

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain, Judicial Member**

ITA No. 1262/Mum/2011
(Assessment Year: 2007-08)

M/s. Foods and Inns Ltd. Punjabwadi, Sion Trombay Road, Deonar Mumbai 400088	Vs.	ACIT, Circle 10(2) Room No. 432, 4 th Floor Aayakar Bhavan, M.K. Road Mumbai 400020 PAN - AAACF0521C
Appellant		Respondent

ITA No. 6629/Mum/2012
ITA No. 6271/Mum/2014
(Assessment Years: 2009-10 & 2010-11)

ACIT, Circle 10(2) Room No. 432, 4 th Floor Aayakar Bhavan, M.K. Road Mumbai 400020	Vs.	M/s. Foods and Inns Ltd. Punjabwadi, Sion Trombay Road, Deonar Mumbai 400088 PAN - AAACF0521C
Appellant		Respondent

CO No. 291/Mum/2013
(Arising out of ITA No. 6629/M/2012)
CO No. 34/Mum/2016
(Arising out of ITA No. 6271/M/2014)
(Assessment Year: 2009-10 & 2010-11)

M/s. Foods and Inns Ltd. Punjabwadi, Sion Trombay Road, Deonar Mumbai 400088	Vs.	ACIT, Circle 10(2) Room No. 432, 4 th Floor Aayakar Bhavan, M.K. Road Mumbai 400020 PAN - AAACF0521C
Appellant		Respondent

Revenue by:	Shri G.M. Doss & Shri S.R. Kirtane
Assessee by:	Shri Keshav B. Bhujle

Date of Hearing:	24.05.2016
Date of Pronouncement:	07.06.2016

ORDER**Per Jason P. Boaz, A.M.**

These are appeals for A.Y. 2007-08 by the assessee and by the Revenue for assessment years 2009-10 and 2010-11. The assessee has also preferred Cross Objectoins (CO) for assessment years 2009-10 and 2010-11. These appeals and Cos are directed against the orders of the CIT(A)-21, Mumbai dated 01.10.2010 for A.Y. 2007-08, order dated 19.07.2012 for A.Y. 2009-10 and order dated 17.07.2014 for A.Y. 2010-11. Having interconnected issues, these appeals were heard together and disposed off by way of this common order.

2. The grounds of appeal raised by the assessee and Revenue for assessment year 2007-08, 2009-10 and 2010-11 and the assessee's cross objections are as under: -

2.1 Assessee's appeal in ITA No. 1262/Mum/2011 for A.Y. 2007-08

- “1. The learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.10,00,000/- by way of disallowance u/s. 14A of the Income-tax Act, 1961.
2. The learned Commissioner of Income Tax (Appeals) failed to appreciate that the disallowance is arbitrary and illegal.
3. The learned Commissioner of Income Tax (Appeals) failed to appreciate that the disallowance is excessive and unreasonable.
4. The appellant craves leave to add, amend, alter and/or delete any of the grounds of appeal.”

2.2 Revenue's appeal in ITA No. 6629/Mum/2012 for A.Y. 2009-10

- “1.(a) Whether on the facts and in the circumstances of the case as well as in law, the Ld. CIT(A) erred in deleting the disallowances of foreign exchange loss claimed by the assessee.
- (b) Whether on the facts and in the circumstances of the case as well as in law, the Ld. CIT(A) erred in holding that the foreign exchange loss suffered by the assessee was not speculation loss but business expenditure.
2. Whether on the facts and in the circumstances of the case as well as in law, the Ld. CIT(A) erred in deleting the additions made by the AO u/s 40(a)(ia) of the Act.

3. *The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.*
4. *The appellant craves leave to add, amend vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal.”*

2.3 Assessee’s CO No. 291/Mum/2013 for A.Y. 2009-10

“On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) has erred in confirming-

- a) *The Disallowance of Rs.18,86,195/- under the provisions of section 14A read with rule 8D of the Income Tax rules and the reasons assigned for doing so are wrong and contrary to the facts and circumstances of the case, provisions of Income Tax Act 1961 and rules made there under and disregarded the disallowance of Rs.12,280/- worked out suo moto during the Assessment proceedings.*
- b) *The Disallowance of Rs.1,00,000/- being the expenditure for the corporate club membership fees by holding that the said expenditure is capital in nature which gives enduring right of membership.*

2.4 Revenue’s appeal in ITA No. 6271/Mum/2014 for A.Y. 2010-11

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of interest while working of disallowance u/s. 14A r.w. Rule 8D of the IT Rules and directing the AO to compute 0.5% of average investment for administrative expenses.*
2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of loss of foreign exchange by holding the same as not a speculative loss but was allowable as business loss.*
3. *The appellant prays that the order of CIT(A) on the above ground be set aside and that of the assessing officer be restored.*
4. *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.”*

2.5 Assessee’s CO No. 34/Mum/2016 for A.Y. 2010-11

“On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) has erred in directing to compute the Disallowance at 0.5% of the total average investments on the opening and closing day of the previous year for administrative expenses under the provisions of section 14A read with rule 8D of the Income Tax rules without assigning any reasons which is wrong and contrary to the facts and circumstances of the case, provisions of

Income Tax Act 1961 and rules made there under and disregarded that such disallowance can only be made on the average investments yielding tax free income and not on total average investments.”

3. **Disallowance under section 14A r.w Rule 8D**

3.1 Grounds in respect of the disallowance under section 14A of the Act r.w. Rule 8D have been raised by both Revenue and the assessee as under:-

- i) Assessee's grounds at S.Nos. 1 to 4 for A.Y. 2007-08
- ii) Assessee's CO No. (a) for A.Y. 2009-10
- iii) Revenue's ground at S.No. 1 for A.Y. 2010-11
- iv) Assessee's CO for A.Y. 2010-11

3.2.1 In **A.Y. 2007-08** the assessee earned exempt dividend income of ₹46,655/- on which it was claimed that no expenditure was incurred. The Assessing Officer (AO) invoked the provisions of section 14A r.w. Rule 8D and proceeded to disallow an amount of ₹15,38,089/- thereunder. On appeal, the learned CIT(A) restricted the disallowance thereunder to ₹10,00,000/- on an adhoc basis.

3.2.2 The assessee is in appeal before us on this issue challenging the decision of the learned CIT(A) in sustaining the disallowance to the extent of ₹10,00,000/- as being arbitrary, illegal, excessive and unreasonable. At the outset, it was brought to our notice that Revenue's appeal for A.Y. 2007-08 on this very issue of disallowance under section 14A r.w. Rule 8D was considered and disposed off by a Coordinate Bench in ITA No. 6556/Mum/2011 vide order dated 28.01.2013. It appears that though this appeal was filed on 10.02.2011, this fact was not brought to the notice of the Coordinate Bench by the assessee and the first hearing in this appeal was fixed by the Registry on 30.07.2013; by which time the Coordinate Bench had disposed off Revenue's appeal (viz. in ITA No. 6556/Mum/2011 vide order dated 28.01.2013). In that order, the Coordinate Bench restored the matter back to the file of the AO to decide the issue of disallowance under section 14A of the Act afresh. In these factual circumstances, since the issue in the cross appeal stands prejudged by the order of the Coordinate Bench (supra), it would not be appropriate for us to comment

on the correctness or otherwise of the impugned order of the learned CIT(A). We are, therefore, of the opinion that since the issue of disallowance under section 14A of the Act has already been restored for fresh examination and adjudication to the file of the AO by the order of the Coordinate Bench of this Tribunal in Revenue's appeal for A.Y. 2007-08 (supra), we also accordingly, without rendering any finding on the merits of the matter, restore this issue of disallowance under section 14A, to the file of the AO for fresh examination and adjudication in accordance with law after affording the assessee adequate opportunity of being heard. Consequently, grounds 1 to 4 of assessee's appeal are treated as allowed for statistical purposes.

3.2.3 In the result, the assessee's appeal for A.Y. 2007-08 is treated as allowed for statistical purposes.

3.3.1 For assessment years 2009-10 and 2010-11

The assessee had earned exempt dividend income of ₹41,126/- and ₹40,003/- respectively, but suo moto disallowed an amount of ₹40,000/- as expenditure incurred for earning exempt income only in A.Y. 2010-11. The AO invoking the provisions of section 14A r.w. Rule 8D disallowed ₹18,86,195/- for A.Y. 2009-10 and ₹17,38,275/- for A.Y. 2010-11. On appeal, the learned CIT(A) restricted the disallowance under section 14A r.w. Rule 8D to ₹1,07,754/- for A.Y. 2009-10 and to ½% of average investments for A.Y. 2010-11.

3.3.2 Before us, Revenue for A.Y. 2009-10 and the assessee by way of COs for A.Y. 2009-10 and 2010-11 have assailed the orders of the learned CIT(A) in respect of his finding/decision on the issue of disallowance under section 14A r.w. Rule 8D. Revenue in A.Y. 2009-10 assails the orders of the learned CIT(A) in restricting the disallowance to ½% of the average investment for administrative expenses. On the other hand, the assessee in its COs for assessment years 2009-10 and 2010-11 has challenged the impugned orders of the learned CIT(A) in directing the AO to compute the disallowance under section 14A r.w. Rule 8D @0.5% of the total average investment for administrative expenses without assigning any reasons,

when such disallowance ought to be made only in respect of 0.5% of average investments yielding tax free income.

3.3.3 We have heard both the learned D.R. for Revenue and the learned A.R. for the assessee. In the course of hearing, the learned A.R. for the assessee submitted that the assessee had earned exempt dividend income of ₹41,216/- in A.Y. 2009-10 and ₹40,003/- in A.Y. 2010-11 and that while the assessee had claimed that no expenditure had been incurred for earning this income in A.Y. 2009-10, ₹40,000/- was shown to have been incurred for earning the exempt income in A.Y. 2010-11 It was contended that in the light of the decisions of the Hon'ble Punjab & Haryana High Court in the case of Empire Package P. Ltd. in ITA NO. 415 of 2015 dated 12.01.2016 and of the Hon'ble Delhi High Court in the case of CIT vs. Deepak Mittal (2013) 38 Taxman 83 (Delhi), the disallowance under section 14A r.w. Rule 9D in the case on hand @ 0.5% of investment in tax free securities cannot exceed the exempt income and should be restricted accordingly.

3.3.4 We have perused the cited judgements. In the case of Empire Package P. Ltd. (supra), the question raised by Revenue before the Hon'ble Court was: -

“Whether in the facts and circumstances of the case the Hon'ble ITAT is justified in law to hold that the disallowance made under section 14A read with Rule 8D cannot exceed exempt income, in the absence of any such instruction being there in the relevant section or rule?”

The Hon'ble High Court dismissed Revenue's appeal holding as under at paras 3 to 5: -

“3. We have heard learned counsel for the appellant-revenue.

4. The Tribunal has only remanded the matter to the Assessing Officer after considering the factual position and the relevant case law on the point. It relied upon the decision rendered by this Court in CIT vs. Deepak Mittal, (2013) 38 Taxman 83 holding that disallowance under Section 14A of the Act requires finding of incurring of expenditure in respect of exempted income and where it is found that for earning exempted income, no expenditure has been incurred, disallowance under section 14A of the Act cannot stand. In the present case, when the assessee claimed that it had not made any expenditure on earning exempt income, the Assessing Officer in terms of sub section (2) of

Section 14A of the Act was required to collect such material evidence to determine expenditure if any incurred by the assessee in relation to earning of exempt income. The income from dividend had been shown at ₹1,11,564/- whereas disallowance under Section 14A read with Rule 8D of the Rules worked out by the Assessing Officer came to ₹4,09,675/-. Thus, the Assessing Officer disallowed the entire tax exempt income which is not permissible as per settled position of law. Consequently, the Tribunal remitted the matter to the Assessing Officer with a direction to decide the same afresh in accordance with law after affording due and reasonable opportunity of being heard to the assessee. The relevant finding recorded by the Tribunal reads thus:-

“7. In the instant case, the income from dividend has been shown at ₹1,11,564/-, the disallowance under section 14A read with Rule 8 D worked out by the Assessing Officer comes to ₹4,09,675/-. Thus, it is clear that the AO has disallowed the entire tax exempt income which is not permissible in view of the judgment of the Hon'ble Delhi High Court referred to above. The Hon'ble Delhi High Court held that the window for disallowance is indicated in section 14A, and is only to the extent of disallowing expenditure “incurred by the assessee in relation to the tax exempt income”. The disallowance under section 14A read with Rule 8D as worked out by the Assessing officer is not in accordance with law and as such working is not sustainable.

8. In view of the above observations, I think it is appropriate to set aside the order of the learned CIT(A) on this issue and remit the matter to the file of AO with a direction to decide the issue afresh in accordance with law after affording due and reasonable opportunity of being heard to the assessee.”

Additionally, the tax effect involved is of ₹1,26,589/- only.

5. The view adopted by the Tribunal being a plausible view based on factual position and the relevant case law on the point, does not warrant any interference by this Court. Learned counsel for the appellant-revenue has not been able to show any illegality or perversity in the impugned order. Thus, no substantial question of law arises. Consequently, the appeal stands dismissed.”

3.3.5 Respectfully following the decision of the Hon'ble Punjab & Haryana High Court in Empire Package P. Ltd. (supra) and of the Hon'ble Delhi High Court in the case of Deepak Mittal (supra), we are of the considered view that the learned CIT(A) has not given any proper basis for working out the disallowance under section 14A r.w. Rule 8D; specifically when the disallowance is far in excess of the exempt dividend income earned in the year under consideration. In this view of the matter, we set aside the impugned order of the learned CIT(A) on this issue and restore the matter to the file of the AO to decide the issue afresh, in accordance with law in the light of the ratio laid down by the above judicial pronouncements (supra) after affording reasonable opportunity to the assessee of being

heard and to file submissions/details required in this regard. Consequently, assessee's ground No. (a) in CO for 2009-10 and CO for A.Y. 2010-11 and Revenue's ground No. 1 for A.Y. 2010-11 are treated as allowed for statistical purposes.

4. Assessee's CO ground No. (b) for A.Y. 2009-10 - Disallowance of Corporate Club Membership Fee

4.1 In this CO for A.Y. 2009-10 the assessee has assailed the impugned order of the learned CIT(A) in upholding the disallowance of ₹1,00,000/- being the expenditure for Corporate Club Membership fees by holding that such expenditure is capital in nature since it gives enduring right of membership. The learned A.R. for the assessee submitted that identical issue was before the Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2006-07 in ITA No. 3995/Mum/2010 and CO No. 32/Mum/2011 dated 31.01.2010 and it allowed the assessee's claim, following the decision of another Coordinate Bench in the assessee's own case for A.Y. 2004-05 in ITA No. 123/Mum/2009 dated 28.09.2009. It was also contended that the issue is presently settled by the Hon'ble Apex Court's decision in the case of CIT, Bangalore vs. United Glass Mfg. Co. Ltd. in Civil Appeal Nos. 6447 to 6449 of 2012 dated 12.09.2012 wherein it was held that club membership fee paid by the company is an admissible business expenditure.

4.2 Having heard the rival submissions, we find that the issue of allowability of payment of club membership fee by the company on behalf of its employee as a business expenditure has been settled in favour of the assessee by the decision of the Hon'ble Apex Court in the case of CIT, Bangalore vs. United Glass Mfg. Co. Ltd. in Civil Appeals 6447 to 6449 of 2012 (supra). Respectfully following this decision of the Hon'ble Apex Court in United Glass Mfg. Co. Ltd. (supra) we hold that the expenditure of ₹1,00,000/- incurred by the assessee on club membership fees for employees is admissible business expenditure and therefore direct the AO to delete the disallowance of ₹1,00,000/- made in this respect. Consequently the CO's ground (b) for A.Y. 2009-10 is allowed.

5. **Revenue's ground No. 1(a) & (b) for A.Y. 2009-10 and Ground No.2 for A.Y. 2010-11 - Foreign Exchange Losses**

5.1 In these grounds, Revenue assails the impugned orders of the learned CIT(A) for assessment years 2009-10 and 2010-11 as being erroneous in holding that the foreign exchange loss suffered by the assessee on forward contracts in the relevant periods were allowable business expenditure and not speculation loss as held by the AO. According to the learned D.R., the AO in the course of assessment proceedings noticed that the assessee had claimed foreign exchange hedging losses on forward contract of ₹16,72,85,011/- for A.Y. 2009-10 and of ₹6,53,06,057/- for A.Y. 2010-11 as business loss allowable under section 37(1) of the Act. The learned D.R. submits that the AO after examining the matter, while not doubting the genuineness of the aforesaid foreign exchange losses on account of forward contracts held the same to be speculative losses, inter alia, on the grounds that (i) the aforesaid losses were on account of forward trading in foreign exchange, whereas the assessee was dealing in fruit pulp and allied items and not in foreign exchange; (ii) the delivery of foreign exchange was not given or taken; (iii) it is not the case of the assessee that it has done hedging in forward contracts in respect of fruit pulp in which it dealt but was hedging on account of foreign exchange. The learned D.R. contends that the AO after considering the applicability of the provisions of Explanation 2 to section 28, section 43(5) and its proviso (a) to (d), sections 72 & 73 of the Act has correctly held that the assessee has booked foreign exchange with various banks in forward contracts and booked losses thereon and not on account of hedging forward contracts in respect of raw material dealt in by him, i.e. fruit pulp. The learned D.R. contends that in the above factual matrix the AO has correctly held that these transactions were speculative in nature as per section 43(5) of the Act and having been settled otherwise than by actual delivery, were correctly disallowed by the AO for both assessment years 2009-10 and 2010-11.

5.2.1 Per contra the learned A.R. for the assessee supported the findings rendered by the learned CIT(A) in the impugned orders for assessment

years 2009-10 and 2010-11, that the foreign exchange losses of ₹16,72,65,011/- and ₹6,53,06,057/- respectively incurred on forward contracts in respect of its raw material, i.e. fruit pulp were not speculative losses, but was allowable as business loss under section 37(1) of the Act. The learned A.R. contends that the learned CIT(A), on examination of the facts of the case, held that while hedging in the forward contracts, the assessee did not deal in foreign exchange but entered into these forward contracts with the object of safeguarding against foreign exchange losses on account of export sales proceeds to be received by it. Therefore it is clear that the AO's finding were based on factually incorrect assumption that the assessee was indulging in forward contracts in foreign exchange and not in the export material/products it dealt in. According to the learned A.R. for the assessee, the learned CIT(A) after examining the provisions of section 43(5) of the Act, held that the proviso (a) thereto was squarely applicable to the facts of the case on hand, as the assessee had entered into the foreign exchange forward contracts in the course of its business of manufacturing and exporting of its products against specific export orders, export sales and realization of such export sale proceeds, with a view to safe guard itself against foreign exchange losses through future price fluctuations. It is in these circumstances, that the learned CIT(A) held that the proviso (a) to section 43(5) was squarely applicable to the case on hand and therefore the losses suffered on account of foreign exchange forward contracts were not speculative in nature.

5.2.2 The learned A.R. for the assessee submitted that the learned CIT(A) also observed that the foreign exchange forward contracts entered into by the assessee could not be said to be derivative within the meaning of proviso (d) to section 43(5) of the Act. The learned A.R. for the assessee contends that in view of the above factual findings and referring to certain judicial pronouncements; wherein it was held that in cases of exporters of goods, forward contracts entered into to safeguard against future fluctuations in foreign exchange prices and any loss is suffered thereon, the same was not a speculative loss but a business loss which was allowable; the learned CIT(A) has correctly directed the AO to allow the

aforesaid losses of ₹16,72,65,011/- and ₹6,53,06,057/- as business losses in the respective years.

5.3.1 We have heard the rival submissions and perused and carefully considered the material on record, including the judicial pronouncements referred to in the orders of the authorities below. From the fact on record, it is not disputed that the assessee is engaged in the manufacture and export of processed food products such as fruit pulp and other allied items, for which it was receiving export sales proceeds from abroad in foreign exchange currencies. We find from the record that the learned CIT(A), after examination of the matter, found that the assessee had entered into foreign exchange forward contracts with banks only to safeguard itself and hedge against the exposure risks in future fluctuation in the exchange rates of foreign currency to be received by it as export sale proceeds. It is seen that these foreign exchange forward contracts entered into with banks from time to time in the relevant periods under consideration, were made against confirmed export orders and export of goods by the assessee.

5.3.2 In our view the AO's findings to the contrary that the aforesaid foreign exchange losses suffered by the assessee are speculative in nature was factually flawed as it was based on a factually incorrect assumption that the assessee not being dealer in foreign exchange, its forward contracts were only for foreign exchange which were settled without delivery thereof. The RBI has permitted importers and exporters to enter into foreign exchange forward contracts with the banks in respect of its export orders. In the case on hand the assessee entered into foreign exchange export contracts with banks to the extent of its export orders; which means every foreign exchange forward contract is against a specific export order. In this factual matrix, it is clear that the assessee did not deal in foreign exchange, but entered into foreign exchange forward contract with banks to safeguard itself against possible foreign exchange losses on account of export sale proceeds to be received.

5.3.3 We concur with the view of the learned CIT(A) in the impugned order that the facts and circumstances of the case establish that the proviso (a)

to section 43(5) of the Act is squarely applicable in the case on hand since the foreign exchange forward contracts entered into by the assessee with banks, in the course of its manufacturing and export business of fruit pulp and allied items, were in order to safeguard itself against possible future foreign exchange losses on account of exports sale proceeds receivable, due to fluctuation in price of different commodities and which contracts were backed by confirmed export orders for dealing of goods manufactured or traded by it. These transactions were not speculative in nature and the resultant foreign exchange losses were consequently not speculative losses but allowable business losses. Such contracts are directly from and incidental to the assessee's business of manufacture and export of fruit pulp and allied products and therefore, in our view, do not represent speculative transactions. Therefore, the concept of delivery and non-delivery thereof is of no consequence and is irrelevant in the context of the facts of the case on hand. As long as the aforesaid transactions of foreign exchange forward contracts are concerned, they are directly linked with the assessee's business of manufacture and export of fruit pulp and allied items, in our considered view, by no stretch of imagination can they be classified as 'speculative business'.

5.3.4 We find that the issue on hand is squarely covered in favour of the assessee by the decision of the Hon'ble Bombay High Court in the case of CIT vs. Badridas Gauridu (P) Ltd. (2003) 261 ITR 256 (Bom):

"The assessee had entered into forward contracts with the Banks in respect of foreign exchange. Some of these contracts could not be honoured by the assessee for which it had to pay some amount which was debited to the P & L account. The assessee claimed the same as business loss being payment on account of cancellation of forward booking of forex with the banks in respect of exports orders. Finally, when the issue came up for consideration the Hon'ble Bombay High Court held as under: -

The assessee was not a dealer in foreign exchange. The assessee was a cotton exporter. The assessee was an export house. Therefore, foreign exchange contracts were booked only as incidental to the assessee's regular course of business. The Tribunal has recorded a categorical finding to this effect in its order. The Assessing Officer has not considered these facts. Under Section 43(5) of the Income-tax Act, "speculative transaction" has been defined to mean a transaction in which a contract for the purchase or sale of a commodity is settled otherwise than by the actual delivery or transfer of such commodity. However, as

stated above, the assessee was not a dealer in foreign exchange. The assessee was an exporter of cotton. In order to hedge against losses, the assessee had booked foreign exchange in the forward market with the bank. However, the export contracts entered into by the assessee for export of cotton in some cases failed. In the circumstances, the assessee was entitled to claim deduction in respect of Rs. 13.50 lakhs as a business loss. This matter is squarely covered by the judgment of the Calcutta High Court, with which we agree, in the case of CIT v. Soorajmull Nagarmull (1981) 22 CTR Cal 8: (1981) 129 ITR 169 (Cal)".

5.3.5 Taking into account the facts and circumstances of the case as discussed above and the judicial pronouncement referred to (supra), we are of the considered view that the orders of the learned CIT(A) for assessment years 2009-10 and 2010-11 holding that foreign exchange losses of ₹16,72,65,011/- and ₹6,53,06,057/- for assessment years 2009-10 and 2010-11 respectively were business losses and directing the AO to allow the same calls for no interference from us and we therefore confirm an uphold the same. Consequently, Revenue's grounds No. 1(a) and (b) for A.Y. 2009-10 and ground No. 2 for A.Y. 2010-11 are dismissed.

6. Revenue's Ground No. 2 for A.Y. 2009-10 - Disallowance under section 40(a)(ia) of the Act

6.1 In this ground Revenue assails the order of the learned CIT(A) as erroneous for deleting the disallowance of ₹10,04,650/- made by the AO under section 40(a)(ia) of the Act for non payment of TDS before the end of the financial year, by which time it was due to be paid. The learned D.R. was heard and placed support on the order of the AO in the matter.

6.2 Per contra, the learned A.R. for the assessee supported the findings of the learned CIT(A) on this issue in directing the deletion of the disallowance of ₹10,04,650/- under section 40(a)(ia) of the Act following the decision of the Hon'ble Calcutta High Court in the case of CIT vs. Virgin Creations (ITA No. 302 of 2011 dated 23.11.2011).

6.3.1 We have heard the rival contentions of both the parties and perused and carefully considered the material on record, including the judicial pronouncements cited. The facts of the matter as emerge from the record are that even though payments amounting to ₹10,04.650/- were made and debited to the books and the TDS was due to be paid before the close of the year, the same has been paid subsequently in the next financial year.

It is, however, seen that all the payments of TDS were made by the assessee before the due date of filing the return of income under section 139(1) of the Act. According to the assessee in these circumstances no disallowance under section 40(a)(ia) of the Act was called for.

6.3.2 The Hon'ble Calcutta High Court in the case of CIT vs. Virgin Creation (ITA No. 322 of 2011 dated 23.11.2011) has held that the amendment to section 40(a)(ia) of the Act by Finance Act, 2010 w.e.f. 01.04.2010 was retrospective and therefore TDS has to be paid on or before the due date specified for filing the return of income under section 139(1) of the Act; in this case 30.09.2009. In view of the fact that in the case on hand, the assessee has admittedly made the payments of TDS in the next financial year but before the due date for filing the return of income under section 139(1) of the Act the assessee's case is squarely covered in its favour by the aforesaid decision of the Hon'ble Calcutta High Court. Respectfully following the decision of the Hon'ble Calcutta High Court in the case of CIT vs. Virgin Creations (supra), we uphold the order of the learned CIT(A) directing the AO to delete the disallowance of ₹10,04,650/- under section 40(a)(ia) of the Act. Consequently, Ground No. 2 of Revenue's appeal for A.Y. 2009-10 is dismissed.

7. **Ground Nos. 3 & 4 of Revenue's appeals for assessment years 2009-10 and 2010-11** are general in nature and therefore no adjudication is called for thereon.

8. To sum up, Assessee's appeal for A.Y. 2007-08 is treated as allowed for statistical purposes. Revenues appeals for assessment years 2009-10 and 2010-11 are partly allowed for statistical purposes. Assessee's CO for A.Y. 2009-10 is partly allowed. Assessee's CO for A.Y. 2010-11 is partly allowed for statistical purposes.

Order pronounced in the open court on 7th June, 2016.

Sd/-
(Sandeep Gosain)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 7th June, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -21, Mumbai*
4. *The CIT - 10, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

*Assistant Registrar
ITAT, Mumbai Benches, Mumbai*

n.p.