IN THE INCOME TAX APPELLATE TRIBUNAL,
"G" BENCH, MUMBAI.

[Coram: Pramod Kumar, AM and V. Durga Rao, JM]

I.T.A No.4603/ Mum/2008
Assessment year: 2004-05

Addl. CIT, Range 1 (3) ***……Appellant***
Mumbai.

Vs.

Weizmann Ltd., ***……Respondent***
Empire House, 2214, D.N. Road,
A.K.Nayak Marg, Fort, Mumbai.
PA No.AAACW 1260 H

ITA No.4161/Mum/2008
Assessment Year: 2004-05

Weizmann Ltd., ***……Appellant***
Empire House, 2214, D.N. Road,
A.K.Nayak Marg, Fort, Mumbai.
PA No.AAACW 1260 H

Vs

Addl. CIT, Range 1 (3) ***……Respondent***
Mumbai.

Pavan Ved, *for the revenue*
J.D.Mistry and Vijay Mehta , *for the assessee*

O R D E R

Per Pramod Kumar:

1. By way of this appeal, the Assessing Officer has challenged the order dated 10th April, 2008 of CIT(A)-XXI, Mumbai, in the matter of assessment under section

143(3) of the income tax Act, 1961 for the assessment year 2004-05, on the following grounds:

> "1. On the facts and in the circumstances of the case and in law, the CIT (A) erred in deleting the addition of Rs 23,31,963 against disallowance of lease rental, paid on windmill, ignoring the fact that the assessee company with mutual understanding first purchased and then sold back to manufacturer and again purchased through its sister concern from whom it has borrowed the same on lease.

2. Briefly stated, relevant material facts are like this. In the course of assessment proceedings, the Assessing officer noticed that the assessee company has claimed expenditure on account of payment of lease rental of Rs. 23,32,963 to M/s. Weizmann Homes Limited, in respect of one 250 K.W. Windmill. The AO also noted that the lease rental expenses was disallowed in A.Y. 1998-99 on account of the fact that the said asset was purchased in the year 1997-98 being sold to the manufacture in A.Y. 1998-99, who in turn sold the same to M/s. Weizmann Homes Limited from whom the assessee company took back the windmill on lease. The AO also noted that similar rental expenditure was disallowed in A.Y. 1998-99. In this backdrop, the Assessing Officer disallowed the payment of lease rent. Aggrieved, the assessee carried the matter in appeal. The CIT (A) following the decision of the ITAT in assessee's own case for the assessment years 1998-99 and 1999-2000 on this issue, directed the Assessing Officer to delete the addition of Rs. 23,31,963. Being aggrieved by the stand so taken by the CIT (A), the Assessing officer is in appeal before the Tribunal.

3. Having heard the rival contentions, we do not find any infirmity in the order of the CIT (A) to interfere as the CIT (A) has followed the decision of the ITAT in assessee's own case for the assessment years 1998-99 and 1999-200 on similar facts, wherein, the Tribunal has allowed the deduction of lease rental on this windmill, observing as follows:-

"We have carefully considered the rival submissions. The case of the authorities below is that there was no need for the assessee to sell these two windmills because in any case directly or indirectly these windmills were utilized for the purposes of the business of the assessee. As to windmill 250 KW the assessee took it back on lease from WHL. Windmill 500 KW was finally taken on lease by Tapi Energy Product ltd (Tapi) who was a sister concern of the assessee. Tapi was sharing revenue from assessee's sale of electricity to Andhra Pradesh Government. The Revenue has also contended that the series of transactions were entered into between the group concerns with a view to avoid tax liability of the group as a whole. There is certain flaw on the face of this argument in as much as Bank of Madura who purchased windmill 500 KW is not part of the assessee group. Secondly, it is not for the Income-tax authorities to determine as to in what manner the assessee should have conducted his business affairs. It is not in dispute that the transactions were given effect to by the parties. Even if the hunch of the learned CIT(A) that windmill 250 KW was not physically moved is correct the fact remains that ownership of the assessee over the windmill was substituted and the assessee thereafter operated the windmill as a lessee. The authorities below have approached the issue from physical point of view alone. They have not gone into the financial restructuring part of the transactions which too could be an important consideration for the assessee. The assessee has argued before the authorities below that there is no reduction in the assessee's tax liability by the transactions an din fact the assessee stood to gain by the transactions in as much as the assessee received Rs.550 lacs by way of liquidated damages. The case of the Revenue is that all these arrangements might have facilitated reduction of tax liability of the assessee group taken as a whole. The learned counsel for the assessee has rightly argued that the assessment of the assessee cannot be affected by what happened in the case of there assessee even if they were part of the same group as the assessee himself. Action, if any was legally permissible, could be taken in the assessment of there assessees. For the purpose of Income-tax proceedings each assessee is a separate entity. Above all there is considerable force in the contention of the assessee that while on the one hand the assessee's claim of deduction of lease rentals has been disallowed, the income earned by the assessee on sale of power to Andhra Pradesh Government has been assessed without demur. We therefore hold that the disallowance of the assessee's claim of deduction on account of lease rent paid in respect of windmill 250 KW is without adequate justification and direct the Assessing Officer to allow deduction of lease rental on this windmill."

4. Respectfully following the esteemed views of the coordinate bench, we confirm the order of the CIT(A) and decline to interfere in the matter.

5. Ground No. 1 is thus dismissed.

6. In second ground of appeal, the Assessing Officer has raised the following grievance:

> 2. On the facts and in the circumstances of the case and in law, the CIT (A) erred in directing the AO to allow the deduction u/s. 80 HHC of Rs 43,26,451 while computing the book profit u/s.115JB of the Act, in spite of the fact that the deduction u/s. 80HHC computed under clause (a), (b) & (c) of sub-section(3) or sub-section 3(A) is Nil an as provided in section 115JB of the Act.

7. So far as this grievance of the Assessing Officer is concerned, relevant materials are like this. In the course of the assessment proceedings, the Assessing officer noticed the profits eligible for deduction under section 80 HHC have been claimed to be Rs. 43,26,431, even though no deduction under section 80 HHC is claimed because the gross total income during the year was nil. In the computation of total income as per the normal provisions other than section 115JB, the assesee has claimed deduction u/s. 80 HHC at Nil while working out the book profit u/s.115JB, the assessee has deducted Rs. 43,26,431 on account of profit eligible for deduction u/s. 80 HHC. The Assessing Officer asked the assessee to explain as to why the deduction u/s. 80HHC, as actually claimed in the return and not the profits said to be eligible for deduction under section 80 HHC, be reduced from the book profit u/s.115JB. It was explained before the AO that the deduction u/s. 80HHC is allowable as per section 115JB(2)(iv) of the income tax Act, 1961. The Assessing Officer rejected the explanation of the assessee and determined the book profit under section 115JB of the Act. Aggrieved, the assessee carried the matter in appeal. Before the CIT (A), reliance was placed on the decision of the Mumbai ITAT (SB) in the case of DCIT and Ors v Syncome Formulations India Ltd (292 ITR 144) in respect of deduction u/s.80HHC from book profit, wherein, it was held that deduction u/s. 80HHC in a case of MAT assessment is to be worked out on the basis of adjusted book profit and not on the basis of profit computed under the regular provisions of

law applicable to the computation of profit and gains of business or profession. The CIT (A) allowed the assessee's plea, inter alia, observing as under:-

> ***"..... After due consideration of the fact as well as the law, I am inclined to agree with the contention of the appellant. It is noticed that the appellant had profits to the extent of Rs. 2,60,55,412 as per the normal computation of income. The said income was reduced to NIL due to adjustment of carry forward of unabsorbed depreciation. The said judgement was required to be made as per the provisions of law. Had such unabsorbed depreciation not been available, the appellant could have got the said deduction even in the normal computation of income. The AO's contention that if the said deduction is not available in the normal course of computation of income then, the same cannot be allowed even from the book profit is not correct. The decision of the ITAT Mumbai Bench cited supra, has clarified this issue and held that deduction u/s. 80HHC in MAT cases is allowable on the basis of the adjusted book profit and not on the basis of the profit computed under the regular provisions of law applicable to the computation of profit & gains of business or profession. The computation of income under normal provisions and the computation of book profit are two distinct computation of income and both the computations are to be viewed separately. The deduction available in respect of book profit has to be allowed within the ambit of section 115JB. Thus considering the facts in totality and also the Special Bench decision, cited supra, I am of the considered opinion that the deduction u/s. 80HHC of Rs. 43,26,431 cannot be denied to the appellant. Accordingly, the AO is directed to allow the deduction of Rs. 43,26,451 u/s. 80 HHC of the Act to the appellant from book profit."***

8. Aggrieved, the revenue is in appeal before the Tribunal.

9. Learned representatives fairly agree that the issue under consideration is squarely covered by the decision of a co-ordinate Bench in the case of DCIT v. M/s. Glenmark Laboratories Ltd in ITA No.4155/M/2007 for the assessment year 2004-05, wherein, the Tribunal following the decision of the ITAT (SB) in the case of Syncome formulations (I) Ltd. (supra) has affirmed the view of the CIT (A) deleting the similar addition. In any event, the view taken by the Tribunal in Special Bench decision in the case of Syncome Formulations (supra) now stands approved by Hon'ble Supreme Court in the case of Ajanta Pharma Ltd Vs CIT (327 ITR 305) .

10. Ground No. 2 is thus dismissed.

11. In ground no. 3, the Assessing Officer has raised the following grievance :

> 3. On the facts and in the circumstances of the case and in law, the CIT (A) erred in directing the AO to re-compute the adjusted profit from DEPB, after reducing the reasonable cost of DEPB from the sale consideration, for computing the deduction u/s. 80 HHC, ignoring the fact that the assessee company has received the DEPB on export of goods without any cost. Insptie of this, the assessee company has shown loss on sale of DEPB by reducing the inflated cost without any valid basis and thus claimed the higher deduction u/s. 80 HHC, for calculating the book profit.

12. Apropos Ground No.3, the Assessing Officer noticed that the assessee has received export incentives of Rs. 3,71,45,425 on account of profit from sale of Duty Entitlement Pass Book (DEPB) licenses and has computed the deduction u/s. 80 HHC on the same. It is also noticed that the total export turnover is Rs. 38,29,93,698/-, which is more than Rs. 10 crores. The AO observed that there is nothing on record to show that the assessee has satisfied the condition required for allowance of deduction u/s. 80 HHC on the DEPB benefits earned by the assessee, therefore, he disallowed the claim of the assessee and has reduced 90% of sale price of DEPB licence in computing the adjusted profit for the purpose of determining deduction u/s. 80 HHC. Being aggrieved, the assessee carried the matter in appeal. The CIT (A) after considering the assessee's submission and after considering decisions of coordinate benches of this Tribunal, upheld the grievance of the assessee and directed the AO to re-compute the adjusted profit for determining 80 HHC deduction, taking into account 90% of only the profits on the sale of DEPB license and by taking only the profit element on sale of DEPB licence and not the entire sale proceeds. Aggrieved, the revenue is in appeal before us.

13. Having heard the rival contentions and having perused the material on record, we find that the issue is now squarely covered by the judgment of Hon'ble jurisdictional High Court in the case of CIT Vs Kalptaru Colours & Chemicals (328 ITR 451). As held by Their Lordships, the income on sale of DEPB licence is represented by entire sale proceeds of the licence and "there is no logical justification in bifurcating the value of the sale consideration realized by the

exporter on the transfer of the DEPB credit" as has been directed by the CIT(A) in this case. In the present case, while a loss has been computed because of segregation of the sale proceeds of the DEPB licence but once entire amount is taken as income, it will obviously be a positive figure. Accordingly, we vacate the relief granted by the CIT(A) and restore the order of the Assessing Officer on this issue.

14. Ground No. 3 is thus allowed.

15. In ground no. 4, the Assessing Officer has raised the following grievance:

> 4. On the facts and in the circumstances of the case and in law, the CIT (A) erred in directing the AO to re-compute the deduction u/s. 80 HHC by taking the turnover of the taxable division only on "standalone" basis and ignoring the turnover of the other divisions, without considering the provision of section 80 AB of the Act, which talk about the gross profit of the assessee and not of the Division.

16. With regard to Ground No.4, learned representatives fairly agree that the issue is covered by the decision of the ITAT in assessee's own case for the assessment years 1998-99, 1999-2000(supra). We find that similar issue had come up for consideration before a co-ordinate Bench of this Tribunal and it was, inter alia, observed as follows:-

> ***"During the course of hearing before us the learned counsel for the assessee pointed out that the assessee company was engaged in diversified business activities and each business was distinct and separate from another. For this purpose the assessee company had several division viz. Textile Division, Lease and Hire Purchase Division; Power Generation Division, Foreign Exchange Division & Financial and Other Services Division. These activities were distinct and separate from each other. For this purpose the assessee had maintained separate books of account in respect of each division and separate P & L A/s. and separate balance sheet were prepared in respect of each division. For the purpose of annual accounts of the company as a whole the accounts of various divisions were consolidated and a consolidated P & L A/s. and balance-sheet was also prepared. The Assessing Officer had simply adopted the figures appearing in the consolidated account and ignored the separate accounts of Textile Division. In the case of an assessee***

carrying on more than one business it was only the business of which export was a part was required to be taken into consideration and not other business which had nothing to do with the export business. At our direction the assessee has filed separate balance sheet and P & L A/s. of Textile Division as also audit report in form no.10CCAC. In support of its contentions the learned counsel has relied upon the judgments reported in 245 ITR 49 (Bom); 245 ITR 769 (Bom); 246 ITR 429 (Bom); 246 ITR 439 (Bom); 254 ITR 656 (Mad); 257 ITR 60 (Mad) and 132 Taxmann 297 (Ker). The learned counsel has also placed reliance on the decisions reported in 63 TTJ 409 (Ahd); 66 ITD 353 and the decision of ITAT Mumbai Bench 'A' in ITA NO. 4205/Mum/96 in the case of Miku Agencies and Mumbai Bench 'C' decision in ITA No.4259 & 4260/M/95 in the case of M/s. Trab Enterprises. The learned Departmental Representative argued that under the provisions of section 80HHC(3) no distinction has been drawn as to whether the assessee was engaged in a single business or more than one business. For the purpose of that sub-section all the business of the assessee were required to be aggregated even if the same were separate and distinct from each other. In support of these contentions he placed reliance on the decision reported in 212 ITR (AT) 1 (Del) and 257 ITR 41 (Ker). On consideration of the matter we find that the claim of the assessee for deduction u/s. 80HHC on Textile Division on stand alone basis is fully supported by the decisions of ITAT Mumbai Bench 'A' Mumbai dated 29/8/02 in ITA NO.4205/Mum/1996 in the case of Miku Agencies v. DCIT Spl. Rg.9, Mumbai for A.Y 1991-92 and decision of ITAT Mumbai Bench 'C' dated 8/7/02 in ITA No. 4259 & 4260/Mum/95 in the case of DCIT Spl. Rg.22 Mumbai Vs. M/s. Trab Enterprises for A. Y.s 1990-91 and 1991-92. it is seen that in the later case the Tribunal has followed the judgment of the Jurisdictional High Court in the case of K.K. Doshi & Co. 245 ITR 849 (Bom) Respectfully, following these decisions of the Tribunal we accept the assessee's grounds of appeal no.7 and direct that the assessee should be allowed deduction u/s.80HHC on the basis of the business turnover and business profit of Textile Division only without taking into consideration the business turnover and the business profit of other Divisions."

17. Having heard the rival contentions and having perused the material on record, we see no reasons to disturb the conclusions arrived at by the CIT(A) Since the CIT (A) has followed the decision of the Tribunal (supra) directing the AO to compute the deduction under section 80 HHC in respect textile division on 'stand-alone' basis taking into account the total turnover and business profits of textile division only, we see no reason to interfere with the order of the CIT (A). The view so taken by the CIT(A) is consistent with the views of the coordinate benches, and no contrary decision has been cited before us.

18. Accordingly, Ground No.4 is dismissed.

19. In ground no. 5, grievance raised by the Assessing Officer is as follows:

> 5. On the facts and in the circumstances of the case and in law, the CIT (A) erred in directing the AO to delete the disallowance of interest expenditure of Rs 109.20 lacs relatable to interest free advance of Rs 7.26 crores to its sister concern i.e. Weizman Home Ltd ignoring the fact that on one hand it has advanced free of interest, Rs 1.21 cr on 28.3.2003, Rs 1.76 crore on 1.4.2003, & Rs 4.29 crore on 1.4.2003 totaling Rs 7.26 crores to its sister concern i.e. Weizman Homes Ltd and on the other hand the assessee company paid interest @ 15% against borrowing of Rs 4.68 crores from Weizman Corporate Services Ltd., Rs 7.7 crore from Om Mitra Securities Ltd and Rs 3 crores from PMP Ltd, all sister concerns for which the assessee company could not prove the nexus between availability of surplus fund for advancing free of interest.

20. The relevant material facts are like this. In the course of assessment proceedings, from the balance sheet, the Assessing Officer noticed that the assessee company has shown closing balance of the secured loans at Rs.60.81 crores and unsecured loans at Rs.7.95 crores. Against these loans, the assessee company has paid interest expenditure of Rs.4.85 crores against term loan, Rs.25.44 lacs against debentures and Rs.3.16 crores against other loans. On a perusal of the list of the loan creditors furnished by the assessee, the AO noticed that the assessee has borrowed Rs. 4.68 crores from Weizmann Corporate Services ltd., Rs.7.7 crores from Om Mitra Securities Ltd and Rs. 3 crores from Prabhanjan Multitrade P Ltd., the sister concerns of the assessee and allowed interest @ 15%. It was also noticed that the assessee had diverted an amount of Rs.1.21 crores on 28.3.2003,Rs 1.76 crores on 1.4.2003 and Rs 4.29 crores on 1.4.2003 totaling to Rs. 7.26 crores to M/s. Weizmann Homes Ltd., free of interest. The AO was of the opinion that the assessee has paid interest to sister concern @ 15% and has advanced interest free loan to M/s. Weizmann Home Ltd out of interest bearing loan. The assessee was, therefore, asked to prove the nexus about the availability of interest free/surplus funds diverted to Weizzmann Homes Ltd. In reply, it was, inter alia, submitted by the assessee that investments in the group company have been made from own fund as

the net worth of the assessee company as on 31.3.2004 constituted at Rs. 61.45 crores. The AO rejected the assessee's contention, inter alia, observing that the assessee could not establish the nexus between availability of interest free/surplus fund and diversion thereof to M/s. Weizmann Homes ltd. Accordingly, he disallowed interest expenditure of Rs 109.20 lakhs and added back to the income of the assessee. Aggrieved, the assessee carried the matter in appeal before the CIT (A). The CIT (A) deleted the disallowance, inter alia, observing as under:-

> ***"..... During the year the appellant has invested a sum of Rs.7.26 crores in Weizmann Homes Ltd. and purchased its shares as is evident from the balance sheet. It is also evident from the balance sheet that no fresh borrowings have been made by the appellant during the year. In fact, the loans borrowed from banks and financial institutions have been reduced substantially and there is a minor increase in unsecured loans, which works out to about Rs 18 lakhs only. Thus, it is quite clear from the balance sheet of the appellant that the appellant has not made any borrowings during the year. Once there is no borrowing during the year, it cannot, therefore, be concluded that borrowed funds have been diverted to M/s. Weizmann Home Ltd as interest free loan. The appellant company's worth is about s. 61 crores and there is a substantial turnover and internal accrual during the year. There is nothing on record to conclude that the said investment is not out of internal accrual as well as the net worth of the appellant company. In order to disallow a part of the interest expenditure on the ground that borrowed funds have been used for non-business purposes, a nexus has to be established between the borrowed funds and its utilization for non-business purposes. Until and unless a co-relation between the borrowed funds and its use of non-business purposes is established, the disallowance of part of interest cannot be sustained. In the instant case, such nexus is totally missing. It has not been proved that borrowed funds have gone for the purpose of investment in shares of M/s. Weizmann Homes Ltd. it is further noticed that during the course of assessment proceedings, the appellant has already satisfactory explained the sources of investments in M/s. Weizmann Homes Ltd. In the appellant's case, no borrowed funds have been used for non-business purposes. Thus, on the whole, looking to the facts of the matter, I find that the disallowance of interest expenditure on the ground that borrowed funds have been used for investments or advances as interest free loan has no merit. The AO has not been able to establish any nexus between the borrowed funds and its use for non-business activities. Rather, the appellant has been able to establish the opposite through the chart at para 9.3 above. In view of these facts, I feel that the disallowance of expenditure cannot be sustained. Accordingly, the disallowance of interest expenditure of Rs 109.20 lakhs is directed to be deleted..."***

21. Having considered the rival contentions, we do not find any reason to interfere with the order of the CIT (A). On perusal of the paper book produced before us, as is evident from balance sheet as at 31.3.2004, it is noticed that the assessee has own fund of Rs. 72.63 crores as against diversion of Rs. 7.26 crores. Perusal of the impugned order also reveals that the assessee has established one to one nexus. In any event, as is held by Hon'ble jurisdictional High Court in the case of CIT Vs Reliance Utilities and Power Ltd (313 ITR 340), as long as assessee has sufficient interest free funds, the presumption to be taken is that the investments are made out of such interest free funds. We also find that a co-ordinate Bench of this Tribunal in the case of ACIT v. M/s. Vaman Prestressing co. Ltd. in ITA No.4190/M/2008 order dated 7.1.2010, on similar facts, rejected the grounds taken by the revenue. We, therefore, decline to interfere.

22. Ground No. 5 is thus dismissed.

23. In ground no. 6, the Assessing Officer has raised the following grievance:

> 6. On the facts and in the circumstances of the case and in law, the CIT (A) erred in directing the AO to delete the disallowance of interest expenditure of Rs 4,81,022 ignoring the fact that the same was incurred on diversion of higher interest bearing fund to directors close friends, at lower interest rate that too without any business need.

24. Apropos Ground No.6, facts are that the assessee has borrowed unsecured loan @ 15% interest and also advanced certain loans to its sister concerns @ 15% interest. However, in case of two companies, i.e. M/s. Imperial Assets & Capital Management P. ltd., and M/s. Ve-Cares Driers and Cleaners P. Ltd, the assessee has allowed interest bearing advances @ 14% & 10%, respectively. Before the AO, the assessee could not furnish satisfactory explanation regarding nexus for advancing of surplus/interest funds. On this background, the AO disallowed the excess interest expenditure amounting to Rs 4,81,022. Aggrieved, the assessee carried the matter

in appeal. The CIT (A) deleted the disallowance and the revenue is in appeal before the Tribunal.

25. Having heard both the sides, we do not find any infirmity in the order of the CIT (A) to interfere. We have noted that what has been disallowed is interest paid by the assessee on the ground that borrowings at higher rate of interest have been diverted as interest bearing advances at lower rate, even though it is not in dispute that the assessee had sufficient interest free funds available and even as commercial expediency of the advances is not even called into question. Mere fact of allowing interest free advance at a rate lower than the rate on which borrowings are made, cannot justify the impugned disallowance, but then, on the facts of this case, there is nothing more than this arithmetic to justify the impugned disallowance. Grievance of the Assessing Officer is, therefore, not really sustainable in law. We reject the grievance and decline to interfere in the matter.

26. Ground No. 6 is thus dismissed.

27. In ground no. 7, the assessee has raised the following grievance :

> 7. On the facts and in the circumstances of the case and in law, the CIT (A) erred in directing the AO to restrict the disallowance of personal foreign travel at Rs 3,98,560 as against Rs 7,24,000 without giving any valid justification

28. Apropos Ground No.7, brief facts are that the Assessing officer noticed that the assessee company has incurred an expenditure of Rs. 28,96,888 on foreign traveling, which includes Rs. 9,04,809 on ticketing and Rs. 19,92,079 on other miscellaneous expenditure. The Assessing Officer asked the assessee to furnish the details of miscellaneous expenses, which could not be complied with. Therefore, in the absence of any documentary evidences, and the purpose of travel, the AO disallowed one fourth i.e. Rs 7,24,200/- out of total expenditure of Rs.19,92,079. Aggrieved by the stand so taken by the Assessing Officer, the assessee carried the matter in appeal before the CIT (A).

29. Before the CIT (A), it was submitted that the whole expenses of the foreign traveling have been incurred for the purpose of business and no element of personal expenditure is involved. Reliance was placed in the case of Beta Naphthol Pvt Ltd., v DCIT, 50 TTJ 375(Indore), wherein, it was held that adhoc disallowance are not permitted. While the CIT(A) allowed the ticket expenses in full, he restricted the disallowance out of the balance expenses to 20%, as against 25% disallowed by the Assessing Officer. Aggrieved, the revenue is in appeal before the Tribunal.

30. Having heard the rival contentions and having perused the material on record, we see no reasons to disturb the findings of the CIT(A) on this issue either. The reasoning adopted by the CIT(A) is this. The requisite details of travelling, such as names of persons travelling and purpose of travel etc are on record, and since complete details of expenses, other than ticket expenses, are not placed, an adhoc disallowance of 20% is made towards personal expenses. As for ticket expenses, since there is no dispute about the fact of, evidence of or justification of expenses, the entire amount is allowed in full by the CIT(A). We see no infirmity in this approach of the CIT(A). We approve the action of the CIT(A) and decline to interfere in the matter.

31. Ground No. 7 is thus dismissed.

32. In ground no. 8, grievance of the Assessing Officer is as follows:

> 8. On the facts and in the circumstances of the case and in law, the CIT (A) erred in directing the AO to delete the addition of Rs 2,66,36,753 out of Rs 2,91,36,753 made on account of remission of loan liabilities by ignoring the fact that the addition was made after gathering the relevant information from the bank, and also the Explanation 1 of Section 41 which explained the fact that the remission or cessation of any liability will be profit chargeable to tax in the hands of the recipient.

33. In the course of the assessment proceedings, the Assessing Officer noticed that in the computation of income, attached to the return, the assessee has reduced

its profit by Rs 2,91,36,753 on account of remission of bank liabilities. The claim of the assessee was that since the assessee never claimed any deduction in respect of amounts so waived by the bank, it could not be added to his income under section 41(1) of the Act. It was also submitted that the said amount could not be brought to tax in the hands of the assessee under section 28(iv) either. It was pointed out that the banker, i.e. Vyasya Bank Ltd, has extended NCD facility of Rs 7.50 crores, specifically for the purpose of meeting capital expenditure of the company, and only part amount of the said NCD was written back after due settlement with the banker. Reliance was placed on Hon'ble Gujarat High Court judgment in the case of CIT Vs Chetan Chemicals 267 ITR 770 and on Hon'ble Bombay High Court's judgment in the case of Mahindra & Mahindra Ltd Vs CIT (261 ITR 501). None of these submissions, however, impressed the Assessing Officer. He proceeded to add the said sum to the income returned by the assessee, and observed as follows:

"I have carefully considered the submissions of the assessee company as well as the case laws, cited by the A.R. and noticed that there is no force in the same. It is pertinent to mention here that the assessee company has duly credited its P&L A/c., by an amount of Rs 2,91,36,753/-, on account of remission of loan liability of Vysya Bank. However, in the computation of income, it has reduced the same. It is also noticed that the assessee company has not reduced the same out of block of assets, for which it has claimed to have been used. Accordingly vide order sheet noting dt. 16.10.06, the A.R. of the assessee company, was requested to furnish the necessary papers / reports, submitted for sanction of loan, copy of settlement letters for remission of liabilities, details of interest paid till date etc. against the loan borrowed from the Vysya Bank. In compliance the A.R. of the assessee company, simply furnished a sanction letter regarding approval of the higher authorities of the bank, for investing in the NCD, to meet the capital expenditure of the company, at 16% interest p.a.. The assessee company, however, could not furnish the other documents, as desired above. In due course of time on 07.12.06, the assessee company has submitted a letter dt. 02.12.06, signed by the Vice President and Head of ING Vyasa Bank Ltd., Mumbai regarding one time settlement of outstanding balance under NCD — Rs.750 lacs. The perusal of letter reveals the following facts.

> ***"With reference to the above, we hereby clarify / confirm that the Bank had granted / disbursed financial assistance to your company i.e. Lease finance of Rs. 450.00 lacs on 28 03. 1995 & NCD of Ps. 750.00 lacs on 29.9 2001. The balance liability under the above facilities was crystallized at Rs. 775. 0O lacs in Sept, 2002, of which the company paid only Ps. 363.63 lacs till Nov,2003.***
>
> ***On account of non payments of over dues in spite of reschedulements,***

pursuant to series of discussions and considering the constraints faced by the company, we considered your representations and had agreed for one time settlement of balance dues at an aggregate amount of Ps.320.OO lacs in June,2004.

Accordingly, we confirm the receipt of Rs.200 lacs, sourced from the sale of 2 Wind Mills, which was appropriated towards the balance liability under the Lease Finance Facility and also receipt of an amount of Ps. 120 Iacs, which was appropriated towards the balance liability under the NCD facility on 23.06.2004. As the full aggregate amount of Rs.320.00 lacs was received by the Bank, we have issued no dues certificate vide our letter dt. 23.06.2004."

The careful reading of the above contents reveals that the bank has not given a clear-cut reply, regarding the nature of remission of liability of Rs. 2,91,36,753. On given telephone number, in the presence of the AR, I spoke to the person, who has signed the above letter. However, he could not explain, properly about the nature of liability settled, facts and figures, referred in the letter. Accordingly, vide letter dt. 07.12.06, the concerned persons of the Bank, as suggested by him, was requested to furnish the following details.

- ***(a) Terms and Conditions under which the above loan was sanctioned.***
- ***(b) Purpose for which loan was sanctioned.***
- ***(c) Details of securities obtained for sanctioning the above loans.***
- ***(d) Copy of letters submitted by M/s. Weizmann Ltd., for waiver of above loan.***
- ***(e) Reasons recorded by the bank before waiving the loan liabilities of Rs.291.37 lacs.***
- ***(f) Whether the waiver pertains to the excess rate of interest or against waiver of principle amount of loans.***
- ***(g) Date-wise and amount-wise repayment of loan and interest till the date of waiver of loans.***

In compliance to above, the Vice President/Regional head of the bank, vide his reply dated 08/12/2006 has submitted as under:

"With reference to the above we furnish hereunder the following details:

(a) &(b)

Particulars	***Lease finance for Wind mills***	***Non convertible Debentures(NCD)***
Date of Sanction	***28/03/1995***	***29/09/2001***
Amount Sanctioned	***Rs 450.00 lacs***	***Rs 750.00 lacs***

Rate of Interest .	*OD Int. @ 24.48%*	*@ 14% comp(Half year rests)*
Repayment period	*43 quarters*	*84 months with initial holiday period of months*
Purpose of facility	*2 wind mills of 500 KV*	*To meet normal capital expenditure of the company*

(c) Details of securities (NCD facility)

(i) Hypothecation of 2 wind mills of capacity of 500 KW belonging to Company located at Ram girl, Anantapur Dist~, Andhra Pradesh together valued at Rs.3.30 crores (which are free from encumbrance of any nature)

(ii) Equitable mortgage of property at Laxmi Chambers, 3" Floor, MG. Road, Ernakula, Chochin valued at Rs.35 lacs

(iii) Personal Guarantee of Chetan D. Mehra

(iv) EM of office unit No. 005, 005A and 005B, Centre Point, Residency Road, Bangalore valued at Rs.56~O0 lacs.

(d) Copy of Company's letter dated 18/02/2004 and 29/04/2004 requesting for concessions and one time settlement is enclosed.

(e) Reasons recommended/recorded for approval of the One Time Settlement by the Bank:

(1) APTRANSCO, with whom the company has got PPA (Power Purchase Agreement) increased wheeling charges from 2% to Rupee 1.00 per unit (i.e. 33% increase), which results into straightway loss of 113 revenue to the company — terrible squeezing the margins in power generation division of the company.

(2) Income Tax Department has claimed Rs.190 lacs against the group Companies and in pursuance thereof, IT has attached all the Group Company accounts.

(3) Their joint venture partners Mis. Windia Wind Power of Netherlands has exited from the joint venture partners MIs. Windia Power Ltd., making the company a sick one and rendering the investment of Rs.8.00 crores in the group company irrecoverable and also making their dues to IDBI to the tune of Rs.6.00 crores — NPA

(4) The company has altogether written off an amount of Rs.20.00 crores in their financial services division receivable from their clients. Further, the company foresees deficit of cash flows to the extent of Rs.32.00 crores by 31/03/2005.

(5) Initiating legal action against the company may not be the preferred option for the bank owing to lack of adequate securities.

(6) The company has paid Rs.363.63 lacs (against Rs.775.00 lacs) and has also cleared off the entire working capital facilities to the extent of Rs.140.00 lacs in Banks exposure by 5.00 crores appx.

(7) This bullet payment of Rs.320 lacs to the Bank is not coming from the company's cash flows but is coming from unexpected sources, such as Income Tax Refund and outside borrowings. In fact, other banks and FIs are eyeing on targeting on this IT refund to the company and bring Pressure on the company to divert the amount to them.

(8) As prospects for the group as a whole is discouraging, as seen from their deficit forecasts it is better to come out of this account strategically forthwith by accepting this bullet payment of Rs.320 lacs in full and final settlement and further SOD of appx. Rs.91.37 lacs is justified from this point of view.

(9) SLMG, Mumbai 7 and Head SLMG, B'lore over the period could systematically stretch the party upto Rs.320 lacs (maximum for final settlement and no further increase is possible for the party.

(f) The Executive management committee of the Bank permitted for write off /waiver as under:

Lease account:
To sell the wind mills to TAPL Energy Projects Ltd. for Rs.20000 lacs
To write off balance in book balance of Rs.163.90 lacs
To waiver the overdue interest of Rs.159.17 lacs
To transfer the assets to them

NCD Account
To accept Rs.120.00 lacs as full and final settlement
To write off balance in book balance of Rs.266.37 lacs
To waive overdue interest of Rs..234.9-i lacs

5. Details of amount Recovered from the company out of the crystalised liability of Ps. 775.00 lacs in NCD and Lease Finance Facility are as under:

L

Date of recovery	***Amount recovered (Rupees)***
01/01/2003	***10000000.00***
04/04/2003	***20000000.00***
25/04/2003	***1000000.00***
12/07/2003	***2000000.00***
06/09/2003	***1050000.00***
1 2/0 9/2003	***400000.00***
10/10/2003	***1000000.00***
11/10/2003	***500000.00***
05/11/2003	***413246~ 52***
23/06/2004	***32000000.00***
Total	***68363246.52***

This is for your favour of information.

I have carefully considered the above submission of the bank and. noticed that the bank has waived the overdue interest of Rs.159.17 lac in the lease account and Rs.234.91 lacs in the NCD account. Accordingly, vide order sheet noting dated 12/12/2006, the AR of the assessee company was required to justify the claim, with respect to the letter dated 08/12/2006 received from the bank. In compliance, the assessee company could not offer any satisfactory explanation. It is pertinent to mention here that the ING Vysya Bank used to claim, such type of waiver as bad debt against its profit . In view of these facts, the remission/waiver of over due interest of Rs.2.91 crore, as claimed above, is hereby, treated as income of the company for AX. 2004—05 and added back to the total income…….

34. Aggrieved, assessee carried the matter in appeal before the CIT(A) and pointed that no part of the write off was ever claimed as deduction. It was contended that write off of an amount, which has not been claimed as deduction, cannot result in an addition under section 41(1). Elaborate submissions were made on merits pointing out that the liabilities written off were not of revenue nature, and that it represented the capital amount. Learned CIT(A) upheld the contentions of the assessee, except to the extent of Rs 25 lakhs represented by lease rental written off, and deleted the rest of the addition. While doing so, the CIT(A) observed as follows:

13.9. I have considered the submissions of the appellant. I have also gone through the assessment order carefully. During the year the

appellant has remitted a loan liability of Rs 2,91,36,753 on account of loans taken from ING Vysya bank. The AO was of the view that the provision of section 41(1) would apply to this remission of loan liability and accordingly, he brought the said remission to tax. The appellant contended that the said remission was on loan account to which the provisions of section 41(1) does not apply as the said remission has not routed through profit and loss account and no deduction was claimed which is a primary condition for invoking the provisions of section 41(1) of the I,.T.Act. The appellant placed heavy reliance on Gujarat High Court decision in the case of CIT v. Chetan Chemical Pvt Ltd cited supra, wherein, the Hon'ble High Court held that remission of loan does not come under the purview of section 41(1) of the I.T.Act.

13.10. As the facts speak, the appellant availed loan facilities from the ING Vysya Bank on two counts namely, lease finance for windmills of Rs 450 lacs on 28.3.1995. Another loan was also taken by the appellant company on account of NCD obtained on 29.9.2001 at Rs 750 lakhs. The appellant maintains both loan accounts separately. Even interest account in respect of both the accounts was maintained separately. From the ledger account of ING Vysya Bank in appellant's books, it is noted that the appellant obtained loans of Rs 750 lakhs on 28.10.2001 against 750 NCDs of Rs 1,00,000 each. As on 31.3.2004 the balance loan on this account was Rs.4,70,88,295. Against this loan balance, the appellant made payment of Rs 59,51,541 leaving a loan balance of Rs 4,11,36,754. The company has then negotiated with the bank for waiver of the said loan. After negotiations the bank agreed to waive the loan of Rs 2,91,36,753 only and the remaining amount of Rs 1,20,00,000 out of Rs 4,11,36,754 was paid by the appellant. A close look on the interest account in respect of this loan reveals that the appellant was required to pay an interest of Rs 1,25,64,041. Out of this, interest of Rs 46,89,041 has been offered to tax for the A.Y. 2003-04 as is evident from the other income for A.Y 2003-04. The remaining due interest of Rs 78,75,000 has

never been claimed in the profit and loss account and, therefore, the same is not hit by the provisions of section 41(1) of the I.T.Act. Thus, it is noted that no part of the interest has been claimed in the profit and loss account from 1.4.2001 to 31.3.2003 and, therefore, there is no remission on account of interest in respect of NCDs loan of Rs 750 lakhs.

13.11 It is noted from the assessment order that the AO has made independent inquiries in respect of remission of Rs 2,91,36,753 from ING Vysya Bank. The ING Vysya Bank vide letter dated 2.12.2009 explained to the AO about the remission of loan liability of Rs 2,91,36,753. The relevant extracts from the said bank's letter as reproduced in the assessment order is reproduced hereunder:

> ***"(f) <u>The Executive management committee of the bank permitted for write off/waiver as under:</u>***
>
> ***<u>Lease account</u>***
> ***To sell the windmills to TAPL energy Projects ltd for Rs 200.00 lakhs.***
>
> ***To write off balance in book balance of Rs 163.90 lakhs.***
> ***To waiver the overdue interest of Rs 159.17 lakhs***
> ***To transfer the assets to them***
>
> ***NCD Account***
> ***To accept Rs 120.00 lakhs as full and final settlement***
> ***To write off balance in book balance of Rs 266.37 lakhs***
> ***To waive overdue interest of Rs 234.91 lakhs"***

13.12 From this letter, it is seen that in NCD A/c there is a remission of loan amount of Rs 266.7 lakhs only whereas the appellant has claimed the remission of loan account of Rs 2,91,36,753. During the course of

appeal hearing, the appellant was asked to reconcile the claim of Rs 2,91,36,753 in view of bank's letter written to the AO. The appellant informed that it seems that the bank, out of remission of Rs 2,91,36,753 has adjusted a sum of Rs 25,00,000 against NCD account.

13.13 From these facts, it is gathered that though the liabilities amounting to Rs 2,91,36,753 has been considered by the appellant as remission of loan liabilities, but the bank has adjusted the payment of Rs 25,00,000 in NCD account whereas the appellant has adjusted the same against lease account. Thus, the bank is showing the balance of Rs 2,66,36,753 in NCD account. Thus, it is seen that a sum of Rs 25 lacs pertains to lease rent account and this amount therefore is not a part of loan amount remitted by the appellant but a part of interest account which has been remitted.

13.14 It is further noted that in respect of lease rent account which started from 30.9.1996 to 31.3.2003 the interest under the lease rent account has regularly been paid by the appellant except a sum of Rs 1,13,04,918 which was due to the bank on 31.3.2003. Out of this, the appellant adjusted a sum of Rs 25 lacs and the remaining amount of Rs 88,04,918 which was claimed in the profit and loss account has been offered to income tax in the A.Y. 2003-04. In case, the appellant had written back Rs 25,00,000 alongwith Rs 88,04,918 on account of interest totaling to Rs 1,13,04,918 and offered the same to tax, only in that case, the appellant's claim of Rs 2,91,36,753 could have been considered as remission of loan liability. Thus, in my considered opinion, the appellant is entitled for relief of Rs 2,66,36,753 as the same is not hit by the provision of section 41(1) of the I.T.Act being the remission of loan amount. The sum of Rs 25 lacs remitted by the appellant is on account of lease rent to which provision of section 41(1) are applicable. In view of these facts, the AO is directed to delete the addition of Rs 2,66,36,753 out of Rs 2,91,36,753 and the balance disallowance of Rs 25 lacs is upheld as

the same is brought to tax in view of provisions of section 41(1) of the I.T.Act, 1961. The AO is directed to allow deduction of Rs2,66,36,753. The ground is partly allowed.

35. Aggrieved by the stand so taken by the CIT(A), the Assessing Officer is in appeal before us.

36. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

37. The main thrust of learned Departmental Representative's submissions is that in view of Hon'ble Bombay High Court's judgment in the case of Solid Containers Ltd Vs DCIT (308 ITR 417), the amount of loan written off is to be treated as income as the said write off has taken place in the course of assessee's business activity. It is his stand that the law laid down by Hon'ble Bombay High Court in the case of Mahindra & Maindra Ltd Vs CIT (261 ITR 5010), to that extent, ceases to be good law. We are unable to see merits in this stand for more reasons than one. In the case of Sulzer India Ltd Vs DCIT (42 SOT 457), a special bench of this Tribunal, after considering a number of decisions of Hon'ble Bombay High Court as also other Hon'ble High Courts and Hon'ble Supreme Court, has held that , " Having regard to the aforesaid law laid down by the Hon'ble Supreme Court and High Courts, we find that to invoke the provisions of section 41(1) of the Act, the first requirement is as to whether in the assessment of the assessee, an allowance or deduction has been made in respect of loss, expenditure or the trading liability incurred by the assessee.". In Solid Container's case (supra), Their Lordships were dealing with a situation in which the loan was taken during the course of trading and the income was held to be directly as a result of the trading activity. In any event, this decision does not negate the law laid down by Hon'ble Bombay High Court but only holds that the law so laid down in Mahindra & Mahindra (supra) does not apply to the particular fact situation that Solid Containers' case (supra) was dealing with. When it is so specifically observed in Solid Container's case (supra), it

cannot be open to us to disregard the law laid down by Hon'ble High Court in Mahindra & Mahindra's case. In this view of the matter, and having regard to the fact that it is an uncontroverted finding of the CIT(A) that the amount representing impugned relief was never claimed as deduction by the assesse, we see no reasons to disturb the well reasoned findings of the CIT(A). We approve the stand of the CIT(A) and decline to interfere in the matter.

38. Ground No. 8 is thus dismissed.

39. Ground No. 9 is as follows:

> 9. On the facts and in the circumstances of the case and in law, the CIT (A) erred in directing the AO to delete the disallowance of Rs 63,36,000 of depreciation @ 5.28% made u/s.115JB in respect of inflated price of windmill of Rs 12 cr which was disallowed after necessary verification in the earlier years."

40. Learned representatives fairly agree that the issue is covered in favour of the assessee by Hon'ble Supreme Court's judgment in the case of Appollo Tyres Ltd Vs CIT (255 ITR 273), even as learned Departmental Representative rather dutifully relies upon the order of the Assessing Officer. We, therefore, see no reasons to disturb the conclusions arrived at by the CIT(A) and confirm the same.

41. Ground No. 9 is dismissed.

42. In the result, appeal is partly allowed in the terms indicated above. Pronounced in the open court on 7th March , 2011

Sd/-	Sd/-
(V. Durga Rao)	(Pramod Kumar)
(Judicial Member)	(Accountant Member)

Mumbai, Dated 7th March , 2011
Parida

Copy to:
1. The appellant
2. The respondent
3. Commissioner of Income Tax (Appeals),XXI, Mumbai
4. Commissioner of Income Tax, City -1, Mumbai
5. Departmental Representative, Bench 'G, Mumbai

//TRUE COPY// BY ORDER

ASSTT. REGISTRAR, ITAT, MUMBAI