आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ, अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD

BEFORESHRI PRAMOD M. JAGTAP, VICE PRESIDENT
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

Sl. No	ITA No(s)	Assessment Year (s)	Appeal(s) by Appellants vs. Respondent	
			Appellants	Respondent
1.	328/Ahd/2017	2011-12	N.K. Proteins Pvt. Ltd. (NKPL) 7th Floor, Popular House Ashram Road, Ahmedabad PAN: AAACN 9377 N	The DCIT Circle-3(1)(1) Ahmedabad
2.	329/Ahd/2017	2011-12	N.K. Industries Ltd. (address same as above) PAN: AAACN 9376 N	-do-Revenue
3.	1211/Ahd/2018	2012-13	-do-Assessee	-do-Revenue
4.	1213/Ahd/2018	2011-12	Tirupati Proteins Pvt. Ltd. 2nd Floor, Popular House Opp. Sales India Ashram Road, Ahmedabad PAN: AABCT 8423 E	The ACIT Circle-4(1)(2) Ahmedabad

Assessee by :	Shri S.N. Soparkar, Sr. Advocate & Shri Parin Shah, AR
Revenue by :	Shri Sudhendu Das, CIT-DR

सुनवाई की तारीख/Date of Hearing : 22/09/2022 & 13/10/2022
घोषणा की तारीख /Date of Pronouncement: 16/11/2022

आदेश/O R D E R

PER MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

Out of these four appeals, two appeals being ITA Nos.329/Ahd/2017 & 1211/Ahd/2018 filed by the assessee N.K. Industries Ltd. are filed against the order of the learned Commissioner of Income-tax (Appeals)-9 & 7, Ahmedabad ["CIT(A)" in short] dated 22/11/2016 & 12/03/2018 for Assessment Years (AYs) 2011-12 & 2012-13 respectively, one appeal being ITA No.328/Ahd/2017 filed by the assessee namely N.K. Proteins Pvt. Ltd. is directed against the order of the CIT(A)-9, Ahmedabad dated 23/11/2016

for AY 2011-12 while the remaining one appeal being ITA No.1213/Ahd/2018 filed by the assessee namely Tirupati Proteins Pvt. Ltd. is against the order of the CIT(A)-7, Ahmedabad dated 12/03/2018 for AY 2011-12. Since these appeals filed in the case of assessees belonging to the same group involve some common issues, the same have been heard together and are being disposed of by a single consolidated order for the sake of convenience.

2. First we take up ITA No.328/Ahd/2017 for AY 2011-12 in the case of N.K. Proteins Pvt. Ltd. and the grounds of appeal raised therein are as under:

1. *On the facts and in the circumstances of the case, the CIT(A) has erred in not accepting Appellant's plea that the order passed by the Ld.CIT(A) is bad in law and void ab initio.*
2. *On the facts and in the circumstances of the case, the Ld.CIT(A) ought to have accepted that assessment order was barred by limitation.*
3. *On the facts and in the circumstances of the case, the learned CIT(A) is not correct in observing that the Assessing Officer had right reasons to believe that special audit was required in the given case.*
4. *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred by confirming the Assessing Officer's decision that the loss of Rs.14,42,91,136/- is speculative in nature.*
5. *On the facts and circumstances of the case, the Ld.CIT(A) has erred in confirming the disallowance of transaction charges of Rs.2,65,865/- u/s.40(a)(ia) in as much as Section 194H is not applicable, since the transaction charges is not the commission or brokerage within the meaning of Section 194H.*
6. *On the facts and circumstances of the case, the Ld.CIT(A) has erred in confirming the disallowance of transaction charges of Rs.1,30,29,338/- in as much as there is no obligation on the part of assessee to recover such amount from the client and the assessee is following consistent practice not to recover such charges from client.*
7. *On the facts and circumstances of the case, the Ld.CIT(A) has erred in confirming the disallowance of depreciation of Rs.6,04,648/- without appreciating the tax audit report and the production sheet.*

3. At the time of hearing before us, the learned Counsel for the assessee has not pressed Ground Nos. 1 to 3 raised by the assessee in this appeal; the same are accordingly dismissed as not pressed.

4. Apropos the issue raised in Ground No.4 relating to the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) on account of the alleged speculative loss, the relevant facts of the case are that the assessee is a company which is engaged in the business of manufacturing edible and non-edible oil products and by-products thereof. The return of income for the year under consideration was filed by it on 25.10.2011 declaring a total income of Rs.25,68,73,038/-. Although the said return was originally processed by the Assessing Officer under Section 143(1) of the Income-tax Act, 1961 ("the Act" in short), the case was subsequently selected for scrutiny and a notice under Section 143(2) of the Act was issued by him to the assessee on 14.09.2012. During the course of assessment proceedings, complexities and doubts about the accounts of the assessee-company were noticed as it was a group concern of N.K. Proteins Group which was involved in transactions with National Spot Exchange Ltd. ("NSEL" in short) and the assessee-company had also carried out certain transactions on NSEL platform. In order to ascertain whether the transactions with its sister-concerns were completed by the assessee-company by actual delivery of stocks or merely multiple transactions of the same stocks were done with a view to artificially inflate turnover, Special Audit of the books of accounts of the assessee-company for the year under consideration was ordered under Section 142(2A) of the Act by the competent authority. Due to financial irregularities and default in payments to investors, the NSEL was investigated by various Government agencies. In this connection, the assessee-company being member of NSEL

and its group concerns were also surveyed under Section 133A of the Act by the Investigation Wing of the Income-tax Department on 22.08.2013. After taking into consideration the survey report as well as Special Audit Report and the submission made on behalf of the assessee on the relevant issues, the following observations/findings, as summarized in paragraph No. 7.19 of the assessment order, were recorded by the Assessing Officer:-

> *"a. The assessee group is closely linked with NSEL.*
>
> *b. Though NKPL claimed to a broker for NSEL in effect all transactions done by it were done for the entities of the NKP group only. Thus the charade of being a broker was created only to mask the true nature of the transactions entered into by the group entities on the NSEL platform.*
>
> *c. These was systemic misuse of the NSEL platform and what was apparent was admittedly as per the assesses group itself not the true form of the transactions.*
>
> *d. Though NSEL was a physical exchange that is all the trades were to be backed with goods and the transactions on paper were to be settled against delivery of goods, delivery never took place and transactions of buy and sell remained on paper only.*
>
> *e. In effect the whole of the stock on paper was nonexistent. The assessee group being one of the main warehouses of NSEL for castor o(l and -other related items was aware of the true nature of NSEL and was in effect an active collaborator In the misuse of the NSEL platform.*
>
> *f. Though in his submissions before the it authorities the assessee group claimed that the true nature of the transactions on NSEL were finance transactions it has never withdrawn the claim of losses of Rs. 14,42,91,136 debited in its books.*
>
> *g. Even if the form in which the transactions are booked is taken to be true the loss of Rs. 14,42,91,136 admittedly incurred on transactions that were settled without effecting delivery being speculative in nature cannot be allowed to be set off against business income.*
>
> *h. Even if the form of the transactions is takers to be financing transactions then as discussed above the difference between the sale -purchase partakes the character of interest and as no TDS was done on these the same is disallowable. Further as till date the assessee group has not been able to discharge the onus of explaining the use of the funds to the extent of Rs.43.80 Crores, that it got from the so called financing transactions, for the purpose*

of its business the interest expenses claimed to have been incurred on the said finance is disallowed."

4.1 On the basis of the above findings/observations recorded by him, the Assessing Officer treated the amount of Rs.14,42,91,136/- as speculative loss and the claim of the assessee that the same being interest expenditure allowable as deduction was disallowed by him.

5. The action of the Assessing Officer in treating the amount of Rs.14,42,91,136/- as speculative loss was challenged by the assessee in an appeal filed before the learned CIT(A) and the following submissions were made on behalf of the assessee before the learned CIT(A) in writing in support of its case that the amount in question being finance charges/interest was deductible as business expenditure and the Assessing Officer was not justified in treating the same as speculative loss:-

"5. Regarding addition on account of trading transactions on NSEL platform and loss incurred at Rs. 14,42,91,136/-.

5.1 The Assessing Officer in para 4 of the assessment order has referred trading practice of the commodities on NSEL i.e. National Spot Exchange Ltd. It is stated that as per the mechanism the sellers of a particular commodity brings their goods to the godown operated by National Spot Exchange and get receipt online for such goods and thereafter they can sell the receipt to the buyer online, the buyer will pay the amount and on producing the receipt they can get the material. It is stated that the buyer can also sell the receipt to other buyer. According to him there is supposed to be a settlement cycle for the commodities to be traded on NSEL. It is stated by the AO that the buyer was supposed to pay the money to the seller for the entire lot to be purchased by him on the date of settlement of the cycle. However, in reality, it did not happen and quantity of goods was never delivered. The cycle was settled by repayment of whole amount of money back to the buyer i.e. the purchaser sold the goods back to the seller. Thus, the financial transactions took place through NSEL. In para 5.3 of the order, the AO has stated as under-

"5.3 The borrowers and lenders entered into a pair of contracts for every deal. First, there was a three-day contract that mandated that

within two days of signing it, the investor will lend the money and the borrower will hand over a warehouse receipt. Simultaneously, they entered into a 36-day contract, which said 35 days after cutting the deal, the borrower will pay back a pre-agreed amount and get back the receipt. The difference between the money lent and paid back captured the interest return. The money borrowed was rarely paid back after 36 days. On the contract's expiry, the borrower just paid the interest to the lender and the two parties would roll over the positions by entering into d new but similar contract, this would go on for months. This was similar to the now banned badla finance once the lifeline of stock markets."

In the background of the above discussion, the Assessing Officer has referred to appellant's transaction in the NSEL in para 6 and 7 of the assessment order. As stated to by him, NK Proteins is a member of National Spot Exchange Ltd. It is stated by him that there was survey in the group cases of N.K. Proteins u/s. 133A of the Act on 22.8.2013 by the Income Tax Department. The Special Auditors appointed by him have given their report dated 26.9.2014. On the basis of Special Audit Report, it is stated by him that the appellant has incurred loss of Rs. 14,42,91,136/- on the transactions of cotton wash oil on NSEL through NK Proteins. The Party-wise summary of the transactions of sale and' purchase is reproduced on page 8 to 10 of the assessment order. The transactions stated by him are summarized as under:-

	Sale of NKIL		*Purchase of NKIL*		
Goods traded	*Quantity*	*Amount*	*Quantity*	*Amount*	*Profits/losses*
Castor seeds	*333154875*	*12778992143*	*333154875*	*13071300187*	*(-)292308045*
Indian castor oil	*47070000*	*4231635650*	*47070000*	*4309751760*	*(-)78116110*
Cotton wash oil	*90079620*	*4670418546*	*90079620*	*4747764011*	*(-)77345466*
				Total:-	*(-}447769621*

Keeping in view the background of para 5.2 of the assessment order, the Assessing Officer proposed to disallow the above loss on the ground that the transactions were not supported by the delivery of goods. The appellant had, therefore, explained before the AO that :-

i) the transactions were entered into through NK Proteins, broker of the NSEL and that transactions are basically in the nature of financial transactions.

ii) The appellant had entered into sale and purchase of both. The sale and purchase invoices with quantity details, VAT charged were submitted and it was also explained that the VAT was paid by the appellant.

iii) it was explained that the transactions were entered into with a view to avail finance for the business requirements of the appellant and that the loss represented the cost to garner funds to run business, which is reflected as trading loss as above.

iv) It was explained that the assessee company was in the need of finance and trading facility available on NSEL attracted the appellant to enter into such transactions, so that the appellant was having finance available for its business and thus there was no intention for incurring loss.

v) The transactions were entered into with the market rate and were entered into on the NSEL platform.

vi) the payment is made by banking channel through account payee cheque for purchase as well as sale; and

vii) the sellers and buyers are assessed to tax i.e. they are having PAN No.

The Assessing Officer was, therefore, requested to consider the above facts and that the loss represents the cost to garner funds for running the business. The appellant had also submitted the details of fund utilization with the bank statement and it showed that the funds were utilized for the purpose of business.

The Assessing Officer has referred to explanation of Nilesh Patel during the course of survey u/s. 133A of the Act, and that the modus operandi adopted by NK Proteins and its clients was explained by him. The relevant para is para 7.6 of the order. The same is summarized as under:-

I) NK Proteins is Member Broker on NSEL.

II) NK Inds. being client of NK Proteins executes T+3 contract on the electronic platform of NSEL, say for sale of 100 Kg. of castor oil to another client of another broker of NSEL for Rs. 100 per Kg.

III) The other prospective client/ investor referred to above who has purchased the quantity as above executes another transaction on NSEL for sale of said quantity on T+36 contract on the electronic platform whereby it sells entire quantity purchased as above to another client of NK Proteins (say NK Corporation) for Rs.110 per kg.

IV) NK Corporation carry out Intra group sale of same quantity to NK Inds., say for Rs.112 per kg.

Thus, the entire quantity is set off for purchase of sale in the hands of each of the party.

V) NK Inds. on the first sale receives the sale consideration within 3 days i.e. on settlement of T+3 contract.

As against this, NK Corporation makes payment for purchase made by it under T+36 contract from the purchasing party of NK Inds. and it has to pay on the settlement date, after 36 days.

The assesses pays to NK Corporation the purchase consideration on the expiry of T+36 contract.

VI) Similar contracts are being entered into and the funds are received as per T+3 contract which are repaid as per T+36 contract.

VII) For the above purpose, NK Proteins also maintains margin account of certain percentage of value of transaction on NSEL.

VIII) The Assessing Officer has not accepted the above contentions vide para 7.16 to 7.20 of the order. The main reasons given by him are summarized as under-

i) The transactions are fictitious for purchase & sale on NSEL platform, without actual delivery of goods. (para 7.14)

ii) There was no real transaction of purchase and sale but the transactions were given to obtain the funds from the investor on short term basis. (para 7.15 & 7.16)

iii) If the appellant's contention that it is a finance transaction, is accepted, it represents interest element which is not reflected in the accounts. It is stated by the AO that if it is a finance transaction as stated by the assessee, the tax should have been deducted at source on the interest and as per provisions of section 40(a)(ia) the payment is required to be disallowed in absence of deduction of tax. It is stated that apart from furnishing the details of payment out of funds received from NSEL, the assessee has not given fund flow statement. (para 7.17)

iv) The loss so incurred without delivery of goods cannot be set off against the regular business income. As it is an arrangement by the assessee with the help of NSEL to get the funds, according to him the same is not the normal business transaction.

v) Therefore, according to the AO, arrangement made is colourable device to reduce tax liability in connivance with NSEL and the said loss cannot be considered as normal business loss.

vi) Alternatively, it is stated by him that the transactions having been settled without delivery, the same is covered by Sec.43(5) r.w.s. 73 and is speculative loss and cannot be set off against the normal business income.

With the above remarks, the Assessing Officer has held that the claim of loss of Rs.44,77,69,621 is rejected.

5.2 In this connection, the appellant submits that as stated above, the transactions were entered into in the NSEL by the appellant through NKPL in order to get the funds for short term period. The modus operandi has been explained before the AO and even in the proceedings u/s.133A, the same is again explained by way of example as under:-

i) The first step is, NKIL sells the castor oil for Rs.100 for a particular quantity to client of another broker, say to IBMA on a particular date for T+3 settlement contract. In that case, the settlement is to be carried out within 3 working days from the date of transaction. On that day of settlement, the NKIL gets payment from NKPL via NSEL.

ii) The IBMA on the same day entered into contract under T+36 settlement contract with the concern related to NKIL, say NK Corporation for Rs.110. This settlement is to be made at the period of 36 working days. On the date of settlement NK Corporation pays Rs.110 to IBMA.
iii) On the other end, NK Corporation sells the said material to NKIL on the same day for Rs.112 and its payment is to be made after the period of settlement of T+36 transaction.

iv) Thus, the goods sold by NKIL are adjusted against goods purchased from NK Corpn. Similarly, goods purchased by IBMA are adjusted against goods sold to NK Corpn. and goods purchased by NK Corpn. from IBMA are adjusted against the goods sold to NKIL.

v) Thus, in the process, the NKIL gets funds of Rs,100 for a period of at least 36 days. The difference between the payment made by it at Rs.112 and the payment received at Rs.100 is the cost of finance of Rs. 100 for the period of 36 days.

Copies of bills representing one such trading cycle are enclosed which is explained as above. Slide / chart explaining above cycle and fund-flow arising there from is enclosed.

It was with reference to the above contention explained before the AO that the transactions are of the nature to garner funds for business and that the difference being the trading loss is in fact the cost. It was explained that the appellant had obtained the funds for the purpose of its business, and hence, the cost is admissible as business expenditure.

In the light of the above facts, the AO's observation that there was no actual transfer of goods i.e. purchase or sales is not material for admissibility of the claim. What is important is that it represents cost for the use of the funds as explained herein above which is for the purpose of business, and hence, it is admissible. It may be seen that the AO has also noticed this fact inasmuch as he has accepted that the transactions were made to obtain funds from investors on short term basis which support appellant's contention, (para 7.16 & 7.18)

As regards the AO's observation about not debiting any interest to the profit and loss account, it may be noticed that as stated above it represents difference between the purchase and sales price of transaction. Therefore, it is considered as trading loss in the books, hence there is no question of debiting the same as interest in the accounts Moreover, as will be observed from the example given herein above the receipt of proceeds from sale are from a different entity than the payment made towards the purchase which is from a different entity. As it is considered as trading loss, there is no question of applicability of section 40(a)(ia).

The withdrawal of claim by the appellant to the extent of Rs. 10 crores was only in order to buy peace and was not on account of accepting such allegation of AO. It was proposed by the appellant in order to reduce the claim for cost, for probable use of funds by other concern, if any, keeping in view the nature of transactions explained above.

In so far as the AO's observation about considering it as speculative loss u/s. 43(5) is concerned, it may be submitted that the transactions are with a view to obtain funds, more so when even the Assessing Officer himself states the same and, therefore, the loss represents cost, and hence there is no question of invoking the provisions of section 43(5) of the Act."

5.1 The learned CIT(A) did not find merit in the submissions made on behalf of the assessee on this issue and proceeded to confirm the action of the Assessing Officer in treating the amount in question as speculative loss for the following reasons given in paragraph No. 7.2 of his impugned order:-

"7.2 I have carefully considered the facts of the case, observation of the A.O as well as the case law relied upon by the appellant. It is observed that the A.O has made an addition of Rs. 14,42,91,136/- on account of loss arising out of fictitious transactions. It is observed at para-6.1 of the order that due

to NSEL Scam various regulatory and law enforcement agencies are already investigating the role of the appellant as well as the N.K. Group concerns. The Investigation wing of Income-tax Department too had surveyed the N.K. Group u/s.133A of the Act on 22/8/2013. The appellant itself has admitted that the T+3 and T+36 transactions were in the nature of paired contracts and there was no underlying commodities in these contracts. It is also seen from the findings of FMC, as mentioned earlier, that A.O has correctly drawn the conclusion that these were the trade contracts without any actual delivery of the goods. Shri Nilesh Patel, Director of the appellant has also admitted the said fact. The A.O has summarised the finding at para 7.19 page-17 of the assessment order. I completely agree with the findings of the A.O. The appellant has tried to defend itself by taking the argument such as the substance of transaction should be considered and not the form of the transaction. Further, the appellant has tried to blame NSEL that it was that promoted the appellant to enter into such trading transactions. The books of accounts audited by the special auditor also reflect that the appellant itself has considered these transactions as trading transactions and not financial transactions. The A.O has rightly held that the loss arising out of these transactions is a fictitious loss in nature. Therefore, the A.O has concluded that such transactions cannot be considered as part of its normal business and hence the loss incurred is nothing but an arrangement between NSEL and the appellant and it is the colourable device to reduce its tax liability. Finally, at para 7.18the A.O has given the finding that the transactions conducted on the NSEL platform concluded without physical delivery and hence the Joss incurred is speculative loss. Such a speculative loss cannot set off against the normal business income. Accordingly, the A.O has disallowed Rs.14,42,91,136/-. I completely agree with the contention of the A.O. It is apparent that the books of accounts maintained by the appellant are in difference with the argument it has taken during the assessment proceedings. According to the appellant, these are financial transactions, however, the appellant itself has not reflected these transactions as financial transactions in its books of accounts. It can also be seen from the order of FMC quoted above that the FMC too is considering these transactions as financial transactions. However, for the Income-tax proceedings and the appellate proceedings, what could matter is the way the books of accounts have been maintained by the appellant. The books of accounts tell a different story. Even if the argument of the appellant that the transactions of NSEL platforms are financial transactions taken into account then the A.O at para-7.16 has raised the issue of deduction of tax at source on payment of interest on these financial transactions. As no TDS has been made on such interest payment the whole quantum is liable to be added back to the income of the appellant u/s.40(a)(ia) of the Act. Therefore, the alternate argument of the appellant also fails. It is also seen that appellant has charged VAT on the

purchases and sales in its books of accounts. Therefore, reliance is placed more on the nature of transactions as trade contracts and not financial transactions. I am of the considered opinion that irrespective of the contention of the appellant that these are financial transactions, I would like to rely upon what has been reflected in its books of accounts by the appellant. As all the transactions on NSEL platform conducted by the appellant were without any physical delivery these transactions are treated as speculative in nature and the loss incurred is speculative loss which cannot be set off against the normal business income. Therefore, the addition of Rs.14,42,91,136/- is hereby confirmed and the ground of appeal is hereby dismissed."

6. The learned Counsel for the assessee submitted that the assessee has suffered a loss of Rs.14,42,91,136/-, but the Assessing Officer disallowed the same stating therein that it is a speculative loss. The Ld.AR submitted that a reference was made for audit u/s.142(2A) only on the basis of some newspaper report and on that basis it was presumed that the assessee's case is required a special audit. The Ld.AR further submitted that the assessee incurred loss in respect of cotton wash oil. The Ld.AR submitted that the assessee entered into transactions with NSEL as broker which were basically of financial nature. The *modus operandi* followed by NSEL to enter into sales and purchase transactions and related to same invoices were prepared with quantitative details. The VAT is also charged on purchases and sales and wherever VAT is payable, it is actually paid by the assessee. The assessee-company has entered into the trading transactions with NSEL with a view to avail finance for the business requirements and the loss represents the interest cost reflected as trading loss in the financial statements. The Ld. AR submitted that there was no intention on the part of the assessee to declare the losses. The assessee-company was in need of finance and the NSEL prompted the company to enter into such trading transactions. There was no intention to book the loss since such loss is nothing but the interest. It is only *modus operandi* followed by NSEL. Thus, in substance, the trading loss

represents the interest expenses on the finance availed from NSEL for the business purposes. The transactions of purchase and sales are actually entered at market rate and the settlement of the same has also been done through NSEL platform. The payment is made and received only by account payee cheques. The sellers and buyers are holding PAN. The Ld.AR further submitted that the treatment given in the accounts is of no relevance. What is to be seen is the substance over form. The substance is interest and not the trading loss. Therefore, the transaction cannot be considered as bogus or not genuine or the loss arising there from is also not bogus. The loss represents the interest expenses represented by trading loss and therefore the loss claimed is genuine having regard to the facts and circumstances of the case. The Ld.AR submitted that the funds received from NKPL are utilized for the purpose of making payment for purchases from suppliers. The funds utilized are for the purpose of business and, therefore, interest represented by loss should be allowed as deduction. For the purpose of financing, the NSEL has maintained a Settlement Account with HDFC bank in the name of N.K. Proteins Ltd. All the pay-in and pay-out transactions with National Spot Exchange Ltd. have taken place through this account only. Thus, the Ld.AR submitted that there was a difference between purchase and sales transactions which is considered as trading loss in the books, hence, there is no question of debiting the same as interest in the accounts. The Ld.AR submitted that moreover as will be observed from the example given by the assessee before the CIT(A), the receipt of proceeds from sale are from the different entity than the payment made towards the purchase which is from a different entity. As it is considered as trading loss, there is no question of applicability of section 40(a)(ia) of the Act. The Ld. A.R. relied upon the decision of Hon'ble Apex Court in case of Tuticorin Alkali Chemicals & Fertilizers Ltd. vs. CIT (1997) 227 ITR 172 (SC), Mc

Dowell & Co. Ltd. (1985) 154 ITR 148 (SC), Virtual 400 ITR 409 and 370 ITR 547 (SC). The Ld. A.R. also relied upon the decision of Great Eastern Shipping related to interest which was decided by the Apex Court.

7. The Ld. DR submitted that as regards ground No.4, there was no transfer of goods and the assessee could not explain as to why the route of exchange, i.e. NSEL has been taken. The DR relied upon the assessment order and the order of the CIT(A). The Ld. D.R. submitted that the borrowers and lenders entered into a pair of contracts for every deal and conceptually NSEL was set up as an online trading platform for a number of commodities and each commodity as its delivery locations at NSEL designated warehouse or accredited godowns. But as per information the said platform was misused. Client of M/s. N. K. Proteins Pvt. Ltd. submitted that M/s. N. K. Industries Ltd. executed T+3 contract in the electronic platform of NSEL whereby N. K. Industries Ltd. sold 100 kg. of castor seeds to another prospective investor/client of another broker of NSEL for Rs. 100/-. The another prospective investor client of NSEL in turn executes T+36 trade contract on the electronic platform of NSEL whereby it sells the castor seeds to another client of M/s. N. K. Proteins Ltd. such as M/s. N. K. Corporation which is an associate concern for Rs. 110/-. Thereafter, the associate concern i.e. M/s. N. K. Corporation carry out intra-group sale back to M/s. N. K. Proteins Ltd. to square off the sale/purchase transactions and to maintain the stock position. All these three transactions were executed simultaneously and after the above set off of circular transactions, M/s. N. K. Proteins Ltd. has to receive the amount on the 3rd day from prospective investor and the subsidiary concern of M/s. N. K. Proteins Ltd. has to pay to the prospective investor after 36 days. In this way the T+36 contracts are rolled over from one settlement cycle to next

cycle. The Ld. D.R. further submitted that the assessee itself has not reflected these transactions as financial transaction in its books of accounts. Therefore, the addition of Rs. 14,42,91,136/- is justifiable.

8. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note here that the Ld. AR submitted before us that the transactions were entered into with a view to avail finance for the business requirements of the assessee and the loss represented the cost to get the funds to run the business. The trading facility available on NSEL attracted the assessee to enter into such transaction. But the Assessing Officer has observed that if the assessee's contention that it is a finance transaction, then it attracts the interest element which is not reflected in assessee's account. Though the contention of the assessee is that it should not be taken as speculative loss, the test of speculative loss can only be determined when the transaction itself is speculative, but in the present case the transaction was that of payment made by banking channel through account payee cheque for purchase and sale with the seller and buyers who are assessed to tax as per the contentions of the assessee. When the parties that of purchaser and seller are present and not artificial then the said transaction cannot be treated as speculative transaction and the loss incurred thereon cannot be speculative loss. The contention of the Ld. D.R. that the N. K. Proteins and its client has executed T+3 and T+36 trade contracts itself establishes that there was a transaction to that effect from the platform of NSEL for which the NSEL has maintained a settlement account with HDFC Bank in the name of N. K. Protein Ltd.. For the purpose of carrying out transaction with NSEL they use to keep 3.5% of the value of the transaction as margin money of this account which is released only after the transaction is over. But since the transaction was not materialized in end

the settlement amount was received in consonance with these business transactions from NSEL and thus it cannot be treated as speculative loss and is a part of business loss. As rightly contended on behalf of the assessee-company, the exercise of re-characterization of transactions in the light of statement given by Shri Nilesh Patel should be restricted to only determination of correct taxable income. The relevant purchase and sales transactions were entered into by the assessee-company in order to avail the funds and, therefore, the loss incurred in the said transactions actually represented cost of such funds which was a business loss. The adverse inference drawn by the learned CIT(A) against the assessee on the basis of withdrawal of such loss partly was also not correct as the reasons for such withdrawal proposed by the assessee were duly explained and the fact that the assessee-company by entering into these transactions had availed finance for the purpose of business was duly established. As regards the applicability of TDS provision, the learned Counsel for the assessee has pointed out from the relevant details of transactions that the sale proceeds were received by the assessee-company from different entities while payment towards the purchase was made towards different entities. The cost of finance thus was not paid to the party from whom the finance was actually availed and the applicability of TDS, therefore, was not warranted. Moreover, the cost incurred by the assessee for availing finance was not strictly in the nature of interest and the party selling the goods having offered the same for taxation, there is no obligation of deduction of tax at source by the assessee. Having regard to all these facts of the case, we are of the view that the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) on account of alleged speculation loss is not sustainable and deleting the same, we allow Ground No.4 of the assessee's appeal.

9. As regards the next issue raised in Ground No.5 relating to the disallowance of Rs.2,65,865/- made by the Assessing Officer and confirmed by the learned CIT(A) on account of transaction charges under Section 40(a)(ia) of the Act, it is observed that even though the details of tax deducted at source from the payment of transaction charges aggregating to Rs.1,21,29,843/- were furnished by the assessee, the Assessing Officer found that the same did not relate to the transaction charges in question amounting to Rs.2,65,865/-. He, therefore, disallowed the transaction charges to that extent by invoking Section 40(a)(ia) of the Act. As noted by the learned CIT(A) in paragraph No. 8.2 of his impugned order, the assessee failed to furnish any details or make any submission to show that tax at source was deducted from the payment of Rs.2,65,865/- made on account of transaction charges paid to IBMA. He, therefore, confirmed the disallowance made by the Assessing Officer under Section 40(a)(ia) of the Act. Even at the time of hearing before us, nothing has been brought on record on behalf of the assessee to prove that the tax at source was deducted from the amount in question paid towards transaction charges. We, therefore, find no justifiable reason to interfere with the impugned order of the learned CIT(A) confirming the disallowance made by the Assessing Officer on this issue. Ground No.5 of the assessee's appeal is accordingly dismissed.

10. As regards the next issue raised in Ground No.6 relating to disallowance of Rs.1,30,29,338/- made by the Assessing Officer and confirmed by the learned CIT(A) on account of transaction charges, the relevant facts are as follows. During the course of Special Audit, it was noticed that transaction charges were paid by the assessee-company for transactions on NSEL platform in connection to caster seeds, soya bean

seeds, castor oil and cotton wash oil. Although it was submitted on behalf of the assessee that such transaction charges were not debited to the profit and loss account, the Assessing Officer found that the same were debited and included in the purchases. In this regard, it was explained by the assessee that it was not obligatory on its part as a broker to recover the transaction charges from the clients. It was also pointed out that as per the consistent practice followed by the assessee-company, the transaction charges were never recovered from the clients and the same, therefore, were debited to the purchase account as forming part of the purchase price. The Assessing Officer did not find this contention of the assessee-company to be acceptable. According to him, the transaction charges were recoverable by the assessee-company from clients and since it could not produce any documentary evidence to substantiate its claim that it was not obligatory to recover the transaction charges, he disallowed the entire transaction charges of Rs.1,30,29,338/-.

11. The disallowance made by the Assessing Officer on account of transaction charges was challenged by the assessee in an appeal filed before the learned CIT(A) and the following submissions in writing were made on behalf of the assessee in support of its case on this issue:-

> *"The Assessing Officer has stated that the company had paid transaction charges for the transactions carried out on NSEL platform for various commodities. This transaction charges was transferred to purchase account of the respective commodities, instead of charging it to the NSEL client. It is stated by the AO that the transaction charges are debited to the purchase of commodities and are charged to P&L A/c. and no recovery thereof has been made from the client. The appellant had explained that it is a practice followed by the appellant-company broker. It is not obligatory on the part of broker to recover the amount of transaction charges. The Assessing Officer has not accepted this contention of the appellant on the ground that before the Special Auditor, the appellant had explained that such transaction charges are not accepted, and hence, not recorded in the books. According to*

the AO, therefore, the appellant was of the view that the said charges are liable for recovery from the clients. Thereafter, he has stated that the transaction charges are debited in the P&L A/c. as accepted by the assessee and assessee could not produce documentary evidence to show that it was not its obligation to recover its transaction charges. Thus, he has made the addition.

The Assessing Officer has further observed that before the auditors in the course of special audit, it was stated that the payment had not accepted such transaction charges and not recorded the same in the books, and hence, it is presumed by the AO that the assessee has confirmed that it is not debited to P&L A/c. Therefore, the question of recovery thereof from the client does not arise. According to him, the appellant has thus confirmed that it is liable to recover the transaction charges. This conclusion of the assessee is only his presumption. At the time of special audit, as the transaction charges were not separately debited in the P&L A/c., but it was debited as part of purchase cost, the concerned person had explained that it has not been debited to P& L A/c. However, it does not mean that it was conceded by him that charges are recoverable.

The appellant submits that this contention of the Assessing Officer is not correct. It is the discretion of the businessman as to how the transactions are to be carried out. Whether the transaction charge paid by it to the Exchange are to be recovered or not, is the discretion of the assessee and the AO cannot ask the assessee to carry out the business as per his opinion. It is held by courts the revenue cannot justifiably claim to put itself in the arm-chair of businessmen and no businessmen can be compelled to maximize his profit. See CIT vs. Dalmia Cement 254 ITR 377 (Delhi). Further, it may be noticed that he has no-where established with any practice prevailing in this business that such transaction charges are liable to be recovered."

11.1 The submission made by the assessee in support of its case on this issue did not find favour with the learned CIT(A) who proceeded to confirm the disallowance made by the Assessing Officer on account of transaction charges for the following reasons given in paragraph No.9.2 of his impugned order:-

"9.2 I have carefully considered the facts of the case, contention of the appellant as well as the case law relied upon by the appellant. It is observed that the A.O has made an addition of Rs. 1,30,29,338/- by disallowing transaction charges claimed by the appellant in its P & L A/c. It is observed

from para-9 of the order of assessment that the appellant had claimed transaction charges, delivery charges, warehousing charges etc. in its P & L A/c. During the appellate proceedings initially the appellant has submitted that it has not accepted such charges and therefore, it has not recorded any such charges in the books of accounts or P & L A/c. The A.O pointed out that the transaction charges amounting to Rs. 1,30,29,338/- are indirectly charged to P & L A/c. and no recovery has been made from its clients. The appellant submitted to the A.O on 31/10/2014 that it has debited Rs.1,30,29,338/- to its purchase accounts as transaction charges and such charges should have been recovered from its clients. However, it contended that it is upto the broker whether to recover transaction charges from its clients or not. However, the A.O has not agreed with the contention of the appellant that it is not necessary for it to recover the charges from the clients. On admission of the fact that appellant can recover the transaction charges from the clients and admission of the appellant that the transaction charges have been debited in its purchase account indirectly, the A.O. has proceeded to disallow Rs.1,30,29,338/- on account of transaction charges. It is normal practice of any broker of any exchange that the only income that the broker earns is the commission income for the transactions taken place on the platform of exchange. Over a period of time the % of said brokerage or commission has gone down. Here, the appellant is further willing to incur expenses on behalf of clients, which is difficult to understand. Rest of all the expenses because of transactions are charged to the client. Therefore, I agree with the contention of the A.O and hereby confirm the disallowance of Rs. 1,30,29,338/- on account of transaction charges debited to P & L A/c. by the appellant. Thus, this ground of appeal is dismissed."

12. The learned Counsel for the assessee invited our attention to page No.34 of the paper book to point out that the transaction charges of Rs.1,30,29,398/- were actually paid/incurred by the assessee-company. He submitted that the said charges incurred by the assessee represented additional cost of funds raised and utilized; and, since there was no requirement of TDS, it should have been allowed as deduction as rightly claimed by the assessee. He submitted that the factum and quantum of the expenditure incurred by the assessee towards transaction charges was not disputed by the authorities below and disallowance was made merely because the assessee did not recover the same from the clients. He

contended that there was no obligation to recover the said charges from the clients and the assessee choose to bear the same as a matter of business expediency. In support of assessee's case on this issue, he relied on the submission made on behalf of the assessee before the learned CIT(A) as reproduced in paragraph No.9.1 of the impugned order. He also relied on the decision of the Hon'ble Gujarat High Court in the case of CIT Vs. Khambhatta Family Trust, reported in [2013] 215 Taxman 602 (Guj.), to contend that for the allowability of any expenditure the requirement is that the same should be wholly and exclusively incurred for the purpose of business and not necessarily.

13. The learned DR, on the other hand, relied on the impugned order of the learned CIT(A) in support of the Revenue's case on this issue and read out paragraph No.9.2 of the same. He contended that the transaction charges should have been recovered by the assessee-company from its clients; but since the assessee choose not to recover the same without there being any business expediency, the claim of the assessee for deduction on account of transaction charges was rightly disallowed by the authorities below.

14. We have heard both the sides and perused all the relevant material available on record. It is observed that the transaction charges in question were actually paid/incurred by the assessee-company and this position was not disputed or doubted even by the authorities below. They, however, still disallowed the deduction claimed by the assessee on account of transaction charges on the ground that the same ought to have been recovered by the assessee from the clients. As submitted on behalf of the assessee-company before the authorities below as well as before the Tribunal, there was no such obligation on the part of the assessee to recover the transaction charges

from the customers and the decision not to recover the same from the clients was taken as a matter of business expediency. The transaction charges actually represented additional cost of funds raised by the assessee-company for the purpose of its business and the expenditure incurred on account of the same was wholly and exclusively for the purpose of business of the assessee as rightly contended by the learned Counsel for the assessee. In the case of Khambhatta Family Trust (supra) cited by the learned Counsel for the assessee, the Hon'ble Gujarat High Court has held that the requirement for allowability of any expenditure as business expenditure is that the same should be wholly and exclusively incurred for the purpose of business and not necessarily. Keeping in view the said decision of Hon'ble jurisdictional High Court and having regard to the facts of the case as discussed above, we are of the view that the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) on account of transaction charges is not justifiable and deleting the same, we allow Ground No.6 of the assessee's appeal.

15. As regards the issue raised in Ground No.7 relating to the disallowance of Rs.6,04,648/- made by the Assessing Officer and confirmed by the learned CIT(A), it is observed that the claim of the assessee for depreciation on the concerned plant was restricted by the Assessing Officer as well as by the learned CIT(A) to the extent of 50% on the ground that even though the said plant was ready to commence the operation, the actual production had started only after 30.09.2010. As rightly submitted by the learned Counsel for the assessee by relying on the relevant judicial pronouncements including the decision of Hon'ble Gujarat High Court in the case of ACIT Vs. Ashima Syntex Ltd, reported in [2001] 251 ITR 133 (Guj.), the assessee is entitled for depreciation at full rate as the concerned

plant was ready to use on 27.09.2010 itself as agreed by the authorities below also and the business of the assessee was already in existence. We accordingly direct the Assessing Officer to allow depreciation on the said plant at full rate as claimed by the assessee and allow Ground No.7 of the assessee's appeal.

16. Thus, ITA No. 328/Ahd/2020 is partly allowed.

17. Now, we take up ITA No.329/Ahd/2017 for AY 2011-12 in the case of N.K. Industries Ltd. and the grounds of appeal raised therein are as under:

1. *On the facts and in the circumstances of the case, the CIT(A) has erred in not accepting Appellant's plea that the order passed by the Ld.CIT(A) is bad in law and void ab initio.*
2. *On the facts and in the circumstances of the case, the Ld.CIT(A) ought to have accepted that assessment order was barred by limitation.*
3. *On the facts and in the circumstances of the case, the learned CIT(A) is not correct in observing that the Assessing Officer had right reasons to believe that special audit was required in the given case.*
4. *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred by confirming the AO's decision that the loss of Rs.44,77,69,621/- is speculative in nature.*
5. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in confirming the disallowance made by the Ld. Assessing Officer of Rs.32,79,68,772/- on account of debit note received from N.K. Proteins Ltd treating the same as Unexplained expenditure without appreciating the facts that the same was raised in respect of the Sale difference and trade margin charged by NKPL on appellant for the exports carried on its behalf by NKPL. Furthermore, the said amount of Rs.32,79,68,772/- has already been offered for tax by NKPL and the impugned addition thus amounts to double taxation which is not permissible in law.*
6. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in confirming the disallowance of Rs.1,45,18,708/- made by the Ld. Assessing Officer u/s.36(1)(iii) of the Act on good as well as doubtful debt and the same is not warranted since the advances are for the business purpose only. The same deserves to be deleted.*
7. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in confirming the disallowance of*

Rs.1,66,584/- made by the Ld. Assessing Officer u/s.36(1)(va) of the Act as the Employees contribution to PF and ESI were deposited before the due date of filing of return of income.

8. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in confirming addition u/s68 to the extent of Rs.52.01 crore out of Rs.244.98 crores added by the AO as unexplained expenditure. The same deserves to be deleted. He ought to have appreciated that this amount is acknowledge as payable and is paid in subsequent year and thus, there is no justification for the addition confirmed by him.*

18. At the time of hearing before us, the learned Counsel for the assessee has not pressed Ground Nos. 1 to 3 raised by the assessee in this appeal; the same are accordingly dismissed as not pressed.

19. As regards Ground No.4 raised by the assessee in this appeal, it is observed that the issue involved therein relating to disallowance made by the Assessing Officer and confirmed by the learned CIT(A) on account of alleged speculative loss is similar to the issue raised in Ground No.4 of the appeal filed in the case of N.K. Proteins Pvt. Ltd. (supra) being ITA No.328/Ahd/2017. Since all the material facts relevant thereto as well as the arguments of both the sides are similar to the case of N.K. Proteins Pvt. Ltd. (supra), we follow our conclusion drawn in the case of N.K. Proteins Pvt. Ltd. (supra) and decide the issue involved in Ground No.4 in favour of the assessee.

20. As regards the issue involved in Ground No.5 of this appeal relating to the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) on account of debit notes received by the assessee from N.K. Proteins Ltd by treating the same as unexplained expenditure, the material facts relevant to this issue are that NKPL had raised debit notes on assessee-company for poor quality of FSG oil; and, as noted by the Special

Auditor, the rate difference as reflected in the said debit notes was not debited by the assessee-company in the P&L account but the same was adjusted in the purchase and sales ledger. It was also found by the Assessing Officer that credit was given by the assessee-company to NKPL on account of such debit notes firstly on 28.02.2011 for Rs.18,18,62,275/- and then on 31.03.2011 for Rs.14,61,06,496/-. In this connection, the following explanation was offered by the assessee-company before the Assessing Officer to support and substantiate the debit notes raised by the NKPL.

> *"5. It is stated that NKPL has raised a debit note in favour of NKIL for Rs, 32,79,68,772 for poor Quality of FSG oil and that the NKPL has made exports on behalf of NKIL.*
>
> *5.1 In this connection, it may please be noted that the debit note is not for the poor quality of FSG oil sold to NKPL and that the NKPL has not made any exports on behalf of NKIL.*
>
> *5.2 The Debit Note [Page No. 81 to 93] is raised by NKPL in favour of NKIL as per MOU dated 20-04-2010 [Page No. 101 to 103] and as per the correspondence exchanged between NKIL and NKPL /Page No. 94 to 100] (the copy of MOU and correspondence are enclosed]. The transaction of sale of castor oil to NKPL is strictly a commercial transaction.*
>
> *5.3 NKIL is the manufacturer of castor oil FSG export quality. The assesses company is not likely to fetch the sale price from the domestic market and therefore requested NKPL who is Star Trading Export House [Certificate Page No. 80] to buy from NKIL for the purpose of exports as per the terms and conditions stated in the correspondence and MOU as referred to above. NKIL does not enjoy any banking facilities since it is BIFR Company as per BIFR Order dated 31-03-2014 [Page No. 112 of Paper Book-Para No. 15.1&15.2].*
>
> *5.4 The main terms as per MOU are as under:*
>
> *(1) NKPL shall purchase at the prevailing market rate during F, Y. 2010-2011,*
>
> *(2) If the purchases are exported by NKPL than the price realized will belong to NKIL. In other words, if there is a profit it will belong to NKIL and if there is a loss the same will also belong to NKIL*

(3) NKPL shall charge 1% trade margin on average purchase price.

(4) NKPL shall retain the export incentives that may be received as a result of the exports made by us and we shall bear all the export expenses as stated by you.

(5) Any export incentives that may realize as a result of the exports in overseas market shall belong to NKPL

(6) NKPL shall bear all the export expenses such as transportation from factory at Kadi to Kandla Port, storage charges for storing the castor oil and derivatives at Kandla port, if any.

(7) Taxes and duties, ocean freight, if the contract is CIF etc.

5.5 There is exchange of correspondence between NKIL and NKPL and there is MOU dated 20-04-2010 entered into by NKIL and NKPL [copy enclosed]

5.6 From the MOU, it may please be seen that the entire transaction is commercial transaction and that NKPL is entitled to export Incentives of Rs. 60.38 Crore since NKPL is a star trading export house and therefore the buyers would feel comfortable to buy from NKPL At the same time NKPL has borne the entire export expenses of Rs. 32.78 Crore. The break-up of such expenses is enclosed [Page No._____].

5.7 It may please further be noted that if export incentives do not belong to the NKPL than the entire transaction is not profitable in case of NKPL in as much as if it is ignored than there would be net loss as per P & L Account Further, it may please be noted that there was no intension whatsoever to make NKIL BIFR company in as much as NKIL is already sick company from 2002 as per BIFR Order dated 31-03-2014 [Please refer Para No. 15 & 16].

5.8 Further, it may please be noted that NKIL and NKPL are companies and are liable to tax @ 30% with surcharge. NKIL has returned the loss. Whereas NKPL has returned the profit and paid the taxies thereon meaning by there is no question of any favour or disfavor by NKPL to NKIL. The transactions are entirely strictly commercial transactions and that the same was entered in the beginning of the year, No party was aware about the outcome of transaction at the end of the year. One may lose or one may gain which all depends upon the MOU entered into between the parties.

5.9 NKPL has charged 1% trade margin on average purchase price as per MOU dated 20-04-2010.

5.10. From the above, it may please be seen that the entire transaction is entered into by NKIL with NKPL on account of commercial expediency in as much as NKIL was not able to export since it has no credit facilities since it is BIFR company and that it has no brand name in the overseas market. Whereas in case of NKPL it is not the manufacturer of castor oil FSG and that it is star trading export house and that for the continuation of status as star trading export house it is necessary to have minimum exports. NKPL got opportunity to maintain the status and also to make some profit on account of working hard for making exports. It may please be noted that the export expenses of Rs. 32.78 Crore are only direct expenses and that indirect expenses in the form of managerial remuneration and other administrative facilities are not considered. NKPL has competent staff for entering into export agreements and for its execution to maintain its brand name. If indirect cost is considered than NKPL has made only nominal profit and not as is seen from the figures mentioned in the notice."

20.1 The above explanation offered by the assessee was not found acceptable by the Assessing Officer for the following reasons:-

"i) The contention of the assessee that the debit notes are received not on account of poor quality of FSG Oil sold to NKPL but in respect of Export Expenses incurred according to MOU dated 20.04.2010 entered between NKPL and NKIL, is not tenable. Because the statement of the assessee is in contravention as it has credited the sums in its books of account on account of poor quality of FSG Oil. Further, according to para 6 of the MOU it is clearly evident that the Export expenses are to be borne by the NKPL only.

ii) The assessee contended that the debit notes were issued as per the MOU dated 20.04.2010 as per correspondence exchanged between NKIL and NKPL. On perusal of the copy of the MOU furnished by the assessee, it is noticed that the MOU has been signed by Shri Kamlesh L. Patel, Whole time Director in NKPL and Shri Ashvin P. Patel, Whole Time Director in NKIL. Since both of them are not the Managing Directors of the respective companies, the MOU signed by them has no significance in deciding the business policies. Further, the MOU has been executed on plain paper which is not notarized or registered document. Thus the MOU is of no worth to substantiate the contention of the assessee.

iii) Further, on perusal of the related party details and copies of ledger accounts submitted by the assessee vide submission dated 03.11.2014,

it was noticed that the assessee has credited Rs.18,18,62,275/- on 28.02.2011 and Rs, 14,61,06,496/- on 31.03.2011 ***on account of debited note received from NKPL towards poor quality of FSG Oil received during the year as per debit note dated raised by NKPL on 28.02.2011.***

……
……

Thus the contention of the assessee that the debit notes were not issued in respect of poor quality of FSG Oil sold to NKPL, is conflicting statements of the assessee which establishes the modus operandi of the assessee to reduce its profit.

iv) The notes on accounts are silent on this aspect. The 'MOU' has neither been mentioned in the auditor's report nor in the Director's Report. Thus this is an afterthought of the assessee to reduce the tax liability of the company.

v) Further the auditor has during the course of special audit has observed that the assessee has introduced such debit notes to reduce income of the assessee.

…….
…….

v) On perusal of the debit notes issued by the NKPL and submitted by the assessee vide its submissions dated 03.11.2014, it is noticed that the debit notes are issued monthly. However, the assessee has credited the sums only on 28.02.2011 and 30.03.2011 i.e. at the end of the financial year stating that on account of debit note issued on 28.02.2011 which is factually untrue and proves the assessee's intention to reduce of reducing profit.

vi) The MOU entered into by the NKPL and NKIL is nothing but an afterthought of the assessee to hide the modus operandi of reducing profit by issuing debit notes on account of poor quality of the FSG Oil.

vii) In any circumstances, two different stands cannot be taken in respect of any sum credited or debited in books of accounts to Standard Principals of Accounting. Therefore the dual stand taken by the assessee on account of debit notes of Rs. 32.79 crores cannot be sustained and accordingly liable to be rejected."

20.2 For the reasons given above, the Assessing Officer disallowed the assessee's claim on account of debit notes raised by NKPL and the amount

of such debit notes was added by him to the total income of the assessee by treating the same as unexplained expenditure.

20.3 The disallowance made by the Assessing Officer by treating the amount of debit notes as unexplained expenditure was challenged by the assessee in an appeal filed before the learned CIT(A) and the following submissions in writing were made on behalf of the assessee before the learned CIT(A) in support of its case.

> *"i) As explained before the AO, the debit notes are issued in terms of the MOD i.e. agreement between the parties. Merely because MOD is on plain paper it does not justify the rejection of the claim made by NKPL by issue of debit notes. The appellant submits a copy of the chart furnished by the special auditor with their report and copies of debit notes for ready reference. The details/break up of chart so amount by debit notes is as under:*

Sr.	*Particulars*	*Amount (Rs)*
1.	*Trade margin at 1% of value.*	*7,96,84,259*
2.	*Rate difference*	*23,26,66,952*
3.	*VAT at 4%.*	*1,24,94,048*
4.	*Additional VAT at 1%.*	*31,23,512*
	Total of Debit Notes:-	*32,79,68,772*

> *It may be noted that the debit note is on account of trade margin i.e. commission @ 1% and such trade margin is being charged in the course of normal business practice. Further amount represents rate difference charged by NKPL in terms of the MOU. As stated before the AO, as per understanding between the parties, the profit/loss on the goods so sold to NKPL which may arise to them on further sale by them for export would be belonging to the appellant. Thus, any difference between the price charged by the appellant and the price realised by the NKPL is transferred to the appellant. A perusal of the chart would show that for the month of April, May and June there was credit given by them for such rate difference. This itself shows that there was no intention of transfer of profit from the appellant, and the debit notes were raised as per the understanding between the parties. It does not represent transfer of any profit.*

The entry in the books of account narrating the same as debit on account of poor quality of FSG oil does not differentiate the fact that the debit note is raised on account of trade margin and price difference and that too as per the MOU.

Further, it is stated that merely because MOU is not referred to in the auditors' report or directors' report, it does not establish that there was no such arrangement There is no requirement in audit standards to report the supporting documents for debit to P&L Account in audit report unless the auditors find it to be not reliable. In fact, one has to appreciate that the debit note was in terms of MOU and the commercial practice and that, therefore. no adverse view is required to be taken.

ii) Observation of Auditors that it is not debited to P&L A/c, but to either purchase/sales or somewhere else does not effect the nature of transaction. As it relates to appellant's sales it is natural that it can be debited to sales.

iii) The rate margin of 1% recovered by the NKPL is as per the normal trade practice. The auditors have alleged that the debit note is merely shifting of profit from NKIL to MKPL and to keep assessee company under loss, is totally irrelevant. The auditor has to appreciate that there was no avoidance of tax from the transactions referred to above. The assessee company is having loss whereas NKPL is having taxable income chargeable at 30%. The auditors have stated that the debit note is dubious and colourable device to make the assessee company as sick company. However, he has to failed to appreciate that there is no benefit of having a sick company. Further, the assessee company is sick company under BIFR since 2002 as explained before the AO, and that therefore, the debit note referred to by him would not effect the said status of sick company. Also one fails to understand as to how the assessee group would stand to gain in terms of its overall income tax liability when there is an increase in loss in an already loss making entity, vis-a-vis an increase in profit in a profit making entity. Accordingly, the very argument of the Assessing Officer goes against his logic.

iv) Having regard to the above explanation, the entire disallowance made by the AO is based on presumption of the special auditors and it has been made on account of irrelevant presumption. The debit notes are as stated above, on genuine MOD and genuine commercial understanding between parties. The addition may please be deleted."

20.4 The learned CIT(A) did not find merit in the submissions made on behalf of the assessee on this issue and proceeded to confirm the addition

made by the Assessing Officer by disallowing assessee's claim on account of debit notes raised by NKPL vide paragraph no. 8.2 of his impugned order as under :-

> *"8.2 I have carefully considered rival contentions and observations made by the A.O. in the assessment order. It is observed that the A.O has made an addition of Rs.32,79,68,772/- as unexplained expenses on account of debit note received from N.K. Proteins Ltd. At para-8 of the order of assessment the A.O has mentioned that as per the special audit report that NKPL has raised debit note for poor quality of FSG Oil on the appellant. The rate difference on this account was not directly debited to the P & L A/c. On scrutiny by the special auditor it was observed by the special auditor that the credit is given to M/s. NKPL through debit notes firstly on 28/2/2011 for Rs. 18,18,62,275/- and on 31/3/2011 for Rs. 14,61,06,496/-. According to appellant it is a manufacturer of caster oil but it has no facilities for exporting the same. Therefore, it had asked its sister concern NKPL to export on its behalf. As per the memorandum of understanding entered between the two whatever losses or profits are incurred would be borne by appellant and the NKPL would charge 1% trade margin as well as would be the beneficiary of export incentive to be received by the appellant. As per the said understanding the total export benefit received by NKPL on the export of caster oil was of Rs. 60.38 crores. During the assessment proceedings the appellant has submitted that NKPL had raised a debit note in favour of appellant for Rs.32,79,68,072/- and NKPL had made exports on behalf of the appellant. According to the appellant said debit note was not for the poor quality of FSG Oil sold to NKPL and it also stated that NKPL has not made any exports on behalf of the appellant (para 8.4 of the order of assessment). According to the appellant the debit note raised by NKPL in favour of the appellant has been as per the MOU and the transaction of sale of caster oil to NKPL is strictly a commercial transaction. As NKPL was a star trading export house the appellant requested NKPL to buy from it for the purpose of exports as per the terms and conditions of the MOU. As per the MOU NKPL would purchase at market rate from NKIL and if these purchases are exported then the price realised will belong to the appellant i.e. the profit or loss would belong to the appellant. Apart from this, NKPL would be also charging 1% and trade margin on average purchase price and it would be also entitled to export incentives. However, the A.O has not accepted the contention of the appellant. According to the A.O, the perusal of books of accounts reflect that the appellant has credited its sums in its books of accounts on account of poor quality of FSG oil, therefore, the contention of the appellant that the debit notes were not received on account of poor quality of FSG oil to NKPL in respect of export expenses is not tenable.*

Further, according to the A.O the appellant has debit note received from NKPL towards the poor quality of FSG oil on 2872/2011 and 31/3/2011. The A.O at page-24 has reproduced the scanned copies of the books of accounts for its support. The special auditor has also given the observations on this issue. The special auditor too has observed that the amount of Rs. 18,18,62,275/- on 28/2/2011 an amount of Rs. 14,61,06,496/- on 31/3/2011 were reflected as debit note for poor quality of FSG oil in the books of the appellant. The calculation done by the special auditor reflects that the debit note has been raised for trade margin of 1%, Further on the trade margin and rate difference amount in the debit note, 5% of VAT is also charged which has resulted into total debit note of Rs. 32,79,68,772/-. According to special auditor this transaction of debit note has helped the appellant to file the BIFR status of sick company. The whole transaction of debit note has resulted into loss of Rs. 32.80 crores to the appellant. The special auditor has also doubted and considered the debit note as a colourable device to maximize loss of the appellant company. Further the special auditor has also pointed out that the appellant had sold caster oil to Tirupati Proteins Pvt. Ltd, which in turn had sold caster oil to another concern namely Hathibhai Bhulakhidas Pvt. Ltd. for exports as well as to M/s. NKPL (exporter for the appellant). However, Tirupati Proteins has not charged any trade margin or rate difference for the said transactions with the appellant. The different stands taken by the appellant with regard to the debit note for exports as well as for poor quality of FSG oil that too at the end of the financial year lead the A.O to doubt the genuineness of the MOU itself. The A.O has considered it as an afterthought to hide the modus operandi of the appellant to increase its loss. Accordingly, the A.O has made a disallowance of Rs. 32,79,68,772/- to the income of the appellant. During the appellate proceedings the appellant has relied upon the arguments made before the A.O during the assessment proceedings. No new argument was put forth by the appellant. Considering the facts and the circumstances referred to by the A.O at para-8 of its assessment order wherein the A.O has also mentioned the findings of the special auditor, I agree with the contention of the A.O. It is seen that the appellant has taken different stand and has tried to use a colourable device in the form of debit note to increase its own loss. As pointed out by the special auditor the appellant has not entered into such kind of MOU with its other sister concern namely Tirupati Proteins for exports. The appellant has loaded the cost of rate difference, trade margins of 1% of the value of goods and VAT @5% resulting into raising of debit note amounting to Rs.32,79,68,772/- by NKPL. Further, considering that the debit note was issued at the fag end of the year that too on account of poor quality of FSG oil, I agree with the finding of the A.O that the MOU is an afterthought and confirm the addition of Rs.32,79,68,772/- on account of unexplained

expenses debited to P & L A/c. Thus, the said addition is confirmed and the ground of appeal is dismissed."

21. The learned Counsel for the assessee submitted that exports were made by the assessee-company through N.K. Proteins Pvt. Ltd. and as per the agreement with them, invoices were regularly raised by the assessee-company with an understanding that the difference in actual realization from exports will be finally adjusted. He submitted that debit/credit notes were accordingly issued by NKPL for the difference between the amount of invoices raised by the assessee and the amount actually realized through exports and the same were duly accounted for by the assessee-company in its books of account. He contended that the net amount of such credit/debit notes amounting to Rs.32.80 crores accordingly was debited by the assessee-company in its books of accounts and the said amount was already offered to tax by NKPL as its income. He invited our attention to the Memorandum of Understanding entered into by the assessee-company with NKPL and submitted that the same was duly acted upon by both the parties. He submitted that even VAT was also charged by NKPL on the said debit notes. He contended that all these vital aspects were brought to the notice of the learned CIT(A) by the assessee in the written submission filed before him, but he proceeded to upheld the findings of the Assessing Officer without appreciating the case of the assessee. He also invited our attention to the details of credit/debit notes issued by NKPL and submitted that the disallowance made by the authorities below, which has resulted in double taxation of the said amount, is not sustainable.

22. Learned DR, on the other hand, submitted that although it has now been claimed by the assessee that the debit notes were raised on account of price difference actually charged and realized, the same was debited in the

books of account on account of poor quality of goods exported. He contended that the genuineness of the debit notes thus was doubted by the Special Auditor and the same was considered as a colourable device to maximize the loss of the assessee-company. He contended that the stand taken by the assessee on this issue thus is different from the treatment given in the books of account and the same, therefore, cannot be accepted as rightly held by the authorities below.

23. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that there is exchange correspondence between assessee and N. K. Proteins Ltd. and Memorandum of Understanding (MOU) between both the parties. The entire transaction was commercial transaction and N. K. Proteins Ltd. was entitled to export incentives of Rs. 60.38 crores as the same is a Star Trading Export House and therefore, the buyers will be able to buy from assessee's company. It is an undisputed fact that the assessee company has entered into Memorandum of Understanding for export of its FSG Oil and borne the export expenses as the debit note has been raised by the N. K. Proteins Ltd. for poor quality of FSG Oil on the assessee. The break-up of such expenses were given during the assessment proceedings by the assessee. It is not disputed fact that assessee has returned the loss whereas N. K. Proteins Ltd. has returned the profit and paid the taxes thereon on the said transaction which is a commercial transaction. As per the understanding between the assessee-company and the NKPL, invoices were being raised by the assessee on NKPL at the agreed rate for the goods to be exported through NKPL. At the time of actual export of the said goods, NKPL at many times used to realize a different rate than the rate charged by the assessee in the invoices for various reasons including the quality difference. Since the assessee-

company was accountable for these differences as per understanding with NKPL, NKPL raised debt/credit notes on the assessee-company to transfer the price difference. The said difference, going by the nature thereof, was adjusted by the assessee-company in the books of account against sales and the authorities below, in our opinion, were not justified to doubt the genuineness of the debit/credit notes on the basis of this accounting treatment given by the assessee-company which actually was correct. Moreover, the amount of debit note in question was duly recognized by NKPL as its profit which was offered to tax and keeping in view that the assessee-company was a BIFR company since 2002 incurring consistent losses, it cannot be said by any stretch of imagination that the debit notes were raised to reduce the taxable income of the assessee-company as alleged by the authorities below. There was a Memorandum of Understanding entered into between the assessee-company & NKPL and the same was acted upon by both the sides by raising debit/credit notes for the difference in price charged by the assessee to NKPL and the price actually realized by NKPL from corresponding exports as the same was to be transferred to the assessee-company. Keeping in view all these facts and circumstances of the case, we are inclined to accept the claim of the assessee that the amount of debit notes in question was its business expenditure being the difference in sale price charged and actually realized which is allowable as deduction. In that view of the matter, we delete the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) on this issue and allow Ground No.5 of the assessee's appeal.

24. As regards the issue raised in Ground No.6 relating to the disallowance of Rs.1,45,18,708/- made by the Assessing Officer and confirmed by the learned CIT(A) on account of interest under Section

36(1)(iii) of the Act, the relevant facts are that it was noticed by the Assessing Officer from the balance-sheet of the assessee-company as on 30.03.2011 that various advances were given by the assessee aggregating to Rs.12.10 crores to certain parties which were considered as doubtful. Since no interest was charged by the assessee on the said advances, the Assessing Officer required the assessee to show-cause as to why interest attributable to the said advances should not be disallowed under Section 36(1)(iii) of the Act. In reply, it was submitted by the assessee that the said advances were given in the earlier years and no disallowance made on account of interest attributable to the said advances. It was contended that since none of the said advances was given during the year under consideration, there was no question of utilization of funds borrowed in the year under consideration for giving the said advances and the disallowance of interest under Section 36(1)(iii) of the Act, therefore, was not warranted. It was also contended that the said advances had become doubtful as clearly stated in the balance-sheet and, therefore, there was no question of charging any interest on the said advances. This explanation of the assessee was not found acceptable by the Assessing Officer. He noted that the assessee-company on one hand paid interest @ 12 to 18% on the money borrowed and on the other hand the advances were given without any interest. He accordingly worked out the interest attributable to the said advances by applying the rate of 12% at Rs.1,45,18,708/- and made disallowance to that extent under Section 36(1)(iii) of the Act.

25. The disallowance made by the Assessing Officer on account of interest under Section 36(1)(iii) of the Act was challenged by the assessee in an appeal filed before the learned CIT(A) and the following submission was

made on behalf of the assessee in support of its case that the disallowance made by the Assessing Officer on account of interest was not sustainable.

> *"8.1 The Assessing Officer has stated that the appellant had given advances to 13 parties of the aggregate amount of Rs.12,09,89,234 and that, therefore, the appellant was asked to show cause as to why the interest should not be disallowed. The appellant's reply has been reproduced by the Assessing Officer in which it was stated that the out of 13 parties, 9 parties are such that recovery from those parties were doubtful and that, therefore, appellant had made provisions for doubtful debts with reference to balances of such parties. The appellant had submitted copies of accounts of those parties, which represented old balances and classified as doubtful debts in the balance sheet. It was, therefore, stated that there was no question of considering the interest income or receiving any interest income on such sticky advances. The Assessing Officer was, therefore, requested not to take any adverse view u/s.36(1)(iii) of the Act. The appellant had also explained the nature of other balances and explained that those were opening balances and that no new advances were given. Relevant explanations of those balances are reproduced on page 31 & 32 of the assessment order.*
>
> *The Assessing Officer has, however, not accepted the said explanation and stated that the appellant has not charged interest on such advances and on the other hand it has paid interest @ 12% to 18%. The assessee had not established that the amounts were given for the business purpose. Therefore, he was justified to disallow proportionate interest. He has worked out the interest @ 12% on such balances which is disallowed at Rs. 1,45,18,708.*
>
> *8.2 In this connection, the appellant may refer to the submissions filed before the Assessing Officer, copy of which is attached in the paper book, it may be noticed that the balance had arisen in the account of those parties in the past on account of trade transactions or business transactions. It is submitted that the Assessing Officer has not established that the borrowed funds are diverted for such advances. In fact, the borrowings were made for the purpose of business.*
>
> *Thus, addition the Assessing Officer has failed to appreciate that the borrowings were for the purpose of business and hence the interest expenditure incurred for such borrowings was invariably allowable u/s. 36(1)(iii) of the Act, which reads as under:*
>
> *"(iii) the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession.*

Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset 'for extension of existing business of profession (whether capitalised in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction."

Thus, as per said section 36(1)(iii), for allowance of a claim for deduction of interest paid in respect of capital borrowed is that following three conditions should be fulfilled.
(i) The Assessee must have borrowed money
(ii) The interest should have been payable
(iii) Borrowing should be made for the purpose of business.

Once these three conditions are satisfied the claim of interest payment simply cannot be rejected. In the present case the assessing officer has presumed that advances made to the 13 parties are for other than business purpose and on such assumption made impugned addition of interest without appreciating the circumstantial evidences.
Here it would not be out of place to go into the various judicial decisions establishing the ratios for the purpose of allowing deduction for the interest paid by the appellant. The Supreme Court in the case of Madhav Prasad Jatia v. CIT (1979) 118ITR 200 has laid down at page 208 asunder:

"..... we may point out that under s. 10(2)(iii), three conditions are required to be satisfied in order to enable the assesses to claim a deduction in respect of interest on borrowed capital, namely, (a) that money (capital) must have been borrowed by the assesses, (b) that it must have been borrowed for the purpose of business, and (c) that the assesses must have paid interest on the said amount and claimed it as a deduction. ....."

The principle of law after going through following decisions is that that once it is found that the capital is borrowed for the purposes of business, the appellant is entitled to claim the interest paid thereon as deduction u/s. 36(i)(iii) of the Income-tax Act regardless of the fact that the appellant himself charges interest at the lower rates on moneys advanced out of such borrowed loans or even provides interest free advances to the sister concerns etc. The only condition which sec. 36{i)(iii) of the I. T. Act prescribes is that the capital must be borrowed for the purposes of business and the appellant must have paid the interest on the said amount and claimed it as a deduction –

(i) Madhya Pradesh High Court in the case of Birla Gwalior Pvt. Ltd. v/s. CIT (1962)44 ITR 847
(ii) The Madras High Court in the case of CIT v/s. Pudukottal Co. (P) Ltd. (1972)84 ITR/788
(iii) The Madhya Pradesh High Court in the case D & H Secheron Electrodes Pvt. Ltd. v/s. CIT 142 ITR 528
(iv) The I.T.A.T., Ahmedabad Bench, in the case of Sahibaug Enterprise vs. I.T.O.

As stated above, advances were given for business purposes in the past. The appellant being BIFR company, further transactions were not being carried out with those parties for several reasons. In the circumstances, the Assessing Officer was not justified in presuming that the advances were required to be charged any interest. He has failed to appreciate that out of the 13 parties, 9 parties are such from whom even recovery is not possible, and it is treated as doubtful advances. Therefore, with reference to such balances no interest was even likely to be recovered. Hence, there is no justification for calculating interest income on notional basis for such balances.

Further to this, the balances of NK Developers, and NG Patel group entities were with reference to the advances given to them long back for the purchase of property. However, due to some disputes the properties could not be acquired and even the said funds could not be recovered. Hence, such balances are doubtful. As stated above, the funds were given for business purpose and hence having regard to the decision of SA Builders 288 ITR 1 (SC) no disallowance is justified.

It may be noted that this balances are outstanding even in the earlier years and no adverse view has been taken by the Department. As no new facts are arisen in this year, considering the consistency required also the disallowance is not justified."

26. The learned CIT(A) did not find merit in the submission made on behalf of the assessee on this issue and proceeded to confirm the disallowance made by the Assessing Officer on account of interest for the following reasons given in paragraph No. 9.2 of his impugned order:-

"9.2 I have carefully considered the rival contentions, observation of the A.O as well as the case law relied upon by the appellant. It is observed that the A.O has made an addition of Rs, 1,45,18,708/- u/s.36(1)(iii) of the Act. The appellant has given interest free advances to 13 different persons for a total

amount of Rs, 12,09,89,234/-. According to appellant out of these 13 persons the advances given to 9 persons as mentioned by the A.O at para-9.2 of the order of assessment are sticky advances and are doubtful as far as their recovery is concerned. On failure of the appellant to establish that the sums advanced were for the business purposes only, the A.O has disallowed the interest at the rate of 12% per annum on these interest free advances amounting to Rs.1,45,18,708/- u/s.36(1)(iii) of the Act. During the appellate proceedings the appellant has submitted that the advances given to 9 persons as mentioned by the A.O are difficult to be recovered, therefore, these advances are doubtful. During the appellate proceedings the appellant could not produce any argument or cogent evidence to substantiate that the advances given were for the business purposes or not. Therefore, I agree with the contention of the A.O that in absence of any proof submitted by the appellant to establish that the sums advanced were for the business purposes and hence were given interest free, the appellant would be liable for disallowance @12% per annum on the quantum of interest u/s. 36(1)(iii) of the Act. Therefore, addition of Rs. 1,45,18,708/- is hereby confirmed and the grounds of appeal is dismissed."

27. The learned Counsel for the assessee submitted that the advances in question are old advances which were given by the assessee-company in the earlier years for business purpose. He submitted that the recovery of these advances had become doubtful and, therefore, there was no question of charging any interest thereon. He contended that the learned CIT(A), however, ignored this vital aspect and confirmed the disallowance made by the Assessing Officer on account of the interest attributable to the said advances going by the non-business purpose. He contended that when the advances were given in the earlier years and there was no advance made on account of interest attributable to the said advances, there is no justification to make disallowance in the year under consideration when there was no question of utilization of borrowed funds for giving the said old advances. In support of this contention, he relied on the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Sridev Enterprises, reported in [1991] 59 Taxman 439 (Kar.), wherein it was held that since no additions had

been made in earlier years, the opening debit balance could not be considered for making disallowance in the current year.

28. The learned DR, on the other hand, relied on the impugned order of the learned CIT(A) in support of Revenue's case on this issue.

29. We have heard both the parties and perused all the relevant material available on record. The assessee has not produced any cogent evidence to substantiate its claim that the advances in question were given for the purposes of business. He has also not furnished any details or given any reasons as to why the recovery of these advances had become doubtful as claimed. Since the business purpose of giving these advances was not established by the assessee on evidence, we are of the view that it was a clear case of diversion of interest bearing loans for non-business purpose and disallowance on account of interest attributable to the said advances was rightly made by the Assessing Officer and confirmed by the learned CIT(A). Ground No.6 of the assessee's appeal is accordingly dismissed.

30. As regards the issue raised in Ground No.7, the learned representatives of both the sides have agreed that the issue raised therein relating to the disallowance made by the Assessing Officer and confirmed by the leaned CIT(A) on account of employees' contribution to PF and ESI is squarely covered against the assessee by the decision of Hon'ble Gujarat High Court in the case of CIT Vs. Gujarat State Road Transport Corporation, reported in 366 ITR 170 (Guj.), which has been subsequently upheld by the Hon'ble Supreme Court. Respectfully following the said judgment of the Hon'ble jurisdictional High Court which has been upheld by the Hon'ble Apex Court, we uphold the impugned order of the learned CIT(A)

confirming the disallowance made by the Assessing Officer on this issue. Ground No.7 is accordingly dismissed.

31. As regards the issue raised in Ground No.8 relating to the addition made by the Assessing Officer under Section 68 of the Act which is sustained by the learned CIT(A) to the extent of Rs.52.01 crores, the relevant facts are that the assessee-company had undertaken the transactions of Castor Seed, Castor Oil and Cotton Wash Oil with NSEL through M/s. NKPL – a member of NSEL. Against the said transactions, NKPL had received payment from NSEL and a sum aggregating to Rs.244.98 crores was transferred to the bank account of the assessee-company. From the fund flow chart prepared by the Special Auditor, it was noted by the Assessing Officer that out of the said amount of Rs.244.98 crores, a major portion amounting to Rs.205.86 crores was transferred by the assessee-company to M/s. NK Corporation and the remaining amount was used for business purposes. Since the transactions with NSEL by assessee's own claim were financial in nature and no delivery of any goods was either taken or given, the assessee-company was called upon by the Assessing Officer to explain the nature of the amount in question received by it. In this regard, it was explained by the assessee that the amount in question having been substantially utilized for making payments to the suppliers to the extent of Rs.245.15 crores, it was a case of utilization of funds for the purpose of business. The break-up of purchases against which said payments had been made was also furnished by the assessee. It was submitted that the amount of Rs. 244.98 crores thus was received on account of sale made to NSEL parties through NKPL and the said amount was substantially utilized for making payments of corresponding purchases. It was also contended that even though the transactions were paper

transactions, yet the payments for the purchases were made and receipts for the same were received by account payee cheques which were duly reflected in the bank account. This submission of the assessee was not found acceptable by the Assessing Officer. According to him, all the NSEL transactions were of the same colour and nature and when the other transactions were settled through journal entries, there was no justifiable reason for the assessee to have received the amount of Rs.244.98 crores in question by cheques against the NSEL transactions of sale as claimed by it which by assessee's own admission were only paper transactions. He held that the assessee-company had never dealt with any goods through physical delivery as far as transactions on NSEL are concerned; and, therefore, its claim of having received a huge amount in question against the paper transactions without making any sales to anyone was not acceptable. He accordingly treated the amount of Rs.244.98 crores in question as unexplained cash credit and made addition to that extent to the total income of the assessee under Section 68 of the Act.

31.1 The addition made by the Assessing Officer under Section 68 of the Act was challenged by the assessee in an appeal filed before the learned CIT(A) and the following submission was made on behalf of the assessee-company in support of its case on this issue.

> *"7. Regarding addition of Rs.244,98,04,635/- on account of payment received from NKPL – NSEL Client A/c.*
>
> *7.1 This issue has been raised by the Assessing Officer as per para 12 of the assessment order. It is observed by the AO that the appellant company had undertaken transactions of castor seeds, castor oil and cotton wash oil on NSEL with the Member of NSEL viz NKPL. It is stated by him that NKPL has received the payment from NSEL in HDFC, NSEL Client A/c being A/c. No. 00076340013639 and from this account, the appellant NKIL has received Rs.244,98,04,635.*

He has referred to the observation of Special Auditors and stated that the date-wise details of payment received from NKPL - NSEL Client A/c as above and the details of utilization of such funds received were prepared from the books of the appellant and bank statement in the form of a chart submitted with special audit report. The auditors have observed that the appellant received Rs.244.98 crores and had made payment of Rs.205.86 crores to NK Corporation and the remaining amount was used for the business purpose.

The appellant was, therefore, asked to explain the nature of funds received. The appellant had submitted the detailed explanation which is referred to in the assessment order.

It was explained by the appellant that company had received the above amount and used Rs.244.98 crores for making the payment to the suppliers for material purchased and thus it was used for the purpose of business.

It was also explained by the appellant that the amount of Rs.244.98 crores was received on account of sales made to NSEL parties, from NKPL being broker on NSEL and that the funds so received is used for making the payment for purchase of raw materials as per the statement submitted before the AO. The AO has, however, not accepted the said contention and made the addition. His observations are summarized as under:-

i) With reference to the question asked to Nilesh Patel about the outstanding liability to NSEL, he had in his statement stated that as against the liability of Rs.935 crores referred to by the officials, the group had actually received and utilized Rs.275 crores from NSEL through Settlement Account over the period of years, the details of which were submitted by him. The amount so received from the settlement was broadly explained by him.

ii) The Assessing Officer states that as per the explanation of Nilesh Patel the amount was utilized for expansion/capital expenditure of NKPL, towards capital expenditure of NKIL and towards joint venture with Adani Wilmar Ltd. The Assessing Officer states that the appellant had not given fund flow statement before the AO in the post-survey proceedings.

It is stated by him that during the course of post-survey proceedings, the appellant had altered the explanation as above and it was found that the funds so withdrawn are utilized for the purpose of payment to the suppliers and for the purpose of incurring expenditure. It is stated by the AO that the

appellant had given the statement of use of funds from the books of NKIL, Tirupati Proteins.

The AO has again referred to liability of the group company to NSEL at Rs.384 crores as against the claim by NSEL of Rs.969 crores. The appellant had explained before the AO that the payment was received from NSEL client settlement account to NKPL by actual transfer of funds through bank or Obligation Report. The AO states that the contention of the appellant are contradictory, inasmuch as, it has explained that the actual money received was paid and in the second time it was added to the funds received through bank or Obligation Report."

31.2 The above submission made by the assessee was forwarded by the learned CIT(A) to the Assessing Officer for his comments. In the remand report dated 08.07.2016 submitted to the learned CIT(A), the Assessing Officer offered his comments as under:-

"2. The assessee's request under Rule 46A is with reference to their submissions against the addition of Rs.244,98,04,635 made in the assessment order u/s.68 of the Act, holding that the said amount represents unexplained credits received in the bank account of the assessee. The Special Auditor in their Report u/s. 142(2A) had stated that out of the funds so received Rs.205.86 crores was transferred to M/s. N.K. Corporation(NKC) and the balance amount was used for the purpose of business. The assessee had contended at the time of assessment that the amount was received on account of sales made on NSEL and it was utilized for making payment for purchase of raw-material. The said submissions were not accepted as the assessee could not co-relate it with the sales made by the group and had failed to explain the nature of funds. It had simply explained the utilization of funds. It was further observed that genuineness of trade and nature of payment received which was in the nature of accommodation entries for the huge amount received was not established. It was further observed that even if the arguments that the purpose of transaction was to obtain money as claimed, in absence of obligation for repayment of the said amount, the amount has to be taxed as assessee's income.

3. Vide letter dated 27.12.2015 the assessee was requested to appear before the undersigned along with additional evidence submitted before CIT(A)-9. Shri Shaunak Majumdar, CA from M/s G.K.Chauksi & co. appeared as AR of the company and furnished a written reply in this regard. Vide the same the assessee has stated that the amount in question was received by them against the sales made by them in the trade cycle explained as under-

I) NK Inds. being client of NK Proteins executes T+3 contract on the electronic platform of NSEL, say for sale of 100 kg of castor oil to another client of another broker of NSEL for Rs. 100 per kg.

II) The other prospective client/ investor referred to above who has purchased the quantity as above executes another transaction on NSEL for sale of said quantity on T+36 contract on the electronic platform whereby it sells entire quantity purchased as above to another client of NK Proteins (say NK Corporation) for Rs.110 per kg.

III) NK Corporation carry out Intra group sale of same quantity to NK Inds., say for Rs.112 per kg.

Thus, the entire quantity is set off for purchase of sale in the hands of each of the party.

IV) NKIL on the first sale receives the sale consideration within 3 days i.e. on settlement of T+3 contract.

As against this, NK Corporation makes payment for purchase made by it under T+36 contract from the purchasing party of NKIL and it has to pay on the settlement date, after 36 days.

The assessee pays to NK Corporation the purchase consideration on the expiry of T+36 contract.
V) Similar contracts are being entered into and the funds are received as per T+3 contract which are repaid as per T+36 contract.

VI) For the above purpose, NK Proteins also maintains margin account of certain percentage of value of transaction on NSEL

3.1 The transactions so entered into were to raise temporary funds. However, there was no co-relation of sales and amount transferred from NKPL client A/c. to the assessee's bank account. The assessee has explained that in the above trade cycle, the assessee has to make payment to NKC from whom they have made the purchases in the trade cycle. The amount has been paid against the sales made through NKPL as broker in NSEL and against that amount NSEL had made payment in the Settlement Account of NKPL and from that account NKPL has transferred the funds to NSEL Client A/c and from such account the assessee has received funds. The assessee has further stated that as observed by the Auditor against the amount of Rs.244.98 crores received from NKPL Client A/c. they have paid Rs.205.86 crores to NKC from whom they have made purchases as reported in the Special Audit

Report. Thus, it is stated that the funds are received on account of sales and it is utilized for the purpose of business. The funds are raised through trade cycle for the 'purpose of business and that assessee has also repaid the funds in the trade cycle by making payment to NKC who has made the sales. This has been explained by giving details as under:-

i) Reference is made to the Special Auditor Report page 22 to 26 wherein it is reported that the funds of Rs. 244.98 crores are received by the assessee from NKPL Client A/c and against the same, the payment is made to NKC. Here, the assessee has in the course of remand proceedings explained that the correct amount of the funds paid to NKC during the year against the purchases is Rs. 193.86 crores, and there is mistake in the figure taken in the Audit Report to the extent of Rs.12 crores. This is verified from the bank statement and also from account of NKC.

ii) The assessee has further given a chart and the bank statement to show that NKC who has made the purchases from NSEL platform in the above trade cycle has made the payment to NKPL as broker. As the NKC has made the purchases from NSEL parties through NKPL being broker, they have made payment to NKPL by cheque, the amount so paid by NKC to NKPL during the year is Rs. 192.9 7crores.

iii) The assessee has further given chart of payment made by NKPL to NSEL Settlement A/c. during the year which also includes the funds received from NKC. During the year under consideration, they have made payment of Rs. 134.01 crores to NSEL Settlement A/c from their bank account.

3.2 The above 3 charts are verified with reference to bank statement of the assessee, of NKC and of NKPL. The figures stated hereinabove in the chart are found to be correct.

4. During the course of remand proceedings, the assessee has further stated that they have received the funds of Rs.244.98 crores from NKPL-NSEL Client Account and they have made payment of Rs. 192.97crores as stated hereinabove to NKC and that therefore, there is credit balance of NKC in balance sheet of the assessee as at the close of the year. Against this credit balance in the subsequent year they have made payment to NKC. This fact is verified from the records that there is a credit balance of NKC in the books of the assessee which assessee has made payment in the subsequent year. However, the fact remains that during the year under consideration, the assessee has made payment to NKC of Rs. 192.97 crores only and balance amount has not been utilized for payment against purchases during the year.

5. The above facts are found from the details furnished by the assessee along with the bank statement.

6. During the course of hearing, I have also perused the trade cycle explained by the assessee by which they have entered into alleged transaction of sales & purchases on sample basis. In those cases, the assessee has made sales on NSEL through NKPL in T+3 contract. On test check, it is also seen that the same quantity of goods are purchased by NKC from NSEL platform in T+36 transaction. NKC has thereafter made sales of the same quantity of goods which is purchased by them to the assessee company. Thus, the quantity of sales made by the assessee and purchases made in the cycle is the same."

31.3 When the remand report submitted by the Assessing Officer was confronted by the learned CIT(A) to the assessee, the latter submitted its rejoinder thereon as under:-

"1. In the above assessment order various additions were made to the returned income which are the subject matter of appeal before your honour. One of the additions is on account of unexplained credit in the bank account amounting to Rs. 244,98,04,635 considered u/s. 68 of the I. T. Act for which on our submissions the A O has submitted remand report.

1.1 In this connection, the Assessing Officer had while considering the appellant's explanation that this amount was received against the sales made on NSEL platform by way of trade cycle in the form of T3 transactions and T36 transactions entered into by the appellant and other concerns. The Assessing Officer had in the assessment order, however, observed that if the appellant had entered into purchase & sale transactions as above, in order to raise finance i.e. it is in the nature of finance, in that case when the money has been raised/obtained in absence of any evidence regarding repayment obligation of this amount, the receipt has to be taxed as income of the appellant.

1.2 It was in this context explained in the appellate proceedings that in such trade cycle payment obligation arises to the party from whom the assessee has made purchases (in the present case NK Corporation from whom purchases are made) and that there cannot be any repayment to the NSEL Client A/c. from where the funds are received. This may be appreciated from the nature of trade cycle, explained before your honour that the amount has been received by appellant against the sales and it has to make payment against the purchases. The Assessing Officer has now considered this fact in

para 2 of the Remand Report, and in para 3.1 and 3.2 of the Remand Report, it is stated under:-

"3.1 The transactions so entered into were to raise temporary funds. However, there was no co-relation of sales and amount transferred from NKPL client A/c to the assessee's bank account. The assessee has explained that in the above trade cycle, the assessee has to make payment to NKC from whom they have made the purchases in the trade cycle. The amount has been paid against the sales made through NKPL as broker in NSEL and against that amount NSEL had made payment in the Settlement Account of NKPL and from that account NKPL has transferred the funds to NSEL Client A/c and from such account the assessee has received funds. The assessee has further stated that A as observed by the Auditor against the amount of Rs.244.98 crores received from NKPL Client A/c they have paid Rs.205.86 crores to NKC from whom they have made purchases as reported in the Special Audit Report. Thus, it is stated that the funds are received on account of sales and it is utilized for the purpose of bus/ness. The funds are raised through trade cycle for the purpose of business and that assessee has also repaid the funds in the trade cycle by making payment to NKC who has made the sales. This has been explained by giving details as under:-

i) Reference is made to the Special Auditor Report page 22 to 26 wherein it is reported that the funds of Rs.244.98 crores are received by the assessee from NKPL Client A/c and against the same, the payment is made to NKC. Here, the assessee has in the course of remand proceedings explained that the correct amount of the funds paid to NKC during the year against the purchases is Rs. 193.86 crores, and there is mistake in the figure taken in the Audit Report to the extent of Rs. 12 crores. This is verified from the bank statement and also from account of NKC.

ii) The assessee has further given a chart and the bank statement to show that NKC who has made the purchases from NSEL platform in the above trade cycle has made the payment to NKPL as broker. As the NKC has made the purchases from NSEL parties through NKPL being broker, they have made payment to NKPL by cheque, the amount so paid by NKC to NKPL during the year is Rs. 192.97 crores.

iii) The assessee has further given chart of payment made by NKPL to NSEL Settlement A/c during the year which also includes the funds received from NKC. During the year under consideration, they have made payment of Rs. 134.01 crores to NSEL Settlement Ac from their bank account.

3.2 The above 3 charts are verified with reference to bank statement of the assessee, of NKC and of NKPL. The figures stated herein above in the chart are found to be correct.

"2. It may be noted that against the amount of Rs. 244.98 crores received as above from the NSEL Client A/c, the auditors had reported that the appellant had made payment of Rs.205.86 crores to NKC. However, on actual verification, it was found that the payment during the year to NKC is of Rs. 192.97 crores which is verified by the AO. He has also considered that after such payment there remains credit balance in the account of NKC. Thus, the liability for such purchases is recognized in the books. Further to this, it is also verified by the Assessing Officer that against this credit balance, in the subsequent year, the assessee company has made payment to NKC. Thus, the entire amount is utilized for payment to NKC against the purchases in the trade cycle. Accordingly, there was no justification for the addition made on this account.

It may be noticed that the Assessing Officer has, however, observed that during the year under consideration the assessee made payment to NKC of Rs. 192.97 crores only and balance amount is not utilized for payment against the purchases. However, as accepted by him, the appellant has recognized balance amount payable to NKC in the books and also such balance amount has been paid in the subsequent year. Accordingly, this observation in the Remand Report that only Rs. 192.97 crores have been paid to NKC during the year may please be considered in the light of the subsequent payment. Thus, entire amount of Rs. 244 crores is paid to NKC and, therefore, the addition for the entire amount of Rs. 244.98 crores may please be deleted."

31.4 After considering the entire material available on record including the submission made by the assessee, the remand report submitted by the Assessing Officer and the rejoinder made by the assessee, the learned CIT(A) decided the issue vide paragraph no. 12. 3 of his impugned order as under:-

"12.3 The A.O has observed at para-4 of the remand report that it has made a payment of Rs. 192.97 crores out of receipt of Rs. 244.98 crores to N.K. Corporation. Thus, it is seen that the appellant has received Rs. 52.01 crores from the NSEL client account during the year under consideration for which it had no repayment obligation. It is seen earlier that the transactions entered

into by the appellant on NSEL platform were in the nature of paired contracts. There was no physical delivery of goods involved in these paired contracts. The A.O has mentioned in the remand report that the appellant has made a payment of the remaining amount to N.K. Corporation in the subsequent years. However, in the remand proceedings the obligation on the appellant to repay back Rs. 52.01 crores has not been established at all. In absence of such obligation the quantum of Rs. 52.01 crore is the receipt of the appellant. As there was no actual delivery of goods for the contracts entered into by the appellant, the amount of Rs. 52.01 crores (Rs. 244.98 - 192.97 crores) is treated hereby as the income of the appellant. The appellant may have used the said amount for purchases from N.K. Corporation in subsequent years. However, as there was no payment obligation on amount of Rs. 52.01 crores the said amount is treated as income of the appellant as unexplained credit received in the NSEL client account. Accordingly, based on the findings given by the A.O in the remand report, the addition to the extent of Rs. 52.01 crores is hereby confirmed and the addition of Rs. 192.97 crores is hereby directed to be deleted. Thus, the ground of appeal is partly allowed."

31.5 The learned CIT(A) thus sustained the addition made by the Assessing Officer on this issue under Section 68 of the Act to the extent of Rs.52.01 crores.

32. The learned Counsel for the assessee submitted that the amount in question added under Section 68 of the Act as unexplained cash credit was related to the trading transactions entered into by the assessee-company and the same was duly paid by the assessee. He submitted that the learned CIT(A) deleted the addition made by the Assessing Officer on account of the said amount to the extent the same was paid by the assessee during the year under consideration and sustained the balance addition on the ground that the same was not paid by the assessee-company. He invited our attention to page no. 4 of the assessment order to point out that this balance amount was repaid by the assessee-company in the subsequent year and the same, therefore, is liable to be deleted going by the basis on which addition was partly deleted by the learned CIT(A) himself. He contended that the

addition made by the Assessing Officer on account of unexplained cash was partly sustained by the learned CIT(A) on the ground that there was no obligation for the assessee-company to repay the said amount. He contended that this basis itself is wrong and the fact that the balance amount was also paid by the assessee-company in the subsequent year is sufficient to establish that there was an obligation on the assessee-company to repay the said amount.

33. The learned DR, on the other hand, relied on the impugned order of the learned CIT(A) in support of the Revenue's case on this issue.

34. We have heard both the sides and perused all the relevant material available on record. It is observed that the amount of Rs.244.98 crores received by the assessee-company from NSEL client against sale was substantially paid towards the purchases made. Since such payment to the extent of Rs.192.97 crores was made by the assessee during the year under consideration as found by the Assessing Officer on verification, the learned CIT(A) deleted the addition of Rs.244.98 crores made by the Assessing Officer to the extent of Rs.192.97 crores. He, however, sustained the balance addition of Rs.52.01 crores on the ground that the same was not paid by the assessee-company. It appears that the learned CIT(A), however, completely ignored the fact that this balance amount of Rs.52.01 crores was carried over to the next year and the same was paid by assessee-company to NKPL in the subsequent year as found by the Assessing Officer himself on verification. It is thus clear that the entire amount of Rs.244.98 crores was utilized by the assessee-company for making payment against purchase as a part of the trade cycle and consequently even the balance amount of Rs.52.01 cores cannot be treated as unexplained cash credit under Section 68 of the Act merely on the ground that the same had remained unpaid.

Moreover, the entire corresponding sales made by the assessee-company to the parties through NSEL was duly recognized as its income in the books of account and the proceeds against the same cannot be treated as income of the assessee again as the same would amount to double addition. We, therefore, delete the addition made by the Assessing Officer and confirmed by the learned CIT(A) on this issue and allow Ground No.8 of the assessee's appeal.

35. Therefore, ITA No. 329/Ahd/2017 for A.Y. 2011-12 in case of N. K. Industries Ltd. is partly allowed.

36. Now we take up ITA No.1211/Ahd/2018 for AY 2012-13 in the case of N.K. Industries Ltd. The Grounds of appeal are as under:

1. *On the facts and in the circumstances of the case, the CIT(A) has erred in not accepting Appellant's plea that the order passed by the AO is bad in law and void ab initio.*
2. *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in accepting the contentions of the Assessing Officer that he had reasons to believe that special audit was required in the given case.*
3. *On the facts and in the circumstances of the case, the ld.CIT(A) has erred by confirming the AO's decision that the loss of Rs.36,93,99,151/- is speculative in nature.*
4. *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred by confirming he AO's decision that the business loss of Rs.20,62,50,456/- on account of trading with related parties is non-genuine and speculative in nature.*
5. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in confirming the disallowance made by the Ld. Assessing Officer of Rs.13,30,35,616/- on account of debit note received from N.K. Proteins Ltd. treating the same as unexplained expenditure. The impugned addition deserves to be deleted.*
6. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in confirming the addition of Rs.66 crores made by the Ld. Assessing Officer and the same is not warranted.*
7. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in confirming the disallowance of*

Rs.7,34,404/- made by the Ld. Assessing Officer u/s.36(1)(va) of the Act. The impugned addition deserves to be deleted.

37. At the time of hearing before us, the learned Counsel for the assessee has not pressed Ground Nos. 1 & 2 raised by the assessee in this appeal; the same are accordingly dismissed as not pressed.

38. As regards the issue raised in Ground No.3, it is observed that the issue involved therein relating to the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) on account of alleged speculation loss is similar to the issue raised in Ground No.4 of the appeal filed in the case of N.K. Proteins Pvt. Ltd. (supra) being ITA No.328/Ahd/2017. Since all the material facts relevant thereto as well as the arguments of both the sides are similar to the case of N.K. Proteins Pvt. Ltd. (supra), we follow our conclusion drawn in the case of N.K. Proteins Pvt. Ltd. (supra) and decide the issue involved in Ground No.4 in favour of the assessee.

39. As regards the issue raised in Ground No.4 of this appeal relating to the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) on account of assessee's claim for business loss of Rs.20,62,50,456/-, the relevant facts are that the assessee-company had undertaken transactions of caster seeds, soya bean seeds, castor oil and cotton wash oil with group/associated concerns. As per the summary given in the Audit Report, such transactions of purchase and sales had resulted in a loss of Rs.20,62,50,456/- which according to the Special Auditor were fictitious/paper transactions without delivery. During the course of assessment proceedings, the assessee-company was called upon by the Assessing Officer to show-cause as to why the said loss should not be

disallowed. In reply, the following submission in writing was offered by the assessee:-

"Vide point no. 2 of the notice, your good selves have referred to the observation made by the Special Auditor whereby it is stated that NKPL has made paper transaction of purchase and sales of Cotton Washed Oil (CWO) and castor seed with Group / Associated Concerns. In these transactions of purchases and sales, the assessee company has shown losses of Rs. 20,62,50,456/- and alleged that the said fosses are fictitious. Your good selves hove asked the assessee to show cause as to why the losses of Rs. 20,62,50,456/- be not disallowed being fictitious/paper transactions. In this regards, the assessee proceeds to explain as under:

The said losses are as under:

Sr. No.	*Losses on*	*Amount*
1	*Castor Seed*	*57,00,456*
2	*Cotton Washed Oil (CWO)*	*20,05,50,000*

2.1 At the outset, it is submitted that with respect to losses of Rs. 57 lacs as stated above, the contention of the Special Auditor that the said transactions are entered with Group Concerns is incorrect. On perusal of the details, it will be noticed that ***there are outside parties*** *- Rajiv Petrochemical Pvt. Ltd and C.K.Shah Marketing Pvt. Ltd are also involved.*

2.2 Now, it is submitted that every industry has its own market dynamics and it is best left to the businessman to take policy decisions. The business man is required to take certain business decisions, the outcome of which may be different in future. Moreover, the business man does not have control over the market fluctuations. He might not be aware that the transactions undertaken once would result into loss in future.

Notwithstanding the above, there was nothing to be gained by diverting the profits of the assessee company to another company, since both are resident taxpaying companies are taxable at maximum marginal rate and there is no fax planning or tax avoidance.

Even otherwise, in case your good selves are desirous to take adverse view then also, there would be no ultimate benefit to the revenue authorities as in case of the assessee, only loss to a certain extent would be reduced in case of the assessee company and there would still be loss and hence no taxable income would be there in case of the assessee whereas the other group

concerns are in profit which would turn into losses and / or reduce the taxable income making them liable to pay lesser amount of tax.

Looking at the above explanation, it will be noticed by your good selves that the assessee had no control over the prices that it fetched as a result of the transactions entered into by it with TPPL. NKC and NKPL and therefore, the contention of Special Auditor that it is paper loss is factually erroneous."

39.1 The submission made by the assessee was not found acceptable by the Assessing Officer. According to him, the assessee-company could not provide any supporting evidence relating to the alleged sale or purchase transactions with group/associated concerns in respect of which the trading loss of Rs.20,62,50,456/- was claimed. He held that the said transactions were effected without actual delivery of goods and the loss incurred in the said transactions by the assessee thus was a speculative loss and not a trading loss as claimed by the assessee.

39.2 The action of the Assessing Officer in treating the loss in question as speculative loss instead of trading loss was challenged by the assessee in an appeal filed before the learned CIT(A) and the following submissions were made on behalf of the assessee before the learned CIT(A) in support of its case on this issue.

"4.1 The Assessing Officer has in the assessment order referred to page 13 of the Special Audit Report u/s.142(2A) and stated that as per this report, the appellant has entered into transactions of caster seeds and cotton wash oil with group/associated concerns, and as per the Special Audit Report the company has booked losses in these transactions by way of accommodation/ paper trade rotation transactions. The Assessing Officer stated that thus as per Special Audit Report, the loss shown is fictitious /paper transactions without delivery with group/associated concerns, the details of loss is as under:-

Group concerns	*Qty.(Kg)*	*Amount*
Purchase Parties		
Rajiv Petrochemical Pvt. Ltd.	*2667000*	*114755811*

CK. Shah Marketing Pvt. Ltd.	*82000*	*3949120*
Tirupati Proteins Pvt. Ltd.	*2458500*	*98340000*
Total purchase (A)	*5207500*	*217044931*
Sales parties		
Rajiv Petrochemical Pvt. Ltd.	*2458500*	*95266875*
Tirupati Proteins Pvt. Ltd	*2749000*	*116077600*
Total sales (B)	*5207500*	*211344475*
Losses in transaction	*A-B*	*(-)57,00,456*

Group concerns	*Qty.(Kg)*	*Rate*	*Amount*
Purchase Parties(Group)			
Tirupati Proteins Pvt. Ltd.	*10500000*	*721*	*757050000*
N.K. Corporation	*9000000*	*720*	*648000000*
Total purchase= (A)	*19500000*		*1405050000*
Sales parties (Group)			
N.K. Corporation	*10500000*	*590*	*619500000*
N.K. Proteins Pvt. Ltd.	*9000000*	*650*	*585000000*
Total sales =(B)	*19500000*		*1204500000*
			(-)20,0550,000

4.2 In reply to above proposal of the Assessing Officer, it was specifically explained by the appellant that in so far as caster seeds purchase and sale is concerned, there are transactions with other than group concerns also, and that therefore, the observation that the transactions are duly with group concerns was incorrect.

It was also explained before the Assessing Officer that the transactions were taken at the market rate and the price fluctuation depends on market dynamics. It was the business decision to enter into such transactions and the appellant had no control over the market fluctuations taking place. It was also explained before the AO that there was no intention of diversion of profit by the assessee company since both the concerns, i.e., group concerns and are liable to pay taxes at the maximum marginal rate. Hence, there was no tax planning or tax avoidance.

However, the Ld. Assessing Officer has not appreciated the above contention and stated that during the course of special audit, the appellant had not provided any transport evidence relating to purchase/sale of the material with sister concern on which such loss has incurred. He has also held that transaction is speculative in nature and the loss cannot be allowed for set off

on the ground that the transaction is without physical delivery and that it is covered by the provision ofSec.43(5) and Sec.73 of the IT. Act.

4.3 With reference to the above addition, it may be noticed that the presumption of the AO and the Special Auditor is that the loss is incurred in such transaction and that the transactions are with group concerns, and as per the presumption of the AO/ Auditors, the transactions are fictitious (without delivery).

It is submitted that in so far as caster seeds purchase/sale is concerned, there are transactions with concerns other than group concerns viz. Rajiv Petrochem Pvt. Ltd. and C.K. Shah Marketing Pvt. Ltd. who are not related parties. Thus, the presumption that transactions are with group concerns only and it was fictitious, is incorrect. Further, it will be seen that there is transaction with the group concern which is not resulting into loss so far as caster seeds purchase/sale is concerned. This may be appreciated in view of the fact that during the purchase of caster seeds from Tirupati Proteins and sale thereof is as under:-

	Qty. (Kg)	*Value (Rs)*	*Average rate/Kg.*
Purchase	*24,58,500*	*9,83,40,000*	*Rs.40/-*
Sale	*27,49,000*	*11,60,77,600*	*Rs.42.22*

Thus, there is no basis for presumption that the transactions with group concerns are entered into only with an intention of creating loss or transferring any profit.

4.4 Without prejudice to the above contention as stated before the AO the group concerns, i.e. Tirupati Proteins Pvt. Ltd. or N.K. Proteins Pvt. Ltd, or N.K. Corporation with whom transaction of Cotton Wash Oil are entered into are liable to tax at the maximum marginal rate, and that they have shown profit in their returns. The appellant is liable to maximum and marginal rate? Thus, there is no loss of Revenue in such transactions, and that therefore, the disallowance made merely on the ground that it is with group concern and further on presumption basis that it is diversion of income is totally unjustified and unwarranted. In connection with this contention, the appellant relies upon the following cases:-

i) "Reference is drawn towards the decision of Apex Court in case of CIT vs. Glaxo Smithkline (Asia) reported in 195 Taxman 35. The facts of the case are that the assessee did not have any employee other than a company secretary and all administrative services relating to marketing, finance, HR etc were

provided by Glaxo Smith Kline Consumer Healthcare Ltd ("GSKCH") pursuant to an agreement under which the assesses agreed to reimburse the costs incurred by GSKCH for providing the various services plus 5%. The costs towards services provided to the assessee were allocated on the basis suggested by a firm of CAs. The AO disallowed a part of the charges reimbursed on the ground that they were excessive and not for business purposes which was upheld by the CIT (A). However, the Tribunal deleted the disallowance on the ground that there was provision to disallow expenditure on the ground that it was excessive or unreasonable unless the case of the assessee fell within the scope of s. 40A (2). It was held that as it was not the case of the Department that s. 40A (2) was attracted, the disallowance could not be made. The department challenged the deletion, HELD dismissing the SLP:

"The Authorities below have recorded a concurrent finding that the said two Companies are not related Companies under s. 40A (2). As far as this SLP is concerned, no interference is called for as the entire exercise is a revenue neutral exercise. Hence, the SLP stands dismissed. For other years, the authorities must examine whether there is any loss of revenue. If the Authorities find that the exercise is a revenue neutral exercise, then the matter may be decided accordingly"

ii) Hence the entire exercise carried out by department is tax neutral and Department is not deprived of tax- Reliance is placed on ratio of decision of Hon'ble Supreme Court in the case of CIT V/s Excel Industries Limited 3581TR 295 wherein the Hon'ble Court has held as under:

"Thirdly, the real question concerning us is the year in which the assessee is required to pay tax. There is no dispute that in the subsequent accounting year, the assessee did make imports and did derive benefits under the advance licence and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear chat not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers."

4.5 Apart from the above contention, it is submitted that the AO had never called upon the appellant to submit any details regarding delivery of such goods. Such transactions are reflected in stock. In the circumstances, the presumption made by him is only basis on the report of the Special Auditor

who had also never called upon the appellant to give such details. Thus, the addition made in the present case is without providing adequate opportunity."

39.3 The learned CIT(A) did not find merit in the submission made by the assessee-company on this issue and proceeded to uphold the action of the Assessing Officer in treating the loss in question as speculative loss instead of trading loss for the following reasons given in paragraph Nos. 9.2 to 9.2.1 of his impugned order:-

"9.2 I have carefully considered the assessment order, remand report of the Assessing Officer, rejoinder, facts of the case and the submissions made by the appellant. The AO made the impugned addition after a detailed discussion in his order which is reproduced above. It was held by him that the appellant was not able to furnish any evidence which could prove that sales and purchases with its sister concern had actually taken place on which the appellant had claimed trading losses. It is an undisputed fact that transactions of various commodities were concluded by the appellant and its group concerns without actual physical delivery and therefore the issue being covered by Section 43(5) read with Section 73 of the Act as being speculative los and was disallowed by the AO. The appellant on the other hand claimed that it had also entered into transaction with concerns other than its group concerns which were not related parties.

9.2.1 It is seen from the submission made by the appellant and the remand report sent by the AO that the appellant has not provided any proof of the actual delivery of commodities either during the course of special audit, during the assessment proceedings or during remand proceedings. Even during the appellate proceedings, while it has been claimed that trading was carried out with other concerns as well, no evidences in the form of documents, copies of bills/invoices, payment details or proof of delivery have been furnished. In view of these facts, I am inclined to agree with the decision taken by the AO that transactions were completed without physical delivery, and therefore the same were speculative in nature. The addition of Rs.20,62,50,456/- made by the AO is therefore confirmed. Ground of appeal No.3 is dismissed."

40. The learned Counsel for the assessee submitted that the loss in question as claimed by the assessee as business loss was disallowed by the

authorities below *inter alia* on the ground that the goods purchased by the assessee-company at higher rate were sold at lower rate. He submitted that since the associated concerns with whom the assessee-company had entered into these transactions were also chargeable to tax at maximum marginal rate, there was no loss of revenue as a result of trading loss claimed by the assessee. He contended that the assessee-company in any case had entered into all these transactions at the prevailing market price and since the assessee-company is in a position to establish this position, the matter may be sent back to the Assessing Officer to give the assessee an opportunity to support and substantiate its claim.

41. The learned DR, on the other hand, did not raise any objection for sending the matter back to the Assessing Officer for verifying the claim of the assessee that all the transactions in question with associated concerns were effected by the assessee-company at the prevailing market rate.

42. We have heard both the parties and perused all the relevant material available on record. Keeping in view the submission made by both the sides, we consider it fair and proper and in the interest of justice to restore this issue to the file of the Assessing Officer with the direction to decide the same afresh after giving the assessee an opportunity to establish that all the transactions resulting in the business loss in question were made at the prevailing market price and it was not a case where the goods purchased at higher rate were sold by the assessee-company at lower rate in order to claim trading loss.

43. As regards Ground No.5 raised by the assessee in this appeal, it is observed that the issue involved therein relating to the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) on account of

assessee's claim for deduction towards debit notes raised by N.K. Proteins Limited is similar to the issue raised in Ground No.5 of the appeal filed in the case of N.K. Industries Ltd. (supra) being ITA No.329/Ahd/2017. Since all the material facts relevant thereto as well as the arguments of both the sides are similar to the case of N.K. Industries Ltd. (supra) ,we follow our conclusion drawn in the case of N.K. Industries Ltd. (supra) and delete the addition made by the Assessing Officer and confirmed by the learned CIT(A) on this issue. Ground No. 5 of assessee's appeal is accordingly allowed.

44. As regards Ground No.6, it is observed that the issue raised therein relating to the addition made by the Assessing Officer under Section 68 of the Act and confirmed by the learned CIT(A) is similar to the issue raised in Ground No.8 of the appeal filed in the case of N.K. Industries Ltd. (supra) being ITA No.329/Ahd/2017. Since all the material facts relevant thereto as well as the arguments of both the sides are similar to the case of N.K. Industries Ltd. (supra) ,we follow our conclusion drawn in the case of N.K. Industries Ltd. (supra) and decide the issue involved in Ground No.6 in favour of the assessee.

45. As regards the issue raised in Ground No.7, the learned representatives of both the sides have agreed that the issue raised therein relating to the disallowance made by the Assessing Officer and confirmed by the leaned CIT(A) on account of employees' contribution to PF and ESI is squarely covered against the assessee by the decision of Hon'ble Gujarat High Court in the case of CIT Vs. Gujarat State Road Transport Corporation, reported in 366 ITR 170 (Guj.), which has been subsequently upheld by the Hon'ble Supreme Court. Respectfully following the said judgment of the Hon'ble jurisdictional High Court which has been upheld by the Hon'ble

Apex Court, we uphold the impugned order of the learned CIT(A) confirming the disallowance made by the Assessing Officer on this issue. Ground No.7 is accordingly dismissed.

46. Therefore, ITA No. 1211/Ahd/2018 for A.Y. 2012-13 filed by N. K. Industries Ltd. is partly allowed.

47. Finally, we take up ITA No.1213/Ahd/2018 for AY 2011-12 in the case of Tirupati Proteins Pvt. Ltd. The Grounds of appeal are as under:

1. *On the facts and in the circumstances of the case, the CIT(A) has erred in not accepting Appellant's plea that the order passed by the AO is bad in law and void ab initio.*
2. *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in accepting the contentions of the Assessing Officer that he had reasons to believe that special audit was required in the given case.*
3. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in confirming the addition made by the Ld. Assessing Officer of Rs.108,97,00,000/- by treating the same as unexplained credit u/s.68 of the Act.*
4. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in confirming the addition of Rs.59,69,58,528/- made by the Ld. Assessing Officer on account of non-genuine purchase. The impugned addition deserves to be deleted.*
5. *In law2 and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in confirming the addition of Rs.2,04,63,344/- made by the Ld. Assessing Officer as unexplained sales. The impugned addition deserves to be deleted.*
6. *In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in confirming the addition of Rs.10,04,170/- made by the Ld. Assessing Officer on account of cash credit and the same deserves to be deleted.*
7. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred by confirming the addition made by the AO of Rs.3,17,346/- u/s.36(1)(iii) of the Act. The impugned addition deserves to be deleted.*

48. At the time of hearing before us, the learned Counsel for the assessee has not pressed Ground Nos. 1 & 2 raised by the assessee in this appeal; the same are accordingly dismissed as not pressed.

49. As regard the issue involved in Ground No.3 relating to the addition made by the Assessing Officer and confirmed by the learned CIT(A) on account of unexplained cash credit under Section 68 of the Act, it is observed that the amount of Rs.108.97 crores in question was received by the assessee-company on account of transaction of sales made on NSEL through NKPL. Although the transactions on NSEL were made by the assessee-company for raising finance for the purpose of business as claimed by it, the relevant sales of 108.97 cores were duly accounted for by the assessee-company in its books of account as income. As rightly contended by the learned Counsel for the assessee, the amount in question received against such sales which was duly accounted for in the books of account and recognized as income by the assessee-company; therefore, cannot be treated as unexplained cash credit under Section 68 of the Act. Treating the said amount as income of the assessee under Section 68 of the Act clearly amounts to double addition of the same amount which is not permissible. The amount in question was received by the assessee from NSEL client through its broker NKPL and the same was directly received by cheque in HDFC bank account. It appears that the authorities below failed to appreciate the nature of these transactions and without considering that the amount in question received by the assessee against sale through NSEL was utilized for making payment against the purchases, they treated the same as unexplained cash credit which, in our opinion, was totally unjustified in the facts and circumstances of the case. As submitted by the learned Counsel for the assessee, similar amount was also received by the assessee in the

previous year relevant to AY 2012-13 and the same was not considered as unexplained cash credit under Section 68 of the Act in the assessment completed by the Assessing Officer under Section 143(3) of the Act. It is also observed that a similar issue was involved in the case of N.K. Industries Limited for AY 2011-12 and the same has already been decided by us in favour of the assessee in the foregoing portion of this order deleting the similar addition made by the Assessing Officer and sustained by the learned CIT(A). Keeping in view the conclusion drawn in the case of N.K. Industries Ltd. (supra) and having regard to the facts of the case discussed above, we are of the view that the addition made by the Assessing Officer and confirmed by the learned CIT(A) on this issue under Section 68 of the Act is not sustainable and deleting the same, we allow Ground No. 3 of the assessee's appeal.

50. As regards Ground No.4 of this appeal relating to the addition of Rs.59.70 crores made by the Assessing Officer and confirmed by the learned CIT(A) on account of non-genuine purchases, the relevant facts of the case are that the assessee had undertaken transactions of Cotton Wash Oil (CWO) on NSEL platform through its Member M/s. N.K. Proteins Ltd. As pointed out in the Special Audit Report, the assessee-company had shown purchases of CWO amounting to Rs.59.70 crores -more than the sales shown by NKPL. When this difference was pointed out by the Assessing Officer to the assessee, following explanation was offered by the assessee in writing:-

> *"2. It is stated that there is a difference between the sales made by NKPL and purchase by TPPL as per the chart to the extent of RS. 59.70 Crore. In fact, there is no difference as is seen from the quantity tally as per books of TPPL and NKPL reproduced below:*

Purchases	*M.Tons*	*Amount Rs. in Crore*	*Sales*	*M.Tons*	*Amount of Rs. in Crore*

Purchase from NSEL through NKPL	*249737.98*	*1290.73*	*Sales to NSEL Parties*	*259917.98*	*1350.43*
Purchase from NKPL	*10180.00*	*59.70*			
Total:	***259917.98***	***1350.43***	***Total:***	***259917.98***	***1350.43***

From the above, it is seen that the difference of Rs. 59.70 Crore represents the purchase from NKPL which is not considered by the special auditor. The quantity and value is reconciled above. Therefore there is no question of any addition."

50.1 The assessee also furnished sales invoices and delivery challans to support and substantiate its explanation. A certificate from Shree Rajkot Lodhika Sahkari Kharid Vechan Sangh Ltd. dated 18.11.2014 was also filed by the assessee confirming that the CWO had actually been delivered by the assessee to the concerned parties. The assessee also submitted soft copy of purchase and sales register in excel format to prove the transactions of purchase and sales and to show that the observations made in the Special Audit Report regarding difference was wrong. The Assessing Officer, however, did not find the explanation of the assessee to be acceptable for want of confirmation from the concerned parties. He also observed that the transactions made by the assessee through NSEL were only paper transactions as per assessee's own submission without any actual movement of goods. He accordingly held that purchases of Rs.59.70 crores were claimed by the assessee in excess of sales actually made and by treating the same as non-genuine, he made an addition of Rs.59.70 crores to the total income of the assessee.

50.2 The addition of Rs.59.70 cores made by the Assessing Officer on account of alleged non-genuine purchases was challenged by the assessee in an appeal filed before the learned CIT(A) and the following submission was

made on behalf of the assessee before the learned CIT(A) in support of its case on this issue.

"6.1 This addition has been discussed in para 7 of the assessment order. It is stated by the AO that on scrutiny of the transaction of cotton wash oil on NSEL Platform through broker NKPL, entered into by the appellant. It is noticed that the appellant had shown total purchases of cotton wash oil from NKPL at Rs. 1350,43,10,147 (for 25,99,17,979 Kgs) whereas on verification of details from NSEL transaction of NKPL it was seen that the NKPL has shown sale of cotton wash oil of Rs.1290,73,51,619 (for 24,97,37,981 Kgs), According to the AO, since all the transactions are without delivery and paper transactions, the difference in purchase by assessee and sale of NKPL is not matching and thus, the appellant has shown excess purchase ofRs.59.70crores. He has referred to the Auditors report wherein question about this difference was raised and the appellant's reply to the Auditors is also referred to by the AO. It is stated by the AO that in view of the above show cause notice was issued proposing to make the addition ofRs.59.70 crores on account of such difference.

6.2 The appellant had in response to such notice, explained that the purchases from NKPL through NSEL platform was of 24,97,37,981 Kgs that further purchase of 10,180 MT was in respect of physical purchase. This stock was sold to NSEL parties through NKPL on NSEL platform. It was explained that thus the sales to NSEL parties is also m the same quantity of 25,99,17,979. Thus, there was no difference. The appellant had also explained that the sales of 10,180 MT was made to different parties, details of which were given and are reproduced on page 21 of the assessment order.

6.3 The appellant had before the AO explained that this 10,180 MT was sold in physical form and that the stock so sold was lying with Rajkot Lodhika Sahkari Kharid Vechan Sangh at Rajkot, wherein they have confirmed chat this physical delivery was received by them on behalf of the respective parties. It was also explained that the amount for sale of Rs.59.82 crores received by way of obligation report and banking channels.

Cotton Wash Oil	*Purchases*		*Sales*	
	Qty. (Kg)	*Amt (Rs)*	*Qty. (Kg)*	*Amt(Rs)*
NSEL Transactions	*59917979*	*13504310147*	*259917979*	*13505517944*
Group Concerns	*2254615*	*90184600*	*28339674*	*1384341016*
STC/PEC	*0*	*0*	*2253034*	*87868326*
Other parties	*39531040*	*1978430127*	*11202265*	*597988134*
Total	*301703634*	*15572924874*	*301712952*	*15575715420*

The Assessing Officer has, however, not accepted the said contention. He has referred to details of total purchase and sale of cotton wash oil by appellant which as per the report of Auditors is as under:-

The Assessing Officer has while rejecting the contention of the appellant observed that –

i) The total purchase of cotton wash oil on NSEL platform was of Rs. 1350.43 crores, whereas corresponding sale by NKPL is of Rs.1290.73 crores. It is stated by the Assessing Officer that the appellant had submitted soft copy of purchase and sale register to prove the transactions. However, according to him, in absence of profit for actual delivery of goods and confirmation of the parties, the register is not acceptable to him.

ii) The appellant has not submitted proof for actual delivery of goods purchased from NKPL.

iii) Assessee as well as Nilesh Patel has already accepted that NSEL transactions are only paper transactions and no actual delivery has taken place. Therefore, he questions delivery of goods sold through NSEL.

iv) The appellant had submitted reconciliation before Auditors showing that the total purchase including purchases from NKPL was of 262172.60 MT and sales was also of 262172.60 MT which include the above figure of Rs.59 crores. However, the AO has stated that the appellant has given a different fact showing that it has made further sale of 2254.62 MT to others also outside NSEL. It is stated by the AO that all the transactions of NSEL are only paper transactions without actually delivery.

v) It is stated by the AO that the bills and delivery challans submitted by the assessee are not reliable in absence of third party confirmation. He has alleged that the explanation given by the assessee was contradictory and an afterthought.

vi) The Assessing Officer has observed that in response to his question about payment, the appellant had explained that the actual payment has been received against the sales by way of obligation report and payment by way of cheque from NSEL Client A/c of NKPL. The details submitted by the assessee in this regard are not accepted by the AO on the ground that the appellant has credited

amount to the account IBMA in its books of account out of the total payment of Rs.108.97 crores received. The appellant had provided copy of account of IBMA from its bocks of account reflecting the payment received. It is stated by the AO that the assessee has not received any other amount from NSEL Client A/c. other than Rs.108.97 crones and it is further stated that the assesses cannot credit the account of IBMA for payment received from and on behalf of other parties. Therefore, the submission of the assessee about payment received from various parties is not accepted.

vii) The Certificate from Rajkot Lodhika Sahkar Kharid-Vechan Sangh to support delivery of goods filed with AO which is referred to earlier, is also not held to be reliable on the ground that it does not mention the tank number against the stock lying for cotton wash oil und, that the particulars of warehouse of the Sangh for the storage. He has also stated that the certificate does not mention the confirmation of the parties. There is no movement of the stock from warehouse. The certificate was submitted at the fag end of the year and, therefore, verification was not done.

viii) With the above discussion, it is ultimately held that the appellant has booked purchases from NKPL in excess of the sales actually made by the NKPL to the appellant and the assessee has not reconciled the actual sale & purchase carried out on NSEL platform.

6.4 In this connection, the appellant submits as under:-

i) The Assessing Officer has referred to purchases shown by the assessee from NKPL which were sold on NSEL platform, it was specifically explained that these sales include sale of 10,180 MT referred to earlier which is received by physical delivery. The AO has referred to cross verification of the details of NSEL transactions of cotton wash oil by NKPL for sale to the assessee. However, he has failed to appreciate that the cotton was oil purchased from NKPL which is referred to by the Assessing Officer, is with reference to transaction by way of trade cycle referred to above. However, it does not include the physical delivery of stock from NKPL which is sold on NSEL platform to the respective parties through NKPL. Thus, AO and the Auditors have ignored the actual delivery of stock of 10,180 MT purchased from NKPL. The appellant had explained that this physical stock was sold to different parties of NSEL and, that therefore, the sale to those parties was on account of this physical stock as also the stock on account of trade cycle referred to above. The

AO has confused the transaction by way of trade cycle which is explained by the appellant and which is in respect of the finance raised by the appellant on NSEL and concluded that all the transactions on NSEL platform by way of sale by the appellant is with reference to such trade cycle for which there is no physical delivery. The appellant has produced before the AO the bills and delivery challans for sale of 10,180 MT of cotton wash oil referred to above, a copy of the same is again enclosed. It may be noted that as certified by the Auditors the total purchase by appellant is of 301703.63 MT and the sale is of 301712.9 MT. These facts itself shows that there are also transaction of physical purchase and sale of material.

ii) Apart from the above, the appellant may refer to the Annual Accounts for the year which separately shows opening stock, sale & purchase as also closing stock of cotton wash oil which includes the transaction of NSEL by way of trade cycle and also the transaction of physical delivery. If there was only transaction of trade cycle, there cannot be any stock. Further, the stock (opening) purchase and sales also stock (closing) quantity gets reconciled. Thus, there is no excess purchase booked by the company.

iii) Apart from the above, the appellant may submit the copies of documents by way of confirmation from NKPL.

Considering the above facts and circumstances of the assessee's case, the Assessing Officer has incorrectly made the addition for the alleged excess purchase shown by the appellant from NKPL, which is based on assumption that on NSEL the sales made are without delivery. The addition so made deserves to be deleted."

50.3 The learned CIT(A) did not find merit in the submission made by the assessee and proceeded to confirm the addition made by the Assessing Officer on account of the alleged non-genuine purchases for the following reasons given in paragraph No. 10.2 of his impugned order:-

"10.2 I have carefully considered the assessment order facts of the case and the submissions made by the appellant. It was noted by the AO during the course of assessment proceedings that the appellant had undertaken transactions of CWO through NKPL on the NSEL platform. He noted that as per the said audit report, the appellant had shown purchases of CWO from NKPL amounting to Rs. 13,50,43,10,147/- (weighing 259917979 kgs)

whereas on cross verification, it was seen that NKPL had shown sale of CWO to the appellant amounting to Rs.12,90,73,51,619/- [weighing 249737981 kgs). Thus, the appellant i.e. Tirupati Proteins Pvt. Ltd. (TPPL) had shown excess purchases amounting to Rs.59.70 crores over the sales shown by NKPL. The AO after a discussion in his order, held that it was an undisputed fact that all the transactions entered into by the appellant and its group concerns on the NSEL platform were paper transactions and also that the appellant could not furnish any proof of actual delivery of goods as claimed. The appellant on the other hand during the assessment as well as appellate proceedings .including vide its rejoinder to the remand report has stated that evidences in respect of the transactions entered into by it and the purchases and sales made to different parties had been furnished to the AO by way of a certificate stating that goods were actual delivered. On a perusal of all the material available on record, I find that the appellant submitted a certificate from Shree Rajkot Lodhika Sahkari Kharid Vechan Sangh Ltd. of Rajkot which stated that the Cotton Wash Oil had been delivered by the appellant to various parties and had been held in its storage area. However, no proof of actual delivery of the goods has been given by the appellant other than a certificate. There are no confirmations from the recipient parties either. In fact, even before the Special Auditor, no evidences were furnished by the appellant. Moreover, it is also pertinent to note here that the appellant as well as Shri Nilesh Patel, on behalf of NKPL have already accepted the fact that NSEL transactions were only paper transactions and no actual delivery of commodities had even taken place. The appellant has also not been able to reconcile this discrepancy of the actual sale and purchase transaction carried out on NSEL. In the light of this statement and facts of the case and in the absence of any proof of delivery by the appellant, it is clear that the excess purchases of Rs.59,69,58,528/- shown by the appellant was a non genuine transaction, and the addition of addition of Rs.59,69,58,528/- made by the AO on this account is therefore confirmed. Ground of appeal No.4 is dismissed."

51. The learned Counsel for the assessee submitted that the genuineness of purchases in question amounting to Rs.59.70 crores was doubted by the authorities below, but the corresponding sales made out of the said purchases were accepted by them. He invited our attention to the details of such purchases and corresponding sales given at page nos. 197 & 198 of the paper-book respectively and submitted that the corresponding sales made by the assessee-company out of purchases in question were duly supported

by documentary evidence in the form of relevant invoices – copies of which are placed at page nos. 199 to 240 of the paper-book. He contended that when the corresponding sales duly accounted for by the assessee-company were accepted by the authorities below, there was no justification on their part to doubt the genuineness of the purchases from which the said sales were made and disallowed the said purchases.

52. The learned DR, on the other hand, relied on the orders of the authorities below in support of the Revenue's case on this issue.

53. We have heard both the parties and perused all the relevant material available on record. It is observed that the transactions of 10,180 MT of CWO for Rs.59.70 crores was through actual delivery of goods and it was not a part of trading cycle effected by the assessee-company through NSEL for raising finance. As submitted on behalf of the assessee-company, NKPL was having one functionary unit at Rajkot Lodhika Sahkari Kharid Vechan Sangh, situated at Rajkot and they had sold 10,180 CWO to the assessee-company on actual delivery basis. The said sale was duly recorded and recognized in the books of NKPL as verified by the Assessing Officer and the corresponding sale of 10,180 MT of CWO made by the assessee-company from the purchases made from NKPL was duly supported by the party-wise details furnished by the assessee-company. The said sale recorded and recognized by the assessee-company in its books of account was accepted by the authorities below and we find merit in the contention raised by the learned Counsel for the assessee that the corresponding purchases cannot be disallowed when the sale was accepted. A confirmation of Shree Rajkot Lodhika Sahakari Kharid Vechan Sangh Ltd. was also filed by the assessee confirming delivery of CWO made to the concerned parties on various dates. Moreover, the quantitative details

furnished by the assessee also revealed that the quantity of both purchases and sales was tallying with each other. It is thus clear that the purchase of 10180 MT of CWO for Rs.59.70 crores on delivery basis was actually established by the assessee on the basis of supporting evidence and since the corresponding sale of the same was not only proved but the same was also recorded and recognized as income in the books of account of the assessee-company, we are of the view that the purchase of 10,180 MT of CWO for Rs.59.70 crores cannot be said to be excessive as alleged by the authorities below. We, therefore, delete the addition made by the Assessing Officer and confirmed by the learned CIT(A) on account of alleged excessive purchases and allow Ground No.4 of the assessee's appeal.

54. As regard the issue raised in Ground No.5 relating to the addition made by the Assessing Officer and confirmed by the learned CIT(A) on account of alleged unexplained sales, the learned Counsel for the assessee submitted that the said sales treated as unexplained by the authorities below were duly accounted for by the assessee-company in its books of account. He contended that the addition of the same again by treating the same as unexplained by the authorities below has clearly resulted in double addition. The learned DR, on the other hand, has submitted that this claim of the assessee specifically made for the first time before the Tribunal requires verification by the Assessing Officer. We find merit in this contention of the learned DR and since the learned Counsel for the assessee has also no objection for such verification being done by the Assessing Officer, we restore this issue to the file of the Assessing Officer with the direction to decide the same afresh after verifying the claim of the assessee that the sales in question treated as unexplained was already accounted for

by the assessee-company in its books of account. Ground No.5 is accordingly treated as allowed for statistical purposes.

55. As regard the issue raised in Ground No.6 of this appeal relating to the addition of Rs.10,04,170/- made by the Assessing Officer and confirmed by the learned CIT(A) on account of unexplained cash credit, the learned Counsel for the assessee has submitted that the said amount actually represented realization of sale proceeds as explained on behalf of the assessee before the authorities below. He contended that the same, therefore, cannot be treated as unexplained cash credit and Section 68 of the Act has no application. We find merit in this contention of the learned Counsel for the assessee and since the learned DR has not been able to dispute the position that the amount in question represented sale proceeds realized by the assessee-company, we accept the contention of the learned Counsel for the assessee that Section 68 of the Act has no application and the addition made by the Assessing Officer and confirmed by the learned CIT(A) on this issue by invoking Section 68 of the Act cannot be sustained. Ground No.6 of assessee's appeal is accordingly allowed.

56. As regards the issue raised in Ground No. 7 relating to the disallowance of Rs.3,17,346/- made by the Assessing Officer and confirmed by the learned CIT(A) on account of interest expenses, it is observed that interest free advances were given by the assessee to five parties during the year under consideration. Since the assessee failed to establish that the said advances were given for the purpose of business, the interest attributable to the said advances as worked out at Rs.3,17,346/- was disallowed by the Assessing Officer. At the time of hearing before us, the learned Counsel for the assessee has invited our attention to the balance-sheet of the assessee-company placed at page No.141 of the paper-book to point out that own

funds in the form of capital and reserves to the extent of Rs.420 crores were available with the assessee-company at the relevant time and the same were sufficient to give interest free advances in question. We, therefore, find merit in this contention of the learned Counsel for the assessee that the disallowance made by the Assessing Officer on account of interest and confirmed by the learned CIT(A) is not sustainable. The same is accordingly deleted and Ground No.7 of the assessee's appeal is allowed.

57. Thus, ITA No. 1213/Ahd/2018 for A.Y. 2011-12 filed by Tirupati Proteins Pvt. Ltd. is partly allowed.

58. In the result, all the four appeals of the assessee(s) are partly allowed.

Order pronounced in the open Court on 16.11.2022 at Ahmedabad.

Sd/-	**Sd/-**
(PRAMOD M. JAGTAP)	**(SUCHITRA KAMBLE)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Ahmedabad, Dated 16/11/2022

TRUE COPY

Tanmay, Sr. PS/bt

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)-9, Ahmedabad
5. विभागीय प्रतिनिधि,आयकर अपीलीय अधिकरण ,राजोकट/DR,ITAT, Ahmedabad,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, ITAT, Ahmedabad