IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI

Before Shri M. Balaganesh, Accountant Member
& Shri Amarjit Singh, Judicial Member

ITA No.380/Mum/2017
Assessment Year: 2012-13

Grand Wood Work & Saw Mills Plot no.127 E.S. Patanwal a Cross Road Gorupude Road Mumbai- 400 023 PAN **AAAFG1160F**	Vs.	**Income tax Officer-20(1)(2)** Room No.119,1st Floor Piramal Chambers, Lalbaugh Mumbai- 400 012
(Appellant)		Respondent)

&

ITA No.7556/Mum/2016
Assessment Year: 2012-13

Income tax Officer-20(1)(2) Room No.119,1st Floor Piramal Chambers, Lalbaugh Mumbai-400 012	Vs.	**Grand Wood Work & Saw Mills** Plot no.127 E.S. Patanwala Cross Road Gorupude Road Mumbai-400 023 PAN **AAAFG1160F**
(Appellant)		Respondent)

Assessee By : Shri Mandar Vaidya, Ld. AR
Revenue By : Shri Chaudhary Arun Kumar Singh, Ld. DR

Date of Hearing :13.12.2018		Date of Pronouncement :19.12.2018

O R D E R

Per Shri M. Balaganesh, Accountant Member

These cross appeals arise out of the order of the Ld. Commissioner of Income-Tax (Appeals)-32 [CIT(A)], Mumbai [in short the "Ld. CIT(A)"] in *Appeal No. CIT(A)-32/IT-182/ITO-20(1)(2)/15-16* dated 25/10/2016 against the order of assessment framed u/s 143(3) of the Income Tax Act,1961 [hereinafter referred to as "the Act"] dated 23/03/2015 by the Income Tax Officer-20(1)(2), Mumbai [hereinafter referred to as "the Ld. AO"] for the Assessment Year [AY] 2012-13.

2. First let us take up assessee appeal in ITA No.380/ Mum/2017. At the outset, the Ld.AR of the assessee brought to our notice that though the registry has issued defect notice stating that there is a delay of 362 days in filing of appeal before this Tribunal by the assessee, effectively there was no delay at all in as much as the date of communication of the order of Ld. CIT(A) was wrongly mentioned in the original form 36 as 22/11/2015 instead of 22/11/2016. He also drew our attention to page No. 87 of the paper book explaining the same in the form of a letter addressed to the Registry. We have gone through the same and find that there is no delay in filing of appeal by the assessee in the instant case.

3. The first issue to be decided in this appeal is as to whether the Ld. CIT(A) was justified in upholding the addition in the sum of Rs.17,11,818/- u/s 41(1) of the Act in respect of liability written back pertaining to dues payable to Bombay Port Trust (in short "BPT").

4. The assessee is a registered partnership firm carrying on warehousing business under the name and style of M/s. Sankalchand Amritalal Parekh and also engaged in manufacturing of wooden articles for the use of textile industry under the name and style of M/s Grand Wood Works & Saw Mills. The income derived from these two activities were offered by the assessee as business income. The assessee has obtained warehousing license from Municipal Corporation of Greater Mumbai and carrying on warehousing business since last several years. The assessee is a tenant of BPT. The assessee is liable to pay rentals in respect of premises taken on lease to BPT. BPT increased the rentals which was subject matter of litigation for AY 1990-91,91-92 & 92-93. However, the assessee in the past, has provided for the incremental rentals payable to BPT and claimed the same as deduction in the returns filed for AY 1990-91,91-92 & 92-93. This was disallowed by the Ld. AO. The rentals were ultimately fixed at a particular price by the Hon'ble Supreme Court vide its order dated 13/01/2004. But the dispute in income tax proceedings regarding the allowability of rentals which were made only on a provisional basis but not actually paid to the tenant were pending before the Hon'ble Bombay High Court. Pursuant to order of the Hon'ble Apex Court fixing the rentals payable to BPT, the Hon'ble Bombay High Court in ITA No. 838 & 839 of 2000 dated 04/09/2008 held that the assessee is entitled for deduction only to the extent of rent ultimately fixed by the Hon'ble Apex Court. This decision was rendered by the Hon'ble Bombay High court pursuant to the appeal

preferred by the Revenue before Hon'ble Court against the order of Tribunal wherein, relief was granted to the assessee. The giving effect order to this High Court order was passed by the Ld. AO on 30/03/2009 which are enclosed in Page Nos. 52 to 54 of the paper book.

5. During the year under consideration, the assessee wrote back the liabilities representing incremental rentals payable to BPT in the sum of Rs.17,11,818/- (Rs.5,96,358/- pertaining to Grand wood Works and Saw mills and Rs.11,15,459/- pertaining to Sankalchand Amritalal Parekh as stated supra) and credited the same to its profit and loss account. The assessee in the return of income filed for the AY 2012-13 reduced this sum of Rs.17,11,818/- in the computation of income on the ground that for the earlier years, the incremental rentals were not allowed as a deduction pursuant to giving effect order passed for order of Hon'ble Bombay High Court dated 30/03/2009. The Ld. AO ignored the giving effect order passed by his predecessor pursuant to High Court order and simply proceeded to add the sum of Rs.17,11,818 /- of the Section 41(1) of the Act on the ground that the Tribunal had granted relief to the assessee and hence assessee cannot be given double benefit for the very same amount. This action of the Ld. AO was upheld by the Ld. CIT(A). Aggrieved, the assessee is in appeal before us.

6. We have heard the rival submissions. From the facts narrated above, we find that the assessee is entitled for deduction of Rs.17,11,818/- as an item to be reduced from computation of total

income. We find that the lower authorities had erroneously proceeded on the ground that assessee was granted relief by this Tribunal vide order dated 31/03/1994 for AY 1990-91,91-92 & 92-93 in respect of provision made for incremental rentals. But the lower authorities had grossly erred in not considering the giving effect order to High Court order passed by the Ld. AO on 30/03/2009 wherein, ultimately the assessee was denied the benefit of deduction towards provision for incremental rentals as the increased rentals were determined at a particular figure by Hon'ble Apex Court vide its order dated 13/01/2004. We hold that there is no double benefit claimed by the assessee in the facts of the instant case as narrated above. Moreover, we hold that the provisions of Section 41(1) of the Act could be invoked only if deduction for the very same sum has been allowed in earlier years for the assessee, which in the facts of the instant case, was not granted vide order of Ld. AO dated 30/3/2009. Accordingly, we direct the Ld. AO to delete the addition made in the sum of Rs.17,11,818/- u/s 41(1) of the Act and allow the ground No.1 raised by the assessee.

7. The next ground to be decided in this appeal is as to whether the Ld. CIT(A) were justified in upholding the disallowance of Rs.2,04,186/- in respect of sales promotion expenses in the facts and circumstances of the case. The Ld. AO observed that from the details of sales promotion expenditure furnished in the course of assessment proceedings, the assessee had debited the sum of Rs.2,04,186/- towards sales promotion expenses in its

warehousing business. From the details submitted by the assessee, the Ld. AO observed that this expenditure of Rs. 2,04,186/- pertains to purchase of Gold and Silver which were given to various customers for promoting its business. The assessee also pleaded that the warehousing receipts derived by it were offered tax as income from business and that the said sales promotion expenditure were incurred in order to promote the said business and to invite new customers for its warehousing activity. The Ld. AO held that this sum of Rs.2,04,186/- incurred towards sales promotion as representing purchase of Gold and Silvers has got nothing to do with the warehousing activity of the assessee accordingly proceeded to disallow the same. This action of the Ld. AO was upheld by the Ld. CIT(A). Aggrieved, the assessee is in appeal before us.

7.1. We have heard the rival submissions. We find from the Consolidated Manufacturing, Trading, Profit and Loss Account for the year ended 31/03/2012 relevant to AY 2012-13, net sales derived from manufacturing of wooden articles were only Rs.93,029/- and closing stock of Rs.89,619/-. The warehousing receipts during the year was Rs.79,41,384/-. Apart from this, the assessee had reflected interest income on fixed deposits of Rs.5,95,014/- and liabilities no longer required written back to the tune of Rs.17,11,818/- by way of credit to the Profit and Loss Account. The Ld. AR argued that sales promotion expenditure incurred by the assessee in the past were duly allowed as deduction and hence there is no reason for the revenue to take a

divergent view during the year under consideration. We find that this argument of the Ld. AR is not acceptable in as much as, during the year under consideration, the assessee had purchased Gold and Silver for allegedly giving the same to its customers to the tune of Rs.2,04,186/- and debited the same in its warehousing business. We do not have any details before us to ascertain whether similar items of expenditure in the form of purchase of Gold and Silver were incurred in the past and whether the same were allowed as revenue expenditure by the department for the earlier AY. Hence we have to look at this issue in isolation based on the material available on record. It is not in dispute the assessee had duly produced the bills for incurrence of purchase of Gold and Silver to the tune of Rs.2,04,186/-. But we find that the assessee had not established the nexus between the incurrence of this expenditure vis-à-vis the warehousing revenue derived by it. Hence, we hold that the lower authorities were justified in disallowing this claim of Rs.2,04,186/- towards sales promotion expenses. Accordingly, the ground No. 2 raised by the assessee is dismissed.

8. The ground No.3 raised by the assessee is general in nature and does not require any specific adjudication.

9. In the result, the appeal of the assessee is partly allowed.

10. Let us come to revenue appeal in ITA No.7556/Mum/2016 the only issue to be decided in this appeal is as to whether the rental income derived from the warehousing activities of the assessee is to be brought to tax under the head income from business or under

the head income from house property in the facts and circumstances of the case. The interconnected issue involved therein is with regard to violation of provisions of Rule 46A of the Income Tax Rules by the Ld. CIT(A) by not affording an opportunity to the Ld. AO while granting relief to the assessee in respect of this issue. We find that the impugned issue is fairly covered in favour of the assessee in its own case by the order of this Tribunal for AY 2010-11 in ITA No.206/Mum/2015 dated 22/06/2017. The said order is reproduced page No. 93-96 of paper book herein under: -

> *This appeal by Revenue under section 253 of Income Tax Act is directed against the order of Commissioner of Income Tax (Appeals)-29 [CIT(A)-29, Mumbai] dated 10-10-2014 for the AY 2010-11. For this Revenue has raised following grounds of Appeal: -*
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> > *"1. on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not allowing AO to examine the facts produced before him to treat warehouse rent income of Rs.62,56,664/- under the head business income & allowed all the expenses".*
> > *2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deciding warehouse rent income under the head business income and allowed all expenses even when prerequisite to Rule 46A of the I. T. Rules were not in existence and without affording specific opportunity to the AO as required under Rule 46A.*
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> *2. We have heard the rival submissions of Ld representatives both the parties and perused the material available on record. At the outset, of the hearing the learned AR of the assessee argued that the grounds of appeal raised by Revenue in the present appeal is squarely covered in favour of assessee and against Revenue in assessee's own case for AY 2007-08 in ITA No. 785/Mum/2012 dated 28-10-2015. On the other hand, the learned DR for Revenue not disputed the contention of the learned AR of the assessee.*
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> *3. We have considered the rival submissions of ld representatives of both the parties and perused the order of co-ordinate Bench in assessee's own case for AY 2007-08. We have seen that the Revenue has raised identical ground of appeal for AY 2007-08 and the co-ordinate Bench of Tribunal passed the following order in Para 4 which reads as under: -*

"4. After considering the facts on record and the rival contentions put forward before us, we observe that the assessee is not merely letting out its premises for warehousing but were doing complex commercial activity. All the duties cast upon the assessee was responsible for ensuring the incoming and, outgoing of goods apart from providing adequate security. The consideration received by the assessee from client is not for letting the property on rental basis but the consideration received is exclusively for providing the benefits of business service facilities to the client. The assessee is not providing warehousing sex-vice to one or two fixed customers. There is number of customers to whom warehousing service is provided. Apart from that the godwown control of the assessee; customer had no right of occupancy. As per the definition of business u/s 2(13) of the Act, business include adventure or concern in the nature of trade. The word adventure' implies a calculative risk and systematic pattern and operation involved in a trade or practice that will fulfil the instant' case of the assessee. It is providing round the clock service to the clients from various aspects from letting out of goods, their security etc. will definitely fall within the purview of business income. We also find from the order of the id. CIT(A) that the A.O. has accepted the claim of the assessee and treated the income as business income in assessment years 2005-06 & 2006-07. Therefore, we sustain the order of the Id. CIT(A) treating the assessee's income as business income. This ground of the Revenue is, therefore, dismissed.

5. In ground No. 2, the Revenue is aggrieved by the decision of id. CIT(A) in allowing the income of the assessee as business: income and also allowing all the expenses by violating Rule 46A of the Income Tax Rules, 1962.

6. Rule 46A provides that whenever some additional evidence is accepted by the id. CIT(A), then he must give an opportunity to the A.O. for cross examination or those evidences and or clarification of the genuineness of such evidences put forward. That in the present case, the id. CIT(A) in his entire order, we do not find anywhere in accepting any additional evidences. The Ld. D.R. also failed to show us any additional evidences which were the ld. CIT(A). Thus, when it is a fact on record that the Id. CIT(A) has not accepted any additional evidence, is no question of violation of Rule 46-A by the ld. CIT(A). Therefore, this ground of the Revenue is also dismissed". Considering the above refer decision of the Tribunal, we find that the grounds of appeal raised by Revenue are squarely covered against the Revenue. The facts of the present and grounds of appeal raised by Revenue are exactly identical. By considering the above appeal in assessee's own case, we do not find any merit in the appeal raised by the Revenue. Hence, we dismiss the same.

4. In the result, appeal of Revenue is dismissed.

11. Since the ground raised during the year under consideration and the grounds raised by the revenue for AY 2010-11 supra are similar, the above decision rendered by this Tribunal for AY 2010-11 would apply Mutatis Mutandis to the facts of the instant case. We also find that no additional evidences were filed by the assessee before Ld. CIT(A) and hence there could not be any violation of provisions of Rule 46A of the Rules as contended by the revenue in its grounds.

11.1. Respectfully following the aforesaid decision, the grounds raised by the revenue are hereby dismissed.

12. To sum up, the appeal of the assessee is partly allowed and appeal of the revenue is dismissed.

Order pronounced in the open court on this day of 19th December, 2018.

Sd/-	**Sd/-**
(Amarjith Singh)	**(M. Balaganesh)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated : 19th December, 2018
***** Thirumalesh

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'B' Bench, ITAT, Mumbai

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai