

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H', NEW DELHI**

Before Sh. C. N. Prasad, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 6872/Del/2018 : Asstt. Year : 2015-16

ITA No. 5375/Del/2019 : Asstt. Year : 2016-17

DCIT, Circle-13(1), New Delhi-110002	Vs	Jagson International Ltd., 3 rd Floor, Vandana Building, 11, Tolstoy Marg, Connaught Place, New Delhi-110001
(APPELLANT)		(RESPONDENT)
PAN No. AAACJ2147A		

CO No. 83/Del/2022

(in ITA No. 6872/Del/2018 : Asstt. Year : 2015-16)

Jagson International Ltd., 3 rd Floor, Vandana Building, 11, Tolstoy Marg, Connaught Place, New Delhi-110001	Vs	DCIT, Circle-13(1), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AAACJ2147A		

**Assessee by : Sh. Rajiv Saxena, Adv. &
Sh. Sumangla Saxena, Adv.
Revenue by : Sh. Rajesh Kumar, CIT DR**

Date of Hearing: 15.09.2022

Date of Pronouncement: 25.11.2022

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the Revenue and the Cross Objection by the assessee against the orders of Id. CIT(A)-5, Delhi dated 23.08.2018 and 18.03.2019.

2. In ITA No. 6872/Del/2018, following grounds have been raised by the Revenue:

"1. Whether on the facts and in law, the Ld. CIT(A) was right in deleting the disallowance of Rs. 98,14,547/- made by the A.O. on account of that the assessee has given interest free loans to its subsidiary company without substantiating commercial expediency?"

2. Whether on the facts and in law, the Ld. CIT(A) was right in deleting the disallowance of Rs. 81,50,878/- made by the A.O. on account of Section 14A r.w. Rule 8D by ignoring fact that as per the CBDT's Instruction No. 5/2014 dated 11.02.2014 Rule 8D read with section 14A of the Act provides for disallowance of the expenditure even where taxpayer in a particular year has not earned any exempt income?"

3. Whether on the facts and in law, the Ld. CIT(A) was right in deleting the disallowance of Rs. 1,49,52,823/- made by the A.O. on account of expenses disallowed u/s 40(a)(ia) of the IT Act."?"

3. In ITA No. 5375/Del/2019, following grounds have been raised by the Revenue:

1. Whether, the Ld. CIT(A) has erred in facts and in law, in holding that "Deepsea Matdrill" is a Ship and not an off-shore installation (RIG), which is excluded from the definition of qualifying ship under section 115VD of the Act?"

2. Whether the Ld. CIT(A) has erred in facts and in law, in holding that a drilling rig like 'Deepsea Matdrill' does not require to be fixed, without going into the facts of the case independently?"

3. Whether, the Ld. CIT(A) has erred in facts and in law, in deleting the disallowance of Rs. 29,05,22,492/-

made by the AO, disallowing the assessee's claim of exempt income under Tonnage Tax Scheme.

4. Whether, the Ld. CIT(A) has erred in facts and in law, in deleting the disallowance of Rs. 94,05,22,492/- made in computation of income of u/s 115JB of the Act?

5. Whether the Ld. CIT(A) has erred in facts and in law, in deleting the disallowance of Rs. 1,39,63,535/- made by the A.O. on account of advancing the interest free loans by the assessee to its subsidiary company without substantiating commercial expediency?

6. Whether the Ld. CIT(A) has erred in facts and in law, in deleting the disallowance of Rs. 30,61,33,- made by the A.O. on account of expenses disallowed u/s 36(1)(va) of the IT Act."

4. In CO No. 83/Del/2022, following grounds have been raised by the assessee:

"1. That the Ld. CIT(A) has erred in law as well as on facts in not disposing ground no. 1 by treating the same general in nature and ignoring the submissions raised by the assessee for re-computing income under section 115JB as MAT provisions are not applicable on tonnage tax companies as per section 115VO of the IT Act.

2. That Ld. CIT(A) has erred in law as well as on facts in sustaining the "addition" made by AO of Rs. 73,11,794/- i.e., interest earned on refund which was already declared by the Assessee during assessment proceedings and so cannot be treated as "Addition" once declared as income.

3. The Ld. CIT (A) and AO have erred in law as well as on facts in making addition of Rs. 1,54,62,672/- for computing income u/s. 115JB of the IT Act."

5. All the relevant facts have been taken from the order of the Id. CIT(A).

6. The assessee filed return of income on 05.10.2016 declaring total income of Rs. "Nil". The same has been assessed u/s 143(3) determining total income at Rs. 31,10,78,215/- by making additions of Rs. 36,09,700/- on account of disallowance u/s 14A, Rs. 1,39,63,535/- on account of disallowance on interest free loans to sister concern, disallowance u/s 36(i)(va) of Rs. 30,61,331/- and disallowance on income from shipping unit of Rs. 29,04,43,649/- of the Act. The book profit u/s 115JB of the Act as been determined at Rs. 97,50,82,483/- against declared book profit of Rs. 3,09,50,292/- making disallowance/addition on account of section 14A of the Act amounting to Rs. 36,09,700/- and income from shipping business of Rs. 94,05,22,492/-.

7. Aggrieved by the above action of the AO, the appellant filed appeal before the Id. CIT(A).

8. During appellate proceedings, the assessee has made following submissions in respect of the various grounds of appeal. Relevant part of the same is as under:

"1. Assessment in the above case was completed at 31,10,78,220/- and book profit at Rs. 97,50,82,483/- as against income returned at NIL under normal provisions and at the booked profit of Rs 3,09,50,291/- against which assessee preferred the appeal raising four grounds of appeal. The issues raised in this appeal have been dealt by your predecessors in

AY 2006-07 to AY 2015-16 and have been decided in favor of assessee. The appeals against the orders of your predecessors filed before ITAT were dismissed in AY 2006-07 to AY 2011-12 and further appeal before the Hon'ble Delhi High court was also dismissed. The appeals for AY 2012-13 to AY 2015-16 are pending before TTAT. Kindly find enclosed copy of orders of the Hon'ble Delhi High Court for AY 2006-07 and AY 2007-08 against which revenue's SLP is pending before the Hon'ble Supreme Court at pages 1 to 5 and orders of IT AT and the Hon'ble Delhi High Court for AY 2008-09 to AY 2011-12 are also enclosed at pages 6 to 57. Copy of orders of your predecessors for AY 2012-13 to AY 2015-16 are enclosed at pages 58 to 136 for your kind perusal. A chart is hereby prepared relating to issues involved in order to understand the outcome in earlier years. It is necessary to point out that following issues have been raised in the grounds of appeal and dealt by your predecessors in various years and decided in favor of the assessee.

Sr. No.	Issue Involved	Dealt in A Ys	Relevant Pages & Paras of PB
1.	a. Claim on the income from operation of ships under Tonnage Tax scheme of Rs. 29,04,43,649/- h. Claim of non-application of MAT provisions under tonnage tax scheme of Rs. 94,05,22,492/-	2006-07 and 2007-08 by the Hon'ble Delhi High Court followed in subsequent years till AY 2015-16	1 to 5
2.	Disallowance u/s 14A and claiming alternate plea to enhance tonnage tax income on any such disallowance if any made of Rs. 36,09,700/-	<p>2007- 08 by CIT Appeal and no appeal filed by revenue</p> <p>2008-09 no such disallowance</p> <p>2009-10 and 2010-11 ITAT allowed and revenue's appeal before High Court has been dismissed.</p> <p>2011-12 ITAT followed earlier years and dismissed the appeal and Hon'ble Delhi Court also dismissed.</p> <p>2012-13 and 2013-14 the CIT appeal allowed the appeal in AY 2012-13 and directed to enhance tonnage tax income in AY 2013- 14.</p> <p>AY 2014-15 CIT appeal accepted the alternate plea to enhance the tonnage tax income.</p> <p>AY 2015-16 by CIT appeal allowing the ground by following earlier orders.</p>	<p>6 to 35 Para 7 in AY 2009-10 & Para 13 in AY 2010-11 by ITAT and by the High Court at pages 38 to 40 at Pgra 5 and 6.</p> <p>Para 14 in AY2011-12 at page 51 by IT AT Para 1 and 2 of Page 56 by High Court Para 4.2 and 4.3 in AY 2012-13 and 2013-14 by CIT appeal at pages 69 to 71</p> <p>Para 4.2 of Page 97 to 99 by CIT Appeal in AY 2014-15 and appeal effect to the order at pages 110 & 111 by AO</p> <p>Para 2 to 4.3 of Pages 130 to 132 by CIT appeal in AY 2015-16</p>

3.	<p>Disallowance of interest on loans to subsidiary companies of Rs. 1,39,63,535/-</p>	<p>AY2010-11 by ITAT who allowed the claim by dismissing revenue's appeal and no appeal filed by the revenue on this issue before the Hon'ble Delhi High Court who dismissed revenue's appeal on other issues.</p> <p>AY 2011-12 by IT AT who allowed the claim by dismissing revenue's appeal and no appeal filed by the revenue on this issue before the Hon'ble Delhi High Court who dismissed revenue's appeal on other issues.</p> <p>AY 2012-13 and AY 2013-14 by CIT appeal and revenue's appeal before IT AT is pending.</p> <p>AY 2014-15 by CIT appeal following order for AY 2012-13 and AY 2013-14 and revenue's appeal before ITA T is pending.</p> <p>AY 2015-16 by CIT appeal by following ITAT order for AY 2010-11.</p>	<p>Para 12.7 of Page 32 by IT AT and High Court order is on 38 to 40.</p> <p>Para 13 of Page 47 to 50 by IT AT and High Court order is on 56 and 57.</p> <p>Para 3 of Pages 62 to 67 by CIT</p> <p>Para 3.2 of Page 93 to 96 by CIT</p> <p>Page 115-116</p>
4.	<p>Disallowance u/s 36(i)(va) of Rs. 30,61,331/- on account of late deposit but deposited before the due date of filing.</p>	<p>This issue is covered by the decision of Hon'ble Supreme Court in the case of PCIT vs. Rajasthan State Beverages Corp Ltd 84 Taxmann.com 185 dismissing SLR and confirming the decision of Rajasthan High Court reported in 84 Taxmann.com 173 following TRF Ltd vs. CIT 323 ITR 397 SC.</p>	<p>Enclosed at pages 269 to 273</p> <p>The provision of Sec 43B is also amended with affect from 01/04/2004 deleting any restriction which were earlier existing in the proviso and so w.e.f 01/04/2004 any payment made before the due date of filing is allowable u/s 43B. It is not disputed that payments have been made before the due date of filing as depicted in tax audit report and the return.</p>

2. It is submitted that most of the issues as mentioned above are covered by the decision of your predecessor and also

confirmed by Hon'ble ITAT/ Dei hi High Court, however during the course of assessment proceedings detailed submissions have been filed on these issues which are necessary to be referred to for your kind consideration in relation to issues involved raised in grounds of appeal. The assessee wants to submit as under on the grounds of appeal.

3. Ground no. 1 relates to disallowance of claim made of Rs. 29,04,43,649/- on the income from operation of ships and Rs 94,05,22,492/- under the MAT provisions.

The A.O. has discussed this issue in the assessment order at Para 7 of the assessment order. It is submitted that apart from referring to earlier decisions she has reproduced various provisions of Tonnage Tax Scheme and she has highlighted that relevant shipping income of Tonnage Tax company means its profits from core activities and from incidental activities as mentioned in subsection (2) and (5). She has also referred to certain debates and deliberations before introducing chapter XII G of the IT Act i.e. Tonnage Tax Scheme and express her opinion at page 13 that main intent of the introduction of tonnage tax scheme was to provide a level playing field for Indian shipping companies to compete with their global counterparts and to increase the growth of trade and export competitiveness of the Indian shipping industry. She has referred to the facts of the assessee where assessee company declare rigs in their assets which are mainly used for the purpose of exploration and production of gas and. oil. She explained that for the purpose of drilling it is essentially have to be fixed to the place where drilling is required. It cannot be

imagined that the rig move and drill at the same time. Mobility of the rig by use of rotor to move it like a ship is essential for placing it at different places where drilling is required or for moving the rig to the new customer. The rig is given the shape of a ship and has moving ability only for the purpose of arriving at the designated location of its drilling activity. The customer hires it for drilling and not for moving from one place to other. The income from rigs of the assessee is derived from its drilling operations. The assessee himself in his ITR shows the income as drilling income only. Further in his computation of income the assessee itself shows that the turnover from core activities is zero and drilling income does not fall under the incidental activities of shipping income also. She expressed her opinion that the rigs of assessee company have never been used for the transport of goods or cargo, the income derived from such business is actually exempted under the Tonnage Tax Scheme. Just because the assessee claims that they are ships, it is not acceptable that the income derived is exempted under Tonnage Tax Scheme. The income generated by the operation of drilling rig has no correlation with its net tonnage. Therefore Tonnage Tax Scheme is prima facie inapplicable for computing income arising to a rig from drilling operations. The fact that the assessee ships have been registered under Merchant Shipping Act 1958 does not help the case as even the IT Act in 115VD includes in its ambit various ships but specifically excludes off shore installations like drilling rig from the definition of qualifying ship. Therefore in a sense rig is taken as ship for the purpose of both the Acts but has been excluded in section 115VD from being treated as "qualifying ships".

The AO therefore did not allow income claim as exempt of Rs. 29,04,43,649/- normal provisions and Rs 94,05,22,492/- under MAT u/s 115JB of the IT Act.

4. It is submitted that the AO has neither looked into the relevant provisions nor the orders and submissions raised before her predecessor as well as before the appellate authorities. The shipping industry is not limited to passengers and cargos in this modern times. The deduction u/s 33AC was earlier available to shipping industries but later on while introducing Tonnage Tax Scheme certain ships which are not movable have been excluded except pleasure crafts/ motorboats and dredgers. The vessels mentioned u/s 115VD under serial no. (i), (ii), (iii), (vi) and (viii) are all those vessels which are fixed and stationary not moving at all. The vessels mentions in sr. no. (iv) and (v) are basically for coastal area and river ferries and pleasure crafts are meant also for entertainment and so legislature has excluded them specifically. The vessels in high seas are not only cargo and passenger ships but are meant for various other purposes like tugs, barges, dredgers, submarines, war ships, tankers and so on. The vessels are built for the purpose it is meant and therefore the nomenclature of the vessels are also given according to the use of the vessels. The vessels used for drilling and off shores are carrying rigs which is not separately installed but the vessel is meant for the purpose of drilling in offshore and so they are called generally in the industry as rigs. The various name of these ships are as under: Aircraft carrier, Balinger, Barque, Barquentine, Battle cruiser, Battle ships, Bilander, Frigates, Hydrofoil, Liberty ships,

Mercy Ships, Research Ships, Ro ro ships, Tanker, Victory Ships, Whether Ships, Treasure Ships, etc.

5. *It is submitted that legislature has no intention to narrow down the industry in these modern worlds as shipping industry is not limited to passenger and cargo as understood by the AO. The provision is therefore very specific excluding certain categories which are only fixed at one place but not moving except Harbor and River ferries and Pleasure Crafts which were excluded due to some other reasons. They have initially also excluded dredgers but later on amended the provision. The vessels who are carrying passengers and cargo are meant to take them from one place to another and are stationary before carrying them to travel. The vessels used for dredging are also stationary when carrying sand from the sea and moving thereafter. The rigs which are used for drilling in offshore are also stationary when they have to take out mud cuts and petroleum from the sea and after taking out the same and work is over they are moving as rightly noticed by the AO to another place where it has to work. Thus vessels are moving when required and are stationary when required for the specific work for which it is assigned. The vessels which are engaged in research are also stationary from time to time and the rigs are also doing the search on petroleum products carrying more than 70-100 persons, having motorboats, canteen, residential quarters/ rooms, lab for doing research work, radio station for signals and so on. They are also carrying specific features for the safety of passengers staying on the vessel. The AO did not understand that the rig called is not merely carrying a*

machinery rig but it is a huge ship specifically meant for drilling in offshore. It has sophisticated equipments for the specific purpose and the data taken out from the sea bed has to be analyzed to find out oil and gas in the lab and thereafter conclusion is drawn and once the same is found it has to safeguard interest of the nation and has to hand over the same to the production team who are installing in the off shore platform which is commonly known as "offshore installation" but the vessels used by the assessee company are moving from one place to another and so are not installations as understood by the AO. The Hon'ble Delhi high Court twice while interpreting sec 35AC and later on while Interpreting Tonnage Tax Scheme analyzed that vessels operated by the assessee company are ships and not offshore installations.

6. *It is submitted that the AO also incorrectly understood that income of the assessee in the computation of income in ITR was showing zero. In this connection your kind attention is invited to the various portions of the ITR in which it clearly and specifically mentioned. PB 158 is the part of ITR and operating revenues from drilling operations has been mentioned at 302,70,45,912/-. The profit and gains from business was declared after adjusting the claim of tonnage tax benefit at page 164 and losses of earlier years have been adjusted against the income at page 166 computation of income from business or profession has been mentioned and profit has been declared at 97,14,72,783/- and deduction under chapter 12G has been taken of Rs 29,04,43,649/-. The AO has incorrectly not adjusted the carry forward of losses after not granting tonnage tax*

benefit due to which application u/s 154 was filed on 3rd Jan 2019 PB234 and 235. The drilling activities as shown is the operating income from ships and it is the income from core activities only, it hardly matters if nature of the ships has been mentioned in accounts or on the website because the shipping industry knows such vessels by the name of rig. In order to enhance its business it has to declare right name in the website. The vessels at page 15 have been shown moving from one place to another and also when activity of drilling is going on and vessel is stationary on its legs.

7. It is submitted that these aspects have been examined in AY 2006-07 and AY 2007-08 if we examine the orders of the lower authorities and nothing new fact have been brought by the AO during the year in concern. The Hon'ble Delhi High Court has decided the issue in favor of the assessee and subsequently this order has been followed by the appellate authorities but not by the AO because the revenue has filed SLP.

8. It is submitted that assessee may kindly be granted benefits of tonnage tax scheme and claim of deduction from the business of operation of ships may kindly be allowed. It is necessary to submit that as per section 115VO the MAT provisions are not applicable on the tonnage tax income and so the same cannot be applied while calculating income under MAT provisions. The loss carrying forward for the last so many years includes unabsorbed depreciation which is required to be adjusted but the AO did not look into those aspects and not adjusted the same. After granting tonnage tax benefits the

business loss as well as unabsorbed depreciation would may kindly be allowed to be carried forward.

9. *It is submitted that ground no. 2 related to disallowance u/s 14A. It is submitted that sec 14A is not applicable as income is already exempt under tonnage tax scheme and this issue has already been examined in earlier years and decided in assessee's favor as tabulated above.*

10. *It is submitted that ground no. 3 is also covered by the decision of your predecessor as well as Hon'ble ITAT in earlier years, the submissions before the AO has been given on 24/12/2018 PB 232 and 233 that the loans to the sister concerns were given in which assessee company is either wholly owning them or having major shareholding while loans were given out of the interest free funds available with the assessee and so issue is covered by the decision of Hon'ble Supreme Court and the same has been followed by your predecessor as well as Hon'ble ITAT.*

11. *It is submitted that gr. no. 4 is in relation to disallowance u/s 36(i)(v) of the IT Act for non-payment of ESI and PF before the due date prescribed in those acts. It is submitted that law has been amended as proviso introduced by the legislature has been amended w.e.f. 01.04.2004 by which payments made before the due date of filing are allowable. It is not disputed that payments have been made before the due date and the details of such payments are required to be provided under the tax audit report itself, kindly refer page 145 and 146 of the PB. The due date have been mentioned and actual date of payment*

is also mentioned, it would be seen all the dates are much before the due date of filing income tax return though there was a delay in depositing as per the relevant act i.e. PF and ESI. In this connection your kind attention is also invited to the decision of Hon'ble Supreme Court in the case of PCIT Jaipur vs. Rajasthan State Beverages Corp Ltd dismissing revenue's SLP and confirming the order of Rajasthan High Court PB 269 and 270 is the decision of Hon'ble Supreme Court and PB 271 to 273 is the decision of Rajasthan High Court for your kind perusal.

12. It is therefore humbly requested that appeal of the assessee may kindly be allowed because the issues involved are either covered by the decision of appellate authorities including your predecessor in assessee's own case or by the decision of Hon'ble Supreme Court."

9. The Id. CIT(A) held that the assessee has also provided paper book containing various decisions/orders of CIT(A), ITAT and Hon'ble High Court, related to the appellant company in the different assessment years, correspondence with the AO during assessment proceedings and other details to substantiate their contentions.

10. The adjudication of the Id. CIT(A) has been examined in detail.

Addition on account of shipping business:

11. It is contended by the appellant that it's company is entitled for the benefits of the provisions of section 115VO under the Tonnage Tax Scheme. The AO has made this addition

stating that the drilling of Oil is the main operation and it is not provided in the Act that drilling and exploration of Oil will be the shipping income, to be included in computation of income under Tonnage Tax Scheme. It is further stated that just because they are treated as ships, it is not acceptable that income derived is exempt under Tonnage Tax Scheme. After detailed discussions, the AO disallowed the benefits of provisions of Section 115VO. In its submission, as reproduced above, the appellant contends that it is dully entitled for such benefits, relying upon the order of Hon'ble Delhi High Court for the A.Y. 2006-07 & 2007-08, which was further followed by the lower authorities and allowed the relief to appellant. The addition has been made as SLP has been filed by the Department, on this issue before Hon'ble Supreme Court.

12. The Id. CIT(A) followed the order of Id. CIT(A)-5, Delhi for the A.Y. 2014-15 dated 17.11.2016 in the case of appellant where on similar issue, relying upon the decision of Hon'ble High Court, the appeal has been allowed with following remarks:-

"I have considered the issue and perused the order of the Hon'ble High Court available at pages 1 to 8 of the paper book wherein the High Court considered its earlier decision in Jagson International (214 CTR 227) wherein the 'Deepsea Madrill' vessel owned or leased by the assessee was held to be ships for the purposes of section 33AC. It was noted that the vessel owned by the assessee was a qualifying ship in terms of clause(a) of section 115VD and the very nature of the activity in which the assessee engaged is to carry out operations at

different places, whereby necessarily, at least for a short duration, the vessel had to be stationed at one place. In these circumstances, the court held that the revenue's contention that the vessel is nothing but 'off shore' installations had no merit. Since the Hon'ble High Court has rendered the findings in the appellant's own case for the A.Y. 2006-07 & 2007-08, that the appellant is taxable under the provisions of Chapter XIIG, no change in the facts and circumstances are brought out by the AO in the assessment order vis-a-vis those years, it is held that the benefit of the said Chapter is to be allowed to the appellant. It may be mentioned here that on specific requisition by the undersigned the AR has filed an additional paper book enclosing herewith the computation of total income filed with the return of income and the computation of such income separately in respect of shipping unit and port infrastructure unit. The relevant certificates of registration, tonnage certificate, mobile offshore drilling unit (MODU) safety certificate, and all other such certificates in respect of the three vessels namely Deepsea Matdrill, Deepsea Fossil and Deepsea Fortune have also been filed. Although not discussed by the AO in the Assessment Order perusal of these certificates show that the three vessels owned by the appellant are of the same nature as that of the Deepsea Matdrill on which the Hon'ble High Court rendered its decision, Accordingly, ground no. 7 is allowed."

13. Accordingly, looking to the similarity in the facts and circumstances of this case and following the judgment by Hon'ble Delhi High Court in the case of appellant, the Id. CIT(A) held that this addition deserves to be deleted for the year under

consideration also. Hence, we decline to interfere with the order of the Id. CIT(A).

MAT provisions:

14. The appellant also disputed this addition for Rs. 94,05,22,432/- under the MAT provisions, stating that the same is not attracted under MAT as it is not provided under section 115JB of the Act. In this regard it has referred to the findings of various judicial authorities and the order of CIT(A) for the A.Y. 2014-15 dated 17.11.2016.

15. The Id. CIT(A) for the A.Y. 2014-15 that the then CIT(A) has allowed the appeal in the case of appellant with the followings remarks:-

"This ground is consequential to the earlier ground wherein the issue of eligibility of the appellant company to be assessed under the provision of Chapter-XIIG has been upheld by the Hon'ble Delhi High Court for A. Y. 2006-07 & 2007-08. Following the above decision, my learned predecessors have allowed the appeals on this issue for the AYs 2008-09 to 2011-12, and I have allowed the appeals on this issue for the AYs 2012-13 & 2013-14. Section 115VO clearly provides that the book profits derived by the Tonnage Tax company shall be excluded from the books of the company for the purposes of section 115JB. Accordingly the AO is directed to exclude the income derived from shipping activities from the computation of books profits for the both the years."

16. The Id. CIT(A) held that income of assessee is taxable under provisions of section of Chapter XIIG of the Act, and since income of shipping unit is exempt u/s 115V-I of the Act, in view of section 115VO of the Act, same is liable to be excluded from the computation of book profit under section 115JB of the Act. Since, the decision of the Id. CIT(A) is inconsonance with the provisions of the Act, we decline to interfere with the order of the Id. CIT(A).

Disallowance of interest:

17. This addition has been made by the AO as appellant company has provided interest free loans amounting to Rs. 11,63,62,793/- to its subsidiary companies due to the reason that there is no business exigency for advancing these loans and the appellant has incurred substantial interest expenditure towards its borrowed fund.

18. It is contended by the appellant that this issue is duly covered for the AY 2010-11 & 2011-12 by the decision of Hon'ble ITAT, where the revenue appeal was dismissed and no further appeal was filed on this issue before the Hon'ble Delhi High Court. In subsequent years, the then CIT(A) has allowed this issue in appeal.

19. This issue has been found duly covered by the order of CIT(A) dated 23.08.2018 for the appellate order in AY 2015-16 where in the Ld. CIT(A) has deleted the addition holding as under:

"The disallowance of proportionate interest of Rs. 98,14,547/- calculated in account of interest free loans to M/s. Jagson Airlines Ltd. in which it had major shareholding out of financial cost of Rs. 33,38,73,122/- claimed by it for the purpose of its business. For the AY 2013-14 and AY 2012-13 the same issue was examined by my predecessor. While deleting the aforesaid addition it was observed as under:

"1. It is submitted that assessee has running account with its subsidiary M/s Jagson Airlines Limited and at the end of the year there was outstanding debit balances of Rs. 56,64,204/- & Rs. 16,90,627/- respectively. Learned AO has disallowed interest @ 12% of these balances on the ground that since assessee has paid interest on the loans obtained by it and aforesaid sum has been given out of the common pool and there is no commercial expediency. It is submitted that before making the impugned addition the learned AO has failed to prove the nexus between the funds borrowed and the funds advanced to the subsidiary. The learned AO has not established that borrowed funds alone were advanced to the subsidiary. The Hon Gujarat High Court in the case of CIT vs. RL Kalthia Engineering Automobiles (P) Ltd. Reported in (2013) 33 taxmann.com (GUJ) has held that where there was no nexus between the borrowed funds and the funds advanced to the sister concern, the disallowance would not be justified. A similar view has been taken by the Mum Bench of ITAT in the case of Dy.CIT vs. Kukreja Development COL (2007) 161 Taxmann 199 (Mum)(Mag) has held that where the AO had not established nexus between interest bearing borrowed funds and interest free advances

given by assessee, the disallowance of interest would not be justified. Further, in the case of CIT vs. Reliance Utilities and Power Ltd. reported in 313 ITR 340, High Court of Bombay held that if there were funds available both interest free and overdraft and/or loans taken, then a presumption would arise that investment would be out of the interest free funds generated or available with the company, if the interest free funds were sufficient to meet the investments." Further reliance is placed on the following judicial pronouncements:

That once the advances has been made out of own funds on which no interest has been paid, no disallowance can be made by invoking section 36(1)(iii) of the Act without establishing the nexus between the payment of interest and loan advanced.

- a) ITA No. 1231 with CM 16759/2009 dated 02.12.2009 CIT vs. Jet Air Pvt. Ltd.*
- b) 260 ITR 637 (Del) CIT vs. Tin Box Co.*
- c) 177 Taxman 300 (Del) CIT vs. DCM Ltd.*
- d) 184 Taxman 352 (Del) CIT vs. H.B. Stock Holdings Ltd.*
- e) 313 ITR 340 (Bom) CIT vs. Reliance Utilities and Power Ltd.*
- f) 29 SOT 531 (Mum) Metro Exports Ltd. vs. ITO*
- g) 20 SOT 47 (Mum) Tata Finance Ltd. vs. ACIT*
- h) 194 CTR 451 (All) CIT vs. RadicoKhaitan Ltd.*

The Id. CIT(A) held that the Hon'ble Supreme Court while giving judgment in the case of Madhav Prasad Jatia V. CIT, (SC) 118 ITR 200 has established that the expression "for the purposes of Business & Profession" occurring in Section 36(1)(iii) is wider in

scope than the expression occurring in Section 57(iii), meaning thereby that the scope for allowing a deduction under Section 36(1)(iii) would be much wider than the one available under Section 57(iii). This phrase, as held in many legal pronouncements, is the most important yardstick for the allowability of deduction under Section 36(1)(iii) of Income Tax Act, 1961. While explaining the meaning of this phrase, the Hon'ble Supreme Court in the case of S. A. Builders Ltd. Vs. CIT reported in 288 ITR 1 has used the word "commercial expediency". By using this phrase Hon'ble Supreme Court has given a new dimension and clarified the concept further. In the judgment the Supreme Court has defined commercial expediency as "an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure, if it was incurred on grounds of commercial expediency". Further, following this judgment, the High Court of Delhi, in the case of Punjab Stainless Steel Industries vs. CIT 324 ITR 396, has further elaborated "The commercial expediency would include such purpose as is expected by the assessee to advance its business interest and may include measures taken for preservation, protection or advancement of its business interests, which has to be distinguished from the personal interest of its directors or partners, as the case may be. In other words, there has to be a nexus between the advancing of funds and business interest of the assessee-firm. The appropriate test in such a case would be as to whether a reasonable person stepping into the shoes of the

directors/partners of the assessee-firm and working solely in the interest of the assessee-firm/company, would have extended such interest free advances. Some business objective should be sought to have been achieved by extending such interest free advances when the assessee-firm/company itself is borrowing funds for running its business".

20. Thus, following three conditions are sine qua non for allowance of a claim for deduction of interest under this provision:

- (i) The money, that is capital, must have been borrowed by the assessee.
- (ii) It must have been borrowed for the purpose of business.
- (iii) The assessee must have paid interest on the borrowed amount i.e. he has shown the same as an item of expenditure.

21. The main argument of the AR is that the loans and advances are for business activities, the appellant being a major share holder in Jagson Airlines with long term business relationship. The aircraft belonging to the appellant company were being run by the said airline on lease basis for last many years and advance had been also taken for the airline for business purposes in the past, on which no interest had been charged. The AO has disallowed the interest on loan without recording any finding that the interest bearing loan had been diverted by the appellant for providing interest free advances to the sister concern. It is not the case of the A.O that the interest

free funds available with the appellant were not sufficient to advance the interest free money in question, as the appellant has shown a profit of Rs. 64,93,03,890/- (before tax) and had reserves and surplus of Rs. 464 Crores.

22. In accordance with the legal position u/s 36(1)(iii) the assessee is entitled to claim interest expenditure incurred for its purposes of business. As already stated above, the loans and advances have been established to have been made by the appellant for business purposes only and no personal nature of any kind has been attributed by the AO nor does it emerge from the assessment proceedings. The AO has presumed that the appellant has made the interest free advances from out of borrowed funds but perusal of the balance sheet for the A.Y 2012-13 shows that the appellant had stocks (net of sundry creditors) of Rs. 34.99 crores as well as additions to fixed assets of Rs. 784.32 crores and sundry debtors of 59.09 crores, which shows that the borrowed funds have been utilized for the business purposes. The reserves and surplus of the appellant as well as share capital is to the extent of Rs. 500 crores. The AO has not established any nexus between the borrowed funds and the interest free advances which is essential for making such a disallowance. In this regard the jurisdictional Delhi High Court and various other Courts in the citations mentioned below have held that, where the capital of the company and the interest-free funds with the assessee far exceeded the amounts advanced to the sister concerns or related parties, then no disallowance can be made u/s 36(1)(iii) of the Income Tax Act

in respect of interest on loans and borrowed funds utilized for the purpose of business:

- CIT vs. Gautam Motors 45 DTR 89 (Del)
- CIT vs. Bharti Televenture Ltd. 51 DTR 98 (Del.)
- CIT vs. Dalmia Cement (Bharti) Ltd. 29 DTR 138 (Del)
- CIT vs. Reliance Utilities & Power Ltd. 313 ITR 340 (Bom)
- Satish Katta vs. Asstt. CIT 13 DTR 237 (JP 'A')
- Madhu Industries Ltd. vs. ITO 43 DTR 23 (Ahd D)

23. In the case of Hero Cycles Pvt. Ltd. (Civil Appeal No. 514 / 2008 dated 5.11.2015) the Supreme Court has held that, so long as there is nexus between the expenditure incurred and the purpose of the business of the subsidiary company (which need not necessarily be the business of the assessee itself), the revenue cannot justifiably claim to put itself in the arm chair of the business man or in the position of the board of directors and assume the role to decide how much is the reasonable expenditure having regard to the circumstances of the case. In the said decision, the Hon'ble Supreme Court approved of the view taken by Delhi High Court in Dalmia Cement Pvt. Ltd. (254 ITR 377) and disapproved of the Punjab & Haryana High Court decision in the case of Abhishek Industries (286 ITR). Incidentally in the case of Hero Cycles, it was found that the interest liability of the assessee towards the bank on borrowings made had no bearings on the issue as otherwise, the assessee had sufficient funds of its own to advance the funds to the sister concern. Under such circumstances it was for the AO to establish such nexus between the borrowings and advances to prove that the

expenditure was for non-business purposes, which the AO failed to do. In the present case also, it is found that the appellant has sufficient funds of its own which he could have advanced and therefore the interest liability on the borrowings made could not be disallowed, particularly when the AO failed to prove that the expenditure was for non-business purposes.

24. Accordingly, it is held that no notional interest can be attributed towards the interest free advances made during the impugned year. The decision of the Id. CIT(A) is affirmed.

Disallowance of Rs. 30,61,331/- on account of late deposit of PF& ESI:

25. Ground no. 6 relates to the disallowance of Rs. 30,61,331/- on account of late deposit of PF& ESI u/s 36(i)(va) of the Act as it was paid after due date as prescribed in the relevant Act.

26. It is contended by the appellant that this issue is covered by the decision of Hon'ble Supreme Court in the case of PCIT vs. Rajasthan State Beverages Corp Ltd. 84 Taxmann.com 185 dismissing SLP and confirming the decision of Rajasthan High Court reported in 84 Taxmann.com 173 following TRF Ltd. vs. CIT 323 ITR 397 SC. It is also stated that the payments have been made before the due date.

27. It was submitted by the appellant that since all the deposits have been made before the due date of filing of return of income, therefore, the same deserves to be allowed. The Id. CIT(A) deleted the disallowance.

28. The matter has attained finality by the order of the Hon'ble Supreme Court wherein it was observed that employers have to deposit the employee's contribution towards EPF/ESI on or before the due date for availing deduction. In the cases before the Hon'ble Apex Court, the employers had belatedly deposited their employees' contribution towards the EPF and ESI, considering the due dates under the relevant provisions of the Act. The Assessing Officer ruled that by virtue of Section 36(1)(va) read with Section 2(24)(x) of the IT Act, such sums received by the appellants constituted "income". It was held that those amounts could not have been allowed as deductions under Section 36(1)(va) of the IT Act when the payment was made beyond the relevant due date under the respective acts. The Income Tax Appellate Tribunal and later the Gujarat High Court dismissed the challenge against this order of AO. In appeal, the court noted that the Kerala High Court has also ruled in favour of revenue on this issue whereas the Hon'ble High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi have favoured the interpretation beneficial to the assessee. The Hon'ble Apex Bench effectively reversed the judgment in Commissioner of Income Tax vs. Alom Extrusions Ltd. (1 SCC 489) relied upon by the assessee.

29. The Hon'ble Apex Court observed that there is a marked distinction between the nature and character of the two amounts viz., the employers' contribution and employees' contribution required to be deposited by the employer. The first one is the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it

is the deduction from the employees' income and held in trust by the employer. The Hon'ble Apex Court held as under:

"In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43 B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43 B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction."

30. As the issue of payment of employees contribution towards the PF has been ruled against the assessee by the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. vs.

Commissioner Of Income Tax-I in CA No. 2833/2016 vide order dated 12.10.2022. Hence, the appeal of the revenue on this ground is allowed.

ITA No. 6872/Del/2018 : A.Y. 2015-16

31. Interest free loans – Appeal of the Revenue on this ground is dismissed as in A.Y. 2016-17.

32. Disallowance u/s 14A – The Id. CIT(A) held that no exempt income has been earned by the assessee, hence, in view of the judgment of the Hon'ble Jurisdictional High Court in the case of Cheminvest Ltd. Vs CIT-IV (378 ITR 33), no disallowance is called for. Hence, we decline to interfere with the order of the Id. CIT(A).

33. Disallowance u/s 40(a)(ia) – TDS – This issue has been examined by the Id. CIT(A) and followed the order for the A.Y. 2012-13 and A.Y. 2013-14. The relevant part of the order of the Id. CIT(A) is as under:

"I have given careful consideration to the submissions made. At the outset it may be mentioned that the payments in question have been made to a non-resident and hence the provisions of section 40(a)(i) do not apply. Assuming that the AO meant to invoke the provisions of section 40(a)(i), which section is applicable for payment made to non-residents, it is seen from the invoices of the said party that the appellant requisitioned professional services rendered in connection with the issuance of water maker letter for the rig "Deep Sea Fortune", issuance of Suitability and jacking capacity for the rig "Deep Sea Treasure" for operations offshore India and for movement of the Deep Sea Matdrill from one location to another. The AR has

explained that the foreign personnel were deputed in order to carry out the appropriate survey and inspection of the Deep Sea Rigs that are used for the shipping operations and these personnel meet the stringent requirements and standards set by the ONGC. Undoubtedly the payments amount to fees for technical services which are ordinarily taxable under the provisions of section 9(l)(vii). In this view of the matter, the income accrued in the hands of the foreign resident as per section 5 sub section (2) of the IT Act. However, section 90(2) of the IT Act provides that where India has a DTAA with any other country, then in relation to the assessee to whom such agreements applies, the provisions of this Act shall applied to the extent they are more than beneficial to that assessee. In the present case it is seen that the foreign party M/s Noble Denton Middle East Ltd. (Dubai Branch) is based in Dubai in the United Arab Emirates and India has a comprehensive DTAA with UAE w.e.f. 22.09.1993, which was amended by notification No. SO 2001 (E), dated 28.11.2007 & notification no 29/2013 [F. No. 503/5/2004-FTD-II], dated 12.04.2013. Perusal of the current Double Tax Avoidance Agreement shows that the entire income of Noble Denton Middle East would be assessable as business profit as per article 7 in the UAE. This is because Middle Dental UAE does not have a permanent establishment (PE as decided under article of the DTAA). The appellant had been provided services by the Dubai Branch and not by the branches of Nobel Denton that are located within India. The AO has not brought anything on record to show that the Foreign Party to whom payment has been made, has a PE in India. As seen from the definition of 'PE' as given under article 5, sub-article (2)(i) includes furnishing of services including consultancy services, by an enterprise of one of the Contracting States through employees or other personnel in the other Contracting State, provide that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any twelve-

month period. Perusal of the invoices of Noble Denton Middle East reveals that the professionals rendered services ranging from period between 10 to 27 days. Accordingly even under sub-article (2)(i) of Article 5, The services rendered by the foreign consultants cannot be said to amount to a permanent establishment or a fixed place for a business through which the foreign enterprise carries out its business in India, wholly and partly. It is also seen that during the appellate proceedings relating to A.Y. 2011-12 my Ld. Predecessor considered the letter issued by Nobel Denton Middle East Ltd. clarifying that they did not have a permanent establishment in India as per Article 5 of the DTAA and were assessed to tax in the UAE. I also find from the tax audit report for the impugned years placed at pages 28 & 69 of the paper book that the auditors have clarified that no amount is inadmissible u/s 40(a). Keeping in view the above facts it is held that neither the provisions of section 40(a)(ia) nor 40(a)(i) are applicable. Ground no. 5 for both A.Ys. 2012-13 & 2013-14 are allowed.”

34. We find that the order of the Id. CIT(A) is based on the right interpretation of DTAA. Hence, we decline to interfere with the order of the Id. CIT(A).

35. The PF and ESI issue: The revenue has not filed any appeal against the deletion made by the Id. CIT(A) for the A.Y. 2015-16 but filed appeal on the similar issue for the A.Y. 2016-17. Since, no grounds has been taken by the Revenue, no adjudication is required.

CO No. 83/Del/2022 : A.Y. 2015-16:

36. In the CO, the assessee raised the issue of non-applicability of provisions of Section 115JB for the companies

liable to be taxed u/s 115VO. In view of the adjudication on the similar issue for the A.Y. 2016-17, we hold that the provisions of Section 115JB are not applicable in the case of the assessee.

37. The interest on the Income Tax Refund earned by the assessee has been unequivocally offered to tax during the assessment, hence no separate adjudication is required.

38. The appeal of the Revenue in A.Y. 2016-17 is partly allowed. The appeal of the Revenue in A.Y. 2015-16 is dismissed. The CO of the assessee in A.Y. 2015-16 is allowed.

Order Pronounced in the Open Court on 25/11/2022.

Sd/-

(C. N. Prasad)
Judicial Member

Dated: 25/11/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

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

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR