

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "I", MUMBAI**

**BEFORE SHRI G.S. PANNU (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No. 2502/MUM/2013
Assessment Year: 2009-10**

International Ships Stores Suppliers
101, Navratan, 69 P.D. Mello Road
1st Floor, Carnac Bunder,
Mumbai

Vs. JCIT, Range 13(2)
Mumbai

PAN No. AAIFI0135Q

(Appellant)

(Respondent)

Revenue By: Mr. Deepak Tralshawala
Assessee By: Mr. Javed Akhtar

Date of Hearing : 25/07/2016
Date of pronouncement : 28/10/2016

ORDER

PER RAVISH SOOD, JUDICIAL MEMBER :

The present appeal has been filed by the assessee against the order of CIT(A)-24, Mumbai, dt. 08/01/2013 which in itself has arisen from the assessment order passed by the A.O under section 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. In this appeal the assessee has raised the following grounds of appeal:

"1. On the facts and in the circumstances of the case and in law, the Learned CIT(A) has erred in upholding the disallowance of a sum of Rs. 30,92,432/- under the provisions of Section 40A(3) of the Income Tax Act, 1961 without considering the facts of the case and various judgments quoted by the appellants.

2. On the facts and in the circumstances of the case and in law, the Learned CIT(A) has erred in upholding the disallowance of a sum of Rs. 14,74,982/- being loss on sale of fenders on surmises and without considering the facts of the case submitted by the appellants.

3. Hence, the total income be reduced by Rs. 45,67,414/- by deleting the addition made under the provisions of Section 40A(3) of the Income Tax Act, 1961 and on account of loss on sale of fenders."

3. Brief facts of the case are that the assessee firm which is engaged in the business of supplier of stores to ships had filed its return of income for AY 2009-10 as on 30/09/2009, declaring total income at Rs. 4,00,16,475/-. The case of the assessee was taken up for scrutiny proceeding and the A.O after deliberating on certain issues assessed the income at Rs. 4,29,04,040/-. The assessee being aggrieved with certain additions/disallowances so made by the A.O carried the matter in appeal before the CIT(A), however the appeal of the assessee was partly allowed.

4. That assailing the order of the CIT(A) the assessee had filed the present appeal before us on the following issues :-

Sr. No.	Particulars	Amount
1	Disallowance under section 40A(3) of the Act	Rs. 13,11,455/-

2	Disallowance of loss on sale of fenders	Rs. 14,74,982/-
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However, before advertng further it may be clarified that though the assessee vide its ground of appeal no. 1 had challenged the disallowance under Sec. 40A(3) which amounts to Rs. 13,11,455/-, however it had wrongly made a mention of the amount in the ground of appeal at Rs. 30,92,432/-, which as a matter of fact is the sum total of the additions/disallowances made by the A.O. That on careful perusal of the records we find that except for the aforesaid two issues assailed before us, the remaining additions/disallowances were either deleted by the CIT(A), or having not been further carried in appeal had thus attained finality. Thus in backdrop of the aforesaid factual position, the scope of adjudication as regards ground of appeal no. 1 is restricted to the disallowance u/s 40A(3) of Rs. 13,11,455/- sustained by the CIT(A).

5. That during the course of hearing of the appeal before us the Ld. Authorized representative (for short 'A.R') for the assessee advertng to ground of appeal no. 1, therein submitted that the CIT(A) had wrongly upheld the disallowance of Rs. 13,11,455/- made by the A.O u/s 40A(3) of the 'Act'. The Ld. A.R taking us to the background of the disallowance therein submitted that the assessee firm was inter alia engaged in the business of supplier of ship stores to ocean going ships calling at different Indian ports. It was submitted by the Ld. A.R that as the respective supplies were to be made at various ports of calls, wherein though at certain ports the assessee had its own offices, while for on the remaining ports they had to rely on local agents, who as required by the vessels at their port of call would locally procure the items and supply the same on board. It was submitted by the Ld. A.R that since the ships usually halt for a period

ranging from a few hours to a maximum of two days, therefore the supplies had to be procured and supplied on board the ship prior to its sailing, failing which the assessee would lose its clients. The Ld. A.R submitted that during the year under consideration certain supplies of stores were required at Vishakapatnam port where the vessel of the customer had docked, however as the assessee which did not have an office at the said place, thus it had to rely on the local supplies. That keeping in view the short period within which the supplies were to be made and the assessee not being known personally in the said city therefore their cheques were not accepted by the local suppliers, coupled with the fact that during the year under consideration the bank of the assessee was not having RTGS/NEFT facility, therefore in light of the pressing business exigency and being left with no other alternative, the payments had to be made to the suppliers upfront in cash. It was further submitted by the Ld. A.R that though the purchases were made in cash, however the genuineness of the transactions and the identity of the supplier were well established before the lower authorities and had not been doubted at any stage. The Ld. A.R in order to fortify the genuineness of the purchase transactions, therein referred to his 'Paper book' (for short 'APB') and brought to our notice the complete details of the parties from whom purchases were made, alongwith the respective PAN Nos. of the majority of the said parties, as well as took us through the copies of the purchase bills, bank certificate, letters by agents and the affidavits of the supplier parties, which did go to support the genuineness of the purchases as well as the compelling circumstances under which the cash payments had to be made by the assessee in the very interest of its business. It was further submitted by the Ld. A.R that the bonafide conduct of the assessee could be gathered from the very fact that during the year under

consideration only 0.5% of the total purchases were made in cash. Thus in the backdrop of the aforesaid facts so averred by the Ld. A.R, it was submitted that now when the genuineness of the purchases was not in doubt, payees were identifiable alongwith their respective income tax credentials, coupled with the fact that the business exigency leading to making of such cash purchases stood established, therefore no disallowance u/s 40A(3) of the 'Act' was called for. The Ld. A.R in order to drive home his aforesaid contention relied on the following judgments and a Circular issued by the CBDT :-

(i). Attar Singh Gurmukh Singh Vs. Income Tax Officer, Ludhiana.

(1991) 191 ITR 667 (SC)

(ii). CIT Vs. Chaudhary And Co.

(1996) 217 ITR 431 (All)

(iii). Ramaditya Investments Vs. CIT

(2003) 262 ITR 491 (Del)

(iv). Circular No. 1 of 2009, dt. 27th March, 2009

The Ld. A.R still further in his attempt to support his contention on the basis of an analogy that once the genuineness of a transaction is established, then the onus cast on the assessee stands discharged and no adverse inference as regards such transactions can be drawn, relied on the judgment of the **Hon'ble Punjab & Haryana High Court** in the case of: **CIT Vs. Chandni Bhuchar (2010) 323 ITR 510 (P&H)**, and submitted that now when in the present case the genuineness of the purchase transactions

had been established and accepted by the lower authorities, therefore no disallowance u/s 40A(3) w.r.t such purchases was liable to be made.

6. That on the other hand the Ld. Departmental representative (for short 'D.R') heavily relied on the orders of the lower authorities and subscribed to the findings of the CIT(A) sustaining the disallowance u/s 40A(3) of the 'Act'. It was thus submitted by the Ld. D.R that the order of the CIT(A) sustaining the disallowance of Rs. 13,11,455/- u/s 40A(3) of the 'Act' may be upheld.

7. We have heard the Ld. Representatives of both the parties and also perused the material placed on record before us. That after giving thoughtful consideration to the facts of the case read in light of the settled position of law, we are of the considered opinion that section 40A(3) of the 'Act' is an overriding provision which operates in spite of anything to the contrary contained in any other provision of the 'Act' relating to the computation of income under the head "Profits and gains of business or profession" and being mandatory in nature, calls for a strict compliance, with the only exceptions as regards its applicability being carved out in Rule 6DD. That in the present case there is no denying of the fact that the assessee had made payments aggregating to Rs. 13,11,455/- in cash, which had been held by the revenue to be in contravention of the statutory provisions contemplated u/s 40A(3) of the 'Act'. The assessee had not been able to demonstrate either before the lower authorities, nor before us, that its case is covered by either of the exceptions contemplated U/rule 6DD. Rather, the only contention of the Ld. A.R is that as the genuineness and veracity of the purchase transactions under consideration are not in doubt, coupled with the fact that the same were prompted on account of business exigencies, therefore no disallowance

u/s 40A(3) of the 'Act' was warranted. We find the contention of the Ld. A.R at the first blush to be very logical and convincing and though are one with him as regards the fact that the genuineness of the purchase transactions had not been doubted by the lower authorities, but are unable to persuade ourselves to subscribe to the view that mere finding of the purchase transactions as genuine would in *simpliciter* take the same beyond the scope and ken of the disallowance contemplated u/s 40A(3) of the 'Act', as acceptance of such a view on our part would lead to traversing beyond the plain literal interpretation of the said clearly worded statutory provision, which we are afraid to say is not permissible under law. We are of the considered view that though the contention of the assessee that now when the genuineness of the purchase transactions, identity of the parties and the unavoidable circumstances compelling making of cash payments was demonstrated by an assessee to the satisfaction of the A.O, then no disallowance u/s 40A(3) was warranted, is a proposition which could be well appreciated under the pre-amended provisions of Sec. 40A(3) r.w Rule 6DD, as such a contention as per the law as was then so available, was specifically taken care of by Rule 6DD(J) as remained available on the statute upto A.Y. 1995-96, and read as under:-

“ 6DD. Cases and circumstances in which payment in a sum exceeding ten thousand rupees may be made otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft:- No disallowance under sub-section (3) of section 40A shall be made where any payment in a sum exceeding ten thousand rupees is made otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft in the cases and circumstances specified hereunder, namely:-

(J) in any other case, where the assessee satisfies the Assessing Officer that the payment could not be made by a crossed cheque drawn on a bank or by a crossed bank draft-

(1) due to exceptional or unavoidable circumstances ; or

(2) because payment in the manner aforesaid was 'not practicable or would have caused genuine difficulty to the payee, having regard to the nature of the transaction and the necessity for expeditious settlement thereof.

and, also furnishes evidence to the satisfaction of the Assessing Officer as to the genuineness of the payment and the identity of the payee."

, but then we cannot lose sight of the fact that the aforesaid exception contemplated by Sub-rule (J) of Rule 6DD which prescribed the mitigating circumstances with a view to relax the rigors of Sec. 40A(3) in genuine and *bonafide* cases was omitted from the statute by the legislature in all its wisdom, on the basis of the amendment carried out vide the Finance Act, 1995, w.e.f 01.04.1996, the scope and effect of which amendment is found elaborated in **Circular No. 717, dated 14th August, 1995**, as under:-

"27.1Sub-rule (j) of rule 6DD prescribes the mitigating circumstances with a view to relax the rigors of section 40A(3) in genuine and *bonafide* cases. **Sub-rule (j) was introduced at a time when banking facilities had yet to take roots in rural areas. Now that the banks have established themselves in rural areas and a vast branch network is available, it is felt that sub-rule (j) has outlived its utility.**"

Thus, pursuant to omission of the aforesaid Rule 6DD(j) from the statute, and absence of any such *pari materia* rule or exception being thereafter made available, the concession or benefit which was earlier available to an assessee as per Sub-rule (J) of the pre amended Rule 6DD, cannot be transposed from the said pre-amended provisions and read into the post-amended provisions, as a result whereof the same cannot come to the rescue of the assessee whose case is squarely covered by the post-amended Sec. 40A(3) r.w Rule 6DD.

7.1 That now adverting to the case laws relied upon by the assessee, we find that the reliance placed is misconceived. The Ld. A.R had relied on the judgment of the **Hon'ble Supreme Court** in the case of **:Attar Singh Gurmukh Singh (supra)**, relevant extract of which reads as under:-

*"The terms of section 40A(3) are not absolute. Consideration of business expediency and other relevant factor are not excluded. **Genuine and bona fide transactions are not taken out of the sweep of the section.** It is open to the assessee to furnish to the satisfaction of the Assessing Officer the circumstances under which the payment in the manner prescribed in section 40A(3) was not practicable or would have caused genuine difficulty to the payee. It is also open to the assessee to identify the person who has received the cash payment. Rule 6DD provides that an assessee can be exempted from the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule. It will be clear from the provisions of section 40A(3) and rule 6DD that they are intended to regulate business transactions and to prevent the use of unaccounted money or reduce the chances to use black money for business transactions."*

That a perusal of the aforesaid judgment therein reveals that though the **Hon'ble Apex Court** had held that the terms of Section 40A(3) are not absolute, but thereafter it had categorically stated that **genuine and bonafide transaction are not taken out of the sweep of the section.** That to our understanding the observations of the Hon'ble Supreme Court that while invoking section 40A(3) the consideration of business exigencies and other relevant factors are not excluded and it is open to the assessee to furnish to the satisfaction of the Assessing Officer the circumstances under which the payment in the manner prescribed under section 40A(3) was not practicable or would have caused genuine difficulty to the payee, as well as it was open to the assessee to identify the person who has received the cash payment, on cumulative satisfaction of which conditions the assessee would stand exempted from the applicability of rigors of Section 40A(3), were given in context of and in the course of

interpreting the scope of the aforesaid pre-amended Rule 6DD(J) as had specifically been referred to and appreciated by the Hon'ble Apex Court in its aforesaid judgment. Thus in light of our aforesaid observations that the pre-amended Rule 6DD(j) would not be applicable to the case of the assessee, the reliance placed on the said judgment can safely be held to be misconceived. We are further of the considered opinion that even otherwise a bare perusal of the aforesaid judgment of the Hon'ble Supreme Court therein reveals that the Hon'ble Court had nowhere held that the applicability of the rigors of Sec. 40A(3) of the 'Act' can be relaxed in situations other than those covered by the exceptions carved out in Rule 6DD.

7.2. That as regards the reliance placed by the assessee on the judgment of the **Hon'ble Allahabad High Court** in the case of : **Chaudhary And Co.(supra)** and the **Hon'ble Delhi High Court** in the case of **Ramaditya Investments (supra)**, we find that both of the Hon'ble High Courts in the aforesaid cases too had interpreted the scope and gamut of Sec 40A(3) in light of the pre-amended Rule 6DD(J). Thus on the basis of the reasoning adopted by us for distinguishing the case of the assessee as against that of the Hon'ble Supreme Court, on a similar footing we find that the reliance placed by the assessee on the aforesaid judgments also is misconceived. Now advertent to the judgment of the **Hon'ble Punjab & Haryana High Court** in the case of : **Chandni Bhuchar (supra)** relied upon by the Ld. A.R to canvass the proposition that where the genuineness and veracity of the purchase transactions had been established and accepted as such by the lower authorities, then the onus as stood cast on the assessee stood discharged and no disallowance u/s 40A(3) was warranted, we are of the considered view that the assessee while placing

reliance on the aforesaid judgment had absolutely lost sight of the context in which the same was delivered. The aforesaid judgment was passed by the Hon'ble High Court in context of adjudicating the issue as to whether the presumption as regards the amount of 'Sale consideration' at which the seller in light of Sec. 50C is to be deemed to have sold a property, could also be stretched and thus applied to the case of the buyer of the property, which the High court answered in the negative. Thus the reliance placed by the Ld. A.R on the aforesaid judgment, being not relevant to the issue under consideration before us is thus misconceived and does not come to the rescue of the assessee.

7.2 That as regards the reliance placed by the Ld. A.R on **Circular No. 1 of 2009, dt. 27th March, 2009**, which are the '**Explanatory notes on provisions relating to Direct taxes**' pertaining to the amendments carried out vide the '**Finance Act, 2008**', relevant extract of which to the extent relatable to Sec. 40A(3) of the 'Act' had been placed on record, therein reveals that the said reliance is misconceived and not in context of the issue under consideration. That the relevant extract of the aforesaid Circular No. 1 (supra) heavily relied upon by the assessee, for better understanding is reproduced as under:-

"13. Amendment to the provisions of sub-section (3) of section 40A of the Income-tax Act.

13.1. Clause (a) of sub-section (3) of Section 40A of the Income-tax Act, 1961 provides that any expenditure incurred in respect of which payment is made in a sum exceeding Rs. 20,000/- otherwise than by an account payee cheque drawn on a bank or by an account payee bank draft, shall not be allowed

as a deduction. Clause (b) of sub-section (3) of section 40A also provides for deeming a payment as profits and gains of business or profession if the expenditure is incurred in a particular year but the payment is made in any subsequent year in a sum exceeding Rs. 20,000/- otherwise than by an account payee cheque or by an account payee bank draft. However, the provisions of this section are subject to exceptions as provided in Rule 6DD of the Income-tax Rules, 1962.

13.2 Sub-section (3) of section 40A is an anti-tax evasion measure. By requiring payments to be made by an account payee instrument, it is possible to verify the genuineness of the transactions. Thereby the risk of evasion is substantially mitigated. Field formations have reported that assesses tend to circumvent the provisions of sub-section (3) of section 40A by splitting a particular high value payment to one person into several cash payments, each below Rs. 20,000/-. This splitting is also resorted to for payments made in the course of a single day. The Courts have approached such splitting by interpreting the words 'in a sum' used in the section to mean a single sum thereby applying the limit to each transaction. This interpretation is against the legislative intent and has, consequently, adversely affected the efficacy of this antiabuse provision.

13.3 Therefore, the provisions of sub-section (3) of section 40A have been amended providing that the provisions of sub-section (3) of section 40A shall also be attracted where the aggregate of

payments made to a single party otherwise than by an account payee cheque drawn on a bank or account payee bank draft exceeds twenty thousand rupees in a day."

That a perusal of the aforesaid Circular therein reveals that the same is in context of extending the scope of rigors of Sec. 40A(3) even to the cases where payments in excess of Rs. 20,000/- are split by an assessee into several cash payments in a single day, each below Rs. 20,000/-, with the intent to circumvent the aforesaid statutory provision. We are unable to persuade ourselves to subscribe to the interpretation arrived at by the Ld. A.R, who by divorcing the term "*anti-tax evasion measure*" used in the aforesaid Circular, had therein canvassed that the rigors of Sec. 40A(3) would not take within its sweep transactions which though are found to have been carried out in contravention of the aforesaid statutory provision, solely for the reason that genuineness of such transactions is not in doubt. We are of the considered view that not only a bare perusal of the aforesaid circular reveals that the same is an explanatory note as regards extension of the rigors of Sec. 40A(3) even to the cases where there is an attempt on the part of an assessee to circumvent the said statutory provision by splitting the payments in excess of Rs. 20,000/- (supra), into several cash payments, each below Rs. 20,000/-, and the interpretation arrived at by the Ld. A.R by digressing from the issue addressed by the aforesaid circular and rather divorcing certain terms from the text and reading the same in isolation, cannot be accepted. Rather, we are of the considered view that the interpretation pressed into service by the Ld. A.R to support his contention that genuine transactions would not fall within the gamut of Sec. 40A(3) not only fails for the aforesaid fallacious methodology of interpretation so adopted, but rather

a perusal of the judgment of the **Hon'ble Supreme Court** in the case of : **Attar Singh Gurmukh Singh (supra)**, relevant extract of which had been reproduced hereinabove, therein reveals that now when the **Hon'ble Apex Court** in clear and unambiguous terms while interpreting the scope of Sec. 40A(3), had held :-

“Genuine and bona fide transactions are not taken out of the sweep of the section.”

, therefore the aforesaid contention of the assessee would thus fail on the said count too. Thus in light of our aforesaid observations, the ground no.1 of the appeal is dismissed and the order of the CIT(A) to the extent sustaining the addition/disallowance of Rs.13,11,455/- is upheld.

8. We now advert to the disallowance of a sum of Rs. 14,74,982/- pertaining to 'loss on sale of fenders' made by the AO, which thereafter had been sustained by the CIT(A). The brief facts emerging from the issue under consideration are that the assessee firm had purchased fenders in F.Y 2007-08 for a consideration of Rs. 34,80,380/-, which were reflected as a 'Fixed asset' in the 'Balance sheet' as on 31.03.2008. The fenders were sold by the assessee in the month of June, 2008 for a consideration of Rs. 20,05,398/-, therein leading to a resultant loss of Rs. 14,74,982/- ,which was claimed by the assessee in its 'Profit & loss a/c' for the year under consideration. The A.O taking cognizance of the fact that the assessee had claimed the loss on sale of a capital asset in its 'P & loss a/c', therein disallowed the same, which view of the A.O was thereafter sustained by the CIT(A).

8.1 That the assessee being aggrieved with the order of the CIT(A) sustaining the disallowance of loss of Rs. 14,74,982/- on sale of fenders, had carried the matter in appeal before us. That it was averred by the Ld.

A.R that the fenders were purchased by the assessee in the normal course of its business as that of supplier of stores pursuant to an order placed upon it by a shipping company. However, as the fenders were received by the assessee only after sailing of the vessel, therefore the supply of the same to the shipping company could not fructify and the fenders remained lying with the assessee. The Ld. A.R further submitted that the assessee thereafter tried to sell the fenders to other parties, but could not succeed, and therefore being prompted by his business prudence did rent out the fenders to third parties, which commercial exploitation continued as such from January 2008 till they were sold in June 2008, December 2008 and January 2009. It was submitted by the Ld. A.R that inadvertently on account of a clerical mistake the fenders which were purchased by the assessee for sale in the normal course of its business, were though reflected under the head 'Fixed Assets' in the 'Balance sheet' as on 31.03.2008, but as the same were not a capital asset, therefore no depreciation was claimed on the same. It was thus submitted by the Ld. A.R that in the light of the aforesaid factual background as the loss on sale of fenders had rightly been claimed by the assessee in its 'Profit & loss a/c' and the authorities below had gravely erred in disallowing the same, therefore the order of the CIT(A) sustaining the disallowance may be vacated. The Ld. A.R in support of his aforesaid contention relied on the judgment of the **Hon'ble Supreme Court** in the case of :

**Universal Past Ltd. etc. Vs. CIT
(1999) 237 ITR 454 (SC)**

8.2 That on the other hand the Ld. D.R heavily relying on the orders of the lower authorities therein submitted that as the fenders were reflected

in the books of accounts of the assessee as a capital asset, therefore the loss of Rs. 14,74,982/- arising on the sale of the same could not be allowed to be booked as a business loss and as such though had rightly been disallowed by the authorities below, but in all fairness while deducing the income of the assessee the consequential depreciation of Rs. 3,15,278/- pertaining to the said capital asset was fairly allowed in the hands of the assessee. It was thus submitted by the Ld. D.R that the order of the CIT(A) be upheld and the appeal of the assessee on the said issue be dismissed.

8.3 We have considered the rival submissions and perused the material placed on record before us and find that the genesis of the issue under consideration emerges from the fact that though the fenders had been reflected by the assessee in its 'balance sheet' for the year ended 31/03/2008 as a 'fixed asset', but such a treatment in the books of account as claimed by the assessee was due to an inadvertent mistake on the part of the accountant, as it was claimed that the assessee pursuant to an order placed on it by a customer had purchased the fenders as a tradable commodity in the normal course of its business of supplier of stores to ships. Though we are not oblivious of the fact that a mistake cannot be allowed to perpetuate merely for the reason that an assessee had treated a transaction in a particular manner in its 'books of accounts', and rather the AO remains under a statutory obligation to correct any such mistake as comes to his notice during the course of the assessment proceeding, we however find that in the present case, now when the assessee had reflected the fenders as a capital asset in its 'books of accounts', but however had claimed that the same were purchased as a tradable commodity in the normal course of its business of supplier of stores to ships, therefore a very heavy onus was cast on the

assessee to irrebutably substantiate his contention, all the more when the said claim was found to be in absolute contradiction of the facts as emerged from its 'books of accounts', and therein prove that the fenders were purchased as a tradable commodity in the course of its normal business as that of supplier of stores and were to be supplied pursuant to an order placed upon it by a customer, but by way of an inadvertent mistake had been reflected as a capital asset in the 'Books of account'. We however find that the assessee except for repeatedly raising an unsubstantiated claim had however absolutely failed to place on record any material which could go to fortify its contention. The assessee had neither before the lower authorities, nor before us, placed on record copy of any such order or correspondence pertaining to placement of any such order for supply of fenders by the customer. Thus the state of affairs prevailing in the case do not inspire much confidence, as a result whereof we are unable to subscribe to the hollow claim so raised by the assessee.

8.4. During the course of hearing of the appeal the Ld. AR had taken us through the details of purchase of fenders alongwith copies of the respective bills, details of rentals paid for fenders, copies of the bills pertaining to the sale of fenders which are placed at page 50-68 of the 'APB'. On a conjoint perusal of the details of purchases of fenders and the rentals therein reveals that while for the fenders were purchased vide eight bills spread over a period of two months from 08/01/2008 to 05/03/2008, while for the rental charges of fenders received were spread over the period 29/01/2008 to 04/06/2008. That a thoughtful consideration of the aforesaid details therein reveals that the fenders had been rented out by the assessee immediately after carrying out the respective purchases of the same, which on going by the 'Principle of

preponderance of human probabilities' can safely be concluded to have been purchased by the assessee with a clear intent and purpose of exploiting the same by renting out the same to third parties, and deriving income there from. We further find that the assessee had not only failed to place on record any material which could go to substantiate its claim that the fenders were purchased pursuant to orders placed on it by a shipping company, which orders could not fructify for the reason that by the time the fenders were received the vessels had already left the docks, but rather on the contrary a thoughtful consideration on our part of the details of purchase of fenders [Page 50-58 of the 'APB'] reveals an inextricable nexus between the regular and systematic purchase of fenders by the assessee over a period of three months i.e 08/01/2008 to 05/03/2008, vide eight bills from two parties, with the renting of the same to the third parties over the period 29/01/2008 to 05/06/2008. Thus a conjoint perusal of the purchase of fenders and renting of the same therein reveals the said transactions to be so inextricably interwoven, that in the absence of any material which could go to prove otherwise, we are persuaded to safely conclude that the fenders were purchased by the assessee with a predetermined intent of commercially exploiting the same and deriving income therefrom. We further are unable to persuade ourselves to subscribe to the claim of the assessee that the fenders were purchased by it with the purpose of being supplied to a customer, which orders however could not fructify for the reason that by the time the fenders were received by the assessee, the vessel of the customer had already left the docks, as the said contention of the assessee does not inspire any confidence, for the reason that if in case this would had been the true state of affairs, then the assessee would not had been carrying out systematic and regular purchase of fenders over a period of three

months. Thus we are of the considered view that the regular and systematic purchase of fenders by the assessee in itself goes to dislodge the claim of the assessee that the same were purchased in the course of its normal business and were to be supplied pursuant to orders placed upon it by a customer. That as regards the reliance placed by the Ld. A.R on the judgment of the **Hon'ble Supreme Court** in the case of : **Universal Plast Ltd. etc. Vs. CIT (1999) 237 ITR 454 (SC)**, we are of the considered view that the said judgment was passed by the Hon'ble Apex Court in context of the issue as to whether income derived by an assessee from leasing or letting out of assets would fall under the head "Profits and gains of business or profession", or not. That as the issue before us for adjudication in the present case is not as regards the head under which income from leasing or letting out of the assets by the assessee is to be assessed, but as to whether the loss on sale of an asset which is claimed by the assessee as a business loss, despite the fact that the asset was reflected as a 'Capital asset' in the books of accounts of the assessee, could be accepted and allowed, as such. Thus we find that the Ld. A.R while placing reliance on the aforesaid judgment, had digressed from the issue under consideration in the present case, as against the issue which had been addressed and adjudicated upon by the Hon'ble Supreme Court. That as the aforesaid judgment relied upon by the Ld. A.R is found to be distinguishable, therefore the reliance placed on the same is held to be misconceived. Thus in light of the aforesaid observations the disallowance/addition of Rs. 14,74,982/- sustained by the Ld. CIT(A) is upheld and the ground of appeal no. 2 is dismissed.

9. The ground no. 3 of appeal is found to be inextricably linked to the Grounds of appeal No. 1 and 2, therefore the same is disposed of in the light of our observations recoded hereinabove as regards the same.

In the result appeal of the assessee is dismissed.

Order pronounced in the open court on 28/10/2016.

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Mumbai; Dated: 28/10/2016
AG (On Tour)

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai