आयकर अपीलीय अधिकरण पुणे न्यायपीठ "सी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C" PUNE

BEFORE SHRI INTURI RAMA RAO, AM
AND SHRI PARTHA SARATHI CHAUDHURY, JM

ITA No.938/PUN/2017
निर्धारण वर्ष / Assessment Year : 2011-12

The Asst. Commissioner of Income Tax, Circle – 8, Pune. ..... अपीलार्थी / Appellant

बनाम v/s

Atlas Copco (India) Ltd., Mumbai-Pune Road, Dapodi, Pune-411012 ..... प्रत्यर्थी / Respondent

PAN : AAACA4074D

Assessee by : Shri R. Muralidhar

Revenue by : Smt. Divya Bajpai

सुनवाई की तारीख / Date of Hearing : 28.10.2021
घोषणा की तारीख / Date of Pronouncement : 01.11.2021

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the Revenue directed against the order of the learned Commissioner of Income Tax (Appeals) – 13, Pune dated 27.01.2017 for the Assessment Year 2011-12.

2. The Revenue has raised the following grounds of appeal :

"1. Whether the Ld.CIT(A)-IT/TP, Pune correct in fact and law, in holding that only a completely uncontrolled transaction can be used for the benchmarking when there are no limits identified in the I.T.Act, 1961 for such a categorization of the International Transaction and further the OECD guidelines in para 1.70 clearly suggests that 'an attempt should be made to reach a reasonable accommodation keeping in mind the imprecision of the various methods and the preference for higher degrees of comparability and a more

direct and closer relationship to the transaction?

2. Whether, the Ld.CIT(A)-IT/TP, Pune has erred on facts and in law, while allowing the adjustment made on account of Sales Commission, when perfectly comparable internal segment was available and disregarding the fact that all International Transactions should have been separately benchmarked by ACIL?

3. Whether on the facts and circumstances of the case, the Ld.CIT(A) was justified in holding that discount of Rs.23,88,025/- received on pre-payment of liability under the 'Sales Tax Deferral Scheme, as not a remission or cessation of liability u/s 41(1)?

4. Whether on the facts and circumstances of the case, the CIT(A) was justified in allowing expenditure of Rs.37,38,703/- incurred on interior work in Bangalore office which is capital in nature & not allowable u/s 30(i) of the IT Act & also the Ld. CIT(A) failed to apply the case of Laxmi Sugar & Oil Mills to this case.

5. Whether on the facts and circumstances of the case, the CIT(A) was justified in restricting the addition made out of miscellaneous expenditure of Rs.2,00,000/- to Rs. 1 lac on adhoc basis, when the onus to prove the genuineness of the expenses was not discharged by the assessee inspite of opportunity allowed by the A.O and also when no finding on the genuineness of the claim has been brought out by the CIT(A)?

6. Whether on the facts and circumstances of the case, the CIT(A) was justified in allowing commission expenses of Rs.42,53,300/- when onus to prove the genuineness of the expenses was not discharged by the assessee inspite of opportunity allowed by the A.O and also when assessee can prove genuineness of remaining commission expenses of Rs.19,08,66,583/- out of total commission expenses of Rs.19,51,19,883/- and when assessee failed to discharge its onus in submitting evidences called for by the AO when the law specifically requires such onus to be discharged before allowing such expenses & also when in fact the CIT(A) has not given a finding on the genuineness of the claim?

7. Whether on the facts and circumstances of the case the Ld. CIT(A) erred in deleting the disallowance of Rs.25,72,235/- u/s 14(A) ignoring that AO has clearly recorded in his order that he is not satisfied with the quantum of expenses allocated by the assessee against exempt income?

3. The Revenue has filed the following revised grounds in substitution of ground No.1.

"1. The CIT(A) erred in holding that the comparison of two controlled transactions cannot be made for benchmarking of the royalty paid by the assessee to its Associated Enterprise by comparing it with the rate of royalty agreed between two Associated Enterprises when no such limits of categorization of international transactions are specified in the I.T.Act, 1961.

2. The CIT(A) erred in allowing the adjustment made on account of receipt of sales commission by holding that the profit earned in independent marketing function cannot be compared with the integrated marketing function of a fully integrated manufacturer and by rejecting the approach of the TPO using internal segment, though it is an acceptable method of benchmarking the international transaction."

4. The brief facts of the case are that the respondent / assessee is a Public Limited Company and a part of Swedish Multinational Group of Companies i.e., Atlas Copco AB. It is engaged in the business of manufacturing and sale of Air & Gas Compressors, Construction and Mining Equipment & Industrial Tools. The return of income for A.Y. 2011-12 was filed on 29.11.2011 disclosing total return of income of Rs.280,05,60,374/-. The same was revised on 29.03.2013 declaring total income of Rs.278,47,90,766/-. The said return of income was selected for scrutiny assessment. On noticing that the respondent / assessee had reported the international transactions in Form No.3CB, the Dy. Commissioner of Income Tax, Circle - 8, Pune (hereinafter referred as the "Assessing Officer") made a reference to the Addl.Commissioner of Income Tax, Pune, (hereinafter referred as the "Transfer Pricing Officer (TPO)") u/s 92CA(3) of the Act for the purpose of determination of Arms Length Price (hereinafter referred as "ALP") in relation to the following international transactions :

l.No.	**Description**	**Amount (Rs)**	**Method**
1	Import of components and Spares	203,06,18,058	TNMM
2	Import of finished goods	247,53,51,918	TNMM
3	Export of Manufactured goods	144,48,44,205	TNMM
4	Import capital goods & spares	2,30,65,662	CUP

5	Payment of royalty	12,19,70,217	TNMM
6	Receipt of Sales commission	34,48,45,112	TNMM
7	Payment of commission	2,64,67,023	TNMM
8	Provision of on-site engineering	29,86,247	TNMM
9	Provision of Administrative support services	98,65,458	TNMM
10	Provision of Procurement support services	1,12,66,020	TNMM
11	Payment of management fees	1,55,26,788	TNMM
12	Commission charges paid	5,95,563	TNMM
13	Receipt of technical services	3,00,000	TNMM
14 T	Recovery of warranty cost	4,25,49,256	TNMM
15	Provision of IT enabled design engineering services	33,15,26,391	TNMM
16	Allocation of common costs	9,00,49,643	
17	Reimbursement of expenses	4,78,05,887	
18	Recovery of expenses	66,42,107	
19	Goods in Transit	62,33,84,243	TNMM
20	Amounts Written off	11,45,520	TNMM
21	Amounts written back	18,14,270	TNMM
22	Write-off Old Balances	94,46,248	TNMM
23	Write back of old balances	1,20,04,005	TNMM
	Total	**767,40,69,841**	

The TPO vide order dt.28.01.2015 passed u/s 92CA(3) of the Act suggested the T.P. adjustments of Rs.13,25,00,000/- in respect of following international transactions :

a) Payment of royalty at Rs.4,31,00,000/-

b) Commission towards the provision of marketing support services at Rs.8,23,00,000/-

c) Sale of products to A.E. at Rs.71,00,000/-

Finally, the assessment was completed by the Assessing Officer at a total income of Rs.293,02,56,090/- u/s 143(3) r.w.s. 144C(3) of the Act on 10.04.2015 after making following disallowances :

(a) Sales Tax deferred and NPV at Rs.423,88,626/-

(b) Expenses on repairs and maintenance at Rs.35,51,768/-

(c) Other miscellaneous expenses at Rs.2,00,000/-

(d) Commission payment at Rs.42,53,300/-

(e) Disallowance u/s 14A of the Act at Rs.25,72,225/-

(f) T.P. Adjustment of Rs.13,25,00,000/-

5. Being aggrieved by the assessment order, an appeal was preferred by the respondent / assessee before the ld.CIT(A), who vide impugned order deleted the T.P. Adjustment on account of payment of royalty at Rs.4,31,00,000/- following his order in respondent / assessee's own case for the earlier assessment years i.e., A.Y. 2008-09, 2009-10 and 2010-11. Similarly, as regards to the T.P. adjustment on account of receipt of commission payment of Rs.8,23,00,000/-, the ld.CIT(A) following his order in respondent / assessee's own case for the earlier assessment years for A.Y. 2008-09, 2009-10 and 2010-11 deleted the T.P. adjustment. As regards to the disallowance of Rs.71 lakhs i.e., difference in prices of the products sold in AE and non-AE, ld.CIT(A) remitted the issue back to the file of Assessing

Officer. As regards addition of Rs.23,88,025/- on account of pre-payment of sales tax deferred loan, the ld. CIT(A) following the decision of Hon'ble Bombay High Court in the case of CIT vs. Sulzer India Limited (2014) 369 ITR 717 (Bom) and the Hon'ble High Court of Karnataka in the case of CIT vs. McDowell & Co Ltd (2014) 369 ITR 684 (Kar) held that the provisions of section 41(1) of the Act have no application, accordingly, directed the Assessing Officer to delete the addition.

6. As regards to the disallowance of Repairs and Maintenance Expenses of Rs.37,38,703/-, the ld.CIT(A) following his order in assessee's own case for earlier years i.e., A.Ys. 2009-10 and 2010-11 had directed the Assessing Officer for the deletion of the same. As regards to the disallowance of Miscellaneous Expenditure of Rs.2,00,000/- on adhoc basis, ld.CIT(A) confirmed the disallowance only to the extent of Rs.1,00,000/-. Regarding to the disallowance of commission expenditure of Rs.42,53,300/-, ld.CIT(A) following his own order in respondent / assessee's own case for the earlier assessment years 2010-11 and 2012-13 had deleted the addition. On the issue of addition u/s 14A, the ld. CIT(A) had accepted the submissions of respondent-assessee that the actual amount of disallowance works out to Rs.12,86,118/-, accordingly confirmed the addition.

7. Aggrieved by the order of ld.CIT(A), the Revenue is in appeal before us.

8. **In Ground No.1, the Revenue challenges the decision of ld.CIT(A) deleting the Arms Length Price adjustment on account of payment of Royalty.**

The brief factual matrix of the issue in ground No.1 as under :

During the previous year relevant to the assessment year under consideration, the respondent / assessee made a payment of royalty to it's Associated Enterprise (hereinafter referred as "A.E.") i.e., Atlas Copco Air Power NV in consideration of receipt of technology in the form of know-how, technical training and technical assistance. In terms of the agreement with Atlas Copco Power NV Belgium, royalty is payable at 5% of domestic sales and 8% on export sales. In the T.P. Study, the respondent / assessee sought to justify the transaction of payment of royalty in ALP by adopting Transactional Net Margin Method (hereinafter referred as "TNMM") by aggregating with the other international transactions. However, the TPO did not accept the aggregation of transactions and considered the transaction of payment of royalty separately under CUP method. The respondent / assessee company also accepted this.

9. The TPO computed the ALP adjustment in respect of the payment of royalty by adopting royalty paid by other group company i.e., Wuxi-Atlas Copco Compressor Co. Ltd., which paid the royalty at 3% on the net sales price. The TPO considered it as a comparable transaction and held that ALP of the royalty is determined at 3% of the domestic sales and 8% of the export sales and the value of which is determined at Rs.2.97 crores. Consequently the difference between the actual payment of Rs.6.41 crores and ALP of Rs.2.79 lac being Rs.3.62 lac was suggested as TP adjustment on account of royalty payment.

10. On appeal before the ld.CIT(A), the ld.CIT(A) deleted the addition by holding that the methodology adopted by the TPO in comparing the controlled transaction with another controlled transaction is flawed by placing reliance on his order in assessee's own case for the earlier A.Ys. 2008-09, 2009-10 and 2010-11.

11. Before us, the ld.CIT DR had vehemently contested that the ld.CIT(A) ought not have granted relief to respondent / assessee on the ground that comparison of two controlled transactions cannot be made when no such method is barred by law.

12. On the other hand, Shri R. Muralidhar, learned counsel for assessee contended that the transaction of payment of royalty is at ALP. It is in accordance with the policy of the Government of India on payment of royalty under Foreign Technology Collaboration Agreement. He also filed a copy of the Press Note No.8 dt. l6.12.2009 in terms of which payment of royalty @ 5% domestic sales and 8% of exports is permitted under automatic approval. He also relied on the decision of Hon'ble jurisdictional High Court in the case of CIT Vs. SGS India Pvt Ltd., reported in (2015) 94 CCH 0338 (Bombay High Court) wherein it is held that the royalty paid at 3% of the sales to arrive at the ALP is much below the royalty for trade mark and which is allowed to be paid. He also placed reliance on the orders of the Tribunal in assessee's own case for earlier assessment years wherein the Tribunal had deleted the

similar addition by holding that comparison of one controlled transaction cannot be made with another controlled transaction.

13. We heard the rival submissions and perused the material on record. The issue in the present ground of appeal relates to the determination of ALP of the transaction of payment of royalty. Admittedly, the royalty was paid @ 5% of domestic sales and 8% of the export sales in consideration of receipt of technology in the form of know-how, technical training and technical assistance for the purpose of manufacturing the compressors. The TPO determined the ALP of the royalty payment at 3% of the sales by taking it as appropriate benchmark. The TPO adopted this benchmark considering the transaction of payment of royalty by it's A.E. i.e., Wuxi Atlas Copco Compressor Co Ltd., which is undisputedly controlled transactions, and the difference between two and the actual price was suggested as TP adjustment u/s 92CA of the Act without even going into the issue whether the approval of payment of RBI will constitute a CUP method or not. The issue in the present ground of appeal was adjudicated by Co-ordinate Bench of this Tribunal in assessee's own case for A.Y. 2010-11 in ITA No.1353/PUN/2015 by holding as under:

> *"13.....The present issue can be decided in favour of the assessee by holding that comparison in order to determine if the ALP cannot be done by comparing the prices charged to by A.E., which is controlled transaction, as the provisions of I.T. Act, mandates that the determination of ALP has to be done by comparison between controlled and un-controlled transactions. An identical issue has been dealt by the Hon'ble Bombay High Court in the case of PCIT Vs. Audco India Limited reported in (2019) 104 taxmann.com 386 (Bom) wherein the Hon'ble High Court on identical facts had confirmed the decision of Tribunal by dismissing the appeal filed by the Revenue by holding that TPO has to arrive at ALP of the transaction only comparing it with uncontrolled transactions and the Hon'ble High Court had found fault with the approach of the TPO by holding*

that it is contrary to the clear provisions of the Act as per Rule 10A(d) of the Rules.

Hon'ble Bombay High Court dismissed the appeal of Revenue on the following question of law by holding as under :

> *"(d) We note that Chapter X of the Act is a special provision relating to avoidance of tax. Section 92 deals with computation of income from international transaction having regard to ALP. It provides any income arising from the international transaction shall be computed having regard to the ALP. The ALP is defined under Section 92F(ii) of the Act to mean a price which is applied or proposed to be applied in transactions between persons other than AE's in uncontrolled transactions. This is further supported by Rule 10A(d) where uncontrolled transaction has been defined as a transaction between enterprises other than with A.E's. whether resident or non-resident. In view of the above clear position in law, the TPO ought to have arrived at the ALP of the respondent's sale to its A.E.viz. Flow Serve by only comparing it with uncontrolled transaction of sale to in USA. Thus the approach of the TPO is contrary to the clear provisions of law. Besides as held by the Tribunal the comparison has to be region/country specific, which in this case, the TPO has completely ignored.*
>
> *(e) Therefore, the view taken by the Tribunal does not call for any interference as it is in accordance with the self-evident provisions of law. Thus, this question as proposed does not give rise to any substantial question of law. Thus not entertained."*

14. We found that the decision referred by the Co-ordinate Bench of the Tribunal in assessee's own case for earlier assessment years i.e., 2005-06, 2007-08 and 2008-09 are in consonance with the above principle of law and therefore, the ld.CIT(A) merely followed the order of Tribunal in earlier orders. In these circumstances, we do not see any reason to interfere with the order of ld.CIT(A). Accordingly, the ground No.1 of appeal filed by the Revenue stands dismissed."

14. Therefore, we do not find any merit in the ground of appeal No.1 filed by the Revenue. Accordingly, ground of appeal filed by the Revenue stands dismissed.

15. **In Ground No.2 of appeal, the Revenue challenges the decision of ld.CIT(A) deleting the addition on ALP adjustment on account of receipt of commission for Marketing Services at Rs.7.23 crores.**

The brief factual matrix of the issue in ground No.2 is as under :

During the previous year relevant to the assessment year under consideration, the appellant received indenting commission for the services rendered to it's A.E. The functions performed by the appellant are described in the T.P. Study Report at Para 8 reads as under :

> *"8. The sales team of ACIL in the course of marketing the goods manufactured by ACIL may come across a prospective/existing customer having requirement for a product which is not being manufactured by ACIL. bur which* is *manufactured by its AEs, In such a situation, the sales team informs the prospective/existing customer about the availability of the, requisite product with their AEs, obtains from the customer the technical specifications of the products desired, and communicates the same to the concerned AE It should be noted that ACIL 's involvement is restricted to providing the AEs with the lead and in providing routine administrative support whenever required ACIL does not conclude contracts on behalf of the AEs, nor does it hold any inventory of products on behalf of the AEs, The consideration due to ACIL* is *mutually agreed between ACIL and the transacting AE, and generally depends on the size of the order procured as well as the price which the AE* is *able to negotiate with the customer, The consideration due to ACIL is mutually agreed between ACIL and the transacting AE, and generally depends on the size of the order procured as well as the price which the AE* is *able [Q] negotiate with the customer."*

The appellant received commission of Rs.34.73 crores for rendering the indenting / marketing services to its A.E. The respondent / assessee applied the TNMM method in respect of this international transactions and sought to justify the transaction of receipt of commission is at ALP by applying the TNMM separately. There is no dispute as to the computation of the total profit arrived at Rs.230.02 crores attributed to both the manufacturing functions and marketing functions. However for the purpose of allocation of profits so arrived at Rs.230.20 crores between two segments i.e., manufacturing and marketing function, the depreciation and cost of material

consumed were excluded from total cost and the cost has been taken as key for allocation of net profit earned by the entity.

16. The TPO of the view that since the cost of material consumption and depreciation does not contribute to the profits, the same should not be included as a part of total cost incurred by the entity. On this basis, the TPO was of the opinion that for the purpose of calculating the percentage of marketing cost to the total cost, the cost of material and depreciation should be excluded as result of which percentage of marketing cost to total cost was arrived at 7.38%. Then TPO proceeded to allocate the total profits earned by the respondent / assessee in terms of percentage of cost between two segments. Accordingly, the TPO attributed profits to marketing functions in the proportion of percentage cost at 17.43 crores. When the profit is converted into percentage of sales, it worked out to 4.24%. Then the TPO calculated the profit attributable to marketing functions on sales of 411.06 crores @ 17.43 crores. Then after including the cost incurred on marketing A.E. products of Rs.25.53 crores, the TPO arrived at 42.96 crores as the amount ought to have been received on marketing services from A.E. as against the actual receipt of Rs.34.73 crores and the difference was proposed as T.P. Adjustment.

17. On appeal before the ld.CIT(A), the ld.CIT(A) following his decision in assessee's own case in earlier years deleted the adjustments.

18. Being aggrieved with the order of ld.CIT(A), Revenue is in appeal before us in the present appeal.

19. The ld. CIT DR had vehemently contested that the ld.CIT(A) ought not have deleted the ALP adjustment made by the TPO on account of receipt of sales commission by rejecting the approach of the TPO using the internal segment results.

20. On the other hand, learned counsel for the respondent / assessee submitted that the methodology adopted by the assessee has been upheld in the earlier year i.e., A.Y. 2005-06 by this Tribunal vide ITA No.736/PUN/2011 dated 05.08.2019.

21. We have heard the rival submissions and perused the material on record. The issue in this ground of appeal relates to the determination of ALP in respect of the transaction of receipt of commission. The main contention of the appellant is that the functions undertaken by the assessee for selling the product is significantly different from what is undertaken for the purpose of earning the commission income from A.E. The profit earned from independent activity of marketing function cannot be compared with the integrated marketing function of a fully integrated manufacturer. But the TPO had aggregated both the functions, however proceeded to benchmark the marketing function separately. We need not examine propriety of aggregating both the functions as the respondent / assessee is not objecting the same. The only bone of contention between the Department and the

assessee is exclusion of the cost of material consumed and the depreciation in the total cost for the purpose of determining the percentage of marketing cost to the total cost. The reasoning given by the TPO that these two segments of the cost does not contribute to profit does not stand to any reason, in as much as the depreciation and the material actually contributes to the profits in the manufacturing segment. An identical issue was examined by the Co-ordinate Bench of this Tribunal in assessee's own case for A.Y. 2010-11 in ITA No.1353/PUN/2015, wherein the Tribunal following the decision in assessee's own case for earlier year i.e. A.Y 2005-06 allowed the claim by holding as under:

> *"21....The identical issue was examined by the Co-ordinate Bench of the Tribunal in assessee's own case (ITA No.736/PUN/2011 dt.05.08.2019) for A.Y. 2005-06 wherein it was held as under :*
>
> > *"14.....As the transaction is that of earning commission, ideally, the benchmarking should also have been done with reference to an uncontrolled transaction of earning commission only. Notwithstanding the fact that the TPO was required to take the comparable uncontrolled transaction as that of rendering of marketing services alone, he started with the entity level figures of the assessee which also include sale of self goods ostensibly involving altogether different functions, assets and risks vis-à-vis earning commission on sale for AEs. Thereafter again, he went off the mark by excluding the amount of raw material costs etc. and depreciation from the base of total costs by overlooking the fact that the figure of profit taken up by him also included profit from sale of manufactured goods. The ld. DR was fair enough to accept that the amount of depreciation ought to have been included. Even if we presume the initial step of adoption of the entity level profit of the assessee, including that from sale of self goods as correct, with which we do not otherwise agree, then also the total costs contributing to the manufacturing profit should have been considered, which obviously include raw material cost and depreciation, as has been held in the first appeal. On considering the position in this manner, the ld. CIT(A), on pages 27 and 28 of the impugned order, has found the ALP of commission income at Rs.13.79 crore as against the transacted value of commission income at Rs.13.38 core, which is within plus minus 5% range, not calling for any transfer pricing addition. We, therefore, accord our imprimatur to the view taken by the ld. CIT(A) on this score. This ground is not allowed. 15. Ground no.1 of the assessee's appeal is against the confirmation of disallowance u/s.35DD of the Act at*

Rs.2,10,000/-, being, 1/5th of the fees paid to Registrar of Companies for increasing the authorized capital on amalgamation."

Thus, we are of the considered opinion that the TPO was not justified in excluding the depreciation and cost of the material consumed in denominator of total costs. Further, we find that the methodology adopted by the TPO does not fall into any of the appropriate methods prescribed under Rule 10(b) of the I.T. Rules, 1962. We must also mention that clause (f) of clause (1) of Rule 10(b) prescribing any other method was inserted with retrospective effect from 01.04.2013 is not applicable for the year under consideration. Therefore, the ratio of the jurisdictional Bombay High Court in the case of CIT Vs. Kodak India (P) Ltd., reported in (2017) 79 taxmann.com 362 (Bombay) is applicable in the present set of facts. In the case of CIT Vs. Kodak India (P) Ltd. (supra), the Hon'ble Bombay High Court has held as under :

***"10.** We must also record the fact that the ALP was arrived at by the Transfer Pricing Officer (TPO) by not adopting any of the methods prescribed under Section 92C of the Act. The method to determine the ALP adopted was not one of the prescribed methods for computing the ALP. It was not even any method prescribed by the Board. At the relevant time, i.e. for A.Y. 2008-09 Section 92C of the Act did not provide for other method as provided in Section 92C(1)(f) of the Act. The impugned order of the Tribunal holds that the method adopted by the Revenue to determine the ALP was alien to the methods prescribed under Section 92C of the Act. In the above circumstances, the Tribunal declined to restore the issue to the Assessing Officer for re-determining the ALP by adopting one of the methods as listed out in Section 92C of the Act. This finding of the Tribunal has also not been challenged by the Revenue.*

***11.** In view of the fact that the Revenue has accepted the order of the Tribunal on its finding on facts on the two issues as pointed out hereinabove as well as the refusal of the Tribunal to restore the issue of determination of ALP to the TPO by following one of the methods prescribed under Section 92C of the Act. Thus, the questions as formulated for our consideration even if answered in favour of the Revenue would become academic in the present facts. Thus, we see no reason to entertain this appeal. However, we make it clear that the issues of law which has been raised in the present appeal are left open for consideration in an appropriate case."*

The ratio that can be culled out from the above decision is that when the TPO had not adopted any of methods prescribed u/s 92CA of the I.T. Act, no adjustment on account of ALP can be made by TPO. Therefore, the order of the ld.CIT(A) though does not contain independent reasoning, keeping in view of the order of the Tribunal for earlier years on identical issue in assessee's own case on the principle of consistency and ratio of decision of Hon'ble Bombay High Court in the case of CIT Vs. Kodak India (P) Ltd. (supra), we uphold the order of ld.CIT(A). Thus, the ground No.2 of the appeal filed by the Revenue is dismissed."

Since the identical issue was decided against the Revenue in earlier years, on the parity of same reasoning, the ground of appeal No.2 filed by the Revenue stands dismissed.

22. **In ground of appeal No.3 the Revenue challenges the decision of ld. CIT(A) in deleting the addition of Rs.23,88,025/- on account of pre-payment of liability under Sales Tax Defferal Scheme.**

The brief factual matrix of the case is as under:

During the previous year relevant to the year under consideration, the Net Present Value of total sales tax defferal loan of Rs.1,89,66,384/- was determined at Rs.1,65,78,359/-. Under the Package Scheme of Incentive of Government of Maharashtra, the Appellant was entitled to defer the sales tax liability of the year 1998-1999 and 1999-2000 for 10 years and thereafter, pay the same in installments. Subsequently, the scheme was amended to allow prepayment of deferred sales tax liability at Net Present Value (NPV) and during the year relevant to the year under consideration, the appellant made an application to the Dy. Commissioner of Sales Tax for prepayment of sales tax liability of Rs.1,89,66,384/- and the same came to be approved by the said authority vide letter dated 23.12.2010. The said difference between the sales tax liability and NPV of the said sales tax liability of Rs.23,88,025/- was not offered to tax claiming to be capital receipt. However, the Assessing Officer was of the opinion that the provisions of section 41(1) and 28(iv) of the Act have application to the facts of the case and accordingly, brought the

difference amount of Rs.23,88,025/- to tax. However, on appeal, the ld. CIT(A) applying the ratio laid down by the Hon'ble Bombay High Court in the case of CIT vs. Sulzer India Limited (2014) 369 ITR 717 (Bom) and the Hon'ble High Court of Karnataka in the case of CIT vs. McDowell & Co Ltd (2014) 369 ITR 684 (Kar) held that when net value of the difference of sales tax had been paid, then the benefit is not arising from the business on account of statutory provisions and therefore, the provisions of section 28(iv) have no application. It was further held that the same does not fall within the ambit of cessation of liability thereby coming within purview of provisions of section 41(1) of the Act in view of the decision of Hon'ble Bombay High Court in the case of CIT vs. Sulzer India Limited (supra) and in the case of CIT vs. Colgate Palmolive (India) Limited (159 taxmann.com 139) and accordingly, directed the Assessing Officer to delete the addition of the same.

23. Having aggrieved by the decision of ld. CIT(A), the Revenue is in appeal before us vide this present ground of appeal challenging the correctness of the decision of ld. CIT(A).

24. The issue in the ground of appeal is no more *res integra* as the issue was decided in favour of assessee by the Hon'ble jurisdictional High Court in the case of CIT vs. Sulzer India Limited (supra), wherein it was held that when the sales tax liability was discharged at Net Present Value, the difference between the sales tax liability and NPV of the sales tax liability cannot be brought to tax within the provisions of section 41(1) of the Act applying the ratio of the decision of Hon'ble High Court of Karnataka in the

case of CIT vs. McDowell & Co Ltd (supra). The relevant observations made by the Hon'ble Bombay High Court are extracted below:

> *"**43.** We agree with the Tribunal's conclusion also because in a recent Judgment brought to our notice, the Hon'ble High Court of Karnataka has taken a similar view. In its Judgment delivered in the case of McDowell & Co. Ltd. (supra) the Karnataka High Court determined and decided a similar controversy. A similar scheme was availed of by M/s. McDowell, the Assessee before the Karnataka High Court under the BST, wherein, it paid the NPV against premature payment of the amount of the deferred tax under a incentive Scheme and settled the amount. As against a higher sum, which was due and payable and afterwards, the Assessee paid the lesser sum of Rs.,25,79,684/- to the Sales Tax Department on 29th March, 2004 and the amount got settled.*
>
> ***44.** In relation to this very controversy and the very provision namely section 41(1), the High Court of Karnataka noted the rival contentions in para 5 and 6. Those were admittedly raised on the factual background that deferred Sales Tax was to be paid in the year 2007. The State Government itself determined the NPV of the amount, which was receivable in 2017, calculated the same and treated it as payment of deferred tax.*
>
> ***45.** In dealing with the rival contentions, the High Court framed one identical substantial question of law as was dealt with by the Tribunal in the present case before us and held as under:*
>
> > *"8. As per the incentive scheme announced by the Government of Maharashtra, the assessee entered into an agreement with the Governor of Maharashtra to avail the benefits under deferral/1993 scheme which provides for deferment of payment of taxes. This agreement not only determines the eligibility of the assessee but also lays down the terms and conditions under which the agreement exists. The quantification of this deferment was made by Sicom Limited, a Government of Maharashtra Undertaking, which was an agent for the package scheme of incentives. M/s. Sicom Limited quantified the entitlement of deferral of sales tax to the assessee. As against the total amount of Rs.20,21,64,149/- collected by the assessee towards Bombay Sales Tax and Central Sales Tax, the maximum entitlement of sales tax incentives by way of deferment was determined at Rs.13,78,41,600/-. The validity period of the deferral was determined as 1.4.2002 to 31.3.2017, thereby the assessee could retain the amount of sales tax collected to the extent of Rs.13,78,41,600/- up to 31.3.2017. Accordingly, a certificate of entitlement was issued by the Deputy Commissioner of Sales Tax (Incentives and Enforcement) dated 1.4.2002. consequent to the assessee opting for the scheme of deferment of sales tax, an amount of Rs.13,78,41,600/- was deemed to have been paid for the purpose of Section 43B of the Act and, therefore, while concluding the assessment for the assessment year 2003-04, the same was allowed as a deduction. The Maharashtra Government by way of Maharashtra Tax Laws (Levy and Amendment) Act, 2002 inserted the proviso to Section 38 of the Bombay Sales Tax Act, 1959 which came into effect from 1.5.2002. The proviso provided that notwithstanding anything to the contrary contained in the Act or in the Rules or in any of the package scheme of the incentives or in the Power Generation Promotion Policy 1998, the eligible*

unit to whom the entitlement certificate has been granted for availing of the incentives by way of deferment of sales tax, purchase tax, additional tax, turn over tax or surcharge as the case may be, may, in respect of any of the periods during which, the said certificate is valid, at its option, prematurely in place of the amount of tax deferred by it an amount, equal to the net present value of the deferred tax as may be prescribed and on making such payments, in the public interest, the deferred tax shall be deemed to have been paid.

9. In view of the proviso to Section 38 of the Bombay Sales Tax Act, 1959, the net present value was determined at Rs.4,25,79,684/-. It was paid on 2.4.2004 in Form No. 25. Consequent to the payment of the net present value, the Deputy Commissioner of Sales Tax has issued a certificate on 14.4.2004 waiving the balance of the amount payable. It is thereafter the assessee did not offer Rs.9,52,61,916/- for tax.

** ** **

11. As could be seen from the aforesaid provision, if the assessee obtains, whether in cash or in any other manner in respect of such loss or expenditure or some benefit in respect of trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income tax as the income of the previous year. Therefore, the assessee should obtain benefit, before it is deemed to be profits and gains of business or profession.

12. In the instant case, as per the scheme he was allowed to retain the sales tax as determined by the competent authority and pay the same 15 years thereafter. The tax collected was deemed to have been paid and, therefore, the tax so collected cannot be construed as income in the hands of the assessee. The tax so retained by the assessee is in the nature of a loan given by the Government as an incentive for setting up the industrial unit in a rural area. The said loan had to be repaid after 15 years. Again it is an incentive. However, by a subsequent scheme, a provision was made for premature payment. when the assessee had the benefit of making the payment after 15 years, if he is making a premature payment, the said amount equal to the net present value of the deferred tax was determined at Rs.4,25,79,684/- and on such payment the entire liability to pay tax/loan stood discharged. Again it is not a benefit conferred on an assessee. Therefore, Section 41(1) of the Act is not attracted to the facts of this case. Hence, the Tribunal was justified in holding that there is no liability to pay tax. Under these circumstances, we do not see any error committed by the Tribunal in passing the impugned order. The substantial question of law is answered in favour of the assessee and against the revenue."

46. *We respectfully concur with the above view of the High Court of Karnataka.*

47. *Once we concur, then, we do not deem it necessary to deal with the other Judgments cited by Mr. Dastur. They are essentially cited so as to urge that what has taken place as between the Assessee, the State Government and SICOM could not be questioned by the Revenue.*

48. *The other order which has been brought to our notice is delivered by a Division Bench of this Court in the case of CIT v. Xylon Holdings (P.) Ltd. [2012] 26 taxmann.com 333/211 Taxman 108 (Bom.) (Mag.). That is on the point as to whether Assessee's loan liability is capital receipt not taxable as income. In relation to that the Division Bench held as under:*

"** ** **"

> *8. We have considered the submissions. The issue arising in this case stand covered by the decision of this Court in the matter of Mahindra & Mahindra (supra). The decision of this court in the matter of Solid Containers (supra) is on completely different facts and inapplicable to this case. In the matter of Solid Containers (supra) the assessee therein had taken a loan for business purpose. In view of the consent terms arrived at, the amount of loan taken was waived by the lender. The case of the assessee therein was that the loan was a capital receipt and has not been claimed as deduction from the taxable income in the earlier years and would not come within the purview of Section 41(1) of the Act. However, this Court by placing reliance upon the decision of the Apex Court in the matter of CIT v. T.V. Sundaram Iyengar & Sons Ltd. [1996] 222 ITR 344 held that the loan was received by the assessee for carrying on its business and therefore, not a loan taken for the purchase of capital assets. Consequently, the decision of this Court in the matter of Mahindra and Mahindra Limited (supra) was distinguished as in the said case the loan was taken for the purchase of capital assets and not for trading activities as in the case of Solid Containers Limited (supra). In view of the above, the decision of this Court in the matter of Solid containers Limited (supra) will have no application to the facts of the present case and the matter stands covered by the decision of this Court in the matter of Mahindra & Mahindra Limited (supra). The alternative submission that the amount of loan written off would be taxable under Section 28(iv) of the Act also came up for consideration before this Court in the matter of Mahindra & Mahindra Limited (supra) and it was held therein that Section 28(iv) of the Act would apply only when a benefit or perquisite is received in kind and has no application where benefit is received in cash or money.*

** ** **"

49. *These observations of the Division Bench have been reproduced only to distinguish the Judgment of an another Division Bench of this Court in the case of Solid Containers Ltd. (supra), which is relied upon by Mr. Gupta.*

50. *Further, our view finds support from the above observations. In Mahindra & Mahindra Ltd. (supra), the Bench speaking through His Lordship the Hon'ble Mr. Justice S. H. Kapadia, as his Lordship then was, held as under:*

> *" Alternatively, it was argued on behalf of the Department that in this case waiver constituted remission of trading liability and, therefore, section 41(1) stood attracted. We do not find any merit in this argument. Firstly, in the present case, the prerequisite of section 41(1) is not applicable. In order to apply section 41(1), an assessee should have*

obtained a deduction in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee. In this case, the assessee has not obtained such allowance or deduction in respect of expenditure or trading liability. It is not disputed that the assessee has paid interest at 6 per cent. over a period of ten years to KJC on Rs.57,74,064/. In respect of that interest, the assessee never got deduction under section 36(1)(iii) or section 37. In the circumstances, section 41(1) was not applicable because such deduction was not in respect of loss, expenditure or trading liability. In order to get over this alternative argument, it was argued by the Department that the loan was used to buy toolings on which assessee got depreciation allowance of Rs.27,29,585 and, therefore, the amount of Rs.27,29,585 should be set off against Rs.57,74,064. We do not find any merit in this argument. The Department's case is that the assessee got remission of Rs.57,74,064. Remission for depreciation is not in issue before us. The only argument of the Department throughout has been that the waiver constituted remission of Rs.57,74,064. In the circumstances, we cannot direct set off of Rs.27,29,585 against Rs.57,74,064. It is important to bear in mind that before section 41(1) came to be enacted, various judgments as reported in Mohsin Re4hman Penkar v. CIT [1948] 16 ITR 183 (Bom) and Orient Corporation v. CIT [1950] 18 ITR 28 (Bom) had laid down that remission was not income and in order to get over those judgments section 41(1) came to be enacted. In the case of CIT v. Phool Chand Jiwan Ram [1981] 131 ITR 37 (Delhi), the assessee firm had purchased goods. They had also obtained loans from a party, accounts were settled and the balance was credited to the partners' account. It was held by the Delhi High Court that the amount referable to loans was not a trading liability. That, only amounts allowed as deduction in earlier years could be treated as a trading liability. In other words, unless the amounts heave been allowed as deduction in earlier years they cannot be treated as trading liability. In the circumstances, section 41(1) was not applicable. This case applies to the facts of our case also. In the case of CIT v. A.V.M. Ltd. [1984] 146 ITR 355 (Mad), it has been held by the Madras High Court that every deposit money does not constitute trading receipt. That, although such a receipt may be in connection with business, it could not be dealt with by the assessee as a receipt of its trade. Therefore, the amounts referable to loans received for purchase of capital asset would not constitute a trading liability and accordingly section 41(1) was not attracted.

In our case, the most fundamental fact which is required to be borne in mind is that there was no deduction given to the assessee in earlier years and, therefore, Rs.57,74,064 could not be include as income under section 41(1) of the Act. Lastly, it is important to bear in mind that the toolings constituted capital asset and not stock-in-trade. Therefore, taking into account all the above facts, section 41(1) of the Act is not applicable.

In the circumstances, the above questions are all answered in the affirmative, i.e., in favour of the assessee and against the Department.

This disposes of Reference Application No. 1709 of 1982 filed by the Department."

51. *In the final analysis, we find that Mr. Gupta can derive no assistance from the Judgment of Polyflex India (P.) Ltd. (supra). There, the Assessee paid excise duty on certain goods. Pursuant to the decision of the Customs, Excise and Gold Control Appellate Tribunal, a sum of Rs.9,64,206/- was refunded in September, 1988. The Excise Department filed an Appeal to the High Court but it was dismissed. A Petition for special leave to Appeal before the Hon'ble Supreme Court was filed, but fate of that Petition was not known. For the assessment year 1989-90, the Assessing Officer brought to tax the amount by invoking section 41(1) of the I.T. Act, but the Appellate Authority and the Appellate Tribunal held that there was no remission or cessation of trading liability so long as the Petition for special leave to appeal was pending in the Supreme Court. A reference was made to the High Court, but it held that the amount was assessable to tax. However, on the basis of the Counsel's argument that the Tribunal ought to consider the question whether the excise duty was actually refunded to the Assessee or not, the case was sent back to the Tribunal. This was a clear case, in our view, as held by the Supreme Court, the statutory levy being discharged by the Assessee, the amount thereunder was refunded to him. That will definitely be a case where he obtains an amount in respect of the expenditure within the meaning of section 41(1) of the I.T. Act. It will not be a case of "benefit by way of remission/cessation of trading liability". It is in these circumstances that the Judgment of the Hon'ble Supreme Court was rendered. We do not find that the observations and conclusions at pages 346 and 347 of the report, which are relied upon heavily by Mr.Gupta, would have any application in the facts and circumstances of the present case. The Judgment of the Hon'ble Supreme Court is therefore distinguishable on facts.*

52. *We are of the opinion that the Revenue's argument really misses the point. The Incentive to establish a unit or factory in a industrially backward or hilly area is the core of the Sales Tax Deferral Scheme. Some time has to be given to the unit to establish itself before it starts giving corresponding benefit to the state. That opportunity is granted by deferring the remittance of the Sales Tax collected by the unit like the Assessee. In that regard, we have perused the compilation of admitted documents placed on record by Shri. Dastur. From a perusal thereof, it is apparent that the Government Resolution dated 4th May, 1983 evolves a package of incentives to disperse the industries from Bombay-Thane-Pune belt and to attract them to underdeveloped and developing areas of the State of Maharashtra. This package evolves several measures to achieve this object. Then, there is a New Package Scheme of incentives, 1988. Both Schemes have clauses and paras containing Sales Tax deferral incentives. To carry this object further and also to achieve the purpose of early remittance of deferred Sales Tax collected by the units availing of the Schemes, the statutory option was incorporated in section 38 by substituting the 4th proviso to sub-section 4 of section 38 of the Bombay Sales Tax Act, 1959. That is informed by the Trade Circular dated 12th December, 2002 issued by the Commissioner of Sales Tax, Maharashtra. A combined reading of the Schemes and this Circular reveals the legislative intent as noted above. In such circumstances, a proper understanding of all this by the Tribunal cannot be termed as perverse. The view taken by it is imminently possible. Once this conclusion is reached, the other Judgments cited by the Revenue are obviously distinguishable and on facts.*

53. *As a result of the above discussion, we find that the questions of law formulated by us and termed as substantial will have to be answered in favour of the Assessee and against the Revenue. Those are answered accordingly. The*

Appeals are dismissed. Insofar as Income Tax Appeal No. 909 of 2012 is concerned, at page 4 of the paper book in that Appeal, two additional questions in para 4(B) and 4(C) are termed as substantial questions of law. However, the Counsel appearing for the parties conceded that questions (B) and (C) are covered by two Judgments noted by the Tribunal, namely, in the case of Associated Capsules (P.) Ltd. v. Dy. CIT [2011] 332 ITR 42 (Bom.) and CIT v. Saumya Finance & Leasing Co. (P.) Ltd. [2008] 300 ITR 422 (Bom.). These are Judgments which are rendered in favour of the Assessee by this Court and against the Revenue. Therefore, the additional questions also cannot be termed as substantial questions of law. That Appeal is also dismissed accordingly. However, in the facts and circumstances, there would be no order as to costs."

25. This decision was subsequently reiterated by the Hon'ble Bombay High Court in CIT vs. Colgate Palmolive (India) Limited (supra). The ratio of decision of Hon'ble Bombay High Court in CIT vs. Sulzer India Limited (supra) came to be affirmed by the Hon'ble Apex Court in the case of CIT vs. Balkrishna Industries Ltd., 88 taxmann.com 273 by holding as under:

*"**7.** A glimpse of the facts taken note of, shows that the assessee herein had collected the sales tax in the sum of Rs. 7,52,01,378/-. As per the Scheme floated by the Government of Maharashtra, for those assessees who set up their industries in the backward area, the sales tax liability was deferred for a period of 7 years and, thereafter, it can be paid over a period of 7 years under the Deferral Scheme of 1983 and over a period of 6 years under the Deferral Scheme of 1988. However, under the Scheme of 1988, the Government of Maharashtra promoted premature or payment of deferral sales tax at Net Present Value (NPV).*

***8.** In the meantime, section 38 of the Sales Tax Act was amended which provides that where the NPV of deferred tax as may be prescribed was paid, the deferred tax was deemed to have been paid. Taking advantage of this Scheme, the assessee made repayment of Rs. 3,37,13,393/- against the total liability of Rs. 7,52,01,378/-. In this manner, the assessee could save a sum of Rs. 4,14,87,985/-. The issue is as to whether this amount, which the assessee could save, is to be treated as 'income' by applying the provisions of Section 41 of the Act. The Assessing Officer treated it as the revenue receipt and thereby income. Contention of the assessee is that it is a capital receipt, which is accepted by the High Court.*

***9.** In a very detailed and exhaustive judgment rendered by the High Court, it has discussed the view taken by the Assessing Officer, which was confirmed by the Commissioner of Income Tax (Appeals). Thereafter, the High Court noted in detail the manner in which the Tribunal has dealt with the issue. A perusal of the judgment would show that the High Court took into consideration the provisions of Section 41 of the Act and the conditions which are required to be satisfied for bringing a particular receipt as "income" within the ambit thereof and found that those conditions are not satisfied in the present case. The High Court also repelled the contention of the Revenue that the assessee obtained the*

benefit of reduction of sales tax liability under Section 43B of the Act as per the CBDT Circular No. 496 dated 25th September, 1987. The relevant portion of the discussion in this behalf reads as under:

> *"It is not possible to agree with Mr. Gupta. Because, premature payment of Sales Tax already collected but its remittance to the Government, as Mr. Gupta envisages, is not covered by this provision else the subsections and particularly section 43B(1) would have been worded accordingly. Therefore Section 43B has no application. Insofar as applicability of section 41(1)(a), there also the applicability is to be considered in the light of the liability. It is a loss, expenditure or trading liability. In this case, the scheme under which the Sales Tax liability was deferred enables the Assessee to remit the Sales Tax collected from the customers or consumers to the Government not immediately but as agreed after 7 to 12 years. If the amount is not to be immediately paid to the Government upon collection but can be remitted later on in terms of the Scheme, then, we are of the opinion that the exercise undertaken by the Government of Maharashtra in terms of the amendment made to the Bombay Sales Tax Act and noted above, may relieve the Assessee of his obligation, but that is not by way of obtaining remission. The worth of the amount which has to be remitted after 7 to 12 years has been determined prematurely. That has been done by find out its NPV. If that is the value of the money that the State Government would be entitled to receive after the end of 7 to 12 years, then, we do not see how ingredients of sub section (1) of section 41 can be said to be fulfilled. The obligation to remit to the Government the Sales Tax amount already recovered and collected from the customers is in no way wiped out or diluted. The obligation remains. All that has happened is an option is given to the Assessee to approach the SICOM and request it to consider the application of the Assessee of premature payment and discharge of the liability by finding out its NPV. If that was a permissible exercise and in terms of the settled law, then, we do not see how the Assessee can be said to have been benefited and as claimed by the Revenue. The argument of Mr. Gupta is not that the Assessee having paid Rs. 3.37 crores has obtained for himself anything in terms of section 41(1), but the Assessee is deemed to have received the sum of Rs. 4.14 crores, which is the difference between the original amount to be remitted with the payment made. Mr. Gupta terms this as deemed payment and by the State to the Assessee. We are unable to agree with him. The Tribunal has found that the first requirement of section 41(1) is that the allowance or deduction is made in respect of the loss, expenditure or a trading liability incurred by the Assessee and the other requirement is the Assessee has subsequently obtained any amount in respect of such loss and expenditure or obtained a benefit in respect of such trading liability by way of a remission or cessation thereof. As rightly noted by the Tribunal, the Sales Tax collected by the Assessee during the relevant year amounting to Rs. 7,52,01,378/- was treated by the State Government as loan liability payable after 12 years in 6 annual/equal installments. Subsequently and pursuant to the amendment made to the 4th proviso to section 38 of the Bombay Sales Tax Act, 1959, the Assessee accepted the offer of SICOM, the implementing agency of the State Government, paid an amount of Rs. 3,37,13,393/- to SICOM, which, according to the Assessee, represented the NPV of the future sum as determined and prescribed by the SICOM. In other words, what the Assessee was*

required to pay after 12 years in 6 equal installments was paid by the Assessee prematurely in terms of the NPV of the same. That the State may have received a higher sum after the period of 12 years and in installments. However, the statutory arrangement and vide section 38, 4th proviso does not amount to remission or cessation of the Assessee's liability assuming the same to be a trading one. Rather that obtains a payment to the State prematurely and in terms of the correct value of the debt due to it. There is no evidence to show that there has been any remission or cessation of the liability by the State Government. We agree with the Tribunal that one of the requirement of section 41(1)(a) has not been fulfilled in the facts of the present case."

10. *After hearing the counsel for the parties at length, we are of the view that the aforesaid approach of the High Court is without any blemish, inasmuch as all the requirements of Section 41(1) of the Act could not be fulfilled in this case.*

11. *We, therefore, do not find any merit in these appeals which are accordingly, dismissed."*

26. Thus, the decision of ld. CIT(A) is premised on the decision of Hon'ble Bombay High Court which was affirmed by the Hon'ble Apex Court. In the circumstances, we do not find any reason to interfere with the order of ld. CIT(A) and we do not find any merit in the present ground of appeal. In the circumstances, this ground of appeal filed by the Revenue stands dismissed.

27. **In ground No.4 the Revenue challenges the decision of ld.CIT(A) holding that the expenditure incurred on the renovation of lease premises of Rs.35,51,768/- is revenue in nature.**

The brief factual matrix of the issue in ground No.4 is as under :

During the previous year relevant to the assessment year under consideration, the respondent / assessee incurred an expenditure of Rs.37,38,703/- on renovating the lease premises which are used for the business purpose of the respondent / assessee at Bangalore. From details of

expenditure, it is evident that the expenditure is incurred on interior work, electrical work and painting etc. The Assessing Officer capitalized this expenditure and allowed the depreciation at 5% and the balance amount of Rs.96,776/- was disallowed.

28. On appeal before ld.CIT(A), the ld.CIT(A) deleted the addition by holding that no new asset was brought into existence and no enduring benefit was accrued to the assessee as a result of this expenditure.

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

30. Before us, the Ld. CIT DR vehemently contested that the decision of the ld.CIT(A) holding the expenditure incurred on rented premises as revenue in nature is contrary to the Explanation 1 of Sec.32 of the I.T. Act and submitted that in view of the plain provisions of the Act, the expenditure cannot held to be revenue in nature.

31. On the other hand, the learned counsel for the assessee submitted that no new asset came into existence as a result of this expenditure and the expenditure incurred is only revenue in nature and Explanation 1 to Sec.32(1) was inserted by the Finance Act has no application to the expenditure as it was incurred only on revenue items like painting, flooring etc.

32. We have heard the rival submissions and perused the material on record. The issue in the present ground of appeal relates to the allowability of expenditure incurred on items interior decoration, etc on the rented premises which are used for the business purpose of the assessee. The identical issue was examined by the Co-ordinate Bench of this Tribunal in assessee's own case for A.Y. 2010-11 in ITA No.1353/PUN/2015 (AM was author of the said order), wherein after making reference to the provisions of Explanation (1) to section 32 and the decisions of Hon'ble Madras High Court in the cases of CIT Vs. ETA Travel Agency Pvt. Ltd., reported in (2019) 109 taxmann.com 66 (Madras) and CIT Vs. Viswams reported in (2019) 105 taxmann.com 289 (Madras) held as under:

> *"36. Thus, in view of the above legal position, the expenditure incurred on rented premises cannot be treated as revenue in view of the plain provisions of Explanation 1 to Sec.32 of the Act. The ld.CIT(A) is in total ignorance of the provisions of Explanation 1 of Sec.32 of the Act held it to be revenue in nature. The decision relied upon by the learned counsel has no application after insertion of Explanation 1 of Sec.32 of the Act. In the above circumstances, we reverse the order of ld.CIT(A) and restore the issue in this ground to the file of Assessing Officer. Thus, this ground of the Revenue is allowed for statistical purposes."*

33. Similarly, on the parity of same reasoning, we are of the considered opinion that this is a fit case to remand to the file of Assessing Officer with a direction to verify the true nature of expenditure i.e. whether revenue or capital and also examine the applicability of Explanation (1) to section 32(1) of the Act, even in respect of expenditure incurred is revenue in nature. Thus, this ground of appeal is partly allowed for statistical purposes.

34. **In ground No.5, the Revenue challenges the decision of ld.CIT(A) restricting the disallowance of the minimum expenditure from Rs.2,00,000/- to Rs.1,00,000/-.**

The brief factual matrix of the issue in ground No.5 is as under :

During the course of assessment proceedings, the Assessing Officer found that out of the miscellaneous expenses, the assessee could not produce supporting documents, details, vouchers to the extent of Rs.2,00,000/-, therefore disallowed the same.

35. On appeal before ld.CIT(A), ld.CIT(A) following his order in assessee's own case in the earlier years in A.Ys. 2008-09 and 2009-10, restricted the disallowance to Rs.1,00,000/-.

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

37. Before us, the learned CIT DR vehemently contested that there is no basis to restrict the disallowance to Rs.1,00,000/-.

38. On the other hand, the learned counsel for the respondent / assessee contested that no disallowance can be made on adhoc basis without rejecting the books of accounts.

39. We heard the rival submissions and perused the material on record. During the course of assessment proceedings, the respondent / assessee company could not furnish the evidence, bills, vouchers etc to the extent of Rs.2,59,407/- out of the total Miscellaneous Expenditure. On appeal before ld.CIT(A), ld.CIT(A) restricted the disallowance to Rs.1,00,000/- which is in accordance with the decision of his order in assessee's own case for the earlier assessment years. On the principle of consistency, we uphold the order of ld.CIT(A). Accordingly, this ground of appeal stands dismissed.

40. **In ground No.6, the Revenue challenges the decision of ld.CIT(A) deleting the addition of commission expenditure of Rs.42,53,300/-.**

The brief factual matrix of the issue in ground No.6 is as under :

During the course of assessment proceedings, the Assessing Officer had called for details of total commission expenditure of Rs.19,51,19,803/-. Out of which, the assessee could not furnish the confirmations from the parties to the extent of Rs.42,53,300/-. Therefore, the Assessing Officer dismissed the same.

41. On appeal before ld.CIT(A), ld.CIT(A) following his earlier decision for the assessment years 2008-09 and 2010-11 deleted the same on the ground that the ld.CIT(A) had not conducted any fresh verification to prove the genuineness of the transaction or otherwise of the case.

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

43. Before us, the learned CIT DR has prayed that the matter may be remitted back for further enquiry.

44. On the other hand, the learned counsel for the respondent / assessee submitted that the similar disallowance was deleted by this Tribunal in assessee's own case for A.Ys. 2002-03 to 2007-08 and similarly, the Hon'ble Bombay High Court also confirmed the order of the Tribunal deleting the addition on account of commission expenditure in assessee's own case.

45. We heard the rival submissions and perused the material on record. The issue in the present appeal relates to the allowance of commission expenditure of Rs.42,53,300/-. Admittedly, the appellant had filed the primary details such as name, address, invoice, payment made etc. However, the assessee could not furnish the confirmations from payees and for want of the confirmations, Assessing Officer made disallowance. The ld.CIT(A) following the decision of his order in assessee's own case in earlier years has deleted the addition. From the material on record, it is clear that the respondent / assessee had discharged the onus cast upon it by filing the primary details. Mere inability to furnish the confirmation letters from the recipients cannot be the reason to disallow the commission expenditure without causing any further enquiries by the Assessing Officer as to the genuineness or otherwise of the expenditure. The identical issue was examined by the Co-ordinate Bench of this Tribunal in assessee's own case for A.Y. 2010-11 in ITA No.1353/PUN/2015, wherein it was held as under:

"48.....Admittedly, there is no material on record exhibiting the non-genuineness of the expenditure. Hence, respectfully following the decisions of this Tribunal and Hon'ble Bombay High Court in respondent/assessee's own case, we hold that ld.CIT(A) is justified in deleting the commission expenditure and accordingly, this ground of appeal is dismissed."

Since the identical issue was decided against the Revenue in earlier year, on the parity of same reasoning, the ground of appeal No.6 filed by the Revenue stands dismissed.

46. **In ground No.7, the Revenue challenges the decision of ld.CIT(A) in deleting the disallowance of Rs.25,72,235/- made u/s 14(A)**

The ld. DR submitted that this ground of appeal is not being pressed. Therefore, we dismiss ground of appeal no.7 as not pressed.

47. In the result, the appeal of the Revenue is partly allowed for statistical purposes.

Order pronounced in open Court on 01st day of November, 2021.

Sd/-	**Sd/-**
(PARTHA SARATHI CHAUDHURY)	**(INTURI RAMA RAO)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 01st November, 2021.
GCVSR/Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-13, Pune.
4. The Pr.CIT-5, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **"सी"** बेंच, पुणे / DR, ITAT, "C" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.