

Diamond Power Infrastructure Ltd., ... vs Assessee on 11 August, 2016

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH

Before: Shri S. S. Godara, Judicial Member
and Shri Manish Borad, Accountant Member

ITA Nos. 499 to 502, 838, 325, 326, 2218/Ahd/2012
AY 2000-01, 01-02, 04-05, 05-06, 06-07, 07-08, 08-09 & 2009-10

Diamond Power Infrastructure Ltd., 5/12, Essen House, BIDC, Gorwa, Baroda PAN: AACCD8043K (Appellant)	Vs	The DCIT, Circle- (1), Baroda (Respondent)
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ITA Nos. 320 & 2197/Ahd/2012
Assessment Year 2007-08

The DCIT, Circle- (1), Baroda (Appellant)	Vs	Diamond Power Infrastructure Ltd., 5/12, Essen House, BIDC, Gorwa, Baroda PAN: AACCD8043K (Respondent)
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Revenue by: Shri Sanjeev Kumar Dev, Sr. D.R.
Assessee by: Shri Riddhi Shah, A.R.

Date of hearing : 14-07-2016

Date of pronouncement : 11-08-2016

I.T.A Nos. 499 to 502, 838, 320, 325, 326, 2197 & 2218/Ahd/2012 Page No 2
Diamond Power Infrastructure Ltd. vs. DCIT

/ORDER

PER BENCH:-

This set of ten appeals pertains A.Ys. 2000-01 to 2001-02 and 2004-05 to 2009-10. First assessment year 2000-01 involves assessee's appeal ITA 499/Ahd/2012 arising from order of the CIT(A)-I, Baroda dated 24-02-2011 passed in appeal no. CAB-I/111/04-05, in proceedings under section 143(3) r.w.s. 147 of the Income Tax Act, 1961; in short "the Act".

2. Second assessment year 2001-02 contains assessee's appeal ITA 500/Ahd/2012 directed against order of CIT(A)-I, Baroda passed in case No. CAB-I/265/05-06, in proceedings u/s. 143(3) of the Act.

3. Third assessment year 2004-05 comprises assessee's appeal ITA 501/Ahd/2012 instituted against order dated 24-02-2011 passed by the CIT(A)-I, Baroda dated 24-02-2011 in case no. CAB-I/434/06-07, in proceedings u/s. 143(3) of the Act.

4. Next assessment year 2005-06 contains assessee's appeal ITA 502/Ahd/2012 filed against order of the CIT(A)-I, Baroda dated 24-02-2011 in case no. CAB-I/414/07-08, in proceedings u/s. 143(3) of the act.

5. Fifth assessment year 2006-07 involves assessee's appeal ITA 838/Ahd/2012 being directed against order of the CIT(A)-I, Baroda I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 3 Diamond Power Infrastructure Ltd. vs. DCIT dated 08-02-2012 passed in case no. CAB-I/162/10-11, in proceedings u/s. 143(3) r.w.s. 147 of the Act.

6. We notice that assessment year 2007-08 involves three appeals. First two are Revenue's appeal and assessee's cross appeal ITA No. 320 and 325/Ahd/2012 respectively; arising from order dated 02-11-2011 passed in case no. CAB-I/234/09-10, in proceedings u/s 143(3) of the Act. This is followed by Revenue's latter appeal ITA 2197/Ahd/2012 directed against the very CIT(A)'s order dated 20-07-2012 in case no. CAB-I/235/05-06, in proceedings u/s 143(3) r.w.s 147 of the Act.

7. We come to assessment year 2008-09. The assessee has filed its appeal ITA 326/Ahd/2012 against the CIT(A)-I, Baroda's order dated 02-11-2011 passed in case no. CAB-I/161/10-11, in proceedings u/s. 143(3) of the Act.

8. This leaves us with last assessment year 2009-10 comprising of assessee's appeal ITA 2218/Ahd/2012 arising from CIT(A)-I, Baroda's order dated 24-07-2012 in case no. CAB-I/318/11-12, in proceedings u/s. 143(3) of the act.

9. We notice at the outset that assessee's first four appeals ITA 499 to 502/Ahd/2012 are time barred by 296 days delay in filing. It has filed identical condonation petitions therein stating that its vice president holding accounts and taxation charge Shri H.V. Parikh I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 4 Diamond Power Infrastructure Ltd. vs. DCIT suddenly left the company leaving the instant cases unattended. It is submitted that the assessee could know about the CIT(A)'s order only after the new incumbent joined. Learned counsel takes us to assessee's condonation petition/affidavit dated 22-02-2012 stating therein that it immediately

filed the instant appeals after coming to know about the lower appellate orders under challenge. The Revenue fails to rebut these solemn affirmations. We accordingly treat the same as true and correct forming reasonable cause to condone the impugned delay of 296 days in assessee's four appeals ITA nos. 499 to 502/Ahd/2012 hereinabove. The same are accordingly admitted for adjudication on merits.

A combined perusal of the instant cases reveals that some of them raise inter-connected issues. We deem it appropriate to proceed assessment year wise for the sake of convenience and brevity.

ASSESSMENT YEAR 2000-01 Assessee's appeal 499/Ahd/2012

10. The assessee raises eight substantive grounds in challenging CIT(A)'s order inter alia confirming validity of reopening followed by disallowances/additions of section 80IB deduction, allocation of indirect expenses between Baroda and Silvassa by adopting turnover ratio, restricting expenditure disallowance of Rs. 28,95,000/- to a lumpsum amount of Rs. 2 lacs as attributable to trading turnover, electricity duty refund sum of Rs. 15,83,809/-, accounting package I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 5 Diamond Power Infrastructure Ltd. vs. DCIT SAP R/3 and software development charges of Rs. 16.2 lacs and Rs. 4 lacs and in enhancing book profits in furtherance section 80IB deduction disallowance; respectively.

11. Learned counsel states at the outset that the assessee herein confines its challenge to the lower appellate order qua grounds 5 to 7 only. We accordingly confirm the CIT(A)'s findings relating to assessee's grounds 1 to 4 and 8 as narrated in the preceding paragraphs.

12. The assessee's fifth substantive ground assails correctness of the CIT(A)'s order in partly upholding Assessing Officer' action in disallowing/adding a sum of Rs. 28.95 lacs to a lumpsum amount of Rs. 2 lacs. The Assessing Officer held in assessment order dated 28-03-2006 that assessee's expenditure incurred for arranging its turnover and maintaining records for being shown to the bank authorities in the nature of paper transactions could not be allowed. This made him to invoke the impugned disallowance @ 1% of the total turnover of Rs. 28.95 crores.

13. The assessee's case in lower appellate proceedings was that it had inter alia settled all accounts by way of book entries resulting in trading profits offered to tax, the impugned estimation of additional expenditure @ 1% was totally uncalled for and the lower appellate authority had itself accepted an identical ground in assessment year 2003-04. The CIT(A) declines the same by observing that the I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 6 Diamond Power Infrastructure Ltd. vs. DCIT assessee had admittedly offered profits on paper transactions for taxation. And that it had fairly admitted in the course of hearing that there would be some cost always incurred in arranging entries and bills etc. in question. He accordingly restricts the impugned disallowance to a lumpsum figure of Rs. 2 lacs.

14. We have given our thoughtful consideration to rival contentions. We find that the CIT(A) has nowhere dealt with assessee's specific argument that its very claim has been accepted in the lower appellate proceedings of assessment year 2003-04. The assessee has also not placed on record any

such material to this effect.. We further do not see any distinction in the relevant facts of these two assessment years. We direct the Assessing Officer in these peculiar facts that he shall verify the factual position as indicated herein and accept assessee's contention against the impugned disallowance of Rs. 2 lacs in case it is found that the CIT(A)'s order in assessment year 2003-04 has become final. This fifth substantive ground is accepted for statistical purposes.

15. The assessee's sixth substantive ground challenges the lower appellate order disallowing electricity duty refund of Rs. 15,83,809/- made by both the lower authorities. It lodged a claim before power board authorities for electricity duty rebate for having set up a unit in a backward area. The assessee would pass such entries on accrual basis in its books. Both the lower authorities disallow the impugned sum by placing reliance on their identical findings in earlier I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 7 Diamond Power Infrastructure Ltd. vs. DCIT assessment years; more particularly assessment year 2002-03 in assessee's case itself.

16. We have heard both parties at length. The assessee fails to prove that the very disallowance made in assessment year 2002-03 has not become final. Nor does the instant batch of 10 appeals involve the said assessment year. We adopt consistency in these facts and circumstances to uphold the impugned disallowance. This ground fails.

17. We come to assessee's next substantive ground challenging disallowance/addition of Rs. 16.20 lacs and Rs. 4 lacs incurred on accounting package SAP R/3 and software development charges; respectively. It had debited the same for inventory control miscellaneous matter. The CIT(A)'s order under challenge summarizes Assessing Officer 's finding and assessee's submissions as under:-

"10. The seventh ground of appeal is against disallowance of Rs.16,20,000/- and Rs.4,00,000/- on account of software development expenses.

10.1. During the course of assessment proceedings, it is noticed that during the financial year, the appellant company had incurred a total expenditure of Rs.20,20,000/- on development of SAP software for control of inventory and other MIS Matters. The appellant stated that the expenditure related to the field project and since the expenditure was incurred in the normal course of business it is revenue in nature. The AO expresses that the expenses are capital in nature and as they pertained to field venture, these are allowable. I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 8 Diamond Power Infrastructure Ltd. vs. DCIT 10.2. In appeal, it-is argued that on development of SAP software expenditure was incurred and as per AS-8, any expenditure on R & D project even if unsuccessful is revenue in nature.

10.3 I have carefully considered the facts of the case, the submissions of the appellant and the assessment order. It has been admitted before me that the said expenditure is in relation to development of SAP Software which is a major application software encompassing the entire organization and involving all functions such as inventory, asset, plant maintenance, financial accounting, system, etc. It is also conceded before

me that the benefits would have flowed for more than 2 years. Thus in terms of the decision of the Special Bench in the case of Amway India the expenditure is capital in nature. However the expenditure was in respect of new project which could not take off and therefore it is in the nature of sunk cost and allowable. In the case of Mohan Meakins Breweries Ltd v CIT, 227 ITR 878 (HP), it was held that loss in respect of Milk plant discarded and written off during the previous year was not, allowable u/s 45. Ground No. 7 is dismissed."

18. Heard both sides. There is no dispute that assessee has incurred the impugned expenditure in respect of a new project which ultimately did not take off. Hon'ble Delhi high court in (2011) 333 ITR 18 (Del) Indo Rama Synthetics vs. CIT has accepted a similar outgo as business expenditure regarding consultancy availed in relation to a shelved project. We apply the same ratio herein as well to accept this assessee's ground in absence of any distinction pointed out. This corresponding ground succeeds accordingly. ITA 499/Ahd/2012 is partly allowed.

ASSESSMENT	YEAR	2001-02	Assessee's	appeal	ITA
500/Ahd/2012					
I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No					9
Diamond Power Infrastructure Ltd. vs. DCIT					

19. This assessee raises seven substantive grounds in challenging the CIT(A)'s order confirming the Assessing Officer's action disallowing/adding sales tax deferment loan of Rs. 1,51,50,524/-, section 40A(3) of Rs. 1,08,486/-, prior period expenses of Rs. 7,38,565/-, foreign travel expenses of Rs. 1,09,849/-, ESI/PF contributions relating to employees involving receptive sums of Rs. 5,65,882/- and Rs. 6947/-, loss on sale of fixed assets of Rs. 4,18,324/- and under the head incorrect allocation of Silvasa and Borada unit expenses of Rs. 56,94,703/-; respectively. It does not press its ground nos. 1-2, 4, 6 & 7.

20. We come to assessee's third substantive ground of prior period expenditure disallowance amounting to Rs. 7,38,565/- made by both the lower authorities. The CIT(A) deals with the issue as follows:-

"7. The fourth ground of appeal is against disallowance of Rs.738565/- out of prior period expenditure.

7.1. The AO relying on the decision of Gujarat High Court in the case of Saurashtra Cement & Chemicals Ltd, 213 ITR 523 disallowed the prior period expenditure amounting to Rs.738565/-for the reason that the assessee failed to discharge its onus of proving that the impugned amount had become payable during the FY 00-01.

7.2 In appeal, it was contended that in the tax audit report it is indicated that there was prior period income of Rs.133992/-and prior period expenses of Rs.738565/- and that a net amount of Rs.598426/- was offered for tax and that the AO has not

considered the explanation and merely disallowed the prior period expenses.

7.3. I have carefully considered the facts of the case, the submissions of the appellant and the assessment order. In respect to prior period items, the onus is upon the appellant to justify with proof that the expenses indeed pertain to earlier years and that I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 10 Diamond Power Infrastructure Ltd. vs. DCIT these could not be claimed for genuine reasons and that liability in respect of these expenses crystallized during the year. However neither before AO nor in appellate proceedings such details could be furnished. The AO was justified in rejecting the claim of prior period expenses. Ground No. 4 is dismissed."

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21. Heard both the sides. The assessee has already netted the impugned prior period expenditure against prior period income of Rs. 1,33,992/- as per its tax audit report. We however find that there is no evidence in the case file proving that its expenses in question to have been crystalized in the impugned assessment year. The assessee further fails in making out a case that the Assessing Officer has assessed its prior period income only since its netting plea (supra) has also been declined. We conclude in these facts that both the lower authorities have rightly invoked the impugned disallowance in absence of supportive evidence. This ground is accordingly declined.

22. We come to assessee's next substantive ground assailing correctness of employees contributions to PF/ESIC amounting to Rs. 5,65,882/- and Rs. 6947/- respectively. Hon'ble jurisdictional high court in Gujarat State Transport Corporation case (2014) 366 ITR 170 (Guj) has already accepted the very issue in Revenue's favour. We draw support therefrom to reject this ground. ITA 500/Ahd/2012 fails.

ASSESSMENT	YEAR	2004-05	Assessee's	appeal	ITA
501/Ahd/2012					

I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 11 Diamond Power Infrastructure Ltd. vs. DCIT

23. This appeal raises eight substantive grounds in challenging the lower appellate order inter alia disallowing/adding section 80IB deduction in respect of Silvasa unit on the ground that no gross profits are available after giving effect to brought forward unabsorbed business loss/depreciation of preceding assessment years, allocation of indirect expenses between Baroda and Silvasa by following turnover ratio, sales tax liability of rs. 41,22,800/- u/s. 43B, lumpsum disallowance of Rs. 2 lacs made on expenses attributable to trading turnover, setting aside the issue relating to disallowance of Rs. 66,18,645/- (actual expenditure of Rs. 60,72,117/-) back to the Assessing Officer, that made on software development expense of Rs. 79,000/- after treating he same as capital in nature, prior period disallowance of Rs. 1,38,105/- and employees contributions to PF amounting to Rs. 7,24,585/-; respectively. Learned counsel appearing at assessee's behest does not press for ground nos. 1,2 & 3 hereinabove. He further clarifies that ground no. 4 challenging lumpsum disallowance

of Rs. 2 lacs is identical to the very issue being decided in assessment year 2000-01. The same stands accepted for statistical purposes in assessee's favour in the said assessment year. We proceed in the same analogy herein as well.

24. We proceed further to deal with the remaining grounds. Learned counsel takes us to ground no. 5 challenging disallowance of expenses amounting to Rs. 6,18,645/- as dealt with in the lower appellate order in the manner:-

I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 12
Diamond Power Infrastructure Ltd. vs. DCIT "8. The seventh ground of appeal is against disallowance of Rs.6618645/- out of R & D expenditure.

8.1, It is noticed by the AO that the assessee company had claimed R & D expenditure of Rs.6618645/- to which it was explained that R&D expenditure on HSHC project was incurred in AY 01-02 but the expenses were deferred over a period of 5 years. It was also claimed that the expenditure was on account of raw material, power consumed for developmental activities and salaries paid to R&D personnel. The AO disallowed the claim for the reason that no separate bills of R&D expenditure was furnished.

8.2 In appeal, it is contended that expenditure of Rs.11755187/- was incurred in AY 01-02 on high strength high conductivity cable project and fire resistant low smoke cable and though appellant was entitled to claim 100% deduction, it claimed only 20% of the expenditure. It is also clarified that the expenses claimed during the year were actually Rs.6072117 and not Rs.6618645/- disallowed by the AO.

8.3. I have carefully considered the facts of the case, the submissions of the appellant and the assessment order. It is true that the raw material, fuel and power, labour expenses have been credited to raw material consumer account and that the expenditure has been carved out of normal business purchases/expenses and that the appellant has deferred the expenses as in its view the benefit of new product would be enjoyed over a five year period. It was also explained before the AO that there was no exclusive expenses on R & D but these have emanated out of normal purchases of raw material, salary expenses, fuel and power expenses. However, in appeal it is mentioned that the total expenditure on project was Rs.11755187/- in AY 01-02. In that case 20% of expenses would be Rs.2351035/- as against the claim of Rs.6072117/-. The appellant is directed to provide all the details of the project expenses incurred in AY 01-02 and 1/5th of that would stand allowed during the year. The ground is allowed subject to verification and above directions."

25. Learned counsel fails to point any illegality or infirmity in the lower appellate order remitting the issue back to the Assessing Officer for factual verification after allowing the same in principle. The I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 13 Diamond Power Infrastructure Ltd. vs. DCIT assessee nowhere proves that the lower appellate order records

incorrect figures so far as 1/5 of the gross expenses are concerned. We find no merit to interfere in the ld. CIT(A)'s findings. This ground is accordingly declined.

26. The assessee's sixth substantive ground challenges software expenses of Rs. 79,000/- as disallowed by both the lower authorities after treating the same as capital expenditure. Its sole substantive argument is that the same already stood included in aggregate deferred revenue expenditure of Rs. 3,03,60,586/- forming subject matter of our adjudication in the previous substantive ground. Learned Departmental Representative fails to repel this factual position. We accordingly direct the Assessing Officer to re-decide the issue after ensuring that impugned sum is not subjected to double addition. This ground is accepted for statistical purposes.

27. The Assessee's next substantive ground challenges correctness of prior period expenditure disallowance of Rs. 1,38,105/- . We find no evidence of the impugned expenditure being crystallized in the relevant previous year. We follow our discussion on the very issue in assessment year 2001-02 hereinabove to affirm the lower appellate finding under challenge. This ground fails

28. The assessee's last substantive ground remaining undecided is that pertaining to employees contribution amounting to rs. 7,24,585/-. There is hardly any dispute that hon'ble jurisdictional high I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 14 Diamond Power Infrastructure Ltd. vs. DCIT court (supra) has already decided this very issue in Revenue's favour. We also follow the suit. ITA 501/Ahd/2012 is partly allowed.

ASSESSMENT 502/Ahd/2012	YEAR	2005-06	Assessee's	appeal	ITA
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29 We come to assessee's first substantive ground challenging

section 40(a)(ia) disallowance of Rs. 10,56,480/- made by both the lower authorities on the ground that although it had deducted TDS on payment in question, the same were not deposited within the prescribed time limit. There is no dispute that assessee had deducted the relevant TDS, deposited the same after the due date but before filing return u/s. 139(1) of the act. WE notice that a co-ordinate bench of this tribunal in ITA 3983/Ahd/2008 Shree Kanubhai Ramjibhai Makwana decided on 03-12-2010 for the impugned assessment year 2005-06 holds that the amendment made in section 40(a)(ia) by the Finance Act, 2010 is curative having retrospective effect in nature as under:-

"5. The next issue in this appeal of assessee is against the order of CIT(A) confirming the addition made by Assessing Officer by invoking Section 40a(ia) of the Act on account of non-payment of TDS deducted on labour payments within the due date prescribed under IT. Rules, 1962. For this, assessee has raised the following ground No.2:-

"2. The Learned Commissioner of Income Tax (Appeals)-IV, Baroda has erred in law and on facts of the case by confirming the addition of Rs.63,56,387/- u/s.40a(ia) of

the Income Tax Act, 1961."

6. The brief facts are that the assessee is a contractor and required to get work done through sub-contractors. During the course of assessment proceedings, the Assessing Officer required the assessee to produce the details of TDS deducted on sub-labour contract payments and paid. The assessee intimated as regards to inadmissibility with regard to non- I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 15 Diamond Power Infrastructure Ltd. vs. DCIT deduction of TDS to the tune of Rs.1,65,824/-. The assessee has filed the following details regarding TDS deducted and payment of TDS on labour contract payments as under:-

DETAILS OF TAX DEDUCTED AT SOURCE AND PAYMENT OF TDS SECTI
NATURE AMOUNT OF DATE OF TDS DATE OF TAX TAX TAX DUE DATE
ACTUAL ON OF PAYMENT CREDIT TDS DEDUC DEDUC DEPOSI OF DATE OF
RAT EXPENSE DEDUCTED TIBLE T ED T ED DEPOSIT DEPOSIT E 195C Labour
52,635 12/6/04 1.02 31/3/05 537 537 537 7/7/04 19/7/05 Contract 194C Labour
45,700 14/10/04 1.02 31/3/05 466 466 466 7/11/04 19/7/05 Contract 194C Labour
41,665 12/1/05 1.02 31/3/05 425 425 425 7/2/05 19/9/05 Contract 194C Contract
11,76,470 24/12/04 1.02 24/12/04 12000 12000 12000 7/1/04 19/7/05 Sub 194C
Contract 8,33,334 18/1/05 1.02 18/1/05 8500 8500 8500 7/2/05 19/7/05 Sub 194C
Contract 9,01,960 9/3/05 1.02 9/3/05 9200 9200 9200 7/2/05 19/7/05 Sub 194C
Contract 15,49,020 9/11/04 1.02 9/11/04 15800 15800 15800 7/12/04 19/7/05 Sub
194C Contract 4,21,587 14/2/05 1.02 14/2/05 4300 4300 4300 7/3/05 19/7/05 Sub
194C Contract 6,17,647 15/3/05 1.02 15/3/05 6300 6300 6300 7/4/05 19/7/05 Sub
194C Contract 13,13,725 8/2/05 1.02 8/2/05 13400 13400 13400 7/3/05 19/7/05
Labour 194C Contract 5,15,000 31/12/04 1.02 31/12/04 85263 5263 5263 7/1/05
19/7/05 Labour ITA No.3983/Ahd/2008 A.Y. 2005-06 Sh. Kanubhai R Makwana v.
ITO Wd-1 Anand Page 4 194C Contract 9,62,942 31/3/05 1.02 31/3/05 9822 9822
9822 31/5/05 19/7/05 Labour 194C Contract 3,25,615 31/12/04 1.02 31/12/04 3321
3321 3321 7/1/05 19/7/05 Labour 194C Contract 8,87,620 31/3/05 1.02 31/3/05
9054 9054 9054 31/5/05 19/7/05 Labour 194C Contract 8.52.775 31/3/05 1.02
31/3/05 8698 8698 8698 31/5/05 19/7/05 Labour 194C Contract 2,85,655 31/3/05
1.02 31/3/05 2914 2914 2914 31/5/05 19/7/05 Labour 194C Contract 3,53,922
31/12/04 1.02 31/12/04 3610 3610 3610 7/1/04 19/7/05 Labour 194C Contract
7,93,628 31/3/05 1.02 31/3/05 8095 8095 8095 7/1/04 19/7/05 Labour 1,19,30,900
Accordingly, Assessing Officer made disallowance by invoking provisions of Section
40(a)(ia) of the Act by stating that the total admissible expenditure worked out to
Rs.1,21,56,330/- but as payments have already been disallowed u/s.40A (2)(b) of the
Act at Rs.4,97,716/-

and the balance Rs.1,16,58,614/- was disallowed. Aggrieved, assessee preferred appeal before CIT(A).

7. The CIT(A) partly confirmed the disallowance at Rs.63,56,387/- by stating in para-3.4 of his appellate order as under:-

"3.4. I have considered the submissions of the A.R and the assessment order. The Assessing Officer merely followed the provisions of the unamended section 40(a)(ia). As per the said I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 16 Diamond Power Infrastructure Ltd. vs. DCIT section, the disallowance is justified. However, the following payments i.e.:

Nature of expenses Date of credit Amount of payment (Rs) Sub- contract 9.03.2005 9,01,960 Sub-contract 15.03.2005 6,17,647 Sub-contract 31.03.2005 9,62,942 Labour Contract 31.03.2005 8,87,620 Labour Contract 31.03.2005 8,52,775 Labour Contract 31.03.2005 2,85,655 Labour Contract 31.03.2005 7,93,628 Total 53,02,227 Fall within the amended provisions of section 40(a)(ia) which state that if tax had been deducted in the month of March and deposited with the Government before submission of return of income, the provisions of section 40(a)(ia) are not attracted. In the above cases, since the tax had been deposited on 19.07.2005, the provisions of section 40(a)(ia) are not attracted.

Therefore, the addition to the extent of Rs.53,02,227/- is deleted and balance is confirmed."

Aggrieved, assessee came in second appeal before us.

Sh. Kanubhai R Makwana v. ITO Wd-1 Anand Page 5

8. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the CIT(A) has deleted the addition to the extent of Rs.53,02,227/- as the payments relates to the month of Mar' and the TDS was deducted in Mar, 04 and paid in 19-07- 2005 i.e. before the due date of filing of return of income u/s.139(1) of the Act. Balance, the CIT(A) confirmed as payments relates to Aprl'04 to Feb'05 on which the TDS was deducted from Nov'04 to Feb'05 and TDS was paid on 19-07-2005. The Ld. counsel for the assessee, Shri M.G. Patel stated that the provisions as substituted by the Finance Act, 2010 that the TDS deducted is paid on or before the due date of filing of return of income as specified in Section 139(1) of the Act, the expenses relating to such TDS are eligible for deduction and no disallowance can be made by invoking the provisions of Section 40(a)(ia) of the Act. The Ld counsel for the assessee argued that this provision as amended by Finance Act, 2010 is curative in nature and retrospective in operation.

He relied on the decision of the Hon'ble apex court in the case of Allied Motors (P) Ltd. v. CIT(1997) 201 ITR 677 (SC) and also on CIT v. Alom Extrusions Ltd. (2009) 319 ITR 306 (SC). On the other hand, Ld. SR-DR, Shri K. M. Madhusudan argued that the amendment brought out by the Finance Act, 2010 is not curative in nature and hence not retrospective. He stated that the Legislature in its wisdom has given a date regarding the applicability of this provision. He stated that the substitution has been done by the Finance Act, 2010 w.e.f. 1-4-2010, this means that this amended provision will apply for and from assessment year 2010-11 and not to earlier assessment years. Accordingly, he urged the Bench to confirm the orders of the lower authorities.

I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 17 Diamond Power Infrastructure Ltd. vs. DCIT

9. Now the question arises is, whether the amendment brought out by the Finance Act, 2010 w.e.f 1-4-2010 in Section 40(a)(ia) of the Act is clarificatory in nature or not. To decide this issue, now we have to go to the history of the provisions of Section 40(a)(ia), which was substituted for sub-clause-1 by Finance (No. 2) Act, 2004 w.e.f. 1-4-2005 as under:-

"Amount not deductible.

40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or professions",-

(a)

Sh. Kanubhai R Makwana v. ITO Wd-1 Anand Page 6 (ia) any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub- section (1) of section 200:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub- section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid. Explanation:- For the purposes of this sub-clause:-

(i) "commission or brokerage" shall have the same meaning as in clause

(i) the explanation to section 194H;

(ii) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (11) of section 9;

(iii) "professional services" shall have the same meaning as in clause (a) of the explanation to section 194J;

(iv) "work" shall have the same meaning as in explanation-III to section 194C;"

Subsequently, in sub-clause (ia) the words, (rent and royalty) has been inserted by the Taxation Laws (Amendment) Act, 2006 w.r.e.f. 1-4-2006 and similarly in Explanation sub-clause (v) & (vi) were inserted as under:-

"(v) 'rent' shall have the same meaning as in clause (i) to the explanation to section 194-1;

(vi) 'royalty' shall have the same meaning as in explanation 2 to clause

(vi) of sub-section (1) of section 9;"

Further, by the Finance Act, 2008, the quoted words were substituted in sub-clause (ia) w.r.e.f. 1-4-2005 as under:-

I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 18
Diamond Power Infrastructure Ltd. vs. DCIT ``has not been paid -

(A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139: or (B) in any other case, on or before the lat day of the previous year"

And finally by the Finance Act, 2010 w.e.f. 1-4-2010 sub-clause (ia) is as under:-

Sh. Kanubhai R Makwana v. ITO Wd-1 Anand Page 7 (ia) any interest, commission or brokerage, rent royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of Section 139:

10. We find from the above provision of Section 40(a)(ia) of the Act, amended by Finance Act, 2010, that the payment of expenses as specified in this provision, on which tax is deductible at source under Chapter XVII-B of the Act and the assessee has not deducted the tax or after deduction has not been paid on or before the due date specified in Section 139(1) of the Act, will be disallowed while computing the income chargeable under the Head 'profits and gains of business or profession'. It means that the tax so deductible at source has been deducted and paid on or before the due date specified in Section 139(1) of the Act, the expenses related to the same will be allowed while computing the income chargeable under the Head 'profits and gains of business or profession'. Prior to its amendment, this Section was amended by the Finance Act, 2008, w.r.e.f. 1-4-2005 where the provision was made to disallow the payments on which tax is deductible at source and such tax has not been deducted or after deduction has not been paid:-

(A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139; or (B) in any other case, on or before the last day of the previous years.

From the above amendments in this provision of Section 40(a)(ia) of the Act it is clear that the intention of the Legislature is to operate retrospectively to serve its object of removing hardship faced by the I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 19 Diamond Power Infrastructure Ltd. vs. DCIT taxpayers. While bringing this amendment by Finance Bill, 2010, the object was explained in Notes On Clauses and the relevant Clause-12 was explained as under:-

"Clause 12 of the Bill seeks to amend section 40 of the Income-tax Act relating to amounts not deductible.

Under the existing provisions contained in sub-clause (ia) of clause (a) of the aforesaid section, non-deduction of tax or non-payment of tax after deduction ITA No.3983/Ahd/2008 A.Y. 2005-06 Sh. Kanubhai R Makwana v. ITO Wd-1 Anand Page 8 on payment of any sum by way of interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident or amounts payable to a contractor or sub-contractor, being resident, results in the disallowance of the said sum, in the computation of income of the payer, on which tax is required to be deducted under Chapter XVII-B. The proviso to the said sub-clause provides that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the last month of the previous year but paid after the due date of filing of return or deducted during any other month of the previous year but paid after the end of the said previous year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."

Further the Amendment was explained in Memorandum Explaining the provision in Finance Bill, 2010 as under:-

Disallowance expenditure on account of non-compliance with TDS provisions, "The existing provisions of section 40(a)(ia) of the Income-tax Act provide for the disallowance of expenditure like interest, commission,, brokerage, professional fees, etc. if tax on such expenditure was not deducted, or after deduction was not paid during the previous year. However, in case the deduction of tax is made during the last month of the previous year, no disallowance is made if the tax is deposited on or before the due date of filing of return.

It is proposed to amend the said section to provide that no disallowance will be made if after deduction of tax during the previous year, the same has been paid on or before the due date of filing of return of income specified in sub- section(1) of section 139.

This amendment is proposed to take effect retrospectively from 1st April, 2010 and will, accordingly, apply in relation to the assessment year 2010-

11 and subsequent years."

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11. In view of the above amendments brought out in Section 40(a)(ia) on different times to remove the difficulties of taxpayers a remedial steps were taken by the Legislature. We are of the view that for modern purposes a declaratory amendment in Section of the Act may be defined as an amendment to remove doubts existing as to the meaning or effect of any statute and such amendments are usually held to be retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act and this view has been held in *Keshavlal Jethalal Shah v. Mohanalal Bhagwandas*, AIR 1968 SC 1336, ITA No.3983/Ahd/2008 A.Y. 2005-06 Sh. Kanubhai R Makwana v. ITO Wd-1 Anand Page 9 1339]. Further Hon'ble apex court in the case of *CIT v. Podar Cement Pvt. Ltd.*, (1997) 226 ITR 625, 652 (SC) settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. Further more in similar circumstances, Hon'ble apex court in the case of *Allied Motors (P). Ltd. v CIT* (1977) 224 ITR 677,687 (SC) held that the amendment will not serve its object in such a situation unless it is construed as retrospective. The Hon'ble apex court held as under:-

"The departmental understanding also appears to be that section 43B, the proviso and Explanation 2 have to be read together as expressing the true intention of section 43B. Explanation 2 has been expressly made retrospective. The first proviso, however, cannot be isolated from Explanation 2 and the main body of section 43B. Without the first proviso, Explanation 2 would not obviate the hardship or the unintended consequences of section 43B. The proviso supplies n obvious, omission. But for this proviso the ambit of section 43B becomes unduly wide bringing within its scope those payments, which were not intended to be prohibited from the category of permissible deductions.

In the case of *Goodyear India Ltd. v. State of Haryana* (1991) 188 ITR 402, this court said that the rule of reasonable construction must be applied while construing a statute. A Literal construction should be avoided if it defeats the manifest object and purpose of the Act.

Therefore, in the well known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of *R.B. Jodha Mal Kuthiala v. CIT* (1971) 82 ITR 570, this court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to make the

provision workable, a proviso which supplies an obvious omission in the section and is I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 21 Diamond Power Infrastructure Ltd. vs. DCIT required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation, so that a reasonable interpretation can be given to the section as a whole.

This view has been accepted by a number of High Courts. In the case of CIT v. Chandulal Venichand (1984) 209 ITR 7, the Gujarat High Court has held that the first proviso to section 43Bis retrospective and sales tax for the last quarter paid before the filing of the return for the assessment year is deductible. This decision deals with assessment year 1984-85. The Calcutta High Court in the case of CIT v. Sri Jagannath Steel Corporation (1991) 191 ITR 676, has taken a similar view holding that the statutory liability for sales tax actually discharged after the expiry of the accounting year in compliance with the relevant statute is entitled to deduction under section 43B. The High Court has held the amendment to be clarificatory and, therefore, retrospective. The Gujarat High Court in the above case held the amendment ITA No.3983/Ahd/2008 A.Y. 2005-06 Sh. Kanubhai R Makwana v. ITO Wd-1 Anand Page 10 to be curative and explanatory and hence retrospective. The Patna High Court has also held the amendment inserting the first provisos to be explanatory in the case of Jamshedpur Motor Accessories Stores v. Union of India(1991) 189 ITR

70. It has held the amendment inserting first proviso to be retrospective. The special leave petition from this decision of the Patna High Court was dismissed (see [1991] 191 ITR (St.)8). The view of the Delhi High Court, therefore, that the first proviso to section 43B will be available only prospectively does not appear to be correct. As observed by G.P. Singh in his Principles of Statutory Interpretation, 43B will be available only prospectively does not appear to be correct. As observed by G.P. Singh in his Principles of Statutory Interpretation, 4th Edn., page 291. "It is well settled that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended." In act the amendment would not serve its subject in such a situation, unless it is construed as retrospective. The view, therefore, taken by the Delhi High Court cannot be sustained."

12. Accordingly, we are of the view that the Amendments brought out in Section 40(a)(ia) of the Act from time-to-time was clarificatory and when an amendment is declaratory and clarificatory in nature, the presumption against its retrospectivity is not applicable and amendments of this kind only declare. It is no doubt true that, ordinarily, a statute, and particularly when the same has been made applicable with effect from a particular date should be construed prospectively and not retrospectively. But this principle will not be applicable in a case where the provision construed is merely explanatory, clarificatory or declaratory it cannot be disputed that the object of the Explanation is to explain the meaning and intendment of I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 22 Diamond Power Infrastructure Ltd. vs. DCIT the Act itself and this view has been hold by Ho'ble Calcutta High Court in the case of CIT v. India Steamship Co. Ltd. (1992) 196 ITR 917, 936 (Cal)]. In that case, Explanation 8, which has newly

been inserted by the Finance Act, 1986, with retrospective effect from 1st April, 1974, to section 43(1), has been held to be clarificatory in nature and the same has been held to be deemed to be always in existence even before 1-4-1974. Similarly, in the case of Allied Motors (P) Ltd (supra), it has been held that the provisions of the first proviso, which has newly been inserted by the Finance Act, 1987, with effect from 1st April, 1988 to section 43B is remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation, and is of clarificatory nature and, therefore, has to be treated as retrospective with effect from 1st April, 1984, the date on which section 43B has newly been inserted by the Finance Act, 1983. In taking this view, the Supreme Court has approved ITA No.3983/Ahd/2008 A.Y. 2005-06 Sh. Kanubhai R Makwana v. ITO Wd-1 Anand Page 11 Jamshedpur Motor Accessories Stores v. Union of India [(1991) 189 ITR 70 (Pat), special leave petition dismissed by the Supreme Court : (1991) 191 ITR (St.) 8 (SC)], CIT v. Sri Jagannath Steel Corporation [(1991) 191 ITR 676 (Cal)], and CIT v. Chandulal Venichand [(1992) 197 ITR 718, 720 (Cal)] and CIT v. Pyarilal Kasam Manji & Co. [(1992) 198 ITR 110 (Ori)].

13. In view of the above discussion, following the case laws of Hon'ble apex court and of Hon'ble High Courts cited above, we are of the view that the provisions of Section 40(a)(ia) as amended by the Finance Act, 2010 w.e.f 1-4-2010, which has newly been inserted by the Finance (No.2) Act, 2004, with effect from 1st April, 2005 to section 40 of the Act is remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the taxpayers and which made the provision unworkable or unjust in a specific situation, and is of clarificatory nature and, therefore, has to be treated as retrospective with effect from 1st April, 2005, the date on which section 40(a)(ia) has been inserted by the Finance (No.2) Act, 2004. Accordingly, this issue of the assessee's appeal is allowed."

Ld. Departmental Representative fails to point out any distinction on facts or law. We accordingly adopt the very reasoning to delete the impugned section 40(a)(ia) disallowance of Rs. 10,56,480/-. This first substantive ground succeeds. I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 23 Diamond Power Infrastructure Ltd. vs. DCIT 30 The assessee's second substantive ground challenges disallowance/addition of electricity duty refund of Rs. 78,74,664/- made by both lower authorities. The CIT(A)'s findings are extracted as under:-

"6. The third ground of appeal is against addition of Rs.78,74,664/- being refund receivable on account of electricity duty.

6.1. It was noticed during the course of assessment proceedings that the assessee company had lodged a claim with the Appropriate Authority for Electricity Duty rebate for setting up a unit in the backward area. Accordingly, the company was passing an entry for such rebate on accrual basis. In all the previous assessment years the respective amounts pertaining to the electricity duty refunds were disallowed and treated as income while completing assessments u/s 143(3) of the Act. During the year an amount of Rs.78.75 lacs is correspondingly credited to electricity duty rebate and included under the head loans and advances. Since the assessee's claims on this score are disallowed year after year in the assessment orders u/s 143(3), for the same

reason the AO disallowed the claim of Rs. 78,74,664/-.

6.2. In appeal, the arguments before the AO are reiterated and it is added that appropriate authority had denied rebate and hence there will be no claim after the year under consideration and that during the year the amount was credited to electricity rebate amount and included under the head 'loans and advances' and that there is no case for making any disallowance.

6.3. I have carefully considered the facts of the case, the submissions of the appellant and the assessment order. I find that an identical issue has already been decided against the appellant by my Id. predecessor in Appeal No. CAB/I-177/06-07 vide order dated 21.9.07 for A.Y. 2002-03. Therefore, following the rationale of the order dt.21.9.07, it is held that the AO was justified in making the addition. Ground No.3 is accordingly dismissed."

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31. Learned counsel submits that assessee had claimed the impugned sum in view of the fact that the electricity authorities started rejecting refund claims. He further states that the same is required to be allowed since the very sums stood already added in earlier assessment years i.e. assessment year 2000-01 forming part of the instant adjudication itself. Ld. Departmental Representative strongly supports the CIT(A)'s order. He however fails to rebut assessee's plea of double addition qua the very sums in question disallowed in earlier assessment year as well as in the impugned assessment year. We observe in these peculiar facts that this assessee's arguments require factual verification since involving multiple assessment year figures of preceding assessment years. The Assessing Officer is according directed to re-decide this issue as per law. He shall ensure that the amount is not taxed twice as stated hereinabove. This assessee's ground is accepted for statistical purposes.

32. The assessee does not press next two substantive grounds raising issues of software development expenses of Rs. 79,000/- treated as capital expenditure, section 43B disallowance of Rs. 59,83,128/- on account of sales tax liability.

33. We come to assessee's fifth substantive ground challenging prior period expenditure disallowance amounting to Rs. 11,752/- as disallowed in both the lower proceedings. Learned representatives point out very fairly that we have rejected assessee's identical I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 25 Diamond Power Infrastructure Ltd. vs. DCIT arguments in earlier assessment years forming part of this very order. We affirm CIT(A)'s findings under challenge.

34. The assessee does not press for its next substantive ground challenging disallowance of corporate credit card payments of Rs. 56,639/-. The same is accordingly declined. ITA 502/Ahd/2012 is partly accepted.

ASSESSMENT

YEAR

2006-07

Assessee's

appeal

ITA

834/Ahd/2012

35. The assessee's two substantive grounds raised in the instant appeal challenge validity of the reopening in question followed by correctness of section 40(a)(ia) disallowance of Rs. 4,61,171/- made by both the lower authorities on the ground that it failed in depositing the TDS deducted within the due time prescribed. Former legal plea is not pressed in the course of hearing. Learned representatives state that our corresponding findings on the identical issue in previous appeal decided hereinabove squarely cover the impugned disallowance issue in assessee's favour on merits. We appreciate this fair stand. Section 40(a)(ia) disallowance hereinabove is accordingly deleted. This appeal ITA 834/Ahd/2012 is accepted on merits.

ASSESSMENT	YEAR	2007-08	Revenue's	appeal	ITA
320/Ahd/2012	along with	assessee's	cross	appeal	ITA
I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012					Page No 26
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325/Ahd/2012 followed by former's appeal ITA 2197/Ahd/2012 (arising from section 147 proceedings)

36. We come to the above stated cross appeals first. The Revenue's appeal ITA 320/Ahd/2012 raises two substantive grounds. The first one seeks to revive section 43B disallowance of Rs. 3,61,369/- on account of employees contributions towards PF and ESIC as made by the Assessing Officer and deleted in lower appellate proceedings. The assessee is fair enough in pointing out that the hon'ble jurisdictional high court in GSRTC case (supra) supports Revenue's case. This first substantive ground is accordingly accepted.

37. We come to Revenue's latter substantive ground challenging correctness of the CIT(A)'s order directing the Assessing Officer to treat a sum of Rs. 4,26,91698/- as revenue expenditure out of gross amount of Rs. 5,01,39,255/- claimed as preliminary expenses. The assessee's second substantive ground raises the very issue to the extent the CIT(A) has upheld Assessing Officer's action qua remaining sum of Rs. 74,47,557/-. It does not press for the same in the course of hearing in view of hon'ble jurisdictional high court decision in Torrent Pharmaceuticals Pvt. Vs. ACIT (2015) 55 taxmann.com 170 (Guj) holding that expenditure incurred on convertible debenture is directly related to expansion of capital base is capital in nature.

I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 27 Diamond Power Infrastructure Ltd. vs. DCIT

38. We proceed further to notice that the CIT(A) elaborately discusses Assessing Officer's findings, assessee's submissions to partly confirmed the assessment findings as under:-

"7.2. I have considered facts of the case and appellant's submissions. Assessing Officer held expenses in question to be of capital nature only on the ground that due to issue of debentures and one time settlement with banks, appellant would be benefited for a period of five years and would hence derive benefit of enduring nature. Facts of the case are that appellant company had incurred heavy losses in the preceding years resulting in erosion of more than 50% of its share capital and free reserves. During the year under appeal, appellant company engaged outside experts for its revival and restructuring. As a result, appellant company entered into One Time Settlement (OTS) with banks to repay loans/liabilities towards banks and issued debentures to strategic investors to raise funds. Entire expenses in question were incurred in connection with restructuring carried out by entering into One Time Settlement (OTS) with banks and issue of debentures to strategic investors. Although appellant had amortized the expenses in the books of account over a period of 5 years considering the same as deferred revenue expenditure; in the computation of income, entire expenses were claimed as revenue expenditure. It is a well settled position in law that revenue expenses are to be allowed in the year of incurring of expenditure irrespective of assessee treating them on deferred basis in its books of accounts to comply with requirements of Companies Act, etc. In a recent decision, Mumbai Bench of ITAT ([2011] 14 taxmann.com 176) has also held that entire revenue expenditure is allowable in the year in which liability has crystallized irrespective of fact that assessee treats such expenditure as deferred revenue expenditure in the said year and amortises a part of it in its books of accounts. No adverse inference can therefore be drawn regarding nature of expenses due to appellant treating the expenses on deferred basis in the books of accounts. The only issue to be decided therefore is whether the expenses in question were of revenue nature or capital nature. If the same were of revenue nature, they are to be allowed in full in the year of incurring the same, i.e. in A.Y. 2007-08 otherwise not. As a result of restructuring exercise carried out during the year, appellant's debts towards banks were replaced by entering into a One Time Settlement (OTS) with banks on one hand and raising of funds from Clearwater group of I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 28 Diamond Power Infrastructure Ltd. vs. DCIT NBFCs on other hand. Appellant raised funds from Clearwater Capital group by way of Non Convertible Debentures (NCDs), Fully Convertible Debentures as well as a short term working capital loan. Preliminary expenses in question comprised stamping charges in connection with various agreements entered into (i.e. debenture subscription agreement, loan agreement, hypothecation of assets etc) for raising funds as above and also professional fees, legal fees etc. paid to experts in this regard. Appellant raised Rs.68.5 crore as NCDs and Rs. 60 crore as short term working capital loan through Debenture Subscription Agreement dated 28.8.2006 and Loan Agreement dated 13.11.2006 respectively. Funds of Rs. 65 crore raised through non convertible debenture route and Rs. 60 crore as working capital loan were exclusively loan funds. Appellant also raised funds of Rs 23.5 crore as Fully Convertible Debentures(FCDs) through Subscription agreement dated 20.7.2006. Hon'ble Supreme Court in the case of India Cements Ltd. (1966) 60 ITR 52 (SC) held that loan is not an asset or

advantage of enduring nature and expenditure incurred in connection with obtaining loan is not capital expenditure. Thus, so far as the expenses in question were related to raising of loan funds, they would be revenue expenditure. Fully Convertible Debentures (FCDs) were convertible into shares compulsorily any time within 18 months of the date of issue of FCDs as per Subscription Agreement dated 20.7.2006 between appellant and Clear Water Capital Partners (Cyprus) Ltd. Expenses in relation to fully convertible debentures would therefore be capital expenditure as held in the case of Ashima Syntex Ltd. (2006) 102 777 (Ahd) (SB) 177. Reliance in this regard is also placed on decision in the case of DC/7 vs Ranbaxy Laboratories Ltd (2004) 89 TTJ (Del) 100 also, where the ITAT held that expenditure on issuing fully convertible debentures would be capital expenditure when both the issuer assessee company and the investor knew fully well at the initial stage that the relevant fund would be automatically converted into share capital. It is seen that following expenses out of the expenses classified as preliminary expenses were incurred exclusively in connection with raising of loan funds:

Stamping charges (Debenture Subscription Agreement/NCD dated 28.8.2006)	Rs. 68,500/-
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Stamping charges (Debenture Trust Deed dated 18.9.2006 for NCDs)	Rs. 7,20,100/-
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Stamping charges	Rs.
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(Towards Deed of Pledge dated 13.11.2006, Deed of 10,63,000/-

Hypothecation dated 13.11.2006 and Loan Agreement dated 13.11.2006 in connection with working capital loan)

Stamp duty (For mortgage document/ through IL & FS)	Rs. 4,20,000/-
Retainership fees to Brescon Corporate Advisors Ltd. (For OTS)	Rs. 11, 22,400/-Rs. 1,68,360/-

Professional charges to H. S. Kochar (In connection Rs.

with OTS/working capital loan)	4,00,922/-
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Total...	Rs. 39,63,282/-
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On other hand, following charges were exclusively in connection with raising of FCDs, i.e. equity funds:

Stamping charges for FCDs	Rs.
(as per appellant's own submission)	25,830/-

Consultancy charges paid to J. Sagar & Associates, Rs.

legal counsel (Being in connection subscription 5,76,275/-

with agreement dated 21.7.2006)

Total...	Rs.
	6,02,105/-

Remaining expenses, i.e, professional fees paid to Clear Water Capital Partners (India) Pvt. Ltd. (Rs.3,36,72,000/-) and professional fees to Ernst & Young (Rs.1,15,14,484/-) were towards raising of NCDs of Rs. 68.5 crore, FCDs of Rs. 23.5 crore as well as short I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 30 Diamond Power Infrastructure Ltd. vs. DCIT term working capital loan of Rs. 60 crore. The professional fees paid to M/s. Clearwater Capital Partners (India) Pvt. Ltd., though paid through Debenture Subscription Agreement was towards raising of entire funds i.e. NCDs/FCDs/Working Capital Loan from Clearwater Group and the professional fees paid to M/s. Ernst & Young was towards financial due diligence for appellant company's accounts, again relevant to raising funds through non convertible debentures/loan agreement as well as fully convertible debentures, i.e. equity. The professional fees was paid also for seeking advice on revival & restructuring of company, which had turned sick. As submitted by appellant, the experts gave their opinion on various spheres for revival of sick appellant company. It was held by High Court of Punjab & Haryana in the case of JCT Electronics Ltd. (2010) 188 Taxman 191 (P&H) that professional fees paid towards preparation of restructuring scheme for sick company was allowable as revenue expenditure. In view of the fact that the professional fee was mainly towards substitution of bank loans by raising funds through NCDs/FCDs/short term working loan from Clearwater group, it would be reasonable to allocate the expenses referred to above, i.e. for raising loan funds as well as equity funds in the ratio of loan funds raised (Rs. 68.5 Cr. + Rs. 60 Cr., i.e. Rs.128.5 Cr.) and equity funds (Rs.23.5 Cr.)\ and treat them as revenue and capital expenses respectively. The professional fees paid to Clear Water Capital Partners (India) Pvt. Ltd./Ernst & Young attributable to raising of loan funds would thus be Rs. 4,51,86,484 X 128.5/ 152, i.e. Rs.3,82,00,416/- and professional fees relating to raising of equity funds, i.e. FCD would be Rs.69,86,068/-. The total expenses attributable to raising to loan funds would thus be Rs.3,82,00,416/- plus Rs 39,63,282/- i.e. Rs.4,21,63,698/-. The same are held to be revenue expenditure following decision in the case of India Cements(supra). Tender expenses of Rs.5,28,000/- in connection with PGVCL tenders are also revenue expenses and are to be allowed.

Accordingly, expenses of Rs.4,21,63,698/- plus tender expenses of Rs.5,28,000/- i.e. Rs.4,26,91,698/- are directed to be allowed out of preliminary expenses of Rs.5,01,39,255/- and balance disallowance, i.e. Rs.74,47,557/-; being expenses in connection with raising of equity funds is confirmed."

39. There is no dispute that the CIT(A) has examined each and every expenditure head threadbare to partly agree with assessee's I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 31 Diamond Power Infrastructure Ltd. vs. DCIT contentions. The Revenue fails to rebut the fact that the assessee had amortized the expenditure in question in its relevant books. Hon'ble apex court in a recent judgment Taparia Tools Vs. JCIT (2015) 372 ITR 605 concludes that the mere fact of such an amortization in books is not a conclusive evidence and the same does not form a justifiable ground to invoke disallowance in case it is allowable in the nature of revenue expenditure. The Revenue fails to point out any distinction on facts or law. We find no reason to interfere qua Revenue's second substantive ground. ITA 320/Ahd/2012 is partly accepted.

40. We come to assessee's cross appeal ITA 325/Ahd/2012 raising three substantive grounds inter alia challenging section 14A disallowance restricted from Rs. 2 , 55, 033, capital expenditure of Rs. 74,47,557/- (already conceded in Revenue's cross appeal hereinabove) and enhancement of book profits u/s. 115JB of the act qua section 14A disallowance.

41. We come to first issue of section 14A disallowance. There is no dispute that the assessee has not declared any exempt income in the impugned assessment year. Hon'ble jurisdictional high court in (2015) 372 ITR 97 (Guj) CIT vs. Correctech Energy Ltd negates section 14A application in absence of any exempt income being declared. We draw support therefrom to delete section 14A disallowance in question on this score alone. The assessee's first I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 32 Diamond Power Infrastructure Ltd. vs. DCIT substantive ground is accepted rendering the third one as infructuous. ITA 325/Ahd/2012 is partly accepted.

42. Next comes Revenue's ITA 217/Ahd/2012. Its first substantive ground pleads that the CIT(A) has wrongly allowed set off brought forward losses against interest income of Rs. 56,29,755/- by treating the same as business income. We deem it appropriate to reproduce CIT(A) much elaborate findings as under:-

"3. Ground No. 2 of appeal is that the learned Assessing Officer erred in law and on facts in treating interest income of Rs.56,29,755/- as income under the head 'Other Sources' thereby disallowing set off thereof from the unabsorbed business losses/depreciation of earlier years and the learned Assessing Officer ought to have appreciated that that said interest was earned from banks against margin money for issue of bank guarantee/LC and the same was ordinary business income. Assessing Officer did not accept appellant's contention that the said interest of Rs.56,29,753/- was taxable as business income since it was received from banks against margin money for issue of bank guarantees and LC. Assessing Officer was of the view that the said income was not earned from any business activity and was therefore to be taxed under the residuary head.

3.1 In appeal, submissions as under were made:-

"Ground No.2 : Interest Income treated as Income from Other Sources 1.0 The learned Assessing Officer has treated the interest of 56,29,755/- as income under the head "Income from Other Sources"

and has thereby disallowed the set off thereof from the unabsorbed business losses/ depreciation of earlier years.

1.1 It was explained at the time of assessment proceedings that the said interest of 56,29,755/- is received from banks against margin money for issue of bank guarantees and LC. The said interest received is taxable under the head income from business or I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 33 Diamond Power Infrastructure Ltd. vs. DCIT profession and not income from other sources. This apart, the said interest does not fall in any of nine types of incomes which are taxable under the head "Income from other sources" as per section 56(2) of the I T Act.

1.2 It is submitted that in order to treat any interest income as business income, the fact to be verified is to see whether the funds on which such interest has been earned is inextricably linked with the business of the assessee or not. The appellant relies on the decision of Delhi High Court in case Koshika Telecom Ltd. [2006] 287 ITR 479. In this case, the facts were that the assessee was engaged in the business of operating cellular mobile telephone services in the states of Uttar Pradesh, Bihar, Orissa and West Bengal. The assessee was required to provide finance and performance bank guarantees to the Department of Telecommunications. In the backdrop of these facts, it was held that the deposit of margin money by the assessee was inextricably linked with the furnishing of bank guarantees by the assessee to the Department of Telecommunication for obtaining a licence and accordingly the said interest was to be assessed as Business Income and not as Income from Other Sources.

Following the above decision of Delhi High Court, Mumbai Tribunal has considered the similar issue in case of Voltas International Ltd. vs. ACIT, (2010) 2 ITR(TRIB.) 410 holding that in the present case also, interest has been received on margin money kept with bank for availing of credit facilities. Thus, the .interest was inextricably linked to the execution of foreign project and in view of the decision in the case of Koshika Telecom Ltd. [2006] 287 479 (Delhi), the interest was assessable as business income.

1.3 The appellant also relies on the Decision of Mumbai High Court in case of CIT v. Indo Swiss Jewels Ltd, [2006] 284 ITR 389 and Lok Holdings [2009] 308 ITR 356. In the said cases, the issue involved was whether the surplus fund on which interest was earned was inextricably linked with the business of the assessee and thus, assessable as income from business or was a case of surplus funds per se being invested in fixed deposits for earning interest income. In the case of Indo Swiss Jewels Ltd. [2006] 284 ITR 389, inter- corporate deposits were made by the assessee from the surplus fund that was set apart for payment for importing machinery. It was held in the said case that the interest earned on the short-term I.T.A Nos. 499 to 502, 838, 320,325,326,2197 &

2218/Ahd/2012 Page No 34 Diamond Power Infrastructure Ltd. vs. DCIT deposits of the money kept apart for the business purposes had to be treated as income earned from business and not as income from other sources.

Further, in the case of Lok Holdings [2009] 308 ITR 356, the facts were that the assessee firm was engaged in construction business and received monies from the purchasers of flats which it deposited with the bank. The hon'ble Bombay High Court upheld the view of the Tribunal that the entire interest sprang from the business activity of the assessee and not out of any independent activity.

1.4 It is further submitted that the above two judgements have been considered by the Mumbai Tribunal in case of Voltas International Ltd. vs. ACIT, (2010) 2 ITR(TRIB.) 410 (Supra) and it has been held that the assessee had to keep funds readily available to it for purposes of its projects and, therefore, till the funds were actually required for project activities, the assessee kept the same in fixed deposits for temporary period. It is a case of temporary surplus fund available to the assessee not immediately required for its business purposes which was kept in fixed deposits but nevertheless, the funds were meant only for assessee's construction activities and, therefore, they were inextricably linked with the assessee's activities and hence, assessable as income from business.

1.5 In view of the facts and circumstances, it is submitted that the interest earned on the Fixed Deposits kept for the purpose of issuing bank guarantees and LC has to be assessed as business income. The appellant, therefore, prays that the learned Assessing Officer may be directed to treat the same as Business Income and allow the set off of unabsorbed business losses and depreciation of earlier years from the same."

3.2 I have considered the matter. Interest of Rs.56,29,755/- was received from banks against margin money for issue of bank guarantees^ and LC. Delhi High Court in the case of Koshika Telecom Ltd. (2006) 287 ITR 479 and Mumbai Bench of ITAT in the case of Voltas International Ltd. (2010) 2 ITR (Trib) 410 have held that deposit of margin money with the banks being inextricably linked to the requirement of furnishing bank guarantees for the purpose of assessee's business, interest on margin money is to be treated as business income. Following Delhi High Court's decision in the case of Koshika Telecom Ltd. (supra), interest of Rs. 56,29,755/- on I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 35 Diamond Power Infrastructure Ltd. vs. DCIT margin money etc. is directed to be assessed as business income. Ground No. 2 of appeal is allowed."

43. Ld. Departmental Representative fails to dispute the fact that the assessee has derived its interest income against margin money for issue of bank guarantee and letter of credit. Various judicial forums as quoted in lower appellate findings hereinabove treat similar interest receipts as business income. We find no reason to interfere therein. This first substantive ground is accordingly declined.

44. Revenue's second substantive grievance assails correctness of the lower appellate order deleting addition of Rs. 17,23,80,955/- on account of sum waived by creditor bank in furtherance to a one

time settlement scheme. The Assessing Officer treated this amount to be covered u/s. 2(24) of the Act. The CIT(A) reverses the same as under:-

"5.2 I have considered facts of the case and appellant's submissions. Assessing Officer has taxed amount of Rs.17,23,80,955/- waived by the banks under One Time Settlement(OTS) scheme as income u/s.2(24) without referring to the nature of loan amount waived i.e. whether it was principal or interest that was waived. Taxation of loan amounts waived under OTS by banks would depend upon the nature of amount waived, i.e. whether it was principal or interest. Further as held by the Courts, taxation of principal amount of loan waived under OTS would also depend on the purpose of loan, whereas interest waived under OTS would be taxable u/s.41(1) provided it was allowed as deduction in income tax assessments of earlier years. In the case of Tosha International Ltd. (2009) 176 Taxman 187 (Del) relied upon by appellant, Hon'ble Delhi Court held that remission of principal amount of loan did not amount to income u/s.41(1) or u/s.28(iv) or u/s 2(24) and remission would become income u/s.41(1) only if assessee claimed deduction in respect of expenditure or trading I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 36 Diamond Power Infrastructure Ltd. vs. DCIT liability and since remission of principal amount of loan obtained from bank/financial institutions had not been claimed as expenditure or trading liability in any of earlier previous years, the same did not amount to income. Regarding interest waived, it was held to be taxable u/s 41(1) only if it was allowed as expenditure in the income tax assessments earlier. In later decisions in the cases of Logitronics (P) Ltd. (2011) 9 taxmann.com 302 (Delhi) and Rollatainers Ltd. (2011) 15 taxmann.com 111 (Delhi), Delhi High Court has held that principal amount of loan waived would not constitute taxable income, if it was taken for acquiring capital asset; however, even principal amount of loan would result into income if it was taken for trading purpose. During appellate proceedings, nature of amount waived under OTS of Rs.17,23,80,955/- was therefore, enquired into and appellant was asked to clarify the nature of amount in question.

Appellant through second submission reproduced above in para 5.1 of this order submitted that the amount of Rs.17,23,80,955/- was interest on interest charged by banks/financial institutions, which was never admitted or accounted for by appellant company in its books of accounts.

In this regard, appellant filed copy of State Bank of India's letter No. SAMB/2006-07/RKA/1177 dated 19.9.2006, as per which amount of Rs.17.23 crore was interest, which was not accounted for in appellant's books of accounts and the same was waived as a special case having levied by banks unilaterally in view of chronic default in appellant's accounts and was beyond the sanction terms. Since amount waived under OTS of Rs.17,23,80,955/- was interest, it could be taxed u/s.41(1) as remission/cessation of liability, only if it was allowed as a deduction in income tax assessments of appellant for earlier years. On enquiry on this aspect, appellant has filed a certificate that interest of Rs.17.23 crore waived under OTS scheme was never charged/claimed and was not allowed in any of the income tax assessments of appellant company. Addition of Rs. 17,23,80,955/- is accordingly deleted subject to re- verification by the Assessing Officer that the interest amount in question was

not allowed as deduction in income tax assessments of appellant for earlier years."

45. Heard both sides. The Revenue does not produce any evidence before us that the amount in question is not interest on interest which has never been accounted in assessee's books in I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 37 Diamond Power Infrastructure Ltd. vs. DCIT preceding assessment year so as to attract section 41(1) of the act. This is further not it's case that the impugned sum has been incurred for the purpose of acquiring any capital asset. We also find that the CIT(A) has already directed the Assessing Officer to re-verify the relevant facts that the amount in question was never claimed as interest deduction in earlier assessment year. The Revenue fails in indicating any illegality or infirmity in the lower appellate findings under challenge. This latter ground is accordingly rejected. ITA 2197/Ahd/2012 fails.

ASSESSMENT 326/Ahd/2012	YEAR	2008-09	Assessee's	appeal	ITA
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46. This assessee's appeal raises four substantive grounds in challenging the CIT(A)'s order confirming assessment findings inter alia making section 14A disallowance of Rs. 20,58,483/-, sales promotion expenses of Rs. 6 lacs, the one u/s. 40A (3) of the Act amounting to Rs. 71,624/- and MAT enhancement arising from section 14A disallowance. Latter three grounds are not pressed in the course of hearing.

47. We come to section 14A disallowance of Rs. 20,58,483/-. Both the parties inform the bench that our findings in assessment year 2007-08 hereinabove squarely cover the instant issue since there is no exempt income in the impugned assessment year as well. We I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 38 Diamond Power Infrastructure Ltd. vs. DCIT draw support therefrom to delete this section 14A disallowance. ITA 326/Ahd/2012 is partly allowed.

ASSESSMENT 2218/Ahd/2012	YEAR	2009-10	Assessee's	appeal	ITA
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48. The assessee raises six substantive grounds in assailing correctness of the lower appellate order confirming Assessing Officer's action making disallowances/additions inter alia u/s. 14A of the act amounting to Rs. 32,40,719/-, u/s. 40A(3) of the Act of Rs. 1,02,148/-, 80G of the act of Rs. 1,000/-, depreciation on motor car of Rs. 8,12,250/- and enhancement of section 115JB book profit to the extent of section 14A disallowance figure; respectively. Grounds no. 2 to 4 and 6 are not pressed in the course of hearing.

49. We come to first issue of section 14A disallowance of Rs. 32,40,719/-. There is no dispute about assessee's exempt income to the tune of Rs. 750/- from dividend. Its corresponding investments as on 31-03-2009 read a figure of Rs. 5,0690,427/- turning out to be much less than capital, reserves/surplus figure of Rs. 21.04 crores and Rs. 192.5 crores and Rs. 192.56 crores; respectively. The Assessing Officer applied rule 8D(2)(ii) and (iii) to compute proportionate interest and

administrative expenditure disallowance of Rs. 29,87,267/- and Rs. 2,53,452/-; respectively aggregating to the impugned figure as confirmed in the lower appellate proceedings. I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 39 Diamond Power Infrastructure Ltd. vs. DCIT

50. We have heard both the parties reiterating respective stands against and in support of the impugned disallowance. We notice first of all that the Assessing Officer has nowhere recorded section 14A (2) satisfaction that assessee's books not attributing any expenditure to have been incurred in relation to the impugned income are not correct. Both the lower authorities further do not dispute that assessee's interest free funds exceed much more than its impugned investments resulting in exempt income. We find no reason to concur with the impugned section 14A disallowance in this backdrop of facts. The same is accordingly deleted.

51. The assessee's last surviving substantive ground challenges depreciation disallowance of Rs. 8,12,250/-. It claimed the impugned depreciation @ 50% on a car purchased in its director's name for Rs. 32.49 lacs. The Assessing Officer disallowed half of the claim in question coming to the impugned sum by observing that neither there was any evidence of the car being purchased in company's name nor its usage wholly and exclusively for the purpose of the business.

52. We find that the CIT(A) follows case law of Mysore Mineral (1199) 239 ITR 775 (SC) to accept assessee's contention in principle that the car in question was purchased in its director's name. He however directs the Assessing Officer to verify as to whether assessee's funds had been utilized in the car purchased in question or not. Ld. counsel representing assessee fails to take us to relevant evidence qua this crucial aspect. We find no reason to interfere with I.T.A Nos. 499 to 502, 838, 320,325,326,2197 & 2218/Ahd/2012 Page No 40 Diamond Power Infrastructure Ltd. vs. DCIT the CIT(A)'s order under challenge. This assessee's ground is declined. ITA 2218/Ahd/2012 is partly accepted.

53. To sum up, assessee's appeals ITAs 499, 501, 502, 325, 326 & 2218/Ahd/2012 are partly accepted. Its appeal ITA 500/Ahd/2012 fails. Appeal ITA No. 834/Ahd/2012 is accepted on merits. Revenue's appeal ITA 320/Ahd/2012 is partly accepted. Its latter appeal ITA 2197/Ahd/2012 is dismissed.

Order pronounced in the open court on 11-08-2016

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER
Ahmedabad : Dated 11/08/2016
ak

Sd/-
(S. S. GODARA)
JUDICIAL MEMBER

/ Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/ ,

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