# Dcit, New Delhi vs M/S. Dlf Ltd., New Delhi on 27 May, 2019

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            IN THE INCOME TAX APPELLATE TRIBUNAL
                  DELHI BENCH "B" NEW DELHI

        BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
                              &
           SHRI L.P. SAHU, ACCOUNTANT MEMBER

                     I.T.A. No. 2126/DEL/2013
                     Assessment Year: 2008-09

DLF Limited,                     v.    The Addl. Commissioner
DLF Centre, (9th Floor),               of Income Tax, Range-
Sansad Marg,                           10,
New Delhi.                             New Delhi.
TAN/PAN: AAACD 3494N
(Appellant)                            (Respondent)

                     I.T.A. No. 2749/DEL/2013
                     Assessment Year: 2008-09

The Deputy Commissioner of       v.    DLF Limited,
Income Tax, Circle-0,                  DLF Centre, (9th Floor),
New Delhi.                             Sansad Marg,
                                       New Delhi.
TAN/PAN: AAACD 3494N
(Appellant)                            (Respondent)


Appellant by:              Shri R.S. Singhvi & Shri Satyajeet
                           Goel, CA
Respondent by:             Shri Puneet Rai, Adv. Special counsel
Date of hearing:           28 03 2019
Date of pronouncement:     27 05 2019


                           ORDER

PER AMIT SHUKLA, JM;
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The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against impugned order dated 12.02.2013 passed by ld. CIT (Appeals)-XIII, New Delhi for the quantum of assessment passed u/s.143(3) for the Assessment Year 2008-09. We will first take up the assessee's appeal being ITA No.2126/D/2013, wherein the assessee in various grounds of appeal has raised the following issues: -

> Ground no. 1: Addition on account of brokerage and commission expenses relates to leased out property 64,51,161/-.

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Ground    no.    2.1    to    2.6:    Disallowance         u/s.14A        -
Rs.6,53,00,000/-
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> Ground no. 3: Disallowance u/s.43B on account of provision for leave salary - Rs. 1,33,77,910/-
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> Ground no. 4: Addition on account of disallowance of expenses u/s. 40(a)(ia) for non deduction of TDS on payment to Petron Civil Engineering Ltd.Rs. 1,29,52,790/-
>
> Ground nos. 5 To 5.1: addition on account of notional rent where security deposits received but no rental income- Rs.10,91,270/-
>
> Ground no. 6: Addition on account of capitalization of interest and processing fees on loan taken for purchase of windmills: -Rs.2,15,51,123/-
>
> Ground no. 7: Addition on account of interest on late of deposit TDS - Rs.28,79,372/-

2. At the outset, learned counsel for the assessee, Shri R.S. Singhvi submitted that ground nos.1 and 3 relating to brokerage and commission expenses and disallowance u/s. 43B are not pressed. Accordingly, grounds no. 1 and 3 are dismissed as not pressed.

3. Coming to the issue of disallowance u/s.14A, the facts in brief are that the Assessing Officer has made disallowance u/s.14A to the extent of Rs.35,40,91,000/- in accordance with Rule 8D. The Assessing Officer noted that the special auditors to whom matter was referred u/s.142A have pointed out that assessee-company has made investment for an amount aggregating to Rs.89.97 crore as on 31st March, 2008 in 12 partnership firms as its capital contribution. These investments have been made out of interest bearing funds having direct nexus between the funds borrowed and capital contribution made in the partnership firm, since share of profits earned by the assessee company aggregates to Rs.87.20 lac which is exempt u/s. 10(2A). Apart from that, assessee has also made investment in various private limited companies. The closing balance as on 31st March, 2008 was Rs.1,63,342.19 lacs. The assessee has paid over all interest of Rs.425.61 crore. The Assessing Officer rejected the assessee's contention that no interest bearing funds were utilized for making the investment for earning the exempt income on the ground that the same has not been substantiated by the assessee for documentary evidences. He further rejected the assessee's contention that it has received interest at Rs.426.08 crores against the interest expenditure claimed of Rs.425.61 crores and the borrowed funds were used for giving loan to other subsidiary companies at a higher interest rate, therefore, the interest on which sums have been borrowed and assessee has not made any expenditure on earning interest free income or exempt income to warrant any disallowance, on the ground that same also remained unsubstantiated. AO further observed that assessee-company has not been able to establish flow of funds or any nexus. The assessee's contention is based on the presumption that entire investments have been made from the interest free funds available in the balance sheet as the assessee has not establish only flow of funds from its bank account into investment and establish that same is from interest free funds available only. He accordingly worked out the disallowance of 29.42 crore on account of interest expenditure under Rule 8D(2) and further

made disallowance of administrative expenditure of Rs.5.98 crore under Rule 8D(2)(3) after following decision of ITAT Special Bench in the case of Chem Invest Ltd., 121 ITD 318. He proceeded to make the disallowance of Rs.35,40,91,000/- u/s. 14A r.w. Rule 8D(ii).

4. Ld. CIT (A) after analyzing the investment made interest income on an interest expenditure incurred and the position of availability of surplus funds with assessee held that no disallowance of interest can be made. However, he has confirmed the part of the disallowance after observing and holding as under:

> 20.10 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, orders of CIT (A)-XVIII for AY 2006-07 and my own order for AY 2007-08 in appellant's own case and various judicial pronouncements relied upon by the appellant on this issue. It is seen that during the year, the appellant has earned exempt income of Rs. 87,20,11,847/- as share of profit from partnership firms and dividend income on mutual funds. It is also seen that appellant has made average investment of Rs.

1197.30 crore in various partnership firms and in the shares of various group companies and mutual funds. The appellant has shown total average assets during the year of 17319.40 crore in the balance sheet. Vide my decision on ground No. 6 and 7,1 have held that appellant has shown interest incurred on fixed period loan of Rs. 604.43 crore. Out of this, an amount of Rs. 354.89 crore has been capitalized over the project. The appellant has also paid interest on over draft etc. to the tune of Rs. 176.06 crore. As such the total interest payment during the year comes to Rs. 425.60 crore. As against this, the appellant has shown interest receipts of Rs. 411.99 crore in the P&L account. If the interest paid on bank overdraft facilities of Rs. 176.06 crore is reduced then balance interest paid comes to Rs. 249.54 crore which is less than the interest receipt from subsidiary companies and banks. On the basis of above working it can be said that investment made by the appellant company was interest neutral. Therefore, on this basis the disallowance of interest for earning exempt income will be nominal or nil. At the same time the appellant has been sanctioned loan of Rs. 370 crores by ICICI Bank and has invested in the shares of M/s Edward Keventor (Successors) Pvt. Ltd. for acquiring shares of said company. The appellant had paid Rs. 7.93 crore as interest on the loan taken from ICICI Bank which has been specifically taken for making investment in shares of M/s Edward Keventor (Successors) Pvt. Ltd. (page 203 of AO's Order). The other loans taken by the appellant company on which interest is paid were related to the construction projects being undertaken by the appellant company and advanced to other group, entities. Therefore, interest on such loan cannot be considered for disallowance u/s 14A. The loan taken in making investments in the shares of M/s Edward Keventor (Successor) Pvt. Ltd can be considered for making disallowance u/s 14A of the IT Act which worked out as under:-

> Amount 1 Expenditure directly relating to the exempted income -
>
> Amount of expenditure by way of interest other than 2 the amount of interest included in point No.l. (directly 0.54 related to exempted income) (A x B / C) Disallowance u/s 14A ( 1 + 2 ) 0.54 Amount of expenditure by way of interest other

than A the amount of interest included in point No. 1. 7.93 (directly related to exempt income) B Average of value of investment, income from which 1197.30 does not form part of total income.

C The average of total assets as appearing in the 17,419.40 balance sheet

5. Before us, the learned counsel for the assessee, Mr. R.S. Singhvi submitted that, the ld. CIT (A) has allowed the relief to the extent of Rs.28,87,91,000/- by observing that the entire investment is out of assessee's own fund, however has confirmed the disallowance of Rs.6.53 crore consisting of proportionate interest of Rs.54 lac on loan taken for purchase of shares of M/s. Edward Keventor Pvt. Ltd. and Rs.5.99 crores under Rule 8D(2)(iii). He submitted that investment in the share of M/s. Edward Keventor Pvt. Ltd. was purely a strategic investment, and therefore, no disallowance can be made u/s.14A. Apart from that, he submitted that assessee has substantial amount of own funds in the form of share capital and reserves and entire investments are fully made out of non interest bearing free funds. The details of share capital and reserves as on 31.03.2008 and corresponding investment appearing in the balance sheet were as under:

Amount (Rs. in Lacs) a. Share Capital 34,095.95 b. Reserve and Surplus 1,092,818.68 Own funds 1,126,914.63 Total investment in shares/partnership firms As per Balance sheet 175,349.69

6. He further provided us the details of investment and the details of exempt income in the following manner:

(a) Details of investment are given hereunder:

(Rs. in crores) 31.03.08 31.03.07 31.03.06 31.03.05 31.03.04 Investments:

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- Quoted Mutual           31                          -             -

Funds
- Quoted Shares
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(b) Details of exempt income:
Particulars                          Assessment Year

                                     2008-09           2007-08            2006-07

Share of Profit from Partnership 1,87,02,005       5,66,24,572       4,88,69,429
Firms (net)
Exempt income from subsidiary
Companies
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| | | | |
|---|---|---|---|
| Other Exempt Income (Dividend) | 85,33,09,842 (Mutual funds) | | |
| Total | 87,20,11,847 | 5,66,24,572 | 4,88,69,429 |

7. He further submitted that the same was also come up for consideration before this Tribunal for the Assessment Years 2006-07 and 2007-08, wherein the Tribunal after detailed discussion has deleted the disallowance on the grounds.

• firstly, there is no satisfaction recorded by the Assessing Officer u/s.14A(2).

• secondly, interest free funds available in excess of investments in earning tax free securities, • thirdly, investments in partnership firms and companies are for the business purposes of the assessee and;

• lastly, no dividend was earned by the assessee on investments in unquoted share of the private limited companies.

8. He further strongly relied upon the judgment of Hon'ble Delhi High Court in the case of ACB India Ltd. vs. ACIT reported in (2015) 374 ITR 108, wherein it has been upheld that while calculating the disallowance under Rule 8D(2)(ii) Assessing Officer has to adopt average value of the investment the income from which does not form part of the total income and disallowance can only be computed in respect to investment which has yielded exempt income during the year. The assessee has earned exempt income from the investments made in partnership firm and mutual fund and not from other investments, and therefore, disallowance if any should be restricted to the extent of Rs.53.75 lac, the working of which was given in the following manner:

Average investment in Partnership Firms and Mutual Funds Opening as on 01/04/2007 = Rs.84+10 cr.

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    Closing as on 31/03/2008           = Rs.90+31 cr

                             Total            Rs.215 cr

Average investment                     = Rs.107.50 cr.
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Disallowance being 0.5% of Rs.107.50 cr. = 53.75 lakhs.

9. Before us, ld. Special Counsel appearing on behalf of the Revenue strongly relied upon the order of the Assessing Officer and further submitted that in so far as strategic investments are concerned, the same cannot be removed for the purpose of calculating the disallowance in view of the judgment of Hon'ble Supreme Court in the case of Maxopp Investment Ltd v/s CIT, 402 ITR 640 (SC). He

further submitted that the assessee has to establish the nexus and the link between the borrowed funds and its utilization so as to prove that all the investments yielding investment income has been made out of surplus funds and interest bearing fund has been used purely for the business purposes.

10. We have heard the rival submissions and also perused the relevant findings given in the impugned orders as well as material referred to before us. The undisputed fact is that assessee has earned exempt income of Rs.87,20,11,847/- as share of profit from partnership firm and dividend income on mutual funds. The average investment as on 31st March, 2008 stood at Rs.1197.30 crore in various partnership firm and the shares of various group and mutual funds. The total average assets during the year in the balance-sheet were Rs.1,754 crores. The assessee's case has been that it has huge surplus fund in the form of reserves and surplus and share capital at Rs.1126.91 crore out of which investments in shares and in partnership firm was only 175.30 crore. From a perusal of the impugned appellate order which is based on perusal of material placed on record, it is seen that ld. CIT (A) has taken note to the fact that assessee has paid Rs.176.06 crores interest on bank overdraft facilities and the balance interest of Rs.249.5 crore is much less than total interest received from subsidiary companies and banks which was more than 411.99 crore. On these facts, he has held that on investment made by the assessee-company no disallowance of interest can be made. Apart from that, he has noted that assessee has been sanctioned loan of Rs.370 crores by ICICI bank which was invested in shares of M/s. Edwart Keventor P. Ltd. for acquiring the shares of a said company for which assessee has paid Rs.7.39 crore interest. The other loans taken from the assessee-company on which interest has been paid, purely related to business undertaken by the assessee and business advance to the group companies. Based on such findings he has held that interest of such loan cannot be considered for disallowance u/s.14A. However, he has confirmed the disallowance of Rs.653 lacs mostly arising out of disallowance of administrative expenditure under Rule 8D(2)(iii) and disallowance of interest on the investment made in the shares of M/s. Edward Keventor P. Ltd. which has been stated to be strategic investment.

11. In so far as disallowance of interest is concerned, we find that, not only the ld. CIT (A) has properly examined the utilization of interest bearing funds for the assessee which was purely for the purpose of business but also from the bare perusal of the balance sheet, it is seen that the interest free funds available with the assessee in the form of reserves and surplus far exceeds the total investment made in shares/partnership firms including the investment made in the shares of M/s. Edward Keventor P. Ltd. which has been stated to be strategic investment. If that is so, then no disallowance u/s.14A can be made. This proposition has now been confirmed by the Hon'ble Supreme Court in the case of CIT vs. Reliance Industries Ltd. in civil appeal no.10 to 13 of 2019 judgment and order dated 23rd March, 2019, wherein the Hon'ble Supreme Court has upheld the proposition that if assessee has interest free funds available sufficient to meet its investment, then it can be presumed that the investment have been made from interest free fund available with the assessee and not from the borrowed funds. Thus, no disallowance of interest can be made.

11.1 In so far as disallowance made under Rule 8D2(iii), one of the plea raised by the learned counsel before us is that, for the computation of average investment which had not yielded exempt income should be removed for which, reliance has been placed in the judgment of Hon'ble Delhi Court in the case of ACB India Ltd vs. ACIT (supra). In view of such a binding precedent, we direct the

Assessing Officer only to include those investments while computing the average investments which have yielded exempt income, i.e., investment made in the partnership firm and mutual fund only, because investment made on unquoted shares have not yielded any exempt income. The calculation of average investment in partnership firm and mutual fund has been given by the learned counsel as has been incorporated above and accordingly we direct the Assessing Officer to verify the same and work out the disallowance of 0.5%. Accordingly, appeal of the assessee is partly allowed.

12. The next issue relates to disallowance on account of expenses u/s.40(a)(ia) for non-deduction of TDS on payment to Petron Civil Engineering Ltd for Rs.1,29,52,790/-.

13. The facts in brief are that assessee has paid legal and professional expenses to Petron Civil Engineering Pvt. Ltd. against arbitration award of Rs.1,29,52,790/-. Since assessee has not deducted TDS on the payment made against arbitration award, the Assessing Officer proposed to make disallowance u/s.40(a)(ia). In response to the show cause notice, the assessee submitted that the assessee-company had a dispute with the said party and the matter was referred to arbitrator for arbitration and assessee-company has not recognized any liability against the claim of M/s. Petron Civil Engineering in its books of account. The whole amount of awarded by the arbitrator was treated in the nature of compensation and therefore, the same does not fall under the category of normal payment made against any contractual work and accordingly, TDS was not liable to be deducted. Ld. Assessing Officer rejected the assessee's contention after observing and holding as under:

> "17.4 The assessee in the reply has simply stated that it had a dispute with Petron Civil Engg Pvt. Ltd and the matter was referred to an arbitrator.
>
> The company had not recognised any liability against the claims of Petron Civil Engg and the whole amount awarded by the arbitrator was treated in the nature of compensation and as such the same does not fall in the category of normal payment made against any contractual work and accordingly not liable for TDS. A perusal of the arbitration award shows that the award of Rs. 1,29,52,790/- has been determined as under:

| | |
|---|---|
| Claim No. 1 | 45,00,000.00 |
| Claim No. 2 | 44,54,100.00 |
| Interest Amount | 39,98,690.00 |
| | 1,29,52,790.00 |

> Claim No. 1 was refund of Rs. 45,00,000.00 retained by DLF Ltd. Claim No. 2 of Rs. 44.54.100.0 is in respect of payment due against 36th final bill and the Interest amount of Rs. 39.98.690.0 was calculated @ 10% per annum on Rs. 44,54,100.00 from 01.03.1998 till 28.02.2008. This clearly shows that the payment made against claim No. 1 and claim No. 2 was against running bills raised by Petron Civil Engg

which were disputed by DLF Ltd. The payment made against claim no. 1 and claim no. 2 is contractual payment and covered with the ambit of section 194-C for deduction of TDS. The arbitrator had also awarded interest for delay in payment of running bills as determined under claim no. 2 and this payment is purely in the nature of interest covered under section 194A for deduction of TDS. The assessee has failed to deduct TDS on payment of Rs. 1,29,52,790 as discussed above and the plea of the assessee that the payment was treated in the nature of compensation is not acceptable in view of clear and defined nature of award as per the order. The expense of Rs. 1,29,52,790 is accordingly disallowed u/s.40(a)(ia) for non deduction of TDS."

14. Ld. CIT (A) too has confirmed the said disallowance holding that payment awarded by the arbitrator was not compensation but same was contractual payment for which appellant was required to withheld TDS from running bills as penalty was for delay in executing the work and disputes with regard to the quality of the work.

15. Before us, learned counsel submitted that the M/s. DLF Cement Ltd. had awarded a construction contract to M/s. DLF Ltd. (Appellant assessee) on 24/02/1994. Subsequently, the assessee sub-contracted the work to M/s. Petron Civil Engineering P. Ltd. as per MOU dated 31/03/1994. The effective date of sub-contract was 06/06/1994 and the work was to be completed in 12 months i.e. by 05/06/1995. The work got delayed and dispute arose between the parties regarding correctness of bills and payment of the same. The assessee adjusted an amount of Rs. 45 lacs towards damages for delay in completion of project. Further, the assessee also disputed the correctness of final bill of Rs. 91.87 lacs as the same was highly inflated. The dispute comprising claims and counter claims of both the parties was eventually referred to the arbitration proceedings vide order of Hon'ble Delhi High Court dated 29/01/2002. After detailed discussion on various issues, the Arbitral Tribunal decided the issue substantially in favour of sub- contractor M/s. Petron Civil Engineering P, Ltd.; and directed the assessee to pay following amounts:

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Claim No. 1         :    Rs.   45,00,000

Claim No. 2         :    Rs.   44,54,100



Interest            :   Rs.   39,98,690

Total               :   Rs. 1,29,52,790
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The appellant made the payment of the said amount as per terms of arbitration award which was decreed by the court and accepted by both the parties. The assessing officer has considered the disallowance u/s 40(a)(ia) on the ground that appellant should have deducted TDS u/s 194C at the time of payment of amount mentioned in Claim No.l and 2 u/s 194A on interest component.

16. Ld. Counsel submitted that both the authorities have failed to consider the nature and character of the payment because, firstly, assessee has denied its liability towards M/s. Petron Civil Engineering Pvt. Ltd. and there was claim and counter claim by both the parties and it could not be said that final payment of the decreed amount is in the nature of contractual charges especially when assessee has disputed the bill and in return has demanded damages. Such arbitration award for compensation cannot be said to be under a contract or in pursuance of contract, and therefore, provision of Section 194C are not applicable. Further, the interest on the said amount is in the nature of damages which falls outside the purview of Section 194A. In any case, once amount decreed by Arbitral Tribunal, it is a kind of a judgment debt and overrides the provisions of Income Tax Act; and in support, he relied upon the following judgments:-

1. Islamic Investment Co. v. UOI [2004] 265 ITR 254 (Bom.)

2. Madhusudan Shrikrishna v. Emkay Exports [2010] 188 Taxman 195 (Bom.)

3. Gold Crest Exports vs. ITO (ITAT Mum) (ITA

17. Alternatively, he submitted that in view of proviso to Section 201(1) read with proviso to Section 40(a)(ia) no disallowance should be made with M/s. Petron Civil Engineering Pvt. Ltd. Assessee has offered this amount for taxation.

18. On the other hand, ld. Special Counsel has strongly relied upon the order of the ld. CIT(A) and submitted that basically the payment which was to be made to the said party was due to the nature of contract entered between the assessee and the M/s. Petron Civil Engineering Ltd. Thus, even if the payment has been made through arbitral award, it will not change the character of the payment, and therefore, assessee was liable to deduct TDS under the provision of Income Tax Act.

19. We have heard the rival submissions and also perused the relevant findings given in the impugned orders as well as material referred to before us. As stated above, the assessee has given said contract work to M/s. Petron Civil Engineering Pvt. Ltd. effective from 06.06.1994 and the work was to be completed in 12 months, i.e., 05.06.1995. Due to delay, dispute had arisen between the parties regarding the correctness of the bills and payments of the same. The assessee has adjusted an amount of Rs.45 lacs towards delay in completion of the project and has further disputed the correctness of the final bill of Rs.91.87 lacs. The dispute was referred for arbitration by the Hon'ble Delhi High Court. The Arbitral Tribunal has finally decided the issue, substantially in the favour of the sub-contractor, M/s. Petron Civil Engineering P. Ltd. and assessee was directed to pay the amount along with interest aggregating to Rs.1,29,52,790/-.

20. Ergo, if there was a dispute between the parties and both the parties had made claim and counter claim from each other and the Arbitral Tribunal has given award in favour of the sub-contractor, then such an award assumes the character of a 'judgment debt'; and when an amount becomes a part of judgment debt, then it loses its original character and becomes a judgment debt. In such a situation, judgment debtor is not liable to deduct tax at source either on the amount of the award or a decree including the interest component of the decree/award, because

it cannot be said to be arising out of a contract or any income/interest accruing any provision of the Act. The Hon'ble Supreme Court in the case of All India Reported Ltd. vs. Ramchandra D. Datar, AIR 1961 SC 943, has held that, where any amount becomes a part of the judgment debt, it loses its original character and assumes a character of the judgment debt and once such an amount assumes a character of the judgment debt, the decree passed by the civil court must be executed. This principle has been followed by the Hon'ble Bombay High Court in the case of Islamic Investment Co. vs. UOI (supra) and Madhusudan Shrikrishna vs. Emkay Exports (supra). In both the judgment, it was held that the interest paid in pursuance of decree of the Court which has to be discharged under the said decree, then it assumes the character of the judgment debt and hence judgment debtor is not liable to deduct tax at source on the interest component of the decree. This principle will apply not only to the interest component but also to the other part. In such a case, the award given by the Arbitral Tribunal cannot be reckoned as payment made in pursuance of a contract but payment in pursuance of a judgment decree and is part of a judgment debt, and therefore, in such a case, assessee was not liable to deduct TDS either u/s.194C or u/s.194A. Thus, on this reasoning, we hold that there was no obligation to deduct TDS on the payment made to M/s. Petron Engineering P. Ltd. in accordance with arbitration award. Accordingly, this issue is allowed in favour of the assessee.

21. Coming to the issue of addition on account on notional rent where security deposits were received but no rental was shown, amounting to Rs.10,91,270/-. It has been pointed out by both the parties that this issue now stands covered in favour of the assessee by the Tribunal in assessee's own case for the Assessment Year 2007-08 vide order dated 01.11.2017 in ITA No.3846/D/2012.

22. The addition has been made on the ground that assessee despite being owner of the Kiosks has not disclosed rental income in its books and the same has been transferred to M/s. DLF Services Ltd. by over riding title. M/s. DLF Services Ltd is providing maintenance and upkeep services of the mall including Kiosks. In return for consideration for these services, the appellant vide authority letter dated 12/12/2005 has granted M/s DLF Services Ltd., right to recover the rental receipts from the third parties using said Kiosks. Assessee has not claimed any expenditure in the name of M/s DLF Services Ltd. in connection with maintenance services of the mall. In view of above arrangement, M/s. DLF Services Ltd. is showing the receipts from the Kiosk as a part of its income which is duly subjected to tax in its hands and accordingly there is no loss to the revenue.

23. This precise issue had come up for consideration before the Tribunal in assessee's own case in the earlier year, wherein it has been observed and held as under:

> '42. We have heard the rival submissions and perused the material on record. The ground is regarding addition of Rs. 12,60,000/- as rental income. The Assessing Officer observed that the assessee was owner of Kiosks installed at Malls which were leased to various parties at the lease rent of Rs. 18,00,000/- per annum. The Assessing Officer after accepting statutory deduction of 30%, considered the net rental income at Rs. 12,60,000/-. The CIT(A) confirmed the finding of the Assessing Officer.

43. The appellant contended that M/s. DLF Services Ltd. was appointed as maintenance agency for upkeep and maintenance of Mall, owned and run by appellant. For maintenance services being rendered by DLF Services Ltd., the appellant assigned the lease rental to DLF Services Ltd. as part of maintenance cost. The appellant contended that the diversion of lease rent was towards reimbursement of maintenance services rendered by M/s. DLF Services Ltd. and as such diversion was towards provisions of maintenance services. It was further contended that the rental income as diverted to DLF Services Ltd. has being subjected to tax in the case of M/s. DLF Services Ltd. and there is no case of subjecting the same income again in the case of appellant. In this connection, the appellant made reference to decision of Supreme Court in the case of M/s.

Ashish Plastic Industries Vs. ACIT 373 ITR 45, as per which same income cannot be subjected to tax again in the case of the appellant.

44. The Ld. CIT DR supported the order of the Assessing Officer and CIT(A).

45. After hearing both the parties, we are of the view that the appellant assigned DLF Services Ltd. right to recover lease rent for maintenance and upkeep services of Mall and as such there was a genuine business arrangement between the parties. If the lease income is considered as chargeable to tax in the case of appellant, the appellant may be eligible for claim of expenses on account of maintenance of Mall which was owned and run by the appellant and as such appellant has not derived any tax benefit on the basis of such arrangement and for diversion of lease rent. It is further relevant to take note of the fact that such lease rent has been subjected to tax in case of M/s. DLF Services Ltd.

46. After considering the facts of the case, we are of the view that there is no justification for addition of Rs. 12,60,000/- as same was towards business obligation and for specific services rendered by M/s. DLF Services Ltd. and accordingly the impugned disallowance is directed to be deleted."

24. Thus, following the aforesaid precedence in assessee's own case, we decide this issue in favour of the assessee and the impugned addition is directed to be deleted.

25. The next issue relates to addition on account of capitalization and processing fees on loan taken for purchase of windmills of Rs.2,15,51,123/-.

26. Ld. Assessing Officer noted that assessee-company during the year had shown income from power generation through windmills and corresponding expenses for the same has been debited to the P&L account. The Special Auditors have noted that out of the total amount capitalized/invested in the windmill for Rs.940.61 crore, an amount of Rs.561 crore has been funded out of borrowed funds and balance Rs.379.61 crores were met out of own funds.

27. After taking note of the amount of loan sanctioned, rate of interest charged by the bank and the details pertaining to interest and finance charges were charged in the P&L account in respect of loan taken for windmill projects, and also date-wise details of loan fund and own fund used in the windmill project, the ld. Assessing Officer held that claim of interest and processing charges @ 40% needs to be capitalized in view of the proviso to Section 36(1)(iii) read with Explanation 8 to Section 43(1) of the Act. The relevant observation of the Assessing Officer in this regard reads as under:

> "24.5 The reply of the assessee has been considered and the only contention of the assessee is that the interest expenditure has been claimed according to the AS-16. However it is to be observed that a particular expenditure is allowable as per the Income Tax Act and the allowability of expenditure is not governed by Accounting Standards. The allowability of interest expenditure is governed by section 36(l)(iii) of the Income Tax Act and it clearly states that:
>
> "(iii) the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession :
>
> Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset for extension of existing business or profession (whether capitalized in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction. "
>
> 24.6 Therefore the amount of interest expenditure on capital borrowed for acquisition of a capital asset till the date on which capital asset was put to use shall not be allowed as deduction. The special auditors has calculated such interest expenditure at Rs. 1,99,18,538/-. The assessee in the reply has not put forth any objection to the calculation adopted for arriving at this amount and has not put forth any argument in terms of provisions of section 36(l)(iii) of the Income Tax Act. The only argument raised by the assessee is that it had followed AS-16 which is not acceptable. Accordingly interest expenditure of Rs. 1,99,18,538/- is capitalised. However depreciation @ 40% (for half year) is allowed and the total disallowance of interest expenditure would be Rs. 1,19,51,123/-.
>
> 24.7 As regard the processing fees the assessee has submitted that out of total processing fees of Rs. 1,79,77,600/- it had claimed expenditure of Rs. 1,60,00,000/- and the balance amount of Rs. 19,77,600/- pertained to service tax and was not claimed as expenditure but adjusted against service tax payable as input credit. The assessee has further argued that processing fees is allowable as deduction and it had paid processing fee in the month of December, 2007 of Rs.11,23,600/- and in February, 2008 of Rs.1,68,54,000/-. The company has stated that up to December, 2007, 27 numbers of windmills were installed and were operational, similarly till February, 2008, 63 numbers of windmills were installed and were operational. However as in the case of interest disallowance the processing fees paid for availing

loan is the starting point of disbursement of loan and all the processing fees paid was prior to the installation of windmills and accordingly the processing fees of Rs. 1,60,00,000/- is capitalized and depreciation @ 40% (for half year) is allowed and the total disallowance of processing fee would be Rs.96,00,000/-. Hence the total disallowance is as under:

| | |
|---|---|
| Interest disallowance | Rs.1,19,51,123 |
| Processing Fees Disallowance | Rs.96,00,000 |
| Total | Rs.2,15,51,123/-" |

28. Ld. CIT(A) too has confirmed the said addition.

29. Before us, learned counsel for the assessee submitted that there is no ground or justification for capitalizing the claim of loan processing charges to the extent of Rs.96 lac out of claim of Rs.1,60,00,000/- as the same is allowable u/s.37 and proviso to Section 36(1)(iii) read with Explanation 8 of Section 43(1) is only applicable in respect of claim of interest and not on loan processing charges. Thus, this amount should be allowed out of total disallowance made by the Assessing Officer.

30. On the other hand, ld. Special counsel submitted that the processing charges paid to the bank is part of the same loan agreement and if interest is to be capitalized then processing charges cannot be segregated to be allowed separately.

31. After considering the rivals submissions and on perusal of the relevant findings placed on record, we find that the issue is with regard to the capitalisation of Rs.1,19,51,123/- on account of interest paid on loan for windmill project and Rs.96 lacs on account of loan processing charges. The Assessing Officer has capitalized proportionate claim of interest and processing charges after allowing depreciation @ 40% based on proviso to Section 36(1)(iii) r.w. Explanation 8 to Section 43(1). In so far as capitalisation of interest expenditure is concerned, the same is definitely part of acquisition of the capital asset which needs to be capitalized. The loan processing charges is also part of the same loan agreement, and therefore, it cannot be given a different treatment as it also a charge for acquisition of an asset and same too has to capitalization only. Accordingly, we agree with the contention raised by the ld. Special Counsel that this cannot be allowed separately u/s.37. Accordingly, ground raised by the assessee is dismissed.

32. The next issue relates to addition on account of interest on late deposit of TDS.

33. The facts in brief are that the ld. Assessing Officer on the basis of comments made

by the Special Auditor observed that interest of Rs.28,79,372/- paid on late deposit of TDS has been claimed against interest received on income tax refund and the interest payment on late deposit of TDS is not allowable expenditure. In response to the show cause notice, the assessee relied upon the judgment of Hon'ble Karnataka High Court in the case of CIT vs. Oriental Insurance Company Ltd., (2009) 183 Taxman 186 (Kar.). However, the ld. Assessing Officer held that the assessee has not furnished any statement regarding late deposit of TDS.

34. Ld. CIT(A) has confirmed the said addition after observing and holding as under:

"33.10 I have considered the observations of Special Auditors as well as of the Assessing Officer and submission of the appellant. It is seen that the appellant company has received interest on income tax refund of Rs 30,31,199/-. This interest was credited in the account "interest paid others - Income Tax" and this interest on refund was adjusted against the interest paid on late payment of TDS of Rs. 28,79,372/-. Thus, an amount of Rs. 28,79,372/- was adjusted against the interest received on income-tax refund and balance amount was offered as interest income. The interest paid on late payment of TDS is not an allowable expenditure u/s 37 of the IT Act. This is not an expenditure wholly and exclusively for the purposes of the business of the appellant company, therefore same is not an allowable expenditure. Hence, the disallowance of set off of interest payment on late deposit of TDS against the interest received on income tax refund was justified and same is confirmed."

35. Before us the learned counsel submitted that in an identical issue, ITAT Kolkata Bench in the case of DCIT vs. M/s. Narayani Ispat Pvt. Ltd., ITA No.2127/Kol/2014, order dated 30.08.2017 wherein it was held that TDS amount is in the nature of tax of the deductee, i.e., other party and not that of the assessee and as such the interest on late deposit of TDS is allowable expenses u/s.37 of the Act. In support, following observations and findings of the Tribunal in para 7 was referred: -

"...in the case before us the interest was paid for delayed payment of service tax & TDS. The interest for the delay in making the payment of service tax & TDS is compensatory in nature. As such the interest on delayed payment is not in the nature of penalty in the instant case on hand.

The issue of delay in the payment of service tax is directly covered by the judgment of Hon'ble Apex Court in the case of Lachmandas Mathura Vs. CIT reported in 254 ITR 799 in favour of assessee. The relevant extract of the judgment is reproduced below :

"The High Court has proceeded on the basis that the interest on arrears of sales tax is penal in nature and has rejected the contention of the assessee that it is compensatory in nature. In taking the said view the High Court has placed reliance on its Full Bench's decision in Saraya Sugar Mills (P.) Ltd. v. CIT [1979] 116 ITR 387 (All.) The learned counsel appearing for the appellant- assessee states that the said judgment of the Full Bench has been reversed by the larger Bench of the High Court

> in Triveni Engg. Works Ltd. v. CIT [1983] 144 ITR 732 (All.) (FB), wherein it has been held that interest on arrears of tax is compensatory in nature and not penal. This question has also been considered by this Court in Civil Appeal No. 830 of 1979 titled Saraya Sugar Mills (P.) Ltd. v. CIT decided on 29-2-1996. In that view of the matter, the appeal is allowed and question Nos. 1 and 2 are answered in favour of the assessee and against the revenue."

In view of the above judgment, there remains no doubt that the interest expense on the delayed payment of service tax is allowable deduction.

The above principles can be applied to the interest expenses levied on account of delayed payment of TDS as it relates to the expenses claimed by the assessee which are subject to the TDS provisions. The assessee claims the specified expenses of certain amount in its profit & loss account and thereafter the assessee from the payment to the party deducts certain percentage as specified under the Act as TDS and pays to the Government Exchequer. The amount of TDS represents the amount of income tax of the party on whose behalf the payment was deducted & paid to the Government Exchequer. Thus the TDS amount does not represent the tax of the assessee but it is the tax of the party which has been paid by the assessee. Thus any delay in the payment of TDS by the assessee cannot be linked to the income tax of the assessee and consequently the principles laid down by the Hon'ble Apex Court in the case of Bharat Commerce Industries Ltd. Vs. CIT (1998) reported in 230 ITR 733 cannot be applied to the case on hand.

Thus, in our considered view, the principle laid down by the Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd. (supra) is not applicable in the instant facts of the case. Thus, we hold that the Assessing Officer in the instant case has wrongly applied the principle laid down by the Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd.(supra). We also find that the Hon'ble Supreme Court in the case of Lachmandas Mathura (Supra) has allowed the deduction on account of interest on late deposit of sales tax u/s 37(1 of the Act. In view of the above, we conclude that the interest expenses claimed by the assessee on account of delayed deposit of service tax as well as TDS liability are allowable expenses u/s.37(1) of the Act. In this view of the matter, we find no reason to interfere in the order of the ld. CIT(A) and we uphold the same. Hence, this ground of Revenue is dismissed."

36. Before us, the ld. Special Counsel for the revenue submitted that there is one direct judgment of Hon'ble Madras High Court in the case of Chennai Properties and Investment Ltd., 239 ITR 435 (Mad) and submitted that now in view of this only judgment of Hon'ble High Court, in this issue, the matter should be decided against the assessee.

37. After considering the rival submissions, we find that the assessee-company has received an interest on income tax refund of Rs.30,31,199/- and such an interest was credited in the account of "interest paid others - Income Tax" and such an interest of refund was adjusted against the interest paid on late payment of TDS of Rs.28,79,372/- and only the balance amount has been offered as interest income. Thus, in this manner, interest paid on late payment of TDS has been claimed as expenditure u/s.37 of the Act.

38. Learned counsel for the assessee had contended that the TDS amount is in the nature of tax for the deductee and not that of the assessee and such interest on late deposit of TDS is allowable expenses u/s. 37 because it has been incurred during the course of business. Under the provision of the Act, levy of interest for delay in remittance of the TDS has been envisaged u/s. 201(1A) which is not in the nature of penalty albeit it is more on account of delayed tax, deposited by the assessee on behalf of the deductee, i.e., other party for which the interest is charged. The amount of TDS represents the amount of income tax which is payable by the party on whose behalf the deductor has deducted the tax and pays to the Government Exchequer. The TDS amount does not represent tax liability of the assessee albeit it is the tax of the other party, but it has to be paid by the assessee. In case there is any delay in payment of tax deducted by the assessee on behalf of the deductee, then it cannot be linked or reckoned as income tax of the assessee payable by the assessee, and moreover the interest herein is more of compensatory in nature. Though, Co-ordinate Bench of ITAT Kolkata in the case of DCIT vs. M/s. Narayani Ispat Pvt. Ltd. (supra) has allowed the said expenditure. Even though, we may be persuaded by such a reasoning, however, we find that Hon'ble Madras High Court as pointed out by the ld. Special Counsel for the revenue, in the context of interest u/s. 201(1A) only, has held that the TDS partakes the character of income tax and is not allowable as business expenditure. The relevant observation of the Hon'ble Court reads as under:

> "The liability for deduction of tax arises by reason of the provisions of the Act. Under s. 201, the consequence of failure to comply with the same renders that person liable to be deemed as an assessee in default with all the consequences attached thereto. The liability to pay interest on the amount not deducted or deducted but not paid is directly related to the failure to deduct or remit the amount. The amount required to be deducted is the amount payable as income-tax. The interest paid for the period of delay takes colour from the nature of the principal amount required to be paid, but not paid within time. The principal amount here would be the income-tax and the interest payable for delayed payment is the consequence of failure to pay the tax and in the circumstances, in the nature of a penalty though not described as such in sub-s. (1A) of s. 201 of the Act. The fact that the income-tax required to be remitted was not income-tax payable by the assessee, but is ultimately for the benefit of and to the credit of the recipient of the income on whose behalf that tax is payable does not in any manner alter the character of the payment, namely, its character as income tax.
>
> 6. Learned counsel for the Revenue submitted placing strong reliance on the recent decision of the Supreme Court in the case of Bharat Commerce & Industries Ltd. vs. CIT (1998) 145 CTR (SC) 340 :
>
> (1998) 230 ITR 733 (SC) : TC S17.1878 that payments required to be made by way of income-tax under the IT Act are not deductible as expenditure and the further amounts which a person may be required to pay by a reason of failure to comply with the provisions requiring the payments of the tax are also amounts which cannot be regarded as deductible expenditure under s. 37 of the Act.

In that case the question considered was as to whether interest paid on delayed payment of income-tax and surtax by way of instalments, on income voluntarily disclosed under the Voluntary Disclosure of Income and Wealth Act, 1976, is not in any way an expense incurred wholly or exclusively for the purpose of the assessee's business. The Court held that (headnote) : "When interest is paid for committing a default in respect of the statutory liability to pay advance tax, the amount paid and the expenditure incurred in that connection is not in any way connected with preserving or promoting the business of the assessee. The liability in the case of payment of income-tax and interest for delayed payment of income-tax or advance tax arises n the computation of the profits and gains of business". The Court further held that: "Under the IT Act, the payment of such interest is inextricably connected with the assessee's tax liability. If income-tax itself is not a permissible deduction under s. 37, any interest payable for default committed by the assessee in discharging his statutory obligation under the IT Act, which is calculated with reference to the tax on income, cannot be allowed as deduction".

Before holding so, the Court considered the decision of the apex Court in the case of Mahalakshmi Sugar Mills Co. vs. CIT (1980) 16 CTR (SC) 198: (1980) 123 ITR 429 (SC): TC 17R.877 a decision rendered by three learned Judges of the apex Court and held that the ratio of that judgment had no application to the case before it in the case of Bharat Commerce & Industries Ltd. vs. CIT (supra). The assessee in the case of Mahalakshmi Sugar Mills Co. (supra), had claimed deduction of interest paid on arrears of sugarcane cess. The payment of sugarcane cess, as it was observed by the Court in the case of Bharat Commerce & Industries (supra), is very much a part of the assessee's business expense and any interest on arrears of cess would, therefore, take colour from the cess which is payable, that it was an indirect tax which had to be paid in the course of carrying on business.

7. Learned counsel for the assessee placed reliance on the judgment of the apex Court in the case Mahalakshmi Sugar Mills Co. (supra). As pointed out by the apex Court in its later judgment in the case of Bharat Commerce & Industries (supra), the cess which was considered in the case of Mahalakshmi Sugar Mills Co. (supra) was an indirect tax payable in the course of the business of the assessee and the interest paid on the arrears of the cess took colour from the cess which was paid.

8. Learned counsel for the Revenue also referred to the decisions of the Bombay High Court in the case of Ferro Alloys Corpn. Ltd, vs. CIT (1992) 196 ITR 406 (Bom) : TC 17R.817 and the decision of the Calcutta High Court in the case of Martin & Harris (P) Ltd. vs. CIT (1994) 73 Taxman 555 (Cal). It was held in those cases that the interest paid under s. 201(1A) of the Act was not deductible as business expenditure under s. 37 of the Act.

9. As already noticed the payment of interest takes colour from the nature of the levy with reference to which such interest is paid and the tax required to be but not paid in time, which rendered the assessee liable for payment of interest was in the nature of a direct tax and similar to the income-tax payable under the IT Act. The interest paid under s. 201(1A) of the Act, therefore, would not assume the character of business expenditure and cannot be regarded as a compensatory payment as contended by learned counsel for the assessee.

10. Counsel for the assessee in support of his submission that the interest paid by the assessee was merely compensatory in character besides relying on the case of Mahalakshmi Sugar Mills Co. (supra) also relied on the decision of the apex Court in the cases of Prakash Cotton Mills (P) Ltd. vs. CIT (1993) 111 CTR (SC) 389 : (1993) 201 ITR 684 (SC) : TC 17R.746, Malwa Vanaspati & Chemical Co. vs. CIT (1997) 42 CTR (SC) 137 : (1997) 225 ITR 383 (SC) : S17.1860 and CIT vs. Ahmedabad Cotton Manufacturing Co. Ltd. (1993) 115 CTR (SC) 401 (1994) 205 ITR 163 (SC) : TC 17R.848. In all these cases, the Court was concerned with an indirect tax payable by the assessee in the course of its business and admissible as business expenditure. Further liability for interest which had been incurred by the assessee therein was regarded as compensatory in nature and allowable as business expenditure.

11. The ratio of those cases is not applicable here. Income-tax is not allowable as business expenditure. The amount deducted as tax is not an item of expenditure. The amount not deducted and remitted has the character of tax and has to be remitted to the State and cannot be utilised by the assessee for its own business. The Supreme Court in the case of Bharat Commerce & Industries (supra), rejected the argument advanced by the assessee that retention of money payable to the State as tax or income-tax would augment the capital of the assessee and the expenditure incurred, namely, interest- paid for the period of such retention would assume character of business expenditure. The Court held that an assessee could not possibly claim that it was borrowing from the State, the amounts payable by it as income-tax, and utilising the same as capital in its business, to contend that the interest paid for the period of delay in payment of tax amounted to a business expenditure."

39. Since, this is the only judgment of the Hon'ble High Court brought to our notice and no contrary decision of any High Court has been cited by from the side of the assessee, therefore, as judicial precedence we are persuaded to follow the same and accordingly, we hold that such an interest on late payment of deposit of TDS cannot be allowed as expenditure u/s.37. Consequently, this issue is decided against the assessee.

Department's appeal:

40. Now, we come to the Revenue's appeal wherein the Revenue has challenged various additions.

1. Deletion of addition on account of disallowance of prior period expenses - Rs.55,36,471/-;

2. Deletion of addition on account of disallowance of SEZ deduction U/s 80 IAB. - Rs.11,19,06,82,702/-;

3. Deletion of addition on account of disallowance of revenue recognition as per POCM. -Rs.42,92,17,872/-

4. Deletion of addition on account of disallowance of interest pertaining to loan for Edward Keventer Project by capitalising them:

Rs. 1,10,00,000//;

5. Deletion of addition on account of disallowance on account of capitalization of interest -Rs.7,93,00,000/-;

6. Deletion of addition on account of disallowance of brokerage and commission. - Rs.2,99,74,610/-;

7. Deletion of addition on account of disallowance of late construction charges received from customers: Rs. 1,88,81,388/-;

8. Deletion of addition on account of disallowance of net contingency deposit. - Rs.1,14,837 /-;

9. Deletion of addition on account of disallowance of net interest free security deposit.- Rs.3,30,893/-;

10. Deletion of addition on account of disallowance of net registration charges. - Rs.8,49,20,884/-;

11. Deletion of addition on account of disallowance of closing credit balances in indirect taxes. - Rs.1,81,15,047/-;

12 Deletion of addition on account of disallowance of expenses towards non-allocation of overheads. - Rs.15,02,99,365/-;

13. Deletion of addition on account of disallowance of expenses U/s 14A - Rs.28,87,91,000/-;

14. Deletion of addition on account of disallowance/capitalization of expenses on SEZ Projects not commenced. - Rs.1,26,11,958/-;

15. Deletion of addition on account of disallowance of expenses on projects not commenced. -Rs.1,30,38,853/-;

16. Deletion of addition on account of disallowance of expenditure U/s 40(a)(i)(a) of the I.T. Act for non-deduction of TDS on payment to two Trusts. - Rs. 7,37,222.

17. Deletion of addition on account of reconciliation of rental income as per TDS Certificates and withdrawal of TDS credit:-

Rs.9,94,187/-; and Deletion of withdrawal of credit of TDS Rs.712257/-;

18. Deletion of addition on account of reclassification of income from income from house property to income from business and profession.- Rs.9,40,52,455/-;

19. Deletion of addition on account of disallowance of notional rent/additional annual letting value in respect of the vacant property. - Rs. 12,28,340/-;

20. Deletion of addition on account of disallowance of depreciation claimed on DLF Centre Building. - Rs.7,17,794/-;

21. Deletion of addition on account of disallowance of expenses where bills are not in the name of company -

Rs. 58,50,162.

41. Before us, the learned counsel at the outset pointed out that most of the issues raised in the Revenue's appeal is covered by the earlier decisions of the Tribunal and also confirmed by the Hon'ble High Court.

42. In so far as the first issue is concerned, the facts in brief are that the Special Auditors have pointed out that assessee has claimed prior period expenses amounting to Rs.70,12,062/- on the basis of which, ld. Assessing Officer issued a show cause notice to the assessee. In response, the assessee submitted that first of all, an amount of Rs.14,63,017/- was on account of purchase of assets being the cost of office equipment and computers and was never claimed as admissible expenses but have been capitalized as fixed assets. The balance amount was stated to be on account of reimbursement to their employees on account of telephone expenses, travelling, printing and stationary and these are reimbursed if the employees submit the claims after proper verification. The claim though relates to earlier years, but bills were presented and settled during the year under reference, therefore, the same is allowable in this year. Similarly, with regard to legal and professional charges which was paid to various consultants, these payments were made after due verification of the services rendered and the claim was finally settled during the year, hence, allowable in this year only. Likewise, repair and maintenance expenses, the same was on account of annual maintenance, contract overlapping in the subsequent year or miscellaneous repair maintenance for which bills were received after the closing of the year, therefore, all these expenses were crystallized during the year. Ld. Assessing Officer, however, disallowed the amount of Rs.55,36,471/- which was on account reimbursement relating to employee's; and legal and professional expenses.

43. Ld. CIT(A) relying upon the judgment of Hon'ble Delhi High Court in the case of CIT vs. Modipon Ltd., 334 ITR 102 (Del) has allowed the appeal.

44. After considering the rival submissions, we find that precisely similar issue has arisen in assessee's own case for assessment year 2006-07 wherein the Tribunal has allowed the same nature of expenditures, after observing and holding as under:

> "231. We have carefully considered the rival contentions. Rs.18.51 lakhs were regarding to the leave travel assistance claims of the assessee an Rs.63 lakhs were on account of reimbursement and telephone and conveyance expenses of the assessee. These expenses were disallowed by the AO. The details of these expenses are enclosed as per Annexure 'A' at page 101 along with explanatory statement. These bills are pertaining to the regular staff of the employees and are payable and paid at the time

> of settlement of their entitlement. It is irrespective of the time when employee has actual travelled. In same way, the telephone and conveyance expenses are also reimbursement of the expenditure which would be determining the claim of the employees and admitted by the employer. The special auditor has held so because of the reason that the actual travelling has taken in the previous year. Naturally, it is a matter of common sense for the purpose of LTA claim, the travelling of the employees is prior to the claims submitted by the employees. The CIT (A) has specifically dealt with one instance in para 27.3 of his order. After verification of the details, it was received by the assessee from its employees during this period and after following the decision of Hon'ble jurisdictional High Court in the case of CIT vs. Shriram Piston - 174 taxman 147, the disallowance is deleted. The reliance of the ld. AR on the decision of Hon'ble Delhi High Court in CIT vs. Modipan Ltd. - 334 ITR 102 is also apt as the expenditure are settled during the year. Further genuineness of these expenditure is not in doubt and allowabaility of these expenditure is also not in question except classifying them as prior period expenses and there is no difference in rate of taxes for respective years. In the result, we confirm the order of the CIT (A) in deleting the addition of Rs.22,98,510/- on account of prior period expenditure. In the result, ground no.26 of the revenue's appeal is dismissed."

45. Since, similar issue has been allowed by the Tribunal following the ratio and principle laid down by the Hon'ble Jurisdictional High Court in the case of CIT vs. Modipon Ltd. (supra), therefore, following the same precedence, we allow the claim of the assessee and consequently the Revenue's ground is dismissed.

Disallowance of SEZ deduction u/s 80IAB.

46. The next issue relates to deletion of addition on account of disallowance of SEZ deduction u/s.80IAB, which is one of the core issues raised before us.

47. The facts in brief are that the assessee has shown gross income of Rs.1497.94 crore from SEZ activities and after reducing the cost of construction amounting to Rs.378.78 crore and allocation of common expenses had declared eligible profit at Rs.119.06 crores and claimed the deduction u/s.80IAB.

48. Ld. Assessing Officer after considering the assessee's submission in this regard and strongly relying upon the judgment and order dated 03.02.2011 passed by Hon'ble Punjab and Haryana High Court in respect of assessee's land, came to the conclusion that the acquisition of land for development of SEZ has been held by the Hon'ble High Court to be illegal and the Court's order strike to the very root of the notification issued under the SEZ Act, 2005 for the development of SEZ, and therefore, SEZ itself becomes illegal from the date of inception. According to the AO, under section 80IAB, the deduction is available only in respect of profits and gains by an undertaking or enterprise engaged in the development of SEZ, but the assessee-company is not entitled for claim of deduction u/s.80IAB, because land on which SEZ has been constructed has been found to be acquired by the assessee fraudulently.

49. On the other hand, assessee's reply was that the approval granted by the Board of approval for SEZ has remained untouched despite of the High Court order, and therefore, assessee under the law was entitled for claim of deduction u/s.80IAB. However, the ld. Assessing Officer rejected the said contention and held that the approvals of Board of Approval were granted at the time when High Court order was not pronounced, i.e., on 11.02.2011. Apart from that, the ld. Assessing Officer also proceeded to examine the claim on merits. The relevant observations of the AO in this regard can be summarised as under: -

> Section 80-IAB provides for deduction from the activity of developing, operating and maintaining SEZ. In view of the same, please explain how the activity of constructing buildings and sale thereof to Co-Developer is covered by the provisions of section 80-IAB.
>
> As per SEZ Rules, 2006, developer of an SEZ cannot sell land in the Special Economic Zone under rule 11(9). In view of the same, you are required to explain how the sale of buildings can take place without the sale of land. Also explain that how any income arising from such transfer of assets is covered under section 80-IAB and eligible for deduction.
>
> The SEZ Act notifies specified authorized operations which alone qualify for exemptions, deductions. Please explain how sale of constructed buildings can be classified as authorized operations eligible for deduction under section 80-IAB especially with reference to the Notification No. SO/1846(E) dated 27.10.2006 and also with reference to the approval dated 14.02.2007 granted by Government of India, Ministry of Commerce & Industry.

A modified approval dated 01.06.2009 was granted by Board of Approval, SEZ to co-developer i.e. DLF Assets Ltd. after taking into account the Co-developer agreement dated 20.03.2008. It has been stated in the aforesaid approval that the transactions were approved subject to the condition that as per terms and conditions of lease agreement between developer and co-developer will not have any bearing on the treatment of income by way of lease / rentals / down payment / premium etc. for the purpose of assessment under the prevalent Income Tax Rules. The AO will have the right to examine the taxability of these amounts under the Income Tax Act. In view of the same, the claim for deduction under section 80 IAB is not dependent merely upon the approval granted by Board of Approval and can therefore be independently examined by the AO under the Income Tax Act. Therefore, you are required to explain how the profits arising from the activity of transfer/sale of constructed buildings in the SEZ notified land by DLF Ltd. to DLF Assets Ltd. will qualify for deduction under section 80 IAB. Transactions undertaken between DLF Ltd. and DLF Assets Ltd. amount to transfer of bare shell buildings between the two entities. Why nature of income derived from the co-developer agreement should not be treated as onetime income arising from transfer of assets and why the transaction should not be treated as sold. In this connection, you may note that the Addendum to co-developer agreement clearly states that on expiry of term of lease, the co-developer shall make best efforts to dispose off the warm shell which further shows that he has complete and unfettered rights over the buildings thereby implying that the assessee has basically sold the bare shells to the co-developer and as a result of such sale generated income from the business of development and therefore not eligible for deduction. Further, the Co-developer i.e. DLF Assets Ltd. has reflected the same as "Fixed Assets" in its books of accounts and not as "Business Asset". Thus, looking at it from another angle, please explain why the aforesaid transaction involving transfer/sale of constructed buildings from DLF Ltd. to DLF Assets Ltd. should not be treated as income/loss from capital gains. You may also explain that if the transaction is treated as capital gain, then how such income which would be a non business income can be claimed as being eligible for deduction under section 80IAB.

It was also observed by him that income tax deduction U/s 80IB is allowable for a period of 10 years on the profits arising from development on a year to year basis and there is no provision for claiming the entire deduction of the income in any one year and that also in respect of receipt which actually pertains to a further rent for 49 years. In view of this you may explain why the claim of deduction under section 80IAB, may not be restricted to 1/49th of the total development income received by the assessee company in any one financial year.

50. In light of above observations of the AO, assessee made detail submissions with regard to the specific queries raised by the Assessing Officer which has been noted and dealt by him from paragraph 2.20 to 2.41 of the assessment order. However, ld. Assessing Officer apparently without adverting to the various points and issues raised by the assessee, held that the claim of deduction u/s.80IAB is not allowable predominantly in view of the fact that Hon'ble Punjab and Haryana High Court has held that acquisition of SEZ land was illegal and also the sale of building to a co- builder is neither a business activity nor one of the authorized operations of SEZ. Accordingly, he denied entire claim of deduction and added the same to the income of the assessee.

51. In the first appeal, Ld. CIT (A) after considering the entire gamut of materials placed on record and after detailed discussion has allowed the assessee's claim. The relevant finding and observations are as under: -

> 8.25 From the clarifications dated 18.01.2011 & 10.01.2011 issued by the Ministry as well as the correspondence between the Ministry of Commerce and the CBDT there remains no scope of doubt that the disclaimer referred to by the Assessing Officer in approval letter dated 01.06.2009 is applicable only to a transaction of transfer of land in the guise of long term lease by receiving lease rentals/down payments/premiums commensurate with the sale value of the land as is evidence from para-4 of the letter dtd. 26.05.2009 sent by the Director (ITA-1) CBDT to the Department of Commerce and Industry.

Thus, the disclaimer vide point 3 (XVII) of the co-developer approval letter, on which the Assessing Officer has relied upon is not applicable to the transfer of bare shells and coldshells for a consideration. The transfer of bareshells and coldshells for a consideration was approved as authorized operations as per the approval issued by Board of Approvals. The Ministry of Commerce in their clarification issued on 18.01.2011 has explicitly clarified that all leases of land are subjected to general condition contained in para 3(xvii) of letter dated 01.06.2009 and this general condition is applicable to the terms and conditions of the land lease agreement only.

8.26 Keeping in view, the discussions above it is clear that the appellant has been duly approved by the Board of Approvals as a developer, the land owned by the appellant in Sector-30 of Gurgaon was notified by the Govt. of India for establishment of SEZ, the authorized operations to be undertaken in the proposed SEZ were approved by the Board of approvals, the co-developer agreement dated 20.03.2008 executed with the co-developer contemplating transfer of bare shells to the co-developer for an agreed development consideration has been duly approved by the Board of approvals, the DAPL has been approved as a co-developer. The transfer of bare shells to the co-developer has been approved as an authorized operation by the Board of Approvals and the disclaimer contained in clause 3(xvii) of approval letter dated 01.06.2009 applies only to transfer of land or one time lease rental/one time down payment/premium etc. as clarified by the Ministry of Commerce in the clarification dated 18.01.2011 and correspondence made between the Ministry of Commerce and Department of Revenue as filed by the appellant during the course of appellate proceedings as additional evidence.

In view of the facts discussed above, I agree with the submission of the appellant that the disclaimer condition mentioned in the co- developer approval letter dated 01.06.2009 is primarily put in by the Board of approvals in the approvals to put a curb on the wrong practices of leasing the land for long periods and receiving onetime payment in the form of lease rental/down payments/premiums etc. which tantamount to sale of land in the guise of long term lease. The appellant has obtained requisite approval from the Board of Approvals by disclosing all facts. The entire controversy as to whether the transfer of bare shell buildings to the co-developer was an authorized operation has been set at rest by the correspondence made between the Ministry of Commerce and Department of Revenue and also by clarification letters issued, dated 18.01.2011 & 20.01.2011 by Ministry of Commerce. I am satisfied that all the conditions as required to be satisfied under the SEZ Act/Rules are fulfilled and the appellant is an approved developer for all intent and purpose of Section 80 IAB of the Act. Consequent upon approval granted by the Board of Approvals for the transfer of bare shells to the co-developer for a consideration is an authorized operation and income derived from such transfer of coldshell or bareshells is eligible for deduction U/s 80 IAB of the Income Tax Act, 1961.

Regarding the observation of the Assessing Officer that the land and building are one composite and cannot be separated, the appellant has stated that the Indian Law recognizes separate ownership of the land and building and this position has been recognized by various High Courts including the Hon'ble Supreme Court wherein it has been held that the maxim, what is annexed to the soil goes with the soil has not been accepted as an absolute rule of law of this country. In the following judgments the Hon'ble Courts have held that a person who bonafidely puts up constructions on land belonging to others with their permission would not be a trespasser, nor would the buildings so constructed vest in the owner of the land.

(i) Park View Enterprises Vs State Govt. of Tamil Nadu [1991] 189 ITR 192.

(ii) The Privy Council in Narayan Das Khettry v. Jatindra Nath Roy Chowdhry, AIR 1927 PC 135, has also taken the view that having regard to the law in India it is possible to have separation of ownership of the building from the ownership of the land.

(iii) This view of the Privy Council was approved by the Supreme Court in Bishan Das v. State of Punjab, AIR 1961 SC 1570.

Therefore, in view of the above judicial pronouncements, land is an independent, identifiable asset, and continues to remain identifiable even after construction of the building.

8.27 I have gone through these judgments and am of the considered view that there is a force in the arguments of the AR as the land and building are independent identifiable assets. It is a common practice in India that one person owns a land and the other owns the superstructure built thereon. Keeping in view these facts and circumstances and the legal position, the appellant has not violated any of the conditions as provided under the SEZ Rules.

8.28 Ground Nos.4.1.7, 4.1.8, 4.1.9, 4.1.10 & 4.1.11 - These grounds of appeal pertains to the observation of the Assessing Officer wherein the Assessing Officer has held that the profit arising from sale of bare shell buildings by the appellant to the co-developer constitute capital gains and not the business income so as to be eligible for deduction U/s 80 IAB of the Act. Further, the Assessing Officer has held that the sale consideration received for the sale of bare shells had to be spread over the period of 49 years. The appellant has contended without prejudice to the other grounds that if the contentions of the Assessing Officer are accepted that either the appellant was not the lawful owner of the land on which SEZ has been set up or sale of bare shell buildings by the appellant was impermissible then the amount received by the appellant has to be refunded to the co-developer.

The appellant has contended that it had been engaged in the business of real estate and the development of such commercial projects is the main object of the appellant. The appellant had been following the Percentage of Completion Method (POCM) for recognizing revenue of various projects as per the Accounting Standards issued by the Institute of Chartered Accountants of India and it has been accepted by the department since inception. It is a matter of record that the Assessing Officer herself has accepted such incomes as business income of all the projects developed by the appellant even during the year under consideration.

It is seen that the appellant has been following mercantile system of accounting and has been recognizing the revenue in accordance with the Accounting Standard AS-7 & AS-19 issued by the Institute of Chartered Accountants of India. It is now a judicially recognized preposition that in case of contracts or business of construction, in order to ascertain the income, one need not wait till the contract is completed. The Assessing Officer however cannot apply any other method for recognizing the revenue and has to accept the accounting policy followed by the appellant, therefore, when the appellant has recognized the income following percentage of completion method as per AS-7 issued by the Institute of Chartered Accountants of India, the profits derived on account of development considerations of bare shells would constitute the profits and gains derived from business of developing any Special Economic Zone within the meaning of Section 80 IAB of the Act.

The claim of deduction U/s 80 IAB is a valid claim considering the overall facts of the case.

The accounting treatment of warm shells by the co-developer in its books of accounts as an asset would not make any difference as far as the appellant is concerned. The admitted fact remains that the appellant has computed its income under the Percentage of Completion Method (POCM) which is prescribed for calculating profits and gains of business of real estate developer under the mandatory accounting standard issued by the Institute of Chartered Accountants of India. The Assessing Officer's observations by referring to the classification of assets shown by the co-developer was a sale of capital asset subjected to capital gain is against the very principle of the Act when the bare shell buildings were neither part of capital work in progress nor fixed assets of the appellant. A perusal of the assessment order reveals that the Assessing Officer has not categorically held the income of the appellant under the head 'Capital Gains' as no such specific addition has been made. The Assessing Officer has only made her observations without prejudice to her decision in disallowing the entire claim of deduction U/s 80 IAB.

8.29 I have considered the submission of the appellant and observation of the Assessing Officer. It is seen that observations of the Assessing Officer are not based on correct appreciation of facts. The appellant has shown work in progress in the business of construction and by no stretch of imagination work in progress can be treated as capital asset. The stock in trade is specifically excluded from the definition of 'Capital Asset' Under section 2(14) of the Act. The development of the bare shell buildings in the SEZ and subsequent transfer thereof cannot be considered as giving rise to short term capital gain considering the business of the appellant and accounting treatment adopted in the books of account irrespective of the treatment by the co-developer in the books of accounts as fixed assets. The observations of the Assessing Officer on this issue are erroneous, legally untenable and misdirected in holding that the income can be assessed as capital gains. I have gone through the judicial rulings relied upon by the appellant in support to its claim.

Further, the appellant has disputed the decision of the Assessing Officer in holding that the development income was relatable to 49 years of lease period and only 1/49th could have been earned by the appellant in one year. The appellant has contended that having held so the Assessing Officer ought to have allowed a deduction of Rs.22,83,81,280/-U/s 80 IAB and excluded the remaining income pertaining to the subsequent years for the computation thereby resulting in no addition. It is noticed from the assessment order that Assessing Officer notwithstanding with her decision holding the income from transfer of bare shells as income from capital gains has further held that even if the income from transfer of bare shell was to be treated as development income from SEZ, the entire income was relatable to 49 years spread over the period of 49 years lease.

From the discussions in earlier paragraphs it is an admitted fact that the appellant has leased out only the land. The bare shell buildings have not been leased out but transferred to the co-developer for a agreed consideration which has been approved by the Board of Approvals. Therefore, to link the transfer consideration of bare shells with the period of lease of land is totally irrelevant in the facts of the appellant's case. It is a fact that the appellant has adopted rent capitalization method for determining the development consideration of bare shells but the period of lease is again irrelevant in such determination because the rent capitalization method includes theory of determination of market value of building having regard to net operating income yielded by the property in a year or average of multiple years. Such method of valuation is in conformity with the basis adopted for capitalisation of net maintainable rent as per Rule- 3 of Schedule III of the Wealth Tax Act. Therefore, when the transfer of bare shells has been permitted as an authorized operation by the Board of Approvals, the application of lease period becomes redundant. Considering the above, there is neither any question for treating 1/49th of development consideration as income of one year for the purpose of deduction U/s 80 IAB nor for the purpose of disregarding balance income filed by the appellant during the year.

The appellant has further contended that if the observations of the Assessing Officer are accepted in as much as the transfer of bare shell buildings is not an authorized operation or the acquisition of land was illegal then nothing accrues to the appellant and the monies received by it from the co-developer ought to have been refunded. I have considered the submissions of the appellant. Since it has been held that the deduction U/s 80 IAB is admissible to the appellant, this ground becomes infructuous and does not call for any adjudication.

8.30 Ground No.4.2 - This grounds pertains to the observation of the Assessing Officer wherein the Assessing Officer held that without prejudice to the disallowance made U/s 80 IAB, if at any higher appellate stage the assessee is allowed deduction U/s 80 IAB of the IT Act, then the quantum of deduction is to be reduced by Rs.24,20,98,512/- on the basis of findings given by the Special Auditors in para 3.15 to 3.22 at page Nos.25-29 in Volume-IIIA of the Special Audit Report. The appellant has contended that the Assessing Officer has made these observations on the basis of Special Audit Report wherein the Special Auditors have stated that there is short allocation of overheads to the SEZ Division. The Special Auditors proposed that some expenses ought to have been allocated to the SEZ project out of the other non-SEZ project.

The AR of the appellant has drawn my attention to the details filed during the course of assessment proceedings as well as before the Special Auditors. These details have been filed in the paper book at pages 258-271. The AR of the appellant has vehemently argued that the appellant is a listed company and its accounts are subjected to various checks and audits. Particularly for claim of tax holiday U/s 80 IAB of the Income Tax Act, 1961, the appellant has got its accounts audited from an independent accountant specifically for quantification of the deduction admissible to the appellant. It is a statutory requirement that the independent auditor has to certify the computation of deduction admissible U/s 80 IAB of the Income Tax Act, 1961. The appellant has brought to my notice the statutory report in Form No.10 CCB dated 29.09.2008 which has also been filed in the paper book wherein the deduction has been computed at Rs.1119,06,82,702/-.

The AR has also contended that the tax auditors also while finalizing the report U/s 44 AB of the Act have verified the deduction admissible to the appellant U/s 80 IAB and has certified the same in the Tax Audit Report. It has been contended that the appellant is a pioneer in the real estate business and had been executing projects for more than six decades. The expenditure under various heads proposed to be allocated to the SEZ Project by the Special Auditors had all along been incurred by the appellant over the years and have been allowed to it under the provisions of the Income Tax Act, 1961. It has been stated that despite the fact that the SEZ Project was not in operation in earlier years but still these routine expenses have all along been allowed to the appellant while computing the total income for respective years. The appellant has filed a comparative chart of expenses incurred and claimed by the appellant during the year as well as in the preceding year to show that the expenses have been all along allowed. The appellant has also contended that similar issue arose in the case of M/s DLF Commercial Developers Ltd. for AY 2008-09 and the same has been deleted in appeal vide order dated 19.12.2012 in Appeal No.71/12-13.

8.31 I have considered the submissions of the appellant and have perused the details filed by the appellant on this issue. It is seen that the allocation made by the Assessing Officer from the salary expenses of senior management and expenses under the head 'other expenses' have been made without bringing any adverse information on record. The appellant has given details of headwise expenses incurred on SEZ and non-SEZ activities and such information cannot be brushed aside without pointing out any mistake in the allocation of expenses. The allocation cannot be made on the basis of presumptions and some material has to be brought on record to justify such reallocation of expenses for working out deduction U/s 80 IAB. It is seen that this issue has been considered by me while passing the appellate order dated 19.12.2012 in appeal No.71/12-13 in the case of DLF Commercial Developers Ltd. where the similar disallowance has been directed to be deleted.

In view of the factual position, the Assessing Officer is directed to allow the deduction U/s 80 IAB as claimed by the appellant in the return of income without making any reallocation."

52. The Ld. Spl. Counsel appearing on behalf of the Revenue, after referring to the facts as noted in the assessment order, also summarised the findings of the AO given from pages 31 to 81 of the assessment order, in his written submissions.

53. At the outset, he submitted that in the Assessment Year 2009-10, the Hon'ble High Court in the case of DLF Commercial Developers Ltd., (2018) 92 Taxmann.com 10 has remanded the matter to the Tribunal analyzed the case in the light of the provision of SEZ Act, 2005 which Tribunal has not independently done and set aside the matter back to the file of the Tribunal to decide afresh and in accordance with law. The relevant observation of the Hon'ble High Court reads as under:

> "In the present appeals, the ITAT has merely followed the decision rendered in a previous order. The earlier decision in this regard is the one rendered in 2007-08 in the case of DLF Infocity Developers (Chennai) Ltd. There, the Assessing Officers' (AO) order granting deduction u/s 80IAR was interfered with by the CIT(A) u/s 263 of the Income Tax Act, 1961". The ITAT proceeded to set-aside the order, holding on merits that the assessee was entitled to the deduction claimed. That order has been followed on merits by the ITAT in the current A. Y 2009-10 and 2010-11.
>
> This Court is of the opinion that the ITAT's decision merely reproduced that CIT(A) 's judgement and has not analysed independently, in either of the AYs the applicability of Section 80IAB towards the education claimed in the light of the transactions reported and the documents disclosed. Furthermore, those facts have also to be analysed in the light of the provisions of SEZ Act, 2005, which the ITAT has not

independently done. For these reasons, the Impugned orders of the ITAT are set-aside and are remitted for fresh consideration by the ITAT in accordance with the law. All rights and contentions of the parties are reserved."

54. He further submitted that in order to ascertain the nature of income, it is necessary to examine the relevant issues as per SEZ Act and Rules which according to him should be analyzed as under:

i. In the schedule 13 of the Audit Report under the head "Related party disclosures" DLF Assets Pvt. Ltd., the co- developer, has been stated to be entity under the subsidiary companies. The entire income claimed to be exempt under section 80 IAB has been shown as received on account of sale of buildings to this related party.

ii. The commercial terms for sale to DLF Assets Pvt. Ltd (DAPL) were decided by the Memorandum of understanding for Co-developer Agreement, Co- Developer agreements and addendums to Co-developers agreements executed. It is significant to note that the intention here, from the very beginning, was to transfer the entire land and buildings to the co-developer and the assessee company never engaged itself in the business of development of SEZ. Some of these clauses were later amended only with a purpose to show that it might not appear to approving authorities that the intention was to transfer both land and buildings to the co-

developer, particularly when they realized that sale of land in SEZ was not permitted. This fact can be vouched from point 3 of the facts of the case mentioned above. Combined reading of all the clauses of Co-Developer Agreement and Lease deed clearly shows that the intention of the assessee company was to sell land to their related company and they have booked business income out of the transaction. Thereafter the deduction u/s 80-IAB has been claimed out of the business income which should not be allowed for the reason that sale of land is not permitted as per SEZ Act and Rules. iii. When the Board of Approval (BoA) later examined this issue, they were of the categorical view that transfer and handover of buildings on payment of development consideration was against the spirit of SEZ. This issue will be discussed in detail later. The fact remains that the assessee merely built the structure and sold the same to the co- developer.

iv. It is seen that section 3(8) of SEZ Act specifically states that the Central Government may prescribe the requirements for establishment, namely:

a. The minimum area of land and other terms and conditions subject to which Board shall approve, modify or reject any proposal received by it under sub section(2) to (4); and b. the terms and conditions, subject to which the Developer shall undertake the authorized operations and entitlements.

v. Further section 3(11) of SEZ Act while referring to the agreement between developer and co-developer stipulates that section 3(8) quoted above shall apply to the said proposal. Thus, the condition regarding examination of taxability of the transactions by Assessing officer is one of the main requirements subject to which the Co-developer agreement has been approved by competent authority. vi. Section 7 of SEZ Act further restricts the exemptions of Developer from taxes, duties of cess to any goods or services exported out of, or imported into, or procured from the Domestic Tariff Area thus clearly specifying the activities for which exemption from tax will be granted to the developer. In the present case, the assessee company has sold assets and income derived there from does not fall in this category.

vii. Section 9 of SEZ Act clearly define duties, powers and functions of Board of Approval (BOA) which includes granting of approval or rejecting proposal or modifying such proposals for establishment of SEZ.

viii. It is very relevant to note that transfer of buildings by the developer to the co-developer was considered by the BoA as against the spirit of SEZ as pointed out by the Department of Revenue and agreed to by BOA unanimously.

(i.e. it is not the business of development of SEZ.) This is the reason that BOA has put the condition of examination of the issue of taxability after determining the nature of income by the Assessing Officer. In this respect minutes of 32nd meeting and of 34th meeting of SEZ BOA held on 23rd February 2009 and 19th June 2009, which discussed the assessee company's case as one of the co-developer, are very important and are reproduced as follows:

> 32nd Meeting "The representative of the DoR (Department of Revenue i.e representative of CBDT) pointed out that the co-development agreement refers to transfer and hand over deeds which states that co-developer shall be the owner of the SEZ buildings on payment of development consideration, which is against the spirit of SEZ Act and Rules.
>
> 34th Meeting "The Board noted that in the meeting held on 23.02.2009 it was decided to defer the 4 proposals of co-developers in respect of same Developer, i.e., M/s DLF Limited as the representative of the DoR pointed out that the co-developer agreement refers to transfer and hand over deeds which states that co-developer shall be the owner of the SEZ buildings on payment of development consideration, which is against the spirit of SEZ Act and Rules. Following this observation, the proposals were deferred and it was decided to examine the case on file. DoC examined these proposals on file in consultation with CBDT and the agreements were revised by the co-developer. The proposals were approved subject to the condition that particular terms and conditions of lease agreement will not have any bearing on the treatment of income by way of lease rentals/down payment/premium etc. for the purpose of assessment under the prevalent Income Tax Act and Rules. The Assessing Officer, will have the right to examine the taxability of these amounts under the income tax Act. "
>
> Copy of Minutes of 32nd Meeting and 34th Meeting of BOA are enclosed with these Submissions.

ix. Section 27 of the SEZ Act which deals with provisions of Income Tax Act, 1961 to apply with certain modification in relation to Developers and entrepreneurs clearly states that the provisions of the Income Tax Act, as in the force, for the time being, shall apply to, or in relation to, the Developer or entrepreneur for carrying on the authorized operations in a SEZ. The notification for IT SEZ's authorized operations does not include sale of building from which income has been shown by the assessee company on which deduction u/s 80IAB has been claimed.

x. Rule 11(10) of SEZ Rules 2006 specifies that the developer shall not sell the land in a SEZ. As sale of land is prohibited and the land has been given to co-developer through an arrangement of lease of land which is nothing but a ploy to overcome this prohibition. This is the reason that BOA said such arrangement was against the spirit of SEZ and asked the assessing officer to examine the taxability of such income.

xi. SEZ Act notifies specific authorized operations which alone would qualify for exemptions, concessions and drawbacks. Sale or transfer of assets is not an authorized operation and therefore income from such operation would not be eligible for exemption as per notification no. S.O.1846 (E) dated 27th October 2006.

Copy of the Notification dated 2Th October 2006 is enclosed with these submissions.

xii. That the copy of CBDT letter dated 26th May 2009 is on page 210 of the paper book II filed by the assessee counsel. Para 4 of the letter clearly states that approval will have no bearing on tax treatment of income arising out of such transaction which will be decided as per the relevant provisions of the Income Tax Act."

55. If these issues are examined in detail then following facts are established:

a. "That the assessee company has not developed the SEZ rather only constructed the buildings. The deduction u/s 80- IAB is available only in the case of development of SEZ. Mere construction of Bare shell buildings will allow the assessee the deduction u/s 80-IAB. Section 80-IAB states that profit and gains derived from business of developing SEZ. Thus, the deduction is only available once the SEZ is developed and it cannot be allowed before the stage of development of SEZ.

b. Sale of buildings to the co-developer is neither an activity of development of SEZ nor one of the authorized operations for SEZ notified by the competent authority. It is an isolated transaction giving one time income from transfer of capital assets. It is very clear from the Co- Developer agreement and lease deed that the intention on the part of the assessee company, from the very beginning was to construct and sale the buildings as a onetime activity. Such isolated transaction can never be termed as business activity. Co-developer agreement and lease deed very clearly shows that the developer has sold the land and building and loses all rights over these transferred capital assets and the relinquishment of right is irrevocable.

c. Though SEZ Act prohibits for sale of land thereby implicitly denying any benefit to a developer who is basically interested in deriving income by transfer of assets, the assessee has found a way to overcome this prohibition by creating 49 years lease in favour of co-developer. It is pertinent to note that the lease deed is renewable further and thus effectively transferring the land also. Para 2.3 and 5.1 of the Lease Deed clearly allows the parties to renew the lease deed. Thus, the assessee company has transferred the land in actual sense and substance of this present transaction means sale of land. In most of the cases, substance of the transaction and its form are one and the same. However, the substance can be different from the form of the transaction in many cases. In the present case, the assessing officer has rightly gone for the substance of the transaction and disallowed the deduction u/s 80-IAB claimed by the assessee company as the lease deed is mere eye wash and actual transaction was sale of land which is clearly not permissible under SEZ Act. Relevant paras of Lease deed are at page 135 & 136 of the Paper Book II filed by the Counsel of the assessee.

d. The transfer of building is absolute and as per the amended agreement and lease deed , Co-developer shall be treated as owner of the bare shell building and the warm shell building after additions etc and will have exclusive rights to let, mortgage, or allow use of all or any part of buildings.

e. That if the deduction u/s 80-IAB is allowed to the assessee company in this case and the Co-developer does not develop the SEZ later on, how can we say that the SEZ has been developed and why should the deduction be allowed to the assessee company at this stage where the development of SEZ has not been done. Allowing the deduction at the stage of construction of bare shell building would be against the provisions of SEZ and Income Tax Act.

56. Thus, he submitted that assessee's income from sale of assets is not eligible for deduction u/s.80IAB and once it is established that the transfer of buildings to co-developer is not a business activity and the income from such transfer is not business income, it is clear that sale of such buildings, in the nature of capital assets, has generated capital gains and, therefore, income shown by the assessee on this count has to be treated as capital gains. In this respect the most important aspect to be examined is whether by co-developer agreement entered in the Financial Year 2007-08, the transfer of the building can be deemed to be transfer for the purpose of taxability.

57. Thereafter, he referred to the provision of Section 2(47)(v) r.w.s. 53A of Transfer of Property Act and submitted that in such cases capital gain should be taxable in the year in which such transaction is entered into even if the transfer of the immovable property is not complete under the general law. He further submitted that in the light of provisions of section 2(47)(v), this issue was examined in great details by AAR Tribunal in the case of Mr. Jasbir Singh Sarkaria (2007) 294 ITR196, it was held that the transaction of the nature referred to in clause (v) of section 2(47) had taken place on a particular date, the actual date of taking physical possession need not be probed into. It is enough if the transferee has by virtue of that transaction a right to enter upon and exercise the acts of

possession effectively. It was further held that to attract clause (v) of section 2(47), it is not necessary that the entire sale consideration up to the last installment should be received by the owner.

In the above-mentioned case the judges have gone into detailed examination of the issue and applicability of provisions section 2(47)(v). To make the issue clearer, it is relevant to reproduce some relevant paragraphs as under:

> "There is no doubt that the agreement to transfer the entire right, title and interest of the owners for a consideration specified in the agreement and in accordance with the terms thereof answers the description of a contract falling within the scope of section 53-A of the Transfer of Property Act. The crucial question then arises - at what point of time the transaction allowing the taking of possession in part- performance of such contract had taken place. Incidentally it raises the question as to how the expression 'transaction' is to be understood. One view that could possibly be taken is that the execution of the agreement under the terms of which the purchaser is enabled to take possession even before the execution of conveyance deed is itself the 'transaction' contemplated by section 2(47)(v). It is enough if the agreement/contract falling within the description of Section 53-A provides for taking possession at some stage before the ownership is transferred in a manner known to law. What is contemplated by section 2(47)(v) is a transaction which has direct and immediate bearing on allowing the possession to be taken in part performance of the contract of transfer. It is at that point of time that the deemed transfer takes place. In this context, the observations of a Division Bench of Bombay High Court speaking through S.H. Kapadia, J in Chaturbhuj Dwarkadas v. CIT are apposite: We quote the same:
>
> If the Contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability.
>
> Further, if 'possession' referred to in clause (v) is to be understood as exclusive possession of the transferee/developer, then, the very purpose of the amendment expanding the definition of transfer for the purpose of capital gains may be defeated. The reason is this: the owner of the property can very well contend, as is being contended in the present case, that the developer will have such exclusive possession in his own right only after the entire amount is paid to the owner to the last pie. There is then a possibility of staggering the last installment of a small amount to a distant date may be, when the entire building complex gets ready. Even if some amount, say 10 per cent, remains to be paid and the developer/transferee fails to pay, leading to a dispute between the parties, the right to exclusive and indefeasible possession may be in jeopardy. In this state of affairs, the transaction within the meaning of clause (v) cannot be said to have been effected and the liability to pay capital gains may be indefinitely postponed. True, it may not be profitable for the developer to allow this situation to linger for long as the process of transfer of flats to

the prospective purchasers will get delayed. At the same time, the other side of the picture cannot be overlooked. There is a possibility of the owner with the connivance of the transferee postponing the payment of capital gain tax on the ostensible ground that the entire consideration has not been received and some balance is left. The mischief sought to be remedied, will then perpetuate. We are, therefore of the view that possession given to the developers need not ripen itself into exclusive possession on payment of all the installments in entirety for the purpose of determining the date of transfer.

While on the point of possession, we would like to clarify one more aspect. What is spoken to in clause (v) of section 2(47) is the 'transaction' which involves allowing the possession to be taken. By means of such transaction, a transferee like a developer is allowed to undertake development work on the land by assuming general control over the property in part performance of the contract. The date of that transaction determines the date of transfer. The actual date of taking physical possession or the instances of possessory acts exercised is not very relevant. The ascertainment of such date, if called for, leads to complicated inquiries, which may frustrate the objective of the legislative provision. Relying upon the aforesaid decision, he submitted that income received during the year from sale of assets to the developer is taxable under the head "Short Term Capital Gain" in Assessment Year 2008-09 due to following reasons.

a) The co-developer agreement, giving full ownership rights over buildings to co-developers, was signed on 20103/2008 and substantial amount of sale consideration was also received during the year 2007-08.

b) There is a transfer of assets in the form of land and bare shell buildings which is not stock-in-trade in the books of the assessee company, and has been shown as addition to fixed assets in the co-developer's case (i.e. the buyer).

c) There is a specific sales consideration, which has been fixed for this transaction.

d) The transfer of building is absolute and as per clause 7.1 of the Co- Developer Agreement dated 20.03.2008, the Co-

Developer shall have exclusive rights to let, sub-let, mortgage, or to allow use of all or any part of the SEZ buildings in accordance with the SEZ Act, on such terms and conditions as the Co-developer may impose and agreed to. In the amended clause 2.4 to the addendum to MOU also it has been made clear that Co-developer shall own the bare shell buildings and shall continue to own warm shell building also.

e) Sale of buildings is not one of authorized operations in the SEZ as per the notification dated 27th October, 2006 issued by the Ministry of Commerce and Industry, Govt, of India.

f) As the sale of bare shell buildings to the co-developer, i.e. DLF Commercial Developers Ltd. in accordance with the co- developer agreement, is against the spirit of SEZ Act & Rules and is not one of the authorized operations of SEZ, the assessee did not derive income from business of developing SEZ. Such isolated transaction of sale of bare shell buildings to the co-developer is nothing but sale of capital assets as the assessee has relinquished all rights over the buildings. Accordingly, the income from sale of bare shell buildings is capital gains on sale of buildings.

g) Sale of buildings to the co-developer is not an activity of development of SEZ. It is an isolated transaction giving one time income from transfer of capital assets. It is very clear from the agreement that the intention from the very beginning was to construct and sale the buildings as a onetime activity. Such isolated transaction can never be termed as business activity. CO-developer agreement is very clearly showing that the developer loses all rights over these assets and the relinquishment of right is irrevocable."

58. Referring to the provisions contained in Section 80IAB, he submitted that the word 'derived' is very crucial in appreciating any kind of deduction which would fall within the ambit of the said provision. Here, in this case, the source of income is a sale of bare shell of the building and there is no question of development of SEZ. The same has been done by co-developer. In support, he has also relied upon the following decisions.

> "CYBER PEARL INFORMATION TECHNOLOGY PARK P. LTD V. INCOME TAX OFFICER- (2017) 399 ITR 310(Mad) Hon'ble Madras High Court held that the consistent view of the courts has been that wherever, in such like sections, the expression "derived" is used, as against "attributable to", the width and the amplitude is narrower. Therefore, courts have held consistently that in order to come to a conclusion as to whether such pro fits or gains, i.e., income, would be amenable to deduction, the effective source of such income is to be looked at. Once, it is found that the income is derived from a secondary source, which is not the effective source, it falls outside the purview of such like provisions, which provide for deductions with purpose of giving fillip to the designated activity, which, in the instant case, is the business of developing a Special Economic Zone.
>
> PANDIAN CHEMICALS LTD. V. COMMISSIONER OF INCOME TAX - (2003) 262 ITR 278(SC) Hon'ble Supreme Court held that the words "derived from" in Section 80HH of the Income Tax Act 1961, must be understood as something which has a direct or immediate nexys with the assessee's industrial undertaking. Although electricity may be required for the purposes of the industrial undertaking, the deposit required for is supply is a step removed from the business of industrial undertaking. Held accordingly, that interest derived by the industrial undertaking of the assessee on the deposits made with the Electricity Board for supply of electricity for running the industrial undertaking could not be said to flow directly from the industrial undertaking itself and was not profits or gains derived by the undertaking for the purpose of the special deduction under Section 80HH. COMMISSIONER OF INCOME TAX V. STERLING FOODS -

(1999) 237 ITR 579 (SC) Hon'ble Supreme Court held that there must be, for the application of the words "derived from', a direct nexus between the profits and gains and the industrial undertaking.

Copies of the Judgments are enclosed with these submissions."

59. He further referred to the Supreme Court's judgment in the case of Commissioner of Custom vs. Dileep Kumar & Co. (supra) wherein it was held that tax exemption has to be interpreted wherein the benefit of doubt should go in favour of the Revenue and also referred to observations of Their Lordships in paragraph 49 to 52. Thus, he submitted that assessee is not eligible for claim of deduction u/s.80IAB.

60. By way of counter submission, learned counsel for the assessee submitted that the Revenue's counsel has merely reiterated the observations of the Assessing Officer and no new arguments have been taken in respect of claim of deduction u/s.80IAB. He has tabulated the various arguments and point-wise rebuttal of ld. Special counsel in his written submissions.

61. We have heard the rival submissions and also perused the relevant findings given in the impugned orders as well as material referred to before us. The main issue is with regard to allowability of claim of deduction u/s.80IAB in respect of profit arising from sale of bare shell building in SEZ by assessee to M/s. DLF Pvt. Ltd. As a part of its business activities, the assessee has undertaken to develop SEZ project in a Govt. designate Special Economic Zone after obtaining requisite approval under SEZ Act and SEZ Rules in terms of provisions of Section 80IAB of the Income Tax Act. As brought on record, assessee had undertaken to develop SEZ project which was duly approved by Government of India and later on had entered into MOU with co-developer, wherein it was agreed that assessee shall develop the bare shell building and transfer to M/s. DLF Pvt. Ltd. (co-developer) for further development and lease of the same to eligible tenants. It was also agreed that land on which building was to be constructed will not be sold to the co-developer, M/s. DLF Ltd. but will be leased out for a definite period. It was the profit from such developmental activity, amounting to Rs.11,19,06,82,702/- arising from transfer of bare shell building was claimed as deduction u/s.80IAB, after obtaining the approvals from 'Board of Approvals, Ministry of Commerce and Industry', Government of India in respect of SEZ Project. In order to appreciate the facts, it would be relevant to highlight the sequence of event in this regard: -

• The assessee company was in possession of land admeasuring 29.8062 Acres of land located in Village Silokhera, Tehsil and Distt. Gurgaon.

• It further took on lease adjacent parcel of land admeasuring 7.1875 Acres from M/s. Chandrajyoti Estate Developers Pvt. Ltd.

• The assessee was granted approval by the Ministry of Commerce & Industry (SEZ Section) for setting up a sector specific SEZ for IT/ITES sector at Sector 30, Silokhera, Gurgaon. An area of 12.06 Hectares and an additional area of 2.96 Hectares were notified by the Ministry of Commerce & Industry, vide notifications dated 06.12.2006 & 19.03.2007.

• The authorized operations to be undertaken by the assessee were also approved by a separate approval by the Govt. of India, Ministry of Commerce & Industry (SEZ Section) vide letter dated 14.02.2007.

• The assessee entered into a MOU dated 29.01.2007 with the co-developer and filed the copy of the MOU for the approval before the Board of Approvals.

• An addendum thereto was also entered into amending the terms of the original MOU on 23.04.2007.

• The authorized operations to be taken up by the co- developer in the said Silokhera SEZ was also approved by the Ministry of Commerce & Industry (SEZ Section) vide letter dated 22.05.2007 which included development of office space also (Warm Shell).

• In order to consolidate the MOU and addendums thereto a co-developer agreement was entered into between the assessee and DLF Assets Pvt. Ltd. on 20.03.2008 which was also filed before the Board of approvals and the approval was also granted to this agreement vide letter dated 01.06.2009 by the Ministry of Commerce & Industry (SEZ Section).

62. The case of the Assessing Officer for making the disallowance on various counts can be summarized in the following manner: -

A. The ownership of land on which SEZ has been developed is in dispute in view of the decision of Punjab & Haryana High Court and as such the claim of deduction is inadmissible in absence existence of SEZ project.

B. Transfer of building cannot be considered as activity of development of SEZ and as such the profit arising from such transfer is not eligible for deduction u/s 80IAB. The activity of development and sale of building is neither an authorized operation under SEZ Act nor approved by competent authority. Further, lease of land for 30 years to M/s. DLF Asset Ltd. tantamount to transfer of land which is an impermissible activity in terms of Rule 11(9) of SEZ Rules, 2006. (Which AO has wrongly construed the period of lease as 49 Years) C. Isolated transaction of sale of building is assessable under the head income from capital gain and as such the provisions of section 80IAB are not applicable. Further, as the purchaser M/s. DLF Asset Ltd. has shown the said bare shell building as fixed asset in its Balance Sheet, the same constitute capital asset of the appellant and as such profit arising from sale of bare shell is in the nature of Short-Term Capital Gain.

D. Alternatively, the profit from the project should be apportioned and spread over 49 years (correct figure 30 years) and as such only the proportionate claim of deduction u/s 80IAB is allowable.

63. The 'SEZ Act, 2005' defines co-developer as a person, who has been granted by the Central Government letter of approval u/s. 3(12) and developer u/s. 3(10) of the SEZ Act. Further, the Board of Approval authorizes the developer to undertake in a SEZ such operation as Central Government may authorize after granting the approval of the authorized operation to an eligible entity, who is authorized to carry out the operation in Special Economic Zone. Now the relevant portion of Section 80IAB Act reads as under:

80-IAB. (1) Where the gross total income of an assessee, being a Developer, includes any profits and gains derived by an undertaking or an enterprise from any business of developing a Special Economic Zone, notified on or after the 1st day of April, 2005 under the Special Economic Zones Act, 2005, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to one hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which a Special Economic Zone has been notified by the Central Government:

Provided that where in computing the total income of any undertaking, being a Developer for any assessment year, its profits and gains had not been included by application of the provisions of sub-section (13) of section 80-IA, the undertaking being the Developer shall be entitled to deduction referred to in this section only for the unexpired period of ten consecutive assessment years and thereafter it shall be eligible for deduction from income as provided in sub- section (1) or sub-section (2), as the case may be:

Provided further that in a case where an undertaking, being a Developer who develops a Special Economic Zone on or after the 1st day of April, 2005 and transfers the operation and maintenance of such Special Economic Zone to another Developer (hereafter in this section referred to as the transferee Developer), the deduction under sub-section (1) shall be allowed to such transferee Developer for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee Developer.

(3) The provisions of sub-section (5) and sub-sections (7) to (12) of section 80-IA shall apply to the Special Economic Zones for the purpose of allowing deductions under sub-section (1).

Explanation--For the purposes of this section, "Developer" and "Special Economic Zone" shall have the same meanings respectively as assigned to them in clauses (g) and (za) of section 2 of the Special Economic Zones Act, 2005."

64. Ergo, the benefit u/s.80IAB is eligible only in respect of project approved by Board of Approval under the aegis of Ministry of Commerce and Industry and once the approval is granted by BOA, the statutory benefit has to be granted so as to give effect to such approval. The SEZ Act, 2005 has been enacted as a self-contained code and is a Special Act which has an overriding effect on any other Act including the Income Tax Act, 1961, in view of provision of Section 51 and r.w.s. 27 of the SEZ Act 2005.

65. Before us, the learned counsel has given the sequence of various approvals which are quite relevant for examining the claim of the assessee, which are as under:

> i. That SEZ project undertaken by the assessee was approved by Government of India (BOA) vide letter dated 25/10/2006 which was subsequently notified in Official Gazette.
>
> ii. Vide letter dated 14/02/2007, approval was granted to the assessee to carry out authorized operations in SEZ which included development of infrastructure facility. iii. The MOU filed vide letter dated 22/03/2007 before BOA for treating M/s. DLF Assets P. Ltd. as co-developer for the purpose of developing of SEZ project was approved by Ministry of Commerce and Industry, Government of India (SEZ Section) vide approval dated 07/05/2007.
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> iv. Vide approval letter dated 22/05/2007, BOA approved authorized operations that could be carried out by M/s.

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DLF    Assets   P.   Ltd.    which    inter-alia      included
development of warm shell.

v.    The MOU dated 29/01/2007 got culminated into
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> definitive agreement dated 20/03/2008 which was duly considered while granting approval to M/s. DLF Assets P. Ltd. vide letter dated 01/06/2009.
>
> vi. That assessee further sought clarifications vide letter dated 10/01/2011 from Ministry of Commerce and Industry, Government of India (SEZ Section) which were answered by letter dated 18/01/2011 wherein it was categorically stated that lease of land to co-developer is permissible under Rule 11(9) of SEZ Rules. It was further clarified by the Ministry that Co-developer can acquire / purchase building on the leased land to perform approved operations. Moreover, the transaction envisaged in the MOU and agreement with M/s. DLF Assets P. Ltd. has been specifically approved in reply to Query No.6 & 7 of the said letter. This position was once again clarified in reply dated 20/01/2011.

vii. The BOA also sought clarification from CBDT regarding activity proposed to be carried out by the assessee and co-developer and CBDT duly approved by the same vide letter dated 01.06.2009 with disclaimer that Income Tax Department shall have right to examine the taxability of transaction involving lease of land.

66. One of the main reasons for denying the claim of benefit u/s.80IAB by the Assessing Officer was that the ownership of land on which SEZ has been developed is in dispute in view of decision of Hon'ble Punjab and Haryana High Court, and therefore, such a claim is inadmissible. In this connection, learned counsel before us has clarified that assessee was a bona fide purchaser of the property in respect of which approval for development of SEZ project was duly granted by Government of India. In any case, the Hon'ble P&H High Court has not commented upon SEZ Project developed on said piece of land and the decision will not at all affect the right of the assessee. In these circumstances, the decision of P&H High Court shall have no bearing on the claim of deduction u/s 80IAB of the Act particularly when the infrastructure project has already been executed and completed. In any case, the order of P&H High Court pronounced on 03/02/2011 was challenged before Supreme Court by the assessee and other parties and now the Hon'ble Supreme Court vide order dated 20/06/2011 has stayed the operation of judgment of P&H High Court and therefore, the adverse inference on the basis of order of P&H High Court is not sustainable. He clarified that assessment order was passed on 27/04/2011, i.e., before passing of the order by the Hon'ble Supreme Court and thus, the observation of the assessing officer is no longer relevant and this controversy has no legs to stand.

67. We find that, even the ld. CIT (A) has considered this fact in light of the judgment of the Hon'ble Supreme Court and on this basis has rejected the observations made by the Assessing Officer. Thus, when the operation of the order of the Hon'ble Punjab and Haryana High Court has been stayed by the Hon'ble Supreme Court vide judgment and order dated 20.06.2011, then blindly relying upon the order of the Hon'ble High Court cannot be the ground for rejecting the claim of deduction. Even otherwise also, in case the acquisition of land by State Government and consequential ownership of the land by the assessee in future is cancelled by the Hon'ble Supreme Court, then as a consequence, assessee will have to return the entire consideration to the co-developer and in such a situation there would arise no occasion to charge any income tax or give any consequential benefit u/s.80IAB. Thus, the reasoning given by the ld. CIT (A) to reject this ground is affirmed and is upheld.

68. Now coming to the Assessing Officer's reasoning that transfer of a building cannot be considered as activity of development of SEZ, and therefore, profit arising from such transfer is not eligible for deduction u/s.80IAB; and lease of land for further 30 years to M/s. DLF Asset Ltd. tantamount to transfer of land. All these reasoning of the ld. Assessing Officer at the threshold cannot be entertained or appreciated, in view of series of approvals from 'Board of Approval', which is a body authorised by the statute and by the Govt. of India. Assessing Officer has mainly considered/examined the issue of disallowance of claim of deduction on the ground that activity of developing of building and subsequent transfer of bare shell to co-developer is not the authorized operation under SEZ Act. As stated above, before undertaking the activity of development of SEZ, the assessee has obtained approvals from time to time so as to comply strictly within the provisions of SEZ Act r.w.s. 80IAB of I.T. Act. The Board has granted approval not only to the assessee for

building the bare shell but also to the co-developer after examining the various clauses of MOUs dated 29.01.2007 and 20.03.2008, wherein particulars of development activity are extensively laid down. The provision of Section 80IAB mandates that assessee must be a developer under the SEZ Act and income must be derived from business of developing SEZ notified under the SEZ Act, 2005. Here in this case, all the conditions stood satisfied and Assessing Officer has also not pointed out as to which of the conditions have not been fulfilled. Likewise, in the present case, it is an undisputed fact that, firstly, the area has been notified as Special Economic Zone vide notification dated 06.12.2006 and 19.03.2007; secondly, the assessee has been approved as Developer by BOA vide letter dated 25.10.2006 and 14.12.2007; and lastly, the operation of developing of building has been approved as authorized operations and as such the income has been derived from developing and sale of bare shell building in SEZ. The term 'Developing a Special Economic Zone' has to be seen in terms of authorized operations specified by BOA under the SEZ Act, 2005. Though Income Tax Act does not define the term 'Developing a Special Economic Zone', however, the meaning of the same has to be deduced from the SEZ Act. Here, in this case, not only the BOA has recognized the existence of SEZ but has also approved the activity of developing and transfer of bare shell as authorized operation of developing of SEZ and assessee has been recognized as developer. Accordingly, all the conditions spelt out in Section 80IAB stands fulfilled.

69. The Assessing Officer has also drawn adverse inference from the fact that sale of land is not allowed in SEZ, because as per SEZ Rules the assessee has transferred the land for 49 years lease, which in fact is not correct, because the same was for 30 years, and also it is against the spirit of Rule 11(9) of 'SEZ Rule 2006'. It has been brought on record and has been contended at every stage that assessee has not transferred the ownership of the land to co-developer M/s. DLF Pvt. Ltd. at any point of time, as the same has been given on lease for the period of 30 years and this fact is clearly borne out from the clauses of MOU and definitive agreements that the ownership of the land remains with the assessee and there is no case of transfer of land. Rule 11(9) of SEZ Rules, 2006 only prohibits sale of land and same is not applicable in the case of lease. This position is also corroborated from specific reply of BOA in letter dated 18.01.2011 and 20.01.2011. This clarification issued by BOA clearly clinches the issue in favour of the assessee, because BOA in clear words and terms has clarified the legality and permissibility of transaction of bare shell building to co-developers and lease of land in terms of provision of SEZ Act, 2005. Thus, any doubts regarding authorized operation have been set at rest by BOA. Hence, the allegations of the Assessing Officer are totally misconceived and are rejected.

70. The ld. CIT(A) vide his finding recorded in paragraph 8.17 to 8.27 had specifically referred to the minutes of BOA meets as well as comments obtained from CBDT with regard to the lease of land. The Director CBDT vide letter dated 26.05.2009 has conveyed its approval for the project under consideration with the right to examine the taxability of income arising from such transaction under the Income Tax Act. The BOA only after considering the reply from the CBDT, granted the approval vide letter dated 01.06.2009 to Co- developer, M/s. DLF Assets P. Ltd. on definitive agreement dated 20.03.2008 after inserting clause (xvii) of Para 3, wherein it was clarified that approval to lease agreement will not have any bearing on treatment of income by way of lease /rental/down payment/premium etc. under the Income tax Act, 1961. It was specifically pointed out by the Ld. Counsel that there was nothing in the minutes of meetings of Board of Approval held on 23.02.2009

and 19.06.2009, indicating that there was any objection with regard to proposed transfer of bare shells by the assessee to Co-developer. The assessing officer has relied upon clause (xvii) of Para 3 of letter dated 01.06.2009 while reaching to the erroneous conclusion that taxability of entire transaction is open for examination and assessment. However, it is seen that the assessing officer in fact has failed to appreciate the above clause in right perspective and has attempted to make use of the same for justifying the denial of claim of deduction u/s 80IAB of the Act. It is pertinent to note here that clause (xvii) of Para 3 is only with regard to terms and conditions of lease agreement and same cannot be inferred to dispute the transaction of transfer of bare shell building and profit arising therefrom. In the present case, the assessee has claimed deduction of profit from sale of bare shell building and as such the clause relating to issue of taxability of lease income is of no help to the revenue. The CIT(A) has given express finding on this issue vide para 8.25 of his order which is quite relevant and allay the charge of the AO. Further, it is seen that the Disclaimer Clause in approval dated 01.06.2009 granted to Co-Developer has been primarily inserted by the BOA in the approval to put a curb on the wrong practice of leasing the land for long periods and receiving onetime payment in the form of lease rentals/down payments/premium etc. which tantamount to sale of Land in the guise of long-term lease. Thus, the reliance by AO on such disclaimer is misplaced as the disclaimer per se shall have no bearing on taxability of development of the building and income by way of sale of bare shell buildings in the hands of the assessee. The assessee has obtained requisite approvals from the Board of Approval in by disclosing not only the development consideration but also the basis for determining the same.

71. The entire controversy as to whether the transfer of bare shell buildings to the Co-developer was an Authorized operation or not as highlighted by the Ld. Counsel before us, has been set at rest by further clarifications dated 18.01.2011 and 20.01.2011 issued by the Ministry of Commerce. In our opinion, the Revenue authorities do not have jurisdiction to question the validity or the legality of 'authorized operations' once it has been approved by the Board of Approval/Central Government under a statute and any attempt to dispute the same would be contrary to the provisions of the SEZ Act, which has an overriding effect. In the garb of disclaimer, the AO cannot usurp the functions of the Board of Approval and sit over the judgement on what constitutes an authorized operation within the meaning of SEZ Act/SEZ Rules. Merely because a deduction is allowed to transferee developer in respect of profits derived from operation and maintenance would not lead to inference that the deduction for development of a SEZ would not be available to the developer. The mandate of Section 80IAB is that a developer is entitled to deduction in respect of "profits and gains" derived from "any business of developing a Special Economic Zone" and for what constitutes 'developing a Special Economic Zone', one has to refer to the provisions of the SEZ Act. When the assessee has been granted approval as a Developer and all the authorized operation were approved including transfer of bare shells to the Co-developer for a development consideration by the Board of Approval, the business activity carried out by the assessee pursuant to such approvals constitute business of 'Developing a Special Economic Zone' within the meaning of Section 80IAB of the Act. Under section 80IAB, the AO's authority is limited to examine whether the provisions of section 80IAB read along with the relevant Rules have been complied or not. For instance, some of the conditions as stipulated in the section which the AO may examine may include: -

-Whether the assessee is a developer under the SEZ Act and is in the business of developing a SEZ.

-The SEZ has been notified on or after the 1st day of April 2005 under the Special Economic Zone Act, 2005.

-Whether the profits have been derived from the business of development, operation and maintenance of a SEZ.

72. The case of assessee has been that the land has been given on lease for a period of 30 years and lease rentals per annum are being received over a period of lease term on annual basis and not up-front for all the years under the lease. The disclaimer condition mentioned in clause 3(xvii) of the approval letter dated 01.06.2009 does not give any additional power to the AO to examine the taxability of the transaction of hand over and transfer of bare shells but has to be restricted only to examine the transaction of lease of Land, as expressly clarified by the Ministry of Commerce in the clarification dated 18.01.2011 so that the transactions of sale of land in the guise of long term lease by receiving premium/down payments etc. do not escape the scrutiny under the Income Tax Act as there is an express prohibition on sale of Land in the SEZ. Under these facts and circumstances, we do not find the reasoning given by the AO to disallow the claim is justified.

73. Before us, learned Special counsel referring to the same reasoning given by the Assessing Officer had submitted that transfer of building of co-developer cannot be treated as a business activity and the income from such transfer cannot be treated as business income. In fact, it is a sale of a building in the nature of capital asset. The contention raised on behalf of the Revenue in the facts of the present case cannot be sustained because all the conditions laid down under the SEZ Act have been examined minutely by the authorized authority, i.e., Board of Approval. Once assessee has been notified as developer under the SEZ Act and his activity has been approved by BOA and the SEZ in which the assessee has carried out its business activity has been notified under the SEZ Act, 2005 then profits derived from business of development, operation and maintenance of a SEZ has to be taken from such activity and consequently is entitled for claim of deduction u/s.80IAB.

74. Thus, in view of our reasoning given above, we hold that Assessing Officer was not justified in denying the benefit of deduction u/s.80IAB arising from sale of bare shell building to co-developer.

75. Before us, learned counsel for the assessee has also pointed out that in a group concern, this Tribunal in the case of DLF Info City Developer (Chennai) Ltd. and M/s. DLF Cyber City Developers Ltd. on identical circumstances and similar reasoning given by the AO has allowed the claim of deduction u/s.80IAB. The copy of these judgments has been placed before us in paper books.

76. From the perusal of the aforesaid, we find that precisely same reasoning were given by the Assessing Officer in these cases wherein the Tribunal after analyzing the provision of SEZ Act, 2005 and on exactly similar set of activities have held that assessee is eligible for deduction u/s.80IAB because they were in consonance not only under the SEZ but also BOA has approved such activities.

77. The Assessing Officer as an alternative has also held that isolated transaction of sale of building is assessable under the head 'income from capital gain', and therefore, provision of Section 80IAB is not applicable and since the purchaser M/s. DLF Ltd. has shown the bare shell building as fixed assets with balance-sheet, therefore, the same constitutes the capital assets of the assessee and thus, the profit arising from sale of bare shell is in the nature of Short Term Capital Gain. The aforesaid observations of the ld. Assessing Officer cannot be accepted because assessee is engaged assessee is engaged in the business of real estate and the building in SEZ has been shown as stock-in-trade on which revenue has been recognized as per Percentage Completion method (POCM) prescribed under AS-7. The SEZ project was part of regular business activity of the assessee and as such there is no case to treat this transaction in different context so as to re-characterize income under the head capital gain merely to defeat the claim of deduction based on requisite approval and provisions of section 80IAB. In fact, even during the year under reference, AO has considered various other projects under the head business income. Further, when the books of account of the assessee were subjected to Special Audit u/s 142(2A) and the Special Auditor has accepted the treatment of income from sale of bare shell building as part of business profits, then such an income arising from sale of bare shell building would fall in the nature of business income eligible for deduction u/s 80IAB of the Act. Apart from that, it is noted that assessee- company was formed with the object of real estate development and has been engaged in this activity since inception. It is the intention of the assessee which is relevant and determining factor whether the asset is held as stock or capital asset. In the present case, the assessee moved an application for setting up of SEZ project which was duly approved as Developer by BOA. The cost incurred on development of bare shell building was disclosed as stock and revenue was recognized as per POCM. Under these circumstances, the income from sale of building is purely in the nature of business income. The assessee is engaged in organized activity of development of infrastructure facility in SEZ and as such operations ostensibly are in the nature of business in terms of section 2(13) of the Income tax Act, 1961. Thus, re-characterising the income as short-term capital gain by the AO is rejected.

78. Coming to another alternative finding of the ld. Assessing Officer that, since the land has been leased for 49 years, therefore, the income from sale of bare shell building should also be bifurcated and proportionate recognized over a period of 49 years. We find that the Ld. CIT (A) has discussed this issue in detail and has held that the lease is only in respect of land and same cannot be applied on transfer of building. In any case, the recognition of revenue relating to real estate projects is governed by AS-7 and the assessee has been consistently following POCM which has accepted by the Tribunal in assessee's own case for AY 2006-07. Hence, such a reasoning of the AO to disallow proportionate deduction cannot be sustained.

79. Thus, in view of our finding given above, the order of the ld. CIT (A) in allowing the claim of benefit u/s.80IAB is confirmed and consequently the ground raised by the Revenue is dismissed.

80. Lastly, in so far as the reliance placed by the Ld. Spl. Counsel for the revenue that the Hon'ble High Court in the case of one of the sister concerns, has set-aside the issue for deciding on merits while upholding the revision us/s 263 by the CIT, is also sans any merits, because, nowhere the Hon'ble High Court has adversely commented on the claim of deduction u/s 80IAB on merits. In fact, matter has been restored back to the Tribunal to decide the issue on merits afresh after

considering all the facts and the relevant provisions of SEZ Act, which we have already discussed in detail. Thus, reliance placed by the Revenue to draw any adverse inference on merits cannot be sustained.

81. The next issue relates to deletion of addition on account of disallowance of Revenue recognition as per percentage of completion method (POCM) of Rs.42,92,17,872/-.

82. At the outset, learned counsel informed that this issue stands covered in favour of the assessee by the Tribunal in assessee's own case for the Assessment Year 2006-07 and drew our attention to paragraphs 35 and 42 of the said order.

83. Ld. Special counsel also admitted that this issue now stands covered in favour of the assessee.

84. Ld. Assessing Officer on the basis of remarks made by the Special Auditors held that Revenue to be recognized from various projects as per the POCM method have to be worked out in the following manner: -

Name of the Revenue Gross Margin Difference Additional Additional Project recognition as recognised as Revenue revenue per POCM for per our working recognized as recognised as F.Y.07-08 during F.Y.07- per per Assessment 08 Assessment Order for AY Order for 2006-07 A.Y.2007-08 Trinity (11,58,438) 1,42,52,087 2,25,90,443 12,70,13,958 1,30,93,649 Aralias (34,15,34,045) (29,50,49,819) 4,64,84,226 10,49,09,048 37,50,19,955 Westend Heights 81,42,828 3,74,00,432 2,92,57,604 6,34,73,181 38,56,76,277 Royalton 7,15,12,958 82,06,432 1,43,28,160 4,88,79,491 7,97,19,390 Pinnacle 45,32,46,474 49,38,96,094 4,06,49,620 4,39,97,615 28,41,42,051 Icon 38,56,98,510 2,97,69,020 4,05,73,424 93,46,81,602 41,54,67,530 Summit 67,87,31,045 69,82,35,605 1,95,04,559 1,28,23,779 -

Magnolias 526,66,86,898 5,36,95,65,201 10,28,78,303 2,17,22,670 - The Belaire 322,94,28,422 6,98,60,598 1,55,03,253 -

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|---|---|---|---|---|---|
| | | 3,29,92,89,020 | | | |
| The Park Place | 250,38,47,408 | 2,570,346,411 | | 66,499,003 | - |
| Wellington | (49,17,634) | (4,917,634) | | - | - |
| Princeton | (59, 02,013) | (5,902,013) | | - | - |
| Carlton | (38,99,436) | (3,899,436) | | - | - |
| Total Phase-V (A) | 1223,98,82,978 | 12,66,72,44,430 | 42,73,61,452 | | 33, |
| DLF City Court | 9,33,58,702 | 94,652,773 | | 1,294,071 | - |
| CourtYard Office | 6,37,92,669 | 6,38,23,974 | | 31,305 | 65, |

| | | | | | |
|---|---|---|---|---|---|
| Rajarhat Kolkata | 59,75,03,936 | 597,503,936 | - | | - |
| Jallandhar Mall | 23,83,66,943 | 238,366,943 | - | | - |
| Ludhiana Mall | 28,96,61,350 | 289,661,350 | - | | - |
| Star Tower - | 5,11,80,289 | | | 18,450 | - |
| Silokhera | | 51,198,739 | | | |
| Cross Point | 6,58,07,790 | 66,245,928 | 512,594 | - | - |
| Corporate Park | 33,75,82,954 | 337,582,954 | - | - | - |
| Grand Mall | - | - | - | - | - |
| Exclusive Floors | - | - | - | - | 6,9 |
| Moulsary Arcade | - | - | - | - | 6,7 |
| Total (B) | 173,72,54,633 | 1,73,90,55,150 | 18,56,420 | 65,641 | 7,0 |
| Net Total (A+B) | 13,97,71,37,609 | 14,40,62,99,580 | 42,92,17,872 | 33,99,87,214 | 2,2 |

Accordingly, AO made the addition of Rs.42,92,17,872/-.

85. Ld. CIT(A) after detailed finding has deleted the said addition after observing and holding as under:

> "9.8 I have considered the submission of appellant, observation of the ASSESSING OFFICER & Special Auditors comments, decision of Hon'ble ITAT in appellant's own case in A.Y. 1994-95 and treatment given to this issue in earlier assessment years by ASSESSING OFFICER as well as appellate authorities. It is also noticed that this issue has been decided in favour of the appellant vide order dated 25.03.2011 passed by CIT(A)-XVIII, New Delhi, for A.Y. 2006-07 (page Nos.122-153 of the said order) and in my own order in appellant's own case for the immediately preceding year relevant to assessment year 2007-08 (page Nos.108-139 of the said order). It is seen that whenever appellant company starts a new building/ project, it prepares a budgeted statement of total cost to be incurred for completing the building or Project and the total revenue which can be derived from sale of such building or project. The budgeted statement of Revenue and cost gives the budgeted margin on such building or project. When the actual construction of building or project starts, the actual cost incurred at the end of financial year is compared with total budgeted cost to determine the percentage of completion of building or project.
>
> The appellant has following components of cost to be included in the budgeted cost:-

> • cost of land (including Land under agreements to purchase) • estimated internal development cost (IDC), • external development charges, • construction costs and development/ construction materials, Internal Development Charges are incurred towards amount spent on roads, parks, water supply, electricity and other facilities required for habitation inside the peripheral of a colony. Since the expenditure is common for total colony and cannot be directly correlated with the particular project or Building, the total internal development charges (IDC) are required to be apportioned on some scientific basis over the projects. The availability of approach road, sewage and other infrastructure facilities are an essential part of sale transaction and therefore, it is a liability committed by the appellant at the very initial stage of sale of property itself. Without the provision of these infrastructure facilities, the constructed building cannot be habitable and no customer may even buy the property of the appellant without these essential facilities. Thus, there is a direct nexus between the sale price and the expenditure to be incurred on these infrastructure facilities by the appellant. The sale revenue as well as expenditure on internal development works is inextricably linked with each other and, since the estimated revenue includes charges for internal development work, the corresponding estimated expenditure on internal development work also has to be taken into consideration in the total cost to be incurred. In other words, internal Development Work is inbuilt in the total estimated revenue; the corresponding expenditure has to be necessarily included in the total cost to be incurred. The appellant is bound to apply the matching principles i.e. matching revenue with cost to be incurred to earn the revenue. On this principle alone and by itself the inclusion of IDC in the total cost to be incurred is reasonable and justified, as without applying the principle of matching revenue with cost there would be distortion in the matter of arriving at income. This distortion needs to be avoided for the purpose of ascertaining the true profit/loss of the appellant.

As per the initial estimate prepared by the appellant the cost on internal development charges was estimated at Rs.230 crores for its phase V projects. The same has been prepared by Shri Sunil Arora having diploma in civil engineering with an experience of 16 years and Sh. Devender Singh, B.E. (Civil) having an experience of 24 years. The cost estimate of Rs.230 crores is further backed by individual items of cost, such as earth work, road work, storm water drainage work, horticulture work, water supply work, sewerage work, boundary wall, electrical work etc. In turn, there is a cost break down of all these broad heads.

9.9 In view of the detailed facts discussed above, the IDC is a part of budgeted cost prepared by the appellant. The budgeted IDC is prepared on scientific basis. The appellant has an experience of more than 30 years in this line of business and over the years the budgeted IDC estimated by the appellant company has been accepted as part of budgeted cost by the department. In between there was a difference between the budgeted cost and the cost estimated by the department which was finally settled before the ITAT in A.Y. 1994-95 wherein the budgeted cost of IDC as estimated by the appellant was accepted as part of the budgeted cost and issue was settled in favour of the appellant. It is also seen that the budgeted IDC has been accepted by the department from A.Y. 1988-89 to

1994-95. For A.Y. 1995-96 to 2000-01, the department has made certain additions which have been deleted by CIT (A) as well as ITAT and no further appeal has been filed by the department. From A.Y. 2001-02 to 2005-06, no additions have also been made on this issue except in A.Y. 2002-03 wherein an addition of Rs. 4,43,994/- was made, which was deleted by CIT(A). It is also seen that Hon'ble ITAT in the appellant's own case has held that appellant can claim upto 30% as IDC cost of the budgeted sales. It may be seen that revised IDC of Rs. 236.05 crore claimed by the appellant for Phase-V project is less than the 30% of budgeted sales as stated supra. It is also seen that budgeted cost of the IDC has been accepted in A.Y. 2004-05 and 2005-06 in the appellant's case.

It may be seen that IDC is an integral part of the cost of the project and based on these estimates, the project has been approved by the Director Town and Country Planning, Govt. of Haryana. If there is no provision for IDC in the project then, appellant's project may not be approved by the Director Town and Country Planning, Haryana. It is also an accepted fact that whenever project is taken for development, initially flats are constructed and thereafter the basic infrastructure facilities like roads, sewage, lightning, park, water supply line etc. are developed. Therefore, the observation of the ASSESSING OFFICER that only Rs. 60.39 (36.07 + 24.32) crore have been spent on IDC till 31.03.2008 cannot be given much weightage and provision of such facilities has to be taken into account as part of budgeted cost. Merely because the contract for internal development work has not been awarded in the current assessment year or in the absence of actual payment of IDC, cannot lead the revision of the IDC cost from its budgeted level to actual cost incurred. In my considered view, whether one follow project completion method or percentage of completion method, the element of cost cannot change. Once IDC is accepted to be an element of cost, then whichever method one apply, it has to be allowed as a cost of the project for working out the true profit and loss account in respect thereof.

9.10 I am therefore, of the considered view that ASSESSING OFFICER was not justified in replacing budgeted IDC with actual IDC cost incurred for recognizing revenue as per POCM Method. The Budgeted IDC is a part of cost and same has to be accepted for recognizing revenue as per POCM which is being consistently accepted by the department. Hence, the addition of Rs. 39,52,39,897/- made by the ASSESSING OFFICER on this issue is uncalled for and the same is, therefore, deleted.

(II) Labour Cost:

> 9.11 Special Auditors have increased cost of construction actually incurred by Rs.3,39,77,973/- on the ground that expenditure in relation to contract work performed during FY 2007-08 has been booked in subsequent financial year i.e F.Y. 2008-09. They have based their findings on the period of measurement as given by contractors.
>
> 9.12 The AR submitted that the balance addition of Rs.3,39,77,973/- is on account of increase in labour cost / material cost by shifting this cost from F.Y. 2008-09 to current financial year i.e. F.Y. 2007-08 based on the observation of the Special Auditors. The Submissions filed by the appellant on this point is as under:-

> "Summary of all the bills, made by the special auditors in Volume IVA to IVD of Special Audit Report was furnished before the Assessing Officer at page Nos. 67 of our letter dated 24.03.2011 and all the bills mentioned therein were produced in original before the Assessing Officer. A copy of the same was furnished before me by the appellant vide its submission dated 29.11.2012 at page No.91 of Paper Book (Volume II). It was submitted that no liability has been accrued or arisen upto 31.3.2008. On perusal of this summary, it will be appreciated that all these bills were for over lapped period beginning in the previous year and continuing in the subsequent year. Obviously, the bills were received after the close of the year and after receipt of such bills due verification of the work was done. After verification and measurement of the work done, bills were approved. Till that date no expenditure accrues or arises and that date falls in the subsequent financial year. The company consistently follows the policy of accruing and booking costs on the basis of the date on which bills were approved and verified which can only be after the date of receipt of the bill. In the opening balance also, similar policy has been adopted. This is the only possible way for accounting. The law does not require the assessee to do the impossible. The Hon'ble Chhattisgarh High Court in the latest judgment reported in 323 ITR 252 (Chhattisgarh) in the case of Beekay Engineering Corporation has decided the similar issue. Head Note of the said judgment is reproduced for your ready reference as under:-
>
> "The assessee entered into a contract for doing job works and made a payment of Rs.1,36,767 to B in respect of certain jobs done by it from December 1988 to June 1989. The bills were raised by the party in the month of August 1989. According to the assessee, as it was not aware of the actual liability on the last date of the accounting period, it claimed this deduction only when the bills were submitted by the corporation. The Assessing Officer however, held that as the assessee was following mercantile system of accounting, the expenditure should have been claimed as deduction in the earlier year and not in the subsequent year and accordingly, disallowed the claim. The Commissioner (Appeals) confirmed the order but the Tribunal held that the liability could be ascertained only in the accounting year relevant to the assessment year 1990-
>
> 91. On a reference:
>
> Held, that the expenditure was deductible in the assessment year 1990-91."

Thus, by applying the same principles it is requested that the allocation of expenses by the Special Auditors, against the bills which were received subsequently, was not justified.

Reliance is placed on the decision in the case of CIT vs. Modipon Ltd. [2011] 334 ITR 0102 wherein the similar issue was decided in the favour of assessee.

9.13 The AR further submitted that the facts of Saurashtra Cement and Chemical Industries Ltd. Vs. CIT (1995) 213 ITR 523 (Guj.) were similar to the facts of the instant case, in which it was held that earlier years expenses could be allowed in the year in which the liability is accepted and paid. Hon'ble Gujarat High Court in the case of Saurashtra Cement and Chemicals Industries Ltd. vs. CIT (1995) 213 ITR 523 (Guj.), has held as follows:

> ". . . Merely because an expense relates to a transaction of an earlier year it does not become a liability payable in the earlier year unless it can be said that the liability was determined and crystallized in the year in question on the basis of maintaining accounts on the mercantile basis. In each case where the accounts are maintained on the mercantile basis it has to be found in respect of any claim, whether such liability was crystallized and quantified during the previous year so as to be required to be adjusted in the books of account of that previous year. If any liability, though relating to the earlier year, depends upon making a demand and its acceptance by the assessee and such liability has been actually claimed and paid in the later previous years it cannot be disallowed as deduction merely on the basis the accounts are maintained on mercantile basis and that it related to a transaction of the previous year. . . ." (p. 531) Further reliance was placed on the judgment in the case of National Agricultural Co-operative Federation of India Ltd. vs. Jt. CIT (2008) 304 ITR (AT) 303 (Delhi) wherein it has been held that the liability is deductible only when it crystallizes into an ascertained liability. In this case as per an arbitration award interest was payable by the assessee on the sum awarded only up to the date of award of the arbitrator. Thereafter, a decree was passed by the High Court, for further interest on amount of award from the date of the award by the arbitrator till the date of payment, after the end of the accounting year.

In the circumstances of the case it was held by the Hon'ble jurisdictional Tribunal that there was no liability to pay interest after the award of the arbitrator and such liability arose only after the decree of the High Court. Thus, the liability to pay future interest had crystallized in the next assessment year and not in the assessment year in question and hence the deduction was not allowable in the current assessment year.

Reliance was also placed on the judgment in the case of CIT v Shri Ram Pistons & Rings Ltd (2008) 174 Taxman 147 (Del), wherein it was held that:

> "4. In terms of the scheme, as extended, the assessee incurred a liability of Rs. 1,40,541 and according to the assessee this amount was liable to be adjusted in the assessment year 1983-84. The basis on which the assessee had claimed this deduction for that year was that the liability had accrued and crystallized only on 30-6-1981 when the assessee came to know the actual sales made by its dealers."

As far as the purchase of material is concerned the entry of purchases and stocks is made only after receipt of material, inspection of material and Material Receipt Note (MRN). It is, therefore, submitted that liability accrued only when material is accepted and MRN is made.

Therefore, the appellant submitted that the effect of this proposed addition of Rs.3,39,77,973/- recommended by the special auditors may please be deleted."

9.14 I have carefully considered submission of the appellant, observation of Assessing Officer and various judicial pronouncements relied upon by the appellant. It is also noticed that this issue has been decided in favour of the appellant vide order dated 25.03.2011 passed by learned CIT(A)-XVIII, New Delhi, for A.Y. 2006-07 (page Nos.122-153 of the said order) and my own order in appellant's own case for the immediately preceding year relevant to assessment year 2007-08 (page Nos.108-139 of the said order). As discussed above, in large construction contracts, it is natural that contractors submits running bills which may sometime overlap the accounting year. These bills per se did not accrue and become payable merely on their raising. The measurements etc done by the inspection staff have to be checked and verified by the concerned person and only after due verification and examination of the measurements and quality of the work done, the contract bills are approved and liability of such work is crystallized. The appellant has accounted for the bills of contract work, material and labour work only after proper verification of receipt of material, work done by the labours and measurement of the work done by the concerned person. Once it is certified of having material received upto the desired standard and quantity, and work done by the labour and contractor upto proper satisfaction, then only the liability is crystallized and entered into the books of account. The various bills of material, labour and contract mentioned by the Special Auditors and ASSESSING OFFICER, as pertaining to the F.Y. 2007-08 were, in fact, crystallized during the F.Y. 2008-09 and on the basis of same rightly accounted for in F.Y. 2008-09. The cost of Rs.3,39,77,973/- pertaining to labour charges, contract and material which was accounted for in F.Y. 2008-09 on the basis of crystallization of liability cannot be preponed from assessment year 2009-10 to the current Assessment Year 2008-09. Again, this attempt and exercise made by the Special Auditors and the ASSESSING OFFICER is revenue neutral and it would make no difference to the Revenue except resulting in increased administrative work load of shifting expenses from one year to another. In my view, it is only a futile exercise and consequently, the addition based on the said increase of cost of construction is deleted.

In this regard, reliance is placed on the judgment of Hon'ble Chattisgarh High Court in the case of Beekay Engineering Corporation India 323 ITR 252 (Chattisgarh). The head note of the same is reproduced as under:-

> "BUSINESS EXPENDITURE--YEAR IN WHICH DEDUCTIBLE--
>
> ASSESSEE DOING JOB WORK FOR ENGINEERING CORPORATION FROM DECEMBER 1988 TO JUNE 1989--BILLS SUBMITTED BY CORPORATION IN AUGUST 1989--
>
> EXPENDITURE DEDUCTIBLE IN ASSESSMENT YEAR 1990-91-- INCOME-TAX ACT, 1961, S. 37.
>
> The assessee entered into a contract for doing job works and made a payment of Rs. 1,36,767/- to B in respect of certain jobs done by it from December 1988 to June

1989. The bills were raised by the party in the month of August 1989. According to the assessee, as it was not aware of the actual liability on the last date of the accounting period, it claimed this deduction only when the bills were submitted by the corporation. The Assessing Officer however, held that as the assessee was following mercantile system of accounting, the expenditure should have been claimed as deduction in the earlier year and not in the subsequent year and accordingly, disallowed the claim. The Commissioner (Appeals) confirmed the order but the Tribunal held that the liability could be ascertained only in the accounting year relevant to the assessment year 1990-

91. On a reference Held, that the expenditure was deductible in the assessment year 1990-91.

COMMISSIONER OF INCOME-TAX V. MODIPON LTD. (No. 1) [2011] 334 ITR 0102- BUSINESS EXPENDITURE--DEDUCTION ONLY ON ACTUAL PAYMENT--DISALLOWANCE ON GROUND THAT EXPENSES RELATED TO PRIOR PERIOD AND NOT PRESENT ASSESSMENT YEAR--TRIBUNAL FINDING ALL EXPENSES SETTLED IN CURRENT YEAR AND COVERED UNDER SECTION 43B(D)-- JUSTIFIED--INCOME-TAX ACT, 1961, S. 43B(D).

The assessee for the assessment year 2004-05 filed the return claiming certain expenses allowable as business expenditure. The Assessing Officer was of the view that out of those, expenses to the tune of Rs. 41,95,719 related to the prior period and did not pertain to the financial year 2003-04 relevant to the assessment year 2004-05, as the assessee-company was following the mercantile system of accounting and therefore, these expenses should have been claimed in the previous year. The Commissioner (Appeals) confirmed this view whereas the Tribunal reversed the order and allowed those expenses. On appeal :

Held, dismissing the appeal, that even when the assessee was following the mercantile system of accounting, the explanation furnished by the assessee was that the expenses were not booked due to non-receipt of details, information thereof on time, which was beyond the control of the assessee. It was also explained that these expenses to the tune of Rs. 41.95 lakhs were marginal as compared to the enormous size of the assessee-company. It was also explained that as per the accounting policy followed by the assessee, such expenses were booked in the year in which they were settled for payment. The Tribunal went into the details of each and every such expense and recorded the finding of fact that all these expenses were settled during this year. It was also recorded that more than 50 per cent. of expenses could be claimed only on actual payment, as they were covered under section 43B(d) of the Income-tax Act, 1961. The assessee also informed that even in the earlier year, the assessee had shown positive income and paid tax thereon. Therefore there was no loss of revenue. Had this expense been allowed in the previous year, the assessee would have paid less tax. There was no necessity to interfere with the order of the

Tribunal."

The Facts of the above cited judicial pronouncement are identical with the facts of appellant's case. Therefore, ratio of the said judgments is squarely applicable to the appellant's case. Hence, the addition of Rs.3,39,77,973/- based on pre-ponement of certain expenses is deleted.

As a result, the appellant gets a relief of Rs. 42,92,17,870/ (Rs. 39,52,39,897/- + Rs. 3,39,77,973/-)"

> 86. We find that the similar issue was also involved before this Tribunal in the appeal for the Assessment Year 2006-07, wherein the Tribunal has decided this issue in favour the assessee in the following manner:
>
> "42. We have carefully considered the rival contentions and also given a careful thought to the offer of ld. DR for setting aside this ground of appeal to the file of the AO for determination of threshold limit of 30% of the total project cost incurred up to this year or not. Before that we would like to address the issue of threshold percentages determined by the assessee of 30% instead of 25 % provided in the guidance note on accounting for real estate transactions issued by ICAI in 2012. Firstly assessee has submitted the instances where in the identical facts and circumstances there is trade practice of adopting threshold of 30 % of the achievement of total project cost for commencement of recognising of revenue. According to that guidance note it is provided that "5.3 Further to the conditions in paragraph 5.2 there is a rebuttable presumption that the outcome of a real estate project can be estimated reliably and that revenue should be recognised under the percentage completion method only when the events in (a) to (d) below are completed.
>
> (a) All critical approvals necessary for commencement of the project have been obtained. These include, wherever applicable:
>
> (i) Environmental and other clearances.
>
> (ii) Approval of plans, designs, etc.
>
> (iii) Title to land or other rights to development/ construction.
>
> (iv) Change in land use
>
> (b) When the stage of completion of the project reaches a reasonable level of development. A reasonable level of development is not achieved if the expenditure incurred on construction and development costs is less than 25 % of the construction and development costs as defined in paragraph 2.2 (c) read with paragraphs 2.3 to 2.5.

(c) At least 25% of the saleable project area is secured by contracts or agreements with buyers.

(d) At least 10 % of the total revenue as per the agreements of sale or any other legally enforceable documents are realised at the reporting date in respect of each of the contracts and it is reasonable to expect that the parties to such contracts will comply with the payment terms as defined in the contracts. To illustrate - If there are 10 Agreements of sale and 10 % of gross amount is realised in case of 8 agreements, revenue can be recognised with respect to these 8 agreements."

According to the above guidance note the revenue of the project can be recognised only when the above conditions specified therein. According to one of the conditions specified there in is reasonable level of development is not achieved if the expenditure incurred on construction and development costs is less than 25 % of the construction and development costs as defined in paragraph 2.2 (c) read with paragraphs 2.3 to 2.5. Therefore the threshold suggested by ICAI is the minimum threshold and it is not prohibited that looking to the business conditions assessee cannot fix up higher threshold. More so when the assessee has stated that many identical companies are also following similar threshold of 30 % of the total project cost, no fault can be found with the estimate made by the assessee. It is also undisputed that in subsequent years the special auditor appointed by revenue has accepted the threshold of 30 % adopted by assessee and AO has accepted the same. In view of above we are of the opinion that assessee has rightly accepted the threshold of 30 % of achievement of total project cost for commencement of revenue recognition. Further the working of the total project should also include all types of development charges required to be included in the same. Ld. AR has stated that the details of percentage of completion of project are available in the assessment order itself. However after careful consideration and agreed by both the parties, we set aside this issue to the file of the AO to determine with respect to Magnolia Project and Summit Project following :-

(i) To determine the total project cost of both these projects including the cost of internal and external development charges of the project

(ii) To determine whether the actual cost of expenditure incurred up to 31.03.2006 is less than 30% of the total project cost estimated by the assessee;

(iii) If the threshold limit of 30% is crossed then to determine the income of both these projects on percentage completion method in this year;

(iv) To give appropriate relief in subsequent years, if any income is taxed on these projects in those years;

(v) If the project cost incurred up to this year has not crossed threshold of 30% limit of the total project cost estimated then to delete the addition of Rs.1,02,84,93,509/-.

While deciding this issue AO may however keep in mind the principle laid down by honorable Supreme court in case of CIT v. Excel Industries Ltd. [2013] 358 ITR 295, if AO is satisfied that issue is revenue neutral the matter may be set at rest.

Therefore, ground no.8 of the appeal is allowed with above direction."

87. Thus, following the earlier year precedence, we decide the issue in favour of the assessee and revenue's appeal is consequently, dismissed.

88. The next issue relates the deletion of addition on account of disallowance of interest pertaining to loan for M/s. Edward Keventer Project by capitalizing the same. This issue too stands covered by the decision of the Tribunal in assessee's own case for Assessment Year 2006-07.

89. Ld. Assessing Officer noted that the assessee had 52% of the funds in the business were borrowed fund and 48% were non-interest-bearing fund. He held that, on the advances given to sister concerns, the presumption can be drawn that the 52% of the funds could have been given for advances to the sister concern for earning interest income. In other words, as per the AO netting of interest to the extent of 52% of Rs.412.84 crore can be allowed. The resultant figure of Rs.34.86 crore, i.e., Rs. 249.54 crores (-) Rs 214.68 crores being 52% of Rs. 412.84 crores have to be apportioned in the following manner:

> (Rs. in Crores) Particulars Gross Intt Intt. to be Net Interest to Remarks netted off be disallowed Project - 7.93 6.83 1.10 No revenue Keventer recognised hence entire amount to be disallowed

90. After detailed discussion, AO held that no direct nexus can be established to hold that the loans for specific projects were utilized for such projects only. The own funds or other funds available to the assessee by way of interest free funds are mixed up with the borrowed funds and the utilization of such funds for uncompleted residential projects or for the commercial projects or for granting loan / advances to group concerns cannot be correlated. Accordingly, based on disallowance calculated by the Special Auditor for Rs.1,10,00,000/-, he has made the addition after making the following calculation: -

| | INTEREST BEARING FUNDS | INTEREST FREE FUNDS | | | | |
|---|---|---|---|---|---|---|
| Particulars | Bank Loans | Advance from Customers | Equity Reserves | (+) | Total | Total Fun |
| | (1) | (2) | (3) | | (2)+(3)=(4) | (1)+(4) = |
| As on 1.4.07 | 6,76,929 | 1,34,822 | 65,280 | | 2,00,102 | 8,77,031 |
| As on 31.3.08 | 8,38,640 | 91,961 | 11,26,915 | | 12,18,876 | 20,57,516 |
| TOTAL 'A' | 15,15,569 | 2,26,783 | 11,92,195 | | 14,18,978 | 29,34,547 |
| Average Funds | 7,57,784 | | | | 7,09,489 | 14,67,273 |

| | | | |
|---|---|---|---|
| 'A'/2 | | | |
| Proportion of funds (rounded off) | 52% | 48% | 100% |

Amount (Rs. in crores)

Total fixed period - loan interest debited to

P & L Account for the year ended 31.3.2007. 249.54 Less: - 52% of interest earned on loans/advances to Group entities i.e. Rs. 412.84 lacs 214.68 Net interest expenditure eligible for capitalization 34.86 S.No Issue/Particulars Amount Inter-se (Rs.) % (crores)

1. Interest on Project- 7.93 3.18 Keventer Lane

2. Interest pertaining 241.61 96.82 to projects under execution Accordingly, interest of Rs. 1,10,00,000 from the interest paid on loan taken for Keventer land project was capitalised by the AO was disallowed.

91. Ld. CIT(A) has deleted the said addition in the following manner:

> "10.10 I have considered the submission of the appellant and observations of the ASSESSING OFFICER as well as observation of the Special Auditors and my order for A.Y. 2007-08 in the case of appellant in which this issue was decided in favour of the appellant. It is seen that appellant had purchased shares of Edward Keventor (Successors) Pvt. Ltd. during the F.Y. 2005-06 for Rs. 438.92 crores. Out of this an amount of Rs. 370 crore was sanctioned by the ICICI Bank as loan to finance the acquisition of Edward Keventor (Successors) Pvt. Ltd. The appellant is in the business of real estate and following Percentage of Completion Method for recognition of its revenue. If the project has commenced, then interest related to such project is capitalized over the project. However, if project has not commenced, no interest can be capitalized in terms of para-14 and 16 of accounting standard AS-16. In the instant case, the Land and Development Officer has not sanctioned the conversion of this land use from 'dairy farming' to 'residential'. The Writ Petition filed against the order of Land & Development Officer, Ministry of Urban Development, Union of India, is pending before Hon'ble Delhi High Court. Therefore, no development activity could be carried out on this land. In view of the accounting para 14 and 16 of AS-16, the interest pertaining to this project cannot be capitalized and has to be debited to the P&L a/c, as the interest expenditure pertaining to this project is wholly and exclusively for the business purposes of the appellant.
>
> It is also seen that shares of M/s Edward Keventor (Successor) Pvt. Ltd. were purchased in F.Y. 2005-06 related to A.Y. 2006-07 and loan was sanctioned by ICICI Bank for Rs. 370 crore for acquiring the shares of this company. This issue was examined by the Special Auditor as well as ASSESSING OFFICER in assessment year 2006-07 and considering the business module of the appellant and para 14 and 16 of

AS-16, no interest was capitalized on this issue in that year. There is no change in the facts and circumstances of this issue in the year under consideration. Hence, interest cannot be capitalized. Further, the appellant has made investment of Rs. 438.92 crore for acquiring shares of Edward Keventor (Successor) Pvt. Ltd. The investment has already been considered by the ASSESSING OFFICER while working out the disallowance of interest u/s 14A. Therefore, further capitalization of interest on this issue will amount to double addition.

10.11 Otherwise also from the details filed by the appellant, it is seen that appellant has paid total interest of Rs.604.43 crores on fixed period loans during the year. Out of this, interest to the extent of Rs. 354.89 crores have been capitalized over the projects. As a result, the total interest claimed in the profit & loss account on fixed termed loans comes to Rs. 249.54 crores. The appellant has also paid bank over draft interest of Rs. 176.06 crores. Thus, the total interest claimed in the profit & loss account is at Rs. 425.60 crores. As against this the appellant has shown receipt of interest from bank deposits, customers and subsidiary and associate companies to the extent of Rs. 411.99 crores. If the interest payment on over drafts is taken out from the total interest claimed in the profit and loss account, then the total interest claimed in profit and loss account is Rs. 249.54 crores which is less than the interest receipts offered by the appellant from bank deposits and interest received from subsidiary and associates of Rs. 411.99 crores. As such the interest received is much more than the interest claimed in the profit and loss account by the appellant. Therefore, it cannot be said that appellant has used interest bearing funds for making investments in Edward Keventor project. The formula devised by the ASSESSING OFFICER of mixed funds to work out proportionate notional disallowance of interest is not based on any scientific method. When interest payment claimed by the appellant is less than the interest income offered in the profit and loss account, there was no justification to work out any formula based on mixed funds theory which is based on permutation and computation. The case of the appellant is interest neutral; therefore, notional interest cannot be capitalized on Edward Keventor Project. Further, It is also noted that this issue is covered in favour of appellant vide my order dated 29.05.2012 in appeal No.66/2010-11 in appellant's own case for A.Y. 2006-07 (at page Nos.69-77). Hence the disallowance of interest expenses and capitalization of interest of Rs.1,10,00,000/- is deleted."

92. The Tribunal has deleted the said addition after observing and holding as under:

"49. We have carefully considered the rival contentions. It appears that the AO has made this addition mainly because of note mentioned by assessee in its accounting policies with respect to borrowing costs according to Accounting Standard 16 issues by ICAI. We have perused notes attached to financial statements and we are of opinion that these notes have arisen in the financial statement of the assessee because of the issue of applicability of Accounting Standard 16 issued by the ICAI. According to Accounting Standard 1 i.e. disclosure of accounting policies, each and every company is required to disclose the accounting policy with respect to various significant income, expenditure and assets and liabilities etc. applicable to it. Borrowing cost is also one of them. ICAI has issued Accounting Standard 16 Accounting for Borrowing Cost wherein it is provided that in case of interest expenditure incurred by the company, it is required to be capitalized if the borrowing is related to the qualifying assets. In this case the inventory is a qualifying assets as it is held for more than 12 months and therefore interest attributable to it is required to be capitalised in the books of accounts as per AS -16. Therefore, we do not agree with the arguments of AR that AS -16 does not apply to inventory. However, those are the provisions which are applicable for the maintenance of the accounts of the company and interest is allowable according to provisions of section 36(1) (iii) of the act. Further according to us, the provisions of Accounting Standards and provisions of the Act are two different set of regulations and while deciding this issue, it is well settled judicial precedent that is if there is a contradiction between the two, the provisions of the Act shall prevail. Provisions of section 36(1)(iii) provides that the amount of interest paid in respect of capital borrowed for the purposes of the business or profession deduction is required to be allowed. Proviso inserted w.e.f. 01.04.2004 is the only restriction if condition laid down u/s 36(1) (iii) are satisfied by the assessee. The proviso says that any amount of the interest paid in respect of capital borrowed for acquisition of an asset whether capitalized in books of accounts or not for any period beginning from the date on which the capital asset was borrowed for acquisition of the asset till the date on which such asset was put to use shall not be allowed as deduction. The deduction is to be disallowed even if the interest is capitalized in the books of accounts or not. Hon'ble Supreme Court in the case of Core Healthcare [298 ITR 194] has held that provisions of section 36(1)(iii) is a code in itself. In the present case, the interest paid by the assessee is not for the purpose of acquisition of any capital asset but for its inventory. We do not find any restriction in provisions contained u/s 36(1)(iii) which provides that the interest can be disallowed if incurred for the purpose of inventory as provided under Accounting Standard 16. Apparently, in this case, there is no allegation that interest is not paid on capital borrowed for the purpose of the business. Hon'ble Mumbai High Court in the case of CIT vs. Lokhandwala Constructions Industries Ltd. [ 131 taxman 810] has held as under: -

"4. From the facts found by the Tribunal on record, it is clear that assessee undertook two-fold activities. It bought and sold flats. Secondly, the assessee was also engaged in the business of construction of buildings. The profits from both the activities were assessed under section 28 of the Income-tax Act. In this case, we are concerned with the second activity (hereinafter referred to, for the sake of brevity, as "Kandivali Project"). According to the Commissioner, loan was raised for securing land/development rights from the Mandal. That, the loan was utilised for purchasing the development rights, which, according to the Commissioner, constituted a capital asset. According to the Commissioner, since the loan was raised for securing capital asset, the interest incurred thereon constituted part of capital expenditure. This finding of the Commissioner was erroneous. In the case of India Cements Ltd. v. CIT [1966] 60 ITR 52, it was held by the Supreme Court that in cases where the act of borrowing was incidental to carrying on of business, the loan obtained was not an asset. That, for the purposes of deciding the claim of deduction under section 10(2)(iii) of the Income-tax Act, 1922 [section 36(1)(iii) of the present Income- tax Act], it was irrelevant to consider the purpose for which the loan was obtained. In the present case, the assessee was a builder. In the present case, the assessee had undertaken the Project of construction of flats under the Kandivali Project. Therefore, the loan was for obtaining stock-in-trade. That, the Kandivali Project constituted the stock-in-trade of the assessee. That, the Project did not constitute a fixed asset of the assessee. In this case, we are concerned with deduction under section 36(1)(iii). Since the assessee had received loan for obtaining stock-in-trade (Kandivali Project), the assessee was entitled to deduction under section 36(1)(iii) of the Act. That, while adjudicating the claim for deduction under section 36(1)(iii) of the Act, the nature of the expense - whether the expense was on capital account or revenue account - was irrelevant as the section itself says that interest paid by the assessee on the capital borrowed by the assessee was an item of deduction. That, the utilization of the capital was irrelevant for the purposes of adjudicating the claim for deduction under section 36(1)(iii) of the Act - Calico Dyeing & Printing Works v. CIT [1958] 34 ITR 265 (Bom.). In that judgment, it has been laid down that where an assessee claims deduction of interest paid on capital borrowed, all that the assessee had to show was that the capital which was borrowed was used for business purpose in the relevant year of account and it did not matter whether the capital was borrowed in order to acquire a revenue asset or a capital asset. The said judgment of the Bombay High Court applies to the facts of this case."

Further, in the following decisions of various coordinate Benches, the deduction of interest has been allowed u/s 36(1)(iii) even where the assessee has followed the projection completion method:-

(i) ACIT vs. Tata Housing Development Company Ltd. - 45 SOT 9 (Bom.);

(ii) DCIT vs. Thakar Developers - 115 TTJ 841 (Pune);

(iii) DCIT vs. K. Raheja Pvt. Ltd. - (2006) TIOL 220 ITAT-MUM.;

(iv) K. Raheja Development Corporation vs. DCIT in ITA No.240/Bang./97 dated 22.09.1997 - In this case, reference application filed by the Department has also been rejected by the Hon'ble Karnataka High Court vide its order dated 08.11.2000 in Civil Petition No.832/2000 (IT).

Before us, ld. DR could not cite any decision against the claim of the assessee, therefore, respectfully following the decision of Hon'ble Bombay High Court and as well as various coordinate Benches, cited above, we do not concur with the view of CIT (A) on disallowance of interest of RS.24.75 crores u/s 36(1) (iii) of the Act. The alternative argument of the assessee regarding adoption of any artificial formula for the purpose of computing interest disallowance. Ld. CIT (A) has presumed proportion of utilisation of funds in absence of the nexus holding that assessee has used mixed funds. Honorable Bombay High court in case of CIT V Reliance Utilities & Power limited 313 ITR 340 has held that:

> "The principle therefore would be that if there are funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available with the company, if the interest-free funds were sufficient to meet the investments."

Therefore, we are of the view that presumption is to be assumed in favour of the assessee and not against assessee. Hence, we reject the formulae adopted by CIT (A) of working out proportionate disallowance by adopting artificial formulae. Therefore, respectfully following decisions of Honorable Bombay High court in CIT vs. Lokhandwala Constructions Industries Ltd. [ 131 taxman 810] and CIT V Reliance Utilities & Power limited [313 ITR 340] We reverse the order of the CIT (A) confirming the disallowance of expenditure of Rs.27.40 crores and direct the AO to allow this interest expenditure u/s 36(1) (iii) of the Act."

93. Since, similar facts and reasons for disallowance is permeating in this year also, therefore, respectfully following the earlier year precedence, we decide this issue in favour of the assessee.

94. The next issue pertains to deletion of addition on account of disallowance of capitalization of interest of Rs.7,93,00,000/-. Ld. Assessing Officer on the basis of Special Auditor's comment observed that interest capitalization is also required on interest paid on loan taken for M/s. Edward Keventer Project, and therefore, net interest eligible for capitalization is to be bifurcated into interest capitalization on Keventer loan and interest capitalization on project under execution. The Special Auditor has recommended that out of net interest of Rs. 34.86 crore requiring capitalization, Rs.1.10 crore is to be capitalized towards interest paid on loan taken for M/s. Edward Keventer project and Rs.33.76 crore of interest is eligible for capitalization on account of projects under execution on the level of completion achieved till 31st March, 2008 and accordingly, the interest to be capitalized on projects under execution is to be completed in the following manner:

> (Rs. in crores) Interest Expenditure Interest expenditure to % of Revenue allowable in be capitalized towards Cost of Total recognised the proportion non- recognition of Project as on % value of Net Interest for A.Y. 08- of revenue proportionate revenue Particulars 31.03.2008 projects Expenditure 09 recognised from projects Phase - V Gurgaon Project 1,529.55 100.00 33.76 76.50 25.83 7.93

95. After detailed discussion, AO held that the interest to the extent of Rs.7.39 crore is in the nature of borrowing cost attributable to the acquisition or construction of qualifying assets and hence these expenses needs to be capitalized and is not allowable as revenue expenditure.

96. Ld. CIT(A) has deleted the addition after observing as under:

"11.12 I have considered the submission of the appellant and observation of the Special Auditors as well as ASSESSING OFFICER and order of CIT (A)-XVIII for AY 2006-07 and my own order for AY 2007-08 in appellant's own case wherein this issue was decided in favour of appellant. It is seen that ASSESSING OFFICER has further capitalized an amount of Rs. 7,93,00,000/- towards ongoing projects. This capitalization is over and above the amount already capitalized by the appellant to the extent of Rs.354.43 crores which relates to the loan taken for fixed period term loan. It is seen that appellant has claimed total interest expenditure of Rs.604.43 crores on fixed period term loan, out of which it has capitalized Rs.354.43 crores over the ongoing projects and has claimed interest of Rs. 249.54 crores on fixed period term loan. The appellant has also claimed Rs. 176.06 crores as interest on bank overdraft. Thus, the total interest payment claimed in the P&L A/c comes to Rs.425.60 crores. As against this appellant has offered interest received from banks, customers, loans to subsidiaries and associates to the tune of Rs. 411.99 crore in the profit and loss account. If the interest pertaining to bank overdraft and interest paid to others is excluded from the total interest charged to the profit and loss account, then the remaining interest debited to P&L A/c comes to Rs. 249.54 crores, which is less than the interest income of Rs. 411.99 crores as offered in the P&L A/c. Since, the interest payable is less than the interest received from different sources. No further notional interest can be capitalized over the projects. The interest pertaining to projects has already been capitalized by the appellant to the extent to Rs. 354.89 crores, which is specific to the projects under execution. The further capitalization of Rs. 7.93 crores is based on presumptions, there is no scientific method worked out by the ASSESSING OFFICER for capitalizing the further interest of Rs. 7.93 crores. The net impact of the interest in Profit & Loss A/c is positive income after excluding the overdraft interest expenses. Once the interest income is positive in the P&L a/c, the further capitalization of interest cannot be estimated on presumption basis as done by the ASSESSING OFFICER. It is also seen that ASSESSING OFFICER has not pointed out any diversion of funds which was not utilized for business purposes. The funds taken by the appellant from banks or otherwise generated from own sources have either been utilized in construction business or advanced to the subsidiaries and associate companies at an appropriate interest rates. It is also observed that:-

• There is no diversion of money for non-business purpose. • Loans to subsidiaries are on interest at rates more than the rate of interest paid on borrowings.

• The proviso to section 36(1)(iii) is not applicable as:

1. The building under construction are not capital asset

2. These are stock in trade

3. Any borrowing for stock in trade can never be capitalized.

• Accounting standard AS-(16) has no application. • Accounting Standards cannot override the provisions of Income Tax Act.

In view of the above, it is held that capitalization of interest of Rs. 7,93,00,000/- on notional basis done by the assessing officer based on various permutation and computation was not justified and same is deleted."

97. This issue too has been decided in favour of the assessee after detailed discussion by the Tribunal and the relevant observation of the Tribunal reads as under:

> "49. We have carefully considered the rival contentions. It appears that the AO has made this addition mainly because of note mentioned by assessee in its accounting policies with respect to borrowing costs according to Accounting Standard 16 issues by ICAI. We have perused notes attached to financial statements and we are of opinion that these notes have arisen in the financial statement of the assessee because of the issue of applicability of Accounting Standard 16 issued by the ICAI. According to Accounting Standard 1 i.e. disclosure of accounting policies, each and every company is required to disclose the accounting policy with respect to various significant income, expenditure and assets and liabilities etc. applicable to it. Borrowing cost is also one of them. ICAI has issued Accounting Standard 16 Accounting for Borrowing Cost wherein it is provided that in case of interest expenditure incurred by the company, it is required to be capitalized if the borrowing is related to the qualifying assets. In this case the inventory is a qualifying assets as it is held for more than 12 months and therefore interest attributable to it is required to be capitalized in the books of accounts as per AS -16. Therefore we do not agree with the arguments of AR that AS -16 does not apply to inventory. However, those are the provisions which are applicable for the maintenance of the accounts of the company and interest is allowable according to provisions of section 36(1) (iii) of the act. Further according to us, the provisions of Accounting Standards and provisions of the Act are two different set of regulations and while deciding this issue, it is well settled judicial precedent that is if there is a contradiction between the two, the provisions of the Act shall prevail. Provisions of section 36(1)(iii) provides that the amount of interest paid in respect of capital borrowed for the purposes of the business or profession deduction is required to be allowed. Proviso inserted w.e.f. 01.04.2004 is the only restriction if condition laid down u/s 36(1) (iii) are satisfied by the assessee. The proviso says that any amount of the interest paid in respect of capital borrowed for acquisition of an asset whether capitalized in books of accounts or not for any period beginning from the date on which the capital asset was borrowed for acquisition of the asset till the date on which such asset was put to use shall not be allowed as deduction. The deduction is to be disallowed even if the interest is capitalized in the books of accounts or not. Hon'ble Supreme Court in the case of Core Healthcare [298 ITR 194] has held that provisions of section 36(1)(iii) is a code in itself. In the present case, the interest paid by the assessee is not for the purpose of acquisition of any capital asset but for its inventory. We do not find any restriction in

provisions contained u/s 36(1)(iii) which provides that the interest can be disallowed if incurred for the purpose of inventory as provided under Accounting Standard 16. Apparently, in this case, there is no allegation that interest is not paid on capital borrowed for the purpose of the business. Hon'ble Mumbai High Court in the case of CIT vs. Lokhandwala Constructions Industries Ltd. [ 131 taxman 810] has held as under :-

"4. From the facts found by the Tribunal on record, it is clear that assessee undertook two-fold activities. It bought and sold flats. Secondly, the assessee was also engaged in the business of construction of buildings. The profits from both the activities were assessed under section 28 of the Income-tax Act. In this case, we are concerned with the second activity (hereinafter referred to, for the sake of brevity, as "Kandivali Project"). According to the Commissioner, loan was raised for securing land/development rights from the Mandal. That, the loan was utilised for purchasing the development rights, which, according to the Commissioner, constituted a capital asset. According to the Commissioner, since the loan was raised for securing capital asset, the interest incurred thereon constituted part of capital expenditure. This finding of the Commissioner was erroneous. In the case of India Cements Ltd. v. CIT [1966] 60 ITR 52 , it was held by the Supreme Court that in cases where the act of borrowing was incidental to carrying on of business, the loan obtained was not an asset. That, for the purposes of deciding the claim of deduction under section 10(2)(iii) of the Income-tax Act, 1922 [section 36(1)(iii) of the present Income-tax Act], it was irrelevant to consider the purpose for which the loan was obtained. In the present case, the assessee was a builder. In the present case, the assessee had undertaken the Project of construction of flats under the Kandivali Project. Therefore, the loan was for obtaining stock-in-trade. That, the Kandivali Project constituted the stock-in-trade of the assessee. That, the Project did not constitute a fixed asset of the assessee. In this case, we are concerned with deduction under section 36(1)(iii). Since the assessee had received loan for obtaining stock-in- trade (Kandivali Project), the assessee was entitled to deduction under section 36(1)(iii) of the Act. That, while adjudicating the claim for deduction under section 36(1)(iii) of the Act, the nature of the expense - whether the expense was on capital account or revenue account - was irrelevant as the section itself says that interest paid by the assessee on the capital borrowed by the assessee was an item of deduction. That, the utilization of the capital was irrelevant for the purposes of adjudicating the claim for deduction under section 36(1)(iii) of the Act - Calico Dyeing & Printing Works v. CIT [1958] 34 ITR 265 (Bom.). In that judgment, it has been laid down that where an assessee claims deduction of interest paid on capital borrowed, all that the assessee had to show was that the capital which was borrowed was used for business purpose in the relevant year of account and it did not matter whether the capital was borrowed in order to acquire a revenue asset or a capital asset. The said judgment of the Bombay High Court applies to the facts of this case."

Further, in the following decisions of various coordinate Benches, the deduction of interest has been allowed u/s 36(1)(iii) even where the assesse has followed the projection completion method :-

(i) ACIT vs. Tata Housing Development Company Ltd. - 45 SOT 9 (Bom.);

(ii) DCIT vs. Thakar Developers - 115 TTJ 841 (Pune);

(iii) DCIT vs. K. Raheja Pvt. Ltd. - (2006) TIOL 220 ITAT-MUM.;

(iv) K. Raheja Development Corporation vs. DCIT in ITA No.240/Bang./97 dated 22.09.1997 - In this case, reference application filed by the Department has also been rejected by the Hon'ble Karnataka High Court vide its order dated 08.11.2000 in Civil Petition No.832/2000 (IT).

Before us, ld. DR could not cite any decision against the claim of the assesse, therefore, respectfully following the decision of Hon'ble Bombay High Court and as well as various coordinate Benches, cited above, we do not concur with the view of CIT (A) on disallowance of interest of RS.24.75 crores u/s 36(1) (iii) of the Act. The alternative argument of the assesse regarding adoption of any artificial formula for the purpose of computing interest disallowance. Ld. CIT (A) has presumed proportion of utilisation of funds in absence of the nexus holding that assesse has used mixed funds. Honourable Bombay High court in case of CIT V Reliance Utilities & Power limited 313 ITR 340 has held that "The principle therefore would be that if there are funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available with the company, if the interest-free funds were sufficient to meet the investments."

Therefore we are of the view that presumption is to be assumed in favour of the assesse and not against assesse. Hence, we reject the formulae adopted by CIT (A) of working out proportionate disallowance by adopting artificial formulae. Therefore respectfully following decisions of Honourable Bombay High court in CIT vs. Lokhandwala Constructions Industries Ltd. [ 131 taxman 810] and CIT V Reliance Utilities & Power limited [313 ITR 340] We reverse the order of the CIT (A) confirming the disallowance of expenditure of Rs.27.40 crores and direct the AO to allow this interest expenditure u/s 36(1) (iii) of the Act."

98. Accordingly, respectfully following the aforesaid precedence which is applicable on the facts of the present year also, we decide this issue in favour of the assessee.

99. In ground no.6, the Revenue has challenged the deletion of addition on account of disallowance of brokerage and commission of Rs.2,99,74,610/-.

100. Ld. Assessing Officer on the basis of comments of Special Auditors observed that certain expenses such as brokerage and commission are being claimed in the P&L account while the matching revenues are not credited to the P&L account. He has discussed in detail various observations and note of the Special Auditors and observed that assessee's reliance on accounting

standard-7 is not misplaced as it applies to construction contract and not to development project undertaken by the assessee himself. Further, the reliance placed by the assessee upon the order of the ld. CIT(A) for the Assessment Year 1983-84 is also misplaced as accounting policy is followed for recognition of revenue in Assessment Year 1983-84 is to be from the accounting policy followed for the year under assessment. The assessee has not paid this brokerage as a selling cost for procuring any construction contract. He has paid this money for selling of this various project even before the construction project was started. He further held liability of expenditure for the purpose of determining the taxable income is determined by the Income Tax Act and not by the accounting standard. He also made reference to the judgment of Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. vs. CIT, (1997) 225 ITR 0802 (SC) and out of total claim of Rs.10,63,46,742/-, he made disallowance of Rs.3,64,25,771/-.

101. Ld. CIT(A) has discussed the issue in detail and has allowed part relief after observing and holding as under:

> "13.20 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, accounting standard AS-2 & AS-7 and judgment of ITAT in earlier years and CIT (Appeals) in appellant's own case for A.Yrs. 2006-07 and 2007-08. It is seen that as per para-19 of AS-7, it is mentioned that the selling cost cannot be attributed to contract activity or cannot be allocated to a contract under construction. Even as per AS-2 "Valuation of Inventory" issued by ICAI, it is seen that selling and distribution cost cannot be considered as part of the cost of inventory and such expense has to recognized in the period in which they are incurred. The cost which can be attributed /allocated over the inventory should comprise all the cost of purchase, cost of conversion and other cost incurred in bringing the inventory to their present location and condition. In the case of construction activities the cost of purchase of land and construction cost can only be attributed over the project. The brokerage expenses are purely a selling cost and cannot form a part of inventory. In view of the accounting standard, the brokerage expenses being a selling cost cannot be capitalized with the cost of inventory and cannot be allocated to the construction activity. During the year the appellant has paid brokerage of Rs.10,63,46,742/- for selling of the flats and other properties and properties given on lease to various brokers. The brokerage expenses to the extent of Rs.9,98,95,581/- pertains to selling of flats and other property. Therefore, such expenses has to be allowed as selling cost in the year in which such expenditure is incurred. The selling cost cannot be capitalized with the inventory as per AS-2 and AS-7 issued by ICAI. Hence, the brokerage paid for selling of flats and property to the extent of Rs.9,98,95,581/- is an allowable expenditure during the year and disallowance to that extent of Rs.2,99,74,644/- is deleted.
>
> It is also seen that this issue has been decided in favour of the appellant by Hon'ble ITAT in its order for A.Y. 1984-85. However, the ASSESSING OFFICER has observed that the accounting policy followed by the appellant company for recognition of revenue in the A.Y. 1983-84 were different from the accounting policy followed

during the year under consideration. It is seen that in A.Y. 1983-84 also the selling cost i.e. brokerage and commission were claimed in the year in which they are incurred and same were not recognized on the basis of revenue recognition. Therefore, the ratio of the said judgment is still applicable in the case of appellant and the brokerage and commission has to be allowed in the year in which they are incurred and cannot be associated with construction cost. The contention of the ASSESSING OFFICER that the brokerage expenditure to be postponed to subsequent year as per AS-9 cannot be accepted, as brokerage and commission are related to the sale of flats and properties. By incurring the same the appellant has not derived any enduring advantage in subsequent years.

The ASSESSING OFFICER has relied upon the Supreme Court judgment in the case of Madras Industrial Investment Corp. 225 ITR

802. (SC), and has held that the expenses have to be spread over in several years if the benefit of such expenditure is continued in the ensuing years. The facts of this judgment cannot be applied to the appellant's case as Brokerage and Commission linked with the services rendered by the brokers to the appellant for selling the flats and other properties. There is a nexus between the expenses and services rendered which cannot be spread to several years. The benefit of the brokerage and commission is related to a particular property or flat sold and it cannot be extended to other properties. Therefore, brokerage expenses cannot be postponed for the future years. Therefore, ratio of the said judgment is not applicable in the case of appellant.

13.21 The appellant has placed reliance on the decision of the jurisdictional High Court in the case of Nokia Corporation vs. DIT, Delhi, 2007, 162 Taxman 369 (Delhi), wherein it is held that even if the Department has filed further appeal against the last order, which is in favour of the appellant, the last order is judicially binding on the subordinate authority. Hence, respectfully following the order of the Hon'ble Income Tax appellate Tribunal for AY 1984-85 and the order of CIT(Appeals) for the immediately preceding years relevant to the Assessment Years 2006-07 and 2007-08 in appellant's own case. In view of the above, the addition to the extent of Rs.2,99,74,600/-(Rs. 2,82,93,983 + Rs. 16,80,717) pertaining to payment of brokerage and commission is deleted.

13.22 However, expenses of Rs.64,51,161/- pertains to brokerage paid for giving property on lease. These brokerage expenses have been incurred for giving the Grand Mall and Town Square Mall on rent. This expenditure does not pertain to selling of the inventory or stock in trade, therefore, such expenses cannot be covered under AS-2 and AS-7. This brokerage expenditure of Rs.64,51,161/-is inextricably linked with the giving Grand Mall and Town Square Mall on rent. The income of the Grand Mall and Town Square Mall received or receivable from rent is assessable under the head "house property". As per the provisions of IT Act no expenditure is allowable

> against the income from house property except deduction @30% and interest payment on the loan for construction of house u/s 24 of the IT Act. There is no provision of deduction of brokerage paid for giving the property on rent, therefore, the expenditure incurred by the appellant of Rs.64,51,161/-( for Grand Mall Rs. 3,65,378/- + town square mall Rs. 60,85,783/-) is not an allowable expenditure.
>
> In the result, this ground of appeal is partly allowed and appellant gets a relief of Rs. 2,99,74,600/-."

102. Again, this issue has been decided in favour of the assessee by the Tribunal in assessee's own case for Assessment Year 2006-07 in the following manner:

> "69. We have carefully considered the rival contentions. We have also perused the order of ITAT in assessee's own case for AY 1984-85 submitted before us by the ld. AR. This decision has also been considered by the AO at page 188 of the assessment order. The AO has not followed this decision as it could not be verified whether the issue has been taken up by the department before the Hon'ble Delhi High Court or not. Before us, ld. DR also could not point out that why this decision cannot be followed nor we could find any reason for not following the same by AO except that whether it is accepted by the department or not is not verified. Ld. CIT (A) has also deleted the addition following the order of coordinate Bench of ITAT for AY 1984- 85 in the case of the assessee. Merely because the decision is not accepted by revenue disallowance has been made. As observed by the CIT (A), these expenses related to brokerage of flats as part of selling expenses and, therefore, cannot be included in the cost of construction for the purpose of value of closing stock of WIP and in view of Accounting Standards issued by the ICAI. Respectfully following the decision of Honourable high court in case of CIT V DLF universal Limited in ITA no 1136/2009 dated 16.04.2015 while deciding ground no 4 of the appeal of the revenue honourable high court has held that expenditure towards brokerage and commission paid to brokers for booking and sale of certain properties is allowable firstly in view f the facts that assessee's treatment of such expenditure has been decided in favour of the assessee and revenue has not challenged it and secondly such expenditure are allowable. In view of the above facts and following the decision of coordinate Bench as facts are not distinguished by revenue, we confirm the order of CIT (A) in deleting the addition of Rs.20,87,70,567/- on account of brokerage expenses for sale of various properties. Therefore, ground no.14 is dismissed."

103. Thus, in view of the aforesaid precedence of the earlier year this issue is decided in favour of the assessee.

104. In ground no.7, the Revenue has challenged the deletion of addition on account of late construction charges of Rs.1,88,81,388/-. Ld. Assessing Officer following the assessment order for Assessment Years 2006-07 and 2007-08 held that receipt of late construction charges is income on the basis of such late construction charges were collected during the year. Though, he observed that

assessee has claimed that it has recognized all the credit balance lying in the construction charges till 31st March, 2010 as income in its books of account yet in view of the judgment of Hon'ble Supreme Court in the case of DLF Universal and others Ltd. Vs. Town Country Planning, the late construction charges received by the assessee-company is to be taxed in the year of receipt.

105. Ld. CIT(A) has deleted the said company in the following manner:

> "14.9 I have considered the submission of the appellant, observation of the ASSESSING OFFICER and judgment of Hon'ble Supreme Court in this regard. It is seen that Hon'ble Supreme Court has set aside the judgment of Hon'ble Punjab & Haryana High Court and has accepted the appellant's right to collect the late construction charges from customers, if they fail to commence the construction activities within stipulated time. It may be seen that Hon'ble Punjab & Haryana High Court had declared such levy as illegal, therefore, appellant was showing such charges as its liability instead of showing such late construction charges as its income. Because of that judgment these charges were not treated as appellant's income and the amount of late construction charges cannot be said to have accrued to appellant unless the appellant acquires a right to receive it. Had the Hon'ble Supreme Court would have approved the judgment of Punjab & Haryana High Court, the appellant would have refunded such late construction charges to the respective parties. Therefore, such amount was kept in a liability account. After the Supreme Court judgment which has set aside the Punjab & Haryana high Court judgment a right to receive has been created in favour of appellant on 19.11.2010. Therefore, the entire amount has been offered as income in F.Y. 2010-11 relevant to A.Y. 2011-12. In view of the above, the appellant has rightly not offered the late construction charges as its income in the relevant year. It has further been noticed that this issue of treatment of late construction charges has been decided in favour of the appellant vide order dated 25.03.2011 passed by learned CIT(A)- XVIII, New Delhi, in appeal No.35/2010-11 for A.Y. 2006-07 (page Nos. 204-218 of the said order) and by me vide order dated 29.05.2012, in appeal No.66/2010-11 for A.Y. 2007-08 (page Nos. 146-149 of the said order) respectively in appellant's own case.
>
> Accordingly, the addition of Rs.1,88,81,388/- made by the AO is not sustainable. The same is, therefore, deleted."

106. This issue has been dealt in detail by the Tribunal in assessee's own case for Assessment Year 2006-07 wherein this issue has been decided in favour of the assessee in the following manner:

> "225. We have carefully considered the rival contentions. It is an admitted fact that the assessee is receiving late construction charges from customers which is under dispute before the Hon'ble Punjab & Haryana High Court and that litigation was settled vide order dated 19.11.2000 of Hon'ble Supreme Court. The ld. CIT (A) has decided this issue after considering the judgment of Hon'ble Supreme Court in the case of E.D. Sassoon & Co. Ltd. v. CIT [1954] 26 ITR 27wherein it is held that if the

assessee acquires a right to receive the income the said income has accrued to him. As till the decision of Hon'ble Supreme Court assessee did not have right to receive that income and even though that amount was collected, it becomes a liability on the assessee towards the customers. The CIT (A) has further considered this issue in entirety as under:-

"26.10 It is observed that up to September 2002, the appellant has treated collection of late construction charges as its income and from October 2002 onward, the appellant has not been treated the receipts of late construction charges as its income, in view of the matter being under litigation. The assessee himself has stated that if the Hon'ble Supreme Court decides that the assessee cannot collect late construction charges then only charges will be returned to concerned customers. It is noted that as per the High Court order, the assessee company had no right to collect late construction charges from its customers. However, the Supreme Court by its order dated 19.11.2010 has set aside the order of the High Court and therefore, it cannot be said that receipts in question are not accrued income. As the order of the Hon'ble Supreme Court is dated 19.11.2010 the amount collected is the income for financial year 2010-11.

26.11 An amount cannot be said to accrue unless enforceable debt is created in favour of assessee. Reference can be made to the judgment of Hon'ble Supreme Court in the case of E.D. Sassoon & Co. Ltd. v. CIT [1954] 26 ITR 27. Their Lordships at page 51 observed as under :

"That the words 'arising or accruing' are general words descriptive of a right to receive profits... If the assessee acquires a right to receive the income, the income can be said to have accrued to him. Though it may be received later on it being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody... Unless and until there is created in favour of assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him."

26.12 In view of the above binding principle, it has to be held that the amount of late construction charges cannot be said to have accrued to assessee unless the assessee acquires a right to receive it. A right to receive can be said to be created in favour of assessee on 19.11.2010 when the order of the Hon'ble Supreme Court is passed and till that date revenue cannot be legally recognized. During the hearing, I was informed by the ld. AR that this income has been recognized in the current financial year (F.Y. 2010-11) after receiving the judgement of the Supreme Court. 26.13 Accordingly, the addition of Rs.1,88,81,388/- made by the AO is not sustainable. The same is, therefore, deleted."

226. We have noted that identical issue has been decided by the coordinate bench of ITAT in case of Nilgiri Cultivations Pvt Ltd V ACIT for AY 2006-07 in ITA no 4634 & 4635/Del/2011 dated 30.4.2012 where in while deciding the issue in ground no 1 of the appeal addition of late construction charges received from customers shown under the head sundry creditors is income

which has accrued to the assessee or not, It is held that "7.1 Assessee as following a prudent and consistent accounting policy which was necessitated by the order of Honourable Punjab And Haryana High court. The assessee offered the entire amount as its income on settlement of disputes by the Honourable Supreme Court. Therefore, we hold that the assessee was acting on prudent and consistent accounting policy. Going by this accounting policy, the income cannot be recognised unless it is free from impending and binding litigation which in this case was clarified in A.Y. 2011-12 only"

> Accounting standard 9 issued by ICAI on revenue Recognition also satisfies the accounting policy of the company that when the revenue is saddled with uncertainties same should not be recognised till the uncertainties are resolved. Therefore following the decision of coordinate bench as well as the accounting standard 9 of ICAI we are of the view that assessee has correctly recognised revenue in the year the issue attained certainty. Therefore on perusal of the decision of CIT (A) we are of the view that there is no infirmity in the order. Hence we confirm the order of CIT (A) and dismiss ground no 25 of the appeal."

107. Accordingly, following the aforesaid order of the Tribunal in assessee's own case, this issue is decided in favour of the assessee.

108. The next issue for deletion of addition on account of net contingency deposit received at Rs.1,14,837/-. Ld. Assessing Officer observed that the deposits have been received from the customers as part of total sale price to meet out various contingency expenses and this amount has neither paid back to the customers nor was intended to be paid back. Accordingly, he treated the amount of Rs1,14,837/- as income of the assessee.

109. Ld. CIT(A) has deleted the addition in the following manner:

> "15.6 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, orders of the CIT(Appeals) for the Assessment Years 2006-07 and 2007-08, which are in favour of the appellant, and the other material available on record. It is seen that these contingency deposits were received from the customers at the time of sale or agreement to sale of plot/flat to meet out the future liability which may arise on account of enhancement of compensation to the land owners or any demand from Govt. of Haryana on account of development or providing external services to the plot/flat holders. Therefore, such deposits were kept in a separate account and shown under the head 'liability'. These receipts are not trading receipts of the appellant and same have been received to meet out any un-foreseeable liability which may occur in future. In the event of non spending of this amount on any liability, such deposits were required to be refunded to the owners of the plot/flat holders. Since these deposits have been collected for specific purposes, therefore, the same cannot be treated as receipts of the appellant and same cannot be taxed in the head of the appellant as 'trading receipts'. It is also seen from this deposit account that there is a regular movement of funds and large amounts have been

> incurred on account of meeting the contingent liabilities like fixing of transformers, laying of electric of line and other demands from Govt. of Haryana. Since this deposit account is maintained for performance of contractual obligations as per clause- 4 of the agreement to sell entered with the respective customers, the same cannot be treated as trading receipts of the appellant. Hence, the addition on account of these receipts amounting to Rs. 1,14,837/- is deleted."

110. The Tribunal also in Assessment Year 2006-07 has dismissed the Revenue's appeal after observing and holding as under:

> "236. We have carefully considered the rival contentions. This amount has been collected by the assessee at predetermined rate from the buyers which has obligation to incur expenditure on account of contingent nature for the projects. It is not a fact that this amount has not been utilised as it is evident that in March 2006, assessee has incurred the cost of Rs.9.87 crores. Furthermore, in the preceding two years as well as succeeding two years, the assessee has incurred expenditure out of this sum. We agree with the contention of the ld. AR that each and every receipt cannot be charged to tax unless it partakes the character of revenue. Further, we also agree with the observation of the ld. DR that receipts if revenue in nature and camouflaged as deposits cannot escape the taxation. In between these two use, facts of the case show that there is a regular movement in this account and expenditure of Rs.9.87 crores as noted by the CIT (A) has been incurred. Therefore, we are of the view that these are the security deposits which would be utilised in performance of the contractual obligation of the assessee towards those buyers. Anyway, it is not the case of the AO that these receipts have been received during the year, it is also not the case that the payers or the depositors are unidentified and it is not the case of the AO that these amounts have been paid by the buyers without any obligation on the assessee to perform by providing the services. In view of this, we confirm the order of CIT (A) in deleting the addition of Rs.

4,94,00,550/-. on account of security deposits. In the result, the ground no.27 of the revenue's appeal is dismissed."

111. Accordingly, following the same precedence this issue is decided in favour of the assessee.

112. In ground no.9, the Revenue has challenged the deletion of addition on account of net interest fee security deposits receipt of Rs.3,30,893/-. This amount has been added by the Assessing Officer on the ground that maintenance charges collected by the assessee are the same as has been collected by the maintenance agencies. There was no liability of the assessee to pay back this amount to the buyers, and therefore, this amount is income generated by the assessee which should be liable to be taxed.

113. Ld. CIT(A) has deleted the addition made by the Assessing Officer in the following manner:

> "16.9 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, decision of CIT (Appeals) for A.Y. 2006-07 and A.Y. 2007-08 which have decided this issue in favour of the appellant company and various judicial pronouncements available on the issue. It is seen that that these deposits were received in terms of sale agreement from customers as interest free security deposits on account of buyers obligation to regularly pay to the appellant or any other agency appointed by the appellant in respect of insurance premium, maintenance etc. These amounts are refundable to customers/ resident associations, once a society or association is formed. In the agreement to sell, it is specifically mentioned that these interest free deposits were taken from the customers to meet certain future liabilities like insurance premium and maintenance charges of the building. For these receipts, a separate account is maintained and as and when the buildings or the complex is handed over to the resident association or condominium association such deposits are handed over to them for maintaining the building and payment of insurance premium of building out of interest received from such deposits. Such deposits are not forming part of sale proceeds, therefore, the same cannot be treated as trading receipts in the hands of the appellant. There is a regular movement of funds for utilization of the same for maintenance and payment of insurance premium from this account. Hence, the addition made by the ASSESSING OFFICER on account of interest free deposits is deleted. The reliance in this regard is placed to the decision of jurisdictional high court in the case of CIT vs. Goyal Gases Pvt. Ltd. ( Supra), wherein security deposits received by the said company were not held as revenue receipt."

114. The Tribunal also in Assessment Year 2006-07 has dismissed the Revenue's appeal after observing and holding as under:

> "240. We have carefully considered the rival contentions. It is a fact that these deposits are received in terms of sale agreement for customers as security deposit till the formation of condominium and society. These deposits are taken as a safeguard to defray the maintenance expenditure of the society and to keep these deposits for insurance premium and maintenance. They are refundable to resident welfare associations. CIT (A) relying on the decision of Hon'ble jurisdictional High Court in the case of CIT vs. Goel Gases Pvt. Ltd. - 188 ITR 216 (Del.) held that security deposit cannot be charged to tax as an income. In view of this, we do not find any infirmity in the order of the CIT (A) when deposits are with a purpose, the depositors are identified, there is a regular method of accounting adopted in past for treatment of this income which is accepted by the revenue and there is an obligation cast upon the assessee. Hence, ground no.28 of the revenue's appeal is dismissed."

115. Accordingly, following the aforesaid order, this issue is decided in favour of the assessee and revenue's ground is dismissed.

116. The next issue relates to deletion of addition on account of net registration charges received at Rs.8,49,20,884/-.

117. Ld. Assessing Officer noted that as per clause 13 of the 'Buyers' agreement', it is mentioned that the company along with subsidiary company will prepare and execute Conveyance Deed in favour of the buyer only after receiving the full payment of the total price of the property, parking space, all security deposits, registration charges etc. If the buyer is in default of any of the payment, then the company can withhold the registration of the Conveyance Deed in favour of the buyer till the full payment is made by the buyer. This clause means an obligation on the buyer to undertake the Conveyance Deed within the time stipulated by the company, failing which, in terms of clause 12 of the Agreement, the company can cancel the allotment and forfeit the amount received from the buyer. The assessee's contention before the Assessing Officer was that real nature of the balance is that buyers have paid advance bills to the assessee and accordingly this has been shown as liability in the balance-sheet and this method has been consistently followed by the assessee in the earlier assessment years. However, the ld. Assessing Officer held that these are not correct fact because similarly additions have been made in the Assessment Years 2006-07 and 2007-08 by the Assessing Officer. The Assessing Officer has also accompanied the assessee company has furnished company-wise, property- wise of the persons from whom registration charges were received during the financial year 2007-08 which cannot contains the subsequent dates of payment of registration charges till 31.12.2010. From these details, Assessing Officer held that it is difficult to assessed the amount spent up to the period ending 31.02.2010 which corresponding to the amount received in the financial year 2007-08 and whether the amount of Rs.8,49,20,884/- received in the year was actually spend till 31.12.12010 assessee has also not given proof of deposit of registration charges and has only enclosed the list. He thus concluded assessee has not utilized the amount received in account for more than two years, and therefore, it is in the nature of income and assessee may claim the expenditure against such income in the year when the registration charges are paid to the concern parties in these manner he has made the addition.

118. Ld. CIT (A) has deleted the addition after observing as under:

> 17.15 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, decision of CIT (Appeals) for Assessment Years 2006-07 and 2007-08 in appellant's own case wherein this issue has been decided in favour of the appellant and various judicial pronouncements on the issue. It is seen that registration charges are received from the buyers of the plots/flats alongwith other charges to get the flats/plots registered in the name of buyer. There is time gap between the receipt of such charges and actual registration of the flat/plot. Before actual registration takes place, the appellant has to pay stamp charges or it has to get the documents franking for the stamp charges. Therefore, after payment of franking/stamp charges a date is fixed for registration of the property. This procedure takes time, therefore, the amount received on account of registration charges are credited in the account maintained under the head 'registration charges'. These registration charges have been shown as liability in the balance sheet of the appellant. It is also seen that some time registration charges are received from the customers but actual registration could not takes place due to non availability of person concerned or for want of other formalities or documents. Therefore, the money received in this account is kept in a separate account under the head 'Current

> Liability' as the same does not belong to the appellant. The appellant is a custodian of this amount which ultimately is to be paid to the Government. As observed by the Special Auditors that out of an amount of Rs.24.76 crore received during the year, an amount of Rs. 16.29 crore has been spent on registration charges. This shows that there is a regular movement of funds by way of credit or debit in this account which has been utilized for registration of conveyance deed in favour of the customers.

Hence, the assessing officer was not justified in treating the registration charges as appellant's income. Hence, the addition of Rs. 8,49,20,884/- made by the ASSESSING OFFICER is deleted."

119. We find that similar issue was decided by the Tribunal in assessee's own case in Assessment Year 2007-08 has dismissed the Revenue's appeal after observing and holding as under:

> "244. We have carefully considered the rival contentions. It is noted that this is the amount which is collected by the buyers with specific object of getting exclusion of conveyance deed in favour of the buyer. In fact, it is an advance collected by the assessee from the buyer towards registration charges with the office of the Registrar for conveyance deed registration. At the time of registration, assessee incurs this expenditure by debiting to this account of that particular customer. The total receipt of registration charges is identified with respect to each of the buyer and there are movement in respective accounts. In fact, it is a past through cost collected by the assessee from the buyer to be incurred by assessee on behalf of the buyer. In view of these facts, these receipts cannot partake character of the revenue in the hands of the assessee. It is also not the case of the AO that the depositors are not identified and despite the conveyance deed executed by the assessee, the amount has not been incurred. In absence of this finding, it is not possible to confirm the disallowance. Therefore, we confirm the order of the CIT (A) in deleting the addition of Rs.18,66,82,603/- being credit balance of registration charges received from the customers. Ground No.29 of the revenue's appeal is dismissed."

2. Further, the department has accepted this issue as the above finding of Hon'ble ITAT in AY 2006-07 has not been challenged before High Court. Also, the assessing officer himself has accepted this claim from AY 2012-13 onwards and no addition has been made in this regard."

120. Further, learned counsel has informed that this issue is decided in favour of the assessee by ld. CIT (A) in assessee's own case for Assessment Year 2007-08 and the Department has not preferred any second appeal and further, no addition has been made from Assessment Year 2012-13 onwards. In view of the Tribunal order and as a matter of consistency, in this year also we delete the said addition.

121. In Ground No.11, the Revenue has challenged the deletion of addition on account of closing credit balances in indirect taxes account at Rs.1,81,15,047/-.

122. Ld. Assessing Officer after considering the entire facts and submission of the assessee noted that as per assessee's own submission in direct tax amounts which received from the customers as per clause 32(b) of the agreement to sale entered into with different customers. He observed that these receipts are received from the customers in terms of the contractual obligation and treated as part of the sale price while working out the POCM sale revenue. Assessing Officer held that as the assessee itself has stated that the amount in respect of indirect taxes are a part of sale price, therefore, it is clear that the amounts are in the nature of income and should be recognised as income of the financial year in which the same is received from the customers instead of being shown under the head of liability in the books of accounts. Moreover, the expenditure on taxes is allowed on payment basis and in this case since the assessee has received indirect taxes, therefore, it is to be treated as income of the assessee. The assessee may claim the expenditure against the indirect taxes recognised as income in the books, in the year of deposit of the same with the concerned department. With these remarks, an amount of Rs. 1,81,15,047.75 being the indirect tax received during the year but not shown as income for the Assessment Year 2008-09 was added by the Assessing Officer to the income of the assessee.

123. Ld. CIT (A) has deleted the addition in the following manner:

> 18.9 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, decision of CIT (A)-XVIII for A.Y. 2006-07 in appellant's own case which has been decided in favour of the appellant and various judicial pronouncements on the issue. It is seen that credit balance of indirect taxes i.e. service tax was received from the customers as per the clause - 32(b) of the Agreement to sell entered into with different customers. These amounts were recovered from the customers in terms of the contractual obligation and treated as part of sale price while working out the POCM sale revenue. These indirect taxes have been shown as liability in the balance sheet of the appellant.

Therefore, the money received in this account is kept in a separate account under the head 'Current Liability' as the same does not belong to the appellant. The appellant is a custodian of this amount which ultimately is to be paid to the Government. It is noted that there is a regular movement of funds by way of credit or debit in this account which has been subsequently utilized/paid by the appellant to the Govt as per the due date. Hence, the assessing officer was not justified in treating the service tax collected from customers as appellant's income. Hence, the addition of Rs.1,81,15,047/- made by the ASSESSING OFFICER is deleted.

124. Before us, it has been brought on record by the learned counsel that this issue is fully covered in favour of the assessee by the order of the ld. CIT(A) in assessee's case for Assessment Year 2006-07 and Department has not preferred any second appeal in ITAT. Otherwise also, we are of the view that, the indirect tax collected from the customer on behalf of the Revenue authorities, which the assessee is liable to pay to the government, then such an action of the Assessing Officer in treating the indirect taxes as income of the assessee is highly misconceived and unjustified. In any case, this amount has been subsequently paid and therefore, it cannot be treated as income in this year. Accordingly, the order of the ld. CIT (A) is affirmed.

125. In ground no.12, the Revenue has challenged the deletion of addition Rs. 15,02,99,365/- on account of disallowance of expenses towards non allocation of overheads.

126. Ld. Assessing Officer based on Special auditor's observation noted that there were certain discrepancies with regard to apportionment of common overhead expenses incurred by the assessee company but attributable to group concern were benefitting from such expenditure. Based on the observations of the Special Auditors, the Assessing Officer required the assessee as to why the expenditure of Rs.15,02,99,365/- benefit of which has accrued to the group entities like, DLF Infocity developers (Chennai Limited) and DLF Cyber City Developers Ltd. be apportioned to them and correspondingly the same should be disallowed in the hands of the assessee. In response, the assessee has submitted the detail reply and submitted that if income expenditure has been incurred on behalf of company, the same have been duly recovered from those companies specifically and assessee has not debited to the P&L account. For the specific expenses which were debited to the concern group companies there is no expenditure which pertains to other group companies and all the expenses debited in the P&L account are related to the business of the assessee. Even the Special auditors have not been pointed out even a single voucher pertaining to other group company which has been wrongly debited to the P & L account of the assessee. Regarding overhead allocation the assessee has submitted as under:

> a. That the assessee company has not developed the SEZ rather only constructed the buildings. The deduction u/s 80-IAB is available only in the case of development of SEZ. Mere construction of Bare shell buildings will allow the assessee the deduction u/s 80-IAB. Section 80-IAB states that profit and gains derived from business of developing SEZ. Thus, the deduction is only available once the SEZ is developed and it cannot be allowed before the stage of development of SEZ.
>
> b. Sale of buildings to the co-developer is neither an activity of development of SEZ nor one of the authorized operations for SEZ notified by the competent authority. It is an isolated transaction giving one time income from transfer of capital assets. It is very clear from the Co- Developer agreement and lease deed that the intention on the part of the assessee company, from the very beginning was to construct and sale the buildings as a onetime activity. Such isolated transaction can never be termed as business activity. Co-developer agreement and lease deed very clearly shows that the developer has sold the land and building and loses all rights over these transferred capital assets and the relinquishment of right is irrevocable.
>
> c. Though SEZ Act prohibits for sale of land thereby implicitly denying any benefit to a developer who is basically interested in deriving income by transfer of assets, the assessee has found a way to overcome this prohibition by creating 49 years lease in favour of co-developer. It is pertinent to note that the lease deed is renewable further and thus effectively transferring the land also. Para 2.3 and 5.1 of the Lease Deed clearly allows the parties to renew the lease deed. Thus, the assessee company has transferred the land in actual sense and substance of this present transaction means sale of land. In most of the cases, substance of the transaction and its form are one

and the same. However, the substance can be different from the form of the transaction in many cases. In the present case, the assessing officer has rightly gone for the substance of the transaction and disallowed the deduction u/s 80-IAB claimed by the assessee company as the lease deed is mere eye wash and actual transaction was sale of land which is clearly not permissible under SEZ Act. Relevant paras of Lease deed are at page 135 & 136 of the Paper Book II filed by the Counsel of the assessee.

d. The transfer of building is absolute and as per the amended agreement and lease deed, Co-developer shall be treated as owner of the bare shell building and the warm shell building after additions etc and will have exclusive rights to let, mortgage, or allow use of all or any part of buildings.

e. That if the deduction u/s 80-IAB is allowed to the assessee company in this case and the Co-developer does not develop the SEZ later on , how can we say that the SEZ has been developed and why should the deduction be allowed to the assessee company at this stage where the development of SEZ has not been done . Allowing the deduction at the stage of construction of bare shell building would be against the provisions of SEZ and Income Tax Act.

127. Ld. Assessing Officer after considering the assessee's reply had observed as under:

"12.5 The reply of the assessee has been considered and from the reply it emerges that the assessee has stated that it is a listed company and not incurred any expenditure on behalf of its associated companies. The assessee company has argued that in case of both the companies to which the expenses have been allocated the main project undertaken by the two companies is development of SEZ and hence administrative activities in these companies are minimal and there is no need for allocation of further overheads. Both these companies have incurred overhead expenditure which formed part of development cost considered in POCM. This argument of the company is not tenable as the two companies DLF Info City Developers (Chennai) Ltd and DLF Cyber City Developer Ltd. during the Asstt. year 2008-09 had earned development income of Rs. 1,68,686.15 lacs and Rs. 1,63,049.03 lacs respectively and against the same the overhead expenditure shown by these companies is Rs. 71.58 lacs and Rs. 1,194.51 lacs respectively. In fact, in case of DLF Cyber City Developers, the expenditure of Rs. 1194.51 lacs includes commission and brokerage expenditure of Rs. 1155.79 Lacs and if this is reduced then the overhead expenditure incurred would be just Rs. 38.72 Lacs. It is difficult to imagine that the two companies earning development income of Rs. 168686 lacs and Rs. 163049 lacs would have incurred overhead expenditure of Rs. 71.58 lac and 38.72 lacs only. This clearly points to the fact that these two companies must have benefitted from the overhead expenditure incurred by DLF Ltd. In the previous year's also DLF Ltd has itself allocated overhead expenditure to its associated concerns.

12.6 The assessee has contended that revenue impact of whole of this exercise is revenue neutral since if certain amount of expenses is held to be allocable to group entities, the same will have to be allowed in the hands of those entities. In this respect the point to be observed is that the two companies identified by the Special Auditors which had incurred negligible overheads have earned income from development of SEZ and claimed deduction equal to 100% of profit earned on SEZ development u/s 801AB, hence the argument of the assessee that this exercise would be revenue neutral is incorrect.

12.7 The assessee has stated in the reply that in these two companies even though construction activities were going on, there was no marketing, planning or any other HO level administrative work involved during the year. The assessee has not been able to substantiate this argument with any documentary evidence.

12.8 The assessee has relied on certain citations wherein it has been held that expenses incurred for business requirement are allowable and any incidental benefit arising to a third party out of such expenditure cannot be made basis for disallowing the same. These citations are not relevant in the present case since the expenses incurred by the assessee have benefitted the associated companies of the assessee who are in similar line of business as that of the assessee and in the past also the assessee itself had allocated certain expenditure to its associated companies. The assessee has also mentioned certain citations regarding business expediency and stated that the expenses must be incidental to the business of the assessee. The question here is that the expenses incurred by the assessee have benefitted the associated concerns and therefore the same are to be apportioned to the associated concerns. The associated concerns during the year have developed SEZ and the assessee company during the year had also earned income from development of SEZ but there is substantial variance in the level of expenses incurred and accordingly some expenses are to be attributable for the benefit of associated concerns since there is similar line of business. The associated concerns has claimed 100% deduction u/s 80IAB and therefore by transferring the expenses of associated concerns to the assessee company some portion of such expenses are to be allocated to the associated companies.

12.9The assessee has also cited judgement in the case of Nestle India Limited Vs DCIT (2009) 27 SOT 9(Delhi). In this case it was held that the assessee company had incurred expenditure on account of advertisement and sales promotion in respect of only those products in which the Indian company dealing in. Thus, the expenditure had been incurred to promote sales in India. Therefore, those expenses were incurred wholly and exclusively for the purpose of business of the assessee. In this case the associated concerns of Nestle India are situated outside India and it was easily established by Nestle that the advertisement expenses were incurred in respect of products dealt by the Indian company. However, in the case of the assessee the line of business of the assessee company and its associated concerns is identical and therefore the percentage of overhead expenditure incurred by the assessee and its associated concerns would be similar. The Special Auditor in their report have reported that DLF Ltd have incurred administrative overheads of 3.18% of the total turnover but in the case of DLF Info City Developers (Chennai) Ltd. the company has incurred administrative overheads of Rs. 71.58 Lacs against development income of Rs. 168686 Lacs which is just 0.042% of total turnover and DLF Cyber City Developers Ltd have incurred administrative overheads of Rs. 38.72 Lacs (after reducing brokerage and commission) against development income of Rs. 163049 Lacs which is just 0.023% of total turnover. The line of business of the assessee company and associated concern being identical, the proportion of overhead expenditure to the level of business should also be similar but as mentioned above there is substantial variance in the proportion of overhead expenditure incurred by the assessee company vis-a-vis the two associated concerns. The judgment of Nestle quoted by the assessee is not at all relevant in the present case since the assessee has not been able to prove that the overhead expenses incurred were wholly and exclusively for its benefit and had not benefitted the associated concerns. The assessee has not been able to convincingly explain the extremely low level of administrative overhead expenditure incurred by the two associated concerns as compared to the assessee company considering the similar line of business.

12.10 In view of the same it can be inferred that a part of overhead expenses relatable to the two entities stand in the books of the assessee. Since the benefit of such expenditure does not accrue to the assessee but to the two group entities also, the expenditure of Rs.15,02,99,365/- as worked out by the special auditors is disallowed."

128. Ld. CIT(A) has deleted the addition in the following manner:

"19.22 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, order of the CIT (A)-XVIII for the A.Y. 2006-07 and my own order for A.Y. 2007-08 wherein this issue has been decided in favour of the appellant, and various case laws relied upon by the appellant on this issue. It is seen that appellant company was allocating over head expenses to its associate companies till October 2006. However, after October 2006, the appellant company stopped allocating overhead expenses to its group companies and transferred the concerned staff, who were previously looking after the affairs of group entities, to the respective entities. After October 2006, the group entities started incurring their own expenses themselves and this fact has been verified by the Special Auditors during the course of Special Audit. It is seen that there are certain heads of expenses which were exclusively pertaining to the appellant company and could not have been allocated to the other group entities. It is also seen from the Special Audit report that the Special Auditors have not brought out any instance of expenditure specifically pertaining to other group companies but has been claimed in the profit and loss account of appellant company during the year. The allocation made out by the Special Auditors was based on the presumption without bringing any material on record. No allocation of overheads is needed in the case of M/s. DLF Info City Developers (Chennai) Ltd. and DLF Cyber City Developers Ltd. because these subsidiaries have their own resources and are meeting out their expenses own their own. In the case of M/s DLF Info City Developers (Chennai) Ltd. it is seen that this company has only one project that is the development of SEZ at Chennai. The only activity in this company is the development of SEZ building and the administrative activity is bare minimum and hence there was no requirement of the allocation of further expenses. Apart from the above the company had incurred overhead expenditure which formed part of the development cost which has been considered for POCM. The details of such expenditure was furnished to the Assessing Officer at page No.1 of appellant's letter dated 31.3.2011. The amount of overhead expenditure forming part of development cost comes to Rs. 13,12,65,162/-. This expenditure includes the overhead expenses incurred by the DLF Infocity Developer (Chennai) Ltd.

In the case of M/s. DLF Cyber City Developers Ltd, it is noted that the main project was only development of SEZ project at Sector 25 Gurgaon. Besides, the above project this company has only rental income. The administrative activity in this company is also minimal and hence there is no need of allocation of any further overheads. This Company is again self sufficient and has its own resources to carry out the activity and hence no further allocation is required. Apart from the above, the company had incurred overhead expenditure which formed part of the development cost which has been considered for POCM. The details of such expenditure was furnished to the Assessing Officer at page No.2 of appellant's letter dated 31.3.2011. The total cost of the overhead expenditure forming part of development cost is Rs.9,73,06,213/-. This expenditure includes the overhead expenses incurred by the DLF Cybercity Developer Ltd.

19.23 Hence, it is clear that no benefit has accrued to group companies namely DLF Info City Developers (Chennai) Ltd. and DLF Cyber City Developers Ltd from the expenses of Rs.150,299,365/-, as these expenses were exclusively for the business of the appellant company. There was no justification for disallowing these expenses. The ASSESSING OFFICER as well as Special Auditors have not brought any material on record which can prove that expenditure debited in the P&L account of the appellant company was not incurred for the bonafide business needs of the appellant company. The appellant company is main group company and expenditure incurred in this company are bound to be higher and in the process of incurring such expenditure if other group companies derived some benefit from such expenses, the expenditure cannot be allocated to the companies who have also derived some benefit. The genuineness of the impugned expenditure for the purpose of business has not been disputed by the AO. Further, under the facts and circumstances as discussed above, it cannot be denied that the said expenditure was not incurred wholly and exclusively for the purpose of the appellant's business. Further, as argued by the learned AR that all the above group companies of the appellant are subject to tax at the same rate and hence shifting of such expenditure from appellant company to other group companies would be futile and revenue neutral exercise. Considering the above, the impugned disallowance of Rs.15,02,99,365/- made by the Assessing Officer cannot be sustained. The same is, therefore, deleted."

129. The Tribunal in Assessment Year 2006-07 has dismissed the Revenue's appeal on this issue after observing and holding as under:

> "121. We have carefully considered the rival contentions. The brief fact is that certain overhead expenses incurred by the assessee have been apportioned to the other group companies for the reason that by incurring those expenses, the assessee has passed on some benefit to those companies. The amount of 75% of that expenditure has been transferred to the group companies and 30% of that expenditure is borne by the assessee company. During the course of assessment proceedings, the AO found that an amount of Rs.20,79,10,574/- expenditure pertaining to payment to Directors, advertisements, printing and stationery, security charges, leave encashment and salary and wages are not apportioned to group companies and, therefore, AO disallowed 70% of those expenditure amounting to Rs.14,55,37,401/-. It is not the case of the AO that these amount of expenditure are not incurred by the assessee and further veracity of those expenditure have also not been doubted. The only reason for disallowance is that assessee has not allocated this expenditure to its various group companies and, therefore, AO was of the view that this expenditure has not been incurred wholly and exclusively for the business purpose of the company. On perusal of the expenditure and the orders of the lower authorities, it is apparent that the director's salary is being paid to the directors of the company including a commission thereof is for the purpose of managing the business of the DLF - assessee. Further, for the protection of the interest of the company even if the directors have given their time for looking after other group activities it is merely a shareholders' activity. Furthermore, the advertisements, salary and wages, leave encashment expenditure and printing expenses etc. are all pertaining to the business of the company. No evidence / instances have been cited by AO that any of this expenditure has not been incurred by the company and they are not related to the business of the assessee. It may happen that by incurring certain expenditure by the assessee for the purpose of his business may result into some indirect benefit to the group companies but that cannot be the ground for disallowance of that expenditure in the hands of the assessee. The CIT (A) relying upon the decision of ITAT, Delhi Bench in the case of Nestle India Ltd. vs. DICT - 27 SOT 9 has deleted the addition. We do not find any infirmity in the order of the CIT (A) and revenue could not controvert the fact of any expenditure with instances that these are not incurred by the assessee wholly and exclusively for the purposes of the business of the assessee. Hence, we confirm the order of the CIT (A) deleting the addition of Rs.14,55,37,400/-. Ground No.4 of the revenue's appeal is dismissed."

130. In view of the aforesaid observation and the finding of the Tribunal which is applicable in this year also, therefore, respectfully following the same, the Revenue's ground is dismissed.

131. In ground no.13, the Revenue has challenged the deletion of addition on account of disallowance of expenses u/s.14A r.w. Rule 8D.

132. Admittedly, this issue is similar and linked with the grounds no. 2 and 3 of appeal and in view of our finding given therein, the grounds raised by the Revenue is dismissed.

133. In ground no.14, the Revenue has challenged the deletion of addition of Rs. 1,26,11,958/- on account of disallowance /capitalization of preoperative expenses (on SEZ projects not commenced).

134. Ld. Assessing Officer has treated the various business expenses relating to development of various commercial projects to be part of project cost, and therefore, such cost of the project needs to be capitalized.

135. Ld. CIT (A) has deleted the addition in the following manner:

> "22.12 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, and various judicial pronouncements relied upon by the appellant and my own order for AY 2007-08 in the case of appellant, wherein this issue was decided in favour of the appellant company. It is seen that the appellant is engaged in the business of developing real estate like development of plots, multi storey buildings, commercial complexes etc. During the year, the appellant has incurred certain expenditure on market study, feasibility report and viability report on possibility of developing SEZ projects at various locations like Jaipur, Bhuvaneshwar, Gandhinagar, Ambala, Ludhiana, West Bengal, etc. On these studies, the appellant has incurred an expenditure of Rs.1,26,11,958/-. In the assessment proceedings these expenses have been treated as pre-operative expenses by the ASSESSING OFFICER. It is claimed by the appellant that conducting feasibility and viability study for developing SEZ was not a new line of business but it was expansion/extension of the same line of business. Development of SEZ is very akin development of commercial projects which falls within the objectives of the MOA of the appellant company. Any expenditure incurred for expansion or extension of same line of business with complete unity of control, common fund and with the common management is a revenue expenditure and same cannot be held as capital expenditure. The feasibility and viability study was to extend the business of the appellant in same line, therefore, the expenditure incurred on such study is revenue expenditure and by exploring the possibility of obtaining/developing or extension of the existing business at various stations identified, the appellant was only planning to expand its business and no new asset much less capital asset have been created. The Assessing Officer was not justified in treating these expenses as pre-operative expenses and same is to be capitalized. The question of capitalization does not arise as these expenses were incurred on conducting feasibility and viability study of taking

various projects at the stations mentioned above. However, after the feasibility and viability study these places were not found suitable for developing SEZ Projects and same were abandoned. The expenses were incurred for extension of same line business and such expenses have to be allowed as revenue expenditure. Therefore, respectfully following the decisions of jurisdictional High Court and my own order for AY 2007-08 in appellant's own case (Page 222-229), the disallowance of Rs.1,26,11,958/- made by the Assessing Officer on this account is deleted. "

136. Before us, the learned counsel for the assessee submitted that the disallowance of expenses incurred towards conducting feasibility study, market study and viability report in relation to SEZ projects at various locations like Jaipur, Buvaneshwar, Gandhinagar, Ambala, Ludhiana etc.. The assessing officer has capitalized these expenses on the basis of observation of Special Auditor. However, the genuineness and nature of these expenses is not in dispute. The assessee is engaged in the business of real estate and the claim of expenses towards feasibility and viability report is part of regular business operations and as such the assessing officer was not justified in identifying these expenses with specific project and capitalizing the same. It is pertinant to note that development of SEZ is part of business activities of the assessee and cannot be considered as altogether a new line of business. The CIT (A) therefore has rightly deleted the disallowance after examining the purpose of these expenses in the light of principle laid down by Hon'ble Delhi High Court.

137. We find that the Tribunal also in Assessment Year 2006-07 has dismissed the Revenue's appeal after observing and holding as under:

"96. We have carefully considered the rival contention. Admittedly assessee is in business s of the real estate development. The tender fees paid for bidding of modernization of airport cannot be said to be the new line of business but it is the same line of business i.e. of development of real estate. Therefore according to us the expenditure if incurred for the tender fees same is allowable u/s 37(1) of the act. The decision cited by the AR of the appellant has held that the when the assessee proposed to set up new project which had inextricable linkage with the existing business of the assessee, The proposed business was not an individual business but vertical expansion of the existing business and Thus, the test of existing business with common administration and common fund was met. Since the project was abandoned, no new asset also came to be created. The expenditure was deductible. Therefore the facts of the expenditure disallowed are also similar. Hence following the decision of Honourable Delhi high court in case of Indo Rama Synthetics India Ltd. v. Commissioner of Income-tax [2011] 333 ITR 18 (del) we reverse the order of CIT (A) and delete the disallowance of Rs 1,47,70, ,222/- on account of tender fees for modernisation of airports. Therefore ground no 16 of the appeal is allowed."

" 216. We have carefully considered the rival contentions. The assessee has incurred this expenditure on proportionate and feasibility of various construction projects in which business the assessee is engaged into. Before embarking on to any of the projects, it is a common practice to obtain a feasibility and economic viability of construction projects at different geographical location. These expenses are for facilitating the existing business of the assessee. It is not the case of the revenue that it is altogether a new line of the business or unrelated to the business of the assessee. Therefore, in our view, this expenditure are wholly and exclusively incurred for the purposes of the business of the assessee. Hence, we confirm the order of CIT (A) and delete this ground of revenue's appeal."

138. Since on the similar issue the Tribunal has accepted the assessee's contention, therefore, consistent with the same view, we affirm the order of the ld. CIT (A) and dismissed the Revenue's ground.

139. In ground no.15, the Revenue has challenged the deletion of addition of Rs. 1,30,38,853/- on account of disallowance of expenses on projects not commenced.

140. Ld. Assessing Officer has treated various expenses to be capitalized as per the noting of the Special Auditor in their report which were as under:-

| A/c Head | Amount | Narration |
|---|---|---|
| Legal & Professional Expenses | 2,791,433.00 | LANGHAM CAPITAL LTD. - PROF. / TRANSACTIONS FEE FOR JOINT VENTURE WITH WSP GROUP PLC |
| Legal & Professional Expenses | 522,474.00 | 50% FEES ON SUBMISSION OF DRAFT REPORT FOR GUJRAL DESIGN PLUS VALUATION |

Legal & Professional 5,000,000.00 PROF FEE FOR SR IN CONNECTION OF Expenses PUR . OF CONV. PREF. SHARES BY DAL SINGAPORE FROM LEHMAN BR. & D.E. SHAW Legal & Professional 229,500.00 Amount paid to amar chand mangaldas Expenses towards drafting of Memorandum of Corporation with Fraport AG Frankfurt Airport services worldwide for joint colaboration relating to Airport projects.

| | | |
|---|---|---|
| Legal & Professional Expenses | 289,250.00 | Amount paid to amar chand mangaldas towards drafting of Memorandum of Corporation with Fraport AG Frankfurt Airport services worldwide for joint colaboration relating to Airport projects. |
| Legal & Professional | 505,620.00 | FEES FOR VALUATION OF GUJRAL DESIGN PLUS OVERSEAS PVT LTD. For buying stake in company. |

Legal & Professional 1,966,300.00 PROF. FEES IN CONNECTION WITH IMPLEMENTATION AND ACQUISITION OF CYPRUS HOLDING COMPANY, INCLUDING ASSISTANCE IN ACQUISITION & IMPLEMENTATION OF CYPRUS HOLDING COMPANY.

Legal & Professional 161,236.60 OUT OF POCKET EXPENSES FOR TRAVEL TO CYPRUS Legal & Professional 1,067,420.00 PROF. FEES IN RESPECT OF CROSS BORDER INVESTMENT STRUCTURING FOR HOSPITALITY BUSINESS EVALUATION FOR SETTING UP AN OFFSHORE COMPANY FOR ACQUIRING OVERSEAS HOTEL COMPANY Legal & Professional 505,620.00 50% PROF.FEES FOR SUBMISSION OF DRAFT REPORT FOR BUSINESS VALUATION OF GUJRAL DESIGN PLUS OVERSEAS PVT LTD. For buying stake in company

141. Ld. CIT (A) has deleted the addition in the following manner:

> "23.11 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, and various judicial pronouncements relied upon by the appellant and my own order for AY 2007-08 in the case of the appellant company wherein the issue was decided in favour of the appellant. It is seen that the appellant is engaged in the business of developing real estate like development of plots, multi storey buildings, commercial complexes etc. During the year, the appellant has incurred certain expenditure on legal and professional fees paid for drafting the joint venture agreements, preparing draft report for Gujral Design Plus Valuation, Purchase of preferential shares by DAL Singapore from Lehmen Brothers, drafting of memorandum corporation with Fraport AG for joint venture and airport projects, acquisition of companies, advice taken for cross border investments etc and other expenses on feasibility and viability of the various projects. It is seen that the appellant has paid these expenses for taking legal and professional advice on the issues mentioned above and have paid Rs.1,30,38,853/- to the various parties for services rendered by them. In the assessment proceedings these expenses have been treated as capital expenditure by the ASSESSING OFFICER. It is claimed by the appellant that expenses incurred on legal and professional fees paid for drafting the joint venture agreements, preparing draft report for Gujral Design Plus Valuation, Purchase of preferencial shares by DAL Singapore from Lehmen Brothers, drafting of memorandum corporation with Fraport AG for joint venture in airport projects, acquisition of companies, advice taken for cross border investments etc was not new line of business but it was incurred to expand the business in same line. Out of the above proposals most of the study or legal advice or joint venture agreements did not fructified, therefore, the same were abandoned. Most of these projects were only with consultancy stage, therefore, treating such expenses as capital nature cannot be justified. The expansion of the appellant's business by entering into joint ventures and acquisition of shares and company which are engaged in the business of real estate was in the same line of business and such expenses are in the revenue field. The expenses like planning, identification of sites, consultation charges, lay out etc. and other expenses on feasibility and viability of the commercial projects etc, are the expenses incurred for bonafide business requirement of the appellant and such expenses falls within the objectives of the MOA of the appellant company. Any expenditure incurred for the projects to be undertaken in future and viability of such projects are business expenditure and same has to be allowed as revenue expenditure. The question of capitalization of such expenses arises only when such

> projects actually commence & are in existence, but there are certain projects for which various expenses were incurred before their intended commencement but due to some reasons, such projects could not be commenced. Therefore, expenses relating to such projects cannot be capitalized and has to be allowed as revenue expenditure as these expenses have been incurred wholly and exclusively for the business requirement of the appellant company. The Assessing Officer was not justified in treating these expenses as pre-operative expenses and same is to be capitalized. The question of capitalization does not arise as these expenses were incurred on legal and professional advice and preparing joint venture agreements. However, after the feasibility and viability study these proposed joint ventures or valuation reports were not found suitable for carrying out further investments and same were abandoned. The expenses were incurred for extension of same line business and such expenses has to be allowed as revenue expenditure. In view of the above, the disallowance made by the ASSESSING OFFICER on account of capitalisation of such expenses cannot be sustained. Therefore, respectfully following the decisions of jurisdictional High Court and my own order for AY 2007-08 in appellant's case (Page 229-237), the disallowance of Rs.1,30,38,853/- made by the Assessing Officer on this account is deleted."

142. We find that the Tribunal also in Assessment Year 2006-07 has dismissed the Revenue's appeal after observing and holding as under:

> "216. We have carefully considered the rival contentions. The assessee has incurred this expenditure on proportionate and feasibility of various construction projects in which business the assessee is engaged into. Before embarking on to any of the projects, it is a common practice to obtain a feasibility and economic viability of construction projects at different geographical location. These expenses are for facilitating the existing business of the assessee. It is not the case of the revenue that it is altogether a new line of the business or unrelated to the business of the assessee. Therefore, in our view, this expenditure are wholly and exclusively incurred for the purposes of the business of the assessee. Hence, we confirm the order of CIT (A) and delete this ground of revenue's appeal.

143. Thus, when similar nature of expenditure has been incurred for the purpose of business then in this year also we do not find any reason to deviate from such a finding and accordingly ground of the Revenue on this score is dismissed.

144. In ground no.16, the Revenue has challenged the deletion of addition of Rs. 7,37,222/- on account of disallowance of expenditure u/s.40(a)(ia) of the IT Act for non deduction of TDS on payment to two trusts.

145. Ld. Assessing Officer has disallowed rent payment to DLF Qutub Enclave Complex Medical Charitable Trust and DLF Qutub Enclave Complex Educational Charitable Trust for non deduction of TDS the assessee company has received certificate u/s. 197(1) from two Trust and the said

certificate clearly specifies amount of rend which the DLF has to pay to them without deducting TDS during the financial year 2007-

08. The Assessing Officer held that assessee has made the payment of an amount more than what has been specified in the certificate issued u/s.197 and excess amount of Rs.7,37,322/- has been disallowed by him u/s.40(ia).

146. Ld. CIT (A) has deleted the addition in the following manner:

> "25.10 I have considered the submission of the appellant, observation of the ASSESSING OFFICER and the certificates issued by ITO, TDS Ward 49(4), New Delhi. It is noted that this issue is covered in favour of appellant by my own order for AY 2007-08 in appellant's own case as mentioned above. It is seen from the certificates that amounts which were to be paid by the appellant during the year of Rs. 40,13,838/- + Rs. 15,98,984/- in respect of M/s DLF Qutub Enclave Complex Educational Charitable Trust and M/s DLF Qutub Enclave Complex Medical Charitable Trust respectively were clearly mentioned in the column "amount of rent expected to be realized during F.Y. 2007-08". These certificates were signed by ITO, TDS Ward 49(4), New Delhi and same were filed before me from page 458 to 461 of Paper Book Volume II of the appellant's submission dated 29.11.2012. The certificates issued by ITO 49(4) cover the amounts to be paid during F.Y. 2007-08 and he has clearly mentioned in the certificate "amount of rent expected to be realized during F.Y. 2007-08". The language of certificate is clear and it covers the amount paid during the year. In view of the above, it is established that the certificates issued by the ITO were meant for the entire amount mentioned in the certificates. The ASSESSING OFFICER has not appreciated the certificates issued by the ITO, TDS Ward 49(4), New Delhi, in its proper prospective and disallowance of Rs.7,37,222/- made on account of Non Deduction of TDS was not justified. Hence, the same is deleted."

147. The Tribunal also in assessee's own case in Assessment Year 2007-08 has dismissed the Revenue's appeal after observing and holding as under:

> "122. Ground no. 25 is against deletion of disallowance of Rs. 27,08,664/- u/s 40(a)(ia) on account of non deduction of TDS on payments made to two trusts. The AO has made the disallowance on the ground that the assessee has not produced certificate u/s 197 and as such the payment made by it were liable for TDS deduction. The CIT(A) delete the disallowance by recording following finding :
>
> "30.9 I have considered the submission of the appellant, observation of the ASSESSING OFFICER and the certificates issued by ITO TDS Ward 49(4), New Delhi. It is seen from the certificates which were issued on 06.11.2006 that amount which were to be paid by the appellant during the year of Rs. 28,70,484 + Rs.

6,75,408 and Rs. 590976/- + Rs. 506556/- in respect of M/s DLF Qutub Enclave Complex Educational Charitable Trust and M/s DLF Qutub Enclave Complex Medical Charitable Trust respectively was clearly mentioned in the column "amount of rent expected to be realized during F.Y. 2006-07". These certificates were signed by ITO TDS Ward 49(4), New Delhi and same are filed before me from page 170 to 175 of the appellant's submission dated 08.05.2012. In view of the above it is established that the certificates issued by the ITO were meant for the entire amount mentioned in the certificates and not for the amount payable/paid for the months November 2006 to March, 2007. The ASSESSING OFFICER has not appreciated the certificates issued by the ITO TDS Ward 49(4), New Delhi, in its proper prospective and disallowance of Rs. 27,08,664/- made on account of Non Deduction of TDS was not justified. Hence, the same is deleted."

123. The ld. CIT DR relied upon the order of ITO whereas the ld. Counsel for the assessee supported the order of CIT(A).

124. We have gone through the order of the CIT(A) and noticed that the relief was allowed by CIT(A) after taking into consideration certificate issued by ITO, TDS Ward-49(4), New Delhi and as such there is no default on the part of the assessee in not deducting TDS on such payment. The order of the CIT (A) is based on proper appreciation of facts and there is thus no justification for any interference and this ground of revenue is dismissed."

148. Thus in view of the above similar finding given in the earlier year on identical set of facts, as a matter of consistency we do not find any infirmity in the order of the ld. CIT(A) as noted above, therefore, ground raised by the Revenue is dismissed.

149. In ground no.17, the Revenue has challenged the deletion of addition of Rs. 9,94,187/- on account of reconciliation of rental income as per TDS certificates and withdrawal of TDS credit of Rs.7,12,257/-.

150. Ld. Assessing Officer on the basis of comments of the Special Auditors if there was a difference of Rs.984249/- between rental incomes as per the TDS certificate issued by the tenant a rental income of the tenant shown by the company. The assessee's contention was that the tenant while issuing the TDS certificate for the A.Y. 2008-09 had issued TDS certificate for 13 months including the period of April 2008 and a confirmatory letter from the tenant was enclosed with the reply. The company has further stated that the said income of Rs. 9,84,249/- was offered by them for taxation in the subsequent year relevant to A.Y. 2009-10. In the Special Audit report it was mentioned that the company in reply to the special auditors on this issue had mentioned that Emirates had issued a wrong certificate and a clarificatory letter was being obtained from them. Based on the same the Special Auditors had in the report had commented that the assessee company had not furnished any clarificatory letter from Emirates and if the same is furnished during the course of assessment proceedings, the same may be considered. The letter furnished by the assessee company now has been seen and in the letter the tenant has given details of TDS deducted by them during the Financial Year 2007-08 and in the end it has been mentioned in the letter that: "Please note that no

excess TDS have been deducted as mentioned in your email."

151. Ld. Assessing Officer observed from the details of TDS deducted by Emirates during the financial year 2007-08 as per the letter is exactly same as the amount appearing in the TDS certificate issued by them for the F.Y. 2007-08. Therefore, there is no discrepancy in the TDS certificate issued by Emirates. The company has mentioned that the income for April 2008 appearing in the TDS certificate has been offered by them for taxation in the A.Y. 2009-10, however no evidence for the same has been furnished and the same is not acceptable. Accordingly, the rent of Rs. 9,84,249/- was added to the income of the assessee company as rental income based on the difference between rental income as per TDS certificate and rental income offered for taxation. The deduction u/s 24 in respect of repairs @ 30% was allowed on the same which comes to Rs.2,95,275/- and the total amount of addition made by the Assessing Officer was arrived at Rs.6,88,974/-. Assessing Officer further observed that, from the reply of the assessee company it is observed that Rs. 2,17,242 in respect of Oracle India Pvt. Ltd & Rs. 2,18,777/- in respect of KPMG represent the TDS deducted by the party in respect of previous financial year for which income has already been declared by the assessee company in the earlier years. Whereas actually these amounts represent the difference in income declared by the company vis-a-vis TDS certificate issued. Further it is also worthwhile to note here that the submission of the assessee company is not backed by any substantiating document. It is observed that the reply of the assessee is general and vague; therefore, computation made by the Special Auditors is treated to be correct in the absence of any contrary evidence brought on record of the assessee, thereby an amount of Rs.4,36,0191- (Rs. 2,17,242+ Rs. 2,18,777/-) is to be added to the income of the assessee on account of income from house property and deduction U/s 24 in respect of repairs @ 30% is allowable on the same which comes to Rs.1,30,806/-. The total amount of addition under this head comes to Rs.3,05,213/-. Total addition made was Rs. 9,94,187/- Rs. 6,88,074/- + Rs. 3,05,213/-)

152. Ld. CIT(A) has deleted the addition in the following manner:

> "26.5 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, various judicial pronouncement relied upon by the appellant, order of CIT (A) XVIII for AY 2006-07 and my own order for AY 2007-08 in appellant's own case wherein I have decided this issue in favour of the appellant. It is seen that as per the reconciliation submitted by the appelant, the difference in income as per books of account and TDS certificates is on account of either the payee deducted the excess TDS or part of the income has been booked in the subsequent year since the rents was increased or adjusted against the future rent. It is noted that all incomes have been recorded by the appellant either in the next year or in the earlier year. It is observed that this issue is covered in favour of the appellant by the judicial pronouncements in the case of Smt. Pushpa Vijoy vs. ACIT and Pashupati Acrylon Limited vs. CBDT and orders of CIT(Appeals) in appellant's own case for the assessment years 2006-07 and 2007-08. In view of the above, the addition of Rs.9,94,187/- made by the Assessing Officer is deleted as no rental income has escaped from the taxation. The addition made by the ASSESSING OFFICER is revenue neutral, therefore, no cognizance of the same is taken.

26.7 Item (C)-Ground Nos.21.5 -Withdrawal of Credit of TDS-Rs.7,12,257/-

It was submitted that while verifying the details of income viz- a-viz the incomes shown by various payees on the TDS certificates, the Special Auditors raised few issues during the course of special audit. In response to the queries the reply alongwith explanations were filed which are placed at Annexure 'F' at Page No.80 to 89 and Annexure 'F' at Page Nos.100 to 104 of Vol. IX of Special Audit Report. A copy of our said reply was filed before the Assessing Officer at page Nos.27 to 31 of its letter dated 31.03.2011. A perusal of the same shall reveal that either the payee deducted the excess TDS or part of the income has been booked in the subsequent year since the rent was increased or adjusted against the future rent. It is a matter of record that all incomes have been recorded by the appellant either in this year or has been adjusted in the subsequent year. As already reported by the Special Auditors on page 45 to 48 of Volume IX of the Special Auditor, it is evident that the appellant company has offered the income in respect of TDS amounting to Rs.7,12,257/- during the next financial year 2008-09 relevant to A.Y. 2009-10. The appellant submitted that it is a matter of record that all incomes have been offered for taxation either in this year or has been adjusted in the subsequent year.

The appellant without prejudice further submitted that if TDS credit as above is not allowed during the year under appeal, the same may kindly be directed to the allowed in the next assessment year i.e. A.Y. 2009-10 as held by Assessing Officer herself in the assessment order in para No.19.6 on page 354.

26.8 After going through the material available on record and the arguments of the AR, I find that so far as the AO's denial of the credit of TDS of Rs.7,12,257/- on the advanced rent received during the year from American Express Bank, Accenture Services Private Limited, Sumitomo Corporation India Pvt. Ltd. and Bank of America is concerned, it is seen that income of advance rent has been offered in F.Y. 2008-09. However, the TDS deducted on such rent has been claimed during the year in view of the TDS certificates issued by the tenant. The appellant is following mercantile system of accounting, therefore, advance rent received for F.Y. 2008-09 cannot be taken into consideration this year and same was recognized as income in F.Y. 2008-09. However, the TDS has been claimed on the basis of income recognized in the next year since the TDS certificates pertains to the accounting year 2007-08. It is further noted that this issue is covered in favour of the appellant by the judicial pronouncements in the case of Smt. Pushpa Vijoy vs. ACIT and Pashupati Acrylon Limited vs. CBDT and orders of CIT(Appeals) in appellant's own case for the assessment years 2006-07 and 2007-08. Since income has been offered for this TDS certificate, therefore, the credit for the same cannot be denied and the credit has to be allowed of Rs. Rs.7,12,257/- during the year under consideration. Therefore, the ASSESSING OFFICER is directed to allow TDS credit of Rs. Rs.7,12,257/- .

Hence, the appellant get total relief of Rs.9,94,187/- on account of reconciliation of rental income as per TDS certificates viz-a-viz books of accounts for and withdrawal of TDS credits of Rs. 7,12,257/-"

153. We find that the Tribunal also in assessee's own case in Assessment Year 2006-07 has dismissed the Revenue's appeal after observing and holding as under:

> "190. We do not find any infirmity in the order of CIT(A) and also none has been pointed out by the Ld. DR. We have come across the argument of the Ld. DR that assessee is required to show income in the year in which TDS is made is not acceptable to us so far as chargeability of income under the income from house property is concerned. According to us the income from house property does not follow any method of accounting but is chargeable to tax on annual letting value basis of the property irrespective of the receipt of the rent or advance receipt of rent. Tax deduction at source is required to be made only at the time of payment or credit in the books of payer of rent as prescribed u/s 194I of the Act. The timing between the taxability of rental income under the head income from house property and timing of tax deduction at source can be different as both the sections have different intentions, objects and purposes. In view of the above facts, we confirm the order of CIT(A) in deleting the addition of Rs.4,49,85,573/- with a direction to AO for verification of the statement submitted by the assessee. Furthermore, the AO vide his order dated 20.11.2012 in order to give effect to the appeal of the CIT(A)'s order has already made the deletion of the amount after verification. Hence ground no 18 of the appeal is dismissed."

2. As regards withdrawal of credit of TDS, it is submitted that this issue is fully covered in favour of the assessee vide ITAT's Order dated 11.03.2016 in Assessee's own case for AY 2006-07 in ITA No.3061/Del/2011(Para 204-208, Page 113-

114). The relevant finding is extracted hereunder :

> 207. We have carefully considered the rival contentions. As the income itself has been treated as taxable in the hands of the assessee u/s 56 of the Act, therefore, the assessee is eligible for credit of tax deduction at source. The ld. CIT (A) has dealt with this issue in para 22.15 as under:-
>
> "22.15 So far as the AO's denial of the credit of TDS of Rs.26,25,369/- on the income received from Shriram School is concerned, I find that as the rental income has been assessed under the head "income from other sources" and since the TDS relates to the very same income, the credit for the said TDS cannot be logically denied. Therefore, the AO is directed to allow credit of TDS of Rs.26,25,369/-, after due verification."

208. Further, the ld. CIT (A) has asked the AO to make necessary verification; therefore, we confirm the order of the CIT (A) and dismiss ground no.21 of the revenue's appeal."

154. Thus in view of the aforesaid finding of the Tribunal, the ground raised by the Revenue is dismissed.

155. In ground no.18, the Revenue has challenged the deletion of addition of Rs. 9,4,52,455/- on account of reclassification of income from house property to income from business and profession.

156. Ld. Assessing Officer had noted the following observation of the Special Auditor that following properties have been reflected as fixed assets in the balance sheet as on 31st March, 2008 and also noted their comments in the following manner:

Properties reflected as Fixed Assets in the Balance Sheet:-

S. No. Name of the property

------------ ----------------------------------------------------------------------

1. DLF, Centre, Sansad Marg, New Delhi (Partly held as office).

2. 40F Cannaught Place New Delhi.

3. Shops at Belvedere Park, Gurgaon (CWIP)

4. Shops at Belvedere Tower, Gurgaon (CWIP)

5. Shops at Grand Mall, Gurgaon (CWIP) Copy of fixed assets register in substantiation of the above is enclosed as Annexure "A"

(Page 15).

b) Properties shown as current assets:-

S. No. Name of the property

1. Corporate Park.

2. Shops at Centre Point Faridabad.

3. Le Millennia Supermart, Windsor Court, Phase -V, Gurgaon.

4. Le Millennia Supermart, Carlton Estate, Phase -V, Gurgaon.

5. Apartments at DLF City, Gurgaon.

6. Shop at DLF City Centre, Gurgaon.

7. Shops at Ridgewood Estate.

8. DLF Centre, Sansad Marg, New Delhi (Partly held as SIT).

9. American Express bank Ltd. Phase - V, DLF City, Gurgaon.

10. Felicite Builders & Constructions Pvt. Ltd., I-E, Jhandewalan Copy of the finalization schedule of Balance Sheet in substantiation of the above is enclosed as Annexure "B" (page No. 16).

Out of the properties mentioned in (b) above the property mentioned at S1. No.8 is not treated as owned by the Company.

In the case of property at DLF Centre Sansad Marg, in the assessment order for A.Y.2007-08 & A.Y. 2006-07 and earlier years, it has been held that the said property is not owned by the assessee company. However, it is explained that as per ITAT order for the A. Y. 1996-97, the said property is considered as owned by the Company.

In view of the above stated findings, the computation of income from house property needs to be recalculated according to the nature of income from all the 15 different properties. We have therefore restated the Income from House Property under the various heads of income which is tabulated as under:-

Reclassification of income declared under the head income from house property:-

Amount (Rs.)

1. INCOME FROM HOUSE PROPERTY

a) 40 - F Connaught Place, New Delhi 8,56,693.00 Less:- House Tax paid 1,07,720.00 ______________________ 7,48,973.00

b) Shops at Bevlvedre Park, Gurgaon 1,63,200.00

c) Shops at Bevlvedre Park, Tower 3,29,040.00

d) Shops at Grand Mall, Gurgaon 1,30,32,412.00

e) Other rent 1 9,18,123.00 1,61,91,748.00 Less: Statutory Deduction @ 30 % 48,57,524.00 1,13,34,224.00 ______________

2. INCOME FROM BUSINESS & PROFESSION

a) Corporate Park 8,46,69,205.00

b) Shops at Centre Point, Faridabad 7,15,586.00

c) Le Milennia Supermart, Windsor 7,17,876.00 Court, Ph-IV, Gurgaon

d) Le Milennia Supermart, Carlton 1,02,600.00 Estate, Ph-IV, Gurgaon

e) Rent / License Fee for Appartments 16,63,333.00 at DLF City, Gurgaon

f) Shops at DLF City Centre, Gurgaon 9,49,912.00

g) Shops at Ridgewood Estate 7,50,000.00

h) American Express Bank Ltd., Phase-V, DLF City Gurgaon 5,89,25,991.00

i) Felicite Builders & Construction 88,000.00 Pvt. Ltd., I-E, Jhandewalan

j) DLF Centre, Sansad Marg, 19,39, 85,629.00 New Delhi Less: Expenses- House Tax Paid 2,90,59,948.00 16,49,25,681.00 31,35,08,184.00 ______________ _______________ _______________ TOTAL INCOME __________________

a)Income from House Property Shown in Computation of Income 32,48,42,408.00

b)Income under stated by the Company 23,07,89,953.00 __________________

(a) - (b) 9,40,52,455 In view of the above a sum of Rs. 9,40,52,455/- has been under stated by the company by including it as income from House Property instead of Business Income/Income from other Sources."

157. Ld. Assessing Officer based on similar observation and following the judgment of Hon'ble Gujarat High Court in the case of CIT vs. Neha Builders, 296 ITR 661, reiterated the addition and computation made by the Special Auditor.

158. Ld. CIT (A) has deleted the addition in the following manner:

"27.13 I have considered the submission of the appellant and observation of the ASSESSING OFFICER and decision of Hon'ble ITAT for A.Y. 1996-97 in appellant's own case and decision of the Hon'ble CIT(A)-XVIII for A.Y. 2006-07 and my own decision in appellant's own case for A.Y. 2007-08. It is seen that the issue in this ground is covered in favour of the appellant by the order of Hon'ble ITAT in appellant's own case for AY 1996-97. The appellant has received income from the properties owned by it and such properties are reflecting in balance sheet as stock in trade. The appellant has furnished the receipt of house tax payment with respect to above said properties during the course of assessment proceedings which establish that said properties belong to appellant and owned by it. It is noticed that the Assessing Officer has made the addition by reclassifying the income by relying upon the judgment of Hon'ble Gujarat High Court in the case of CIT vs. Neha Builders Pvt. Ltd. (supra). However, there is no dispute on the facts noted above. Taking into consideration the order of Hon'ble ITAT in the appellant's own case for earlier years and the decision in CIT vs. National & Grindlays Bank Limited (supra) and CIT (A)'s order for the immediately preceding years relevant to AY 2006-07 & 2007-08 in appellant's own case, the income received from the properties owned by the appellant and shown in the balance sheet has to be assessed as income from house property. Therefore, the ASSESSING OFFICER is directed to treat the income from such properties as income from "house property" and allow deduction u/s 24(a) of the IT Act. Hence, the addition made by the ASSESSING OFFICER of Rs. 9,40,52,455/- is deleted."

159. The Tribunal in assessee's own case for Assessment Year 2006-07 has dismissed the Revenue's appeal after observing and holding as under:

"184. Further, Ld. DR has relied upon the decision of Hon'ble Supreme Court in the case of Chennai Properties and Investment Ltd. vs. CIT in Civil Appeal No.4494/2004 wherein Hon'ble Supreme Court has held that letting out of the properties is in fact the business of the assessee. We have gone through the decision of Hon'ble Supreme Court and we are of the view that this decision favours the argument of the assessee. At page 4 of the decision, the Hon'ble Supreme Court has considered the judgement of that court in East India Housing and Land Trust Ltd. The court has considered that decision that where the main objection the company is buying and developing land and properties and promoting and developing markets and some rent is turned out of that, the character of that income shall be income from house property. Therefore, in this case too, the assessee company is a developer and hence, the decision of Hon'ble Supreme Court in the case of Chennai Properties is rendered in the context of the company which is formed with the main object of renting up of the properties. In view of the above, respectfully following the decision of coordinate Bench of the ITAT in the case of assessee for AY 2005-06, we confirm the order of CIT(A) in taxing the rental income as income from house property. In the result the ground no.17 of the revenue's appeal is dismissed."

160. Since this issue has been dealt by the Tribunal in various years, therefore, consistent with the view taken, the order of the ld. CIT (A) has confirmed and consequently the Revenue's ground is dismissed.

161. In ground no.19, the Revenue has challenged the deletion of addition of Rs. 12,28,340/- on account of disallowance of notional rent/additional annual letting value in respect of the vacant

property.

162. Ld. Assessing Officer noted that Special Auditor has pointed out that number of immovable property owned by the assessee were lying vacant and notional rent in respect of such properties has been worked out at Rs.12,28,340/-.

163. Ld. CIT (A) has deleted the addition in the following manner:

> "28.13 I have considered the submission of the appellant, observation of the ASSESSING OFFICER and various judicial pronouncements available on the issue and order of Commissioner of Income Tax (Appeals)- XVIII for AY 2006-07 and my own order for AY 2007-08 in the case of appellant wherein this issue was decided in favour of appellant. It is seen that impugned addition made on account of notional rent on properties that remained vacant for part of the previous year, the AR reiterated submissions made before the AO and emphasized that the matter is covered in favour of the appellant by judgment in the case of one of the appellant's group concerns M/s DLF Office Developers Vs. ACIT reported in 23 SOT 19 (Del) and orders of CIT (Appeals) in appellant's own case for the Assessment years 2006-07 and 2007-
>
> 08. It is observed that" where there was an intention to let out the house property and assessee took steps to let it but could not get suitable tenant, in such cases the annual value will have to be worked out under section 23(1)(c) of the IT Act and according to this clause, if the actual rent received /receivable during the year is Nil then that has to be taken as annual value of the property in order to compute the income from property."

In the case of appellant, the appellant had intention to let such properties but could not get suitable tenant. In such a situation, the ALV will be Nil as per provision of section 23(1)(c) of the IT Act. Section 23(1)(a) r.w.s 23(1)(c) clearly provides that if the property remain vacant wholly or partly during the party, then actual rent received or receivable will be taken as the ALV of such properties. In the case of appellant the property is remained vacant, therefore, the ALV of such properties will be Nil. Hence, no notional rent can be estimated in the case of vacant properties. The decision of the ASSESSING OFFICER was not justified."

164. The Tribunal also in assessee's own case for Assessment Year 2006-07 has dismissed the Revenue's appeal after observing and holding as under:

> "196. We have carefully considered the rival contentions. We have also perused the order of the coordinate Bench of the ITAT in ITA No.3561/Del/2013 wherein ground no.3 have considered the identical issue where in para no 16 to 23 addition is deleted by ITAT as under :-

"16. The Assessing Officer made an addition of Rs.3,02,61,251/- on account of notional rent/ additional annual letting value (ALB) u/s 23(1) (a) of the Income tax Act,1961, in respect of vacant properties.

The details of the addition as per the assessment order is as under:

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- DLF City Centre                            Rs.2,36,01,310/-
- DLF Commercial Shopping Complex            Rs. 27,21,360/-
DLF Corporate Park                           Rs.1,69,07,688/-



                                  Rs.4,32,30,358/-
Less: Standard Deduction u/s 24(1)    Rs.1,29,69,107/-
                                  Rs.3,02,61,250/-
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17. The Ld. CIT (A) has deleted the addition after discussing the case of the assessee in detail and following the decision cited before him in this regard including decision of 'D' Bench of the Tribunal on an identical issue in the assessee's group concern M/s DLF Office Developers vs. ACIT reported in 23 SOT 19 (Del) and first appellate orders in the assessee's own case for the assessment years 2006-07, 2007-08 and 2008-09.

18. In support of the ground the Ld. Departmental Representative has basically placed reliance on the assessment order.

19. The Ld. AR on the other hand reiterated the submissions made before the Ld. CIT (A) and the decisions cited and relied upon before him.

20. Considering the above submission, we find that the Ld. CIT (A) has decided the issue in favour of the assessee narrating the observation made in the cited decisions in case of M/s DLF Office Developers vs. ACIT (Supra) and other that where there was an intention to let out the house property and assessee took steps to let it but could not get suitable tenant, in such cases the annual value have to be worked out u/s 23(1) (c) of the IT Act and according to this clause if the actual rent received/ receivable during the year is Nil then that has to be taken as annual value of the property in order to compute the income from property. He has accordingly held that in case of the assessee where the property remained vacant then the ALV of such property will be Nil. Hence, no notional rent can be estimated in the case of vacant properties.

21. In absence of rebuttal of above aspect of the facts in the case of present assessee, we are of the view, that the Ld. CIT (A) has rightly decided the issue in favour of the assessee taking assistance of the cited decisions before him. We find that the Ld. CIT

> (A) has discussed the issue in appeal and has passed a speaking order, which is being reproduced hereunder: 7.15 I have considered the submission of the appellant, observation of the ASSESSING OFFICER and various judicial pronouncements available on the issue and order of Commissioner of Income Tax (Appeals)-XVIII for AY 2006-07 and my own orders for A Y 2007-08 & 2008-09 in the case of appellant wherein this issue was decided in favour of appellant. It is seen that impugned addition made on account of notional rent on properties that remained vacant for part of the previous year, the AR reiterated submissions made before the AO and emphasized that the matter is covered in favour of the appellant by judgment in the case of one of the appellant's group concerns M/s DLF Office Developers Vs. ACIT reported in 23 SOT 19 (Del) and orders of CIT(Appeals) in appellant's own case for the Assessment years 2006-07, 2007-08 & 2008-09. It is observed that "where there was an intention to let out the house property and assessee took steps to let it but could not get suitable tenant, in such cases the annual value will have to be worked out under section 23(l)(c) of the IT Act and according to this clause, if the actual rent received / receivable during the year is Nil then that has to be taken as annual value of the property in order to compute the income from property. "

In the case of appellant, the appellant had intention to let such properties but could not get suitable tenant. In such a situation, the AL V will be Nil as per provision of section 23(1)(c) of the IT Act. Section 23(1)(a) r.w.s 23(1)(c) clearly provides that if the property remain vacant wholly or partly during the year, then actual rent received or receivable will be taken as the ALV of such properties. In the case of appellant the property is remained vacant, therefore, the ALV of such properties will be Nil. Hence, no notional rent can be estimated in the case of vacant properties. The decision of the Assessing Officer was not justified.

As regards, the Assessing Officer's decision of computing the notional rent based on highest rent in respect of each building, it is seen that the properties have been given to various parties which are not related to the appellant and some of them are of International repute like GE Capital, KPMG. The rent has been charged based on the location of the property, area of lease property and timing of lease agreement. It is seen that appellant has filed copies of the all lease agreement before Assessing Officer for verification and no discrepancy in the rental income in the books of accounts, as compared to the lease agreement was pointed out by the Assessing Officer. It is not the case that appellant has received some under hand rent from the tenants. In this regard the Assessing Officer has not brought any evidence on record and no enquiry in this direction was conducted by him. Therefore, assuming the rent for all properties based on the highest lease agreement was not justifiable. As regards Assessing Officer's reliance on various judgments in the assessment order, it is seen that the facts of the said judgments are squarely different with that of the appellant's case. In the case of appellant, none of the properties have been rented out/leased to the related parties. Therefore, the ratio of the said judgment cannot be applied in the appellant case. In view of the above, the bonafide lease agreement between the appellant and third parties cannot be disregarded without having any adverse information in this regard and based on conjectures and surmises. Hence, the addition made by the Assessing Officer on this issued is deleted.

Facts of the above cited judicial pronouncements are identical with the facts of the appellant's case. Therefore, ratio of the said judgment is squarely applicable to the facts of the appellant's case. Hence, the notional addition made by the Assessing Officer of Rs.

3,02,61,251/- under the head "income from house property" on account of notional income u/s 23(1)(a) of the Income Tax Act is deleted."

22. We find that the first appellate order on the issue as discussed above is reasonable and view supported with this decision. Hence, we are not inclined to interfere with the order, the same is upheld. Ground no.3 is accordingly rejected."

197. Therefore, following the decision of the coordinate Bench of the ITAT in the case of the assessee for AY 2005-06 , the addition of Rs.3,27,52,542/-is deleted. In the result, ground no.19 is dismissed."

165. Once this issue has been consistently decided in favour of the assessee, then in this year, without any change in material facts no different view can be taken. Respectfully following the aforesaid decision of the Tribunal, we dismiss the ground raised by the Revenue.

166. In ground no.20, the Revenue has challenged the deletion of addition Rs. 7,17,794/- on account of depreciation claimed on DLF Centre Building.

167. The Assessing Officer on the basis of Special Audit Report observed that assessee company has charged excess depreciation of Rs.914277/- on certain portion in respect of building on DLF Center which was earlier let out but during the Assessment Year the same has been converted into self occupied already therefore excess depreciation has been charged since the assessee has claimed depreciation existing on 01.04.1999 whereas depreciation is allowable on WVS on 01.04.2005 the Assessing Officer worked out the excess depreciation of Rs.8,03,807/-.

168. Ld. CIT(A) has deleted the addition in the following manner:

> "30.7 I have considered the submission of the appellant and observation of the ASSESSING OFFICER and order of CIT (A) XVIII for AY 2006-07 and my own order for AY 2007-08 in appellant's case, where this issue was decided in favour of the appellant company. It is seen that the AO has recalculated written down value as on 01.04.2005 by notionally deducting depreciation from the WDV as on 01.04.1999. The amount of notional depreciation for the period 01.04.1999 01.04.2005 during which period the property had been leased and the income taxed under the head "Income from House Property" after allowing deductions permissible under Section 24 of the Income Tax Act. Deductions by way of depreciation allowance are dealt in section 32 of the Income Tax Act which provides for allowing depreciation on the basis of Written Down Value of the assets under section 32(1)(ii). The definition of the word written down value is in section 43(6)(b) of the Income Tax Act which provides that in the case of assets acquired before the previous year written down

> value means the actual cost to the appellant less all depreciation actually allowed under the Act. From the facts and the judgment of Hon'ble Supreme Court in the case of CIT vs. Doomdooma India Limited (2009) 178 Taxman 261 (SC), it is clear that the depreciation is to be allowed on the basis of actual WDV and same cannot be reduced on notional basis for the period for which property was not used for business purposes and no depreciation was claimed on such part of the property. From the facts as narrated above and respectfully following the judgment of Hon'ble Supreme Court in the case of CIT vs. Doomdooma India Limited (2009) 178 Taxman 261 (SC) and the judgment of the CIT (Appeals) in the case of the appellant for A.Y. 2006-07 and 2007-08 (supra), the disallowance of depreciation of Rs.7,17,794/- made by the ASSESSING OFFICER is deleted."

169. The Tribunal also in assessee's own case for Assessment Year 2007-08 has dismissed the Revenue's appeal after observing and holding as under:

> "151. We have gone through the submission of the parties. The CIT(A) has observed that this very issue arose in the preceding year and relief allowed at the first appellate stage was accepted by the revenue as no appeal was filed against the same before ITAT. In the light of above position and as per the decision of Hon'ble Supreme Court in the case of CIT v. J K Charitable Trust [2008] 308 ITR 161 (SC), the revenue could not be permitted to agitate the very same issue in the year under reference. Accordingly, the order of CIT(A) is confirmed."

170. In view of the above, this issue is decided against the Revenue.

171. In ground no.21, the Revenue has challenged the deletion of addition of Rs. 58,50,162/-on account of disallowance of expenses where bills are not in the name of the company.

172. The Assessing Officer has made the disallowance on the ground that no documentary evidences have been filed in respect to certain expenses as bills does not contain the name of the assessee company.

173. Ld. CIT(A) has deleted the addition in the following manner:

> ""32.7 I have considered the facts available on records and the contention of the appellant and order of CIT (A) XVIII for AY 2006-07 and my own order for AY 2007-08 in appellant's own case where this issue was decided in favour of the appellant company. It is observed that the impugned disallowance of expenditure of Rs.58,50,162/- have been made on the ground that the bills are not in the name of appellant. It is observed from pages 403 to 406 of the assessment order that the appellant has explained each and every item of expenditure in detail. It is seen that these expenses are in the nature of electricity bill and water charges pertaining to Jhandewalan Office of the appellant, reimbursement made to the employees and other group companies. As explained by the appellant that Jhandewalan Property

> belongs to the appellant since so many years but the same was given on rent to M/s DCM Ltd. When the said property was given on rent those companies took electricity connection and water connection on their name. Though the property has been vacated by those tenants and being used by the appellant but the electricity and water connection is still running in their name. These expenses have been incurred wholly and exclusively for the business purposes of the appellant as these premises are being used by the appellant for its office purposes. Merely because the water and electricity bills are in the name of earlier tenants, the same cannot be disallowed. It is also submitted by the appellant that water and electricity bill pertaining to Raisina Cold Storage are also being utilized by the appellant as property in the name of said company is in the possession of the appellant. This company has been merged with the appellant, therefore, these expenses also pertain to the appellant's and therefore, incurred only for the business purposes of the appellant. The reimbursement made to the group companies and employees of the appellant company for the expenses incurred by them on behalf of the appellant also pertains to the appellant as these expenses were incurred on behalf of the appellant for its business purposes. Considering the facts it is established that these expenses were pertaining to appellant company and services or utilization thereof were for the purposes of the business of appellant company. Hence, the same are allowable. In view of the above discussions the disallowance of Rs. 58,50,162/- made by the Assessing Officer is deleted."

174. We find that the Tribunal also in assessee's own case for Assessment Year 2006-07 has dismissed the Revenue's appeal after observing and holding as under:-

> "276. We have noted that most of these expenses are in the nature of electricity expenses of the property taken on rent by the assessee that was explained to the AO by assessee however same were disallowed. Naturally the electricity bill would be in the name of owner of the property and not tenant in case the property is rented. Therefore we do not find any infirmity in the order of CIT (A) in deleting disallowance. In the result ground no 38 of the appeal is dismissed."

175. Here, in this case also, the bulk of expenses are in the nature of electricity and water expenses for which the name of erstwhile tenant has been mentioned. Similar issue was involved in the earlier year also, therefore, respectfully following the precedence this issue is decided in favour of the assessee and against the Revenue. Accordingly, the Revenue's grounds are dismissed.

176. In the result, the appeal of the assessee is partly allowed and Revenue's appeal is dismissed.

Order pronounced in the open Court on 27th May, 2019.

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          Sd/-                                         Sd/-
      [L.P. SAHU]                                 [AMIT SHUKLA]
   ACCOUNTANT MEMBER                             JUDICIAL MEMBER
DATED: 27th May, 2019
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PKK: