Delhi International Airport Pvt. Ltd., ... vs Dcit, New Delhi on 31 January, 2018

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B', NEW DELHI

BEFORESH. H.S. SIDHU, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA Nos. 2636, 4213/Del/2012& 3707/Del/2013
Assessment Years: 2008-09, 2009-10& 2010-11

M/s. Delhi International Airport Pvt. Ltd., New Udaan Bhawan, Terminal 3, Indira Gandhi International Airport, New Delhi PAN : AACCD3570F	Vs.	Addl.CIT, Range-10, New Delhi
(Appellant)		(Respondent)

And

ITA Nos.2812 &4353/Del/2012& 4203/Del/2013
Assessment Years: 2008-09, 2009-10& 2010-11

DCIT, Circle -10(1), New Delhi	Vs.	M/s. Delhi International Airport Pvt. Ltd., Udaan Bhawan, Terminal 1B, Indira Gandhi International Airport, New Delhi PAN : AACCD3570F
(Appellant)		(Respondent)

Assessee by Sh. Ronak G. Doshi, CA
Department by Ms. Rachna Singh, CIT(DR)

Date of hearing 22.01.2018
Date of pronouncement 31.01.2018
2

ORDER

PERO.P. KANT,A.M.:

These cross appeals of the Revenue and the assessee are directed against different orders passed by the Ld. Commissioner of Income-tax(Appeals) [in short 'the Ld. CIT(A')] for assessment year 2008-09 to 2010-11. In these appeals, common grounds are involved, therefore, same were heard together and disposed off by way of this consolidated order.

2. First, we take up the appeals of the assessee and the Revenue for assessment year 2008-09 having ITA No. 2636/Del/2012 and ITA No. 2812/Del/2012.

3. The grounds of appeal raised by the Assessee in ITA No. 2636/Del/2012 are reproduced as under:

"Ground 1: Charging Passenger Service Fee (Security Component) as income of the Appellant - Rs. 80,72,64,401/-

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Additional Commissioner of Income- tax, Range-10, New Delhi ("the A.O.") in charging to tax the Passenger Service Fee (Security Component) managed by the Appellant in fiduciary capacity on behalf of the Government of India as income of the Appellant.

2. The Appellant prays that the action of AO in treating the Security Component of the Passenger Service Fee as income of the Appellant be deleted.

Ground 2: Disallowance u/s.40a(ia) of the Act - Rs.7,51,65,000/-

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the action of AO in disallowing a sum of Rs. 7,51,65,000/- being provision made at year end on best estimate basis, on account of non- deduction of tax on the said payment under section 40a(ia) of the Act.

2. The Appellant humbly prays that the AO be directed to delete the aforesaid disallowance.

Ground 3: Disallowance under section 14A of the Act.

1. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in upholding the action of AO in disallowing a sum of Rs.2,36,70,000/- on the ground that the Appellant had earned exempt income and therefore the said sum was disallowable u/s. 14A of the Act r.w.r. 8D the Income Tax Rules, 1962.

2. The Appellant humbly prays that the AO be directed to delete the disallowance of Rs. 2,36,70,000/- made by invoking provisions of Section 14A and Rule 8D.

Without prejudice to Ground 3 above Ground 4:

1. On the facts and circumstances of the case and in law, the Ld. CIT(A]has erred in not deciding the Appellant Ground No. VII relating to not adding the disallowance made under section 14A of the Act to the cost of the mutual fund units.

2. The Appellant humbly prays that the AO be directed to add the disallowance made under 14A to the cost of mutual fund units.

Without Prejudice to the claim of the Appellant that Upfornt Fee and Payment to AAI for Capital Work in Progress was allowable as revenue expenditure in AY 2007-08.

Ground No. 5: Not granting Depreciation

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the alternate claim raised by the Appellant in regard to not granting depreciation as per section 32 of the Act at appropriate rates on the ground that though the Upfront fees and payment towards the Capital Work in Progress incurred by AAI was in the nature of license fees for conducting business for 30 years, it was not an intangible asset within the meaning of section 32(1)(ii) of the Act is infructuous.

2. The Ld. CIT(A) failed to appreciate and ought to have held that if the expenditure is treated as capital expenditure, depreciation ought to have been allowed on the same inasmuch as the same is in the nature of a business or commercial right similar to license / franchise/ other commercial right and falls within the meaning of an intangible asset as specified under section 32(1)(ii) of the Act.

3.The Appellant prays that if department appeal on this issue is allowed for the Assessment year 2007-08 and it is held that expense on Upfront fees is capital in nature then depreciation be allowed at appropriate rate under section 32 of the Act on the amount of upfront fees Without Prejudice to the claim of the Appellant that Repairs and Maintenance incurred in AY 2007-08 were allowable as revenue expenditure in AY 2007-08 Ground 6: Not granting Depreciation

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the alternate claim raised by the Appellant in regard to not granting depreciation under section 32 of the Act at appropriate rates on the repair and maintenance of the building, plant and other as the same treated as capital in nature but merely allowing the amortization over the term of the agreement is infructuous.

2. The Appellant prays that if department appeal on this issue is allowed for the Assessment year 2007-08 and it is held that expense on repair and maintenance of building, plant and others amounting to Rs. 24,00,00,000/- is capital in nature then depreciation be allowed under section 32 of the Act on the repairs and maintenance of the building, plant and others.

Ground 7: Not granting Deduction under section 80-IA of the Act

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not deciding the Appellant Ground No. XI relating to not granting deduction under section 80-IA of the Act on the profits derived by the Appellant from the business of operation and maintenance of the Airport.

2. The Ld. CIT(A) failed to appreciate and ought to have held that:

· The Appellant is engaged in the business which is specified in the Section 80-IA (4) (i) i.e. the business of operating and maintaining of Airport;

· The profits and gains derived by an undertaking or an enterprise from any business referred to in Section 80-IA (4) is eligible for deduction under section 80-IA of the Act and as the Appellant is engaged in the business specified in Section 80-IA (4) the Appellant is eligible for deduction under section 80-IA of the Act;

3.The Appellant prays that the AO be directed to grant deduction u/s. 80-IA of the Act on the profits derived by the Appellant from the business of operating and maintaining of Airport.

Ground 8:

The Appellant craves leave to add, alter and/or amend all or any of the foregoing grounds of appeal."

3.1 The grounds of appeal raised by the Revenue in ITA No. 2812/Del/2012 are reproduced as under:

" i) Whether the Ld. CIT(A) under the facts and circumstances of the case and in law was correct in allowing the expenses of Rs.

11,13,73,000 on account of repair & Maintenance of building as revenue expenditure as against the capital expenditure assessed by the AO.

ii) Whether the Ld. CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs. 12.20 lakhs &Rs. 8.31 lakhs made u/s 40(a)(ia) of the IT Act, 1961 by the AO.

iii) Whether the Ld. CIT(A) under the facts and circumstances of the case and in law was justified in deleting disallowance of Rs. 33,69,000/- made on account of club expenditure by the AO.

iv. The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing."

4. Briefly stated facts of the case are that the assessee company was engaged in developing, operating and maintaining airport and related infrastructure at the New Delhi Airport. For the year under consideration, the assessee filed return of income on 30/09/2008 declaring nil income. The

case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short 'the Act') was issued and complied with. The assessment under section 143(3) of the Act was completed on 24/12/2010 assessing total income at Rs.201,61,04,090/-. The additions/disallowances made by the Assessing Officer were challenged by the assessee before the Ld. CIT-(A), who allowed part relief to the assessee. Aggrieved with the finding of the Ld. CIT-(A), both the assessee and the Revenue are in appeal before the Tribunal raising the grounds as reproduced above.

5. Before us, the Ld. counsel filed two paper books containing pages from 1 to 420 and 1 to 494 and made detailed arguments supporting the grounds raised.

5.1 The ground No. 1 of the appeal of the assessee relates to "Passenger Service Fee" (security component) amounting to Rs.80,72,64,401/- which has been treated by the Assessing Officer as taxable income of the assessee and upheld by the Ld. CIT-(A).

5.2 The brief background of the issue in dispute involved as culled out from the order of the lower authorities is that:

> (i) the assessee entered into an agreement for "
>
> Operation, Management and Development Agreement"(OMDA) with the "Airport Authority of the India" (AAI) on 04/04/2006. Under the said agreement the 'AAI' granted certain exclusive rights and authority to the assessee to undertake some of the functions of the 'AAI', being the function of operation, maintenance and development, construction, modernization etc of the airport and perform certain specified services at the "Indira Gandhi International airport New Delhi".

(ii) Under chapter XXII of the said agreement, the assessee has been granted right to collect Passenger Service Fee (PSF), which is a fee leviable under the provisions contained in Rule 88 of Aircraft Rules 1937. This passenger service fee (PSF) is charged on per passenger embarking into airport and included in air-tickets purchased by the passengers from 'Airlines' or other 'service providers'. This entire 'PSF' has been transferred by the 'Airlines' to the operator of the airport i.e. the assessee.

(iii) Under Schedule 8 of the State support agreement (SSA) entered into by the assessee with the government of India on 26/04/2006, 65% of the 'PSF' was earmarked for security expenditure component (SC) and 35% for facilitation component (FC). During relevant period passenger service fee (PSF) was fixed by the competent authority at the rate of Indian Rs. 200 per embarking passenger in respect of ticket issued against Indian rupees (INR) tariff and US dollar 5 (five) in respect of tickets issued against dollar tariff.

(iv) The assessee considered the facilitation component of 'PSF' as revenue in its books of account, however the security component (SC) was not considered as revenue due to following reasons:

i. The PSF (SC) is received by DIAL in fiduciary Capacity.

ii. Security Function is handled under the aegis of Bureau of Civil Aviation Security (bcas).

iii. Security is a reserved activity, which cannot be performed by DIAL, towards which this fee is being collected.

iv. The Government has absolute discretion when it comes to determining the amount to be charged as PSF -SC v. Standard Operating Procedure(SOP), has been framed by MOCA.

vi. The PSF (SC) fee has to flow into a separate Escrow account which is subject to strict control, including controls in respect of withdrawals, accounting of fixed assets procured maintenance of accounts and audit by the Comptroller and Auditor General of India.

vii. The MOCA has supervening powers to direct the operation of the Escrow account.

viii. The amount of PSF to be collected is statutorily fixed by MOCA, and a fixed portion (65%) of the PSF is statutorily earmarked for scrutiny purposes.

(v) During assessment proceedings before the Assessing officer, the assessee agreed to offer the income from PSF(SC). The assessee submitted that after the decision of the Central Board of Direct Taxes (CBDT) as conveyed by the Ministry of civil aviation (MOCA) vide letter dated 15/11/2010, income arising out of PSF(SC) was considered as liable to tax and accordingly , it paid tax.

(vi) The assessee vide letter dated 30/11/2010 filed a revised computation incorporating income from PSF(SC) before the Assessing Officer. The assessee declared receipt of aeronautical passenger service fee of Rs. 15044.74 lakhs and other income of Rs. 1198.71 lakhs aggregating to Rs. 16243.45 lakh under the head PSF(SC) and claimed following expenses of Rs. 7937.27 lakhs against the said receipt :

Security Deployment cost Rs.7351.85 lakhs Administrative cost Rs. 539.90 lakhs Interest & Finance charges Rs. 4.37 lakhs Depreciation Rs. 41.15 lakhs Total Rs.7937.27

(vii) In addition to the above expenses, the assessee claimed exemption of Rs. 233.53 Lakhs towards dividend received on mutual funds- daily dividend scheme. In support of the claim of the above expenses, the assessee company filed a separate independent Audit Report dated 9th June, 2009 signed by the Chartered Accountants "M/s Vijay Sanghi and Company" .

(viii) According to the Assessing Officer, in view of the letter dated 30/01/2010 of the CBDT as communicated to the assessee through the MOCA, the PSF(SC) receipt is part of the revenue of the assessee and he accepted the revenue offered by the assessee in revised computation of income. But, he did not allow the expenses claimed in the revised computation of income, on the ground that audit report of M/s Vijay Sanghi & Co was not having any legal sanctity under the provision of section 44AB of the Act and the said audit was also not conducted within the prescribed time period.

(ix) Before the Ld. CIT-(A), the assessee contended that collection, administration and disposal of the PSF(SC)fund was mandated by the 'MOCA' and the assessee was only designated to manage the aforesaid activity, which the assessee discharged in its 'fiduciary' capacity on behalf of the government of India.

According to the assessee, amount of security component of PSF represents a receipt, which is diverted by overriding the title in favour of the government and the assessee was permitted to use the amount from the 'Escrow account' only for a specified security purposes as laid out by the standard operation procedure (SOP). According to the assessee, the OM issued by the CBDT to MOCA is not a circular issued by the CBDT under section 119 of the Act and therefore not binding on the assessee.

(x) The Ld. CIT-(A) however was not satisfied with the contention of the assessee and following the decision of the Hon'ble Supreme Court in the case of Chowringhee Sales Bureau P Ltd V CIT 87 ITR 542 and endorsing the view expressed by the CBDT that PSF(SC) constitutes income of the assessee, upheld the addition made by the Assessing Officer.

Submission of the assessee before Tribunal

6. Before us the Ld. counsel of the assessee relied on the order dated 30/11/2016 of the Tribunal, Mumbai bench in the case of Mumbai International airport private limited versus ACIT in submitted that amount of passenger service fee(security component) is not the income of the assessee. 6.1 Further, the Ld. counsel submitted that that the amount is received in fiduciary capacity on behalf of the Government of India and therefore the assessee being holder, said amount is not chargeable as income in the hands of the assessee. According to the assessee, the amount was held in the fiduciary capacity due to following reasons:

(i) The security services formed part of the 'reserved activities' and ,hence the assessee was barred under 'OMDA' to carry out security services.

(ii) The security component of the PSF was to be deposited in a separate 'Escrow account' maintained with bank

(iii) The 'SOP' required the assessee to maintain separate bank account for PSF(SC) and cheques in respect of security component were credited directly to 'Escrow

account' .

(iv) The assessee cannot use the said money for any purpose it desires.

6.2 In support of the contention that amount received in fiduciary capacity ,is not taxable in the hands of the assessee, the Ld. counsel cited following decisions in written submission filed:

i. Kishanchand Lunidasing Bajaj vs. CIT (60 ITR 500) (SC) ii. CED v. Aloke Mitra (126 ITR 599)(SC) iii. CESC Ltd. Vs. CIT (235 Taxman 6) (Cal.) iv. CIT Vs. Devatha Chandraiah& Sons (33 Taxaman 104) (AP) v. CIT Vs. Tanubai D Desai (84 ITR 713) (Bom) 6.3 He further contended that the PSF(SC) received by the assessee is diverted at the source by overriding title and, therefore, cannot be considered as income of the assessee. In support of the contention, he cited following decisions in written submission:

i. CIT Vs. Sitaldas Tirathdas (41 ITR 367) (SC) ii. CIT Vs. Bijii Cotton Mills P. Ltd. (116 ITR 60) (SC) iii. Siddheshwar Sahakari Sakliar Karkliana Ltd. v. CIT (2004) (270 ITR 1) (SC) iv. CIT Vs. Tollygunge Club Lid. (107 ITR 776) (SC) v. CIT Vs. New Horizon Sugar Mills Pvt. Ltd. (244 ITR 738) (Mad.) affirmed by the Hon'ble Supreme Court in 269 ITR vi. DCM Ltd. v. CIT (192 CTR 408) (Del HC) vii. CIT v. Salem Co-operative Sugar Mills Ltd. (229 ITR 285) (Mad.) viii. UP Bhumi Sudhar Nigarm Vs. CIT (280 ITR 776) (All.) 6.4 He further contended that even if the assessee has only considered the receipt as income and offered the same to tax, it is the duty of the Department to rightfully compute the income of the assessee. In support of the contention, he cited following decisions in written submission filed:

i. CIT v. Shelly Products (261 ITR 367) (SC)
ii. CIT v. Bharat General Reinsurance Co. Ltd. (1971) (8' ITR 303) (Del HC)
iii. Balmukund Acltarya v. DCIT (310 ITR 310) (Bom.)
iv. Ninnala L. Mehta v. CIT (2004) (269 ITR 1) (Bom.)
v. Mavank Poddar (HUF) v. WTO (2003) (262 ITR 633) (Cal)
vi. S.R. Koshti v. CIT (2005) (276 ITR 165) (Guj)

6.5 He further contended that clarifications issued by the Department are not binding on the appellate authority as well as on the assessee. He supported the contention with following decisions cited in written submission:

1. J.K. Synthetics Ltd. Vs. Central Board of Direct Taxes (83 ITR 335) (SC)

2. Keshavji Ravji & Co. Vs. CI/t (183 ITR 1) (SC)

3. CIT Vs. Hero Cycles (P) Ltd. (1997) 94 Taxman 271)(SC)

4. Banque Nationale de Paris Vs. CIT (237 ITR 518) Submission of Revenue before the Tribunal

7. On the contrary, Ld. CIT(DR) contended that in the revised computation of income filed, the assessee itself has included the income from PSF(SC) as its income and also paid taxes thereon and therefore the assessee has already accepted the amount as income liable to tax and the issue before the Assessing Officer was only regarding allowing of the expenditure claimed by the assessee against receipt of PSF(SC) only.

7.1 The Ld. CIT(DR) further referred to the standard operating procedure(SOP) for account/audit of PSF(SC) by the Private airport operator issued by the 'MOCA' dated 19/01/2009, which is available on page 438 to 447 of the assessee's paper book. She particularly referred to para-4.6 and 4.8 of the said SOP and submitted that the assessee was allowed to adjust the tax deducted at source on payments related to security component by 'Airlines' against the income tax liability on PSF(SC) ,which establish that PSF(SC) is in the nature of income in the hands of the assessee.

7.2 The Ld. CIT(DR) placed reliance on Para -8 of the CBDT Office Memorandum dated 30/06/2008, which is available on page 448 to 449 of the assessee's paper book 09.01.2018 and submitted that entire amount of PSF(SC) is taxable within the meaning of Act. She also referred to the CBDT OM No. 792414/2010, dated 07/06/2010, and submitted that said OM clarified that whole of the PSF is revenue receipt and taxable under income tax Act.

7.3 She further submitted that income from PSF(SC) is earned in the course of carrying on the business and therefore it is liable as income as described under section 28(i) of the Act as profit and gains of any business carried on by the assessee at any time during the year. According to the Ld. CIT(DR), PSF is in the nature of fee earned for services rendered to the passenger in the course of routine business and falls clearly within the ambit of the revenue receipt which is income for the purpose of income tax Act.

7.4 The Ld. CIT(DR) also placed reliance on the decision of the Hon'ble Supreme Court in the case of 'Chowringhee Sales Bureau' (supra) and reference made to the same in the office memorandum.

7.5 The Ld. CIT(DR) further submitted that that the Tribunal in the case of Mumbai International airport limited (supra) has cherry picked the clauses of various agreements and based their finding on various presumptions. She submitted that in para-

14.8 of the said order the Tribunal has mentioned that the said fee was initially collected by the concerned 'Airline' and then handed over to the assessee company for the sake of administrative convenience. She submitted that the fact of 'administrative convenience' has been presumed by the Tribunal without any supporting evidence. She further submitted that in said para the Tribunal

presumed the fact that entire PSF(SC) amount was to be utilized for payment to security agency designated by the Central government. She submitted that the Tribunal presumed this fact without verifying various expenditure incurred by the assessee out of PSF(SC) including on capital asset.

7.6 According to her, the amount was not held in the fiduciary capacity and the Central government issued the notification after consultation with the stakeholders including the airport operators for ensuring that security concerns at the airports are not neglected on the plea of insufficient funds. She submitted that there was no diversion of income at source by overriding title and it was application of funds as it was part of the passenger service fee like other component of facilitation and only difference was instruction of incurring expenditure for maintaining standards of security prescribed by the relevant competent authorities. 7.7 Lastly, The Ld. CIT(DR) submitted that the assessee has not taken any ground related to PSF(SC) as income in assessment year 2010-11,therefore, the assessee has impliedly accepted that PSF(SC) is an income in that year. According to her, once the assessee has accepted that position, then following the Rule of Consistency, the assessee should not dispute the position in the year under consideration.

Rejoinder by the Assessee

8. In the rejoinder, the Ld. counsel of the assessee submitted that the assessee neither credited the PSF(SC) to the profit and loss account nor same was offered to tax and only subsequent to the standard operating procedure issued by MOCA on 19/01/2009, it offered the income from PSF(SC) in the revised computation of income and that too without prejudice to the main contention that this income was not taxable. 8.1 The Ld. counsel submitted that the Tribunal in the case of Mumbai International airport limited (supra) has considered all the order of the MOCA and the SOP and thus it cannot be said that the Tribunal has cherry picked the clauses. He further submitted that the Tribunal in the case of Mumbai International airport limited (supra) has clearly stated that OM issued by the CBDT to MOCA and the guidance provided by the MOCA on the accounting aspect of PSF(SC) has no authority in the eyes of law. 8.2 He further submitted that security services specifically falls under reserved activity which cannot be carried out by the assessee and hence the understanding by the CBDT and reference by the Ld. CIT DR of section 2(24) and 28 of the Act to the fact that such PSF(SC) is income in the ordinary course of business of the assessee , is misplaced.

8.3 He further submitted that the decision of the Chowringhee Sales Bureau Private Limited (supra) is also distinguishable on the facts. He submitted that in that case, the assessee was an auctioneer and used to issue bills in its own name to the purchaser and did not pay the amount of sales-tax either to the actual owner of the goods or on deposit of the same to the Treasury. Whereas in the present case the assessee is collecting the PSF(SC) through airlines on behalf of the government of India and thus no section 43B of the Act can be applied in the case of the assessee. He further submitted that said argument was also taken by the Department in the case of Mumbai International airport limited (supra) and has been decided in favour of the assessee.

8.4 On the issue of not taking ground of PSF(SC) in assessment year 2010-11, the Ld. counsel submitted that in the assessment year 2010-11 there was a loss in the PSF(SC) account and which was not claimed in the return of income on the same contention that security component was held

by the assessee in the fiduciary capacity. Since the AO did not allow the losses pertaining to PSF(SC), the assessee on a without prejudice basis claimed that losses from PSF(SC) might be allowed, however it never claimed the said loss on account of PSF(SC) in the return of income. The Ld. counsel contended that losses on PSF(SC) if any, might be allowed to it, only on a without prejudice basis and in no event the assessee had impliedly accepted that PSF(SC) is income of the assessee.

9. We have heard the rival submissions and perused the relevant material on record including the decision of the Tribunal Mumbai bench in the case of Mumbai International Airport P. Ltd. (supra).

9.1 In the instant case, the Ld. CIT(DR) has raised issues that additions in question was accepted by the assessee in assessment proceedings and the addition has been made by the Assessing Officer following the opinion expressed by the CBDT. We find that both these issues have been raised before the Tribunal in the case of Mumbai International Airport P. Ltd.(supra). The Tribunal in para-14.8 to para-14.17 of the order discussed the first issue, whether amount could be taxed in the hands of the assessee merely because it was offered to tax during the course of assessment proceeding. The Tribunal answered in negative. The relevant discussion and finding of the Tribunal is reproduced as under:

> "14.8 With regard to the first issue, the brief facts and background brought before us are that in pursuance to process of privatization of airports in India, the assessee company had entered into an agreement in the nature of OMDA with Airport Authority of India to operate, maintain, develop, design, construct, upgrade, modernize, finance and manage the Chhatrapati Shivaji International Airport at Mumbai (hereinafter called 'airport', in short). As per Rule 88 of the Aircraft Rules, 1937, the assessee was entitled to collect a fee termed as 'Passenger Services Fee (PSF) from all the passengers embarking at the airport. The said fee was initially collected by the concerned airline and then handed over to the assessee company for the sake of administrative convenience. As per terms, the PSF was chargeable @ Rs.200 per passenger, out of which Rs.70/- (i.e. 35% of PSF) was for use of assessee company for passenger facilitation services and the balance amount of Rs.130/- (i.e. 65% of PSF) was to be utilized for payment to security agency designated by the central government for providing security services at airport and the said component was called as Passenger Service Fee- Security Component (in short referred to as PSF-SC). The said portion i.e. Rs.130/- (65% of PSF) was deposited in an 'Escrow Account' pending utilization.
>
> 14.9. During the year under consideration, the assessee included passenger facilitation component of PSF (i.e. Rs.70/- being 35% of PSF) as income of the assessee company. But the balance amount of Rs.130/- (i.e. 65%) portion was kept in separate 'Escrow Account' for which separate books of account were maintained in accordance with the Standard Operating Procedure (SOP) formulated by MOCA and, therefore, the same was not included in the income of the assessee company. The assessee company did not include revenue pertaining to PSF- SC as well as the

corresponding expenses in the financial statements of the assessee company. During the course of assessment proceedings, the AO confronted to the assessee, an Office Memorandum issued by CBDT to MOCA and clarification from MOCA wherein it was stated that PSF - SC was also taxable in the hands of assessee and tax was to be recovered from the said funds. Under these circumstances, the assessee finally stated that the said amount may be included in its taxable income. The AO accordingly made addition in the income of the assessee. Being aggrieved, the assessee filed appeal before the Ld. CIT(A) wherein addition was confirmed. Still aggrieved, the assessee filed appeal before the Tribunal. During the course of hearing before us, the preliminary objection of the Ld. CIT-DR was that the assessee once having taken a stand during the course of assessment proceedings that the aforesaid amount was taxable, cannot now turn back and cannot claim it to be not taxable. On the other hand, the assessee's Counsel maintains that the said amount was not included as part of its income in the return filed originally and only during the course of assessment proceedings, because of the pressure made by the assessing officer by showing letters of CBDT and MOCA, the said amount was offered for tax. But the assessment should be done strictly in accordance with law and mere acquiescence of the assessee expressed during the course of assessment proceedings would not alter the true position of law and would not make the aforesaid amount as liable to be taxed in the hands of the assessee, if the same is actually not liable to be taxed as per the provisions of the Income-tax Act.

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

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

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

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

> "In view of the circular No. 14(XI-35) of 1955 dated 11-4- 1955, it was clear that for the purpose of the circular, what should be the guiding factor was whether the proceedings or other particulars before the Income-tax officer at the stage of original assessment disclosed any grounds for relief under section 2(5) (a) (hi) of the Finance Act of 1964 or of the Finance Act of 1965, even though no claim was made for that relief by the assessee at the stage of those proceedings before him.
>
> Even if there is a deviation on a point of law, so far as the circular of the Board is concerned, that circular will be binding on all officers concerned with the execution of the Act and they must carry out their duties in the light of the circular.
>
> In view of this clear position regarding the effect of the circular, it was obvious that in the instant case it was incumbent on the Income-tax officer to advise the assessee to claim relief under section 2(5)(a) if the proceeding or any other particulars before him at the stage of the original assessment indicated that the assessee was entitled to such relief under the provisions of the relevant Finance Act, 1965, so far as the order under reference was concerned..... "

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

> "The authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or on not being properly instructed, is over- assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected[Para 20] 14.13. In the case of CIT vs. Lucknow Public Educational Society 318 ITR 223, it was observed by Honble Allahabad High Court that the income tax department should not take undue advantage of the ignorance of the assessee in view of Board's Circular No. 14(XL-35)/1955, dated 11-4-1955.
>
> 14.14. In the case of Nirmala L Mehta vs CIT 269 ITR 1, Hon'ble Bombay High Court, relying upon Article 265 of Constitution of India held that acquiescence cannot take

away from the taxpayer, the relief he is entitled where tax is levied or collected without authority of law and, therefore, merely because the taxpayer offered a receipt to tax, that cannot take away its right in contending that the said amount was not chargeable to tax.

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

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

14.17. Thus, in view of the aforesaid legal discussion and facts of this case as discussed above, it is held that the amount in question cannot be taxed in the hands of the assessee merely because the same was offered to tax during the course of assessment proceedings under certain circumstances. Under these circumstances, we need to examine and determine whether the impugned amount of PSF-SC collected by the assessee company is actually taxable in the hands of the assessee as per the provisions of Income-tax Act, 1961.

9.2 In the instant case also, the assessee has not filed any income from the PSF-(SC) in the return of income filed and it has been filed during assessment proceeding by way of a revised computation of income that too, without prejudice to the claim that it was not taxable in the hands of the assessee. Thus, respectfully, following the finding of the Tribunal that amount in question cannot be taxed in the hands of the assessee merely because the same was offered to tax during assessment proceedings under certain circumstances, we reject the contention of the Ld. CIT(DR) that once the assessee itself has offered the income from PSF(SC), it cannot be allowed to contest the issue in further appellate proceedings .

10. The second issue of binding legal force of the opinion expressed by the CBDT and MOCA has also been discussed by the Tribunal in para-14.18 to para-14.24. The Tribunal concluded that the CBDT or MOCA has no authority in the eyes of law to hold the amount of security component as taxable in the hands of the assessee. The relevant discussion in the order of the Tribunal (supra) is reproduced as under:

"14.18 The aforesaid discussion takes us to the second issue wherein we have been called upon to decide about the binding legal force of the opinion expressed by CBDT and MOCA vide their office memorandum/ instructions for determining taxability of the impugned amount. It is admitted fact on record that the assessee company collected PSF-SC in view of the order issued by MOCA vide its order dated 09th May, 2006. The terms of the order have been modified / amended from time to time as per the requirements. One such order issued by MOCA was issued on 20th June, 2007. Subsequently, CBDT issued an Office Memorandum dated 30/06/2008 in pursuance to the request made by the concerned officials of MOCA regarding taxability of PSF-SC, wherein it has been observed that since the assessee company was collecting this amount in the course of business and assessee was rendering facilitation and securities services whether in-house or outsourced, therefore, the amount collected by the assessee in the form of PSF-SC was in the nature of income of the assessee and liable to be taxed in its hands. In support of its view, reliance has been placed by the Board on the judgment of Honble Supreme Court in the case of Chowringhee Sales Bureau vs CIT 87 ITR 547 (SC) with a view to fortify its opinion. Subsequently, Ministry of Civil Aviation's office issued an order dated 19-01-2009 laying down accounting/audit procedure in respect of PSF-SC. It was intended to act as Standard Operating Procedure (SOP) for accounting / audit of PSF-SC by the airport operator. In the aforesaid document, the whole procedure was duly explained how the amount has to be collected and to be kept in escrow account and to be disbursed for the purpose of security. Relying upon the Office Memorandum issued by the CBDT dated 30-06-2008, it was mentioned therein that the tax component may be charged to the PSF-SC account in proportion to its liability on standalone basis. The assessee was of the opinion that the aforesaid amount was not taxable in the hands of the assessee company, and therefore, while filing the return the same was not included in the taxable income by the assessee. But during the course of assessment proceedings, the AO was of the opinion that the said amount was taxable in the hands of the assessee in view of Office Memorandum of CBDT dated 30- 06- 2008 and instructions dated 19-01-2009 issued by MOCA. With a view to clarify the situation, representation was made before the CBDT as well as MOCA. In response, MOCA issued a letter dated 15-11-2010 wherein it was stated that the matter was examined with the Ministry of Finance and accordingly it is clarified that the whole amount of PSF - SC including security component was revenue receipt, and thus it was taxable under the Income-tax Act.

14.19 The assessee challenged before us, the validity and binding force of the aforesaid Office Memorandum issued by the CBDT and clarification received by MOCA. It has been noted by us firstly that in none of these documents, there seems to have been made any application of mind by the concerned authorities while expressing their opinion. None of the authorities have considered the aspect that the impugned amount was collected in the fiduciary capacity by the assessee. None of the authorities have stated that under what provisions of law, the aforesaid amount can be brought to tax in the hands of the assessee. The CBDT in its Office Memorandum

has made a reference to the judgment of the Hon'ble Supreme Court in the case of Chowringhee Sales Bureau (supra). But facts of that case have not been discussed. The aforesaid judgment has different facts, wherein, the amount of sales-tax was received by the said assessee and deposited in its bank account. The funds got mixed in assessee's accounts. Thus, in case of non-payment by the said assessee, the same became income of the seller (the said assessee), whereas the facts are totally different in the case before us. The amount here was collected purely in fiduciary capacity and the same was deposited in escrow account on which assessee had no control at all; the assessee had no discretion at all upon its usage. No reasoning has been made out by the CBDT while issuing its opinion as to how the said judgment was applicable on the facts of this case. It is noted by us that aforesaid judgment came up for consideration before many courts wherein its true meaning and scope of its applicability was explained time to time. In one such matter having similar facts as to the assessee before us, Hon'ble Allahabad High Court explained correct application of aforesaid judgment in the case of CIT vs. Sita Ram Sri Kishan Das 141 ITR 685 (All). In this case, the facts were that said assessee was a commission agent and was accountable for the recovery (called as Market Fee) which he made from the sellers of agricultural produce in terms of Krishi Utpadan Mandi Rules framed under the U.P. Krishi Utpadan Mandi Adhiniyam, 1964. The Revenue treated the amount so collected by the agent as part of its taxable income being a trading receipt in view of judgment of Hon'ble Supreme Court in the case of Chowringhee Sales Bureau vs CIT 87 ITR 547 (SC), supra. After analyzing the facts of the case, it was held by the Hon'ble Court that the market fee realized by the commission agent does not form part of his trading receipt as he (the commission agent) held this amount only as a trustee for and on behalf of the Market Committee. Hon Tile Court applied the judgment of Hon'ble Supreme Court in the case of CIT vs. Sitaldas Tirathdas 41 ITR 367 (SC) and distinguished that of Chowringhee Sales Bureau P. Ltd. vs. CIT, supra.

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

14.21 Apart from that, the binding effect of Office Memorandum issued by CBDT, clarification issued by MOCA is also under question. It has been argued that it has been held by Hon'ble Supreme Court many times that circulars issued by the Board are binding upon the authorities working under it, viz. the AO, etc. but these are not binding upon the appellate authorities including Income Tax Appellate Tribunal. We have examined this aspect also carefully. It is noted that as per section 119 of the Act, the CBDT has been empowered by the legislature to issue orders, instructions or directions to all the Income-tax authorities working under it for proper administration of the I.T. Act. And it has also been provided that this shall be binding upon the Income-tax authorities. But it is further noted that a proviso has been added to sub section (1) of section 119 which says that no such orders, instructions or directions shall be issued:- (a) so as to require any income-

tax authority to make a particular assessment or to dispose a particular case in a particular manner; or (b) so as to interfere with the discretion of the Commissioner (Appeals) in exercise of his appellate functions . It is clear from the perusal of aforesaid proviso that neither the Board has power to decide the taxability of a particular receipt nor has it got any power to interfere with the appellate functions of Commissioner (Appeals), which is judicial in nature. Thus, in view of the aforesaid legal scenario coupled with facts of this case as discussed above, we have strong doubts if at all the Board could have issued any instructions to decide the taxability of amount collected by the assessee company on account of PSF - SC in a purely fiduciary capacity. This task of determination of taxability has been left by the legislature upon the shoulders of the designated AO, who is obliged under the law to determine the same strictly in accordance with the provisions of the Income-tax Act, 1961.

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

14.23 It is noted by us that this issue is not res integra, as it has been settled by Hon'ble jurisdictional High Court and Hon'ble Supreme Court in many cases. It was held by Hon'ble Bombay High Court in the case of Banque Nationale De Paris vs. CIT (supra) that circulars cannot override or detract from the provisions of the Act in as much as section 119 of the Act has empowered the CBDT to issue orders, instructions or directions for the proper administration of the Act. Hon'ble High Court has taken into consideration various earlier judgments of Hon'ble Supreme Court on this issue. Similarly, the Hon'ble Supreme Court in the case of CIT Vs. Hero Cycles Pvt. Ltd (supra) held that circulars can bind the Income-tax Officer but will not bind the appellate authority or the Tribunal or the Court or even the assessee. It is further noted that law in this regard was further analyzed by Hon'ble Supreme Court in the case of UCO Bank (supra). It was observed by the Hon'ble Supreme Court that CBDT has power to tone down the rigour of the law and ensure enforcement of its provisions of issuing circulars. The Board has been given for the purpose of just, proper and efficient management of work of assessment. However, these are not meant for contradicting or nullifying any provision of the statute. Relying upon its earlier judgment comprising of three judges in the case of Keshavji Ravji & Co vs CIT 183 ITR 1 (SC), it was inter-alia observed that Board cannot pre-empt judicial interpretation and the scope and ambit of a provision of the Act. Also, a circular cannot impose on the taxpayer a burden higher than what the Act itself on a true interpretation, envisages. The task of interpretation of the law is exclusively the domain of the Courts. However, the Board has the statutory power u/s 119 to tone down the rigour of the law for the benefit of the assessee by issuing circulars to ensure proper administration of the fiscal statute and such circulars would be binding on the authorities enshrined in the Act.

14.24 Thus, taking guidance from the aforesaid legal discussion as has been clarified by the Hon'ble jurisdictional High Court as well as by Hon'ble Supreme Court, it is clear that the Office Memorandum issued by CBDT to MOCA cannot hold an amount as taxable, if the same is otherwise not taxable as per the provisions of the Income-tax Act, 1961 Further, as far as the clarification issued by MOCA is concerned, it is noted that the role of MOCA was confined to issuing Standard Operating Procedures and other guidelines to the airport operators to ensure that funds collected by the assessee company in the fiduciary capacity on behalf of MOCA are properly kept and disbursed for the designated purposes only. It has no jurisdiction to determine the taxability of the impugned amount. It clearly had no jurisdiction in holding the same as taxable and, therefore, to that extent its order / clarification has no authority in the eyes of law and the same has been rightly ignored by the assessee as well as by the appellate courts while determining the taxability of the impugned amount."

11. In the instant case also, the Ld. CIT(DR) advanced civil arguments that the opinion of the CBDT was binding on the Assessing Officer and should be considered as position of law explained by the CBDT. Thus, respectfully, following the finding of the Tribunal(supra), we hold that opinion of the CBDT on the issue in dispute is not binding on the Tribunal and issue in dispute has to be decided by the Tribunal in accordance with law. 11.1 The contention of the Ld. CIT(DR) that in assessment year 2010-11 the assessee has impliedly accepted the PSF(SC) as its income is not found to be correct. The Ld. counsel submitted before us that in assessment year 2010-11 the expenses incurred towards security component were more than the amount received. He submitted that expenditure being excess over the receipt there was no income and it was actually a loss, but this loss was not claimed in the return of income filed. It was only claimed during assessment proceeding without prejudice to the claim of the assessee that income from PSF(SC) was not taxable in the hands of the assessee. We find the claim of the loss in assessment year 2010-11 has only been made, to take care of the situation in case the security component of PSF would have been held taxable. Thus in our opinion, the assessee has not accepted that PSF(SC) was taxable in the hands of the assessee and accordingly ,the rule of consistency cited by the Ld. CIT(DR) cannot be applied in the instant case before us.

11.2 The argument of the Ld. CIT(DR) that in view of the decision of the Hon'ble Supreme Court in the case of Chowrangi Sales Bureau (supra), the receipt is taxable in the hands of the assessee, has also been considered by the Tribunal (supra) in para 14.19 of the order. The Tribunal (supra) has distinguished the facts of the case of Chowangiee Sales Bureau (supra). The relevant finding of the Tribunal has already been reproduced by us in preceding paras and, therefore, we are not reproducing again. In the said case, amount of sales tax was received by the assessee and deposited in its bank account and the funds were mixed in assessee's account. Thus, in that case non-payment by the said assessee was held to be income of the seller (said assessee). In the instant case, taxability of the amount of PSF(SC) held to be examined on the ground of fiduciary capacity or income by way of overriding title.

11.3 The Ld. CIT(DR) contended that the PSF(SC) amount received was income in the nature of business and it was not received in fiducial capacity. She also further argued that amount was not received by diversion of income by overriding title and it was application of funds. The identical

issues were raised in the case of Mumbai international airport private limited (supra). 11.4 Thus, , after dealing with initial objection of the Ld. CIT(DR), in substance, the issues left before us are that whether the amount of PSF(SC) received was in 'fiduciary capacity' or 'diversion of income by overriding title'.

11.5 First, we examine the existence of 'fiduciary capacity' in the transactions before us. During the year under consideration, the issue of PSF(SC) was governed primarily by various orders issued by the 'MOCA'. The said orders have been discussed in the order of Tribunal in the case of Mumbai International Airport P Ltd. (supra). The first such provision has been made in Rule 88 of the Aircraft Rule which reads as under:

> "88. Passenger Service Fee - The Licensee is entitled to collect fees to be called as Passenger Service Fee from the embarking passengers at such rate as the Central Government may specify and is also liable to pay for security component to any security agency designated by the Central Government for providing the security service.
>
> Provided that in respect of a major airport such rate shall be as determined under clause (c) of sub-section (1) of section 13 of the Airports Economic Regulatory Authority of India Act, 2008."

11.6 In pursuance of the above Rule, the 'MOCA' issued an order dated 9/05/2006, a copy of which is available on page 433 of the assesses paper book dated 01/09/2018. The relevant part of the order is reproduced as under:

> "Subject: Collection of Passenger Service Fee (PSF) at. Greenfield/Private airports - regarding Consequent to allowing private companies, Joint Venture. Companies to own and operate airports in the Country, the manner and mode of collection of Passenger Service Fee (PSF) at airports have been engaging the attention of the Government for some time. The matter has been deliberated with Airports Authority of India and other airport operators and it has now been decided that:-
>
> i. CISF will be deployed as per the assessment of BCAS at airports operated by JVCs or private operators also.
>
> ii. Passenger Service Fee (PSF) at airports would he collected by the respective Airport Operator, which could be AM, JVC, or a private operator.
>
> iii. The amount of PSF to be collected will he fixed by the Ministry of Civil Aviation. The amount will continue to be Rs.200/- per passenger till further orders. The airport operator would retain Rs.70/- towards passenger facilitation. An Escrow account would be opened whenever the airport operator is a JVC or private operator. This account will be operated by the airport operator (not by AM). Rs.130/- of the PSF collected per passenger by such airport operator would be deposited in the

> Escrow account by the Airport Operator for payments to be made to CISF. The Escrow account would be subject to Government Audit of CAG.
>
> iv. In case any amount remains, this will be transferred to AAI by the airport operator through a process of mutual consultation for payment to CISF deployed for security purposes at other airports. In case of a dispute, the matter may be referred to the Ministry of Civil Aviation whose decision will be treated as final and binding on both parties.
>
> 2. The new procedure will be effective from 01.04.2006.
>
> 3. This issues with the approval of the Minister of State for Civil Aviation (Independent charge). "

(emphasis supplied externally) 11.7 We note that in this order has provided for opening of an escrow account for deposit of PSF (SC) amount but the authority to operate the 'Escrow Account' has been given to the assessee. 11.8 Thereafter, another order dated 20/06/2007 has been passed by the MOCA, a copy of which is available on page 436 of the assessee's paper book dated 09/01/2018. According to this order the PSF(SC) collected at airport operated by JVC or a private operator was directed to be utilized at the airport concerned only to meet the security related expenses of the airport.

11.9 The same orders were applicable in the case of PSF(SC) received by the Mumbai International Airports P ltd (Supra). The Tribunal in view of the above orders concluded that the amount of PSF(SC) was collected by MIAL on behalf of MOCA. The relevant finding of the Tribunal is reproduced as under:

> "14.32 Thus, aforesaid rules and orders issued by MOCA clearly stipulates that security component of passenger service fee was meant exclusively to be utilized at the airport concerned, only to meet security related expenses of that airport. The security agency designated in this regard was CISF. It is further noted that the funds so collected were to be deposited in an Escrow account which was subject to the government audit of CAG. Further, in case of any amount was left in the said account, it was to be mandatorily transferred to Airport Authority of India by the airport operator. Thus, from the above said facts and circumstances of the case and terms and conditions it is clear that the said amount was collected by the assessee on behalf of MOCA to be disbursed for security purposes to CISF deployed by the Ministry of Home Affairs. The amount was collected and retained purely in fiduciary capacity. The assessee had no discretion or freedom at all to utilize the aforesaid amount for any other purposes other than the designated purpose of meeting security expenses. So much so, even the surplus left if any, was not at the disposal of the assessee company but was to be mandatorily transferred to the account of Airport Authority of India as per the prescribed procedure. Under these circumstances, it is clear that assessee merely acted as a conduit or a trustee for collection and disposal of the

> impugned amount of PSF-SC. Under these circumstances, the aforesaid amount could not have been characterized as income' u/s 2(24), section 5 or any other provisions of the Income-tax Act, 1961."

(emphasis supplied externally) 11.10 Thus, in above cases the Tribunal observed that the assessee has no freedom to utilize the amount or even surplus was not at the disposal of the assessee. But in the instant case, we found that certain facts differ from the facts in the case of MIAL. In the instant case, during the year the assessee entered into agreement for operating of Escrow Account with the Bank. A copy of said agreement has been produced before the Bench by the Ld. Counsel. We find that on the directions of the assessee, the bank invested the funds (which were lying in Escrow Account), into Mutual funds and earned dividend income. A finding of dividend income of Rs. 233.53 Lakhs earned by the assessee on PSF(SC) amount has been given by the Assessing Officer in para-3.6 of the assessment order, which is reproduced as under:

> "3.6 In this way the assessee company added income of Rs.7218.80 lakh out of the receipts of Passenger Services Fees of Rs.15044.74 lakh and Rs.853.84 lakhs out of the other income of Rs.1198.71 lakhs under the head 'Passenger Services Fee (SC) Account' after claiming the expenses detailed as above and exemption of Rs.233.53 lakh towards Dividend received on Mutual Funds-Daily Div. Scheme. In support of claim of the above detailed expenses the assessee company filed a separate independent Audit Report of M/s. Vijay Sanghi & Company as per their letter No. 043/2009 dated 9th June, 2009."

11.11 We also note that the Ld. CIT(A) in para-6.2 of the order for A.Y. 2009-10 has also given the finding to the effect that assessee received dividend income from the investment made out of surplus PSF(SC) income with mutual funds. When the ld. Counsel was questioned by the Bench as whether the dividend income was utilized by the assessee or it was deposited in Escrow Account for utilization towards security expenses, the Ld. Counsel could not give any satisfactory reply. Thus, it is not clear before us as who enjoyed the dividend income. Further, we also note that the investment in mutual fund was not on the direction of MOCA.

11.12 The above facts make a material difference from the facts recorded by the Tribunal in the case of MIAL(supra). In the case of MIAL(supra) the Tribunal observed that that the assessee had no discretion or freedom to utilize the PSF(SC) amount for any other purpose than designated purpose of security, whereas in the instant case surplus funds out of PSF(SC) have been admittedly invested in mutual funds, which is not a designated purpose.

11.13 The Tribunal (supra) in the case of MIAL also considered the Standard Operating Procedure (SOP) dated 19/01/2009 issued by the MOCA. The SOP has been issued during last quarter of the period relevant to AY 2009-10. The said SOP has been reproduced by the Tribunal (supra) as under:

> "14.33 It is noted that subsequently MOCA issued another order dated 19-01-2009 containing Standard Operating Procedures for accounting / audit of Passenger Service Fee (Security Component) by the airport operators. The aforesaid order

contained whole procedure in detail for collection and disbursement of the said amount. Relevant portion of the same is reproduced hereunder, for the sake of better clarity on facts related to conditions attached with regard to collection and disbursement of the aforesaid amount:

"2. Nature of Security component of PSF:

2.1 Aviation security is an activity reserved for the Government of India. Force deployment at the airports, security requirements including the requirement of capital items and specifications thereof are laid down by the Government/Bureau of Civil Aviation Security (BCAS). As stated above, PSF is levied under Rule 88 of the Aircraft Rules, 1937 and covers security component as well as facilitation. While the fee is collected by the license of the airports, i.e., the airport operator, through the airlines, the security component thereof, which constitutes 65% of the total amount, can be used only in terms of directions issued by the Government/ BCAS, from time to time. The amount collected by the airport operator, which is kept separately in an escrow account, is thus held in fiduciary capacity. 2.2. Since the amount is held by the airport operator in fiduciary capacity for the Government, the accounts thereof would have to be maintained separately in accordance with the procedure laid down by the Government and have to be offered for audit by the Comptroller & Auditory General of India (CAG).

3. Escrow Account Operating Procedure:

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

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

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

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

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

ii) Withdrawal from PSF (SC) Account: The Escrow Bank shall allow withdrawal by JVC/Private Operators of amounts deposited into the PSF (SC) account only towards the following purposes, in the order of priority by descending under:

a. To pay amounts towards taxes, including Income Tax on PSF(SC) income as per provisions of Income Tax Act, 1961, Service Tax or any other statutory does.

b. To pay for security related expenses to Central Industrial Security Force (CISF).

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

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

11.14 In view of the SOP, the Tribunal (supra) concluded as under:

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

11.15 Thus, the Tribunal concluded that the funds of PSF(SC) was held by the MIAL in fiduciary capacity on the premise that amount of surplus left in the said account could not have been utilized for any purpose other than security related expenses. Before, us the Ld. Counsel though cited many decisions in written submission, he confined himself mainly to the decision of the Tribunal in the case of Mumbai International Airports P. Ltd.(supra) and the decisions discussed in that, to support his claim of fiduciary capacity, and thus we are discussing the other cases cited by the Ld. Counsel in written submission. 11.16 When we compare the facts of the case of Mumbai International Airports P ltd (supra) with the facts of the present case, we find that in present case, facts are slightly different and surplus funds have been deployed in mutual funds and it is not clear who has enjoyed the dividend income. Thus, straight way we can not follow the finding of the Tribunal (supra) the funds of PSF(SC) were held by the assessing fiduciary capacity. 11.17 Further, on the issue of

diversion of income by overriding title also the Ld. Counsel in his arguments relied heavily on the order of the Tribunal (supra) and decisions cited therein, rather than on the decisions cited in written submission. We find that the Tribunal(supra) held that amount of PSF(SC) as diversion of income by overriding title. The relevant finding of the Tribunal is reproduced as under:

> "14.35. It has further been argued before us that the impugned amount would not be income in the hands of the assessee company in view of the Doctrine of 'Diversion of Income by Overriding Title'. Few judgments have been relied upon before us in support of this argument, as mentioned above in the earlier part of our order. It has been vehemently argued by the Ld. Counsel of the assessee that the impugned amount could not have been brought to tax in view of diversion of income at the source.
>
> 14.36. Per contra, the stand of the Revenue has been that the amount has been disbursed on account of security arrangements, and therefore it amounts to 'application' of income and not 'diversion' of income.
>
> 14.37. We have carefully analyzed legal intricacies and nuances involved here in this case. Law in this regard was clarified and Hon'ble Supreme Court way back in its landmark judgment in the case of CIT Vs. Sitaldas Tirathdas 41 ITR 367 (SC) which is still followed in many other judgments by various courts all over the country. The relevant part of the judgment laying down an acid test to decide such issues is reproduced hereunder:
>
> "In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and. an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it does so, not as part of his income, but for and on behalf of the person to whom it is payable."

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

after analyzing various other judgments suggested following principles

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

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

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

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

14.39. Turning back to the facts of the case before us, if we apply the aforesaid principles, we will find that the impugned amount cannot be treated as taxable income in the hands of the assessee. If we apply the first principle, we find that as soon as the amount was collected from the passengers @ Rs,200/- per ticket, a portion of it, i.e. Rs.130/- per ticket became payable to CISF and/or any other agency designated for the purposes of security at the airport. The same was liable to be deposited in a separate 'Escrow Account' and the assessee had no right, whatsoever, in the same account. The aforesaid amount was axed or sliced at its very source. The amount was permitted or directed to be collected from the passengers with this clear understanding and prior stipulation that 65% of the same is meant for security agencies. Thus, the assessee merely acted as a collection agent. Thus, applying the first principle, the impugned amount would fall in the category of diversion of income.

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

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

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

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

(emphasis supplied externally)

27. While concluding that PSF(SC) is an income by overriding of title , the Tribunal (supra) has noted that no income was retained by the assessee. But in present case, this fact is not getting ascertained from the orders of lower authorities as well as submission of the assessee and Ld. Counsel also could clear this fact as how the dividend income earned on investment made out of surplus fund has been utilized. Thus, the above finding of Tribunal (supra) also cannot be applied straightway in the instant case in view of inconsistent facts pointed out above by us. The tribunal in Mumbai International Airport P ltd (supra) held the income as not taxable in the hands of the assessee with finding as under:

> "14.44 Before parting with, we have also analyzed the facts / about utilization of the impugned amount. The Escrow Account maintained by the assessee is simply a pool created by the MOCA through assessee for meeting security expenses. Under these circumstances, if at all any income can be computed, that would be possible only if any surplus arises, which is not possible to happen since entire amount collected by

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

11.18 During the hearing, the Ld. Counsel was asked to produce a statement of 'Escrow Account' with narration of entries to assertion whether; the assessee has invested the funds for purposes other than designated purpose of security. But the Ld. counsel provided copy of statement for a period of one month that too without any narration, thus it is not possible at our end to determine whether the assessee utilized the PSF(SC) funds for its own benefit or according to its choice. It is vey crucial to determine that how the assessee utilized the funds lying in 'Escrow Account' and whether the Dividend income was enjoyed by the asssessee. This factual finding would determine whether the PSF(SC) amount was held in fiduciary capacity or it was diversion of income by overriding title. In view of above facts and circumstances, we feel it appropriate to restore the issue to the file of the Assessing Officer for deciding the taxability of income from PSF(SC) in the light of principles or test laid down by various courts in decisions discussed in the case of MIAL(supra) for determining existence of fiduciary capacity and diversion of income by overriding title.

12. Accordingly, we feel appropriate to restore the matter of determining taxability of PSF(SC) income to the file of the assessing Officer , with the direction to the assessee to produce entire statement of the escrow account maintained for PSF(SC) along with narration of every entry so that utilization of the funds of PSF(SC) for any purposes by the assessee(including investment in mutual funds) other than designated purposes can be filtered out. The assessee shall be free to furnish any other documents to support its claim. The Assessing Officer is further directed to examine any other benefit of deduction like collection fee at the rate of 2.5 % charges by the airlines or benefit of depreciation on capital asset purchased for security purpose etc or benefit of tax credit against tax deducted at source on PSF(SC) or any other benefit taken out of the funds received against PSF(SC). The Assessing Officer may carry out necessary enquiries as deemed fit in the matter. Accordingly, the ground No. 2 of the appeal of the assessee is allowed for statistical purposes.

13. Since, we have already restored the issue of existence of fiduciary capacity or diversion of income by overriding title to the file of the Assessing Officer for deciding afresh, we are not required to give any finding on the other arguments of the Ld. CIT(DR) including the arguments that the decision in the case of Mumbai International airport private limited(supra) was based on certain projections.

14. The ground No. 2 of the appeal of the assessee and ground No. 2 Of the appeal of the Revenue relates to disallowance made by the Assessing Officer under section 40(a)(ia) in respect of provision of Rs.7,51,65,000/-made at the year end on estimate basis, director sitting fee etc. The Revenue is aggrieved with the finding of the Ld. CIT-(A) that no tax is deductible on sitting fee of Rs. 12.20 Lakhs and direction to delete the addition of Rs. 8.31 lakhs subject to verification of deduction of tax, whereas the assessee is aggrieved with the disallowance under section 40(a)(ia) sustained in respect of the year-end provisions.

15. The facts qua the addition are that the Assessing Officer observed various expenses amounting to Rs. 759.75 Lakhs, like cargo handling charges(Rs. 457.53 Lakhs), consultancy horticulture (Rs. 11.80 Lakhs), equipment hire (Rs. 53.04 Lakhs), housekeeping (Rs. 99.55 Lakhs) , operation security cargo(Rs. 2.73 Lakhs), audit fee (Rs. 27.00 Lakhs), advertisement (Rs. 87.59 Lakhs), recruitment employee verification fee (Rs. 8.31 Lakhs), sitting fee board meeting (Rs. 12.20 Lakhs) and found that no tax was deducted though same was liable for TDS according to him, thus, he disallowed the said sum of Rs. 759.75 Lakhs in terms of section 40(a)(ia) of the Act. 15.1 The Ld. CIT-(A) grouped the above expenses under four heads as under:

Nature of Expenditure	Amount (in Lakhs)
Various Provisions	701.65
Sponsorship Fees	50.00
Recruitment Fees	8.31
Sitting fees	12.20

15.2 Regarding various provisions, the assessee submitted that same were created on best estimate basis following the accounting standards. Regarding board sitting fees, it was submitted that in assessee's own case, against the order under section 201(1) and 201(1A) of the Act , the concerned

commissioner of Income-tax (appeals) held that no tax was deductible on payments made to directors as sitting fee for attending board meetings. Regarding recruitment verification fee, it was submitted that tax was deducted at the time of booking of the expenses in another general Ledger.

15.3 The Ld. CIT-(A) deleted the addition in respect of sitting fee of Rs. 12.20 Lacs paid to directors. He also allowed relief in respect of recruitment expenses amounting to Rs. 8.31 lakhs subject to verification of the contention of the assessee that tax was deducted at the time of booking of the expenses in another general Ledger. The disallowance in respect of year-end provisions was confirmed, however the Assessing Officer was directed to verify the deduction of tax at source on the above amount and payment thereof to the government treasury by the assessee in the next year, then allow the deduction of Rs.751.65 lakhs in next year.

16. Before us, the Ld. counsel submitted that insofar as items of year-end provisions are concerned, the assessee has deducted tax at source in the subsequent years and deposited it with the government account. According to the Ld. counsel in the current year provisions made on best estimate basis have been disallowed and in subsequent year no expenses have been claimed by the assessee, because of bills pertaining to such expenses had been adjusted against the provisions and thus it will lead to double disallowance. The Ld. counsel, without prejudice to the contention that TDS was not required to deducted on year-end provisions, submitted that in terms of section 40(a)(ia) of the Act, even if taxes not deducted at source on any sum, the said sum will be allowed as deduction in the year in which that TDS is deducted and paid.

17. Without prejudice to above, the Ld. counsel submitted that the Assessing Officer be directed to verify that the if the recipient has offered to tax income from the assessee and discharged the tax liability, in such a case the assessee should not be considered at assessee in default and deduction be allowed to it in the year in which tax is deducted.

18. On the other hand, Ld. CIT(DR) on the issue of sitting fee submitted that an employer needs to deduct TDS on salary paid to employees as per provisions of section 192 of the Act and the term employee in its scope also include managing director. She referred to the new clause i.e. (1)(ba) of section 194J of the Act inserted as on 01/07/2012 by the Finance Act, 2012, which reads that any remuneration of fees or commission by whatever name called, other than those on which tax is deductible under section 192 of the Act, to a director of a company, shall be liable to deduct at the rate of 10% . According to her, this insertion is clarificatory in nature and therefore it would be retrospective in application. She submitted that even prior to the amendment, the sitting fee paid was in the nature of fee for technical services and thus it was liable for deduction at the rate of 10% under section 194J of the Act. In respect of recruitment verification fee, she referred to circular No. 715 dated 08/08/1995 and submitted that in terms of question No. 12, it is clearly specified that payment to a recruitment agency would be subject to TDS under section 194J of the Act. According to her, this was also applicable for advertisement expenses paid to advertisement agency, housekeeping, consultancy, audit fee etc as clarified by the Circular No. 715 dated 08/08/1995. In respect of year-end provisions, she submitted that respective party has already rendered the services and the same were identifiable and thus the assessee was required to deduct tax at source.

19. In the rejoinder, the Ld. counsel of the assessee submitted that in respect of the sitting fee, the amendment to section 194J has been inserted from 01/07/2012 whereas the financial year involved in the case is 2007-08 and the assessee cannot be expected to comply with the provisions inserted subsequently and cannot be penalized for the same.

20. We have heard the rival submission and perused the relevant material on record. As far as ground of the Revenue related to disallowance of sitting fee is concerned, the relevant clause (1)(ba) of section 194J reads as under:

> "Fees for professional or technical services.63 194J. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of--
>
> (a) .....
>
> (b) .....
>
> (ba) any remuneration or fees or commission by whatever name called, other than those on which tax is deductible under section 192, to a director of a company, or
>
> (c) .....
>
> (d) ....."

21. The above clause (ba) has been inserted w.e.f. 01/07/2012 whereas year under consideration in the instant case is previous year 2007-08 and thus the assessee cannot be expected to take into account the subsequent amendment and comply the same for deduction of tax at source. The Ld. counsel of the assessee further submitted that the Revenue has not filed any appeal against the order of the Ld. Commissioner of Income-tax(A)-XXX, New Delhi, who while deciding the appeal of the assessee against order under section 201(1) and 201(1A) of the Act ,held that no tax was deductible on sitting fee paid to director. The Ld. CIT(DR) has not controverted the above fact of not filing appeal against the order of Ld. Commissioner of Income-tax (Appeals) -XXX, New Delhi. In view of the facts and circumstances, we uphold the order of the Ld. CIT-(A) on the issue in dispute. 21.1 As far as the issue of recruitment expenses amounting to Rs. 8.31 lakhs is concerned, the Ld. CIT-(A) held as under:

> 6.2.3 As regards the recruitment expenses amounting to Rs. 8.31 lacs, the appellant submits that tax has been deducted at the time of booking the expenses in another general ledger account which was merely transferred to another general there is no case for disallowance u/s 40(a)(ia). The AO is directed to verify the above contention of the appellant from the books of account and to delete the impugned addition of Rs.8.31 lakhs if/the appellant's contention is found to be correct.

21.2. In our opinion, the finding of the Ld. CIT-(A) on the issue in dispute is well reasoned as he has directed the Assessing Officer to verify the fact of deduction of tax at source already done by the assessee. We do not find any error in the said direction of the Ld. CIT-(A) and, accordingly, we uphold the same. 21.3 As regard to the year-end provisions, the Ld. CIT-(A) has observed as under:

"6.2 I have carefully considered the assessment order and the submissions of the Ld. AR on the above issue. As regards the various provisions and sponsorship fees, considering their nature I am of the view that tax was deductible thereon. The appellant has also not disputed this. However, the point of time for deduction at source is only in dispute as per the primary contention of the appellant. The appellant referred to the decision of the Mumbai Tribunal in the case of IDBI Bank reported in 107 ITD 45 to support its argument that when the payee is not determinable the mechanism for deduction of tax at source fails and therefore the appellant cannot be expected to deduct tax till the payee is known and a valid claim for the payment is made by way of invoice or otherwise by the vendor / service provider.

6.2.1 As regards the appellant's second contention, recently the Mumbai Bench of the Tribunal has held in the case of Golden Stables Lifestyle Centre P. Ltd. (ITA No. 5145/M/2009) that the amendment to section 40(a)(ia) by Finance Act, 2010 is clarificatory in nature and therefore, retrospectively applicable. However, the amended provision will apply only where tax has been deducted during the financial year but paid in the next financial year before the due date of filing the return. In the present case, the appellant has not substantiated from its accounts that tax deduction was made during the previous year. Since the payment of TDS has been made in the next year, the appellant may have passed the entries for deduction also in the next year. Under the circumstances, the impugned addition of Rs.751.65 crores on account of various provisions and sponsorship fees made in the assessment order for the year under consideration is confirmed. The AO is directed to verify if the deduction of tax at source on the above amount and payment thereof to the Government treasury has been done by the appellant in the next year and if so, to allow deduction of the above amount of Rs.751.65 crores in the next year.

21.4 We have observed that expenses are of the nature where parties are identified, as those parties have already rendered services to the assessee. Thus the contention of the assessee that parties were not identifiable in the year-end provisions made and therefore tax was not deducted at source and, is not tenable. 21.5 In respect of the alternative plea of the Ld. counsel to allow the deduction in subsequent year, we find that Ld. CIT-(A) has already taken into consideration the alternative plea of the assessee to allow the deduction in subsequent year and accordingly directed the Assessing Officer. The Revenue has not filed any appeal on that issue. In our opinion, the finding of the Ld. CIT-(A) on the issue in dispute is well reasoned and no further interference is required. Accordingly we uphold the same.

22. The ground No. 2 of the appeal of assessee is accordingly, allowed, and ground No. 2 of the appeal of Revenue is dismissed.

23. The ground No. 3 of the appeal of the assessee relates to disallowance of Rs.2,36,70,000/-under section 14A read with Rule 8D of the Income-tax Rules, 1962.

24. The Ld. counsel further submitted that during the year under consideration investments were only in mutual funds-daily dividend scheme and there was no actual cost incurred since the dividend was directly reinvested in the mutual funds. 24.1 The Ld. counsel of the assessee submitted that the assessee had not incurred any expenditure in relation to earning exempt income and therefore in view of the Hon'ble Supreme Court is in in the case of Godrej Boyce manufacturing Co Ltd versus DCIT (394 ITR 449) and Maxopp Investment Ltd. Vs. CIT (203 Taxman

364), no disallowance is warranted under section 14A of the Act.

24.2 The Ld. counsel further submitted that the assessee also submitted without prejudice working before the Assessing Officer stating that if at all disallowance had to be made, then same should be restricted to Rs. 4.64 lakh and the Assessing Officer had not recorded any satisfaction on the said working of disallowance submitted by the assessee and therefore relying on the decision of the Hon'ble Delhi High Court in the case of HT Media Ltd versus Pr. CIT (85 taxmann.com 113), the disallowance under section 14A of the Act be deleted on account of administrative expenses under rule 8D(iii) of the Act. 24.3 Alternatively, the Ld. counsel submitted that this was the first year of Rule 8D made applicable and, thereafter, there has been judicial pronouncement on the same, thus, the matter might be restored to the Assessing Officer and assessee would provide a working of the assesses accounts.

24.4 Ld. counsel further submitted that during the year under consideration the assessee made only two strategic investment (Delhi Aetropolice Private Limited Rs. 10.00 lakhs and DIAL Cargo Private Limited Rs. 10.00 Lakhs) from which no dividend was received and the applying the ratio of the special bench of the Tribunal in the case of ACIT Vs. Vireet Investment Private Limited(165 ITD 27), only investment yielding exempt income should be considered for computing average value of investment and thus the Assessing Officer should be directed to exclude those investment from computing disallowance under section 14A of the Act.

25. The Ld. CIT(DR) referred to provisions of section 14A of the Act, explanatory memorandum issued by the Finance Bill, 2001 and amendment in provisions of section 14A by the Finance Act, 2006. She also referred to circular No. 14/2006 dated 28/12/2006. On the issue of recording dis-satisfaction on the correctness of the claim of the assessee, she submitted that the Assessing Officer has sufficiently demonstrated that he was not satisfied with the claim of the assessee that no expenditure was incurred for earning exempt income. In support thereof, she relied on the decision of the Hon'ble Delhi High Court in the case of Indiabulls financial services Ltd. versus DCIT(2016) 76 taxmann.com 268 (Delhi).

26. We have heard the rival submission and perused the relevant material on record. On the issue of dissatisfaction on correctness of the claim of the assessee, the Assessing Officer in para-8.1 of the assessment order has reproduced the submission of the assessee and thereafter in Para-8.2 in 8.3 of the assessment order has expressed his dissatisfaction on the claim of no expenditure incurred by the assessee. The relevant paragraphs of the assessment order are reproduced as under:

> "8.2 In view of the Supreme court judgment in the case of CIT Vs United General Trust Ltd 200ITR 455(SC) coupled with the finding that expenditure has been incurred by the assessee Company on the earning of the dividend income and in absence of any better method the method suggested by Rule 8D of the Income Tax Rules is adopted in determining the expenditure incurred by the assessee company in relation to dividend income/ exempt income calculated as under which is not includible in total income.
>
> 8.3 The language of subsection (1) of section 14A clearly provides that no deduction shall be allowed n respect of expenditure incurred by the assessee in rotation to income which does not form part of the total income under this Act On going through the simple and plain language, it is abundantly clear that the relation has to be seen between the exempt income and the expenditure incurred in relation to it and not vice versa It is to work out the expenditure in relation to the exempt income and the expenditure incurred in relation to it and not vice versa What is relevant whether the expenditure incurred by the assessee has resulted into exempt income or taxable income From the three clauses of Rule 8D it clearly emerges that stipulation of section is to compute the amount of expenditure which is not allowable u/s 14A as is relatable to the exempt income and not in considering all the expenses one by one for ascertaining if either of them have resulted into exempt income and thereafter considering such amount as disallowable u/s 14A But in order to quantify such expenditure Assessing Officer is not at liberty to make any estimation but he has to workout such disallowance as per method provided in law i.e. Rule 8D. In this regard, reliance is placed on the judgment of the Hon'ble High Court of Judicature at Bombay in the case of Godraj Boyce Mfg Co. Ltd vs DCIT Range-10(2) & Anr ITA No 626/10 & W P No 758/10 Where the Hon'ble Court not only held the Rule 8D as constitutionally valid but also held that the Assessing Officer has to enforce the provisions of sub-section 1 of Section 14A. For that purpose the Assessing Officer is duty bound to determine the expenditure which has been incurred in relation to income which does not farm part of total income under the Act The Hon'ble Court held as under:
>
> (ii) The effect of Section 14A is to widen the theory of apportionment of expenditure Prior to the enactment of Section 14A where the business of an assessee was not a composite and indivisible business and the assessee earned both taxable and non taxable income the expenditure incurred on earning non taxable income could not be allowed as a deduction as against the taxable income As a result of the enactment of Section 14A no expenditure can he allowed as a deduction in relation income which

> docs not farm part of total income under the Act. Hence even if the case of a composite and indivisible business which results into earning of taxable and non taxable income it would be necessary to apportion the expenditure incurred by the assessee Only that part of the expenditure which is incurred in relation to income which forms pad of the total income can be allowed. The expenditure incurred in relation to income which does not form pad of the total income has to be disallowed.
>
> (iii) From this it would follow that Section 14A has implicate within it a notion of apportionment The principal of apportionment which prior to the amendment of Section 14A would have not applied to expenditure incurred in a composite and indivisible business which results in taxable and nontax able income must after the enhancement of the provisions apply even to such a situation.

.....

(v) Even in the absence of sub-section (2) of Section 14A the Assessing Officer would have to apportion the expenditure and to disallow the expenditure incurred by the assessee in relation to income which does not farm part of total income under the Act."

26.1 Thus, in our opinion, it cannot be said that the Assessing Officer was not dissatisfied with the claim of the assessee. We find that Hon'ble Delhi High Court in the case of Indiabulls Financial Services Ltd. (supra) has held that where the Assessing Officer after carrying out elaborate analysis and following the steps enacted in the statute, had determined amount of expenditure incurred for earning tax exempt income, merely because he did not expressly recorded dissatisfaction about assessee's calculation, his conclusion could not be rejected. In the instant case, the assessee has claimed that no expenditure has been incurred, and thus in view of provisions of section 14A(3) of the Act as well as decision of the Hon'ble Delhi High Court in the case of Indiabulls Financial Services Ltd (supra) , the Assessing Officer was justified in invoking section 14A(2) and Rule 8D of the Income Tax Rules for determination of expenditure in relation to income, which did not form part of the total income under this Act.

26.2 However, in the case of Vireet Investment Private Limited (supra), the special bench of the Tribunal has held that for computing average value of investment in terms of Rule 8D(2)(iii) of the Income Tax Rules, only investment yielding exempt income should be considered. The relevant finding of the Tribunal(supra) is reproduced as under:

> "11.14 Now the position of law as stands is that the decision of Hon'ble Jurisdiction High Court is directly on the point in dispute whereas the decision of Hon'ble Supreme court in the case of Rajendra Prasad Moody (supra) has been rendered in the context of section 57(iii), the applicability of which has been ruled out by Hon'ble Delhi High Court in the case of Cheminvest (supra).
>
> 11.15 Under Article 227 of the Constitution of India, the courts function under the supervisory jurisdiction of Hon'ble High Court. The decisions rendered by Hon'ble

High Court are binding on all subordinate courts working within its jurisdiction. In this regard we may refer to the following decisions:

(i) CIT v. Thana Electricity Supply Ltd. (1994) 206 ITR 727 (Bom.), wherein on the issue of "whose decision-is binding on whom", the. Hon'ble Bombay Court considered in detail the hierarchy of the courts and has observed as under:

"It is also well-settled that though there is no specific provision making the law declared by the High Court binding on subordinate courts, it is implicit in the power of supervision conferred on a superior Tribunal that the Tribunals subject to its supervision would conform to the law laid down by it. It is in that view of the matter that the Supreme Court in East India Commercial Co. Ltd. v. Collector of Customs, AIR 1962 SC 1893 (at page1905) declared:

"We, therefore', hold that the law declared by the highest court in the State is binding on authorities or Tribunals under its superintendence, and they cannot ignore it. ...."

This position has been summed up by the Supreme Court in Mahadeolal Kanodia v. Administrator General of West Bengal, AIR 1960 SC 936 (at page 941) as follows:

"Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view, the result would be utter confusion. The position would be equally bad where a judge sitting singly in the High Court is of opinion that the previous decision of another single judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench."

The above decision was followed by the Supreme Court in Baradakanta Mishra v. Bhimsen Dixit, AIR 1972 SC 2466, wherein the legal position was reiterated in the following words (at page 2469) :

"It would be anomalous to suggest that a Tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a Tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer,"

(ii) CIT v. Svnil Kumar (1995) 212 ITR 238 (Raj.), it was observed as under:

> "The point which has been raised could have been considered to be debatable because other High Courts have taken a different view. But since the view taken by this court is binding on the Tribunal and other authorities under the Act in this State, it could not be considered to be a debatable point in view of the decision of this court in the case of CIT v. M.I, Sanghi [1988] 170 ITR 670."

(iii) Indian Tube Company Ltd. v. CIT & others (1993) 203 ITR 54 (Col.) , it was observed as under:

> "In the impugned order, respondent No.1 has rejected the petitioner's contention by stating that, although the Calcutta High Court had held that an assessee was entitled to interest on such refund calculated up to the date of the order passed consequent upon an appeal or revision of the original assessment, this view had not been accepted by the Bombay High Court, the Allahabad High Court and the Kerala High Court. Respondent No.1, accordingly, chose to accept the view of the Bombay, Allahabad and Kerala High Courts in preference to the view of the Calcutta High Court.
>
> In my view, the order of respondent No. 1 cannot be sustained on the simple ground that respondent No. 1 is an authority operating within the State of West Bengal and is bound by the decisions of the Nigh Court of this State (see CIT v. Indian Press Exchange Ltd. [1989] 176 ITR 331 (Col) ; East India Commercial Co. Ltd. v. Collector of Customs AIR 1962 SC 1993, paragraph 29).
>
> In that view of the matter, the impugned order must be set aside and the Commissioner is directed to consider the matter afresh in keeping with the decisions of this court after giving the petitioners an opportunity of being heard. At least 48 hours clear notice must be given to the petitioners. The Commissioner will communicate the final order to the petitioner within eight weeks from the date of hearing.
>
> (iv) CIT v. J.K. Jain [1998] 230 ITR 839 (P&H), observing as under:
>
> "We have carefully examined the records and have heard Ld. counsel representing the parties. We are in respectful agreement with the view expressed by the Allahabad High Court in Omega Sports and Radio Works' case [1982] 134 ITR 28, as also the decision of this court in Mohan Lal Kansal's case [1978] 114 ITR
>
> 583. Following the decision in the two cases referred to above, we hold that it was not a case of divergence of opinion inasmuch as the opinion expressed by this court was binding upon the Tribunal."

11.16 Therefore, in our considered opinion, no contrary view can be taken under these circumstances. We, accordingly, hold that only those investments are to be considered for computing average value of investment which yielded exempt income during the year."

26.3 In view of above finding of the Tribunal special bench in Vireet Investment (supra) for considering investment yielding exempt income for computing average value of investment, we feel it appropriate to restore the issue of computation of disallowance in terms of rule 8D of the Income-tax Rules to the file of the Assessing Officer for deciding in accordance with law. The assessee shall be afforded adequate opportunity of being heard. The Ground No. 3 of the appeal of the assessee, is accordingly allowed for statistical purposes.

27. The ground No. 4 of the appeal of the assessee relates to request of the assessee to add disallowance made under section 14A of the Act to the cost of the mutual fund units. In the grounds, the assessee has raised that the issue was not adjudicated by the Ld. CIT(A). Before us, the Ld. counsel of the assessee did not press this ground and accordingly it is dismissed as infructuous. Even otherwise, this issue is not arising in the present proceedings and the issue can be raised by the assessee at the time of offering capital gain on those mutual fund units. If the assessee wishes to add disallowance to the cost of mutual fund units, in its books of accounts it may do so following respective accounting standards, but as far as income tax is concerned, this issue is premature and cannot be considered at this stage.

25. The ground No. 5 of the appeal of the assessee relates to claim of depreciation on upfront fee paid to Airport Authority of India(AAI).

26. The facts qua the ground raised are that in assessment year 2007-08 the upfront fee paid by the assessee to the Airport Authority of India (AAI) was claimed by the assessee as revenue in nature, however, the said claim was rejected by the Assessing Officer and said fee paid by the assessee was treated as capital expenditure. The assessee, without prejudice to its contention that the upfront fee paid was revenue in nature, it claimed for allowing depreciation on said amount of upfront fee held as capital expenditure.

27. Before us, the Ld. counsel of the assessee submitted that the Tribunal in assessment year 2007-08 has held the upfront fee paid by the assessee to the AAI as revenue in nature. The Ld. counsel accordingly did not press this ground.

28. The Ld. CIT(DR), on the other hand, concurred with the submission of the Ld. counsel of the assessee and submitted that the Assessing Officer might be directed to withdraw depreciation if any allowed to the assessee during the year under consideration on said upfront fee amount held by the Assessing Officer as capital in assessment year 2007-08.

29. We have heard the rival submission and perused the relevant material on record. The Tribunal in ITA No. 2720/Del/2011 and ITA No. 4202/Del/2013 for assessment year 2007-08 in para-35 of the order has held the payment of upfront fee as revenue expenditure. The relevant para of the Tribunal(supra) is reproduced as under:

> "25. One more important aspect in this case is that, if the assessee had acquired any right by making payment of Rs.150 crores, then under the terms of OMDA it is clearly stipulated that the payment of 'annual fee' of 45.99% of gross revenue of the year is not made continuously then the OMDA agreement will come to an end. On this fact also the assessee has not acquired any licence or right by making the payment of Rs.150 crores. Thus, on this count also it cannot held that the said sum is for acquiring any licence or right. In view the aforesaid discussion and analysis we are of the opinion that the payment of Rs.150 crores is to be treated as revenue expenditure and order of the Ld. CIT(A) allowing such expenditure is affirmed and grounds taken by the revenue is dismissed."

29.1 Since the upfront fee has already been held as revenue expenditure in nature, the claim of the assessee for allowing depreciation on said upfront fee, cannot be allowed. Accordingly, the ground of the appeal is dismissed and the Assessing Officer is directed to withdraw depreciation on the upfront fee already allowed if any, by the lower authorities.

30. The ground No. 6 of the appeal relates to claim of depreciation on the amount of repair and maintenance of Rs.24,00,00,000/-incurred in assessment year 2007-08, which was held capital in nature by the Assessing Officer.

31. The facts qua the ground raised are that in assessment year 2007-08, the assessee claimed amount of Rs. 24 crores towards repair and maintenance of building etc, which was held by the Assessing Officer and the Ld. CIT-(A) as capital in nature, but no depreciation was allowed in the year under consideration on the said amount held as capital in nature.

32. Before us, Ld. counsel of the assessee submitted that this claim of the assessee was without prejudice to the claim that expenses incurred on repair and maintenance in the assessment year 2007-08 were revenue in nature. The Ld. counsel submitted that the Tribunal in assessment year 2007-08 has held the expenditure incurred on repair and maintenance as revenue in nature except a small amount of Rs.1,54,61,755/-, which has been directed to remove from the head repair and maintenance of buildings, accordingly he did not press the claim of depreciation on said repair and maintenance expenses before us.

33. The Ld. CIT(DR) concurred with the submission of the Ld. counsel of the assessee.

34. We have heard the rival submission and perused the relevant material on record. In assessment year 2007-08, the assessee incurred expenses of Rs. 24 crores on repair and maintenance of building and claimed the same as revenue expenditure. The Assessing Officer held the same as capital expenditure. The Tribunal in ITA No. 2720/Del/2011 and ITA No. 4202/Del/2013 for assessment year 2007-08, out of the repair and maintenance expenditure of Rs.20 crore, removed amount of Rs.1,54,61,755/- towards advertisement in newspaper and the balance amount on repair and maintenance was treated as revenue expenditure. The relevant finding of the Tribunal(supra) in para-42 is extracted as under:

"42. We have heard the rival submissions and also perused the relevant finding given in the impugned orders as well as the judgments referred and relied upon by the parties. Here in this case as noted above the nature of expenditure is on account of renovation and repairs for improving the existing infrastructure. The Ld. AO has not pointed out as to which expenditure is for construction of new structure. In fact he has classified all the expenditure as revenue and that is why he has allowed it in a deferred manner, that is, as deferred revenue expenditure. If AO himself has accepted that expenditure is revenue and has held to be allowable on a deferred basis spread over 30 years, then there cannot be case that it is capital in nature. As submitted by the Ld. Sr. Counsel in light of various judgment as cited above, that there is no concept of deferred revenue expenditure under the Income Tax Law and the expenditure has to be allowed in the year in which it is incurred. Since, AO has himself has not classified or distinguished as to which repairs is for new infrastructure or for construction of new structure, therefore, we are unable to give any finding that any of the expenditure as noted above pertains to new construction. As he himself has treated to be revenue, then in that case, we hold that the entire expenditure under the head repair and maintenance is allowable as revenue expenditure in the year in which it is claimed. The judgments relied upon by the Ld. CIT DR would not apply under such facts and circumstances of the case. However, we agree with one of the contentions of the Ld. CIT DR that an amount of Rs. 1,54,61,755/- debited under this head cannot be treated as expenditure on repair and maintenance and therefore, AO is directed to remove this expenditure from the head 'repair and maintenance of building etc. With this direction, ground No. 2 as raised by the revenue is partly allowed."

34.1 We find that the repair and maintenance expenses on building has already been held by the Tribunal(supra) as revenue in nature, the claim of the assessee for allowing depreciation on said expenditure cannot be allowed. Accordingly we dismiss the ground of the appeal of the assessee and direct the Assessing Officer to withdraw the depreciation if any allowed by the lower authorities on the said repair and maintenance expenses incurred in assessment year 2007-08.

35. The ground No. 7 of the appeal relates to deduction under section 80IA of the Act on profit enhanced after appellate orders. The assessee has raised the issue that this ground was not adjudicated by the Ld. CIT-(A).

36. Before us, the Ld. counsel of the assessee submitted that the Tribunal in assessment year 2007-08 has adjudicated this issue and upheld the direction of the Ld. CIT-(A) for allowing deduction under section 80 IA of the Act on income finally assessed in accordance with law.

37. The Ld. CIT(DR), on the other hand, submitted that the assessee has not accepted the additions/disallowances made by the Assessing Officer finally and therefore no deduction under section 80IA of the Act can be allowed on such finally assessed income ,in absence of audit report specified for the purpose.

38. We have heard the rival submission and perused the relevant material on record. We find that the issue of claim of deduction under section 80IA of the Act in case the assessee has been adjudicated by the Tribunal in ITA No. 2720/Del/2011 and 4202/Del/2013 for assessment year 2007-08 as under:

> "48. Lastly, with regard to the ground No. 4 that Ld. CIT (A) has erred in allowing the assessee's claim u/s 80-IA in case the assessed income is positive, we find that here in this case, it is an undisputed fact that assessee is engaged in the business of operating and maintaining of airport and the profits and gains derived by an undertaking from such business which has been referred to as eligible business in section 80-IA. The assessee before the Ld. CIT (A) has submitted that, since the return of income has filed at a huge loss of Rs. 150.55 crores, therefore, no claim for deduction u/s 80IA was made. It is only when the AO has made the assessment at a positive figure Rs. 62.70 crores, the assessee has made a claim for deduction u/s 80-IA. In support of such a claim, audit report was also filed in the prescribed form, a copy of which has also been placed in the paper book before us.

Ld. CIT (A) after examining the entire facts and submissions of the assessee observed and held as under:-

> "11.5 It is undisputed that the Appellant is carrying on the business of operating and maintaining an airport. The AO in his remand report has only contested that claim u/s 80IA cannot be entertained since it was not made in the return of income.
>
> 11.6 In view of the above discussion, the question of rejection of the claim merely on the basis that it has not been made in the return of income does not arise. However, the prayer of the Appellant is that the said deduction be allowed if the assessed income is a positive figure. In view of the decisions in respect of the grounds of appeal dealt with above, the income of the Appellant would not be a positive figure. Therefore, this ground is allowed for statistical purposes."

49. After hearing both the parties, we do not find any infirmity in the direction of the Ld. CIT(A), because, the assessee is carrying on the business of operating and maintaining of airport which is an eligible business specified in section 80IA(4)(i) for which assessee is eligible for claim for deduction u/s 80IA. In support of the claim, audit report in prescribed form had already been obtained. The said claim was not made in the return of income, because there was a huge loss of more than Rs. 155.55 crores. It was only when huge income was assessed at positive figure; assessee has made its claim for deduction u/s 80IA. In light of this background, the direction of the Ld. CIT (A) to the AO is in accordance with the law and no interference is called."

38.1 Respectfully, following the above finding of the Tribunal(supra), we direct the Assessing Officer to follow the direction of the Tribunal for allowing deduction under section 80IA of the Act in case income is assessed positive.

39. The ground No. 1 of the appeal of the Revenue relates to expenses of Rs.11,13,73,000/-on account of repair and maintenance of building held by the Assessing Officer as capital, however held by the Ld. CIT-(A) as revenue in nature.

74. The Assessing Officer in the assessment order has reproduced the list of the expenses towards repair and maintenance held as capital in nature. The list of such expenses is extracted as under :

Expense Head	Brief Description	Rs. In lacs
Cargo Expenses	Rectification of civil & fire fighting work etc.- old Cargo Bldg.	7.59

Cargo Expenses Misc. civil work at Haj terminal 3.31 Cargo Expenses Providing & fixing industrial vents at roof- Import & Export 8.08 area Cargo Expenses Supply/hiring of tents for the Air 17.59 side area Cargo Expenses Maint. &repair of Tech. Bldg. 29.98 Cargo- Procurement of Trouplin for cargo terminal Cargo Expenses Repair of covered Shed for motor 9.60 transport workshop....

Civil, Masonary& repair work at Repair &Maint. - the terminal & in front of 20.20 Terminal Bldgs. terminal Internal painting & repair work 32.65 Repair &Maint. - in Ceremonia Lounge at Igia at Terminal Bldgs. terminal-1 Repair &Maint. - Supply of spare part-replacement 8.29 Terminal Bldgs of sanitary fittings Painting-P/F frameless Glass 4.25 Repair &Maint. - double doors&Alumn. Composite Terminal Bldgs. panels Renovation of ceremonial lounge Repair &Maint. - in terminal 1B-flooring, civil work 10.11 Terminal Bldgs. & furniture Repair &Maint. - Renovation of Delta ladies 7.16 Terminal Bldgs. toilets/baggage area toilet Repair &Maint. - Replacement of false ceiling - 6.41 Terminal Bldgs. terminal 1 B-wooden doors etc. Repair &Maint. - Water proofing at Terrace of 13.46 Terminal Bldgs. terminal 1B Repair &Maint. - Civil work-repairing of false 33.70 Terminal Bldgs. ceiling-Tile replacement and painting job-terminal Bldg.

Repair/Maint.- Construction of vehicle parking 49.56 Roads & at old NH8-R&M of existing Culverts vehicle parking to accommodate more vehicles Repair/Maint - 10.03 Roads & Improvement of roads in front of Culverts petrol pump Repair/Maint.- Construction of pavement for 42.16 Roads & parking of vehiclesat air side Culverts Repair/Maint.- 5.76 Roads & Improvement of roads in front of Culverts petrol pump Repair/Maint.- 3.67 Roads & Supply of flexible permanent lane Culverts divider/springpost at Igia Repairs - Office Electrical work Uddan Bhawan- 54.28 repair of connecting bridge-

	flooring tile work- glazing windows etc. Repair &Maint. Of lifts at Uddan	
Repairs - Office	Bhawan	20.32
	Interior work of R&M at cargo	
Repairs-Office	terminal	8.94
Repairs-Office	Supply of -1-Queue managing ribbons and stands at terminal of passengers	23.63

Repairs-Office Supply and installation of road 39.53 side signages Repairs-Office Misc. repairs and maint. At 33.75 airport and adjacent sites Rep. &Maint.- Renovation of AOCC Tower 10.73 Bldg.in Terminal IB-interior civil work operational area and furniture etc. Rep. &Maint.- Work extension of Canopy at 5.36 Bldg.in operational area for baggage operational area laoding& unloading Water proofing work at Uddan 4.55 Rep. &Maint.- Bhawan- fixing of leakages at other Bldg office bLdg. roof Rep. &Maint.- Maint. Of fire Stn. Area by 6.79 other Bldg dismantling of structure, removing unwanted structure at airside Rep. &Maint.- Repairs of toilets and Nsg 6.02 other Bldg Barracks-etc. Rep. &Maint.-of Installation of frangible fencing to 5.77 fencing & prevent intrusion of animals security walls Rep. &Maint.-of Providing and fixing of fencing 5.63 fencing & Fuards at Blue Dart Cargo. ..

security walls		
Rep. &Maint.-of Sewage & Drainage	Boring & development of tubewells for water requirements	7.34
Rep. &Maint.-of Sewage & Drainage	Misc. civil, plumbing & piping work related to water supply at terminal-li	3.46
	Modification of rain water	11.30

Rep. &Maint.-of drainage system over the check Sewage & in area of terminal 1B civil works Drainage for diversion Rep. &Maint.-of Providing & fixing of drain covers 1.14 Sewage & Drainage Repairs- Misc. civil jobs at terminal 48.00 operational Bldg Buldgroads& car park area fixing of step tiles at stair case Repairs- Temp, vehicle parking-renovation 52.00 operational for facilitating vehicle movement Bldg.

Repairs-operational Bldg.	Structure steel work, demolition cement concrete-painting with enamel paint	7.00
Repair and Maint.-Runways	Misc. civil works amd filling of joints with sealing compound - Terminal 1 &2	4.31
Repair and Maint.-Runways	Painting of taxiways and Apron at Igia- marking with paint to facilitate Aircrafts	21.01
Repair and Maint.-Runways	Recarpetting of balance area of taxiways at Igia	31.98
Repair and Maint.- Taxi Runways	Operation &maint Contract of Runway marking Machine	3.20
Repair and Maint.-	Repairs of flexible pavement in front of Terminal 1a	37.62

Taxiways

Repair and Repair of taxiways and the

Maint.-Taxiways	adjuscentAretrial Roads connecting to Runways	166.11
Repair and Maint.-Taxiways	Painting of taxiways and Apron at Igia- marking with paint to facilitate Aircrafts	21.38
Repairs Runways	Maint. And repairs of roads & culverts at cargo terminal	23.00
Repairs Runways	Exp. -for bird scaring & removal of debris etc. at airside	66.00
Repairs &Maint. Aprons	Replacement of AC sheets MS profile Sheet in Air traffic unit hanger-repairs of roofs of hangers	60.02
	Total	1113.73

40. According to the Assessing Officer the expenses were incurred for enduring benefit which have been derived by the assessee in following years. The Ld. CIT-(A), however allowed the claim of the assessee with following observations:

> "5.2 I have carefully considered the assessment order and submissions made by d. AR along with documents placed on record and case laws on the above issue. Under the OMDA, the appellant as a part of its obligation to Operate, Maintain, Develop, Design, Construct, Upgrade, Modernize, and Manage the Airport had incurred an amount of Rs. 15,52,05,000/- towards repairs and maintenance. It was argued by the appellant before the AO that the expenditure incurred towards repairs and maintenance was in the nature of current repairs primarily for the maintenance and upkeep of the existing airport facilities. It was not an 'one time' expenditure, but recurring operational expenditure necessary for efficient functioning of the existing assets. Further, such expenditure was incurred on leased premises riot owned by the appellant and did not result in any benefit of enduring nature. Therefore, it was allowable as revenue expenditure. However, the AO has disallowed the above amount of Rs. 11,53,73,000/- by considering it as capital in nature.
>
> 5.3 On careful examination of the matter, I find that similar expenditure has been claimed by the appellant on a continuous basis from year to year in its return of income. The appellant has claimed Rs. 24.3 crores, Rs. 15.52 crores, Rs. 19.8 crores and Rs. 24.01 crores on account of repair and maintenance for A.Yq2007- 08, 2008-09, 2009- 10 and 2010-11 respectively. While the above expenditure claimed for A.Y. 2007-08 was disallowed in the assessment order, the same has been fully allowed by the Id. CIT (A) XVI, New Delhi vide her order dated 28.02.2011 in appeal no. 69/2010-11 and 419/09-10 with the following observations.
>
> "8.14 From the assessment order, it is observed that the expenditure has been incurred for renovation, tile fitting and flooring, dismantling and shifting, electrical

fitting and rewiring, rehabilitating and painting, interior work, beautification and decoration work, advertisement, etc. It cannot be said that the expenditure so incurred is capital in nature, these expenses cannot be held to be capital in nature in view of the judicial pronouncements which would apply directly to the present facts.

8.15 Thus, applying the above discussed general principles, I hold that the said expenditure is allowable under section 30/31/37 of the Act as being in the general nature of repair, and maintenance expenditure. Therefore, this ground of appeal stands allowed.

5.3.1 Perusal of the assessment order for the year under consideration shows that the nature of expenditure is similar to that of A.Y. 2007-08. Further, the said expenditure is on account of repair and maintenance of the existing facilities at Terminals 1A, 1B and 2 with a view to operating the existing profit making apparatus of the appellant company and does not involve creation of any new asset or advantage of enduring nature. As explained by the Id. AR the above expenditure is different from the expenditure on construction of new terminals and runways which has been duly capitalized by the appellant as capital work-in- progress in its Balance Sheet. Under the facts arid circumstances as discussed above and respectfully following the settled case laws on the matter and the order of Id. CIT (A) XVI for A.Y. 2007j38j^led- sqpra, I find that the impugned expenditure of Rs. 11.13,73,000/- would fall in the domain of revenue expenditure and would be allowed as such. The impugned addition is, therefore, deleted. In the assessment order, the AO has allowed depreciation of Rs. 1,11,37,300/- @ 10% on the above capitalized amount of Rs. 11,13,73,000/-. The above depreciation amount is required to be withdrawn in view of the above decision allowing the amount of Rs. 11,13,73,000/- as revenue expenditure. The AO is directed accordingly."

41. Before us the Ld. CIT(DR) submitted that the Ld. CIT-(A) has simply relied on the order of the Ld. CIT-(A) for assessment year 2007-08 and he has not applied mind to the facts of the year under consideration. According to her various expenses, claimed as repair and maintenance are toward the construction of the Delhi airport. She submitted that expenses of Rs. 49.56 lakh towards construction of Vehicle parking at old NH8-R&M of existing vehicle parking to accommodate more vehicles, is clearly in the nature of capital expenditure and wrongly claimed as revenue expenditure. She further submitted that other expenses like renovation of ceremonial launge (Rs. 10.11 lakhs), renovation of ladies toilets (Rs. 7.16 Lakhs), replacement of false ceiling (Rs. 6.41 Lakhs), construction of payment for parking of vehicles air side(Rs. 42.16 Lakhs) etc. have contributed to a permanent structure of enduring nature and thus Assessing Officer has rightly treated the expenditure capital in nature. According to her, the repairs of runway or payments or roads of the terminal are in the nature of capital expenditure. She further submitted that Ld. CIT-(A) has not considered the difference between capital expenditure and revenue expenditure on the basis of tests laid down by various courts as under:

• Nature Capital expenditure is of non-recurring nature. Revenue expenditure is of recurring nature.

• Purpose Capital expenditure is incurred in acquiring permanent assets or improving their existing capacity. Revenue expenditure is incurred in managing day-to-day activities of the organization and maintaining its fixed assets.

• Benefit Capital expenditure gives benefit over a number of years. Revenue expenditure gives benefit not for more than one year.

• Earning Capital expenditure helps in increasing earning capacity of the business. Revenue expenditure helps in earning capacity of the business.

• Treatment Capital expenditure is shown on asset side of the balance sheet. Revenue expenditure is shown on the debit side of the trading and profit and loss account.

41.1 She further relied on the following judgments:

1. Empire Jute Company (1980) 124 ITR 1

2. Assam Bengal Cement Co. Ltd. Vs. CIT (1955) 27 ITR 34

42. On the contrary, the Ld. counsel of the assessee submitted that:

a. The assessee was under an obligation to keep in good operating repair and condition, the Airport, in order to ensure that at all times, it met the requirements of an international world class airport. The assessee was to manage the airport in accordance with good industrial practice and in accordance with Development standards and requirements and Operation and Maintenance Standards and Requirements and renew, replace and upgrade to the extent reasonably necessary. All maintenance, repair and other works were to be carried out in such a way as to minimise inconvenience to users of the Airport.

b. By looking at the nature of repairs (As detailed in Pg 8 and 10 of AO order), it can never be said that the assessee has created a new infrastructural facility and dismantled existing structure and constructed new structures. The assessee did not obtain any new asset by carrying out the activities of repairs.

c. In AY 2008-09, when repair expenditure was incurred, it was in contemplation that Terminals 1A, IB and 2 will become non-operational after Terminals ID and 3 are developed. Therefore, there is no question of any enduring benefit to the assessee for the expenditure to be amortized since most of the expenses are incurred on Terminals 1A, IB and 2 and they are also comparable to the expenses incurred in AY 2007-08 which has been allowed to the Appellant by the Hon'ble Tribunal vide order dated December 14, 2017.

43. We have heard the rival submission and perused the relevant material on record. In assessment year 2007-08, the Tribunal(supra) has allowed the expenditure on repair and maintenance as revenue expenditure on the premise that the Assessing Officer himself as accepted the expenditure as revenue and has held to be allowable on the deferred basis spread over 30 years. The relevant finding of the Tribunal has already been reproduced by us in earlier paras while adjudicating the claim of depreciation of the assessee on said repair and maintenance expenses. In our opinion, the finding of the assessment year 2007-08 of the Tribunal(supra) cannot be applied over the facts of the instant year as in the instant year the Assessing Officer has clearly held the expenses as capital in nature and even held that the assessee was entitled for depreciation of said capitalized expenditure. Further, the Ld. CIT(DR) has also pointed out certain expenses like construction of vehicle parking for accommodating more vehicles etc, which apparently are in the nature of capital expenditure.

43.1 The issue of distinction between capital and revenue expenditure came for consideration before the Hon'ble Supreme Court in the case of Assam Bengal cement Co Ltd versus CIT(1955) 27 ITR 34. The Hon'ble court laid down following test for deciding whether expenditure incurred is capital or revenue:

> "5. This synthesis attempted by the Full Bench of the Lahore High Court truly enunciates the principles which emerge from the authorities. In cases where the expenditure is made for the initial outlay or for extension of a business or a substantial replacement of the equipment, there is no doubt that it is capital expenditure. A capital asset of the business is either acquired or extended or substantially replaced and that outlay whatever be its source whether it is drawn from the capital or the income of the concern is certainly in the nature of capital expenditure. The question however arises for consideration where expenditure is incurred while the business is going on and is not incurred either for extension of the business or for the substantial replacement of its equipment. Such expenditure can be looked at either from the point of view of what is acquired or from the point of view of what is the source from which the expenditure is incurred. If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business it is properly attributable to capital and is of the nature of capital expenditure. If on the other hand it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits it is a revenue expenditure. If any such asset or advantage for the enduring benefit of the business is thus acquired or brought into existence it would be immaterial whether the source of the payment was the capital or the income of the concern or whether the payment was made once and for all or was made periodically. The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure. The source or the manner of the payment would then be of no consequence. It is only in those cases where this test is of no avail that one may go to the test of fixed or circulating capital and consider whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital. If it was part of the fixed capital of the business it would be of the nature of capital

expenditure and if it was part of its circulating capital it would be of the nature of revenue expenditure. These tests are thus mutually exclusive and have to be applied to the facts of each particular case in the manner above indicated. It has been rightly observed that in the great diversity of human affairs and the complicated nature of business operations it is difficult to lay down a test which would apply to all situations. One has therefore got to apply these criteria one after the other from the business point of view and come to the conclusion whether on a fair appreciation of the whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure in which latter event only it would be a deductible allowance under s. 10(2)(xv) of the IT Act. The question has all along been considered to be a question of fact to be determined by the IT authorities on an application of the broad principles laid down above and the Courts of law would not ordinarily interfere with such findings of fact if they have been arrived at on a proper application of those principles.

The expression "once and for all" used by Lord Dunedin has created some difficulty and it has been contended that where the payment is not in a lump sum but in instalments, it cannot satisfy the test. Whether a payment be in a lump sum or by instalments, what has got to be looked to is the character of the payment. A lump sum payment can as well be made for liquidating certain recurring claims which are clearly of a revenue nature, and on the other hand payment for purchasing a concern which is prima facie an expenditure of a capital nature may as well be spread over a number of years and yet retain its character as a capital expenditure (Per Mukherjee, J., in CIT vs. Piggot Chapman & Co. (1949) 17 ITR 317 (Cal). The character of the payment can be determined by looking at what is the true nature of the asset which has been acquired and not by the fact whether it is a payment in a lump sum or by instalments. As was otherwise put by Lord Greene, M.R., in Henriksen (Inspector of Taxes) vs. Grafton Hotel Ltd. (1942) 2 KB 184 : (1943) 11 ITR (Supp) 10 (CA) :

"The thing that is paid for is of a permanent quality although its permanence, being conditioned by the length of the term, is short lived. A payment of this character appears to me to fall into the same class as the payment of a premium on the grant of a lease, which is admittedly not deductible."

The case of Tata Hydro-Electric Agencies Ltd. vs. CIT (supra), affords another illustration of this principle. It was observed there :

"If the purchaser of a business undertakes to the vendor as one of the terms of the purchase that he will pay a sum annually to a third party, irrespective of whether the business yields any profits or not, it would be difficult to say that the annual payments were made solely for the purpose of earning the profits of the business."

The expression "once and for all" is used to denote an expenditure which is made once and for all for procuring an enduring benefit to the business as distinguished

from a recurring expenditure in the nature of operational expenses.

The expression "enduring benefit" also has been judicially interpreted. Romer, L.J., in Anglo-Persian Oil Co. Ltd. vs. Dale (supra) agreed with Rowlatt, J., that by enduring benefit is meant enduring in the way that fixed capital endures.

"An expenditure on acquiring floating capital is not made with a view to acquiring an enduring asset. It is made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date."

Latham, C.J., observed in Sun Newspapers Ltd. & Associated Newspapers Ltd. vs. Federal Commr. of Taxation (supra) :

"When the words 'permanent' or 'enduring' are used in this connection it is not meant that the advantage which will be obtained will last forever. The distinction which is drawn is that between more or less recurrent expenses involved in running a business and an expenditure for the benefit of the business as a whole"...e.g....--"enlargement of the goodwill company"--"permanent improvement in the material or immaterial assets of the concern."

To the same effect are the observations of Lord Greene, M.R., in Henriksen (H.M. Inspector of Taxes) vs. Grafton Hotel Ltd. above referred to.

6. These are the principles which have to be applied in order to determine whether in the present case the expenditure incurred by the company was capital expenditure or revenue expenditure. Under cl. 4 of the deed the lessors undertook not to grant any lease, permit or prospecting licence regarding limestone to any other party in respect of the group of quarries called the Durgasil area without a condition therein that no limestone shall be used for the manufacture of cement. The consideration of Rs. 5,000 per annum was to be paid by the company to the lessor during the whole period of the lease and this advantage or benefit was to enure for the whole period of the lease. It was an enduring benefit for the benefit of the whole of the business of the company and came well within the test laid down by Viscount Cave. It was not a lump sum payment but was spread over the whole period of the lease and it could be urged that it was a recurring payment. The fact however that it was a recurring payment was immaterial, because one had got to look to the nature of the payment which in its turn was determined by the nature of the asset which the company had acquired. The asset which the company had acquired in consideration of this recurring payment was in the nature of a capital asset, the right to carry on its business unfettered by any competition from outsiders within the area. It was a protection acquired by the company for its business as a whole. It was not a part of the working of the business but went to appreciate the whole of the capital asset and make it more profit yielding. The expenditure made by the company in acquiring this advantage which was certainly an enduring advantage was thus of the nature of capital expenditure and was not an allowable deduction under s. 10(2)(xv) of the IT Act.

The further protection fee which was paid by the company to the lessor under cl. 5 of the deed was also of a similar nature. It was no doubt spread over a period of 5 years, but the advantage which the company got as a result of the payment was to enure for its benefit for the whole of the period of the lease unless determined in the manner provided in the last part of the clause. It provided protection to the company against all competitors in the whole of the Khasi and Jaintia Hills District and the capital asset which the company acquired under the lease was thereby appreciated to a considerable extent. The sum of Rs. 35,000 agreed to be paid by the company to the lessor for the period of 5 years was not a revenue expenditure which was made by the company for working the capital asset which it had acquired. It was no part of the working or operational expenses of the company. It was an expenditure made for the purpose of acquiring an appreciated capital asset which would no doubt by reason of the undertaking given by the lessor make the capital asset more profit yielding. The period of 5 years over which the payments were spread did not make any difference to the nature of the acquisition. It was none the less an acquisition of an advantage of an enduring nature which enured for the benefit of the whole of the business for the full period of the lease unless terminated by the lessor by notice as prescribed in the last part of the clause. This again was the acquisition of an asset or advantage of an enduring nature for the whole of the business and was of the nature of capital expenditure and thus was not an allowable deduction under s. 10(2)(xv) of the Act.

44. The Hon'ble Supreme Court in the case of Empire jute company (supra) after taking note of various judicial decisions and various tests evolved for distinguishing the capital or revenue expenditure held that no test is paramount or conclusive as every case has to be decided on its facts keeping in mind the broad picture of whole operation in respect of which the expenditure has been incurred. The relevant finding of the Hon'ble Supreme Court is reproduced as under:

> "6. The decided cases have, from time to time, evolved various tests for distinguishing between capital and revenue expenditure but no test is paramount or conclusive. There is no all-embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts, keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred. But a few tests formulated by the Courts may be referred to as they might help to arrive at a correct decision of the controversy between the parties. One celebrated test is that laid down by Lord Cave L.C. in Atherton vs. British Insulated & Helsby Cables Ltd. (1925) 10 Tax Cases 155 (HL), where the Ld. Law Lord stated :
>
> "....when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

This test, as the parenthetical clause shows, must yield where there are special circumstances leading to a contrary conclusion and, as pointed out by Lord Radcliffe in Commr. of Taxes vs.

Nchanga Consolidated Copper Mines Ltd. (1965) 58 ITR 241 (PC) : TC16R.991, it would be misleading to suppose that in all cases, securing a benefit for the business would be, prima facie, capital expenditure "so long as the benefit is not so transitory as to have no endurance at all". There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. But even if this test were applied in the present case, it does not yield a conclusion in favour of the Revenue. Here, by purchase of loom hours no new asset has been created.

There is no addition to or expansion of the profit-making apparatus of the assessee. The income-earning machine remains what it was prior to the purchase of loom hours. The assessee is merely enabled to operate the profit making structure for a longer number of hours. And this advantage is clearly not of an enduring nature. It is limited in its duration to six months and, moreover, the additional working hours per week transferred to the assessee have to be utilized during the week and cannot be carried forward to the next week. It is, therefore, not possible to say that any advantage of enduring benefit in the capital field was acquired by the assessee in purchasing loom hours and the test of enduring benefit cannot help the Revenue.

Another test which is often applied is the one based on the distinction between fixed and circulating capital. This test was applied by Lord Haldane in the leading case of John Smith & Son vs. Moore (1921) 12 Tax Cases 266 (HL) where the Ld. law Lord drew the distinction between fixed capital and circulating capital in words which have almost acquired the status of a definition. He said:

> "Fixed capital is what the owner turns to profit by keeping it in his own possession; circulating capital is what he makes profit of by parting with it and letting it change masters."

Now so long as the expenditure in question can be clearly referred to the acquisition of an asset which falls within one or the other of these two categories, such a test would be a critical one. But this test also sometimes breaks down because there are many forms of expenditure which do not fall easily within these two categories and not infrequently, as pointed out by Lord Radcliffe in Commr. of Taxes vs. Nchanga Consolidated Copper Mines Ltd. (supra), the line of demarcation is difficult to draw and leads to subtle distinctions between profit that is made "out of" assets and profit that is made "upon" assets or "with" assets. Moreover, there may be cases where expenditure, though referable to or in connection with fixed capital, is nevertheless allowable as revenue expenditure.

An illustrative example would be of expenditure incurred in preserving or maintaining capital assets. This test is, therefore, clearly not one of universal application. But even if we were to apply this test, it would not be possible to characterize the amount paid for purchase of loom hours as capital expenditure, because acquisition of additional loom hours does not add at all to the fixed capital of the assessee. The permanent structure of which the income is to be the produce or fruit remains the same; it is not enlarged. We are not sure whether loom hours can be regarded as part of circulating capital like labour, raw material, power, etc., but it is clear beyond doubt that they are not part of fixed capital and hence even the application of this test does not compel the conclusion that the payment for purchase of loom hours was in the nature of capital expenditure.

7. The Revenue, however, contended that by purchase of loom hours the assessee acquired a right to produce more than what it otherwise would have been entitled to do and this right to produce additional quantity of goods constituted addition to or augmentation of its profit-making structure. The assessee acquired the right to produce a larger quantity of goods and to earn more income and this, according to the Revenue, amounted to acquisition of a source of profit or income which though intangible was nevertheless a source or "spinner" of income and the amount spent on purchase of this source of profit or income, therefore, represented expenditure of capital nature. Now it is true that if disbursement is made for acquisition of a source of profit or income, it would ordinarily, in the absence of any other countervailing circumstances, be in the nature of capital expenditure. But we fail to see how it can at all be said in the present case that the assessee acquired a source of profit or income when it purchased loom hours. The source of profit or income was the profit making apparatus and this remained untouched and unaltered. There was no enlargement of the permanent structure of which the income would be the produce or fruit. What the assessee acquired was merely an advantage in the nature of relaxation of restriction on working hours imposed by the working time agreement, so that the assessee could operate its profit-earning structure for a longer number of hours. Undoubtedly, the profit-earning structure of the assessee was enabled to produce more goods, but that was not because of any addition or augmentation in the profit-making structure, but because the profit-making structure could be operated for longer working hours. The expenditure incurred for this purpose was primarily and essentially related to the operation or working of the looms which constituted the profit-earning apparatus of the assessee. It was an expenditure for operating or working the looms for longer working hours with a view to producing a larger quantity of goods and earning more income and was, therefore, in the nature of revenue expenditure. We are conscious that in law as in life, and particularly in the field of taxation law, analogies are apt to be deceptive and misleading, but in the present context, the analogy of quota right may not be inappropriate. Take a case where acquisition of raw material is regulated by quota system and in order to obtain more raw material the assessee purchases the quota right of another. Now, it is obvious that by purchase of such quota right, the assessee would be able to acquire more raw material and that would increase the profitability of his profit-making apparatus, but the amount paid for purchase of such quota right would indubitably be revenue expenditure, since it is incurred for acquiring raw material and is part of the operating cost. Similarly, if payment has to be made for securing additional power every week, such payment would also be part of the cost of operating the profit- making structure and hence in the nature of revenue expenditure, even though the effect of acquiring additional power would be to augment the productivity of the profit- making structure. On the same analogy payment made for purchase of

loom hours which would enable the assessee to operate the profit-making structure for a longer number of hours than those permitted under the working time agreement would also be part of the cost of performing the income earning operations and hence revenue in character.

8. When dealing with cases of this kind where the question is whether expenditure incurred by an assessee is capital or revenue expenditure, it is necessary to bear in mind what Dixon J. said in Hallstorm's Property Ltd. vs. Federal Commr. of Taxation 72 CLR 634. "What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process". The question must be viewed in the larger context of business necessity or expediency. If the outgoing expenditure is so related to the carrying on or the conduct of the business that it may be regarded as an integral part of the profit- earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure. See Bombay Steam Navigation Co. (P) Ltd. vs. CIT (1965) 56 ITR 52 (SC) : TC16R.881. The same test was formulated by Lord Clyde in Robert Addie & Sons' Collieries Ltd. vs. IRC (1924) 8 Tax Cases 671 (C Sess) in these words : "Is it a part of the company's working expenses?--is it expenditure laid out as part of the process of profit earning ?--or, on the other hand, is it a capital outlay ?-- is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all ?" It is clear from the above discussion that the payment made by the assessee for purchase of loom hours was expenditure laid out as part of the process of profit earning. It was, to use Lord Sumner's words, an outlay of a business "in order to carry it on and to earn a profit out of this expense as an expense of carrying it on". John Smith & Son vs. Moore (supra). It was part of the cost of operating the profit- earning apparatus and was clearly in the nature of revenue expenditure.

9. It was pointed out by Lord Radcliffe in Commr. of Taxes vs. Nchanga Consolidated Copper Mines Ltd. (supra) that "in considering allocation of expenditure between the capital and income accounts, it is almost unavoidable to argue from analogy". There are always cases falling indisputably on the one or the other side of the line and it is a familiar argument in tax Courts that the case under review bears close analogy to a case falling on the right side of the line and must, therefore, be decided in the same manner. If we apply this method, the case closest to the present one that we can find is Nchanga Consolidated Copper Mines' case (supra). The facts of this case were that three companies which were engaged in the business of copper mining formed a group and consequent on a steep fall in the price of copper in the world market, this group decided voluntarily to cut its production by 10 per cent which for the three companies together meant a cut of 27,000 tons for the year in question. It was agreed between the three companies that for the purpose of giving effect to this cut, company B should cease production for one year and that the assessee-company and company R should undertake between them the whole group programme for the year reduced by the overall cut of 27,000 tons and should pay compensation to company B for the abandonment of its production for the year. Pursuant to this agreement the assessee paid to company B, £1,384,569 by way of its proportionate share of the compensation and the question arose whether this payment was in the nature of capital expenditure or revenue expenditure. The Privy Council held that the compensation paid by the assessee to company B in consideration of the latter agreeing to cease production for one

year was in the nature of revenue expenditure and was allowable as a deduction in computing the taxable income of the assessee. Lord Radcliffe, delivering the opinion of the Privy Council, observed that the assessee's arrangement with companies R and B "out of which the expenditure arose, made it a cost incidental to the production and sale of the output of the mine" and as such its true analogy was with an operating cost. The payment of compensation represented expenditure incurred by the assessee for enabling it to produce more goods despite the cut of 10 per cent and it was plainly part of the cost of performing the income-earning operation. This decision bears a very close analogy to the present case and if payment made by the assessee-company to company B for acquiring an advantage by way of entitlement to produce more goods notwithstanding the cut of 10 per cent was regarded by the Privy Council as revenue expenditure, a fortiori, expenditure incurred by the assessee in the present case for purchase of loom hours so as to enable the assessee to work the profit making apparatus for a longer number of hours and produce more goods than what the assessee would otherwise be entitled to do, must be held to be of revenue character.

The decision in IRC vs. Carron Co. (1968) 45 Tax Cases 18 (HL), also bears comparison with the present case. There certain expenditure was incurred by the assessee- company for the purpose of obtaining a supplementary charter altering its constitution, so that the management of the company could be placed on a sound commercial footing and restrictions on the borrowing powers of the assessee-company could be removed. The old charter contained certain antiquated provisions and also restricted the borrowing powers of the assessee-company and these features severely handicapped the assessee-company in the development of its trading activities. The House of Lords held that the expenditure incurred for obtaining the revised charter eliminating these features which operated as impediments to the profitable development of the assessee-company's business was in the nature of revenue expenditure since it was incurred for facilitating the day-to-day trading operations of the assessee- company and enabling the management and conduct of the assessee-company's business to be carried on more efficiently. Lord Reid emphasized in the course of his speech that the expenditure was incurred by the assessee- company "to remove antiquated restrictions which were preventing profits from being earned" and on that account held the expenditure to be of revenue character. It must follow on an analogical reasoning that expenditure incurred by the assessee in the present case for the purpose of removing a restriction on the number of working hours for which it could operate the looms, with a view to increasing its profits, would also be in the nature of revenue expenditure."

45. The Issue of repairs and maintenance expenses whether as capital or revenue has been considered by the Tribunal in the case of Vardhaman Developers Ltd vs ITO in ITA No. 6820/Mum/2012 reported in 38 ITR(Trib) 512. In the said case the assessee had taken an office premise on rent for a period of five years. As the said premises were old and not in use for longtime it incurred the expenditure toward repair and innovation, which included expenditure on false ceiling, fixing tiles/floorings, replacing glasses; wooden partitions; replacement of electrical wiring; plumbing sanitation etc. The Tribunal observed that the advantage or asset, in terms of its functional utility and capacity for the business, needs to maintained, so that expenditure for retaining the same is essentially revenue expenditure, which again, by definition does not lead to result in enhancement or improvement. The Tribunal further observed that the premises in the said case was admittedly not in use for a long time, and thus, in a dysfunctional, if not dilapidated state

prior to it being acquired by the assessee. The Tribunal accordingly held that expenditure restraints thus incurred on refurbishment and renovation of an old premises, in an inoperable state so as to make it fit for the use and as the expenditure was incurred to render it in its functional state and therefore it is clearly in the capital field.

46. The Apex Court in CIT versus Saravana spinning Mills private limited (2007) 293 ITR 201(SC) referred its earlier decision to express as when the repair expenditure could be of capital nature. The relevant paragraph of the said decision is reproduced as under:

> "12. This Court in the case of Ballimal Naval Kishore vs. CIT (1997) 138 CTR (SC) 284 : (1997) 2 SCC 449 approved the test formulated by Chagla C.J. in the case of New Shorrock Spinning & Manufacturing Co. Ltd. vs. CIT (1956) 30 ITR 338 (Bom) as to when the expenditure can be said to have been incurred on current repairs. In that case it was observed as follows :
>
> "The simple test that must be constantly borne in mind is that as a result of the expenditure which is claimed as an expenditure for repairs what is really being done is to preserve and maintain an already existing asset. The object of the expenditure is not to bring a new asset into existence, nor is its object the obtaining of a new or fresh advantage. This can be the only definition of "repairs" because it is only by reason of this definition of repairs that the expenditure is a revenue expenditure.
>
> If the amount spent was for the purpose of bringing into existence a new asset or obtaining a new advantage, then obviously such an expenditure would not be an expenditure of a revenue nature but it would be a capital expenditure, and it is clear that the deduction which the legislature has permitted under s. 10(2)(v) is a deduction where the expenditure is a revenue expenditure and not a capital expenditure.
>
> ..... "

(Emphasis supplied externally)

47. In view of the above judicial pronouncement, we are of the opinion that normally repair to an asset, is an allowable item of expenditure but if the asset is altered, improved or replaced the expenditure may become capital expenditure. Similarly the functional capacity of the asset is altered or improved, the expenditure incurred would be in the nature of capital.

48. Since the lower authorities have not examined the various items of expenditure in view of the above principles laid down in various judicial pronouncements, we feel it appropriate to restore the issue to the file of the Assessing Officer for examining each item of expenditure and decide the issue in dispute afresh in accordance with law. The Assessing Officer may examine the bills and vouchers etc in respect of the expenditure and may carry out enquiries as deemed fit in the case, maybe from the Airport Authority of India or from the relevant contractors etc. The assessee shall be afforded

adequate opportunity of being heard. The ground No. 1 of the appeal of the Revenue is accordingly allowed for statistical purposes.

49. The ground No. 3 of the appeal of the Revenue relates to deletion of disallowance of Rs.33,69,000/-made on account of club expenditure. According to the Assessing Officer the facilities of club are generally availed by very few top-ranked person and very occasionally availed for the guest related to the business and therefore the expenses were not incurred wholly and exclusively for the purpose of business. Before the Ld. CIT-(A) the assessee submitted that expenses incurred were to enable the employees, directors and executives to socialize and develop contacts with various persons for promoting the business of the assessee and the assessee being a company, it cannot be considered to have incurred a personal expenditure, even if certain expenditure has resulted in personal benefit to its employees . The Ld. CIT-(A) deleted the addition on two grounds, firstly that addition of Rs.16,84,500/-has been made twice, secondly that said amount has already been subjected to Fringe Benefit Tax (FBT) by the Assessing Officer.

50. Before us, the Ld. CIT(DR) submitted that merely by charging FBT, the entire expenditure should not be allowed and the addition for the balance amount should be sustained.

51. On the contrary, the Ld. counsel of the assessee relied on various judgments as follows to support that expenses incurred towards club expenditure are for the benefit of the business and therefore allowable as business expenditure:

> i. CIT v. United Glass Mfg. Co. Ltd. (2012-TIOL-102-SC-IT) ii. CIT v. Samtel Color Ltd. (2010) (326 ITR 425) (Del HC.) iii. CIT v. Nestle India Ltd. (296 ITR 682) (Del HC.) iv. Hero Honda Motors Ltd. v. JCIT (2006) (103 ITD 157) (Del ITAT) v. CIT v. Johnson & Johnson Ltd. (2017) (297 CTR 480) (Bom) vi. CIT v. Groz Beckert Asia Ltd. (2013) (214 Taxman 205) (P&H) vii. Gujarat State Export Corpn Ltd. v. CIT (1994) (209 ITR 649) (Guj)

52. He also relied on the CBDT circular No. 5 of 2005 to support his contention that expenditure on which fringe benefit tax is levied, cannot be personal in nature.

53. We have heard the rival submissions and perused the relevant material on record. The CBDT circular cited by the Ld. counsel of the assessee has already been considered by the Ld. CIT-(A). The relevant finding of the ld. CIT-(A) is reproduced as under:

> "8.2 I have carefully considered the assessment order and the submissions made by the appellant on the above issue. I find that whereas the AO has disallowed the said sum under section 37 of the Act, the AO has also considered the said expenses as liable to FBT despite the fact being expressly pointed out to him by the appellant. The CBDT in its Circular 5 of 2005 in answer to Question No.35 has clarified that :
>
> "Whether expenses disallowed under section 37 of the Income-tax Act on the plea that the expenses are personal in nature, would also be liable to FBT?

> 35. Section 37 of the Income-tax Act provides that any expenditure laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head 'profits and gains of business or profession'. Accordingly, any expenditure that is incurred for personal purposes is not allowable as deduction. Sub-section (2) of section 115WB provides for a levy on fringe benefits estimated on a presumptive basis using certain expenses as a measure. To the extent the expenses incurred by the employer are personal in nature and have, therefore, been disallowed under section 37 of the Income-tax Act, such disallowance would not be liable to FBT. For example, let us assume a firm, being an employer, has incurred an expenditure of Rs. 100 towards tour and travel, of which Rs. 40, is personal in nature. Therefore, the amount of Rs. 40, being personal in nature, will be disallowed under section 37 of he Income-tax Act, and FBT will be levied on 20 per cent of the amount of Rs. 60 (Rs. 100 - Rs.40)."

54. In our opinion, the Assessing Officer cannot take two opposite stands. Once, he consider the club expenses for charging FBT, and then again disallow the same. He cannot be allowed to take opposite stand simultaneously that said expenditure was not incurred wholly and exclusively for the purpose of business.

55. Further, we note that in the case of Commissioner of Income Tax Vs. Samtel Colour Ltd. (supra), the Hon'ble Jurisdictional High Court High Court followed the ratio of the judgment of Hon'ble Delhi High Court in the case of CIT Vs. Nestle India Ltd. (supra) and Hon'ble Bombay High Court in the case of Otis Elevator Company India Ltd. Vs. CIT (1992) 195 ITR 682 and held that the admission fee paid toward corporate membership is an expenditure incurred wholly and exclusively for the purpose of business and not a capital expenditure . It has only facilitated smooth and efficient running of the business enterprises and did not add to profit earning apparatus of the business enterprise.

56. In view of our discussion above, we do not find any error in the finding of the Ld. CIT-(A) on the issue in dispute. Accordingly ground No. 3 of the appeal of the Revenue is dismissed.

57. In the result, the appeals of the assessee as well as Revenue, both are allowed partly for statistical purposes.

58. Now, we take up the appeal of the assessee in ITA No. 4213/Del/2012 and appeal of the Revenue in ITA No. 4353/Del/2012 for assessment year 2009-10. The respective grounds raised in the appeal of the assessee as well as appeal of the Revenue are reproduced as under:

> Ground 1: Charging Passenger Service Fee (Security Component) as income of the Appellant - Rs.
>
> 40,91,74,000/-

1. On the facts and circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the Additional Commissioner of Income- tax, Range-10, New Delhi ("the A.O.") in charging to tax the Passenger Service Fee (Security Component) managed by the Appellant in fiduciary capacity on behalf of the Government of India as income of the Appellant.

2. The Appellant prays that the action of AO in treating the Security Component of the Passenger Service Fee as income of the Appellant is incorrect and the AO be directed to delete the aforesaid chargeability of the amount of Passenger Service Fee (Security Component) managed by the Appellant in fiduciary capacity on behalf of the Government of India as income of the Appellant.

Without prejudice to Ground 1:

Ground 2: Even if the Passenger Service Fee (Security Component) is treated as "income" of the Appellant, the same is transferred by over-riding title:

1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in upholding the action of AO in charging Passenger Service Fee (Security Component) collected and managed by the Appellant as income in the hands of the Appellant when the same was transferred by over-riding charge over the same to the Ministry of Civil Aviation, Government of India.

2. The Appellant prays that it be held that the said sum being transferable to the Government of India by an over-

riding title, the same could not be charged as income of the Appellant.

Ground 3: Disallowance under section 14A of the Act

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the action of AO in disallowing a sum of Rs. 2,33,10,128/- on the ground that the Appellant had earned exempt income and therefore the said sum was disallowable u/s. 14A of the Act r.w.r. 8D of the Income Tax Rules, 1962.

2. The Appellant humbly prays that the AO be directed to delete the disallowance of Rs. 2,33,10,128/- made by invoking provisions of Section 14A and Rule 8D.

Without prejudice to Ground 3 above Ground 4:

1. On the facts and circumstances of the case and in law, the learned CIT(A)has erred in not deciding the Appellant Ground No. VIII relating to not adding the disallowance made under section 14A of the Act to the cost of the mutual fund units.

2. The Appellant humbly prays that the AO be directed to add the disallowance made under 14A to the cost of mutual fund units.

Without Prejudice to the claim of the Appellant that Upfornt Fee and Payment to AAI for Capital Work in Progress was allowable as revenue expenditure in AY 2007-08 Ground No. 5: Not granting Depreciation

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the alternate claim raised by the Appellant in regard to not granting depreciation as per section 32 of the Act at appropriate rates on the ground that though the Upfront fees and payment towards the Capital Work in Progress incurred by AAI was in the nature of license fees for conducting business for 30 years, it was not an intangible asset within the meaning of section 32(1)(ii) of the Act is infructuous.

2. The learned CIT(A) failed to appreciate and ought to have held that if the expenditure is treated as capital expenditure, depreciation ought to have been allowed on the same inasmuch as the same is in the nature of a business or commercial right similar to license / franchise/ other commercial right and falls within the meaning of an intangible asset as specified under section 32(1)(ii) of the Act.

3. The Appellant prays that if department appeal on this issue is allowed for the Assessment year 2007-08 and it is held that expense on Upfront fees is capital in nature then depreciation be allowed at appropriate rate under section 32 of the Act on the amount of upfront fees.

Without Prejudice to the claim of the Appellant that Repairs and Maintenance incurred in AY 2007-08 and AY 2008-09 were allowable as revenue expenditure in AY 2007-08 and AY 2008-09.

Ground 6: Not granting Depreciation

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the alternate claim raised by the Appellant in regard to not granting depreciation under section 32 of the Act at appropriate rates on the repair and maintenance of the building, plant and other as the same treated as capital in nature but merely allowing the amortization over the term of the agreement is infructuous.

2. The Appellant prays that if department appeal on this issue is allowed for the Assessment year 2007-08 and 2008-09 and it is held that expense incurred on repair and maintenance of building, plant and others are capital in nature then depreciation be allowed under section 32 of the Act on the repairs and maintenance of the building, plant and others.

Ground 7 The Appellant craves leave to add, alter and/or amend all or any of the foregoing grounds of appeal.

58.1 Grounds of appeal raised by the Revenue as under:

i) Whether the Ld. CIT(A) under the facts and circumstances of the case and in law was correct in allowing the expenses of Rs. 14,15,80,482/- on account of repair & Maintenance of building as revenue expenditure as against the capital expenditure assessed by the AO.

ii) Whether the Ld. CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs.

10.80 made u/s 40(a)(ia) of the IT Act, 1961 by the AO.

iii) Whether the Ld. CIT(A) under the facts and circumstances of the case and in law was justified in deleting disallowance of Rs. 3,30,000/- made on account of club expenditure by the AO.

iv) Whether the Ld. CIT(A) under the facts and circumstances of the case and in law was justified in restricting the disallowance u/s 14A read with Rule 8D of the Rules, 1962 to Rs. 2,33,10,128/- as against Rs. 8,06,74,000/- worked out the AO.

v) The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing.

59. Before us, both the parties were agreed that issue involved in ground No. 1 & 2, 3 &4 and 5 are identical to various grounds raised in appeal of the assessee for assessment year 2008-09, and thus might be decided accordingly.

59.1 The ground Nos. 1 and 2 of the appeal of the assessee relate to the issue of taxability of security component of passenger service fee (PSF), which we have already restored to the file of the Assessing Officer, while adjudicating ground No. 1 of the appeal of the assessee for assessment year 2008-09. Accordingly, in the year under consideration also both these grounds are restored to the file of the Assessing Officer with the directions to follow the directions given while adjudicating the ground No. 1 for assessment year 2008-09.

60. The ground Nos. 3 and 4 of the appeal relates to disallowance under section 14A of the Act. The identical issue for disallowance under section 14A of the Act has been adjudicated in appeal of the assessee for assessment year 2008-09. As the facts and circumstances of the year under consideration related to issue in dispute are identical to the facts and circumstances for assessment year 2008-09, thus these grounds are adjudicated mutatis mutandis.

61. The ground No. 5 of the appeal relates to claim of depreciation of the assessee on 'upfront fee' payment to 'AAI' for capital work in progress in assessment year 2007-08. The issue raised is identical to issue raised in ground No. 5 of the appeal for assessment year 2007-08. Since both these expenditures have already been allowed by the Tribunal in assessment year 2007-08 as revenue expenditure, the without prejudice claim of the depreciation made by the assessee, cannot be allowed. Accordingly, the ground No. 5 of the appeal is dismissed.

62. The ground No. 6 of the appeal relate to depreciation on repair and maintenance expenses held by the Assessing Officer as capital in nature in assessment year 2007-08 and assessment year 2008-09.

62.1 We find that the repair and maintenance expenses in assessment year 2007-08 has already been held by the Tribunal(supra) as revenue expenditure and hence , the without prejudice claim of the assessee for granting depreciation cannot be allowed and accordingly rejected.

62.2 In assessment year 2008-09, the issue of repair and maintenance expenses, whether capital or revenue has been restored back to the file of the Assessing Officer for deciding afresh and thus the without prejudice claim of the assessee for granting depreciation on said repair and maintenance expenses, also cannot be allowed.

62.3 Accordingly, the ground No. 6 of the appeal of the assessee is dismissed.

64. The ground No. 1 of the appeal of the Revenue relates to expenses of Rs.14,15,80,482/-on account of repair and maintenance of building. The said expenses were held by the Assessing Officer as capital in nature, whereas the Ld. CIT-(A) has allowed the same as revenue expenditure.

64.1 Before us both the parties agreed that issue in dispute is identical to the ground No. 1 of the appeal of the revenue in assessment year 2008-09. Accordingly following our finding on the issue in dispute in assessment year 2008-09, we restore the issue to the file of the Assessing Officer for deciding afresh in the light of our finding on the issue in dispute in assessment year 2008-09.

65. The ground No. 2 of the appeal of the revenue relates to disallowance under section 40(a)(ia) of the Act of sitting fee of Rs. 10.80 Lacs paid to directors, due to non-deduction of tax at source. This issue has been decided in ground No. 2 of the appeal of the Revenue for assessment year 2008-09. Accordingly, this ground of appeal is dismissed.

66. The ground No. 3 of the appeal of the Revenue relates to disallowance of Rs.3,30,000/-made on account of club expenditure . This issue has also been decided by us in ground No. 3 of the appeal of the Revenue for assessment year 2008-09. Accordingly, this ground of appeal is also dismissed.

67. The ground No. 4 of the appeal of the Revenue relates to disallowance under section 14A of the Act. The Assessing Officer invoked rule 8D of Income-tax Rules, considered entire interest expenditure including interest on unsecured loans for disallowance in terms of rule 8D(2)(ii) of Income-Tax Rules,1962 and computed the disallowance of Rs.8,06,74,000/-and after allowing the disallowance of Rs.30,79,790/-already made by the assessee, he made addition for the remaining amount of Rs.7,75,94,210/-. The Ld. CIT-(A) restricted the disallowance under rule 8D(2)(ii) of the Rules for interest of Rs.1,07,98,051/- towards working capital loan and computed the disallowance at Rs.2,33,10,128/-. The Revenue is aggrieved with this reduction of the disallowance in terms of section 14A of the Act.

68. Before us, the Ld. CIT-(A) relied on the order of the Assessing Officer, whereas the Ld. counsel of the assessee relied on the order of the Ld. CIT(A).

69. We have heard the rival submission and perused the relevant material on record. The Ld. CIT-(A) has adjudicated the issue in dispute as under:

> "I have considered the submission of the appellant and observation of the assessing officer. It is seen that during the year the appellant has received Rs.4,15,77,513/- as dividend income from mutual funds and daily division schemes. In the computation of income filed along with the return of income, the appellant had worked out Rs. 30.80 lacs as expenses attributable to earning exempt income u/s 14A. The appellant has claimed that no borrowed funds have been utilized for making investments in mutual funds and the loans taken as short term or long term investment have been kept separately and income arising from such funds was credited to capital work in progress. The appellant claims that it has taken working capital loans for meeting day to day expenses till the DIAL gets payment from airlines and other airport users. The moment money is received against monthly billing, the same were credited to working capital account and the surplus if arisen during the intervening period was kept in mutual funds. The appellant has also claimed that during the F.Y. 2006-07 and 2007-08 the company had earned profit before tax of Rs. 134 crore and after payment of MAT taxes of Rs. 14 crore, the appellant company had internal accruals of Rs. 120 crores. The appellant claims that a large part of the amount was available for making investments during F.Y. 2008-09. The appellant contended that Assessing Officer has applied Rule 8D read with section 14A of the IT Act 1961 for disallowance u/s 14A mechanically. The AR of the appellant has submitted that for considering disallowance u/s 14A there are two types of disallowances (i). Disallowance out of the interest payment claimed and (ii) Disallowance out of indirect expenses incurred. The appellant submits that while making disallowance out of interest cost, the Assessing Officer has considered the entire amount of interest paid for disallowance u/s 14A which mainly consist of interest on secured loans obtained by the appellant for development of runway and terminal '1-D' and other assets. It is submitted that no part of these secured loans was utilized by the appellant for making investment. Therefore, the interest payment of Rs. 52.31 crore on secured loans cannot be considered for disallowance u/s 14A of the IT Act. There is another component of interest payment which was paid on loans taken for day to day working capital requirement of the appellant company. For this the appellant has paid interest of Rs. 1,07,98,051/-. The working capital loan was utilized for day to day working capital requirement and for making investment, if there was a surplus amount available. The appellant submits that disallowance u/s 14A if at all to be considered, the amount of interest paid of Rs. 1,07,98,051/- can be considered for disallowance and not the entire interest payment as taken by the Assessing Officer in assessment order.
>
> The appellant submitted that while making disallowance under Rule 8D read with section 14A, the Assessing Officer has not established any nexus with the secured

loans taken and investments made in the mutual funds and other instruments. The Assessing Officer has not given any finding that secured loan taken by the appellant has been utilized for making investments in mutual funds. Since, there is no nexus established between the secured loans taken and investments made by the appellant, the interest payment made for secured loans which were utilized for development of run way and Terminal T1 cannot be considered for disallowance. It is also seen that secured loans were not put in a common hotchpotch account and same were kept separately for use in development of run way and Terminal Tl. Only the loans taken for working capital requirements were credited with the appellant's fund and put in a common hotchpotch account. The interest payment of Rs. 52.31 crore on secured loans relates to acquisition and development of assets which were put to use during the year. Therefore, for working out of disallowance under Rule 8D read with section 14A, the interest paid on working capital of Rs. 1,07,98,051/- is to be considered for disallowance u/s 14A. The revised working for disallowance is as under:-

Particulars	Amount (Rs.)	Amount (Rs.)
1. Direct Expenses		455,000
2. Indirect Interest Cost		
Interest on working capital	10,798,051	
A. Average Tax free Investment As on March, 31st ,	8,805,421,3	
As on March, 31st, 2009	2,080,000	
Average Value of	4,403,750,	
B. Average Total Assets	43,211,921,	
As on March, 31st, 2009	70,497,626,	
Average Value of Total Assets	56,854,774 ,071	
Amount of Indirect Cost not allowable (A*B/C)	836,375	836,375
3. Indirect Expenses	(440375065	
0.50% of Average Tax Free Investment	2*0.50%)	22,018,753
Total amount of disallowance as per 8D (1+2+3)		23,310,12

> In view of the working submitted above, the expenses pertaining to earning of exempt income comes to Rs. 2,33,10,128/-. Therefore, the disallowance u/s 14A of expenses pertaining to earning exempt income is restricted to Rs. 2,33,10,128/-as against the amount of Rs. 8,06,74,000/- worked out by the Assessing Officer. As a result, the appellant gets a relief of Rs. 5,73,63,872/-.

70. The issue of dispute raised by the Revenue is in respect of amount of indirect interest expenditure to be apportioned towards the exempt income earned. In terms of rule 8D(2)(i) only direct expenses including interest expenses are attributed towards the exempt income. In rule 8D(2)(ii), the interest expenses which are not directly related to investment yielding exempt income, are apportioned in the ratio of the average value of investment yielding exempt income to the average value of total assets. In the case of the assessee, the Ld. CIT-(A), has considered the interest expenses toward working capital loan of Rs.1,07,98,051/- and segregated the interest expenses paid towards secured loans. In our opinion, the action of the Ld. CIT-(A), is justified and in accordance with law. We do not find any error in the said finding of the Ld. CIT-(A) on the issue in dispute, accordingly we uphold the same. The ground of the appeal of the Revenue is accordingly dismissed.

71. Since, while adjudicating the grounds of the appeal of the assessee, the computation of disallowance under section 14A of the Act read with rule 8D of Income- tax Rules has been restored to the file of the Assessing Officer, , we direct the Assessing Officer to take the amount of indirect interest expenditure amounting to Rs.1,07,98,051/- only for the purpose of Rule 8D(2)(ii) as upheld by us above.

72. In the result, appeal of the assessee as well as appeal of the Revenue, both are partly allowed for statistical purposes.

73. Now, we take up the appeal of the assessee in ITA No. 3707/Del/2013 and appeal of the Revenue in ITA No. 4203/Del/2013 for assessment year 2010-11. The respective grounds raised in the appeal of the assessee as well as appeal of the Revenue are reproduced as under:

74. Grounds of appeal raised by the assessee in ITA No. 3707/Del/2013 are as under:

> Ground 1: Disallowance under section 14A of the Act
>
> 1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the action of AO in disallowing a sum of Rs. 5,48,790/- on the ground that the Appellant had earned exempt income and therefore the said sum was disallowable u/s. 14A of the Act r.w.r. 8D of the Income Tax Rules, 1962.
>
> 2. The Appellant humbly prays that the AO be directed to delete the disallowance of Rs. 5,48,790/- made by invoking provisions of Section 14A and Rule 8D.

Without prejudice to Ground 1 above Ground 2:

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not deciding the Appellant Ground No. VI relating to not adding the disallowance made under section 14A of the Act to the cost of the mutual fund units.

2. The Appellant humbly prays that the AO be directed to add the disallowance made under 14A to the cost of mutual fund units.

Without Prejudice to the claim of the Appellant that Upfornt Fee was allowable as revenue expenditure in AY 2007-08 Ground No. 3: Not granting Depreciation

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the alternate claim raised by the Appellant in regard to not granting depreciation as per section 32 of the Act at appropriate rates on the ground that though the Upfront fees payment towards to AAI was in the nature of license fees for conducting business for 30 years, it was not an intangible asset within the meaning of section 32(1)(ii) of the Act is infructuous.

2. The learned CIT(A) failed to appreciate and ought to have held that if the expenditure is treated as capital expenditure, depreciation ought to have been allowed on the same inasmuch as the same is in the nature of a business or commercial right similar to license / franchise/ other commercial right and falls within the meaning of an intangible asset as specified under section 32(1)(ii) of the Act.

3. The Appellant prays that if department appeal on this issue is allowed for the Assessment year 2007-08 and it is held that expense on Upfront fees is capital in nature then depreciation be allowed at appropriate rate under section 32 of the Act on the amount of upfront fees.

Without Prejudice to the claim of the Appellant that Repairs and Maintenance incurred in AY 2007-08 to 2009-10 were allowable as revenue expenditure in AY 2007-08 to 2009-10 Ground 4: Not granting Depreciation

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the alternate claim raised by the Appellant in regard to not granting depreciation under section 32 of the Act at appropriate rates on the repair and maintenance of the building, plant and other as the same treated as capital in nature but merely allowing the amortization over the term of the agreement is infructuous.

2. The Appellant prays that if department appeal on this issue is allowed for the Assessment year 2007-08 to 2009-10 and it is held that expense incurred on repair and maintenance of building, plant and others are capital in nature then depreciation be allowed under section 32 of the Act on the repairs and maintenance of the building, plant and others.

Ground 5 The Appellant craves leave to add, alter and/or amend all or any of the foregoing grounds of appeal.

74.1 Grounds of appeal raised by the Revenue in ITA No. 4203/Del/2013 read as under:

> i) Whether the Ld. CIT(A) under the facts and circumstances of the case and in law was correct in allowing set off loss Rs.

1550.81 lacs which has never been claimed by the assessee in its return or revised return of income or during any stage of assessment proceedings?

ii) Whether the Ld. CIT(A) under the facts and circumstances of the case and in law was correct in allowing the expenses of Rs. 794.93 lacs on account of repair & Maintenance of building as revenue expenditure as against the capital expenditure assessed by the AO?

iii) Whether the Ld. CIT(A) under the facts and circumstances of the case and in law was justified in deleting disallowance of Rs. 2,31,250/- made on account of club expenditure by the AO?

iv) Whether the Ld. CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs. 13,60,000 made on account of non deduction of TDS u/s 40(a)(ia) of the IT Act, 1961 by the AO?

v) Whether the Ld. CIT(A) under the facts and circumstances of the case and in law was justified in restricting the disallowance u/s 14A read with Rule 8D of the Rules, 1962 to Rs. Rs. 5,48,790/- as against the amount of Rs.'TO,07,34,258/- worked out the AO?

vi) The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing.

75. The ground No. 1 of the appeal of the assessee and ground No. 5 of the appeal of the Revenue relate to disallowance under section 14A of the Act.

76. The facts qua the disallowance are that the assessee submitted before the Assessing Officer that no dividend income was earned by the assessee during the relevant year, thus no disallowance was called for but the Assessing Officer rejected the contention of the assessee and invoking section 14A of the Act read with Rule 8D of Income-tax Rules, 1962 (in short 'the Rules') made disallowance of Rs.10,07,34,000/-.

77. Before the Ld. CIT-(A), the assessee contended that for disallowance in terms of Rule 8D(2)(ii) of Rules, the interest payment of Rs.3,42,54,495/-towards loan taken for working capital requirement could only be considered. Further the assessee contended that the disallowance under Rule 8D can only be made with respect to the amount of investment which are capable of generating exempted income and thus investment made in mutual funds with growth option scheme should not be considered for such a disallowance as such investment does not earn any exempted income by way of dividend. The ld. CIT-(A) accepted the contention of the assessee and after considering the revised computation of disallowance as per Rule 8D filed by the assessee, he restricted the disallowance to only Rs.5,48,790/-. Aggrieved with the finding of the Ld. CIT-(A), both the assessee

and the Revenue are in appeal before the Tribunal.

78. Before us, the Ld. counsel of the assessee submitted that no dividend income was earned by the assessee during the year under consideration and thus in view of the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltd Vs. CIT 378 ITR 33, no disallowance could be made where no exempt income has been received by the assessee.

79. On the other hand, Ld. CIT(DR) relied on the order of the Assessing Officer and submitted that Assessing Officer has correctly made the disallowance in terms of section 14A of the Act read with rule 8D of the Income-tax Rules.

80. We have heard the rival submission and perused the relevant material on record. The Hon'ble Delhi High Court in the case of Cheminvest Ltd (supra) has held as under:

> "23. In the context of the facts enumerated hereinbefore the Court answers the question framed by holding that the expression 'does not form part of the total income' in Section I4A of the envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year."

81. Before us, there is no dispute on the fact that no dividend income was earned by the assessee during the relevant year and therefore respectfully following the finding of the Hon'ble Delhi High Court ,we hold that no disallowance is required to made in terms of section 14A of the Act in the case of the assessee as no exempt income is received or receivable during the relevant year. Accordingly, we allow the ground No.1 of the appeal of the assessee and dismiss the ground No. 5 of the appeal of the Revenue.

82. The ground No. 2 of the appeal of the assessee is regarding adding the amount of disallowance made under section 14A of the Act to the cost of the mutual fund units. This ground has been raised without prejudice to the ground No. 1 of the appeal of the assessee. Since the ground No. 1 has already been allowed in favour of the assessee, the ground No. 2 is rendered infructuous and accordingly dismissed.

83. The ground No. 3 of the appeal of the assessee relates to allowing depreciation on the amount of upfront fee, which was held by the Assessing Officer as capital expenditure in assessment year 2007-08, though same was claimed by the assessee as revenue expenditure.

84. We find that the Tribunal in the case of assessee for assessment year 2007-08, has allowed the claim of the assessee of upfront fee being revenue expenditure, thus, the claim of depreciation on said amount of upfront fee ,no longer can be allowed and accordingly, we dismiss the ground No. 3 of the appeal of the assessee.

85. The ground No. 4 of the appeal of the assessee relates to allowing depreciation on the repair and maintenance expenses in assessment year 2007-08 to 2009-10 held by the Assessing Officer as capital expenditure, though same were claimed by the assessee as revenue expenditure.

86. We find that the Tribunal in appeal of the assessee for assessment year 2007-08 has already held the expenditure incurred towards repair and maintenance as revenue in nature and therefore claim of the assessee of depreciation on said expenditure cannot be allowed, hence we dismiss the claim of depreciation of the assessee on repair and maintenance expenses for assessment year 2007-08. In assessment year 2008-09 and 2009-10, the issue whether the repair and maintenance expenditure is capital or revenue has been restored to the file of the Assessing Officer by the Tribunal for re-adjudication, accordingly, it is premature to adjudicate the issue of claim of depreciation on said expenses, and hence the claim of the assessee for allowing depreciation in assessment year 2008-09 and 2009-10 is also rejected. The ground No. 4 of the appeal is accordingly dismissed.

87. Ground No. 5 of the appeal of the assessee is general in nature, accordingly dismissed as infructuous.

88. The ground No. 1 of the appeal of the Revenue relates to allowing setoff of losses of Rs. 1550.81 lakhs claimed in the revised computation of income filed before the Assessing Officer.

89. The facts qua the disallowance are that during the assessment year 2008-09 and 2009-10, the assessee considered the receipt of passenger service fee (security component) from airlines as held in fiduciary capacity for incurring expenses towards security and thus surplus of receipt over expenditure was held as non-taxable. During the year under consideration expenditure incurred towards security expenses was higher than the receipt from PSF(SC) and thus there was a deficit in the PSF(SC) account. In the books of accounts, the assessee recorded loss of Rs. 692.95 Lakhs. During the course of assessment proceeding, the assessee filed a revised computation of income and claimed business loss of Rs. 1550.81 lakhs for allowing setoff against the income under the heads as per the provisions of the Act. According to the Assessing Officer, the loss was not claimed in the return of income or subsequent revision of return of income and thus it was not allowable to set off in terms of the Income-tax Act.

90. The learned CIT-(A) observed that PSF(SC) was held an integral part of taxable income in assessment year 2008-09 and 2009-10. He noted that though the assessee did not claim the loss in reference while filing return of income, but after receipt of communication from Ministry of civil aviation, it filed the computation of income before the Assessing Officer on 14/01/2011 and claimed setoff of the loss of PSF(SC) against other income. The Ld. CIT-(A) rejected the basis adopted by the Assessing Officer for declining setoff of losses and concluded that the appellant had filed a revised computation within statutory time of one year and claimed the set off. According to him, in the earlier years when PSF(SC) was having surplus amount, the same was included in the total income of the assessee as taxable income, there was no reason why on the same analogy, the loss suffered during the year should not be included in the hands of the assessee. Accordingly, he directed the Assessing Officer to include the amount of loss of Rs. 1550.81 lakhs in the total income/loss of the

assessee.

91. Before us the Ld. CIT(DR) submitted that under the provisions of the Act for setoff of the loss, it has to be reported in the return of income filed under section 139(3) of the Act and Ld. CIT-(A) has brushed aside the clear and unambiguous provisions of the Act. She further submitted that the stand of the assessee is contradictory. On one hand the assessee refuses to accept the PSF(SC) as taxable receipt, whereas on the other hand, it is claiming to set off the expenses and subsequent losses generated under the PSF(SC) head. Further, she also submitted that the Ld. CIT-(A) has not examined the correctness of the claim particularly when the Assessing Officer has doubted the credibility of the independent audit report. The Ld. CIT-(A) submitted that before allowing the Assessing Officer should be allowed to carry out following verifications:

· Examination of PSF(SC) account where loss has been generated to ascertain correctness of loss of the assessee's claim.

· Verify if the claim of loss is in keeping with the accounting procedure as laid down in the SOP.

· Consider the issue of allowability of loss in terms of Income Tax Act and the legal principles enunciated in this regard.

92. We have heard the rival submission and perused the relevant material on record. The issue of income from PSF(SC) is taxable in the hands of the assessee or not has been restored by us to the file of the Assessing Officer in assessment year 2008-09 and 2009-10. During the year under consideration there is a deficit in the account and assessee has claimed the same as loss in the revised computation of income. Thus the issues before us is that whether the receipts in the PSF (SC) are taxable in the hand of the assessee. In case same are found to be taxable , then only the question of allowing the loss will arise . But if same were found to be not taxable, then issue of loss will not arise . Since in assessment year 2008-09 and 2009-10 the issue of taxability of the receipt from the PSF(SC) has been restored by us to the file of the Assessing Officer, we feel it appropriate to restore this issue of taxability of receipts from PSF(SC) in the year under consideration also to the file of the Assessing Officer with directions similar to what have been issued in assessment year 2008-09. The issue of allowability of loss other than under return of income or revised return of income ,is therefore presently academic only and will arise only ,if the receipts of PSF (SC) are held taxable, thus we are not adjudicating upon that issue. The Assessing Officer may also verify the correctness of the quantum of the loss if so required. The assessee shall be afforded adequate opportunity of being heard. Accordingly, the ground of the appeal of the Revenue is allowed for statistical purposes.

93. The ground No. 2 of the appeal of the Revenue relates to the issue whether the expenses of Rs. 794.93 Lakhs on account of repair and maintenance of building are capital or revenue expenses.

94. This issue whether the repair and maintenance expenses incurred by the assessee are in the nature of capital or revenue expenditure has already been restored by us in assessment year

2008-09. Accordingly, following our finding on the issue in dispute in assessment year 2008-09, in the year under consideration also we restore the issue to the file of the Assessing Officer to decide in accordance with the direction given thereon. Accordingly, this ground of appeal is allowed for statistical purposes.

95. The ground No. 3 of the appeal of the Revenue relates to disallowance of Rs.2,31,250/-on account of club expenses. The identical issue has already been decided by us in the case of the assessee in assessment year 2008-09, thus, following consistent view, we uphold the finding of the Ld. CIT-(A) in deleting the disallowance. Accordingly, the ground No. 3 of the appeal of the Revenue is dismissed.

96. The ground No. 4 of the appeal of the Revenue relates to deleting the addition of Rs. 13, 60,000/-by the Ld. CIT-(A), which was made by the Assessing Officer in terms of section 40(a)(ia) of the Act for non-deduction of TDS on director sitting fee. The identical issue has already been decided by us in assessment year 2008-09 in the case of the assessee and we have upheld the deletion of disallowance by the Ld. CIT-(A). Accordingly to have a consistent view on the issue in dispute, we uphold the finding of the Ld. CIT-(A) in deleting the said disallowance in the year under consideration also. The ground of the appeal of the Revenue is accordingly dismissed.

97. The ground No. 6 of the appeal of the Revenue being general in nature, we dismiss it as infructuous.

98. In the result, appeal of the assessee and appeal of the Revenue are partly allowed for statistical purposes.

99. In a summary, all the appeals of the assessee as well as of the Revenue are partly allowed for statistical purposes, as indicated above.

The decision is pronounced in the open court on 31st Jan., 2018.

Sd/-	Sd/-
(H.S. SIDHU)	(O.P. KANT)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 31st January, 2018.
RK/-(D.T.D)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi