IN THE INCOME TAX APPELLATE TRIBUNAL
PANAJI BENCH, PANAJI

BEFORE SHRI P. K. BANSAL, HON'BLE ACCOUNTANT MEMBER
AND SHRI D.T. GARASIA, HON'BLE JUDICIAL MEMBER

ITA NO. 145/PNJ/2014	:	**(A.Y – 2010-11)**
Asst. Commissioner of Income Tax, Circle-2(1), Panaji, Goa. **(**Appellant)	Vs.	Ajit Ramakant Phatarpekar, 601/602, 6th Floor, Gera Imperium, Patto Plaza, Goa 403 001. **PAN : AFJPP5786N** (Respondent)
ITA NO. 146/PNJ/2014	:	**(A.Y – 2010-11)**
Asst. Commissioner of Income Tax, Circle-2(1), Panaji, Goa. **(**Appellant)	Vs.	Smt. Neelam Ajit Phatarpekar, 601/602, 6th Floor, Gera Imperium, Patto Plaza, Goa 403 001. **PAN : AFJPP5785R** (Respondent)

Assessee by : Jitendra Jain, Adv.
Revenue by : B. Balakrishna, Ld. DR

Date of Hearing : 09/02/2015
Date of Order : 16/03/2015

O R D E R

PER P.K. BANSAL :

1. Both the above appeals have been filed by the Revenue against the common order of CIT(A) dt. 15.01.2014. Since the Assessees' are husband and wife, therefore, due to applicability of provisions of Sec. 5A of the Income Tax Act common issues are involved as the income has to be divided among the husband and wife. The common grounds of appeal taken by the Revenue reads as under :

"1. The CIT(A) erred in restricting the disallowance to the extent of Rs.65,000/- only and deleting the balance addition of Rs.24,06,566/- u/s 14A without considering the merits of the case particularly where the borrowals are not made for any specific purpose as alleged by

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the assessee and these are utilized partly for investments in shares and share application money and share application money paid of Rs. 1.80 crores falls within the ambit of section 14A of the I.T.Act.

2. The CIT(A) erred in deleting the additions of Rs.28,87,983/- u/s 40(a) under facts and circumstances of the case and failed to appreciate that destination sampling charges are in the nature of technical or consultancy services which come within the ambit of Explanation 2 to sec. 9(1)(vii) and CIT(A) failed to appreciate the Finance Act, 2010 amendment to section 9(1)(vii) according to which the income from technical services is deemed to accrue or arise in India whether the services are rendered within India or outside India and whether the non-resident is having place of business in India or not and therefore, the income from technical/consultancy services rendered outside India is deemed to accrue in India and hence the provisions of TDS are applicable for the above income/expenses.

3. The CIT(A) erred in deleting the addition made of Rs.68,67,067/- u/s 40(a) by not following the binding decision of Hon'ble Bombay High Court Panaji Bench decision in the case of CIT vs. Orient Goa Pvt. Ltd., which held that the assessee is liable to deduct TDS on the demurrages paid and the facts of the assessee's case are exactly similar to the above case and the ITAT, Panaji Bench followed the above decision in the case of Sesa Goa Ltd., for the A.Y. 2008-09 in ITA No.89/PNJ/2012 dt.17.05.2013.

4. Whether CIT(A) is right in disallowing only 10% of unproved cash purchases of Rs.60,28,080/- and allowing 90% of cash purchases without considering the fact that the onus is on the assessee to prove the genuineness of the purchases particularly, when assessee does not have any details of parties from whom these purchases are made and no purchase bills are available for the above purchases and CIT(A) ignored the judicial decisions of Supreme Court in the case of .CIT vs. Calcutta Agency Ltd., 19 ITR 191, Lakshinarayana Cotton Mills Co. Ltd., Vs. CIT (SC), 74 ITR 634, CIT Vs. Chandravilas Hotel (Guj), 164 ITR 102, CIT vs. Modi Stone Ltd., (Del). 203 Taxman 123 and CIT Vs. S.G. Exports (P&H), 336 ITR 2 on the above issue.

5. The CIT(A) erred in deleting the additions made u/s 41(1) of Rs.3,07,61,558/- where the assessee not filed any confirmations of trade creditors and not proved the existence of the liabilities and most of the liabilities are more than 4 years old and the CIT(A) failed to appreciate the decision of the ITAT, Bangalore Bench decision reported in 128 ITD 74 in the case of Sureshkumar T. Jain Vs. ITO which held that the onus is on the assessee to prove the genuineness of the existence of liability of trade creditors which confirmed the additions made by the AO u/s 41(1) and facts of the assessee's case are identical to the above case.

6. Whether the CIT(A) is right in deleting the addition of Rs.1,18,26,320/- on account of Undervaluation of closing stock by the assessee by way of merely passing journal entries on 31.03.2010 in the name of sister concerns at a much lower rate viz., Rs.839 per M.T. as against the closing stock rate of Rs.1,141 per M.T. under the facts and circumstances of the

case where the assessee not proved that the stock transferred by way of journal entries is unscreened and no transportation charges are incurred on the stock transferred.

7. Whether the CIT(A) is right in deleting the additions of Rs. 1,44,99,8507- towards Staking and Handling expenses and Blending and Screening charges of Rs.74,50,000/- paid to sister concerns by merely passing journal entries on 31.03.2010 where genuineness of the rendering of any service by sister concerns is not proved by the assessee and CIT(A) failed to appreciate that the onus is on the assessee to prove the genuineness of the expenditure as held by the Supreme Court in the cases of CIT vs. Calcutta Agency Ltd., 19 1TR 191, Lakshinarayana Cotton Mills Co. Ltd., Vs. CIT (SC), 74 ITR 634 and other judicial decisions viz., CIT Vs. Chandravilas Hotel (Guj), 164 ITR 102, CIT vs. Modi Stone Ltd., (Del). 203 Taxman 123 and CIT Vs. S.G. Exports (P&H), 336 ITR 2 and CIT(A) failed to appreciate that bills raised in this regard are not genuine as these do not contain levy of any service tax or any other taxes which is normal feature of genuine bills.

8. The CIT(A) erred in deleting addition made on account of Transportation charges of Rs.30,93,640/- paid in cash and these are not supported by any transport bills issued by the Transporters and assessee does not have any details such as names of transporters to whom the cash is paid.

9. The CIT(A) erred in deleting the disallowance of commission amounting to Rs.53,21,905/- where the assessee failed to prove the nature of services rendered and the basis of payment of commission, paid and the CIT(A) failed to appreciate the judicial decisions in the case of CIT Vs. McDowell and Co. Ltd., (Kar) 291 ITR 107, CIT Vs. Premier Breweries Ltd., (Ker), 279 ITR 51, Schneider Electric India Ltd., Vs. CIT(Del), 304 ITR 360."

2. Ground no. 1 relates to applicability of provisions of Sec. 14A. The brief facts relating to this ground are that the AO disallowed sum of Rs. 24,71,566/- by applying the provisions of Sec. 14A read with Rule 8D. The AO noted that the Assessee has received Dividend amounting to Rs. 45,371/- claimed as exempt but did not disallow any expenditure u/s 14A. The AO noted that the Assessee has paid interest amounting to Rs. 2,06,70,112/- and Assessee has invested an amount of Rs. 5,93,02,505/- in mutual funds, shares/share application money and therefore computed the disallowance at Rs. 24,71,566/- by applying Rule 8D as under :

"Accordingly, the disallowance u/s 14A is worked out under Rule 8D as under:-

1. *Amount of expenditure directly relating to income which does not form part of total income = Nil*
2. *In a case where the assessee has incurred expenditure by way of , Interest during the previous year which is not directly attributable to any particular income or receipt, an amount computed in accordance with the following formula, namely:- [AxB]/C=*

A. Amount of expenditure by way of interest other than the amount of interest included in clause (i) incurred during the previous year- Rs.2,06,70,112

B The average of value of investment, income from which does not or shall not form part of the total income appearing in the balance sheet of the assessee on the first day and the last day of the previous year

Rs.6,30,43,814 + Rs. 5,93,02,505/- = Rs.12,23,46,319
*Average of the above = **Rs.6,11,73,159***

C The average of total assets as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year;

Rs. 61,68,02,659 + 55,09,07,484 = 116,77,10,143
*Average = **58,38,55,071/-***

(i) Interest disallowance = :- [AxB]/C= (2,06,70,112 x 6,11,73,159)
58,38,55,071-

= Rs. 21,65,701/-

(ii) an amount equal to one-half per cent of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year.

= Rs.6,11,73,159 x .005 = Rs. 3,05,865/-

4.6 Accordingly, a sum of Rs. 24,71,566/- (21,65,701 + 3,05,865) is disallowed u/s 14A read with Rule 8D as expenditure incurred for earning the exempted income and same is added to the total income."

The Assessee went in appeal before the CIT(A). Before the CIT(A) the Assessee contended that the Assessee has not incurred any expenditure to earn the dividend income, the interest is paid for the loan borrowed for business purposes, sum of Rs. 1,63,35,372/- was paid on packing credit and FBD as

interest which is for export business, the sum of Rs. 3,22,125/- is paid as interest to VAT authorities under Goa VAT Act and the balance sum of Rs.40,12,615/- consists of bank charges, interest on overdrawn account, processing of loan for hotel and packing credit limits, interest on secured loan for car, hotel loan taken from LIC for business purposes. The AO while rejecting the claim of the Assessee simply stated that he is not satisfied with the correctness of the claim but did not specify why the accounts are not reliable for the claim of no expenditure made by the Assessee. Alternately it was contended that the disallowance cannot exceed the exempt income i.e. Rs. 45,371/-, no disallowance was made in the preceding assessment year 2009-10 where investment of Rs. 6.30 crores was made which are reduced to Rs. 5.93 crores during the year. Even Rule 8D(2)(ii) and 8D(2)(iii) has wrongly been applied and in the investment of Rs. 5.93 crores a sum of Rs. 1.8 crores relates to share application money while Rs. 2.83 crores represents investments made in Bajaj Insurance, Aviva Insurance, ICICI Prudential, ING Vysya Life Insurance and investment in firm in which he is not a partner. Even in respect of indirect expenses also the disallowance comes to 65% on the remaining amount of Rs. 1.30 crores @ 0.5%. CIT(A) ultimately sustained the disallowance to the extent of Rs. 65,000/-.

3. We heard the rival submissions and carefully considered the same alongwith the order of the tax authorities below. We noted that the Assessee has investment of Rs. 5,93,02,505/- in mutual funds, shares/share application money and earned dividend amounting to Rs. 45,371/-. The Assessee has not made any disallowance in the computation. The AO since was not satisfied with the working of the Assessee, therefore, applied Rule 8D for estimating the disallowance. The Assessee claims that out of interest expenditure of Rs. 2.60 crores, Rs. 1.63 crores has been paid for availing of packing credit and this loan is availed only for export, Rs. 43 lacs are paid to VAT authorities, interest on

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overdrawn account, processing of loan for hotel and packing credit limits. As per CIT(A), Assessee has furnished the ledger account of interest paid to substantiate his claim. These facts have not been denied by the ld. DR even though he vehemently relied on the order of the AO. The investment has been reduced during the impugned assessment year from Rs. 6.30 crores to Rs. 5.93 crores. Out of the investment of Rs. 5.93 crores, sum of Rs. 1.80 crores constitutes share application money and Rs. 2.83 crores comprises of Bajaj Insurance, Aviva Insurance, ICICI Prudential, ING Vysya Life Insurance and investment in firm in which Assessee is not a partner which, in our opinion, does not fall within the ambit of Sec. 14A. Therefore, balance investment remains only Rs. 1.30 crores out of which disallowance @ 0.5% can be only of Rs. 65,000/- as per Rule 8D(2)(iii). CIT(A), therefore, reduced the disallowance to Rs. 65,000/-. In our opinion, there is no error in the order of CIT(A) reducing the disallowance to Rs. 65,000/- which may warrant our interference. We, accordingly, confirm the order of CIT(A) on this ground. Thus, this ground stands dismissed.

4. Ground no. 2 relates to deletion of the addition of Rs. 28,87,983/- added by the AO u/s 40(a)(i). The AO noted that the Assessee has paid a sum of Rs.28,87,983/- towards destination sampling charges to the parties of Hongkong and Singapore but Assessee has not deducted any TDS on the belief that the services are rendered outside India and India is having DTAA with China and Singapore, therefore, these charges are taxable in those countries. The AO did not agree in view of the Explanation 2 to Sec. 9(1)(vii). According to him the interest and fee for technical services/professional services is taxable in the hands of the party who received it outside India as the income is deemed to accrue or arise in India. According to the AO, the Finance Act, 2010 amended Sec. 9(1)(vii) retrospectively w.e.f. 1.6.1976 and as per the amended provisions, income of non-resident shall be deemed to accrue or arise in India under clause

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(v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident whether or not the non-resident has a residence or place of business or business connection in India or the non-resident has rendered the services in India. The income arising to the non-resident agent on account of the commission payable to him is to be deemed to accrue or arise in India in respect of soliciting export order and is taxable in view of the specific provision of Sec. 5(2)(b) r.w.s. 9(1)(i) as the right to receive the commission has arisen in India when the order is executed by the Indian company in India. CBDT withdrew Circular no. 786 dt. 7.2.2000 by subsequent circular no. 7 of 2009 dt. 22.10.2009. The AO also observed that Article 12 of the DTAA with all the above countries state that fees for technical/consultancy services arising in a contracting state and paid to a resident of other contracting state may be taxed in that other state. It further states that, however, such royalties and technical/consultancy fees may also be taxed in the contracting state in which they arise and according to the laws of that state. As per the Indian law, these fees are deemed to accrue or arise in India. Referring to Article 8 of the DTAA it was observed by the AO that the profit derived by an enterprise of a contracting state from operation by that enterprise of ships or aircraft in international territory shall be taxable only in that state. Thus, there is difference between Article 12 and Article 8 and in view of the specific provision of Article 12 the royalties and technical/consultancy fees may also be taxed in the contracting state in which they arise and according to the laws of that state. The non-resident will only get double taxation benefit in their respective countries but they have to pay the tax in India for services rendered by them and therefore, the Assessee was liable to deduct TDS as per the provisions of Sec. 195. The Assessee went in appeal before the CIT(A) and submitted that the Assessee has made payment to Zhao Long (Asia) Ltd., Hong Kong amounting to Rs. 17,43,033/- and Delong Mineral & Logistic PTE Ltd. of Rs. 11,44,950/-, payment to Zhao Long (Asia) Ltd. is for monitoring,

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supervision of discharged cargo, draft survey, joint sampling of discharged cargo, photographs, sample preparation and sealing of samples, analysis of grade etc. and payment to Delong Mineral & Logistic PTE Ltd. was for supervision of the vessel at the discharge port, the non-residents did not have any permanent establishment in India and there has to be territorial nexus with the earning of the income, no services are rendered in India and neither the same is received in India. Therefore, no income accrued in India. Explanation to Sec. 9 inserted by the Finance Act, 2010 is not applicable as all the payments were made when the Finance Act received assent of the President on 8.5.2010. The payment does not constitute fees for technical services as defined under Explanation 2 to Sec. 9(1)(vii) of the Act. Ultimately, the CIT(A) deleted the disallowance by observing as under :

> *6.4 I have gone through the assessment order and submission of the appellant. The admitted fact is that, the appellant is engaged in the business of export of iron ore. At the destination of export, again the sampling of exported ore has to be done, for which the payment has been made by the appellant. The appellant did not deduct any TDS because, (i) the consultancy firm was a foreign national, no part of whose income was assessable in India, and ii) the services were rendered outside India. On the other hand, the A.O. held that, since the services rendered are of technical in nature and payment has been sent from India, the income has accrued in India and therefore, TDS was deductible on the payment made. In my considered opinion, the view taken by the A.O. is factually and legally incorrect. Since the services have been rendered outside India, the income shall accrue or arise outside India, where the actual service has been rendered. Nature of service rendered and source country of the payment is immaterial in this context. Second aspect of the issue is that no part of recipient's income is assessable in India. Therefore, in view of these undisputed facts, in my opinion, TDS was not deductible in this case and the disallowance made by the A.O amounting to Rs. 28,87,983/- is hereby deleted. This Ground of appeal of the appellant is allowed."*

5. We heard the rival submissions and carefully considered the same alongwith the order of the tax authorities below. The issue before us is whether any disallowance can be made u/s 40(a)(i). The AO during the course of the assessment proceedings noted that the Assessee has made payment amounting

to Rs. 28,87,983/- to Hongkong and Singapore parties, Rs. 17,43,033/- to Zhao Long (Asia) Ltd. for monitoring, supervision of discharged cargo, draft survey, joint sampling of discharged cargo, photographs, sample preparation and sealing of samples, analysis of the grades etc. Copies of the bills were placed at pg. 134-140 of the paper book. From all the bills it is apparent that these services were rendered in the People's Republic of China. Similarly, the Assessee has paid a sum of Rs. 11,44,950/- to De Long Minerals and Logistics Pte Ltd., Singapore for supervision of the vessel at the discharge port. The payment has been made through DBS Bank Ltd., Singapore. Details of the payments made are given at pg. 133 of the paper book. From these payments, it is apparent that the payment of Rs. 2,58,506/- does not relate to the impugned assessment year. Rest of the payments was made prior to 31.3.2010. The Revenue was of the opinion that due to retrospective amendment made by the Finance Act, 2010 w.e.f. 1.6.1976 the income of the non-resident shall be deemed to accrue or arise in India under clause (v) or (vi) or (vii) of sub-section (1) and shall be included in the total income of the non-resident whether or not the non-resident has residence or place of business or business connection in India or the non-resident has rendered services in India. The destination sample charges are consultant/technical charges paid for gradation of the iron ore exported and due to explanation-2 to Sec. 9(1)(vii) fee for technical services means any consideration including any lump sum consideration for rendering of any managerial, technical or consultancy services (including the provisions of services of technical or other personnel). The technical services rendered in the case of the Assessee, according to the ld. DR, was taxable in the hands of the party who received it outside India as the said income is deemed to accrue or arise in India. In view of the provisions of Sec. 40(a)(i) any interest or fee for technical services which is payable outside India on which tax is deductible at source under Chapter 17B is not allowable unless TDS is deducted. This is an undisputed fact that in this case the Assessee has not deducted the tax. We are

not going on the merits of the taxability of the payments made by the Assessee to the non-resident company as, in our opinion, once the payments made by the Assessee to the non-residents are of the nature of technical fee, the legal position in view of the retrospective amendment w.e.f. 1.6.1976 in Sec. 9 brought out by the Finance Act, 2010 is indisputably that the said income will be deemed to accrue and arise in India whether or not the non-resident has residence or place of business or business connection in India or the non-resident has rendered services in India. Under the amended explanation to Sec. 9(1) as it exists today it is specifically stated that the income of non-resident shall be deemed to accrue or arise in India under clause (v) or (vi) or (vii) of Sec. 9(1) and shall be included in the total income whether or not (a) the non-resident has residence or place of business or business connection in India or (b) the non-resident has rendered services in India. Similar view has been taken by the co-ordinate Mumbai bench of this Tribunal in the case of Ashapura Minichem Ltd. vs. ADIT, 40 SOT 220 (Mum.) in which it was observed as under :

> *"9. The legal proposition canvassed by the learned counsel, however, does no longer hold good in view of retrospective amendment with effect from 1-6-1976 in section 9 brought out by the Finance Act, 2010. Under the amended Explanation to section 9(1), as it exists on the statute now, it is specifically stated that the income of the non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of section 9(1), and shall be included in his total income, whether or not (a) the non-resident has a residence or place of business or business connection in India; or (b) the non-resident has rendered services in India. It is thus no longer necessary that, in order to attract taxability in India, the services must also be rendered in India. As the law stands now, utilization of these services in India is enough to attract its taxability in India. To that effect, recent amendment in the statute has virtually negated the judicial precedents supporting the proposition that rendition of services in India is a sine qua non for its taxability in India.*
>
> *10. The concept of territorial nexus, for the purpose of determining the tax liability, is relevant only for a territorial tax system in which taxability in a tax jurisdiction is confined to the income earned within its borders. Under this system, any foreign income that is earned outside of its borders is not taxed by the tax jurisdiction, but then apart from tax heavens, the only prominent countries that are*

considered territorial tax systems are France, Belgium, Hong Kong and the Netherlands, and in those countries also this system comes with certain anti abuse riders. In other major tax systems, the source and residence rules are concurrently followed. On a conceptual note, source rule of taxation requires an income sourced from a tax jurisdiction to be taxed in this jurisdiction, and residence rule of taxation requires income, earned from wherever, to be taxed in the tax jurisdiction in which earner is resident. In the US tax system, this residence rule is further stretched to cover US taxation of all its citizens irrespective of their domicile, and the source rule is also concurrently followed. It is this conflict of source and residence rules which has been the fundamental justification of mechanism to relieve a taxpayer, whether under a bilateral treaty or under domestic legislations, of the double taxation either by way of exclusion of income from the scope of taxability in one of the competing jurisdictions or by way of tax credits. Except in a situation in which a territorial method of taxation is followed, which is usually also a lowest common factor in taxation policies of tax heavens, source rule is an integral part of the taxation system and any double jeopardy, due to inherent clash of source and residence rule, to a taxpayer is relieved only through the specified relief mechanism under the treaties and the domestic law. It is thus fallacious to proceed on the basis that territorial nexus to a tax jurisdiction being sine qua non to taxability in that jurisdiction is a normal international practice in all tax systems. This school of thought is now specifically supported by the retrospective amendment to section 9."

6. It is an undisputed fact that the Finance Act, 2010 received the assent of the President on 8.5.2010 and all the payments have been made by the Assessee to the non-resident party prior to receiving of assent of the President making the retrospective amendment by adding explanation to Sec. 9(1). At the time when the Assessee made the payment there was no provision u/s 9(1) making the technical fees deemed to accrue or arise in India whether or not (a) the non-resident has residence or place of business or business connection in India or (b) the non-resident has rendered services in India. It is not disputed by the ld. DR that the non-resident did not have residence or place of business or business connection in India. The non-resident has also not rendered services in India. The source of the income in the hands of the non-resident was outside India. Even the place of business which earned the income was also outside India. Since the technical fees was not deemed to accrue or arise in India at the time when the Assessee made the payment as there was no provision under Sec. 9(1),

the income received by the non-resident as per the existing law at the time when the Assessee made the payment, in our opinion, was not taxable in India under the Income Tax Act. We are not going through the tax treaty which under Article 12 provides that *any fees for technical/consultancy services arising in a contracting state and paid to a resident of other contracting state may be taxed in that other state*. This article also provides that such royalty and technical/consultancy fees may also be taxed in the contracting state in which they arise or accrue according to the laws of the state. Prior to the insertion of explanation to Sec. 9(1) by the Finance Act, 2010 with retrospective effect, the professional and consultancy services even though rendered outside India were not deemed to accrue or arise in India irrespective of the fact whether the party who rendered the services is having place of residence or place of business in India. It is only due to the retrospective amendment made by the Finance Act, 2010 that the position has become clear. If the income was not taxable in India it cannot be made taxable in view of the tax treaty. This is a fact that as argued by the ld. AR the retrospective amendment brought by the Finance Act, 2010 was not in existence at the time when the Assessee had made the payments. The ld. AR submitted that the Assessee cannot be penalized for performing an impossible task of deducting TDS in accordance with the law which was brought into the statute book much after the point of time when the tax deduction obligation was to be discharged. In this regard, we perused the decision of the co-ordinate bench in the case of Channel Guide India Ltd. vs. ACIT, 139 ITD 49 (Mum.) as relied by the ld. AR. We noted that in this decision the co-ordinate bench of ITAT held as under :

> *"25. In our opinion, the issue involved in the present case however, is relating to disallowance made u/s.40(a)(i) for non-deduction of tax-at-source from the payment made by the assessee to SSA and as held by Ahmedabad Bench of this Tribunal in the case of Sterling Abrasives Ltd. by its order dated 23.12.2010 cited by the Ld. Counsel for the assessee, the assessee cannot be held to be liable to deduct tax at source relying on the subsequent amendments made in the Act with retrospective*

effect. In the said case, Explanation to sec.9(2) was inserted by the Finance Act, 2007 with retrospective effect from 1.6.1976 and it was held by the Tribunal that it was impossible for the assessee to deduct tax in the financial year 2003-04 when as per the relevant legal position prevalent in the financial year 2003-04, the obligation to deduct tax was not on the assessee. The Tribunal based its decision on a legal Maxim lex non cogit ad impossiblia meaning thereby that the law cannot possibly compel a person to do something which is impossible to perform and relied on the decision of Hon'ble Supreme Court in the case of Krishna Swamy S. PD and Another v. Union of India and others 281 ITR 305 wherein the said legal Maxim was accepted by the Hon'ble apex court.

26. In view of the above discussion, we are of the view that the amount in question paid by the assessee to SSA was not taxable in India in the hands of SSA either u/s.9(1)(vi) or 9(1)(vii) as per the legal position prevalent at the relevant time and the assessee therefore was not liable to deduct tax at source from the said amount paid to M/s. SSA and there was no question of disallowing the said amount by invoking the provisions of sec.40(a)(i). In that view of the matter, we delete the disallowance made by the AO u/s.40(a)(i) and confirmed by Ld. CIT (A) and allow ground no.1 of the assessee's appeal."

The ld. DR even though vehemently contended but did not deny that the Finance Act, 2010 got the assent of the President on 8.5.2010 much later than the date when the Assessee had made the payment to these parties. Even the ld. DR could not site any contrary decision. Therefore, we hold that the aforementioned amendment does not create any liability against the Assessee as the legal position prevailing at the relevant time has to be considered when the payment was made by the Assessee to the non-resident party. Accordingly, we hold that the Assessee was not liable for deduction of tax u/s 195 of the Income Tax Act. Since the Assessee was not liable at that time to deduct the tax, the disallowance u/s 40(a)(i) cannot be made. We accordingly confirm the order of CIT(A) deleting the addition though on a different ground pleaded by the ld. AR. Thus, this ground stands dismissed.

7. Ground no. 3 relates to deletion of the addition made by the AO u/s 40(a)(i) amounting to Rs. 68,67,067/- as Assessee has not deducted any TDS on

the demurrage paid. The brief facts of the case are that the AO noted that the Assessee has paid Demurrage amounting to Rs.68,67,067/- to various parties but the Assessee did not deduct any TDS. The contention of the Assessee was that Demurrage were paid to the owner of the ship through purchaser of the ore as the contract were FOB. The ships were not hired by the Assessee but were hired by the purchaser of the ore from the owner of the vessel. As per Section 172 the Assessee was not required deduct TDS and the demurrage payments were made to the purchasers of the iron ore from Hong Kong, Dubai, British origin island countries by the Assessee as per sale agreement and was part of the total price adjustment on the final bill. Therefore, no TDS was deductible. The AO in view of the decision in the case of CIT vs. Orient Goa Co. (P) Ltd., 325 ITR 554 took the view that the Assessee is liable to deduct TDS on the demurrage if DTAA is not in existence and therefore, disallowed the said amount of Rs. 68,67,067/-. When the matter went before the CIT(A), CIT(A) deleted the addition by observing as under :

> *"7.4 I have gone through the assessment order and written submission of the appellant. This is an undisputed fact that the appellant has made payment to the buyers, who are foreign residents in the form of "Demmurage." In this case, demmurage has not been paid to transport vessel but to the foreign buyers to compensate them for the delay in loading the ore cargo. In reality, this reduction is nothing, 'but a reduction in the sale price received by the appellant. No part of income of the foreign buyers are assessable in India. In my opinion, on these set of facts, it is not important, whether these countries, have a DTAA with India or not. It is enough that these parties are foreign buyers and no part of their income is assessable in India. The payment relates to normal sale-purchase transaction and therefore, it cannot be said that the payment relates to an income, that arose or accrued in India. Facts of M/s Orient Goa are completely different and AOs reliance on this decision is clearly misplaced. In view of the above facts, the disallowance amounting to Rs.68,67,067/- on account of non-deduction of TDS on demmurage charges paid is hereby deleted. This ground of appeal of the appellant is allowed accordingly."*

Against the decision of CIT(A), the Revenue has come in appeal.

8. The Assessee reiterated the submissions made before the CIT(A) while the ld. DR relied on the decision of the jurisdiction High Court in the case of CIT vs. Orient Goa Co. (P) Ltd., 325 ITR 554 (*supra*) and the decision pronounced by this Bench in ITA No. 89/PNJ/2012 in the case of Sesa Goa. It is a case where as per the decision of the jurisdiction High Court in the case of CIT vs. Orient Goa Co. (P) Ltd., 325 ITR 554 (*supra*) the Assessee was bound to deduct TDS on the sum of Rs. 68,67,067/-. Therefore, u/s 40(a)(i) of the Income Tax Act the disallowance has to be made in respect of full sum of Rs. 68,67,067/- as the said sum has been claimed by the Assessee as deduction. In the case of CIT vs. Orient Goa Co. (P) Ltd., 325 ITR 554 (*supra*) we noted that the Hon'ble Bombay High Court has held as under :

> *"7. We have given anxious consideration to the submission of the learned Senior Counsel. On reading of the entire judgment of the learned Single Bench, it is not possible for us to countenance the submission of the learned Senior Advocate that the ratio of the Judgment is applicable to the facts of the case on hand. In our view, this Judgment does not help the present respondent, i.e., the assessee.*
>
> *Another Judgment relied on by the learned Senior Advocate Mr. Usgaonkar for the respondent-assessee is in the matter of CBDT v. Chowgule & Co. Ltd. [1991] 192 ITR 40 (Kar.). There the learned Division Bench observed that "The question for consideration is whether demurrage payable to a non-resident owner or charterer of a ship for the delay in loading the ore sold to the foreigner is liable to be taxed under the provisions of the Income-tax Act". We have seen the facts obtaining in that case. In our view, the facts are distinguishable. The ratio of this Judgment also does not help the present assessee, i.e., the respondent in this appeal. We have noticed the various dates in the cited judgment. We have also considered the definition of word "demurrage" to which our attention was invited by learned Senior Advocate Shri Usgaonkar. Learned Senior Advocate also invited our attention to dictionary meaning of the word "demurrage" (Black's Law Dictionary).*
>
> *8. Section 172 of the Act 1961 is carefully considered by us. Chapter XV titles as "Liability in special cases". We have no concern with sections, starting from section 159, till section 171 from this Chapter XV. Section 172 comes under sub-title "H.-Profits of non-residents from occasional shipping business". Title of section 172 is "Shipping business of non-residents." For bringing a case under*

Chapter XV- H of the Act 1961, one has to establish a case of profits of non-residents from occasional shipping business. "Non-resident" is defined under section 2(30), as a person who is not a "resident" and for the purpose of sections 92, 93 and 168, includes a person who is not ordinarily resident within the meaning of clause (6) of section 6. The respondent-assessee is a company, incorporated under the provisions of Indian Companies Act, 1956, is fairly an admitted position. The assessee cannot be said to be non-resident. We have also taken notice of section 6, i.e., "Residence in India". In short, respondent-assessee cannot be said to be non-resident. The present appeal pertains to the respondent-assessee. In our view, in the facts of the present case, the respondent-assessee cannot lay fingers on section 172, since we are not dealing with profits of non-residents. The other aspect is that such profits of non-residents should be from occasional shipping business. It is not the case that the respondent-assessee has earned some profit from occasional shipping and is a non-resident. In our view, section 172 does not have application in relation to the respondent-assessee and in the facts and circumstances of the present case. The company from Japan viz., Mitsui & Co. Ltd., Japan, recipient of demurrage amount is not before us. In other words, we are not examining the tax liability of the foreign company, i.e., Mitsui & Co. Ltd., Japan. On our query to the learned Senior Advocate Shri Usgaonkar as to material on record for occasional shipping, part of para 3 from the Judgment of the learned Commissioner of Income-tax has been pointed out to us. His observations are in very few lines. We may reproduce the said portion herein below. " 3. We have heard the rival submissions in the light of material placed before us. Assessee claimed deduction of Rs. 1,08,53,980 being the amount of demurrage payable to Mitsui Co. Ltd., Japan. The Assessing Officer opined that since the assessee did not deduct tax at source, as such the case of the assessee falls within the mischief of section 40(a)(i) of the Income-tax Act, 1961". Provisions of section 172 are to apply notwithstanding anything contained in the other provisions of the Act. Therefore, in such cases, the provisions of sections 194C and 195 relating to tax deduction at source, are not applicable. The recovery of tax is to be regulated for voyage undertaken from any port in India by a ship, under the provisions of section 172. In this view, these observations of the learned Vice President of Income-tax Appellate Tribunal have no concern with the factual aspect that it is a case of occasional shipping, pleaded or raised by assessee. There is no dispute about interpretation of section 172 or section 195. Crucial point is as to how section 172 applies to the facts of the present case wherein the respondent-assessee is an Indian company, incorporated under the provisions of Indian Companies Act, 1956. In our view, the learned Vice President of the ITAT has recorded a perverse observation/finding in para 3 regarding application of sections 44B and 172 of the 1961 Act.

9. We may notice that the Judgment of the learned Appellate Tribunal is unreasoned and cryptic one. This judgment runs in around 20 to 25 lines. We are

not oblivious of the fact, that not the form, but substance is material. The learned appellate Tribunal seems to have referred to the Circular of CBDT No. 723, dated 19-9-1995.

10. We have considered the submission of the learned Counsel appearing for the parties pertaining to the Circular No. 723, dated 19-9-1995 by CBDT (Annexure "C"). Section 119 empowers the Central Board of Direct Taxes to give instructions to subordinate authorities. We have considered section 119 of the Act 1961. We have also perused the Circular Annexure C. This Circular seems to have been issued by the CBDT, clarifying the scope of sections 172, 194C and 195 of the Act 1961. Advocate on behalf of the Revenue points out from para 4 of the Circular and submits that section 172 operates in the area of computation of profits from shipping business of non-residents and there is no overlapping in the areas of operation of these sections. Learned Senior Advocate Shri Usgaonkar, appearing on behalf of the respondent-assessee, also drew our attention to the Judgment of the Hon'ble Supreme Court in the matter of Commissioner of Sales Tax v. Indra Industries [2001] 248 ITR 338. It is a three Bench Judgment of the Hon'ble Supreme Court. It has been held by the Hon'ble Supreme Court that the circulars issued by Commissioner of Sales Tax not binding on assessee or Court, however, binding on the Department. In the case on hand, in our view, learned Commissioner of Income-tax (Appeals) and the learned appellate Tribunal have wrongly interpreted the Circular dated 19-9-1995 issued by the CBDT. This circular, in our opinion, cannot be considered in the facts and circumstances of the present case, in aid to the respondent-assessee. The learned Assessing Officer, in fact, has passed a legal, proper and reasoned order, holding that the provisions laid down under section 40(a)(i) of the 1961 Act apply to the case on hand.

11. We may notice here the Judgment of the Hon'ble Supreme Court in the matter of Union of India v. Gosalia Shipping (P.) Ltd. [1978] 113 ITR 307. This judgment seems to be the basic judgment which is being referred to by the learned Single Bench of the Karnataka High Court. In that case, Gosalia Shipping (P.) Ltd., a company incorporated under the provisions of the Indian Companies Act, 1956 indulged at the relevant time in business of clearing and forwarding and as steamship agents. Gosalia Shipping (P.) Ltd., had acted as the shipping agent of "Aluminium Company of Canada Limited" which was a non-resident company. That non-resident company had chartered a ship "M.V. Sparto" belonging to a non-resident company called Sparto Compania Naviera of Panama. The said ship called at the port of Betul, Goa on 1-3-1970. On 20-3-1970, the ship had left for Canada. The ship was allowed to leave port of Betul on the basis of guarantee bond, executed by the respondent in favour of the President of India. On 15-4-1970, the First Income-tax Officer, Margao, Goa issued a Demand Notice to the respondent Gosalia Shipping (P.) Ltd. for payment of Rs. 51,000 and odd amount, by way of Income-tax. We have noticed all these

facts only to say that in the case on hand, there are no pleadings or material brought on record to show that the case is governed by occasional shipping within the meaning of section 172 of the Act, 1961 and said section applies.

12. Having considered the submissions of the learned Counsel appearing for the parties, in our view, the facts of the present case, are governed by section 40(a)(i) of the Act 1961. Order passed by the Assessing Officer, in our view, is legal, proper and in accordance with the Scheme of Act 1961. In view of which we have taken in the matter, the appeal deserves to be allowed by quashing and setting aside the Order passed by the learned Commissioner of Income-Tax (Appeals) dated 28-8-2002 and the Order passed by the Income-tax Appellate Tribunal, Panaji dated 2-12-2004. The same are, accordingly, quashed and set aside and the Order passed by the Assessing Officer stands upheld. Appeal is, accordingly, allowed and disposed of with no order as to costs."

Respectfully following the aforesaid decision of the Hon'ble Jurisdiction High court we set aside the order of the CIT(A) and restore the order of the AO. Thus, this ground stands allowed.

9. Ground no. 4 relates to disallowance on account of cash purchases. The AO disallowed unproved cash purchases of Rs. 60,28,080/- on the ground that the Assessee has not proved the identity of the sellers. The Assessee went in appeal before the CIT(A). CIT(A) reduced the addition to Rs. 6,02,808/- being 10% of the cash purchases by observing as under :

"8.4 I have gone through the assessment order and contentions of the appellant. The A.O. asked the assessee to bring confirmation from the parties, from whom purchases in cash were claimed. The assessee replied that since the purchases were, smaller than Rs.20,000/- each, it has not maintained records of the same. The A.O. reached the conclusion that the onus to prove the genuineness of these cash purchases was on the assessee, and since the assessee has failed to discharge his onus, the claim of cash purchases are treated as non-genuine and the addition was made by the A.O.

On the other hand, it is the contention of the assessee, that during the year under consideration, it has a total purchases of Rs.29.97 crores, and cash purchases are Rs.60.28 lakhs only which is a paltry 2% of total purchases. Each purchase is less than Rs.20,000/- and purchases have been made for commercial expediency. The

appellant had charged VAT on these purchases and obtained Form 'H' from the sellers, as the purchases were made for the purpose of export.

On the basis of these facts, the A.O. jumped to conclusion regarding genuineness of these purchases prematurely, in my opinion. The A.O. has not doubted the correctness of books of accounts of the appellant. The A.O. has also not commented on the gross-profit ratio of the appellant. The books of accounts of the appellant are audited. It has paid VAT and has obtained Form H. In my opinion, the A.O. has taken a very narrow view, regarding the decision, relied upon by him. Indeed, the primary onus, of proving genuineness of the expenses claimed, is on the assessee but at same time, if one is not able to produce the party, does not mean that he has failed to discharge its onus. There are other means and evidences to prove the genuineness of such transactions. In my opinion, the A.O. jumped to the conclusion prematurely without examining other cogent evidences available with the assessee in forms of entries in the books of accounts, VAT Returns, Stock (quantitative) details, Form No. H, cash book, reflecting the payment made, etc. In view of the fact, that the A.O. did not call for or examine other evidences available with the appellant and made addition in a predetermined manner, the addition made by the A.O. cannot be sustained.

However, on one hand, the A.O. jumped to the conclusion prematurely, at the same time, the conduct of the appellant can also not be called to be above board. While making cash purchases and preparing cash vouchers, it could have obtained the addresses of these parties which could have helped in obtaining the confirmations of these parties. By not maintaining records of such parties, in fact, the appellant stopped the A.O. or rather created obstackle in carrying out further investigation. In view of these facts and taking overall view of all the facts, 10% of cash purchases needs to be disallowed which works out to Rs.6,02,808/-. Addition to the extent of Rs.6,02,808/- is confirmed and balance is deleted. This ground of appeal of the appellant is partly allowed."

10. We heard the rival submissions and carefully considered the same alongwith the order of the tax authorities below. We do not find any provisions under the Income Tax Act under which there is a bar on making the purchases in cash in case the amount is less than Rs. 20,000/-. In the case of the Assessee the total purchases are to the extent of Rs. 29.97 crores. Cash purchases are only around Rs. 60,28,080/- which is around 2% of the total purchases. It is not a case where the provisions of Sec. 40A(3) have been applied by the AO. It is also not a case where the books of accounts of the Assessee were rejected. The

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books of accounts were duly audited. The Assessee has paid the VAT and obtained Form H. We find force in the submission of the ld. AR that small sellers use to come and negotiate with the Assessee for selling iron ore and these sellers are generally mining contractors who used to collect the residue iron ore remaining on the land and sell it to the traders like the Assessee. Since such type of iron ore is available at cheaper price, the Assessee bought the same on spot cash payment. The Assessee has duly submitted the cash purchases. Even we noted that the quantitative details of opening stock, sales and closing stock as has been given in the Tax audit report has not been disputed by the AO. Sales have duly been accepted. Without making the purchases, in our opinion, the Assessee cannot make the sales. We are of the opinion that even the addition to the extent of 10% should have not been sustained by the CIT(A). In our opinion, it is a case where the whole of the addition made by the AO does not have any leg to stand. Since the Assessee has not come in appeal nor filed cross objection, we confirm the order of CIT(A) sustaining the addition to the extent of Rs. 6,02,808/-. Thus, this ground stands dismissed.

11. Ground no. 5 relates to deletion of the addition amounting to Rs.3,07,61,558/- u/s 41(1) of the Income Tax Act. The AO added sum of Rs.3,07,61,558/- u/s 41 of the Income Tax Act in the income of the Assessee mentioning that as per the details furnished by the Assessee it is seen that almost all the creditors are more than 4 years old and till date the Assessee has not paid the above liabilities. The Assessee went in appeal before the CIT(A) and filed the detailed submission alongwith the copy of the submissions as filed before the AO. CIT(A) deleted the addition by observing as under :

> *"9.4 Perusal of assessment order shows that the A.O. has made this addition in a summary manner only on the ground that the appellant did not file balance confirmation. The A.O. has made addition U/S 41(1) saying that the liability to pay back had ceased to exist and has placed reliance on the decision in the case of SureshKumar T. Jain Vs ITO, reported in 128 ITD 74, ITAT, Bangalore. There are a*

member of judicial pronouncements, wherein it has been held that addition U/S 41(1) cannot made in a routine manner. The A.O. has not doubted genuineness of these creditors. In some cases amounts are as big as Rs.68 lakhs, 43.93 lakhs and 48.88 lakhs. No one will leave such big amounts. Various courts have held that even one sided write-off is also not enough to make addition U/S 41(1). The A.O. has also not bothered to verify and investigate each creditor individually. In view of these facts, addition U/S 41(1) in a summary manner cannot be sustained. Entire addition amounting to Rs.3,07,61,558/- is hereby deleted and this ground of appeal of the appellant is allowed."

12. Before us, the ld. DR relied on the order of the AO while the ld. AR submission that Sec. 41(1) is applicable only if there is remission or cessation of the liability and there is no material on record or finding that the liability ceased to exist. Acknowledgement of the Assessee in the balance sheet itself demonstrates that these liabilities subsist. The AO himself in his order accepted that the liability pertains to the item which has been allowed as expenditure in the earlier year. Our attention was drawn to pg. 186 and 187 of the paper book and on that basis it was pointed out that the creditors are not dormant but the Assessee has been discharging the liability albeit slowly due to various reasons such as disputes between the parties, closing of the mining business resulting in funds crisis. Reliance was placed on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Jain Exports Pvt. Ltd., 35 Taxmann.com 540.

13. We heard the rival submissions and carefully considered the same alongwith the order of the tax authorities below. We noted that a similar issue had arisen in the case of the Assessee for the A.Y 2009-10 and when the matter reached to this Tribunal, the Tribunal vide its order in ITA Nos. 15 & 16/PNJ/2013 and C.O Nos. 16 & 17/PNJ/2013 dt. 14.8.2013 confirmed the order of the CIT(A) deleting the addition relying on the decision of the jurisdiction High Court in the case of CIT vs. Chase Bright Steel Ltd., 177 ITR 128 by holding as under :

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"4.2 We have heard the rival submissions alongwith the orders of the tax authorities and carefully considered the same. We have also gone through the documents and papers which were referred to during the course of hearing. We noted that the AO has taken the list of the Sundry Creditors as on 31.3.2011 and, on the basis of that, the AO made the addition in the income of the Assessee u/s 41(1) on the basis that there has been cessation of liability as the Assessee has not made the payment of the Sundry Creditors over a period of 3 years. Sec. 41(1) is applicable only where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee and subsequently during any previous year the Assessee has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof. The amount so obtained by the Assessee or the value of benefit accruing to the Assessee shall be deemed to be profits and gains of business or profession and shall be charged to income tax as income of that previous year. This section creates a fiction. The fiction is an individual one. It cannot be enlarged by importing another fiction that if the amount was obtainable or receivable during the previous year, it must be deemed to have been obtained or received during the year. Merely that the Assessee has not made the payment for the last 3 years, it cannot be said that the liability has ceased to exist. We noted on the facts of the case that the addition has been made by the AO in respect of unpaid liabilities which were in existence as on 31.3.2011, not the liability which were in existence as on 31.3.2009 and had not been paid by the Assessee during the 3 years. The unpaid liability, in our opinion, cannot be added by the AO u/s 41(1) merely because they remained unpaid for a sufficiently long time. Unless there is evidence to show that the creditors have remitted the debt or otherwise by operation of law the liability to pay him has ceased, there can be no benefit arising to the Assessee u/s 41(1). It is not the case where the Revenue has issued notice to the Creditors and the creditors have confirmed that there exists no liability or they have waived the liability. The onus, in our opinion, lies on the revenue to prove that there is a cessation of liability. The liability is subsisting but no legal enforcement cannot amount to be cessation of liability. This view has been taken by the Hon'ble Gujarat High Court in the case of CIT v. Silver Cotton Mills Co. Ltd. [2002] 125 Taxman 741 (Guj.). Similar view has been taken by the Hon'ble Delhi High Court in CIT vs. Hotline Electronics Ltd. The jurisdiction High Court i.e. the Bombay High Court in the case of CIT vs. Chase Bright Steel Ltd. 177 ITR 128 took the view that the liability of the Assessee does not cease merely because the liability has become barred by limitation. The liability ceases when it has become barred by limitation and the Assessee has unequivocally expressed his intention not to honour the liability even when demanded. It is not the case of the revenue that the Assessee has expressed his intention not to honour the liability. From the chart of the Sundry Creditors which has been filed before us and is available in the paper book, we also noted that the Assessee has made the payment in respect of some of the liabilities in the subsequent year. Therefore, under the facts and circumstances of the case, we

are of the firm view that there is no cessation of liability in terms of Sec. 41(1) of the Income Tax Act. We, accordingly, confirm the order of CIT(A) deleting the addition. Thus, this ground stands dismissed."

Respectfully following our aforesaid order, in our opinion, this is not a fit case which warrants our interference. The onus is on the AO to prove that the liability stands ceased or remitted. No legal enforcement cannot mean cessation of liability. We accordingly confirm the order of CIT(A). Thus, this ground stands dismissed.

14. Ground no. 6 relates to deletion of the addition of Rs. 1,18,26,320/-. The AO made addition on the ground that the sales to sister concern at rate lower than the rate adopted for valuation of the closing stock is not genuine and therefore he added the difference between the two rates. The Assessee went in appeal before the CIT(A). CIT(A) deleted the addition by observing as under :

"10.4. The A.O. has made addition to the value of closing stock. The A.O. has himself said that, the stock was transferred by way of sale to the sister concern. When stock was already transferred, how can any addition be made to the value of non-existing stock. The appellant has contended that no show cause to this effect was asked by the A.O. and without verifying the reasons and facts, the A.O. reached the conclusion on guess work, presumption and surmises that the appellant has sold ore to the sister concern at lower than the market price. In the submission, the appellant has explained that the ore sold to sister concern did not have the screening and transportation cost loaded on it, which is a substantial part of cost. The sale has also been offered by the sister concern and the same has been assessed by the Department. While passing the order, the A.O. placed reliance on many judicial pronouncements, wherein it has been held that, "Dealings involving funds transfer to near and dear ones need to be looked into with care and caution and necessary inferences drawn if there are abnormalities attaching to such transactions." Having relied on these decisions, the A.O. adopted a casual approach instead of showing any care or caution and without making any further investigation or even asking the assessee any explanation made the addition in a summary manner on a non-existing stock. This addition cannot be sustained. The A.O is directed to delete the addition amounting to Rs. 1,18,26,320/- made on account of alleged undervaluation of closing stock. This ground of appeal of the appellant is allowed accordingly."

15. Before us, the ld. DR relied on the order of the AO while the ld. AR vehemently contended that the Assessee vide its letter dt. 13.2.2013 explained to the AO that it is on account of transportation but the AO has not recorded in his order nor has he referred the same in his order. It was also stated in the said letter that the iron ore sold to M/s. Karishma Impex was not screened and sales price is lower. It is submitted that the closing stock was screened ore and therefore the cost of screening had to be added to the closing stock thereby increasing the value of the closing stock. In this regard, our attention was drawn towards pg. 188-191 of the paper book which contains copy of the letter dt. 13.2.2013. The transaction has been accepted in the return of M/s. Karishma Impex by the revenue. The revenue cannot blow hot and cold at the same time i.e. accept it in the hands of one part to the transaction and doubt the genuineness in the hands of the other party to the transaction. It was also submitted that there is no material on record nor any allegation that the Assessee has received more than what has been recorded. The closing stock of iron ore was lying at jetty and Assessee had to incur transport cost to bring it to jetty thereby increasing the cost at which the goods are brought upto the jetty. Same being direct cost has to be added while valuing the closing stock. Since M/s. Karishma Impex has purchased the goods from store yard therefore the value was less to the extent of the transport and loading and unloading cost which was around Rs. 250-300/MT. The Assessee has also received advance payment for the sale of these goods. Once the transportation cost is added, the value is comparable to the closing stock. The Assessee has obtained Form-H as required under Goa VAT. Unless the sale is genuine, it is incomprehensible to think that the export authorities will allow the exports. On the one hand, the AO has doubted the sale and on the other hand stated that there is undervaluation of the stock. Both these are contradictory.

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16. We heard the rival submissions and carefully considered the same alongwith the order of the tax authorities below. We noted that the addition has been made on account of undervaluation of the closing stock. It is not denied that the Revenue has accepted the sale. The Assessee has explained to the AO that the ore sold to the sister concern did not have screening and transport cost loaded on it while the closing stock was inclusive of the transport cost as well as screening cost as the iron ore which was in stock was screened ore. In our opinion, the AO has not appreciated the facts and once the sale of the goods has been accepted, how there can be addition on the basis of undervaluation of closing stock. We, therefore, hold that this is not a fit case which warrants our interference. We accordingly confirm the order of CIT(A) on this ground.

17. Ground no. 7 relates to deletion of the addition of Rs. 2,19,49,850/- on account of disallowance of stacking and handling expenses and blending and screening charges paid to sister concern. The AO noted that the Assessee has paid stacking and handling charges of Rs. 1,44,99,850/- to M/s. Karishma Goa Mineral Trading Pvt. Ltd. and blending and screening charges of Rs.74,50,000/- to M/s. Karishma Impex. The AO was not satisfied with the explanation of the Assessee and was of the opinion that these expenses have not been genuinely incurred. Therefore, he disallowed the same. When the matter went before the CIT(A), CIT(A) deleted the disallowance by observing as under :

> *"Thus, in my opinion, the A.O. has not been able to make a case, so that the disallowances of expenses done by him could be sustained, for the following reasons:*
>
> *i) The A.O. has not made any investigation and given his findings that services were actually not rendered by the sister concerns of the appellant.*
> *ii) The assessee produced invoices for services rendered and made entries in the books of accounts.*
> *iii) The books of accounts are audited by a competent chartered Accountant and the Books of Accounts have not been rejected by the A.O.*

iv) The appellant has successfully explained as to why service charges were not charged to the sister concerns for services rendered.

v) The A.O. has also not found out, whether amount paid for services received were reasonable or higher compared to prevailing market rates.

vi) The sister concerns have received such payments in the immediately preceding year also from the appellant and the same has been accepted by the Department.

vii) The sister concerns have filed their Returns of Income and have disclosed these receipts as income.

viii) The A.O has made the addition on presumptions and surmises and has mis-applied the judicial pronouncements relied upon by him.

In view of the above reasons, the disallowances of expenses amounting to Rs. 2,19,49,850/- is hereby deleted. This ground of appeal of the appellant is allowed."

18. We heard the rival submissions and carefully considered the same alongwith the order of the tax authorities below. We noted that similar type of services has been rendered by sister concern to the Assessee in the earlier year and no such disallowance was ever made. M/s. Karishma Goa Mineral Trading Pvt. Ltd. had rendered similar type of services to M/s. Karishma Global Mineral Exports Pvt. Ltd. during A.Y 2010-11 and the said expenditure has not been disallowed in the assessment of M/s. Karishma Global Mineral Exports Pvt. Ltd. even though assessment has been completed u/s 143(3). This itself proves that M/s. Karishma Goa Mineral Trading Pvt. Ltd. had rendered services not only to the Assessee but to other parties also. We perused the copy of the invoice and we noted that even though the invoice has been raised at the end of the year but it talks of services being rendered throughout the year by M/s. Karishma Goa Mineral Trading Pvt. Ltd. to the Assessee. The Assessee has duly deducted TDS, the charges paid by the Assessee have duly been shown as income in the hands of M/s. Karishma Goa Mineral Trading Pvt. Ltd. The Assessee has made similar payments to D.B. Mineral @ Rs. 80/ton but in the case of M/s. Karishma Goa Mineral Trading Pvt. Ltd. it is @ Rs. 95/ton. The Assessee has duly explained that the difference was due to loading and unloading on account of manual and mechanical operation. So far as non-

charging of service tax is concerned, we noted that service tax has also not been charged by D.B. Mineral as there is no liability to service tax in respect of this type of services rendered with respect to export cargo in view of Circular no. B.11/1/2002-TRU dt. 1.8.2002. It is a fact that when ore is extracted from the mines in raw form it is known as Run of Mines. This block form needs to be crushed to arrive at the desired size, and as contended by the ld. AR, as per the market practice 10% positive tolerance limit is provided. If the size exceeds the tolerance limit, same is to be crushed to bring it within the desired size and tolerance limit. Raw ore contains various impurities which need to be removed before exporting. This process of removing the impurities is known as screening. M/s. Karishma Impex has charged at the same rate to M/s. Karishma Exports towards crushing and screening charges. It is not a case where the AO has applied the provisions of Sec. 40A(2). We, therefore, do not find any illegality or infirmity in the order of CIT(A) deleting the addition of Rs.2,19,49,850/-. Thus, this ground stands dismissed.

19. Ground no. 8 relates to the deletion of the addition of Rs. 30,93,640/- incurred in cash in respect of transportation charges. The brief facts of this ground are that the AO as per the discussion at pg. 22 of his order disallowed whole of the charges incurred by the Assessee in cash for transportation of iron ore on the ground that the identity of the payees are not proved and, therefore, treated these expenses to be non-genuine. It is not a case where the AO has invoked jurisdiction u/s 40A(3). When the matter before the CIT(A), CIT(A) deleted the disallowance by observing as under :

> *"12.4 I have gone through the assessment order and submission of the appellant. The A.O. has confirmed that each payment of transportation charges are recorded as less than Rs.20,000/- and the appellant has not maintained addresses of these transporters. On the basis of these facts, the A.O. derived a conclusion that the appellant has not been able to prove genuineness of these transactions and disallowed entire amount of Rs.30,93,640/- as bogus claim of expenditure. In my*

opinion, the conclusion drawn by the A.O. is premature as the same has been reached without appreciating full facts of the case. In fact, the assessee has paid a total amount of Rs.8.33 crores on transportation and cash payment is Rs.30 lakhs only which works out to a paltry 3.6% of the total expenses. The appellant claimed that on every voucher truck no. is mentioned and signature of the driver/cleaner has been obtained and therefore, the same is verifiable. The cash transportation charges have been paid for goods received, which has been part of the stock and subsequently sold. The quantitative details of stock is a sufficient testimony of the fact that material has indeed been received for which transport charges have been paid. In my opinion, the appellant has maintained sufficient records and evidences to prove genuineness of these cash payments and A.Os. conclusion which is based on presumption and surmises cannot be sustained. The A.O. is directed to delete the addition amounting to Rs.30,93,640/- accordingly. This ground of appeal of the appellant is allowed."

20. We heard the rival submissions and carefully considered the same alongwith the order of the tax authorities below as well as the relevant provisions of the Income Tax Act. We noted that the Assessee has incurred expenditure on transportation to the extent of Rs. 8.33 crores out of which only a sum of Rs. 13,93,640/- has been incurred in cash. It is not a case where the AO has invoked the provisions of Sec. 40A(3) i.e. in no case the expenditure incurred in cash does not exceed Rs. 20,000/-. CIT(A), we noted, has given a clear-cut finding of fact that on every voucher truck number is mentioned and the signature of the driver/cleaner has been obtained and the expenditure is clearly verifiable. Even we noted that the cash expenditure is only to the extent of 3.6% of the total expenses. CIT(A), in our opinion, has given a finding of fact. No cogent material or evidence was brought to our knowledge which may compel us to take a view different from the view taken by the CIT(A). We, accordingly dismiss this ground.

21. Ground no. 9 relates to claim of commission amounting to Rs. 53,21,905/-. The brief facts of the case are that the AO noted that the Assessee has debited commission and brokerage of Rs. 53,21,905/-. The Assessee was requested to prove the nature of the services rendered and the basis of the

payment of the commission alongwith the agreement. Explanation given by the Assessee was not accepted by the AO and therefore commission and brokerage was disallowed. The Assessee went in appeal before the CIT(A). CIT(A) noted that the Assessee has made commission to following parties :

i)	*S.G. Radhakrishnan*	*Rs. 28,56,206/-*
ii)	*Arham M&M*	*Rs. 5,25,629/-*
iii)	*Mr. Rane*	*Rs. 15,00,000/-*
iv)	*Durga Sawkar*	*Rs. 4,40,000/-*
	Total	*Rs. 53,21,905/-*

CIT(A) after analyzing each of the parties noted that the Assessee has identified the parties to whom commission has been paid, tax has been deducted at source on such payments and nature of the services rendered by these parties were also explained. Radhakrishnan was examined by the AO in the case of the sister concerns of the Assessee in which commission was found to be an allowable expenditure. We have also confirmed the order of CIT(A) allowing the commission to Radhakrishnan in the case of M/s. Karishma Global Mineral Exports Pvt. Ltd. Similarly, Arham Mines and Minerals has also rendered services to M/s. Karishma Impex and M/s. Karishma Goa Mineral Trading Pvt. Ltd. and payment of the commission was allowed as deduction.

22. We noted after hearing the rival submissions and considering the same that the Assessee has paid commission to the following parties :

i)	*S.G. Radhakrishnan*	*Rs. 28,56,206/-*
ii)	*Arham M&M*	*Rs. 5,25,629/-*
iii)	*Mr. Rane*	*Rs. 15,00,000/-*
iv)	*Durga Sawkar*	*Rs. 4,40,000/-*
	Total	*Rs. 53,21,905/-*

We also noted that Radhakrishnan has been paid commission by the Assessee in the earlier A.Ys 2007-08 and 2008-09 and the commission paid was not disallowed even though assessments were completed u/s 143(3). Similarly, in

the case of Arham Mines and Minerals we noted that commission has been paid to Arham Mines and Minerals for procuring export orders. These very parties have rendered services to the sister concerns, M/s. Karishma Impex and M/s. Karishma Goa Mineral Trading Pvt. Ltd. in A.Y 2009-10 and the payment of commission has duly been allowed as deduction in the case of the said sister concerns while framing assessment u/s 143(3). In the case of Durga Sawkar we noted that the Assessee has paid commission in the A.Ys 2008-09 and 2009-10 and the commission so paid was allowed as deduction while framing assessment u/s 143(3). Mr. B.L. Rane has rendered services in connection with procurement of iron ore from suppliers. Payment has been made through banking channels, TDS has been deducted and there is no allegation of any back flow of money. Assessee has filed confirmation during the course of the assessment proceedings. Same was duly verified by the AO. The invoice raised by the agent gives details of the services rendered. Mr. Rane has also rendered services as commission agent to various parties and is acting in the same capacity since long. Under these facts and circumstances, we find that CIT(A) has correctly deleted the disallowance. In our opinion, no interference is called for in the order of CIT(A). We, accordingly, confirm the order of CIT(A) on this issue. Thus, this ground stands dismissed.

23. In the result, both the appeals filed by the Revenue stand partly allowed.

24. Order pronounced in the open court on 16/03/2015.

Sd/-	Sd/-
(D.T.Garasia)	(P.K. Bansal)
Judicial Member	Accountant Member

Place : PANAJI / GOA
Dated : 16/03/2015

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Copy to :

(1) Appellant
(2) Respondents – Ajit Ramakant Phatarpekar, Smt. Neelam Ajit Phatarpekar
(3) CIT(A) concerned
(4) CIT concerned
(5) D.R
(6) Guard file

True copy,

By order,