

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 3418/MUM/2015
(Assessment Year : 2011-12)

Quantum Advisors Pvt. Ltd.,
503, Regent Chamber,
Nariman Point, Mumbai 400 021.
PAN:AAACQ 0281C

... Appellant

Vs.

The Dy. Comm. Of Income-tax,
Circle -1 (3),
Aaykar Bhavan, MK Road,
Mumbai 400 020

.... Respondent

Appellant by : S/Shri J.D.Mistry/Niraj D. Seth
Respondent by : Shri Amit Kumar Singh

Date of hearing : 09/09/2015
Date of pronouncement : 15/07/2016

ORDER

PER G.S. PANNU,AM:

The captioned appeal filed by the assessee pertaining to assessment year 2011-12 is directed against an order passed by CIT(A)-15, Mumbai dated 29/05/2015, which in turn arises out of an order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') dated 20/03/2014.

2. In this appeal assessee has raised the following Grounds of Appeal:-

"1:0 Re.: Disallowance of Rs. 3,26,05,268/- paid to QIEF Management LLC for 'marketing support services':

1:1 The Commissioner of Income-tax (Appeals) has erred in holding that the marketing and distribution fees paid by the Appellant during the year to QIEF Management LLC are not allowable u/s.37(1) of the Income-tax Act, 1961.

1:2 The Commissioner of Income-tax (Appeals) has erred in making various erroneous and unsubstantiated observations (which ignore the facts submitted before him and/or are contrary to the facts on record) in the impugned Order to buttress his stand vis-a-vis the disallowance of marketing and development fees.

1:3 The Commissioner of Income-tax (Appeals) erred in making the disallowance without providing an opportunity to the Appellant to show-cause why the said disallowance should not be made.

1:4 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the marketing and distribution fee i incurred by it wholly and exclusively for the purpose of its business and the stand taken by the Commissioner of Income-tax (Appeals) is misconceived, erroneous and not in accordance with law.

1:5 The Appellant submits that the Assessing Officer be directed to allow the marketing and distribution fees paid by it to QIEF while computing the Appellant's total income for the year under consideration.

2 : 0 Re.: Disallowance of advertising expenditure of Rs. 3,77,14,278/-: *2 : 1 The Commissioner of Income-tax (Appeals) has erred in confirming the action of the Assessing Officer of disallowing the amount of Rs. 3.77.14.278 - being the advertisement expenditure incurred by the Appellant during the year under consideration.*

2:2 The Commissioner of Income-tax (Appeals) has erred in making various erroneous and unsubstantiated observations (which ignore the facts submitted before him and/or are contrary to the facts on record) in the impugned Order to buttress his stand vis-a-vis the disallowance of marketing and development fees.

2:3 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the advertising expenditure incurred by the Appellant was revenue in nature and was incurred wholly and exclusively for the purposes of its business and the Commissioner of Income-tax (Appeals) ought to have held as such.

2:3 The Commissioner of Income-tax (Appeals) erred in making the disallowance without providing an opportunity to the Appellant to show cause why the said disallowance should not be made.

2:4 The Commissioner of Income-tax (Appeals) erred in rejecting the additional evidence filed by the Appellant.

2:5 The Appellant submits that the Assessing Officer be directed to delete the disallowance so made by him and to re-compute its total income and tax thereon accordingly.”

3. As a perusal of the aforesaid Grounds of appeal reveal, appellant has raised two issues, which we shall deal in seriatim. The appellant is a company incorporated under the provisions of the Companies Act, 1956 and is carrying on the business as SEBI registered Portfolio Manager and Advisory Services. For the assessment year under consideration, it filed return of income declaring a total income of Rs.29,65,75,840/-, which was subject to scrutiny assessment, whereby the total income has been determined at Rs.36,68,95,810/- after making certain disallowances, which have further been affirmed by the CIT(A). Not being satisfied with the order of the CIT(A), assessee company is in appeal before the Tribunal on the above stated Grounds of appeal.

4. The first issue relates to a disallowance of Rs.3,26,05,689/- representing marketing and distribution fee paid to QIEF Management LLC, Mauritius (in short 'QIEF'). On being asked by the Assessing Officer to justify such expenditure, assessee had explained that the payment was made for marketing and distribution services rendered by QIEF and since the payee did not have a Permanent Establishment (PE) in India, such amounts were not taxable in India. The Assessing Officer however, noted that since QIEF was a group concern; its directors are residents in India; and, QIEF operates an administrative back-office in

India and, therefore, QIEF has a PE in India, which rendered such payments liable to tax in India. Therefore, according to the Assessing Officer, assessee was required to deduct tax at source (TDS) on the payment of Rs.3,26,05,689/- made to QIEF and assessee not having deducted such TDS, the impugned sum was disallowable under section 40(a)(i) of the Act. Be that as it may, the aforesaid basis of disallowance is not relevant for the present, inasmuch as, the CIT(A) disagreed with the Assessing Officer on the aspect of applicability of section 40(a)(i) of the Act, instead he has retained the disallowance on a different ground. As per the CIT(A), the impugned expenditure does not qualify for deduction under section 37(1) of the Act. The reasons which weighed with the CIT(A) to hold so can be summarized as follows. Firstly, according to CIT(A), assessee had failed to demonstrate that the infrastructure available with QIEF was sufficient to canvass business on behalf of the assessee in Europe or in any other part of the world. As per the CIT(A), the Transfer Pricing documents and the Annual Accounts of QIEF showed that it was a Mauritius-centric concern having no branch office anywhere in the world. On this basis, the CIT(A) concluded that QIEF could not have undertaken marketing activities on behalf of the assessee in Europe or anywhere else. Secondly, as per the CIT(A), the fact that there was an agreement between assessee and QIEF is not determinative of the issue of allowability of expenditure under section 37(1) of the Act. By relying on the ratio of the judgment of the Hon'ble Supreme Court in the case of *Lachminarayan Madan Lal Vs. CIT, 86 ITR 439(SC)* he observed that it was open for the Revenue to examine the relevant factors and determine allowability of expenditure

under section 37(1) of the Act. According to him, the factors in the present case show that the amounts have not been laid out wholly and exclusively for the purpose of business, and he retained the disallowance, *albeit* on a different ground. In this background, assessee company is in appeal before Tribunal.

5. Before us, the Ld. Representative for the assessee has made detailed submissions assailing the findings of the CIT(A). Firstly, the Ld. Representative for the assessee contested the findings of the CIT(A) on lack of infrastructure with QIEF, which was a Mauritius based company. It was explained that QIEF had a 100% subsidiary, Q India Corp. based in USA. By referring to Page -338 of the Paper Book, it is sought to be canvassed that the US subsidiary of QIEF had on its rolls one Mr. Arvind Rangarajan, based in America, whose profile demonstrates expertise in India-related research and investment efforts. Apart therefrom, it has also been pointed out that Page 339 of the Paper Book contains a list of clients referred by QIEF alongwith the corresponding fees earned by the assessee from such clients, which clearly demonstrates that a substantial portion of assessee's income is on account of clients referred by QIEF. Furthermore, Ld. Representative for the assessee has referred to Pages 34 to 35 of Paper Book, wherein is placed a copy of the agreement with QIEF dated 01/07/2008 pertaining to rendering of marketing services to non-USA and non-Canada based clients, including Europe, Middle East and Asian clients. Furthermore, our attention has also been drawn to Pages 39 to 42 of the Paper Book, wherein is placed agreement with QIEF relating to marketing services for the clients located in USA. Ld. Representative for the assessee

pointed out that the aforesaid material was very much before the lower authorities and there was no justification to disbelieve the same and hold that the requisite services were not provided by QIEF to the assessee. It was also canvassed that the agreement between assessee and QIEF has been duly acted upon and, therefore, it cannot be disbelieved by the Revenue and in this regard reliance was placed on the judgment of the Hon'ble Calcutta High Court in the case of CIT vs Arun Dua, 186 ITR 494(Cal). Emphasizing on the adequacy of infrastructural and other facilities available with QIEF to render services to assessee, Ld. Representative for the assessee also referred to Pages 242 to 298 of Paper Book, wherein is placed copies of the Annual Accounts of QIEF for years ending 31/12/2010 and 31/12/2011. By referring to the relevant portions, it is sought to be emphasized that the said concern is carrying on requisite levels of business, inasmuch as, the gross revenues for 31/12/2010 amounted to USD 56,63,538/-, out of which the impugned marketing fee of USD 22,55,952 has been received from assessee company. By referring to relevant notes on Page 260 of the Paper Book it is sought to be pointed out that QIEF had entered into Fund development agreement with Celerity Venture LLC, a Delaware Limited liability company and the assessee company, under which the interests and obligations of Celerity Venture LLC were assigned to the assessee-company. Thus, QIEF was carrying out various activities, including launch of a Fund in Delaware. It has also been sought to be pointed out that QIEF was also acting as CIS Manager and Investor Manager(unregistered) and was granted certificate of registration as Foreign Institutional Investment (FII) by SEBI in

September, 2008. All these aspects have been referred by the Ld. Representative to demonstrate that requisite infrastructural facilities were available with QIEF for rendering marketing services to the assessee.

6. On the other hand, the Ld. Departmental Representative appearing for the Revenue has primarily reiterated the arguments taken by the CIT(A), which we have already adverted to in an earlier para, and are not being repeated for the sake of brevity. According to the Ld. Departmental Representative, the CIT(A) has denied the deduction under section 37(1) of the Act primarily for the reason that assessee could not establish rendering of services by QIEF to the assessee company on the basis of any evidence.

7. We have carefully considered the rival submissions. Pertinently, the dispute before us pertains to the allowability of expenditure incurred by the assessee on fee paid to QIEF for marketing support services. The Assessing Officer as well as the CIT(A) have found it expedient to disallow the expenditure, albeit on different grounds. The Assessing Officer disallowed it on the ground that the requisite tax was not deducted at source and hence such expenditure was to be disallowed under section 40(a)(i) of the Act. This position did not find favour with the CIT(A) as according to him tax was not required to be deducted at source on the impugned amount, as it was not liable to be taxed in India in the hands of QIEF. On this aspect of the matter, there is no appeal preferred by the Revenue and, therefore, such finding of CIT(A) has attained finality. Therefore, we proceed to examine the basis

on which the CIT(A) has sustained the disallowance. As per the CIT(A) the expenditure does not qualify for deduction under section 37(1) of the Act. Shorn of other aspects of section 37(1) of the Act, what has been invoked by the CIT(A) in the present case is that the impugned expenditure cannot be considered to have been incurred 'wholly and exclusively for the purposes of the business' of the assessee company. The efficacy of such a conclusion is required to be judged having regard to the reasons advanced by the CIT(A), which we do hereinafter.

7.1 On the issue of availability of infrastructure with QIEF, in our view, the CIT(A) has merely brushed aside the material and evidence which the assessee sought to put-forth before him. In Para 1.13(a) of the order, the CIT(A) observes that assessee had failed to show the infrastructure available with QIEF to render services to assessee-company. Such an observation by the CIT(A) is a bland assertion because the material which was before him, and which has also been placed in the Paper Book filed before us, clearly shows that it is not a case where QIEF could be said to be a concern without adequate infrastructure and ability to render services to assessee. The Annual Accounts of the said concern, copies of which have been placed in the Paper Book, clearly show that QIEF is a concern which is carrying on regular activities in the field of management of investors, etc. and it was having a subsidiary in USA. Notably, assessee is engaged in providing investment management services to International Institutional clients such as sovereign funds, pension fund, etc. in relation to their investment exposures in India-listed securities. Ostensibly, such institutional clients would require appropriate and diligent evaluation

of their Investment Manager and for that purpose assessee had undertaken marketing efforts through QIEF. In terms of the agreement with QIEF, the said concern was tasked to look for potential opportunities and to market the capabilities and experience of the assessee-company on India-focused investment options. In fact, at Page-339 of the Paper Book, a list of clients have been placed, who were referred to the assessee by QIEF and at the time of hearing it was explained that more than 90% of assessee's revenues have been earned from the clients referred by QIEF. From the submissions of the assessee made to the lower authorities, it is seen that assessee has consistently explained that QIEF was marketing assessee's services to prospective institutional investors such as sovereign funds, pension funds, etc. in Europe, Middle East and Asia and also to private sector institutional clients in USA. In our considered opinion, the assertions which have been made by the assessee before the lower authorities as well as before us are borne out of record inasmuch as assessee has earned income through clients referred by QIEF, which is not disputed. Much has been made out by the CIT(A) that mere existence of an agreement between assessee and QIEF would not *ipso-facto* lead to the allowability of the impugned expenditure. In absolute terms, we have no quarrel with the said proposition advanced by the CIT(A) but the onus in the present case was on him to establish on the basis of evidence and material that the actual state of affairs was contrary to the agreement. In fact, the agreement between assessee and QIEF has been acted upon inasmuch as assessee has earned business thereupon and in return assessee made payments for the services rendered by the

payee. In our considered opinion, having regard to the material and evidence on record, the CIT(A) has sought to disregard the agreement on a mere hypothetical basis, without any factual support.

7.2 Before parting, we may mention two more aspects which were before the CIT(A) . In the course of the assessment proceedings, the only objection of the Assessing Officer was based on non-deduction of tax at source and in so far as the issue of section 37(1) of the Act was concerned, the Assessing Officer had no objection. It was only during the appellate proceedings that the CIT(A) show caused the assessee-company on the aspect of section 37(1) of the Act. It is seen from the record that during the appellate proceedings, CIT(A) called for a remand report from the Assessing Officer on the issue of allowability of the expenditure under section 37(1), which was not a point raised in the assessment order. In such remand report, the Assessing Officer observed that the impugned expenditure was incurred during the course of normal business activity by the assessee and hence deductible under section 37(1) of the Act. Thus, impliedly the Assessing Officer reiterated the stand taken in the assessment order on the issue of section 37(1) of the Act. Second aspect which needs mentions is the assessment made by the Assessing Officer under section 143(3) of the Act for the assessment year 2012-13, wherein a portion of the marketing support fee paid to QIEF was disallowed by invoking section 40A (2)(b) of the Act. As per the CIT(A), the aforesaid two aspects reflected that the Assessing Officer was contradicting his own position taken in the assessment for assessment year 2012-13 by accepting that the expenditure was deductible under section 37(1) of

the Act in the remand report. It appears that for the aforesaid reason, the CIT(A) disregarded the stand of the Assessing Officer in the remand report and proceeded to examine afresh the issue of allowability under section 37(1) of the Act.

7.3 In our considered opinion, the stand of the CIT(A) is misdirected and is based on a wrong perspective. In fact, the invoking of section 40A(2)(b) of the Act to disallow a portion of the expenditure in assessment year 2012-13 does not lend any support to the inference of the CIT(A) that the expenditure has not been made wholly and exclusively for the purpose of assessee's business because what is envisaged by section 40A(2)(b) is to disallow an expenditure which is found to be unreasonable or excessive in relation to its market value. Invoking of section 40A(2)(b) of the Act to disallow a portion of the expenditure is an altogether different dimension than invoking section 37(1) of the Act to say that the expenditure is not laid out wholly and exclusively for the purposes of business. In fact, under such a situation, it was all the more onerous on the part of the CIT(A) to demonstrate as to why the entire expenditure was disallowable under section 37(1) of the Act, having regard to the stand of the Assessing Officer in the remand report as well as in the assessment for assessment year 2012-13. The said burden, in our view, has not been discharged by the CIT(A) in the present case and, therefore, we are unable to acquiesce to the same. As a consequence, we hereby set-aside the order of the CIT(A) on this aspect and direct the Assessing Officer to delete the addition of Rs.3,26,05,268/- representing payment made to QIEF for marketing support services. Thus, on this aspect assessee succeeds.

8. The second issue in this appeal relates to disallowance of advertisement expenditure of Rs.3,77,14,278/-. In context of this dispute, the relevant facts can be summarized as follows. The Assessing Officer noted that the assessee-company had claimed advertisement expenditure of Rs.3,97,53,486/- in the instant year as compared to Rs.70,645/- in the immediately preceding assessment year. The Assessing Officer also noticed that an expenditure of Rs.3,77,14,278/- was incurred by way of payment to M/s. Hansa Vision Pvt. Ltd. for placing advertisements in newspapers. On being asked to justify the claim of advertisement expenses, assessee furnished the detail of expenditure, sample copies of invoices raised by M/s. Hansa Vision Pvt. Ltd. and also photocopies of newspaper cuttings evidencing the advertisements placed. Assessee also explained that the advertisement expense was incurred in its capacity as the 'sponsor' of 'Quantum Mutual Fund' on the media campaign to promote the various schemes of the Fund. It was further canvassed that such expenditure was a routine business expenditure incurred in the course of regular business. The Assessing Officer has made varied observations in paragraphs 6.8 to 6.14 of the assessment order and has ultimately disallowed the entire expenditure on the ground that it has been incurred for advertising and promoting 'Quantum Mutual Fund' and that the advertisements nowhere mention the name of the assessee and, therefore, according to him, the expenditure was incurred for a group company and it was not allowable as a business expense in the hands of the assessee-company. Before reaching to his ultimate conclusion, the Assessing Officer noted that the newspaper cuttings for the entire advertisement

expenditure were not furnished; and, thus the entire claim of Rs.3,77,14,278/- could not be said to be supported by documentary evidence. Further, the Assessing Officer observed that the advertisement expenditure was incurred by the assessee for 'brand building' and hence it was capital in nature. Be that as it may, the entire expenditure on advertisement claimed by the assessee at Rs.3,77,14,278/- was disallowed and added to the returned income.

9. In appeal before the CIT(A), assessee-company made various submissions on points of fact and law. The assessee-company pointed out that it had entered into agreement with M/s. Hansa Vision Pvt. Ltd. for placing advertisements in newspapers and thus payment was made to one party; a confirmation from M/s. Hansa Vision Pvt. Ltd. was adduced as additional evidence by making application under Rule 46A of the Income-tax Rules, 1962; an agreement entered with M/s. Hansa Vision Pvt. Ltd. dated 15.2.2011 was also adduced as additional evidence by way of an application under Rule 46A of the Rules; that the Assessing Officer could not have questioned the business decision of the assessee to incur the impugned advertisement expenditure; that the non-filing of newspaper cuttings for the entire expenditure was because assessee had filed only sample copies of the newspaper cuttings and the invoices issued by M/s. Hansa Vision Pvt. Ltd.; that the expenditure was incurred by the assessee as a sponsor of Quantum Mutual Fund in order to attract prospective investors to invest in the various schemes of the Fund; that the sample advertisements itself show that the purpose was to attract prospective investors to invest in

the schemes of Quantum Mutual Fund; that under such circumstances it could not be said that the expenditure was incurred for 'brand building'; that the name of the assessee was appearing in the newspaper advertisements as sponsor of the Mutual Fund and therefore it could not be said that the advertisements did not reflect the name of assessee-company; and, lastly that even if it was to be held that the expenditure was made for a group concern, it was pointed that the assessee-company had a direct interest in the business of the Quantum Asset Management Company (QAMC), which managed the assets of Quantum Mutual Fund and, therefore, such expenditure was allowable in the hands of the assessee. Reliance was sought to be placed on the following decisions –

- i) CIT v/s Chandulal Keshavlal & Co. [1960] 38 ITR 601 (SC)
- ii) CIT v/s Royal Calcutta Turf Club [1961] 41 ITR 414 (SC)
- iii) Eastern Investment Limited v/s CIT [1951] 20 ITR 1
- iv) Campa Beverages (P) Ltd. v/s IAC [1990] 34 ITD 241 (Del.)
- v) CIT v/s Alfa Laval (I) Pvt. Ltd. [2005] 149 Taxman 29
- vi) S.A. Builders v/s CIT [2007] 158 Taxman 74

to say that an expenditure incurred for the purposes of business is allowable even if some benefit arises to a third party. Apart from relying on the aforesaid decisions, assessee also relied on the following decisions for the proposition that the nature of the impugned advertisement expenditure could not be construed as having been incurred for 'brand building':-

- i) ACIT v/s Global Healthline (P) Ltd. [2012] 19 ITR(T) 298

- ii) ITO v/s Spice Communications Ltd. [2010] 35 SOT 78
- iii) JCIT v/s ITC Ltd. [2008] 112 ITD 57

Further, reliance was also placed on the judgment of the Hon'ble Gujarat High Court in the case of *Core Healthcare Ltd.*, 308 ITR 263 and that of Hon'ble Delhi High Court in the case of *Modi Revlon Pvt. Ltd.*, 26 *taxmann.com* 133 for the proposition that even advertisement expenses incurred to create a brand image was allowable as revenue expenditure. The CIT(A) considered the exhaustive submissions made by the assessee and called for a Remand report from the Assessing Officer on various issues, including the application of the assessee seeking admission of additional evidences under Rule 46A of the Rules. In response, the Assessing Officer submitted that M/s. Hansa Vision Pvt. Ltd. had raised all the invoices in the months of February and March, 2011 and even the agreement was dated 15.2.2011, which was towards the fag end of the year, which appeared to be doubtful. Secondly, the Assessing Officer submitted that the assessee was allowed opportunity during the assessment proceedings to furnish the complete evidence and, therefore, no additional evidence ought to be admitted by the CIT(A). Thirdly, the Assessing Officer canvassed that assessee had paid to a single entity , i.e. M/s. Hansa Vision Pvt. Ltd. for advertisement and promotion of Quantum Mutual Fund, which was a trust and a separate taxable entity exempt from tax and hence the advertisement expenditure ought to have been incurred by the Mutual Fund itself and not by the assessee-company acting as a sponsor. In sum and substance, the Assessing Officer reiterated his earlier position and also opposed the plea of the assessee for admission of additional evidence.

It is noticed from the order of CIT(A) that assessee also furnished its say on the Remand report submitted by the Assessing Officer, which has been reproduced by the CIT(A) in para 2.5 of his order. The CIT(A) considered the rival stands and concluded as follows. Firstly, on the issue of admission of additional evidence under Rule 46A of the Rules, the CIT(A) declined the plea of the assessee. At this stage, we may notice that apart from other additional evidences, assessee produced before the CIT(A) an agreement dated 1.6.2011 entered with Quantum Asset Management Co. Pvt. Ltd., who managed the assets of Quantum Mutual Fund. The aforesaid agreement was produced by the assessee to show that it was also earning Management fees from Quantum Asset Management Co. Pvt. Ltd. and thus, the action of incurring expenditure on promotion of various schemes of Quantum Mutual Fund was on relevant considerations. The CIT(A) declined to admit such an evidence as, according to him, the agreement did not pertain to the impugned assessment year as it was dated 1.6.2011. With regard to the merits, CIT(A) concluded that the expenditure did not qualify for deduction u/s 37(1) of the Act as it was not laid out wholly and exclusively for the purposes of assessee's business.

10. Furthermore, the CIT(A) noted that as a sponsor of the fund, assessee was having substantial interest in the QAMC and would earn income by way of dividend from the QAMC or by way of increase in the capital net worth of such company. According to the CIT(A), both the possible gains accruing to the assessee-sponsor, whether by way of dividend or Long Term Capital Gain, would be exempt from tax under

the Act. In such a situation, according to the CIT(A), the impugned expenditure on advertisements can be considered to have been incurred for earning tax-free incomes and the same was not allowable u/s 14A of the Act. For the said reasons, he has affirmed the disallowance made by the Assessing Officer.

11. Before us, the learned representative for the assessee vehemently pointed out that the material on record clearly shows that the entire expenditure was incurred by the assessee for the purpose of attracting investors towards investing in the Quantum Mutual Fund, of which assessee was the sponsor. The learned representative for the assessee pointed out that the cause for incurring the expenditure at the fag end of the year was that one of the Funds launched by Quantum Mutual Fund, i.e., Quantum Long Term Equity Fund (QLTEF) was completing 5 years on 13.3.2011 and, therefore, it was decided to market the performance of the Fund as its track record was favourable in comparison to the other Funds. It was decided to enter into a marketing agreement with M/s. Hansa Vision Pvt. Ltd. in February/March, 2011 and thereafter the incurrence of the advertisement expenditure started. In this manner, it was sought to be canvassed that incurrence of the expenditure towards the fag end of the year is not for any 'doubtful reasons', as made out by the lower authorities. Emphasizing that the expenditure was falling within the tests laid down in Sec. 37(1) of the Act, it was pointed out that the wholly owned subsidiary of the assessee-company, i.e., QAMC was managing the assets of Quantum Mutual Fund which had various

Mutual Fund schemes and the advertisement expenditure was incurred primarily for attracting investors for investing in the various existing schemes of the Fund. As a sponsor of the Mutual Fund, and as a holding company of QAMC, which was managing the assets of the Fund, assessee-company has a direct interest in the performance of the Mutual Fund. The learned representative for the assessee also referred to the SEBI (Mutual Funds) Regulations, 1996 to point out the *locus standi* of the assessee-company to incur such advertisement expenditure for attracting investors to invest in the Mutual Fund. In particular, attention was invited to Regulation 52(7) of SEBI (Mutual Funds) Regulation, 1996 to emphasize that any expenditure in excess of the limits specified in the Regulations was liable to be borne only by the concerned Asset Management Company or by the Trustees or sponsors of the Mutual Fund. The learned representative explained that in view of the fact that the Mutual Fund could not charge expenses over and above the prescribed limits, any expenditure incurred over and above such limit was borne by the assessee-company. In fact, by referring to Regulation 52(4)(b) and 52(5) of the SEBI (Mutual Fund) Regulations, 1996 it was pointed out that 'advertisement expenditure' could not be incurred by the Mutual Fund but could only be borne by the Asset Management Company or trustee or sponsors of the Fund. Apart therefrom, the learned representative also pointed out that it was wrong on the part of the CIT(A) to have observed that the assessee-company was entitled to earn only tax-exempt incomes from QAMC. In this context, reference was invited to the agreement dated 1.6.2011 with QAMC, a copy of which has been placed at pages 223 to 226 of the

Paper Book, to show that assessee was entitled to earn Management fee also, which was a taxable receipt. The learned representative pointed out that the aforesaid crucial piece of evidence was put before the CIT(A), who had also called for a Remand report on such evidence, but same has not been admitted by the CIT(A) on unjustified grounds. The learned representative pointed out that the agreement date was 1.6.2011, which was beyond the year under consideration, but the same was necessitated because of the fact that relevant approval from the Regional Director, Western Region, Mumbai under proviso to Sec. 297(1) of the Companies Act, 1956 was received only on 30.5.2011. For this aspect, attention was invited to the relevant clause in the agreement dated 1.6.2011. It was, therefore, contended that the refusal of the CIT(A) to consider such an evidence was on irrelevant considerations. Notwithstanding the aforesaid, the learned representative pointed out that Sec. 14A of the Act was of no relevance for the period under consideration inasmuch as there was no tax-free dividend income earned by the assessee from QAMC, as no dividend has been paid by QAMC at all. On this aspect, reliance was placed on the judgment of the Hon'ble Delhi High Court in the case of *Cheminvest Ltd.*, 378 ITR 33. It was also pointed out that QAMC was a 100% subsidiary of the assessee-company, and thus, assessee's investments in its subsidiary were liable to be considered in the nature of strategic investments, which were outside the purview of Sec. 14A of the Act. In support of such proposition, reliance was placed on the judgment of Hon'ble Delhi High Court in the case of *Oriental Structural Engineers (P) Ltd.*, 35 Taxmann.com 210, order of Chennai Bench of Tribunal in the

case of *EIH Associated Hotels Ltd.* (ITA No. 1503/Mds/2012 dated 17.7.2013), order of Mumbai Bench of Tribunal in the case of *M/s. JM Financial Ltd.* (ITA No. 4521/Mum/2012 dated 26.3.2014) and order of Delhi Bench of Tribunal in the case of *Interglobe Enterprises Ltd.* (ITA Nos. 1362 & 1032/Del/2013 dated 4.4.2014). For all the above reasons, the learned representative for the assessee submitted that the impugned expenditure has been unjustly disallowed by the lower authorities.

12. On the other hand, the Id. DR appearing for the Revenue has defended the action of the lower authorities by pointing out that the advertisement expenses was relatable to the activities of the Mutual Fund and not of the assessee and, therefore, the same has been rightly disallowed in the hands of the assessee. It was also pointed that the impugned expenses would have been justifiably incurred by QAMC, which was the Asset Management Company of the Mutual Fund and not by the assessee who was sponsor of the Fund. With regard to the earning of taxable Management fee from QAMC, the Id. DR pointed out that such income earned by the assessee over the years was less than the expenditure incurred by the assessee on advertisement, etc., and it would not defeat the invoking of Sec. 14A of the Act. According to him, the incomes that assessee was liable to earn in future on account of dividend and Long Term Capital Gain from QAMC were indeed exempt from tax and thus, invoking of Sec. 14A of the Act was justified in order to disallow the impugned advertisement expenditure.

13. We have carefully considered the rival submissions. The crux of the controversy in this ground revolves around as to whether the advertisement expenditure incurred by the assessee could be construed to have been incurred "*for the purposes of the business*" within the meaning of Sec. 37(1) of the Act. The appellant-company has established a Mutual Fund, i.e., Quantum Mutual Fund as a sponsor in terms of SEBI (Mutual Fund) Regulations, 1996. A Mutual Fund is set-up in the form of a Trust, which has a sponsor, trustees, Asset Management Company and a Custodian. In terms of SEBI (Mutual Fund) Regulations, 1996 a sponsor is akin to a promoter of a corporate body as it is the sponsor who establishes a Mutual Fund and registers it under the SEBI (Mutual Fund) Regulations, 1996. In term of the SEBI (Mutual Fund) Regulations, 1996 it is the sponsor who forms the Trust, appoints the Board of Trustees and has also the freedom to appoint the Asset Management Company, which would manage the funds of the Fund. Before us, the relevant provisions of the SEBI (Mutual Fund) Regulations, 1996 were referred to emphasize that a sponsor of a Mutual Fund is obligated to contribute atleast 40% of the net worth of the Asset Management Company. The Trustees of the Mutual Fund act as protectors of the unit-holders' interest. The Trustees do not directly manage the portfolio of securities and instead, the same is done by an Asset Management Company in terms of SEBI (Mutual Fund) Regulations, 1996. The Asset Management Company thus manages the Fund's schemes and also its corpus. The Fund management includes buying and selling of securities in large volumes and in order to keep a track of such transactions, there is a Custodian. The aforesaid briefly

brings out the schematic position of the assessee-company in the context of the complexities involved in the functioning of a Mutual Fund.

14. Now, the case of the assessee is that it has incurred advertisement expenditure so as to promote the various schemes launched by Quantum Mutual Fund. The assessee has explained that the expenditure has been incurred for attracting investors for investing in the existing schemes of Quantum Mutual Fund. It has also been sought to be pointed out that the Asset Management Company, i.e., QAMC is its 100% subsidiary. According to the assessee, it has a direct interest in the business of the QAMC, who in turn manages the assets of Quantum Mutual Fund. The aforesaid factual matrix is not in dispute and is also emerging from record. Having regard to the same, the moot question is as to whether the assessee was driven by considerations of commercial expediency or not while incurring the impugned expenditure on advertisement? No doubt, the expression "commercial expediency" is not amenable to a straightjacketed definition, but its meaning is required to be understood in the context of the facts and circumstances of each case. So however, in the context of a businessman, it would be safe to deduce that the expression "commercial expediency" would suggest that expenditure is incurred with a sense of prudence for the purposes of business. In fact, it is a trite law that in order to determine the allowability of business expenditure, legal obligation to incur the expenditure is not the requirement, but it would suffice if the expenditure was incurred on the

ground of commercial expediency. If we examine the impugned advertisement expenditure incurred by the assessee as a sponsor of the Mutual Fund and as a holding company for the Asset Management Company of the Mutual Fund, it could not be said that assessee was devoid of any *locus standi*. In fact, there can be no denying the fact that the purport of the expenditure was to increase assessee's own earnings inasmuch as the Management fee which the assessee is entitled to earn from QAMC is also dependent on the level of average assets of the Fund managed by QAMC. The aforesaid becomes clear from the agreement of the assessee with QAMC, a copy of which has been placed in the Paper Book at pages 223 to 226. In fact, the agreement dated 1.6.2011 enumerates the role and responsibilities of assessee-company which, *inter-alia*, includes promotion of schemes of Quantum Mutual Fund through online/offline/print-media, etc. In this view of the matter, in our view, the stand of the lower authorities that there is no nexus between the expenditure and the business of the assessee is quite fallacious and contrary to the fact-situation. At this stage, we may also refer to a concurrent stand of the Revenue that as the advertisements relate to securing investors to invest in the schemes of Quantum Mutual Fund, the expenditure, at best, could be said to be for the benefit of Quantum Mutual Fund, which is a separate taxable entity. Thus, as per the Revenue, such expenditure is for the benefit of a third party and not for assessee's business. In this context, we may refer to the judgment of the Hon'ble Supreme Court in the case of *S.A. Builders Ltd., 288 ITR 1 (SC)*, which was also relied upon before us by the learned representative for the assessee. Though the judgment of the Hon'ble

Supreme Court was in the context of Sec. 36(1)(iii) of the Act relating to expenditure on interest, but the observations of the Hon'ble Court are relevant for Sec. 37(1) of the Act due to the presence of the expression "for the purposes of business" in both the sections. The Hon'ble Supreme Court emphasized that even in the context of Sec. 37(1) of the Act, the expression "for the purposes of business" would include an expenditure voluntarily incurred for commercial expediency and it would be immaterial if a third party also benefitted from the same. The following extract from the judgment of the Hon'ble Supreme Court is notable:-

"..... once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their view point but that of a prudent businessman."

In view of the aforesaid, we therefore do not find any merit in the stand of the income-tax authorities that the expenditure in question is not laid out for the purposes of assessee's business, merely because it could benefit another entity also.

15. We may also refer to the reliance placed by CIT(A) on the judgment of Hon'ble Supreme Court in the case of *Amalgamations (P)*

Ltd., 226 ITR 188 (SC). According to the CIT(A), the ratio of the above decision justifies the inference that the impugned expenditure was not incurred for the purposes of assessee's business. We have perused the judgment of Hon'ble Supreme Court in the case of *Amalgamations (P) Ltd. (supra)* and find that the same has been unjustly applied in the present case inasmuch as the facts and circumstances in the case before the Hon'ble Supreme Court stood on an entirely different footing. The assessee before the Hon'ble Supreme Court was a bulk shareholder in several companies and it was rendering services to its subsidiaries in various areas of finance, liaisoning, export promotion etc. The Directors of the subsidiary companies were earning remuneration from the respective companies in terms of the limits fixed under the Companies Act, 1956. The assessee-company paid remuneration to Directors of the subsidiary companies in excess of the ceiling prescribed in the Companies Act, 1956. Such excess remuneration paid by the assessee-company to the Directors of the subsidiary companies was claimed as a deduction on the ground that it was incurred wholly and exclusively for the business of the assessee-company. The Hon'ble Supreme Court noted that there was no nexus between the expenditure and the business of the assessee. The business of the assessee was noted to be of holding its investments and it was noticed that such income could be earned by the assessee without incurring the disputed expenditure. It is for the said reason the claim of the assessee was negated by the Hon'ble Supreme Court. So however, in the present case, the complexion of the factual matrix is quite different. Herein, it is the assessee-company which has set-up the

Mutual Fund as a sponsor and is also the holding company for the Asset Management Company, which in turn is managing the assets of the Mutual Fund. The income-earning apparatus of the assessee includes a stream of income from such an activity in which assessee has a deep interest, may it be the affairs of the Asset Management Company or the Mutual Fund. No doubt, the advertisements are intended to secure investors for investing in the schemes of the Mutual Fund, which is a separate entity, so however, the incurrence of such expenditure vis-à-vis assessee's business cannot be discounted even if its incurrence would result in a benefit to a third party. On this aspect of the matter, the learned representative for the assessee relied upon the judgment of the Hon'ble Bombay High Court in the case of *Tata Sons (P) Ltd.*, 18 ITR 460 which has also been referred to by the Hon'ble Supreme Court in the case of *Amalgamations (P) Ltd. (supra)*. In the case of *Tata Sons (P) Ltd. (supra)* assessee was managing agent of an another company and it was earning agency commission computed with reference to the net profits of the managed company. Assessee-company voluntarily paid certain sums to some of the officers of managed company as bonus, and such expenditure was claimed as deduction while computing its taxable business income. Such claim was upheld on the ground of commercial principles as according to the Hon'ble High Court, what the assessee had done was something, which had an objective of increasing the profits of the managed company, which in turn would increase its own share of commission income. The Hon'ble Supreme Court in the case of *Amalgamations (P) Ltd. (supra)* considered the judgment of Hon'ble Bombay High Court and observed that there was a direct nexus

between the increased profits of the managed company and the managerial commission payable to the assessee since such agency commission was calculated as a prescribed percentage of the net profits of the managed company. In our considered opinion, the parity of reasoning in the case of *Tata Sons (P) Ltd. (supra)* is clearly attracted in the present case too. There can be no gain saying that-better the performance of the Mutual Fund and the Asset Management Company, better would be the returns of the assessee-company. Therefore, in our view, the CIT(A) has erred in holding that the advertisement expenditure is not laid out wholly and exclusively for the purposes of the appellant's business. Having regard to the aforesaid discussion, we reverse the stand of the lower authorities on this aspect.

16. The other plea of the Revenue, based on the provisions of Sec. 14A of the Act, in our view, is also quite untenable. The said plea is based on the premise that the only possible earnings of the assessee as a sponsor of the Mutual Fund, and as a holding company of the Asset Management Company, by way of dividends or Long Term Capital Gain would be exempt from tax and, therefore, the impugned expenditure would constitute an expenditure incurred for earning of exempt income, which is hit by the provisions of Sec. 14A of the Act. Factually speaking, the said premise is misplaced inasmuch as assessee is also entitled to earn Management fee from QAMC, which is a taxable receipt. In fact, before the CIT(A), assessee had specifically brought out the same and the tabulation of such earnings in different years have been reproduced in the order of CIT(A) in para 2.2. However, the CIT(A)

has not considered the same because it was based on an agreement dated 1.6.2011 between the assessee-company and QAMC, which was sought to be produced before him as an additional evidence which hitherto was not before the Assessing Officer during the assessment proceedings. In our considered opinion, the said evidence has been unjustly disregarded by the CIT(A). A copy of the said agreement is placed in the Paper Book at pages 223 to 226 and it is averred therein that the same is governed by the terms and conditions approved by the Regional Director, Western Region, Mumbai under the proviso to Sec. 297(1) of the Companies Act, 1956. Such approval of the authority under the Companies Act, 1956 is dated 30.5.2011, which ostensibly explains the date of the agreement to be 1.6.2011. The agreement dated 1.6.2011, which was in turn based on the approval of a statutory authority under Companies Act, 1956, cannot be said to be an evidence lacking in *bona fides*. It also cannot be construed as an afterthought because the same is of a date prior to the date of filing of return of income by the assessee for the impugned assessment year and is in terms of conditions approved by a statutory authority. Be that as it may, in our view, the aforesaid material was only in support of assessee's primary assertion that the expenditure was incurred on considerations of 'commercial expediency'. In our considered opinion, the aforesaid piece of evidence was quite germane for the purposes of appreciating the entire transaction in its proper perspective, and the CIT(A) erred in not considering such material to decide the controversy before him.

17. In any case, on the issue of Sec. 14A of the Act, assessee has also pointed out that no exempt income has been earned during the year and, therefore, Sec. 14A of the Act cannot be invoked to disallow any expenditure having regard to the judgment of the Hon'ble Delhi High Court in the case of *Cheminvest Ltd. (supra)*. The factual matrix of the assessee-company not having earned any exempt income in the instant year has not been controverted by the Revenue and, therefore, on this limited point itself we find no reason to uphold invoking of Sec. 14A of the Act by CIT(A) in this year in order to disallow the impugned expenditure on advertisement.

18. Insofar as the other grounds of disallowance discussed by the Assessing Officer in the assessment order, namely the expenditure being of capital nature having been incurred for 'brand building'; or that the complete newspaper cuttings of advertisements not having been filed is concerned, we find no specific determination by CIT(A) on this aspect. In any case, we find that before the CIT(A), assessee had assailed the aforesaid position in a detailed manner and in the absence of any rebuttal of the same by the CIT(A), it can only be inferred that the CIT(A) acquiesced to the same. Nevertheless, we find that factually there is nothing on record to show that the expenditure has been incurred with the objective of brand building inasmuch as the advertisements are intended to canvas investors to invest in the schemes of the Quantum Mutual Fund. Therefore, on facts also, we find no support for the plea of the Assessing Officer. Insofar as the non-furnishing of some of the newspaper cuttings is concerned, before the CIT(A) assessee had explained it properly and we find that there are no

credible reasons to disbelieve the assessee on this aspect, as the sample newspaper cuttings clearly support the invoices raised by M/s. Hansa Vision Pvt. Ltd.

18. In conclusion, having regard to the aforesaid discussion, we deem it fit and proper to set-aside the order of CIT(A) and direct the Assessing Officer to delete the addition of Rs.3,77,14,278/- out of advertisement expenditure.

19. Resultantly, appeal of the assessee is allowed.

Order pronounced in the open court on 15/07/2016

Sd/-

(PAWAN SINGH)
JUDICIAL MEMBER
Mumbai, Dated 15/07/2016
Vm/SSL, Sr. PS

Sd/-

(G.S. PANNU)
ACCOUNTANT MEMBER

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