

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER**

**AND**

**SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NOs. 3708 & 3707/MUM/2023  
(A.Ys: 2013-14&2014-15)**

Aczet Private Limited Plot No. 15, Unit No. E02, CEP Zone MIDC MarolOpp. Speez Andheri (E), Mumbai – 400093  <b>PAN: AABCC3800G</b>	v.	DCIT-Circle 4(1)(1) Aayakar Bhavan Mumbai 400020
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA NOs. 3868 & 3869/MUM/2023  
(A.Ys: 2013-14 & 2014-15)**

ACIT - Circle 4(1)(1) Room No. 649, Aayakar Bhavan M.K. Road, Mumbai – 400020	v.	Aczet Private Limited Shop No.3, Pushpanjali Building Gaushala Lane, Malad (E) Maharashtra – 400097  <b>PAN: AABCC3800G</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee Represented by</b>	<b>:</b>	<b>Shri Satish Mody</b>
<b>Department Represented by</b>	<b>:</b>	<b>Shri Manoj Kumar Sinha</b>
<b>Date of conclusion of Hearing</b>	<b>:</b>	<b>27.03.2024</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>05.04.2024</b>

## **ORDER**

### **PER BENCH**

1. These appeals are filed by the assessee and revenue against different orders of the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld. CIT(A)"] dated 23.8.2023 for the A.Y. 2013-14 and 2014-15.

2. Since the issues raised in all these appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order.

### **ASSESSEE APPEALS**

#### **ITA No. 3708/MUM/2023 (A.Y. 2013-14)**

3. Assessee has raised following grounds in its appeal: -

1. *The Learned CIT(A) NFAC has erred in law and on facts in confirming the disallowance of Rs. 5,98,549/- being commission/incentives paid to staff members which was debited to commission account without properly considering the facts of the case that the appellant company has compensated the staff for putting their hard work and which was also considered for taxability of salary of employees.*
2. *The learned CIT(A) NFAC has erred in law and on facts in confirming the disallowance of expenses u/s. 14A amounting to ₹.2,77,702/- without properly considering the facts that the major portion of disallowance is deemed interest expenses of Rs.2,23,012/- without considering the facts and submissions that the appellant has its own interest free fund available for investment.*

4. We proceed to dispose off the appeal by adjudicating the issues ground wise.

5. We observe that Ground No.1 is similar to the Ground No.1 raised by the revenue in ITA No. 3868/MUM/2023 (A.Y. 2013-14) and we proceed to adjudicate the issue together. Ground raised by the revenue is reproduced below: -

*"1. "Whether on the facts and in the circumstances of the case and in law the Ld.CIT(A) is justified in deleting the addition made by the AO on account of nongenuine commission payment without appreciating the fact that during the assessment proceedings, the assessee has not replied to the query raised by the AO as to how the commission recipients were in contact with the assessee, the exact technical qualification and expertise and the place of rendering the services, also the assessee was not able to reply to the query regarding how the non-payment Of commission would have affected the business of the assessee as the transactions are one time and specific order based and also supply to SBI is on principal to principal basis as per the reply of the assessee?"*

6. Brief facts relating to the grounds are during the course of the assessment proceedings, Assessing Officer observed from the profit and loss account an amount of ₹.50,42,143/- was found to be debited to the profit and loss account. It was noticed that the commission amount was paid to various individuals and other parties. In this regard, the assessee only filed credit notes and no explanation as to why the commission was paid and how the persons were competent to whom the commissions

were paid, were not furnished. Assessee could not submitted the details as called for. Therefore, a show cause letter dated 21.03.2016 was issued, the contents of the notices are reproduced as under: -

*"From the perusal of details furnished for Commission:*

- a *Commission has been paid to PareshVora HUF Rs. 8,41,666/- and Arpita P. Vora Rs. 8,25,000/-:- Kindly furnish the bills raised by them alongwith the ledger A/C. : -*

*No bill raised by the parties submitted till date. Only credit note issued by the assessee have been submitted.*

- b *Padhiyar&Mahidar trading LLP And Keon Trading LLP:- Kindly furnish the bills raised by them alongwith the ledger A/c.*

*No bill raised by the parties submitted till date. Only credit note issued by the assessee have been submitted.*

- c *Credit notes issued by the assessee company's West Bengal Branch or commission on sale to SBI branches as under:*

Sr. No	Name	Model	No	Ass. Value	Comm.	Location	Amt.
1.	ArpitaVora	Cube	15	8250000	825000	Malad	550000
2.	Pawankumar	Cube	17	8925000	892500	Valsad	525000
3.	Rajesh Trading co	Cube	10	5775000	5521250	V.P.rd. Mumbai	57500
4.	P.B Vora HUF	Cube	16	8416660	841666	Malad	558853
5.	P & M trading	Cube	8	4200000	420000	Mulund	525000
6.	Keon trading LLP	Cube	7	3675000	367500	Ghatkopar	525000
7.	S.S. Tiwari	Cube	6	3100000	310000	Opera House	516617
8.	JayshreeThakkar	Cube	3	1800000	f80000	Kandivali	600000
9.	Jitendra Tiwari	Cube	3	1660000	166000	No add	553333

*In this regard, kindly furnish the agreement entered with SBI to supplying CUBE and justify the payments made to the above*

*persons in form of Commission on these transactions, also furnish the ledger account of these persons.*

*No bill raised by the parties submitted till date. Only credit note issued by the assessee have been submitted.*

*In this regard the sales of CUBE to SBI is out of order procured by floating tender and reaching to the successful bid, the assessee had made business with SBI and generated revenue. The contract entered into is Principal to Principal. Under these circumstances the submission of the assessee with the support of mere filing of credit note mentioning 10% on assessable value seems to be evasive. In order to prove the genuineness of these transactions for its allowability as business expenditure the assessee needs to show the following with evidences for the recipients of commission 1) How these persons were in contact of the assessee 2) What is the exact nature of work done by the them 3) The Invoices raised by them 4) What is the technical qualification/ expertise of these persons to render services due to which they received commission 5) The basis of the calculation of commission 6) Whether they are one-timers or such commissions were paid in any previous year or subsequent year? If yes, provide the details thereof. 6) Produce some persons randomly from the list provided before the undersigned for examination.*

*Inability to provide the above details showcause why the relating to the commission paid should not be disallowed.*

*d. In case of sales to Inter gold Gems Pvt Ltd, commission is paid to 2 parties (a) Deepak Kumar Rs. 24,000, bill no 102 dated 23.04.2012 and (b) Parle Global on bill no.081dated 5.7,2012. The fact is that Inter Gold Gems Pvt. Ltd is assessee's old customer which is evident from the details of services income filed by the assessee( Annexure -3), in which service charges of Rs. 128,888 is received by the assessee. Kindly justify the commission paid to these two entities in light of the above referred facts. No bill raised by the parties submitted till date. Only credit note issued by the assessee have been submitted.*

*e. Kindly furnish details of commission paid to others Rs. 1,42,507/-*

*No bill raised by the parties submitted till date. Only credit note issued by the assessee have been submitted.*

7. In response, assessee vide letter dated 28.03.2016, submitted the ledger accounts, ITR and credit notes for the parties to whom the commission had been paid. Further, the reasons to pay such commission was described by the assessee in the following manner, the extract of which is reproduced as under:

*"We would like to state that SBI was already buying our competitors machines at individual branch level in various states before this tender. So the above persons informed us that they were able to convince SBI to amalgamate their individual requirement of each branch in different states into a big single requirement. This made us give SBI a competitive offer and also made us understand that they had done really outstanding work, With due regards to your point, the contract has been entered on e Principal to Principal basis in the normal course of business. However, merely because the contract has been entered on principal to principal basis does not mean that the commission payment was not necessary. The above persons have done all the grass root level work and all the ground work because of which it was possible for us to get an order of such big magnitude. It would be appreciated that getting an order at such big level and that too a Government Bank Order requires a lot of ground work which expertise was possessed by the above persons. We had never handfed such single big orders in the past The above persons were going to take care of generating the requirement, demonstrating our products as end when required through our engineers, make sure our products has all the compliance needed to the requirement best suited to SBI and also helped us in each stage of filling of tender till execution of order. The tender requirement was proposed after 1.5 to 2 years of leg work and meeting with SBI persons at AGM levels in various states along with demonstrating the products. It was business decision to offer them 10% commission which we firmly state helped us grab such a huge order from nowhere. Unfortunately, we did not have competent marketing staff who could handle such work which includes PR, compliance, demonstration (with our engineer) liasioning work in a Govt. sector which is a very special job.*

- 1. We have been participating in various exhibitions / trade shows such as GGJS , IIUS, Indian Bank Association expo*

*etc These persons to whom the commission has been paid came to know through their sources the prospect of our Gold Testing Assaying Machine (Model: CUBE) in Agri business of SBI and upon sourcing through exhibitions 1 industrial shows / Internet found Citizen as one of the Vendors who had the technology and capacity to supply Gold Testing Machine*

- 2. They did leg work in the market for almost 1.5 to 2 years after which tender was created and guided us in each and every step from filling the tender to arranging demonstration at different managerial levels of our machines with SBI and getting the same approved technically, They also assisted the company in managing transportation and timely delivery of the machines to the various locations of SBI spread all over Maharashtra, Goa & Andhra Pradesh in the initial stage and later on in other states also. They also assured that we could arrange timely installation & commissioning of the machines as well as getting our payments in their due time.*
- 3. We have attached the invoices raised by them as Annexure 2.*
- 4. Generally, these type of people are graduates and have marketing skills / expertise in getting such big orders for various companies. It is not necessary for these people to have technical skills, since once these people are aware about the basic features of the product, these people who are expert in marketing use their marketing skills to market the product of the assessee It will be appreciated that they were engaged in doing ground work and for that no great technical skill is required and such marketing skills are acquired over a period of time by gaining experience.*
- 5. Considering the efforts put in by these persons the management decided to impart with 10% as commission to them.*
- 6. The nature of such transactions is one time and this being a specific order they have been appointed and paid only for one time job.*
- 7. If you still fill that you need person for further examination even after above clarification than you may ask us.*

*Copy of ITR of parties are also attached for your reference, where your goodself may note that the commission income is offered to income tax by all the parties concerned and hence there are no evasion of tax from revenue point of view And considering the*

*collective nature of services provided for the single largest order in life received by our company. Hence request you not to disallow the commission expenses used for business.*

*We would like to state that all the above commission expenses are incurred for the purpose or the business of the assessee and are therefore u/s 37(1). The expenses are directly incurred for earning of income or the assessee and are therefore allowable. As a result of their efforts we were able to get this order and therefore the commission expense is allowable as deduction. Thus, we request your good self to allow the expenditure as deduction..\**

**8.** After considering the submissions of the assessee, Assessing Officer observed that despite the assessee was repeatedly asked to furnish the genuineness of the commission expenses incurred by the assessee, the assessee has chosen not to reply and not provided complete details for the same till 28.03.2016 i.e. at the fag end of the completion of the assessment proceedings. Thus the investigation over the genuineness of the commission could not be carried out in the case of the assessee by the undersigned. Accordingly, Assessing Officer proceeded to complete the assessment with the following observations:

- a *The bills of the commission parties appears to be prepared in a stereotyped fashion because the description of the work mentions "generating enquiry, liasoning and demonstration work for State Bank of India tender for gold testing assaying machine". The letter pads of these commissions receiving people are all generated out of the personal computer and no logo, nor a printed format of bitt are being seen. In one such bill pertains to Paresh B. Vora HUF. How an entity with an HUF status can render services for whom commission could become payable? No bills contain the area of the operation, the rate applied for charging the commission, the amount of sale transaction executed on which commission*

*became payable. Also nowhere it has been mentioned as in which bank branches the said persons have rendered their services.*

- b The figures appearing on such self-generated bills in odd figures without a rounded off figures. Such bills produced do not support to make belief that these bills are genuine in nature. The assessee had filed the copies of ITR returns of these commission receivers in order to justify that the amount paid by the assessee company has been taxed in the hands of the recipients and no loss to revenue has been caused.*
- c Admittedly, the assessee agreed that supply to SBI is on a principal to principal basis. Having agreed so, still the assessee steps out to say that commission payment was necessitated. This fact is very difficult to be digested because the assessee has not brought on record any linkage between the SBI and the assessee as to how the individuals were skilled and competent. The assessee has not produced any evidence to show that had such commission not paid the business of supply to SBI would have been hindered. With respect to the qualification and expertise of the person to whom the commission was paid, the assessee had made a general remark that they are graduates and have marketing skills expertise in getting such big orders for various companies. The agreement of the purchase order with SBI clearly shows that the rate decided with SBI includes all costs of incidental services such as transportation, insurance etc. upto various destination branches, which is reimbursable. In these circumstances, the assessee has not shown anything on record that the commission paid was also reimbursed by the SBI as per the contract signed with the SBI.*
- d In respect of the commission paid of Rs. 1,42,507/- names of 32 persons have been provided. Their addresses are not provided and even the vouchers and the bills of these individuals have not been provided. In the circumstances, without any evidences, merely providing the names do not substantiate the authenticity of these expenses. Therefore, Rs.1,42,507/-is not allowable.*
- e The commission paid to Mr. Deepak Kumar of Rs.24,000/- is supported with the assessee company's invoice number and date. The assessee has stated that the invoice raised in the name of M/s. Intergold Gems Pvt. Ltd is a very old*

*customer and Mr. Deepak Kumar is associated with this company and hence, the genuinity of this commission is ascertainable and hence, Rs.24,000/- is allowed.*

- f The bills of these persons produced as evidences itself shows that they are not persons of high skill to execute big orders for various companies. In other words, the bills of these persons indicate that they are not in any way established peoples.*
- g The assessee in its submission has categorically agreed that the transactions are one time and specific order based itself shows that the assessee company though established in this business need no requirement of the so-called expertise people to whom commissions were paid. This indicates that the so-called commission recipients have been used as a platform to generate cash on one hand and inflate the expenses on other hand.*

*3.4 Though asked in the show cause, the assessee company has not replied how the commission recipients were in contact with the assessee, the exact technical qualification & expertise, place of rendering the services.*

*3.5 The assessee company has not shown its own sales bills the name of the commission recipients in order to ascertain that the number of cube models sold to SBI determining their assessable value. A mere raising of credit notes after the sales is a pure after-thought only to inflate the expenses of the assessee company. The assessee company fails to understand the fact that the amount paid from its accounts do not directly yield tax to the revenue from the recipient because the recipient also reduces tax liability and only a miniscule amount of tax gets into the booty of the revenue. Thus, the stand taken by the assessee that the revenue is not affected, is not acceptable.*

*In view of the above discussion and the facts established regarding its ingenuity of commission expenses, except Rs.24,000/-, the balance amount of Rs.50,18,143/- (50,42,143 - 24,000) is disallowed and added to the total income."*

**9.** Aggrieved with the above order, assessee preferred an appeal before the Ld. CIT(A) and filed its submissions. After considering the submissions of the assessee, Ld. CIT(A) partly allowed the ground raised by the assessee.

**10.** Aggrieved, assessee and revenue are in appeal before us raising the above ground of appeal.

**11.** At the time of hearing, Ld.AR of the assessee submitted that Commission paid is partly allowed by Ld.CIT(A) in case of Paresh B. Vora HUF and Arpita P Vora. There are two Debit Notes for each person However, inadvertently Ld.CIT(A) has considered one Debit Note only in each case though both the Debit Notes and payment details were submitted with Paper Book and other small payments made to various parties for the sales to other customers not considered by Ld.CIT(A). The list of commission disallowed is on Page No 1 of Paper Book. He prayed that the issue may be sent back to Assessing officer for verification of the services rendered for which the commission has been paid.

**12.** On the other hand, Ld. DR submitted that the issue raised in the appeal is similar to A.Y. 2015-16 wherein the assessee made the payment to nine people and similar to A.Y. 2015-16 and agreed that this issue may be remitted back to the file of Assessing Officer. However, he submitted that services were not provided by the assessee and credentials of the suppliers are not provided.

**13.** Considered the rival submissions and material placed on record, we observe that the assessee has filed the information before the Ld.CIT(A) and based on that Ld.CIT(A) has given part relief to the assessee and even revenue has filed grievances that the facts were not properly verified and this needs to be verified whether the agents have actually performed the duties of an agent and their credentials were not verified. After considering the facts on record and both the counsels are of the view that this issue needs to be verified afresh, we deem it fit to remit this issue back to the file of Assessing Officer for fresh verification of the documents submitted by the assessee before the Ld CIT(A). Accordingly, we remit this issue back to the file of Assessing Officer with the direction to verify the evidences/documents as per law after giving proper opportunity of being heard to the assessee. In the result,

grounds raised by the revenue and assessee are allowed for statistical purpose.

**14.** With regard to Ground No. 2 which is in respect of 14A disallowance, brief facts relating to the ground are, during the course of assessment proceedings, Assessing Officer observed from Balance Sheet that the assessee is holding investments in shares and mutual fund, income from which does not or shall not form part of total income. The assessee ought to have made disallowance of expenditure in relation to the income which does not or shall not form part of total income as required u/s.14A in accordance with the provision of Rule 8D of the Income Tax Rules, 1962. Accordingly, assessee was specifically asked whether the assessee maintains separate books of accounts for ascertaining the investment made in exempt income instruments and the expenses relating towards earning exempt income. As the assessee showed his inability to provide such books of accounts, Assessing Officer was satisfied that the provisions of section 14A is applicable in the instant case.

**15.** Further, in the course of assessment proceedings, the assessee was asked to show cause as to why disallowance u/s.14A of the Act

should not be made in accordance with the provisions of Rule 8D in response to which it has been stated that the assessee has not incurred any expenditure towards earning of such exempt income.

**16.** Assessing Officer proceeded to complete the assessment by observing as under: -

- ❖ *The provision of sub-section (1) of Section 14A provides;*  
*"14A. For the purposes of computing the total income under this 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 this Act."*
- ❖ *The term "expenditure" occurring in Section 14A would take in its sweep not only direct expenditure but also all forms of expenditure regardless of whether they are fixed, variable, direct, indirect, administrative, managerial or financial.*
- ❖ *As regards the applicability of Rule 8D of the I.T.Rules, the Hon'ble ITAT in the case of Citicorp Finance (I) Ld. held that "...it is no longer open to the Assessing Officer to apply his discretion in computing the disallowance or make adhoc disallowance u/s.14A..." as "...sub-sections (2) and (3) seek to achieve the underlying objection of section 14A(1) that any expenditure incurred in relation to exempt income should not be allowed deduction..."*
- ❖ *The assessee's plea that it has not earned any exempt income during the year, hence the provision of Section 14A is not applicable to its case, is not acceptable in view of the clear position of law that the nomenclature of the heading of Rule 8D of the Rules, 1962 provides for 'method for determining amount of expenditure in relation to income not includible in total income'. The words used are "income not includible in total income", it is not "income not included in total income". There is a difference between the terms "not Includible" and "not included" as such. Moreover, part 'B' of clause (ii) of sub-rule (2) of Rule 8D also prescribes the average of value of investment, income from which does not or shall not form part of the total income, as appearing in*

*the balance sheet of the assessee, on the first day and the last day of the previous year. Thus, the intent of legislature is very much clear from the wordings used in the heading as well as Rule 8D itself so as to cover all the investments which might generate such an income either in the present or even in future, which is not includible in total income of the assessee.*

❖ *The disallowance would be justified even where there is no receipt of exempt income u/s. 10 in the year under consideration. As per provisions of Section 14A, actual earning of Income Is not sine qua non for deciding deduction of expenditure laid out or expended wholly or exclusively for purpose of such income.*

❖ *The Hon'ble Special Bench of ITAT, Delhi in case of Cheminvest Limited vs. ITO 317 ITR 86 (AT) had held that the disallowance u/s.14A can be made even if no exempt income is actually earned or received during the year from the investments in stock, shares, tax-free bonds, tax-free schemes of UT, other mutual funds and agricultural land, Investments in IOA/IOB eligible units by the main non-eligible units.*

❖ *Further, the CBDT vide Circular No.5/2014 (F.No.225/182/2013.ITA.II) dated 11.02.2014 has clarified that provisions of Section 14A of the Act can be invoked even in those cases where no income has been earned by an assessee which has been claimed as exempt during the financial year. The said Circular categorically stated that the legislative intent is to only that expenditure which is relatable to earning of Income and it therefore follows that the expenses which are relatable to earning of exempt income have to be considered for disallowance, irrespective of the fact whether any such income has been earned during the financial year or not.*

*5.3 Thus, having regard to the accounts of the assessee company of the previous year relevant to A.Y.2013-14, the Assessing Officer undersigned not satisfied with the correctness of the assessee's claim. Accordingly, the amount of expenditure disallowable u/s.14A of the Act in relation to such income is hereby determined in accordance with the provisions of Rule 8D of the Income Tax Rules, 1962 as under:-*

I.	The amount of expenditure directly relating to income which does not form part of total income	---	---
II.	Proportionate of interest expenditure computed in accordance with the formula given in rule 8D(2)(ii).	(A X B/C)	Rs. 1,55,174/-
III.	Amount equal to one-half percent of the average of the value of investment, income from which does not or shall not form part of the total income as appearing in the Balance Sheet of the assessee, on the first day and the last day of the previous year.	0.5% of Rs. 36.,31,210/-	Rs.18,156/-
Total expenditure disallowed u/s. 14A.			Rs. 1,73,330/-
Note			
I.	A = Interest (finance cost) = Rs. 36,31,210/- (net)		
II.	B = Average of exempt income-bearing investments = Rs.75,72,415/-		
III.	C = Average of total assets appearing in the Balance Sheet on the first and last day of the previous year = Rs.17,72,01,155/-		

*Thus, having regard to the accounts of the assessee company of the previous year relevant to A.Y. 2013-14, the undersigned is not satisfied with the correctness of the assessee's claim. The amount of expenditure attributable to the activity of investments, income from which is not includible in total income of the assessee company, is hereby determined in accordance with Rule 8D of the Income Tax Rules, 1962 at Rs. 1,73,330/-. Thus, the sum of Rs. 1,73,330/- is hereby disallowed u/s. 14A and the same is added to income as well as Book Profit of the assessee company in view of provisions of clause (f) of Explanation 1 to Section 115JB of the Act."*

**17.** Aggrieved, assessee preferred an appeal before the Ld. CIT(A) and filed detailed submissions. After considering the submissions of the assessee, Ld. CIT(A) dismissed the ground raised by the assessee.

**18.** Aggrieved with the above order, assessee is in appeal before us.

**19.** At the time of hearing, Ld.AR of the assessee submitted that no dividend or tax free income received during the year hence no expenses can be attributed to earning tax free income hence no disallowance under section 14A of the Act. Further, Ld.AR of the assessee submitted that own capital and free reserve is ₹.9.20 Crores which is much more than the investment in tax free securities, thus interest cannot be disallowed.

**20.** On the other hand, Ld. DR fairly accepted that assessee has not received any exempt income during this year.

**21.** Considered the rival submissions and material placed on record, we observed that the assessee has not received any exempt income from the investments made and as held by the Hon'ble Delhi High Court in the case of Cheminvest Limited *v.* CIT [378 ITR 33] held that if disallowance exceeds the exempt income the same should be restricted to the exempt income only. The Hon'ble Bombay High Court in the case of Pr.CIT *v.* M/s. Ballarpur Industries Limited in Income Tax Appeal No. 51 of 2016 dated 13.10.2010 rejected the appeal filed by the Revenue

holding that there is no substantial question of law, in upholding the view of the Tribunal that provisions of section 14A would not apply when there is no exempt income received or receivable during the relevant previous year. This bench is consistently holding that, the disallowance u/s. 14A of the Act shall not exceed exempt income and shall be restricted to the exempt income earned by the assessee. Therefore, we direct the Assessing Officer to delete the 14A disallowances.

**22.** In the result, appeal filed by the assessee is partly allowed.

**ITA No. 3707/MUM/2023 (A.Y. 2014-15)**

**23.** Assessee has raised following grounds in its appeal: -

*"1. The learned CIT(A) NFAC has erred in law and on facts in confirming the disallowance of Rs.11,07,600/- out of the commission payment of Rs.50,42,143/- without properly considering the facts that the appellant has submitted the details of names of the parties to whom the small payment of commission was made against the business services rendered by them. The learned CIT(A) NAFC has not asked the details during the appellate proceedings and suo moto observed in Para 5.3.2 that the entire commission paid including the other twelve agents is for the single order of State Bank of India Order without considering that there was other business on which the commission was paid.*

*2. The learned CIT(A) NFAC has erred in law and on facts in confirming the disallowance of expenses u/s 14A amounting to Rs.1,73,330/- without properly considering the facts that the major portion of disallowance is deemed interest expenses of Rs.1,55,174/without considering the facts and submissions that the appellant has its own interest free fund available for investment."*

**24.** Coming to the appeal relating to A.Y. 2014-15, since facts in this case are mutatis mutandis, therefore the decision taken in assessee's case for the A.Y. 2013-14 are applicable to this assessment year also. Accordingly, appeal filed by the assessee is partly allowed.

**25.** In the result, appeal filed by the assessee is partly allowed.

## **REVENUE APPEALS**

### **ITA No. 3868/MUM/2023 (A.Y. 2013-14)**

**26.** Revenue has raised following grounds in its appeal: -

1. *"Whether on the facts and in the circumstances of the case and in law the Ld.CIT(A) is justified in deleting the addition made by the AO on account of nongenuine commission payment without appreciating the fact that during the assessment proceedings, the assessee has not replied to the query raised by the AO as to how the commission recipients were in contact with the assessee, the exact technical qualification and expertise and the place of rendering the services, also the assessee was not able to reply to the query regarding how the non-payment Of commission would have affected the business of the assessee as the transactions are one time and specific order based and also supply to SBI is on principal to principal basis as per the reply of the assessee?"*

2. *"Whether on the facts and in the circumstances of the case and in law and Ld.CIT(A) is justified in deleting the addition made by the AO u/s. 37(1) of the Act, on account of bogus purchases without appreciating the fact that the assessee made purchases from tainted party which has been confirmed to be involved in accommodation entries by the DDIT (Inv)-III, Surat, in response to the commission issued by the Assessing Officer u/s.131(1)(d) and also during the assessment proceedings the assessee failed to discharge the onus Of proving genuineness of the transactions in question?"*

**27.** We proceed to dispose off the appeal by adjudicating the issues ground wise.

**28.** With regard to Ground No. 1 which is in respect of non-genuine payment of commission, this ground is similar to the ground raised by the assessee in its appeal for the A.Y. 2013-14 and we have adjudicated this ground while adjudicating the ground raised by the assessee in ITA No. 3708/MUM/2023 for the A.Y. 2013-14.

**29.** With regard to Ground No. 2, brief facts relating to this ground are, assessee filed its return of income on 30.09.2013 declaring total income at ₹.1,28,31,594/-. The case was selected for scrutiny and notices under section 143(2) and 142(1) of Income-tax Act, 1961 (in short "Act") were issued and served on the assessee along with questionnaire. In response, Authorised Representative attended and submitted the relevant information as called for.

**30.** Assessee company is engaged in the business of manufacturing, supply and after sales service of electronics weighing scales/balance and instruments.

**31.** During the course of the assessment proceedings, Assessing Officer observed that assessee has made purchases from Roshni Marketing, Jay Traders, Padmavati Corporation, Moksh Trading Company, Shubham Enterprise, D & Sons amounting to ₹.4,44,52,336/-. Assessee was asked to prove the genuineness of the purchases made from the dealers as referred in Assessment Order. In response assessee filed its submissions and submitted that the purchases made are genuine.

**32.** Not convinced with the submissions of the assessee, the Assessing Officer treated the purchases as non-genuine and he was of the opinion that assessee had obtained only accommodation entries without there being any transportation of materials and the assessee might have made purchases in the gray market. Accordingly, Assessing Officer treated the said purchases made for an amount of ₹.4,44,52,336/- for the A.Y.2013-14 as bogus and non-genuine purchases and added to the total income of the assessee.

**33.** Aggrieved, assessee preferred an appeal before the Ld. CIT(A) and filed detailed submissions. After considering the detailed submissions of the assessee, Ld. CIT(A) deleted the addition made by the Assessing

Officer and sustained the GP rate of about 6% on the basis of decision of Hon'ble Bombay High Court in the case of PCIT *v.* Mohammed Haji Adam & Co.

**34.** Aggrieved, revenue is in appeal before us raising the above grounds of appeal.

**35.** At the time of hearing, Ld. DR submitted that purchases are made from Surat and Assessing Officer has issued notices under section 133(6) of the Act to verify the genuineness of the purchases. However, notices were served and no suppliers were found. Therefore, he submitted that all these parties have only provided accommodation entries. He submitted that assessee has supplied counting machines to the SBI and assessee has claimed to have purchased software. He submitted that what sort of software purchased by the assessee from all these suppliers.

**36.** On the other hand, Ld. AR submitted that assessee has purchased all the counting machines and he brought to our notice Page No. 63 of the Paper Book wherein assessee has purchased only the machinery not the software. Further, he submitted that Ld. CIT(A) has confirmed

about 6% of the Gross profit and he further, brought to our notice Page No. 148 of the Paper Book which is the stock register maintained by the assessee and Ld.AR of the assessee submitted that assessee has properly recorded the various machineries / goods the purchases and sold by the assessee in proper stock register. However, he relied on the orders of the Ld. CIT(A).

**37.** Further, Ld. AR of the assessee filed its written submissions for the sake of clarity, the same is reproduced below: -

*"The CIT(A) has not fully deleted the purchases and restricted to disallowance of about 5% of total such purchases on account of additional Gross Profit in light of the decision of the Hon'ble Bombay High Court in the case of PCIT vs. Mohammad Haji Adam & Co. which is accepted by the appellant and not disputed in appeal filed by the appellant.*

*Gross profit percentage even after accounting the said purchases it much higher as compared to earlier years (Page No.206/207 of Paper book) which is again reproduced as under:-*

**Table 1**

**The gross profit earned by the appellant for last three year**

*[Rupees in crores]*

<b>Assessment year</b>	<b>Turnover</b>	<b>Gross Profit</b>	<b>% Gross Profit</b>	<b>Net profit</b>	<b>% Net Profit</b>
2010-2011	25.29	5.89	23.27%	1.08	4.27
2011-2012	20.13	6.15	30.54%	1.00	4.97
2012-2013	24.07	6.20	25.77%	0.77	3.20
2013-2014	27.12	9.16	33.78%	1.50	5.55
2014-2015	34.68	11.34	32.71%	1.60	4.64

*Purchases include body part and software for the purpose of machines manufactured which are the basic raw material for*

*manufacturing the machines. The assessee has given exact stock tally of the purchases with the product manufactured and sold or available in the closing stock. The assessee has also tiled the orders of the excise authority accepting the purchases."*

**38.** In view of the above submissions of the assessee, Ld.AR of the assessee prayed that the order of the Ld. CIT(A) may be sustained.

**39.** Considered the rival submissions and material placed on record. On a perusal of the order of the Ld.CIT(A), we find that the Ld.CIT(A) considered this aspect of the matter elaborately with reference to the submissions of the assessee and the averments in the Assessment Order and restricted the disallowance to profit ratio for the actual purchases for the year under consideration. While holding so, the Ld.CIT(A) observed as under: -

**"7.3.1.** *The appellant had purchased from the following concerns controlled by Shri. Bhimjibhai Shah and Shri. Jayant Chimanlal Shah, which by the investigation report of DGIT, Surat, were found to be indulging in bogus transactions:*

<i>Sr. No.</i>	<i>Name of the Party</i>	<i>Amount</i>
<i>1.</i>	<i>D &amp; Sons</i>	<i>9636246</i>
<i>2.</i>	<i>Padmavati Corporation</i>	<i>8496600</i>
<i>3.</i>	<i>Subham Enterprises</i>	<i>7636150</i>
<i>4.</i>	<i>Jay Traders</i>	<i>7629600</i>
<i>5.</i>	<i>Roshni Marketing</i>	<i>7213440</i>
<i>6.</i>	<i>Moksh Trading Company</i>	<i>3840300</i>
	<i>Total</i>	<i>44452336</i>

*These are purchases claimed by the appellant and not income attributed by the department. In this context, the onus lies on the appellant to prove the expenditure claimed. When the appellant filed, apart from his own accounts and ledgers, was the sales invoice, quantitative data and the gate pass/excise barrier entry. Simply account payee cheques being issued and confirmed, does not also substantiate the genuineness of the purchase as the modus operandi is exactly that – to show bank transaction to state there is a purchase. But the cash is returned later by the entry provider after taking his/its commission and providing a bogus bill. To state that this modus operandi that the vendors were following, did not apply to the appellant, the appellant has to prove that goods were actually received/delivered and to show that there were no cash withdrawals with vendor corresponding to cash deposits with the appellant.*

**7.3.2.** *The fact remains that the appellant did not provide for the direct evidence, i.e. to bring the other party and show its documents too on movement of goods, the money trail of their sales and purchases etc. However, even the circumstantial evidence such as transportation means and mode, amount paid, etc., is not there. The gate pass and excise barriers are not inductive of the software loaded into the equipment, which is claimed to be the main purchase from these concerns. Thus, for an expenditure in form of purchases claimed by the appellant, there is not sufficient proof provided by the appellant, as per the submissions available in the ITBA system. Further, the notices of the AO were not complied with by the said concerns and some returned back. Thus, concrete proof of the genuineness of the transactions is not there.*

**7.3.3.** *In light of the above, the AO's action of bringing to tax entire purchases is the only issue for consideration. The AO has relied upon some judicial decisions to establish that the onus is on the appellant. That being established, the issue is of how to treat the bogus purchases when books are accepted and the sales are accepted too.*

**7.3.4.** *The principal of taxing income on the non-genuine purchases, rather than adding the entire purchases is upheld by the decision of the jurisdictional High Court of Bombay in case of PCIT vs. M/s. Mohommad Haji Adam & Co. 103 taxmann.com 459 (2019), in which the Honourable Court observed as under*

*"...the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the*

*G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of N.K. Industries Ltd. (supra) cannot be applied without reference to the facts. In fact in paragraph 8 of the same Judgment the Court held and observed as under—*

*"So far as the question regarding addition of Rs.3,70,78,125/- as gross profit on sales of Rs. 37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6% gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66%. Therefore, considering 5.66% of Rs. 3,70,78,125/- which comes to Rs. 20,98,621.88 we think it fit to direct the revenue to add Rs. 20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue."*

*9. In these circumstances, no question of law, therefore, arises. All Income Tax Appeals are dismissed, accordingly. No order as to costs."*

**7.3.5.** *Thus, the Hon'ble Bombay HC, considering other judgements, had concluded that the gross profit ratio on purchases at the same rate of other genuine purchases has to be brought to tax. The position was reiterated in case of Principal Commissioner of Income-tax v. Nitin Ramdeoji Lohia<sup>145</sup> taxmann.com 546 (2022) wherein the Hon'ble HC remanded the matter back to the Tribunal to consider the issue of determining the gross profit ratio on the purchases found to be non-genuine. The court stated thus:*

*"We are in agreement with the view expressed by the CIT (Appeals) that, if the purchases are bogus, it would be impossible for the assessee to complete the business transaction and that if the purchase is bogus, the corresponding sale also must be bogus or else the transaction would be impossible to complete and as a necessary corollary, unless the corresponding sale is held to be bogus, the purchase also cannot be held to be bogus, rather it would be a case of purchase from bogus entities/parties. That view has been upheld by the Tribunal in principal while dismissing the appeal of the Revenue. In*

*view of the above, we are of the opinion that the questions of law proposed as (a), (b), and (c) in the appeal cannot be said to be substantial questions of law.*

*Insofar as the question of law framed as (d) is concerned, we find that the Tribunal has not addressed the issue of adopting the gross profit rate of 5% on the alleged Hawala purchase of Rs. 2.45 crores as against the rate of 0.69% declared by the assessee, despite the fact that the CIT (Appeals) had specifically gone into that question in its order dated 18th August, 2015 and had directed the A.O. to make 5% addition in the gross profit ratio, while deleting the balance addition."*

**7.3.6.** *These decisions are applicable to the current case as the facts and circumstances are similar because here too, only the part of purchases was questioned by the AO, without questioning the sales. The Hon'ble High Court of Bombay has taken the gross profit ratio on purchases at the same rate of other genuine purchases accepted by the department. The Honourable HC has consistently held onto this logic. In the very latest judgement in case of PCIT v. S.V.Jiwani 449 ITR 583 (2022), 290 Taxman 178(2022), the Court held thus:*

*"It also held that the A.O. had not disputed the turnover of the contract work executed by the assessee and that unless the assessee procured the materials and goods, if not from the declared sources but from some other sources, it would not be possible on the part of the assessee to execute work awarded by MCGM. The Tribunal, therefore, held that the entire purchase made by the assessee could not be added back as income, but only profit element embedded therein, be treated as income of the assessee.*

**7.3.7.** *The High Court of Gujarat in case of PCIT v.Surya Impex[2023] 148 taxmann.com 154 (Gujarat) also held that*

**11.** *Having found that the Assessing Officer has chosen not to reject the books of accounts of the assessee and had made the estimated additions of the pieces of the purchases. Both, the CIT (Appeals) and the Tribunal, have concurrently and rightly held to make the additions, which the CIT (Appeals) had done @ 12.5% of the impugned purchases,*

*which have been reduced and restricted to 6%. It will not be out of place to make a mention that the Assessing Officer's inquiry was based on the report of the Investigation Wing, Mumbai, the copy of the statement of Shri Bhanwarlal Jain and others had been asked for by the assessee, which also had not been provided nor was he allowed a cross-examination. This, of course, could have been a reason for the Authority concerned to restore the matter back to the Assessing Officer, however, noticing the elaborate evidence consisting the details of purchase, PAN, etc., coupled with the Assessing Officer and the CIT (Appeals) dealing with the case of Shri Bhanwarlal Jain and others involved therein, if addition directed of 6% of the disputed purchases by noting that the profit margin in the said industry is 5% to 7% without even going by the estimation of the possible profit margin in the industry, suffice to note that in all cases relating to Shri Bhanwarlal Jain, both, the Assessing Officer and the CIT (Appeals), Mumbai, have chosen to make addition @ 3% to 5% of the boguspurchases. That view of the matter, no purpose is going to be served in interference. There are concurrent findings with sound reasons.*

**12.** *This Court in Tax Appeal No. 200 of 2003 in case of Mayank Diamonds (P.) Ltd. (supra) was required to decide the estimation of the gross profit @ 12.5% against the gross profit of 1.03% shown by the assessee. The Court allowed the gross profit rate of 5% holding that 12.5% is drastically higher. In N.K. Industries (P.) Ltd. (supra), where the Court had considered the addition of entire amount on the ground that the fictitious purchases is a factually different than what was already held at Mayank Diamonds (P.) Ltd. (supra). In the other cases of Shri Bhanwarlal Jain also, addition rates are 3% to 5% where no further challenge possibly is there or it has not been processed further. This Court finds that no question of law, much less any substantial question of law arises for consideration of this Court."*

**7.3.8.** *Therefore, respectfully following the jurisdictional HC and other HC decisions, the calculation of gross profit on the bogus purchases of Rs. 26,11,034/- is upheld and not the entire addition of the purchase amount. Following the decision of the Hon'ble*

***Bombay HC, the AO is directed to calculate the gross profit on these bogus purchases based on the profit ratio for the other actual purchases in the year."***

**40.** On a careful perusal of the order of the Ld.CIT(A) and the reasons given therein, we do not find any infirmity in the order passed by the Ld.CIT(A) in restricting the addition to gross profit ratio of 5.87% of purchases as against 100% of the purchases disallowed by the Assessing Officer in the assessment year under consideration. Accordingly, ground raised by the revenue is dismissed.

**41.** In the result, appeal filed by the revenue is partly allowed as indicated above.

**ITA No. 3869/MUM/2023 (A.Y. 2014-15)**

**42.** Revenue has raised following grounds in its appeal: -

*"1. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is justified in deleted the disallowance of purchases of ₹.2,19,23,370/- made by the Assessing Officer under section 37(1) of the Act without appreciating the fact that the Assessing Officer during the assessment proceedings considered the same as bogus purchase when the assessee failed to discharge the onus of proving the genuineness of the transactions entered into with the party."*

**43.** Coming to the appeal relating to A.Y. 2014-15, since facts in this case are mutatis mutandis, therefore the decision taken in A.Y. 2013-14 are applicable to this assessment year also. Accordingly, appeal filed by the revenue is partly allowed as indicated above.

**44.** In the result, appeal filed by the revenue is partly allowed.

**45.** To sum-up, appeals filed by the revenue are partly allowed and appeals filed by the assessee are also partly allowed.

Order pronounced in the open court on 05<sup>th</sup> April, 2024.

**Sd/-**  
**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**

Mumbai / Dated 05.04.2024  
Giridhar, Sr.PS

**Sd/-**  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**