आयकरअपीलीयअधिकरण, अहमदाबादन्यायपीठ **'C'- *अहमदाबाद*]**

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'C'

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
& Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकरअपीलसं.**ITA Nos. 2349/Ahd/2015**

निर्धारणवर्ष/**Asstt. Year: 2009-10**

ITO Ward-1(1)(2), A Wing, Room No. 3-2, 3rd Floor, Pratyakhash Kar Bhavan, Ambawadi, Ahmedabad-380015	Vs.	M/s. Bajaj Herbals Pvt. Ltd., A-401, Samudra Complex, Nr. Hotel Classic gold, Ellis Bridge, Ahmedabad-380006 PAN No. AACCB6654J
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri L P. Jain, SR DR
Revenue by :	Shri Tushar Hemani, Sr. Adv. with Shri P. B. Parmar ARs

सुनवाईकीतारीख/Date of Hearing : 03/06/2021
घोषणाकीतारीख/Date of Pronouncement: 15/07/2021

आदेश/O R D E R

PER Ms. MADHUMITA ROY- JM:

The appeal filed by the Revenue is directed against the order dated 18.05.2015 passed by the CIT(A)-1, Ahmedabad arising out of the order dated 28.03.2013 passed by the ITO Wd-1(2), Ahmedabad under Section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for Assessment Years 2009-10. The Revenue has filed the appeal with the following grounds:-

"(1) The ld. CIT(A) has erred in law and on facts in deleting the addition made u/s. 2(22)(e) of the Act.

(2) The ld. CIT(A) has erred n law and on facts in deleting the addition of Rs.1,13,91,826/- made u/s. 40(a)(ia) of the Act, especially when the assessee has failed to bring any evidence of record that the payments made are covered under Circular No. 723 of 1995 and that the non-residents ship owners/charters had filed returns u/s 172 of the Act.

(3) The ld. CIT(A) has erred in law and on facts in holding that the provisions of section 40(a)(ia) are not attracted in case where tax has been deducted improperly/inadequately.

(4) The ld. CIT(A) has erred in law and on facts in deleting the disallowance made on interest and insurance expenses claimed on vehicle.

(5) The ld. CIT(A) has erred in law and on facts in partly deleting the disallowances made of depreciation and incidental expenses claimed on vehicle.

(6) The ld. CIT(A) has erred in law and on facts in deleting the addition made of Rs. 34,04,016/- on account of under invoicing of sales made to sister concern."

2. **Ground No.1:-** The deletion of addition of Rs. 1,01,59,839/- made under Section 2(22)(e) of the Act has been challenged before us by the Revenue.

3. We have heard the rival submission made by the respective parties, we have also perused the relevant materials available on records.

4. The facts culled out from the orders passed by the authorities below is this that the assessee company took a loan of Rs. 1,15,10,516/- from "Bajaj Foods Ltd." during the year under consideration. The Ld. AO observed that all the three shareholders having equal share holding 33.33% in "Bajaj Foods Ltd." and also having substantial interest in "Bajaj Foods Ltd." who is having accumulated profit of Rs. 1,01,59,839/- as on 31.03.2009. Relying on this the Ld. AO came to the finding that the loan received amounting to Rs 1, 5,10,516/- from "Bajaj Foods Ltd." during the year under consideration is covered by the definition of deemed dividend in terms of Section 2(22)(e) of the Act and finally the accumulated reserve and surplus of "Bajaj Foods Ltd." as on 31.03.2009 to the tune of Rs. 1,01,59,839/- has been taxed as deemed dividend in the hands of the assessee which was in turn deleted by the Ld. First Appellate Authority. Hence the instant appeal before us.

5. However, it appears from the records that particularly at Page 13 of the order passed by the Ld. First Appellate Authority, that the three directors are holding less than 10% of the shares in any of the company and as such they are not beneficial shareholder of the company. The case of the assessee is this that none of the director hold more than 10% of the shares in any of the company and, therefore they cannot be considered a beneficial shareholder of the company is, therefore, seems to be true.

Neither the director holds more than 20% of the shareholding and thus they are also not having substantial interest in the company. When the assessee is not registered shareholder of JCSL no addition can be made as deemed dividend in his hand merely because there is a common shareholders in payer and payee company as also the case made out by the appellant before us. In support of this contention the Ld. AR relied upon the judgment passed in the matter of ACIT vs. Bhaumik Colors P. Ltd., reported in 118 ITD 1 (Mum)(SB), CIT vs. Ankitech (P.) Ltd., reported in 340 ITR 14 (Del) and CIT vs. Mahavir Inducto Pvt. Ltd., reported in Tax Appeal No. 890 of 2011 which have considered by us.

Apart from that the lender company namely "Bajaj Foods Ltd." is a public limited company i.e. company in which public is substant ally interested. It is a settled principle of law that Section 2(22)(e) can only be invoked when the lender company is not a company in which public is substantially interested and, thus, on this score the impugned addition is not justified as also the case made out by the assessee.

While dealing with the issue in favour of the assessee the Ld. CIT(A) observed as follows:-

> *"...it is undisputed that appellant was in receipt of loan of Rs. 11510516/- from M/s. Bajaj Food Ltd. and three of the directors of appellant Having equal share holding aggregating to 29.30% of share holding in appellant company while 29.94% in M/s. Bajaj Food Ltd.. The A.O. after observing the accumulated profit of Rs. 10159839/- as on 13/03/2009 in M/s. Bajaj Food ltd. invoked the provision of section 2(22)(e) of the Act relying on ratio of Hon'ble ITAT order in the case of Skyline Corn Pvt. Ltd. The appellant in appeal submitted that M/s. M/s. Bajaj Food Ltd. is not closely held company, as per the share holding pattern of both appellant as well as M/s. M/s. Bajaj Food Ltd., the basic condition of beneficial share holder and substantial interest does not satisfy, none of the share holder of M/s. Bajaj Food Ltd. is having more than 10% share holding except Surya International and as per the ratio of various case laws as relied on provisions of section 2(22)(e) of the Act are not attracted. The tax audit report in the case of appellant company in Form no. 3CD in reference to cl.24(a) in annexure VIII clearly reflect that during the year appellant accepted the loan of Rs. 63687112/- and repaid Rs. 54754675/- with a maximum balance outstanding of Rs. 11510516/-. The audited financial account of M/s. Bajaj Food Ltd. reflect accumulated profit in the form of "reserves and surplus" in the balance sheet as on 31/03/2009 of Rs. 10159839/. It is therefore, in view of ratio of Hon'ble Delhi High Court in the case of CIT Vs. National Travel Services(2012) 347 ITR 305 where Hon'ble High Court after considering ratio of its own order in the case of CIT Vs. Ankitech (P) Ltd. as well as Hon'ble Hon'ble ITAT Mumbai order in the case of Bhaumik Colours P. Ltd. considered such Board circular no. 495 of 24/09/1987 being explanatory notes to finance Act 1987, and held that deeming provisions of section 2(22)(e) of the Act are applicable to beneficial share holding also. On account of frequent transaction of acceptance and repayment of loan and maximum outstanding loan of Rs. 11510516/- the ratio of Hon'ble Supreme Court judgment in the case of Miss P. Sarada vs*

C.I.T. 1998 VII, SITC 398 in civil appeal no. 649(NT) of 1987 order dt. 09/12/97 provide answer. Hon'ble Supreme Court held that "The legal fiction came into play as soon as the monies were paid by the company to the appellant. The assessee must be deemed to have received dividends on the dates on which she withdraw the aforesaid amounts of money from the company. The loan or advance taken from the company may have been ultimately repaid or adjusted, but that will not alter the fact that the assessee, in the eye "of law, had received dividend from the company during the relevant accounting period."

It is therefore the additions so made by A.O. are as per the provisions and legal preposition as discussed above. But, The appellant during the course of appeal proceeding relied on Hon'ble Gujarat high court order in the case of C.I.T.-1 vs Daisy Packeres P. Ltd. in tax appeal 212 of 2010 order dt. 18/03/2012 where in Hon'ble high court considered following facts and held.

"This tax appeal has been filed by Revenue challenging the order of the Tribunal and this Court had admitted the appeal on the following question of law.

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in reversing the order of CIT(A) and thereby deleting the addition made on account of deemed dividend u/s.2(22)(e) of the Act on inter-corporate deposits?

2.0 The brief facts are that the assessee filed return of income for the Assessment Year 2000-01 declaring a loss of Rs.4,22,792/-. The return was processed under Section 143(1)(a) of the Income Tax Act, 1961 (for short 'the Act') and income of the assessee was declared under Section 115JA of the Act. Thereafter the case was reopened under Section 147 of the Act which was served on the assessee of the case of the department was that the Amigo Brushes Pvt. Ltd. had a total surplus of Rs.70 lacs as on 31st March 1999 and it has advanced a loan to the assessee to the tune of Rs.25 lacs. Whereas the assessee contended that he received deposit from Amigo Brushes Pvt. Ltd. and Daisy Packers Pvt. Ltd. was not a shareholder in Amigo Brushes Pvt. Ltd. The Assessing Officer by his order dated 30th September 2004 rejected the claim of the assessee and treated the deposits as loan and consequently deemed to be a deemed dividend under Section 2(22)(e) of the Act and accordingly computed the tax. The assessee filed appeal which was dismissed by CIT(A) on 11th May 2006. The assessee fried-Second Appeal which has been allowed by the Tribunal on 5th June 2009 and the Tribunal has hold that it was not the case of the deemed dividend and it was the case of the deposits. The Tribunal further recorded finding that it was not a loan given by Amiga Brushes Pvt. Ltd, to the assessee company and it was inter-corporate deposits. However, we need not go into various questions raised by learned counsel for the parties as admittedly the assessee was not shareholder in the Amigo Brushes Pvt. Ltd. The Division Bench of this Court in Commissioner of Income Tax vs. Ankitach (P) Ltd. [(2012) 340 ITR 14]. The Delhi High Court has held that if the assessee company does not hold a share in other company from which it had received deposit then it cannot be treated to be a deemed dividend under Section 2(22)(e) of the Act. In view of this admitted position that assessee is not a shareholder in Amigo Brushes Pvt. Ltd. and therefore, the deposit received by the assessee of Rs.25 lacs from Amigo Brushes Pvt. Ltd. was an inter-corporate deposit and not a deemed dividend and, therefore, though this aspect has not been considered by the Tribunal but since the order of the Tribunal can be supported by another legal reason on the admitted facts, we need not send the matter back.

3.0 For the aforesaid reasons, we are of the considered opinion that substantial question of law formulated by the Division Bench is to be answered in affirmative against the assessee in favour of the department.

The appellant also relied on Hon'ble Bombay high court in the case of C.I.T. central IV vs. Jignesh P. Shah (I.T. Appeal No. 197 of 2013 order dt. 20/01/2015) where in Hon'ble high court following the ratio of CIT vs. Impact containers P. Ltd. 367 ITR 346 where in it was held that section 2(22)(e) of the Act cannot be applied / invoked where the assessee is not a share holder of the lending company, held in favour of assessee, Hon'ble Bombay High-Court following Supreme Court judgement in the case of CIT vs. Vatika Township 2015 (1)SCC 1 held that "Thus on strict interpretation of section 2(22)(e) of the Act, unless the Respondent – Assessee is the share holder of the company lending him money, no occasion to apply it "can arise." The appellant also relied on Hon'ble Karnataka high court in the case of Sarva Equity P. Ltd. (2014) 214 taxmann.com 28(Karnataka) wherein on this issue, ratio of Hon'ble Delhi high court in the case of National Travels Services (supra) was considered but held in favor of assessee.

It is therefore, the question of legal binding of ratio of Hon'ble Jurisdictional high court comes into picture. Other Hon'ble high court also held in favors of assessee on the issue that provisions of section 2(22)(e) of the Act is applicable to loan & advance transaction between a company and registered shareholder and not beneficial share holder. Though, as discussed above, the basic objective as per Board circular No. 495 dt. 22/09/2008 as considered and interpreted by Hon'ble Delhi high court in the case of National Travel Services (supra) were not considered in these caw laws, but the ratio of Hon'ble Jurisdictional high court is binding on lower appellate authority, it is therefore following ratio of Hon ble Gujarat high court in the case of Daisy Packeres Ltd. (supra), it is held that the addition so made of Rs. 10159839/- by the A.O. is not justified under the provisions of section 2(22)(e) of the Act. The A.O. is directed to delete the addition so made. The appellant gets relief accordingly. This ground is treated as allowed."

6. It appears that the conditions for applying the provision of Section 2(22)(e) has been examined by the Ld. CIT(A) to this effect that when the appellant company does not hold a share in other company from which it had received deposit it cannot be treated to be a deemed dividend under Section 2(22)(e) of the Act. On this aspect the Ld. CIT(A) relied upon the order passed by the Hon'ble Delhi High Court in the case of CIT vs. Ankitech Pvt. Ltd., reported in (2012) 340 ITR 14. Reliance was also placed upon the order passed by the Hon'ble Bombay High Court in the case of CIT Central vs. Jignesh P. Shah in ITA No. 197 of 2013 where the judgment passed by the Hon'ble Apex Court in the case of CIT vs. Vatika Township (2015) (1) SCC 1 was followed. It is relevant to mention that in the said judgment the Hon'ble Apex Court has been pleased to make following observation:-

"On this interpretation of Section 2(22)(e) of the Act, unless the appellant is the shareholder of the company lending him money, no occasion to apply it can arise."

7. Apart from that the judgment passed by the Hon'ble Jurisdictional High Court in the case of CIT vs. Daisy Packers Pvt. Ltd. Tax Appeal No. 212 of 2010 while

deciding the issue in favour of the assessee the Hon'ble Court has been pleased to hold that the provision of Section 2(22)(e) of the Act is applicable for the loan and advance transaction between a company and a registered shareholder and not beneficial shareholder. Thus, relying upon the ratio laid down in all the judgments discussed above passed by the different Judicial Forum, the Ld. CIT(A) in our considered opinion rightly deleted the addition to the tune of Rs. 1,01,59,839/- made by the Ld. AO as unjustified under the provision of Section 2(22)(e) of the Act so as to warrant interference. Hence, the ground preferred by the Revenue is found to be devoid of any merit and hence, dismissed.

8. **Ground Nos. 2 & 3:-** These grounds relate to disallowance of Rs. 1,13,91,826/- made under Section 40(a)(ia) of the Act.

9. The Ld. AO considered payment of impugned amount made to five parties in respect of freight and forwarding expenses rejecting the appellant's contention that TDS is not applicable for the freight expenses to non-resident shipping agencies agent and added the same to the total income of the assessee which was, in turn, deleted by the Ld. CIT(A) with the following observation:-

> *"From the verification of such bills it has been gathered that bills are raised to appellant with composite amount reflecting freight expenses in foreign currency i.e. US dollar converted into rupees of that date with other charges like terminal handling, documentation etc. in Indian rupees. The appellant's contention that payment in foreign currency by these parties to the non resident shipping company is on account of they are being agent and permitted by RBI guide line found to be justified in view of board circular no. 723 dt. 19/09/1995 and ratio of various case laws relied on by appellant. The appellant deducted TDS out of the terminal handling charges, documentation charges etc. being paid to these parties treating them as contractual payment while payment for non resident shipping company in foreign currency by these parties is treated as reimbursement of actual expenses. Hon'ble ITAT Ahmedabad in the case of Dy. CIT Bharuch Vs. Hasmukh J. Patel (2011) 10 taxmann.com 229(Ahd) (also relied by appellant) in the similar facts held that all such parties acted as agent shipping companies and such payment in foreign currency to such non resident shipping company duly permitted by RBI Guide line has to be dealt with special provision as provided u/s.172 of the Act, hence deduction of TDS is not required u/s. 194C of the Act. The appellant's A.R. during the course of appeal proceedings further submitted that out of the composite bill of each such party including freight charges, terminal handling charges, documentation charges, container repo charges etc., the appellant deducted TDS except that from freight charges therefore if considered for a composite bill then the deficiency is of incorrect deduction of tax rather than no deduction of tax and therefore appellant cannot be held as in default u/s. 201(1) of the Act. I am inclined with t appellant that out of the total composite bill if TDS is deducted from terminal handling charges, documentation charges, container repo charges etc. as per prescribed rate u/s. 194C of the Act then the issue becomes about inadequacy/improper deduction of TDS for total amount of composite bill. In this situation the appellant cannot be*

held in default u/s. 201(1) of the Act and provisions of section 40(a)(ia) of the Act will not be applicable. It is therefore, considering the facts and judicial preposition, the A.O. is directed to allow such expenses and delete the addition so made of Rs.11391826/-. The appellant gets relief accordingly. This ground is allowed."

10. The Ld. DR relied upon the order passed by the Ld. AO while the matter was heard. However, the Ld. AR relied upon the order passed by the Co-ordinate Bench where the identical ground was decided in favour of the assessee in the appeal preferred by the Revenue. The relevant portion whereof is as follows:-

"9. These grounds of appeal relate to disallowance of freight expenses of Rs. 34,14,124/- made under section 40(a)(ia) of the Act. The Learned AO discussed payment of such amount to eight parties in respect of expenses on account of deduction of TDS upon rejecting the appellant's contention that TDS was deducted as per the provisions on the basis of evidences being photocopies of the invoices raised by these parties. However, the Learned CIT(A) while dealing with this ground observed as follows:-

"(B) Ground no. 2 is against the disallowance of freigh expenses of Rs. 34,14,124/- u/s. 40(a)(ia) of the Act. The A.O. in the impugned order considered payment of Rs. 34,14,124/- to eight parties in respect of freight and forwarding expenses (already discussed para 4A above) and rejected appellant's explanation that due TDS was deducted as per the provision s as evidenced by photo copies of invoices raised by these parties (submitted by appellant and verified by A.O.) on the amounts attributable to servicing and handling charges and not reimbursement. The A.O. also rejected appellant's contention about non application of TDS for the freight expenses to non resident shipping agencies agent. The appellant in appeal reiterated its contention with copies of su h invoices and emphasizing the fact that circular no. 723 dt. 19/09/1995 is applicable for such non resident shipping agencies and its agent since taxable u/s. 172 of the Act and no provision of section 195/194C of the Act is applicable. The appellant further relied on Hon'ble Gujarat High Court order dt. 25/06/2013 in the case of CIT-III Vs. Gujarat Narmada Valley Fertilizers company Ltd.(tax appeal no. 315 of 2013) and Hon'ble ITAT Ahmedabad order in the case of M/s. Om Satya Exim Pvt. Ltd. Vs. ITO ward-1(4), Surat (ITA no. 1335/Ahd/2010 order dt. 13/05/2011).

From the verification of such bills it has been gathered that bills are raised to appellant with composite amount reflecting freight expenses in foreign currency i.e. US dollar converted into rupees of that date with other charges like terminal handling, documentation etc. in Indian rupees. The appellant's contention that payment in foreign currency by these parties to the non resident shipping company is on account of they are being agent and permitted by RBI guide line found to be justified in view of Board circular no. 723 dt. 19/09/1995 and ratio of various case laws relied on by appellant. The appellant deducted TDS out of the terminal handling charges, documentation charges etc. being paid to these parties treating them as contractual payment while payment, for non resident shipping company in foreign currency by these parties is treated as reimbursement of actual expenses. Hon'ble ITAT Ahmedabad in the case Dy. CIT Bharuch Vs. Hasmukh J. Patel (2011) 10 taxmann.com 229(Ahd) (also relied by appellant) in the similar facts held that all such parties acted as agent of non resident shipping companies and such payment in foreign currency to such non resident shipping company duly permitted by RBI Guide line has to be dealt with special provision as provided u/s. 172 of the Act hence deduction of TDS is not required u/s. 194C of the Act. The appellant's A.R. during

the course of appeal proceedings further submitted that out of the composite bill of each such party including freight charges, terminal handling charges, documentation charges, container repo charges etc., the appellant deducted TDS except that from freight charges, therefore, is considered for a composite bill then the deficiency is of incorrect deduction of tax rather than no deduction of tax and appellant cannot be held as in default u/s. 201(1) of the Act. I am inclined with appellant that out of the total composite bill if TDS is deducted from terminal handling charges, documentation charges, container repo charges etc. as per prescribed rate u/s. 194C of the Act, then the issue becomes about inadequacy/improper deduction of TDS for total amount of composite bill. In this situation the appellant cannot be held in default u/s. 201(1) of the Act and provisions of section 40(a)(ia) of the Act will not be applicable. It is, therefore, considering the facts and judicial preposition, the A.O. is directed to allow such expenses and delete the addition so made of Rs. 3414124/-. The appellant gets relief accordingly. This ground is allowed. "
Heard the parties, perused the relevant materials available on record.

10. It is the case of the assessee that while exporting its goods, it books the container of various foreign shipping companies through their offices in India/clearing and forwarding agents (C&F) who deal with the office of such shipping compan es. In fact upon receipt of bills for freight and other related charges of shipping companies the assessee pays to clearing and forwarding agents, who in turn, make such payment to the concerned shipping companies. As it appears from the records that such bills comprise of freight in foreign currency, terminal handling charges, consolidation and documentation charges, detention charges etc. It is further the case of the assessee that the assessee has duly deducted tax at source on terminal handling charges, documentation charges etc paid to these agents. However, the payment made to the non-resident shipping company in foreign currency by such agents is reimbursement of actual expenses and thus no tax is required to be deducted at source on the same as it appears from the records which has been duly taken care of by the Learned CITA.

11. It is relevant to mention that as per CBDT circular No. 723 dated 19.09.1995 since agents acts on behalf of the non resident ship-owner he therefore steps into the shoes of the principal. Accordingly provi ion of Sec.172 shall apply and provisions of Sec.194C and Sec.195 would not apply. Having regard to the this particular aspect of the matter the Learned CIT(A) has deleted such disallowance made under section 40(a)(ia) of the Act.

12. Alternatively in the event the C&F agents have declared terminal handling charges, documentation charges etc. as income and pay tax thereon disallowance under section 40(a)(ia) is not called for. In this regard the assessee relied upon the judgement passed by the Hon'ble Delhi High Court in the case of CIT vs. Ansal Land Mark Township Pvt. Ltd. reported in 377 ITR 635(Del). In that view of the matter the order passed by the Learned CIT(A), in our considered opinion, just and proper and without any ambiguity so as to warrant interference. Thus, the order is passed in the affirmative i.e. in favour of the assessee and against the Revenue. Hence, Revenue's appeal on this ground is dismissed."

11. Except numerical differences in the absence of any changed circumstances we do not find any reason in interfering with the order passed by the Ld. CIT(A) in deciding the issue in favour of the assessee by holding the assessee is not in default under Section 201(1) of the Act and further that the provision of Section 40(a)(ia) of the Act will not be applicable in respect of the freight charges in the present facts and circumstances of the case. Finally, relying upon the judgment passed by the ITAT

Ahmedabad in the case of DCIT Bharuch vs. Hasmukh J. Patel, reported in (2011) 10 taxmann.com 229 (Ahd) wherein the identical facts, where the parties acted as agent of non-resident shipping companies and such payment in foreign currency to such non-resident shipping company duly permitted by RBI guide line in view of the special provision as provided under Section 172 of the Act we hold that in that case TDS deduction is not required under Section 194C of the Act and, thus, provision of Section 40(a)(ia) is not applicable to the facts and circumstances of the case in hand. Thus, the ground preferred by the Revenue is found to be devoid of any merit and hence, dismissed.

12. **Ground Nos. 4&5:-** These grounds are interlinked in respect of the claim of Rs. 64,568/- being depreciation on car, Rs. 26,569/- of insurance on car and interest of Rs. 44,409/- for the loan taken for purchase of the car, petrol expenses of Rs. 28,715/- and repairing expenses of Rs. 29,457/- related to the car

13. We have heard the respective parties, and we have also perused the relevant materials available on record.

The Ld. AO observed that the car was purchased in the name of the Director Shri Sanjay Bajaj. While rejecting the claim of the assessee the Ld. AO observed that only for registration the director's name was used as per the resolution passed by the appellant company whereas all the expenses including repayment of loan for that car has been incurred from the source of appellant company. Moreso, the car is reflected as an asset of the company reflecting dominion control.

The case of the assessee is this that the car is used for the purpose of appellant business as all the incidental expenses incurred by the appellant company. The appellant further relied upon the judgment passed by the Hon'ble Tribunal in the case of Vimco Synthetic Pvt. Ltd. vs. ACIT Cir.8 in ITA No. 208/Ahd/2010 where the identical claim of depreciation and incidental expenses was allowed.

It appears that the Ld. CIT(A) while partly allowing the matter observed as follows:-

> *"I am partly inclined with appellant. As per the ratio of Hon'ble ITAT Ahmedabad order dt. 06/07/2012 in the case of Vimco Synthetic Pvt. Ltd. (supra) and also in the case of Swagat Infrastructure Ltd. (2013) 37 taxmann.com 83, Hon'ble Tribunal Considered the question of ownership of assets with registration in the name of director but with dominion control with company following the ratio of Hon'ble Supreme Court decision in the case of Mysore Minerals Ltd CIT (1999) 239 ITR 775 and held that depreciation is available to appellant company if the reason for registration is submitted by appellant company, evidences to support such contention is furnished (here in the case of company resolution is submitted), funds for purchase are sourced by appellant company and the same is reflected as asset of the company. However, I am not inclined with appellant that said vehicle is exclusively used for the purpose of business of appellant. In the absence of any log book, it cannot be substantiated that said vehicle is used wholly and exclusively for the purpose of business. Hon'ble Madras high court in the case of New Ambadi Estate Pvt. Ltd. vs. State of Tamilnadu (2002) 256 ITR 64 held that:*
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> *"Onus was not on the authorities to prove that motor car expenses are for personal usage, Rather the onus lays on the petitioner, who maimed that it was not used for personal usage." Hon'ble Supreme Court in the case of CIT vs. Calcutta Agency Ltd (1951) 191TR 191 held that:*
> *"There cannot be any presumption regarding incurring of loss by the assessee since as per the settled legal proposition, the onus is on the assessee to prove that conditions for claiming the deduction are fulfilled or that an expenditure or loss has been incurred by him."*
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> *Though the A.O. has disallowed entire depreciation and incidental expenses but the provisions of section 38(2) of the Act specifically provided to handle such situation i.e. appellant can claim depreciation for the asset even if the same is partly used to the extent of proportion of its use. In the absence of any detail provided by appellant, I treat that the vehicle so purchased and registered in the name of director is partly used by appellant company for business purpose to the extent of 75% while balance 25% is used for either personal purpose of director or not wholly and exclusively for the purpose of appellant's company business. It is therefore the depreciation claim and other incidental expenses related to use of this vehicle is allowable to the extent of 75%. In respect of disallowances of interest and insurance, since it has been held that motor car was purchased from loan fund and partly used (75%) for appellant business, but such interest and insurance are for the purpose of business and essential to run the car irrespective of fact that whether it is used partly or wholly, therefore such claim are allowable in its entirety. It has been gathered that appellant claimed depreciation of Rs. 64568/-, petrol expenses of Rs. 28715/- and repair expenses at Rs. 29457/- i.e. in aggregate 122740/-. It is therefore disallowance out of it @ 25% i.e. 30658/- are upheld. The A.O. is directed to delete the balance of Rs. 92082(122740-30658). The A.O. is also directed to delete interest disallowance of Rs. 44409 and insurance expenses of Rs. 23569/-. The appellant gets part relief. These grounds are treated as partly allowed."*

14. It is also a fact that the identical issue has already been settled in favour of the assessee in A.Y. 2010-11 by the Co-ordinate Bench with following observation:-

> *"13. These ground relate to deletion of disallowance made in respect of interest and insurance expenses claimed on vehicles, and part disallowance in respect of depreciation and incidental expenses claimed on vehicle. The following expenses were disallowed by the Learned AO in respect of Toyota Corolla Altis on the ground that the said car was registered in the name of the director of the company:*

"Interest	*: Rs. 82,121/-*
Insurance	*: Rs. 23,370/-*
Depreciation	*: Rs. 1,36,000/-*
Car expenses (1/4th of total)	*: Rs. 28,9995/-"*

14. Heard the parties, perused the relevant materials available on record.

15. It is the case of the assessee that the car is reflected as an asset in the balance sheet of the company and the car loan also appears as a liability in the balance sheet of the company. Further that the company has passed a resolution for registration of the said car in the name of the director but the company has domination over the said car and the same is used wholly and exclusively for the business of the company. However, this plea of the assessee has found to be confronted by the ld.DR but he failed to bring any decision in his favour.

14. Heard the parties and perused the records. It is the settled principle of law that though cars are brought by a company the name of its director, the company is eligible for claiming depreciation on the same. In this regard, the assessee relied upon the judgement passed in the matter of CIT vs. Aravalli Finlease reported in 341 ITR 282(Guj) which we have carefully perused.

16. As we find that the Learned CIT(A) deleted additions made in respect of "Interest Rs. 82,121/-" and "Insurance Rs. 23,370/-"; However, addition in respect of "Depreciation Rs. 1,36,000/-" and "car expense Rs. 28,995/-" has been partly deleted to extent of 75% i.e. 25% which according to us is unambiguous taking into consideration of the assesses books of accounts maintained in regard to the said asset as it appears from the records and thus we uphold the same. Hence, this ground of appeal preferred by the Revenue is dismissed."

15. Thus, taking into consideration the entire aspect of the matter respectfully relying upon the order passed by the Ld. Tribunal in the absence of any changed circumstances, we do not find any reason to interfere with the order passed by the Ld. CIT(A). Thus, the ground preferred by the Revenue is found to be devoid of any merit and rejected.

16. **Ground No.6:-** Deletion of addition of Rs. 34,04,016/- made on account of under-invoicing of sales to sister concern has been impugned before us by Revenue.

17. The crux of the matter is this that during the previous year the appellant made export sales of Rs. 34,72,784/- to M/s. Bajaj Herbal FZE LLP (BHFZE) which is appellant's associated concerned. The appellant also exported similar product to third parties. The Ld. AO compared the sale prices made to the sister concern i.e. M/s. BHFZE and other such concern and tabulated the average price of sales with difference and worked out percentage of under-invoicing and its average. The Ld. AO determined that the average difference of percentage of under-invoicing is 50% made

to the sister concern rejecting the explanation of the assessee that sale price to the sister concern is as per prevailing market price of that relevant time including other factors like terms of payment, quantity supplied, debtors realization, quality of product etc.

In appeal the appellant objected the methodology adopted by the Ld. AO to work out such 50% under-invoicing on the basis of average. The appellant before the First Appellate Authority submitted the brake up export sales with comparison, sample copy of the bills of sister concern, the ledger account of the sister concern namely M/s. BHFZE and the other such concern too. The assessee objected before the appellate authority the method of comparison and estimation adopted by the Ld. AO in making such huge addition. The appellant further relied upon series of judgments where such method of comparison and estimation made by the Ld. AO has been held by the unscientific and improper. The Ld. CIT(A) while holding the issue in favour of the assessee observed as follows:-

> *"I am inclined with appellant that A.O 's method of comparison and estimation cannot be held scientific and justified. The appellant's books of accounts are audited and no such adverse comment about sales to sister concern particularly the export are mentioned by tax auditor. The A.O. without rejecting such books of account cannot estimate such under invoicing affecting the gross profit. The issue is not of any payment under section 40A(2)(b) of the Act and therefore the question of unreasonableness or excessive payment cannot applied into appellant's case. The export transaction are subject to determination of arms length price (ALP) for which A.O. neither referred the case to TPO nor he adopted any of such methodology. The comparative chart as submitted by appellant is part of this order which is got verified from the bills and also from the comparative chart enclosed by A.O. with the impugne order. This clearly reflect that A.O. has made comparison on pick and chose basis and has not taken into consideration various other factors as pointed out by appellant which is a primary requirement of doing ALP analysis. I am inclined with appellant that working of average price to find out the difference of these average price and again working out average percentage under invoicing from 3.16% to 366.32% is neither scientific nor on the basis of prescribed method but the same are conjecture and surmises. The working of 49.50% under invoicing is also an estimate with no basis. As per settled legal preposition the A.O. cannot entered in the shoes of any business man and can direct/dictate about how to conduct such business. All the export transaction are genuine and in comparison to such export to other parties of Rs. 18.88 crore the export to M/s. M/s. BHFZE is only Rs. 0.35 crore. It is important to note here that during survey proceedings u/s. 133A of the Act on 22/02/2010 no evidences reflecting such modus operandi were found. I am inclined with the ratio of various case laws relied on appellant that unless and until such export are sham transaction no addition for under invoicing can be made. It is therefore the addition so made by A.O. are not legally sustainable. The A.Q. is directed to delete the addition so made of Rs. 3404016/-. The appellant gets relief accordingly. This ground is treated as allowed."*

18. At the time of hearing of the instant appeal the Ld. Counsel also referred the order passed by the Co-ordinate Bench in assessee's own case for A.Y. 2010-11; ultimately the similar issue has been settled in favour of the assessee in the appeal preferred by the Revenue with the following observation:-

> *"32. Apart from that Assessee's exports to its sister concern for AY 2010-11 are of Rs. 2,42,67,490/- whereas AO has worked out under-invoicing of exports to a huge sum of Rs. 13,44,47,290/- i.e. almost 5.54 times of exports to sister concern shown by the assessee. We also find that the total turnover for Asst. Year 2010-11 is Rs. 16,64,10,392/- as appears at Page No. 54 of the Paper Book. After addition of Rs. 13,44,47,290/- in respect of alleged under invoicing the Gross Profit rate and Net Profit rate shall be 64,79% & 46.38% which is not possible. In fact, a survey was took place on 22.02.10 which is at the fag end of the year. The assessee are duly audited all books of accounts. After taking into consideration the entire aspect of the matter, we find the Ld. CIT(A) has rightly deleted the impugned disallowance. Hence, in the absence of any merit, we dismiss the ground raised by the Revenue."*

19. Considering the order passed by the Co-ordinate Bench in the identical issue as narrated above in the absence of any changed circumstances we do not find any reason in interfering with the order passed by the Ld. CIT(A) in giving relief to the assessee. Hence, the ground preferred by the Revenue is found to be devoid of any merit and, thus, dismissed.

20. In the result, the appeal filed by the Revenue is dismissed.

[Order pronounced in the Court on 15.07.2021]

Sd/	Sd/-
(**WASEEM AHMED**)	(**MADHUMITA ROY**)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 15/07/2020
TANMAY ***TRUE COPY***

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. संबंधितआयकरआयुक्त/ Concerned CIT
4. आयकरआयुक्त(अपील) / The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण/ DR, ITAT,
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आदेशानुसार/ BY ORDER

उप/सहायकपंजीकार (Dy./Asstt. Registrar)
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