IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAHUL CHAUDHARY (JUDICIAL MEMBER)

ITA No. 2136/MUM/2014
Assessment Year: 2008-09

DCIT, Cir 6(1), R.No. 506, 5th floor, Aayakar Bhavan, M.K. Road, Mumbai-20.	***Vs.***	M/s Briggs Trading Co. Pvt. Ltd., 135, Continental Building, Dr. Annie Beasent Rd., Worli, Mumbai-400018. **PAN NO. AAACB 4674 J**
Appellant		**Respondent**

ITA No. 2269/MUM/2014
Assessment Year: 2008-09

M/s Briggs Trading Co. Pvt. Ltd., Fun Republic, 844/4 Shah Ind Estate Off New Link Road, Opp Laxmi Ind Estate, Andheri W, Mumbai-400053. **PAN NO. AAACB 4674 J**	***Vs.***	ACIT, Cir. 6(1), Aayakar Bhavan, Mumbai-400020.
Appellant		**Respondent**

ITA No. 2270/MUM/2014
Assessment Year: 2009-10

M/s Briggs Trading Co. Pvt. Ltd., Continental Bldg., 135, Dr. AB. Road, Worli, Mumbai-400018. **PAN NO. AAACB 4674 J**	***Vs.***	ACIT, Cir. 6(1), Aayakar Bhavan, Mumbai-400020.
Appellant		**Respondent**

Assessee by	**:**	Mr. Dalpat Shah & Mr. B.S. Sharma
Revenue by	**:**	Mr. Ujjawal Kumar Chavan, Sr. DR
Date of Hearing	**:**	21/12/2023
Date of pronouncement	**:**	17/01/2024

ORDER

PER OM PRAKASH KANT, AM

These appeals by the assessee and Revenue are directed against two separate orders dated 23.01.2014 and 15.01.2014 passed by the Ld. Commissioner of Income-tax (Appeals)-14, Mumbai [in short 'the Ld. CIT(A)'] for assessment years 2008-09 and 2009-10 respectively. As common issue-in-dispute is involved in these appeals, therefore, same were heard together and disposed off by way of this consolidated order for convenience.

2. The grounds raised by the assessee in the appeal for assessment year 2008-09 are reproduced as under:

> *1. The Ld Commissioner of Income tax (Appeals) - 14, Mumbai (Hereinafter referred to as "Ld CIT(A)) has erred on facts, in law and in the circumstances of the case in confirming the action of the Ld Assessing Officer (Ld A.O.) in disallowing Rs.132,86,85,561/- including Interest of Rs.7,96,85,561/- as bad debts or write offs under Section 36 of the Income Tax Act 1961 (Hereinafter referred to as "the Act").*
>
> *2. The Ld CIT(A)) has erred on facts, in law and in the circumstances of the case in confirming the disallowane of notional interest of Rs.95,21,457 / - on investments in equity shares worked out under Rule 8D of the Income tax Rules 1962 r w Section 14A of the Act.*

3. Briefly stated facts of the assessee for assessment year 2008-09 are that it filed return of income on 29-09.2008 declaring loss of Rs.(-) 141,02,70,137/-. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. The assessee company claimed to be a non-banking

financial company. The assessee claimed that it was engaged in the business of financing, trading of securities, lending and borrowing of money etc. In the assessment completed u/s 143(3) of the Act on 30.12.2010, the Assessing Officer rejected the claim of deduction for bad debt u/s 36(1)(vii) of the Act in respect of three parties namely (i) M/s Digital Super High-way (Rs.575,259,040/-) ; (ii) M/s Classic Credit Ltd. (Rs.74,90,000/-) and (iii) M/s Classic Share & Stocking Broking Services Ltd. (Rs.44,26,521/-). In this manner total claim of deduction for bad debt amounting to Rs.132,86,85,561/- was disallowed by the Assessing officer. Further, the Assessing Officer also made disallowance u/s 14A of the Act and for certain amount of income mismatched with data of Annual Information Return (AIR). On further appeal, the Ld. CIT(A) allowed part relief to the assessee. Aggrieved both the assessee and the Revenue are before the Income-tax Appellate Tribunal (in short 'the Tribunal') by way of raising grounds as reproduced above.

4. Before us, the Ld. Counsel for assessee has filed a Paper Book in two volumes containing pages 1 to 286 and 287 to 305.

5. The ground No. 1 of the appeal of the assessee relates to disallowance of claim for bad debt of the assessee amounting to Rs.132,86,85,561/-. The facts qua the issue in dispute are that the assessee claimed deduction for bad debt written off Rs.132,86,85,561/-, which comprises of bad debt written off in respect of three parties, namely (i) M/s Digital Super High-way

amounting to Rs.575,259,040/-, which consist of principle amount of Rs.50 crores and interest of Rs.7.50 crores, (ii) advance to M/s Classic Credit Ltd. amounting to Rs.74,90,00,000/- for acquisition of shares of ABCL Ltd, (iii) the interest amount in respect of M/s Classic Share & Stocking Broking Services Ltd. amounting to Rs.44,26,521/-. The facts in respect of each party being different therefore, we are taking up claim of bad debt in respect of each party separately as under:

Digital Super Highway Pvt. Ltd.

5.1 The facts mentioned by the Assessing Officer in respect of the party are as under:

> *"a) Assessee company had made advance (loan) of Rs. 50.00 crores on 31.03.2001 to Digital Super Highway Pvt. Ltd. (DSHPL) Le. on the last date of Financial year and thereafter credited the interest for 1 day of Rs. 1,59,040/- on the said loan and also issued TDS certificates to the assessee company, which the assessee company has offered for taxation. From the next financial year i.e. A.Y. 2002-03, asssessee has provided interst @15% in its books of Accounts on accrual basis of Rs. 7.64 crores and shown the same in the Balance Sheet.*
>
> *The said company neither paid interest nor issued TDS certificate to the assessee company.*
>
> *After A.Y. 2002-03, assessee company came to know that DSHPL is in critical condition. Now the question arises:*
>
> *(i) Whether the assessee entered into any agreement with the DSHPL before giving loan to them.*
>
> *ii) Whether the assessee had analysed the creditworthiness of DSHPL by examining the B/s, P & L A/c, portfolio, modus operandi, goodwill etc.*
>
> *(iii) Whether the assessee had tried to verify the credentials of DSHPL.*

b) There is no doubt that the loan was intentionally given. The earning of interest income just for one day is just to make one of the eligible crieteria for claiming of Bad Debts, which would arise in future and that was in the mind of the management of the company. This advance, as admitted by the company, is towards the project cost and for that purpose SPV (Special Purpose Vehicle) was created. This SPV (DSHPL) was promoted by Essel Group, which is a sister concern of Briggs Trading. The purpose was to float an SPV for the project purpose for which the assessee company had contributed loans by way of inter-corporate deposit with the said company and interest was provided only in one year that too for one day i.e. 31/3/2001 as admitted by the company. However, it is confirmed that since 31/3/2002 the Company has not received any interest on the said inter-corporate deposit. According to the Company, interest was provided only for a day at Rs.1,59,040 on Advance of Rs.50 crores, and interest income for Rs.7,64,29,329 was provided for Asst year 2002-03.

d) The assessee-company has not also provided the copy of the Agreement and it could be that after 31-3-2001 or 31-3-2002 the SPV was floated for the project. Be that so, the company has also not demonstrated as to how after 31/3/2002 the interest was not receivable nor any profit had accrued to the company. It is on record that the company is following mercantile system of accounting and for a period of 6 years, it chose not to offer any income on the advance of Rs.56 crore. Hence, the advance is not in normal course of lending business and as informed, the advance was given for the purpose of entering into a Joint Venture with HFCL Group. This is more on a capital contribution towards the project cost and hence any loss or write-off of such amount would only be considered as capital loss and not allowable as trading loss, much less bad-debt.

e) The sections which governs the allowability of the bad debts is Section 36(1)(vii) r.w.s. 36(2). As per the provisions of the Income tax Act, no deduction by way of bad debts should be allowed unless such debt or part there of has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year or represents money lent in the ordinary course of business of banking for money lending carried on by the assessee. In view of the specific provisions governing the allowability of the bad debts, the claim of the assessee regarding allowability of bad debts in respect of advance is disallowed for the following reasons:

(i) No part of such debt has been taken into account in computing the income of any previous year.

(ii) No part of such debt represents money lent in the ordinary course of the business of banking or money lending as the assessee is not engaged in such business.

f) Even if we go by the plain reading of clause (vii) of section 36, the requirement for allowing deduction on account of bad debt is that the same has to be taken into account in computing the income of any previous year and the bad debt should be written off as irrecoverable. Mere debiting the amount is not sufficient. Writing off bad debts, without charging the same in the profit and loss account is not a write off at all. The assessee has failed to provide details with supporting evidences that the same have been taken into account in computing the income of any previous year. Therefore, no deduction is allowable u/s 36(1)(vii) of the Income Tax Act 61.

g) The onus to prove any claim made by the assessee is on the assessee himself as is held by the Apex Court in the case of CIT v/s Calcutta Sales Agency P Ltd (19 ITR 191). The assessee has not discharged his primary onus.

If the object of this loan was for the purpose of making Investment then the irrecoverability is certainly not allowable being a capital expenditure. Moreover, the assessee has not established by leading the necessary evidence in the assessment proceedings that the afore mentioned payment/advance was incurred for the business purpose of the assessee. In these circumstances, it has to be concluded that the advance was not incurred for the business purpose of the assessee. Hence an amount of Rs.57,66,51,369 is disallowed as deduction and added back to the total income of the company. For claiming the incorrect deduction of bad-debts which is prima-facie incorrect, Penalty u/s 271(1)(c) of the Act is initiated for this disallowance.

[Addition: Rs. 57,52,59,040]"

5.2 The Ld. CIT(A) upheld the disallowance for principle advance of Rs.50 crores and interest component credited in assessment year 2001-02 and assessment year 2002-03.

5.3 Before us, the Ld. Counsel for the assessee submitted that assessee is registered NBFC (copy of certificate on PB-222). He further referred to the norms of Reserve Bank of India for treating any loan as non-performing asset (NPA) and submitted that the party M/s Digital Super Highway Pvt. Ltd. failed to pay interest for consecutive two financial years and therefore, it was treated as NPA as per the prudential norms prescribed by the Reserve Bank of

India in respect of NBFC's. The Ld. Counsel referred to notification No. DFC 119/DG/SPT-98 dated January 31st, 1998 wherein non-performing asset means asset in respect of which interest had remained due for past six months. He further referred to clause 3 of said notification wherein it is prescribed that income including interest/discount or any other charges on NPA shall be recognized only when it is actually realized. The Ld. Counsel referred to section 36(1)(vii) and section 36(2) of the Act and submitted that the bad debt claimed by the assessee represented money lent in the ordinary course of business of money lending carried out by the assessee and therefore, assessee is eligible for deduction u/s 36(1)(vii) of the Act when said bad debt is written off as irrecoverable in the accounts of the assessee. The Ld. Counsel referred to the decision of Hon'ble Supreme Court in the case of PCIT v. Mahindra Engineering and Chemical Products Ltd. (2022) 136 taxmann.com 183 (Bombay) and decision of Hon'ble Delhi High Court in the case of CIT v. Tulip Star Hotels (2011) 11 taxmann.com 209 (Delhi). The Ld. counsel also referred to the CBDT Circular No. 12/2016 dated 30.05.2016 to support that once the assessee has written off any debt in its books of accounts, the assessee is eligible for deduction u/s 36(1)(vii) of the Act.

5.4 On the contrary the Ld. DR submitted that though the assessee claimed to advanced loan to the party in ordinary course of business, but the Assessing Officer has held the transaction as

sham transaction for the reasons that ***firstly***, no agreement between parties for advancing said sum was submitted before him, ***secondly***, no security was taken against the alleged loan transaction, no analysis of the loanee was made and **thirdly** , no measures for recovery of loan including any FIR etc. were made on the part of the assessee. The Ld. DR further submitted that the transaction was a colorable device to reduce the tax liability of the assessee. He submitted that the company to which the assessee had advanced money was floated as Special Purpose Vehicle (SPV) by the assessee alongwith Ketan Parekh group and Essel Group, who were engaged in security scams. He submitted that advance was made on the last day of the financial year for transfer of funds and interest for one day was only paid to the assessee and thereafter nothing was paid to the assessee. According to him, advance was not in the normal course of business and it was more in the nature of capital towards project cost. He submitted that assessee did not file balance sheet for financial years when loan was given. Further, the Ld. DR submitted that loan given to the party was never part of income of current previous year or earlier years and not lent in the ordinary course of business of assessee. The Ld. DR referred to the decision in the case of **Pr. CIT v. Khyati Realtors (P.) Ltd. [2022] 141 taxmann.com 461 (SC)**, wherein it is held that advance given not proved to be in ordinary course of business, is not allowable as bad debts.

5.5 We have heard rival submission of the parties and perused the relevant material on record. The assessee has made claim for bad debt in terms of section 36(1)(vii) of the Act. For ready reference relevant part of said section is reproduced as under:

> *"36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—*
>
> *(i) .....*
>
> *to*
>
> *(vi) .....*
>
> *(vii) subject to the provisions of sub-section (2), the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year:*
>
> *....."*

5.5.1 Further the section 36(2) of the Act is reproduced as under:

> *"(2) In making any deduction for a bad debt or part thereof, the following provisions shall apply—*
>
> *(i) no such deduction shall be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year, or* ***represents money lent in the ordinary course of the business of banking or money-lending which is carried on by the assessee****;*
>
> *....."*

5.5.2 Thus in view of the above provision, it is clear that no dispute is regarding written off of the loan u/s 36(1)(vii) of the Act. The dispute is regarding applicability of section 36(2) , which should be taken into consideration before invkong section 36(1)(vii)

of the Act. Under section 36(2) for any claim of the bad debt written off, first of all the said amount of debt should have represented as income of the assessee in the relevant previous year or earlier previous years. This condition is however is relaxed in case of the assessee where the debt represents money lent in the ordinary course of the business of the banking or money lending carried out by the assessee. In the case in hand, the assessee is claiming that debt or advances to the party represents money lent in the ordinary course of the business of the money lending of the assessee. Thus, in the case in hand, the issue in dispute is regarding the condition that whether the debt or advance represents money lent in the ordinary course of the business of the money lending of the assessee. According to the Assessing Officer, the money lent was in the nature of capital contribution by the assessee for the project of DTH/Telecom and for which said company M/s Digital Super Highway p Ltd was floated as special purpose vehicle. In the facts submitted by the assessee before the Assessing Officer it is mentioned that on 31.03.2000 i.e. relevant to assessment year 2001-02, the assessee company and HFCL Group by mutual understanding floated the company namely Digital Super Highway Pvt. Ltd. for executing project of DTH/Telecom in the field of information, entertainment and communication sector. It is further mentioned that both the assessee and HFCL group were to make financial participation by way of contribution to project cost and for that purpose the Digital Super Highway Pvt. Ltd. was floated for

carrying out said project. It is further mentioned that the assessee company contributed by way of inter-corporate loan by paying Rupees 50.00 crores to the said Digital Super Highway Pvt. Ltd. and provided interest of Rs.1,51,040/- @ 15% per annum for one day which was considered income for said year by the assessee company. In subsequent years i.e. Financial year 2001-02, the assessee provided interest @ 15% amounting to Rs.7,64,92,329/- on the outstanding loan and same was offered to tax during the assessment year 2002-03 and after the financial year 2002-03 when it was found that said company had critical financial condition and would not be able to pay even the principal amount, the assessee stopped charging interest and was pursuing recovery of interest so provided, but there was no response from the said company. In subsequent year, there was no trace of the company in the Register of the company and under the circumstances, in March 2008, the management of the assessee company decided to write off the loans and interest thereon as bad debt. In view of the above facts, the assessee claimed that to loan advanced was in normal course of business of money lending.

5.5.3 During the course of the hearing, the Ld. counsel for the was asked to explain as how many loans were advanced by the assessee other than the sum in question, in normal course of the business of money lending but no such details were provided. In the light of the facts mentioned by the assessee before the Assessing Officer , ,

we are of the opinion that the object of the assessee was to participate in the Special Purpose Vehicle for entry in DTH/ Telecom business and the advance was part of contribution of the assessee for the project. Thus, it cannot be said to be as money lent in the ordinary course of the business of the money lending of the assessee, more so when the assessee has failed to establish that money lending was an ordinary business of the assessee. Further, the Assessing Officer has questioned the money lent as a shame transaction as no written agreement has been presented by the assessee for advancing such a huge loans that too without any security. The Ld. Counsel for the assessee was asked to produce any agreement entered into with the said company but no such agreement was filed before us. Further, the Ld. DR submitted that the said SPV was part of the Ketan Parekh Group of companies and the source of the money received in the hands of the assessee for extending loan to SPV was received from the Ketan Parekh group companies and therefore, advancing the said sum by the assessee was only a colorable device to create business loss on account of bad debt in the case of the assessee. The ld. counsel for the assessee didn't rebut above factual observation. In the case of Mahindra Engineering and Chemical Products Ltd. (supra), the Hon'ble Court held that deposits made to the concerns were in the ordinary course of business and therefore eligible for deduction u/s 36(1)(vii) of the Act. However, in the case in hand, the assessee has failed to establish that the money lent was in ordinary course of

business of money lending of the assessee. Similarly, in the case of Tulip Star Hotels Ltd. (supra), also there was a finding of the Tribunal that money was lent in the ordinary course of the business of the money lending, which was carried out by the assessee. But in the case in hand, the assessee has not been able to establish that said money was lent in the ordinary course of business of money lending. In the case of **Khyati Realtors (P.) Ltd. (supra)**, the Hon'ble Supreme Court observed as under:

> *"17. It is evident from the above rulings of this court, that:*
>
> > *(i) The amount of any bad debt or part thereof has to be written-off as irrecoverable in the accounts of the assessee for the previous year;*
> >
> > *(ii) Such bad debt or part of it written-off as irrecoverable in the accounts of the assessee cannot include any provision for bad and doubtful debts made in the accounts of the assessee;*
> >
> > *(iii) No deduction is allowable unless the debt or part of it "has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year", or represents money lent in the ordinary course of the business of banking or money-lending which is carried on by the assessee;*
> >
> > *(iv) The assessee is obliged to prove to the AO that the case satisfies the ingredients of Section 36(1)(vii) as well as Section 36(2) of the Act.*
>
> *18. In the present case,* ***the record shows that the accounts of the assessee nowhere showed that the advance was made by it to M/s C. Bhansali Developers Pvt. Ltd. in the ordinary course of business.*** *Its primary argument was that the amount of □ 10 crores was given for the purpose of purchasing constructed premises. However, the amount was written-off on 28.03.2009. As noted by the CIT(A), there was no*

material to substantiate this submission, in respect of payment of the amount, the time by which the constructed unit was to be given to it, the area agreed to be purchased, etc. Equally, in support of its other argument that the amount was given as a loan, the assessee nowhere established the duration of the advance, the terms and conditions applicable to it, interest payable, etc. The assessee conceded that it had received interest income for the relevant assessment year. However, it could not establish that any interest was paid (or shown to be payable in its accounts) for the sum of 10 crores. Furthermore, there is nothing on record to suggest that the requirement of the law that the bad debt was written-off as irrecoverable in the assessee's accounts for the previous year had been satisfied. Another reason why theamount could not have been written-off, is that the assessee's claim was that it was given to M/s Bhansali Developers Pvt. Ltd. for acquiring immovable property – it therefore, was in the nature of a capital expenditure. It could not have been treated as a business expenditure. In A.V. Thomas and Co. Ltd., Alleppey v. The Commissioner of Income Tax, (Bangalore) Kerala10 this court held as follows:

> *"16. Now, a question under s. 10(2)(xi) can only arise if there is a bad or doubtful debt. Before a debt can become bad or doubtful it must first be a debt. What is meant by debt in this connection was laid down by Rowlatt J., in Curtis v. J. & G. Oldfield Ltd., (1925) 9 TC 319 as follows :-*
>
> *"When the Rule speaks of a bad debt it means a debt which is a debt that would have come into the balance sheet as a trading debt in the trade that is in question and that it is bad. It does not really mean any bad debt which, when it was a good debt, would not have come in to swell the profits."*
>
> *17. A debt in such cases is an outstanding which if recovered would have swelled the profits. It is not money handed over to someone for purchasing a thing which that person has failed to return even though no purchase was made. In the section a debt means something more than a mere advance. It means something which is related to business or results from it. To be claimable as a bad or doubtful debt it must first be shown as a proper debt…"*

19. In view of the above discussion, it is held that the assessee's claim for deduction of 10 crore as a bad and doubtful debt could not have been allowed. The findings of the ITAT and the

High Court, to the contrary, are therefore, insubstantial and have to be set aside."

(emphasis supplied externally)

5.5.4 In view of the aforesaid discussion, we are of the opinion that the assessee has failed to substantiate that debt represented money lent in the ordinary course of business of money lending of the assessee. Thus, the assessee failed to satisfy the conditions laid down u/s 36(2) of the Act and therefore not eligible for deduction u/s 36(1)(vii) of the Act in respect of above party.

Classic Credit Ltd (CCL). Rs.74.90 crores

6. The Assessing Officer disallowed the claim of the bad debt in respect of above party observing as under:

(a) Agreement has been made on Stamp Paper of Rs. 100/- in just one and half page and the deal of advance had been made of Rs. 75 crore for acquiring of equity share of ABCL (Amitabh Bachchan Corporation Ltd.).

(b) 2nd page of the said agreement clearly states that "CCL are in a process of acquiring 20.75% equity shares of AB Corporation Limited and CCL agrees to sell the same to the assessee.

This is very much evident that CCL had not in possession of the said shares of ABCL, though, BRIGGS had paid full amount as per agreement.

(c) Para No. 5 of the agreement states that

CCL have informed and represented to BRIGGS that CCL are absolute owners of the said shares...., which is contradictory to the earlier statement.

Now the focus point in this case is :

(i) Here again it is to be noted that whether the assessee company had tried to verify the credentials of CCL.

(ii) Whether any gurantee were obtained

(iii) Whether criminal case of breach of contract filed.

But assessee failed to provide any of the above queries.

After having perused the submissions made by the assessee-company it is transpired that the money was given only for acquisition of the equity shares of ABCL through Classic Credit. Out of Rs.75 crore only Rs.10 lacs was repaid and no income had been shown since the time advance was given. There is loss on account of non-receipt of equity shares of ABCL Corporation that loss can never be equated with trading loss. It is also to be borne in mind that this is not yet a stock-in-trade of the company and it is mere advance for acquisition of equity shares of ABCL thorough Classic Credit Limited and is nothing but advance for capital assets in the nature of shares.

Neither there is any transfer, extinguishment, loss of the existing capital asset, hence it can amount to only a capital loss and since there is no transfer of the shares of ABCL Corpn. It cannot even be termed as long-term capital loss as such!

The company has claimed proposition that this is a NBFC company and therefore provisions are to be made for irrecoverable advances in accordance with NBFC guidelines issued by Reserve Bank of India. However, BFC guideline do not override the provisions of Income-tax Act. A reference maybe made to ITAT Mumbai decision in the case of Concept Cabled Ltd. V/s Addi.CIT, Special Bench-28 in an identical issue wherein the Tribunal has held as under:

> *Section 36(1)(vii) of the Income Tax Act, 1961 - Bad Debts - Assessment year 1998-99 - Assessee, a non-banking financial company(NBFC), claimed deduction on account of provision for irrecoverable advances made in accordance with NBFC guidelines issued by RBI - Whether though assessee was required to make such provision as per directions of RBI but there being no direction issued by RBI regarding granting of deduction of such provision from taxation income, Explanation to section 36(1)(vii) would be applicable and, therefore, provision in question would not be allowable either as revenue deduction or as business loss - HELD yes*

Hence, taking the totality of facts and after taking into account the facts of matters, and having not included any income in respect of advance to Classic of R574.90 crore, the provisions of section 36(i)(vii) or Section 28 or 37(1) of the Act are applicable.

It is treated as Capital loss; hence bad debts of Rs. 74,90,00,000/- is not allowable and therefore is added back to the total income of the assessee. Penalty proceedings u/s 271(1)(c) is initiated for furnishing of inaccurate particulars of income."

6.1 The Ld. CIT(A) upheld the disallowance of the claim of the assessee. Before us, the Ld. counsel for the assessee submitted that it had paid entire consideration of Rs.75 crores to CCL as advance on 09.03.2001 for acquiring 20.70% equity shares of AB Corporation Ltd. which was valued at Rs.85 crores. According to the Ld. counsel for the assessee amount was advanced for the business of trading in equities on block deals and to earn profits, which could be seen as prior to agreement and bidding by any prospective buyers since the company was planning to go public at that time. He submitted that company had been carrying on the business of dealing in shares, advancing money for acquisition of block shares and agreement for purchase of shares was not for acquiring controlling interest /stake in the said company, therefore, decision to write off debt as not recoverable was a commercial decision on the part of the assessee company. The Ld. Counsel further argued as why said debt was considered as non-recoverable by the assessee. The Ld. counsel further relied on the decision of the Hon'ble Delhi High Court in the case of Mohan Meakin Ltd. v. CIT [2011] 11 taxmann.com 141 (Delhi), decision of the Tribunal Mumbai Bench in the case of Jackie Shroff v. ACIT [2019] 101 taxmann.com 455 (Mumbai-Trib.) and decision of Hon'ble Delhi High Court in the case of All Grow Finance and Investment (P.) Ltd. v. CIT [2012] 20 taxmann.com 260 (Delhi).

6.2 On the contrary, the Ld. DR submitted that assessee failed to satisfy the conditions of section 36(2) of the Act. He submitted that the amount claimed to have been written off as bad debt was never shown as income in any of the previous year including the current previous year. Alternatively, the debt did not represent money lent in the ordinary course of the business of the money lending of the assessee. Therefore, in absence of either of the conditions of section 36(2) of the Act satisfied by the assessee, the assessee is not eligible for claim of deduction for bad debt written off u/s 36(1)(vii) of the Act. The Ld. DR referred to the decision in the case of **Pr. CIT v. Khyati Realtors (P.) Ltd. [2022] 141 taxmann.com 461 (SC)**,

6.3 We have heard rival submissions of the parties on the issue in dispute and perused the relevant material on record. For the purpose of eligibility of bad debt written off u/s 36(1)(vii) of the Act the assessee has to fulfill either of the two conditions of section 36(2) of the Act, ***firstly***, the amount of the bad debt claimed was shown as income in the current previous year or earlier previous year or ***secondly***, the debt in question represents the money lent in the ordinary course of business of banking or money lending. Axiomatically, the advance given to CCL for purchase or acquiring shares of ABCL has not been shown as income in previous year or earlier previous year and therefore, first part of the conditions section 36(2) of the Act is not satisfied. As far as second part of section 36(2) is concerned, the assessee claimed to have engaged in

the business of the money lending and therefore, for eligibility of deduction u/s 36(1)(vii) of the Act, the assessee is required to demonstrate whether the said advance represents the money lent in the ordinary course of the business of the money lending of the assessee. The advance has been claimed to be for purchase of shares of the ABCL as stock in trade in continuation of the trading activity in securities, therefore, in our opinion such an advance or debt does not fulfill the conditions of section 36(2) of the Act as it is not the money advanced in the ordinary course of the business of the money lending of the assessee. In the case of Mohan Meakin Ltd. (supra) non-recovery of the trade advances have been held to be business loss to be allowed as deduction u/s 28(1) and 37(1) of the Act. But in the instant case claim of the assessee is u/s 36(1)(vii) of the Act and therefore, ratio of the said decision is not applicable over the facts of the instant case. Similarly, in the case of Jackie Shroff (supra) the Tribunal held that advance given by the assessee to be allowed as deduction u/s 37(i) of the Act or u/s 28(i) of the Act as business loss. In the case of All Grow Finance and Investment (P.) Ltd. (supra) also, the Hon'ble High Court held that when the amount of debts in question were advanced by the assessee in ordinary course of money lending same was allowable. In the case in hand, money has not been advanced in the ordinary course of the money lending therefore, the said ratio of the decision is not applicable in the instant case. In view of the aforesaid

discussion, we uphold the disallowance of bad debt in respect of advance to Classic Credit Ltd.

Classic Shares and Stock Broking Services Ltd.

7. In the case of above party, the Assessing Officer has disallowed the claim of the bad debt in respect of interest component on the loans to Classic Shares and Stock Broking Services Ltd. The Assessing Officer recorded that in the records for assessment year 2007-08, the assessee has nowhere mentioned in the balance sheet that amount of Rs.44,26,521/- was receivable. The assessee however has claimed that said interest was shown as income in earlier previous year and therefore, the assessee is entitled for deduction of the claim invoking section 36(2) of the Act, where said debt is shown as income in earlier previous years. The Ld. counsel for the assessee was directed to produce documentary evidence to support the claim that said interest income was shown income as earlier previous year(s), however no such evidences were produced before us. In the interest of substantial justice, we feel it appropriate to restore this issue back to the file of the Ld. Assessing Officer with the direction to the assessee to produce necessary evidence in support of claim that said amount of the debt was shown as income in earlier previous year(s). The Ld. Assessing Officer is directed to verify the above claim of the assessee and allow in accordance with law.

8. The ground No. 1 of the appeal of the assessee is accordingly partly allowed for statistical purposes.

9. The ground No. 2 of the appeal of the assessee relates to disallowance of Rs.95,21,457/- in terms of section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962.

9.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, the Ld. counsel for the assessee submitted that disallowance u/s 14A should be limited to the extent of the exempted income in view of the decision of the Hon'ble Delhi High Court in the case of PCIT v. **Caraf Builders & Construciotn (P.) Ltd. [2019] 101 taxmann.com 167 (Delhi)** . He further submitted that a SLP filed against the same by the Revenue has been dismissed by the Hon'ble Supreme Court as reported in (2019) 112 taxmann.com 322 (SC). The Ld. DR on the other hand, submitted that before the Ld. CIT(A) the assessee mainly claimed that the investment was in the nature of stock-in-trade and therefore no disallowance should have been called for, which has been rejected by the Ld. CIT(A) following the decision of the **Third Member of the Tribunal in the case of DH Securities Pvt. Ltd. (supra).** We find that Hon'ble Supreme Court in the case of Maxopp. Investment Pvt. Ltd. as reported in (2018) 91 taxmann.com154(SC) has held that S. 14A applies irrespective of whether the shares are held to gain control or as stock-in-trade, however, where the shares are held as stock-in-trade, the

expenditure incurred for earning business profits will have to be apportioned and allowed as deduction. However, as far as the claim of the assessee for restricting the disallowance to the extent of dividend income is concerned, same has been upheld by Hon'ble Delhi High Court in the case of Caraf Builders & Construction (P.) Ltd.(supra). The relevant finding of the Hon'ble High Court is reproduced as under:

> *"25. Total exempt income earned by the respondent-assessee in this year was Rs.19 lakhs. In these circumstances, we are not required to consider the case of the Revenue that the disallowance should be enhanced from Rs. 75.89 crores to Rs.144.52 crores. Upper disallowance as held in Principal Commissioner of Income Tax vs. McDonalds India Pvt. Ltd., ITA 725/2018 decided on 22nd October, 2018 cannot exceed the exempt income of that year. This decision follows the ratio and judgment of the Supreme Court in the case of Maxopp Investments Ltd. vs. CIT (2018) 402 ITR 640 (SC) and the earlier judgments of the Delhi High Court in Cheminvest vs. CIT (2015) 378 ITR 33 and CIT vs. Holcim Pvt. Ltd. (2014) 272 CTR (Del.) 282. Relevant portion of the judgment in McDonalds India Pvt. Ltd.(supra) reads:-*
>
> *"8. The decision in the case of Maxopp Investment Ltd. (Supra) is significant and does answer the question in issue. This decision does not support the Revenue as the Assessing Officer in the case of Maxopp Investment Ltd. (Supra) had himself restricted the disallowance to the extent of exempt income. After referring to Walford Share and Stock Brokers P. Ltd. (Supra) it was held-*
>
> *"Axiomatically, it is that expenditure alone which has been incurred in relation to the income which is includable in total income that has to be disallowed. If an expenditure incurred has no causal connection with the exempted income, then such an expenditure would obviously be treated as not related to the income that is exempted from tax, and such expenditure would be allowed as business expenditure. To put it differently, such expenditure would then be considered as incurred in respect of other income which is to be treated as part of the total income."*
>
> *10. The decision of the Delhi High Court in Holcim India Pvt. Ltd (Supra) had referred to the issue whether disallowance of expenditure under Section 14A of the Act would be made even when*

no exempt income in the form of dividend was earned in the year, and it was observed:

"14. On the issue whether the respondent-assessee could have earned dividend income and even if no dividend income was earned, yet Section 14A can be invoked and disallowance of expenditure can be made, there are three decisions of the different High Courts directly on the issue and against the appellant-Revenue. No contrary decision of a High Court has been shown to us. The Punjab and Haryana High Court in Commissioner of Income Tax, Faridabad Vs. M/s. Lakhani Marketing Incl., ITA No. 970/2008, decided on 02.04.2014, made reference to two earlier decisions of the same Court in CIT Vs. Hero Cycles Limited, [2010] 323 ITR 518 and CIT Vs. Winsome Textile Industries Limited, [2009] 319 ITR 204 to hold that Section 14A cannot be invoked when no exempt income was earned. The second decision is of the Gujarat High Court in Commissioner of Income Tax-I Vs. Corrtech Energy (P.) Ltd. [2014] 223 Taxmann 130 (Guj.). The third decision is of the Allahabad High Court in Income Tax Appeal No. 88 of 2014, Commissioner of Income Tax (Ii) Kanpur, Vs. M/s. Shivam Motors (P) Ltd. decided on 05.05.2014. In the said decision it has been held:

"As regards the second question, Section 14A of the Act provides that for the purposes of computing the total income under the Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. Hence, what Section 14A provides is that if there is any income which does not form part of the income under the Act, the expenditure which is incurred for earning the income is not an allowable deduction. For the year in question, the finding of fact is that the assessee had not earned any tax free income. Hence, in the absence of any tax free income, the corresponding expenditure could not be worked out for disallowance. The view of the CIT(A), which has been affirmed by the Tribunal, hence does not give rise to any substantial question of law. Hence, the deletion of the disallowance of Rs.2,03,752/- made by the Assessing Officer was in order" .

15. Income exempt under Section 10 in a particular assessment year, may not have been exempt earlier and can become taxable in future years. Further, whether income earned in a subsequent year would or would not be taxable, may depend upon the nature of transaction entered into in the subsequent assessment year. For example, long term capital gain on sale of shares is presently not taxable where security transaction tax has been paid, but a private sale of shares in an off market transaction attracts capital gains tax. It is an undisputed position that respondent assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement etc. cannot be ruled out and is not an improbability. Dividend may or may not be declared. Dividend is

declared by the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. When declared, it is subjected to dividend distribution tax."

11. Decision in Holcim India Pvt. Ltd (Supra) was followed and elaborated in Cheminvest Ltd. (Supra)."

9.1.1 Further, the Hon'ble High Court has also held that further disallowance under Rule 8D(2) the investment which has yielded dividend income are only to be considered and not the average value of entire investment. Respectfully following the above decision of the Hon'ble Delhi High Court, we restore the issue in dispute back to the file of the Ld. Assessing Officer for restricting the disallowance in accordance with law.

10. Now, we take up the appeal of the Revenue for AY 2008-09. The relevant grounds raised by the Revenue for assessment year 2008-09 are reproduced as under:

1 "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the A.O to verify the claim of the assessee as regards the reconciliation of AIR data which amounts to setting aside the matter to the A.O which the Ld.CIT(A) is not empowered to."

2 "The appellant prays that the order of CIT(A) on the above grounds be set aside to the file of AO or confirm the order of the AO.

10.1 The facts in brief qua the issue in dispute are that the Assessing Officer observed difference in the amount of interest received from following three parties as compared to the information received by him on the basis of the Annual Information Return:

Name of the parties	*Amt. of Int as per AIR*	*As per books*
Uddar Tree Growing P Ltd	*32,17,285*	*33,60,520 Excess*
Harnit Cyberways P Ltd.;	*40,31,164*	*40,31,964 okay.*

Aashima Chemicals & Dyechem	*27,36,644*	*Int paid 1,14,10,581 Received is NIL*

10.2 The Ld. CIT(A) directed the Assessing Officer to verify the claim. Before us, the Ld. DR submitted that as per provisions of law, the Ld. CIT(A) is not authorized to restore any matter back to the Assessing Officer for verification.

10.3 We have considered rival submission of the parties on the issue in dispute. It is a matter of verification whether the assessee has shown income of interest in respect of those parties and therefore, we feel it appropriate to restore this issue back to the Assessing Officer. The direction of the Ld. CIT(A) are accordingly set aside. The ground of appeal of the Revenue is accordingly allowed for statistical purposes.

11. Now we take up the appeal of the assessee for assessment year 2009-10. The relevant ground raised is reproduced as under:

> *1. The Hon'ble Commissioner of Income tax (Appeals)-14 (hereinafter referred to as " the CIT(A)") erred in law, on facts and in the circumstances of the case in upholding the action of the Learned Assessing officer (Hereinafter referred to as "the Ld A.O.") in disallowance of Rs. 1,82,37,369/- u/s 14A rwr 8D of the Act,*

11.1 Before us, the Ld. counsel for the assessee has filed a Paper book containing pages 1 to 95. The Ld. counsel referred to page 51 of the Paper Book and submitted that the assessee made *suo-motu* disallowance u/s 14A of the Act of Rs.6,16,923/- towards investment yielding dividend and Rs.1,24,21,428/- in respect of

stock. The relevant note below the computation of income available on page 53 is reproduced as under:

COMPUTATION OF THE INCOME

Amt in Rs.

LIST OF LOANS & ADVANCES GIVEN, SHARE APPLICATION MONEY PAID ETC., ON WHICH INTERES DISALLOWABLE IS GIVEN IN THE ANNEXURE ATTACHED HERETO FOR THE REASONS BELOW:

NOTES TO TAX RETURN OF BRIGGS TRADING CO PVT LTD., A Y 2005-06:

1. Interest disallowances u/s 14A of the Income tax Act 1961 is restricted, UNDER PROTEST, to the funds ut for investments in preceding years in equity shares of Zee Telefilms Ltd., held as investments & Essel Prop held as stock in trade interest at average rate of 10% p.a. is considered while working out of such disallowances, only on the equity shares yielding dividend during the year, without f to our submissions and interest as above. We state that Sec 14A is not applicable to such investments and st trade since not held for earning dividend but intend to gain on capital appreciation, liable to tax if STT is n The stock in trade of shares since not held for earning dividend but intend to make profits or gain on tradin which is liable to income tax, are out side the perview of the provisions of the said Section 14A. A note atte

2. The company is in the business of trading in securities, promotion of new companies in the field of Enterta communication, media, both print & satellite, Disk TV, Cable, telecommunication, etc., by financial partici advancing of loans, whether interest free or with interest or equity or preference share participation etc., hence, all the advances for strategic investment in projects or new companies and also the share application paid for the purposes of allotment of equity shares, are considered as advances for business purposes, heni interest on notional or assumed basis is considered for disallowable under Section 36(1)(iii) or any other pr of the IT Act 1961.

3. No administrative expenses to earn the dividend can be disallowed, since there is no cost relatable to the e: of dividend, since its either credited directly to the bank account or is received by a cheque without any acl from receipient's end. Hence there is no cost to earn the tax free dividend,

4. The investments in equity shares and stock in trade yield both taxable and non-taxable income and there is provision under Section 14A or others to disallow the interest on assumed or notional basis on the funds di for making such investments or stock in trade. Hence, is not considered for such disallowances.

5. We further annex hereto a note on the above points and also rely on the decision of the Hon'ble Supreme Court in the case of Hon'ble Supreme Court decision in the case of Rajasthan Warchousing Corporation Ltd., (242 TR 450), Bombay High Court decision in the case General Insurance Corporation of India as reported in 254 ITR 204, Laxmi Agents Pvt Ltd., 125 ITR 227, Hon'ble High Court, in the case of CIT vs Alok Paper Industries (1982) 138 ITR 739 (M.P.), Seth Banarsi Das Gupta c CIT / 1977] 106 ITR 559 , CIT v. Indian Bank Ltd. (1965) 56 ITR 77 (SC).CIT v. Devichana Uttamchand (1984) 145 ITR 530 (Bom), Supreme Court in V.M. Salgaonakar and Bros. Pvt .Ltd. [2000] 243 ITR 293 (SC)."

11.2 The Assessing Officer computed the total disallowance of Rs.1,76,20,446/- invoking Rule 8D of the Income-tax Rules, 1962 which consist of indirect interest disallowance of Rs.1,73,19,924/- under Rule 8D(2)(ii) and administrative disallowance @ 0.5% of average investment amounting to Rs.3,00,522/- invoking Rule 8D(2)(iii) of the Rules. However, the Assessing Officer in final computation of income, reduced *suo-moto* disallowance by the assessee and made addition to the extent of Rs.51,99,018/- only. The Ld. CIT(A) following the decision of the Third Member of the Tribunal in the case of DH Securities Pvt. Ltd. (supra) rejected the contention of the assessee for not making disallowance in respect of shares treated as stock in trade.

11.3 Before us, the Ld. Counsel for the assessee referred to the decisions which were referred by him while arguing the relevant ground for assessment year 2008-09.

11.4 We have heard rival submission of the parties and perused the relevant material on record. The issue in dispute raised in the year under consideration is identical to the issue of disallowance u/s 14A of the Act raised in assessment year 2008-09 and therefore,

following our finding in assessment year 2008-09 on the issue in dispute, we restore the matter back to the Ld. Assessing Officer for deciding in accordance with law. The relevant ground of appeal of the assessee is allowed for statistical purposes.

12. In the result, the appeal of the assessee for assessment year 2008-09 is allowed partly for statistical purposes whereas appeal of the assessee for assessment year 2009-10 and appeal of the Revenue for assessment year 2008-09 are allowed for statistical purposes.

Order pronounced in the open Court on 17/01/2024.

Sd/-	**Sd/-**
(RAHUL CHAUDHARY)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 17/01/2024
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai