IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 115 of 2021
With
R/TAX APPEAL NO. 116 of 2021

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THE PR. COMMISSIONER OF INCOME TAX, RAJKOT 1
Versus
M/S DML EXIM PVT. LTD.

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Appearance:
MAUNIL G YAJNIK(9346) for the Appellant(s) No. 1
MR B S SOPARKAR(6851) for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR. JUSTICE NIRZAR S. DESAI

Date : 21/10/2026

COMMON ORDER

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned Senior Standing Counsel Mr. Maunil G. Yajnik for the appellant and learned advocate Mr. B. S. Soparkar for the opponent.

2. These appeals are filed under Section 260A of the Income Tax Act, 1961 (for short, 'the

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Act'), by the appellant-Revenue, proposing the following substantial questions of law arising out of the impugned common order of the Income Tax Appellate Tribunal, Rajkot Bench, Rajkot (for short "The Tribunal") in ITA No.360/RJT/2015 for AY 2011-12 and in ITA No.27/RJT/2016 for AY 2012-13, filed by the Revenue being aggrieved by the order passed by the CIT (Appeals).

TAX APPEAL NO. 115 OF 2021

[A] "Whether the Appellate Tribunal has erred in law and on facts in confirming the order of CIT(A) deleting disallowance of Rs. 21,60,87,454/- made under Section 40(a)(ia) of the Act without appreciating the fact that the assessee failed to deduct tax at source on payments made to foreign agents?"

[B] "Whether the Appellate Tribunal has erred in law and on facts in confirming the order of CIT(A) deleting disallowance of Rs. 10,04,33,270/- made on account of contract cancellation charges despite the fact that the same were not genuine?"

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TAX APPEAL NO. 116 OF 2021

[A] "Whether the Appellate Tribunal has erred in law and on facts in confirming the order of CIT(A) deleting disallowance of Rs.2,80,05,500/- made on account of contract cancellation charges despite the fact that transaction was speculative in nature and not a part and parcel of the export business of the assessee?

[B] "Whether the Appellate Tribunal has erred in law and on facts in confirming the order of CIT(A) deleting disallowance of Rs.9,73,33,826/- made under Section 40(a)(ia) of the Act without appreciating the fact that the assessee failed to deduct tax at source on payments made to foreign agents?"

[C] "Whether the Appellate Tribunal has erred in law and on facts in deleting the disallowance of loss of Rs.46,28,828/- by holding that loss on fluctuation of foreign exchange is not speculative under section 43(5) of the Act and the same is incidental to the assessee's business?"

[D] "Whether the Appellate Tribunal has erred in law and on facts in deleting the disallowance of Rs.6,02,976/-made under section 14A r.w. Rule 8D?"

3.For the sake of convenience, Tax Appeal No.

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116 of 2021 is treated as the lead matter.

4. The assessee is a Private Limited Company engaged in the business of trading of agricultural products, building construction, and generation of power/energy. For Assessment Year 2012-13, the assessee file the return of income on 08.09.2012, declaring income at Rs.23,96,84,200/-. During the course of assessment proceedings, the Assessing Officer found that an amount of Rs.2,80,05,500/- was paid by the assessee as contract cancellation charges to various foreign parties for non-fulfillment of the contractual terms and conditions, resulting in settlement of contracts at a price which is lower than the predetermined price as a result of which the assessee had to make such payment.

5. The Assessing Officer, however, held that

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cancellation of transaction caused on account of non-delivery within the specific time and the surplus or deficit so generated, leading to payment or receipt of money, acquired the colour of speculation profit/loss. It was observed by the Assessing Officer that the transaction was arranged in such a way as to reduce the profit and, after invoking the provisions of Section 73(1) pertaining to loss of speculation business or activity, it was held by the Assessing Officer that such amount paid by the assessee would partake the character of loss of speculation business or activity and, therefore, the same could not have been set-off against the profit generated from regular business and accordingly, the cancellation charges of Rs.2,80,05,500/- was disallowed as speculation loss.

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6. The CIT (Appeals), however, allowed the appeal filed by the assessee, deleting such disallowance.

7. Being aggrieved, the Revenue preferred an appeal before the Tribunal. The assessee contended before the Tribunal that, in the business of export of cotton and other agricultural products to various countries and while procuring the export orders, the assessee entered into contracts proforma invoice with the proposed purchasers of the foreign country. It was further contended that in the terms of the contract of goods, the time, period of supply and the rate were specified and failure of the terms of the contract, resulted into the loss, as the dispute was settled with the proposed buyer by paying the cancellation charges by the assessee. It was, therefore, contended that the contract cancellation charges are in the

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nature of payment for failure to oblige for contractual terms and conditions, resulting in settlement of contract at a price lower than the predetermined price, and accordingly, the appellant had to make the payment as per the terms of the contract for cancellation, wherein the cancellation of contract was in respect of supply of the goods which the appellant has dealt with during the course of the business. The Tribunal, after considering the facts recorded by the CIT (Appeals), upheld his order on the ground that there was no ambiguity, as the CIT (Appeals) took into consideration the facts pertaining to cancellation of charges for non-reduction of cancellation charges paid by the assessee, and similar order having been passed, where no TDS was deducted in respect of such cancellation charges in the preceding year

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which was also deleted. Accordingly, the Tribunal dismissed the appeal of the Revenue.

8. With regard to the disallowance of Rs.9,73,33,826/- being the export commission paid to non-resident agent under Section 40(a)(ia) of the Act on the ground of non-deduction of TDS, the Assessing Officer was of the opinion that the person making the payment to the non-resident would be liable to deduct tax at source under Section 194H of the Act, with the payment so paid in view of the expression “any other sum chargeable under the provision of the Act” under Section 195 of the Act. Whereas, it was the case of the assessee that disallowance under Section 40(a)(ia) read with Section 194H of the Act could be made only if the payer did not deduct the tax at source on the sum paid/credited in the account of their

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resident. The Assessing Officer, invoking the amended provision of Section 195(1) of the Act, held that the assessee was liable to deduct tax at source on the commission paid to the non-resident agent and, for failure to deduct TDS under Section 194H of the Act on the such payment, expenses of such commission was disallowed as per the provision of Section 40(a)(ia) of the Act.

9. The Tribunal after considering the provisions of Section 195 of the Act, observed that the said provision clearly provides that unless the income is liable to be taxed in India, there is no obligation to withhold tax in India, in view of the basic condition under Section 9 of the Act with respect to the income accruing and arising in India, namely, connection with the property in India or control and management vested in India, and

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such conditions were not satisfied. The Tribunal has arrived at a finding that the commission expenses paid on export sales to a non-resident admittedly for services rendered outside India would not be covered by the provisions of Section 40(a)(ia) of the Act. The Tribunal further held that the commission paid by the assessee cannot be considered as fees for technical services under Section 9(1)(vii) of the Act and the same was business income for recipient of income, which is not taxable in India, and such non-resident did not have any business connection in India. The Tribunal referred to and relied upon the decision of a Co-ordinate Bench in assessee's own case for deletion of such disallowance made by the Assessing Officer under Section 40(a)(ia) of the Act, by observing as under:

> "9. In this respect, we have considered the judgment passed by the Hon'ble Co-

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ordinate Bench in ITA No. 573/Rjt/2014 in assessee's own case for A.Y. 2010-11; while dealing with the identical issue upon making the following observation such disallowance was deleted. The following observation is as follows:-

> "2. To adjudicate on this appeal, only a few material and undisputed facts need to be taken note of. During the assessment proceedings, the Assessing Officer noted that the assessee has deducted tax under section 194C from the payment aggregating to Rs.67,84,807/- to the Customs House Agents whereas according to the Assessing Officer, tax was deductible under section 194J. The Assessing Officer was thus of the view that there was a short deduction of tax at source from these payments. It was in this backdrop he came to the conclusion that there was failure to deduct tax at source from payments to the Customs House Agents and accordingly the same is to be disallowed under section 40(a)(ia) of the Act. Aggrieved by the disallowance so made, the assessee carried the matter in appeal before the ld. CIT(A). It was, inter alia, contended by the assessee that the disallowance under section 40(a)(ia) cannot be resorted to in the case of short deduction of tax at source, even if any and, therefore, the impugned disallowance is unsustainable in law. Reliance was placed on Hon'ble High Court of

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Calcutta in the case of CIT vs. S.K. Tekriwal, 260 CTR 73. Accepting these arguments, learned CIT(A) deleted the impugned disallowance and justified his stand as follows: "7. While holding that the payments made to CHAs are liable for tax deduction at source u/s. 194J of the IT Act, 1961, the issue at hand is whether the assessing officer is justified to disallow the entire payment made to CHAS at Rs.67,84,807/- u/s. 40(a)(ia) of the IT Act, 1961 on the ground that the appellant has deducted the tax on the impugned payments u/s. 194C @ 2% as against stipulated deduction of tax @ 10% u/s. 194J of the IT Act, 1961. The assessing officer has not made any notable discussion on this issue. However, on the other hand, the authorized representative has cited the judgement of Hon'ble High Court of Calcutta in the case of CIT vs. S.K. Tekriwal 260 CTR 0073, wherein it has been held that "Expenses are not liable to be disallowed u/s 40(a)(ia) on account of short deduction of tax at source". The relevant paragraph of the judgement is reproduced hereunder for the sake of brevity: "We are of the view that the provisions of section 40(a)(ia) of the Act has two limbs one is where, inter alia, assessee has to deduct tax and the second where after deducting tax, inter alia, the assessee has to pay into Government Account. There is nothing in the said section to treat, inter alia, the assessee as defaulter

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where there is a shortfall in deduction. With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not as required by or under the Act, but the facts is that this expression, on which tax is deductible at source under chapter XIVV-B and such tax has not been deducted or, after deduction has not been paid on or before the due date specified in sub-section (1) of section 139. This section 40(a)(ia) of the Act refers only to the duty to deduct tax and pay to government account. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payment falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s. 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act." 8. Apart from the above citation, the authorised representative has cited the following judgements to buttress his arguments that the disallowance u/s. 40(a)(ia) is not warranted when the tax deduction at sources was incorrectly me under a different section which resulted in the shortfall. Hon'ble ITAT Delhi 'E' Bench in the case of Glaxo Smithkline Consumer Healthcare Ltd. us. ITO 12 SOT 221 (Delhi) Hon'ble Bombay High Court in the case of CIT vs. JivanlalLalloobhai& Co. 206 ITR 548 (Bom) Hon'ble ITAT, Mumbai "B" Bench

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in the case of ACIT vs. Merchant Shipping Services (P) Ltd. 129 ITD 109 (Mumbai) Hon'ble ITAT Mumabi in the case DCIT US. of Chandabhoy&Jassobhoy 49 SOT 448 (Mumbai) 9. Respectfully following the above judgement, I am also of the view that in a case like this, where the appellant has deducted tax at source in respect of the payments made to CHAs @ 2% under section 194C, when it is required to be made @10% u/s. 194J of the IT Act, 1961, the provisions of section 40(a)(ia) of the IT Act, 1961 cannot be made applicable. As held by the Hon'ble High Court of Calcutta in the above referred case that if there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payment falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s. 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act. Therefore, the disallowance made by the assessing officer cannot be sustained. The addition made Rs.67,84,807/ on account of disallowance of payments made to CHAs u/s. 40(a)(ia) of the IT Act, 1961 stands deleted. This ground of appeal is allowed." 3. Aggrieved by the relief so granted by the ld. CIT(A), the Assessing Officer is in appeal before us. 4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the

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light of the applicable legal position. We are not inclined to disturb the very well reasoned conclusions arrived at by the ld. CIT(A) as he has explained at length a binding judicial precedent for the proposition that a short deduction of tax at source, even if any, cannot be visited with the disallowance under section 40(a)(ia) of the Act. Therefore, the disallowance was unsustainable in law and the ld. CIT(A) was quite justified in deleting the impugned disallowance. We approve and uphold the erudite and well reasoned stand taken by the ld. CIT(A) and decline to interfere in the matter."

Apart from that we have further considered the appeal preferred by the Revenue against the order passed by the Co-ordinate Bench in allowing the appeal. We have further considered the judgment passed by the Hon'ble Jurisdictional High Court in the matter of Pr. Commissioner of Income Tax vs. MGM Exports in Tax Appeal No. 309 of 2018. The relevant portion whereof is as follows:-

"6. The second issue relates to the addition made by the Assessing Officer of a sum of Rs.5.05 lacs under section 40(a)(ia) of the Income Tax Act, 1961 on the ground that the assessee had not deducted tax at source on foreign commission payments. The Tribunal however,

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recorded that the non-resident agent of the assessee was operating at his own level and no part of the income arose or accrued in India.

7. In the recent order in Tax Appeal No. 290 of 2018, we had dealt with similar situation making following observations:

"It can thus be seen that while confirming the order of CIT [A], the Tribunal relied on judgment of the Supreme Court in the case of G.E India Technology Centre P. Limited vs. Commissioner of Income-Tax & Anr., reported in [2010] 327 ITR 456 (SC). In such judgment, it was held and observed that C/TAXAP/309/2018 ORDER the most important expression in Section 195[1] of the Act consists of the words, "chargeable under the provisions of the Act". It was observed that, "..A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the Act." Counsel for the Revenue, however, drew our attention to the Explanation 2 to sub-section [1] of Section 195 of the Act which was inserted by the Finance Act of 2012 with retrospective effect from 1st April 1962. Such explanation reads as under :-

Explanation 2 For the removal of doubts, it is hereby clarified that

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the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has -

[i] a residence or place of business or business connection in India; or

[ii] any other presence in any manner whatsoever in India.

It is indisputably true that such explanation inserted with retrospective effect provides that obligation to comply with subsection [1] of Section 195 would extend to any person resident or non-resident, whether or not non-resident person has a residence or place of business or business connections in India or any other persons in any manner whatsoever in India. This expression which is added for removal of doubt is clear from the plain language thereof, may have a bearing while ascertaining whether certain payment made to a non-resident was taxable under the Act or not. However, once the conclusion is arrived that such payment did not entail tax liability of the payee under the Act, as held by the Supreme Court in the case of GE India Technology Centre P. Limited [Supra], sub-section [1] of Section

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195 of the Act would not apply. The fundamental principle of deducting tax at source in C/TAXAP/309/2018 ORDER connection with payment only, where the sum is chargeable to tax under the Act, still continues to hold the field. In the present case, the Revenue has not seven seriously contended that the payment to foreign commission agent was not taxable in India.

Tax Appeal is therefore dismissed."

8. In the result, Tax Appeal is dismissed."

Further that we have considered the judgment passed by the Co-ordinate Bench in the case of ACIT vs. Rimtex Industries in ITA No. 315/Rjt/2013 as relied upon by the Ld. AR and the judgment passed by the Hon'ble Apex Court in the case of Ishikawajima Harima Heavy Industries Ltd. (2008) 288 ITR 408 (SC).

10. We find that the ratio laid down by all the above judgments holding that when the commission has been paid to foreign parties for rendering services admittedly abroad for soliciting customers for its export business activities, the appellant is not liable for short deduction of tax at source and therefore disallowance made on this score under Section 40(a)(ia) is not

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> permissible. Hence, keeping in mind such judicial precedent we find no infirmity in the order passed by the Ld. CIT(A) in deleting the disallowance made by the Ld. AO under Section 40(a)(ia) of the Act holding that such commission is not fees for technical services under Section 9(1)(vii) of the act and the same being in nature of business income for recipient of income/payee/non-residents is not taxable in India in terms Sec. 9(1)(i) in the absence of business connection in India, so as to warrant interference. We, therefore, find no merit in the issue raised by the Revenue. Hence, the same is dismissed."

10. With regard to the addition of foreign exchange fluctuation of Rs.46,28,828/- is concerned, the relevant facts are as under:

> "During the course of assessment proceeding from the final accounts it was gathered that under the head administration / general expenses, the assessee has claimed other general administrative expenses at Rs. 1,21,09,315/-, the details whereof were also furnished before the authorities below. From the details it was further found that the general administrative expenses included the fluctuation in foreign currency at Rs. 46,28,828/-The assessee explained his claim before the AO which was accepted by the Ld. AO to the extent that the dollar bookings

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made in advance and set off against dollar remittances as hedging transaction. However, dollar bookings not set off against dollar remittances arising from exports has not been accepted to be framed as hedging by the Ld. AO as there is booking in excess of the actual remittance accepted to be receipt, which according to the Ld. AO falls under the scope and purview of speculation. He, therefore, added Rs. 46,28,828/-in respect of the claim of fluctuation in foreign exchange considering the same as speculation with a rider that assessee can set off his speculation loss against the speculation income as provided by the Act. In appeal the Ld. CIT(A) deleted such addition relying upon the judgment passed by the Jurisdictional High Court in the case of CIT vs. Panchmahal Steel Ltd. Hence, the instant appeal before us."

11. The Tribunal, after considering the submissions made before the CIT (Appeals), upheld his order by observing as under:

"14. We have heard the respective parties, we have also perused the relevant materials available on record including the orders passed by the authorities below. It appears that the assessee made the following submission before the Ld. AO:-

"Normally when we confirm any export

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sale contract, to prevent any future loss due to change in exchange rates we book (hedge) dollars from our Banker Oriental Bank of Commerce where we have document discounting limits. Latter on we submit the documents for collection/discount against this dollar booking contracts. Firstly we only sales the dollars and never purchase dollars. After dollar booking we give sales documents for collection/discount. Before the expiry of the contract if we cannot submit the documents then the unutilized part of contract is settled by the bank.

Thus the forward contracts done by us are only one sided and only for the purpose of hedging and not the purpose of doing any speculative gain or loss.

Thus if we book dollar for latter period then we get more rate i.e. we get premium as per RBI & Banking premium rules.

Similarly if we give the documents against future period of booking then the bank get back the premium of the same and this charges they debit to our account under the head of Forward Contract early delivery charges. Thus the forward contract early delivery charges paid by us are just return back of excess premium which we get at the time of booking of dollar.

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This amount is not at all speculative but it is routine practice and part and partial of the banking and export business transactions."

Though in spite of the same the AO termed the dollar bookings, which was not set off against the dollar remittance, as speculation and not hedging since there is booking in excess of the actual remittance accepted to be received. However, as we find from the records while allowing the claim of the assessee the Ld. CIT(A) observed as follows:-

"7.2 I have perused the assessment order and the written submission filed by the ld. AR.

The AO vide para 7 of the assessment order had held that the fluctuation in foreign currency arose on account of the dollar bookings by way of advance contracts entered into by assessee with the banks against which the realization of dollar at the time of export is adjusted and the extent of the unutilized dollar booked in advance by the assessee with the bank which remained outstanding at the end of the month, was closed by the bank by crediting/debiting the assessee's account to the extent of the unused dollar left behind out of the dollar booking for want of export

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realization, is speculative I nature. According to the AO, this settlement is done on a month to month basis by the ban and there is no squaring up of transactions by way of actual realization of dollar. On the other hand, the ld. AR submitted that, in the appellant's export business, there is always a risk of fluctuating foreign currency at the time of realization of sale proceeds. Therefore in order to hedge against the loss, the appellant enters into forward contracts with its bank and tries to minimize the risk on account of fluctuation in foreign exchange against the future export sales realization. It is also seen that, forward contracts are extensively used to get export receivables hedged against adverse currency movements. The ld. AR also admits that, such contracts are only executed against the export receivables and these facts are clearly mentioned in the said contract. So it can be said that the transactions involved in these contracts have direct nexus with the export of specific merchandise and export receivables. The appellant's ld. AR also brought on record the large fluctuation in foreign currency during the relevant financial year, in order to justify the appellant's action of currency hedging. This is summarized supra, in the written submission. As per this chart, there is variation of upto 10 USD between May 2011 and December, 2011.

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I find substantial force in the above contention of the ld. AR. It is also seen that the issue is now squarely covered by the decision of the Hon. Gujarat High Court in the case of CIT vs. Panchmahal Steel ltd. where it relied upon its own decision in the case of Friends and Friends Shipping P. Ltd., wherein it was held that though the assessee is not a dealer in foreign exchange, it entered into forward contracts with banks for the purpose of hedging the loss due to fluctuation in foreign exchange while implementing the export contracts. The transactions in foreign exchanges were incidental to the assessee's regular course of business and the loss was thus not a speculative loss under section 43(5) but was incidental to the assessee's business and allowable as such. Thus, the hedging of currency is incidental to the appellant's business and the same is therefore held as allowable business expenditure. disallowance made by the AO is therefore directed to be deleted."

Thus, from the above it appears that it is specific observation made by the Ld. CIT(A) that though the assessee is not a dealer in foreign exchange it had entered into forward contracts with banks for the purpose of hedging the loss due to fluctuation of foreign exchange while implementing the export contracts.

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> Such transaction in foreign exchanges were truly identical to the assessee's regular course of business and hence the loss is not a speculative one under Section 43(5) of the Act; the same is incidental to the assessee's business and hence allowable. We, therefore, taking into consideration the entire aspect of the matter find no infirmity in the order passed by the Ld. CIT(A) in deleting the addition made by the Ld. AO on the Premise that hedging of currency is incidental to appellant's business and thus the same is allowable business expenditure, in the present facts and circumstances of the case so as to warrant interference. We, thus, find no merit in the case made out by the Revenue. Hence, the order is passed in the affirmative i.e. in favour of the assessee and against the Revenue."

12. Regarding the addition of Rs.6,02,976/- made under Section 14A of the Act by the Assessing Officer, the facts recorded by the Tribunal, are as follows:

> "16. The brief facts regarding the issue is this that during the course of assessment proceeding upon perusal of the final accounts and the balance sheet it was found that the assessee made investments which are likely to generate exempt income which will not

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> form part of the gross total income. No expenses, however, were activated by the assessee towards earning of this income.
>
> 17. The assessment proceeding was finalised upon making disallowance of Rs. 6,02,976/ out of the interest expenses of Rs. 9,90,30,159/- by invoking the provision of Sec. 14 A r.w.r 8D of the Income Tax Act, 1961. This particular disallowance was made on the contemplation that the appellant may receive income not chargeable to tax from the investment of Rs. 63,25,000/- as appearing in the balance sheet. However, the same was deleted by the First Appellate Authority before the appellate proceeding."

13. After considering the submissions made by both the sides, the Tribunal upheld the order passed by the CIT (Appeals), observing as under:

> "We have heard the submissions made by the respective parties. We have also perused the relevant materials available on record.
>
> 20. The case of the assessee before the 1st appellate authority is this that since without recording satisfaction as contemplated in sub-section 1 of Sec. 14 of the Act, the Ld. AO proceeded to made disallowance under Section 14 A by

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applying provision of Rule 8D and as such the same is not permissible in the eyes of law and thus not sustainable. It appears that the Ld. CIT-A relying upon the series of judgements deleted the addition made by the Ld.AO in view of the particular fact that the Ld.AO has not made any observation and/or deliberation by recording satisfaction so as to the correctness of the claim of the assessee in respect of the expenditure in relation to income which does not form part of the total income under the Act which is a precondition for applying the method under Section 14A r.w.r 8D for disallowing the expenses. The judgement passed by the Hon'ble Jurisdictional High Court in the case of CIT vs. Gujarat State Fertilisers and Chemicals Ltd. reported in 2013, 36 taxman.com 557 was also considered by the Ld. CIT-A where it was held that where the assessee had more funds than investment in shares and borrowed funds were not proved to be used for sale, disallowance of 10% of exempt dividend income was unsustainable. Apart from that the order passed by the Co-ordinate Bench in the case of Torrent Power Ltd. vs. DCIT 2013, 33 taxmann.com 287 was also taken care of by the Ld. CIT-A. The operative for portion of the same is as follows:-

> "If no expenditure is incurred in relation to exempt income, no disallowance can be made under section 14A."

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The order passed by the Mumbai Bench in Raj Shipping Agencies Ltd. vs. Additional CIT, reported in 2013, 30 taxmann.com 347 was also considered by the Ld. CIT-A. The relevant portion whereof is reproduced herein below:-

"Expenditure incurred in relation to income not includible in total income [Conditions precedent] Assessment year 2008-09 — Whether Assessing Officer has to examine accounts of assessee first and then if he is not satisfied with correctness of claim, only he can invoke rule 8D -Held, yes Whether further, disallowance under section 14A required finding of incurring of expenditure and where it was found that for earning exempted income no expenditure had been incurred, disallowance under section 14A could not stand Held, yes - Whether where Assessing Officer had not recorded any satisfaction with reference to accounts of assessee or claim that no expenditure was incurred, invocation of rule 8D for disallowing expenditure under section 14A on estimation/presumptive basis did not arise -Held, yes"

In fact, we find that in the absence of any material or basis to hold that interest expenditure directly or indirectly was attributable for earning dividend

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> income, the decision of the Ld. CIT-A cannot be said to be incorrect particularly taking into consideration the fact of non-recording of satisfaction as envisaged under sub-section 1 of Sec. 14 of the Act. Hence, we do not find any merit in the issue raised by the Revenue and therefore the same is dismissed."

14. The questions referred in Tax Appeal No. 115 of 2021 are same as that of Tax Appeal No. 116 of 2021, on the same issue, which are decided by the Tribunal in Tax Appeal No. 116 of 2021.

15. Considering the submissions made by the learned advocates for the parties and on perusal of the impugned order of the Tribunal, there are concurrent findings of fact recorded by the CIT (Appeals) and Tribunal with respect to each of the issues.

16. With regard to question (A) raised by the Revenue regarding issue of deleting

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disallowance of Rs. 2,80,05,500/- made on account of contract cancellation charges, the CIT(Appeals) and the Tribunal have arrived at a finding of fact that the assessee paid the contract cancellation charges in the nature of payment for failure to oblige the contractual terms and conditions, resulting in settlement of contracts at a price lower than the pre-determined price, and cancellation of contract was in respect of supply of goods in which the appellant was dealing. Therefore, such contract cancellation charges have direct nexus with the business of the assessee. Moreover, such contract cancellation charges were the subject matter of non-deduction of TDS in respect of immediately preceding year, which was also allowed in favour of the assessee.

17. Therefore, considering the concurrent

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findings of fact recorded by the CIT(Appeals) and the Tribunal, question (A) is not considered for admission.

18. With regard to question (B) for deletion of the disallowance of Rs. 9,73,33,826/- under section 40(a)(ia) of the Act, the CIT(Appeals) and the Tribunal, after discussing the provisions of Section 9 read with Section 195 of the Act, concluded that the commission expenses paid on export sales to a non-resident are admittedly for services rendered outside India and, therefore, the same would not come within the purview of Section 40(a)(ia) of the Act. The Tribunal has also placed reliance upon the decision of the Co-ordinate Bench in the ITA No.573/RJT/2014 in the assessee's own case for AY 2010-11, as well as the decision of this Court in case of ***Principal Commissioner***

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of Income Tax versus MGM Exports in Tax Appeal No.309 of 2018, and decision of the Co-ordinate Bench in case of **ACIT versus Rimtex Industries in ITA No.315/RJT/2013,** and the decision of the Hon'ble Apex Court in case of **Ishikawajima Harima Heavy Industries Limited, reported in (2008) 288 ITR 408 SC,** to hold that the commission paid to foreign parties for rendering services outside India for soliciting customers for export business activities would not be covered by the provision for TDS and, therefore, no disallowance can be made under Section 40(a)(ia) of the Act. We are of the opinion that as the commission is not fees for technical services under Section 9(1)(vii) of the Act and the same being in the nature of business income for the recipient, it would not be taxable in India in terms of Section 9(1)(i) of the Act in the absence of any business

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connection in India for the recipient.

19. In view of such findings of fact, question (B) is also not considered for admission.

20. With regard to question (C) for deletion of the disallowance of loss of Rs.46,28,828/- on account of fluctuation of foreign exchange which is not considered as speculative under Section 43(5) of the Act, both the CIT(Appeals) and the Tribunal have arrived at a concurrent finding of fact that though the assessee is not a dealer in foreign exchange, it had entered into forward contracts with banks for the purpose of hedging the loss due to fluctuation of foreign exchange while implementing export contracts, which would be similar to assessee's regular course of business. Hence, the loss incurred cannot be considered as a speculative under Section

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43(5) of the Act.

21. In view of such concurrent findings of fact, question No.(C) is also not considered for admission.

22. So far as question (D) regarding deleting the disallowance of Rs.6,02,976/- made under Section 14A of the Act read with Rule 8 of the Rules is concerned, the said amount refers to interest expense out of total interest expense of Rs.9,90,30,159/- on the ground that the assessee may receive income not chargeable to tax from investment of Rs.63,25,000/- as appearing in the balance sheet. Both the CIT(Appeals) and the Tribunal relying upon the settled legal position, more particularly, in view of the fact that the Assessing Officer has not made any observation and/or deliberation by recording satisfaction so as to correctness of the

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claim of the assessee in respect of the expenditure in relation to income which does not form part of the total income under the Act which is a pre-condition for applying the provision of Section 14A read with Rule 8D for disallowance expenses. The Tribunal referred to and relied upon the decision of this Court in case of **CIT versus Gujarat State Fertilizers and Chemical Limited, reported in (2013) 36 taxmann.com 557,** wherein it was held that where the assessee had more funds than investment in shares and borrowed funds, but they had not proved to be used for sale, disallowance of 10% of exempt dividend income was unsustainable. The Tribunal after referring to various decision of the Co-ordinate Bench recorded the findings of fact that in absence of any material or basis to hold that interest expense directly or indirectly was

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attributable for earning dividend income, provision of Section 14A read with Rule 8D, cannot be invoked. Hence, question (D) is also not considered for admission.

23. In view of the above foregoing reasons, in so far as question Nos.(A) to (D) raised in Tax Appeal No. 116 of 2021 are not required to be considered for admission. Accordingly, the appeals are dismissed.

24. In view of the findings recorded in relation to question (A) and (B) of Tax Appeal No.116 of 2021 which are identical to both the questions referred in Tax Appeal No. 115 of 2021, the same is also dismissed. Both the appeals are accordingly dismissed.

(BHARGAV D. KARIA, J)

SAG blog

(NIRZAR S. DESAI,J)

Pallavi

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