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

BEFORE HON'BLE PRESIDENT SHRI G.E.VEERABHADRAPPA AND SHRI D.K.AGARWAL (JM)

ITA No.646/Mum/2009
(Assessment Year:2004-05)

M/s Bombay Gas Co.Ltd., Empire House, A.K.Nayak Marg, Fort, Mumbai-400001 PAN: AAACB5863D	V/s	Additional Commissioner of Income Tax 1(1), Mumbai.
APPELLANT		**RESPONDENT**

ITA No.1188/Mum/2009
(Assessment Years: 2004-05)

Dy. Commissioner of Income Tax 1(1), Room No.579, Aayakar Bhavan, M K Road, Mumbai-400020	V/s	M/s Bombay Gas Co..Ltd., Empire House, A.K.Nayak Marg, Fort, Mumbai-400001 PAN: AAACB5863D
APPELLANT		**RESPONDENT**

Date of Hearing	: 22.2.2012
Date of Pronouncement	: 30.3.2012

Revenue by : Shri P.C.Maurya
Assessee by : Shri Divyesh I.Shah

ORDER

PER D.K.AGARWAL (JM)

These cross-appeals by the assessee and Revenue are directed against the order, dated 25.11.2008 passed by the ld. CIT(A) for the assessment year 2004-05. Both these appeals

are disposed of by this common order for the sake of conveyance.

2. Briefly stated facts of the case are that the assessee company is engaged in the business of Finance and Investment, income from house property, compensation, service charges from sub-tenants and income by way of interest and dividend. It filed return declaring total income at Rs.27,780/-. However, the assessment was completed at an income of Rs.92,12,980/- under normal provisions of the Act vide assessment order dated 20.12.2006 passed under section 143(3) of the Income Tax Act, 1961 (the Act). On appeal, the ld. CIT(A) partly allowed the appeal.

3. Being aggrieved by the order of the ld. CIT(A), the assessee and Revenue both are in appeal before us.

ITA No.646/Mum/2009 (by assessee)

4. Grounds of appeal No.I taken by the assessee reads as under :

> "1. On the facts and circumstances of the case and in law, the CIT(A),erred in upholding the action of the Additional Commissioner of Income Tax, Range 1(1), Mumbai ("the A.O.") in disallowing a sum of Rs. 7,54,200/- being 50% of the expenditure in nature of Legal & Professional Expenses on the alleged ground

that expenses were not incurred for the purpose of business."

5. Briefly stated facts of the above issue are that the AO noted that the assessee company has claimed deduction for expenses incurred for Lalbaugh property to the tune of Rs.15,08,400/- under the head "Legal and Professional expenses" . When asked to explain the nature of this expenses, the assessee submitted that " Company has claimed expenses as Lalbaugh property. The Co. was a 50% partner in a firm M/s Gas Property developers formed in 1986 with M/s Mittals. The Co. contributed a piece of land at Lalbaugh, Parel into the Firm as its contribution towards capital in the year 1986. Thereafter, dispute arose between the partners. During the year settlement has been arrived at between the partners and development agreement was entered by partnership firm with a third party in which Co. is confirming party. The Co. has incurred Legal & Professional expenses for drafting, perusing, and approving the suit papers, settlement agreement, development agreement etc." The AO after considering the assessee's explanation held that the expenditure incurred by the assessee company is in fact, the liability of the partnership firm and not of the individual partner who might have contributed that asset as his capital contribution and hence the same cannot be allowed

in the hands of the assessee company and accordingly added a sum of Rs.15,08,400/- to the income of the assessee. On appeal, the ld. CIT(A) in the absence of exact break up of various expenses, directed the AO to allow 50% of the claim of the expenses and sustained 50% of disallowance.

6. At the time of hearing, the ld. Counsel for the assessee while reiterating the same submissions as submitted before the AO and the ld. CIT(A) further submits that the Legal and Professional expenses were incurred in settlement of dispute of the Lalbaug property in which the assessee company was the partner, therefore to protect the interests of the Company property, the assessee has incurred the expenses of Rs.15,08,400/-, the copy of invoices for Legal and Professional fees paid are appearing at pages 34-37 of the assessee's paper book and hence, the same be allowed in full as business expenses.

7. On the other hand, the ld. DR while relying on the order of the AO further submits that the expenditure incurred by the assessee company is in fact the liability of the partnership firm and hence it cannot be allowed and accordingly the ld. CIT(A) was not justified in allowing even 50% relief to the

assessee and the same be reversed and the disallowance made by the AO be restored.

8. We have carefully considered the submissions of the rival parties and perused the material available on record. We find that the ld. CIT(A) has observed that the expenditure claimed also includes expenses for development agreement which has been entered into by the partnership firm with third party in respect of the land after the appellant reaching a settlement with its partners. Therefore, development project belongs to the firm and any expenditure incurred in this regard cannot be the expenditure of the appellant. In the absence of the exact break up of expenses, he reduced the disallowance to 50%. In the absence of any contrary material placed on record by the ld. Counsel for the assessee against the findings of the ld. CIT(A) we are of the view that the ld. CIT(A) was fully justified in sustaining the disallowance to 50% and accordingly, the order passed by the ld. CIT(A) does not call for any interference. The ground taken by the assessee is, therefore, rejected.

9. Grounds of appeal No.II taken by the assessee reads as under :

"1. On the facts and circumstances of the case and in law, the CIT(A) erred in upholding the action of the A.O. in assessing the Income received in the form of Rent and service charges from sub-lease under the head "Income form House property" instead of "Income from Business" on the alleged ground that provisions of Section 27 (iii) (b) r.w.s.269UA(f) of the Income tax Act ("the Act") relating to deemed ownership is attracted."

10. The Brief facts of the above issue are that the AO found that the assessee had credited the following rental income to the P&L account:

Rent & compensation	Rs. 73.64 lacs
Service charges	Rs.43.67 lacs
Total	Rs.117.31 lacs

The assessee was asked to show as to why this income should not be assessed as 'income from house property'. The assessee explained that the property is owned by Life Insurance Corporation of India (LIC). So the assessee is not the owner. It was further explained that it is a pre condition u/s 22 of the Act that the assessee must be the owner. It was further pointed out that the rent and service charges received was declared as income from business for the past several years which was accepted by the department. It was further submitted that section 27(iiib) of the Act specifically excluded any right by way of any lease from month to month and as the

assessee's lease agreement with LIC is a monthly tenancy right, the assessee is not covered by section 27(iiib). However according to the AO the assessee could not furnish any copy of lease deed in support of this contention. On the other hand he found that the premises has been leased to the assessee seven decades back. Further it was found that in Assessment Year 2003-04 the premises was let out to the State Bank of Indore by an agreement made in 1990 which was subsequently renewed in stages for 15 years and the LIC has given its consent for subletting the premises. In view of this he held that the assessee's contention that it is monthly tenant with LIC does not hold good. Accordingly he considered the assessee as deemed owner u/s 27(iiib) r.w.s. 269UA(f) for the premises rented to State Bank of Indore. Accordingly the rent and service charges of Rs.1,17,31,000/- received was treated as income from house property. On appeal, the ld. CIT(A) while agreeing with the views of the AO confirmed the addition made by the AO.

11. At the time of hearing, the ld. Counsel for the assessee very fairly submits that this issue stands covered against the assessee and in favour of the Revenue by the order of the Tribunal in assessee's own case in M/s Bombay Gas Co.Ltd.

V/s ITO in ITA No.2465/Mum/2007 (AY-2003-04) order dated 31.10.2011, therefore, the issue may be decided accordingly.

12. On the other hand, the ld. DR supports the order of the AO, ld. CIT(A) and the orders of the Tribunal in assessee's own case for Assessment Year 2003-04 (supra).

13. After hearing rival parties and perusal of the material available on record, we find merit in the plea of the parties that the issue is covered against the assessee and in favour of the Revenue by the order of the Tribunal, wherein it has been held vide paragraph 10.1 of the order of the Tribunal as under :

> "10.1 In view of the above discussion, we hold that the lower authorities have rightly treated the assessee as deemed owner u/s 27(iiib) of the Act and subsequently treated the rental income from State Bank of Indore as income from house property. Accordingly, this ground of the assessee is dismissed."

14. In the absence of any contrary material brought on record by the assessee, we respectfully following the order of the Tribunal (supra), decline to interfere with the order passed by the ld. CIT(A) on this account. Accordingly, the ground taken by the assessee is rejected.

15. Ground No.III taken by the assessee reads as under :

"1. On the facts and circumstances of the case and in law, the CIT(A) erred in directing the AO to work out the disallowance u/s 14A of the Act for expenditure attributable to the exempted income by applying Rule 8D."

16. Brief facts on the above issue are that the assessee claimed the share of profit from partnership Rs.10,16,82,872 and Dividend Rs.10,03,642/- as exempt income and thus reduced from the computation of income. The assessee was asked to furnish details of expenses relatable to these exempt incomes vis-à-vis provisions of section 14A of the Act. In reply, the assessee explained that the company has not incurred any expenditure to earn share of profit from partnership firm and dividend income which has been claimed as exempt income. Further no expenses of partnership firm of which assessee is a partner have been incurred by the assessee or debited to P & L account of the assessee, therefore, no disallowance u/s 14A is called for. However, the AO did not satisfy with the explanation of the assessee. According to the AO, the capital investment in the partnership firm was Rs.340.33 lacs and investment in shares was Rs.369.68 lacs. The own funds as per balance sheet was Rs.1431.27 lacs and borrowed funds was Rs.693.37 lacs. The AO further observed that the assessee has not proved that the borrowed funds have

not been invested to earn exempt income. Considering the cost of borrowings at 10%, he worked out the sum of Rs.23.17 lacs as expenditure relating to the exempt income and accordingly he disallowed an amount of Rs.23,17,000/- u/s 14A of the Act. On appeal, the ld. CIT(A) following the decision of the Special Bench of the Tribunal in ITO V/s Daga Capital Management P. Ltd. (2008) 26 SOT 603 (Mum) (SB) upheld the retrospective application of the provisions of sub-section (2) and (3) of section 14A and rule 8D of the Income Tax Rules, 1962 and directed the AO to work out the expenditure attributable to the exempted income by applying rule 8D, and confirmed the disallowance of expenditure to that extent.

17. At the time of hearing, both the parties have agreed that the issue may be set aside to the file of the AO to decide the same in view of the judgment of the Hon'ble Bombay High Court in Court in Godrej & Boyce Ltd. Mfg. Co. V/s DCIT (2010) 328 ITR 81 (Bom).

18. Having carefully heard the submissions of the rival parties and perusing the material available on record we find merit in the plea of the parties. The question of making disallowance u/s 14A is no more res integra in view of the

judgment of the Hon'ble Bombay High Court in Godrej & Boyce Ltd. Mfg. Co. (supra) holding that the provisions of section 14A are applicable in circumstances as are prevailing presently and the disallowance has to be worked out by the AO on some `reasonable basis' and not under rule 8D. Under such circumstances, we set aside the impugned order and restore the matter to the file of the AO for deciding the quantum of disallowance, as per the afore-noted judgment, after allowing a reasonable opportunity of being heard to the assessee. The ground taken by the assessee is, therefore, partly allowed for statistical purposes.

19. Ground No.IV taken by the assessee reads as under :

> "1. On the facts and circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO in treating the income from sale of scrap of Rs.22,500/- as income from other sources instead of income from business and profession."

20. Brief facts of the above issue are that the AO from the profit and loss account observed that the assessee has received Rs.22,500/- on account of sale of scrap. The said amount has been shown as income from other sources. The assessee was required to show cause why the same should not be treated as income from other sources. The assessee has

not replied to this query. Therefore, the AO was of the view that since assessee is not doing any business, income from sale of scrap is taxable under the head income from other sources. On appeal, the ld. CIT(A) confirmed the action of the AO.

21. At the time of hearing, both the parties have agreed that this issue is covered against the assessee and in favour of the Revenue by the decision of the Tribunal in assessee's own case for the assessment year 2003-04, therefore, the issue may be decided accordingly.

22. After carefully hearing the submissions of the rival parties and perusing the material available on record we find merit in the plea of the parties. The Tribunal in the assessee's own case in M/s Bombay Gas Co. Ltd. (supra), vide paragraph 15 has held as under :

> "15 We have heard the ld AR as well as ld DR and considered the relevant material on record. The undisputed fact is that the assessee has not carried out any business activity except the rental income from subletting the premises; therefore, the scrap is not generated in the process of business activity and accordingly, we do not find any merit or substance in the claim of the assessee. Hence, in the absence of any material brought before us to show that the scrap has direct nexus or connection with the business activity of the assessee, we do not find any reason to interfere with the order of the lower authorities, qua this issue. Accordingly, the ground of the assessee is dismissed."

23. In the absence of any distinguishing feature brought on record by the ld. Counsel for the assessee we respectfully following the order of the Tribunal, decline to interfere with the order passed by the ld.CIT(A) on this account. The ground taken by the assessee is, therefore, rejected.

ITA No.1188/Mum/2009 (by Revenue)

24. Ground Mo.1 taken by the Revenue reads as under :

> 1. "Whether on the facts and circumstances of the case and in law the CIT (A) is right in deleting the addition of Rs.35,67,817/- u/s.41(1) of the I.T.Act being cessation of trade liability."

25. Brief facts of the above issue are that the AO found from the note appended to form No. 3CD of the audit report that there was a cessation of liability amounting to Rs.35,67,817/- which has not been credited to the P&L account and not declared as taxable income. On inquiry by the AO, the assessee submitted that the assessee owned a sum of Rs.1,20,67,817/- to M/s Blue Chip Business Centre Pvt. Ltd. towards advance received in earlier years. That party was in requirement of funds and agreed to accept Rs.85 lacs as full and final settlement of the dues. The difference amount of Rs.35,67,817/- has been transferred to capital reserve. This

cannot be treated as income for the current year as it was not a cessation of trading liability. This liability was in respect of a loan which ceased to exist and as such was credited as a capital receipt. Referring to the provisions of section 41(1) the assessee pleaded that this section specifically covers only trading liability and not any other liability. In the assessee's case, it was not a trading liability. The decision of the Hon'ble Delhi High Court in the case of CIT V/s Phool Chand Jiwan Ram reported in 131 ITR 37 and the decision of the Hon'ble Allahabad High Court in the case of Motilal and Sons V/s CIT, 101 ITR 177 was cited in this regard. The assessee also referred to section 28(iv) which covers profits and gains from Business or profession to suggest that this section applies to benefit or perquisite whether convertible into money or not. Further reference was made in the decision of Mahindra and Mahindra Ltd. V/s CIT, 261 ITR 501, CIT V/s Mafatlal Gangabhai & Co. Pvt.Ltd (1996), 219 ITR 644 (SC) and CIT V/s New India Industries Ltd (1993), 201 ITR 208 (Guj). The assessee while distinguishing the ratio of decision of the Hon'ble Supreme Court in the case of T.V.Sundaram Iyengar & Sons Ltd.,222 ITR 344 submitted that the same is not applicable to its case. However, the AO was not satisfied with the explanation offered on behalf of the assessee. He held that

that the assessee is engaged in the business of financing activities and that it is accepting loans and providing loans on interest. The loan / advances was taken from M/s. Blue Chip Business Centre Pvt. Ltd. in the course of its business activity. He further rebutted the claim that M/s. Blue Chip Centre Pvt.Ltd. was in need of funds and agreed for a settlement for a lesser sum. Referring to the transactions in the accounts of M/s. Blue Chip Business Centre Pvt.Ltd. in the assessee's books he observed that no such situation is suggested by the transactions. According to him the details of transaction in this account do not suggest that M/s Blue Chip Business Centre Pvt. Ltd. was in immediate need of funds because the payment to them is made on different dates partly after the waiver of part of the loan. Further the facts of the assessee's case are squarely covered by the decision of the Hon'ble Supreme Court in the case of CIT V/s T.V. Sundaram Iyengar & Sons Ltd. (supra). In the assessee's case the amount was received during the course of business of financial activity Initially the amount received was capital in nature but when the creditor i.e. M/s. Blue Chip Business Centre Pvt. Ltd. opted to waive off a part of money receivable by them, it takes the character of the assessee's money and hence it becomes taxable.

Accordingly, the AO taxed the sum of Rs.35,67,817/- as the assessee's income for the year under consideration.

26. On appeal, the ld. CIT(A) while observing that it is not disputed that the advance received by the appellant from M/s Blue Chip Business Centre Pvt. Ltd. has not been claimed as deduction in the profit and loss account, therefore, the basic condition under section u/s 41(1) that the deduction must have been given in any year in respect of the liability which has ceased to exists, has not been fulfilled. The Ld. CIT(A) following the decision of the Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd Vs CIT (2003) 261 ITR 501 (Bom) and the decision of the Tribunal in Prism Cement Ltd. V/s JCIT (2006) 285 ITR (AT) 43 ITAT(Mum) held that the AO was not justified in making addition to the appellant's income and hence he deleted the same.

27. At the time of hearing, the ld. DR while relying on the order of the AO submits that it is a case of cessation of trade liability, therefore, the ld. CIT(A) has erred in deleting the addition of Rs.35,67,817/ made by the AO u/s 41(1) of the Act. The reliance was also placed on the decision of the Tribunal in Schenectady Specialities Asia (P) Ltd V/s ACIT (2009) 29 SOT 1 (Mum) and the decision of the Hon'ble

Bombay High Court in the case of Solid Containers Ltd. V/s DCIT & Anr (2009) 308 ITR 417 (Bom). He, therefore, submits that the addition made by the AO be restored.

28. On the other hand, the ld. Counsel for the assessee submits that the assessee received loan from M/s Blue Chip Business Centre Pvt. Ltd. from 31.12.1997 on words and it was credited to the ledger account of the company appearing at pages 26 to 32 of the assessee's paper book. He further submits that the said loan was partly repaid by the assessee during the financial year 2000-01 onwards and partly adjusted against the rent. He further submits that during the financial year 2003-04 relevant to the assessment year 2004-05 the year under consideration, there was an opening balance in the account of M/s Blue Chip Business Centre Pvt. Ltd. Rs.1,21,31,817/-. The firm M/s Blue Chip Business Centre Pvt. Ltd. approached to the assessee company to clear all its dues as they had immediate business obligation. The Board decided to initiate the compromise and accordingly the company has settled the old outstanding liability of Rs.1,20,67,817/- for Rs.85,00,000/- payable Rs.50,00,000/- on 24.12.2003 and Rs.35,00,000/- on 31.3.2004 and the resolution to this effect was passed in the meeting of the

Board of Directors dated 24.12.2003. The copy of account and copy of Board Resolution are appearing at pages 26 to 33 of the assessee's paper book. He further submits that since it was loan liability and not a trading liability and no deduction was allowed in any of the years, therefore, the provisions of section 41(1) are not applicable to the assessee's case. The ld. Counsel for the assessee while distinguishing the decisions relied on by the ld. DR submits that the order passed by the ld.CIT(A) in deleting the addition made by the AO be upheld.

29. We have carefully considered the submissions of the rival parties and perused the material available on record. In order to better appreciate the controversy involved, it would be convenient to extracts. 41(1) of the IT Act, as follows :

> "41(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first mentioned person) and subsequently during any previous year,—
>
> > (a) the first mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not."

30. We have refrained from reproducing the rest of the section which is not relevant for the purpose of the present controversy, before us.

31. Thus to invoke the provisions of s. 41(1), the following conditions must be fulfilled :

> (i) In the assessment of the assessee, an allowance or deduction has been made in respect of loss, expenditure or the trading liability incurred by the assessee.
>
> (ii) The assessee must have subsequently (i) obtained any amount in respect of such loss or expenditure or (ii) obtained any benefit in respect of such trading liability by way of remission or cessation thereof. In case either of these events happen, the deeming provision enacted in closing part of sub-s. (1) comes into play.
>
> (iii) The amount obtained by the assessee or the value of benefit accruing to him is deemed to be profits and gains of the business or profession and it becomes chargeable to income-tax as an income of that previous year.

32. Further on a plain reading of s. 41(1) of the Act, it is also clear that the provisions contained in s. 41(1) do not make any distinction between any contractual trading liability or any statutory trading liability. Even if any statutory liability is remitted or ceased of, or any amount, whether in cash or in any other manner has been obtained in respect of the expenditure incurred by way of statutory liability, the same would be deemed to be the profit and gains of the business of the assessee and would accordingly be chargeable to income-

tax as the income of that year in which such benefit or amount is obtained.

33. Applying the above provisions of law to the facts of the present case, we find that there is no dispute that the loans/advances were taken by the assessee company from M/s Blue Chip Business Centre Pvt. Ltd in the course of its business activity. We further find that the assessee has taken loan from M/s Blue Chip Business Centre Pvt. Ltd from 31.12.1997 onwards and after adjustment of the rent and repayment of part of the loan/advance, the opening balance as on 1.4.2003 was Rs.1,21,31,817/-. During the year the above company of M/s Blue Chip Business Centre Pvt. Ltd. has approached the assessee company to clear its dues as they had immediate business obligation. The assessee company has initiated compromise with the company and has settled the old outstanding dues of Rs.1,20,67,817/- for Rs.85,00,000/- payable in two instalments of Rs.50,00,000/- by 24.12.2003 and Rs.35,00,000/- by 31.3.2004 and for the above compromise, the assessee company has also passed Board's Resolution dated 24.12.2003 appearing at page 33 of the assessee's paper book. Accordingly, the assessee has passed necessary entries in the books of account and after adjusting

the rent and the amount already paid cleared outstanding amount of M/s Blue Chip Business Centre Pvt. Ltd. to Nil. Since the balance amount of Rs.35,67,817/- was waived by M/s Blue Chip Business Centre Pvt. Ltd, the assessee credited this amount into capital reserve account as capital reserve not subject to tax. In the light of the above facts, we find that there is no dispute that the advance received by the assessee from M/s Blue Chip Business Centre Pvt. Ltd. has not been allowed as a deduction in any of the previous financial year. Thus it is a case of loan liability and not trading liability.

34. It is settled law that if the loan was taken for acquiring the capital asset, waiver thereof would not amount to any income exigible to tax. On the other hand, if this loan was for trading purpose and was treated as such from the very beginning in the books of account, as per T.V.Sundaram Iyengar and Sons Ltd's case (supra), the waiver thereof may result in the income more so when it was transferred to Profit and Loss account.

35. It is also settled law that when the question is whether a receipt of money is taxable or not or whether certain deductions from that receipt are permissible in law or not, the

question has to be decided according to the principles of law and not in accordance with accountancy practice.

36. The decision relied on by the ld. DR in the case of Schenectady Specialities Asia (P) Ltd (supra), has since been reversed by the Hon'ble Jurisdictional High Court in the case of SI Group India Ltd. V/s ACIT (2010) 326 ITR 117 (Bom) wherein it has been held (headnote) :

> "Held,..... Having regard both to the order passed by the Sales Tax Tribunal and the notice of demand, it was not possible for the court to accept the contention that there was a remission or cessation of liability. The record before the court did not disclose that there was a remission or cessation of liability, one of the requirements spelt out for the applicability of section 41(1)(a)……."

37. As regard the other decision relied on by the ld.DR in Solid Containers Ltd.(supra), the loan was taken for trading activities and not for acquiring capital assets. Whereas the case before us, there is no material on record to show that the loan was taken for trading purpose, therefore, the decision relied on by the ld. DR is distinguishable and not applicable to the facts of the present case.

38. For the reasons as discussed above, we hold that the waiver of loan liability credited by the assessee under capital reserve account in its books of account is a capital receipt and cannot be deemed as remission or cessation of liability and

consequently no benefit has arisen to the assessee in terms of section 41(1) of the Act. We, therefore, while upholding the order passed by the ld. CIT(A) on this account, reject the ground taken by the Revenue.

39. Ground No.2 taken by the Revenue reads as under :

> "2. Whether on the facts and circumstances of the case and in law the CIT (A) is right in restricting the disallowance out of legal and professional charges to 50 %."

40. In view of our findings recorded in paragraph 8 of the order, the ground taken by the Revenue is, therefore, rejected.

41. Ground No.3 taken by the Revenue reads as under :

> "3. Whether on the facts and circumstances of the case and in law the CIT (A) is right in deleting the disallowance of interest of Rs.15,96,000/- without appreciating the fact that the proviso to Sec. 36(1)(iii) introduced w.e.f. 01.04.2004 squarely applies to this case and the disallowance has been correctly made by the Assessing Officer."

42. Brief facts of the above issue are that the AO found that a sum of Rs.40.07 lacs was claimed as interest in the P&L account. He further found that this expenditure was disallowed from 1996-97 onwards and such disallowance has been confirmed by the CIT(A). Accordingly, he called for the explanation of the assessee. He was not satisfied with the assessee's explanation that such disallowance in the past is

under appeal before the ITAT and that some new loans have been taken during the year. He observed that it appears from the details of expenditure that 15.96 lacs is the interest element on loans of preceding years, mainly term loan from State Bank of Indore while balance interest is on fresh loans raised during the year. According to him the facts of the case as for old loans are concerned are similar to the facts in preceding years and accordingly he disallowed interest component on old loans amounting to Rs.15.96 lacs. On appeal, the ld. CIT(A) while observing that there is no dispute that the facts relating to the disallowance of interest are the same as in the earlier years, followed by the order of the Tribunal in the assessee's own case for the assessment years 1996-97 and 1997-98 and deleted the disallowance made by the AO.

43. At the time of hearing, the ld. DR supports the order of the AO.

44. On the other hand, the ld. Counsel for the assessee very fairly submits that the Tribunal in the assessee's own case for the assessment year 2003-04 has set aside the issue to the file of the AO, therefore, following the same the issue may be set aside to the file of the AO.

45. We have carefully considered the submissions of the rival parties and perused the material available on record. We find merit in the plea of the ld. Counsel for the assessee that the Tribunal in the immediately preceding year i.e. assessment year 2003-04 in assessee's own case in M/s Bombay Gas Co.Ltd. (supra) has considered the similar issue in paragraphs 11 to 12.1 of its order and vide paragraph 13 has held as under:

> "13 Since the claim of deduction of interest is made u/s 36(iii) of the I T Act and for the year under consideration, when part of the income has been treated as income from house property; therefore, the claim of interest u/s 36(iii) is required to be re-examined and re-adjudicated;. Though the lower authorities have disallowed the claim of the assessee by following the earlier years order, however, in view of our findings on the issue of rental income to be treated as income from house property and particularly, in view of the facts that the assessee has not carried out any business activity and admitted only income by way of sub letting the premises in question. Therefore, the claim of interest is required to be re-examined by considering this aspect. Accordingly, this issue is set aside to the file of the Assessing Officer to decide the same as per law."

46. In the absence of any distinguishing feature brought on record by the parties, we respectfully following the order of the Tribunal (supra) set aside the issue to the file of the AO to decide the same afresh in the light of the direction given by the Tribunal in the said order (supra) and according to law after

providing reasonable opportunity of being heard to the assessee. The ground taken by the revenue is, therefore, partly allowed for statistical purposes.

47. Ground No.4 taken by the Revenue reads as under :

> "Whether on the facts and circumstances of the case and in law the CIT (A) is right in deleting the addition of the amounts claimed towards write off of fixed assets and miscellaneous assets for computing book profit u/s 115JB."

48. Brief facts of the case are that the AO observed that the assessee had debited a sum of Rs.72,05,571/- towards write off of fixed assets and another sum of Rs.1,57,48,103/- towards write off of miscellaneous expenses. The assessee had further credited a sum of Rs.35,67,817/- towards cessation of liabilities. For the purpose of calculating the book profit u/s 115JB the AO added the write off of fixed assets, the write off of miscellaneous expenditure and cessation of liabilities while calculating the book profit on the ground that the amounts written off were on estimated basis and were representing the provisions for unascertained liability. On appeal, the ld. CIT(A) relying on the decision of the Special Bench of Kolkata Tribunal in Jt.CIT V/s Usha Martine Industries Limited, (2007)104 ITD 249[Kol.](SB) and the decision of the Hon'ble Supreme Court in the case of CIT V/s . HCL Comnet Systems &

Services Ltd. [2008] 305 ITR 409 (SC) has held that the AO was not justified to add back the amounts claimed towards the write off of fixed assets and write off of miscellaneous assets for the purpose of computing book profit u/s 115JB and accordingly deleted the addition made by the AO.

49. At the time of hearing, the ld. DR while relying on the order of the AO also relied on the decision of the Tribunal in the case of M/s Sumer Builders Pvt.Ltd. V/s DCIT in ITA Nos. 2512 to 2514/Mum/2009 (AYs. 2003-04 to 2005-06) dated 13.1.2012 for the proposition that the AO can make adjustments to the profit u/s 115JB of the Act. He, therefore, submits that the order passed by the ld. CIT(A) in deleting the addition made by the AO be reversed and that of the AO be restored.

50. On the other hand, the ld. Counsel for the assessee submits that the assessee has actually written off the fixed assets Rs.72.06 lakhs in its profit and loss account and miscellaneous expenses Rs.157.48 lakhs vide schedule 12 to the profit and loss account appearing at page 19 of the assessee's paper book. Therefore, the said amount cannot be added back for the purpose of computing book profit u/s 115JB of the Act and for this proposition the reliance was also placed

on the decision in the case of Tainwala Chemicals & Plastics India Limited V/s ACIT in ITA No.3338/Mum/2008 (AY:2004-05) order dated 27.4.2011. He, therefore submits that the order passed by the ld. CIT(A) be upheld.

51. We have carefully considered the submissions of the rival parties and perused the material available on record. We find that the above amount of fixed asset Rs.72.06 lakhs and miscellaneous expenses of Rs.157.48 lakhs have been added back by the AO on the ground that the said items have also added back by the assessee itself in the computation of income under normal provisions of Act. According to the AO these two amounts have been written off just on estimate basis and thus represent the unascertained liability. However, the ld. CIT(A) deleted the same on the ground that the said amount cannot be added back for the purpose of computation of book profit u/s 115JB of the Act. After considering the totality of the facts and circumstances of the case, we find that there is no material on record to show as to how the assessee has written off the fixed assets of Rs.72.06 lakhs in the profit and loss account out of block of assets without considering the relevant provisions of section 32 of the Act. Neither there is any details of miscellaneous expenditures nor there is any

basis of the same to write off. In the absence thereof, we are of the view that the issue needs further examination at the end of the AO and accordingly in the interests of justice, we consider it fair and reasonable that the matter should go back to the file of the AO to examine the same afresh in the light of our observations here in above and according to law including the aforesaid decisions cited by both the parties after providing reasonable opportunities of being heard to the assessee. The ground taken by the Revenue is, therefore, partly allowed for statistical purpose.

52. In the result, both the appeals are partly allowed for statistical purposes.

Order pronounced in the open court on 30th March,2012.

Sd	sd
(G.E.VEERABHADRAPPA)	**(D.K.AGARWAL)**
PRESIDENT	**JUDICIAL MEMBER**

Mumbai, Dated 30th March, 2012.

SRL:

Copy to:
1. Appellant
2. Respondent
3. CIT Concerned
4. CIT(A) concerned
5. DR concerned Bench
6. Guard file.

True copy

BY ORDER

ASSTT. REGISTRAR,
ITAT, MUMBAI