IN THE INCOME TAX APPELLATE TRIBUNAL
PANAJI BENCH, PANAJI

BEFORE SHRI N.S. SAINI, HON'BLE ACCOUNTANT MEMBER
AND SHRI GEORGE MATHAN, HON'BLE JUDICIAL MEMBER

ITA NO. 252/PNJ/2015	:	**(A.Y – 2009-10)**
Sesa Resources Ltd. (Earlier known as V.S. Dempo & Co. Pvt. Ltd.) Dempo House, Campal, Panaji Goa (Appellant) **PAN : AAACV7160R**	Vs.	Asst. Commissioner of Income Tax, Circle-1(1), Panaji, Goa (Respondent)
ITA NO. 267/PNJ/2015	:	**(A.Y – 2009-10)**
Dy. Commissioner of Income Tax, Circle-1(1), Panaji, Goa (Appellant)	Vs.	Sesa Resources Ltd. (Earlier known as V.S. Dempo & Co. Pvt. Ltd.) Dempo House, Campal, Panaji, Goa (Appellant) **PAN : AAACV7160R**

Assessee by : Smt. Sharmila Prabhu
Revenue by : None

Date of Hearing : 20/08/2015
Date of Pronouncement : 20/08/2015

ORDER

PER GEORGE MATHAN :

1. ITA No. 252/PNJ/2015 is an appeal filed by the Assessee and ITA No. 267/PNJ/2015 is an appeal filed by the Revenue against the order of CIT(A),

Panaji-1 in ITA No. 489/PNJ/2011-12 dt. 25.3.2015 for the A.Y 2009-10. Smt. Sharmila Prabhu, FCA represented on behalf of the Assessee and none represented on behalf of the Revenue.

2. In the Assessee's appeal, the Assessee has raised the following grounds of appeal :

> *"I. DISALLOWANCE UNDER SECTION 14A : The Learned Commissioner of Income Tax (Appeals) has erred in confirming an amount of Rs. 86,51,566/- to be disallowed under section 14A of the Income Tax Act.*
>
> *Your Petitioner contends that the Commissioner (Appeals) has erred in applying the provisions of Rule 8D while computing the disallowance under section 14A to all the investments made by the appellant."*

In the Revenue's appeal, the Revenue has raised the following grounds of appeal :

> *"1) The order of the learned CIT(A) is opposed to law and facts of the case.*
>
> *2) The Ld CIT(A) erred in deleting the additions of Rs.2,41,01,002/- made u/s. 14A of the Income Tax Act in accordance with Rule 8D of Income Tax Rules as provided by the decision given by the Mumbai Special Bench of ITAT in the case of ITO vs Daga Capital Management Pvt. Ltd. (2009) 117 ITD 169 and in the case of Lakshmi Ring Travellers Vs. ACIT ITA 2083/Mds/2011 order dated 02/03/2012 A.Y. 2008-09.*
>
> *3) The Ld CIT(A) has erred in deleting the additions of Rs.70,78,076/- on account of disallowance of expenditure towards renewal of mining lease/Afforestation charges as revenue expenditure when it is of capital nature, as provided by the decision given by the Hon'ble Supreme Court in the case of R. B. Seth Moolchand Vs. CIT(1972) 86*

ITR 647, afforestation charges paid forms part of the expenditure for acquiring the right over or in the land to win the mineral and has given enduring benefit to the assessee over the years.

4) *Whether Ld CIT(A) was correct in deleting the additions of Rs.10,86,92,826/- made u/s.40a(ia) r.w.s. 195(1) towards payment of commission to foreign agents outside India as these payments are deemed to accrue/arise in India and also in view of explanation 2 to section 195(1) as held in the case of Rajiv Malhotra INRE(AAR)284 1TR 564 and SKF Boilers and Driers Pvt. Ltd and also as per Board's Circular No.7 of 2009 dated 22.10.2009.*

5) *Whether Ld CIT(A) was correct in deleting the additions of Rs. 1,53,313/- on account of disallowance of excess claim of depreciation @ 60% as against @ 15% on UPS at par with the depreciation rate on computers when UPS are electrical equipments and installations as held in decision of Hon'ble Delhi Bench of ITAT in Nestle India Ltd., Vs. DCIT (2007) 111 TTJ(Del) 0498?*

6) *The Ld CIT(A) has erred in deleting the addition of Rs.4,27,39,010/- towards disallowance of expenditure of interest paid on loans taken at interest and advanced the same money to sister concerns without charging any interest, nor the assessee produced evidence to show that the advances were used for business purpose as held in the case of CIT Vs. Mir Mohd. Ali in 38 ITR 413.*

7) *The Ld CIT(A) has erred in deleting the addition on account of notional loss on exchange variation amounting to Rs.14,39,60,911/- made by AO as per CBDT instruction No. 3/2010 dated 23.03.2010.*

8) *The Ld CIT(A) has erred in deleting the addition on account of loss on options/forwards — marked to market amounting to Rs.24,64,78,790/- made by AO without considering the CBDT instruction No.3/2010 dated 23.03.2010 which states that in cases where there is no sale or settlement has actually taken place and the loss on marked to market basis has resulted in reduction of book profits, such a notional loss would be contingent in nature and cannot be allowed to be set off against the taxable income.*

9) *The Ld CIT(A) has erred in treating the loss incurred by the assessee on forward contracts as hedging loss instead of treating it as speculative loss and deleting the addition of Rs. 120,01,95,278/-.*

10) *The Ld CIT(A) has failed to appreciate the essential features of a hedging contract that the hedging transaction should be in the commodity manufactured/traded by the assessee and the hedging transactions total value should not exceed on any given date more than the actual stocks available with the assessee. The reliance was placed on the following decisions and Board's circular in F. No.23 (XXXIV-4) D of 1960 dated 12.09.1960 and instruction No.3-2010 dated 23.03.2010.*
i) Delhi Flour Mills Co. Ltd Vs CIT(1974) 95 ITR 151, 157-8 (Delhi)
ii) Juvi Subbaramaiah & Co. Vs. CIT (1964) 51 ITR 742, 753
iii) (AP). Omkarmal Agarwal Vs. CIT (1968) 67 ITR 329, 335(AP)
iv) Raghunath Das Prahlad Das Vs. CIT (1976) 104 ITR 95(All)
v) Onkar Shankar Trading (P) Ltd Vs. CIT (1974) X CTB 809 (Cal)
vi) Supreme Court Decision in CIT Vs Joseph John (1968) 67 ITR 74

11) *The Ld CIT(A) ignored the Board's Circulars and the above judicial decisions wherein the burden of proof that transactions carried on by the assessee are not speculative but hedging transactions is on the assessee as per the Supreme Court Decision in CIT Vs Joseph John (1968) 67 ITR 74.*

12) *Whether in law and on facts and circumstances the Ld CIT(A) was correct in deleting the addition on Rs.21,19,97,295/- stating that expenses incurred on repairs and maintenance of the old vessels can only be categorized as current repairs as the same has been incurred to keep the vessels in good condition without increasing the capacity ignoring the decision of the Supreme Court in CIT Vs Ballimal Navakishore (1997) 224 ITR 414 and CIT Vs Saravana Spining Mills (P) Ltd (2007) 163 Taxman 196 wherein it is held that the object of current repairs should not be obtaining a new or fresh advantage and every expenditure does not come automatically under current repairs.*

13) *Whether in law and on facts and circumstances the Ld CIT(A) was correct in deleting the addition made by the AO on account of disallowance of additional depreciation amounting to Rs.88,24,295/- ignoring the Supreme Court's decision in CIT Vs Gem India*

Manufacturing Co. (2001) 249 ITR 307 (S.C.) and in Lucky Minerals Pvt. Ltd., Vs. CIT (2001) 116 Taxman 1 (SC)."

3. In the Assessee's appeal, the Assessee has challenged the action of the ld. CIT(A) in confirming the disallowance made u/s 14A representing 5% of the investments. It was the submission by the ld. AR that the Assessee had in its return of income made disallowance u/s 14A to the extent of Rs. 2,05,410/-. It was the submission that the AO had applied the provisions of Rule 8D r.w.s. 14A and had made disallowance of Rs. 2.41 crores in respect of the interest disallowance and an additional 0.5% of the investments amounting to Rs. 89 lacs. It was the submission that on appeal, the ld. CIT(A) had deleted the disallowance made in respect of the interest but had upheld the disallowance in respect of the 0.5% of the investment. It was the submission that in the Revenue's appeal also, being ground no. 2, the Revenue has challenged the action of the ld. CIT(A) in deleting the disallowance made by the AO of an amount of Rs. 2,41,01,002/- u/s 14A. It was the submission that the disallowance as deleted by the ld. CIT(A) was liable to be upheld and further, the deduction in respect of 0.5% of the investment was liable to be allowed insofar as the Assessee has not received any exempt income in respect of the investments made by the Assessee in the Assessee's subsidiaries. On a specific query from the Bench as to the calculation made by the Assessee and the AO, it was submitted by the ld. AR that the Assessee had submitted the calculation of the disallowance u/s 14A before the AO, however, the AO had not considered the said calculation and had made his own calculation in page 5 of the assessment order. It was the submission that the Assessee must be granted relief.

4. We have heard the submissions. A perusal of the calculation made by the AO at page 5 of the assessment order shows that the AO has considered

all the investments. This is not permissible. Here, it was brought to the attention of the ld. AR that the computation of deduction u/s 14A was liable to be made in line with the decision of the co-ordinate bench of this Tribunal in the case of REI Agro Ltd., Kolkata in ITA Nos. 1331/Kol/2011 and 1423/Kol/2011 dt. 19.6.2013 wherein the co-ordinate bench of this Tribunal has held as follows :

> *"7. Now coming to the merits of the issue. A perusal of the provision of section 14A(1) clearly shows the wordings, "in relation to the income which does not form part of the total income under this Act". In the present case, this income, which does not form part of the total income under the Act, is the dividend income of Rs.1,32,638/-. Therefore, if any disallowance is to be made in respect of expenditure incurred, it should be in relation to this dividend income of Rs.1,32,638/-. If an assessee has invested in shares, which could get dividend or there is investment which generates dividend income or exempt income as also investment which does not generate exempt income, it is only such investments in respect of which the dividend income or exempted income has been earned which can be considered when computing the disallowance under section 14A read with rule 8D. A perusal of the provisions of rule 8D also talks of satisfaction in sub-rule (1). Rule 8D(2) has three sub-parts. The first sub-part i.e. (i) deals with the amount of expenditure directly relating to the income which does not form part of the total income. That issue is not in dispute here and therefore, we do not go into it in this case. In second sub-part i.e.(ii), it is a computation provided in respect of expenditure incurred by the assessee by way of interest during the previous year which is not directly attributable to any particular income or receipt. This clearly means that if there is any interest expenditure, which is directly relatable to any particular income or receipt, such interest expenditure is not to be considered under rule 8D(2)(ii). In the assessee's case here the interest has been paid by the assessee on the loans taken from the banks for its business purpose. There is no allegation from the banks nor the AO that the loan funds have been diverted for making the investment in shares or for non-business purposes. Further rule 8D(2)(ii) clearly is worded in the negative with the words "not directly attributable". Thus for bringing any interest expenditure, claimed by the assessee, under the ambit of rule 8D(2)(ii) it will have to be shown by the AO that the said interest is not directly attributable to any particular*

income or receipt. Why we say here that it is to be shown by the AO is on account of the words in Rule 8D(1) being

"(1) Where the Assessing Officer, ... is not satisfied with—

*(a) to (b)*** ** **

in relation to income....., he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2).

In the assessee's case, admittedly, the assessee has substantial capital. The increase in the capital itself is to an extent of Rs.4 crores and in respect of reserves and surplus, the increase is Rs.112 crores. The loans taken during the year admittedly are for the letters of credit and the assessee is bound to provide the bank stock statement and other details to show the utilization of the loans. No bank would permit the loan given for one purpose to be used for making any investment in shares. The ld. CIT(A), it is noticed that after considering these facts that the assessee had not used any of its borrowings for purchasing the shares, has deleted the disallowance. On this ground itself, the deletion as made by the ld. CIT(A) is liable to be confirmed and we do so.

7.1 In any case, the working of the disallowance under sub-part (ii) of sub-clause (2) of rule 8D as made by the AO also suffers from a substantial error in so far as in the said rule in regard to the numerator B, the words used are the average value of the investment, income from which does not form or shall not form part of the total income as appearing in the balance-sheet as on the first day and in the last day of the previous year. Here the AO has taken into consideration the investment of Rs.103 crores made this year, which has not earned any dividend or exempt income. It is only the average of the value of the investment from which the income has been earned which is not falling within the part of the total income that is to be considered. This is why the question of satisfaction is provided in section 14A and rule 8D(1), that relates to the accounts of the assessee. Thus, it is not the total investment at the beginning of the year and at the end of the year, which is to be considered but it is the average of the value of investments which has given rise to the income which does not form part of the total income which is to be considered. A question may arise as to why the term "average of the value of investment" is then used. The term average of the value of investment would be to take care of cases where there is the issue of dividend striping. In any case, as we have already held that the assessee has not incurred any expenditure by way of interest

during the previous year, which is not directly attributable to any particular income, the findings of the ld. CIT(A) on the issue stand confirmed and consequently the appeal filed by the Revenue stands dismissed."

In the circumstances, the issue of calculation of disallowance u/s 14A is restored to the file of the AO to re-compute the disallowance u/s 14A by taking into consideration the principles laid down by the co-ordinate bench of this Tribunal in the case of REI Agro Ltd. referred to *supra*. Consequently, the appeal of the Assessee is partly allowed for statistical purposes and ground no. 2 of the Revenue's appeal is also partly allowed for statistical purposes.

5. In regard to ground no. 3 of the Revenue's appeal, it was submitted by the ld. AR that the issue was against the action of the ld. CIT(A) in deleting the disallowance made by the AO in respect of the expenditure towards renewal of a mining lease/afforestation charges made by the AO as capital expenditure. It was submission by the ld. AR that the afforestation charges had been paid by the Assessee to an extent of Rs. 70,78,076/-. It was the submission that this issue was covered by the decision of the co-ordinate bench of this Tribunal in the case of M/s. Damodar Mangalji & Co. Ltd. in ITA No. 131/PNJ/2013 dt. 25.10.2013 wherein in para 3.3 the co-ordinate bench of this Tribunal has held as follows :

"3.3 We have heard the rival submissions and carefully considered the same. We noted that the AO has disallowed the expenditure incurred by the Assessee on the plea that the expenditure is a capital expenditure and the benefit of the expenditure has to accrue over a number of years and therefore has to be treated as a capital expenditure. The AO also took the view that the whole expenditure did not accrue during the year. We noted that the CIT(A) deleted the disallowance merely relying on the order of this

Tribunal which was passed in respect of an appeal filed before this Tribunal u/s 263 of the Income Tax Act. The question before the Tribunal was whether the order passed by CIT(A) is erroneous and prejudicial to the interest of the revenue. The Tribunal set aside the order of CIT(A) made u/s 263 holding that the order passed by the AO could not be held to be erroneous order and prejudicial to the interest of the revenue relying on the decision in Malabar Industrial Co. Ltd. vs. CIT, 243 ITR 83 (SC). The CIT(A) instead of giving any finding on the merit of the case has simply relied on the order of ITAT by referring to the question about the validity of the order passed u/s 263. In an appeal against order passed u/s 263 when the order has been set aside by the CIT(A) and sent back to the AO for passing it afresh in accordance with law, the Tribunal does not have any jurisdiction to examine the case on merit. We have also gone through the order of the Tribunal passed u/s 263 on which the CIT(A) has relied. In our opinion, that order will not be applicable in this case. The CIT(A) was bound to give a clear-cut finding whether the expenditure incurred by the Assessee is a capital expenditure or whether it is a revenue expenditure and whether the expenditure has accrued during the year or not. The order passed by the CIT(A), in our opinion, is cryptic and has not dealt with the issue involved. We, therefore, set aside the order of CIT(A) and restore this issue to the file of CIT(A) with the direction that the CIT(A) should re-decide this issue on merit whether the expenditure incurred by the Assessee is a capital expenditure or whether it is a revenue expenditure and if it is a revenue expenditure, whether the expenditure has accrued during the year or not after giving proper and sufficient opportunity to the Assessee. Thus, this ground is allowed for statistical purpose."

6. We have heard the submissions. A perusal of the decision of the co-ordinate bench of this Tribunal in the case of M/s. Damodar Mangalji & Co. Ltd. referred to *supra* shows that the co-ordinate bench of this Tribunal has restored this issue to the file of the ld. CIT(A) for re-deciding the issue as to whether the expenditure incurred by the Assessee is a capital expenditure or whether it is revenue expenditure and if it is revenue expenditure, whether the expenditure has accrued during the year or not after giving sufficient opportunity to the Assessee. In the Assessee's case, it is noticed that the AO has taken a specific view that the expenditure is in the nature of capital

expenditure. However, a perusal of the order of the ld. CIT(A) shows that the ld. CIT(A) has held the same to be a revenue expenditure by holding that the issue was covered by the decision of the jurisdictional bench of this Tribunal in the case of Dr. P.R. Hede in ITA No. 135/PNJ/2011. It is noticed that the decision in the case of M/s. Damodar Mangalji & Co. Ltd. is a subsequent decision and consequently, we are of the view that the said decision is liable to be followed. In the decision of the co-ordinate bench of this Tribunal in the case of M/s. Damodar Mangalji & Co. Ltd. wherein the issue was restored to the file of the ld. CIT(A) for re-adjudication, the ld. CIT(A) had not given a clear-cut finding as to whether the said expenditure was revenue in nature or capital. It is also noticed that the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. reported in 225 ITR 802 has not been considered by any of the authorities below. Admittedly, the afforestation charges are clearly revenue expenditure as has been held by the co-ordinate bench of this Tribunal in the case of Dr. P.R. Hede referred to by the ld. CIT(A). However, in view of the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. referred to *supra* the allowance of this expenditure is to be staggered proportionately over the period of the lease and in proportion to the quantity of ore extracted from the said mine. In these circumstances, this issue is restored to the file of the AO for computation of the allowance of the afforestation charges as revenue expenditure in proportion to the quantum of iron ore extracted over the period of the lease. In the result, ground no. 3 of the Revenue's appeal is partly allowed for statistical purposes.

7. It was submitted by the ld. AR that in the Revenue's appeal in ground no. 4, the Revenue has challenged the action of the ld. CIT(A) in deleting the addition made by the AO in respect of the commission to the foreign agents

outside India by applying the provisions of Sec. 195(1) r.w.s. 40(a)(ia) of the Act. It was the submission that this issue was squarely covered by the decision of the co-ordinate bench of this Tribunal in the case of Sesa Goa Ltd. in ITA No. 72/PNJ/2012 dt. 8.3.2013 wherein the co-ordinate bench of this Tribunal has held in para 27, 27.1 to 27.2 as follows :

"27. If we apply the principles of the law as enunciated in the various judgments, we are of the opinion that once the A.O. finds that the assessee has bonafidely incurred the expenditure for the business, the A.O. cannot decide the quantum of the expenditure to be incurred by the assessee. In this case before us the assessing officer has disputed the fact that commission has been paid for the purpose of the business and also disallowed the said expenditure by applying the provisions of sec. 40(a)(i) as well as on the basis of the genuineness of the expenditure incurred. The CIT (A) while holding that the assessee was not liable to deduct tax in respect of the commission payment made to the non-resident agents took the view that the assessing officer was not justified in disallowing the commission payment by invoking the provision of sec. 40(a)(i). The CIT(A), however, disallowed the commission paid by the assessee to the foreign non-resident agents by applying the provisions of sec. 37 as according to him the assessee had not able to substantiate the claim for payment of commission to non-resident agents by adducing specific and tangible evidence to demonstrate that the services were rendered by the sales agents to justify the commission payment as claimed by the assessee. He, thus, confirmed the order of the assessing officer for the said disallowance. Now the only issue before us is whether the assessee had discharged its onus of proving the genuineness of the expenditure incurred by the assessee or not.

27.1 The documentary evidences by way of agreements with the non-resident agents and emails exchanged with them in this regard, which were placed on record of the authorities below and also furnished at page nos. 135 to 156 of the paper book before us, clearly exhibit the nature and extent of services rendered by those non-resident agents; and the genuineness of the same cannot be doubted merely on surmises without bringing anything contrary on record. CIT (A) while rejecting this vital piece of evidence has merely stated vide para 6.5 of his appellate order that "it is possible that the assessee may have some kind of business relationship with the above two companies. It is also possible that there may be some

correspondence with the two companies with regard to sales of iron ore abroad. But this shall not be sufficient justification to prove that the companies abroad have rendered necessary services for effecting sales so as to justify the claim of commission." Whereas in our considered view, the contents of the emails furnished by the assessee, which have been summarized herein above, clearly show that those were being exchanged with the said two non-resident agents in actual performance of their services for which they had been engaged by the assessee as per the respective agreements entered into with them and for which commission had been paid to them. It is not the case of the Revenue that the impugned emails were fabricated or forged one. In fact, the CIT (A) has admitted in his appellate order that 'it is possible that there may some correspondence with the two companies with regard to sale of iron ore abroad', but without going into the merits of the emails exchanged and without controverting how the same did not exhibit that actual services had not been rendered by those agents, he merely rejected the claim of the assessee as if the assessee has not incurred these expenses genuinely for the purpose of the business. It is cardinal principle of law that a disallowance cannot be made on mere surmises and conjectures. Where the explanation of the assessee is bonafide and evidences produced by it further corroborate its explanation, there is no reason for Revenue to disregard the same on whims without bringing forth any tangible and cogent material to the contrary.

27.2 The said two non-resident agents had been engaged by the assessee in the past and they have been paid commission on sales abroad since last so many years. There is no law which mandates that a middleman is entitled to his commission only for the first time when he introduces both the parties to each other. We agree with the ld. AR that in fact, it is a normal business practice all over the world that after the parties are introduced the actual work of a commission agent starts. Here in the instant case of the assessee, the buyers had been introduced by the said agents in the past. The emails exhibit that the agents were deeply involved with the buyers vis-à-vis the assessee in actual transportation of goods and securing payments to the assessee. Emails show that the agent was confirming vessel nomination from the buyer, which was later accepted by the assessee. Other emails show the assessee's request to the agent for opening of LC and subsequently requesting the agent for LC amendments and LC acceptances. In other such set of emails, the assessee is found suggesting amendments to the draft LC and the agent confirming / suggesting amendments to the LC.

Similarly, another set of emails show the Agent advising changes in the sale contract with the buyer and the assessee accepting the same. Yet another exchange of emails shows the agent is forwarding draft revised Final Adjustment Sheet and the assessee is suggesting corrections to Final Adjustment Sheets and requesting the agent to forward the same to the buyer. More so, in one such set of emails, the assessee is seen asking the agent to convey its message to the buyer and the agent can be seen conveying message from the buyer to the assessee. Thus, there remains no doubt in our mind that the non-resident agents were actually rendering the services as middlemen in terms of their respective agreements with the assessee and, accordingly, commission was genuinely paid by the assessee for those services only, i.e., wholly and exclusively for the purpose of the business of the assessee.

The decision in Lachminarayan Madan Lal Vs CIT (1972) 86 ITR 439 (SC), relied upon by the Revenue is totally distinguishable on facts. In that case the assessee had only produced the agreements and the Hon'ble apex court decided that the mere existence of an agreement between the assessee and its selling agents or payment of certain amounts as commission, assuming there were such payments, does not bind the ITO to hold that payment was made exclusively and wholly for the purpose of the assessee's business. Whereas in the instant case, the assessee has placed other documentary evidences on record besides the agreements, which clearly demonstrate that the requisite services under those agreements for which commission was paid to them, had actually been rendered by them. Thus, in the case of the assessee commercial expediency has clearly been proved. Therefore, the disallowance of Rs. 9,88,29,729/- for commission paid to non-resident agents is deleted by allowing this ground of appeal of the assessee."

8. We have considered the submissions. A perusal of the assessment order in the Assessee's case shows that the AO has disallowed the commission paid to the foreign agents on two grounds; one on account of non-deduction of TDS and second that the expenditure has not been paid for the purposes of the business of the Assessee. A perusal of the decision of the co-ordinate bench of this Tribunal in the case of Sesa Goa Ltd. referred to *supra* shows that the Tribunal has only decided the issue in respect of

payment made to the agents as being for the purpose of the business and commercial expediency. The reasoning given by the AO in respect of non-deduction of TDS and applicability of the provisions of Sec. 40(a)(ia) of the Act has not been adjudicated. In these circumstances, respectfully following the decision of the co-ordinate bench of this Tribunal in the case of Sesa Goa Ltd. referred to *supra*, it is held that the expenditure has been incurred by the Assessee for the purpose of the business of the Assessee itself. However, in respect of the issue as to whether the Assessee was liable to deduct TDS u/s 195 and whether the disallowance was liable to be made u/s 40(a)(ia) of the Act for non-deduction of the TDS u/s 195(1) of the Act, it is noticed that the provisions of Sec. 195 has been amended by the introduction of Explanation-II to the said section by the Finance Act, 2012 with retrospective effect from 1.4.1962 whereby it is clarified that "*the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has (i) a residence or place of business or business connection in India; or (ii) any other presence in any manner whatsoever in India.*" In view of the introduction of Explanation - II to Sec. 195 of the Act, as the Assessee has not deducted TDS u/s 195, the disallowance made by the AO by invoking the provisions of Sec. 40(a)(ia) of the Act would have to be restored and we do so. In the result, ground no. 4 of the Revenue's appeal stands allowed.

9. In regard to ground no. 5 of the Revenue's appeal, the ld. AR submitted that the issue was against the deletion of the disallowance of claim of depreciation @ 60% as against 15% on the UPS at par with the depreciation rate on computers. It was the submission that the issue was squarely covered

by the decision of the co-ordinate bench of this Tribunal in the case of Sesa Goa Ltd. in ITA No. 190/PNJ/2011. It was the submission that the ld. CIT(A) had followed the decision of the co-ordinate bench of this Tribunal in the case of Sesa Goa Ltd. referred to *supra*.

10. We have considered the submissions. As it is noticed that the ld. CIT(A) has followed the decision of the co-ordinate bench of this Tribunal in the case of Sesa Goa Ltd. referred to *supra*, we find no reason to interfere with the order of the ld. CIT(A). Consequently, the finding of the ld. CIT(A) on this issue stands confirmed. Consequently, ground no. 5 of the Revenue's appeal stands dismissed.

11. It was the submission that in ground no. 6 of the Revenue's appeal, the Revenue has challenged the deletion of the addition towards disallowance of expenditure of interest paid on loans taken at interest and advanced to the sister concerns without charging any interest. It was the submission that the issue was squarely covered by the decision of the co-ordinate bench of this Tribunal in the case of M/s. V.S. Dempo Holding Pvt. Ltd. in ITA No. 60/PNJ/2015 dt. 27.7.2015 wherein the co-ordinate bench of this Tribunal has held as follows :

> *"14 We find that the Commissioner of Income Tax (Appeals) has observed that the assessee had given interest free advances to its subsidiaries in its business requirements. He placed reliance on the decision of the Hon'ble Bombay High Court in the case of CIT-7 Vs. Reliance Communications in Appeal No. 3155/2009 dated 28/03/2012 and has held that where interest free borrowed funds are advanced as interest free loans to its subsidiaries for business expediency, the interest cannot be disallowed. Commissioner of Income Tax (Appeals) held that in the case of the assessee, business expediency exists and interest free own funds have been advanced. No interest expenses have been claimed by the assessee on this account.*

Therefore, he deleted the notional interest of Rs. 15,37,40,627/-. The Hon'ble Gauhati High Court in the case of Highways Construction Co. Pvt. Ltd. Vs. CIT reported in 199 ITR 702 (Gau.) held as under:-

"ii) That there was no finding of fact to the effect that actually the loan had been granted to the managing director or any other person on interest, or that interest had actually been collected but the collection of the interest was not reflected in the accounts. The finding of the Income-tax Officer was that the assessee ought to have collected interest. If the assessee had not bargained for interest, or had not collected interest, the income-tax authorities could not fix a notional interest as due, or as collected by the assessee. There was no provision in the Income-tax Act empowering the income-tax authorities to include in the income interest which was not due or not collected. The addition of amounts as notional interest was not justified."

15 A reading of the above order of the Hon'ble Gauhati High Court shows that under the Income Tax Act, only a real income earned by the assessee can be brought to tax and not any notional income. On this count also, the addition deleted by the Commissioner of Income Tax (Appeals) finds support from the order of the Hon'ble Gauhati High Court.

16. Therefore, in view of the above, we find no infirmity in the order of the Commissioner of Income Tax (Appeals) which is hereby confirmed and the ground of appeal of the Revenue is dismissed."

It was the submission that during the year the Assessee has disclosed a profit of Rs. 355 crores and the advance to sister concerns was only Rs. 54 crores. It was the submission that the non-interest bearing funds being available with the Assessee, no disallowance was called for.

12. We have considered the submissions. As it is noticed that the Assessee has sufficient non-interest bearing funds available with it, the disallowance as made by the AO, and as deleted by the ld. CIT(A) stands confirmed. In the result, ground no. 6 of the Revenue's appeal stands dismissed.

13. In regard to ground nos. 7 to 11 of the Revenue's appeal, it was submitted by the ld. AR that the issue was against the deletion of the addition on account of notional loss on exchange variation. It was the submission that the Assessee is an iron ore exporter and its turnover during the year exceeded Rs. 1000 crores. It was the submission that there was some unrealized amount at the year end. The Assessee had claimed that the foreign exchange fluctuation resulted in a loss. It was the submission that this issue was squarely covered by the decision of the co-ordinate bench of this Tribunal in the case of M/s. Rupam Impex in ITA No. 4008/Mum/2012 dt. 21.10.2013 wherein the co-ordinate bench of this Tribunal has held as follows :

> *"3. After hearing both the parties, we find that the ld. CIT(A) did not commit any error in deciding the issue in favour of assessee. The Hon'ble Supreme Court in case of ONGC vs. CIT (supra), following the earlier decision in the case of CIT vs. Woodward Governor India (P.) Ltd. (supra), have held that the Assessee having maintained account on mercantile system of accounting, loss claimed by the Assessee on account fluctuation in the rate of foreign exchange as on the date of balance sheet in respect of loans taken for Revenue purpose is allowable as expenditure u/s. 37(1) notwithstanding the fact that liability has not been actually discharged in the year in which the fluctuation rate of foreign exchange is accrued. Therefore, we find no infirmity in the order passed by the id. CIT(A) and we decline to interfere.*

14. It was put to the ld. AR that subsequent to this decision in the case of M/s. Rupam Impex, the co-ordinate bench of this Tribunal in the case of M/s. Majestic Exports in ITA Nos. 1336 & 3072/Mds/2014 vide order dt. 24.7.2015 has held that

> *"Loss suffered on account of forex derivative contracts (Exotic Cross Currency Option Contracts) cannot be treated as speculative loss to the extent that the derivative transactions are not more than the total export*

turnover of the assessee. If the derivative transaction is in excess of export turnover, the loss in respect of that portion of excess transactions has to be considered as speculative loss because the excess derivative transaction has no proximity with export turnover.

We make it clear that total transaction considered for determining this business loss from derivative transactions cannot be more than the total export turnover of the assessee for the assessment year under consideration and if the derivative transaction is in excess of export turnover, then that loss suffered in respect of that portion of excess transactions to be considered as speculative loss only as that excess derivative transaction has no proximity with export turnover and the Assessing Officer is directed to compute accordingly."

As this calculation has not been done by either side, this issue is restored to the file of the AO for re-adjudication in line with the decision of the co-ordinate bench of this Tribunal in the case of M/s. Majestic Exports referred to *supra*. Consequently, ground nos. 7 to 11 of the Revenue's appeal stand partly allowed for statistical purposes.

15. In regard to ground no. 12 of the Revenue's appeal, it was submitted by the ld. AR that the issue was against the action of the ld. CIT(A) in deleting the addition on account of repairs and maintenance of old vessels which were in the nature of current repairs. It was the submission that the issue was squarely covered by the decision of the co-ordinate bench of this Tribunal in the case of Salgaocar Mining Industries Pvt. Ltd. in ITA No. 361/PNJ/2013. It was the submission that the expenditure was incurred to keep the vessels in good working condition and to keep them sea-worthy according to the requirements of Maritime Regulatory Authorities. It was the submission that because of this expenditure, the capacity of the vessels have not increased and consequently, no new capital asset has come into existence.

16. We have considered the submissions. As it is noticed that the nature of the expenditure is only for the purpose of maintaining the vessels sea-worthy and in accordance with the requirements of the Maritime Regulatory Authority and there is no increase in the capacity and as it is noticed that the ld. CIT(A) has followed the decision of the jurisdictional Tribunal in the case of Salgaoncar Mining Industries Pvt. Ltd. referred to *supra*, the finding of the ld. CIT(A) on this issue stands confirmed. In the result, ground no. 12 of the Revenue's appeal stands dismissed.

17. In regard to ground no. 13 of the Revenue's appeal, it was submitted by the ld. AR that the issue was against the action of the ld. CIT(A) in deleting the addition made by the AO on account of the disallowance of additional depreciation. It was the submission that the issue was squarely covered by the decision of the co-ordinate bench of this Tribunal in the case of Sesa Goa Ltd. in ITA No. 72/PNJ/2015 dt. 8.3.2013 wherein at page 169 it has been held as under :

> *"46.2 From the provisions of the section, it is apparent that the assessee is entitled in the case of any new machinery or plant which has been acquired or installed by him after 31.03.2005 for the additional depreciation if the assessee is engaged in the business of manufacture or production of any article or thing. Proviso to section denies the deduction to an assessee of the additional depreciation in certain cases. From the balance sheet and all other evidences filed before us it is apparently clear that the assessee is engaged primarily in the business of extraction of ore and its processing. The authorities below interpreted the provisions of section, correctly taking the view that the plant and machinery should be installed for the production of an article or thing. The assessee's plants at Codli, Amona and Chitradurga whether engaged for the manufacture or production independently, in our view, is not relevant. The relevant consideration is that the assessee must be engaged in the business of manufacture or production of any article or thing and the new plant and machinery must be acquired and installed. The assessee has extracted the*

iron ore and also processed it. The case of the assessee is duly covered by the decision of the Hon'ble Supreme Court in assessee's own case reported in 271 ITR 331 (SC) (supra). This section used the word 'business of manufacture or production' not the word 'manufacture and production'. We do not agree with the revenue that the case of the assessee is not covered by the decision of the Hon'ble Supreme Court in assessee's own case. Respectfully following the decision of the Hon'ble Supreme Court in assessee's own case, we delete the disallowance and allow the additional depreciation to the assessee amounting to Rs.10,91,75,435/-."

18. We have considered the submissions. As it is noticed that the issue is squarely covered by the decision of the co-ordinate bench of this Tribunal in the case of Sesa Goa Ltd. referred to *supra*, and as it is noticed that the ld. CIT(A) has only followed the decision of the co-ordinate bench of this Tribunal in the case of Sesa Goa Ltd. referred to *supra*, the finding of the ld. CIT(A) on this issue stands confirmed. In the result, ground no. 13 of the Revenue's appeal stands dismissed.

19. In the result, the appeal of the Assessee as well as the Revenue is partly allowed for statistical purposes.

Order pronounced in the open court on 20/08/2015.

Sd/-	Sd/-
(N.S. Saini)	(George Mathan)
Accountant Member	Judicial Member

Place : PANAJI / GOA
Dated : 20/08/2015

SSL

Copy to :

(1) Appellant
(2) Respondent
(3) CIT(A) concerned
(4) CIT concerned
(5) D.R
(6) Guard file

True copy, By order,

		Date	Initial	
Original dictation pad & draft order are enclosed in the file				
1.	Draft dictated on	20/08/2015		Sr.PS
2.	Draft placed before author	20/08/2015		Sr.PS
3.	Draft proposed & placed before the second member	21/08/2015		JM/AM
4.	Draft discussed/approved by Second Member	21/08/2015		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	21/08/2015		Sr.PS
6.	Date of pronouncement	20/08/2015		Sr.PS
7.	File sent to the Bench Clerk	21/08/2015		Sr.PS
8.	Date on which file goes to the Head Clerk			
9.	Date of dispatch of Order			