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

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
and
SHRI B.C. MEENA, ACCOUNTANT MEMBER

(1) ITA No.2831/Del./2007
(ASSESSMENT YEAR : 2004-05)

DCIT, Circle 3 (1), New Delhi.	vs.	M/s. Cosmo Films Limited, 30, Community Centre, Saket, New Delhi. **(PAN : AAACC1152C)**

(2) ITA No.2508/Del./2007
(ASSESSMENT YEAR : 2004-05)

M/s. Cosmo Films Limited, 30, Community Centre, Saket, New Delhi. **(PAN : AAACC1152C)**	vs.	DCIT, Circle 3 (1), New Delhi.

(3) ITA No.1449/Del./2008
(ASSESSMENT YEAR : 2005-06)
(4) ITA No.4040/Del./2009
(ASSESSMENT YEAR : 2006-07)

Addl.CIT, Range 3, New Delhi.	vs.	M/s. Cosmo Films Limited, 30, Community Centre, Saket, New Delhi. **(PAN : AAACC1152C)**

(5) ITA No.1548/Del./2008
(ASSESSMENT YEAR : 2005-06)
(6) ITA No.4010/Del./2009
(ASSESSMENT YEAR : 2006-07)

M/s. Cosmo Films Limited, 30, Community Centre, Saket, New Delhi. **(PAN : AAACC1152C)**	vs.	Addl.CIT, Range 3, New Delhi.

(7) & (8) ITA Nos.934 & 935/Del./2011
(ASSESSMENT YEARS : 2004-05 & 2005-06)

M/s. Cosmo Films Limited, 30, Community Centre, Saket, New Delhi. **(PAN : AAACC1152C)**	vs.	DCIT, Circle 3 (1), New Delhi.
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri K. Sampath, Advocate
REVENUE BY : Shri Krishna, CIT DR

ORDER

PER BENCH :

ITA Nos. 2508/Del/2007 & 2831/Del/2007

Both the cross appeals arise out of the order of the CIT (Appeals)-VI, New Delhi dated 15.03.2007 for the Assessment Year 2004-05.

2. The grounds of appeal taken by the revenue in ITA No.2831/Del/2007 are as under :-

> "1. In the facts and Circumstances of the case, the Ld. CIT(A) erred in treating the "Sales Tax Subsidy" as Capital receipt, which was added by the AO as 'Revenue Receipt"
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> 2. In the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the addition made by the AO on account of Sales tax subsidy, treating the same as Capital receipt ignoring the decision of the Supreme Court in the case of Sahney Steel and Press Works Ltd. (228 ITR 253) which it was held that subsidy given to the assessee to assist in carrying on trade or business, is a trading receipt.

3. In the facts and circumstances of the case, the Ld CIT(A) erred treating the Sales tax subsidy as Capital receipt contrary to the decision of the Madras High Court in the case of Tamilnadu Sugar Corp Ltd. Vs CIT (130 Taxman 348), wherein it was held that Purchase tax subsidy in a revenue receipt.

4. In the facts and circumstances of the case, the Ld CIT(A) erred in allowing depreciation @ 60% on computer peripherals and accessories as against the provisions of the Act.

5. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.

3. The grounds of appeal taken by the assessee ITA No.2508/Del/2007 are as under :-

"1) That the Commissioner of Income tax (Appeals) -VI, New Delhi has grossly erred on facts and in the circumstances of the case and in law in confirming prorated adhoc disallowance of Rs.5,59,000 for interest and administrative expenses which are alleged to have been attributable to the earning of dividend income.

2) That the Commissioner of Income tax (Appeals) -VI, New Delhi has grossly erred on facts and in the circumstances of the case and in law in confirming disallowance of arrears of additional depreciation of Rs.3,31,78,825 as certified by the Chartered Accountant on qualifying assets put to use in the second half of the immediately preceding previous year.

3) That the Commissioner of Income tax (Appeals) -VI, New Delhi has grossly erred on facts and in the circumstances of the case and in law in negating an alternate claim for deduction of additional depreciation of Rs.11,29,06,214 in AY 2004-05.

4) That the appellant reserves the right to add, alter or amend any other ground at the time of hearing.

4. First we take up revenue's appeal. In Ground Nos.1 to 3, the issue involved is against the deletion of addition on account of sales-tax subsidy.

5. The assessee company is engaged in the business of manufacturing BOPP Film which is a thin plastic film used for laminating papers and card board in the packaging industry. The return of income was filed 28.10.2004 declaring income at Rs.16,08,25,590/-.

6. In ground nos1 to 3 of revenue's appeal, the issue is regarding sales-tax subsidy available to assessee for a period of five years under the Government of Maharashtra policy for the dispersal of industries outside Bombay-Thane-Pune belt and to attract industries to the underdeveloped and developing areas of the State. These package of incentives introduced in 1964 was amended from time to time. The Scheme under which assessee got the incentive is Resolution No.IDC-1093 (8889)/IND-8 dated 7.5.1993. Prior to that, such benefits were available under 1988 Scheme and prior to 1988 Scheme, the benefits were extended by 1979 Scheme. The Scheme of 1979 was a modified form of 1977 Scheme. The Scheme of 1988 was revised to rationalize the scope of incentives, various scales and mode of release of incentive to intensify and accelerate the process of dispersal of industries from the developed area to develop the underdeveloped regions of State, particularly those farther away from Bombay-Thane-Pune belt. The Scheme of 1993 under which assessee got benefit was basically a revised form of

incentives. In this revised Scheme of 1993, the experience gained in the implementation of earlier scheme particularly of 1988 and liberalized industrial policy of Govt. of India was taken into consideration and there were some modifications with regard to scope of incentives, various scales and mode of release of incentives.

6.1 In the pleadings, Ld. DR mainly relied on the difference in the earlier Schemes and of 1993 Scheme. He had drawn our attention to various provisions of Scheme which are in variance to the old Scheme. He pleaded that the case is not covered by decision of Special Bench ITAT, Mumbai in the case of DCIT vs. Reliance Industries Ltd., 88 ITD 273 (Mum.)(SB). On the other hand, ld. AR relied on the order of CIT (A) and pleaded that the issue is covered by decision of Mumbai ITAT Special Bench in the case of DCIT vs. Reliance Industries Ltd. 88 IT 273 (Mum.)(SB) which has been affirmed by Hon'ble Bombay High Court in its order dated 15.04.2009 reported in [2010] Taxmann.Com 218 (Bom.).

6.2 We have heard both sides on this issue. The learned CIT (A) has granted the relief on the basis of decision of Special Bench of Mumbai ITAT in the case of DCIT vs. Reliance Industries Ltd. (cited supra). This decision has been upheld by Hon'ble Bombay High Court and the Hon'ble High Court has held as under :-

"4. Sofaras Question (B) is concerned, the Tribunal relied upon the ITAT Mumbai Bench 'J' (Special Bench) decision in the case of assessee itself in Dy. CIT v. Reliance Industries Ltd. [2004] 88 ITD 273: We may gainfully reproduce the following portion:

> "The Scheme framed by the Government of Maharashtra in 1979 find formulated by its Resolution dated 5-1-1980 has been analysed in detail by the Tribunal in its order in RIL for the assessment year 1985-86 which we have already referred to in extenso. On an analysis of the Scheme, the Tribunal has come to the conclusion that the thrust of the Scheme is that the assessee would become entitled for the sales tax incentive even before the commencement of the production, which implies that the object of the incentive is to fund a part of the cost of the setting up of the factory in the notified backward area. The Tribunal has, at more than one place, stated that the thrust of the Scheme was the industrial development of the backward districts as well as generation of employment thus establishing a direct nexus with the investment in fixed capital assets. It has been found that the entitlement of the industrial unit to claim eligibility for the incentive arose even while the industry was in the process of being set up. According to the Tribunal, the Scheme was oriented towards and was subservient to the investment in fixed capital assets. The sale tax incentive was envisaged only as an alternative to the cash disbursement and by its very nature was to be available only after production commenced. Thus, in effect, it was held by the Tribunal that the subsidy in the form of sales tax incentive was not given to the assessee for assisting it in carrying out the business operations. The object of the subsidy was to encourage the setting up of industries in the backward area."

Thus, it can clearly be seen that a finding has been recorded that the object of the subsidy was to encourage the setting up of industries in the backward area by generating employment therein. In our opinion, in answering the issue, the test as laid down by the Supreme Court in CIT v. Ponni Sugars &

Chemicals Ltd [2008] 306 ITR 392 will have to be considered. The Supreme Court has held that the test of the character of the receipt of a subsidy in the hands of the assessee under a scheme has to be determined with respect to the purpose for which the subsidy is granted. The Court further observed that in such cases, what has to be applied is the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. Form of subsidy is material. Court then proceeded to observe as under:

> "The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account."

Therefore, let us apply the purpose test based on the findings recorded by the Special Bench. The object of the subsidy was to set up anew unit in a backward area to generate employment. In our opinion, the subsidy is clearly on capital account. In that view of the matter, Question (D) as framed, would also not arise.

5. In the light of above, appeal is admitted only on the questions (B), (E) and (F).

The learned DR mainly concentrated his arguments on the difference between old Scheme and new Scheme of 1993. However, he is failed to distinguish and make out a markable difference in basic purpose of subsidy received by assessee and subsidy received by Reliance Industries Limited. His reliance on the decision of Hon'ble Supreme Court in the case of Sahney Steel AND

Press Works Ltd., 228 ITR 253 and Hon'ble Madras High Court in the case of Tamilnadu Sugar Corp Ltd. vs. CIT, 130 Taxman 348 (Madras), are of no help. The assessee received the subsidy from the Maharashtra Government under the Maharashtra Govt.'s Package Scheme of Incentives, 1993. The scheme is extension of the earlier schemes. The Preamble of the scheme provided in the Resolution No.IDL-1093/(8889)/IND-8 shows that the scheme was for to achieve dispersal of industries outside the Bomaby-Thane-Pune belt and to attract them to the underdeveloped and developing areas of the State of Maharashtra. The packages of incentives to new/expansion units set up in the developing region of the State were available and were in operation since 1964 under the Scheme popularly known as the Package Scheme of Incentives. This Scheme has been amended from time to time and prior to 1993, the last amendment was in 1988. The learned DR failed to make markable distinction between earlier Schemes and the Scheme of 1993 under which the assessee received the subsidy. The CIT (A) has granted the relief on the basis of Special Bench decision, cited supra, which has been confirmed by the Hon'ble Mumbai High Court, cited supra. The CIT (A) has granted the relied by holding as under :-

> 6.3 I have considered the arguments of learned AR and gone through the observations of the AO. My observations on this issue are as under:-

(i) I find that the issue relating to sales-tax subsidy has been dealt by the Special Bench of Mumbai ITAT in the case of DCIT Vs. Reliance Industries Ltd. 88 ITD 273 Mumbai (SB). The AO also did not distinguish the case of Reliance Industries, (supra) but he made the addition by observing that the judgement of Special Bench has not accepted but the issue is pending before the Hon'ble Mumbai High Court.

(ii) On going through the judgement of Special Bench of IT AT in Reliance Industries Ltd, I find that the question of sales-tax subsidy provided under Maharashtra Benefit Scheme of Incentive was involved in both the cases. Thus, there are similarity in the facts on the issue of sales-tax subsidy in both the cases. Hence, the finding of ITAT in Reliance case is applicable in appellant's case. For the sake of convenience, the relevant portion of finding of the Special Bench Mumbai in Reliance Industries, (Supra) is produced below:-

"Accordingly on the facts and in the circumstances of the case, and in law, the assessee company was Justified in its claim that the sales-tax incentive allowed to it during the previous year in terms of the relevant Govt. order constituted capital receipt and was not to be taken into account in computation of total income. "

Thus, in the light of Special Bench of Mumbai IT AT decision in Reliance Industries Ltd case, I find that the AO in appellant case was not justified to treat the sales-tax subsidy of Rs.6,74,99,274/- as revenue receipt. Further, I find that appellant has charged the Sales Tax amount being part and parcel of sales and quantified this sales-tax subsidy of Rs.6,74,99,274/- and deducted the same from the block of asset by virtue of Explanation 10 of Section 43(1) which was inserted by the Finance Act, 1998 w.e.f 1.4.1999. Thus, the depreciation to that extent has been reduced in this year and further shall be reduced in due course. In other words, the disallowance of sales-tax subsidy would amount to double disallowance in case of appellant. In the light of facts and legal provision I hold that the

> AO was not justified to disallow the sales-tax subsidy amounting to Rs.6,74,99,274 and the same is deleted.
>
> Relief Rs.6,74,99,274/-"

Since the relief is granted on the basis of Special Bench decision of ITAT, Mumbai, which has been affirmed by Hon'ble High Court, the purpose of subsidy remains the same. The facts remain the same, therefore, we find no fault in the order of the CIT (A) and accordingly, ground nos.1 to 3 of revenue's appeal are dismissed.

7. Ground No.4 is against allowing the depreciation @ 60% on computer peripherals. CIT (A) granted relief by holding as under :-

> "3. Ground No. is against disallowance of depreciation of Rs.25,242/- on account of computer accessories. I find that this issue is covered in favour of the appellant. Thus, by following my previous order dated 22.12.06 appeal No.56/06-07 A.Y. 03-04, para 5.3, I hold that computer accessories are integral part of computer system and depreciation against these are liable to be allowed @ 60%. Thus, the A.O. is directed to re work out the depreciation and allow the same accordingly. Thus, ground No.5 is decided in favour of the appellant."

At the time of hearing, learned AR submitted that this issue is covered in favour of the assessee by the decision of ITAT Kolkata 'B' Bench in the case of ITO vs. Samiran Majumdar reported in 98 ITD 119.

7.1 After hearing both the sides on the issue, we find that the matter also stands admittedly covered by the Special Bench of Mumbai Tribunal in the case of CIT vs. Datacraft India Ltd., (2011) 133 TTJ 377. Further in the case

of Expeditors International (India) (P) Ltd. vs. additional CIT, (2008) 13 DTR (Del.)(Trib.) 435, it has been inter alia held that peripherals such as printers, scanners, NT server etc. form integral part of the computer and, therefore, are eligible for deduction of depreciation @ 60% as applicable to the computers. Respectfully following these decisions, we uphold the order of the CIT (Appeals) on this issue.

8. Ground No.5 in revenue's appeal is general in nature and does not require any adjudication.

9. In the result, the revenue's appeal in ITA No.2831/Del/2007 for Assessment Year 2004-05 is dismissed.

10. In the cross appeal (ITA No.2508/Del/2007 for AY 2004-05) filed by the assessee, the ground no.1 is against the confirmation of ad hoc disallowance of Rs.5,59,000/- for interest and administrative expenses attributable to the earning of dividend income.

11. The learned AR submitted that this issue may be restored to the file of Assessing Officer in view of the decision of Hon'ble Mumbai High Court's decision in the case of Godrej & Boyce vs. DCIT, 328 ITR 81 (Mum.). Learned DR was not having any objection to this proposition

12. We have heard both the sides. The Hon'ble Mumbai High Court's decision in the case of Godrej & Boyce vs. DCIT, cited supra, is the only High Court decision available on the applicability of the Rule 8D and

disallowance under section 14A. The Hon'ble Mumbai High Court in the aforesaid case held as under :

> **"Rule 8D r.w. S. 14A (2) is not arbitrary or unreasonable but can be applied only if assessee's method not satisfactory. Rule 8D is not retrospective and applies from AY 2008-09. For earlier years, disallowance has to be worked out on "reasonable basis" u/s 14A (1)**
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> In AY 2002-03, the assessee claimed that no disallowance u/s 14A in respect of the tax-free dividend earned by it could be made as it had not incurred any expenditure to earn the dividend. The AO rejected the claim and made a disallowance u/s 14A. This was deleted by the CIT (A). On appeal by the department, the Tribunal followed the judgement of the Special Bench in Daga Capital 117 ITD 169 (Mum) (where it had been held that s. 14A(2) & (3) & Rule 8D are procedural in nature and have retrospective effect) and remanded the matter to the AO for re-computing the disallowance. The assessee challenged the decision of the Tribunal. HELD:
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> (1) The argument that dividend on shares / units is not tax-free in view of the dividend-distribution tax paid by the payer u/s 115-O is not acceptable because such tax is not paid on behalf of the shareholder but is paid in respect of the payer's own liability;
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> (2) S. 14A supersedes the principle of law that in the case of a composite business expenditure incurred towards tax-free income could not be disallowed and incorporates an implicit theory of apportionment of expenditure between taxable and non-taxable income. **Once a proximate cause for disallowance is established – which is the relationship of the expenditure with income which does not form part of the total income – a disallowance u/s 14A has to be effected**;

(3) The argument that a literal interpretation of s. 14A leads to absurd consequences is not acceptable. **S 14A is founded on a valid rationale** that the basic principle of taxation is to tax net income i.e gross income minus expenditure;

(4) The argument that the method in Rule 8D r.w.s 14A (2) for determining expenditure relating to the tax-free income is arbitrary and violative of Article 14 is not acceptable because there is an adequate safeguard before Rule 8D can be invoked. **The AO cannot ipso facto apply Rule 8D but can do so only where he records satisfaction on an objective basis that the assessee is unable to establish the correctness of its claim**. Also a uniform method prescribed to resolve disputes between assessees and the department cannot be said to be arbitrary or oppressive. There is a rationale in Rule 8D and its method is "fair & reasonable". It cannot be said that there is "madness" in the method of Rule 8D so as to render it unconstitutional;

(5) Rule 8D, inserted w.e.f 24.3.2008 **cannot be regarded as retrospective** because it enacts an artificial method of estimating expenditure relatable to tax-free income. **It applies w.e.f AY 2008-09**;

(6) For the AYs where Rule 8D does not apply, the AO will have to determine the quantum of disallowable expenditure by a **reasonable method** having regard to all facts and circumstances;

(7) On facts, though in the earlier years, the Tribunal had held that the tax-free investments had been made out of the assessee's own funds, this did not mean that there was no expenditure incurred to earn tax-free income. **Even though Rule 8D did not apply to AY 02-03, the AO had to consider whether disallowance could be made u/s 14A (1)**. Also, the

principle of consistency would not apply as s. 14A had introduced a material change in the law."

As stated above, both sides are agreed to restore the matter to the file of Assessing Officer, therefore, we restore the issue to the file of Assessing Officer for working out the reasonable disallowances u/s 14A (1) in view of the aforesaid decision of Hon'ble Mumbai High Court.

13. In Ground Nos.2 & 3, the issue involved is against the disallowance of arrears of additional depreciation of Rs.3,34,78,825/- and negating an alternate claim for deduction of additional depreciation of Rs.11,29,06,214/-.

14. The assessee has claimed additional depreciation during the year which was not pertaining to the addition to the fixed asset during the year. The claim of the assessee was that the additions made during the second half of the financial year 2002-03 relevant to Assessment Year 2003-04, the additional depreciation was claimed only on 50% on all the additions made after 30th September, 2002. The balance 50% could not be claimed in that Assessment Year on account of second proviso to section 32(1)(ii), hence the same is being claimed during this year as it was balance of the additional depreciation. The learned AR submitted that as per the provisions of section 32(1)(iia), the assessee was entitled for further sum of depreciation equal to 15% of the actual cost of new plant and machinery acquired during the year and installed. The assessee has been granted a statutory right by provisions of

section 32(1)(iia) to allow a further sum equal to 15% in the year of acquisition. The expression used in the provision is "shall be allowed". The Second Proviso to section 32(1)(ii) restricts the allowance to 50% if used for less than 180 days. Thus, it is a restriction for period of usage. The statutory right provided to the assessee cannot be get divested by the second proviso to section 32 (1)(ii). Nowhere in the Act it is prohibited that remaining balance of additional depreciation on the assets added after 30th September, shall not be allowed. The cross reference to clause (iia) in the Second Proviso to section 32(1)(ii) provides that 50% rule will apply if assets are purchased in second half of financial year but it cannot overlook the one time allowance which is a statutory right earned in the year of acquisition. Had there been intention to restrict the one time allowance to 50% then it could have been provided in proviso to clause (iia). The restriction is only for period of usage. The proviso to clause (iia) restricts/prohibits deduction only in respect of following :-

> "(*A*) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or
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> (*B*) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or
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> (*C*) any office appliances or road transport vehicles; or
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> (*D*) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income

> chargeable under the head "Profits and gains of business or profession" of any one previous year;"

There is no bar in law that once the amount @ 15% of new plant and machinery is calculated and only 50% is allowable in that particular year on account of period of usage then balance shall not be allowed forever. The law does not restrict/prohibit that the balance of 50% so calculated shall not be allowed in the immediate succeeding year. The additional depreciation u/s 32(1)(iia) as provided by the Finance (No.2) Act, 2002 w.e.f. 1.4.2003 is explained by Circular No.8 of 2002 dated 27.08.2002 reported in 258 ITR (ST) 13 as being 'a deduction of a further sum' as depreciation, therefore what was proposed to be allowed is depreciation simplicitor though it was called as additional depreciation. Section 32(1)(iia) mandates the grant of additional sum of depreciation. Therefore, any balance of the amount of additional sum of depreciation would have to be considered to be carry forward and set off in terms of sub-section (2) of section 32 of the Act. This sub-section of section 32(2) provides that where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) of section 32 in any previous year, than the allowance shall be added to the amount of allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, then it will be deemed to be the allowance for that previous

year, and so on for the succeeding previous year. Section 32 (iia) of the Act is an incentive provision for encouraging the industrialization and such a provision would have to be construed liberally. A provision for promoting economic growth has to be interpreted liberally. This benefit is one time allowance and the restrictions, if any, on such incentive provisions have to be construed so as to advance the objective of the provision and not to frustrate it. The construction which frustrates the basic purpose of the provision should be avoided. The ITAT should take a pragmatic view. He also relied on the decision of Hon'ble Supreme Court in the case of Bajaj Tempo Limited 196 ITR 188. The second proviso to clause (ii) to sub-section (1) of section 32 provides a restriction on the quantum of depreciation based on the usage period. As per this provision, the assets acquired and put to use for the purposes of business or profession for a period of less than 180 days, the deduction in respect of such assets is to be restricted to 50% of the amount calculated. But it does not restrict that balance shall not be allowed forever. The additional depreciation as provided in clause (iia) of sub-section (1) of section 32 is a one time benefit whereas the normal depreciation is year to year feature. If the benefit is restricted only to 50% then it will be against the basic intention to provide incentive for encouraging the industrialization. This will also frustrate the object of the provision and it will be unfair, unequitable and unjust. There is no restriction provided in law which restrict

the carry forward of the additional sum of depreciation which is a one time affair available to assessee on the new machinery and plant. It was also pleaded that what is expressly granted as an incentive cannot be denied through a pejorative interpretation of second proviso to section 32(1)(ii) when such provisions by itself does not bar consideration u/s 32(2) of the Income-tax Act. He pleaded that the orders of the authorities below on this issue is to be set aside.

15. Alternatively, he also pleaded that the provisions of section 32(1)(iia) do not stipulate any condition of put to use, therefore, full deduction is allowable in the year of purchase itself and it may be allowed in full even plant & machinery acquired after 31st September, 2003.

16. On the other hand, the learned DR submitted that the full additional depreciation can be allowed as per section 32(1)(iia) only when the assets are put to use for more than 180 days in the year of acquisition. The additional depreciation on the assets which are put to use by the assessee for less than 180 days is restricted to 50% of the amount by second proviso to section 32(1)(ii). There cannot be any carried forward additional depreciation to be allowed in subsequent year. The second proviso to section 32(1)(ii) restricts such allowances. The proviso laid down conditions for restricting the depreciation where the assets are used for less than 180 days. The condition

to put to use is necessary the condition for allowing any type of depreciation, therefore, the CIT (A) has rightly confirmed the addition.

17. We have heard both the sides on this issue. Section 32(1)(iia) inserted by Finance (No.2) Act, 2002 with effect from 1.4.2003. In speech of Finance Minister, this clause was inserted to provide incentives for fresh investment in industrial sector. This clause was intended to give impetus to new investment in setting up a new industrial unit or for expanding the installed capacity of existing units by at least 25%. Thereafter these provisions were amended by the Finance (No.2) Act of 2004 w.e.f. 1.4.2005 and provided that in the case of any machinery or plant which has been acquired after the 31st day of March, 2005 by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to 15% of actual cost of such machinery or plant shall be allowed as deduction under clause (ii) of section 32(1). This additional allowance u/s 32(1)(iia) is made available as certain percentage of actual cost of new machinery and plant acquired and installed. This provision has been directed towards encouraging industrialization by allowing additional benefit to the setting up new industrial undertakings making or for expansion of the industrial undertaking by way of making more investment in capital goods. Thus, these are incentives aimed to boost new investments in setting up and expanding the

units. The proviso to section 32(1)(iia) restricts the benefit in respect of following :-

> "Provided that no deduction shall be allowed in respect of—
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> (*A*) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or
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> (*B*) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or
>
> (*C*) any office appliances or road transport vehicles; or
>
> (*D*) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year;"

Thus, this incentive in the form of additional sum of depreciation is not available to any plant or machinery which has been used either within India or outside India by any other person or such machinery and plant are installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house or any office appliances or road transport vehicles, or any machinery or plant, the whole of the actual cost of which is allowable as deduction (where by way of depreciation or otherwise) in computing the total income under the head "Profits and gains of business or profession" of any one previous year. Thus, the intention was not to deny the benefit to the assets who have acquired or installed new machinery or plant. The second proviso to section 32(1)(ii) restricts the allowances only to 50%

where the assets have been acquired and put to use for a period less than 180 days in the year of acquisition. This restriction is only on the basis of period of use. There is no restriction that balance of one time incentive in the form of additional sum of depreciation shall not be available in the subsequent year. Section 32(2) provides for a carry forward set up of unabsorbed depreciation. This additional benefit in the form of additional allowance u/s 32(1)(iia) is one time benefit to encourage the industrialization and in view of the decision of Hon'ble Supreme Court in the case of Bajaj Tempo vs. CIT, cited supra, the provisions related to it have to be constructed reasonably, liberally and purposive to make the provision meaningful while granting the additional allowance. This additional benefit is to give impetus to industrialization and the basic intention and purpose of these provisions can be reasonably and liberally held that the assessee deserves to get the benefit in full when there is no restriction in the statute to deny the benefit of balance of 50% when the new plant and machinery were acquired and use for less than 180 days. One time benefit extended to assessee has been earned in the year of acquisition of new plant and machinery. It has been calculated @ 15% but restricted to 50% only on account of usage of these plant & machinery in the year of acquisition. In section 32(1)(iia), the expression used is “shall be allowed”. Thus, the assessee had earned the benefit as soon as he had purchased the new plant and machinery in full but it is restricted to 50% in

that particular year on account of period of usages. Such restrictions cannot divest the statutory right. Law does not prohibit that balance 50% will not be allowed in succeeding year. The extra depreciation allowable u/s 32(1)(iia) in an extra incentive which has been earned and calculated in the year of acquisition but restricted for that year to 50% on account of usage. The so earned incentive must be made available in the subsequent year. The overall deduction of depreciation u/s 32 shall definitely not exceed the total cost of plant and machinery. In view of this matter, we set aside the orders of the authorities below and direct to extend the benefit. We allow ground no.2 of the assessee's appeal. Since we have decided ground no.2 in favour of assessee, there is no need to decide the alternate claim raised in ground no.3. The same is dismissed.

18. Ground No.4 is general in nature and does not require any adjudication.

19. In the result, the appeal filed by the assessee in ITA No.2508/Del/2007 is partly allowed for statistical purposes.

ITA No.1449/Del/2008

20. This appeal filed by the revenue arises out of the order of the CIT (Appeals)-VI, New Delhi dated 21.02.2008 for the Assessment Year 2005-06. The grounds of appeal taken by the revenue are as under :-

> "1. In the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs.51,86,825/- made by AO on account of foreign exchange fluctuation loss

ignoring the fact that liability is unascertained and hence not allowable.

2. In the facts and circumstances of the case, the Ld. CIT(A) erred in allowing the depreciation @ 60% on computer peripherals and accessories amounting to Rs.29,620/- even though rule 5 of the I.T. Rules specifically allow hire rate of depreciation at 60% only on computer and computer software and not on computer accessories.

3. In the facts and circumstances of the case, the Ld. CIT(A) erred in treating the "Sale tax Subsidy" amounting to Rs.9,48,11,588/- as capital receipt which was added by the AO as "Revenue Receipt".

4. The appellant craves leave for reserving the right to amend, modify; alter, add or forego any Grounds(s) of appeal at any time before or during the hearing of this appeal."

21. In ground no.1, the issue involved is foreign exchange fluctuation loss. The learned DR submitted that liability was unascertained; hence the fluctuation is not allowable. He submitted that the CIT (A) was not justified in allowing the appeal.

22. On the other hand, the learned AR submitted that the assessee company has debited a net loss on foreign exchange transactions of Rs.96.87 lacs in the profit and loss account. In the immediate preceding previous year relevant to Assessment Year 2004-05, the assessee has credited a net gain of Rs.374.95 lacs to the profit and loss account. The assessee is converting the foreign currency assets and liabilities into rupee term at the exchange rate prevalent at the last date of financial year, i.e. the date on which the balance sheet of the

assessee is drawn and the same is reflected in the profit and loss account regularly from year to year basis. In the current year, there was a loss while in immediate preceding year there was a gain. The method is being consistently followed. The assessee following the same accounting principles from year to year basis wherever there is a gain the assessee offers the amount for taxation and where there is loss the assessee claims a loss in the profit & loss account.

23. We have heard both the sides on the issue and we hold that this issue is covered in favour of the assessee by various decisions of courts. It is also covered by decision of Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India Limited reported in (2009) 312 ITR 254. In this Hon'ble Supreme Court held as under :-

> " "Loss" suffered by the assessee on account of fluctuation in the rate of foreign exchange as on the date of the balance-sheet is an item of expenditure under section 37(1) of the Income-tax Act, 1961.
>
> Decision of the Delhi High Court in CIT v. Woodward Governor India P. Lt. [2007] 294 ITR 451 affirmed.
>
> For valuing the closing stock at the end of a particular year, the value prevailing on the last date is relevant. This is because profit/loss is embedded in the closing stock. While anticipated loss is taken into account, anticipated profit in the shape of appreciated value of the closing stock is not brought into account, as no prudent trader would care to show increase in profits before actual realization. This is the theory underlying the rule that closing stock is to be valued at cost or market price whichever is lower.

Decision of the Delhi High Court affirmed.

The expression "any expenditure" has been used in section 37 of the Act, 1961, to cover both "expenses incurred" as well as an amount which is really a "loss" even though such amount has not gone out from the pocket of the assessee.

Profits and gains of the previous year are required to be computed in accordance with the relevant accounting standard. On general principles of commercial accounting, the value of the stock-in-trade at the beginning and at the end of the accounting year should be entered in the profit and loss account at cost or market price, whichever is lower-the market value being ascertained on the last date of the accounting year, not at any intermediate date. No gain or profit can arise until a balance is struck between the cost of acquisition and the proceeds of sale. The word "profits" implies a comparison between the state of business at two specific dates, usually separated by an interval of twelve months. Stock-in-trade is an asset: it is a trading asset. Therefore, the concept of profits and gains made by a business during the year can only materialize where a comparison of the assets of the business at two different dates are taken into account.

Under the mercantile system of accounting, what is due is brought into credit before it is actually received : it brings into debit an expenditure for which a legal liability has been incurred before it is actually disbursed.

UNITED COMMERCIAL BANK v. CIT [1999] 240 ITR 355 (SC) followed. .

The accounting method followed by an assessee continuously for a given period of time has to be presumed to be correct till the Assessing Officer comes to the conclusion for reasons to be given that the system does not reflect true and correct profits."

In view of this, we uphold the order of CIT (A) on this issue and accordingly, this ground is dismissed.

24. Ground No.2 is against allowing the depreciation @ 60% on computer peripherals. At the time of hearing, learned AR submitted that this issue is covered in favour of the assessee by the decision of ITAT Kolkata 'B' Bench in the case of ITO vs. Samiran Majumdar reported in 98 ITD 119.

24.1 We have heard both the sides. We have decided this issue in favour of the assessee in this order vide Ground No.4 of ITA No.2831/De/2007 for assessment year 2004-05 in paragraphs 7 & 7.1. Facts remain the same, following our aforesaid order, we sustain the order of CIT (A) on this issue and accordingly this ground is dismissed.

25. Ground No.3 is against the deletion of addition on account of sales tax subsidy. We have taken up this issue in ground nos.1 to 3 in revenue's appeal in ITA No.2831/Del/2007 for Assessment Year 2004-05 vide paragraphs 4 to 6 hereinbefore. Facts and circumstances in this Assessment Year is also similar to that Assessment Year. Therefore, following our decision in the said appeal as aforesaid, we find no fault in the order of the CIT (A) and accordingly, we sustain the same on this issue and this ground of revenue is dismissed.

26. Ground No.4 is general in nature and does not require any adjudication.

27. In the result, appeal filed by the revenue in ITA No.1449/Del/2008 for Assessment Year 2005-06 is dismissed.

ITA No.1548/Del/2008

28. The grounds of appeal taken by the assessee for Assessment Year 2005-06 are as under :-

> "1) That the Commissioner of Income tax (Appeals) -VI, New Delhi has grossly erred on facts and in the circumstances of the case and in law in confirming disallowance of arrears of additional depreciation of Rs.4,07,69,572/- as certified by the Chartered Accountant on qualifying assets put to use in the second half of the immediately preceding previous year.
>
> 2) That the Commissioner of Income tax (Appeals) -VI, New Delhi has grossly erred on facts and in the circumstances of the case and in law in negating an alternate claim for deduction of additional depreciation of Rs.2,22,91,570/- in AY 2005-06.
>
> 3) That the appellant reserves the right to add, alter or amend any other ground at the time of hearing."

29. Ground Nos.1 & 2 are against the confirmation of disallowance of arrears of additional depreciation of Rs.4,07,69,572/- and negating an alternate claim for deduction of additional depreciation of Rs.2,22,91,570/-.

30. We have taken up this issue in ground nos.1 & 2 in assessee's appeal in ITA No.2508/Del/2007 for Assessment Year 2004-05 vide paragraphs 13 to 17 hereinbefore. Facts and circumstances in this assessment year are also similar to that assessment year. Therefore, following our own decision in the aforesaid appeal, we set aside the orders of the authorities below and direct to

extend the benefit. Accordingly, we allow ground no.1 taken by the assessee.

Ground No.2 is alternate claim, hence no need to adjudicate.

31. Ground No.3 is general in nature and does not require any adjudication.

ITA No.4040/Del/2009

32. This appeal filed by the revenue arises out of the order of the CIT (Appeals)-VI, New Delhi dated 23.07.2009 for the Assessment Year 2006-07.

33. The grounds of appeal taken by the revenue are as under :-

> "1. The Ld.CIT(A) erred on facts and in law by treating the "Sales Tax Subsidy" of Rs.266,05,910/- as Capital Receipt, which was added by the AO as "Revenue Receipt".
>
> 2. The Ld.CIT(A) erred on facts and in law by deleting the addition made by the AO on account of Sales Tax Subsidy, treating the same as Capital receipt ignoring the decision of the Supreme Court in the case of Sahney Steel and Press Works Limited (228 ITR 253), where it was held that subsidy given to the Assessee to assist in carrying on trade or business, is a trading receipt.
>
> 3. The Ld.CIT(A) erred on facts and in law by treating the sales tax subsidy as Capital Receipt contrary to the decision of the Madras High Court in the case of Tamilnadu Sugar Corp. Ltd. Vs. CIT (130 Taxman 348) wherein it was held the purchase tax subsidy is a revenue receipt.
>
> 4. The Ld.CIT(A) erred on facts and in law by allowing the depreciation @ 60% on computer peripherals and accessories amounting to Rs.31,378/- though the IT Rules allows 60% depreciation only on computer and computer software.
>
> 5. The appellant craves leave for reserving the right to amend, modify; alter, add or forego any Grounds(s) of appeal at any time before or during the hearing of this appeal."

34. Ground Nos.1 to 3 is against the deletion of addition on account of sales tax subsidy. We have taken up this issue in ground nos.1 to 3 in revenue's appeal in ITA No.2831/Del/2007 for Assessment Year 2004-05 vide paragraphs 4 to 6 hereinbefore. Facts and circumstances in this Assessment Year is also similar to that Assessment Year. Therefore, following our decision in the said appeal as aforesaid, we find no fault in the order of the CIT (A) and accordingly, we sustain the same on this issue and grounds are dismissed.

35. Ground No.4 is against allowing the depreciation @ 60% on computer peripherals. At the time of hearing, learned AR submitted that this issue is covered in favour of the assessee by the decision of ITAT Kolkata 'B' Bench in the case of ITO vs. Samiran Majumdar reported in 98 ITD 119.

35.1 We have heard both the sides. We have decided this issue in favour of the assessee in this order vide Ground No.4 of ITA No.2831/De/2007 for assessment year 2004-05 in paragraphs 7 & 7.1. Facts remain the same, following our aforesaid order, we sustain the order of CIT (A) on this issue and accordingly this ground is dismissed.

36. Ground No.5 is general in nature and does not require any adjudication.

37. In the result, appeal filed by the revenue in ITA No.4040/Del/2009 for assessment year 2006-07 is dismissed.

ITA No.4010/Del/2009

38. The grounds of appeal taken by the assessee for Assessment Year 2006-07 are as under :-

"1) That the Commissioner of Income tax (Appeals) -VI, New Delhi has grossly erred on facts and in the circumstances of the case and in law in confirming disallowance of arrears of additional depreciation of Rs.58,30,495/- as certified by the Chartered Accountant on qualifying assets put to use in the second half of the immediately preceding previous year.

2) That the Commissioner of Income tax (Appeals) -VI, New Delhi has grossly erred on facts and in the circumstances of the case and in law in negating an alternate claim for deduction of additional depreciation of Rs.2,46,25,759/- in AY 2005-06.

3) That the Commissioner of Income tax (Appeals)-VI, New Delhi has grossly erred on facts and in the circumstances of the case and in law in confirming disallowance of prior period expenses of Rs.7,33,260/-

4) That the Commissioner of Income tax (Appeals)-VI, New Delhi has grossly erred on facts and in the circumstances of the case and in law in confirming disallowance of Rs.42,95,700/- out of claim for deduction u/s 10B.

5) That the Commissioner of Income tax (Appeals)-VI, New Delhi has grossly erred on facts and in the circumstances of the case and in law in adjudging allocation of management salary purely on estimate basis.

6) That the Commissioner of Income tax (Appeals)-VI, New Delhi has grossly erred on facts and in the circumstances of the case and in law in confirming disallowance u/s 14A at Rs.88,17,408/- being as high as 111% of the dividend income without regard to the past history in previous two A.Y.s 2004-05 and A.Y. 2005-06 of such disallowance as low as 2.3% of dividend income.

7) That the appellant reserves the right to add, alter or amend any other ground at the time of hearing."

39. Ground No.1 & 2 is against the confirmation of disallowance of arrears of additional depreciation of Rs.58,30,495/- and negating an alternate claim for deduction of additional depreciation of Rs.2,46,25,759/-. We have taken up this issue in ground nos.1 & 2 in assessee's appeal in ITA No.2508/Del/2007 for Assessment Year 2004-05 vide paragraphs 13 to 17 hereinbefore. Facts and circumstances in this assessment year is also similar to that assessment year. Therefore, following our decision in the said appeal as aforesaid, we set aside the orders of the authorities below and direct to extend the benefit. Accordingly, we allow both the grounds taken by the assessee.

40. Ground No.3 is against the disallowance of prior period expenses. In this ground, the assessee has challenged the confirmation of the addition of Rs.7,33,260/- of prior period expenses. The learned AR submitted that the assessee has submitted all the relevant details in respect of these expenses. These were the short provision for expenses and reliance was placed on the decision of ONGC vs. DCIT, 83 ITD 151. It was also submitted that these expenses related to prior period is actually quantified /crystallized in the year relevant to assessment year 2006-07, therefore, it is deductible expenses. He also relied on the unreported decision of Hon'ble Delhi High Court in the case

of CIT, Delhi-III, New Delhi vs. M/s. Vishnu Industrial Gases P. Ltd. in ITR No.229/1988 vide order dated 6th May, 2008 where the Hon'ble High Court has held that the situation does not seem to have changed over the last fifty years and the revenue continues to agitate the question whether tax is leviable in a particular year or in some other year and the Hon'ble Court has held that this is hardly a question that should require us to exercise our minds particularly since there is no doubt that the tax has been paid and the rate of tax remains the same for both the assessment years. He pleaded that the tax rates were the same in those years, therefore, in view of the aforesaid decision of Hon'ble Delhi High Court, no addition is called for.

41. On the other hand, the learned DR submitted that the assessee has failed to establish that these expenses pertaining to prior period expenses were actually quantified and crystallized during the relevant previous year and since the assessee is following the mercantile system of accounting, therefore, these cannot be allowed in this year.

42. We have heard both the sides. We have considered the case laws relied upon and after considering these facts, we find that the assessee has failed to establish that these expenses were actually crystallized during the year under consideration. Since the assessee was following the mercantile system of accounting the assessee has to establish that these liabilities pertaining to the previous year were actually crystallized during the year under consideration.

Since the assessee has failed to do so we sustain the order of the CIT (A) in this ground. Accordingly, the ground is rejected.

43. In Ground Nos.4 & 5, the issue involved is confirmation of disallowance of Rs.42,95,700/- out of the claim for deduction u/s 10B.

44. The learned AR submitted that the following amounts were reduced from the claim u/s 10B :

(i)	Management Salary	Rs.40,56,000/-
(ii)	Charity	Rs. 1,05,700/-
(iii)	Misc.	Rs. 1,34,000/-
		Rs.42,95,700/-

He pleaded that charity and misc. expenses are not at all related to the unit for which deduction u/s 10B is claimed. In the case of management salary, the assessee adjudicated the same @ 5% of the salary paid in proportion to the estimated time spent by these key personnel in the overall management of the EOU unit. He also pleaded alternatively that profits of the business of the undertaking would mean the profits as computed under the head 'Profits and gain of business or profession' in the assessment order. The Assessing Officer has computed the admissible deduction on the returned profit of the EOU as against the assessed profit of the EOU without considering the proportional disallowance for EOU such as additional depreciation, prior period expenses, depreciation on computers, proportionate interest u/s 14A and he pleaded that Assessing Officer has wrongly considered the entire cost

of management salary in proportion of export turnover to the total turnover of the export unit.

45. On the other hand, the learned DR submitted that the assessee has allocated all other expenses in the ratio of sales turnover except the management salary. For this the assessee has adopted the time estimated in proportion to the production capacity employed in EOU and non EOU plants which is purely on estimate basis. It is completely unscientific and unreliable. The allocation on the basis of sales turnover is more accurate and a justified way for allocation of all the common expenses including the expenses of the management salary. He pleaded that the CIT (A) has rightly confirmed the order of Assessing Officer in this regard.

46. We have heard both the sides. In our considered view, two items, charity and misc. expenses should be excluded from the allocation of expenses pertaining to the export oriented unit. However, in the case of management salary, the allocation made by assessee is not justified, the allocation should be made in the ratio of sales turnover as adopted by assessee himself to allocate other expenses. This method of allocation is more accurate and correct way for allocation of management salary to the facts of assessee's case. The basis adopted by assessee of time estimated in proportion to the production capacity employed in EOU and non EOU plants

is highly unreliable and unscientific. In view of these facts, we sustain the order of CIT (A) and dismiss this ground.

47. Ground No.6 is against the confirmation of disallowance u/s 14A at Rs.88,17,408/- being as high as 111% of the dividend income. We have taken up this issue in ground no.1 in assessee's appeal in ITA No.2508/Del/2007 for Assessment Year 2004-05 vide paragraphs 10 to 12 hereinbefore. Facts and circumstances in this assessment year are also similar to that assessment year. Therefore, following our decision in the said appeal as aforesaid, we restore the issue to the file of Assessing Officer for working out the reasonable disallowances u/s 14A (1).

48. Ground No.7 is general in nature and does not require any adjudication.

49. In the result, appeal filed by the assessee in ITA No.4010/Del/2009 for Assessment Year 2006-07 is partly allowed for statistical purposes.

50. The assessee has taken an additional ground in ITA Nos.2508/Del/2007, 1548/Del/2008 and 4010/Del/2009 for assessment years 2004-05, 2005-06 and 2006-07 respectively. The additional ground in all the three appeals, except the difference in figure, read as under :-

> "1. That the amount of sales tax subsidy under Dispersal of Industries Package Scheme of Incentives, 1993 is not deductible from the block of assets for the purpose of computing depreciation as it is solely meant to encourage setting up of industries in undeveloped/underdeveloped regions in

Maharashtra state and not by way of payment made specifically to meet a portion of the cost of any asset.

2. That the appellant reserves the right to add, alter or amend any other ground at the time of hearing."

51. It was submitted before us that this is a purely legal ground and in view of the decision of Hon'ble Supreme Court in the case of NTPC vs. CIT, 229 ITR 383, it should be admitted. The subsidy received by the company is in the capital field for setting up infrastructure/expansion and the subsidy was not meant for reimbursement or for meeting out the cost of the fixed assets. For this, he relied on the decision of Hon'ble Apex Court in the case of P.J. Chemicals Limited, 210 ITD 830 and pleaded that even where the subsidy is given as a specified percentage of fixed capital cost, that can only be called a measure adopted under a particular scheme to quantify the subsidy but that will not be a payment directly or indirectly to meet any portion of the actual cost of the assets, therefore, such subsidy cannot be reduced from the actual cost of any fixed assets. He also submitted that similar view is also taken by the ITAT Visakhapatnam Bench in the case of Sasisri Extractions Ltd. vs. ACIT, 122 ITD 428.

52. On the other hand, learned DR objected to admit the additional ground. He also pleaded that if admitted, then also the assessee's claim that it should

not be reduced from the actual cost of the fixed asset, definitely to prove that it was a revenue receipt and should be treated as income of the assessee.

53. After hearing both the sides, we hold that this is a legal ground raised first time before us. In view of the decision of Hon'ble Supreme Court in the case of NTPC vs. CIT, cited supra, this ground is admitted. However, in the interest of justice and equity, we restore this issue to the file of CIT (A) to be decided on merits after providing an opportunity of being heard to the assessee.

54. In the result, the additional ground taken in all the three appeals of the assessee for assessment years 2004-05 to 2006-07 is allowed for statistical purposes.

ITA NOS.934 & 935/DEL/2011

55. Both these appeals filed by the assessee are directed against the common order of CIT (A)-VI, New Delhi dated 15.10.2010 for Assessment Years 2004-05 & 2005-06.

56. In both the appeals, the issue involved is against the levy of penalty u/s 271(1)(c) of the Income-tax Act, 1961. The brief facts of the case are as under :-

The assessee company claimed additional depreciation of Rs.3,34,78,825/- and Rs.1,96,57,902/- in the assessment years 2004-05 and

2005-06 respectively. The claim of the additional depreciation was pertaining to the assessee made during the second half of the immediate preceding year where the additional depreciation @ 50% was claimed and all the additions are made after 30th September and balance 50% could not be claimed in respect of that year which is claimed in the subsequent year, i.e. 2004-05 and 2005-06. The additional depreciation claimed by the assessee was disallowed by holding that there is no provision of carry forward of depreciation. The CIT (A) confirmed the addition. The Assessing Officer levied the penalty u/s 271(1)(c) and the CIT (A) has confirmed the same by holding as under :-

> " In the present case, the appellant has made a claim that is untenable in law and has tried to take the shelter of legal opinion. However, when the language of the Act is clear and there is no scope of different interpretation, such an act of the assessee cannot be taken as bonafide. Hon'ble Delhi High Court has observed in the above said case that it cannot be disputed that claim needs to be bonafide. If the claim besides being incorrect tin law is mala fide, Explanation 1 to section 271(1)(c) would come into play.
>
> In view of the above discussion and facts of the present case, I find that the Assessing Officer was justified in invoking the provisions of section 271(1)(c) of the Act and the penalty imposed by him is upheld."

57. There is no difference in the grounds of both these appeals except the figures. In the both the appeals, the grounds of appeal are as under :-

> "1) That the Commissioner of Income tax (Appeals)-VI, New Delhi has grossly erred on facts and in law in confirming penalty (Rs.1,02,10,527/- in ITA No.934/Del/2011 & Rs.70,52,272/- In ITA No.935/Del/2011) u/s 271(1)(c) with

reference to a bona fide claim for allowance of deduction of additional depreciation (Rs.3,34,78,825/- in ITA No.934/Del/2011& Rs.4,07,69,572/- in ITA No.935/Del/2011) in the original return of income with a note disclosure and further based on written legal advice obtained by the appellant company.

2) That the Commissioner of Income tax (Appeals)-VI, New Delhi has grossly erred on facts and in the circumstances of the case and in law in not appreciating the point that claim for allowance of deduction of additional depreciation is an arguable, debatable and controversial question on the application of law on which two views are possible.

3) That the entire total action in levying penalty in the appellant's case is outside the jurisdiction and clearly defies the scheme of penalty enshrined in the Income-tax Act, 1961.

4) That the appellant reserves the right to add, alter or amend any other ground at the time of hearing."

58. In the quantum appeals, we have allowed the relief to the assessee on the issue of additional depreciation and these penalties have been levied only on the disallowances made of additional depreciation, since we have deleted the addition in quantum appeal, therefore, the penalty levied in both the appeals could not be sustained, hence deleted. Both the appeals are allowed.

59. In the result, the appeals in ITA Nos.934 & 935/Del/2011 filed by the assessee are allowed

60. To sum up, appeals of the revenue and assessee are disposed off as under :-

(i) ITA No.2831/Del/2007 filed by the revenue for Assessment Year 2004-05 is dismissed;

(ii) ITA No.2508/Del/2007 filed by the assessee is partly allowed for statistical purposes;

(iii) ITA No.1449/Del/2008 filed by the revenue for Assessment Year 2005-06 is dismissed.

(iv) ITA No.1548/Del/2008 filed by the assessee for Assessment Year 2005-06 is allowed for statistical purposes.

(v) ITA No.4040/Del/2009 filed by the revenue for assessment year 2006-07 is dismissed.

(vi) ITA No.4010/Del/2009 filed by the assessee for Assessment Year 2006-07 is partly allowed for statistical purposes.

(vii) Appeals in ITA Nos.934 & 935/Del/2011 filed by the assessee are allowed

Order pronounced in open court on this 5th day of August, 2011.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(B.C. MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 5th day of August, 2011
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)-VI, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.