आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ, राजकोट।

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

सर्वश्री वसीम अहमद, लेखा सदस्य एव मधुमिता रॉय, न्यायिक सदस्य के समक्ष।
BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And SMT MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 211/Rjt/2007
(**निर्धारण वर्ष** / Assessment Year : 2003-04)

ACIT, Gandhidham Circle.	**बनाम**/ Vs.	M/s. Overseas Trading and Shipping Co. Pvt. Ltd., DBZ-S-140, Ward – 12A, Opp: BOB Gandhidham.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACO 4310 N		
(अपीलार्थी/**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Appellant by** :	Shri Lalit P. Jain, Sr. D.R.
प्रत्यर्थी की ओर से/**Respondent by:**	Shri Yogesh Phar, A.R.

सुनवाई की तारीख/ **Date of Hearing**	05/07/2018
घोषणा की तारीख /**Date of Pronouncement**	28/09/2018

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue against the order of the Commissioner of Income Tax(Appeal)-II, Rajkot [CIT(A) in short] vide appeal no.CIT(A)-II/0100/06-07 dated 07-12-2006 arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961(here-in-after referred to as "the Act") dated 28.03.2006 relevant to Assessment Year (AY) 2003-04.

2. The grounds of appeal raised by the Revenue are as under:-

"1. The Ld CIT(A) has erred in law and in the facts and in law in deleting the addition of Rs.11315861/- made by AO on account of disallowance of usance interest.

2.. The Ld CIT(A) has erred in law and in the facts and in law in deleting of Rs.1949620/- made by AO on account of disallowance of prior period expenditure.

3. The ld CIT(A) has erred on facts and in law in restricting the Rs.13312/- against the addition of Rs.466919/- made by AO on account of disallowance of sales promotion expenditure.

4. The ld CIT(A) has erred on facts and in law in deleting the addition of Rs.2166127/- made by AO on account of investment in excess stock of SKO.

5. The ld CIT(A) has erred on facts and in law in deleting the addition of Rs.64894/- on account of profit on sale @3%.

6. On the facts of the case, the ld CIT(A) ought to have upheld the order of the AO.

7. It is therefore, prayed that the order of the ld CIT(A) may be set aside and that of the AO be restored."

3. The first issue raised by the Revenue in this appeal is that ld CIT(A) erred in deleting the addition made by the AO for Rs.1,13,15,861/- on account of usance interest.

4. Briefly stated facts are that the assessee is a private limited company and a subsidiary of a company based in Singapore. The assessee is engaged in the business of import and export of Sulphur, Superior Kerosene Oil, Furnace Oil, Coal, pulses etc.

4.1 The assessee during the year has imported goods from its holding company mainly M/s. Swiss Singapore Overseas Enterprises Pvt. Ltd. but failed to make the payment on the due date. Therefore, the assessee

had to pay usance interest for the delayed payment to its holding company. The usance interests was incurred by the assessee during the year for Rs.1,13,15,861/- only, which was paid without deducting the TDS u/s. 195 r.w.s. 40(a)(i) of the Act.

4.2 The assessee during the assessment proceedings submitted that it was not liable to deduct the TDS on account of the following reasons:

i. The payment for the usance period was made to the banker and not to the creditor against the import of the goods.

ii. The payment of usance interest is in the nature of penalty therefore, there is no liability of TDS under the provision of the DTAA.

iii. The assessee is trying to take permission from CBDT for incurring the expense of such usance interest without deducting the TDS.

4.3 However, the AO disregarded the contention of the assessee by holding that the provisions of TDS is very much attracted on the payment of interest paid to its holding company based in Singapore. The AO in support of his order relied on the judgment of Hon'ble Jurisdictional High Court in the case of CIT vs. Vijay Ship Breaking Corporation reported in 261 ITR 113. Thus, the amount of usance interest was disallowed and added to the total income of the assessee.

5. Aggrieved, assessee preferred an appeal to ld CIT(A). The assessee before the ld CIT(A) submitted as under:

i. The payment of usance interest was paid to the Indian Bank. As such there was no payment made to the holding company from

which the goods were imported. Thus, there is no question of deducting any TDS on the payment of interest made to the bank. On this submission of the assessee a remand report was called by the ld. CIT(A) wherein, it was submitted by the AO that the payment was made to the party from which goods were imported by the assessee.

ii. The interest was paid in relation to the purchase of goods. Therefore the same should be treated as part of the purchase cost. The assessee in support of his claim relied on the judgment of Hon'ble Madras High Court in the case of CIT vs. India Pistons Ltd. reported in 295 ITR 550.

iii. The payment of usance interest paid on account of delayed in the payment to the creditors also does not fall in the definition of interest as prescribed u/s 2(28A) of the Act. The assessee also submitted that the amount of interest income received from the sundry debtors was held to be eligible for deduction u/s 80-I of the Act. Thus, the amount received on account of usance interest from the debtors was treated as sale consideration. Therefore, the same logic/ provision can be applied in relation to the usance interest paid for the delayed payment to the creditors. The assessee in support of his contention relied on the order of this Jurisdictional High Court in the case of Nirma Industries Ltd vs. DCIT reported in 283 ITR 402.

5.1 The assessee also submitted that as per the provisions of Article 11 of DTAA between India and Singapore, such interest was held as penalty charges. Therefore, the same needs to be excluded from the definition of interest expense.

5.2 The ld CIT(A) after considering the submission of the assessee deleted the addition made by the AO by observing as under:

"3.2 I agree with all the above explanations and contentions of the appellant as analysed in above pages. Thus the assessee's transaction with non-resident cannot be segregated into two components of sale price and interest and taxed separately. The decision of Vijay Ship Breaking Corpn. is not applicable in this case. The facts of this case are supported judicially as stated in the above paragraph.

The decision in this case of CIT Vs India Piston Ltd. Squarely applies and that interest on unpaid installments purchase price does not have normal character of interest. What is payable as purchase price is part of consideration of purchase and therefore not covered by section 40(a)(i).

Even reading of DTAA provisions and also non discrimination clause gives inference that the interest payment is not covered by article 11 (Interest income) of DTAA, but it is covered under Article 7 (business profits) under DTAA.

3.3 The Assessing Officer is not right in disallowing an amount of Rs.11315861/- u/s 40(a)(i) that the TDS was not deducted u/s. 195 is not correct in law. Therefore, is to be deleted. This issue is decided thus in favour of the assessee and appeal on this ground is allowed. The AO is directed to delete this addition of Rs.11315861/-."

5.3 Being aggrieved by the order of ld. CIT(A) the Revenue is in appeal before us.

6. The ld. DR before us submitted that the *Hon'ble Gujarat High Court in the case of Vijay Ship Breaking Corporation (Supra)* has decided the issue in favour of the Revenue. Therefore, the assessee was liable to deduct the TDS on account of usance interest payment.

6.1 As per the provisions of DTAA between India and Singapore, the assessee was liable to deduct the TDS on the payment of usance interest

paid to its holding company. The amount of interest income paid to holding company was chargeable to tax in India. Accordingly, the provisions of Section 195 of the Act are attracted.

7. On the other hand, ld AR conceded the fact that the Hon'ble Gujarat High court in the case of *Vijay Ship Breaking Corporation (supra)* has decided the issue against the assessee but further submitted that the judgment of Hon'ble Gujarat High Court in the case of Vijay Ship Breaking Corporation was reversed by the Hon'ble Supreme Court in the case of Vijay Ship Breaking Corporation vs. CIT reported in 314 ITR 309.

8. In his rejoinder the ld. DR submitted that the Hon'ble Supreme Court in the case of Vijay Ship Breaking Corporation decided the issue whether the interest paid for the usance period will be treated as part of purchase price. In fact, the Hon'ble Supreme Court in the case of Vijay Ship Breaking Corporation has given relief to the assessee on account of amendment brought under the statue under the provision of Explanation-2 Section 10(15)(iv)(c) of the Act. Therefore, no reliance on the judgment of Hon'ble Supreme Court can be placed in the case on hand. The ld. DR relied on the order of ld. AO.

9. The ld.AR in his rejoinder further submitted that the order of Hon'ble Gujarat High Court in the case of Vijay Ship Breaking Corporation has been merged with the order of ld. CIT(A) in view of the principle laid down by the Hon'ble Supreme Court in the case of

Kunhayammed and others vs. State of Kerala and others reported in 245 ITR 360.

9.1 The ld.AR in support of his claim relied on the OECD Model Convention 2014 and its commentary on Article 11 of the OECD Model Convention 2014. The ld.AR also compared the DTAA between India-Singapore with India and Philippines, India-Russia, India-Australia & India-Italy. Accordingly, it was claimed that the assessee was not liable to deduct TDS u/s 195 r.w.s 40(a)(i) of the Act. The ld. AR relied on the order of ld. CIT-A.

10. We have heard the rival contentions and perused the materials available on record. The issue in the instant case relates to the expenses incurred by the assessee on account of delayed payment made to the parties. As per the assessee the usance interest should be treated as part of the purchase price of the goods whereas, the case of the revenue is that the usance interest cannot be treated as part of purchase price of the goods.

10.1 The argument of the ld.AR for the assessee are based on two counts; *firstly* the order of Hon'ble Gujarat High Court in the case of Vijay Ship Breaking Corporation has been merged with the order of Hon'ble Supreme Court as discussed above, *secondly* the payment of usance interest is part of purchase cost as per the DTAA between India and Singapore.

10.2 It is undisputed fact that the Hon'ble Gujarat High Court in the case of *Vijay Ship Breaking Corporation(supra)* has decided the issue against the assessee by holding as under:

> ***"28.*** *For the foregoing reasons, we decide the above questions of law formulated in these appeals as under :*
>
> *(1) The usance interest paid by the assessees was not any part of the purchase price of the ships and was interest within the meaning of the definition of the term 'interest' under section 2(28A) of the Income-tax Act, 1961.*
>
> *(2) The assessees who did not deduct tax at source under section 195(1) of the Income-tax Act, 1961 on the usance interest payable outside India and on which tax had not been paid, are not entitled to deduct the amounts of such usance interest in computing their income chargeable under the head "Profits and gains of business or profession". The Tribunal was, therefore, wrong in deleting the disallowance under section 40(a)(i) of the Act for failure on the part of the assessees to deduct tax at source, from usance interest paid to the non-residents, under section 195(1) of the Act.*
>
> *(3) The assessees being responsible for paying to the non-residents usance interest which was chargeable under the provisions of the Income-tax Act, 1961, were liable to deduct income-tax thereon under section 195(1) thereof. The Tribunal was, therefore, wrong in holding that the usance interest partook the character of purchase price and therefore, not liable to deduction at source under section 195(1) of the Act.*
>
> *(4) Usance interest is 'interest' within the meaning of the Article concerning taxation of interest in the relevant Double Taxation Avoidance Agreements. The Tribunal was, therefore, wrong in holding that usance interest was not 'interest' as envisaged in the Double Taxation Avoidance Agreements."*

10.3 Subsequently, the view taken by the Hon'ble Gujarat High Court was reversed by the Hon'ble Apex Court. However, we note that the verdict of the Hon'ble Supreme Court was delivered on a different reason as evident under:

*"**9.** As regards the second question, we may state that in this case, the controversy which arose for determination was whether the assessee was bound to deduct TDS under section 195(1) of the 1961 Act in respect of usance interest paid for purchase of the vessel for shipbreaking?*

***10.** According to the Department, TDS was deductible under section 195(1) whereas, according to the assessee, such interest partook of the character of the purchase price and, therefore, TDS was not deductible. Therefore, the key question which arose for determination was whether the assessee was in default for not deducting TDS under section 195(1) of the 1961 Act?*

***11.** It may be mentioned that we are not required to examine this question in the light of the impugned judgment because after the impugned judgment which was delivered on 20-3-2003, the Income-tax Act was amended on 18-9-2003 with effect from 1-4-1983. By reason of said amendment, Explanation 2 was added to section 10(15)(iv)(c), which reads as under :*

> *"Explanation 2.—For the removal of doubts, it is hereby declared that the usance interest payable outside India by an undertaking engaged in the business of ship-breaking in respect of purchase of a ship from outside India shall be deemed to be the interest payable on a debt incurred in a foreign country in respect of the purchase outside India."*

On reading that Explanation, it is clear that usance interest is exempt from payment of Income-tax if paid in respect of ship breaking activity. This amendment came into force only after the impugned judgment. It was not there when the impugned judgment was delivered.

***12.** For the aforestated reasons, question No. 2 as to whether the assessee was bound to deduct TDS under section 195(1) is answered in favour of the assessee and against the Department. The assessee was not bound to deduct tax at source once Explanation 2 to section 10(15)(iv)(c) stood inserted as TDS arises only if the tax is assessable in India. Since tax was not assessable in India, there was no question of TDS being deducted by the assessee. Therefore, question No. 2 is answered in favour of the assessee and against the Department.*"

10.4 Besides the above, we also note that the Hon'ble Supreme Court has given clear cut finding that the issue on hand has not been adjudicated as discussed above.

10.5 From the above, it is clear that the issue whether usance interest paid by the assessee is part of purchase price was not adjudicated by the Hon'ble Supreme Court in the case of Vijay Ship Breaking Corporation.

10.6 The next issue arises for adjudication whether the issue raised in Vijay Ship Breaking Corporation was merged with the order of Hon'ble Supreme Court. In this regard, we note that the doctrine of merger does not have unlimited/universal obligation. The doctrine of merger depends upon the nature of jurisdiction exercised by the superior forum. The Hon'ble Supreme Court has categorically stated that the issue raised in the appeal filed by the assessee was not adjudicated. Therefore in our considered view the doctrine of merger of the Hon'ble Gujarat High Court in the judgment of Hon'ble Supreme Court has not taken place. In this connection, we find support and guidance from the judgment of Hon'ble Supreme Court in the case of State of Madras vs. Madurai Mills Company Ltd. reported in 1967 ITR 681, wherein, it was held as under:

> *"In our opinion, the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. For example in Amritlal Bhogilal & Co's.(1) case it was observed by this Court that the order of regis- tration made by the Income-tax Officer did not merge in the appellate order of the Appellate Commissioner, because the order of registration was not the subject-matter of appeal before the appellate authority. It should be noticed that the order of assessment made by the Income-Tax Officer in that case*

was a composite order viz., an, order granting registration of the firm and making an assessment on the basis of the registration. The appeal was taken by the assessee to the Appellate Commissioner against the composite order of the Income-tax Officer. It was held by the High Court that the order of the Income-tax Officer granting registration to the respondent must be deemed to be merged in the appellate order and that the revisional power of the Commissioner of Income-tax cannot, therefore, be exercised in respect of it. The view taken by the High Court was over-ruled by this Court for the reason that the order of the Income-tax Officer granting registration cannot be deemed to have merged in the order of the Appellate Commissioner in an appeal taken against the composite order of assessment. Similarly, in The State of Uttar Pradesh v. Mohammed Nooh(2), it was held by this Court that the principle of merger cannot apply in the case of an order of dismissal of a public servant which was made by the departmental Tribunal on the 20th April, 1948 and against which the appeal was dismissed by the Appellate Authority on the 7th May, 1949, and the revisional application was rejected on the 22nd April, 1950. In the circumstances of the present case, it cannot be said that there was a merger of the order of assessment made by the Deputy Commercial Tax Officer dated the 28th November, 1952 with the order of the Deputy Commissioner of Commercial Taxes dated the 21st August, 1954 because the question of exemption on the value of yarn purchased from outside the State of Madras was not the subject-matter of revision before the Deputy Commissioner of Commercial Taxes. The only point that was urged before the Deputy Commissioner was that the sum of Rs. 6,57,971-4-9 collected by the respondent by way of tax should not be included in the taxable turnover. This was the only point raised before the Deputy Commissioner and was rejected by him in the revision proceedings. On the contrary, the question before the Board. of Revenue was whether the Deputy Commercial Tax Officer, Madurai was right in excluding from the net taxable turnover of the respondent the sum of Rs. 7,74,62,706-1-6 which was the value of cotton purchased by the respondent from outside the State of Madras. We are (1)[1959] S.C.R. 713:341.T.R. :130 at 136. (2) [1958] S.C.R. 595"

10.7 In view of above, we hold that there is no merger of the order of the Hon'ble Gujarat High Court with the order of Hon'ble Supreme Court in the instant case.

10.8 We also note that the Hon'ble Gujarat High court in the case of Vijay Ship Breaking Corporation has considered the meaning of definition of the interest given u/s 2(28A) of the Act.

10.9 Similarly, the Hon'ble Gujarat High Court has also considered the DTAA between India and Singapore, OECD Model Convention and its commentary while deciding the issue of usance interest.

10.10 Thus, the other arguments raised by the ld. Counsel as discussed above do not support the case of the assessee.

In view of the above, we hold that the principles laid down by the Hon'ble Gujarat High Court in the case of Vijay Ship Breaking Corporation *(Supra)* still hold the water and is applicable to the facts of the instant case in full strength. Thus we reverse the order of CIT(A) and restore the order of the AO. Hence, the ground of appeal of the Revenue is **allowed**.

11. The second issue raised by the Revenue is that ld CIT(A) erred in deleting the addition made by the AO for Rs. 19,49,620/- on account of prior period expenditure.

12. The assessee during the assessment proceedings has filed the ledger showing the expenses under the head commission on sale for Rs.24,88,787/- only. Out of such expenses an amount of commission for

Rs.19,49,620/- was shown as "OSL (2001-02) on various dates". Therefore the AO was of the view that the assessee has claimed commission expenses pertaining to the earlier years. On question by the AO, the assessee submitted that all the commissions pertain to the year under consideration and it has been wrongly classified as "OSL (2001-02) on various dates". The assessee in support of his claim also filed the copies of the confirmation of the parties to whom the commission was paid. However, the same was disregarded by the AO on the ground that the amount of commission was not matching between the confirmation filed vis-à-vis books of accounts of the assessee. Accordingly, the AO treated the amount of commission expenses for Rs.19,49,620/- as prior period items and added back to the total income of the assessee.

13. Aggrieved, assessee preferred an appeal to learned CIT(A). The assessee before the ld CIT(A) submitted that it has prepared its financial statements on 31st August, 2002 and 31st January, 2003 on provisional basis. While preparing the financial statement on provisional basis entries for Rs.1,00,000/- to M/s. Agarwal (agent) as on 31st August, 2002 was made in the books of accounts.

13.1 Similarly, the entry of commission on provisional basis for Rs.9,24,810/- accrued for M/s. Bleach Chem (agent) was accounted. However, these entries were reversed while preparing the financial statement on 31st March, 2003, but the AO has not taken into consideration the entries which have been reversed in the books of accounts. The assessee during the assessment proceedings also explained

the entries passed in the books of accounts on the provisional balance sheet and reversal of the same while finalizing the financial statement on 31st March, 2003.

13.2 The assessee in support of his claim also filed the copies of confirmation from M/s. Agarwal and M/s. Bleach Chem.

13.3 The ld CIT(A) after considering the submission of the assessee deleted the addition made by the AO by observing as under:

> *"**6.1** The Assessing Office after going through the above comments during the remand proceedings have further not given any finding except that the assessee is asked to provide and furnish separate accounts for the entries - 2001-02 and 2002-03 under this head so that the matter becomes clear.*
>
> *6.2 The Assessing Officer picked up entries form outstanding liabilities account and just made addition without examining whether those expenses have been claimed as deduction or not. Those entries picked up were the entries of 2002-03 but Assessing **Officer** has considered as entries as 2001-02 and made addition as prior period expenditure.*
>
> *6.3 The assessee gave all submissions as required and confirmations of the parties also. The Assessing Officer has stated that two separate accounts for each year called for was not submitted in remand report. According to assessee adequate time was not given. In reply to remand report the said account were furnished. I have examined the account copies and relevant journal vouchers. The entries made for A.Y. 2002-03 are not all relevant, as no addition was made regarding entries of this year. The addition is for this year i.e. 2003-04 is made on account of liability provided vide journal vouchers No. 681 dated 31.08.2002 for Rs.1,00,000/- voucher No.1278 dated 31.01.03 for Rs.9,24,810/- and also voucher 1455 dated 25.03.2003 for Rs.9,24,810/- Thus total addition comes to Rs.19,49,620/-. The Assessing Officer has not considered the reversed entries of voucher 1528 dated 31.03.03 for Rs.1,00,000/- and Rs. 9,24,810/-. The effect of these entries the effect of*

earlier two entries of V. No. 681 and 1278 gets nullified. The actual liability which was provided by Voucher No. 1455 dated 25.03.03 pertains to A.Y. 2003-04. The applicant further submitted confirmation of party and copy of bill of the party and the same is provided to Assessing in the paper books for remand report.

6.4 The addition thus made is without proper verification of evidences and explanation. The addition of Rs.19,49,620/- is therefore deleted."

13.4 Being aggrieved by the order of ld CIT(A) Revenue is in second appeal before us.

14. The ld DR before us submitted that the amount of commission shown by the assessee in the confirmation filed by the M/s. Bleach Chem was not matching therefore the same cannot be relied upon.

15. On the other hand, ld AR before us submitted that it has claimed an expense of Rs.16,43,754/- only under the head commission to sales agent. Therefore, the observation of the AO that the assessee has claimed commission expenses of Rs.24,88,787/- is not correct.

15.1 The ld AR further submitted that the AO has not considered the reversed entries which were reflected in the ledger account of commission to sales agents.

15.2 The ld AR in support of his claim drew our attention on schedule 14 to the financial statement which is placed on page 120 of the paper book.

15.3 The ld AR also drew our attention on the debit note issued by M/s. Agarwal exports and M/s. Bleach Chem which are placed on pages 75 to 77 of the Paper Book amounting to Rs. 2,49,000/-, 2,95,260/- & 6,27,680/-.

15.4 Both the ld DR and ld AR vehemently supported the order of authority below as favorable to them.

16. We have heard the rival contentions and perused the materials available on record. The issue in the instant case relates to the commission expenses claimed by the assessee for Rs. 24,88,787/- only. As per the AO commission expenses amounting to Rs.19,49,620/- represents the prior period expenditure. Therefore, the same was disallowed.

16.1 On perusal of the copy of the ledger for commission of sale placed on page 65 of the paper book. We note that the assessee *inter alia* has shown commission expenses as "OSL (2001-02) on various dates" as detailed under:

Sr No.	Particulars	Date	Amount
1.	OSL (2001-02)	31st August, 2002	1,00,000/-
2.	OSL (2001-02)	31st January, 2003	9,24,810/-
3.	OSL (2001-02)	25th March, 2003	9,24,810/-

16.2 However, from the ledger as discussed above, we further note that a reversal entry was also passed for Rs.10,24,810/- dated 31st March,

2003 where the OSL account (2001-02) was credited. Thus, it is clear from the above that the assessee has not claimed any expense of Rs.10,24,810/- pertaining to the period of earlier years. Now the issue remains to be adjudicated for the expenses claimed by the assessee for Rs. 9,24,810/- dated 31st January, 2003 in the ledger of commission on sale. It is a fact that this commission was claimed as OSL (2001-02) which creates a suspicion that it pertains to the earlier years. However, the assessee before the lower authorities claimed that it pertains to the year under consideration. Accordingly, the assessee filed the confirmation from the parties which are placed on pages 6 to 67 of the paper book. From the confirmation issued by the parties, it is clear that it pertains to the year under consideration. The AO was empowered under section 133(6)/ 131 of the Act to verify the veracity of the commission expenses claimed by the assessee in case he has doubt on the claim of the assessee but he failed to do so. Therefore, we are of the view that accounting entries cannot be decisive factor when the documents contrary to the accounting entry are available on record.

16.3 The argument of the ld Counsel for the assessee also gets fortified from the financial statement wherein, the assessee has claimed an expense of Rs.16,43,754/- only.

16.4 However, we note that the assessee has claimed an expense of Rs.9,24,810/- in the name of M/s. Bleach Chem whereas, the confirmation reveals the amount of Rs.9,22,940/-. Thus, there is a difference of Rs. 1870/- which in our considered view is liable to be

dismissed. Accordingly, we delete the addition made by the AO by Rs. 19,47,750/- and direct the AO to make the addition of Rs. 1870/- only. Thus, the ground of appeal of the Revenue is **partly allowed**.

17. Next issue raised by the revenue is that the ld CIT(A) erred in reducing the disallowance of sales promotion expenses from Rs. 4,66,919/- to Rs.13,312/- only.

18. The assessee during the year has claimed sales promotion expenses for Rs. 4,80,231/- but the same was not substantiated on the basis of documentary evidences. Therefore, the AO disallowed the same and added to the total income of the assessee.

17. Aggrieved, assessee preferred an appeal to ld CIT(A). The assessee before the ld CIT(A) submitted as under:

"*7.2 The AR has made the following submission:*

During the previous year, the appellant company incurred expenditure of Rs.4,80,231 as sale promotion expenses. These expenses were in nature of gifts to Customers on Diwali. Instance of expenses incurred are as follows:

Name of the party	*Item purchased*	*Amount(Rs.)*	*Bill No.*
Shreeji Jewellers	*Silver Gift Items*	*41,365.00*	*3403/dt.20.11.2002*
Shreeji Jewellwers	*Silver Gift Items*	*25,820.00*	*3396/dt. 18.11.2002*

Name of the party	*Item purchased*	*Amount(Rs.)*	*Bill No.*
Shreeji Jewellers	*Silver Gift Items*	*25,450.00*	*3390/dt.16.11.2002*

Radhika Jewellers	*Gold Gift Items*	*38,035.00*	*600/dt.26.11.2002*
Dhoble & Co.	*Mangoes*	*3,22,065.00*	*1888 dt.14.05.2002*
Damodardas Jewellers	*Gold Gift Items*	*10,912.50*	*02S0002128 dt. 01.08.2002*
Damodardas Jewellers	*Gold Gift Items*	*5,240.00*	*02K0000078 dt. 01.08.2002*
Others	*Gifts*	*7503.00*	*1000, 2390, 3340, 774*
Commission paid on out behalf by Sumisu (India) Synthetics & Fibers Pvt. Ltd. has been wrongly debited to sales promotion a/c.		*3,840.00*	
Total….		*4,80,231.00*	

The Learned AO disallowed the same since the appellant had failed to produce the above mentioned bills before the learned AO due to year end pressures during the month of March and lack of sufficient time given for submitting the same. The assessee had hardly got any time for the submission of the evidence as mentioned above before the date of passing of order on 28.03.2006.

Appellant company contends that expenses of Rs.4,80,231 incurred for sate promotion are genuine business expense. All the relevant vouchers and invoices for sale promotion expenses are submitted on page 12-24 of paper-book-II). Hence, it is submitted that expenses of Rs.4,80,231 be allowed as business expenses."

18.1 The ld CIT(A) called for the remand report on the details filed by the assessee. The AO vide letter dated 3rd October 2006 has pointed out certain defects in the details of the expenses filed by the assessee during the remand proceedings. Therefore, the AO disbelieved on the details of

the bills filed by the assessee during the remand proceedings. However, the ld CIT(A) after considering the submission of the assessee deleted the addition in part by observing as under:

> *"7.4 In view of the above detailed billing evidences and considering the nature of business and the occasion the expenses incurred by the assessee is to be considered for business purposes.*
>
> *7.5 I have perused the detail accounts. The expenditure which is supported by evidences and in the course of business cannot be disallowed. I consider that a sum of Rs.13,312/- claimed as reimbursement of the gifts to its employees alone be disallowed. Therefore, addition confirmed on this account is Rs.13,312/- as against addition of Rs.480,231/-. Appeal partly allowed on this ground."*

Being aggrieved by the order of ld CIT(A) Revenue is in appeal before us.

19. Both the parties before us vehemently supported the order of authorities below as favorable to them.

20. We have heard the rival contentions and perused the materials available on record. In the present case, sales promotion expenses was disallowed by the AO on the ground that the assessee failed to substantiate the expenses on the basis of proper documentary evidences.

20.1 However, we note that the assessee has filed all the necessary details for the expenses incurred by it which are placed on pages 78 to 90 of the PB.

20.2 However, these details filed by the assessee were disbelieved by the AO during the remand proceedings but on perusal of the bills filed by the assessee, we note that there were addresses of all the parties in the bills filed by the assessee. In case of any doubt the AO should have taken confirmation from such parties. Therefore, in our considered view, the AO has not exercised his power given under the statute under section 133(6) and 131 of the Act. There can be deficiency in the bills filed by the parties but the assessee has no control over those parties. Therefore, it was necessary to take confirmation from the parties who have filed the bills in support of expenses incurred by the assessee.

20.3 From the preceding discussion we draw a conclusion that the AO failed to exercise his power given under the statute. Therefore we are inclined not to interfere in the finding of ld CIT(A). Thus, the ground of appeal of the Revenue is **dismissed**.

21. The interconnected issue raised by the Revenue in ground no.4 and 5 is that ld CIT(A) erred in deleting the addition made by the AO for Rs. 21,66,127/- on account of excess stock and of Rs.64,984/- on account of profit @ 3% on such stock shown outside the books of accounts.

21.1 The assessee in its stock statement filed during the assessment proceedings has shown closing stock of 3665.569 MT as on 31st July 2002 whereas the stock as on 1st August, 2002 was determined for 3800.379 MT. Accordingly, the AO was of the view that there was excess stock of 134.81 MT. Accordingly, the AO worked out the cost of

such stock for Rs. 21,66,127/- (16068/MT × 134.81 MT) and added the same as undisclosed investment in the stock.

21.2 The AO further observed that such undisclosed investment in stock must have been sold by the assessee outside the books of accounts and the profit on the same has not been offered by the assessee to the income tax. Therefore, the AO worked out the GP@3% on such unaccounted closing stock for Rs. 64,984/- only. Thus, the AO treated the profit on such unaccounted stock as undisclosed income of the assessee and added to the total income of the assessee.

22. Aggrieved, assessee preferred an appeal to ld CIT(A). The assessee before the ld CIT(A) filed a reconciliation statement as detailed under:

" (in MT)

Stock as appearing in the Stock register when seized	*3800.379*
Less: Sales not recorded erroneously in monthly stock register	*147.340*
Add: Excess Stock due to climatic changes	*1,770*
Stock as actually existing a son 31.07.2002	*3654.809*

The matter was referred to the Collector of Kutch who had passed his order on this matter under section 6(A) of the Essential Commodities Act, 1995 on 29.4.2003,. The Collector of Kutch in his order dated 29.04.2003 (Refer page 51-70 of PB), has accepted the above reconciliation and thereby passed an order in favour of appellant company."

22.1 The above reconciliation statement was also filed before the District Supply Officer and same was accepted by the DSO without pointing out any defect.

22.2 The ld. CIT-A after considering the submission of the assessee deleted the addition made by the AO by observing as under :

- **Unaccounted investment in stock for Rs.21,66,127/-:**

  "8.3 The assessee had given a detailed explanation and also the relevant evidences including copy of the Collector, Kutch dated 29.04.2003, wherein he had accepted the accounting of seized stock and accordingly released FDR of Rs.61 lacs of the assessee. This amply shows that the reconciliation stock position of the assessee has been agreed upon by the authority competent to monitor the sale and distribution of stocks. The explanation of the assessee had not been accepted by the Assessing Officer with the belief that there is excess stock of 134.81 MT valued at Rs.21,66,127/-. The assessee's explanation accompanied by reconciliation of stock certification of the Collector inferring that there are no irregularities in the stock amply show that there is no excess stock and therefore the Assessing Officer is directed to delete the value of excess stock added amounting to Rs.21,66,127/-."

- **The profit attributable to unaccounted stock:**

  "9.1 In the earlier grounds of appeal issue is dealt Reconciliation of stock and I ultimate certification by the Collector that there are no irregularities in the stock' has been explained. In view of this finding there is no excess stock and there is no any irregularities in the stock position. Thus issue of estimating 3% on stock therefore does not arise. Therefore addition of Rs.66,984/- @3% on the stock as unaccounted sale is deleted."

Being aggrieved by the order of ld. CIT(A) Revenue is in appeal before us.

23. Both the parties before us relied on the order of authorities below as favorable to them.

24. Heard the rival contentions of both the parties and perused the materials available on record. At the outset, we find that the assessee has filed a reconciliation statement before the District Supply Officer justifying the difference in the quantity of stock as discussed above. The reply of the assessee was duly admitted/ accepted by the DSO. The order of DSO for this mismatch in the stock is placed on pages 101 to110 of the PB. On perusal of the order of District Supply Officer we note that the reconciliation statement filed by the assessee was duly accepted by the DSO. In the case before us the addition was based on the basis of mismatch observed by the DSO in the quantity of stock as on 1st August 2002. Once, the difference observed by the DSO has been reconciled and relief has been given by the DSO then in our considered view no separate addition on account of difference in the stock can be made. The relevant extract of DSO order reads as under:

> *"During inspection from date 30.7.02 to 1.8.02 looking to draw-back in Imported White Kerosene 3800.379 M. Tons valuing Rs.6.10,64,489/- of M/s. Overseas Trading & Shipping Co. Pvt. Ltd., Gandhtdham has been seized out of the same 100% i.e. full stock of kerosene is hereby ordered to be released and the notice is hereby withdrawn*
>
> *2. The party be informed about the written orders"*

24.1 Once we delete the addition on account of unaccounted investment in the stock. We are of the view that the question of any gross profit on account of sale of such stock does not arise. Thus, we do not find any

reason to interfere in the finding of ld CIT(A). Thus, the ground of appeal filed by the Revenue is **dismissed**.

25. In the result, the grounds of appeal filed by the Revenue is **partly allowed.**

This Order pronounced in Open Court on	**28/09/2018**

Sd/- Sd/-

(MADHUMITA ROY) **(WASEEM AHMED)**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Ahmedabad; Dated 28/09/2018
Priti Yadav, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)- II, Rajkot.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,राजोकट/DR,ITAT, Rajkot
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, राजोकट / **ITAT, Rajkot**