IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : C : DELHI

BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No.902/Del/2022
Assessment Year: 2017-18

Jagson International Ltd., H-35, 1st Floor, Jangpura Extension, New Delhi – 110 014.	Vs	DCIT, Circle-13(1), Delhi.

PAN: AAACJ2147A

ITA No.1303/Del/2022
Assessment Year: 2017-18

DCIT, Circle-13(1), Delhi	Vs.	Jagson International Ltd., H-35, 1st Floor, Jangpura Extension, New Delhi – 110 014. PAN: AAACJ2147A
(Appellant)		(Respondent)

Assessee by	:	Shri Rajiv Saxena, Ms Sumangla Saxena & Shri Shyam Sunder, Advocates
Revenue by	:	Mohd. Gayasuddin Ansari, CIT, DR
Date of Hearing	:	08.05.2023
Date of Pronouncement	:	04.08.2023

ORDER

PER M. BALAGANESH, AM:

These cross appeals by the assessee in ITA No.902/Del/2022 and by the Revenue in ITA No.1303/Del/2022 for AY 2017-18, arise out of the order of the National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'ld. CIT(A)', in short] in Appeal No.CIT(A), Delhi-5/10394/2019-20 dated 25.03.2022 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 26.12.2019 by the Assessing Officer, Circle 13(1), Delhi (hereinafter referred to as 'ld. AO').

2. Let us take up the Revenue's appeal first.

3. The grounds No.1 and 3 raised by the Revenue are general in nature and do not require any specific adjudication.

4. The ground No.2(1) raised by the Revenue is challenging the deletion of disallowance of Rs.133,98,65,442/- made by the AO disallowing the assessee's claim of exemption under Tonnage Tax Scheme. The ground No.2(2) raised by the Revenue is challenging the deletion of disallowance of Rs.189,50,06,805/- while computing book profit u/s 115JB of the Act.

5. We have heard the rival submissions and perused the material available on record. The assessee company is engaged in the business of operation of ships for exploitation of mineral oil for ONGC and also for providing infrastructure facilities at New Mangalore Port. The ld. AO, from the perusal of computation sheet of the assessee, noticed that the assessee had claimed a sum of Rs.133,98,65,442/- as exempt shipping income u/s 115VI of the Act while

computing income under normal provisions of the Act. Similarly, a sum of Rs.189,50,05,805/- was reduced by the assessee as exempt income while computing book profit of shipping income u/s 115JB of the Act. The assessee claimed the benefit of Tonnage Tax Scheme u/s 115VP/115VR of the Act. The facts relevant to this issue and the observations made by the ld. AO for rejecting the claim of benefit of Tonnage Tax Scheme of the assessee are as under:-

> *"The issue of claim of the income as per Tonnage system is old and has been dealt with in previous years. The facts are that in the AY 2006-07, the assessee made an application in form no. 65 for exercising option for Tonnage Tax Scheme under section 115VP/115VR of the Income Tax Act, 1961. The then Addl. Commissioner of Income Tax rejected the application of the assessee on the ground that the assessee's ship "Deepsea Matdrill" is not a ship but a "Drilling Rig" which is not covered under the definition of qualifying ships as the same is an offshore installation. It was also held that the ship was not registered under the Merchant Shipping Act, 1958 and assessee's main object of business was not carrying on the business of the operation of the ships. It was also seen that the assessee did not have the license which was to be issued by the Director General of Shipping under section 407 of Merchant Shipping Act, 1958. On this issue the assessee preferred an appeal before Ld. CIT (A) who vide order dated 16.3.2007 in appeal no. 44/2006-07 allowed the appeal of assessee and directed the AO to consider the Rigs as 'qualifying ships' under section 115VD of the Income Tax Act and allow its application for exercising option for Tonnage Tax scheme u/s 115VP/115VR of the Act. Aggrieved with the order of Ld. CIT (A), the Revenue preferred an appeal before Hon'ble ITAT who has however vide order dated 20.11.2009 in ITA no. 2979/Del of 2007 dismissed the appeal of Revenue. The revenue further preferred an appeal before Hon'ble Delhi Court against the order of Hon'ble ITAT. The Delhi High Court vide order dated 08.11.2012 in ITA No. 1289/2011 dismissed the appeal of the revenue. Similar treatment was given for A.Y. 2007-08. The department has filed SLP before Hon'ble Supreme Court against the Delhi High Court Order for A.Y. 2006-07 & 2007-08 and the appeal is pending before Hon'ble Supreme Court. Further, departmental appeal in HC for AY 2008-09 (ITA 1165/2018) order date 26.10.2018, 2009-10(ITA 1179/2018) & 2010-11(1234/2018) HC order dated 01.11.2018 has been disposed off by Hon'ble High Court as both party Revenue as well as assessee agreed to follow the ruling of Supreme Court for AY 2006-07 & 2007-08 as and when appeal will be decided in Supreme Court.*

The addition on this issue has also been made in AY 2011-12, 2012-13 , 2013-14 , 2014-15 & 2016-17 also.

Deep Sea Matdrill is a Jack up Rig owned by the assessee. It is of Mat Slot type designed by Baker Marine Services and built by Nippon Kokan at the Japan Ship Yard in the year 1981. It has rated water depth of 200 ft and Drilling depth of 20,000 ft. It is an drilling equipment and is being operated by ONGC. There could be no denying the fact that the Deepsea Matdril is used for the purpose of deep sea drilling. The service of this rig is mainly utilized for the purpose of exploration and production of gas and oil. For the purpose of drilling it is essentially have to fixed to the place where drilling is required. It cannot be imagined the Matdrill moves and drills at the same time. Mobility of the rig by use of rotor to move it like a ship is essential for placing it at different places where drilling is required or for moving the rig to the new customer. The rig is given the shape of a ship and has moving ability only for the purpose of arriving at the designated location of its drilling activity. The customer hires it for drilling and not for moving from one place to other.

The income from a matdrill is derived from its drilling operations. While tonnage tax scheme as envisaged in chapter Xll-G takes into account net tonnage of the ship. Tonnage is a measure of the size or cargo carrying capacity of a ship.

Net tonnage (NT) is based on a calculation of the volume of all cargo space or the ship. It indicated a vessel's earning space and is a function of the moulded volume of all cargo spaces of the ship.

Tonnage tax Scheme basically a scheme for special rate of taxation depending upon the volume of cargo space of the ship. It is essentially based on load carrying capacity of ships engaged in sea transport business. The taxable income is based on net tonnage and is computed in the manner provided in the said chapter. The income generated by the operation of a drilling rig has no correlation with its net tonnage. Therefore tonnage tax scheme is prima facie inapplicable for computing income arising to a rig from drilling operations.

The fact that it has been registered under the Merchant Shipping Act, 1958 also does not help the case as even the Income Tax Act in 115VD includes in its ambit various ships but specifically excludes off-shore installations like drilling rig from the definition of qualifying ships. Therefore in a sense rig is taken as ship for the purpose of both the Acts but has been excluded in section 115VD from being treated as 'qualifying ships'. This is apart from

the fact that the registration certificate was not available during A.Y. 2006-07 and part of A.Y. 2008-09 as stated above.

The ITAT has taken an argument that deletion of dredger from the exclusions mentioned in section 115VD w.e.f. A.Y. 2006-07 fortifies the fact that the dredgers are not off-shore installations. In this regard, it is stated that dredger are indeed a moving ship which clears the dredge in the designated area. It does not remain fixed with the sea bed in case of the rig. In addition to the above, it is submitted that the exclusion of dredger from the definition of qualifying ship is not based upon the reasoning that it is not an off shore installation. The explanatory note to the Finance Act, 2005 says that "...Representations were received pointing out that inland dredging companies also face international competition and need a level playing field. On appreciation of such representations, clause (vii), excluding "dredgers" from the list of qualifying ship has been omitted through the Finance Act, 2005. The amendment has the effect of rendering the dredgers as qualifying ships for the purposes of tonnage scheme.

In view of the above, the submission of the assessee is rejected. The income claimed as exempt of Rs.133,98,65,442/- in the computation of income under normal provision as well as for calculation of book profit as per MAT u/s 115-VI of the Act of Rs.189,50,05,805/- , is accordingly not allowed to the assessee and an addition of Rs.133,98,65,442/- under normal provisions and Rs.189,50,05,805/- under MAT is made on this account."

6. The ld.CIT(A), by placing reliance on the order passed by his predecessor for AY 2016-17, deleted the disallowance made by the ld. AO and granted the benefit of Tonnage Tax Scheme to the assessee. Accordingly, relief was granted to the assessee for claim of exemption both under the normal provisions of the Act as well as in the computation of book profit u/s 115JB of the Act. Aggrieved, the Revenue is in appeal before us.

7. We find that this issue is no longer *res integra* in view of the decision of the Hon'ble Jurisdictional High Court in assessee's own case in ITA 1395/2010 dated 08.11.2012. For the sake of convenience, the entire order is reproduced hereunder:-

"The substantial question of law arising for consideration is —Whether on the true and correct interpretation of section 115VD of the Act could it be held that "Deep Sea Matdrill" is a ship for the purposes of chapter XX-G of I.T. Act?

2. The relevant facts are that the assessee sought to opt for tonnage tax scheme under Chapter XII-G especially Section 115VP/115VR of the Income Tax Act, 1961. The assessee claims to be owner of ship/ vessels engaged in drilling operations. Its claim was rejected on the ground that in terms of Section 115VD, Deep Sea Matdrills were not qualifying ships. The Assessing Officer rejected the claim stating as follows:

> *"I have gone through the submission of the assessee and the AO's report. After going through the submission of the assessee as well ass (sic) the AO's report, I am satisfied that assessee's claim is not found to be acceptable for the purpose of Section 115VP/115VR of the I.T.Act because as per I.T. Act, the drilling rig is not covered under the definition of "Qualifying ship." The claim of the assessee was not registered as a ship under the Merchant Shipping Act, 1958. The assessee's main object of business was not the carrying on of the business of the operation of ships.*

3. It transpired that the assessee had applied but had not been granted registration under Section 407 of the Merchant Shipping Act, 1958 which was granted on 19.5.2006. In these circumstances, the Appellate Commissioner directed the assessing officer to reconsider the vessel of the assessee as a "qualifying ship". The Commissioner after considering the remand report dated 5.2.2007 allowed the claim and permitted the respondent to claim tonnage tax. The Revenue, claiming to be aggrieved approached the Income Tax Appellate Tribunal („Tribunal", for short). Its contentions essentially were that the vessels used by the assessee did not amount to qualifying ships in view of the Section 115VD; more particularly they amounted to "off shore installations" under sub-clause 115VD. The Tribunal considered various materials including the dictionary meaning of "off shore" and "installations". It observed as follows: -

> *"It may be appreciated that the word "offshore" therefore means away from the shore or located at a little distance from the shore while the installations‖ has been explained as an apparatus or establishment which have been fixed at a place or set in a position for use. It does not mean anything i.e. apparatus or establishment which is being used without being fixed or set in a position for its use. Anything which is moving from one place to another for using the same cannot be termed as installed. Any movable thing cannot be treated as installation. Thus any installation which has been*

fixed or set in a position at distance place from shore or away from the shore is called "offshore installation." The 'installation' is built by installing various equipments, fixing them for the work and then dismantled and shifted to another site. The ship is build or constructed also by various equipments and material for the purpose for which it is required to be used but they are not dismantled instead ship itself shifts from one place to another for working on the other site. The ships are required to be registered under Merchant Shipping Act but not installations secondly they are not those which are not moveable and required to be shifted after dismantling. In the modern world there could be a case of installing any equipment on the ship for the specific cause or requirement but this would not be called offshore installation instead it would be called installation on the ship. There may be a case of installation which is taken from one place to another but that cannot be called as ship because while shifting from one place to another it is required to be partially or totally dismantled according to distance of place and availability of facilities. Further for a ship it is not only necessary to be registered under the Merchant Shipping Act but it has to fulfill all the requirements and formalities to be fulfilled.

7. The relevant chapter of Merchant Shipping Act is named as "Control of Indian ships and ships engaged in coasting trade." This clearly shows that it applies to only ships and not to the offshore installation. Section 405 specifically explained about application of part - it clearly states as under :

"Application of part. - This Part applies only to sea- going ships fitted with mechanical means of propulsion of not less than one hundred and fifty tons gross, but the Central Government may, by notification in the Official Gazatte, fix any lower tonnage for the purposes of this part."

Thus 'ship' required to be licensed is sea-going ship fitted with mechanical means of propulsion which is not provided in any of the "offshore installation."

4. The Tribunal took into consideration the observations of the Appellate Commissioner and noticed that in this case the ship was not initially built and thereafter equipments were amounted or attached. In fact the Tribunal noticed that the Matdrill vessel was built by Nippon Kokan K.K. of Japan in 1981. It was planned for the special purpose of offshore drilling and all equipments befitted or mounted at that stage itself. The Tribunal was thus alive to the fact that the ship was initially designed for the

purpose of drilling and that it moves from one place to another and in fact consists of equipments, boats, life saving devices, its quarters having accommodation of 74 person, canteen, recreation facilities etc. The Tribunal also importantly observed that for the exploration of mineral oil various steps are necessary and for different purpose shipping equipments and installations are used. The assessee owns the vessels which were used for the various purposes such as drilling, testing, casing, producing data and preparing all the reports etc. Thereafter, the Tribunal concluded as follows: -

> *"This clearly show that ships used for drilling, dredging etc are not offshore installations otherwise deletion of dredgers was not required. The offshore installations are those which are fixed for the specific purpose of fishing, production of mineral oil and after finishing the purpose are dismantled and shifted to other site. In case of short distance they are fixed to other site through cranes or through ships. While ships used for drilling, dredging etc are moved from one place to another without being dismantled or without the help of crane. It is therefore submitted that assessee's ship which is duly been registered and has obtained the licence under Merchant Shipping Act, 1958 by an authority of Director General Shipping be treated as —Qualifying ship‖ and not as an —offshore installations‖ as understood by Ld. Addl. CIT. Apart from certificate from DG Shipping various other certificates have already been filed which were also necessary for issuing certificate by the office of DG Shipping."*

5. The Tribunal was also made aware of decision of this Court CIT Vs. Jagson International (2008) 214 CTR (Del) 227 where the same equipment was considered for the purpose of Section 33AC. This Court had also held that Deep Sea Matdrills owned or leased by the assessee were ships. The observations of this Court are as follows :

> *"The issue whether the "Deep Sea Matdrill' is a ship for the purposes of section 33AC was decided in favour of the assessee in respect of the assessment year 1994-95. There is merit in the contention urged by learned counsel for the assessee that this issue cannot be agitated by the revenue again and again. The drilling rig was placed on a vessel described as a barge, which could be moved out from place to place for offshore drilling. The Tribunal considered this aspect of the matter and came to the conclusion that the _Deep Sea Matdrill' is nothing but a ship. It is a barge, which can be moved from place to place like any other ship. When the drilling rig is in use, then apparently to save some*

expenses the ship's propeller is removed; but whenever it is required to be shifted, the propeller is refixed and the ship is made mobile. On merits, therefore, we are of the view that the claim made by the assessee in respect of section 33AC of the Act is quite justified. Only one view is possible, namely, that the _Deep Sea Matdrill' is a ship. Even if learned counsel for the revenue is right in contending that the _Deep Sea Matdrill' is not a ship, we do not think that exercise of power under section 263 of the Act by the Commissioner would be justified only because the assessing officer has taken a view in favour of the assessee. The law requires the view to be erroneous also, and that has not been substantiated by learned counsel for the revenue. Insofar as the second issue relating to section 80-IA(3) of the Act if concerned, which is to the effect whether the _Deep Sea Matdrill' was used in the Indian territorial waters before its acquisition by the assessee, we find that this is essentially a question of fact. That apart, we find that under section 148 of the Act, the assessing officer had specifically mentioned in the reasons recorded that he was prima facie of the view that the vessel had been used in the Indian territorial waters prior to its acquisition by the assessee. A response was given by the assessee to the notice in which it was categorically mentioned that the ship was never used in India so deduction under section 80-IA93) could not be denied to the assessee. The last issue addressed by learned counsel for the revenue relates, to section 80-IA(4) of the Act a bare reading of section 80-IA(4) of the Act shows that what is required to be determined is essentially factual and there is no legal issue which is involved, much less a substantial question of law. This issue was raised by the assessing officer during the course of reassessment proceedings and it was replied to by the assessee. The assessing officer was satisfied with the explanation and did not raise any further questions. The Tribunal has not erred in taking the view that it took, namely, that the CIT had overlooked the agreements dt.28th Feb.1995 and 30th September, 1999 which were on the record of the AO. In all the three issues that have been urged by the counsel for the revenue, no substantial question of law arises. Deduction u/s 33AC is allowable in respect of a barge with the drilling rig over it which can be moved from place to place and therefore, CIT was not justified in exercising power u/s 263 on the ground that the barge is not a ship and assessee's claim for deduction u/s 33AC has been wrongly allowed; question whether the conditions laid down in SS80- IA(3) and 80-IA(4) are fulfilled by the assessee are essentially question of fact and the AO having allowed the claim for deduction u/s 80-IA, revision u/s 263 was not justified."

6. This Court has considered the submissions. Section 115VD which defines a ship as "Qualifying Ship" reads as follows :

> *"115VD. For the purposes of this Chapter, a ship is a qualifying ship if-*
> *(a) it is a sea going ship or vessel of fifteen net tonnage or more;*
>
> *(b) it is a ship registered under the Merchant Shipping Act, 1958 (44 of 1958), or a ship registered outside India in respect of which a licence has been issued by the Director-General of Shipping under section 406 or section 407 of the Merchant Shipping Act, 1958 (44 of 1958); and*
>
> *(c)a valid certificate in respect of such ship indicating its net tonnage is in force, but does not include-*
>
> *(i) a sea going ship or vessel if the main purpose for which it is used is the provision of goods or services of a kind normally provided on land;*
> *(ii) fishing vessels;*
> *(iii) factory ships;*
> *(iv) pleasure crafts;*
> *(v) harbour and river ferries;*
> *(vi) offshore installations;*
> *(vii) 3[***]*
> *(viii) a qualifying ship which is used as a fishing vessel for a period of more than thirty days during a previous year."*

7. In the facts of this case the vessels were consistently registered under Section 407 of the Merchant Shipping Act and had a valid certificate which was produced for consideration by the appellate authority who sought remand report. It is also not disputed that the vessel is a qualifying ship for sea in terms of clause (a) of Section 115VD. The question as to whether it amounted to "off shore installations" was gone into in considerable detail by the Tribunal. The Tribunal noticed that unlike in the case of offshore installations which are stationed at one place, the very nature of the activity in which the assessee engaged is to carry out operations in different places; necessarily, at least for a short duration the vessel has to be stationed at one place. In these circumstances, Revenue"s contentions that the vessel is nothing but "offshore installations" has no merit, in the case of Matdrills of the kind put to use by the assessee.

8. For these reasons the Court is of the opinion that the reasoning and findings of the Appellate Commissioner and the Tribunal cannot be found fault with. The substantial question of law is therefore answered in favour of the assessee and against the Revenue. The appeals are consequently dismissed."

8. Moreover, the ITAT, in assessee's own case in ITA No.6872/Del/2018 and in ITA No.5375/Del/2019 for AYs 2015-16 and 2016-17 respectively, vide order dated 25.11.2022, had decided the very same issue in favour of the assessee. Respectfully following the same, the grounds No.2(1) raised by the Revenue is dismissed. As far as applicability of Tonnage Tax while computing the book profit u/s 115JB is concerned, we find that the provisions of section 115VO specifically provides that the book profit or loss derived from the activities of the Tonnage Tax Company referred to in section 115VI(1) shall be excluded from the book profit of the company for the purpose of section 115JB of the Act. Hence, ground No.2(2) raised by the Revenue is dismissed.

9. The Ground No.2(3) raised by the Revenue is challenging the deletion of disallowance of interest of Rs.1,78,55,887/- on the ground that interest free advances made to subsidiary company is not for business purpose. We find that this issue is no longer *res integra* in view of the decision of this Tribunal in assessee's own case in ITA No.6872/Del/2018 and in ITA No.5375/Del/2019 for AYs 2015-16 and 2016-17 respectively, vide order dated 25.11.2022, wherein it was held as under:-

"17. This addition has been made by the AO as appellant company has provided interest free loans amounting to Rs. 11,63,62,793/- to its subsidiary companies due to the reason that there is no business exigency for advancing these loans and the appellant has incurred substantial interest expenditure towards its borrowed fund.

18. It is contended by the appellant that this issue is duly covered for the AY 2010-11 & 2011-12 by the decision of Hon'ble ITAT, where the revenue appeal was dismissed and no further appeal was filed on this issue before the Hon'ble Delhi High Court. In subsequent years, the then CIT(A) has allowed this issue in appeal.

19. This issue has been found duly covered by the order of CIT(A) dated 23.08.2018 for the appellate order in AY 2015-16 where in the Ld. CIT(A) has deleted the addition holding as under:

"The disallowance of proportionate interest of Rs. 98,14,547/- calculated in account of interest free loans to M/s. Jagson Airlines Ltd. in which it had major shareholding out of financial cost of Rs. 33,38,73,122/- claimed by it for the purpose of its business. For the AY 2013-14 and AY 2012-13 the same issue was examined by my predecessor. While deleting the aforesaid addition it was observed as under:

"1. It s submitted that assessee has running account with its subsidiary M/s Jagson Airlines Limited and at the end of the year there was outstanding debit balances of Rs. 56,64,204/- & Rs. 16,90,627/- respectively. Learned AO has disallowed interest @ 12% of these balances on the ground that since assessee has paid interest on the loans obtained by it and aforesaid sum has been given out of the common pool and there is no commercial expediency. It is submitted that before making the impugned addition the learned AO has failed to prove the nexus between the funds borrowed and the ft advanced to the subsidiary. The Id AO has not established that borrowed funds alone were advanced to the subsidiary. The Hon Gujarat High Court in the case of CIT vs. RL Kalthia Engineering Automobiles (P) Ltd. Reported in (2013) 33 taxmann.com (GUJ) has held that where there was no nexus between the borrow funds and the funds advanced to the sister concern, the disallowance would not be justified. A similar view has been taken by the Mum Bench of ITAT in the case of Dy.CIT vs. Kukreja Development COL (2007) 161 Taxmann 199 (Mum)(Mag) has held that where the AO had not established nexus between interest bearing borrowed funds and interest free advances given by assessee, the disallowance of interest would not be justified. Further, in the case of CIT vs. Reliance Utilities and Power Ltd. reported in 313 ITR 340, High Court of Bombay hi held that if there were funds available both interest free and overdraft and/or loans taken, then a presumption would arise that investment would be out of the interest free funds generated or available with the company, if the interest free funds were sufficient to meet the investments." Further reliance is placed on the following judicial pronouncements:

That once the advances has been made out of own funds on which no interest has been paid, no disallowance can be made by invoking section 36(1)(iii) of the Act without establishing the nexus between the payment of interest and loan advanced.

a) ITA No. 1231 with CM 16759/2009 dated 02.12.2009 CIT vs. Jet Air Pvt. Ltd.

b) 260 ITR 637 (Dei) CIT vs. Tin Box Co.

c) 177 Taxman 300 (Del) CIT vs. DCM Ltd.

d) 184 Taxman 352 (Del) CIT vs. H.B. Stock Holdings Ltd.

e) 313 ITR 340 (Bom) CIT vs. Reliance Utilities and Power Ltd.

f) 29 SOT 531 (Mum) Metro Exports Ltd. vs. ITO

g) 20 SOT 47 (Mum) Tata Finance Ltd. vs. ACIT

h) 194 CTR 451 (All) CIT vs. RadicoKhaitan Ltd.

The ld. CIT(A) held that the Hon'ble Supreme Court while giving judgment in the case of Madhav Prasad Jatia V. CIT, (SC) 118 ITR 200 has established that the expression "for the purposes of Business & Profession" occurring in Section 36(1)(iii) is wider in scope than the expression occurring in Section 57(iii), meaning thereby that the scope for allowing a deduction under Section 36(1)(iii) would be much wider than the one available under Section 57(iii). This phrase, as held in many legal pronouncements, is the most important yardstick for the allowability of deduction under Section 36(1)(iii) of Income Tax Act, 1961. While explaining the meaning of this phrase, the Hon'ble Supreme Court in the case of S. A. Builders Ltd. Vs. CIT reported in 288 ITR 1 has used the word "commercial expediency". By using this phrase Hon'ble Supreme Court has given a new dimension and clarified the concept further. In the judgment the Supreme Court has defined commercial expediency as "an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure, if it was incurred on grounds of commercial expediency". Further, following this judgment, the High Court of Delhi, in the case of Punjab Stainless Steel Industries vs. CIT 324 ITR 396, has further elaborated "The commercial expediency would include such purpose as is expected by the assessee to advance its business interest and may include measures taken for preservation, protection or

advancement of its business interests, which has to be distinguished from the personal interest of its directors or partners, as the case may be. In other words, there has to be a nexus between the advancing of funds and business interest of the assessee-firm. The appropriate test in such a case would be as to whether a reasonable person stepping into the shoes of the directors/partners of the assessee-firm and working solely in the interest of the assessee-firm/company, would have extended such interest free advances. Some business objective should be sought to have been achieved by extending such interest free advances when the assessee-firm/company itself is borrowing funds for running its business".

20. Thus, following three conditions are sine qua non for allowance of a claim for deduction of interest under this provision:

(i) The money, that is capital, must have been borrowed by the assessee.

(ii) It must have been borrowed for the purpose of business.

(iii) The assessee must have paid interest on the borrowed amount i.e. he has shown the same as an item of expenditure.

21. The main argument of the AR is that the loans and advances are for business activities, the appellant being a major share holder in Jagson Airlines with long term business relationship. The aircraft belonging to the appellant company were being run by the said airline on tease basis for last many years and advance had been also taken for the airline for business purposes in the past, on which no interest had been charged. The AO has disallowed the interest on loan without recording any finding that the interest bearing loan had been diverted by the appellant for providing interest free advances to the sister concern. It is not the case of the A.O that the interest free funds available with the appellant were not sufficient to advance the interest free money in question, as the appellant has shown a profit of Rs. 64,93,03,890/- (before tax) and had reserves and surplus of Rs. 464 Crores.

22. In accordance with the legal position u/s 36(1)(iii) the assessee is entitled to claim interest expenditure incurred for its purposes of business. As already stated above, the loans and advances have been established to have been made by the appellant for business purposes only and no personal nature of any kind has been attributed by the AO nor does it emerge from the assessment proceedings. The AO has presumed that the appellant has made the interest free advances from out of borrowed funds but perusal of the balance sheet for the A.Y 2012-13 shows that the appellant had stocks (net of sundry creditors) of Rs. 34.99 crores as well

as additions to fixed assets of Rs. 784.32 crores and sundry debtors of 59.09 crores, which shows that the borrowed funds have been utilized for the business purposes. The reserves and surplus of the appellant as well as share capital is to the extent of Rs. 500 crores. The AO has not established any nexus between the borrowed funds and the interest free advances which is essential for making such a disallowance. In this regard the jurisdictional Delhi High Court and various other Courts in the citations mentioned below have held that, where the capital of the company and the interest- free funds with the assessee far exceeded the amounts advanced to the sister concerns or related parties, then no disallowance can be made u/s 36(1)(iii) of the Income Tax Act in respect of interest on loans and borrowed funds utilized for the purpose of business:

- CIT vs. Gautam Motors 45 DTR 89 (Del)

- CIT vs. Bharti Televenture Ltd. 51 DTR 98 (Del.)

- CIT vs. Dalmia Cement (Bharti) Ltd. 29 DTR 138 (Del)

- CIT vs. Reliance Utilities & Power Ltd 313 ITR 340 (Bom)

- Satish Katta vs. Asstt. CIT 13 DTR 237 (JP 'A').

- Madhu Industries Ltd. vs. ITO 43 DTR 23 (Ahd D)

23. In the case of Hero Cycles Pvt. Ltd. (Civil Appeal No. 514 / 2008 dated 5.11.2015) the Supreme Court has held that, so long as there is nexus between the expenditure incurred and the purpose of the business of the subsidiary company (which need not necessarily be the business of the assessee itself), the revenue cannot justifiably claim to put itself in the arm chair of the business man or in the position of the board of directors and assume the role to decide how much is the reasonable expenditure having regard to the circumstances of the case. In the said decision, the Hon'ble Supreme Court approved of the view taken by Delhi High Court in Dalmia Cement Pvt. Ltd. (254 ITR 377) and disapproved of the Punjab & Haryana High Court decision in the case of Abhishek Industries (286 ITR). Incidentally in the case of Hero Cycles, t was found that the interest liability of the assessee towards the bank on borrowings made had no bearings on the issue as otherwise, the assessee had sufficient funds of its own to advance the funds to the sister concern. Under such circumstances it was for the AO to establish such nexus between the borrowings and advances to prove that the expenditure was for non-business purposes, which the AO failed to do. In the present case also, it is found that the appellant has sufficient funds of its own which he could have advanced and therefore the interest liability on the borrowings

made could not be disallowed, particularly when the AO failed to prove that the expenditure was for non-business purposes.

24. Accordingly, it is held that no notional interest can be attributed towards the interest free advances made during the impugned year. The decision of the ld. CIT(A) is affirmed."

10. In fact, the ld.CIT(A) had relied on the order of his predecessor for AY 2016-17 and granted relief to the assessee. Since, earlier order of the ld. CIT(A) order had been confirmed by this Tribunal, we do not find any infirmity in the order of the ld.CIT(A) granting relief to the assessee. Accordingly, ground No.2 (3) raised by the Revenue is dismissed.

11. In the result, the appeal of the Revenue is dismissed.

12. Let us now take up the assessee's appeal in ITA No.902/Del/2022.

13. The ground No.1 raised by the assessee is general in nature and does not require any specific adjudication. The ground No.6 raised by the assessee regarding the levy of penalty u/s 270A of the Act is premature for adjudication at this stage. Hence, dismissed.

14. The ground No.2 raised by the assessee is challenging the disallowance of employees' contribution to PF and ESI amounting to Rs.14,96,558/- which was remitted beyond the due date prescribed under the respective Acts, but, were remitted before the due date of filing of return of income u/s 139(1) of the Act. The details of the same are tabulated in page 2 to 7 of the assessment order. This issue is no longer *res integra* in view of the decision of the Hon'ble Supreme court in the case of ***Checkmate Services Pvt. Ltd vs CIT reported in 448***

ITR 518. We find that the recent decision of the Hon'ble Supreme Court had settled the entire dispute to rest by deciding it in favour of the Revenue by observing as under:-

> ***"53.*** *The distinction between an employer's contribution which is its primary liability under law - in terms of section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of section 2(24)(x) - unless the conditions spelt by Explanation to section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts - the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under section 43B.*
>
> ***54.*** *In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.*
>
> ***55.*** *In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the*

contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed."

15. The assessee has also filed revised ground in this regard stating that the said expenditure would be otherwise allowable u/s 37 of the Act. We hold that the same is already considered by the decision of the Hon'ble Supreme Court in the case of ***Checkmate Services Pvt. Ltd vs CIT reported in 448 ITR 518 (supra)*** and respectfully following this decision of the Hon'ble Supreme Court, the revised ground No.2(b) and regular ground No.2 raised by the assessee are dismissed.

16. The assessee had raised revised ground No.2(a) stating that the disallowance of employee's contribution to PF and ESI in the sum of Rs.14,96,558/- would only go to enhance the business income of the assessee and that since the assessee is paying presumptive tax on its income under Tonnage Tax Scheme, there is no need to make any separate disallowance towards employee's contribution to PF/ESI.

17. We have heard the rival submissions and perused the material available on record. We find that business income for qualifying ships under Tonnage Tax Scheme is calculated based on the Tonnage capacity of the ship and number of days the ship was on voyage. This income is computed on presumptive basis irrespective of actual profit or loss derived by the assessee from the operation of its qualifying ships. Hence, any disallowance made on account of employee's contribution to PF/ESI would have no relevance to the assessee herein as, ultimately, its business income is only determined based on tonnage capacity on presumptive basis and not on actual income basis. Hence, the contention raised by the assessee, vide revised ground No.2(a) is justified and is hereby allowed.

18. The ground No.3 raised by the assessee is challenging the addition of Rs.2,88,08,175/- on account of cash deposits made during demonetization period in specified bank notes.

19. We have heard the rival submissions and perused the material available on record. The ld. AO observed that the assessee had deposited cash in specified bank notes in its bank account from 09.11.2016 to 30.12.2016 in the total sum of Rs.2,88,08,175/-. The assessee was asked to submit the details of the same together with the sources. The assessee submitted the details in various tabular format giving the details of the cash deposits made during the period 01.04.2015 to 08.11.2015; 09.11.2015 to 30.12.2015; 01.04.2016 to 0.11.2016 and 09.11.2016 to 30.12.2016. The assessee also provided monthwise details of cash balance, cash receipts, cash deposits in bank, cash purchase/expenses, cash withdrawn from bank and closing cash balance for the year under consideration as well as for the immediately preceding year (i.e., AY 2016-17). From the said table, the assessee also proved before the ld.AO that it had cash balance of Rs.2,94,28,861/- as on 08.11.2016 which was used for depositing cash in specified bank notes during demonetization period of 09.11.2016 to 30.12.2016. But, the ld. AO did not agree to this contention of the assessee and proceeded to treat the cash deposits made during the demonetization period as unexplained cash credit u/s 68 of the Act and added the same to the total income of the assessee to be taxed at a higher rate prescribed u/s 115BBE of the Act. This action of the ld. AO was upheld by the ld.CIT(A).

20. At the outset, we find that the assessee had explained the source of cash deposits made in specified bank notes during the period 09.11.2016 to

30.12.2016 made out of cash balance available with it as on 08.11.2016. In this regard, we find that the assessee as on 31.03.2016 had cash balance of Rs.2,76,42,057/- as per the audited balance sheet as on 31.03.2016. The return of income for AY 2016-17 has been filed by the assessee on 05.10.2016 which is prior to the date of announcement of demonetization by the Government of India. The assessment was completed u/s 143(3) of the Act for AY 2016-17 on 29.12.2018 wherein no adverse remarks were made by the ld. AO on the closing cash balance held by the assessee. The assessee also gave the complete details of movement of cash monthwise upto the date of demonetization and also for the whole year under consideration. Similar details were also furnished for the immediately preceding assessment year i.e., AY 2016-17 in tabular format. From the movement of cash balance as tabulated in the assessment order, we find that the assessee had cash balance of Rs.2,94,28,861/- as on 08.11.2016. In fact, the said tabulation which is reproduced in the assessment order, is nothing, but, the furnishing of details by the assessee in the same format sought for by the ld. AO vide questionnaire to notice u/s 142(1) of the Act dated 04.12.2019. When the books of account of the assessee are not rejected and absolutely no deficiencies are found in the cash book maintained by the assessee, there is no case for the Revenue to disbelieve the existence of cash balance as on 08.11.2016 to the tune of Rs.2,94,28,861/-. The assessee is mandated to maintain cash balance at various levels in view of its business operations and to meet its business exigencies. In fact, from the cash movement summary provided by the assessee before the lower authorities monthwise, we find the assessee has been holding cash balance at the end of each month as under:-

(in Rs.)

01.04.2016	*Opening Balance – 2,76,42,057/-*
April, 2016	*2,68,95,396/-*
May, 2016	*2,67,79,660/-*
June, 2016	*2,49,02,189/-*
July, 2016	*2,73,63,297/-*
August, 2016	*2,99,80,507/-*
September, 2016	*2,97,43,776/-*
October, 2016	*2,95,11,903/-*
01.11.2016 to 08.11.2016	*2,94,28,861/-*

21. From the above, it could be safely concluded that the assessee has been consistently holding huge cash balance which meets the entire cash deposits made during the whole year including the cash deposits made during the demonetization period in specified bank notes. Hence, there is absolutely no case for the Revenue to make an addition for cash deposits made during the demonetization period as the entire cash deposits are totally explained by proper sources by the assessee. Accordingly, the ground No.3 raised by the assessee is allowed.

22. The ground No.4 raised by the assessee is challenging the disallowance made u/s 40(a)(ia) of the act in the sum of Rs.68,15,000/- in respect of payment made to non-resident M/s All Farida Worldwide Fze which is a resident of UAE. As per form 15CA submitted by the assessee, the nature of service was mentioned as 'engineering service.' The assessee did not deduct tax at source while making the said payment. Accordingly, the ld. AO issued show cause

notice to the assessee as to why the said expenditure be not disallowed u/s 40(a)(i) r.w.s. 195 of the Act. The assessee, vide its reply dated 23.12.2015, submitted that Form 15CA certificate was obtained for proposed remittance of Rs.85 lakhs, but, the actual payment made was only for Rs.68,15,000/- and that the nature of service was wrongly shown as 'engineering services' in Form 15CA. However, the same was paid on account of purchases made for imported RIG supply. Effectively, the payment is made only for purchase of tools and spares required for maintenance of vessels made by the assessee. It was submitted that the said payee is a non-resident and does not have any permanent establishment in India, the payment made by the assessee to the said non-resident is not chargeable to tax in India and, accordingly, the provisions of section 195(1) of the Act is not attracted at all and, consequently, no disallowance could be made u/s 40(a)(ia) of the Act. The ld. AO, however, did not heed to this contention of the assessee and held that the payment fall within the ambit of 'fee for technical services' u/s 9(1)(vii) of the Act and, therefore, taxable in India in the hands of the non-resident. Since the said payment is taxable in the hands of the non-resident as 'fee for technical services', the ld. AO held that the assessee is bound to deduct tax at source, failure of which could be invited with the disallowance u/s 40(a)(ia) of the Act.

23. Before the ld. CIT(A), the assessee also made an alternative claim that the said payment is not subjected to withholding tax in India due to operation of DTAA between India and UAE. The assessee also placed reliance on the decision of the ld.CIT(A) for AYs 2012-13 and 2013-14 wherein the issue was decided in favour of the assessee. The ld.CIT(A), however, observed that the payments in earlier years, i.e., for AYs 2012-13 and 2013-14 were not made by the assessee to All Farida Worldwide Fze and were made to some other parties. The ld.CIT(A)

also observed that the assessee did not produce any evidence to show that the payee does not have any permanent establishment in India. The ld.CIT(A) also observed that the assessee had not submitted any evidence to prove that it had followed due procedures to claim the benefit set out under the DTAA between India and UAE. The ld. AR before us placed reliance on pages 547 to 557 of the paper book containing ledger account of the payee in the books of the assessee company together with the invoice raised by the payee on the assessee, proforma invoice, bank correspondences, declaration-cum-undertaking to be given under Foreign Exchange Management Act, 1999, Form A2 for making remittance abroad, Form No.15CB issued by a Chartered Accountant and Form 15CA issued by a Director of the assessee company. The ld. AR also placed reliance on the decision of this Tribunal in assessee's own case for AY 2012-13, 2013-14 and 2014-15 dated 31.01.2022. We find that in those years, the payments were made by the assessee to M/s Noble Denton Middle East Ltd., Dubai Branch. Similarly, the ld. AR also placed reliance on the orders of this Tribunal for AY 2015-16 and 2016-17 dated 25.11.2022 in assessee's own case which, in turn, relied on the Tribunal order for AYs 2012-13 and 2013-14. However, in those years, it is not clear from the orders of the Tribunal as to whether the ld. AO had treated the said payment as 'fee for technical services' taxable u/s 9(1)(vii) of the Act. However, we find from pages 547 to 557 of the paper book relied upon by the ld. AR that the claim of the assessee is that it had only imported Rigs from the non-resident payee and the same would not be liable for withholding tax, but, from the invoice raised by the payee on the assessee which is enclosed in page 548 of the paper book, the same specifies that the payment is to be made by the assessee for charges for service engineers for complete inspection, overhauling and certification of mud pump, rotary table and skidding system for which USD 1 lakh is raised on the assessee.

Hence, the basic purpose of the assessee making payment to the non-resident payee itself is to be examined. Hence, in these circumstances, in our considered opinion, the reliance placed on the decision of this Tribunal would not come to the rescue of the assessee for the year under consideration. Hence, in the interest of justice and fair play, we deem it fit and proper to restore this issue to the file of ld. AO for *denovo* adjudication in accordance with law. Accordingly, ground No.4 raised by the assessee is allowed for statistical purposes.

24. The ground No.5 raised by the assessee is challenging the disallowance of Rs.13,71,19,927/- on account of amounts written off.

25. We have heard the rival submissions and perused the material available on record. The ld. AO, on perusal of profit & loss account had observed that the assessee had written off an amount of Rs.13,71,19,927/- under the head 'Miscellaneous expenses.' When confronted regarding the allowability of the same, the assessee submitted that major part of the written off amount was on account of disputed bills with ONGC which were never cleared by the ONGC and in order to keep the books reconciled with ONGC, the assessee company chose to write off the irrecoverable balances and claimed the same as deduction. The assessee stated that a sum of Rs.11,82,90,370/- is on account of amounts not recoverable from ONGC for various years. The assessee even gave the break-up of those disputed bills proving the fact that ONGC had deducted certain amounts while making payments to the assessee. It is not in dispute that the assessee renders service only to ONGC and earns business income from ONGC. Obviously, the assessee had to raise the bills on ONGC. As and when the bills are raised on ONGC, the assessee has offered income on accrual basis. Subsequently, as and when the bills are deducted on account of certain disputes

by ONGC, the same remains outstanding as sundry debtor in the books of the assessee company. Since the said sums are not recoverable from ONGC, the assessee chose to write off the same in its books during he year under consideration. However, we find that the ld. AO, without appreciating these facts, had proceeded to treat the entire written off amount as not an allowable deduction. Similarly, for the remaining sum of Rs.1,88,29,557/-, no findings has been recorded by the lower authorities. Hence, in the interest of justice and fair play, we deem it fit and appropriate to restore this issue to the file of the ld.AO for denovo adjudication in accordance with law, after considering the detailed break-up of the amounts written off submitted by the assessee which are enclosed in the paper book. The assessee is also at liberty to furnish fresh evidences, if any, in support of its contentions. With these directions, the ground No.5 raised by the assessee is allowed for statistical purposes.

26. In the result, the appeal of the assessee is partly allowed for statistical purposes.

27. To sum up, the appeal of the assessee is partly allowed for statistical purposes and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 04.08.2023

Sd/-	Sd/-
(SAKTIJIT DEY) VICE-PRESIDENT	(M. BALAGANESH) ACCOUNTANT MEMBER

Dated: 04th August, 2023.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi