IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "B", KOLKATA
[Before Shri N.V.Vasudevan, JM & Shri Waseem Ahmed, AM]

ITA No.267/Kol/2013
Assessment Year : **2009-10**

(APPELLANT)		(RESPONDENT)
I.T.O., Ward-2 (3) Kolkata	-versus-	M/s. LGW Limited Kolkata (PAN:AAACL 4670 N)

C.O.No.29/Kol/2013
A/o ITA No.267/Kol/2013
Assessment Year : **2009-10**

M/s. LGW Limited Kolkata (PAN AAACL 4670 N)) (CROSS OBJECTOR)	-versus-	I.T.O., Ward-2(3), Kolkata (RESPONDENT)

For the Department : Shri Sachidananda Srivastava, CIT(DR)
For the Assessee : Shri A.K.Tibrewal, FCA & Shri Amit Agarwal,Advocate

Date of Hearing : 08.09.2015.
Date of Pronouncement : 07.10.2015.

ORDER

Per Shri N.V.Vasudevan, JM

ITA No.267/Kol/2013 is an appeal filed by the revenue against order dated 07.12.2012 of CIT(A)-I, Kolkata relating to A.Y.2009-10. The Assessee has filed a Cross Objection against the very same order of CIT(A).

ITA No.267/Kol/2013 (Revenue's appeal) :

2. Ground No.1 raised by the revenue reads as follows :-

" (i)That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in deleting the addition of Rs.1,95,360/- u/s 14A as made by the A.O. in the assessment order."

3. The assessee is a company engaged in the business of manufacture export and trading of goods. The assessee was in receipt of exempt income of Rs.84,154/-. The Assessee computed the disallowance of expenses incurred in relation to income which does not form part of the total income u/s 14A of the Act r.w. Rule 8D (2)(iii) of the

Rules, a sum of Rs.91,360/-. The AO on perusal of the aforesaid computation noticed that the assessee while working out the average value of investments for the purpose of application of Rule 8D (2)(iii) of the Rules had not considered the share application money to the extent of Rs.2,08,00,000/- . According to the Assessee share application money cannot be considered as investment made by the assessee in earning tax payer income. The AO, however was in the view that share application money ought to have been considered while determining the average value of investment.

4. The AO accordingly determined the disallowance u/s 14A of the Act as follows :-

" Hence revised calculation u/s 14A read with Rule-8D(2)(iii) is being invoked as under :

Average Value of Investment as claimed by assessee	Rs.1,82,71,923/-
Add: Share Application Money	Rs.2,08,00,000/-
Revised average value of investment	Rs.3,90,71,923/-
An amount equal to one half per cent of the Average value of investment, income of which does Not form part of total income.	
0.5% of Rs.3,90,71,923/-	Rs. 1,95,360/-
Total disallowance u/s 14A	Rs. 1,95,360/-"

5. On appeal by the assessee, the CIT(A) agreed with the submissions of the assessee that share application money cannot generate any exempt income and therefore need not be considered for computing average investment under Rule 8D(2)(iii) of the Rules. CIT(A) also observed that the share application money was refunded to the Assessee at a later period. Aggrieved by the order of the CIT(A) revenue has raised ground no.(i) before the Tribunal.

6. We have heard the submissions of the ld. DR, who relied on the order of AO. The ld. Counsel for the assessee brought to our notice the decision of ITAT, Chennai Bench in the case of MSA Securities Services Pvt. Ltd. vs ACIT in ITA Nos.1523-1524/Mds/2012 dated 17.10.2012 and in the case of Rainy Investments P.Ltd vs ACIT in ITA No.5491/Mum/2011 dated 16.01.2013. The Honourable benches have taken the view that the share application money gets converted into shares only on allotment by the company. Till such time the share application money is converted into shares, the applicant does not have any rights of a shareholder/member. The share applicant

see was not entitled to any dividend. Therefore share application money cannot be considered as investment which is likely to earn tax free dividend income. Hence, there can be no disallowance u/s 14A of the Act.

7. We have given a careful consideration to the rival submissions. We are of the view that order of CIT(A) on this issue has to be upheld. As rightly contended by the ld. counsel for the assessee, share application money is only in the nature of an offer to buy shares made by the assessee. It is only after the offer is accepted by the company resulting in a concluded contract, the Assessee becomes the shareholder in a company. Till this time the Assessee becomes a shareholder, the assessee cannot have any rights to claim any dividend that may be declared by the company. In such circumstances we are of the view that while working out the average value of the investments u/r 8D(2)(iii) of the Rules the share application money should not be included. We hold accordingly and dismiss ground no.(i) raised by the revenue.

8. Ground nos.(ii) to (vi) raised by the revenue read as follows :-

" (ii) That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in deleting the addition of Rs.15,50,779/- as disallowance of commission expenses made by the A.O. in the assessment order.
(iii) That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in deleting the addition of Rs.3,93,618/- u/s 41 as made by the A.O. in the assessment order.
(iv) That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in deleting the addition of Rs.32,11,437/- as disallowance u/s 43B made by the AO in the assessment order.
(v) That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in deleting the addition of Rs.5,618/- as disallowance of Prior Period Expenses as made by the AO in the assessment order.
(vi) That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in directing the A.O. to treat the loss to the tune of Rs.21,01,52,576/- as Normal Business Loss instead of Speculation Loss."

9. According to the revenue the relief given by the CIT(A) which are challenged in ground nos. (ii) to (vi) as above were based on the additional evidence filed by the assessee before CIT(A). According to the revenue the additional evidence was admitted by CIT(A) in violation of Rule 46A of the Rules and therefore the additions made by the AO were deleted by the CIT(A) and which are the subject matter of

challenge in ground nos. (ii) to (vi) should be set aside and the AO should be afforded an opportunity of examining the fresh evidences filed by the assessee before CIT(A). The revenue has raised ground no.(vii) in this regard, which reads as follows :-

" (vii) That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in violating the provisions of Rule 46A by admitting fresh evidences."

10. We deem it appropriate to decide ground no. (vii) before we proceed to decide ground nos. (ii) to (vi) raised by the revenue. As far as ground no.(vii) raised by the revenue is concerned the facts that emanate from the record are that the assessee filed four volumes of paper book with the request to treat the contents and documents in the said paper book as additional evidence with a request to admit the additional evidence in terms of Rule 46A(1) of the Rules in a hearing before CIT(A) on 07.11.2012. The CIT(A) directed the AO to file his objections on additional evidence filed by the assessee. The AO vide report dated 21.11.2012 objected to admission of additional evidence by the CIT(A). The objection of the AO was that none of the conditions mentioned in clauses (a) to (d) of Rule 46A (1) were satisfied in the case of the assessee so as to admit additional evidence. It is pertinent to mention that the AO had not raised any objections with regard to the veracity of the additional evidences filed by the assessee before CIT(A) nor any objections with regard to the relevance of those documents to the various issues raised by the assessee before CIT(A). A copy of the objection of the AO in this letter dated 21.11.2012 is placed at pages 623 and 624 of the assessee's paper book. In the said letter the AO has also not made a request for liberty to file his objections on veracity of the additional evidence and its relevance to the case of the assessee at a later date.

11. The CIT(A) after considering the objections of the AO was of the view that the AO had not asked for any of the evidence that were sought to be filed by the assesee before CIT(A) and that the additional evidence sought to be filed before CIT(A) by the assessee are relevant and essential for adjudicating the issue before CIT(A).The CIT(A) admitted the additional evidence filed by the assessee.

12. The submission of the ld. DR on ground no.(vii) was that the CIT(A) called upon the AO to file his objections only with regard to the admission of additional evidence. The CIT(A) having come to the conclusion that the additional evidence required to be admitted, ought to have called upon the AO to file his objections with regard to the admissibility, veracity and relevance of the additional evidence to the various issues raised by the assessee before CIT(A).

13. The ld. Counsel for the assessee, on the other hand, submitted before us that Rule 46A(3) only mandates an opportunity to the AO for examining the additional evidence filed before CIT(A) or to produce evidence or documents in rebuttal to the additional evidence produced by the assessee. According to him in the light of the admitted position that the additional evidence filed by the assessee was confronted to the AO and opportunity having been given to the AO to examine the evidences or documents there was no further requirement of specifically calling upon the AO to file objections on the admissibility, veracity and relevance of the additional evidences. He also placed reliance on the decision of the Hon'ble Gujarat High Court in the case of Rajesh Babubhai Damania vs ITO (2002) 122 Taxman 614 (Guj) wherein the Hon'ble Gujarat High Court took the view that the Tribunal should not restore back to the AO to give one more innings.

14. We have given a careful consideration to the rival submissions. We are of the view that under Rule 46A (3) of the Rules, the CIT(A) is only required to afford reasonable opportunity to the AO to examine the evidence or documents produced by the assessee as additional evidence before CIT(A). In the present case admittedly all the documents filed by the assessee as additional evidence were confronted to the AO. The AO has thus been afforded reasonable opportunity to examine the additional evidence or documents produced as additional evidence by the assessee. Rule 46A of the Rules does not contemplate the procedure whereby the CIT(A) should call for objections regarding admissibility of additional evidence first and when such additional evidence are admitted again called for objections with regard to the veracity and relevance of the additional evidences filed by the assessee before CIT(A). It is

also clear from the decision of the CIT(A) that the AO had not asked for the additional evidence filed by the assessee before CIT(A) in the course of assessment proceedings and therefore the admissibility of the additional evidence in terms of Rule 46A(1) of the Rules cannot be found fault with. Therefore, we are of the view that there is no merit in ground no.(vii) raised by the revenue. Consequently the same is dismissed.

15. We will now deal with ground nos. (ii) to (vi) raised by the revenue. As far as ground no.(ii) is concerned, the facts are that the assessee claimed to have paid Shri .Laxmikant Joshi a sum of Rs.15,50,779/- as commission as per the assessee's books of accounts. In response to notice u/s 133(6) of the Act by the AO, Shri Laxmikant Joshi sent a copy of the ledger of the assessee as per his books of accounts which indicated that he had not received any payment from the assessee during the previous year. The AO therefore disallowed commission expenses to the tune of Rs.15,50,779/. Before CIT(A) the assessee pointed out that Shri Laxmikant Joshi(HUF) vide letter dated 15.12.2011 sent by registered post to the AO informed the AO that they had in fact received commission of Rs.15,50,779/- from the assessee and that the assesse had also deducted TDS at Rs.1,69,962/- in respect of the commission paid to the assessee. Relevant copy of the Income tax acknowledgement of Shri Laxmikant Joshi for A.Y.2009-10 and his bank statement was also enclosed along with the letter. The AO had passed order of the assessment on 27.12.2011. This letter was apparently not taken cognizance by the AO. After taking notice of the aforesaid letter of Shri Laxmikant Joshi(HUF), CIT(A) deleted the addition made by the AO.

16. The grievance projected by the revenue in ground no.(ii) is that the reply of Shri Laxmikant Joshi (HUF) in response to notice u/s 133(6) of the Act alone ought to have been considered. In our view the submission made by the revenue cannot be accepted. This is because the payment in question has been made by cheques and TDS has also been made by the assessee. The annexures to the letter of Shri Laxmikant Josh (HUF) dated 15.12.2011 which is at pages 91 to 93 of the assessee's paper book clearly demonstrates the claim of the assessee. We, therefore dismiss ground no.(ii) of the revenue.

17. As far as ground no.(iii) is concerned, the AO noticed from column no.20 of the Tax Audit Report that the tax auditor had reported a sum of Rs.3,93,618/- was chargeable to tax u/s 41 of the Act (benefit accruing to an Assessee on account of ceasation of liability). Based on the Tax Audit Report the AO added the aforesaid sum to the total income of the assessee. Before CIT(A) it was pointed out that a sum of Rs.3,93,618/- was already offered to tax in the profit and loss account under the head miscellaneous receipt in Schedule-O. The break-up of miscellaneous receipt has been given which contains other miscellaneous receipts which is referable to the insurance claim by the assessee from National Insurance Company Ltd. The auditors also certified that the Tax Auditors Report contains wrong statement. These documents are available at pages 94 to 98 of the assessee's paper book –(1). The CIT(A) taking note of the aforesaid evidence deleted the addition made by the AO. The limited request of the ld. DR before us is to set aside the order of CIT(A) and direct the AO to verify the claim made by the assessee as made before CIT(A).

18. We have already held while deciding ground no.7 that the AO already had an opportunity of examining the additional evidence filed by the assessee and therefore request made by the ld. DR cannot be accepted. Consequently ground no.(iii)raised by the revenue is dismissed.

19. As far as ground no.(iv) raised by the revenue is concerned the facts are that on perusal of Col.21 of the Tax Audit Report, the AO noticed that the assessee failed to pay import duty of Rs.31,90,837/- and service tax of Rs.20,600/- before the due date of furnishing the return of income u/s 139(1) of the Act. Invoking the provision of section 43B of the Act, the AO added a sum of Rs/.32,11,437/- as disallowance u/s 43B of the Act to the total income of the assessee.

20. Before CIT(A) assessee pointed out that no duty of service tax was outstanding. The assessee furnished certificate of the auditors in this regard which is at page 99 of the assessee's paper book-1. The said certificate clarifies that the import duty and service tax were not outstanding as on 31.03.2009. It was also clarified that the whole

amount of service tax was paid on 23.04.2009. Similar evidence with regard to import duty was also filed by the assessee. The same are at page nos.100-120 of the assessee's paper book. The CIT(A) on perusal of the aforesaid documents was of the view that the claim made by the assessee was justified and therefore the addition made by the AO is deleted. The request of the ld. DR before us was that fresh opportunity be given to the AO to examine the additional evidence filed by the assessee.

21. We have also decided ground no.7 that the AO had enough opportunity to look into the additional evidence filed by the assessee before CIT(A). In these circumstances the plea of the revenue for a fresh opportunity to the AO cannot be accepted. Accordingly ground No.(iv)4 is hereby rejected.

22. As far as ground no.(v) raised by the revenue is concerned, the AO found that in the Tax Audit Report the auditor reported that a sum of Rs.5,618/- was prior period expenses which was inadmissible for deduction. The AO accordingly added back a sum of Rs.5,618/- to the total income of the assessee.

23. Before CIT(A) the assessee pointed out that a sum of Rs.5,618/- was professional fee paid to Shri B.P.Agarwal for preparation and uploading of annual returns for the financial year 2006-07. The bill dated 31.10.2008 which is at page 123 of the assessee's paper book shows that the liability accrued to the assessee only on 31.10.2008 on receipt of the aforesaid bill. The CIT(A) taking note of the evidence deleted the addition made by the AO. We are of the view that the order on this issue does not call for any interference. Consequently the same is dismissed.

24. As far as ground no.(vi) raised by the revenue is concerned the facts are that the assessee claimed as deduction on account of forex forward contracts of Rs.23,66,02,947/-. Out of the above loss to the tune of Rs.2,66,32,552/- and another sum of Rs.1,82,181/- was a loss on account of forex derivatives and gain on account of gold. The remaining loss of Rs.21,01,52,576/- was loss on account of forex forward contracts consequent to cancellation of export orders. This was treated by the

AO as speculation loss u/s 43(5) of the Act and was accordingly carried forward to be set off against speculative income in future. As a result a sum of Rs.21,01,52,576/- which is part of Rs.23,66,02,947/- was added to the total income of the assessee.

25. On appeal by the assessee the CIT(A) held as follows :-

"After careful consideration of assessment order and A/R's written submission it is noticed that ground no.9 relates disallowance of Rs.23,66,02,947/- on account of forex forward contracts which was treated as speculative loss by the AO as against normal business expenditure/loss claimed by assessee. As per audited accounts submitted by assessee continued to be in the business of exports of raw-cotton, handicrafts, and other miscellaneous items. The export sales in this financial year were for Rs.187.88 crores mainly to Bangladesh. As per audited Profit and Loss A/c assessee had debited a business loss of Rs.23,66,02947/- on account of forward forex contract transactions. This loss figure included loss of Rs.2,66,32,552/- on account of forex derivatives and a gain of Rs.1,82,181/- on account of gold as mentioned in page 4 of the assessment order as under :-

Euro Booking	Rs.4,11,29,143/-
Point Booking	Rs.4,81,16,647/-
JPY (Profit)	Rs. 17,19,818/-
Swiss Frank	Rs. 28,79,030/-
Normal Forward Contract-SBI	Rs.10,46,38,183/-
Normal Forward Contract-Federal Bank	Rs.1,51,09,391/-
Derivatives	Rs.2,66,32,552/-
Gold (Profit)	Rs. 1,82,181/-
Total	Rs.23,66,02,947/-

The AO issued a notice u/s 142(1) along with the questionnaire on 14.07.2011 which was responded by assessee on various dates and AO asked to clarify forward contract loss claimed by assessee as per order sheet entry on 02.12.2011 which was clarified by assessee vide letter dated 16.12.2011. The AO passed the order u/s 143(3) on 27.12.2011 after the hearing on 08.12.2011, 16.12.2011 and 22.12.2011 when he sought certain clarification from the assessee on matters other than the above forex loss. The AO never asked for the detailed evidences of export contract cancelled vis-à-vis forex contract cancelled and made additions of Rs.23,66,02,947/- as he treated the above loss as speculative loss u/s 43(5) of Income Tax Act by relying upon CBDT instruction dated 23.03.2010 and the AO held that nexus between losses suffered due cancellation of forex forward contracts with corresponding value of export contracts which got cancelled could not be established. During the appellate proceedings assessee filed a paper book containing pages 1 to 621 and requested for fresh evidence in its petition dated 07.11.2012. The relevant portion relating to ground no.9 is as under :

Forward Forex Contract Loss

On course of assessment proceedings, the authorized representatives of the Assessee-company had appeared before the Assessing officer and had furnished/filed/produced various documents, evidences and explanations raised and/or requisitioned from time to time. We had debited a sum of Rs.23,66,02,947/- under the head "Forward Forex Contract in the Profit & Loss Account and the same was claimed as business loss. For the first time on 2nd December 2011, the Assessing Officer asked us to clarify "why

Forward Forex Contract Loss has been claimed as Business Expenditure". On 8th December, 2011 our authorized representative appeared before Assessing officer and explained the aforesaid matter and produced before him the relevant documents and evidences relating to aforesaid claim. The explanation was also filed in letter dated 07.12.2011. Having been satisfied no further query was raised nor any evidences were asked to be filed or furnished upto the date of last hearing 22.12.2011.

The ld. Assessing Officer, however, passed the assessment order by alleging that the assessee failed to furnish the details or export contracts which were cancelled by the foreign buyers to establish a nexus between export contracts cancelled vis-à-vis Forward contracts cancelled.

During the course of hearing the authorized representation appeared and explained and produced the details and evidences of export contracts cancelled by the buyers. Such details and evidences were never asked by the Assessing officer to be filed before him. It is only in the assessment order Assessing Officer has alleged that such details were not filed. We enclosed the Xerox copy of the order sheet in respect of assessment proceedings, which would reveal all the aforesaid facts. In these circumstances, we submit that there was reasonable cause for not filing the evidences relating to claim of aforesaid loss as business loss, which have now been filed with a request to accept the same under Rule 46A of the Income Tax Rules, 1962.

Sl.No.	Paper Book identification No.	Nature of documents	PB Page nos.
6	11	Statement of Profit & Loss on Forward Forex Contract during the previous year relevant to the Assessment Year 2009-10	132-150
7	12	Samples of documentary evidences in respect of major amount of losses incurred of Forward Forex Contract with reference to Sale invoices and Banks advices	151-595
8	13	Statement of gains in Forex Exchange Fluctuation include din Sales Account	596-606
9	14	Statement of month-wise inventory of Stock of Cotton	607-621

We submit that the aforesaid additional evidences are vital and essential for rendering justice and in deciding the instant appeal and therefore the same may be admitted under Rule 46A of the Income Tax Rules, 1962. We refer to the decision of Hon'ble Third Member of Patna Income Tax Appellate Tribunal in the case of Abhay Kumar Shroff vs Income Tax Officer reported in 63ITD 144 (Pat) TM. We refer to the following observations made by Hon'ble Tribunal in the said decision :

"It was that the assessee as a matter of right could not file or filed them before the Tribunal as a matter of course. If the assessee produces some documents at the appropriate time, they have to be taken into consideration subject of course to all just exceptions, such as their relevance, etc. if not done at the assessment stage, the admission of documents has to be governed by rule 46A of the I.T.rules 1962., if produced for the first time before the first appellate authority. Having missed the bus

and the matter having travelled to the Tribunal, the admission of documents is to be governed by Rule 29 of the Appellate Tribunal Rules. Hence, if the documents sought to be admitted even at the second appellate stage are of nature and quantitatively such that they render assistance to the Tribunal in passing orders or are required to be admitted for any other substantial cause', it would rather be the duty of the Tribunal to admit them. Therefore, if the receipt or admission of additional evidence is vital and essential for the purpose of consideration of the subject matter of appeal and to arrive at a final and ultimate decision, the Tribunal is amply empowered to admit additional evidence under rule 29. Therefore, the Tribunal had to admit additional evidence produced by the assessee since that was vital and essential for rendering justice and in deciding appeals. However, it was necessary to give the department a reasonable opportunity of rebutting it according to the principle of nature justice and for that purpose the matter was restored to the file of the AO.

The AO was confronted with the additional evidences on 07.11.2012 and AO filed written submission vide letter dated 21.11.2012 with a request not to admit the additional evidences as per Rule 46A. The paper book pages 132 to page 621 are relating to forex forward contract with reference to export orders and the relevant bank advices along with the month-wise inventory of stock of cotton. Since AO never asked for these evidences and disallowed the losses claimed in the assessment order, the principle of natural justice requires that these evidences should be admitted as per Rule 46A and moreover these evidences are relevant and essential to the matter under consideration as these evidences go to the root of matter therefore these additional evidences are admitted in terms of Rule 46A.

In the financial year under consideration assessee-company had exported raw cotton mainly to Bangladesh with export turnover of Rs.187.88 crores. In the paper book assessee had filed a summary statement of loss made on the forward booking at page 132 to 147 of the paper book and assessee also furnish a details statement about the contract number, date, foreign currency booked and cancellation of the contract (due to cancellation or original export order) with the banks viz. SBI and Federal Bank along with the date and amount of loss debited by the respective banks. It is pertinent to mention that the above statement summary contains the details of many contracts which have in fact resulted in profits due to cancellation of export orders and are duly reflected in the books account of assessee. In assessment year 2008-09 there was a net gain in cancellation of foreign exchange contracts with the banks due to cancellation of export orders and the net gain was assessed under the head income from business and profession as per order u/s 143(3).

The net losses (after setting of the profits on account of cancellation of export orders) debited due to cancellation of export with the SBI and Federal Bank were to the tune of Rs.23,66,02,947/- minus Rs.2,66,32,552/- plus Rs.1,82,181/- = Rs.21,01,52,576/-. The page 147 to 150 of paper book contain the statement of profit and loss on account of foreign exchange derivatives and statement of gold booking for Rs.2,66,32,552/- (loss) and profit of Rs.1,82,181/- respectively. These transactions are not related to assessee's business of export of raw cotton and other miscellaneous products while the other transactions incurring the loss of Rs.21,01,52,576/- were related to the cancellation of export orders. Therefore addition made by the AO for Rs.21,01,52,576/- is deleted as cancellation of export orders and resulting loss on cancellation foreign exchange contracts with the banks was normal business expenditure. The foreign exchange

derivative loss for Rs.2,66,32,552/- with no supporting of export orders is treated as speculative loss u/s 43(5) of the Income Tax Act and can only be set off against speculative profits of gold in the financial year for Rs.1,82,181/- and the addition made by AO for net amount of Rs.2,64,50,371/- is confirmed. Therefore ground no.9 is partly allowed."

Aggrieved by the order of CIT(A) the revenue is in appeal before Tribunal.

26. We have heard the rival submissions. The learned DR relied on the order of the AO. According to him it was incumbent on the part of the Assessee to establish correlation between each of the forward contract with export orders and only then can it be said that the loss was incidental to the business of the Assessee. According to him, such correlation has not been established by the Assessee before CIT(A) nor has the CIT(A) given such a finding before deleting the addition made by the AO. He therefore prayed that the addition made by the AO be restored. In the alternative it was prayed that the order of the CIT(A) be set aside and the issue may be remanded to the AO for fresh consideration in the light of the additional evidence filed by the Assessee before the CIT(A). The learned counsel for the Assessee reiterated submissions made before CIT(A) and the order of the CIT(A). It is seen from the evidence on record that in A.Y. 2008-09 gain on account of forex forward contract on cancellation was offered as income by the assessee and the same was brought to tax by the AO which is placed at pages 128 to 131 of the assessee's paper book. The statement of profit/loss on forex forward contract during the previous year relevant to A.Y.2009-10 and the sample of documentary evidence in respect of major amount of loss incurred on forex forward contracts with reference to sale invoice and bank at pages 151 to 595 of the assessee's paper book. The statement of gains in forex forward contract included in the sales account is at pages 596 to 606 of the assessee's paper book. The statement of month-wise inventory of stock of cotton is at pages 607-621 of Assessee's paper book.

27. We have considered the rival submissions. We shall as a test case consider one of the contract for export of contract and the forward contract entered into by the Assessee in connection with such export contract. Page 134 of the Assessee's paper

book contains the list of contract in which forward contract in Euro currency were booked. KS-0000026 is a forward contract dated 17.7.2008 entered into by the Assessee with State Bank of India Trade Finance CPC, Kolkata. The Assessee had an export order for Indian Raw Cotton of 4409200 LBS of the value of 31,74,624 US $ equivalent to 10,00,000 Euros, to supply to one M/S.Nassa Spinning Ltd., Bangladesh. The contract was cancelled by HB Cotton who was agent of M/S.Nassa Spinning Ltd., Bangaldesh on 21.10.2008. The period of the contract for supply of cotton to Bangaldesh was upto 22.1.2009. Since the contract was cancelled by communication dated 24.10.2008, the Bank intimated the Assessee that in view of the adverse fluctuation of Euro currency, the Assessee had to bear the loss of Rs.1,56,80,527 because the booking rate as on 17.7.2008 was 1.5711 the cancellation date was 22.1.2009 on which date the rate was 1.2613. Thus the Assessee suffered a loss on the forward contract in question. From the sample case set out above it is clear that the forward contract in question was purely hedging transactions entered into by the Assessee to safeguard against loss arising out of fluctuation in foreign currency. Such transactions have been held in the following cases to be not speculative transactions falling within the ambit of Sec.43(5) of the Act, CIT Vs. Soorajmull Nagarmull (1981) 5 Taxman 289 (Cal), CIT Vs, Badridas Gauridu (P) Ltd., (2004) 134 Taxman 376 (Bom), CIT Vs. Friends and Friends Shipping Pvt.Ltd., Tax Appeal No.251 of 2010 dated 23.8.2011 and CIT Vs. Panchmahal Steel Ltd. Tax Appeal No.131 of 2013 dated 28.3.2013 by the Hon'ble Gujarat High Court. The conclusions of the CIT(A) on this issue, in our view therefore deserve to be upheld. Accordingly, the ground of appeal raised by the revenue in this regard is rejected.

28. In the result the appeal of the revenue is dismissed.

C.O.No.29/Kol/2013 (by the assessee)

29. As far as Cross Objection is concerned ground no.1 raised by the assessee in the Cross Objection reads as follows :-

> *"1. That the Learned Commissioner of Income tax (Appeals) erred in confirming the assessment of Capital gains on sale of land at Rs.30,08,799 made by the Assessing Officer by adopting the sale consideration of Rs.61,22,330 relying on the provisions of*

sec.50C of the Income tax Act, 1961 ignoring the amount of sale consideration of Rs.60,00,000 actually received by the assessee company."

30. The assessee sold the property on which long term capital gain was declared by the assessee. The actual sale consideration received on transfer was a sum of Rs.60,00,000/-. The sale consideration adopted by the assessee for the purpose of registration and stamp duty was a sum of Rs.61,22,330/-. The AO computed the long term capital gain by adopting the sale consideration at Rs.61,22,330/- resulting in addition to the capital gain declared by the assessee amounting to Rs.61,22,330/-/. CIT(A) confirmed the order of AO taking note of the provision of section 50C of the Act. Before us the ld. Counsel for the assessee relied on the decision of ITAT, Hyderabad Bench in the case of ACIT vs S.Suvarna Rekha in ITA No.743/Hyd/2009 dated 29.10.2010 wherein the Hon'ble ITAT, Hyderabad took the view that if difference between valuation for the purpose of stamp duty and the sale consideration actually received by the assessee is 10% or less then the value actually received by the assessee should be adopted for the purpose of computing the long term capital gain.

31. We have considered the submissions made on behalf of the ld. Counsel for the assessee. Though section 50C of the Act does not speak of any such variation in terms of percentage between value adopted for the purpose of stamp duty and the registration and the actual consideration received on transfer, keeping in view of the decision of the Hon'ble ITAT, Hyderabad Bench referred to above and keeping in view of the fact that the difference between the valuation for the stamp duty and the actual consideration received by the assessee is less than 2% we are of the view that addition sustained by CIT(A) should be deleted. Accordingly ground no.1 raised by the assessee in cross objection is allowed.

32. Ground No.2 raised by the assessee in the Cross Objection reads as follows :-

"2. That the learned Commissioner of Income Tax (Appeals) erred in confirming the disallowance of loss of Rs.5,00,160 incurred by the assessee company on sale of Long Term investment in shares."

33. The assessee incurred a loss of Rs.5,00,160/- on sale of listed shares. This was claimed as deduction in the computation of the total income. The AO was of the view that in section 10(38) of the Act any income arising from the long term capital assets being equity shares is exempt from tax. The AO was of the view that even where there is loss in view of section 10(38) of the Act the loss will not enter the computation of total income of an Assessee. The CIT(A) confirmed the order of AO.

34. Before us the submission of the ld. Counsel for the assessee was that section 10(38) of the Act used the expression "any income" and therefore loss on sale of long term capital asset being equity shares should be allowed as deduction. The ld. DR relied on the order of CIT(A).

35. We are of the view that the stand taken by the Assessee is not acceptable. In Commissioner of Income-tax v. Harprasad and Co. P. Ltd. 99 ITR 118 (SC)., the assessee claimed capital loss on sale of shares of Rs.28,662 during the previous year relevant to assessment year 1955-56. The Income-tax Officer disallowed the loss on the ground that it was a loss of a capital nature. The CIT(A) confirmed the order of the ITO. Before Tribunal the Assessee modified its claim and sought that the loss which had been held to be a " capital loss " by the authorities below, should be allowed to be carried forward and set off against profits and gains, if any, under the head " capital gains " earned in future, as laid down in sub-sections (2A) and (2B) of section 24 of the Act. The Tribunal accepted the contention of the assessee and directed that the " capital loss " of Rs. 28,662 should be carried forward and set off against " capital gains ", if any, in future. On further appeal the Hon'ble Delhi High Court confirmed the order of the Tribunal. On further appeal by the Revenue, the following question was considered by the Hon'ble Supreme Court:

> *"Whether, on the facts and in the circumstances of the case, the capital loss of Rs. 28,662 could be determined and carried forward in accordance with the provisions of section 24 of the Indian Income-tax Act, 1922, when the provisions of section 12B of the Income-tax Act, 1922, itself were not applicable in the assessment year 1955-56. "*

The Hon'ble Supreme Court held :

"Under the Income Tax Act, 1922 capital gain was not included as a head of income and therefore capital gain did not form part of the total income. Certain important amendments were effected in the Income-tax Act by Act XXII of 1947. A new definition of " capital asset " was inserted as Section 2(4A) and " capital asset " was defined as " property of any kind held by an assessee, whether or not connected with his business, profession or vocation ", and the definition then excluded certain properties mentioned in that clause. The definition of " income " was also expanded, and " income " was defined so as to include " any capital gain chargeable according to the provisions of Section 12B ". Section 6 of the Income-tax Act was also amended by including therein an additional head of income, and that additional head was " capital gains, " Section 12B, provided that the tax shall be payable by an assessee under the head " capital gains " in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after 31st March, 1946, and that such profits and gains shall be deemed to be income of the previous year in which the sale, exchange or transfer took place. The Indian Finance Act, 1949, virtually abolished the levy and restricted the operation of section 12B to " capital gains " arising before the 1st April, 1948. But section 12B, in its restricted form, and the VIth head, " capital gains " in section 6, and sub-sections (2A) and (2B) of section 24 were not deleted and continued to form part of the Act. The Finance (No. 3) Act, 1956, reintroduced the " capital gains " tax with effect from the 31st March, 1956. It substantially altered the old section 12B and brought it into its present form. As a result of the Finance (No. 3) Act of 1956, "capital gains " again became taxable in the assessment year 1957-58. The position that emerges is that " capital gains " arising between April 1, 1948, and March 31, 1956, were not taxable. The capital loss in question related to this period.

In the above background of law, the Hon'ble Supreme Court held as follows:

"From the charging provisions of the Act, it is discernible that the words " income " or " profits and gains " should be understood as including losses also, so that, in one sense " profits and gains " represent " plus income " whereas losses represent " minus income " (1). In other words, loss is negative profit. Both positive and negative profits are of a revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee. Although section 6 classifies income under six heads, the main charging provision is section 3 which levies income-tax, as only one tax, on the " total income " of the assessee as defined in section 2(15). An income in order to come within the purview of that definition must satisfy two conditions. Firstly, it must comprise the " total amount of income, profits and gains referred to in section 4(1) ". Secondly, it must be " computed in the manner laid down in the Act ". If either of these conditions fails, the income will not be a part of the total income that can be brought to charge."

36. The Hon'ble Supreme Court thereafter took note of the fact that any " capital gains " arising between April 1, 1948, and April 1, 1957 was not chargeable to tax.

The Hon'ble Supreme Court therefore held that the second condition, namely, "the manner of computation laid down in the Act" which "forms an integral part of the definition of ' total income' " was not satisfied. Thus, in the relevant previous year and the assessment year, or even in the subsequent year, capital gains or "capital losses" did not form part of the "total income" of the assessee which could be brought to charge, and were, therefore, not required to be computed under the Act. The Hon'ble Supreme Court answered the question referred to it in favour of the revenue.

37. The law laid down by the Hon'ble Supreme Court clearly supports the stand taken by the Revenue. Consequently, the ground of cross-objection is without any merit and the same is dismissed.

38. Ground no.3 in the cross objection by the assessee was not pressed and the same is dismissed as not pressed.

39. Ground no.4 raised by the assessee in the cross objection is in support of the conclusion of the CIT(A) admitting and considering the additional evident under Rule 46A of the IT Rules. We have upheld the action of CIT(A) in this regard while deciding ground no.(vii) raised by the revenue. For the reasons stated therein, this ground of Cross objection is allowed.

40. In the result the appeal of the revenue is dismissed and cross objection of the assessee is partly allowed.

Order pronounced in the court on 7th October, 2015.

Sd/-	Sd/-
[Waseem Ahmed]	[N.V.Vasudevan]
Accountant Member	Judicial Member

Date: 7.10.2015.

R.G.(.P.S.)

Copy of the order forwarded to:

1. M/s. LGW Limited, Rajarhat Gopalpur, Narayanpur, 24-Parganas-700136.
2 The D.C.I.T., Circle-II, Kolkata.
3. The CIT-IV, Kolkata,
4. The CIT(A)-XII, Kolkata.
5. DR, Kolkata Benches, Kolkata

True Copy,

By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches