the Cessna aircraft for the mixed use and therefore, there is no dispute on the invoking of the provisions of section 38(2) of the Act. Further, there is no dispute that the AO restricted the disallowance art 1/7th of the claim. The same is evidenced by filing the copies of the assessment orders for the AYs 2002-03 to AYs 2004-05. They are placed at pages 128 to 145 of the paper book. For the instant year, the AO adopted 30% as against 1/7th in the past and therefore the issue travelled to the Tribunal for the first time for the instant AY. Before, it is adequately made out that the 1/7th is reasonable. Therefore the issue in dispute is whether the disallowance on accounts of aviation expenses and the depreciation of both Bell Helicopter and the Cessna Aircraft should be restricted to 1/7th of the claim or not.

11. In this regard, we have perused the provisions of section 38(2) of the Act which reads as under.

Building, etc, partly used for business, etc, or not exclusively so used Section 38(1)....



(2) Where any building, machinery, plant or furniture is not exclusively used for the purposes of the business or profession, the deductions under sub-clause (ii) of clause (a) and clause (c) of section 30, clauses (i) and (ii) of section 31 and clause (ii) of sub-section (1) of section 32 shall be restricted to a fair proportionate part thereof which the Assessing Officer may determine, having regard to the user of such building, machinery, plant or furniture for the purposes of the business or profession."

From the above, it is evident that the restriction should be a 'fair proportionate part thereof which the Assessing Officer may determine, having regard to the user of such, machinery, plant or for the purposes of the business or profession'. If the requirement of the law that the A.O is under obligation to determine having regard to the user of such machinery for determining the same, there is need for reliable data either supplied by the assessee or garnered by the A.O. Neither is available in this case."

10.6 In the case of Poonawala Finvest & Agro P. Ltd. (supra) also disallowance for depreciation and other expenses on helicopter toward non-business use have been upheld by the Tribunal. Similarly in the case of **Kirloskar Oil Engine Ltd. vide ITA No. 1039 & 1040 for AY 1995-96 & 1996-97**, disallowance of a part of the expenses of aircraft for nonbusiness use have been upheld by the Tribunal, Pune Bench.



10.7 In view of above statutory provisions and precedents, it is undisputed that if the helicopter has been used for non-business purposes then fair proportionate of depreciation has to be restricted in terms of section 38(2) of the Act. In the instant case before us the issue-in-dispute finally precipitate as to whether there was any personal use/non-business use of the helicopter or otherwise the trips of the helicopter have been carried out for the purpose of the business of the assessee as well as other three co-owners wholly and exclusively.

10.8 From the orders of the lower authorities and the paperbook and other documents produced by the assessee before us, we find that in the year under consideration the assessee has nowhere connected the trips with its offices or business locations. In the year under consideration no real estate project was carried out by the assessee. The assessee has not submitted any evidence of conducting meeting with any customers or for buying land or for



attending any conference except making a general statement. The assessee has filed a photo copy of logbook before the Ld. CIT(A) and claimed that same was maintained by the pilot of the helicopter as per the Rules of civil aviation authority. This logbook does not contain name of the persons who travelled and therefore it is not an evidence to substantiate whether the helicopter was used wholly and exclusively for the purpose of the business of the assessee only. It is to be particularly noted here that co-owners claimed to have shared the funds for purchase of the helicopter as well as for running and maintenance expenses of the helicopter, but it is nowhere clear how the said helicopter has been used by the co-owners in proportion of the expenses shared. Even, it is not clear from the logbook presented by the assessee, as which co-owner used the helicopter for which trip. It is the onus of the assessee to demonstrate with evidences as to out of the total trips recorded in the logbook, which particular trips was in relation to his business



and who travelled in those trips along with the specific purpose of the trip. The assessee has filed a copy of the MOU entered into among the members of AOP i.e. co-owners of the helicopter, which is available on page 43 to 52 of the paperbook. The clause 19 of the said MOU reads as under:

“19. The Helicopter shall be Mumbai based, accordingly who so ever uses the Craft shall be charged for the flight including return to Mumbai (Round trip). Flight schedule shall be calculated to the Co-owners on daily/weekly basis.”

10.9 According to the above clause user of the helicopter has been charged for the flight including return to Mumbai, and therefore all details i.e. which trips have been undertaken by which co-owner, must be available with the AOP. For determination of fair proportion of depreciation in case, particularly use of the helicopter for non-business purposes, it is essential either the assessee provide all the details of trips carried by the specific business purpose along with the persons and places travelled, duly supported with documentary



evidences or the Assessing Officer has to carry out inquiries from the office of the concerned civil aviation authority or concerned administrations responsible for maintaining records of helicopter landing management. The Assessing Officer should determine the proportion of the non-business use by the all four co-owners, and then restrict the depreciation which could be allowed in terms of section 38(2) of the Act. Subsequently, compute the proportion of depreciation (i.e. 1/4th amount) which could be allowed to the assessee.

10.10 In absence of such evidences, we feel it appropriate to restore this issue back to file of the Assessing Officer for deciding afresh after examining the documentary evidence either presented by the Assessing Officer or gathered by the Assessing Officer through inquiries which he deemed fit in the facts of the case. It is needless to mention that adequate opportunity of being heard shall



be afforded to the assessee. The ground No. 1 of the appeal of the assessee is accordingly allowed for statistical purposes.

11. The ground No. 2 of the appeal relates to addition of ₹3,02,607/- for delayed payment of provident fund (PF) and Employees State Insurance Corporation (ESIC). The Ld. CIT(A) upheld the disallowance in view of the decision of the Hon'ble Gujarat High Court in the case of **CIT Vs. Gujarati State Road Transport Corporation 366 ITR 170**, wherein it is held that the delayed payments of employees contribution of PF and ESIC cannot be allowed as deduction although same is before due date of the filing of return of income but paid after due date prescribed under relevant enactment governing PF and ESIC.

12. Before us the Ld. counsel of the assessee submitted that amendment has been brought to section 36(1)(va) and section 43B of the Act by way of Finance Act, 2021, wherein payment of employees contribution to PF and ESIC after due date prescribed



under relevant enactment, has been made ineligible for deduction, however said amendment has been held prospective by the Tribunal, Mumbai Bench in the case of **DCIT v. Maharashtra Tourism Development Corporation [ITA No. 6426/M/2017] (AY 2012-13)**, order dated **27.07.2021**.

13. The Ld. DR on the other hand submitted that amendment is clarificatory in the nature and therefore same should be treated as retrospective in nature.

14. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The amendment made under section 36(1)(va) and 43B has been held prospective by the Tribunal(supra). The relevant finding of the Tribunal is reproduced as under:

“16. Before us, the learned CIT DR Ms. Mamta Bansal stated that there is no question of allowance of differential payment of ₹65,462/- which has never been paid by the assessee and the amount which are not paid by the assessee amounting to



₹1,28,798/- being claimed on account of employees contribution of provident fund. The balance amount of ₹9,08,873/- was paid after the due date as prescribed under the provident fund Act. She stated that the Assessing Officer clearly brought out the amount due and amount paid. Now, the learned CIT DR further stated that there is an amendment in the Provisions of Section 36(va), wherein explanation 2 was added by the Finance Act 2021, with effect from 01.04.2021 and the relevant explanation read as under: -

“[Explanation-2- For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the “due date” under this clause;]

17. The learned CIT DR stated that this is only clarificatory explanation and normal presumption is that these provisions have been in the Act from the very inception, once it is clarificatory for this, she relied on CIT v. Podar Cement (Pvt.) Ltd. [1997] 226 ITR 625 (SC) and CIT vs. Gold Coin Health Food (P.) Ltd [2008] 304 ITR 308 (SC).

18. On the other hand, the learned Counsel for the assessee relied on the decision of Hyderabad Bench of ITAT in the case of Salzgitter Hydraulics (P.) Ltd. Vs. ITO (2021) 128 taxmann.com 192 (Hyderabad – Trib.) dated 15.06.2021, wherein it is held that the provident fund contribution received from employees deposited by assessee before the due date of filing of return under section 139(1) of the Act but after the due date prescribed in the relevant statute of provident Fund Act is to be allowed despite the fact that legislation has not only incorporated necessary amendment in section



36(1)(va) of the Act by inserting explanation 2 as well as explanation 5 to section 43B vide Finance Act, 2021 with effect from 01.04.2021, wherein it is clarified that the provisions of section shall not apply and shall be deemed to have been applied to a sum received by assessee from any of his employees covered by section 2(24)(x) of the Act because this explanations are prospective and not retrospective. The relevant Para 2 of the case reads as under: -

“2. Coming to the sole substantive issue of ESI/PF disallowance of Rs. 1,09,343/- and Rs. 3,52,622/-, the assessee's and revenue's stand is that the same has been paid before the due date of filing sec. 139(1) return and after the due date prescribed in the corresponding statutes; respectively. I notice in this factual backdrop that the legislature has not only incorporated necessary amendments in Sections 36(va) as well as 43B vide Finance Act, 2021 to this effect but also the CBDT has issued Memorandum of Explanation that the same applies w.e.f. 1-4-2021 only. It is further not an issue that the forergoing legislative amendments have proposed employers contributions; disallowances u/s 43B as against employee u/s 36 (va) of the Act; respectively. However, keeping in mind the fact that the same has been clarified to be applicable only with prospective effect from 1-4-2021, I hold that the impugned disallowance is not sustainable in view of all these latest developments even if the Revenue's case is supported by the following case law.”

19. In view of the above, we are of the view that the legislative amendments incorporated in section 36(1)(va) and 43B of the Act by the Finance Act, 2021 by inserting explanation 2 and explanation 5 to the respective provisions, are prospective in



application with effect from 01.04.2021. Hence, we find no infirmity in the order of Commissioner of Income Tax (Appeals). Hence, the appeal of the Revenue is dismissed.”

(emphasized supplied externally)

15. Therefore, respectfully following the same, the addition for delayed payment of PF/ESIC amounting to ₹3,02,607/- is directed to be deleted. The ground of the appeal of the assessee is accordingly allowed.

16. The ground No. 3 of the appeal relates to disallowance of ₹19,52,896/- in terms of section 14A of the Act. The Assessing Officer observed receipt of dividend income of ₹21,32,592/- from the investments. He further observed that assessee has taken loan from India Bulls Housing Finance Ltd., balance of which was of ₹667,54,75,664/- as on 31/03/2015 as compared to balance of ₹55,00,81,034/- on 31.03.2014. According to the Assessing Officer said term loan was utilized for making investment and thus there is direct nexus between the investment and borrowed funds. The



assessee paid interest of ₹40,85,488/- in respect of this loan and therefore this interest expenditure is directly attributable to the dividend income and therefore he disallowed the said interest expenditure and after subtracting the *suo moto* disallowance by the assessee, made addition for the net amount of ₹19,52,896/-. The Ld. CIT(A) also upheld the disallowance.

17. Before us the Ld. counsel of the assessee submitted that the disallowance under section 14A of the Act should be restricted to the extent of exempted income earned. He further submitted that assessee has already offered tax on the trading activity of this investment and therefore in view of the decision of the Hon'ble Supreme Court in the case of **Maxxop Investment Ltd. vs CIT (2018) 402 ITR 640 (SC)**, interest expenses need to be apportioned between the taxable and exempt income.



18. The Ld. DR on the other hand submitted that in view of the direct nexus of the interest expenditure with the exempted income, same has been correctly disallowed by the lower authorities.

19. We have heard rival submission of the party on the issue in dispute and perused the relevant material on record. In the case of the assessee, the Assessing Officer has made disallowance only for the interest expenditure which is having direct nexus with the borrowed funds invested in the investments, which are eligible for yielding dividend income. The assessee has submitted that it has earned taxable as well as exempted income from said investments and therefore following the decision of the Hon'ble Supreme Court in the case of **Maxxop Investment Ltd (supra)**, interest expenses have to be apportioned between the taxable and exempt income and portion of the interest expense, related to exempted income can only be disallowed in the case of the assessee. Accordingly, we set aside the finding of the Ld. CIT(A) on the issue in dispute and



restore this issue of disallowance in terms of section 14A of the Act to the file of the Ld. Assessing Officer for deciding in view of our direction above. The ground of the appeal of the assessee is accordingly allowed for statistical purposes.

20. The ground No. 4 is only a prayer in respect of the all the 3 grounds. Since, we have already adjudicated above grounds, therefore, the ground No. 4 is dismissed as infructuous being not a separate ground.

ITA No. 1858/MUM/2020
Assessment Year: 2014-15

21. The ground of appeal for AY 2014-15 are reproduced as under:

1. Confirming Disallowance of Rs.84,36,022/- on account of 20% Depreciation claimed on Helicopter :

1.1. Commissioner of I.T. (A) erred in confirming disallowance of Rs. 84,36,022/- on account of 20% depreciation claimed on helicopter out of disallowance of 50% Depreciation made by A.O. without appreciating the fact that the helicopter was not used for personal purpose.

1.2.



1.3. Commissioner of I.T. (A) erred in not appreciating the fact that the helicopter was only and exclusively used for the purpose of business.

2. Addition u/s.2(24)(x) r.w.s. 36(1)(va) for delay in payment of PF & ESIC of Rs.3,91,257/- :

2.1. The Ld. AO erred in making an addition on account of delay in payment of PF & ESIC of Rs. 3,91,257/- without appreciating the fact that the appellant has deposited the employees' contribution to PF & ESIC before filing of income tax return due as per Section 139(1) of the I.T. Act.

2.2. The Ld. AO erred in not appreciating the fact that the Hon'ble Supreme Court in case of Alom Extrusion Ltd. 319 ITR 306 has held that if the employees contribution to PF & ESIC is paid before the filing of IT return than there would not be any disallowance under Section 2(24)(x) r.w.s. 36(1)(va) of I.T. Act.

3. The appellant prays that:

a. Disallowance of Rs. 84,36,022/- on account of 20% Depreciation claimed on Helicopter may be deleted.

b. Addition made u/s.2(24)(x) r.w.s. 36(1)(va) for delay in payment of PF & ESIC of Rs.3,91,257/- may be deleted.

c. The Appellant plead before Honorable ITAT to add, alter or amend any or all grounds of appeal before or at the time of hearing.



ITA No. 2012/MUM/2020
Assessment Year: 2014-15

21.1 Now, we take the cross-appeal for AY 2014-15. The Ground of appeal of Revenue are reproduced as under:

"1. "Whether, on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in directing the AO to restrict the disallowance of Rs 2,10,90,055/-on account of 50% of expenditure claimed on helicopter to 20% of such expenditure for which no documentary evidences in the form of log book, user of helicopter has been submitted during the course of assessment proceedings to prove that personal element of expenditure was not involved therein."

2. "Whether, on the fact and circumstances of the case and in law, the Ld. CIT(A), was justified in deleting the entire business promotions expenses of Rs 19,56,530/- even when the assessee could not substantiate such expenses with documentary evidence to demonstrate as to whether these expenditure had been incurred wholly and exclusively for the business purpose."

22. The ground No. 1 of the appeal of the assessee and ground No. 1 of the appeal of the Revenue are related to disallowance of depreciation on helicopter. Since this ground is identical to the ground No. 1 of the appeal of the assessee for assessment of 2015-



16, which we have already restore to the file of the Assessing Officer, therefore following the same, both these grounds of the appeal of the assessee and the Revenue are allowed for statistical purposes.

23. The ground No. 2 of the appeal of the assessee for the year under consideration is identical to ground No. 2 of the appeal of the assessee for assessment year 2015-16 and therefore following our finding in AY 2015-16, this ground of the appeal of the assessee is allowed.

24. The ground No. 3 of the appeal of the assessee is a prayer in respect of ground one and two of the appeal and therefore same is dismissed as infructuous being no separate adjudication required.

25. As regard to ground No. 2 of the appeal of the Revenue challenging deletion of business promotion expenses ₹19,56,530/- both the parties agreed that issue in dispute may be restored back to the file of the Ld. CIT(A).



26. We find that the Ld. CIT(A) has followed finding of Tribunal (supra) and deleted the addition observing as under:

"7.2 The order of the AO and the submission made by the assessee have been examined. It is noted that the AO has concluded that the assessee has failed to submit any agreement with sister companies wherein it was to be compensated in the form of interest for services in the nature of exhibition expense. However, perusal of the P&L account of the assessee shows that the assessee has shown interest income of Rs 90.79 crore and reimbursement income of Rs 17.36 crore. The assessee submits that the amount of Rs 19,56,530/- is a part of this reimbursement and needs to be allowed. It is noted that this issue was adjudicated by ITAT in ITA No. 5450/M/2016 dated 14.5.2018 for AY 2013-14 wherein the ITAT has decided the issue observing that:

"Having heard both the parties and perusing the relevant material on record and also the impugned order, we find that in this case the Ld:CIT(A) has recorded a finding of fact that assessee has received reimbursement of expenses to the tune of Rs.2.85 crores by way of reimbursement of administrative expenses incurred on behalf of the group companies by the assessee. The administration expenses included exhibition expenses also. Considering all these facts the Ld.CIT(A) deleted the disallowance of Rs.39,99,977/-. In view of these facts, we are of the opinion



that Ld.CIT(A) has taken a correct view of the matter and as such the order of Ld.CIT(A) does not suffer from any infirmity or illegality and therefore the same is affirmed by dismissing the ground raised by the assessee.

7.3 The facts remain the same in this year. Respectfully following the decision of ITAT in assessee's own case, the AO is directed to allow the claim. The ground Nos.3 & 6 is decided in favour of the assessee and is allowed."

27. Since the necessary agreement in respect of reimbursement of exhibition expenses were not made available before the Assessing Officer, we feel it appropriate to restore this issue to the file of the Ld. Assessing Officer for decide in accordance with the finding of the Tribunal (supra) after verifying the necessary documents in support of the claim of the assessee. The ground No. 2 of the appeal of Revenue is accordingly allowed for statistical purposes.

28. The sole ground raised in assessment year 2016-17 by the assessee is relation to disallowance of depreciation on helicopter. The said issue has already been restored to the file of the Ld. Assessing Officer in assessment year 2015-16, therefore following



our finding this issue in the year under consideration is also restored back to the file of the Ld. Assessing Officer for deciding afresh as per directions given in assessment year 2015-16. This ground of the appeal is accordingly allowed for statistical purposes.

29. The ground No. 1 for the appeal of the assessee for assessment year 2017-18 is identical to the ground No. 1 adjudicated in assessment year 2015-16, therefore following our finding in assessment year 2015-16, the ground of the appeal of the assessee for assessment year 17-18 is allowed for statistical purposes.

30. The ground No. 2 of the appeal of the assessee for the assessment year 2017-18 is identical to ground No. 2 adjudicated by us in assessment year 2015-16, therefore following our finding, the ground No. two of the appeal of the year under consideration is also allowed.



31. In the result, the appeals of the assessee and appeal of the revenue are allowed for statistical purposes.

Order pronounced in the Court on 12/08/2022.

Sd/-

(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Sd/-

(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;

Dated: 12/08/2022

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai