Mumbai International Airport P. Ltd, ... vs Addl Cit Rg 8(2), Mumbai on 30 November, 2016

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

Before Shri Mahavir Singh, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA NO.3232/Mum/2012
Assessment Year: 2008-09

Addl. CIT 8(2), R.No.216-A, Aayakar Bhavan M.K. Rd. Mumbai	Vs.	Mumbai International Airport P. Ltd. / 3rd Floor, Corporate Centre, Opp. Hotel, Lotus Suites, Moral Pipeline, Andheri Kurla Rd. Golden Beach Ruiya Park, Juhu Mumbai-400049
(Revenue)		(Respondent)
		P.A. No.AAECM6285C

ITA NO.2760/Mum/2012
Assessment Year: 2008-09

Mumbai International Airport P. Ltd. 3rd Floor, Corporate Centre, Opp. Hotel, Lotus Suites, Moral Pipeline, Andheri Kurla Rd. Golden Beach Ruiya Park, Juhu Mumbai-400049	Vs.	Addl. CIT 8(2), / R.No.216-A, Aayakar Bhavan M.K. Rd. Mumbai
(Appellant)		(Revenue)
		P.A. No. AAECM6285C

Revenue by	Shri N.P. Singh (CIT-DR)
Assessee by	Shri Vijay Mehta (AR)

/ Date of Hearing : 6/09/2016

/Date of Order: 30/11/2016

/ O R D E R

Per Ashwani Taneja (Accountant Member):

These cross appeals have been filed against the order of Ld. Commissioner of Income Tax(Appeals) -17 Mumbai, {(in short 'CIT'}, dated 28.02.2012 passed against the assessment order of the AO u/s 143(3) dated 29.12.2010 for A.Y. 2008-09.

2. During the course of hearing, arguments were made by Shri Vijay Mehta, Authorised Representative (AR) on behalf of the Assessee and by Shri N.P. Singh, Departmental Representative (CIT-DR) on behalf of the Revenue.

3. First we shall take up appeal filed by the revenue in ITA No.3232/Mum/2012 filed on following grounds:

1."On the facts and in the circumstance of the case and in law, the learned CIT(A) erred in deleting the disallo wance of Rs.74,01,325/- incurred oil of perime ter road, treated by the A() as capital expenditure, without considering the fact that the entire expenditure has been incurred for complete renovation and replacement of old assets".

2."On the facts and in the circumstance of the case and in law, the learned CIT(A) erred in deleting the disallowance of refurbishment expenses in the nature of civil works amounting to Rs.24,24,34,541/treated by the AO as capital expenditure, without considering the fact that the entire expenditure has been incurred for renovation, expansion and modernization of the Airport".

3."On facts and in the circumstance of the case and in law, the learned CIT(A) erred in deleting the addition of Rs.4,43,32,547/- made by the AO u/s. 40(a)(ia), without appreciating that the assessee was liable to deduct tax tinder various sections i.e. 194J, 194C and 195 but had failed to do so".

4."On the facts and in the circumstance of the case and in law, the learned CIT(A) erred in deleting the addition of Rs.4,43,32,547/- made by the AO u/s. 40(a)(ia), without appreciating that the assessee's tax auditors had pointed out that the said amount is disallowable".

5."On facts and in the circumstances of the case and in law, the Ld. CIT(A), erred in deleting disallowance of 25% depreciation on fees of Rs.150 crores, without considering the fact that the assessee has not acquired any absolute rights over the Airport, SO as to equate it with a license, but instead of the AAI has

granted the assessee the right to perform certain functions during the contract period of 30 years and hence, the assessee is entitled for deduction of only [lie proportionate amount i.e.. 1/30th of Rs.150 crore".

6."On facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the disallowance of interest of Rs.35,10,000/- (Rs.39,00,000 - 10% depreciation thereon 35,10,000/-) treated by the AO as capital expenditure, without considering the fact that the assessee had failed to substantiate that interest has been properly capitalized with the cost of each asset till the date of putting it to use and hence the AO was justified in holding that 50% depreciation only is allowable on proportionate interest attributable to assets installed during the second half of the previous years."

7."On facts and in the circumstance of the case and iii law, the CIT(A) erred in deleting the disallowance of legal & professional charges of Rs.1,72,98,000/- (Rs.1,92,00,000 - 10% depreciation thereon =1,72,98,000/-), without considering the fact that the AO was justified in allocating / apportioning 10% of the said total expenditure of Rs. 19,20,00,000/- to capital work in progress and allowing depreciation thereon".

4. Ground No.1: In this ground, the Revenue has contested the action of Ld. CIT(A) in deleting the disallowance of Rs.74,01,325/- incurred by the assessee on the strengthening

of perimeter road which was treated by the AO as capital expenditure.

4.1. The brief background of the issue is that as noted in the assessment order, during the year under consideration, the assessee company was engaged in the business of providing service of an Airport operator. The assessee company had taken over the operation of Mumbai Airport i.e. Chhattrapati Shivaji International Airport w.e.f. 03.05.2006. During the course of assessment proceedings it was noted by the AO that assessee had claimed deduction of Rs.74,01,325/- as revenue expenditure incurred towards operation and management of the Airport. It was submitted by the assessee that the said expenditure was incurred towards strengthening of the perimeter road of the Airport premises. The AO observed that impugned expenses were actually part of capital work in progress and that work done on perimeter road was meant for complete renovation of the old assets and therefore it cannot be treated as revenue expenditure. It was also observed that assessee should not have adopted different positions for the income tax purposes and for accounting purposes. In view of all these reasons, this amount was disallowed.

4.2. Being aggrieved, the assessee filed appeal before the Ld. CIT(A) wherein detailed submissions were filed. The submissions made by the assessee can be summarized as

under:

i. The expenditure of Rs.74,01,325/- on strengthening of perimeter road was to maintain, preserve an existing asset,

ii. No new asset has been created,
iii. No advantage of enduring nature has been obtained,
iv. The expenditure has been incurred to upkeep, preserve and maintain the existing assets,
v. The asset was already in use earlier but because of its wear and tear with the passage of time needed repairs,
vi. The question of allowability of a particular expenditure either as capital or revenue has to be judged independently and its capitalization in the books of account has no bearing on the claim of the said expenditure as revenue,
vii. One of terms and conditions of the OMDA is in respect of maintenance of the assets of the airport and for its overall upkeep.

4.3. Ld. CIT(A) considered the order of the AO as well as detailed submissions made by the assessee and decided the issue in favour of the assessee by holding it to be revenue expenditure. It was held by the Ld. CIT(A) that the impugned expenses related to 'repair of the perimeter road' which was only for maintaining an existing asset and did not result into creation of a new asset.

4.4. Being aggrieved, the Revenue brought the matter before the Tribunal. During the course of hearing, both the parties unanimously submitted that identical issue in A.Y. 2007-08 had reached before the Tribunal and there is no distinction in facts or legal position and therefore, the decision of the Tribunal in earlier year can be applied in this year also.

4.5. We have gone through the orders passed by the lower authorities as well as decisions of the Tribunal for the earlier years. It is noted that in A.Y. 2007-08 also the assessee had made claim of the Tribunal expenses on renovation on perimeter road of the Airport premises and claim was made in the similar fashion by capitalizing same in the books of account, but claimed the same as revenue expenditure in the income tax return. The Tribunal vide its order dated 14.02.2014 in ITA No.7111/Mum/2011 decided this issue in favour of the assessee by holding that these expenses are revenue in nature and cannot be treated as capital in nature merely because the assessee in its books of account had given treatment of it as capital in nature. The relevant part of observations of the Tribunal reproduced below:

"We have carefully considered the orders of authorities below and the submission of ld. Representatives of the parties. We observe that the authorities below have considered the said expenditure as capital mainly for the

reasons that the assessee itself has categorized that expenditure in its books of account as capital in nature. In determining whether the expenditure is a capital expenditure or revenue expenditure, one has to take into consideration the facts and nature of expenditure to decide whether it is made for the initiation of business or extension of business or substantially replacement of existing equipment and treatment given in books of accounts could not decide the nature of expenditure. The expenditure would be capital if the expenditure has been incurred to create new assets. However, it will be revenue in nature, if incurred merely in facilitating assessee's operation or enable assessee's business to be carried on effectively, while leaving capital untouched. The similar view is taken by the Hon'ble Apex Court in the case of CIT V/s Associated Cement Companies Ltd. (1988) 172 ITR 257 (SC). If the expenditure incurred does not bring into

existence any new assets but only facilitate operation to ensure that the existing runway is maintained properly ensuring safety of the Aircraft or passenger and also Airport premises and no new asset has come into existence the expenditure is revenue in nature. We are of the considered view that it cannot be said that by incurring the expenditure details given hereinabove, a new asset has come into existence giving rise to the assessee of enduring benefits. There is no dispute to the fact that the said runway /Airport premises does not belong to assessee but belong to "AAI" and the assessee is required to maintain the same under "OMDA". We are of the considered view that the said expenditure has been incurred by assessee only for the purpose of carrying out its one of the object to renovate and/or repair existing runway. The Hon'ble Bombay High Court in the case of New Shorrock Spg. & Mfg. Co. Ltd. V/s CIT (1956) 30 ITR 338 (BOM.) has held that the "the expression "current repairs' means expenditure on building, machinery, plant or furniture which is not for the purpose of renewal or restoration but which is only for the purpose of preserving and maintaining an already existing asset which does not bring new asset into existence or does not give the assessee new or different advantage. We observe that the said expenditure has been incurred only for resurfacing the layer of the runway and to put new tiles to replace floors. Therefore, it cannot be said that expenditure is in the nature of capital as it does not bring into existence any new asset, leaving aside the fact that the said runway /premises is not owned by assessee. No doubt, the assessee is to redesign, upgrade, modernize and also to operate and maintain Airport but the expenditure under consideration has been incurred only to ensure that the existing assets continued to be used for use safely and as

per norms to enable assessee to run its activity. Hence, we are of the considered view that the said expenditure is incurred to facilitate of carrying on by the assessee its main business for which the assessee has been engaged and pending the expansion of the Airport etc. Hence, we hold that the said expenditure is revenue in nature and cannot be said to be capital in nature irrespective of the fact that the assessee in its books of account has given

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treatment of it as capital in nature. We may state that the assessee will not be entitled for depreciation thereon as it is held to be revenue in nature. Hence, Ground No.1 of the appeal taken by assessee is allowed."

4.6. During the course of hearing before us no distinction has been made out on facts or law by the either party. Rather, it was fairly agreed that issue is covered with earlier year's decision. We also find that facts are same. The nature of expenses is also same. Therefore, respectfully following the decisions of the tribunal for A.Y. 2007-08, the impugned expenses are held to be allowable as revenue expenditure. Thus, no interference is called for in the decision of the Ld. CIT(A) and therefore, same is upheld in view of detailed and well reasoned findings of the Tribunal for A.Y. 2007-08. Thus, Ground No.1 is dismissed.

5. Ground 2 : In this ground, the Revenue has challenged the action of the Ld.CIT(A) in deleting the disallowance of refurbishment expenses in the nature of civil works amounting to Rs.24,24,34,541/- which was treated by the AO as capital expenditure.

5.1. It was noted by the AO during the course of assessment proceedings that the assessee had claimed deduction of aforesaid expenses as revenue expenses on account of refurbishment expenses of Terminal 1A and 2C of the Airport. It was further noted that in the return of income it was stated by the assessee that though these expenses were capitalised in the company's books of account, however, in the return of income, these expenses have been claimed as revenue expenses. It was explained by the assessee that these expenses were in the nature of civil works undertaken to

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improve the aesthetics of these terminals. The assessee submitted detailed explanation to justify the same as revenue expenses but the AO was not satisfied and disallowed the claim. Being aggrieved, the assessee filed appeal before the CIT(A) wherein detailed submissions were filed. Ld. CIT(A) accepted the submissions of the assessee and decided this issue in favour of the assessee by treating these expenses as revenue expenses and, therefore, disallowance made by the AO was deleted. Thus, aggrieved, the revenue is before us.

5.2. It has been submitted by the Ld. DR that the order passed by Ld. CIT(A), while deciding this issue in favour of the

assessee is highly cryptic and unreasoned and, therefore, in absence of proper reasoning on the part of the Ld.CIT(A), this issue deserves to go back to the file of lower authorities for de novo adjudication.

5.3. Per contra, the Ld. Counsel of the assessee submitted that the findings of the Ld. CIT(A) are not cryptic, if the final conclusion of the Ld.CIT(A) is read along with the analysis made by him in his order at pages 40-41. It was thus submitted that last part of the order available on page 421 of Ld. CIT(A)'s order should be read along with earlier pages containing detailed discussion on this issue. It was further submitted that this issue was raised by the AO in A.Y. 2007-08 also wherein it has been finally decided by the Tribunal in favour of the assessee. Reliance was also placed on the judgment of the Hon'ble Bombay High Court in the case of CIT vs Chowgule & Co 214 ITR 523 (Bom) and Hon'ble Rajasthan High Court in the case of CIT vs Hindustan Zinc Ltd 322 ITR

478 (Raj). Ld. Counsel also relied upon various judgments discussed in the written submissions filed before the Ld. CIT(A) which have been narrated by the Ld.CIT(A) in his order. It was further submitted that original return in this case was filed on 30-09-2008 and the revised return was filed on 31-03-2010. Thus, revised return was filed within the time limit allowed as per law. The revised return was accepted by the AO and, therefore, the claim was made by the assessee in accordance with law and thus, the Ld. CIT(A) has rightly allowed the same after considering the entire facts and evidences on record, and in any case this issue was covered in favour of the assessee on the basis of judgement of the Tribunal for A.Y. 2007-08.

5.4. We have gone through the orders of the lower authorities and submissions made by both the sides. It is noted that the primary reason given by the AO for disallowance was that since the assessee has made this claim by filing revised return of income, therefore, it shows that it was an afterthought claim on the part of the assessee. It was further objected to by the AO that the assessee should not have adopted different stands for income-tax purposes and for accounting purposes. It was also observed by the AO that since the assessee was responsible only for the development of new airport therefore, most of the expenses incurred under this head were capital in nature.

5.5. Per contra, the justification given by the assessee was that the expenditure was made to meet the aesthetics of the existing operating terminals. Further, the expenditure was to

maintain and preserve an existing asset and no new asset was created. It has also been contended that no advantage of enduring nature has been obtained by the assessee and more so, when the premises in question did not belong to the

assessee. The asset was already in use, but because of its wear and tear with paucity of time it needed repairs. It was also strongly contended that the issue of characterization of an expense as revenue expenditure or capital expenditure has to be done independently, irrespective of its treatment in its books of account of the assessee. Further, since one of the terms of the agreement under which the assessee was operating was in respect of maintenance of the assets of the airport and for its overall upkeep, therefore, the assessee was committed to incur these expenses on regular basis and, therefore, this cannot be treated as capital expenditure.

5.6. It is noted that with regard to similar issue decided by the Tribunal in A.Y.2007-08, we have already decided the issue in favour of the assessee by respectfully following the order of the Tribunal in the case of Reliance Ports Terminals Ltd in ITA Nos.1743,1744 and 1745/Mum/2007 order dated 26-11-2007. The details of expenditure allowed by the Tribunal in A.Y. 2007-08 have been given at page 25 of the order of the Tribunal for A.Y. 2007-08. On the other hand, the details of expenses and the heads under which these expenses in the impugned year have been incurred have been extracted by the Ld. CIT(A) on page 26 of the order passed by the Ld.CIT(A). It is noted that the expenses incurred are of similar nature and pattern. The other conditions i.e. no creation of new asset and

no benefit of enduring nature also remain the same. This fact is not disputed that the concerned premises or building or the structures did not belong to the assessee company. Since the Tribunal has already taken a view by holding the same as revenue expenditure, respectfully following the same, the expenses under consideration should also be held as revenue expenses. Thus, we find that Ld. CIT(A) has rightly held these expenses as revenue expenditure. Thus, respectfully following the order of the Tribunal for A.Y.2007-08, no interference is required in the order of the Ld. CIT(A) and the same is upheld. Ground No.2 is dismissed.

6. Grounds 3 & 4 : In this ground, the Revenue has challenged the action of Ld.CIT(A) in deleting the addition of Rs 4,43,32,547 made by the AO u/s 40(a)(ia) for the reason that the assessee failed to deduct tax at source under various sections, i.e. section 194J, section 194C as well as section 195.

6.1. During the course of assessment proceedings, the AO observed from the tax audit report that auditors had identified various items of inadmissible expenditure u/s 40(a)(ia) of the Act. One of the items identified for the disallowance was provision for expenditure of Rs.4,43,32,547/- on which tax was not deducted at source by the assessee. The assessee was asked to furnish item-wise details of such provisions with actual date of payment. The assessee furnished list of such expenses as well as explanation for non deduction of tax at source. But the AO in the assessment order held that the

entire expenditure was liable for deduction of tax at source

under various sections, viz. 194C, 194J and 195, and since the assessee failed in deducting tax at source, the AO disallowed the provision for the expenditure.

6.2. Being aggrieved, the assessee filed appeal before the Ld. CIT(A). The assessee filed detailed written submissions before Ld. CIT(A) wherein it was inter-alia submitted that these expenses were provided for in the book of account on best estimate basis. No invoices were raised, quantum of expenditure was not definitely ascertained, and therefore amount of expenses was claimed on most conservative basis. Since invoices were not raised, neither any credits nor any payments were made in the name of any particular vendor, therefore, provisions of section 40(a)(ia) of the Act were not applicable since tax was not required to be deducted on the amount of this provisional expenditure. The assessee also filed detailed written submission stating that since liabilities had been not been properly identified, provisions of TDS were not applicable and thus, no TDS was made. Ld. CIT(A) accepted the submissions of the assessee and deleted the disallowance made by the AO. Being aggrieved, the Revenue is in appeal before us.

6.3. It has been contended before us by the Ld. DR that the Ld. CIT(A) while adjudicating this issue has neither applied his mind nor made any analysis of the facts and provisions of the Act and the disallowance was deleted by passing a highly brief and cryptic order in just 6-7 lines. No proper reasoning has been given nor has any details with regard to aforesaid expenses been discussed by the Ld. CIT(A) in his order.

Therefore, this issue should be sent back to the file of the Ld. CIT(A) for proper analysis and adjudication.

6.4. Per contra, the Ld. Counsel submitted that these expenses were on account of 'year-end provisions' and details were submitted to the AO showing head-wise provisions. In subsequent years, whenever the amount was paid, TDS was deducted and provision was reversed. It was also submitted that every year similar practice is followed. In A.Y. 2007-08 also similar practice was followed but no disallowance was made.

6.5. We have gone through the submissions made by both the sides. The case of the assessee is that the impugned amounts represented mere provisions and, therefore, these could not have been properly quantified and further, even names of the payees were not clear. Therefore, no TDS could be deducted in the year under consideration.

6.6. It is noted from the perusal of the order of the Ld. CIT(A) that he has simply accepted the claim of the assessee by stating that the assessee had made only provision and the Ld. Counsel of the assessee had submitted that in the next year

when payments were made against the provisions , TDS was deducted and thus disallowance made by the AO was also deleted. We find that, unfortunately, the order of the Ld. CIT(A) on this issue is devoid of factual analysis or proper reasoning. Ld. CIT(A) has not even discussed the details of the expenses for which provision was made by the assessee which has been disallowed by the AO. Nothing has been discussed about the nature of the expenses, position of crystallisation of

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these expenses, availability of particulars of the payees, etc. It has been observed in the order by Ld. CIT(A) that whenever payments are actually made against these provisions, TDS is deducted as was stated by the Ld. Counsel. But, what are the precise facts in this regard has not been discussed in the order. No details are available or discussed by the Ld.CIT(A) regarding various aspects, e.g. when these expenses were actually incurred, in whose name these are finally credited, who are the actual payees, when the payments were made actually and whether the TDS was deducted at the time of making of payments or not? Nothing has been brought out on record to ensure that finally there was no revenue leakage and full compliance of the TDS provisions was made ultimately. We find that order of Ld. CIT(A) is devoid of any factual narration and, therefore, we find it appropriate to send this issue back to the file of the CIT(A) for complete factual analysis and thereafter applying the correct position of law. Ld. CIT(A) shall provide adequate opportunity of hearing to the assessee. The assessee shall also extend requisite cooperation to the Ld. CIT(A) by filing necessary details / evidences so as to bring complete facts on record. With these directions, this ground may be treated as allowed for statistical purposes.

7. Ground 5 : In this ground, the Revenue has challenged the action of Ld. CIT(A) in deleting the disallowance of 25% depreciation on upfront fees of Rs.150 crores without considering the fact that during the course of assessment proceedings it was noted by the AO that in the depreciation schedule attached to the tax audit report it was observed that

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assessee had treated upfront fee paid to the Airport Authority of India in terms of the agreement as an intangible asset and claimed depreciation of Rs.28,12,50,000 on the opening WDV of Rs.112.50 crores.

7.1. It was noted by the AO that in the assessment year 2007-08 also similar claim was made which was disallowed by the AO, and thus he made similar disallowance in the present year also.

7.2. Being aggrieved, the assessee filed appeal before the Ld. CIT(A) wherein exhaustive submissions were made, and the Ld.CIT(A) found that similar issue has been allowed by him in favour of the assessee company in A.Y. 2007-08 and therefore, following the order for A.Y. 2007-08, the claim of the assessee

was allowed.
7.3. During the course of hearing before us, common point stated by both the parities was that this issue stands covered with the order of the Tribunal for A.Y. 2007-08, and no distinction was made out on facts or law.
7.4. We have gone through the orders of the lower authorities as well as the order of the Tribunal for A.Y. 2007-08 and find that the Tribunal has already decided this issue in favour of the assessee vide its order dated 14-02-2014 with the following observations:

> "We have carefully considered the orders of authorities below and submissions made by Ld. Representatives of the parties. We have also considered the relevant Articles of "OMDA" and the cases relied upon by the parties before the authorities-below (supra) as well as the cases referred before us.
> 10.1 The assessee is a Joint Venture company. it has entered into an agreement with "AAI" and under the
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agreement i.e. "OMDA", the assessee has been granted exclusive right, and authority to undertake some of the functions of "AAI" being functions of operation, maintenance; development, design, construction, up gradation, modernization, finance and management of Airport for an initial term of 30 years, which is extendable for a further period of 30 years on the same terms and conditions as applicable for the initial period, as per Article 18.1 of 'OMDA". Under the terms and conditions of OMDA", the assessee paid a sum of Rs.150 crores to "AAI" as upfront fee m described under Article 11.1.1 of Chapter-XI of "OMDA" which is reproduced as under:
"11.1.1 Upfront Fee
The JVC shall pay to the "AAI" an upfront fee (the 'Upfront fee") of Rs150 crores (Rupees one hundred and fifty crores only) on or before the Effective date. It is mutually agreed that this Upfront fee is non-refundable (except on account of termination of this agreement in accordance with Article 3.3 hereof and payable only once during the term of this Agreement"
Besides, above payment, the assessee is also to pay Annual Fees as per Article 21.1.2.1 for each year during the terms of the agreement. By virtue of above one-time payment of upfront fee of Rs.150 crores, the assessee has been given exclusive right and authority to collect payment of various nature from the users of Airport premises as per Article 2.1.2(iii) of Chapter-II, subject to the Regulations prescribed under Chapter -XII. The question arises as to whether the assessee has got the lease right or license by making this one-time payment of Rs.150 crores to "AAI" as upfront fee.
10.2 That the AO has stated that the assessee has got lease hold rights for a period of 30 years and whereas the

assessee has contended that the assessee has got a license for a period of 30 years and as such it is an Intangible assets". Thus, the assessee is entitled for depreciation as per section 32(1)(ii) of the Act. We observe that the said amount of Rs.150 crores paid by assessee is non-refundable. The assessee has got the privilege under OMDA" to collect charges of the nature as mentioned in the agreement entered into i.e. "OMDA" from the users of Airport premises. We observe that it is not a case where

the assessee has got the transfer of a right to enjoy the Airport premises. The assessee only got a license or right to do something at the Airport premises. The Hon'ble Apex Court has held in the case of B. M. Lal (supra) that the transaction is a lease, if it grants the interest in the land and whereas it is a license if it gives a personal privilege with no interest in the land. We are of the considered view that the assessee has got the economic /commercial right under the said agreement to collect charges from the users of the Airport premises which is similar to grant of a license to the assessee. This case is similar to the case of Technoshares and Stocks Ltd and others (supra), wherein the Hon'ble Apex Court has held that a right given to member of Stock-Exchange to carry on the business at the premises of the Stock-Exchange is a business or commercial right which is akin to license in terms of section 32(1)(ii) of the Act, therefore, eligible for depreciation. Their lordships have held that right to participate in the market is an economic and money value, itself satisfies the test of being a license. There is no dispute to the fact that the said payment of Rs.150 crores paid to "AAI" has not resulted to the assessee in the acquisition of any "tangible assets" like building, machinery, plants or furniture, Therefore the said payment of Rs.150 crores has not resulted into acquisition of tangible assets". Thus, the assessee has only acquired right to collect charges from the users of the Airport preemies, which is a business or commercial right in the form of license and therefore it is an Intangible assets" as per section 32(1)(ii) of the Act. The Hon'ble Delhi High Court In the case of Hindustan Coca Cola Beverages Pvt Ltd (supra) has also held that the assets which are included in the definition of "intangible assets" include, along with other things, any other business or commercial rights of similar nature. In this regard, it is relevant to state that the decision of Delhi High Court in the case of ONGC Videsh Ltd (supra) has held that the assessee who was assigned the rights to participate in oil exploration in Russia through a consortium for a period of 25 years and paid the total consideration for obtaining 20% membership in the consortium, amounting to Rs. 155.9 crores, was treated to acquire a license, being intangible assets, and thus

assessee was entitled to claim depreciation u/s 32(1)(ii) of the Act. The Pune bench of the Tribunal in the case of Ashoka Info (P) Ltd (supra) has also held that the expenditure incurred on construction of highway is eligible for depreciation @25%, as this expenditure has given rise to an 'intangible assets' in the hands of the assessee. In view of above decisions and the facts of the case, we hold that the Ld. CIT(A) has rightly held that the payment of upfront fee of Rs.150 crores paid by assessee to 'AAI" has created capital assets in the form of license to develop and modernize the Airport and collect charges as per terms and conditions as prescribed under the agreement entered into which is an "intangible assets" to the assessee. Thus assessee is entitled for depreciation.

10.3 Hence, the disallowance of Rs.22.50 crores made by AO has rightly been deleted by Ld. CIT(A) by directing the AO to allow depreciation at the rate of 25% on the said payment of upfront fee of Rs.150 crores. Thus, Ground No.1 taken by department is rejected."

7.5. Thus, it is noted from the above that the Tribunal has held that the amount paid on account of upfront fee is in the nature of an "intangible asset" eligible for depreciation and accordingly allowed the claim of depreciation upon the same. The assessee has claimed depreciation in the impugned year on the WDV of the same asset. Therefore, we find that no different decision can be taken in the year under consideration, more so, when no distinction has been made on facts or law, therefore, respectfully following the order of the Tribunal, the claim of depreciation on the upfront fee is allowed. This ground is rejected.

8. Ground 6: In this ground, the revenue has challenged the action of the Ld. CIT(A) in deleting the disallowance of interest of Rs.35,10,000 which was treated by the Assessing Officer as capital expenditure.

8.1. During the course of assessment proceedings, it was noted by the Assessing Officer that certain loans were raised by the assessee from the IDBI, UTI and other banks to finance the CAPEX requirement for upgradation and modernisation of the Mumbai Airport under a common loan agreement signed by the assessee with the consortium banks. It was held by the Assessing Officer that since the loan disbursements were envisaged to fund the capital asset, the interest component of the loan was to be capitalised with the cost of the asset till these were put to use for the business of the assessee in terms of Explanation (8) to section 43(1) of the Act. Accordingly, the

Assessing Officer made some working and disallowed a sum of Rs 35,10,000/- after deducting benefit of depreciation of Rs.3,90,000/- out of total interest of Rs.39,00,0000/-.

8.2. Being aggrieved, the assessee filed appeal before the Ld. CIT(A) and also filed exhaustive submissions supported with various evidences for justifying the claim of interest and for disputing the disallowance made by the Assessing Officer. Ld. CIT(A) was satisfied with the submissions of the assessee and deleted the disallowance. Being aggrieved, Revenue is before us.

8.3. During the course of hearing before us, the Ld. CIT-DR vehemently contested the order of Ld. CIT(A) and submitted that Ld.CIT(A) has passed a very cryptic order on this issue.

No proper reasoning has been given while allowing the relief and submissions made by the assessee have been blindly accepted while deciding this ground.

8.4. Per contra, the Ld. Counsel of the assessee submitted that exhaustive details were submitted but nothing wrong has been pointed out therein by the Ld.CIT(A) or by the Ld. CIT-DR and, therefore, the order of the Ld.CIT(A) on this issue should be upheld. Our attention was also drawn upon the details and evidences submitted before the Assessing Officer.

8.5. We have gone through the order of the lower authorities as well as the submissions made before us by both the sides. It is noted that the Ld. CIT(A) has passed very brief order without giving proper reasoning while allowing the relief by observing as under:-

> "I have considered the above submissions and also the further submission of the Ld. Counsel that once the asset is put to use - interest is to be allowed as a deduction as clearly stated in the proviso to section 36(1)(iii) - it says that once the asset is put to use the interest has to be allowed-which is so in the present case. Hence, the same is allowed and A.O. is directed to delete this disallowance subject to interest of Rs.1,80,294 being disallowed suo moto, offered for taxation by the appellant relating to 'interest on late payment of TDS and professional tax'. Subject to the above, this ground of appeal is partly allowed."

8.6. Thus, from the above it, is noted that submissions and details submitted by the assessee have not been analysed by the Ld. CIT(A) in the light of AO's allegations and doubts narrated in the assessment order. With the assistance of the parties, it was also noticed by us that the assessee had submitted some details before the Assessing Officer vide letter

dated 06-12-2010. But no discussion, whatsoever, had been made by the Ld. CIT(A) while allowing relief. We, therefore, find it appropriate to send this issue back to the file of the Ld. CIT(A) with the direction to decide this issue in a speaking

manner after analysing the details and evidences submitted by the assessee and after giving adequate opportunity of hearing to the assessee to explain its case and furnish further details / evidences as may be considered appropriate by the assessee. Thus, with these directions, this issue is sent back to the file of the Ld. CIT(A). This ground may be treated as allowed for statistical purposes.

9. Ground 7: In this ground, the Revenue has challenged the action of the Ld. CIT(A) in deleting the disallowance of legal and professional charges of Rs.1,72,98,000/-.

9.1. The brief background of this issue is that during the course of assessment proceedings it was observed by the Assessing Officer that that the assessee had not made proper allocation of indirect expenses between capital and revenue heads and therefore in assessment year 2007-08 the assessment was completed by making an allocation of 75% of indirect expenses to the capital heads as it was first year of operation during which assessee had embarked upon massive investments in capital outlays for modernisation and development of the airport. During the year under consideration, the assessee furnished reply before the Assessing Officer vide letter dated 20-12-2010 furnishing a statement containing item-wise details of apportionment of indirect expenses after making analysis of the details

furnished by the assessee. The Assessing Officer was of the opinion that the assessee had omitted to apportion expenses incurred on legal and professional charges amounting to Rs.19.22 crores. As per the Assessing Officer, a portion of these expenses was prima facie allocable to capital work-in-progress. Thus, after deducting a sum of Rs.19,22,000 (i.e. depreciation @10%, the Assessing Officer allocated balance amount of Rs.1,72,98,000 towards capital expenses out of the total legal and professional charges claimed by the assessee.

9.2. Being aggrieved, the assessee filed appeal before Ld. CIT(A). The assessee made detailed submissions, and accepting the same, Ld. CIT(A) deleted the disallowance made by the Assessing Officer.

9.3. Being aggrieved, the Revenue is before us. During the course of hearing, it was vehemently argued by the Ld. DR that on this issue also, the Ld. CIT(A) has decided the issue in a highly cryptic and non-speaking manner and no proper reasoning has been given while allowing relief to the assessee.

9.4. Per contra, the Ld. Counsel of the assessee submitted that complete details were filed before the Assessing Officer showing proper break-up of revenue and capital expenditure and nothing wrong has been pointed out therein.

9.5. We have gone through the submissions made before us as well as before the lower authorities. It is noted that on this issue also, Ld. CIT(A) has not given proper reasoning and order passed by him is cryptic. He allowed the relief by merely observing as under:-

"I have considered the above submissions and in view of the facts brought on record - which clearly show that the

'legal and professional' charges which refer to the current year are clearly an allowable expenses u/s 37(1) of the I.T Act and therefore, this is an allowable expense. Hence, this ground of appeal is allowed and A.O. is directed to delete this disallowance / addition."

9.6. Thus, from the above said paragraph of Ld. CIT(A)'s order, it is noted that he has not given proper reasoning while allowing relief to the assessee. The details submitted by the assessee have not been discussed by the Ld. CIT(A). He has made a sweeping and general remark that the details submitted by the assessee show that legal and professional charges are clearly allowable expenses u/s 37(1) of the Act. He has not discussed the details of the legal and professional charges and whether these have been incurred on account of revenue or capital field. Therefore, under these circumstances, we send this issue back to the file of the Ld. CIT(A) with the same directions as have been given with regard to ground 6 above. This ground may be treated as allowed for statistical purposes.

10. As a result, appeal of the Revenue is partly allowed.

11. Now we shall take up assessee's appeal in ITA No. 2760/um/2012: The assessee company has filed the appeal before us on the following grounds:

"Ground No. 1:
On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the learned Assessing officer of making a disallowance of Rs. 50,20,500/- u/s. 14A r.w.r. 8D of the Income Tax Act, 1961. The Appellant prays that the same may please be deleted.
Ground No. 2:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the disallowance of the provision for leave encashment of Rs.13,782,831/made on the basis of an actuarial valuation by relying on the decision of Calcutta High Court in the case of Exide industries Ltd. v Union of India (292 ITR 470). The appellant prays that the same may be allowed.
Ground No. 3:
On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the stand of A.O. that the Passenger Service Fee - Security Component [PSF(SC)] of Rs.1,32,58,59,023/- forms part of the taxable income of the appellant. The appellant prays that PSF (SC) is not the income of the appellant. Hence,

the addition on this account may please be deleted.
Ground No. 4:
On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in restricting the depreciation allowance to 10% as applicable to Buildings instead of 15% as applic able to Plan t and Machinery, on the expenditure incurred by the appellant on taxiways , taxi track and parking bays."

12. Ground 1 : In this ground, the assessee has challenged the action of Ld.CIT(A) in confirming the action of Assessing Officer in making disallowing Rs.60,20,500 u/s 14 r.w.r 8D of the Act.

12.1. The brief background and facts of this issue is that in the return filed by the assessee, voluntary disallowance of Rs.1,62,580 was made on account of expenses which can be attributed for earning the exempt income. During the course of assessment proceedings, the AO asked the assessee to justify the voluntary disallowance. In response, the assessee submitted working for arriving at the aforesaid figure before the AO, but the AO was of the view that the working given by

the assessee was not acceptable and, therefore, he straight away resorted to provisions of Rule 8D(2)(iii) of the Act for making further disallowance in excess of voluntary disclosure made by the assessee.

12.2. It was submitted during the course of hearing before us that this issue is now covered in favour of the assessee by the decision of Kolkatta Bench of ITAT in the case of DCIT vs Ashish Jhunjhunwalla (ITA 1809/Kol/2012 dated 14-05-2013), authored by one of us, i.e. Hon'ble JM. It was also brought to our notice that the said judgement of the Tribunal has been confirmed by a detailed order of Hon'ble Calcutta High Court dated 08-01-2014 (G.A. No.2990 of 2013 and ITA No.157 of 2013. In addition to the above, the Ld. Counsel relied upon the following judgments in support of his arguments:

i. Order of the Tribunal in the case of REI Agro Ltd in ITA No.1811/Kol/2012
ii. Decision of the Hon'ble Calcutta High Court in the case of CIT vs REI Agro Ltd in GA No.3022 of 2013
iii. Order of the Tribunal in the case of Global Calcium Pvt Ltd vs DCIT in ITA Nos. 2255/Chennai/13
iv. Order of the Tribunal in Kalyani Steels Ltd vs. Addl CIT in ITA No.1733/PN/12
v. Order of the Tribunal in 3DPLM ASoftware Solutions Ltd vs ITO and vice versa in ITA No.5736/Mum/12

12.3. Per contra, the Ld. CIT-DR relied upon the orders of the lower authorities.

12.4. We have gone through the facts and circumstances of the case, submissions made by both the parties as well as the

judgements placed before us. We have noted at the outset that the assessee has mainly made investments in the mutual funds and total number of transactions done during the year was 19. In view of the same, assessee made voluntary disallowance of Rs.1,62,500/-. In support of it, following working was submitted by the assessee before the lower authorities:

1.	In case of investments done from Operations Surplus funds, interest cost is considered to be NIL.	
2.	Payroll costs are as follows:	
	AVP Finance -5% of his CTC for 8 months, as investment activity done from August,2008	1,00,000
	Mgr.(Fin) - 5% of his CTC for 8 months as he has been appointed since January,2008	12,500
	Total A	1,12,500
3.	Other administrative costs are app.	50,000
	Total B	1,62,500

It is noted from the perusal of the assessment order that the AO did not record any satisfaction about the correctness of the claim or otherwise having regard to the accounts of the assessee. We find that this issue is no more res integra. In the case of Ashish Jhunjhunwalla (supra) authored by one of us, i.e. Hon'ble JM, Hon'ble Kolkatta Bench of the Tribunal after

considering umpteen number of judgements available on this issue, held as under :-

> "6. We find from the facts of the above case that the AO has not examined the accounts of the assessee and there is no satisfaction recorded by the AO about the correctness of the claim of the assessee and without the same he invoked Rule 8D of the Rules. While rejecting the claim of the assessee with regard to expenditure or no expenditure, as the case may be, in relation to exempted income, the AO has to indicate cogent reasons for the same. From the facts of the present case it is noticed that the AO has not considered the claim of the assessee and straight away embarked upon computing disallowance under Rule 8D of the Rules on presuming the average value of investment at ½% of the total value. In view of the above and respectfully following the coordinate bench decision in the case of J. K. Investors (Bombay) Ltd., supra, we uphold the order of CIT(A). This appeal of revenue is dismissed."

12.5. Subsequently, aforesaid judgment has been approved by the Hon'ble Calcutta High Court in these very words by passing a detailed order which has been mentioned above. In addition to that it is noted by us that similar view has been taken in the other judgements cited by the Ld. Counsel as mentioned by us in earlier part of our order. No contrary judgment was brought to our notice. Thus, we find that this

issue is covered in favour of the assessee by these judgments and, therefore, respectfully following the same, disallowance made by the AO without assuming jurisdiction as per law for invoking provisions of Rule 8D(2)(iii) is directed to be deleted.

13. Ground 2 : In this ground, the assessee has challenged the action of the Ld.CIT(A) in confirming the disallowance made by the AO on account of provision for leave encashment of Rs.1,37,82,831/- made by the assessee on the basis of actuarial valuation.

13.1. The brief facts of the case are that in the assessment order, the AO made addition of the aforesaid amount on account of provision for leave encashment debited to the Profit & Loss Account on the ground that the decision of Calcutta High Court in the case of Excel Industries vs UOI 292 ITR 470 (Cal) has been stayed by the Hon'ble Supreme Court and, therefore, as on that date, the expenses were not allowable.

13.2. Before the Ld. CIT(A), the assessee challenged this disallowance. But Ld. CIT(A) decided the issue against the assessee.

13.3. During the course of hearing, the Ld. Counsel of the assessee fairly submitted that this issue should go back and it should be decided on the basis of judgement of the Hon'ble Supreme Court in the case of Excel Industries Ltd (supra). It was also submitted that the amount actually paid should be allowed.

13.4. Per contra, the Ld. CIT-DR did not raise any objection and submitted that proper appreciation of facts have not been done in this case and he would have no objection if this issue is sent back to the file of the AO.

13.5. We have gone through the orders passed by lower authorities on this issue. It is noted that none of the authorities have narrated proper facts as to whether the total amount debited under this head was on account of provision or some part of it was paid also. Further, it is also not coming out whether provision for leave encashment has been made on the basis of actuarial basis or not. In our view, this issue needs to go back for proper verification of facts, and therefore,

we send this issue back to the file of the AO for proper adjudication after considering all the facts and the judgments in this regard for which the AO shall give adequate opportunity of hearing to the assessee. The assessee shall submit requisite details and documentary evidences to bring complete facts on record and place all the judgements as may be considered appropriate as per law and facts. The AO shall decide this issue afresh after taking into account all the material held on record and all the judgements as available at that time on this issue. This ground may be treated as allowed for statistical purpose.

14. Ground 3 : In this ground, the assessee has challenged

the action of Ld. CIT(A) in confirming the action of AO in holding that the amount of Passenger Service Fee - Security Component (PSF - SC) of Rs.132.59 crores received by the assessee forms part of taxable income of the assessee company.

14.1. The brief background of the issue involved is that during the course of assessment proceedings, it was noted by the AO from Note No.11 of the computation of income filed by the assessee along with return that assessee had collected PSF-SC as per rule 88 of Aircraft Rules, 1937. The AO noted that the assessee had collected an aggregate amount of Rs.180.27 crores on account of PSF-SC out of which some amount has been disbursed for security purposes, and there was left surplus of Rs.132.59 crores under this head. According to the AO, the same should have been offered to tax. In response, the assessee submitted that this amount was received in

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fiduciary capacity only and was not in the nature of income and, therefore, the same should not be brought to tax. But the AO was not satisfied with the stand of the assessee, and therefore, he further analysed the instruction issued by MOCA (Government of India) Dt 19-01-2009 as well as clarification dated 30-06-2008 issued by the CBDT to MOCA, and made an opinion that the receipts on account of PSF - SC were taxable as income in the hands of airport operator and confronted the same to the assessee. Under these circumstances, the assessee vide letter dated 20-12-2010 submitted that though the aforesaid amount did not constitute assessee's income in view of doctrine of 'diversion of income by overriding title', and since the impugned amounts was collected in fiduciary capacity and the return of income was filed accordingly by not including the said amount as part of its income, but in view of the instruction of MOCA (Government of India) dated 15-11-2010, the assessee was constrained to offer the same as part of its taxable income and pay taxes thereon. Under these circumstances, the AO brought to tax the impugned amount as part of income of the assessee amounting to Rs.132.59 crores.

14.2. However since the assessee was not satisfied with the assessment order, it contested the issue of taxability of the aforesaid amount before the Ld. CIT(A) and made exhaustive submissions challenging the taxability of the impugned amount as part of its taxable income mainly on the ground that the aforesaid amount had no attributes of income as far as taxability of the same was concerned in the hands of the

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assessee company. But Ld. CIT(A) did not agree with the submissions of the assessee mainly for the reason that MOCA (Government of India) had issued guidelines clarifying that PSF-SC was taxable in the hands of the assessee notwithstanding that the aforesaid receipt was fiduciary in

nature in the hands of the assessee.

14.3. Being aggrieved with the order of the Ld. CIT(A), the assessee is before us. During the course of hearing before us, the Ld. Counsel of the assessee made exhaustive arguments to impress upon the point that the impugned amount collected by the assessee from the passengers on behalf of Ministry of Civil Aviation, Government of India (MOCA, for short) was not in the nature of income and thus not taxable in the hands of the assessee. It was thus summarised that the impugned amount was not income of the assessee in view of well established doctrine of 'diversion of income by overriding title'. In support of his argument, the Ld. Counsel relied upon the following judgements:

1. CIT vs Salem Co-operative Sugar Mills Ltd (229 ITR 285)(Mad)
2. Siddheshwar Sahakari Sakhar Karkhana Ltd vs CIT (270 ITR 1)(SC)
3. CIT vs Bijli Cotton Mills (P) Ltd (116 ITR 60)(SC)

It was further submitted that in any case, opinion expressed by CBDT or by MOCA is not binding upon the appellate authorities including the Tribunal. If as per the Income-tax law, the impugned amount is not in the nature of income, then it cannot be brought to tax as income in the hands of the

assessee. In this regard reliance has been placed on the judgement of the Hon'ble Supreme Court in the case of CIT vs Hero Cycles Pvt Ltd 228 ITR 463 (SC) and the decision of the Hon'ble Bombay High Court in the case of Banque National De Paris vs CIT 237 ITR 518 (Bom). Further, it was also argued that there is no estoppel against the law. If a receipt is not taxable income under the Income-tax law, then, it cannot be brought to tax in the hands of the assessee nor can tax be collected by the revenue without the authority of law notwithstanding that the assessee might have offered it for taxation on without prejudice basis. Reliance in this regard was placed on the following judgments:

1. Mayank Poddar (HUF) vs WTO - 262 ITR 633 (Cal)
2. Nirmala L Mehta vsCIT 269 ITR 1 (Bom)
3. Balmukund Acharya vs DCIT 310 ITR 310 (Bom)

Lastly, it was submitted by the Ld. Counsel that in this case the impugned receipt cannot be brought to tax as income in anybody's hands, as there is no surplus or profit which can be characterised as income. Whatever amount is left at the end of the year, it is already earmarked or deducted for meeting security expenses. There is no discretion to use the amount left for any other purposes. He took us through various clauses of the agreement and other documentary evidences to impress upon his point that the impugned amount was not available to the assessee for its own use. It was lastly argued that all the authorities including AO, CIT(A), CBDT and MOCA grossly erred by relying upon the judgement of Hon'ble Supreme Court in the case of Chowringhee Sales Bureau vs

CIT 87 ITR 542 (SC) to hold the impugned amount as taxable receipt in the hands of the recipient. He submitted detailed analysis carving out the distinction between facts of aforesaid judgement and facts of assessee's case. He emphasised that reliance on the said judgement is out of context and misplaced.

14.4. Per contra, the Ld. CIT-DR submitted that after detailed discussion during the assessment proceedings, the assessee himself offered this amount for tax and also submitted that in this case the CBDT and MOCA have already expressed their opinion vide their notification that the impugned amount is taxable in the hands of the assessee company. He submitted that office memorandum issued by CBDT cannot be challenged in the court of law.

14.5. In the rejoinder, the Ld. Counsel reiterated his submissions and also relied upon the judgment of Hon'ble Supreme Court in the case of UCO Bank 237 ITR 889 (SC) and also submitted that assessee is not rendering any security services but only acting as a conduit by collecting the impugned amount on behalf of the government and disbursing it for security purposes strictly in accordance with the rules, regulations and guidelines of the concerned authority and therefore, under these circumstances, the impugned amount could not have been brought to tax in the hands of the assessee and therefore, the addition made by the AO should be deleted.

14.6. We have gone through the orders passed by lower authorities, submissions made and documentary evidences

produced before us by both the sides as well as judgements relied upon by both sides. In our considered opinion, we have been called upon to decide the following three issues to decide this ground:

(1) Whether, the amount of PSF-SC collected by the assessee will be taxable in the hands of the assessee merely because the same has been offered to tax by the assessee during the course of assessment proceedings irrespective of correct position of its taxability in accordance with law?

(2) Whether, office memorandum / clarifications issued by the CBDT or MOCA observing that the aforesaid amount is taxable in the hands of the assessee have been issued after considering provisions of Income-tax Act and whether the opinion expressed therein is binding upon the appellate authorities including the Income-tax Appellate Tribunal?

(3) Whether, the impugned amount of PSF-SC collected by the assessee company on behalf of MOCA as per the relevant regulations for the purposes of meeting security expenses can be characterised as income in

the hands of the assessee company and made liable to tax in its hands as per provisions of Income Tax Act, 1961?

14.7. Having heard both the parties, we have pondered over all the three issues and few other allied issues which were germane to the issues before us and necessary for deciding

these grounds, and all these issues are decided hereunder one by one.

14.8. With regard to the first issue, the brief facts and background brought before us are that in pursuance to process of privatisation of airports in India, the assessee company had entered into an agreement in the nature of OMDA with Airport Authority of India to operate, maintain, develop, design, construct, upgrade, modernise, finance and manage the Chhatrapati Shivaji International Airport at Mumbai (hereinafter called 'airport', in short). As per Rule 88 of the Aircraft Rules, 1937, the assessee was entitled to collect a fee termed as 'Passenger Services Fee (PSF) from all the passengers embarking at the airport. The said fee was initially collected by the concerned airline and then handed over to the assessee company for the sake of administrative convenience. As per terms, the PSF was chargeable @ Rs.200 per passenger, out of which Rs.70/- (i.e. 35% of PSF) was for use of assessee company for passenger facilitation services and the balance amount of Rs.130/- (i.e. 65% of PSF) was to be utilised for payment to security agency designated by the central government for providing security services at airport and the said component was called as Passenger Service Fee-Security Component (in short referred to as PSF-SC). The said portion i.e. Rs.130/- (65% of PSF) was deposited in an 'Escrow Account' pending utilisation.

14.9. During the year under consideration, the assessee included passenger facilitation component of PSF (i.e. Rs.70/- being 35% of PSF) as income of the assessee company. But

the balance amount of Rs.130/- (i.e. 65%) portion was kept in separate 'Escrow Account' for which separate books of account were maintained in accordance with the Standard Operating Procedure (SOP) formulated by MOCA and, therefore, the same was not included in the income of the assessee company. The assessee company did not include revenue pertaining to PSF-SC as well as the corresponding expenses in the financial statements of the assessee company. During the course of assessment proceedings, the AO confronted to the assessee, an Office Memorandum issued by CBDT to MOCA and clarification from MOCA wherein it was stated that PSF - SC was also taxable in the hands of assessee and tax was to be recovered from the said funds. Under these circumstances, the assessee finally stated that the said amount may be included in its taxable income. The AO accordingly made

addition in the income of the assessee. Being aggrieved, the assessee filed appeal before the Ld. CIT(A) wherein addition was confirmed. Still aggrieved, the assessee filed appeal before the Tribunal. During the course of hearing before us, the preliminary objection of the Ld. CIT-DR was that the assessee once having taken a stand during the course of assessment proceedings that the aforesaid amount was taxable, cannot now turn back and cannot claim it to be not taxable. On the other hand, the assessee's Counsel maintains that the said amount was not included as part of its income in the return filed originally and only during the course of assessment proceedings, because of the pressure made by the assessing officer by showing letters of CBDT and MOCA, the said

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amount was offered for tax. But the assessment should be done strictly in accordance with law and mere acquiescence of the assessee expressed during the course of assessment proceedings would not alter the true position of law and would not make the aforesaid amount as liable to be taxed in the hands of the assessee, if the same is actually not liable to be taxed as per the provisions of the Income-tax Act.

14.10. We have analysed this issue. It is well settled position of law that an amount can be brought to tax in the hands of an assessee only in accordance with the provisions of Income-tax Act. This fundamental position has been well explained and well settled in many judgements. It is well settled that there is no estoppel against law. No tax can be collected except with the authority of law as per clear mandate of Article 265 of Constitution of India. If the taxes are to be collected depending upon consent/concurrence of the taxpayers or otherwise, then it will lead to chaotic situation and administration of tax would become impossible. Therefore, if an amount is taxable under the law, assessee is bound to pay tax thereon and if an amount is not taxable under the Income-tax law, then the tax cannot be recovered from the assessee without authority of law merely because assessee offered the same to tax during the course of assessment proceedings. Law in this regard is well settled now, and to begin with, reference is made on the landmark judgment of Hon'ble Delhi High Court in the case of CIT vs Bharat General Reinsurance Co Ltd 81 ITR 303 (Del.) Relevant portion from it is reproduced below:

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> "It was true that the assessee itself had included that dividend income in its return for the year in question, but there was no estoppel in the Income-tax Act and the assessee having itself challenged the validity of taxing the dividend during the year of assessment in question, it must be taken that it had resiled from the position which it had wrongly taken while filing the return. Quite apart from it, it was incumbent on the income-tax

department to find out whether a particular income was assessable in the particular year or not. Merely because the assessee wrongly included the income in its return for a particular year, it could not confer jurisdiction on the department to tax that income in that year even though legally such income did not pertain to that year. Therefore the income from dividend was not assessable during the assessment year 1958-59, but it was assessable in the assessment year 1953-54. It could not, therefore, be taxed in the assessment year 1958-59."

14.11. Our view is further fortified in view of judgment of Hon'ble Gujrat High Court in the case of CIT vs Keiser-E-Hind Mills Co. Ltd 128 ITR 486 (Guj.) in which their lordships have relied upon circular of the Board wherein a duty has been cast upon the Revenue officials to guide the assessee for making claims as permissible under the law. Relevant portion is reproduced below:

"In view of the circular No. 14(XI-35) of 1955 dated 11-4-1955, it was clear that for the purpose of the circular, what should be the guiding factor was whether the proceedings or other particulars before the Income-tax officer at the stage of original assessment disclosed any grounds for relief under section 2(5) (a) (iii) of the Finance Act of 1964 or of the Finance Act of 1965, even though no claim was made for that relief by the assessee at the stage of those proceedings before him.

Even if there is a deviation on a point of law, so far as the circular of the Board is concerned, that circular will be binding on all officers concerned with the execution of the

Act and they must carry out their duties in the light of the circular.

In view of this clear position regarding the effect of the circular, it was obvious that in the instant case it was incumbent on the Income-tax officer to advise the assessee to claim relief under section 2(5)(a)(iii) if the proceeding or any other particulars before him at the stage of the original assessment indicated that the assessee was entitled to such relief under the provisions of the relevant Finance Act, 1965, so far as the order under reference was concerned....."

14.12. Further reference is placed upon another judgment in the case of S.R. Koshti 276 ITR 165 (Guj) in which relief was granted to assessee with following observations:

"The authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or on not being properly instructed, is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected." [Para 20]

14.13. In the case of CIT vs Lucknow Public Educational Society 318 ITR 223, it was observed by Hon'ble Allahabad High Court that the income tax department should not take undue advantage of the ignorance of the assessee in view of Board's Circular No. 14(XL-35)/1955, dated 11-4-1955.

14.14. In the case of Nirmala L Mehta vs CIT 269 ITR 1, Hon'ble Bombay High Court, relying upon Article 265 of Constitution of India held that acquiescence cannot take away from the taxpayer, the relief he is entitled where tax is levied or collected without authority of law and, therefore, merely because the taxpayer offered a receipt to tax, that cannot take away its right in contending that the said amount was not chargeable to tax.

14.15. In the case of Balmukund Acharya vs DCIT 310 ITR 310 (Bom), Hon'ble Bombay High Court observed that the Apex Court and various High Courts have ruled that authorities under the Income-tax law are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate tax dues are collected. If any item of receipt is not taxable under the Act, then tax cannot be levied applying the doctrine of estoppel. The Hon'ble High Court considered the aforesaid judgements while expressing its opinion.

14.16. In the case of Mayank Poddar (HUF) vs WTO 262 ITR 633 (Cal), it was observed by the Hon'ble High Court that there is no estoppel against statute. Thus, if an assessee under misunderstanding, admission or miss-appreciation offered an amount to tax, then the same would not be taxable merely because of wrong understanding of law by the assessee or because of his admission or miss-appreciation of law and facts. It was also observed that there can also not be any waiver of legal right by the assessee.

14.17. Thus, in view of the aforesaid legal discussion and facts of this case as discussed above, it is held that the amount in question cannot be taxed in the hands of the assessee merely because the same was offered to tax during the course of assessment proceedings under certain circumstances. Under these circumstances, we need to

examine and determine whether the impugned amount of PSF-SC collected by the assessee company is actually taxable in the hands of the assessee as per the provisions of Income-tax Act, 1961.

14.18. The aforesaid discussion takes us to the second issue wherein we have been called upon to decide about the binding legal force of the opinion expressed by CBDT and MOCA vide their office memorandum/ instructions for determining

taxability of the impugned amount. It is admitted fact on record that the assessee company collected PSF-SC in view of the order issued by MOCA vide its order dated 09th May, 2006. The terms of the order have been modified / amended from time to time as per the requirements. One such order issued by MOCA was issued on 20th June, 2007. Subsequently, CBDT issued an Office Memorandum dated 30/06/2008 in pursuance to the request made by the concerned officials of MOCA regarding taxability of PSF-SC, wherein it has been observed that since the assessee company was collecting this amount in the course of business and assessee was rendering facilitation and securities services whether in-house or outsourced, therefore, the amount collected by the assessee in the form of PSF-SC was in the nature of income of the assessee and liable to be taxed in its hands. In support of its view, reliance has been placed by the Board on the judgement of Hon'ble Supreme Court in the case of Chowringhee Sales Bureau vs CIT 87 ITR 547 (SC) with a view to fortify its opinion. Subsequently, Ministry of Civil Aviation's office issued an order dated 19-01-2009 laying down accounting /

audit procedure in respect of PSF-SC. It was intended to act as Standard Operating Procedure (SOP) for accounting / audit of PSF-SC by the airport operator. In the aforesaid document, the whole procedure was duly explained how the amount has to be collected and to be kept in escrow account and to be disbursed for the purpose of security. Relying upon the Office Memorandum issued by the CBDT dated 30-06-2008, it was mentioned therein that the tax component may be charged to the PSF-SC account in proportion to its liability on stand-alone basis. The assessee was of the opinion that the aforesaid amount was not taxable in the hands of the assessee company, and therefore, while filing the return the same was not included in the taxable income by the assessee. But during the course of assessment proceedings, the AO was of the opinion that the said amount was taxable in the hands of the assessee in view of Office Memorandum of CBDT dated 30-06-2008 and instructions dated 19-01-2009 issued by MOCA. With a view to clarify the situation, representation was made before the CBDT as well as MOCA. In response, MOCA issued a letter dated 15-11-2010 wherein it was stated that the matter was examined with the Ministry of Finance and accordingly it is clarified that the whole amount of PSF - SC including security component was revenue receipt, and thus it was taxable under the Income-tax Act.

14.19. The assessee challenged before us, the validity and binding force of the aforesaid Office Memorandum issued by the CBDT and clarification received by MOCA. It has been noted by us firstly that in none of these documents, there

seems to have been made any application of mind by the

concerned authorities while expressing their opinion. None of the authorities have considered the aspect that the impugned amount was collected in the fiduciary capacity by the assessee. None of the authorities have stated that under what provisions of law, the aforesaid amount can be brought to tax in the hands of the assessee. The CBDT in its Office Memorandum has made a reference to the judgment of the Hon'ble Supreme Court in the case of Chowringhee Sales Bureau (supra). But facts of that case have not been discussed. The aforesaid judgment has different facts, wherein, the amount of sales-tax was received by the said assessee and deposited in its bank account. The funds got mixed in assessee's accounts. Thus, in case of non payment by the said assessee, the same became income of the seller (the said assessee), whereas the facts are totally different in the case before us. The amount here was collected purely in fiduciary capacity and the same was deposited in escrow account on which assessee had no control at all; the assessee had no discretion at all upon its usage. No reasoning has been made out by the CBDT while issuing its opinion as to how the said judgment was applicable on the facts of this case. It is noted by us that aforesaid judgment came up for consideration before many courts wherein its true meaning and scope of its applicability was explained time to time. In one such matter having similar facts as to the assessee before us, Hon'ble Allahabad High Court explained correct application of aforesaid judgment in the case of CIT vs. Sita

Ram Sri Kishan Das 141 ITR 685 (All). In this case, the facts were that said assessee was a commission agent and was accountable for the recovery (called as Market Fee) which he made from the sellers of agricultural produce in terms of Krishi Utpadan Mandi Rules framed under the U.P. Krishi Utpadan Mandi Adhiniyam, 1964. The Revenue treated the amount so collected by the agent as part of its taxable income being a trading receipt in view of judgment of Hon'ble Supreme Court in the case of Chowringhee Sales Bureau vs CIT 87 ITR 547 (SC), supra. After analysing the facts of the case, it was held by the Hon'ble Court that the market fee realised by the commission agent does not form part of his trading receipt as he (the commission agent) held this amount only as a trustee for and on behalf of the Market Committee. Hon'ble Court applied the judgment of Hon'ble Supreme Court in the case of CIT vs. Sitaldas Tirathdas 41 ITR 367 (SC) and distinguished that of Chowringhee Sales Bureau P. Ltd. vs. CIT, supra.

14.20. Thus, at the outset, it is clearly visible that both the authorities expressed their opinions without proper application of mind and without examining the nature of impugned receipt within the framework of provisions of Income-tax Act, 1961.

14.21. Apart from that, the binding effect of Office

Memorandum issued by CBDT, clarification issued by MOCA is also under question. It has been argued that it has been held by Hon'ble Supreme Court many times that circulars issued by the Board are binding upon the authorities working

under it, viz. the AO, etc. but these are not binding upon the appellate authorities including Income Tax Appellate Tribunal. We have examined this aspect also carefully. It is noted that as per section 119 of the Act, the CBDT has been empowered by the legislature to issue orders, instructions or directions to all the Income-tax authorities working under it for proper administration of the I.T. Act. And it has also been provided that this shall be binding upon the Income-tax authorities. But it is further noted that a proviso has been added to sub section (1) of section 119 which says that no such orders, instructions or directions shall be issued:- (a) so as to require any income-tax authority to make a particular assessment or to dispose a particular case in a particular manner; or (b) so as to interfere with the discretion of the Commissioner (Appeals) in exercise of his appellate functions . It is clear from the perusal of aforesaid proviso that neither the Board has power to decide the taxability of a particular receipt nor has it got any power to interfere with the appellate functions of Commissioner (Appeals), which is judicial in nature. Thus, in view of the aforesaid legal scenario coupled with facts of this case as discussed above, we have strong doubts if at all the Board could have issued any instructions to decide the taxability of amount collected by the assessee company on account of PSF -SC in a purely fiduciary capacity. This task of determination of taxability has been left by the legislature upon the shoulders of the designated AO, who is obliged under the law to determine the same strictly in accordance with the provisions of the Income-tax Act, 1961.

14.22. Further, aforesaid clarification issued by the Board in this case is actually an "Office Memorandum". It is an inter-departmental communication. In our view, Office Memorandum would not carry the legal force of binding effect. Further, it has been provided in section 119 that orders, instructions and directions shall be binding upon the income-tax authorities. It is noted that Income-tax Appellate Tribunal does not fall under the list of Income-tax Authorities as has been provided in section 116 of the Act. Thus, these orders, instructions and directions shall not be binding upon the Income-tax Appellate Tribunal. Further it is noted that these have been held to be not binding upon the CIT(A) as stated above. Therefore, there is no question of there being any binding effect upon the Income-tax Appellate Tribunal of any such communication issued by the Board.

14.23. It is noted by us that this issue is not res integra, as it has been settled by Hon'ble jurisdictional High Court and

Hon'ble Supreme Court in many cases. It was held by Hon'ble Bombay High Court in the case of Banque Nationale De Paris vs CIT (supra) that circulars cannot override or detract from the provisions of the Act in as much as section 119 of the Act has empowered the CBDT to issue orders, instructions or directions for the proper administration of the Act. Hon'ble High Court has taken into consideration various earlier judgments of Hon'ble Supreme Court on this issue. Similarly, the Hon'ble Supreme Court in the case of CIT vs Hero Cycles Pvt Ltd (supra) held that circulars can bind the Income-tax Officer but will not bind the appellate authority or

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the Tribunal or the Court or even the assessee. It is further noted that law in this regard was further analysed by Hon'ble Supreme Court in the case of UCO Bank (supra). It was observed by the Hon'ble Supreme Court that CBDT has power to tone down the rigour of the law and ensure enforcement of its provisions of issuing circulars. The Board has been given for the purpose of just, proper and efficient management of work of assessment. However, these are not meant for contradicting or nullifying any provision of the statute. Relying upon its earlier judgement comprising of three judges in the case of Keshavji Ravji & Co vs CIT 183 ITR 1 (SC), it was inter-alia observed that Board cannot pre-empt judicial interpretation and the scope and ambit of a provision of the Act. Also, a circular cannot impose on the taxpayer a burden higher than what the Act itself on a true interpretation, envisages. The task of interpretation of the law is exclusively the domain of the Courts. However, the Board has the statutory power u/s 119 to tone down the rigour of the law for the benefit of the assessee by issuing circulars to ensure proper administration of the fiscal statute and such circulars would be binding on the authorities enshrined in the Act.

14.24. Thus, taking guidance from the aforesaid legal discussion as has been clarified by the Hon'ble jurisdictional High Court as well as by Hon'ble Supreme Court, it is clear that the Office Memorandum issued by CBDT to MOCA cannot hold an amount as taxable, if the same is otherwise not taxable as per the provisions of the Income-tax Act, 1961. Further, as far as the clarification issued by MOCA is

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concerned, it is noted that the role of MOCA was confined to issuing Standard Operating Procedures and other guidelines to the airport operators to ensure that funds collected by the assessee company in the fiduciary capacity on behalf of MOCA are properly kept and disbursed for the designated purposes only. It has no jurisdiction to determine the taxability of the impugned amount. It clearly had no jurisdiction in holding the same as taxable and, therefore, to that extent its order / clarification has no authority in the eyes of law and the same has been rightly ignored by the assessee as well as by the

appellate courts while determining the taxability of the impugned amount.

14.25. Thus, the aforesaid discussion take us to the third issue wherein we have been called upon to decide whether the impugned amount of PSF-SC collected by the assessee company on behalf of MOCA as per the relevant regulations for the purposes of meeting security expenses can be characterised as income in the hands of the assessee company and made liable to tax in its hands.

14.26. The brief facts related to the issue have already been narrated by us in earlier part of our order and just to recapitulate the relevant part of it, the licensee of an airport in terms of provisions of Rule 88 of Aircraft Rule, 1937, is responsible for collecting a fee from embarking passengers referred to as Passenger Service Fee (PSF) @ Rs.200/- per ticket. Portion of PSF being 35% was on account of providing passenger facilitation and was to be retained by the airport operator for providing passenger related services and the

balance 65% of PSF represents security component to be utilised for payment of security agency, i.e. CISF, who is designated by the Ministry of Home Affairs for providing security services. The assessee had included aforesaid 35% portion in its income but did not include PSF-Security Component in its income while filing the return of income. The dispute before us is with regard to this PSF - SC. Further facts brought out before us are that the assessee had collected during the year, total amount of Rs.180.27 crores on account of PSF - SC from the passengers embarking at Chhatrapati Shivaji International Airport, Mumbai. After meting out security deployment cost and various other related (allied) expenses, the net surplus worked out at Rs.133,13,47,580 and after adjustment of depreciation as per Companies' Act and Income-tax Act, it was computed at Rs.132,58,59,023. During the course of assessment proceedings, the AO concluded that the aforesaid amount is part of taxable income of the assessee. The Ld. CIT(A) had confirmed the action of the AO. The assessee has contended before us that the aforesaid amount is not liable to be included in the income of the assessee. Detailed arguments made by the Ld. Counsel of the assessee have already been narrated by us in earlier part of our order and these are not being discussed here again for the sake of brevity.

14.27. We have gone through the assessment order as well as the order of Ld. CIT(A). Perusal of the orders of AO as well as Ld. CIT(A) reveals that none of the authorities have made independent application of mind to independently determine

whether the impugned amount could have been characterised as income in the hands of the assessee. Relevant part of order of Ld. CIT(A) is reproduced hereunder, for the sake of ready

reference:-

> "I have considered the submissions and arguments of the appellant. It is undisputed that the Ministry of Civil Aviation had already issued its guidelines and instructions to the assessee on 19.01.2009, thereby clarifying the taxability aspect of PSF(SC) in the hands of the assessee notwithstanding the assessee's resistance and belief that such receipts are fiduciary in nature and not taxable. Further, the Ministry of civil Aviation reaffirmed its decision once again vide Instruction dated 15.11.2010. Therefore, the appellant had erroneously resisted from offering the receipts on account of PSF(SC) to tax purely on the basis of its own belief that PSF(SC) receipts are fiduciary in nature, thereby ignoring the mandatory instructions issued by the Ministry of Civil Aviation from time to time under which, the assessee functions as an Airport Operator-the receipts being fiduciary in nature, and the mandatory instructions issued by the Ministry of Civil Aviation from time to time under which, the assessee functions as an Airport Operator make it taxable. When confronted by the second reconfirmation by the Ministry of Civil Aviation on 15.11.2010, the appellant had no other option, but to offer the receipts to tax for A.Y. 2008-09. Thus, as stated by the appellant on merits and in law that although the receipts of PSF (SC) in the hands of the appellant do not partake the character of income and by the 'Doctrine of Overriding Title' as they are to be utilized for security purposes-the issue being highly debatable and a legal difference of opinion being there the same has been offered for taxation. Hence I confirm this addition by the A.O. and thus, this ground of appeal is dismissed."

14.28. It is noted by us that both of the authorities got influenced and swayed away with the opinion expressed by the CBDT/MOCA and admission made by the assessee under certain circumstances emerged during the course of

assessment proceedings. Thus, both the authorities abstained from effectively and independently adjudicating the taxability of this amount as per of law in the hands of the assessee. Since related material and all the facts are before us, we shall determine characterisation and taxability of the impugned amount in the hands of assessee-company purely as per law applicable on the facts of this case.

14.29. It is noted by us that Rule 88 of Aircraft Rule, 1937 provides as under:

> "88. Passenger Service Fee--The licensee is entitled to collect fees to be called as Passenger Service Fee from the embarking passengers at such rate as the Central Government may specify and is also liable to pay for security component to any security agency designated by the Central Government for providing the security service. Provided that in respect of a major airport such rate shall

be as determined under clause (c) of sub-section (1) of section 13 of the Airports Economic Regulatory Authority of India Act, 2008"

14.30. In pursuance to the aforesaid rule, an order dated 09th May, 2006 was issued by concerned official of MOCA which reads as under:-

" ORDER

Subject: Collection of Passenger Service Fee (PSF) at. Greenfield / Private airports - regarding Consequent to allowing private companies, Joint Venture. Companies to own and operate airports in the Country, the manner and mode of collection of Passenger Service Fee (PSF) at airports have been engaging the attention of the Government for some time. The matter has been deliberated with Airports Authority of India and other airport operators and it has now been decided that: -

i. CISF will be deployed as per the assessment of BCAS at airports operated by JVCs or private operators also.

53 M/s. Mumbai International Airport ii. Passenger Service Fee (PSF) at airports would he collected by the respective Airport Operator, which could be AM, JVC, or a private operator.

iii. The amount of PSF to be collected will he fixed by the Ministry of Civil Aviation. The amount will continue to be Rs.200/- per passenger till further orders. The airport operator would retain Rs.70/- towards passenger facilitation. An Escrow account would be opened whenever the airport operator is a JVC or private operator. This account will be operated by the airport operator (not by AM). Rs.130/- of the PSF collected per passenger by such airport operator would be deposited in the Escrow account by the Airport Operator for payments to be made to CISF. The Escrow account would be subject to Government Audit of CAG.

iv. In case any amount remains, this will be transferred to AAI by the airport operator through a process of mutual consultation for payment to CISF deployed for security purposes at other airports. In case of a dispute, the matter may be referred to the Ministry, of Civil Aviation whose decision will be treated as final and binding on both parties.

2. The new procedure will be effective from 01.042006.

3. This issues with the approval of the Minister of State for Civil Aviation (Independent charge)."

14.31. Subsequently another order was passed by MOCA dated 20th June, 2007 wherein it was inter alia clarified that security component of PSF was not regular revenue of the airport operator and the aforesaid amount will be utilised at the airport concerned only to meet security related expenses of that airport. Relevant part of the order is reproduced below:-

"ORDER Sub: Collection of Passenger Service Fee (PSF) at Greenfield / Private airports - regarding.

54 M/s. Mumbai International Airport In this Ministry's Order of even no. dated 09.05.2006 on the subject noted above, the following modifications may be made-

(a) Clause (iii) is modified as under-

"The amount of PSF to be collected will be fixed by the Ministry of Civil Aviation. However, after Airports Economic Regulatory Authority (AERA) becomes functional, PSF will be fixed by AERA.

The amount will continue to be Rs.200/-. per embarking passenger till further orders'.

(b) Clause (vi) is modified as under-

Security Component of PSF, in short PSF (SC) is not a regular revenue income of an airport-operator. PSF (SC) collected at an airport-operator by a JVC or a private- operator will be utilized at airport concerned only to meet the security related expenses of that airport. However, 'AAI' will be considered as a single licensee in respect of its airports for this purpose with liberty to pool the PSF(SC) collections from such airports and use the same for meeting the security related expenses at any of its airport'.

This issues with the approval of the Minister of State for Civil Aviation (Independent charge)."

14.32. Thus, aforesaid rules and orders issued by MOCA clearly stipulates that security component of passenger service fee was meant exclusively to be utilised at the airport concerned, only to meet security related expenses of that airport. The security agency designated in this regard was CISF. It is further noted that the funds so collected were to be deposited in an Escrow account which was subject to the government audit of CAG. Further, in case of any amount was left in the said account, it was to be mandatorily transferred to Airport Authority of India by the airport operator. Thus, from the above said facts and circumstances of the case and terms and conditions it is clear that the said amount was collected 55 M/s. Mumbai International Airport by the assessee on behalf of MOCA to be disbursed for security purposes to CISF deployed by the Ministry of Home Affairs. The amount was collected and retained purely in fiduciary capacity. The assessee had no discretion or freedom at all to utilise the aforesaid amount for any other purposes other than the designated purpose of meeting security expenses. So much so, even the surplus left if any, was not at the disposal of the assessee company but was to be mandatorily transferred to the account of Airport Authority of India as per the prescribed procedure. Under these circumstances, it is clear that assessee merely acted as a conduit or a trustee for collection and disposal of the impugned amount of PSF-SC. Under these circumstances, the aforesaid amount could not have been characterised as 'income' u/s 2(24), section 5 or any other provisions of the Income-tax Act, 1961. 14.33. It is noted that subsequently MOCA issued another order dated 19-01-2009 containing Standard Operating Procedures for accounting / audit of Passenger Service Fee (Security Component) by the airport operators. The aforesaid order contained whole procedure in detail for collection and disbursement of the said amount. Relevant portion of the same is reproduced hereunder, for the sake of better

clarity on facts related to conditions attached with regard to collection and disbursement of the aforesaid amount:

"2. Nature of Security component of PSF:

2.1 Aviation security is an activity reserved for the Government of India. Force deployment at the airports, security requirements including the requirement of capital items and specifications thereof are laid down by the Government/Bureau of Civil Aviation Security (BCAS). As 56 M/s. Mumbai International Airport stated above, PSF is levied under Rule 88 of the Aircraft Rules, 1937 and covers security component as well as facilitation. While the fee is collected by the license of the airports, i.e., the airport operator, through the airlines, the security component thereof, which constitutes 65% of the total amount, can be used only in terms of directions issued by the Government/ BCAS, from time to time. The amount collected by the airport operator, which is kept separately in an escrow account, is thus held in fiduciary capacity.

2.2. Since the amount is held by the airport operator in fiduciary capacity for the Government, the accounts thereof would have to be maintained separately in accordance with the procedure laid down by the Government and have to be offered for audit by the Comptroller & Auditory General of India (CAG).

3. Escrow Account Operating Procedure: 3.1 For PSF (SC) a separate Escrow Account shall be opened by JVC/Private operator, with a Schedule Nationalized Bank.

3.2 An Escrow Account agreement will be entered with the Escrow Banker by the JVC/Private Operator. 3.3 The format of Escrow Agreement will include details such as, definitions for establishment of Escrow Account and declaration of Trust, the Escrow Account provisions, term and Termination, Representations and Warranties of Escrow Bank and JVC/Private operator and Miscellaneous provisions.

3.4 Parties to the Escrow Agreement would consist of JVC/Private operator and Escrow Bank. However, the Escrow Account Agreement will have a clause by which the MOCA will have supervening power to direct the Escrow Bank on the issues regarding operation as well as withdrawals from Escrow Account.

3.5 Escrow Account shall be maintained, controlled and operated by Escrow Bank under the Escrow Agreement as under:

i) PSF (SC) Account: JVC/Private Operator shall deposit immediately all PSF (SC) collections into the PSF (SC) Account.

ii) Withdrawal from PSF (SC) Account: The Escrow Bank shall allow withdrawal by JVC/Private Operators of 57 M/s. Mumbai International Airport amounts deposited

into the PSF (SC) account only towards the following purposes, in the order of priority by descending under:

a. To pay amounts towards taxes, including Income Tax on PSF(SC) income as per provisions of Income Tax Act, 1961, Service Tax or any other statutory does. b. To pay for security related expenses to Central Industrial Security Force (CISF).

c. To pay other security related expenses in terms of MOCA order dated 20.6.2007 or any other decision of MOCA/BCAS or any other Government agency, from time to time.

iii) Deployment of Surplus: Any surplus standing at the credit of the Escrow Account should be deployed by the Escrow Bank in its own Deposit Account. On maturity or otherwise, the proceeds, shall be credited in Escrow Account.

14.34. The perusal of the above order containing SOP makes it clear that the amount collected by the airport operator is to be kept separately in 'Escrow Account' and the same is held by the airport operator in fiduciary capacity. It becomes further clear that the amount of any surplus left in the said account could not have been utilised for any purpose other than security related expenses. Under these circumstances, it was clearly not having any characteristics of income in the hands of the assessee company. The said SOP also contained certain guidelines with respect to taxability of the impugned amount. In our view, MOCA is not the designated authority to determine the taxability of the said amount as has also been discussed by us in detail in earlier part of our order and, therefore, to that extent, the observations or guidelines issued by MOCA exceed its jurisdiction and, therefore, these were not binding upon the assessee. The assessee was, of course, 58 M/s. Mumbai International Airport bound by remaining position of the guidelines as per concerned rules & regulations.

14.35. It has further been argued before us that the impugned amount would not be income in the hands of the assessee company in view of the Doctrine of 'Diversion of Income by Overriding Title'. Few judgments have been relied upon before us in support of this argument, as mentioned above in the earlier part of our order. It has been vehemently argued by the Ld. Counsel of the assessee that the impugned amount could not have been brought to tax in view of diversion of income at the source.

14.36. Per contra, the stand of the Revenue has been that the amount has been disbursed on account of security arrangements, and therefore it amounts to 'application' of income and not 'diversion' of income.

14.37. We have carefully analysed legal intricacies and nuances involved here in this case. Law in this regard was clarified and Hon'ble Supreme Court way back in its landmark judgment in the case of CIT vs Sitaldas Tirathdas 41 ITR 367 (SC) which is still followed in many other judgments by various courts all over the country. The relevant part of the judgment laying down an acid test to decide such issues is reproduced hereunder:

> "In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of 59 M/s. Mumbai International Airport the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it does so, not as part of his income, but for and on behalf of the person to whom it is payable."

14.38. Subsequently, in many judgments, various courts have, from time to time, analysed the law in this regard and suggested various tests to find out whether in a give facts it was a case of 'diversion' or 'application' of income. We find that the Hon'ble Allahabad High Court in the case of U.P. Bhumi Sudhar Nigam vs CIT 280 ITR 197 (All) formulated a set of four tests to find out whether in a given situation, it would be a case of diversion of income by overriding title or not. The Hon'ble Court, after analysing various other judgments suggested following principles:-

> (i) If a third person becomes entitled to receive an amount under an obligation of an assessee even before he could claim to receive it as his income, there would be a diversion of income by overriding title but when after receipt of the income by the assessee, the same is passed on to a third person in discharge of the obligation of the assessee, it will be a case of application of income by the assessee and not of diversion of income by overriding title.

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(ii) If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about the hypothetical income which does not materialise.

(iii) The existence or absence of entries in his books of account cannot be decisive or conclusive in the matter.

(iv) The concept of real income must be applied in appropriate cases but with circumspection and must not be called in aid to defeat the fundamental principle of law of income-tax as developed.

14.39. Turning back to the facts of the case before us, if we apply the aforesaid principles, we will find that the impugned amount cannot be treated as taxable income in the hands of the assessee. If we apply the first principle, we find that as soon as the amount was collected from the passengers @ Rs.200/- per ticket, a portion of it, i.e. Rs.130/- per ticket became payable to CISF and/or any other

agency designated for the purposes of security at the airport. The same was liable to be deposited in a separate 'Escrow Account' and the assessee had no right, whatsoever, in the same account. The aforesaid amount was axed or sliced at its very source. The amount was permitted or directed to be collected from the passengers with this clear understanding and prior stipulation that 65% of the same is meant for security agencies. Thus, the assessee merely acted as a collection agent. Thus, applying the first principle, the impugned amount would fall in the category of diversion of income.

61 M/s. Mumbai International Airport 14.40. As far as the other three principles are concerned, the crux of these three principles is to find out whether the assessee had, in substance, earned any income. In other words, these three principles suggest application of the concept of 'real income', which suggests that unless the income has been earned by a person in real sense, the same cannot be held as taxable income. There has to be first income and only then its taxability could be determined. It is noted by us that in the facts before us, no portion of the amount collected on behalf of AAI / MOCA is reported to have been retained by the assessee as its income in as much as nothing belonged to it. Thus, the impugned amount is clearly not taxable in the hands of the assessee.

14.41. It is further noted by us that in many cases, wherein under some requirement of law if the amounts were transferred to the designated fund, then in such cases the Courts have held it to be a case of diversion of income by overriding title. In a matter before Hon'ble Bombay High Court in the case of Somaiya Organo Chemicals Ltd vs CIT 216 ITR 291 (Bom), the facts were that a portion of the sales price was transferred to a separate fund for building up adequate storage facilities under a statutory obligation, it was held to be diverted at source by overriding title could not form part of assessee's income.

14.42. Ld. Counsel had also relied upon before us the judgment of Hon'ble Madras High Court in the case of CIT vs Salem Co-operative Sugar Mills Ltd (supra). The facts in this case were that the said assessee was a cooperative 62 M/s. Mumbai International Airport society, carrying on business of manufacturing and sale of sugar and in terms of Molasses Control (Amendment) Order dated 06-02-1972, transferred a sum in conformity with the statutory obligation cast by the above order and claimed it as deduction in the computation of its total income for the assessment year 1975-76, which was disputed by the Revenue but allowed by the Tribunal. Hon'ble High Court affirmed Tribunal's order and observed that even before collection of the amount as directed by the Central Government under the Molasses Control ('Amendment) Order, the assessee was directed to keep this amount under a separate account under the head "Molasses Storage Fund". Though, the assessee collected this amount under the statutory obligation, it did not belong to the assessee, but to the molasses storage fund. The assessee could not utilise the amount lying in the said fund for any other purpose. The amount was to be utilised for the purpose of constructing a storage tank in accordance with the specifications given by the Central Government. If the assessee had failed to collect such amount as directed by the Molasses Control (Amendment) Order, the Central Government would construct a molasses storage tank and recoup the construction charges from the assessee. It was held that there was diversion of title at the source of the income collected under the directions given under the Molasses Control (Amendment) Order. The sum in question was held to be not includible in the assessee's total income. 14.43. Similar view was ultimately upheld by the Hon'ble Supreme Court in the case of CIT vs New Morrisson Sugar 63 M/s. Mumbai International

Airport Mills Ltd 269 ITR 397 (SC) and CIT vs Ambur Cooperative Sugar Mills Ltd 269 ITR 398 (SC) wherein it was held that the amount set apart towards molasses reserve fund constituted diversion of income by overriding title, and therefore, it was held to be excludible from assessee's total income. Similarly, in the case of CIT vs Bijli Cotton Mills Pvt Ltd 116 ITR 60 (SC), the Hon'ble Supreme Court held that when right from the inception, amount of 'Dharmada' was collected and held by the assessee company under an obligation to spend for charitable purposes only, then those amounts were not its trading receipts and was not taxable as business income.

14.44. Before parting with, we have also analysed the facts about utilization of the impugned amount. The Escrow Account maintained by the assessee is simply a pool created by the MOCA through assessee for meeting security expenses. Under these circumstances, if at all any income can be computed, that would be possible only if any surplus arises, which is not possible to happen since entire amount collected by Assessee Company is deposited in Escrow Account which is earmarked wholly and exclusively for meeting security expenses. There is no flexibility for using the funds elsewhere. If at all any amount is left unspent from this account, then, the same is to be transferred to the account of Airport Authority of India for meeting security expenses. We had directed the assessee as well as the Ld. CIT-DR to examine requisite facts and inform us whether there was surplus or deficit in the escrow account finally. The information provided 64 M/s. Mumbai International Airport by the Assessing Officer, through Ld. CIT-DR, vide his letter dated 06-09-2016 reveals that upto the assessment year 2013-14 though there was surplus in the said account, but from A.Y. 2014-15 onwards, there was huge deficit, meaning thereby, the expenditure was more than the amount of collection. As per the terms of SOP issued by MOCA, if ultimately there was some deficit, then it was required to be funded by Government of India, and if there was ever any surplus (i.e. unspent amount), it was to be transferred to the account of Airport Authority of India (AAI). Thus, viewed from this angle also, there was no question of there being any income in this exercise, much less, any income, which could be characterised as taxable income in the hands of the assessee company. Thus, we have no hesitation in holding that the aforesaid amount is not taxable as income in the hands of the assessee company. The AO is directed to re- compute the income of the assessee accordingly. The AO has also the liberty to examine that no portion of amount collected by the assessee on account of PSF-SC is utilised by the assessee for its own purposes or for any purposes which are not permitted by MOCA/other competent authorities. In case any violation is done by the assessee in this regard, then the AO will be at his liberty to treat the amount so misappropriated as income of the assessee but to that extent only. Further, if any refund is received by the assessee on account of TDS deducted on this component, i.e. on PSF-SC, then the same shall also be deposited by the assessee in the Escrow Account, as was fairly agreed by the Ld. Counsel 65 M/s. Mumbai International Airport during the course of hearing before us, failing which it would be treated as income of the assessee, to that extent only. We direct accordingly. This ground is allowed subject to directions given above.

15. Ground 4 : In this ground, the assessee has challenged the action of the Ld. CIT(A) in restricting the depreciation allowance to 10% as applicable to buildings as against claim of 15% made by the assessee as applicable to plant and machinery, on the amount of expenditure incurred by the assessee on taxiways, taxiing track and parking ways. 15.1. The brief background of this issue is that during the impugned financial year, the assessee had spent an aggregate amount of Rs.17.52 crores

for making taxiways and aprons on which it had claimed depreciation under block of building @10%. But during the course of assessment proceedings, the assessee claimed that depreciation on these assets should be provided at 15% by treating the same as plant and machinery and not as building. The assessee also relied upon, in its favour, various judgments. But the AO was not satisfied with the claim of the assessee, and therefore, he rejected the claim of the assessee on the ground that taxi ways and aprons are nothing but concrete structures providing parking ways and other logistics facilities to the aircraft, when they are parked in between their flights and, therefore, these are part and parcel of larger meaning of the word 'building' used in the Income-tax Act. In his view, these structures are easily identifiable with building and cannot be equated with a plant. Under these 66 M/s. Mumbai International Airport circumstances, he did not allow the assessee's claim made during the course of assessment proceedings. 15.2. In the appeal before the Ld. CIT(A), the assessee made detailed submissions and provided detailed break-up of aggregate expenditure of Rs.17.52 crores incurred on these structures. The assessee also placed reliance on many judgments in its favour. The CIT(A) was not satisfied with the submission of the assessee and rejected the claim of the assessee by relying upon his earlier order for A.Y. 2007-08. 15.3. During the course of hearing before us, it was pointed out by the Ld. Counsel that CIT(A)'s order for A.Y. 2007-08 had reached upto the Tribunal, wherein the Tribunal had allowed the claim of the assessee by holding that the assessee is eligible for depreciation @15% applicable to plant and machinery on these structures.

15.4. Per contra, the Ld. DR relied upon the orders of lower authorities and did not make any distinction in facts between the assessment years 2007-08 and 2008-09.

15.5. We have gone through the orders passed by lower authorities. From the details brought before us, it is noticed by us that the assessee had incurred an aggregate amount of Rs.17.52 crores on taxi ways, aprons and runways. It is noted that similar expenditure was incurred by the assessee in A.Y. 2007-08 and depreciation as applicable to plant & machinery was claimed but the same was denied by the AO as well as by the CIT(A). The matter reached upto the Tribunal and Tribunal, vide its order dated 14-03-3024 in ITA No.7111/Mum/2011 held as under:-

> 67 M/s. Mumbai International Airport "31. We observe that the assessee in the return filed has treated the asset as of part of building and claimed depreciation at the rate of 10%. AO has accepted the claim of assessee. However, while filing the appeal before the First Appellate Authority, the assessee contended that the said asset is in the form of plant and machinery and therefore, the assessee is entitle for depreciation at the rate of 15%, the rate as applicable to plant and machinery and not at the rate of 10%. The ld. CIT(A) did not accept the contention of the assessee and has stated that assessee, in its computation of income has itself considered the said asset to be a building and it has only by way of note an alternative claim has been made stating that taxiways, aprons, hangar, parking bays and bridges are part of plant on which assessee is entitle for depreciation at the rate of 15%.
>
> 32. The ld. CIT(A) has held that the impugned assets which are basically structures and are in the nature of places which are used by Aircrafts for taxing, parking.

Accordingly they are not in the nature of plant. Hence, assessee is in appeal before the Tribunal.

33. During the course of hearing, ld. AR reiterated the submissions as made before the First Appellate Authority and stated that aprons, taxiways and runway are not only the structures but they are structures for specific purposes which can be considered as tools for the purpose of business of the assessee. Ld AR referred the decision of the Mumbai Bench of Tribunal in the case of National Airports Authority of India V/s CIT [2011] 134 ITD 34 (Delhi), wherein it was held that the terminal place used for regulation of air traffic and communicational and navigational control are part of tool of business of the assessee and therefore they constitute part of the plant. Thus the assessee is accordingly entitled for depreciation as applicable on plant and machinery.

The ld. AR referred the decision of the Hon'ble Apex Court in the case of CIT V/s Dr. B. Venkata Rao (2000) 243 ITR 81(SC) and submitted that in the case of an operation theatre in the hospital, it has been held to be a part of plant and not a part of building. Ld. AR referred the decision of the Hon'ble Apex Court in the case of CIT V/s Karnataka Power Corpn. (2000) 247 ITR 268 (SC) and 68 M/s. Mumbai International Airport submitted that the power generating station building is held to be a plant. He submitted that such structures are specific for the purpose of business of the assessee and the assessee is entitled for depreciation at rate as applicable to plant and machinery.

34. On the other hand, ld. DR supported the orders of authorities below. He submitted that assessee itself has claimed depreciation at the rate of 10% in the return as applicable to building.

35. We have carefully considered the orders of authorities below and submissions of ld. Representatives of the parties. There is no dispute to the facts that runway, taxiway are necessary part of Airport operation and are specific part of infrastructure for use of aircrafts. These are not merely concrete structures. The Hon'ble Bombay High Court in the case of CIT V/s Mazagaon Dock Ltd (1991) 191 ITR 460(Bom) has held that dry dock and wet dock created for ships are to be treated as plant and not building. The Hon'ble Apex Court has held in the case of Karnataka Power Corpn. (supra) that power generating station building is not a simply concrete structure but a specially designed building and is to be treated as part of plant. Similarly, the Hon'ble Apex Court has held in the case of Dr. B. Venkata Rao (supra) that the operation theatre in an hospital building is not simply a concrete structure but 30 necessarily a part for running of the hospital and the assessee is entitled to claim depreciation as applicable to plant and machinery. If we apply the above, decisions to the facts of the case before us, we are of the considered view that taxiways and aprons, parking bays cannot be said to be merely concrete structures but are necessary tools for operating/using the Airport. Hence, the same are to be considered as part of plant and machinery. Therefore, we hold that assessee is entitled for depreciation at the rate as applicable on plant and machinery in respect of taxiways, aprons, parking bays etc. Hence, Ground No.2 of the appeal taken by assessee is allowed."

15.6. Thus, from the perusal of the above, it is noted that the Tribunal has allowed the claim of depreciation @15% as 69 M/s. Mumbai International Airport applicable to plant & machinery. No distinction has been made by the Ld. DR on facts or on legal position. Therefore, respectfully following the order of the Tribunal for A.Y. 2007- 08, this issue is decided in favour of the assessee,

and therefore, the claim of depreciation @15% is directed to be allowed. This ground may be treated as allowed.

Order pronounced in the open court on 30th November, 2016.

Sd/-	Sd/-
(Mahavir Singh)	(Ashwani Taneja)
/ JUDICIAL MEMBER	/ ACCOUNTANT MEMBER

Mumbai; Dated: 30/11/2016
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!" $ % & % /Copy of the Order forwarded to :

1. / The Appellant

2. / The Respondent.

3. ( ) / The CIT, Mumbai.

4. / CIT(A)- , Mumbai

5. # & , & , / DR, ITAT, Mumbai

6. ¡ + ¢ / Guard file.

/ BY ORDER, # //True Copy// £ / ☐ ¥ (Dy./Asstt. Registrar)
, / ITAT, Mumbai