IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" NEW DELHI
BEFORE SHRI R.P. TOLANI AND SHRI SHAMIM YAHYA

ITA Nos. 4277/Del/09, 4817/Del/05 & 3304/Del/07
Asstt. Yrs: 1999-2000, 2002-03 & 2003-04

DCIT, Cen. Cir.-20, New Delhi.	Vs	M/s Ansal Housing & Construction Ltd., 15, UGF, Indraprakash Building, 21, Barakhamba Road, New Delhi.

AND

ITA Nos. 3192/Del/08 & 4595/Del/05
Asstt. Yrs: 2001-02 & 2002-03

M/s Ansal Housing & Construction Ltd., 15, UGF, Indraprakash Building, 21, Barakhamba Road, New Delhi.	Vs.	DCIT, Cen. Cir.-20, New Delhi.

PAN/GIR No.AAACA0377R

(Appellant) (Respondent)

Department by : Shri Ashok Pandey Sr. DR
Assessee by: Shri Gaurav Jain Adv. & Ms. Janpriya Rooprani

O R D E R

PER R.P. TOLANI, J.M :

The revenue is in appeal against separate orders of CIT(A) relating to A.Y. 1999-2000, 2002-03 & 2003-04 and the assessee is in appeal for A.Y. 2001-02 & in cross-appeal for A.Y. 2002-03. All these appeals were heard together and are being disposed of by a consolidated order for the sake of convenience.

ITA no. 4277/Del/2009 (Revenue's appeal for A.Y. 1999-2000):

2. This is revenue's appeal against CIT(A)'s order dated 19-8-2009 relating to A.Y. 1999-2000. Following grounds are raised:

> "1. The order of the ld. CIT(A) is not correct in law and facts.
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> 2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in allowing deduction u/s 80-IA(4F)/80-IB(10) while wrongly taking into consideration the return of income filed belatedly on 27-12-2001 claimed as revised return whereas no such claim had been made in the original return of income.
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> 3. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in allowing deduction u/s 80-IA(4F)/80-IB(10) in respect of three projects whereas in the cases of two projects, the Chartered Accountants in their statutory report have certified that these two projects commenced before 01-10-1998 and for which the assessee company is not entitled for any deduction under section 80-IA(4F)/80-IB(10).
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> 4. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in allowing deduction u/s 80-IA(4F)/80-IB(10) whereas the assessee company had already made expenditure of Rs. 103,01,73,852/- up to 31-3-1998 and small expenditure of Rs. 9,61,17,965/- had been made in the previous year thus showing that substantial expenditure had already been incurred on the projects.
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> 5. The appellant craves leave to add, alter or amend any/ all of the grounds of appeal before or during the course of the hearing of the appeal."

3. Learned DR supports the order of AO.

4. Learned counsel for the assessee, on the other hand, contends as under:

4.1. During the course of original assessment proceedings, the assessee by filing revised computation of income preferred claim of deduction u/s 80-IB(10) of the Act in respect of projects Golf Link I & II, Greater Noida and Avantika Aakriti projects. The AO did not entertain the claim made in the revised computation on the ground that the same was not made by way of filing revised return within the time stipulated u/s 139(5) of the Act. The CIT(A) after considering the submissions and law, reversed the action of the AO in not examining/ entertaining the fresh claim on the aforesaid ground and set aside the mater to the file of AO in order to decide the issue on merits as per law. On further appeal filed by the Department and cross-objections filed by the assessee, the ITAT upheld the order of the CIT(A).

4.2. In set aside proceedings, the AO on the basis of similar findings as given on merits qua allowability of deduction u/s 80-IB(10) for same projects in the assessment orders for A.Yrs. 2000-01 and 2001-02, disallowed the deduction claimed by the assessee on the following grounds:

(1) The projects commenced construction prior to 1-10-1998, being the cut-off date stipulated u/s 80IA(4F)/ 80-IB(10) for claiming deduction under that section;

(2) The built up area in case of certain houses in the project exceeded 1000 sq. ft. being the size of housing project stipulated u/s 80IA(4F)/80-IB(10) for claiming deduction under that section.

4.3. In succeeding assessment years viz. 2000-01 and 2001-02, assessment orders passed u/s 143(3) were revised by CIT u/s 263 of the Act, with the directions to disallow deduction claimed by the assessee u/s 80-IB(10) in respect of Golf Link I & II, Greater Noida; Avantika Aakriti and East End Loni projects.

4.5. On further appeal filed by the assessee before ITAT against the aforesaid orders passed by CIT u/s 263 for A.Y. 2000-01 and 2001-02, the ITAT vide order dated 12-6-2009 decided the issue of eligibility of deduction Golf Link I & II, Greater Noida and Avantika Aakriti, in favour of assessee on merits with the following findings.

(a) The built up area of houses in the project, except 5 houses in East End Loni and 6 houses in Avantika Aakriti, did not exceed the statutory limit of 1000 sq. ft. as per the completion certificates issued by the appropriate authority and, therefore, deduction could not be disallowed in respect of such houses.

(b) The construction of all the housing projects effectively commenced after the statutory date of 1-10-1998 and therefore, deduction u/s 80-

IB(10) was rightly claimed and allowed in the original assessment proceedings.

4.6. On appeal against the captioned order passed by the AO u/s 143(3)/250 for A.Y. 1999-2000, the CIT(A), while following the aforesaid decision of ITAT in the assessee's own case for A.Y. 2000-01 and 2001-02, allowed the appeal in favour of the assessee and upheld the claim of deduction u/s 80-IB(10) on merits by holding as under:

> "On perusal of the details filed and careful consideration of al facts and circumstances of the case, the case of the appellant during the year is squarely covered by the order of Hon'ble ITAT 'A' Bench (ITA no. 1922 and 1923/Del/2005) for Assessment year 2000-01 and 2001-02 of the assessee.
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> 6.3. In view of the above discussion and different judicial pronouncements as cited above particularly following the decision of ITAT Delhi 'A' Bench in the case of the said assessee for Assessment year 2000-01 and 2001-2002, the claim of the assessee u/s 80IA(4F) is directed to be allowed except in the case of Six Units of Awantika Aakriti which exceeded the statutory limit of 1000 sq. ft. per unit as mentioned above. Thus, the appeal of the appellant on this ground is partly allowed."

5. We have heard rival contentions and perused the relevant material available on record. We find merit in the argument of the learned counsel for the assessee that the issue in question, in respect of projects – Golf Link I & II, Greater Noida and Avantika Aakriti, is covered by earlier orders dated 12-6-2009 of the ITAT in assessee's own case in ITA nos. 1922 &

1923/Del/2005 for A.Y. 2000-01 and 2001-02, inter alia, giving following observations:

> "17. Respectfully following the aforesaid three decisions, we hold that the deduction to the assessee can be allowed with respect to the units which did not exceed the statutory limit of 1000 sq. ft. and the assessee would not be entitled to reductions of the built up area in 5 houses in East End Loni and 6 houses in Avantika Aakriti, as referred to in paragraph 10 of the order aforesaid. We order accordingly.
> ….
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> 21. In view of the aforesaid two decisions, we are of the opinion that deduction under section 80-IB(10) has been rightly allowed on housing projects because the building plants of the residential units were approved after 1.10.98 only and the construction has to be deemed to have been commenced on or after the date of approval itself.
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> 22. It should not be lost sight that these are the revision proceedings and in such proceedings the allowance of deduction under section 80IB(10) to the assessee could not be revised as the issue in any case, was debatable and one of the possible views was taken by the assessing officer while granting deduction to the assessee. It was also allowed by the CIT(Appeals) in the succeeding assessment years viz. 2002-03 and 2003-04. The revision of impugned assessment orders as sought to be made by the CIT, while exercising jurisdiction under section 263, would in such a case be merely a difference of opinion and hence not amenable to the revision jurisdiction under section 263 of the Act, in view of Supreme Court decision in the cases of Malabar Industrial Co. Ltd. Vs. CIT 243 ITR 83(SC) as also later decision in CIT v. Max India Ltd. 295 ITR 282 (SC).
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> 23. We hold therefore that CIT is not right in holding that AO failed to make enquiries or to apply his mind and allowed deduction under section 80IB(10) of the Act. We therefore vacate his order and restore that of the AO. It is, however,

> except for the construction found to be in excess built up area over 1000 sq. ft. as aforesaid and in respect of which the assessee would not entitled to deduction."

5.1. Respectfully following the ITAT order in assessee's own case, we uphold the order of CIT(A) on this issue. In the result, revenue's appeal being ITA no. 4277/Del/09 for A.Y. 1999-2000 is dismissed.

ITA no. 3192/Del/08 (Assessee's appeal for A.Y. 2001-02:

6. This is assessee's appeal against CIT(A)'s order dated 27-8-2008 relating to A.Y. 2001-02.

7. Ground nos. 1 to 6 raise one issue in respect of denial of deduction u/s 80-IB(10); Ground no. 7 relates to charging of interest u/s 234B and withdrawal of interest u/s 244A.

7.1. The assessee has also sought to raise an additional ground which is as under:

> "Without prejudice, that on facts and circumstances of the case, the expenditure by way of payment of Rs. 18,75,195/- to RHW Hotel Management Services Ltd. on account of consultation/ development fees claimed as deduction in the assessment year 2002-03 may kindly be directed to be allowed as deduction in the assessment year 2001-02."

7.2. Learned counsel for the assessee contends that assessee had commenced restaurant business during the financial year ending 31.3.2002, relevant to A.Y. 2002-03,. In order to extend the business in the field of

hospitality and for operating the restaurant, the appellant sought professional services of RSW Hotel Management Services Ltd., New Delhi. The agreement for such services was entered on 17th August 2000. In terms of that agreement, invoices of Rs. 18,75,195/- were raised by RSW Hotel Management Services Ltd. in the financial year ending 31st March, 2001.

7.3. Since the business of restaurant commenced during the financial year ending 31-3-2002, the aforesaid amount of Rs. 18,75,195/- was accounted as expense in the books of account and, accordingly, deduction was claimed in the return of income for that year.

7.4. Under the provisions of the Income-tax Act, the expense is, however, allowable as deduction in the year of accrual of expenses, which for the same will assessment year viz. 2001-02. Through the aforesaid additional ground of appeal, the appellant seeks direction for allowability of such expense in A.Y. 2001-02, if they are not allowed in A.Y. 2002-03. The other details with respect to such expense are part of the record of the department and no fresh investigation into facts is called for.

7.5. It is contended that the additional ground of appeal is being raised pursuant to a contingency which may arise due to technical interpretation of law. The omission to raise the aforesaid additional ground of appeal is neither willful nor unreasonable. Reliance is placed on the Supreme Court

in the case of National Thermal Power Company Ltd. Vs. CIT 229 ITR 383 and the powers vested in the ITAT under Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963.

8. After hearing both the parties, we are inclined to admit the additional ground.

9. While deciding revenue's appeal for A.Y. 1999-2000 (supra), we have held that the assessee is entitled for deduction u/s 80-IB(10). Respectfully following the very same reasons herein also, we decide the first issue as raised in ground nos. 1 to 6 in the present appeal, pertaining to deduction u/s 80-IB(10) in favour of the assessee.

10. Charging of interest u/s 234B/ 2441 of the Act is consequential in nature. The AO shall recalculate the charging of interest, if any, while giving appeal effect to appellate order.

11. Additional ground about expenditure by way of payment to RHW Hotel Management Services Ltd. shall be considered along with appeal for A.Y. 2002-03.

ITA no. 4595/Del/05 (Assessee's appeal for A.Y. 2002-03):

12. This is assessee's appeal against CIT(A)'s order dated 20-9-2005 relating to A.Y. 2002-03. Effective grounds of appeal are as under:

> "1. That on the facts and circumstances of the case and in law, the CIT(A)-I has erred in treating the expenses of Rs. 46,55,750/- incurred on consultation/ development fee paid to franchiser companies as capital expenditure and in not providing deductions as revenue expenditure claimed u/s 37(1) of the Income Tax Act, 1961.
>
> The action of the CIT(A)-I being arbitrary, erroneous, unwarranted and unjust must be quashed with directions for reckoning the same as revenue outgoing.
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> 2. That on the facts and circumstances of the case and in law, the CIT(A)-I has erred in law and on the facts in not giving his judgment regarding withdrawal of interest allowed u/s 244A as well as charging of interest u/s 234D in ITNS 150 dated 30th March, 2005 annexed to the assessment order and both the demands are without the authority of law as having not been authorized to do so in the body of the assessment order.

13. The assessee has further sought to raise the following additional ground of appeal:

> "Without prejudice that on facts and circumstances of the case, the expenditure by way of payment of Rs. 18,75,195/- to RHW Hotel Management Services Ltd. On account of consultation/ development fees may kindly be directed to be allowed as deduction in the assessment year 2001-02."

13.1. After hearing both the parties, we admit the additional ground which is consequential/ alternate with A.Y. 2001-02 as mentioned above.

14. Learned counsel for the assessee contends that:

14.1. The appellant is a limited company, engaged, inter alia, in the business of development and construction of housing projects. During the

relevant previous year, assessee extended its existing business in the field of hospitality, viz., business of setting up, operating/running of restaurants.

14.2. To set up restaurants, as part of the aforesaid business of hospitality, the assessee obtained professional services of two leading consultants, viz., RHW Hotel Management Services Ltd., New Delhi and Yorkshire Global Licensing, Netherlands, BV. The assessee entered into following agreements with the above referred parties:

- Franchise & Management Agreement
  with RHW Hotel Management Pvt. Ltd.
  dated 17.8.2000

- Area Development Agreement
  with Yorkshire Global Restaurant
  June 1, 2001

14.3. In accordance with the aforesaid agreement(s), the assessee made following payments to the aforesaid parties towards consultancy/technical assistance/technical know-how obtained from such vendors towards setting-up of restaurant(s):

RHW Hotel Management Pvt. Ltd.	Rs. 18,75,195
Yorkshire Global Restaurant	Rs. 27,80,375
	Rs. 46,55,570

14.4. Payment of Rs. 18,75,195 was made to RHW Hotel Management (P) Ltd. during the period relevant to assessment year 2001-02. The said expenditure was debited, as pre-paid expense, in the books of account for the year ending 31.3.2001 and no deduction was claimed for such expenditure in

the return of income for the assessment year 2001-02, since the restaurant being set-up, had not commenced operations, during that year.

14.5. In the return of income for the relevant assessment year, the aforesaid expenses, including payment of Rs. 18,75,195 made in the assessment year 2001-02, were claimed as revenue expenditure by the assessee.

14.6. In the assessment order, the assessing officer disallowed the aforesaid expenditure on the following grounds:

1. Since the consultancy fee was paid to RHW Hotel Management during the financial year 2000-01, the assessing officer observed that the said payment was made prior to commencement of restaurant business (commenced during the relevant previous year) and was, therefore, not an allowable revenue expenditure;

2 The expenses were capital in nature since the same resulted in acquisition of capital asset in the nature of technical know-how and franchise from the vendors, as also the assessee had obtained advantage of enduring nature by starting a new business of restaurant through know-how acquired from vendors.

14.7. The CIT(Appeals) upheld the action of the assessing officer and held that the impugned expenditure was capital in nature, since the same as it resulted in benefit of enduring nature to the assessee. The CIT(Appeals), however, directed the assessing officer to allow depreciation thereon, as per Rules.

14.8. The impugned expenditure incurred by the assessee for obtaining technical assistance/technical know-how towards setting up/ running restaurants is allowable revenue expenditure for the following reasons:

14.9. Perusal of the various clauses of the agreement dated 17-8-2000 executed between assessee and RHW Hotel Management Services Ltd.

reveals that the impugned payment was made to RHW Hotel Management Services Ltd. towards technical assistance services provided by that company for opening and running the restaurants. The assessee did not acquire any capital asset or any enduring advantage in the nature of know-how from the said vendor. The assessee did not acquire any proprietary rights in the know-how and was only entitled to use thereof, during the currency f the agreement. On termination of the agreement, the assessee was obliged to stop using the brand name of the restaurant (Super Star) associated with it and return any property, used in the restaurant, owned by the vendor/Operator. In such circumstances, it could not be said that the assessee acquired any proprietary rights in the know-how/technical assistance fees, so as to constitute payments made to RHW Management Services Ltd. as capital expenditure.

14.10.Terms of franchisee agreement entered with Yorkshire Hotel, are salso similar wherein, too, the assessee only had the right to use the know-how and brand name of the franchiser to run the restaurant during the currency of the agreement, without any ownership/disposition rights in the same or enduring advantage in the capital field. In such circumstances, the assessee did not acquire any capital asset.

14.11.Reliance, in this regard, is placed on the following decisions, wherein it has been consistently held that payment made for obtaining access to information and restricted license to use of know-how, utilized towards carrying on business, should be treated as revenue expenditure:

- CIT v. Ciba India Ltd. 69 ITR 692 (SC)
- Alembic Chemical Works Co. Ltd. v. CIT 177 ITR 377 (SC)
- CIT vs. British India Corpn. Ltd. 165 ITR 51 (SC)
- CIT v. India Oxygen Ltd. 218 ITR 337 (SC)

- CIT v. IAEC (Pumps) Ltd. 232 ITR 316 (SC)
- CIT v. Wavin (India) Ltd. 236 ITR 314 (SC)
- Shriram Refrigeration Industries Ltd. v. CIT 127 ITR 746(Del)
- Triveni Engineering Works Ltd. v. CIT 136 ITR 340 (Del)
- Shriram Refrigeration Industries Ltd. v. CIT: 127 ITR 746(Del)
- Triveni Engineering Works Ltd. v. CIT:136 ITR 340 (Del)
- Addl. CIT v. Shama Engine Valves Ltd.:138 ITR 216 (Del)
- CIT v. Bhai Sunder Dass & Sons P. Ltd.:158 ITR 195 (Del)
- CIT v. Tata Engineering & Locomotive Co. Pvt. Ltd. 123 ITR 538 (Bom)
- Bajaj Tempo Ltd. v. CIT 207 ITR 1017 (Bom)
- CIT v. Avery India Ltd. 207 ITR 813 (Cal)
- CIT v. Madras Rubber Factory Ltd. 212 ITR 443 (Mad)
- SRP Tools Ltd. v CIT: 237 ITR 684(Mad)
- CIT v Southern Pressings (p) Ltd.: 242 ITR 67(Mad)
- CIT v. Power Build Ltd: 244 ITR 19 (Guj)
- CIT v Gujarat Carbon Ltd. : 254 ITR 294(Guj)
- CIT v. Kirloskar Tractors Ltd.: 98 Taxman 112 (Bom.)
- CIT v Swaraj Engines Ltd. : 154 Taxmann 243(P & H)
- CIT v Zaverchand Gaekwad (P) Ltd. : 202 CTR 94(Guj.)
- CIT v JCT Electronics Ltd. : 203 CTR 315(P &H)
- CIT v. Kanpur Cigarettes (P) Ltd.: 287 ITR 485 (All.)
- CIT v. Eicher Motors Ltd.: 293 ITR 464 (MP)(Indore Bench)
- Shriram Pistons & Rings Ltd. v. CIT: 171 Taxman 81 (Del.)
- CIT v. Lumax Industries Ltd.: 173 Taxman 390 (Del.)
- CIT v. J.K. Synthetics Ltd.: 176 Taxman 355 (Del.)
- DCIT v. DCM Benetton India Ltd.: ITA No. 392 & 3973/Del/2006
- CIT V. Munjal Showa Ltd. : 329 ITR 449 (Del)(HC)
- CIT v. Denso India P. Ltd.: ITA 16/2008 (Del.) (HC)
- ITO v. Shivani Locks Ltd.: 118 TTJ 467 (Del. Tri.)
- Hero Honda Motors Ltd.: 1312/D/2008

14.12. In the aforesaid judgments, the Courts have, on an analysis of the agreement, come to the conclusion that payment made under the agreement was deductible revenue expenditure, since there was no out right or absolute transfer of the know-how by the owner-licensor to the assessee-licensee and the know-how supplied remained the property of the vendor for all times to

come, with the assessee only having limited rights to use such know-how for the purposes of business during the currency of the agreement.

14.13.The ratio decidendi emanating from the aforesaid decisions is squarely applicable, since the assessee had only used the know-how/technical assistances provided by the vendor(s) in the business of running the restaurant, without acquisition of any capital asset, the payments made cannot be regarded as capital expenditure.

14.14.Insofar as the contention of the lower authorities that as the consultancy fees was paid in relation to new business, viz., running of restaurants, the same should be considered as capital expenditure, assessee submitted as under:

14.15.In the present case, as submitted above, the assessee was already engaged in the business of construction. The new venture of opening and running of restaurant(s), in line with the main objects of the assessee, only an extension of the existing business. The test for determining whether different ventures constitutes same business, as has been enunciated by the Supreme Court in various above decisions, is to find out if there is any interconnection, interlacing, interdependence or unity embracing different ventures. The aforesaid interdependence/interlacing of different ventures can be established by existence of common management, common business organization/administration and common fund.

14.16.Reliance is placed on the following decisions:

- Produce Exchange Corporation 77 ITR 739 (SC)
- Setabganj Sugar Mills Ltd. vs. CIT : 41 ITR 272 (SC)
- CIT vs. Prithvi Insurance Co. Ltd.: 63 ITR 632 (SC)

- Hoogly Trust (P) Ltd. v CIT 73 ITR 685 (SC)
- L.M. Chhabda & Sons vs. CIT : 65 ITR 638 (SC)
- Standard Refinery & Distillery Ltd. v. CIT: 79 ITR 589 (SC)
- CIT v. Monnet Industries Limited : 221 CTR (Del) 266,

14.17.In view of the above, if there is unity of control and interlacing of funds between the new venture and the existing business, the new venture is regarded as extension of existing business, even if the new venture constitutes an entirely different activity.

14.18.In the case of assessee, the new business of opening and running of restaurants was commenced under the control and supervision of the existing management of the assessee only. There was complete interlacing of funds between existing business of construction of housing projects and the new activity of setting-up and operating restaurants. The various expenses incurred towards acquisition of assets and those of revenue nature in relation to the new venture, were made out of funds generated from the existing businesses only. The impugned payments were infact made out of funds generated from the business of development and construction of housing projects itself. The lower authorities have also not raised any doubt with respect to the unity of control and interlacing of funds between the existing business and the new venture, which commenced operation during the year.

14.19.It is pleaded that the new venture was only an extension of the existing business and, thus, constituted part of such business, the impugned expenditure incurred on account of consultancy/technical assistance/technical know-how fees was no incurred prior to commencement of business.

14.20.Further reliance in this regard is placed on the following decisions, wherein while following the tests laid down in the aforementioned decisions of Supreme Court, the Courts/Tribunal have held that revenue expenditure incurred in connection with expansion of business, even involving setting up of new unit, which satisfies the test of unity of control, interlacing of funds, common management, etc. would be considered as being incurred for the purposes of business:

CIT v. Relaxo Footwears Ltd: 293 ITR 231 (Del.)
Enpro India Ltd. vs. DCIT: 113 Taxman 132 (Del.)
Jay Engineering Works Ltd. v. CIT: 311 ITR 405 (Del.)
CIT v. Tata Chemicals Ltd: 256 ITR 395 (Bom.)
Addl. CIT v. Aniline Dye Stuffs & Pharmaceuticals Pvt. Ltd.: 138 ITR 843(Bom)
Kesoram Industries and Cotton Mills Ltd vs CIT: 196 ITR 845 (Cal .)
Hindustan Aluminim Corporation Ltd. v. CIT: 159 ITR 673 (Cal.)
CIT v. Rane (Madras) Ltd.: 215 CTR 250 (Chenn.)
Prem Spinning and Weaving Mills Co. Ltd. v. CIT : 98 ITR 20 (All.)
CIT v. Shah Theatres P. Ltd. : 169 ITR 499 (Raj.)
CIT v. Malwa Vanaspati & Chemicals Co. Ltd., 149 CTR 283 (MP)
CIT v. Kerala State Industrial Development Corporation Ltd.: 182 ITR 62 (Ker.)
CCIT v. Senapathy Whitely Ltd. : 101 CTR 31 (Kar.)
CIT v. Hindustan Machine Tools Ltd.: 175 ITR 212 (Kar.)

14.21.Tthe assessee had made payment of Rs.18,75,195 to RHW Hotel Management Services Ltd. in the immediately preceding assessment year, viz., 2001-02. However, since the said restaurant business commenced operations during the relevant previous year, the aforesaid expenditure was claimed business deduction in the return of income for the relevant assessment year, therefore, the said expenditure was allowable expenditure in A.Y. 2001-02.

14.22. Without prejudice to the above, in the event it is held that the expenditure is allowable deduction in the assessment year 2001-02, it is respectfully prayed that the said expenditure may kindly be directed to be allowed as deduction in the assessment year 2001-02, in view of the additional ground of appeal raised by the assessee in both assessment years.

15. Learned DR on the other hand contends that the assessee's own statement it further diversified into hospitality business, clinches the issue that it was a new business. The assessee's construction business and hospitality business are separate and independent. The assessee's presence in construction business, does not imply that it was in the business of hospitality. Consequently, on this first proposition itself the expenditure is in respect of a new business.

15.1. On second proposition, the payment incurred by assessee is in respect of acquiring knowledge and using technical know-how of the operators and the entire payment has been made prior to commencement of business. Article XIV gives complete break up of the one time fee, which is paid before commencement of business in the field of imparting expert knowledge and technical know-how for setting up the restaurants. On commencement of business, the assessee has to pay recurring fee separately. As per assessee's own admission the fee has been spilt into two parts –

(a) Pre-commencement payment on account of expert knowledge and know-how; and
(b) Post commencement recurring fee.

15.2. The impugned amount being pre-commencement of business and on capital account, the CIT(A) has rightly disallowed the same as revenue expenditure.

15.3. Learned DR further contends that assessee has been held eligible for depreciation by CIT(A), therefore, there should be no cause of grievance for it.

16. We have heard rival contentions and perused the material available on record. CIT(A) after considering all the case laws and facts decided the issue as under:

> "20. In the present case of the assessee the payment relates to acquiring of knowledge and using of the technical know-how of the operator the entire payment ahs been made prior to the commencement of business. Article XIV gives complete break up of operator's fee. These fee are one time payment for imparting expert knowledge and technical know-how to the assessee. The operator is also helping the assessee in day to day running of the restaurant and provide all assistance at every stage for day to day running of the business. Such expenditures are not included in this one time fee. Recurring expenditures on operators are being claimed and allowed separately. This development fee is an one time payment. The assessee who was hitherto unknown in this business of hospitality is now running "world class restaurant-cum-bar" and is a much sought after location. Obviously this asset of enduring nature has been created due to the professional help received. This amount therefore has been rightly treated as capital expenditure. I,

> therefore, dismiss this ground of appeal of the assessee and uphold the stand taken by the Assessing Officer. The Assessing Officer however is directed to allow depreciation as per rules."

16.1. A perusal of the facts clearly show that assessee and the operators i.e. M/s RHW Hotel Management Services Ltd., agreed on a formula for two types of fee. The amount in question for A.Y. 2001-02 & 2002-03 was on account of providing of technical know-how and expert knowledge prior to the commencement. By own admission of assessee it was not engaged into hospitality business and diversified from business of construction of buildings. In these circumstances, we see no infirmity in the order of CIT(A), holding that the restaurant business was a new business and expenditure was for setting up the same and the expenses were not allowable as business in nature. We uphold CIT(A)'s order. Assessee's ground no. 1 for A.Y. 2002-03 and additional ground in respect of assessment years 2001-02 & 2002-03 are dismissed.

16.2. Apropos ground no. 2, learned counsel for the assessee contends that interest u/s 244A is consequential in nature. About sec. 234D it is pleaded that these provisions have been inserted by the Finance Act, 2003 w.e.f. 1-6-2003 and therefore the provisions, being prospective in operation, applies from A.Y. 2004-05 onwards and does not apply to the prior year under consideration. Reliance in this regard is placed on the ratio of decisions in

the cases of DIT v. Jacabs Civil Incorporated, Mitsubishi Corpn. & others 330 ITR 578 (Del.); and ITO v. Ekta Promoters Pvt. Ltd. 305 ITR 1 (SB), consequently, interest charged u/s 234D may be directed to be deleted.

17. Learned DR is heard.

18. We have heard rival contentions. The Hon'ble Delhi High Court in the case of Jacabs Civil Incorporated (supra) has held the provisions of sec. 234D to be prospective in nature, applicable from A.Y. 2004-05 onwards. Therefore, provisions of sec. 234D are not applicable for the assessment years under consideration. Accordingly, interest charged u/s 234D is directed to be deleted.

19. In the result, Assessee's appeal for A.Y. 2001-02 and 2002-03 are partly allowed.

ITA No. 4817/Del/05 (Revenue's appeal for A.Y. 2002-03)

20. This is revenue's appeal against CIT(A)'s order dated 20-9-2005 relating to A.Y. 2002-03. Following grounds are raised:

> "1. On the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) has erred in deleting the addition of Rs. 2,24,077/- made on account of prior period expense.
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> 2. On the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) has erred in directing the Assessing Officer, to allow deduction of Rs. 98,40,341/- u/s

80-IB(10) when the Ld. Commissioner of Income Tax (Appeals) himself in para 25 of his order agreed that he deduction is not available to those projects where the development and construction of house was commenced prior to 01-10-1998.

3. On the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) has erred in deleting the addition of Rs. 3,02,65,204/- made on account of additional notional annual letting value of flats."

21. Apropos ground no. 1 the assessee contends as under:

21.1. During he relevant previous year ending 31-3-2002 the assessee claimed an amount of Rs. 2,24,077/- on account of electricity bills pertaining to financial year 2000-01, but which was received and acknowledged/ accounted for payment during the relevant assessment year. Simply because the aforesaid charges were paid in relation to electricity consumed in the preceding financial year, it cannot be said that the aforesaid expenses are prior period expenses. The liability in respect of aforesaid charges crystallized during the relevant year only, on making of the claim by the Electricity Board and its acceptance by the assessee.

21.2. The Gujarat High Court in the case of Saurashtra Cement & Chemical Industries V. CIT 213 ITR 523 held that merely because an expense relates to a transaction of an earlier year, it does not become a liability payable in the earlier year, if the liability was determined and crystallized in the year in

question on the basis of maintaining accounts on the mercantile basis. Reliance is placed on following decisions:

- Saurashtra Cement & Chemical Industries V. CIT 213 ITR 523 (Guj.);
- S.P. Jaiswal Estaes (P) Ltd. v. CIT 214 ITR 558 (Cal.);
- CIT v. India Foils Ltd. 200 ITR 259 (Cal.);
- CIT v. Shriram Pistons & Rings Ltd. 220 CTR 404 (Del.)

21.3. It is further submitted that assessee is subject to uniform rate of tax in both the assessment years viz. 2000-01 & 2001-02. In view of the same, the issue of allowability of impugned expenditure in the relevant year or preceding year is a revenue neutral exercise.

21.4. Reliance in this regard, is placed on the following decisions wherein it has been held that Revenue should not agitate issues relating to allowability of expenditure in one year or different years, since such issues are revenue neutral and do not affect the tax liability of the assessee likely to be collected by the Department as a whole:

- CIT v. Nagri Mills Co. Ltd. 33 ITR 681 (Bom.)
- Shri Ram Pistons & Rings Ltd. 220 CTR 404 (Del.);
- CIT v. Triveni Engineering Industries Ltd. 239 CTR 216 (Del.).

22. Learned DR supports the order of AO.

23. We have heard rival contentions. Since the expenditure in question pertains to consumption of electricity, which was received and payable this year, we see no infirmity in the order of CIT(A), which is upheld.

24. Apropos ground no. 2 regarding deduction u/s 80-IB(10), the issue is covered by the ITAT order in assessee's own case for earlier years. For the reasons given by us while deciding revenue's appeal for A.Y. 1999-2000, above, we dismiss the ground and uphold the order of CIT(A) on the issue in question.

25. Apropos ground no. 3, i.e. notional rent on unsold flats, the learned CIT(A) deleted the addition by following observations:

> "I have considered the submissions of the appellant and the order of the Assessing Officer. The matter with regard to notional annual letting value for the unsold flats which are kept vacant has been considered and allowed in favour of the appellant by my predecessor CIT(A) vide her order for assessment year 2001-02 in the case of the appellant. The appellant ahs also enclosed the copy of decision of the Hon'ble ITAT in the case of M/s Ansal properties and Industries Ltd. in ITA no. 7636/Del/92 for assessment year 1989-90. Vide this order the finding of the CIT(A) has been confirmed that income cannot be taxed on notional basis by estimating ALV.
>
> Since the facts of this case are identical to the facts in the earlier years, I follow the order of my predecessor in the case of the appellant for assessment year 2001-02 and the addition of Rs. 1,87,09,177/- made on account of notional annual letting value of the unsold flats is deleted in appeal."

26. The learned DR supports the order of AO.

27. Learned counsel for the assessee, on the other hand, contends that CIT(A) in deleting the addition in question has relied on earlier order of the ITAT in assessee's own case for A.Y. 1989-90. Learned counsel further

submitted that the ITAT Delhi Bench 'A' vide its order dated 10-6-2009 in assessee's own case for A.Y. 2004-05 also has decided identical issue in favour of the assessee, by following observations:

> 3. The assessee is in the business of real estate, development of mini townships, promotion, development and construction of houses, flats, villas and commercial complexes etc. The assessee, in the course of its business, was in possession of various commercial and residential flats and spaces etc. which were laying in its stock as on 31-3-2003. According to the department, the assessee had not disclosed any income from house property. Notional annual letting value was determined by the AO and was brought to tax. It may be stated that identical issue arose in assessee's own case in A.Y. 1988-89 to 1997-98 as also in A.Y. 2001-02. Different Benches of the ITAT in all those years have deleted like addition. In the light of the discussions made in earlier orders of the ITAT, the issue is decided in favour of the assessee. Accordingly, the revenue 's appeal is dismissed.

The order of the CIT(A) being in conformity with earlier order of ITAT, the same may be upheld.

28. We have heard rival submissions and perused the record. Respectfully following ITAT order in assessee's on case for earlier years, referred to above, holding that no addition on account of additional notional annual letting value of flats can be made in the hands of the assessee, we uphold the order of CIT(A). Ground is dismissed.

29. In the result, revenue's appeal is dismissed.

ITA no. 3304/Del/07 (Revenue's appeal for A.Y. 2003-04)

30. This is revenue's appeal against CIT(A)'s order dated 19-4-2007 relating to A.Y. 2003-04. Following grounds are raised:

> "1. On the facts and circumstances of the case, the Ld. CIT(A) has erred in directing the Assessing Officer to allow a claim of Rs. 16,53,750/- on account of consultation/ development fee as revenue expenditure u/s 37(i) of the I.T. Act, 1961 as against capital expenditure held by the Assessing Officer.
>
> 2. On the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) has erred in deleting the addition of Rs. 1,56,37,782/- made by the Assessing Officer on account of notional rental income on the unsold flats and space held by the assessee company as stock-in-trade.
>
> 3. On the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) has erred in directing the Assessing Officer to allow assessee's claim for deduction u/s 80-IB(10) of the I.T. Act, 1961 amounting to Rs. 3,34,10,717/-."

31. Learned DR supports the order of AO.

32. Apropos ground no. 1, We have already held that if the assessee pays consultancy fees on day to day running of its business, the same is allowable as revenue expenditure. In our view, the orders of both the authorities for the assessment year in question, create some confusion inasmuch as though the AO has referred the disallowance to be attributable to deferred revenue expenditure, however, there is a finding that the assessee started its business during A.Y. 2002-03, CIT(A) though has given the relief but there is no finding that the amount in question is attributable to recurring fee or royalty on running of the restaurant. We have already held that the expenditure

pertaining to consultancy prior to commencement of business will not be allowable, however, the royalty or fee relatable to day to day running of business will be allowable. Since the finding about the nature of expenditure is not clear from the order of lower authorities, we set aside the issue back to the file of AO to verify and if the amount in question is found to be relatable to day to day running of restaurant business post commencement, the same may be allowed. Ground is allowed for statistical purposes only.

33. Apropos ground no. 2, respectfully following our earlier order in assessee's own case, we uphold the order of CIT(A) deleting the notional rental income on the unsold flats and space held by the assessee company as stock-in-trade. This ground of revenue is dismissed.

34. Apropos ground no. 3 i.e. deduction u/s 80-IB(10), following the earlier history of ITAT judgments in assessee's own case, we uphold the order of CIT(A) allowing deduction u/s 80-IB(10) to the assessee.

35. In the result, Revenue's appeal is partly allowed for statistical purposes only.

36. All the appeals are disposed of in the manner indicated above.

Order pronounced in open court on 09-09-2011.

Sd/-	Sd/-
(SHAMIM YAHYA)	(R.P. TOLANI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 09-09-2011.

MP

Copy to :

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR