IN THE INCOME TAX APPELLATE TRIBUNAL, RAJKOT BENCH, RAJKOT

BEFORE DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER AND
SHRI DINESH MOHAN SINHA, JUDICIAL MEMBER

आयकरअपीलसं./**ITA Nos.284 & 353/RJT/2024**
Assessment Years: (2016-17 & 2017-18)

(Hybrid Hearing)

DCIT Central Circle-2, Rajkot	**Vs.**	**Aditya Birla Global Trading (India) Private Limited** (Earlier known as Swiss Singapore India Private Limited) Unit 204-205, 1st Floor, Rayson Arcade, Plot No.139, Sector 8, Gandhidham S.O., Kachchh, Gujarat 370201, Gujarat
(Appellant)		**(Respondent)**

&

आयकरअपीलसं./**ITA Nos.225 & 226/RJT/2024**
Assessment Years: (2015-16 & 2018-19)

(Hybrid Hearing)

Aditya Birla Global Trading (India) Private Limited (Earlier known as Swiss Singapore India Private Limited) Unit 204-205, 1st Floor, Rayson Arcade, Plot No.139, Sector 8,	**Vs.**	**Assistant Commissioner of Income Tax** Circle-1, Gandhidham & **DCIT/ACIT** Central-2, Rajkot

Gandhidham S.O., Kachchh, Gujarat 370201, Gujarat		
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AATCS0544F**		
(Assessee)		**(Respondent)**

Assessee by	Shri Mehul Ranpura, AR
Respondent by	Shri Abhimanyu Singh Yadav, Sr.DR
Date of Hearing	20/12/2024
Date of Pronouncement	13/02/2025

आदेश / O R D E R

PER DR. A. L. SAINI, AM:

This is the bunch of four appeals filed by the assessee and Revenue pertaining to Assessment Years. 2015-16, 2016-17, 2017-18 & 2018-19 are directed against the separate orders passed by the Learned Commissioner of Income Tax (Appeals)-11, Ahmedabad [in short 'Ld. CIT(A)'], which in turn arise out of separate assessment orders passed by the Assessing Officer (in short 'AO') u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

2. Since, the issue involved in all the appeals are common and identical, therefore, we have clubbed these appeals and heard together and consolidated order is being passed for the sake of convenience and brevity.

therefore, these appeals have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

4 First, we shall take Revenue's appeals in ITA Nos. 284 & 353/Rjt/2024 for assessment years (A.Ys.) 2016-17 and 2017-18.

5. The Grounds of appeal raised by the Revenue in appeal in ITA No.284/Rjt/2024 for A.Y. 2016-17, are as follows:

1). On the facts and in the circumstances of the case and in law, learned Commissioner (Appeals) erred in deleting the addition made on account of disallowance of penalty on custom duty of Rs. 7,53,200/-

2) On the facts and in the circumstances of the case and in law, learned Commissioner (Appeals) erred in deleting the addition made on account of commission expenses paid to foreign agents of Rs. 2,21,28,335/-

3) On the facts and in the circumstances of the case and in law, learned Commissioner (Appeals) erred in ignoring the fact that remittance on account of commission expenses is liable to attract TDS provisions u/s 195 of the Act.

4) The Revenue craves leave to add/alter/amend and/or substitute any or all of the grounds of appeal."

6. The Grounds of appeal raised by the Revenue in appeal in ITA No.353/Rjt/2024 for A.Y. 2017-18, are as follows:

1) "In the facts and on the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the addition of Rs. 1.09,30,126/-made on account of disallowance u/s. 40(a)(i) w.r.t. Commission on exports sales to non-resident parties."

2) In the facts and on the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the addition of Rs. 1,47,17,000/- made on account of unaccounted cash receipts.

3) In the facts and on the circumstances of the case and in law, the Id. CIT(A) has erred in considering the additional evidence produced by the assessee during proceedings and allowing the assessee's appeal on the basis of the same, without giving a reasonable opportunity to the assessing officer to produce to any

evidence or document or any witness in rebuttal of the additional evidence produced by the assessee, despite the provisions of the Rule 4613; of the IT Rales

4) The Revenue craves leave to add later armed and or substitute any or all the grounds of appeal.

7. Now we shall take above grounds raised by the Revenue one by one as follows:

8. Ground No.1 raised by the Revenue in ITA No.284/Rjt/2024 for A.Y. 2016-17, relates to disallowance of penalty of Rs. 7,53,200/-

9. Succinct facts qua the issue, are that during the course of assessment proceedings, the assessing officer had noticed that assessee company had paid a total amount of Rs.7,53,200/-, on account of penalty under Customs Act, 1962 and debited the same in the Profit & Loss account, which is not allowable expenses as per section 37(1) of the Act. Therefore, assessing officer issued a show-cause notice to the assessee to explain the facts of the expenditure. In the reply, the assessee- company has stated before the assessing officer that the penalty shown in Profit & Loss account and tax audit report of Rs.7,53,200/-, was related to delay in filing of bill of entry u/s 48 of Customs Act, which was during normal course of business for every importer, as the Customs had notified that every authorized person should file the bills of entry, before the end of the next day following the day on which vessel carrying goods, arrived at the Customs station, at which such goods were to be cleared for home consumption or warehousing. The intention of the assessee was not to violate any law or infringement of law, therefore, the penalty paid by it was for inadvertently occurred and hence requested the assessing officer not to disallow the same. However, the assessing officer had not accepted the reply of the

assessee- company and made disallowance of said expense of Rs. 7,53,200/- and added to the total income of the assessee.

10. Aggrieved by the order of the assessing officer, the assessee, carried the matter in appeal before the Ld. CIT(A), who has deleted the addition made by the assessing officer. Before Id CIT(A), the assessee has submitted that said penalty is compensatory in nature and not penal in nature. The Id CIT(A) noticed that in section 46(3) of the Customs Act, 1961 and the Notification issued by the Government, the word used is Charge for late filing of bill of entry (BOE) and not "penalty". The Id CIT(A) also relied on the judgement of Hon'ble Madras High Court in the case of CIT Vs. India Pistons Ltd. (250 ITR 279), wherein the Hon'ble High Court held that interest paid for delayed remittance of customs duty is compensatory in nature and hence allowable as business expenditure. The Id. CIT(A) therefore, held that the same is compensatory in nature hence is allowable u/s.37 of the Act.

11. Aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before us.

12. Learned DR for the Revenue argued that assessee had paid a total amount of Rs.7,53,200/-, on account of penalty under Customs Act, 1962 and debited the same in the Profit & Loss account, which is not allowable expenses as per section 37(1) of the Act. Moreover, the penalty is not compensatory in nature, hence, addition made by the assessing officer may be sustained.

13. On the other hand, Learned Counsel for the assessee submitted that

in order to allow an expense in nature of charge or interest or penalty, it is necessary to evaluate whether the said levy is compensatory in character or not and for this, it relied on the decision of the Hon'ble Karnataka High Court in the case of Dr. S. Reddappa Vs. Union of India (232 ITR 62). Moreover, these are the charges paid by the assessee under the Customs Act, 1962 for late filing bill of entry, therefore, late fee, should not be treated as a penalty, hence, order passed by the Id. CIT (A) may be upheld.

14. We have heard the rival parties and have gone through the material placed on record. We find that Customs Act, 1962 has a separate chapter XVI-Offences and Prosecution under which punishment is mentioned for violation of law. However, the section under which charges was levied on the assessee falls under Chapter VII of Customs Act, 1962. If the assessee had violated any law the said charges would have been charged under chapter XVI of Customs Act, 1962. Thus, it is clearly seen that the said charges levied was due to late submission of bill of entry but not due to infringement of any law. For this, the Id. Counsel for the assessee, has relied on the decision of the Hon'ble Madras High Court in the case of CIT Vs. India Pistons Ltd. (250 ITR 279), wherein the Hon'ble High Court held that interest paid for delayed remittance of customs duty is compensatory in nature and hence allowable as business expenditure. Therefore, we find that the said expenses were compensatory in nature and hence allowable expenses as per section 37 of the Act. During the course of appellate proceedings, the assessee has submitted before ld. CIT(A) that the importer also has to file the Bill of Entry (BOE) for removal of goods from customs and customs clearance and formalities and in case of delay in filing, the importer shall be liable for fine for late submission of bill of entry (in brief 'BOE'). As per Explanation 4(3) of Electronic Integrated Declaration and Paperless Processing Regulations, 2018, where the BOE is not filed within the time specified in sub-regulation (1) and the proper officer of Customs

is satisfied that there was no sufficient cause for such delay, the importer shall be liable to pay charges for late presentation of the BOE at the rate of rupees five thousand per day for the initial three days of default and at the rate of rupees ten thousand per day for each day of default thereafter, provided that where the proper officer is satisfied with the reasons of delay, he may waive off the charges referred to in the second proviso to sub-section (3) of section 46 of the Customs Act, 1962. Further, the section 46 of the Customs Act, 1952 deals with the provisions of filing of BOE and consequence of late filing of the same. The said section 46(3) of the Customs Act, 1962 stipulates as under.

> *"[(3) The importer shall present the bill of entry under sub-section (1) before the end of the next day following the day (excluding holidays) on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing.*
>
> *Provided that a bill of entry may be presented (at any time not exceeding thirty days prior to the expected arrival of the aircraft or vessel or vehicle by which the goods have been shipped for importation into India.*
>
> *Provided further that where the bill of entry is not presented within the time so specified and the proper officer is satisfied that there was no sufficient cause for such delay, the importer shall pay such charges for late presentation of the bill of entry as may be prescribed.]"*

From the above, it is evident that both in section 46(3) of the Customs Act, 1961 and said Notification referred above, the word used is Charge for late filing of BOE and not "penalty".

15. The Id CIT(A) referred the judgement of the Hon'ble Delhi High Court in the case of M/s Usha Micro Process Controls Ltd, reported in 37 taxmann.com 324, wherein it was held that where the assessee Importer paid redemption fine in lieu of confiscation of re-exported goods is

compensatory in nature and not penal and was therefore an allowable deduction u/s u/s 37(1) of the Act. The Hon'ble Delhi Tribunal in the case of Akshay Khetterpal, in ITA No.129/Del/2019 vide its decision dated 31.05.2022, while adjudicating issue for A.Y.2015-16 has held that the Hon'ble Supreme Court in the case of Prakash Cotton Mills Pvt Ltd has clearly held that when an amount is paid as interest or damages or penalty as would regard as compensatory (reparatory in character), the Assessee would entitled to claim it as an allowable expenses u/s 37(1) of the Act. Therefore, whenever any statutory impost paid by an Assessee by way of damages or penalty or interest, is claimed as an allowable expenditure u/s 37(1) of I.T. Act, the assessing officer is required to examine the scheme of relevant statute providing of such impost not-withstanding the nomenclature of the impost as given by the statute, to find whether it is compensatory or penal in nature. The authority has to allow deduction u/s.37(1) of the I.T. Act, wherever such examination reveals the concern impost to be purely compensatory in nature. Based on the above facts, the Id. CIT(A) observed that both, the sections 46(3) of the Customs Act and said Bill of Entry (Electronic Integrated Declaration and Paperless Processing) Regulations stipulates payment of charge for late filing of BOE, which is levied on the basis of per day of default and considering the nature of same, it is evident that the same is compensatory in nature and therefore, Id. CIT(A) deleted the addition. The above conclusions arrived at by the CIT(A) are, therefore, correct and admit no interference by us. We, approve and confirm the order of the CIT(A) and dismissed the ground raised by the Revenue.

16. In the result, ground No. 1 raised by the Revenue, in ITA No.284/Rjt/2024 for A.Y. 2016-17, is dismissed.

17. Ground No.2 and 3 raised by the Revenue in ITA No.284/Rjt/2024 for A.Y. 2016-17, pertains to deleting the addition made on account of commission expenses paid to foreign agents of Rs.2,21,28,335/-ignoring the fact that remittance on account of commission expenses is liable to attract TDS provisions u/s 195 of the Act. The ground No.1 of Revenue's appeal in ITA No.353/Rjt/2024 for A.Y. 2017-18, which relates to deleting the addition of Rs. 1,09,30,126/-, made on account of disallowance u/s. 40(a)(i) with respect to Commission on exports sales to non-resident parties, which is similar and identical, therefore, we shall adjudicate these grounds together, by taking the lead case in ITA No.284/Rjt/2024 for A.Y. 2016-17.

18. Brief facts qua the issue are that on perusal of details of commission expenses in the head 'other expenses' as provided by the assessee, vide annexure iv, of submission dated 10.12.2018, it was noticed by the assessing officer that the assessee -company has paid commission on exports sales to following non- resident parties:

S. N.	Party Name	Country of party	Country of export/import	Basis of commission	Product	March 2016
1.	Phoenix Gulf Fze	UAE	IRAN	6% of invoice value	Tea	2,12,15,327
2.	Arity Business Inc	RUSSIA	RUSSIA	2 cents per kg	Tea	4,19,226
3.	Rajesh Verma	UAE	UAE	11 cents per kg	Tea	72,967
4.	Delmon Star General Trading	UAE	IRAN	6% of Tea invoice value	Tea	4,20,815
			Total			2.21.28.335

It was noticed by the assessing officer that assessee has not deducted TDS on this commission payment as per the provision of section 195 of the Act. As, TDS was not deducted from the above payment, the same is not allowable as expenses in view of the provisions of 40(a)(i) of the Act. Therefore, the assessee company, vide show- cause, notice dated 05.12.2018 was requested to show cause, as to why an amount of Rs.2,21,28,355/- should not be disallowed u/s.40(a)(i) of the Act and added back to the income. By not deducting TDS on the commission expenses, the assessee- company has committed a default within the purview of section 40(a)(i) of the Income-tax Act, 1961, in respect of payment of Rs.2,21,28,355/- and is therefore liable to be disallowed u/s.40(a)(i) of the Act, on account of non-deduction of tax on payments made by assessee to foreign entities. Accordingly, an amount of Rs.2,21,28,355/-was disallowed by the assessing officer.

19. Aggrieved by the order of the assessing officer, the assessee carried the matter, in appeal before the Ld. CIT(A), who has deleted the addition made by the assessing officer. The Id. CIT(A) held that assessee company had made payment of commission to foreign agents and no part of the income had arisen or accrued in India. Therefore, the payee was not liable to pay tax at such income and thus, requirement of TDS therefore would not arise. Aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before us.

20. Learned DR for the Revenue argued that since the assessee-company, has not deducted TDS on this commission payment, as per the provision of section 195 of the Act. As, TDS was not deducted from the payment, made to non-resident parties, hence, the same is not allowable as expenses in view of the provisions of 40(a)(i) of the Act. Accordingly, an amount of Rs.2,21,28,355/-was rightly disallowed by the assessing officer.

21. On the other hand, Learned Counsel for the assessee argued that the payment was made to a foreign commission, agents and the commission was for export sales for which the agent had rendered services, as a commission agent, outside India. These commission agents did not have any business connection in India. Besides, no any business operations were carried out in India by these commission agents, hence no portion of the commission can be said to have accrued in India in view of specific provision in clause (a) of the Explanation of section 9(1) of the Act. Since the Commission was not chargeable to tax in India, hence there was no requirement to deduct TDS, therefore, Id. Counsel stated that order passed by the Id. CITA, is just and proper, hence it may up be upheld.

22. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials brought on record. In these grounds issue pertain to action of the assessing officer in making disallowance of commission expenses paid to foreign agents. It is an undisputed fact that payment was made to a foreign commission agents and said commission was for export sales for which the agent had rendered services as a commission agent, outside India. The Commission agents never delivered services in India and these commission agents did not have any business connection in India. No any business activity or operations were carried out in India by these commission agents, hence no portion of the commission can be said to have accrued in India in view of specific provision in clause (a) of the Explanation of section 9(1) of the Act. The assessee has further claimed that the liability to deduct tax under section 195 of the Act, is only when a sum is chargeable to tax in India. As commission earned by non-resident commission agents falls outside the

purview of section 9 of the Act, the liability to deduct tax u/s 195 of the Act did not arise as no income was accrued in India. During the appellate proceedings, before the learned CIT(A), the assessee has relied on the following judgements:

(i) The decision of the Hon'ble Supreme Court in the case of CIT Vs. Toshoku Ltd. (125 ITR 525), wherein the Hon'ble Apex Court held that Commission paid to non-resident is not taxable in India. Further, the Supreme Court following the decision in CIT Vs. R. D. Agrawal and Co. (56 ITR 20)(SC) held that if no operation are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India.

(ii) The decision of the Hon'ble Bombay High Court in the case of CIT vs. Gujarat Raclaim & Rubber products Ltd. [2016] (383 ITR 236) (following the decision of the Hon'ble Supreme Court in the case of CIT Vs. Toshoku Ltd.)

(iii) The Hon'ble ITAT, Ahmedabad in the case of DCIT Vs. Welspun Corporation Ltd. [55 ITR (T) 405 (Ahmedabad Tribunal)].

(iv) The decision of the Hon'ble Delhi High Court in the case of CIT VS. Angelique International Ltd. 38 taxmann.com 425.

(v) The Allahabad High Court in the case of CIT Vs. Model Exims (358 ITR 72)

(vi) The decision of the Hon'ble Jurisdictional High Court of Gujarat in the case of PCIT Vs. Jay Chemical Industries Ltd. (120 taxmann.com 315 (Gujarat High Court).

23. The Ld. CIT(A) after going through the above facts of the assessee and the case law applicable on the facts, observed that the claim of the assessee is correct because it is an undisputed fact that the assessee company had made payment of commission to foreign agents and no part of the income had arisen or accrued in India. Therefore, the payee was not liable to pay tax at such income and thus, requirement of TDS therefore would not arise.

24. The Ld. CIT(A) also relied on the decision of the Hon'ble Jurisdictional High Court of Gujarat in the case of Principal Commissioner of Income-tax vs. Ferromatic Milacron India (P.) Ltd. [2018] 99 taxmann.com 154 (Gujarat) dated 09.10.2018, wherein the Hon'ble High Court has decided the appeal in favour of the assessee. The findings of the Hon'ble Court is reproduced below:

> *"Section 9, read with sections 195 and 40(a)(i), of the Income-tax Act 1961 and article 7 of the OECD Model Convention Income Deemed to accrue or arise in India (Business profits) Assessee-company made payments to non-resident agents for carrying out exports out of India-Non-resident agents did not have permanent establishment in India and their activities as commission agents were being carried out outside India. Whether, on facts, there was no liability on assessee to deduct tax at source merely because a portion of sale to overseas purchasers took place in India Held, yes (Para 3) [In favour of assessee)."*

Reliance was also placed on the decision of the Hon'ble Jurisdictional High Court of Gujarat in the case of Principal Commissioner of Income-tax vs. Jay Chemical Industries Ltd.[2020] 120 taxmann.com 315 (Gujarat) dated) 17.02.2020, wherein the Hon'ble High Court has decided the appeal in favour of the assessee. The head note of the decision is as under:

"Section 9, read with section 195, of the Income-tax Act. 1961 and article 7 of the OECD Model Convention Income Deemed to accrue or arise in India (Business profits Business connection) Assessment year 2011-12 Assessing Officer had disallowed commission paid to foreign agents on account of non-deduction of tax taking view that income arising on account of commission payable to foreign agents could be deemed to have accrued or arose in India and, accordingly would be taxable under provisions of section 5(2)(b) read with section 9(1)(i) Whether since non-resident agents had rendered their services outside India and all agents had overseas offices and they were not having any permanent establishment in India, commission paid to them was not liable to tax in India Held, yes [Paras 3 and 4] [In favour of assessee)."

25. In view of the above factual position, the Id CIT(A) deleted the addition. We have gone through the above findings of the Id. CIT(A) and noted that there is no any infirmity in the conclusion reached by the Id. CIT(A). That being so, we decline to interfere with the order of Id. CIT(A) in deleting the aforesaid additions. His order on this addition is, therefore, upheld and the grounds of appeal of the Revenue are dismissed.

26. In the result, ground No.2 and 3 raised by the Revenue in ITA No.284/Rjt/2024 for A.Y. 2016-17 and ground No.1 of Revenue's appeal in ITA No.353/Rjt/2024 for A.Y. 2017-18, are dismissed.

27. Now, we shall take remaining ground Nos. 2 and 3 in ITA No.353/Rjt/2024, raised by the Revenue, which relate to deleting the addition of Rs. 1,47,17,000/- made on account of unaccounted cash receipts and without giving a reasonable opportunity to the assessing officer in respect of the additional evidence produced by the assessee, despite the provisions of the Rule 46A(3) of the I.T. Rules.

28. Brief facts qua the issue are that during the assessment proceedings, the assessing officer observed that in the case of M/s Shiv Shipping Services, Gandhidham, a survey u/s 133A was carried out by the investigation wing

of the department on 15.03.2018, at the business premises along with the other group concerns. During the survey on the business premises of M/s Shiv Shipping services, a pen drives was found and impounded which contains certain incriminating files /excel sheets. A statement of Sh. V. Ananthraman, Sh. Dharmesh Thakker partner of M/s Shiv Shipping services was also recorded on oath u/s 131 of the Act. In the statement it is admitted by Shri V. Anantharaman (Partner of Shiv Shipping Services) in the statement recorded on oath during the survey proceedings, that Shiv Shipping Services was involved in generation of Cash by doing Over-invoicing and the generated cash by such act, was returned to M/s Swiss Singapore India Pvt Ltd, as per the data impounded from the premises of Shiv Shipping Services. They also stated that all such payments were in cash and unaccounted in the books of account. These transactions are out of books transactions. On verification of such data, it was noticed by the assessing officer that during the year relevant to the assessment year under question, an amount of Rs. 1,47,17,000/-was paid by M/s Shiv Shipping Services to the assessee in cash. During the course of assessment proceeding, assessee was asked to explain such cash receipts and also was asked to show- cause, as to why such cash receipt of Rs. 1,47,17,000/- should not be added to the total income, as unexplained and unaccounted cash receipts u/s 68 of the Act.

29. In response, the assessee has replied to the assessing officer that company has not received such cash. However, the assessing officer rejected the contention of the assessee and observed that the imponded material at the premises at Shiv Shipping Services and statement of the partners clearly shows that assessee- company have received such cash payment after receiving the cheque for bill raised which has not been recorded in the books of accounts of the assessee. In view of these facts the amount of Rs. 1,47,17,000/- was added to the total income of the assessee,

as unexplained and unaccounted income received in cash u/s 68 of the Income Tax act 1961.

30. On appeal by the assessee, the Ld. CIT(A), has deleted the addition made by the assessing officer. The Id CIT(A) after analysis of various documents and statements held that assessing officer has not brought any evidence in support of receipt of cash by making any independent enquiry. The partners and the employees had filed retraction with proper explanation before the Hon'ble Settlement Commission and the same has been accepted by the Hon'ble Settlement Commission. In view of the fact that Hon'ble Settlement Commission has accepted the claim/explanation of M/s Shiv Shipping regarding the impugned transactions and treated the same being in the nature of loan given to others and also directed to tax the interest income out of such loan in the hands of Shiv Shipping, therefore, the addition made by the assessing officer does not survive and hence, the Id. CIT(A) deleted the addition. Therefore, the Revenue is in appeal before us.

31. Learned DR for the Revenue submitted that during the survey, on the business premises of M/s Shiv Shipping services, a pen drive was found and impounded which contains certain incriminating files /excel sheets. A statement of Sh. V. Ananthraman, Sh. Dharmesh Thakker partner of M/s Shiv Shipping services was also recorded on oath u/s 131 of the Act. In the statement it was admitted by Shri V. Anantharaman (Partner of Shiv Shipping Services) in the statement recorded on oath during the survey proceedings, that Shiv Shipping Services was involved in generation of Cash by doing Over-invoicing and the generated cash by such act, was returned to M/s Swiss Singapore India Pvt Ltd, as per the data impounded from the premises of Shiv Shipping Services. They also stated that all such payments were in cash and unaccounted in the books of account. These

transactions are out of books transactions. Therefore, assessing officer correctly made the addition in respect of such cash receipts of Rs. 1,47,17,000/-, hence, addition made by the assessing officer may be sustained.

32. On the other hand, learned Counsel for the assessee argued that assessee involved in import and export of commodities, employ various service providers for carrying out discharging and handling of bulk cargo like coal, Iron Ore, Agri Products etc. In the normal course of its business, the assessee had engaged M/s. Shiv Shipping for carrying out clearing and forwarding activities for its shipments of the goods imported from outside India and accordingly all the payments made to them were against the services provided by them. During the course of survey at premises of the assessee, no incriminating material or cash was found and statements of various employees of assessee were recorded and none of the executives of the assessee has accepted over invoicing and receipt of cash by the assessee. The assessing officer has not brought on record any evidence of whatsoever nature to suggest that the assessee has received cash from M/s Shiv Shipping Services. The assessing officer, while making addition, had not given an opportunity to cross examine the persons of M/s. Shiv Shipping Services. The assessee had also filed the copy of the Hon'ble Income Tax Settlement Commission order passed in the case of Shiv Shipping Services on January 20, 2021 wherein, the Hon'ble Settlement Commission, had accepted the disclosure of additional income and the manner in which such additional income was earned after considering all the facts including that the statements furnished by the partners and employee of Shiv Shipping Services which were subsequently retracted and clarified the contents of the excel sheet found in the pen drive at premises of M/s Shiv Shipping Services. The Id. Counsel, thus pointed out that assessing officer made the addition on surmises and guess work,

which has rightly been deleted by the Id. CIT(A). Therefore, Id. Counsel stated that order passed by the Id. CIT(A) may be upheld.

33. We have given our thoughtful consideration to rival contention. We have perused case file as well as paper books furnished by assessee. We find that during the course of appellate proceedings, the assessee has made the following arguments, before ld CIT(A), which are reproduced below:

(1) The assessee being involved in import and export of commodities, employ various service providers for carrying out discharging and handling of bulk cargo like coal, Iron Ore, Agri Products etc. In the normal course of its business, the Assessee had engaged M/s. Shiv Shipping for carrying out clearing and forwarding activities for its shipments of the goods imported from outside India and accordingly all the payments made to them were against the services provided by them.

(ii) The assessee has contended that the assessing officer had solely placed reliance on the statements recorded of the partners and employee of Shiv Shipping Services during the course of survey at the premises of Shiv Shipping Services. However, during the course of survey at premises of the assessee, no incriminating material or cash was found and statements of various employees of assessee were recorded and none of the executives of the assessee has accepted over invoicing and receipt of cash by the assessee. The assessing officer has not brought on record any evidence of whatsoever nature to suggest that the Assessee has received cash from M/s Shiv Shipping Services.

(iii) The assessing officer had not provided the copy of the statements recorded during the survey and other material relied upon by him to make addition in the hands of the Assessee. The Assessee has submitted the

affidavit of Mr. Jitendra Jain stating the above facts. The assessing officer had also not given an opportunity to cross examine the persons of M/s. Shiv Shipping Services.

(iv) The Assessee had also filed the copy of the Hon'ble Income Tax Settlement Commission order passed in the case of Shiv Shipping Services on January 20, 2021 wherein, the Hon'ble Settlement Commission, had accepted the disclosure of additional income and the manner in which such additional income was earned after considering all the facts including that the statements furnished by the partners and employee of Shiv Shipping Services which were subsequently retracted and clarified the contents of the excel sheet found in the pen drive at premises of M/s Shiv Shipping Services. In continuation thereof, the Assessee submitted as under:

(a) At Para 8.1 and 8.4 of the order on page 50 & 54 of SFPD, it has been submitted by M/s Shiv Shipping that the averments made in the statement recorded during the survey proceedings were at spur of moment to safeguard themselves without understanding the implications of their statements.

(b) At Para 8.4. of the order on page 54 of SFPU, it has been submitted by Shiv Shipping Services in its application before the Settlement Commission that the statements given by its partners and employee with incorrect facts have been retracted and explanations given with respect thereto. It has been reiterated by M/s. Shiv Shipping Services that it had not given back any amounts to its customers. The partners and employee of M/s. Shiv Shipping Services summarized correct facts in affidavit before the Hon'ble Settlement Commission. The employes of M/s Shiv Shipping Services i.e. Shri Suresh Pillai clarified in affidavit that he did not make any payment to any employee of the assessee and his replies in

statement given during the survey was based on what was informed to him by the partners while recording the transactions. Further, So, Shri Suresh Pillai in his statement stated that the explanations provided in respect of various notings (more specifically with respect to BGH Exim) are incorrect and do not represent any repayment in cash to the assessee. Shri Suresh Pillai reiterated that the recording in the pen drive is as per the direction received from partners and that no cash has been given to any employee of the assessee. The partners of M/s Shiv Shipping services in their affidavits before the Hon'ble Settlement Commission stated that the averments made by Shri Suresh Pillai in statement and confirmed in their statement were incorrect. It was stated that certain expenses were incurred for the benefit of business of the firm, which were not fully recorded in books of account. Unaccounted funds were generated for the purpose of business and firm would be left with surplus unaccounted cash, which were lent to various persons and entities on interest. Record of such investment were required to be maintained at hands of the employee. To hide real worth from employee and not to reveal the nature of transaction to the employee; the real purpose of payment was never revealed to employee and was fed with the information that cash was given to the customers against inflated sale invoices. It was further stated that invoices raised for services to customers was neither inflated nor any amount was given back. The firm has not given any amounts to its customer and the payments in the impounded material ostensibly were in fact loans and advances given by the firm to various parties at interest. The sales reflected in the books of account of the firm were genuine and no part of the same is over invoiced. The noting contains in various files found from the pen drive made against the names like BGH, Exim, Balani etc do not represent return of the inflated bills. The noting does not represent any repayment in cash and it was reiterated that those noting were merely pertaining to the advance given in cash to various parties for earning interest.

(c) At Para 8.4.2. of the order at page 54 of SFPB, Shiv Shipping Services in its application before the Settlement Commission had accepted that it had generated cash by inflating various expense transactions which were utilised for the purposes of giving short term advances to various parties. It was submitted that the noting's in the nature of BGH were noting pertaining to the transactions of advances to various parties for earning interest. Such loans were recorded in the impounded pages in the name of BGH, Shiv Shipping Services offered interest income at the rate of 12% of such advances to be taxed in its hands,

(d) At Para 10 at Page 63 of SFPB, The Hon'ble Settlement Commission considering the facts and submissions, has held that since Shiv Shipping Services was engaged in inflating of its cargo handling expenses, 24% of such expenses (as against 20% offered by Shiv Shipping Services) were disallowed. Further, the Hon'ble Settlement Commission accepted the cash flow provided by M/s Shiv Shipping and accepted interest income at the rate of 12% in the hands of Shiv Shipping Services for the advances given by it to various parties.

(e) At para 17 of the order at page no. 72 of SFPB, the Hon'ble settlement commission has granted immunity from Penalty and Prosecution to the M/s Shiv Shipping Services on account of giving full & true disclosure of its income and manner in which such income has been derived and nothing has been found to be untrue. Further, the assessee has submitted that there is no appeal made by the Department against the Hon'ble Settlement Commission's order which also is an evidence of the Department having accepted the facts submitted by Shiv Shipping Services before the Hon'ble Settlement Commission.

34. Without prejudice to the above, the Assessee also submitted before ld. CIT (A) that in reopening proceedings in Assessee's own case for earlier years, the assessing officer had relied on statements of its own employee also. In this connection, the Assessee submitted that the assessing officer in the reopening proceedings had merely assumed from the statements recorded of the assessee's employee that it is engaged in over- invoicing with Shiv Shipping Services. In this regard, the assessee has reproduced the relevant para of the statement given by its employee Shri Dharmendra Paliwal in para 1.3.10 of its submission dated 12.03.2024 (reproduced supra). On perusal of statement of Shri Dharmendra Paliwal, it is clearly seen that Shri Dharmendra Paliwal has clearly denied receiving cash as shown in the excel sheet presented to him during the time of survey. Further, he had stated to having received cash of Rs. 2 to 3 lakhs in some instances from Shiv Shipping Services. In his statement recorded during survey, he has mentioned that small amount of cash received was towards distribution of gifts during festivals like Diwali etc and arranging get togethers. However, nowhere had Mr. Paliwal accepted that the Assessee and its employees are engaged in any alleged over- invoicing with Shiv Shipping Services, In fact, in his other statement, Shri Dharmendra Paliwal had mentioned the names of Shri Rajat Chitlangia and Shri Rajat Ahluwalia who were responsible for finalising handling contracts with CHAs. On a conjoint reading of aforesaid extracted statements of Shri Dharmendra Paliwal, it is evident that the assessing officer had erroneously drawn an adverse inference by misinterpreting the aforesaid statements. The assessee submitted that Shri Dharmendra Paliwal has furnished an affidavit clarifying the abovementioned statements made during the course of survey proceedings. From this affidavit it is clearly evident that such cash was given by M/s Ship Shipping to Mr. Dharmendra Paliwal for distribution of gifts, arranging get togethers, parties etc.

35. The Assessee further submitted the below comparative chart which clearly shows that for a similar vessel size, the average rates charged by M/s Shiv Shipping for providing CHA services is similar to that charged by order third-party CHA to the assessee during the captioned assessment year:

S. No.	Handling Agent	Rate per MT	Qty (MT)	Vessel Type
1.	Maheshwari	175	1,15,500	Panamax
2.	Shiv Shipping	170	3,69,647	Panamax
3.	Maheshwari	109	1,64,124	Supramax
4.	Shiv Shipping	108	3,89,408	Supramax
5.	Maheshwari	277	1,57,194	Cape
6.	Shiv Shipping	280	1,15,000	Cape
7.	Rishi	280	1,77,978	Cape

Moreover, TDS u/s. 194C has been duly deducted on all such charges paid to Shiv Shipping and other handling agents. In support of its claim, the appellant has also furnished the copy of sample agreement entered into with the above said handling agents.

36. Further, the appellant has also furnished the summary of the aforesaid agreements pertaining to three different CHA(s) as tabulated below:-

Sr No.	Vendor Name	Vessel	Vessel Type	Contract date	Qty Lifted	Handling	Wharfage	Total
1.	Shiv Shipping Services	M.V. PRABHU SAKHAWAT	Panamax	01.04.2016	38,419	140	0	140
2.	Shiv Shipping Services	M.V. GENCO RHONE	Supramax	20.04.2016	29,000	88	18	106
3.	Shiv Shipping Services	MV TITAN	Supramax	02.05.2016	17,600	88	18	106
4.	Shiv Shipping Services	M.V. NECKLACE	Panamax	09.05.2016	72,499	173	0	173
5.	Shiv Shipping Services	M.V. SAMJOHN AMITY	Panamax	12.05.2016	72,920	173	0	173
6.	Shiv Shipping Services	MV YASA CANARY	Supramax	15.05.2016	25,000	88	18	106
7.	Shiv Shipping Services	M.V. K AMBER	Supramax	20.05.2016	9,000	88	18	106
8.	Shiv Shipping Services	M.V. ZELAND ROTTERDAM	Supramax	14.06.2016	42,997	88	18	106
9.	Shiv Shipping Services	MV ELENI P	Panamax	14.06.2016	70,950	173	0	173
10.	Shiv Shipping Services	M.V. GREEN HERON	Supramax	10.07.2016	15,000	88	18	106
11.	Shiv Shipping Services	MV OCEAN DIAMOND	Supramax	07.09.2016	41,000	88	25.2	113.2
12.	Shiv Shipping Services	M.V. BULK PARAISO	Supramax	15.09.2016	56,100	88	25.2	113.2
13.	Shiv Shipping Services	M.V. JEWEL OF TOKYO	Supramax	30.03.2016	25,000	88	18	106
14.	Maheshwari Handling Agency Private Limited	M.V. MARINE STAR	Supramax	06.04.2016	23,455	88	18	106
15.	Maheshwari Handling Agency Private Limited	M.V. E.R. BARCELONA	Supramax	23.05.2016	43,269	88	18	106
16.	Maheshwari Handling Agency Private Limited	M.V. MINERAL KYUSHU	Cape	24.05.2016	76,242	260	18	278
17.	Maheshwari Handling Agency Private Limited	M.V. RUINING 6	Supramax	20.06.2016	33,000	88	18	106
18.	Maheshwari Handling Agency Private Limited	M.V. MINOAN COURAGE	Panamax	15.07.2016	14,300	173	0	173
19.	Maheshwari Handling Agency Private Limited	M.V. OCEAN HAPPY	Panamax	20.10.2016	40,000	180.2	0	180.2
20.	Maheshwari Handling Agency Private Limited	M.V. SAUBAAGYA	Supramax	12.12.2016	35,000	88	25.2	113.2
21.	Rishi Shipping	M.V. NAVIOUS LUZ	Cape	30.08.2016	48,000	255	25.2	280.2

As can be seen from the above table, the rates charged by M/s Shiv Shipping Services for providing handling services to the Appellant for the year under consideration was in line with the rates charged by the other handling agents. This further strengthens the contention of the appellant that there was no over Invoicing by M/s, Shiv Shipping as interpreted by the AO.

37. It was submitted that the partners and the employee of Shiv Shipping Services have already retracted their statements. This retracement was made in front of Hon'ble Settlement commission and the same is accepted by the Hon'ble Settlement commission. No adverse findings regarding the retraction had been given by the Hon'ble Settlement commission.

38. Based on the above facts, the Id. CIT(A) noted from the records that the assessee was involved in import and export of commodities, employ

various service providers, like M/s, Shiv Shipping Service for carrying out discharging and handling of bulk cargo like coal, Iron Ore, Agri Products etc. It is also a fact that the assessing officer had made the addition on the basis of statements recorded of the partners and employee of Shiv Shipping Services during the course of survey at the premises of Shiv Shipping Services. However, it is also a fact that during the course of survey at premises of the assessee, no incriminating material or cash was found and statements of various employees of assessee were recorded and none of the executives of the assessee had accepted over invoicing and receipt of cash by the assessee. The assessing officer has not brought on record any evidence of whatsoever nature to suggest that the assessee has received cash from M/s Shiv Shipping Services. It is clearly seen from the perusal of relevant portion of the statement of Shri Dharmendra Paliwal that Shri Dharmendra Paliwal had not admitted to have received cash as shown in the excel sheet presented to him during the time of survey. Further, he had clearly stated to have received cash of Rs.2 to 3 lakhs in some instances from Shiv Shipping Services towards distribution of gifts during festivals like Diwali etc and arranging get togethers. Further, Shri Dharmendra Paliwal has furnished an affidavit and clarifying the abovementioned statements made during the course of survey proceedings. In the affidavit, it was clarified that such cash was given by M/s Ship Shipping to him for distribution of gifts, arranging get togethers, parties etc.

39. The Id. CIT(A) observed from copy of the Hon'ble Income Tax Settlement Commission order passed in the case of Shiv Shipping Services dated 29.01.2021 that the Hon'ble Settlement Commission, had accepted the disclosure of additional income and the manner in which such additional income was earned after considering all the facts including that the statements furnished by the partners and employee of Shiv Shipping

Services before whom the transactions/ contents of the excel sheet found in the pen drive at premises of M/s Shiv Shipping Services were clarified. It is also found that Shiv Shipping Services in its application before Hon'ble Settlement Commission had submitted that the statements given by its partners and employee with incorrect facts, had been retracted and explanations given with respect thereto. It has been reiterated by M/s. Shiv Shipping Services that it had not given back any amounts to its customers. The partners and employee of M/s. Shiv Shipping Services summarized correct facts in affidavit before the Hon'ble Settlement Commission. The employee of M/s. Shiv Shipping Services i.e. Shri Suresh Pillai clarified in affidavit that he did not make any payment to any employee of the assessee and his replies in statement given during the survey was based on what was informed to him by the partners while recording the transactions. Further, Shri Suresh Pillai in his statement stated that the explanations provided in respect of various notings (more specifically with respect to BGH Exim) are incorrect and do not represent any repayment in cash to the assessee. The partners of M/s. Shiv Shipping services in their affidavits before the Hon'ble Settlement Commission stated that the averments made by Shri Suresh Pillai in statement and confirmed in their statement were incorrect. It was stated that certain expenses were incurred for the benefit of business of the firm, which were not fully recorded in books of account. It was claimed by M/s Shiv Shipping before Hon'ble Settlement Commission that unaccounted funds were generated for the purpose of business and the firm had been left with surplus unaccounted cash, which were lent to various persons and entities on interest. Record of such investment were required to be maintained at hands of the employee. To hide real worth from employee and not to reveal the nature of transaction to the employee, the real purpose of payment was never revealed to employees and was fed with the information that cash was given to the customers against inflated sale invoices. It was further stated that invoices

raised for services to customers was neither inflated nor any amount was given back. The firm had not given any amounts to its customer and the payments in the impounded material were in fact loans and advances given by the firm to various parties at interest. The noting does not represent any repayment in cash and it was reiterated that those noting were merely pertaining to the advance given in cash to various parties for earning interest.

40. The Id CIT(A) also observed that M/s. Shiv Shipping Services in its application before Hon'ble Settlement Commission had accepted that it had generated cash by inflating various expense transactions which were utilized for the purposes of giving short term advances to various parties. Such loans were recorded in the impounded pages in the name of BGH. Shiv Shipping Services offered interest income at the rate of 12% of such advances to be taxed in its hands. Further, the Hon'ble Settlement Commission considering the facts and submissions, has held that since Shiv Shipping Services was engaged in inflating of its cargo handling expenses, 24% of such expenses (as against 20% offered by Shiv Shipping Services) were disallowed. Further, the Hon'ble Settlement Commission accepted the cash flow provided by M/s Shiv Shipping and accepted interest income at the rate of 12% in the hands of Shiv Shipping Services for the advances given by it to various parties. In view of the above, the Id CIT(A) held that assessing officer has not brought any evidence in support of receipt of cash by making any independent enquiry. The partners and the employees had filed retraction with proper explanation before the Hon'ble Settlement Commission and the same has been accepted by the Hon'ble Settlement Commission. In view of the fact that Hon'ble Settlement Commission has accepted the claim/explanation of M/s Shiv Shipping regarding the impugned transactions and treated the same being in the nature of loan given to others and also directed to tax the interest

income out of such loan in the hands of Shiv Shipping, therefore, the addition made by the assessing officer does not survive. Considering these facts and circumstances, the Id CIT(A) deleted the addition.

41. We note that during the appellate proceedings, the assessee submitted a copy of the decision of the Hon'ble settlement commission dated 29th January 2021, the same should not be treated as an additional evidence. The copy of the decision/judgement of any authority does not fall in the definition of additional evidence, and normally the judgements are in rem, hence, are not additional evidences. Further, the copy of various statements of these persons taken by the department, were on the record of the assessing officer, and in fact, the copy of statements of persons were provided by the department to the assessee, hence these statements were on the record of the lower authorities, therefore, these cannot be treated as an additional evidence, hence, we do not agree with Id DR for the revenue, to the effect that assessee has produced additional evidence and violated the provisions of Rule 46A of the Income Tax Rules. We find that above conclusion, so reached by the Id. CIT(A), does not contain any infirmity. Hence, the conclusions arrived at by the CIT(A) are, therefore, correct and admit no interference by us. We, approve and confirm the order of the CIT(A) and dismiss the ground raised by the Revenue.

42. In the result, ground Nos. 2 and 3 in ITA No.353/Rjt/2024, raised by the Revenue, are dismissed.

43. Now we shall take assessee's appeal in ITA No.226/RJT/2024 for assessment year 2018-19, wherein grounds of appeal raised by the assessee, are as follows:

"*1.10n the facts and circumstances of the case and in law, the Id. CIT(A) erred in confirming the addition of Rs. 1,80,23,440/- made by the Id. assessing officer in respect of commission expenses alleging the same to be unexplained expenditure and thereby invoking section 69C*
1.2 The Assessee therefore prays that the aforesaid addition be deleted."

44. Succinct facts qua the issue are that during the course of assessment proceedings, the assessing officer noticed that assessee has debited commission expenses in the profit and loss discount, however, the rate of commission has been decided and determined without any due diligence between related entities. Therefore, during the course of assessment proceeding, the assessee was asked to explain the above mentioned overseas transaction Rs. 1,80,23,440/-. In response to this, the assessee has submitted his reply, before the assessing officer that commission expenses have been incurred during the course of business, and these expenses has actually been accrued to the assessee. The assessee also submitted that due to restriction on remittance, the amount actually was not paid on time, but there is a definite obligation on the assessee to pay it, and in fact, the amount was paid in subsequent years. The actual services have been rendered by the parties/Commission agents, therefore there was definite obligation on the assessee to pay it as per the accrual concept.

45. However, the assessing officer, rejected the above reply of the assessee and made addition of Rs. 1,80,23,440/-, to the total income of the assessee as unexplained expenditure u/s. 69C of the Act.

46. On appeal, the Id. CIT(A) confirmed the action of the assessing officer. The Id. CIT(A) just reiterated the facts narrated in the assessment order and stated that since the assessee did not submit relevant evidence to prove the expenses, therefore, addition made by assessing officer, should be

confirmed. Aggrieved by the order of the Id CIT(A), the assessee is in appeal before us.

47. Learned Counsel for the assessee argued that a Memorandum of Understanding was entered into between the Assessee and Pheonix Gulf FZE that commission at 6% would be paid to M/s. Phoenix Gulf FZE after realization of export proceeds from the Iranian customer. The commission expenses has accrued, however, post financial year 2018-19, the banks have absolutely declined to make any payment which is linked with an underlying Iranian transaction, and for that assessee has submitted before the assessing officer, the correspondences with UCO Bank in 2019 and 2021 requesting the bank to make payments. The obligation to pay the expenditure/ commission has arisen and it is a definite liability to pay the commission, hence such expenses should be allowed.

48. On the other hand, the Id. DR for the revenue submitted that assessee has shown the commission expenses to be paid, however, the rate of commission was not decided with due diligence. Since it is a transaction between related entities, hence, there is always doubt that assessee might have shown more expenses to reduce the net profit and consequently to avoid the payment of taxes, therefore, these expenses should not be allowed, and hence, addition made by the assessing officer may be sustained.

49. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. We find that assessee had debited in its profit and loss account an amount of Rs. 1,80,23,440/-towards commission expense payable to the overseas entity, M/s. Phoenix Gulf FZE, Iran. During the course of assessment proceedings, the assessing officer had asked the assessee to

explain the said overseas transaction of Rs. 1,80,23,440/-. The assessee had justified the expenses by submitting a memorandum of understanding and stated that assessee has been paying such expenses since long, for business purpose. The assessee had clearly stated before assessing officer that these commission expenses have incurred during the course of business and for the purpose of business, hence the same may be allowed. However, ignoring the above submissions of the assessee, the assessing officer had made the disallowance of the entire commission expense of Rs. 1,80,23,440/-.

50. We do not agree with the above action of the assessing officer. It is also a settled-principle that ordinarily, it is for the assessee to decide whether any expenditure should be incurred in the course of his business. The Hon'ble Apex Court in the case of **Sassoon J David and Co. (P) Ltd vs CIT Bombay (118 ITR 261)(SC)** held that expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits, the assessee can claim deduction for the same. Even the Hon'ble Karnataka High Court in the case **Commissioner of Income-tax vs Motor Industries Company Limited (1907) (223 ITR 112)** was of the view that the commercial expediency of a businessman's decision to incur, an expenditure cannot be tested on the touchstone of strict legal liability to incur such an expenditure. Such decisions in the very nature of things have to be taken from a business point of view and have to be respected by the authorities no matter that it may appear, latter, that the expenditure incurred was unnecessary or avoidable. The assessing officer ought not to have questioned the commercial prudence of the transaction entered into by the assessee, businessman, when there was nothing on record to show that the transaction was not genuine. It is a settled principle of law that business or commercial expediency has to be judged from the perspective of the

businessman and not of the Revenue, since it is the businessman who is being benefited from the services rendered and also it is he who knows to what extent the benefit ensures to him. Reliance in this regard may be placed on the decision of the Hon'ble Supreme Court in the case of CIT vs. Dhanrajgiri Raja Narasingirji, reported in 91 ITR 544 (SC), wherein it was held that "it is not open to the department to prescribe what expenditure an assessee should incur and in what circumstances he should incur the expenditure. Every businessman knows his interest best.

51. Further, the Hon'ble Supreme Court in the decision rendered in the case of Eastern Investments Limited vs. CIT reported in 20 1TR 1 (SC) has opined that the aspect of prudency of entering into a transaction and making an expenditure in connection therewith will have to be judged from the point of view of the businessman and not of the Department. The ratio of the said decision clearly emanates the view that one should not be concerned with the legality or propriety of a transaction or whether the result could have been achieved in another way. What one should be concerned with is whether the transaction was done in the ordinary course of business. Attention in this regard may also be drawn towards the decision of the Hon'ble Supreme Court in the case of Sassoon J David & Co. P Ltd vs. CIT reported in 118 ITR 261 (SC) wherein it was held that "It has to be observed here that the expression 'wholly and exclusively used in section 10(2)(xv) of the Act of the 1922 Act, corresponding to section 37(1) of the 1961 Act, does not mean 'necessarily. Ordinarily, it is for the assessee to decide whether any expenditure should be incurred in the course of his or its business. Such expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits, the assessee can claim deduction under section 37 (1) of the Act, even though there was no compelling necessity to incur such expenditure. We find that Pheonix Gulf FZE is an unrelated party

with whom the assessee had been dealing with since many past years, and Pheonix Gulf FZE used to buy tea from Global Exports & Marketing Division of the assessee- company (earlier known as BGH Exim Ltd.) for direct shipments to its Iranian buyer Golestan Co. till 2012. The Assessee, being the exporting company used to raise invoices on Phoenix Gulf FZE, but the shipment was going directly to Bander Abbas port to the ultimate consignee i.e. Golestan Co. Phoenix Gulf FZE, in turn used to raise invoice on Golestan Co. The terms of such buying were both on L/C and D/A basis and the currency of these transactions were USD or AED. It was also agreed to pay commission to Phoenix Gulf FZE for such sales as the customer was introduced by them and also, they were having long established relationship with them for supply of tea. Accordingly, a Memorandum of Understanding was entered into between the Assessee and Pheonix Gulf FZE such that commission at 6% would be paid to M/s. Phoenix Gulf FZE only after realization of export proceeds from the aforesaid Iranian customer. Further, the Assessee submits that when the export sales were made to the aforesaid Iranian customer i.e. M/s. Golestan Co, the United States of America had imposed various sanctions on trade with Iran, as a result of which there was a substantial delay in the realization of export proceeds. The assessee had still managed to make payments towards commission to Pheonix Gulf over the past years. However, post FY 2018-19, the banks have absolutely declined to make any payment which is linked with an underlying Iranian transaction. To substantiate the same, the assessee had filed its correspondences with UCO Bank in 2019 & 2021 requesting the bank to make payments. The above facts clearly explain that the assessee has incurred Commission expenses of Rs.1,80,23,440/-, for the purpose of business.

52. The Id Counsel for the assessee, also stated that similar transactions with Phoenix Gulf FZE, the assessee had also entered into transactions

with Delmon Star General Trading, a commission agent of Dubai who exported tea to assessee's customers in Iran during the earlier assessment years 2016-17. Further, the rate of commission charged by Delmon Star General Trading was similar to the rate charged by Phoenix Gulf FZE i.e. at 6%. The assessee has also furnished the copy of annual summary of Statement of accounts of M/s Phoenix Gulf FZE in the Assessee books. Therefore, we find that the assessee had incurred these expenses for promoting the business and to earn profits, hence the assessee can claim deduction under section 37 (1) of the Act. Based on these facts, we delete the addition.

53. In the result, the assessee's appeal in ITA No.226/RJT/2024 for assessment year 2018-19, is allowed.

54. Now we shall take assessee's appeal in ITA No.225/RJT/2024, for assessment year 2015-16, wherein grounds of appeal raised by the assessee, are as follows:

> *"On the facts and circumstances of the case and in law, the Id. CIT(A) erred in confirming the disallowance made by the Id. assessing officer /s 43B(f) of the Act in respect of the provision made for leave salary amounting to Rs. 25.04.651/- without appreciating that the said provision is not applicable to the provision made for leave encashment."*

55. The facts necessary for disposal of the above issue are stated in brief. During the course of assessment proceedings, it was noticed by the assessing officer that assessee -company had made provision for leave salary of Rs.25,04,651/-. As no provision for any expenses is allowed as per the Act, therefore, the assessee vide order sheet noting dated 20.11.2017, was requested to show cause, why these should not be disallowed. The AR of the assessee vide submission dated 27.11.2017 furnished its explanation, and stated that there is a definite liability to pay

these expenses as per actuary report, and in fact, the assessee, paid these expenditure in subsequent years. However, the assessing officer rejected the claim of the assessee and made the addition of Rs. Rs.25,04,651/-.

56. On appeal, the Id. CIT(A) has confirmed the addition made by the assessing officer. The Id. CIT(A) has just reiterated the facts narrated in the assessment order, and confirmed the action of the assessing officer. Aggrieved by the order of the assessing officer, the assessee is in appeal before us.

57. Learned Counsel for the assessee, argued that in the assessee's case, the assessee- company, has made provision for leave salary of Rs.25,04,651/- on the basis of actuarial valuation, which is definite liability and paid by the assessee in subsequent years. Reliance was placed on the decision of **PCIT Vs. Akzo Noble India Ltd**, where the Hon`ble Calcutta High Court held that deduction of liability on account of provision of leave encashment having been made, which had not fallen due within relevant assessment year would be allowable as same was not a contingent liability. Further, reliance has also been placed by the ld Counsel on the decision of **Andhra Pradesh High Court in the case of SriKakollu Shubbarao & Co. 173 ITR 708,** where it is held that, in order to apply the provisions of section 43B, not only should the liability to pay the tax or duty be incurred in the accounting year but the amount also should be statutorily "payable" in the accounting year. If the Legislature intended, it should have so provided that any sum for the payment of which liability was incurred by the assessee would not be allowed unless such sum is actually paid. Finally, ld Counsel for the assessee also relied on the judgement of the Co-ordinate Bench in assessee`s own group case in **Aditya Birla Nuvo Ltd. Vs. ACIT (68 SOT 403) Mumbai Trib.**, where it was held that -A perusal of Sec. 43B(f) shows that the Explanation to Sec. 43B referring to the

amendment of the word any sum payable is applicable only for clause (a) of Sec. 43B which means that it is not applicable for clause (f) of section 43B of the Act. The ld. Counsel, based on these facts, argued that addition made by the assessing officer may be deleted.

58. On the other hand, Ld. DR for the revenue strongly argued that as per the provision of section 43B(f) of the Act, the eligibility for deduction arises in previous year in which payment liability is actually made and not in which provision was made in that regard, irrespective of system of accounting followed by the assessee. Therefore, the action of the assessing officer in making disallowance for A.Y.2015-16, should be confirmed.

59. We have given our thoughtful consideration to rival contention. We find merit in the submissions of ld. DR for the revenue to the effect that as per the provision of section 43B(f) of the Act, the eligibility for deduction arises in previous year in which payment liability is actually made and not in which provision was made in that regard, irrespective of system of accounting followed by the assessee. The various judgements relied on by ld. Counsel for the assessee, has been reversed by the Hon`ble Supreme Court in the case of Union of India Vs. Exide industries Limited (2020), 116 taxmann.com.378 (SC), order dated 24.04.2020. The findings of the Hon`ble Supreme Court are as follows:

> *"34. Before stepping into the next ground, we are inclined to observe that the approach of constitutional courts ought to be different while dealing with fiscal statutes. It is trite that the legislature is the best forum to weigh different problems in the fiscal domain and form policies to address the same including to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to new regulatory*
> *measures. In the very nature of taxing statutes, legislature holds the power to frame laws to plug in specific leakages. Such laws are always pin-pointed in nature and are only meant to target a specific avenue of taxability depending upon the experiences of tax evasion and tax avoidance at the ground level. The general principles of exclusion and inclusion do not apply to taxing statutes with the same vigour unless the law reeks*
> *of constitutional infirmities. No doubt, fiscal statutes must comply with the tenets of Article 14. However, a larger discretion is given to the legislature in taxing*

statutes than in other spheres. In Anant Mills Co. Ltd. v. State of Gujarat & Ors. [1975] 2 SCC 175, this Court noted thus:
"25. ...But, in the application of the principles, the courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification so long as it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways..."
Viewed thus, the reason weighed with the Division Bench of the High Court in the impugned judgment is untenable.
Defeating the dictum in Bharat Earth Movers case

35. We shall now examine clause (f) on the ground that it defeats the judgment of this Court in Bharat Earth Movers (supra). We have carefully analysed the decision in Bharat Earth Movers (supra) and note that the Court was sitting in appeal over the nature of liability under the leave encashment scheme and held such liability to be a present liability. Resultantly, it became deductible from the profit and loss account of the assessee in the same accounting year in which provision against the same is made. The Court rejected that leave encashment liability is a contingent one and observed thus:
"7. Applying the abovesaid settled principles to the facts of the case at hand we are satisfied that provision made by the appellant Company for meeting the liability incurred by it under the leave encashment scheme proportionate with the entitlement earned by employees of the Company, inclusive of the officers and the staff, subject to the ceiling on accumulation as applicable on the relevant date, is entitled to deduction out of the gross receipts for the accounting year during which the provision is made for the liability. The liability is not a contingent liability. The High Court was not right in taking the view to the contrary."
36. Before the judgment in Bharat Earth Movers (supra), various tribunals and High Courts across the country were treating the liability in lieu of leave encashment as contingent liability. This did not go down well with the assessees following the mercantile accounting system, as they were not able to avail deductions upon mere creation of a provision against such liability without making the actual payment. challenge to this legal position reached before this Court in Bharat Earth Movers (supra), wherein the Court reversed the position.
37. It is no doubt true that the legislature cannot sit over a judgment of this Court or so to speak overrule it. There cannot be any declaration of invalidating a judgment of the Court without altering the legal basis of the judgment - as a judgment is delivered with strict regard to the enactment as applicable at the relevant time. However, once the enactment itself stands corrected, the basic cause of adjudication stands altered and necessary effect follows the same. A legislative body is not supposed to be in possession of a heavenly

wisdom so as to contemplate all possible exigencies of their enactment. As and when the legislature decides to solve a problem, it has multiple solutions on the table. At this stage, the Parliament exercises its legislative wisdom to shortlist the most desirable solution and enacts a law to that effect. It is in the nature of a 'trial and error' exercise and we must note that a law-making body, particularly in statutes of fiscal nature, is duly empowered to undertake such an exercise as long as the concern of legislative competence does not come into doubt. Upon the law coming into force, it becomes operative in the public domain and opens itself to any review under Part III as and when it is found to be plagued with

infirmities. Upon being invalidated by the Court, the legislature is free to diagnose such law and alter the invalid elements thereof. In doing so, the legislature is not declaring the opinion of the Court to be invalid.
38. In Welfare Association. A.R.P ., Maharashtra v. Ranjit P . Gohil [2003] 9 SCC 358, this Court relied upon Indian Aluminium Co. v. State of Kerala [1996] 7 SCC 637 and upon elaborate analysis, laid down certain principles to preserve the delicate balance of separation of powers and observed thus:
"47. ...(v) in exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as
invalid.... It is competent for the legislature to enact the law with retrospective effect;

(vi) the consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same."
The Court then relied upon State of T.N. v. Arooran Sugars Ltd. [1997] 1 SCC 326 to reaffirm the point and noted thus:
"48. In State of Tamil Nadu v. Arooran Sugars Ltd., the Constitution Bench made an exhaustive review of all the available decisions on the point and summed up the law by holding: —

"It is open to the legislature to remove the defect pointed out by the court or to amend the definition or any other provision of the Act in question retrospectively. In this process it cannot be said that there has been an encroachment by the legislature over the power of the judiciary. A court's directive must always bind unless the conditions on which it is based are so fundamentally altered that under altered circumstances such decisions could not have been given. This will include removal of the defect in a
statute pointed out in the judgment in question, as well as alteration or substitution of provisions of the enactment on which such judgment is based, with retrospective effect."

In Indian Aluminium Co. (supra), the Court relied upon a set of authorities and extended its approval to the above stated position of law thus:

"41. ... A Constitution Bench of this Court had held that the distinction between legislative act and judicial act is well-known. The adjudication of the rights of the parties is a judicial function. The legislature has to lay down the law prescribing the norms or conduct which will govern the parties and transactions to require the court to give effect to that law. Validating legislation which removes the norms of invalidity of action or providing remedy is not an encroachment on judicial power. Statutory rule made under the proviso to article 309 was upheld. The legislature cannot by a bare declaration without anything more, directly overrule, reverse or override a judicial decision at any time in exercise of the plenary power conferred on the legislature by articles 245 and 246 of the

Constitution. It can render a judicial decision ineffective by enacting a valid law on a topic within its legislative field, fundamentally altering or changing with retrospective, curative or nullifying effect, the conditions on which such a decision is based. In Hari Singh and Ors. v. The Military Estate Officer, [1973] 1 SCR 515, prior to 1958 two alternative modes of eviction under Public Premises Act were available. When the eviction was sought of an unauthorised occupant by summary procedure the constitutionality thereof was challenged and upheld. The Act was subsequently amended in 1958 with retrospective operation from September 16, 1958. Thereunder only one procedure for eviction was available. It was contended to be a legislative encroachment of judicial power. A Bench of three Judges held that the legislature possessed competence over the subject matter and the Validation Act could remove the defect which the court had found in the previous case. It was not the legislative encroachment of judicial power but one of removing the defect
which the court had pointed out with a deeming date." (emphasis supplied)

39. Reverting to the true effect of the reported judgment under consideration, it was rendered in light of general dispensation of autonomy of the assessee to follow cash or mercantile system of accounting prevailing at the relevant time, in absence of an express statutory provision to do so differently. It is an authority on the nature of the liability of leave encashment in terms of the earlier dispensation. In absence of any such provision, the sole operative provision was section 145(1) of the 1961 Act that allowed complete autonomy to the assessee to follow the mercantile system. Now a limited change has been brought about by the insertion of
clause (f) in Section 43B and nothing more. It applies prospectively. Merely because a liability has been held to be a present liability qualifying for instant deduction in terms of the applicable provisions at the relevant time does not ipso facto signify that deduction against such liability cannot be regulated by a law made by Parliament prospectively. In matter of statutory deductions, it is open to the legislature to withdraw the same prospectively. In other words, once the Finance Act, 2001 was duly passed by the Parliament inserting clause (f) in section 43B with prospective effect, the deduction against the liability of leave encashment stood regulated in the manner so prescribed. Be it noted that the amendment does not reverse the nature of the liability nor has it taken away the deduction as such. The liability of leave encashment continues to be a
present liability as per the mercantile system of accounting. Further, the insertion of clause (f) has not extinguished the autonomy of the assessee to follow the mercantile system. It merely defers the benefit of deduction to be availed by the assessee for the purpose of computing his taxable income and links it to the date of actual payment thereof to the employee concerned. Thus, the only effect of the insertion of clause (f) is
to regulate the stated deduction by putting it in a special provision.

40. Notably, this regulatory measure is in sync with other deductions specified in Section 43B, which are also present and accrued liabilities. To wit, the liability in lieu of tax, duty, cess, bonus, commission etc. also arise in the present as per the mercantile system, but assessees used to defer payment thereof despite claiming deductions there against under the guise of mercantile system of accounting. Resultantly, irrespective of the category of liability, such deductions were regulated by law under the aegis of Section 43B, keeping in mind the peculiar exigencies of fiscal affairs and underlying concerns of public revenue. A priori,

merely because a certain liability has been declared to be a present liability by the Court as per the prevailing enactment, it does not follow that legislature is denuded of its power to correct the mischief with prospective effect, including to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to new regulatory measures. Strictly speaking, the Court cannot venture into hypothetical spheres while adjudging constitutionality of a duly enacted provision and unfounded limitations cannot be read into the process of judicial review. A priori, the plea that clause (f) has been enacted with the sole purpose to defeat the judgment of this Court is misconceived.

41. The position of law discussed above leaves no manner of doubt as regards the legitimacy of enacting clause (f). The respondents have neither made a case of non existence of competence nor demonstrated any constitutional infirmity in clause (f).
42. In view of the clear legal position explicated above, this appeal deserves to be allowed. Accordingly, the impugned judgment of the Division Bench of the High Court is reversed and clause (f) in Section 43B of the 1961 Act is held to be constitutionally valid and operative for all purposes. No order as to costs. Pending interlocutory applications, if any, shall stand disposed of."

60. Respectfully following the judgement of the Hon`ble Supreme Court, in the case of Exide industries Limited (supra), we dismiss the appeal of the assessee.

61. In the result, appeal filed by the assessee, in ITA No.225/RJT/2024, for assessment year 2015-16, is dismissed.

62. In the combined result, appeals filed by the Revenue (in ITA No.353 &284) are dismissed. The appeal of the assessee, in ITA No.226/RJT/2024, is allowed and the appeal of the assessee, in ITA No.225/RJT/2024, is dismissed.

Order pronounced in the Open Court on 13/02/2025 at Rajkot.

Sd/-	**Sd/-**
(DINESH MOHAN SINHA)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Rajkot
दिनांक/ Date: 13/02/2025

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Rajkot
6. Guard File

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Rajkot