

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'A' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.1873/Mds/2008

आयकर अपील सं./ITA No.456/Mds/2009

आयकर अपील सं./ITA No.1102/Mds/2011

आयकर अपील सं./ITA Nos.115 & 1936/Mds/2012

निर्धारण वर्ष/Assessment Years: 2004-05, 2005-06, 2007-08, 2008-09 &
2009-10

M/s M.Ct.M. Global Investments Pvt. Ltd., v. The Assistant Commissioner of
Income Tax,
761, Anna Salai, Company Circle IV(1),
Chennai - 600 002. Chennai - 600 034.

PAN : AABCM 9738 K
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.1954/Mds/2008

आयकर अपील सं./ITA Nos.1438, 1465 & 1654/Mds/2009

&

C.O. Nos.167 & 200/Mds/2009

(in I.T.A. Nos.1438 & 1654/Mds/2009)

आयकर अपील सं./ITA No.1285/Mds/2011

निर्धारण वर्ष / Assessment Year : 2001-02, 2004-05, 2005-06, 2006-07 &
2007-08

The Assistant Commissioner of Income Tax, v. M/s M.Ct.M. Global Investments
Company Circle IV(1), Pvt. Ltd.,
Chennai - 600 034. 761, Anna Salai,
Chennai - 600 002.
(अपीलार्थी/Appellant) (Respondent & cross-objector)

निर्धारिती की ओर से /Assessee by : Dr. Anita Sumanth, Advocate

राजस्व की ओर से /Revenue by : Sh. Pathlavath Peerya, CIT

सुनवाई की तारीख/Date of Hearing : 11.08.2016

घोषणा की तारीख/Date of Pronouncement : 21.10.2016

आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

All the appeals of the assessee and Revenue are directed against the respective orders of the Commissioner of Income Tax (Appeals)-V, Chennai. The assessee has also filed cross-objections. Since common issues arise for consideration in these appeals and cross-objections, we heard these appeals and cross-objections together and disposing of the same by this common order.

2. The first issue arises for consideration is taxation of income earned by the assessee from investment made in Malaysia.

3. Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that the Malaysian branch of the assessee-company was registered as a company in Malaysia. The assessee invested in bonds, debentures, derivatives, shares, etc. in Malaysia. Since the assessee invested its funds in Malaysia, the income earned by the assessee-company from Malaysian investment is exclusively

attributable to Malaysian branch, therefore, the provisions of Double Taxation Avoidance Agreement between Union of India and Government of Malaysia would come into operation. According to the Ld. counsel, the income earned by the Malaysian branch of the assessee-company cannot be assessed in India.

4. Referring to Double Taxation Avoidance Agreement, the Ld.counsel for the assessee submitted that the asset of the Malaysian branch was assessed by the assessee-company in making investment in Malaysia. Therefore, according to the Ld. counsel, the income earned on the investments made out of the assets of the Malaysian branch is attributable only to Malaysian branch, therefore, the same has to be assessed only in Malaysia and not in India. Referring to the decision of this Bench of the Tribunal in the assessee's own case for assessment year 2000-01 in I.T.A. No. 659/Mds/2005, the Ld.counsel submitted that in fact, this Tribunal has not considered the provisions of Double Taxation Avoidance Agreement while coming to conclusion that there was no permanent establishment in Malaysia. According to the Ld. counsel,, the Malaysian branch of the assessee-company was registered as a separate company in Malaysia, therefore, it has to

be constitute a permanent establishment in Malaysia, hence the income earned by the Malaysian branch of the assessee-company by making investment from the assets of Malaysian branch has to be treated as income of the Malaysian branch and liable for taxation under Malaysian Income Tax Act, therefore, the same cannot be subject matter of taxation in India. The Ld.counsel further submitted that the business of the Malaysian branch of the company is investment, therefore, the income earned by the assessee in investments in Malaysia has to be treated as business income. since the assessee has permanent establishment in Malaysia, the CIT(Appeals) is not justified in placing reliance on the order of this Tribunal for assessment year 2000-01 in holding that the income is taxable in India.

5. On the contrary, Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that the assessee-company had a branch in Malaysia. The assessee invested its funds through Malaysian branch in Malaysia. The decision to make investment was taken at Chennai. In fact, all the directors of the assessee-company were residing in Chennai. Therefore, according to the Ld. D.R., the assessee-company functions from Chennai and

making investment in Malaysia. Therefore, according to the Ld. D.R., the assessee has no permanent establishment in Malaysia. In fact, this Tribunal in the assessee's own case for assessment year 2000-01 examined this issue elaborately and found that the income earned by the Malaysian branch of the assessee-company is liable for taxation in India.

6. Referring to the classification of income under the head "income from other sources", the Ld. Departmental Representative submitted that once the income earned by the Malaysian branch of the assessee-company is taxable in India, the classification of interest income has to be made under the provisions of Income-tax Act. In fact, according to the Ld. D.R., the income of the Malaysian branch of the assessee-company was from investments. The income was in the nature of interest and dividend from such investments. Therefore, it has to be classified as "income from other sources" and not from business.

7. Referring to the order of this Tribunal in the assessee's own case for assessment year 2000-01, the Ld. D.R. submitted that the Tribunal found that the assessee's branch at Malaysia was holding

the investment not as a stock-in-trade but as investments only.

Therefore, the purchase and sale of the investments is liable for capital gain. Since in the assessee's own case, this Tribunal found that the assessee was holding the shares, debentures, etc. as investments only and not as stock-in-trade, the Tribunal found that the loss on sale of investments cannot be set off. Therefore, according to the Ld. D.R., the CIT(Appeals) disallowed the claim of the assessee by rightly placing his reliance on the order of this Tribunal for assessment year 2000-01.

8. We have considered the rival submissions on either side and perused the relevant material available on record. As rightly submitted by the Ld. D.R., this Tribunal examined the issue for assessment year 2000-01 and found that there was no permanent establishment in Malaysia. The Malaysian branch of the assessee-company invested in M/s Goldman Sachs on the basis of the decision taken at Chennai. This Tribunal found that M/s Goldman Sachs invested in various bonds and shares. The Malaysian branch of the assessee-company was, in fact, operated from Chennai. This Tribunal, for the assessment year 2000-01, examined entire nature of investments made by the assessee-

company in Malaysia and found that the interest / income earned by the assessee from investments in Malaysia has to be construed as “income from other sources”. The loss suffered by the assessee on sale of shares and investments cannot be allowed to set off against the capital gain. This Tribunal further found that the income earned by the Malaysian branch of the assessee-company is taxable in India and not taxable in Malaysia. In view of the decision of this Tribunal in the assessee's own case for the assessment year 2000-01, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

9. The next issue arises for consideration is expenditure incurred by the assessee in Malaysian branch. This issue arises for consideration in the Revenue's appeal for assessment year 2001-02.

10. Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that this Tribunal in the assessee's own case for assessment year 2003-04 found that the expenditure cannot be allowed while computing the total income. Therefore, according to the Ld. D.R., the order of the CIT(Appeals) allowing the

expenditure incurred by the assessee in Malaysian branch of the assessee-company is not justified.

11. On the contrary, Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that the CIT(Appeals) found that the income earned by the assessee's branch in Malaysia is taxable in India. Therefore, according to the Ld. counsel, the expenditure has also to be allowed while computing the taxable income. Since the entire foreign income was taxed under the head "Income from other sources", the CIT(Appeals) found that the expenditure incurred by the assessee in Malaysia for earning such income has also to be allowed while computing taxable income in India. According to the Ld. counsel, the claim of the assessee is that the income earned in Malaysia is not taxable in India. Therefore, the expenditure incurred by the assessee for earning such income has to be reduced from the income earned in Malaysia. According to the Ld. counsel, the assessee made investments through Goldman Sachs, Singapore, therefore, the CIT(Appeals) has rightly allowed the claim of the assessee.

12. We have considered the rival submissions on either side and perused the relevant material available on record. Apparently, the CIT(Appeals) allowed the claim of the assessee on the ground that the expenditure incurred by the assessee has to be reduced from the income earned from investments in Malaysia. The Revenue in ground No.2.2 clarifies that this Tribunal in I.T.A. No.558/Mds/2007 for the assessment year 2003-04, by an order dated 26.06.2009, decided the matter in favour of Revenue. The Revenue has filed a copy of the order of this Tribunal dated 26.06.2009 in the paper-book.

13. We have carefully gone through the order of this Tribunal. This Tribunal found that the income from Malaysian branch has to be classified as "income from other sources" and it cannot be said to be arising from business, therefore, there cannot any question of allowing the expenditure against the business income. In view of this order of the Tribunal, the CIT(Appeals) is not justified in allowing the claim of the assessee. In fact, this order of the Tribunal was not brought to the notice of the CIT(Appeals). By following the order of this Tribunal in I.T.A. No.558/Mds/2007 dated 26.06.2009,

the order of the CIT(Appeals) is set aside and that of the Assessing Officer is restored.

14. Next issue arises for consideration is interest under Section 234B of the Act. This was raised by the Revenue in I.T.A. No. 1438/Mds/2009 for assessment year 2001-02.

15. Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that the Assessing Officer levied interest under Section 234B of the Act. The Assessing Officer found that the income of Malaysian branch of the assessee-company has to be taxed in India. However, the CIT(Appeals) allowed the claim of the assessee on the ground that the assessee-company would not have anticipated the foreign income would be held to be taxable in India. Referring to Section 234B of the Act, the Ld. D.R. submitted that when the assessee is liable to pay advance tax and the advance tax paid by the assessee was less than 90% of the assessed tax, the assessee has to pay a simple interest at the rate of 1% every month or part of a month comprised in the period. In this case, it is not in dispute that the assessee is liable to pay advance tax and the advance tax paid by the assessee is less than 90% of assessed tax,

therefore, the Assessing Officer has rightly levied under Section 234B of the Act.

16. On the contrary, Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that the assessee has not anticipated that the income of the Malaysian branch of the assessee-company would be included in the total income of the assessee in India. According to the Ld. counsel, the Malaysian branch has to be construed as having permanent establishment in Malaysia, therefore, the income is not taxable in India. Since the assessee was under the *bona fide* belief that the income of the Malaysian branch is not taxable in India, there cannot be any levy of interest under Section 234B of the Act. Placing reliance on the judgment of Madras High Court in CIT v. Revathi Equipment Limited (2008) 298 ITR 67, the Ld.counsel submitted that the assessee has paid the advance tax voluntarily in respect of Indian income. The assessee never anticipated that the income earned in Malaysian investments would be included in the total income of the assessee, therefore, the assessee is under the *bona fide* belief that the Malaysian income is not taxable in India, hence the interest under Section 234B of the Act is not chargeable.

17. We have considered the rival submissions on either side and perused the relevant material available on record. The payment of advance tax was increased due to inclusion of income of Malaysian branch in India. The assessee claims that there was a bona fide belief that the Malaysian income would not form part of total income of the assessee in India.

18. We have carefully gone through the judgment of Madras High Court in Revathi Equipment Limited (supra). In the case before Madras High Court, the assessee has paid advance tax voluntarily. Section 35DDA of the Act was introduced by Finance Act, 2001 with effect from 01.04.2001. In fact, Finance Bill received assent of President on 11.05.2000. Therefore, the Madras High Court found that the assessee could not have envisaged that the voluntary retirement payments are liable for taxation. In view of the legislative change brought in by Finance Act, 2001, the Madras High Court found that the assessee was under the *bona fide* belief, therefore, the interest is not leviable. In the case before us, it is not the case of legislative change. The income of Malaysian branch of Indian company was not included in the total income of the assessee. It is a well settled principle of law that the global income

of the resident company is liable for taxation in India unless otherwise it was excluded by Double Taxation Avoidance Agreement between two sovereign countries.

19. In the case before us, this Tribunal in the assessee's own case, for assessment year 2000-01, after examining the Double Taxation Avoidance Agreement, and the investment said to be made by the Malaysian branch, found that the assessee is not doing any business in Malaysia other than making investments in M/s Goldman Sachs. The assessee-company is not making investments in any another companies. The other company M/s Goldman Sachs was doing business. The decision to make investment was taken in India, therefore, the Malaysian branch cannot be construed a permanent establishment. In those factual circumstances, this Tribunal found for the assessment year 2000-01, in the assessee's own case, that the income earned on investments by Malaysian branch of the assessee-company is taxable in India. The taxability of income at Malaysian branch is not because of any legislative change brought in subsequently. Therefore, it cannot be said that the assessee was under the bona fide belief. This is the case of levy of tax on the income. Since

there was no legislative change brought in by the Parliament, this Tribunal is of the considered opinion that the judgment of Madras High Court in Revathi Equipment Limited (supra) may not be applicable to the facts of the case. Therefore, when the assessee admittedly paid advance tax, which is less than 90% of assessed tax, the assessee is liable to pay interest under Section 234B of the Act. Therefore, this Tribunal is unable to uphold the order of the CIT(Appeals). Accordingly, the order of the CIT(Appeals) is set aside and that of the Assessing Officer is restored.

20. The next issue arises for consideration is levy of interest under Section 234D of the Act.

21. Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that the interest under Section 234D of the Act was levied on the amount refunded to the assessee. Referring to the judgment of Madras High Court in CIT v. Infrastructure Development Finance Co. Ltd. (2013) 33 taxmann.com 622, the Ld. D.R. submitted that since the excess amount was refunded to the assessee, the assessee is liable to pay interest on the excess amount refunded. The Ld. D.R. has also placed reliance on the decision of the Bangalore Bench of this

Tribunal in Sigma Aldrich Foreign Holding Company v. ACIT (104 ITD 95) and Ahmedabad Bench of this Tribunal in JCIT v. Sardar Sarovar Narmada Nigam Ltd. (93 ITD 321).

22. We have heard Dr. Anita Sumanth, the Ld.counsel for the assessee, also. It is not in dispute that the excess amount was refunded and the levy of interest under Section 234D was made on excess amount refunded. The claim of the assessee before the lower authorities was that no interest could be chargeable under Section 234D of the Act prior to assessment year 2001-02. The Madras High Court in Infrastructure Development Finance Co. Ltd. (supra) found that Section 234D of the Act came into force with effect from 01.06.2003. When the regular assessment was completed after the provisions of Section 234D of the Act came into force, the assessee was liable to pay interest on the excess amount refunded as contemplated under Section 234D of the Act. In this case also, the regular assessment was admittedly made on 21.01.2009 after Section 234D of the Act came into operation. Therefore, the assessee is liable to pay interest under Section 234D of the Act on the excess amount refunded in view of the judgment of Madras High Court in Infrastructure Development Finance Co. Ltd.

(supra). By respectfully following the judgment of Madras High Court in Infrastructure Development Finance Co. Ltd. (supra), the order of the CIT(Appeals) is set aside and that of the Assessing Officer is restored.

23. Now coming to the cross-objection of the assessee for assessment year 2001-02, the first issue raised by the assessee is with regard to reopening of assessment.

24. Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that the Malaysian branch of the assessee-company constitutes a permanent establishment in terms of Article 5 of Double Taxation Avoidance Agreement between India and Malaysia. Therefore, the income of Malaysian branch is not liable for taxation. Hence, according to the Ld. counsel, the Assessing Officer is not justified in reopening the assessment.

25. On the contrary, Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that the income of the assessee escaped assessment, therefore, the Assessing Officer has rightly reopened the assessment by issuing notice under Section 148 of the Act. Referring to the judgment of Madras High

Court in *Areva T&D India Ltd. v. ACIT (2007) 294 ITR 233*, the Ld.

D.R. submitted that when the income was escaped assessment, reassessment was initiated by issuing notice under Section 148 of the Act without giving notice under Section 143(2) of the Act amounts to procedural irregularity, therefore, it would not make reassessment nullity in law. Therefore, the Assessing Officer has rightly reopened the assessment. Similarly, for assessment year 2003-04, this Tribunal found that the assessment was rightly reopened on identical situation.

26. We have considered the rival submissions on either side and perused the relevant material available on record. The assessee is challenging the reopening of assessment on the ground that the Malaysian branch of the assessee-company constitutes a permanent establishment in Malaysia, therefore, the income does not escape from assessment. This Tribunal for assessment year 2000-01, in the assessee's own case, found that the Malaysian branch of the assessee-company cannot constitute a permanent establishment and the assessee's Malaysian branch is not doing any business other than making investments. Therefore, income from Malaysian branch is taxable India. In view of the finding of this

Tribunal for assessment year 2000-01 that the income escaped assessment, therefore, the Assessing Officer has rightly reopened the assessment under Section 147 of the Act. On identical situation, for assessment years 2002-03 and 2003-04, this Tribunal confirmed the order of the Assessing Officer for reopening assessment. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

27. The next issue arises for consideration is the classification of interest income and dividend income.

28. Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that the business of the assessee is investment, therefore, the interest income earned by the assessee from investments and dividend income have to be classified as "income from business". However, the CIT(Appeals) classified the same as "income from other sources" and thus confirmed the order of the Assessing Officer.

29. On the contrary, Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that the assessee was not

engaged in any business in Malaysia. The assessee has simply invested in Malaysia in M/s Goldman Sachs through Malaysian branch and earned interest income and dividend income. In fact, the business was done by M/s Goldman Sachs. Therefore, according to the Ld. D.R., the interest income received by the assessee on investment in M/s Goldman Sachs and dividend income have to be necessarily classified as income from other sources under Indian Income-tax Act. The entire investment made by the assessee in M/s Goldman Sachs was treated as mere investment and not as stock-in-trade. Therefore, according to the Ld. D.R., the CIT(Appeals) has rightly found that the income has to be classified as “income from other sources”.

30. We have considered the rival submissions on either side and perused the relevant material available on record. It is not in dispute that the assessee has invested in one M/s Goldman Sachs through its Malaysian branch. The assessee has not done any other business other than making investment in M/s Goldman Sachs. In those circumstances, this Tribunal is of the considered opinion that the income by way of interest and dividend income received from M/s Goldman Sachs have to be classified as income

from other sources and not as income from business. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

31. The next issue arises for consideration is unrealised gain on currency translation.

32. Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that Rule 115 of Income-tax Rules, 1962 was not taken into consideration by the CIT(Appeals). The assessee claimed before the Assessing Officer that the gain on currency conversion is only a notional gain and ought not to have been included in the taxable income. The assessee also claimed that the profit on account of foreign exchange currency has to be excluded from taxable income. However, the Assessing Officer disallowed the claim of the assessee. On appeal by the assessee, the CIT(Appeals) found that the unrealised gain on foreign transaction is only a notional gain, the same was not crystallised. The CIT(Appeals) placed his reliance on the judgment of Uttarakhand High Court in CIT v. ONGC (301 ITR 415). Accordingly, he deleted the addition made by the Assessing Officer. Referring to Rule 115,

the Ld. D.R. submitted that the rate of exchange for the calculation of value in rupees has to be deemed to be received or arrived or accrued to the assessee depending upon foreign exchange rate prevailing on the particular date. This rule was not taken into consideration by the CIT(Appeals) while placing reliance on the judgment of Uttarakhand High Court in ONGC (supra).

33. On the contrary, Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that unrealised foreign currency translation is only a contingent and notional gain. Even though it was credited to the Profit & Loss account, it is not a real income. Therefore, according to the Ld. counsel, it has to be excluded, hence, the CIT(Appeals) has rightly allowed the claim of the assessee.

34. We have considered the rival submissions on either side and perused the relevant material available on record. The gain on foreign currency translation from various international currencies is notional one. The Uttarakhand High Court in ONGC case (supra) examined this issue and found that the gain is only a notional one and it is not taxable in the hands of the assessee. Since the CIT(Appeals) has followed the judgment of Uttarakhand High Court,

this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

35. The next ground of appeal is with regard to provision for diminution in the value of current investment.

36. Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that the assessee-company invested in various investments and the same was classified as "current investment" and "permanent investment". The assessee has valued the investments at cost or market value, whichever is less, on the date of the balance sheet. The difference between the opening value or the cost price of the previous year and the market value on the last day of financial year was chargeable to Profit & Loss account. The statement showing the computation of amount claimed as provision for diminution in the value of current investment was claimed as deduction. The Assessing Officer disallowed the claim of the assessee on the ground that it is only a provision. However, on appeal by the assessee, the CIT(Appeals) allowed the claim of the assessee on the ground that diminution in the value of investment claimed as deducted in the Profit & Loss account is permissible

deduction under the Income-tax Act. Accordingly he deleted the addition. According to the Ld. D.R., it is only a provision made in the books of account, therefore, it cannot be allowed.

37. On the contrary, Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that Section 145 of the Act provides for computation of profits and gains of the business or profession are income from other sources in accordance with method of account regularly employed by the assessee. The assessee is regularly valuing its current investment at cost or market value, whichever is lower. This practice of valuing current asset was approved by Accounting Standards also. The diminution in the value of current asset on the last date of financial year was ascertained. Therefore, it cannot be said that it is only a provision. Therefore, the CIT(Appeals) has rightly allowed the claim of the assessee.

38. We have considered the rival submissions on either side and perused the relevant material available on record. As rightly submitted by the Ld.counsel for the assessee, the assessee continuously valuing the current investments at cost or market price, whichever is lower. Therefore, as on the last day of the financial

year, the quantum of diminution in the value of current asset can be ascertained. Hence, as rightly submitted by the Ld.counsel for the assessee, it is not a provision. Therefore, the CIT(Appeals) has rightly allowed the claim of the assessee. This Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

39. Now coming to Revenue's appeal for assessment year 2007-08, the first ground of appeal is with regard to diminution in the value of stocks.

40. Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that the profit on sale of investments was found to be a capital gain by this Tribunal for assessment years 2002-03 and 2003-04. Therefore, diminution in the value cannot be allowed as deduction.

41. On the contrary, Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that the current investment was found to be an investment by this Tribunal. The assessee is valuing the current investment either at market value or at cost, whichever is lower. Therefore, according to the Ld. counsel, the diminution in the value

is ascertainable at the last day of financial year. Accordingly, the CIT(Appeals) has rightly allowed the claim of the assessee.

42. We have considered the rival submissions on either side and perused the relevant material available on record. The investment made by the assessee has been continuously valued either at market price or at cost, whichever is lower, as per the provisions of Section 145 of the Act. Therefore, the diminution in the value of investment is ascertainable at the end of the financial year. Hence, the CIT(Appeals) has rightly allowed the claim of the assessee. This Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

43. The next ground of appeal is with regard to disallowance made under Section 14A of the Act.

44. Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that the Assessing Officer disallowed the expenditure for earning the exempt income by applying the provisions of Rule 8D of the Income-tax Rules, 1962. However, the CIT(Appeals) restricted the disallowance to 2% of the exempt income. Since Rule 8D is

mandatory, according to the Ld. D.R., the CIT(Appeals) is not justified in restricting the disallowance at 2%.

45. On the contrary, Dr. Anita Sumanth,, the Ld.counsel for the assessee, submitted that Rule 8D is applicable from assessment year 2008-09. The assessment year under consideration is 2007-08, therefore, Rule 8D cannot be applied for assessment year under consideration. Hence, according to the Ld. counsel, by placing reliance on the decision of this Tribunal, the CIT(Appeals) has rightly restricted the disallowance to 2%.

46. We have considered the rival submissions on either side and perused the relevant material available on record. As rightly submitted by the Ld.counsel for the assessee, Rule 8D of Income-tax Rules, 1962 is not applicable for assessment year 2007-08. This Tribunal is uniformly taking a view that 2% of the exempt income has to be taken as expenditure for earning that income. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

47. The next issue arises for consideration is foreign exchange fluctuation loss.

48. Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that the Assessing Officer disallowed the claim of the assessee on the ground that it is only a notional loss. However, the CIT(Appeals) found that the loss is a capital loss, therefore, it has to be considered under the head "capital gain". According to the Ld. D.R., the loss is on account of restatement of valuing of investment made in foreign currency, therefore, it cannot be allowed as loss.

49. On the contrary, Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that on identical situation, for the assessment year 2001-02, the CIT(Appeals), placing his reliance on the judgment of Uttarakhand High Court in CIT v. ONGC (301 ITR 415), deleted the addition made by the Assessing Officer. Referring to Rule 115, the Ld. D.R. submitted that the rate of exchange for the calculation of value in rupees has to be deemed to be received or arrived or accrued to the assessee depending upon foreign exchange rate prevailing on the particular date. This rule was not taken into consideration by the CIT(Appeals) while placing reliance on the judgment of Uttarakhand High Court in ONGC (supra).

50. We have considered the rival submissions on either side and perused the relevant material available on record. The gain on foreign currency translation from various international currencies are notional one. The Uttarakhand High Court in ONGC case (supra) examined the issue and found that the gain is only a notional one and it is not taxable in the hands of the assessee. Since the CIT(Appeals) has followed the judgment of Uttarakhand High Court, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

51. The next ground of appeal is with regard to expenses incurred on bank guarantee to the extent of ₹5,45,500/-.

52. Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that the assessee has paid a sum of ₹5,45,500/- to M/s Goldsman Sachs for the purpose of issuing a bank guarantee to HDFC bank. According to the Ld. D.R., the expenditure incurred by the assessee is not relatable to business of the assessee. Therefore, the CIT(Appeals) is not justified in allowing the claim of the assessee.

53. On the contrary, Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that the bank guarantee was given for installation of windmill by the assessee. In fact, the guarantee was taken from bank since the interest rate chargeable by HDFC bank was very lower. Therefore, the expenditure is only for the purpose of business, hence, the CIT(Appeals) has allowed the same under Section 37(1) of the Act.

54. We have considered the rival submissions on either side and perused the relevant material available on record. It is not in dispute that the assessee borrowed loan from HDFC Bank on the basis of the bank guarantee given by M/s Goldsman Sachs. It is also not in dispute that the assessee has paid lower rate of interest. Therefore, the expenditure incurred by the assessee in giving bank guarantee of ₹5,45,500/- is for business purpose. Therefore, the CIT(Appeals) has rightly allowed the same. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

55. In the result, while the assessee's appeals in I.T.A. No.1873/Mds/2008 & 456/Mds/2009 are dismissed, appeals in

I.T.A. No. 1102/Mds/2011, 115 & 1936/Mds/2012 are partly allowed.

The Revenue's appeals in I.T.A. No.1954/Mds/2008 and 1438/Mds/2009 are allowed and I.T.A. No.1465/Mds/2009 & 1654/Mds/2009 are partly allowed and I.T.A. No. 1285/Mds/2011 is dismissed. Coming to the assessee's cross-objections, C.O. No.167/Mds/2009 is dismissed and C.O. No.200/Mds/2009 is partly allowed.

Order pronounced on 21st October, 2016 at Chennai.

sd/-

(ए. मोहन अलंकामणी)

(A. Mohan Alankamony)

लेखा सदस्य/Accountant Member

sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,

दिनांक/Dated, the 21st October, 2016.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. निर्धारिती /Assessee
2. Assessing Officer
3. आयकर आयुक्त (अपील)/CIT(A)-V, Chennai-34
4. आयकर आयुक्त/CIT, Chennai-III, Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.