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

BEFORE SHRI BASKARAN BR, ACCOUNTAT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 4467, 4518 & 4544/Mum/2018
(A.Y: 2010-11, 2011-12 & 2012-13)

Air India Ltd., Mumbai Airport, Santacruz (E), Mumbai – 400053	Vs.	DCIT, Range – 5(1) Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCN6194P		
Appellant	..	Respondent

ITA No. 4486, 4485 & 4484/Mum/2018
(A.Y: 2010-11, 2011-12 & 2012-13)

DCIT, Range – 5(1) Mumbai.	Vs.	Air India Ltd., Mumbai Airport, Santacruz (E), Mumbai – 400053
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCN6194P		
Appellant	..	Respondent

Assessee by :	Shri Madhur Agrawal.AR
Revenue by :	Smt Sailaja Rai, CIT DR

Date of Hearing	15.09.2022
Date of Pronouncement	07.12.2022

आदेश / O R D E R

PER BENCH:

These are the cross appeals filed the by the assessee and the revenue against the separate orders of the Commissioner of Income Tax (Appeals)-10, Mumbai passed u/s 250 of the Act.

Since the issues in these appeals are common and identical, hence are clubbed, heard and consolidated order is passed.

ITA No. 4467/Mum/2018, A.Y 2010-11

The assessee has raised the following grounds of appeal.

> *Following Grounds of Appeal are without Prejudice to one another :*
>
> *1. On the facts and circumstances of the case and in law the learned C.I.T. (Appeals) erred in confirming disallowance made by the Assessing Officer (A.O) in respect fines and penalties of Rs.68,41,068/- incurred by the appellant in the course of carrying its lawful business activity.*
>
> *2. (i) On the facts and circumstances of the case and in law the learned C.I.T. (A) erred in remanding matter of disallowance u/s. 14A to the A.O.*
>
> *(ii) The learned C.I.T.(A) erred in concluding that decision of Hon. ITAT in appellants own case to hold*

that investment of Rs. 10 Crores in Shares of Cochin International Airport Ltd. was made by appellant from its own funds required reconsideration.

(iii) The learned C.I.T.(A) erred in concluding that I.T.A.T in Asst. Year 2007-08 had upheld disallowance to the extent of 5% of the exempted income u/s. 14A, when in fact the I.T.A.T. had deleted the disallowance of 5% in Asst. Year 2007-08.

(iv) The learned C.I.T.(A) further erred in holding that investments on which no exempted income (dividends) was received were also liable to be included for calculation of disallowance u/s. 14A r.w. Rule 8D.

(v) On the facts and circumstances of the case and in law the learned. C.I.T.(A) ought to have directed the A.O. to delete the disallowance u/s. 14A of Rs.8.24 Crores as the exempted income from dividends was Rs.1.20 Crore only.

Without Prejudice to above:

It is submitted that on the facts and in the circumstances of the case, the disallowance u/s. 14A r.w. Rule 8D cannot exceed the quantum of exempted income of Rs.1.20 Crore.

3. The learned C.I.T.(A) erred in confirming disallowance made by A.O. of Rs.1,50,000/- on account of estimated depreciation of Air India building.

4. The appellant craves leave to add, amend or alter any of the Grounds of Appeal or to add new Grounds of Appeal if considered necessary.

2. The brief facts of the case are that the assessee company is a Government undertaking and is engaged in the business of national and international air transportation of passengers and air cargo. The assessee has filed the return of income for the A.Y 2010-11 on 13.10.2010 disclosing a total loss of Rs. 9123,21,07,709/- subsequently the case was selected for scrutiny under the CASS and notice u/s 143(2) and 142(1) of the Act was issued. In compliance to the notice, the Ld. AR of the assessee has appeared from time to time and furnished the details as called for and the case was discussed. The Assessing Officer (AO) on perusal of the financial statements found that as per the Tax Audit report u/s 44AB in Form No. 3CD Para 17(e), the company has claimed Foreign Station expenses of Rs. 81,18,500/- and Cargo Immigration Fine of Rs. 1,28,799/- aggregating to Rs. 82,47,299/-. Since the expenses are not incurred wholly and exclusively for the purpose of business and the AO has made the disallowance.

2.1 Further the A.O found that the assessee has earned interest income of Rs. 25.34 Crores during the F.Y 2009-10 but it was disclosed under the head business income. Since the interest has been earned on fixed deposits & other advances, it is required to be taxed under income from other sources therefore the AO has treated the interest on fixed deposits under income from other sources.

2.2 Further the AO observed that the assessee has made a provision for obsolescence and claimed net debit to profit and loss account of Rs. 28,21,16,111/-. Since the assessee has not filed the complete break-up of information, the AO considering the facts of provision for obsolescence has made a total gross disallowance which worked out to Rs. 40,87,82,586/-.

2.3 The fourth disputed issue is with respect to disallowance u/s 14A of the Act, the AO found that the assessee has earned dividend income of Rs. 4,08,29,371/- and the assessee has disclosed the investments of Rs. 121.93 Crs. The AO issued show cause for why the expenses attributed to

exempt income shall not be disallowed, in compliance the assessee has filed the explanation on 24.02.2013. Whereas the AO has relied on the various facts, judicial decisions and applied the provisions of Sec. 14A r.w.r 8D and made disallowance of Rs. 5.26 Crs.

2.4 The next disputed is with respect to depreciation on house property, the AO found that the assessee company while computing income under the business and profession has disclosed income from house property after claiming the deduction u/s 24 of the Act. Further it was found that the assessee has added back proportionate expenses on Air India Building for the floor space let out and the proportionate amount of depreciation on the rented portion was not excluded from the claim of depreciation. Since the assessee has not filed the details the AO has made an ad-hoc addition of Rs. 1,50,000/- as made in the preceding years.

2.5 Further the A.O found that the assessee in preceding year find has made a provision under

the head frequent flyer programme of Rs. 112.3 million. The asssessee has the treated the provision as per schedule 'R' – significant policies and the explanations have been called for. The assessee has relied on the auditors accounting policy in financial statements and the details of provisions and actual amount utilized were filed. Since there was no satisfactory evidences or explanations filed by the asssessee, the AO has made an addition of Rs. 11.23 crores.

2.6 On the other disputed issues with respect to advances to wholly owned and subsidiary company charged off, as per the profit and loss account the assessee has debited Rs 481.4 million as advances to wholly owned companies charged off and in earlier years also the assessee has claimed. Whereas in A.Y 2009-10, the A.O has followed certain norms and the based on the findings of A.Y 2009-10, the AO has made a disallowance as it has debited in the profit and loss account.

2.7 Last disputed issue is with respect to prior period expenditure, the AO based on the Tax

Auditor's report u/s 44AB of the Act and financial statements found that the assessee has debited a net sum of Rs. 32.04 crores under the head prior period expenses and credited to profit and loss account Rs. 52.85 Crs under the same head. Whereas, the assessee has disallowed a sum of Rs. 18,11,85,357/- in the computation of income being prior period adjustments. Since the details were not furnished by the assessee, the AO has made disallowance considering the net amount of Rs. 66,80,14,643/-. The AO finally assessed the total loss of Rs. 8924,72,13,181/- and income computed u/s 115JB of Rs. Nil and passed the order u/s 143(3) of the Act dated 30.03.2013.

3. Aggrieved by the order, the assessee has filed an appeal with the CIT(A). The CIT(A) has considered the grounds of appeal, findings of the A.O. in scrutiny assessment and submissions of the assessee and has allowed the claim of the assessee in respect of treatment of interest income as business income relied on the order of the Honble Tribunal in the assessee's own case.

Similarly in respect of provisions of obsolescence Written off the CIT(A) relied on the assessee's own case and allowed the assessee ground of appeal. Whereas in respect of other grounds of appeal, the CIT(A) has confirmed the action of the AO and has partly allowed the assessee appeal. Aggrieved by the CIT(A) order, the assessee and the revenue has filed an appeal before the Hon'ble Tribunal.

4. At the time of hearing in the assessee appeal, the Ld. AR made submissions on the grounds of appeal pertaining to disallowance of Sec. 14A of the Act, disallowance of depreciation on Air India Building, disallowance of amount due to allied air services, prior period expenses and prior period adjustment. Further substantiated that most of the issues are decided in favour of the assessee by the Hon'ble Tribunal in the earlier years and produced the copy of the orders and substantiated the submissions with the factual paper book, submissions and chart and prayed for allowing the appeal. Per Contra, the Ld. DR has supported the order of the CIT(A).

5. We heard the rival submissions and perused the material on record. The Ld. AR contentions on the first disputed issue with respect to penalty and fines, as they are compensative in nature and it was paid in the course of carrying the business activity and has to be treated as allowable deduction and relied on the Hon'ble Tribunal order in assessee's own case for the earlier A.Ys 2008-09 and 2009-10. We considered it appropriate to refer to the decisions of the Hon'ble Tribunal in assessee's own case for A.Y 2008-09 in ITA No. 2182/Mum/2012 and ors dated 19.17.2019 observed at Para 10 to 12 read as under:

> *10. We have heard rival contentions and gone through the facts and circumstances of the case. We noted that penalty or fine paid at the foreign airport is ordinarily an amount paid in settlement of charges in respect of offence/guilt on the part of the passenger which is neither accepted nor proved. Consideration for payment of such penalty or fine is in respect of any offence/guilt which is neither proved nor accepted and is in the nature damages paid for settlement of disputes to avoid bad reputation and safeguard business interest. In AY.1993-94 such disallowance was considered by CIT(A). However,*

unfortunately the CIT(A) erroneously considered the activity of the assessee as illegal and disallowed the same. In para 22, the CIT(A) has observed as under:

> *"I cannot see any business expediency from an illegitimate activity and therefore, disallowance made by the AO is perfectly in order".*

11. We noted that as such activity of the assessee is neither illegal nor illegitimate. The assessee's activity in the International Air Transport is carried on with due authority and licensed by the Govt. of India and also the respective countries to which it operates its flights. Penalty or fines are paid in foreign country by the assessee for default or mistake of the passengers and not on account of any violation or infraction of law by the assessee. However, under the International Air Transport laws, it is the obligation of the Airlines to bear such penalty/fines which arise in the ordinary course of carrying on its business. As stated above, the penalty/fine which is incurred by the assessee should be considered in the context of nature of business carried on by the assessee. In this case, the assessee's business is fully authorized and carried on legally. However, the assessee incurs the liability for payment of penalty/fine as the documents are misplaced or lost by the passengers for which the assessee cannot be held liable and over which the assessee has no control. The assessee had not made any contravention of law but inspite of the assessee exercising all care as explained above, the liability arises which is incidental and arises ordinarily in the course of international Air Transportation business and the fine/penalty is paid on account of default/non-compliance of laws by the passengers

and not by the assessee. We further note the following:

(a) As submitted above the fine/penalty which is paid by the assessee is not for any infraction of law by the assessee but assessee becomes liable for payment of such fines/penalties either on account of the passengers carried by the assessee-aircraft not possessing proper or sufficient documents for enabling them entry in the foreign country or because of the Immigration Authorities in foreign countries being not satisfied with the documents of the passengers.

(b) The documents carried by the passengers are duly checked by the assessee's staff at the time of departure from Indian Airport and also checked by the Immigration Authorities of the Govt. of India at the Airport of departure.

12. From the above it will be obvious that the assessee has neither carried on any illegal activity nor committed any breach of law. However, in accordance with the International Air Transport laws the assessee becomes liable to pay such penalties/fines to the Immigration Authority of foreign countries and such penalty or fines in the nature of expenses incurred wholly and exclusively for the purpose of business of the assessee and in the course of ordinarily carrying out its business activity

We found that the facts mentioned in the present case are similar to the earlier year, accordingly, we direct the AO to allow the claim as

there is nexus of business and claim and allow this ground of appeal of the assessee.

6. The second disputed issue is with respect to disallowance u/s 14A r.w.r 8D(2)(d), the contention of the assessee that the assessee received substantial investments in foreign companies and the dividend received from foreign companies are taxable in India and offered to tax and the investment in Indian subsidaries have been formed by spinning off divisions from Air India and no dividend is received. The assessee company made investment in Cochin International Airport as precondition for obtaining exclusive contract to provide ground handling services at CIAL and claimed exempt from dividend income. The Ld. AR contentions are that the issue is covered by the assessee's own case and the claim has to be allowed. We considered it appropriate to refer to the decision of the Hon'ble Tribunal in the assessee's own case for A.Y 2009-10 in ITA No.3383/Mum/2014 dated 08.08.2019 at Para 5 read as under:

5. The next issue in this appeal of assessee is as regards to the order of CIT(A), confirming the action of the AO in holding that the provisions of section 14A of the Act are applicable to the dividend income received by the assessee. For this assessee has raised the following grounds: -

"2(i) On the facts and circumstances of the case and in law the learned CIT(A) erred in confirming the action of the AO that provisions of sec. 14A were applicable to dividends received by the appellant on "Trade Investments".

(ii) Without Prejudice to Above on the facts and circumstances of the case and in law the learned CIT(A) erred in directing the learned AO that disallowance under section 14A may be reworked on dividend received from Indian Companies of ₹ 66,68,609/-.

(iii) On the facts and circumstances of the case and in law, the learned AO be directed to delete disallowance under section 14A of ₹ 4,40,85,201/-."

6. We noted that this issue is also covered by the Tribunals decision in assessee's own case for AY 2008-09. The Tribunal has decided this issue in favour of assessee vide Para 24 to 25, which read as under: -

"24. We noted that this issue is also covered by the Tribunal's decision in assessee's own case for AY.2007-08. Ld. Counsel for the assessee before us stated that total dividend received by assessee is as under:

(e) Total Dividend Received

NACIL (I) Foreign Dividend 27,96,151.39

NACIL (A) Foreign Dividend 2,11,18,743.39

Total Rs.2,39,14,898.63

25. He stated that this foreign dividend is not exempt and assessee has not claimed any exemption u/s.14A of the Act. Hence, he stated that once there is no exempt income, the issue is covered by the decision of the Hon'ble Bombay High Court in the case of Pr.CIT Vs. Ballarpur Industries Limited in Income Tax Appeal No.51 of 2016, wherein this issue has been considered following the judgment of Hon'ble Delhi High Court in the case of Chem invest Limited vs. CIT (2015) 378 ITR 33 (Delhi) held as under: -

"On hearing the learned Counsel for the Department and on a perusal of the impugned orders, it appears that both the Authorities have recorded a clear finding of fact that there was no exempt income earned by the assessee. While holding so, the Authorities relied on the judgment of the Delhi High Court in Income Tax Appeal No. 749/2014, which holds that the expression "does not form part of the total income" in Section 14A of the Income Tax Act, 1961 envisages that there should be an actual receipt of the income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. The Income Tax Appellate Tribunal held that the provisions of Section 14A of the Income Tax Act, 1961 would not apply to the facts of this case as no exempt income was received or receivable during the

relevant previous year. It is not the case of the Assessing Officer that any actual income was received by the assessee and the same was includible in the total income. In the facts of the case, the Authorities held that since the investments made by the assessee in the sister concerns were not the actual income received by the assessee, they could not have been included in the total income." Hence, this issue is decided in favour of assessee."

7. As the issue is squarely covered on identical facts by the assessee's own case in earlier year as reproduced above, we decide this issue in favour of assessee and direct the AO to follow the Tribunal direction in earlier year.

Accordingly, we fallow ratio of the above decision, and restore this disputed issue to the file of the Assessing officer to re-compute disallowance u/s 14A considering the exempt income and the investments in subsidiary companies and allow this ground of appeal of the assessee for statistical purpose.

7. The third disputed issue as envisaged by the Ld. AR that the CIT(A) erred in confirming the disallowance of depreciation on Air India Building overlooking the fact that it is a part of the assessee's business property and also the

contentions raised that the depreciation has to be allowed. Whereas the Ld. DR submitted that the assessee is eligible for claim of deduction u/s 24 of the Act and again allowing the depreciation on building tantamount to double deduction and also the claim was also not supported with any evidences. We found the submissions of the Ld. AR cannot be accepted as the CIT(A) has already considered the facts of depreciation and confirmed the action of the A.O. Accordingly, we do not find infirmity on the decision of the CIT(A) on this disputed issue and uphold the same and dismiss this ground of appeal of the assessee.

8. Next disputed issue is with respect to addition of write off of amount pertaining to airlines allied services in respect of wholly owned subsidiary companies.. The Ld. AR contended that the CIT(A) erred in confirming the action of the AO, overlooking the facts that the amount was written off in the books of accounts.We found that this issue is covered by the assessee's own case for the A.Y 2009-10. We considered it appropriate to refer

to the decision of the Hon'ble Tribunal in assessee's own case for A.Y. 2009-10 in ITA No.3383/Mum/2014 (Recalled order for limited purpose) dated 06.06.2022 observed at Para 2 to 9 of the order read as under:

> *2. It is submitted that the said appeal was filed on various grounds and the same was decided by the Hon'ble ITAT on 08/08/2019 alongwith the Revenue's appeal in ITA No.3136/Mum/2014 by way of a consolidated order. It is pertinent to point out that while passing the said order, the Hon'ble ITAT Bench "B", Mumbai inadvertently omitted to dispose of Ground No.4 of ITA No.3383/Mum/2014. Aggrieved by this, the assessee filed a petition to recall the said order dated 09/09/2019 in M.A. No.66/Mum/2020 and the Hon'ble ITAT was pleased to pass an order dated 03/12/2021 for recalling the said order for limited purpose of disposing ground No.4 of the said appeal. The assessee is before us on the following ground of appeal:-*
>
> *"4. On the facts and circumstances of the case and in law the learned C.I.T.(A) erred in confirming additions made to income of the appellant by the A.O. of Rs.121.48 Crores in respect of transactions with its subsidiary Airlines Allied Services Ltd (AASL)."*
>
> *3. The brief facts are that the assessee is a company engaged in the business of National and International Air Transport. The assessee company filed its return of income disclosing total loss at Rs.10,64,71,48,22,431/- for A.Y. 2009-10. During the*

scrutiny assessment proceedings under section 143(3), various additions and disallowances were made by the Assessing Officer which was appealed before the Ld.CIT(A), who confirmed the additions made by the Assessing Officer. Aggrieved by this, the assessee was in appeal before the Hon'ble ITAT.

4. We proceed to hear the Ld.representatives only on the sole issue of transactions with assessee's subsidiary Airline Allied Services Ltd which the assessee claims to be bad debt. The Assessing Officer decided on this issue on the background that such claim was not related to carrying on the assessee's business, but it was of the assessee's subsidiary companies. The Assessing Officer further proceeded to decide on that such expenditure incurred is not wholly and exclusively incidental to the business of the assessee company and, therefore, added the expenditure of Rs.121.48 crores to the total income of the Assessee. On appeal before the Ld.CIT(A), it was held that the write off of the said amount could be recovered from assessee's subsidiaries and Ld.CIT(A) confirmed the addition made by the Assessing Officer.

5. Before us, the Ld.AR contended that the assessee has written off the said amount even in the previous year and was covered by the decision of Apex Court in TRF Ltd vs CIT 323 ITR 397 (SC). The Ld.DR vehemently argued that such debt was recoverable and on the other hand, relied on the order of the lower authorities.

6. Having heard both the Ld.representatives and perused the material on record, we are of the considered opinion that such dues were recoverable

by the assessee from Airline Allied Services Ltd on account of reimbursable costs / expenditure incurred by the subsidiary company. The transactions with the said subsidiary company was found in previous year also as per the materials available on record. It is also evident that the assessee's Audit Committee had stated that said amount should be written off by the assessee company and the same was said to be approved by the Board of Directors in its meeting held on 24/11/2007. Since then, the said amount has been written off in its books. Similar practice also prevailed in F.Y. 2008-09. The Assessing Officer as well as the CIT(A) did not have any evidence to controvert the same. From the facts and circumstances of the case, it is seen that such addition has been made by mere surmise and conjecture.

7. Thus, it is a settled position in law that it is not necessary for the assessee to prove that any amount due / debt which has become irrecoverable but it has written off as irrecoverable in the assessee's books, need not be proved as bad debt by the assessee. We would like to place reliance on the decision of Hon'ble jurisdictional High Court of Bombay in Principal Commissioner of Income-tax-10 vs Hybrid Fiannce Services Ltd in Income-tax Appeal No. 1265 of 2017 with Income-tax Appeal No 1469 of 2017 judgement dated February 11, 2020 and Hon'ble Supreme Court in TRF Ltd vs CIT (supra).

8. From the above observation it is hereby directed to delete the addition made and ground 4 of assessee's appeal is allowed.

9. In the result, appeal of the assessee is allowed.

We considering the facts and explanations of the Ld.AR on the disputed issue and respectfully follow the earlier year decision in the asessee's own case for the A.Y 2009-10 and allow this ground of appeal of the assessee.

9. The next disputed issue being disallowance of Prior period adjustments and prior period expenses, the Ld. AR has made submissions as under:

> *With respect to the allegation made by the CIT(A), on the receipts from Air India Building, the Appellant submits as under:-*
>
> *A. The erstwhile Air India Board in its 8th meeting held on 24th November, 1994 had approved for issuing Eviction Notices to all occupants of Air India Building, after which these occupants were treated as unauthorized occupants and became liable for payment of profits/damages. The Estate Officer conducted proceedings under the Public Premises Act and eviction orders were passed against all the occupants during the period 1996 to 2002.*
>
> *In view of the said orders, damages recoverable from such unauthorized occupants was accounted at Rs. 300 per Sq. ft. per month as revenue in the earlier years.*

Since no amount was realized towards the damages awarded by Estate Officer and in view of the critical financial situation of the company, as an initial step, two of the licensees i.e. TCS and CitiBank were considered for an out of court settlement based on the court judgment in the damages case IPCL vs. Air India. On mutual agreement, an overall amount of Rs. 873.3 millions (after deduction of 0.01% TDS) have been received from them as out of court settlement. As a result, the difference between the amount receivable by the Appellant and the amount actually received of Rs. 676.7 million due from these licensees has been charged to profit and loss account during the year, as this amount was offered to tax in the earlier years. The Appellant submits that the settlement agreement with Tata Consultancy Limited (TCS) was dated 12th July, 2010 and Citibank was dated 5th August, 2010.

The Appellant submits that as the agreement pertained to receivables for earlier years which was already offered to tax in the earlier years and which were outstanding in the books of the Appellant, and as the agreements were executed before the finalization of the Balance sheet, the effect of these agreements was considered in the balance sheet for the year ending 31st March, 2010. The Appellant submits that action of the Appellant is in consonance with 'Accounting

Standard - 4 - Contingencies and Events Occurring after the Balance Sheet Date'. Para 8.1 and 8.2 of the said Accounting Standard reads as under- "8.1 Events which occur between the balance sheet date and the date on which the financial statements are

approved, may indicate the need for adjustments to assets and liabilities as at the balance sheet date or may require disclosure.

8.2 Adjustments to assets and liabilities are required for events occurring after the balance sheet date that provide additional information materially affecting the determination of the amounts relating to conditions existing at the balance sheet date. For example, an adjustment may be made for a loss on a trade receivable account which is confirmed by the insolvency of a customer which occurs after the balance sheet date."

The Appellant submits that in view of Para 8.2 of the Accounting Standard, the Appellant was obliged to incorporate the effects of the agreements dated 12th July, 2010 and 5th August, 2010 in the balance sheet for the period ending 31st March, 2010. The Appellant submits that therefore, the allegation of the CIT(A)'s that as the settlement agreements were not entered by the Appellant before, 31st march, 2010, the same cannot be allowed in the year under consideration is incorrect and bad in law.

The Appellant also refers to the note no. 38 of signed financial statement duly audited by Statutory Auditor and Comptroller and Auditor General of India wherein detailed note on 'Rental Receipts from Air India Building' is highlighted. (Copy of relevant extract is enclosed)

The Appellant also relies of the decision of the Tribunal in the case of Neyveli Lignite Corporation Ltd. v. Assistant Commissioner of Income-tax 93 TTJ

685 (Chennai), wherein the Tribunal on similar facts, allowed the claim of deduction to the assessee even though the agreement was entered into by the assessee after the end of the financial year. The Tribunal had relied on AS-4 to allow the claim of the Assessee.

Without prejudice to the above, the Appellant further submits that in case, it is held that the same amount is not allowable in assessment year 2010-11 as the settlement agreements are in subsequent year, the Hon'ble Tribunal may give a direction to the Assessing Officer to allow the same in the assessment year 2011- 12 as the said appeal is also being adjudicated with the appeal for assessment year 2010-11.

10. The Appellant submits that all the other issues of prior period expenses are recurring and are similar to the issues considered in the earlier assessment years and, hence, following the decision of the Tribunal in the earlier years, the same are also required to be allowed as deduction in the relevant year.

And Ld. AR has also filed the details as under:

1. Note on Prior Period Adjustments in relation to Ground No. 5 in the Appeal (enclosed at page no. 1 to 3)

2. Extract of Schedule 'U' on 'Prior Period Adjustments' to the audited financial statements for the financial year 2009-10 (enclosed at page 4)

3. Extract of Note 38 on 'Rental Receipts from Air India Building' to the audited financial statements for the financial year 2009-10 (enclosed at page no. 5 to 6)

4. Copy of settlement agreement with Tata Consultancy Limited (TCS) dated July 12, 2010 (enclosed at page no. 7 to 10)

5. Copy of settlement agreement with Citibank dated August 05, 2010 (enclosed at page no. 11 to 18).

the Ld. AR referred to the decision of the Hon'ble Tribunal in the assessee's own case for the A.Y 2009-10 in ITA No.3383/Mum/2014 &ors dated 08.08.2019 observed at Para 11 to 13 of the order read as under:

11. The next issue in this appeal of assessee is prior period expenses of ₹ 33,44,64,578/-. For this assessee has raised the following ground No. 5:-

"5. On the facts and circumstances of the case and in law, the learned CIT(A) erred in confirming addition made of Prior Period Expenses of ₹ 33,44,64,578/-"

12. This issue is also covered by the decision of assessee's own case for AY 2007-08, wherein Tribunal vide Para 3 read as under: -

3. The next ground raised pertains to confirmation of disallowance of prior period expenses of Rs.337.10 (millions). The crux of argument on behalf of the assessee that in earlier assessment years, no such

> *disallowance was made and in the present assessment year, the facts are identical. The crystallization was claimed to be made during the year itself. The ld. Counsel filed a chart of prior period adjustment of financial year ending on 31/03/2007, which is summarized as under:-*
>
> *3.4. The aforesaid figures even has been mentioned in para 5.3 of the impugned order. The relief was denied to the assessee on the plea (para 5.5 of the impugned order) that the assessee could not produce the evidence with respect to these liabilities whether crystallize during the year. However, the assessee drew our attention to page 24 of the paper book with respect to rejections/refunds and we found the explanation of the assessee to be correct. Considering the facts and the explanation of the assessee, this ground is allowed. The appeal of the assessee, is, therefore, allowed.*
>
> *13. Respectfully following the earlier year decision in assessee's own case i.e. AY 2007-08, we allow this issue of assessee's appeal.*

We considering the facts and explanations of the Ld.AR on the disputed issue and respectfully follow the earlier year decision in the asessee's own case for the A.Y 2009-10 and allow this ground of appeal of the assessee.

10. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

ITA No. 4518/Mum/2018, A.Y 2011-12

11. As the facts and circumstances in this appeal are identical to ITA No. 4467/Mum/2018, for A.Y 2010-11 (except variance in figures) and the decision rendered in above paragraphs 5,6,&7 would apply mutatis mutandis for this case also. Accordingly, the grounds of appeal of the assessee are partly allowed for statistical purposes.

ITA No. 4544/Mum/2018, A.Y 2012-13

12. The assessee has raised the following grounds of appeal.

> *1. On the facts and circumstances of the case and in law the learned C.I.T. (Appeals) erred in confirming disallowance made by the Assessing Officer (A.O) in respect fines and penalties of Rs.87,387/ incurred by the appellant in the course of carrying its lawful business activity.*
>
> *2. (i) On the facts and circumstances of the case and in law the learned C.I.T.(A) erred in remanding matter of disallowance u/s. 14A to the A.O.*
>
> *(ii) The learned C.I.T.(A) erred in concluding that decision of Hon. ITAT in appellants own case to hold that investment of Rs. 10 Crores in Shares of Cochin*

International Airport Ltd. was made by appellant from its own funds required reconsideration.

(iii) The learned C.I.T. (A) erred in concluding that I.T.A.T in Asst. Year 2007-08 had upheld disallowance to the extent of 5% of the exempted income u/s. 14A, when in fact the I.T.A.T. had deleted the disallowance of 5% in Asst. Year 2007-08.

(iv) The learned C.I.T. (A) further erred in holding that investments on which no exempted income (dividends) was received were also liable to be included for calculation of disallowance u/s. 14A r.w. Rule 8D.

(v) On the facts and circumstances of the case and in law the learned C.I.T.(A) ought to have directed the A.O. to delete the disallowance u/s.14A of Rs.10.49 Crores as the exempted income from dividends was Rs.1.20 Crore only.

Without Prejudice to above:

It is submitted that on the facts and in the circumstances of the case, the disallowance u/s. 14A r.w. Rule 8D cannot exceed the quantum of exempted income of Rs. 1.50 Crore.

3. The learned C.I.T.(A) erred in confirming disallowance made by A.O. of Rs.1,50,000/- on account of estimated depreciation of Air India Building.

4. On the facts and circumstances of the case the learned C.I.T. (A) erred in confirming disallowance of Rs.7,94,09,9111/- paid in respect of delayed payment of T.D.S.

> *5. The appellant craves leave to add, amend or alter any of the Grounds of Appeal or to add new Grounds of Appeal if considered necessary.*

13. The grounds of appeal Nos 1, 2, 3 of the present appeal are identical to ITA No. 4467/Mum/2018, for A.Y 2010-11 (except variance in figures) and the decision rendered in above paragraphs 5,6,&7 would apply mutatis mutandis for this case also. The ground of appeal No. 4 is with regard to disallowance of Interest on TDS.

The Ld. AR submitted that the T.D.S. is part of expense of the payer (asssessee) and such T.D.S. is not income tax relatable to income of assessee and hence as it cannot be disallowed as per provisions of Sec. 40(a) of the I.T. Act 1961. The contentions are that the delay in payment of T.D.S. is in nature of delay in payment of relevant expenses, thus resulting in increased payment in respect of such expenses incurred which are liable to T.D.S. The payment of interest is "Compensation" for use of funds deposited late with Authorities and such interest is allowable/s. 37(1) of the I.T Act 1961 and relied on the judicial decisions.

(a) Mahalaxmi Sugar Mills Ltd. vs. C.I.T. (1980) 123 I.T.R. 429 (SC).

(b) Prakash Cotton Mills Ltd. vs. C.I.T. (1993) 201 I.T.R. 684 (SC).

Whereas the CIT(A) has allowed the interest paid on account of delayed payment of service Tax but has confirmed the addition of interest on delayed payment of TDS. Further the Ld.AR mentioned that interest is not in the nature of penalty as there are separate provisions for levy of penalty for default of T.D.S. under I.T. Act 1961. The interest is compensatory in nature and it is for use of the funds by the person and such interest is allowable u/s. 37(1) of the Act and penalty is not allowable. We considered it appropriate to refer to the judicial decisions as under:

(i). The Honble Tribunal in ITANo.2127/Kol/2014, DCIT Vs. Narayani Ispat Pvt Ltd has observed at page 3 Para 7 as under:

> *7. We have heard the rival contentions of both the parties and perused the material available on record. In the instant case, AO has disallowed the interest expenses incurred by the assessee on account of late*

deposit of service tax and TDS after having reliance on the judgment of Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd. Vs. CIT (1998) (Supra). The relevant extract of the judgment reads as under :

FACTS

During the year under consideration, the assessee failed to pay advance tax equivalent to 75 per cent of estimated tax. The Assessing Officer levied interest under section 215 as well as under section 139. The assessee claimed that since taxes which were payable were delayed, the assessee's financial resources increased which were available for business purposes. Hence, the interest which was paid to the Government was interest on capital that would be borrowed by the assessee otherwise. Hence, the amounts should be allowed as deduction. The revenue did not allow such deduction. The High Court affirmed the view.

On appeal to the Supreme Court :

HELD When interest is paid for committing a default in respect of a statutory liability to pay advance tax, the amount paid and the expenditure incurred in that connection is in no way connected with preserving or promoting the business of the assessee. This is not expenditure which is incurred and which has to be taken into account before the profits of the business are calculated. The liability in the case of payment of incometax and interest for delayed payment of income-tax or advance tax arises on the computation of the profits and gains of business. The tax which is payable is on the assessee's income after the income is determined. This cannot, therefore, be considered

as an expenditure for the purpose of earning any income or profits. Interest which is paid for delayed payment of advance tax on such income cannot be considered as expenditure wholly and exclusively for the purpose of business. Under the Act, the payment of such interest is inextricably connected with the assessee's tax liability. If income-tax itself is not permissible deduction under section 37, any interest payable for default committed by the assessee in discharging his statutory objection under the Act, which is calculated with reference to the tax on income, cannot be allowed as a deduction.

Therefore, it was to be held that deduction of interest levied under sections 139 and 215 would not be allowable under section 37.

In the above judgment, the claim of the assessee for interest expenses was denied as it defaulted to make the payment of advance tax as per the provisions of the Act. The advance tax is nothing but income tax only which the assessee has to pay on his income. In the instant case the default relates to the delay in the payment of advance tax and consequently interest was charged on the delayed payment of advance tax. In the above judgment the Hon'ble Apex Court held that as Income Tax paid by the assessee is not allowable deduction and therefore interest emanating from the delayed payment of income tax (advance tax) is also not allowable deduction. However the facts of the instant case before us are distinguishable as in the case before us the interest was paid for delayed payment of service tax & TDS. The interest for the delay in making the payment of service tax & TDS is compensatory in nature. As such the interest on

delayed payment is not in the nature of penalty in the instant case on hand.

The issue of delay in the payment of service tax is directly covered by the judgment of Hon'ble Apex Court in the case of Lachmandas Mathura Vs. CIT reported in 254 ITR 799 in favour of assessee. The relevant extract of the judgment is reproduced below :

"The High Court has proceeded on the basis that the interest on arrears of sales tax is penal in nature and has rejected the contention of the assessee that it is compensatory in nature. In taking the said view the High Court has placed reliance on its Full Bench's decision in Saraya Sugar Mills (P.) Ltd. v. CIT [1979] 116 ITR 387 (All.) The learned counsel appearing for the appellant-assessee states that the said judgment of the Full Bench has been reversed by the larger Bench of the High Court in Triveni Engg. Works Ltd. v. CIT [1983] 144 ITR 732 (All.) (FB), wherein it has been held that interest on arrears of tax is compensatory in nature and not penal. This question has also been considered by this Court in Civil Appeal No. 830 of 1979 titled Saraya Sugar Mills (P.) Ltd. v. CIT decided on 29-2-1996. In that view of the matter, the appeal is allowed and question Nos. 1 and 2 are answered in favour of the assessee and against the revenue."

In view of the above judgment, there remains no doubt that the interest expense on the delayed payment of service tax is allowable deduction.

The above principles can be applied to the interest expenses levied on account of delayed payment of TDS as it relates to the expenses claimed by the assessee which are subject to the TDS provisions. The assessee claims the specified expenses of certain

amount in its profit & loss account and thereafter the assessee from the payment to the party deducts certain percentage as specified under the Act as TDS and pays to the Government Exchequer. The amount of TDS represents the amount of income tax of the party on whose behalf the payment was deducted & paid to the Government Exchequer. Thus the TDS amount does not represent the tax of the assessee but it is the tax of the party which has been paid by the assessee. Thus any delay in the payment of TDS by the assessee cannot be linked to the income tax of the assessee and consequently the principles laid down by the Hon'ble Apex Court in the case of Bharat Commerce Industries Ltd. Vs. CIT (1998) reported in 230 ITR 733 cannot be applied to the case on hand. Thus, in our considered view, the principle laid down by the Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd. (supra) is not applicable in the instant facts of the case. Thus, we hold that the Assessing Officer in the instant case has wrongly applied the principle laid down by the Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd.(supra). We also find that the Hon'ble Supreme Court in the case of Lachmandas Mathura (Supra) has allowed the deduction on account of interest on late deposit of sales tax u/s 37(1) of the Act. In view of the above, we conclude that the interest expenses claimed by the assessee on account of delayed deposit of service tax as well as TDS liability are allowable expenses u/s 37(1) of the Act. In this view of the matter, we find no reason to interfere in the order of Ld. CIT(A) and we uphold the same. Hence, this ground of Revenue is dismissed.

(ii). The Honble Tribunal in STUP Consultants Pvt Ltd Vs. ACIT, in ITA No. 5827/Mum/2012 has held at page 4 Para 4.1 of the order read as under:

4.1 We have carefully heard the rival contentions and perused relevant material on record. So far as the nature of interest payment u/s 234 is concerned, there could be no quarrel as to the nature thereof since it is settled legal position that the character of such interest payment is compensatory in nature in the sense that it is payable by the assessee to the revenue for delayed payment of its dues. The said proposition is clearly borne out of the following judicial pronouncements: -

No.	*Case Title*	*Judicial Authority*	*Cittion*
1	*Anjum MH Ghaswala and Ors*	*Hon'ble SC*	*252 ITR 1*
2	*CIT Vs. Kotal Mahindra Fin Ltd*	*Hon'ble Bombay HC*	*265 ITR 119*
3	*Raju Bhojwani Vs CIT*	*Hon'ble Delhi HC*	*13 Taxman 221*
4	*CIT Vs Anand Prakash*	*Hon'ble Delhi HC*	*316 ITR 141*

4.2 Proceedings further, the submissions of Ld. AR that the disallowance could not be made u/s 40(a)(ii) since the expression tax did not include interest, is also tenable in view of the following judicial pronouncements: -

No.	*Case Title*	*Judicial*	*Cittion*

		Authority	
1	Harshad Shantilal Mehta Vs Custodian and ors	Hon'ble SC	231 ITR 871
2	CIT Vs. Manoj Kumar Beriwal	Hon'ble Bombay HC	217 CTR 407

Upon perusal, we find that the in terms of the provisions of Section 40(a)(ii), the assessee is not entitled to claim any deduction for any sum paid on account of any rate or tax levied. The expressions tax as defined u/s 2(43) means income tax chargeable under the provisions of this act and includes Fringe Benefit Tax. The expression interest as defined in Section 2(28A) means interest payable in any manner in respect of moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the money borrowed or debt incurred or in respect of any credit facility which has not been utilized. Therefore, tax and interest has been given specific meaning under the act and the provisions of Section 40(a)(ii) refers only to any rate or tax levied without including therein the expression interest. Therefore, the stand of Ld. AO in disallowing the same u/s 40(a)(ii), in our opinion, was not justified.

4.3 However, at the same time, it is also settled position that the payment of income tax is personal liability for the assessee and consequential interest paid thereupon for delay is part and parcel of the aforesaid payment only and retain the same color & character. This being the case, the deduction thereof u/s 37(1) could not be allowed to the assessee since it

was personal expenditure in nature and the same could not be said to have been expanded wholly and exclusively for the purpose of assessee's business since payment of taxes or interest could, by no stretch of imagination, be said to be the assessee's business. For the same reason, the deduction thereof could not be allowed to assessee u/s 36(1)(iii) also which envisages amount of interest paid in respect of capital borrowed for the purposes of business or profession, which is not the case here.

4.4 Proceeding further, it transpires the as per Ld. AR's submissions, the aforesaid interest was paid during impugned AY under protest and the same was refunded to the assessee in AY 2010-11 pursuant to the decisions of appellate authorities wherein assessee's stand in following cash system of accounting got vindicated and the said amount was refunded back to the assessee. This being the case, we are of the opinion that the aforesaid interest paid by the assessee under protest, was nothing but the money kept in trust before the revenue and the expenditure in that respect could not be said to have even crystallized during impugned AY and therefore, there could be no occasion to consider the question that whether the same was an admissible expenditure during impugned AY. Viewing from any angle, the deduction of this expenditure either u/s 37(1) or 36(1)(iii) could not be allowed to the assessee. We order so. The grounds stand dismissed to that extent.

4.5 Having held so, we find substantial force in the argument that the refund of interest amount as received by assessee in the subsequent AY and offered to tax, could not be brought to tax in that AY

since the same was mere refund of the money kept under trust and paid under protest by the assessee. Keeping in view the same, Ld. AO is directed to reconsider this plea as to exclusion of interest amount to the extent of Rs.183.05 Lacs for determining the income for AY 2010-11 after due verification of the fact that said amount was already offered to tax in that AY. The assessee is directed to provide requisite documentary evidences, in this regard, to bolster his claim. The assessee shall get corresponding consequential relief in other AY.

5. For the aforesaid reasons, interest paid on account of late payment of fringe benefit tax could also not be allowed to the assessee. However, the amount of tax deduction at source [TDS] represents the amount of income tax of the third parties party on whose behalf the payment was deducted by the assessee & paid to the Government Exchequer. Therefore, TDS amount do not represent the tax of the assessee but it is the tax of the party which has been paid by the assessee. This being the case, any interest paid on account of late payment of TDS could not be linked to the Income Tax of the assessee and therefore, the deduction thereof was available to the assessee. Hence, the deduction of Rs.9,128/- as claimed by the assessee would be an allowable expenditure. We order so. The grounds stand allowed to that extent.

6. Finally, the appeal stands partly allowed in terms of our above order.

(iii). The Honble Tribunal in M/s Resolve Salvage & Fire India P Ltd Vs DCIT [2022] 139 taxmann.com

196 (Mumbai-Trib) has relied on above discussed judicial decisions and allowed the asssessee appeal read as under:

> *......7. We have heard the rival contentions of both the parties and perused the material available on record. In the instant case, AO has disallowed the interest expenses incurred by the assessee on account of late deposit of service tax and TDS after having reliance on the judgment of Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd. v. CIT (1998) (supra). The relevant extract of the judgment reads as under*
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> *FACTS*
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> *During the year under consideration, the assessee failed to pay advance tax equivalent to 75 per cent of estimated tax. The Assessing Officer levied section 215 as well as under section 139. The assessee claimed that were payable were delayed, the assessee's financial resources increased available for business purposes. Hence, the interest which was paid Government was interest on capital that would be borrowed by the assessee otherwise. Hence, the amounts should be allowed as deduction. The allow such deduction. The High Court affirmed the view. On appeal to the Supreme Court: HELD*
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> *When interest is paid for committing a default in respect of a statutory liability 10 advance tax, the amount paid and the expenditure incurred in that connection is in no way connected with preserving or promoting the business of the assessee. This is not expenditure which is incurred and which has to be*

taken into account before the profits of the business are calculated. The liability in the case of payment of income-tax and interest for delayed payment of income-tax or advance tax arises on the computation of the profits and gains of business. The tax which is payable is on the assessee's income after the income is determined. This cannot, therefore, be considered as an expenditure for the purpose of earning any income or profits. Interest which is paid for delayed payment of advance tax on such income cannot be considered as expenditure wholly and exclusively for the purpose of business. Under the Act, the payment of such interest is inextricably connected with the assessee's tax liability. If income-tax itself is not permissible deduction under section 37, any interest payable for default committed by the assessee in discharging his statutory objection under the Act, which is calculated with reference to the tax on income, cannot be allowed as a deduction.

Therefore, it was to be held that deduction of interest levied under sections 139 and 215 would not be allowable under section 37.

In the above judgment, the claim of the assessee for interest expenses was denied as it defaulted to make the payment of advance tax as per the provisions of the Act. The advance tax is nothing but income tax only which the assessee has to pay on his income. In the instant case the default relates to the delay in the payment of advance tax and consequently interest was charged on the delayed payment of advance tax.

In the above judgment the Hon'ble Apex Court held that as Income-tax paid by the assessee is not

allowable deduction and therefore interest emanating from the delayed payment of income tax (advance tax) is also not allowable deduction.

However the facts of the instant case before us are distinguishable as in the case before us the interest was paid for delayed payment of service tax & TDS. The interest for the delay in making the payment of service tax & TDS is compensatory in nature. As such the interest on delayed payment is not in the nature of penalty in the instant case on hand.

The issue of delay in the payment of service tax is directly covered by the judgment of Hon'ble Apex Court in the case of Lachmandas Mathura v. CIT reported in 254 ITR 799 in favour of assessee. The relevant extract of the judgment is reproduced below :

"The High Court has proceeded on the basis that the interest on arrears of sales tax is penal in nature and has rejected the contention of the assessee that it is compensatory in nature. In taking the said view the High Court has placed reliance on its Full Bench's decision in Saraya Sugar Mills (P.) Ltd. v. CIT [1979]

116 TIR 387 (AIl.) The learned counsel appearing for the appellant-assessee states that the said judgment of the Full Bench has been reversed by the larger Bench of the High Court in Triveningg.

Works Ltd. v. CIT 19831 144 ITR 732 (AIl.) (FB) wherein it has been held that interest on arrear is compensatory in nature and not penal. This question has also been considered by this Court in Civil Appeal No. 830 of 1979 titled Saraya Sugar Mills (P.) Ltd. v. CIT decided on 29-2-1996. In that view of the matter,

the appeal is allowed and question Nos. 1 and 2 are answered in favour of the assessee and against the revenue."

In view of the above judgment, there remains no doubt that the interest expense on the delayed payment of service tax is allowable deduction.

The above principles can be applied to the interest expenses levied on account of delayed payment of

TDS as it relates to the expenses claimed by the assessee which are subject to the TDS provisions. The assessee claims the specified expenses of certain amount in its profit & loss account and thereafter the assessee from the payment to the party deducts certain percentage as specified under the Act as TDS and pays to the Government Exchequer. The amount of TDS represents the amount of income tax of the party on whose behalf the payment was deducted & paid to the Government Exchequer. Thus the TDS amount does not represent the tax of the assessee but it is the tax of the party which has been paid by the assessee. Thus any delay in the payment of TDS by the assessee cannot be linked to the income tax of the assessee and consequently the principles laid down by the Hon'ble Apex Court in the case of Bharat Commerce Industries Ltd. v. CIT (1998) reported in 230 IT 733 cannot be applied to the case on hand.'

6. Being consistent with the above decision of the co-ordinate bench, we hold that the interest paid on delayed payment of TDS w/s 201(1A) is an allowable deduction. We direct accordingly. Assessee succeeds in its appeal.

7. In the result, appeal filed by the assessee is allowed.

(iv). The Honble Tribunal in Welkin Telecom Infra (P) Ltd Vs. DCIT, [2022] 142 Taxmann.com 146 (Kol-Trib) has observed and allowed the claim read as under:

TDS component paid on exp. incurred is not in nature of 'income-tax' of assessee; no disallowance u/s 40(a)(ii): ITAT Welkin Telecom Infra (P.) Ltd. v. DCIT - [2022] 142 taxmann.com 146 (Kolkata - Trib.) Assessee-company was engaged in the business of providing support services to various telecom operators in the field of operation & maintenance/surveillance management services for tower sites. It had made delayed payment of its statutory dues, i.e., service tax, professional tax, and TDS. The assessee claimed that the TDS paid by it was not in the nature of 'income-tax' of the assessee or 'tax levied on its profits and gains of business'. Thus, the TDS component paid on the expenditure is not disallowable under section 40(a)(ii). The Tribunal held that section 40(a)(ii) uses the phrase "profits or gains of any business or profession" which has reference only to profits or gains as determined under section 28/29. Hence it can be safely inferred that section 40(a)(ii) cannot bring within its ambit any tax or interest paid on any other sums apart from profits or gains earned in business. In the instant case, the assessee had paid interest under section 201(1A) on delayed payment of TDS. The said TDS represented the taxes paid on behalf of the payees to the credit of

the Government. In other words, TDS is treated as the tax paid on behalf of the person in respect of whose income such payment of tax has been made. It is therefore evident that 'TDS' qua the assessee, is not income-tax on its "profits or gains of any business or profession" assessable under section 28. Instead, it is the tax on the profits and gains of the business of the recipient. In view of this, the tax deducted at source (TDS) is not like the income tax which is required to be paid on profits & gains chargeable to tax under section 28 and thus not disallowable under section 40(a)(ii). Consequently, the interest paid under section 201(1A) upon late payment of TDS also cannot be disallowed under section 40(a)(ii).

We considering the judicial decisions of Honble Tribunal and observed that the assessee is entitled for claim of deduction of interest on TDS liability and allow this ground of appeal in favour of the assessee.

In the result, the asssessee appeal is partly allowed for stastical purpose.

ITA No. 4486/Mum/2018 A.Y 2010-11

14. The Revenue has raised the grounds of appeal

GROUNDS OF APPEAL

(i). "Whether on the facts and in the circumstances of the case and in law, the Ld CIT (A) has erred in

allowing an amount of Rs.25.34 crores as 'Income from Business' by ignoring the fact that the assessee has income from deposits and other advances, under the nature of business of the assessee?" earned this not falling under the nature of business of the assessee.

(ii) "Whether on the facts and in the circumstances of the case and in law, the Ld CIT (A) has erred in directing the Assessing Officer to delete the addition of Rs 40,87,82,585 made by the A. O on account of excess provision for obsolescence without appreciating the fact that the provision made is contingent liability and was not actually incurred by the assessee?"

(iii) "Whether on the facts a and in the circumstances of the case and in law the Ld CIT (A) has erred in directing the Assessing Officer to delete the addition of Rs 40,87,82,585/- without appreciating the fact that the provision was written back and credited to the P&L A/c and was further reduced from the total income in the computation of income made the AO on account of excess provision of obsolescence without appreciating the fact that the provision made is contingent liability and was not actually incurred by the assessee?"

(iv) "Whether on the facts and in the circumstances of the case and in law, the Ld CIT (A) has erred in allowing an amount of Rs 11.23 crores under the Frequent Flier Programme (FFP) by ignoring the fact that FFP is only a contingent liability of the assessee and there is no contractual liability on the part of the assessee to incur such expenses?"

5. The appellant prays that the order of the Ld. CIT(A) be set aside and the order of the AO be restored.

> *6. The appellant craves leave to amend or alter any ground or add any other grounds which may be necessary.*

15. On the first disputed issue with respect treatment of interest on short term deposit with banks abroad to be taxed as income from other sources and not as business income. The Ld. DR submitted that the CBDT has made representations to Inland revenue department of UK for treating the same business income and not as income from other sources and has accepted the representation made by the revenue. Contra, the Ld. AR submitted that the issue is covered in favour of assessee by the decision of the Honble Tribunal for earlier years in the assessee's own case. The revenue has filed appeal with Hon'ble High Court of Bombay and the same was dismissed. We considered it appropriate to consider the decision of the Hon'ble Tribunal in the assessee's own case for A.Y 2008-09 in ITA No. 2182/Mum/2012 Para 18 to 20 read as under:

> *18. The next issue in this appeal of assessee is against the order of CIT(A), confirming the action of AO, treating the income derived from interest as*

'income from other sources' instead of income declared by assessee as 'business income'. For this, assessee has raised the following Ground No.2:

"2 (i) On the facts and circumstances of the case and in law the learned CIT(Appeals) erred in disregarding and ignoring the decisions of C.I.T(Appeals) erred in appellant's own case in Asst. Years 2001-02 to 2004-05 where the Hon'ble I.T.A.T. had held that "Income from Interest" on Short Term Deposits was assessable as "Business Income" of the appellant.

(ii) The learned C.I.T.(A) erred in confirming action of the A.O. to tax "Income from Interest" on Short Term Deposits of Rs.74,37,00,000/-as "Income from Other Sources" and rejecting the claim of the appellant that such interest income was assessable as "Income from Profits and Gains of Business".

19. At the outset, Ld. Counsel for the assessee stated that this issue is covered by the Tribunal's decision in assessee's own case for the AY.2001-02 and further, the Department's appeal against the ITAT's order were decided by the Hon'ble Bombay High Court vide order dt.14-06-2012, confirming order of ITAT stating that the interest income is taxable as 'business income'.

20. We noted that the assessee has earned interest income of short term deposit amounting to ₹74,37,00,000/- declared as 'business income'. However, the AO treated this interest income under the head 'income from other sources', whereas the Tribunal in AYs.2001-02 & 2002-03 in ITA Nos.6865&6866/Mum/2005, dated 31-10-2008 has

considered this issue and held the same as 'business income' by observing as under:

"We have considered the issue, examined the facts and the case laws. It is true that various judicial principles were established on the basis of the facts available in each case. If the funds arc nor having any business requirement and funds are deposited for Long Term Investments or funds are received and invested which are not required for business purposes the income thereon can be considered as 'Income form Other Sources'. The various case laws relied upon by the learned D.R. are given in the context where the surplus funds were not being used for the business. However, in the various case laws relied upon by the learned counsel for the assessee, the deposits are being used in the course of business and are only deposited for short term periods or in current accounts and the source of funds are business receipts. In the present case, there is no dispute that the funds aresale proceedings m the business activities of the assessee company abroad. It is also seen that instead of repatriating the funds to India, the assessee was permitted to utilize the funds for their day-to-day administration purposes as well as for repayment of various loans taken for business purposes by retaining the funds abroad with the necessary permission from RBI. It is also a fact that these deposits are kept in Current Accounts or in short term deposits for their immediate use for business purposes. On these facts it is to be held that the funds are being used in the business and the incidental business incomes on the short ten deposits abroad are to be considered as business receipts only. This view is also supported by the action of the CBDT in taking

up the assessee's case before the inland revenue authorities of UK when the same was being taxed as 'Income from Other Sources' not covered by the DTAA between UK and India. These facts are established in the order for the Assessment Year 1993-94 of the learned CIT(A) and as submitted by the assessee, the matter was not challenged and accepted upto Assessment Year 1996-97. For these reasons, we are of the opinion that the interest earned on short term deposits is to be considered as Income from Business. Consequently, the Assessing Officer is directed to treat the interest income as income from Business. The assessee's grounds are allowed on this issue".

21. This was affirmed by the Hon'ble Bombay High Court and answered this issue in favour of assessee vide paras 7 and 8 as under:

"7. It is of vital importance to note the representation made by the CBDT to the Revenue Authorities of U.K. in 1990 to the effect that the interest income earned in England from the current account and short term fixed deposits were not income from other sources chargeable to tax in U.K. but in fact income from business. The very fact that in the year 1990, the Central Board of CBDT through its Chairman had represented to the Revenue Authorities in U.K. that the interest income earned on amounts kept in current account arid short terms fixed deposits was essentially business income and not income from other sources is certainly binding upon the department, more so when they are unable to show any difference on facts when the representation was made in 1990 and during the Assessment years 2001-02 and 2002-03 in question.

8. In view of the above, so far as question (b) is concerned, no substantial question of law arises and therefore the same is dismissed."

22. When these facts were confronted, Ld. CIT-DR, he fairly agreed that there is no difference in facts in this year, what was in AY.2001-02 and he could not controvert or could not distinguish the decision of Hon'ble Bombay High Court or of the Tribunal. We noted that this issue is squarely covered in favour of assessee and against the Revenue and respectfully following the view taken in AY.2001-02 by the Hon'ble Bombay High Court, we reverse the order of lower authorities and allow this issue of assessee's appeal.

We considering the facts and explanations of the assessee, respectfully follow the earlier year decision in the asessee's own case and accordingly we dismiss the ground of appeal of the revenue.

16. The second disputed issue with respect to excess provisions for obsolescence credited to profit and loss account, the Ld. DR submitted that the CIT(A) erred in directing the AO to delete the addition. We find this issue is also covered in favour of the assessee in its own case for the A.Y 2009-10 observed at page 16 Para 14 read as under:

14. The only issue in Revenue's appeal is as regards the order of CIT(A), confirming the addition made by the AO on account of excess provision for obsolescence or write back the provisions, amounting to ₹34,75,00,000/-. For this, Revenue has raised following Ground Nos. 1 & 2:

"1. Whether on the facts and in the circumstances and in law, the Ld.CIT(A) erred in directing the Assessing Officer to delete the addition of Rs.34,75,000/- made by the AO on account of excess provisions for obsolescence without appreciating the fact that the provision made is contingent liability and was not incurred by the Assessee?

2. Whether on the facts and in the circumstances and in law, the Ld.CIT(A) erred in directing the Assessing Officer to delete the addition of Rs.34,75,000/- without appreciating the fact that the provision was written back and credited to the P/L A/c. and was further reduced from the total income in the computation of income made by the AO on account of excess provision of obsolescence without appreciating the fact that the provision made is contingent liability and was not actually incurred by the assessee?"

15. We find that this issue is covered by the Tribunal's decision in assessee's own case for AY 2008-09, where vide para 34 to 36 read as under:

34. At the outset, Ld. Counsel for the assessee stated that this issue has been adjudicated by the CIT(A) in AY.2007-08 and the Department has accepted the decision and not filed any appeal in any higher forums regarding the disallowance of exclusion of

provisions for obsolescence transfer to credit of Profit and Loss A/c while computing business income. When this fact was pointed out, Ld. Counsel for the assessee stated that the Tribunal can take a view. The assessee has filed complete details for AYs.2004-05, 2005-06 and 2006-07, wherein excess provision for obsolescence transferred amount to the credit of Profit and Loss A/c and exclusion by assessee while computing business income was not added by the AO. The relevant details are as under:

Account Year: 31.03.2008 Asst. Year: 2008-09

Excess Provision for Obsolescence transferred to the credit of Profit & Loss A/c and excluded in the computing Business Income

35. We noted that the CIT(A) has considered this issue and following the findings of CIT(A) in AY.2007-08, deleted the addition by observing in para 5.3, as under:

"5.3 Ground of appeal No. 3 :

5.3.1 This issue has been discussed by my Ld. Predecessor in appellant's own case in assessment year 2007-08 vide appeal No. CIT(A)-9/AC 5(1)/252/2009-10 dated 28.03.2011 vide para No.3. The LAO as well as the LAR have argued that the facts are identical in assessment year 2007-08 and 2008-09 with reference to this particular disputed issue. Since the facts are identical, hence the decision of my Ld. Predecessor is reproduced from the appellate order for Assessment year 07-08 as under:

"In ground No.2, the appellant has challenged the action of the assessing officer against addition of Rs.42,87,36,908/- credited to the P&L Account for the year ended 31st March 2007 in respect of transfer from provision for obsolescence.

3.1 The facts are that the appellant is engaged in the business of international air transport of passengers and cargo, in accordance with the consistently followed accounting practice based on the method advised by International Air Transport Association has provided for 'Provision for Obsolescence' of air-craft related stores 0nd spare parts. This matter is disclosed in the significant accounting policies in the Audited Accounts, It is further stated by the Counsel of the assessee that the appellant has regularly made provision was always disallowed by the appellant in Computation of Income submitted with Return of Income of determine "Business Income" as per I.T. Act, 1961.

3.2 It is further submitted that if it is observed at the close of the year that the final balance for provision for obsolescence is in excess, such excess amount was transferred to the credit of P&L Account such allowance credited to Profit and Loss Account was excluded from income to compute taxable income of respective years. The appellant has also submitted a statement showing treatment of provisions for obsolescence in earlier years from assessment years 2002-03 to 2006-07.

3.3 In the appellate hearings, the appellant has also submitted copies of Computation of Income and Assessment orders for Assessment Years 2002-03 to

2006-07 in support of the submissions that such provisions debited to the P & L Account was excluded while computing taxable income of the appellant. It is finally submitted that the provisions for obsolescence debited to P & L Account has never been claimed for computing taxable income of the appellant and never been allowed in the income tax assessments of the appellant.

3.4 1 have considered the submissions of the appellant and considering the fact that such provisions was never allowed as deduction in earlier years, any amount transferred to the credit of P & L Account from such "Provisions for Obsolescence" could not be added to the income of the appellant and accordingly the Assessing Officer is directed to delete the addition of Rs.42,87,36,908/- made in respect of Provisions for Obsolescence'.

5.3.2 Respectfully following The decision of my Ld.Predecessor and keeping in view that the facts are absolutely identical in nature for assessment year 2007-08 and the assessment year 2008-09 on this 3.2 It is further submitted that if it is observed at the close of the year that the final balance for provision for obsolescence is in excess, such excess amount was transferred to the credit of P&L Account such allowance credited to Profit and Loss Account was excluded from income to compute taxable income of respective years. The appellant has also submitted a statement showing treatment of provisions for obsolescence in earlier years from assessment years 2002-03 to 2006-07.

3.3 In the appellate hearings, the appellant has also submitted copies of Computation of Income and Assessment orders for Assessment Years 2002-03 to 2006-07 in support of the submissions that such provisions debited to the P & L Account was excluded while computing taxable income of the appellant. It is finally submitted that the provisions for obsolescence debited to P & L Account has never been claimed for computing taxable income of the appellant and never been allowed in the income tax assessments of the appellant.

3.4 1 have considered the submissions of the appellant and considering the fact that such provisions was never allowed as deduction in earlier years, any amount transferred to the credit of P & L Account from such "Provisions for Obsolescence" could not be added to the income of the appellant and accordingly the Assessing Officer is directed to delete the addition of Rs.42,87,36,908/- made in respect of Provisions for Obsolescence'.

5.3.2 Respectfully following The decision of my Ld. Predecessor and keeping in view that the facts are absolutely identical in nature for assessment year 2007-08 and the assessment year 2008-09 on this particular issue, the addition made by the LAO is deleted. Ground of appeal No.3 is allowed".

36. As the issue is no longer res integra we confirm the order of CIT(A) deleting the addition.

Even for the sake of consistency, the issue is in favour of assessee."

> *16. Respectfully, following the earlier year Tribunal decision in assessee's own case, we confirm the order of CIT(A) deleting the addition made by the AO. This issue of Revenue's appeal is dismissed.*

We considering the facts and explanations of the assessee and respectfully follow the earlier year decision in the asessee's own case for the A.Y 2009-10 and we dismiss this ground of appeal of the revenue.

17. The next disputed issue is with respect to claim of provision for frequent flyer programme. The Ld. AR contented that this issue is covered in favour of the assessee by decision of Hon'ble Tribunal in the assessee's own case for the A.Y 2009-10, where the Tribunal has observed at page 12 Para 8 to 10 read as under:

> *8. The next issue in this appeal of assessee is against the order of CIT(A), confirming the action of the AO in disallowing the provision made in respect of accounts of Frequent Flier Programme. For this assessee has raised the following ground No. 4: -*
>
> *"3. On the facts and circumstances of the case and in law the learned CIT(A) erred in confirming disallowance of ₹ 70,00,000/- made in the accounts in respect of Frequent Flier Programme:"*

9. We find that this issue is also covered by Tribunal decision in assessee's own case for AY 2008-09, wherein the Tribunal has dealt with identical issue vide Para 27 & 28 as under: -

"27. Brief facts are that the AO noticed that the assessee-company has made provision under Frequent Flyer Programme of ₹118.1 Million. The AO required the assessee to justify as to how such provision is deductible and also to furnish the working of such claim. The assessee explained vide letter dated 25-10-2010 and noted that the assessee in a view to encourage the passengers to prefer travelling by the same air-line over flights of other air-lines, introduced the reward programme styled as 'Mileage Accumulation Programme/Frequent Flyer Scheme' over the customers. Accordingly, a provision was made for Frequent Flyer Programme of ₹115.90 Million as outstanding in the Balance Sheet as on 31-03-2008. Ld. Counsel for the assessee explained that the AO inferred that out of the provisions of Frequent Flyer Programme, a sum of ₹118.1 Million, the assessee actually incurred expenses of ₹2.2 Million only during the FY.2007-08 relevant to AY.2008-09. According to the AO, the excess provision has been made on this account of ₹115.90 Million. Ld. Counsel for the assessee stated that such excess provision of ₹115.90 Million was contingent in nature and this view was taken in earlier assessment years also and since the excess provision was contingent liability, the same was disallowed. Assessee filed the complete details of Frequent Flyer Programme in assessee's Paper Book at Pages 43 to 48 and reconciled the entire provision made of ₹11,81,12,010/-. Ld. Counsel for the assessee stated that this issue is squarely

covered in favour of assessee by the decision of the Co-ordinate Bench of this Tribunal in assessee's own case for AY.2007-08 in ITA No.5204/Mum/2011, dt.01-04-2016, vide para 6, as under:

6. The last ground pertains to deleting the disallowance of Rs.455.28 lakhs made on account of frequent flier program (FFP). The ld. DR defended the disallowance made by the Assessing Officer, whereas, the ld. Counsel for the assessee contended that the impugned issue is covered by the decision of the Tribunal in the case of Jet Airways Ltd. (ITA No.3201/Mum/2003 and 6084/Mum/2003) order dated 30/05/2006. This factual matrix was not controverted by the ld. DR.

6.1. We have considered the rival submissions and perused the material available on record. There is uncontroverted finding that the liability in respect of FFP miles accrues simultaneously with a passenger undertaking travel on a fare paying ticket, therefore, it cannot be a contingent liability. Following the aforesaid decision of the Tribunal dated 30/05/2006 and further in the absence of any contrary facts/decision and the case laws relied upon in para 7.5 of the impugned order, we find no infirmity in the conclusion of the Commissioner of Income Tax (Appeal).

Finally, the appeal of the assessee is allowed and that of the Revenue is dismissed"

28. As the issue is covered in favour of assessee, respectfully following the decision of the Co-ordinate Bench decision, we allow this issue of assessee."

> *10. This issue is covered in favour of assessee in assessee's own case (supra), respectfully following Tribunal decision in this year also, we allow this issue of assessee.*

We respectfully follow the above decision and dismiss the grounds of appeal of the revenue.

ITA No. 4485/Mum/2018, A.Y 2011-12.

18. The grounds of appeal Nos i, ii, iii of the present revenue appeal are identical to ITA No. 4486/Mum/2018, for A.Y 2010-11 (except variance in figures) and the decision rendered in above paragraphs no 15,16,&17 would apply mutatis mutandis for this case also. The ground of appeal No. (iv) is with regard to write off of amounts in respect of wholly owned subsidiary companies. The Ld.AR submitted that this issue is covered in favour of the assessee's in its own case for the A.Y 2009-10. We considered it appropriate to refer to the decision of the Hon'ble Tribunal in assessee's own case for A.Y. 2009-10 in ITA No. 3383/Mum/2014 & ors dated 08.08.2019 observed at Para 6 read as under:

6. Having heard both the Ld. representatives and perused the material on record, we are of the considered opinion that such dues were recoverable by the assessee from Airline Allied Services Ltd on account of reimbursable costs / expenditure incurred by the subsidiary company. The transactions with the said subsidiary company was found in previous year also as per the materials available on record. It is also evident that the assessee's Audit Committee had stated that said amount should be written off by the assessee company and the same was said to be approved by the Board of Directors in its meeting held on 24/11/2007. Since then, the said amount has been written off in its books. Similar practice also prevailed in F.Y. 2008-09. The Assessing Officer as well as the CIT(A) did not have any evidence to controvert the same. From the facts and circumstances of the case, it is seen that such addition has been made by mere surmise and conjecture.

7. Thus, it is a settled position in law that it is not necessary for the assessee to prove that any amount due / debt which has become irrecoverable but it has written off as irrecoverable in the assessee's books, need not be proved as bad debt by the assessee. We would like to place reliance on the decision of Hon'ble jurisdictional High Court of Bombay in Principal Commissioner of Income-tax-10 vs Hybrid Fiannce Services Ltd in Income-tax Appeal No. 1265 of 2017 with Income-tax Appeal No 1469 of 2017 judgement dated February 11, 2020 and Hon'ble Supreme Court in TRF Ltd vs CIT (supra).

8. From the above observation it is hereby directed to delete the addition made and ground 4 of assessee's appeal is allowed.

9. In the result, appeal of the assessee is allowed.

We respectfully follow the judicial precedence in the assessee's own case and uphold the action of the CIT(A) and dismiss this ground of appeal of the revenue.

In the result, the revenue appeal is dismissed.

ITA No. 4484/Mum/2018, A.Y 2012-13

19. The grounds of appeal Nos i, ii, iii of the revenue appeal are identical to ITA No. 4486/Mum/2018, for A.Y 2010-11 (except variance in figures) and the decision rendered in above paragraphs 15,16&17 would apply mutatis mutandis for this case also. The ground of appeal No. (iv) is with regard disallowance of loss on sale of inventory. The AO has made the disallowance on loss on sale of inventory and on appeal the CIT(A) has granted the relief and CIT(A) observed at page No. 20 Para 12 read as under:

Ground of appeal No.7

7. The learned DCIT erred in concluding that "Inventory" of the appellant is part of the "Fixed Assets" and further erred in disallowing loss on sale of Inventory of Rs. 35.35 Crores.

12.1 AO's Findings & Conclusion:

12.1.1 The AO has disallowed loss of Rs. 35.35 crores suffered by the appellant on account of sale of unusable old/obsolete inventory, by treating the "Inventory" as a part of block of Fixed Assets of the appellant Company. It is stated by the A that once the sale price is reduced from the WDV, the claim of loss cannot be allowed.

12.2 Appellant's Submissions and Contentions:

12.2.1 The appellant has submitted that "INENTORIES" is not part of the Fixed Assets of the appellant company but includes Stores and Spare Parts and Loose tools which are required to carry out maintenance and repairs of the aircraft and other fixed Assets of the appellant Company. It is the submission if the appellant that it is engaged in the business of international air transport of passengers and cargo, that many Spare parts for maintenances of aircraft are specific to the particular type or model of the aircraft and the important spare parts have fixed date (Expiry date) after which they are not to be used for repairs and maintenance of aircraft. It is further submitted that with the phasing out of particular type/model of the aircraft, such parts in stock are required to be identified and disposed of and during the year certain Spares and parts included in "Inventory" were identified as old/ obsolete and not usable by the company and such obsolete/non-usable

inventory was sold by the appellant company. The loss suffered of Rs. 35.35 crores on such sale of unusable old/obsolete inventory has been written off to Profit & Loss Account for the year ended on 31.03.2012. Thus the appellant claimed that the loss on Sale of inventory maintained for repairs and maintenance of aircraft is an allowable deduction for determining taxable "Business Income" of the appellant.

12.3 Decision:

12.3.1 I have considered the submission of the appellant, carefully gone through the order of the AO, and perused the material on record.

12.3.2 The appellant has referred to NOTE 13: "INVENTORIES" forming part of appellant's Audited Accounts for the year ended on 31.03.2012 (Asst. Year 2012-13) and it is observed that it includes only stores and Spare parts and loose tools only. Considering that the Appellant is engaged in the business of areirgyitermational air transport of passengers and cargo and that many spare parts for maintenances of aircraft are otHES os mo to the particular type or model of the aircraft which have a expiry date, after which they are not to be tepairs and maintenance of aircraft, the claim of the appellant that during the year certain spares and parts included in "Inventory" were identified as old/ obsolete and not usable by the company and such obsolete/non-usable inventory was sold by the appellant company, cannot be denied in the absence of the any evidence to the contrary. There is nothing on record to suggest that such "INVENTORIES" which includes stores and spare parts and loose tools was part of the Fixed Assets of the

> *appellant company and the appellant has claimed depreciationon such Inventories earlier.*
>
> *12.3.3 Therefore, the AO is directed to allow loss of Rs. 35.35 crores suffered by the appellant on account of sale of unusable old/obsolete inventory.*
>
> *12.3.4 Accordingly, this ground of appeal is allowed.*

20. The Ld. DR could not controvert the findings of the CIT(A) with new cogent evidence or material information to take different view. Accordingly we uphold the decision of the CIT(A) on the disputed issue and dismiss this ground of appeal.

21. In the result, the appeals filed by the assessee are partly allowed for statistical purposes and the appeals filed by the revenue are dismissed.

Order pronounced in the open Court on 07.12.2022

Sd/-	Sd/-
(BASKARAN BR)	(PAVAN KUMAR GADALE)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated 07.12.2022
KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.

3. The CIT(A)
4. Concerned CIT
5. DR, ITAT, Mumbai
6. Guard file.

आदेशानुसार/ BY ORDER,

//True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai