आयकर अपीलीय अधिकरण, 'बी' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL,MUMBAI "B" BENCH
सर्वश्री राजेन्द्र, लेखा सदस्य एवं शक्तिजीत डे, न्यायिक सदस्य
Before S/Sh. Rajendra,Accountant Member & Saktijit Dey,Judicial Member
आ□कर अपील सं/.ITA No.2738/Mum/2013,निर्ध□रण वर्ष/Assessment Year-2009-10

M/s. Next Media Works Ltd. (Formerly known as Midday Multimedia Ltd.) C.O. Inquilab Offset Printers Ltd. 156, D.J. Dadajee Road, Behind Everest Building, Tardeo Mumbai-400 020. **PAN: AAACM 7512 L**	Vs	The DCIT-5(2) Room No.571 Aayakar Bhavan, M.K. Marg New Marine Lines Mumbai-400 020.

(अपीलार्थी /Appellant) (प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : Shri Yogesh Thar

राजस्व की ओर से/ **Revenue by : Shri M. Rajan**

सुनवाई की तारीख/ Date of Hearing : 30-09-2015

घोषणा की तारीख / Date of Pronouncement : **30**-10-2015

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

<u>लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-</u>

Challenging the order dt.24.01.2013 of CIT(A)-9,Mumbai,the assessee,has filed the present appeal.During the course of hearing before us,the assessee did not press ground J, dealing with disallowance of legal and professional fee,amounting to Rs.21.59 lacs.Hence, same stands dismissed as not pressed.

Assessee company,engaged in the business of printing,publishing and outdoor advertising etc.filed its return of income on 25.9.2009 declaring income of Rs.1.13,12,537/-.The Assessing Officer(AO)completed the assessment on 30.3.2011,determining the income of the assessee at Rs.5.67 crores.

2.First ground of appeal [Ground No.(A)] is about disallowance u/s. 14A r.w.Rule 8D of the Act amounting to Rs.1.02 crores.During the assessment proceedings,the AO found that the assessee's investment in shares and securities as on the balance sheet date was at Rs.9631.12 lacs as against the previous year's closing balance of Rs.7,433.93 lacs, that it had received dividend income of Rs.1.06 lacs.He held that the assessee had earned exempt income,that it had incurred expenses and same were related to earning of exempt income,that they were not allowable within the meaning of provisions of section 14A of the Act.He further noted that the assessee had disallowed Rs.63,523/- paid as STT in its return of income.He held that the disallowance made by the assessee was not satisfactory if quantum of investment made and the dividend received were considered.During the assessment proceedings,he asked the assessee to explain as to why disallowance u/s. 14A r.w. Rule 8D of the Income tax Rules, 1962(Rules)should not be made. It was argued that no expenses were incurred in relation to income not includible in total income,that the dividend received were taxable in the hands of share holders,that the company distributing dividend had to pay dividend distribution tax u/s. 115-O of the Act, that it had invested in shares out of the non-interest bearing funds,that no expenditure can be notionally assigned for working disallowance u/s. 14A. After considering the submission of the assessee the AO made disallowance of Rs.1,02,31, 580/- .

2.1. The First Appellate Authority (FAA),after considering the submission of the assessee and the assessment order,held that the mandate of section 14A of the Act was to prevent claim of deduction of expenditure incurred in relation to the income which did not form part of the total income of the assessee ,that it could not establish the nexus between the entire capital being invested in securities, that it was impossible to believe that out of the common hotch-potch of funds the entire capital had gone into the investment in shares without a part of the same going to the business, that the assessee was not categorical as to how much oif the sum had to be invested in the business.He referred to the case of Dhapa & sons (54 DTR 345) and Smt. Leena Ramachandran (45 DTR 372) and held that the case of the assessee was covered by the provisions of section 14A(3) of the Act,that the case was also covered by sub-section (2) of Section 14A,as the AO was not satisfied with the correctness of the claim made by the assessee in respect of such expenditure.Finally,he upheld the disallowance made by the AO.

2.2. Before us,the Authorised Representative(AR)contended that 99.97% of total investment were strategic investment on which section 14A of the Act r.w.Rule 8D did not apply,that if disallowance u/s.14A was warranted only net interest was to be considered,that only those investment could be taken into consideration for making disallowance from which exempt income had been actually received during the year,that disallowance u/s. 14 r.w.Rule 8D could not exceed the total income earned,that the own fund of the assessee were higher than the total investment.He referred to page No.32,44 and 35 of the Paper book and stated that shares were not acquired from borrowed funds, that the assessee had sold part of subsidiary publishing business.He relied upon the cases of Excel Industries Ltd.(ITA8278/Mum/2011-12);Crompton Greaves Ltd.(ITA/6277/Mum/2012),Four Dimensions Securities(India)Ltd. (ITA/6395/Mum/2011),Pinnacle Brocom Ltd.(ITA/6247/Mum/2012),HDFC Bank Ltd.(366 ITR505).Departmental Representative(DR)supported the order of the FAA.

2.3. We have heard the rival submissions and perused the material before us.We find that the assessee had received dividend of Rs.1.06 lakhs during the year,that the AO and FAA had applied the provisions of section 14A of the Act r.w.Rule 8D,that the arguments of strategic investment and availability of funds were not dealt with.If the shares were not purchased from the borrowed funds then there was no justification in making disallowance of interest expenditure.The provisions of section 14A were brought in to Act to prevent the mischief of claiming expenses against the exempt income.But,that does not mean that whenever an assessee claims exempt income automatic disallowance has to be made.The AO and the FAA have without considering the relevant facts made the disallowance.In the matter of HDFC Bank Ltd.(supra)the Hon'ble jurisdictional High Court has held as under:

> *"We have considered the rival contentions and perused the relevant material on record. There is no dispute on the point that the assessee's share capital, profit reserves and surplus as well as the balance in the current account is more than the investment in the tax-free securities. It is also an accepted norms and business practice that a prudent businessman would make the investment out of his own funds instead of borrowed funds and the borrowed funds are utilized for business/trading purposes ; however, exception may be there to this general practice. As per the provisions of section 14A, the expenditure incurred to earn exempt income cannot be allowed and the expenditure shall be allowed only to the extent that they are relatable to the earning of taxable income. In other words, only the net income is subjected tax and similarly exemption is also allowed on the net exempted income. If an expenditure is directly or indirectly incurred for earning the exempt income, then the same cannot be claimed as against the income, which is taxable.*
>
> ***In order to disallow the proportionate expenditure under section 14A, there should be some proximate course and the nexus of the said expenditure with the tax exempt income**.(emphasis by us).When it has been brought on record that no expenditure actually*

incurred for earning the exempt income, then the provisions of section 14A cannot be invoked.

In the case in hand, undisputedly, the assessee's own funds and noninterest bearing funds are more than the investment in the tax-free securities then there is no basis for deeming that the assessee has used the borrowed funds for investment in tax-free securities. Accordingly, on this factual aspect, we do not find any merit in the contention of the learned Departmental representative. Further, it is to be noted that it is not the case of investment in tax-free securities every year ; but the investment in the earlier years has been carried forward as it is evident from the particulars where the balance at the end of the year shows that the investment is appearing in all the earlier years. Therefore, we do not find any error or illegibility in the order of the Commissioner of Income-tax (Appeals), qua, the issue of disallowance of interest under section 14A."

Respectfully,following the principles enumerated in the above mentioned judgment,we decide ground A in favour of the assessee.

3.Next Ground of appeal deals with disallowance made u/s. 40(a)(ia) of the Act, amounting to Rs.2.70 lacs.During the course of assessment proceedings,the AO asked the assessee to explain as to whether tax had been deducted on the fee paid to the directors.After considering the reply of the assessee,dtd.16.11.2011,the AO held that the directors' sitting fee was in the nature of professional fee paid, that the assessee was required to deduct tax at source in accordance with the provision of section 194J of theAct, that it had failed to comply with the provisions of Chapter XVII-B of the Act.Finally,he disallowed the claim made by the assessee.

3.1. During the appellate proceedings,the assessee argued that section 194J had been amended by the finance Bill 2012,that the amendment was effective from 1.5.2012 and that it was not applicable for the year under consideration.The FAA held that payments made as directors' sitting-fee fell within the definition of professional fee,that the assessee was required to deduct tax at source.He confirmed the order of the AO.

3.2.Before us the Authorised Representative (AR) argued that provisions of section 194J were not applicable to sitting fee paid to directors, that the disallowance made by the AO and confirmed by the FAA was unwarranted.He relied upon the cases of Glaxosmithkline Pharmaceuticals Ltd.(ITA.7069-72/Mum/2012)and Bharat Forge Limited(154TTJ649).The DR supported the order of the FAA.

3.3. We have heard the rival submissions and perused the material before us.We find that in the case of Bharat Forge Ltd.(supra),the Tribunal has held as under:-

8. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions relied on by the learned counsel for the assessee. The only dispute in this ground is regarding deduction of tax at source from the sitting fees paid to the directors. According to the learned counsel for the assessee the provisions of section 194J is not applicable from such sitting fees since fees does not fall in any of the categories of professional service as per explanation to section 194J. Further, no such objection was taken in the past by the department for such non deduction and in view of insertion of sub section (ba) to section 194J(1) TDS is required to be made out of such director sitting fees w.e.f., 01-07-2012. Therefore, for non-deduction of tax at source from the sitting fees for the impugned assessment year there is no default on the part of the assessee. According to the revenue the director is also a manger under the provisions of the Companies Act and therefore a technical personnel and therefore the company is liable to deduct tax at source under the provisions of section 194J.

8.1 As per the explanation to provisions of section 194J professional service means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board. We, therefore, find force in

the submission of the learned counsel for the assessee that sitting fees paid to the directors does not amount to fees paid for any professional services as has been mentioned in the explanation to section 194J(1). We further find from the memorandum explaining to provisions of the Finance Bill 2012 that as per clause No.71 it was specifically mentioned that there was no specific provision for deduction of tax on the remuneration paid to a director which is not in the nature of salary. We find the provisions of section 194J(1)(ba) speaks of any remuneration or fees or commission by whatever name called other than those on which tax is deductible u/s.192 to a director of a company on which tax has to be deducted at the applicable rate and the above provision has been inserted by the Finance Act, 2012 w.e.f., 01-07-2012. We, therefore, find force in the submission of the learned counsel for the assessee that no tax is required to be deducted u/s.194J out of such director's sitting fees for the A.Y. 2007-08. In this view of the matter, the order of the CIT(A) is set-aside and the ground raised by the assessee on the issue of TDS on sitting fees paid to Directors is allowed.

Respectfully following the above,we decide ground no.B in favour of the assessee.

4.Next effective ground of appeal (Ground of appeal C to E) deals with bad debts.During the assessment proceedings,the AO found that the assessee had written off bad debts of Rs.57.73 lacs.He directed it to justify the claim made by it.After considering the submissions of the assessee,dated 2.12.2011 and 13.12.2011,the AO held that the claim of bad debts written off comprised of deposits given to MSRTC, BEST Undertaking, New Delhi Municipal Council and advance to one of its subsidiary, that what was receivable from those parties against the deposit given which was in the nature of capital receipt and what was payable to those parties was revenue in nature, that the amount payable was related to advertisement, that the receivables and payables were not on the same account of revenue, that they could not be set off against each other.Invoking the provisions of section 36(2) of the Act,he disallowed an amount of Rs.2,88,20,474/-.

4.1. Before the FAA,the assessee argued that it had claimed bad debts of Rs.57,73,415/- only, that the AO had disallowed more than the claim made by the assessee under the head bad debts written off.Before him,the assessee filed an application for admission of additional evidences under Rule 46A.He called for a remand report from the AO and forwarded a copy of the same to the assessee for furnishing rebuttal and counter comments.

After considering the material available,he held that the assessee had not debited bad debt to P&L account as an expense and as such bad debts were not written off, that debits due from government institutions/organization could not be summarily written off as bad debts as they were not bad debtors.Referring to the remand report,the FAA observed that submissions made before the AO were ambiguous.Considering the peculiar facts and circumstances of the case,he directed the AO to re-check if he had added certain amounts which had already been added by the assessee by crediting them to the bad debts of accounts.He held that there should not be double taxation.Subject to such verification,he confirmed the disallowance in principle.

4.2. Before us,the AR argued that the assessee had fulfilled the conditions stipulated u/s.36(2) of the Act,that the FAA should have allowed the bad debts as business loss,that the AO had made the addition of Rs.2.80 crores with regard to amount payable to BEST Undertaking, that assessee had debited and credited the bad debts account all receivables and payables in connection with BEST Undertaking,that it had written off only net amount receivable from BEST Undertaking amounting to Rs.54.66 lacs.The AR referred to page No.32,52, and 61 of the paper book and stated that assessee had added back Rs.6.23 crores and had claimed bad debts of Rs.57.73 lacs only,that Rs.57.53 lacs was part of Rs.86.00 lacs of outdoor and TV division.He referred to the case of United Vander (ITA/68/Mum/2010-Legal paper Book 162) and stated that case of the assessee was covered by the decision of Hon'ble Supreme Court delivered in the case of TRF Ltd.(323ITR397).DR supported the order of the FAA.

4.3. We have heard the rival submissions and perused the material.We find that the assessee had claimed bad debts of Rs.57.73 lacs only in the books of accounts and the AO and the FAA had not considered the amounts added back by it,that it had written off only net amount receivable from BEST Undertaking.In our opinion,the assessee is the right person to decide as to whether a particular amount has become bad or not.The AO/FAA cannot decide the issue referring to the entity from whom money is to be recived.If the assessee had,in its books of accounts written off an amount,the revenue authorities cannot disallow in light of the judgment of the Hon'ble Apex Court delivered in the case of TFR Ltd.(supra).The Hon'ble Court has held as under:

> *"After the amendment of section 36(1)(vii) of the Income-tax Act, 1961, with effect from April 1, 1989, in order to obtain a deduction in relation to bad debts, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable : it is enough if the bad debt is written off as irrecoverable in the accounts of the assessee.*

There is no doubt about the writing off the amount in question in the books of accounts.So, reversing the order of the FAA,we decide C-E in favour of the assessee.

5.Next effective ground pertains to taxing provision for doubtful debts written back amount - ing to Rs.7.17 lacs and Rs.5.91 lacs respectively.During the course of hearing before us,the AR stated that the FAA had not appreciated the fact that provisions for doubtful debts (Rs.7,71,244/-) was not allowable as deduction u/s.36 (1)(vii), that same could not be taxed on its being written off, that the provision for doubtful debts written back was not liable to be taxed as income of the assessee, that the FAA had not considered the fact that the service tax payable written back (Rs.5.91 lacs) could not be taxed as income of the assessee for the year under appeal, that no deduction had been allowed to the assessee on account of service tax payable.He referred to the page no.61 and 69 of the Paper book.DR relied upon the order of the FAA.

5.1.We have heard the rival submissions.We have perused the page no.61 of the Paper book.It gives details of the bad debts during the year under consideration.We find that the assessee ahd added back the two sums i.e. Rs.7.17 lacs and Rs.5.91 lacs under the head provisions for doubtful debts and service tax payable respectively. Therefore, we are of the opinion that the action of the AO/FAA has resulted in taxing the same sum twice.Reversing the order of the FAA ground (H) and (I) is decided in favour of the assessee .

6.Last ground of appeal (Ground K)is about disallowance of interest of Rs.38.44 lacs.During the assessment proceedings,the AO found that the assessee had advanced loan to M/s. Ferrari Investment and Trading Co.Pvt. Ltd.,that it had not charged interest for the amount advanced, that it had borrowed funds of Rs.995 lacs,that it had paid interest of Rs.1,10,76,615/-.He asked the assessee to explain as to why the claim of interest to the extent chargeable on loan and advances should not be disallowed treating the same as not incurred wholly and exclusively for the purpose of business.Vide its letter,dtd.13.12.2011,the assessee stated that the amount given to Ferarri Investment was toward the purchase of shares and that it was not for any loan or advance,that the above fact was mentioned in the note to accounts at Pt.No. 14B,that the sole intention of the advance was investment purpose and business expediency, that the advances were not made from the interest bearing funds of the assessee.However, the AO was not convinced and calculated the disallowance as under :

Date	Debit	Credit	Daily Balance	Interest
01/04/2008	17,18,00,000		17,18,00,000	37,84,306
05/06/2008	91,00,000		18,09,00,000	59,474
30/06/2008	9,00,000	18,18,00,000		0.00

30/12/2008	30,00,000		30,00,000	986
21/01/2009		25,00,000	5,00,000	164
24/01/2009		5,00,000		0.00
			Total(Rs.)	**38,44,930**

6.1. During the appellate proceedings,the FAA held that the assessee had advanced interest bearing loan to FITPL for purchase of shares of Radio-Midday(West), that the interest cost had to be added to the cost of acquisition of shares,that the corresponding interest expenditure of Rs.38,44,930/- was not a deductible expenditure.
Before us,the AR stated that the AO had ignored the credit entry of 30.6.2008,while making the addition,that the shares of Radio-Midday(West)were bought from Ferrari, that the money was advanced to FITPL for the purpose of buying the shares, that the transactions was not in the nature of interest free loan,that during the course of assessment proceeding copy of ledger account of Ferrari was presented before the AO,that he ignored the same and made the addition without any basis.He relied upon the case of S.A. Builders and referred to page No.64 of the paper book.DR supported the order of the FAA.

6.2.We have heard the rival submissions and perused the material. We find that assessee had advanced money to Ferrari on account of purchase of shares of Radio Midday, that in the date wise summary a credit entry is appearing on 30th June 2008, that from the said entry it is clear that the shares of Radio(West) were bought by the assessee from Ferrari. Considering these facts we are of the opinion that money advanced by the assessee to M/s. Ferrari was solely for the purpose of buying the shares and that the transactions could not be termed as advance of interest free loan. Therefore, reversing the order of the FAA, we decide the last ground of appeal in favour of the assessee.

As a result appeal filed by the assessee stands partly allowed.
फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है.

Order pronounced in the open court on 30th October,2015.
आदेश की घोषणा खुले न्यायालय में दिनांक 30th अक्टूबर,2015 को की गई ।

Sd/-	**Sd/-**
(शक्तिजीत डे / Saktijit Dey)	**(राजेन्द्र / RAJENDRA)**
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई/Mumbai,दिनांक/Date: 30.10. 2015
व.नि.स./*Jv.Sr.PS.*

आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि**, ए** खंडपीठ,आ.अ.न्या□□मुंबई
6.Guard File/गार्ड फाईल

सत्या□पित प्रति //True Copy//

आदेश□ुसार□/ **BY ORDER,**
उप/सह□क पंजीकार□ **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण**,** मुंबई **/ITAT, Mumbai.**