

आयकर अपीलीय अधिकरण 'ए' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य एवं
माननीय श्री मनु कुमार गिरि, न्यायिक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
AND HON'BLE SHRI MANU KUMAR GIRI, JM

आयकर अपील सं./ ITA Nos.9,10 & 11/Chny/2022
(निर्धारणवर्ष / Assessment Years: 2012-13, 2014-15 & 2015-2016)
&
C.O.Nos.5, 6 &7/Chny/2023
(in ITA Nos.9,10 & 11/Chny/2022)

The Income Tax Officer,
Corporate Ward 1(1)
Chennai 600 034.

Vs. M/s. Inspirisys Solutions Limited,
First floor, New Door Nos. 57,59,63 & 64,
Dowlath Towers,
Taylors Road, Kilpauk,
Chennai 600 010.

[PAN: AAACA 5622M]

(अपीलार्थी/Appellant)

(Respondent/ Cross Objector)

Department by

: Shri. Nilay Baran Som, IRS, CIT.
Shri. ARV Srinivasan, IRS, Addl. CIT

Assessee by

: Shri. N.V. Balaji, Advocate

सुनवाई की तारीख/Date of Hearing

: 20.06.2024

घोषणा की तारीख /Date of Pronouncement

: 26.07.2024

आदेश / ORDER

PER MANU KUMAR GIRI (Judicial Member)

These appeals filed by the Revenue under Section 253 of the Income Tax Act, 1961 ('Act') are against order of even date 29.10.2021 passed by the Ld. Commissioner of Income Tax (Appeal) (NFAC) Delhi [in short 'the CIT(A)'] for

Assessment Years 2012-13, 2014-15 & 2015-2016. The assessee has also filed cross objections for the above assessment years.

2. In three appeals viz; ITA Nos. 9, 10 and 11 of 2022 for AYs 2012-13, 2014-15 & 2015-16, the Revenue has filed a similar ground which reads as under:

"1. The order of the CIT(A) is contrary to law, facts and circumstances of the case.

2. The Ld. CIT(A) erred in giving relief to the Assessee, by relying on the decision in the case of CIT vs Smifs Securities Ltd when the facts of this case are distinguishable from the assessee's case where increase of market worth post merger / acquisition was not established.

3. The Ld.CIT(A) erred in not considering the fact that as per agreement dated 21.11.2021 between Assessee and seller there was a non compete clause which accounted for the excess consideration beyond the net value of assets, especially when the assessee had not produced evidence to link the excess consideration paid directly to goodwill.

4. The Ld. CIT(A) erred in providing relief to the assessee on the issue of Disallowance u/s. 14A by relying on the decision of Hon'ble High Court of madras in the case of Redington (India) Ltd vs Additional Commissioner of Income tax, Co. Range -IV, Chennai [2017] 77 taxmann.com 257 (Madras) wherein it is held that where there is no exempt income, there cannot be a disallowance of expenditure in relation to such assumed income.

5. The Ld.CIT(A) erred in considering the facts of the Circular 5/2014 of CBDT dated 11.02.2021 it has been clarified 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.

6. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored”.

3. In three of the cross objections filed by the Assessee i.e. CO Nos. 5, 6 and 7 of 2023 for AYs 2012-13, 2014-15 & 2015-16 the grounds of cross objections read as under:

For AY 2012-13:-

“1. The learned CIT(A) erred in upholding the disallowance of part of the depreciation claimed on application software.

2. The learned CIT(A) erred in not appreciating the fact that the assessee has acquired application software and no intangible assets was generated and these software are used for generating revenue to the company and as such are entitled to 100% depreciation.

3. The learned CIT(A) erred in upholding the disallowance of part of the depreciation claimed on temporary wooden structures on the following grounds:

a) The CIT(A) erred in holding that the assessing officer correctly concluded that the expenditures are not in the nature of temporary structures when in fact the assessing officer has mechanically disallowed the depreciation assuming the depreciation to be arising out of software.

b) The CIT(A) erred in not appreciating that the assessee had incurred expenditure on rented premises and once dismantled, the temporary structures would only become scrap and could not be reused.

c) The learned CIT(A) erred in not appreciating the fact that no new asset has come into existence on incurring the said expenditure.

d) The learned CIT(A) erred in upholding the disallowance merely on the ground that false ceiling and civil work partitions have a long life and are not temporary structures.

e) The learned CIT(A) erred in not appreciating the fact that building modification and interior design charges were incurred for creating temporary structure.

f) The learned CIT(A) erred in holding that interior design charges, building modification, etc. are not temporary structures.

g) Without prejudice to above grounds, the CIT(A) erred in upholding the disallowance on the ground that assessee has incurred a mixture of expenditure and further erred in not allowing 100% depreciation on that portion of the expenditure which are in the nature of temporary structures.

4. The learned CIT(A) erred in not appreciating the fact that the interest free loans given to subsidiaries are not out of borrowed funds.

5. The learned CIT(A) erred in confirming the disallowance of interest expenditure u/s 36(1) (iii) of the Income Tax Act, 1961 without appreciating the fact that the interest free loans were provided to subsidiaries which are extensions of the assessee's business and has been formed for the purpose of its business operations.

6. Assuming without admitting that there is an element of non-compete fee, the CIT(A) ought to have held that even then the assessee is entitled to depreciation on the same as such a fee gives rise to a right which falls within the meaning of "any other business or commercial right of similar nature".

7. *Without prejudice to above grounds, the learned CIT(A) ought to have granted deduction u/s 10AA of the Income Tax Act, 1961 in respect of the income resulting from disallowances made by the assessing officer.*

8. *For these and such other grounds that may be raised before or at the time of hearing”*

For AY 2014-15:-

1. *The learned CIT(A) erred in upholding the disallowance under section 36(1)(va) of the Income Tax Act, 1961.*

2. *The learned CIT(A) erred in not considering the allowability of deduction of employee's contribution to PF/ESI under section 37 of the Income Tax Act, 1961.*

3. *The learned CIT(A) erred in upholding the disallowance of part of the depreciation claimed on application software.*

4. *The learned CIT(A) erred in not appreciating the fact that the assessee has acquired application software and no intangible assets was generated and these software are used for generating revenue to the company and as such are entitled to 100% depreciation.*

5. *The learned CIT(A) erred in upholding the disallowance of depreciation claimed on temporary structures on the following grounds:*

a) *The CIT(A) erred in holding that the assessing officer correctly concluded that the expenditures are not in the nature of temporary structures when in fact the assessing officer has mechanically disallowed the depreciation assuming the depreciation to be arising out of software.*

b) The CIT(A) erred in not appreciating that the assessee had incurred expenditure on rented premises and once dismantled, the temporary structures would only become scrap and could not be reused.

c) The learned CIT(A) erred in not appreciating the fact that no new asset has come into existence on incurring the said expenditure.

d) The learned CIT(A) erred in upholding the disallowance merely on the ground that false ceiling and civil work partitions have a long life and are not temporary structures.

e) The learned CIT(A) erred in not appreciating the fact that building modification and interior design charges were incurred for creating temporary structure.

f) The learned CIT(A) erred in holding that interior design charges, building modification, etc. are not temporary structures.

g) Without prejudice to above grounds, the CIT(A) erred in upholding the disallowance on the ground that assessee has incurred a mixture of expenditure and further erred in not allowing 100% depreciation on that portion of the expenditure which are in the nature of temporary structures.

h) Without prejudice to above grounds, the CIT(A) erred in upholding the disallowance of entire depreciation of Rs. 53,16,359/- instead of allowing 10% depreciation as recorded by the assessing officer.

6. The learned CIT(A) erred in not appreciating the fact that the interest free loans given to subsidiaries are not out of borrowed funds.

7. The learned CIT(A) erred in confirming the disallowance of interest expenditure u/s 36(1) (iii) of the Income Tax Act, 1961 without appreciating the fact that the interest free loans were provided to subsidiaries which are extensions of the assessee's

business and has been formed for the purpose of its business operations.

8. Assuming without admitting that there is an element of non-compete fee, the CIT(A) ought to have held that even then the assessee is entitled to depreciation on the same as such a fee gives rise to a right which falls within the meaning of "any other business or commercial right of similar nature".

9. Without prejudice to above grounds, the learned CIT(A) ought to have granted deduction u/s 10AA of the Income Tax Act, 1961- in respect of the income resulting from disallowances made by the assessing officer.

10. For these and such other grounds that may be raised before or at the time of hearing".

For AY 2015-16:-

"1. The learned CIT(A) erred in upholding the disallowance under section 36(1)(va) of the Income Tax Act, 1961.

2. The learned CIT(A) erred in not considering the allowability of deduction of employee's contribution to PF/ESI under section 37 of the Income Tax Act, 1961.

3. The learned CIT(A) erred in upholding the disallowance of part of the depreciation claimed on application software.

4. The learned CIT(A) erred in not appreciating the fact that the assessee has acquired application software and no intangible assets was generated and these software are used for generating revenue to the company and as such are entitled to 100% depreciation.

5. The learned CIT(A) erred in upholding the disallowance of part of the depreciation claimed on temporary structures on the following grounds:

a) The CIT(A) erred in holding that the assessing officer correctly concluded that the expenditures are not in the

nature of temporary structures when in fact the assessing officer has mechanically disallowed the depreciation assuming the depreciation to be arising out of software.

b) The CIT(A) erred in not appreciating that the assessee had incurred expenditure on rented premises and once dismantled, the temporary structures would only become scrap and could not be reused.

c) The learned CIT(A) erred in not appreciating the fact that no new asset has come into existence on incurring the said expenditure.

d) The learned CIT(A) erred in upholding the disallowance merely on the ground that false ceiling and civil work partitions have a long life and are not temporary structures.

e) The learned CIT(A) erred in not appreciating the fact that building modification and interior design charges were incurred for creating temporary structure.

f) The learned CIT(A) erred in holding that interior design charges, building modification, etc. are not temporary structures.

g) Without prejudice to above grounds, the CIT(A) erred in upholding the disallowance on the ground that assessee has incurred a mixture of expenditure and further erred in not allowing 100% depreciation on that portion of the expenditure which are in the nature of temporary structures.

6. The learned CUT(A) erred in not appreciating the fact that the interest free loans given to subsidiaries are not out of borrowed funds.

7. The learned CIT(A) erred in confirming the disallowance of interest expenditure u/s 36(1) (iii) of the Income Tax Act, 1961 without appreciating the fact that the interest free loans were provided to subsidiaries which are extensions of the assessee's

business and has been formed for the purpose of its business operations.

8. Assuming without admitting that there is an element of non-compete fee, the CIT(A) ought to have held that even then the assessee is entitled to depreciation on the same as such a fee gives rise to a right which falls within the meaning of "any other business or commercial right of similar nature".

9. The learned assessing officer erred in making disallowance of Rs. 72 lakhs u/s 37 of the Income Tax Act, 1961.

10. The learned assessing officer erred in not appreciating that the expenditure got crystallized only during AY 2015-16.

11. For these and such other grounds that may be raised before or at the time of hearing'.

Background facts:-

4. The facts which lead to the filing of these appeals are that assessee filed its return of income for the Assessment Year 2010-11 on 29.11.2010 admitting total income of Rs.4,77,53,690/- after claiming exemption under section 10AA of the Act amounting to Rs.1,34,62,157/-. Income as per intimation u/s 143(1) dated 29.11.2010 is Rs.4,77,53,690/-. In tax computation, assessing officer ('AO' in short) added following additions:

i)	Disallowance u/s 10AA	:	Rs.29,84,746/-
ii)	Disallowance u/s 14A r.w. Rule 8D	:	Rs.29,84,746/-
iii)	Disallowance of excess depreciation on Software application	:	Rs.40,557/-
iv)	Disallowance of excess depreciation on temporary partitions	:	Rs.1,02,23,595/-
v)	Disallowance u/s 36(i)(iii)	:	Rs.36,22,201/-
vi)	Disallowance of depreciation on goodwill	:	Rs.3,17,83,754/-

FIRST WE WILL TAKE UP REVENUE APPEALS ISSUE WISE:-

5. Depreciation on goodwill:

Assessee had acquired the Software Business Division from Accel Transmatic Ltd (a listed Company), effective from 16.08.2011 on a slump sale. Assessee acquired the said business Division by paying Rs.21.97 crore as purchase consideration. Assessee valued the net assets of Division take over at Rs.5.88 crore. Appellant took the difference between the purchase consideration and the value of net assets taken over as "goodwill" an intangible asset and claimed depreciation thereon @25%. The AO after going through the business transfer agreement dated 11.11.2011 entered between the assessee and Accel Transmatic Ltd. came to a conclusion there was a non-compete clause therefore, the excess consideration paid over and above the net assets taken over was to refrain the seller from competing in this line of business. The Id.CIT(A) accepted the contentions of appellant that the difference between the cost of an asset and the total amount paid for transfer of the asset

should be considered as 'goodwill' and deleted the addition of Rs.3,17,80,754/- relying upon the judgment of the Hon'ble Supreme Court in the case of *CIT Vs Smifs Securities Ltd (2012) 348 ITR 302 SC*.

5.1 We have heard the rival submissions on this issue. Hon'ble Supreme Court in the case of *CIT Vs Smifs Securities Ltd (2012) 348 ITR 302 SC* at para 6 held as under:

"6. One more aspect needs to be highlighted. In the present case, the Assessing Officer, as a matter of fact, came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The Commissioner of Income Tax (Appeals) ['CIT(A)', for short] has come to the conclusion that the authorised representatives had filed copies of the Orders of the High Court ordering amalgamation of the above two Companies; that the assets and liabilities of M/s. YSN Shares and Securities Private Limited were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee-Company stood increased. This finding has also been upheld by Income Tax Appellate Tribunal ['ITAT', for short]. We see no reason to interfere with the factual finding".

5.2 The Id. DR raising the issue of 'non-compete fee' contented that during AY 2012-13, the assessee acquired software division of "Accel Transmatic Limited" on slump sale basis w.e.f. 16/8/2011 vide agreement dt.11/11/2011. In terms of clause 3, the consideration was fixed at Rs.15 crore (fixed portion) and further amount of

Rs.6.97 crore (variable portion). The variable portion was to be quantified at a later date and to be paid based on EBITDA to be achieved by the division in the remaining portion of FY 2011-12. The assessee also filed valuation reports wherein the entire unit has been valued at Rs.22.69 crore and Rs.20.44 crore respectively by two different valuers. The valuation report did not quantify any separate value for fixed assets and goodwill. The assessee claimed that fixed assets are valued at Rs.5.88 crore and excess amount of Rs.16.09 crore (Rs.21.97 crore-Rs.5.88 crore) was claimed as value of goodwill and depreciation was claimed @25%. In the assessment for the AY 2012-13, the AO has disallowed the claim of depreciation holding that the excess amount paid by the assessee over the value of asset represents 'non-compete fee'. For this, the AO has relied upon the agreement dt.11/11/2011 between the parties wherein a specific non-compete clause is included for 5 years vide Item No.13.9. For the purpose of reference, the relevant clause is reproduced as under:

"13.9 Entire agreement.

This agreement constituted the entire agreement between the parties and shall supersede all prior negotiations and correspondences between the parties on the subject matter thereof

.....

.....

ATL agrees that it will not directly or indirectly compete with AFL in its Embedded Software Business activities for a period of 5 years from the date of transfer of the business to KFL."

The Ld. CIT-Dr thus submitted that the payment was for non-compete fees and not a goodwill as claimed by the assessee. The Ld. CIT-DR further contended that the CIT(A) has merely deleted the disallowance by observing that the difference between the cost of asset and the total amount paid should be considered as goodwill following the decision of Hon'ble Supreme Court in the case of Smifs Securities Ltd [(348 ITR 302) (SC)]. In the said order, the Hon'ble Supreme Court observed as under: -

"Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act. Another aspect is that Ld. AO came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The CIT(A) has come to the conclusion that the authorised representatives had filed copies of the Orders of the High Court ordering amalgamation of the above two Companies; that the assets and liabilities of M/s. YSN Shares and Securities Private Limited were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee-Company stood increased. This finding has also been upheld by Income Tax Appellate Tribunal. We see no reason to interfere with the factual finding."

The Ld. CIT-DR thus submitted that the only question answered by the Hon'ble Supreme Court is that goodwill would eligible for depreciation. It has been

pointed out that no amount was actually paid towards goodwill and Revenue did not file any appeal on this point. Hence, Hon'ble Supreme Court did not answer the question raised that "if the difference between consideration paid and value of assets amounts to goodwill". It was further submitted by Id. DR that in the case of Smifs Securities Ltd. (supra), there was a finding of fact that the market worth of the transferee company stood increased post-amalgamation. There is no such finding in this case. In the present case, the agreement specifically mentions that it is a non-compete fee. The Hon'ble High Court, Delhi in the case of Sharp Business System (254 CTR 233) held that payment made towards non-compete fee is not eligible for depreciation observing that "The right can be asserted in the present instance only against L&T and in a sense, the right "in personam"..... 13. For the above reasons, this Court is of the opinion that the words "similar business or commercial rights" have to necessarily result in an intangible asset against the entire world.....". The present case is covered by exactly the same facts and hence the excess payment made by the assessee is only towards the non-compete fee. The Id. DR further contended that goodwill is valued based on the past performance of the company and is not an indeterminate figure contingent upon its future performance. In the present case, both the transferor and transferee company belong to the same group and no fresh goodwill accrued to the transferee company as a result of this acquisition. . Therefore, the depreciation on

goodwill as claimed by the assessee in the facts and circumstances of the case and the legal matrix involved is not allowable.

5.3 On the other hand, Id. Counsel for the assessee referred to the judgment of Hon'ble Jurisdictional High Court in the case of *Pentasoftware Technologies Ltd vs. DCIT, Company Circle V(2), (2014) 41 taxmann.com120 (Madras)* and contended that even in the case of non compete fee depreciation is available to the assessee.

5.4 We have perused the judgment of Hon'ble Jurisdictional High Court of Madras in the case of *Pentasoftware Technologies Ltd (supra)* wherein it was observed as under:-

"17. Be that as it may, the only reason assigned by the Tribunal is that the non-compete fee is not an asset, which the assessee could use like a licence or franchise and therefore, depreciation cannot be allowed.

18. In the preceding paragraphs, we have referred to the agreement entered into between the parties. The said agreement dated 23.02.2000 is a composite agreement by virtue of it, there was transfer of all rights over the IPRs as well as the training and development programmes to be exclusively used by the assessee for a fixed fee. Under the agreement, the consideration payable for transfer of IPRs and towards non compete fee have not been segregated or distinctly mentioned. In order to qualify for a depreciation under Section 32(1)(ii) of the Act, it would first be relevant to refer to the said provision, which reads as under:

*"32 Depreciation: (1) in respect of depreciation of
(i).....*

(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April 1998,

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed -]

Therefore, in terms of the above provision, deduction is allowable in respect of depreciation of patents, copy rights, trade marks, licence, franchise, etc or any other business or commercial rights of similar nature. There is no difficulty insofar as the trade mark and copy rights, which have been transferred in favour of the assessee.

19. The only issue is whether non compete agreement/arrangement would fall within the ambit of clause (ii) of Section 32(1) of the Act.

20. It is the case of the Revenue that this non-compete fee is in the nature of a negative right and it cannot be of a commercial right of similar nature and the expression [similar nature] shall be relatable to patents, copy rights and trade mark licence or franchise or any other business. Therefore, it is submitted that this negative right cannot be construed either as a licence or as a commercial right to be eligible for deduction.

21. We are unable to agree with the stand taken by the Revenue for the simple reason that the agreement between the parties is a composite agreement. Under the agreement, the transferor had transferred all its rights, copy rights, trade marks in respect of the word 'pentasoft' as well as the training and development division exclusively to be exploited by the assessee. In order to strengthen those rights transfer under the said composite agreement, there was a non compete clause by virtue of which, the transferor was restrained from using the same trade mark, copyrights etc., in favour of the assessee. Therefore, the non compete clause under the agreement should be read as a supporting clause to the transferor of the copy rights and patents rather to strengthen the commercial right, which was transferred in favour of the assessee.

22. *Learned counsel for the assessee contended that the non-compete is in effect an indirect licence. However, we are not inclined to agree with the said submission since non compete, at best could be a commercial right because that right is relatable to the transfer of trade mark, copy rights and patents. Therefore, the view taken by the Commissioner of Income Tax(Appeals) in this regard is acceptable.*

23. *In the case of Techno Shares and Stocks Ltd vs. Commissioner of Income Tax reported in 327 ITR 323 (SC), the assessee therein before the Hon'ble Apex Court claimed depreciation on the membership card held by it with the Bombay Stock Exchange enables it to trade on the floor, is a business or commercial right in the nature of a licence under Section 32 (1)(ii) of the Act.*

24. *The Department on the other hand, pointed out that membership is a personal privilege and that it is not an asset and that it is not owned by the assessee and therefore, the claim of the assessee for depreciation was not admissible under Section 32(1)(ii) of the Act.*

25. *While answering the question, the Hon'ble Supreme Court considered the rules of the Bombay Stock Exchange and after perusing Rules 5 to 10, it held thus:*

....."that the right of nomination is conferred on the member of the exchange; that, the said right shall cease and vest in the exchange when his membership gets forfeited to the exchange; that on such forfeiture the right of membership gets vested in the exchange and on such vesting the exchange has the right to deal with it as it may think fit. That, on forfeiture even the right of nomination vests in the exchange. Thus, a non-defaulting continuing member owns the right of nomination with respect to the membership of the exchange till his right of membership is forfeited to the exchange."

However, the Hon'ble Supreme Court observed that the right of membership including the right of nomination gets vested in the exchange on the demise/default committed by the member; that on such forfeiture and vesting in the exchange, the same gets disposed of by inviting offers

and the consideration received thereof is used to liquidate the dues owed by the former/defaulting member to the exchange or clearing house.

26. It further held that it is this right of membership, which allows the non-defaulting member to participate in the trading session on the floor of the exchange. The said membership right is the business or commercial right conferred by the rules of the Bombay Stock Exchange on the non-defaulting continuing member.

27. We are conscious of the fact that the Hon'ble Supreme Court clarified that the said judgment is strictly confined to the right of the membership conferred upon the member under the Bombay Stock Exchange membership card during the relevant assessment years and that judgment should not be understood to mean that every business or commercial right would constitute a 'licence' or a 'franchise'. Therefore, the said decision was rendered after taking into consideration the Rules of the Bombay Stock Exchange.

28. In the case of hand, we have analysed the agreement and also in the previous portion of this order elaborated upon the various terms and conditions, which bind the parties had observed that the earlier transfer of the trade mark, patents and other rights in favour of the assessee was undoubtedly the transfer of intangible assets, which in terms of section 32(1)(ii) of the Act would be a capital asset entitled to depreciation.

29. In the light of the above, we have no hesitation in setting aside the order passed by the Income Tax Appellate Tribunal and answer the issue in favour of the assessee. In such circumstances, there is no necessity for us to consider the alternative submission made by the learned counsel for the assessee”.

5.5 Therefore, we respectfully following the ratio of the judgment of Hon'ble Jurisdictional Madras High Court reject the contention of the Revenue and endorse

the submission of the assessee and held that assessee is entitled to depreciation on non-compete fee. Hence, no interference is required in the impugned order of Id.CIT(A) on this issue. In result, we dismiss grounds No.2 & 3 of revenue raised in all three years.

6. **Disallowance u/s 14A:**

Appellant submitted that in AYS 2012-13, 2014-15 and 2015-16, assessee had not received any exempt income. In support of the claim appellant produced the company's annual report. Appellant also relied upon the judgment of the Hon'ble jurisdictional High Court in the case of *Redington (India) Ltd. Vs Additional Commissioner of Income Tax [2017] 77 taxmann.com 257 (Madras)*.

6.1 We have heard the rival submissions and perused the entire material on record and orders of lower authorities and we find that this issue is no longer res integra. The judgment of the Hon'ble jurisdictional High Court in the case of *Redington (India) Ltd. (supra)* authoritatively concluded the present issue in controversy in favour of appellant. The judgment of the Hon'ble jurisdictional High Court in the case of *Redington (India) Ltd (supra)* held as under:

'15. The exemption extended to dividend income would relate only to the previous year when the income was earned and none other and consequently the expenditure incurred in connection therewith should also be dealt with in the same previous year. Thus, by application of the matching concept, in a year where there is no exempt income, there cannot be a disallowance of expenditure in relation to such assumed income. Madras Industrial Investment

Corpn. Ltd. v. CIT [1997] 225 ITR 802/91 Taxman 340 (SC). The language of s.14A (1) should be read in that context and such that it advances the scheme of the Act rather than distort it.

16. In conclusion, we are of the view that the provisions of s. 14A read with Rule 8D of the Rules cannot be made applicable in a vacuum i.e. in the absence of exempt income. The questions of law are answered in favour of the assessee and against the department and the appeal allowed. No costs."

Therefore, the judgment of the Hon'ble jurisdictional High Court in the case of *Redington (India) Ltd. (supra)*, is precisely apply in this case hence, no interference is required in the impugned order of Id.CIT(A) on this issue. In result, we dismiss grounds No.4 & 5 of revenue raised in all three years.

ASSESSEE'S CROSS OBJECTIONS ISSUE WISE:-

7. The registry has noted delay of 243 days in filing cross objection. The assessee has filed affidavit. The Id. CIT-DR has objected to the delay in filing cross objections. We have perused the reasons given in para 5 of affidavit and find the reasons reasonable. Hence, in the interest of justice, we condone the delay and admit the cross objections for adjudication.

8. Disallowance of part of depreciation on software:

We have perused the record and the orders of the lower authorities. Since, as prayed by the assessee, Id.CIT(A) dismissed this issue as not pressed considering the quantum of depreciation. Therefore, we are also dismissing this ground in AY 2012-13 as there is no adjudication by the Id.CIT(A) on merits. In respect of AY

2014-15 and 2015-16, we are of the view that Id.CIT(A) was right in dismissing this ground for the reasons stated in para 6.2 of his order. In the appellant's own case in earlier years depreciation was allowed @60%. Hence, we also dismiss this ground as appellant had not substantiated the claim that the software was eligible for hundred percent depreciation.

9. **Disallowance of part of depreciation on temporary structures like false ceilings, etc.:**

Before us, assessee submitted that expenditure made on temporary structures included expenditures like Gypboard ceiling, civil work partitions, vertical blinds, building modification, electrical installation, building renovation works etc. Appellant further stated that the expenses on the face of it were in nature of maintenance and do not bring in any asset of enduring nature. The Id.Counsel also referred a judgment of co-ordinate bench in the case of *K.R.Bakes Pvt. Ltd. Vs ACIT in ITA No.1384/Mds/2013 dated 29.05.2015*.

9.1 We have perused the order of Id.CIT(A) and AO. We also perused the order of co-ordinate bench in the case of *K.R.Bakes Pvt. Ltd. Vs ACIT in ITA No.1384/Mds/2013 dated 29.05.2015* referred supra wherein it was observed as under:

"7. We have heard the parties and perused the record. In the present case, the assessee has taken the building on leasehold on which the assessee carried on interior work and claimed as revenue expenditure. The same was rejected by the CIT(A). The Ld. DR

contended that the assessee made new addition the leased building and it is not the case of renovation of the leased building or improvement of the leased building as in the case of Joy Alukkas Pvt. Ltd., cited supra as held by the Kerala High Court. For settling the controversy, we have to go through the Explanation 1 to sec. 32(1) of the Act which was inserted by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 with effect from 1.4.1988 which deals with the situation where the expenditure has been incurred by the assessee on construction of any structure on leasehold premises. The Explanation 1 is reproduced herewith below: "Explanation 1. Where the business or profession is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of business or profession on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of improvement to, building then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee."

8 To fall within the ambit of Explanation 1 questions which are to be answered are:

- (i) Whether the assessee is carrying on business or profession in a leased building or other rights of occupancy?*
- (ii) Whether the assessee has incurred any capital expenditure for the purpose of business on the construction of any structure or doing of any work in or in relation to and by way of renovation or extension or improvement in the building.*

9. If the answer to the aforementioned questions is in affirmative, the assessee falls within the purview of Explanation 1 to sec. 32(1). In the instant case, it is an admitted fact that the assessee has

taken building on lease for setting up of bakery. It is also undisputed that the assessee has carried on interior work in the leased building. These interior decoration works carried out by the assessee if put on to the test of Explanation 1 would show that the construction made by the assessee on the leased out premises would amount to capital expenditure. The assessee in order to support his case has relied on the judgment of the Madras High Court in the case of TVS Lean Logistics Ltd. (supra). In the said case, the assessee had constructed a building on the leased land for the business advantage. The Court held that the entire cost of construction is admissible as revenue expenditure. Explanation 1 categorically states that the business or profession is carried on in a leased building and not on land. The High Court in para 4.4 of the judgment further held as under:-

"4.4 What constitutes a capital expenditure and what does not, to attract Expln. 1 to section 32(1) of the Act depends upon the construction of any structure or doing any work or in relation to and by way of renovation, extension or improvement to the building which is put up in a building taken on lease by him for carrying on his business and profession of the assessee, but not in a case of construction of any structure or doing any work or relation to where such building is put up/constructed for the purpose of business or the profession of the assessee in a land taken on lease by the assessee."

10. Thus it is clear that the ratio laid down by the Madras High Court in the said judgment does not support the case of the assessee.

11. In the present case, the assessee has taken building on lease and made certain interior decoration. It is the case that the assessee has beautified the leased building. The High Court has further held in the aforesaid case that the language employed in a statute is the

determinative factor of the legislative intent and even assuming there is a defect or any omission in the words used in the Legislature, the Court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result an any departure from the literal rule would really be amending the law in the garb of interpretation, which is not permissible and which would be destructive of judicial discipline.

12. The Supreme Court of India in the case of Madras Auto Service (P) Ltd., 233 ITR 468 while dealing with a similar controversy has observed as under:

"5 In order to decide whether this expenditure is revenue expenditure or capital expenditure, one has to look at the expenditure from a commercial point of view. What advantage did the assessee get by constructing a building which belonged to somebody else and spending money for such reconstruction? The assessee got a long lease of a newly constructed building suitable to its own business at a very concessional rent. The expenditure therefore, was made in order to secure a long lease of new and more suitable business premises at a lower rent. In other words, the assessee made substantial savings in in monthly rent for a period of 39 years by expending these amounts. The saving in expenditure was a saving in revenue expenditure in the form of rent. Whatever substitutes for revenue expenditure should normally be considered as revenue expenditure. Moreover, assessee in the present case did not get any capital asset by spending the said amounts. The assessee therefore could not have claimed any depreciation. Looking to the nature of the advantage which the assessee obtained in a commercial sense, the expenditure appears to be revenue expenditure.'

13. Thereafter, the Apex Court referring to several cases decided held as under:

"11.All these cases have looked upon expenditure which did bring about some kind of an enduring benefit to the company as a revenue expenditure when the expenditure did not bring into existence any capital asset for the company. The asset which was created belonged to somebody else and the company derived an enduring business advantage by expending the amount. In all these cases, the expenses have been looked upon as having been made for the purpose of conducting the business of the assessee more profitably or more successfully. In the present case also since the asset created by spending the said amounts did not belong to the assessee but the assessee got the business advantage of using modern premises at a low rent, thus saving considerable revenue expenditure for the next 39 years, both the Tribunal as well as the high Court have rightly come to the conclusion that the expenditure should be looked upon as revenue expenditure."

14. From the above judgment, we can conclude that it is essential that the expenditure incurred on the construction of any structure on the leased premises should result in enduring benefit. That any expenditure incurred for civil work by a lessee in respect of the lease premises, without any further proof cannot be said to be capital expenditure or revenue expenditure. In order to find out the nature of expenditure, it is necessary to find out the nature of construction put up, the purpose of construction/renovation and the use to which the construction put up and also if it is a case of repair, replacement, addition or improvement has to be gone into. It is only on the aforesaid material, keeping in mind the principles enunciated in the judgments by the Supreme Court and keeping in mind section 37 and section 32 of the Act, that one has to determine whether the expenditure is revenue expenditure or capital expenditure. What would apply to civil work equally applies to electrical work or interior decoration. The assessee had not stated the nature of civil works constructed, the nature of interior

decoration made to the leasehold premises and also the nature of electrical work undertaken. In the absence of that material and without proper application of mind, the assessing authority proceeded on the footing that the expenditure constituted capital expenditure.

15. In view of the above, we remit the issue in dispute to AO to consider whether the expenditure is revenue or capital in nature and decide afresh."

Accordingly, in the light of co-ordinate bench order, we also remit the issue in dispute to AO to consider whether the expenditure is revenue or capital in nature and decide afresh in the light of the above order of the Tribunal. Needless to say that AO while doing verification of wooden structures will also keep in mind the judgments of the Hon'ble Supreme Court of India in the case of *CIT Vs Madras Auto Service (P.) Ltd. 233 ITR 468* and Judgment of Jurisdictional High Court of Madras in the case of *Thiru Arooran Sugars Ltd. Vs DCIT 350 ITR 324*.

10. **Disallowance of interest expense on account of interest free loan given to group companies:**

The AO in the assessment order note that in the Profit and Loss Account, the assessee has debited an interest amount of Rs.18,73,31,736/- and the secured loans in the assessee's financial as on 31.03.2015 stood at Rs.174,98,02,694/-. The Id.CIT(A) observed as under:

*“Now, the appellant had to establish how it was substantiating its claim that the interest-free loans/advances to the subsidiaries were made out of the surplus funds. In the **absence of such documentary evidence**, the appellant’s submissions cannot be accepted. The disallowance of Rs.49,38,218/- under section 36(i)(iii) is confirmed.”*

Before us, appellant submitted as under:

2. Disallowance of interest expense on account of interest free loan given to group companies

a) The interest free loan to group companies were given out of interest free funds. The assessee has balance in reserves and surplus to the extent of Rs. 6840.23 lakhs. The advances to associate companies are reflecting as Short Term Loans and Advances and the amount outstanding from them is reflecting at Rs. 857.54 lakhs. Even after giving the advance to the group companies, the assessee has made positive net operating cashflows from operating activities of Rs. 100.62 lakhs Same is the position for AY 2013-14 and appeal is pending before CIT(A) in respect of the same disallowance. During AY 2014-15, no new advances were given and the existing outstanding advances have come down and during AY 2015-16, no new advances were given and the existing outstanding advances have further come down. Reliance was placed on the judgement of the Hon'ble Supreme Court in the case of CIT v. Reliance Industries Ltd. 410 ITR 466. Further, reliance is placed on the judgement of the High Court of Punjab and Haryana in CIT v. Max India Ltd. 398 ITR 209

b) The interest free advances were given out of commercial expediency

The assessee had given the advances to M/s. Accel IT Resources Limited and M/s. Inspirisys Solutions DMCC (formerly M/s. Accel

*FZE Dubai). Assessee has filed Memorandum of Association of M/s. Accel IT Resources Limited as additional evidence to show that the said subsidiary is an extension of the assessee in the same line of business. Assessee has also filed its profile with M/s. Oracle India Pvt. Ltd., its customer as **additional evidence** to show that the said subsidiary is an extension of the assessee in the same line of business. Reliance is placed on the judgement of the Hon'ble Supreme Court in *S.A. Builders Ltd. v. Commissioner of Income-tax (Appeals) 288 ITR 1**

We have heard the submissions on both sides. We find that Id.CIT(A) disallowed Rs.49,38,218/- under section 36(i)(iii) on account of absence of documentary evidence. Therefore, in the light of above facts, we set aside this issue to the file of AO to look into this issue afresh. We also direct the assessee to file all such documentary evidences to establish nexus between the expenditure and the purpose of business. AO while doing verification will also keep in mind the judgments of the Hon'ble Supreme Court or relied by the assessee or any other order(s)/judgment(s).

11. **Deduction u/s 10AA:**

This alternate ground No.9 for AY 2014-15 was neither agitated before the Id.CIT(A) nor any petition for admission of additional ground has been filed, therefore, we refrain from commenting on this issue. Hence, we simpliciter dismiss this ground of cross objection.

12. **Employee's contribution to PF and ESI- delayed remittance:**

At the outset, both parties agreed that grounds No.1 & 2 of cross objection relating to delayed remittance qua Employee's contribution to PF and ESI for AY 2014-15 are covered in favour of Revenue vide the ruling of the Hon'ble Supreme Court in the case of Checkmate Services Private Limited [2022] 448 ITR 518 SC. We are of the considered view that the issue is no longer *res integra* and is covered in favour of revenue by the judgment of Hon'ble Supreme Court referred supra. Hence we dismiss these grounds of cross objection.

13. **Prior period items - Amount got crystallised only during the AY:**

Assessee has not pressed this ground of appeal. Hence, this ground is dismissed as not pressed.

14. In result, all cross objections of assessee are partly allowed on above terms and the appeals of the Revenue stand dismissed.

Order pronounced in open court on 26th day of July, 2024 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)

(MANOJ KUMAR AGGARWAL)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(मनु कुमार गिरि)

(MANU KUMAR GIRI)

न्यायिक सदस्य / JUDICIAL MEMBER

चेन्नई Chennai:

दिनांक Dated :26 -07-2024

KV

आदेश की प्रतिलिपि अग्रेषित /Copy to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai/Coimbatore/Madurai/Salem.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF