IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI ' H ' BENCH
MUMBAI BENCHES, MUMBAI

BEFORE SHRI VIJAY PAL RAO, JM & SHRI RAJENDRA, AM

ITA Nos 6438 to 6441/Mum/2008
(Asst Years 2003-04 to 2006-07)

Hindustan Construction Co Ltd Hinco House L B S Marg, Vikhroli (W) Mumbai 83	Vs	The Dy Commr of Income Tax Cen. Cir 22, Mumbai
(Appellant)		**(Respondent)**

PAN No.	**AAACHO968B**
Assessee by	Shri H P Mahajani
Revenue by	Sh Goli Sriniwas Rao
Dt.of hearing	22nd Aug 2012
Dt of pronouncement	**28th Sept 2012**

PER BENCH

These four appeals by the assessee are directed against four separate orders dated 28.8.2008;1.9.2008 & 2.9.2008 of the CIT(A) for the AYs 2003-04 to 2006-07 respectively.

2 Since majority of the issues are common in these appeals; therefore, we have heard these appeals together and accordingly disposed off by this composite order.

3 First we take up the appeal in ITA No.6438/Mum/2008 for the AY 2003-04 wherein the assessee has raised the following grounds:

1. In the facts and in the circumstances of the case and in law the learned CIT(A) erred in confirming addition of Rs.43,915 being employees' contribution to Provident Fund, paid late

2 On facts and in the circumstances of the case and in law, the learned CIT (A) has erred in upholding the disallowance made by the assessing officer under section 43B of the Income Tax Act, 1961 in respect of Octroi charges of Rs.2,55,278/-,.

On facts and in the circumstances of the case and in law, the learned CIT (A) has erred in upholding the disallowance made by the assessing officer under section 43B of the Income Tax Act, 1961 in respect of interest accrued but not due of Rs. 36,49,315/-.

3 On facts and in the circumstances of the case and in law, the learned CIT (A) has erred in upholding the view of the assessing officer, that claim in respect of capital expenditure incurred on scientific research but awaiting capitalization was premature and thereby disallowing the deduction of Rs.27,25,243/- under section 35 of the Income Tax Act, 1961.

4 On facts and in the circumstances of the case and in law, the learned CIT (A) has erred in directing the Assessing officer to disallow payments to Clubs if the nature of entrance fees restricting the deduction to only monthly/annual subscription.

5 On facts and in the circumstances of the case and in law, the learned CIT (A) erred in holding that the claim of share of loss from AOP amounting to Rs.4,73,00,000l-, under the provisions of section 70 of the Income Tax Act, 1961 is not allowable, thereby confirming the action of the assessing officer.

6 On facts and in circumstances of the case and in law, the learned CIT (A) erred in confirming disallowance of Appellant's claim for deduction u/s 80-lA(4) of the Income tax Act on the ground that the Appellant had developed infrastructure facilities in the status of a 'Works Contractor' and not as an 'Enterprise' engaged in the business of development of such infrastructure facilities as contended by the Appellant; the claim of the Appellant for deduction of profits derived from the eligible profits be upheld, it having satisfied all the conditions prescribed in the said section.

7 On the facts and in the circumstances of the case and in law the learned CIT (A) erred in upholding the denial of deduction of Rs.26,77,666/- under section 80M of the IT. Act.

8 On facts and in the circumstances of the case and in law, the learned CIT (A) erred in not accepting the adjustments made by the Appellant in the computation of its book profits u/s 11 5JB of the Income Tax Act, 1961

4 Ground no. 1 is regarding disallowance u/s 43B towards employees contribution to PF paid late.

4.1 The Assessing Officer has disallowed the claim of the assessee and made an addition of ₹ 43,915/- u/s 43B being the employees contribution to PF paid late.

4.2 On appeal, the CIT(A) has confirmed the disallowance made by the Assessing Officer .

5 We have heard the ld AR of the assessee as well as the ld DR and considered the relevant material on record. The ld AR has submitted that the issue is now covered by the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd reported in 319 ITR 306(SC) as well as the decision of the Hon'ble Delhi High Court, which have been followed by the Tribunal in series of decisions. He has relied upon the decision of the Tribunal in the case of Avion Systems Inc in ITA No.3935/Mum/2009 as well as the decision in the case of PI Drugs & Pharmaceuticals Ltd in 1866/Mum/2009. The ld AR has further contended that though there was a delay in depositing the amount of employees contribution to the PF; however, the payment has been made before the due date of filling of the return and even within the financial year itself.

5.1 On the other hand, the ld DR has submitted that a similar disallowance was made for the AY 1999-00 which has been upheld by the Tribunal in assessee's own case. He has relied upon the orders of the authorities below.

6 We have considered the rival submissions and the relevant material on record. At the outset, we note that in the case of PI Drugs & Pharmaceuticals Ltd (supra), the Tribunal has considered and decided an identical issue in favour of the assessee in paras 4 to 6 as under:

"4. We have heard the rival contentions, perused the material on record and duly Considered factual matrix of the case as also the applicable legal position.

5. A co-ordinate bench of this Tribunal, in the case of Pranavaditya Spinning Mills Vs ACIT (order dated 22nd March 2010) and speaking through one of us (i.e. the President), has, inter alia, observed as follows:

> *"4. The learned Counsel for the assessee relied on several orders of the Mumbai Benches of the Tribunal in support of his contention that the employees' contribution should be allowed under section 43B is deposited within the due date for filing the return for the assessment year in question. In the case of Simpled Engineering and Foundry Works P Ltd vs JCIT in ITA No.5760/Mum./2006 dated 29th November 2007 (assessment year 2003-04) and connected appeals, it has been opined by the Tribunal in Para 16 that since the contribution of the employees' is withheld by the employer by deducting the same from the wages and salaries, the dues of the employees' merged with the funds of the employer and the employees' contribution thus becomes similar to the employer's contribution. It has been observed that the nature of the source of both employer's as well as employees' contribution is the same, namely, the funds of the employer. In this view of the matter it has been held that the contribution of the employees' paid within the due date for filing the return of income is allowable under section 43B. This order of the Tribunal has not been referred to in the subsequent order of the Tribunal dated 28th January 2010 in the case of the same assessee, namely, Simplex Engineering & Foundry Works, for the assessment year 2004-05 in ITA NO.378/Mum./2009, and with reference to the earlier order, the disallowance of the employees' contribution was upheld by the Tribunal. In another order passed on 28th January 2010 in ITA no.6847/Mum,/2008 (assessment year 2005-06) in the case of Pink Pen Private Ltd. Vs ITO, the Tribunal was dealing with the employees' contribution to Provident Fund and ESIC which was paid even beyond the grace period. The Assessing Officer had disallowed the payment under section 36(1)(va), holding that the contribution was not covered by section 43B. The Tribunal was of the opinion that the case was covered by the judgment of the Supreme Court in the case of CIT Vs Alom Extrusions Ltd. MANU/SC/1 846/2009: (2009) 319 ITR 306 (SC) = (2OO9-TIOL- 125-SC-IT) and accordingly held that the contribution of the employees'; if paid before the due date for filing the return of income as contemplated by the proviso to section 438 is to be allowed as a deduction. In the case of Radhakrishna Foodland Pvt. Ltd. vs ACIT in ITA No.4211/ Mum./20 (assessment year 2003-04), the Tribunal by order dated 11th February 2008, held following the view taken by the Supreme Court in the case of Vinay Cement Ltd. (2007) 213 CTR 268 (SC) = (2007-TFOL-251-SC-IT) that the employees' contribution paid before the due date for filing the return of income is allowable as a deduction. There is thus a series of orders of the Mumbal Benches of the Tribunal on the issue and respectfully*

following them we delete the disallowance of Rs. 14,02,512/-, out of which Ps. 5,62,450/- was paid after the due date but before the grace period and Rs.8,40,062/- was paid after the grace period but before the due date for filing the return of income. The first ground is accordingly allowed."

6. The above observations, with which we are in respect agreement, apply to the fact situation before us as well. In this view of the matter, as long as even employees' contribution to Pr and ESIC are paid by the assessee before the due date of filing the income tax return, the same are to be allowed as deduction in computation of income of the assessee. It is an undisputed position that the assessee has paid the employees' contribution to PF and ESIC well before the due date of filing of income tax return. Learned Departmental Representative does not dispute that aspect of the matter. On these facts, and in view of the legal position summed up above, we are of the considered view that the impugned addition indeed deserves to be deleted. We direct so. The assessee gets the relief accordingly."

6.1 Following the order of the coordinate Bench of this Tribunal, we decide this issue in favour of the assessee and against the revenue. Accordingly, the addition made by the Assessing Officer u/s 43B is deleted.

7 Ground no.2 is regarding disallowance made u/s 43B in respect of Octroi charges and interest.

7.1 The Assessing Officer made the disallowance of a sum of ₹ 2,55,278/- towards octroi charges as well as ₹ 36,49,315/- representing interest accrued but not due to UTI.

7.2 On appeal, the CIT(A) has confirmed the disallowance made by the Assessing Officer on the ground that the assessee has not produced any documentary proof to show that the expenditure on octroi has been actually paid before the due date of filling of the return of income u/s 139(1). Similarly, the

interest, though booked by the assessee up 31.3.2003; but the same was not paid within the stipulated time prescribed under the law for filing the return of income.

8 We have heard the ld AR as well as the ld DR and considered the relevant material on record. The ld AR has submitted that the octroi due is paid at the point of time of entry of the goods in the limits of Municipal Authority. He has referred the invoices/receipts whereby the octroi due has been paid/adjusted against the advance payment made to the octroi agent by the assessee. The ld AR has pointed out that a sum of ₹ 1,70,925/- was adjusted against the advance payment to the Octroi agent and the same reflected from the invoice as placed at pages 19 to 21 of the paper book.

8.1 On the point of interest payment to UTI, the ld AR has submitted that the assessee had availed credit facility of ₹ 20 crores from UTI on 26th Dec 2002 for a period of one year. As per the terms of agreement with UTI, this interest is payable annual on 26th Dec. Thus, the interest for the period from 17.1.2003 to 31.3.2003 had not become due for payment to UTI even upto the due date for filing of the return of income and therefore, the same is not payable. Hence, no disallowance can be made u/s 43B. In support of his contention, he has relied upon the following decisions:

i) Garsim Industries Ltd 64 TTJ 357 (Mum)
ii) Samtel Colour Ltd 157 Taxman 39 (Del)
iii) Gujarat Toll Road Investment Co Ltd 125 ITD 159 (Ahd)

8.2 The ld DR on the other hand relied upon the orders of the authorities below and submitted that when the assessee has not produced any documentary proof of payment of octroi, then the same is not allowable as per the provisions u/s 43B.

8.3 As regards the interest to UTI on convertible debenture, the ld DR has submitted that though the assessee has booked the expenditure on interest; but was not actually paid before the due date of filling of the return; therefore, the same is not allowable.

9 Having considered the rival submissions and careful perusal of the relevant material on record, we find that as far as the octroi due payment is concerned, the assessee has produced the relevant invoices/challans which show that the octroi due was paid in the shape of adjustment against the advance payment to the octroi agent. The authorities below have disallowed the claim of the assessee u/s 43B on the ground that the assessee has not actually made the payment. When the assessee has already made the payment, being advance to the octroi agent and the subsequent octroi duty adjustment against the advance, then the disallowance u/s 43B is not warranted because the payment was already made and the municipal authorities have received the amount at the time of goods entered into the municipal limit. It is not a case of octroi duty remains outstanding; but it is a case of advance payment, which was adjusted against the subsequent octroi duty, became due. Therefore, in view of the fact that the assessee had paid the octroi due in the shape of advance payment and there is no outstanding or default; the disallowance u/s 43B on this account is not justified.

9.1 As regards the interest payable to UTI on the credit availed by the assessee, it is clear that the interest from 17.1.2003 to 31.3.2003 did not become due for payment to UTI upto the date of filing of the return.

9.2 In view of the fact that as per the agreement between the parties, interest was not become due for payment, even till the due date of filing of the return of

income, the provision of Section 43B would not be attracted. Even otherwise, this issue is covered by a series of decisions of this Tribunal.

10 In the case of Gujarat Toll Road Investment CO Ltd (supra), an identical issue has been considered and decided by the Tribunal in para 25 as under:

> *"25. We have heard the rival submissions and perused the orders of the lower authorities and the materials on record. In this case the assessee is a public limited company engaged in the business of providing infrastructure facility. Formerly, the assessee company was known as Vadodra Halol Toll Road Company Ltd. now merged with Gujarat Toll Road Investment Company Ltd. Assessee has issued Deep Discount Bonds of Rs. 30 crores in the year 2000 which were subscribed by three classes of persons, namely, mutual funds, public financial institutions and scheduled banks. The assessee has claimed deduction of Rs. 6,08,03,230 as interest accrued on the above bonds for asst. yr. 2003-04. The AO was of the view that as this interest was payable only on completion of full duration of Deep Discount Bonds and as no interest, in fact, was paid during the year, therefore provisions of s. 43B of the IT Act, 1961 were attracted in the instant case and in this view of the matter interest of Rs. 6,08,03,230 claimed by the assessee is not allowable under s. 43B of the IT Act, 1961. The learned CIT(A) confirmed the above disallowance, however, on a different ground,"*

10.1 Following the decision (supra), we decide this issue in favour of the assessee and against the revenue.

11 Ground no.3 is regarding capital expenditure incurred on scientific research and claimed u/s 35 of the I T Act.

11.1 The assessee has incurred certain expenses on scientific research development which has been recognised by the appropriate authorities. The assessee has shown the said expenditure in the books of account as on 31.3.2003 waiting capitalization. The Assessing Officer has disallowed the claim of the assessee on the ground that the assessee has not capitalised the said expenditure in the books of account and shown the same as item waiting capitalisation.

11.2 On appeal, the CIT(A) has confirmed the disallowance made by the Assessing Officer on similar grounds that when the project was not completed as on 31.3.2003, then the amount is not used for the purpose of scientific research.

12 Before us, the ld AR has submitted that there is no dispute that the assessee has incurred the said expenditure of ₹ 27,25,243/- on research which is duly approved by the competent authority being the Ministry of Scie3nce and Technology Govt of India vide latter dated 4.12.2002. He has further submitted that for the purpose of allowing the claim u/s 35, it is sufficient that the assessee incurred the expenditure of a capital nature on scientific research. Section 35 does not require that the assessee's excess assets should aloe be capitalised in the books of account or put to use. The ld has pointed out that in the subsequent year the centre was completed and the deduction was allowed by the Assessing Officer u/s 35 to only on the balance cost. He has relied upon the following decisions:

i) Garsim Industries Ltd 64 TTJ 357 (Mum)
ii) Samtel Colour Ltd 157 Taxman 39 (Del)
iii) Gujarat Toll Road Investment Co Ltd 125 ITD 159 (Ahd)

12.1 On the other hand, ld DR has submitted that in the books of account, the assessee has not capitalised the expenditure incurred on the project whereas only in the computation of income, the assessee has claimed the same u/s 35; therefore, the same is not allowable under the provisions of sec. 35 when the expenditure has not actually incurred on the project used for the purpose of scientific research.

13 We have considered the rival submissions as well as the relevant material on record. There is no dispute that the expenditure incurred by the assessee is capital in

nature and on the research centre for the purpose of in-house research and development. The authorities below have disallowed the claim of the assessee u/s 35 only on the ground that the assessee has not capitalised this amount in the books of account but made a claim u/s 35 of the I T Act in computation of income. When the Assessing Officer has found that the expenditure incurred on research and development centre is allowable for deduction u/s 35 in the subsequent assessment, then the expenditure incurred for the AY under consideration cannot be disallowed merely on the ground that the assessee has not capitalised the same because the research centre was not completed during the year under consideration. Further, the Assessing Officer has allowed the claim u/s 35 of the I T Act in the subsequent year; but only on the balance cost because the claim for the AY under consideration is under dispute.

14 In view of these facts and circumstances of the case as well as in the decisions as relied upon by the ld AR of the assessee, the disallowance made by the authority below is not justified when finally the Assessing Officer found that the expenditure on the R&D centre is eligible for deduction u/s 35 of the IT Act in the subsequent year. Accordingly, we allow the claim of the assessee.

15 Ground no.4 is regarding the disallowance of payment to Club.

15.1 At the time of hearing, the ld AR of the assessee has submitted that this issue was covered in favour of the assessee by the order of the Tribunal in assessee's own case for the AY 1992-93 to 1995-06. Further, this issue was covered by various decisions of the Hon'ble High Courts as well as the Tribunal. He has referred a series of decisions on this issue.

15.2 However, the ld AR of the assessee has submitted that in the second round of litigation, the CIT(A) has allowed the claim of the assessee in respect of the payment to club for corporate Membership fee and therefore, this issue has become infructuous and the same may be dismissed, as not pressed by the assessee. The ld DR has no objection, if this ground of appeal is dismissed as not pressed. Accordingly, we dismiss this ground, being not pressed.

16 Ground no.5 is regarding disallowance of claim of share of loss from AOP.

16.1 The assessee has entered into joint venture with other concerns for execution of various projects. The joint venture is assessed as AOP. During the assessment proceedings, the assessee claimed set off of shares in loss from the AOP against the business income. The Assessing Officer rejected the claim on the ground that the share in profit also includes loss and hence, the claim of the assessee is not tenable.

16.2 On appeal, the CIT(A) confirmed the action of the Assessing Officer on the ground that the profit and loss are assessed in the hands of the respective AOP and hence such profit or loss are not included in the taxable income of the individual member as per the provisions of law.

16.3 Before us, the ld AR has submitted that though the income of the AOP may be taxed in its own hands at the maximum marginal rate. However, on a combined reading of sec. 67A, 86, and 167B, the shares of the members in loss is to be assessed in the hand of the member. He has relied upon the decision of the Tribunal in case

of Metro Export P Ltd in ITA NO.3789/M/99 for the AY 1995-96 as well as in the case of Mahindra Holdings & Finance Ltd reported in 23 SOT 215 (Bom).

16.4 The ld AR has further submitted that only when the income of the AOP is charged at the maximum marginal rate, the share of the member in the profit of AOP is not included in the income; but when the total income of the AOP is not charged at the maximum marginal or in higher rate, then the share of the member is computed as per the provisions of sec. 67A and shall form part of the total income as provided u/s 86 of the I T Act.

16.5 On the other hand, the ld DR has submitted that the income of the AOP is chargeable at a maximum marginal rate and therefore, the share of profit which includes loss as determined under the provisions of sec. 67A is not includible in the total income of the assessee. He has relied upon the decision of the jurisdictional High Court in the case of Commissioner of Income-tax v. Lalita M. Bhat reported in 234 ITR 319 as well as the decision of the Hon'ble Madhya Pradesh High Court in the case of Commissioner of Income-tax v. D & H Secheron Electrodes Ltd. Reported in 290 ITR 697.

17 We have considered the rival submissions as well as the relevant material on record. The arguments advanced by the ld AR of the assessee are on the point that since the assessed income of AOP is a loss; therefore, there is no tax chargeable to the income of the AOP and accordingly, the shares in the loss includable in the income of the assessee, who is a member of the AOP.

17.1 We do not agree with the contention of the assessee, primarily because the reason that the income of the AOP is chargeable to tax at the maximum marginal rate. It is pertinent to mention here that the income of the AOP is assessable to tax at the maximum marginal tax or higher rate of tax because of the status of the AOP and not because of profit or loss of the AOP.

17.2 Section 67A explicitly provides the computation of total income of such association or body being profit or loss. Therefore, the expression 'income of the association or body' includes profits as well as loss. The Hon'ble jurisdictional High Court in the case of Lalita M. Bhat (supra), has considered an identical issue and held in para 9 as under:

> *"9. We have perused the decision of the Calcutta High Court in Ramanlal Madanlal v. CIT [1979] 116 ITR 657. The ratio of the said decision now stands approved by the decision of the Supreme Court in ITO v. Ch. Atchaiah [1996] 218 ITR 239.*
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> *We have also considered the decision of the Andhra Pradesh High Court in Smt. Abida Khatoon v. CIT [1973] 87 ITR 627, wherein it was held that there was no provision preventing a member of the association of persons from setting off his share of the loss in the association of persons against his other income and that the assessee was entitled to set off her share of loss in the association of persons against her income under other heads and the decision of the Madras High Court in CIT v. Rajamani Nadar (S. K. S.) [1977] 109 ITR 258, wherein also it was held that there was no provision preventing the members of the association of persons from setting off their share of loss in the association of persons against their individual income from other sources. These decisions were rendered following the ratio of the decision of the Privy Council in Arunachalam Chettiar v. CIT [1936] 4 ITR 173 and the decision of the Supreme Court in Seth Jamnadas Daga v. CIT [1961] 41 ITR 630, which were cases under the 1922 Act. In those cases, the distinction between the provisions of the 1922 Act and the 1961 Act was not brought to the notice of their Lordships. The ratio of the above decisions of the Andhra Pradesh High Court and the Madras High Court is, therefore, no more valid in view of the decision of the Supreme Court in ITO v. Ch. Atchaiah [1996] 218 ITR 239.*

In the premises, we answer the question referred to us in the negative, i. e., in favour of the Revenue and against the assessee. This reference is disposed of accordingly with no order as to costs."

17.3 Therefore, the issue is covered by the decision of the Hon'ble Jurisdictional High Court cited supra and accordingly, the share in the loss of AOP cannot be set off against the other income of the assessee when the profit of the AOP is not included in the total income of the assessee.

17.4 Even otherwise, when the loss is eligible for carry forward and set off as per the provisions of Chapter VI of the I T Act in the hands of the AOP, then no such claim can be allowed in the hands of the member of the AOP.

18 In view of the above discussion, we do not find any error or illegibility in the order of the CIT(A), qua this issue.

19 Ground no. 6 is regarding the deduction u/s 80IA(4).

19.1 During the assessment, vide letter dated 14.2.2005, the assessee has made a claim of deduction u/s 80IA of the IT Act with respect to business income earned from execution of projects relating to development of infrastructure facility such as dams, roads, power projects etc. The assessee contended before the Assessing Officer that the assessee is engaged in development of infrastructure facility as defined in explanation to sub. Sec. 4 of sec. 80IA. In support of its contention, the assessee relied upon the order of the Tribunal in the case of Patel Engg Ltd ., reported in 84 TTJ 646.

19.2 The assessee further submitted before the Assessing Officer that for the AY 2001-02 and 2002-03, the CIT(A) has allowed the claim of the assessee under section 80IA. The Assessing Officer did not accept the contention of the assessee and

noted that the assessee is a civil contractor executing large infrastructure projects like construction of dams, tunnels, underground structures, roads, express ways, power projects etc. In all such projects, the development authority is invariably government, semi government organisation or a local authority which grant contract to the assessee company for execution of the project. Thus, the assessee is merely a contractor which executes projects for the government or simi- Govt authority for development of infrastructure facility and therefore, cannot be constructed as an enterprise carrying on business of developing, operating and maintaining of any infrastructure facility. He has pointed out that for the AY 2001-02 and 2002-03, the CIT(A) has discussed in detail as to how the assessee is not eligible for deduction u/s 80IA. However, by following the order of the Tribunal in the case of Patel Engg Ltd (supra), the claim was allowed.

19.3 Since the decision of the Tribunal was not accepted by the revenue; therefore, the Assessing Officer disallowed the claim of the assessee u/s 80IA.

19.4 On appeal, the CIT(A) after taking a note of the amendment whereby the Explanation in section 80IA has been inserted by the Finance Act, 2007 with retrospective effect from 1.4.2000 held that the eligible project should be executed by the assessee itself for development of work and since the assessee enters into contract with other persons for executing the work contract, in respect of each of the project for which it has claimed deduction u/s 80IA(4), the assessee has not been able to establish as to how did it make an investment in the project. Accordingly, the CIT(A) has confirmed the disallowance made by the Assessing Officer.

20 Before us, the ld AR of the assessee has submitted that the assessee company is in the business of development of infrastructure projects such as dams, tunnels, bridges, roads etc. For these project, It enters into contracts with the government or local authority or the concerned statutory body. The ld AR has further submitted that the claim for deduction was allowed b y the Tribunal in assessee's own case for the AY 2001-02 and 2002-03; though the department has preferred an appeal before the Hon'ble High Court against the order of the Tribunal. The ld AR has further submitted that explanation as inserted by the Finance Act 2007 has been further substituted by the Finance Act, 2009 and therefore, the authority below have not considered the substituted explanation by the Finance bill 2009. He has further submitted that in the case of GVPR Engineers Ltd , the Hyderabad Bench of the Tribunal in ITA No. No. 347/Hyd/2008 vide order dated 29 Feb 2012 has considered the amendment by the Finance Act, 2009 in sec. 80IA and decided that the assessee therein was a developer and not work contractor. Thus, the ld AR has submitted that even otherwise, the matter is required to be reconsidered by the authorities below in the light of the retrospective amendment in section 80IA of Finance Act, 2009.

20.1 On the other hand, the ld DR has submitted that the Assessing Officer as well as the CIT(A) has examined the relevant facts in respect of the claim of deduction u/s 80IA. The CIT(A) has considered the retrospective amendment by the Finance Act 2007 whereby the explanation below to sec. 80IA was inserted and accordingly given a finding of fact that the assessee is not an investor in the project but only a work contract, who has executed the work on behalf of the government authority, local body and other statutory bodies. He has relied upon the orders of the

authorities below and referred the contention of the Assessing Officer as produced in para 30 of the impugned order as under:

> "30 While rejecting the claim of the appellant u/s. 80lA(4) of the Act, the AO contended/concluded as under
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> a. Upon completion of the contractual obligations, the appellant is being paid the agreed contract price as per work completed. The mere fact that TDS was deducted shows that the relationship between the appellant, purportedly the developer and the government is that of contractor/contractee.
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> b. The appellant has acted as a builder and a contractor, on a specific contract, reimbursed for costs incurred by it, from the person who is the actual owner/developer.
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> c. The appellant's profits are not out of operation of the infrastructure facility but out of construction of the infrastructure facility, for which it has received payment from the government.
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> d. The appellant's activity is that of a contractor, with the standard financial involvement, as in the case of a contractor.
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> e. As a civil contractor, it matters little whether it is an ordinary civil contractor or a professionally qualified or specialized one. However technically qualified the appellant be for the execution of a project, which has been conceived, designed and put together by the government, it cannot become the developer of the project.
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> f. The appellant has ignored the provisions of section 801A(2) as also 801A(4)(i)(c), which as the qualifying section specify the nature of income, that is to be claimed as deduction u/s. 801A(1) and the conditions to be fulfilled. If any of the conditions are not met, then the provisions of the section Will not apply.
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> g. Even if for the sake of argument, one accepts the appellant's stand that it is the developer of the project, even then it would not be covered by section 801A because nowhere does the section refer to income from transfer of a developed facility, but refers constantly to income from operation and maintenance of such facility.
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> h. Section 8OlA(2) talks of deduction specified in sub section (1), which can be claimed for any ten consecutive assessment years beginning from the year in which the undertaking or enterprise develops and begins to operate the infrastructure facility. It is from the operation of the infrastructure facility that income is exempt. In order words it is the income earned from the operation of infrastructure facility that's eligible for deduction u/s. 801A.

i) The developer is the person who conceives the project. It is not necessary for the developer to execute the project. A builder or contractor on the other hand is the person who builds and constructs the project and while part of the work maybe subcontracted out, the builder remains the builder and does not become the developer. The idea for the projects has originated from the government. They have conceived the idea, put it together, raised the funds and then found the person to carry-out the activity, according to the specific terms and conditions and through the procedure of calling for tenders from such persons that qualify. The appellant is therefore not a developer by any stretch of terminology. It is not developing the infrastructure project, but is merely constructing or building in for someone else as per the guidelines and specification provided."

21 We have considered the rival submissions as well as the relevant material on record. There is no dispute that the assessee has executed the work of construction of dams, tunnels, bridges, roads etc. under the agreement with the development authorities which are government, semi-government organisations or local authorities. The provisions of section 80IA provide deduction in respect of profit and gain from infrastructural undertaking or enterprise engaged in infrastructure development etc. The benefit of section 80IA is available to the enterprises which are in the business of developments, operating and maintaining infrastructure facilities as stipulated under sub.sec. (4) of section 80IA. Since the assessee is in the business of execution of work of dams, tunnels, bridges, roads etc; therefore, for the purpose of allowabillity of deduction of sec. 80IA, the case of the assessee has to be tested as per the conditions enumerated under clause (i) of sub.sec. (4) of section 80IA as under:

(4) This section applies to—

(*i*) any enterprise carrying on the business [75][of (*i*) developing or (*ii*) operating and maintaining or (*iii*) developing, operating and maintaining] any infrastructure facility which fulfils all the following conditions, namely :—

(*a*) it is owned by a company registered in India or by a consortium of such companies [76][or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;]

[77][(*b*) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (*i*) developing or (*ii*) operating and maintaining or (*iii*) developing, operating and maintaining a new infrastructure facility;]

(*c*) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995:

Provided that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Central Government, State Government, local authority or statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place.

[78][*Explanation*.—For the purposes of this clause, "infrastructure facility" means—

(*a*) a road including toll road, a bridge or a rail system;

(*b*) a highway project including housing or other activities being an integral part of the highway project;

(*c*) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;

(*d*) a port[79], airport, inland waterway [80][, inland port or navigational channel in the sea];]

21.1 As per the explanation, the infrastructure facilities means a road including toll road, a bridge or a rail system; a highway project including housing and other activities; a water supply project, water treatment system, irrigation project; a port, airport, inland waterway or navigational channel in the sea.

21.2 As per the explanation to the end of section 80IA, the benefit of deduction has been excluded in relation to the business referred in sub.sec. (4) which is in the nature of work contract awarded by any person including central or state governments and executed by the undertaking, or enterprises. The explanation to

sec. 80IA has been substituted by the retrospective amendment by Finance (No.2) Act, 2009 w.e.f 1.4.2000 as under:

> *"Explanation: for the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub sec (4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub section (1).*

21.3 Thus, it is clear from the above explanation that the provisions of sec 80IA shall not apply to a business which is in the nature of work contract awarded by any person or central/statement governments.

21.4 Prior to the substitution of explanation by Finance (No.2) Act, 2009, the Explanation was originally inserted by the Finance Act 2007 w.e.f 1.4.2000 which reads as under:

> *"Explanation: for the removal of doubts, it is hereby declared that nothing contained in this section shall apply to a person who executes a works contract entered into with the undertaking or enterprise, as the case may be."*

22.5 The bare reading of the earlier explanation which was substituted by the Finance (No.2) Act, 2009 makes it clear that there was some ambiguity in the language of the Explanation and therefore, by substituting the explanation by the Finance (No.2) Act 2009, the mischief of ambiguity in the language has been removed. Though, the substance of explanation remains the same that this section shall not apply in relation to the execution of work contract. Though the Commissioner of Income Tax(Appeals) has decided this issue as per the pre-amended provisions of section 80IA by considering the explanation which was inserted by the Finance Act 2007; however, the mute question arises for the purpose of deciding the issue of entitlement of deduction u/s 80IA(4) is whether the work

executed by the assessee is in the nature of work contract or the assessee, being an enterprises/undertaking carried out the activity of developing, operating and maintaining any infrastructure facilities which fulfils the conditions viz (i) it is owned by a company registered in India or by a consortium of such companies; (ii) it has entered into an agreement with the Central Government of a State Government or a local authority or any other statutory body for operating or operating and maintaining or developing, operating and maintaining a new infrastructure facility. The other conditions are not relevant for the purpose of the case in hand.

22.6 It is not the claim of the assessee that the assessee is operating and maintaining the infrastructure facility or developing, operating and maintaining a new infrastructure facility. The claim of the assessee is that the work carried out is in the nature of developing the infrastructure facilities. Thus, the issue before us is very limited only with relation to the question whether the work carried out by the assessee under the agreements/contracts with the Central Government or State Government and other statutory bodies are in the nature of developing the infrastructure facilities which does not fall in the category of work contract awarded by the Central or State Government or any other statutory or local authorities. The nature of work/agreement has to be found only from the terms and conditions of contract/agreement as entered into between the parties under which the work has been executed. Thus, it is the contract which exhibits the intention of the parties and the nature of the work undertaken by the executing party. It is a factual question and can be decided on the basis of facts and circumstances of each case and particularly the nature and terms and conditions of the each contract under which the each project work has been executed. Therefore, there cannot be any

precedent with respect to the question of the nature of activity of the assessee being developing of infrastructure or as a work contractor with respect to the different projects. The decision relied upon by the assessee cannot be applied as a general precedent or rule; but the said decision is based on the peculiar facts of the said case as well as the terms and conditions of the contract and therefore, on the question of pure facts, it cannot be applied as a precedent. The Commissioner of Income Tax(Appeals), in its concluding part of the impugned order in paras 36 and 37 has held as under:

> *"36. The contracts executed by the appellant, pursuant to which it has claimed a deduction u/s 80IA(4) must therefore be measure from the above metrics laid down by the Supreme Court in the matter of works contract. I have perused the copies of the agreements with various undertakings which were executed by the appellant for executing the impugned contracts, which are claimed to fall within the domain of section 80IA(4). It us clear from them that the underlying status of the appellant in each of them is that of a contractor, who has been engaged in a works contract.*
>
> *37 It is clear from the above that the appellant had executed a works contract in respect of each of the projects for which it has claimed a deduction u/s 80IA(4) of the Act. The appellant has also been unable to establish as to how it made an investment in the project, apart from not being able to prove that it had not executed a works contract as is evidence above. In view of the foregoing, I find no merit in the claim of the appellant for a deduction u/s 80IA(4) of the Act and thus reject this ground of appeal."*

22.7 It is clear from the concluding part of the impugned order that the Commissioner of Income Tax (Appeals) has perused the copies of the agreements with various undertakings which were executed by the assessee for the execution of the contract and thereafter reached to the conclusion that the underlining status of the assessee in each of them is that of a contractor, who is engaged in the works contract.

23 We have discussed in the foregoing paragraphs that the nature of activity of the assessee and the status of the assessee can be determined from the terms and

conditions of the contract whether it is a rate contract or even a labour contract or a lump-sum contract or the assessee is a developer. Further, the rights and duties of the executing parties can be ascertained from the terms and conditions of the contract. The Commissioner of Income Tax(Appeals), after examination of the contract has given a finding that the assessee is engaged in the work contract and is not entitled for deduction u/s 80IA(4). Nothing has been produced before us by the assessee to controvert the finding of the Commissioner of Income Tax (Appeals); even the assessee has not produced a single contract/agreement under which the project, which is the subject matter of the controversy are carried out by the assessee. Therefore, we do not find any reason to interfere with the order of the Commissioner of Income Tax(Appeals) on this issue.

24 Ground no.7 is regarding the denial of deduction u/s 80M by reducing the *pro rata* interest attributable to the dividend income.

24.1 The assessee claimed deduction u/s 80M with respect to the dividend received from mutual funds and from shares of ₹ 26,77,666/-. The Assessing Officer was of the view that the deduction u/s 80M is allowable on net income after apportionment of expenses as held by the Hon'ble Supreme Court in the case of Distributors (Baroda) P. Ltd. v. Union of India reported in 155 ITR 120(SC). The Assessing Officer noted that out of the total funds employed by the assessee company of ₹ 51,879.36 lacs, the interest bearing unsecured and secured loans are ₹ 37,945.62 lacs. The Assessing Officer further noted that the total investment of the assessee as on 31.3.2003 is 3,449.71 lacs out of which investment in sharers of other companies is ₹ 870.45 lacs. The Assessing Officer worked out the average borrowing cost of the company at 8.32% and applying the same rate of the

borrowing to the investment made in shares an interest of ₹ 72.42 lacs was held to be attributable to the dividend income. Since the dividend of ₹ 1,58,136/- was received from mutual funds; therefore, the Assessing Officer held that the same is not eligible for deduction u/s 80M as the same is not received from a domestic company.

25 As far as the remaining amount of dividend of ₹ 25,19,530/-, the Assessing Officer has apportioned the interest expenses of ₹ 72.42 lacs and thereby worked the net dividend as (-) ₹ 47.22.470/-. Hence, the Assessing Officer rejected the claim of the assessee for deduction u/s 80M.

25.1 On appeal, the Commissioner of Income Tax(Appeals) has confirmed the disallowance made by the Assessing Officer.

26 Before us, the ld AR has submitted that the Assessing Officer has apportioned the interest against the dividend income without establishing the nexus between the amount borrowed by the assessee and the investment in the shares and mutual funds. He has further submitted that the investment have been carried forward from earlier years and no such disallowance made by the Assessing Officer in those years. Therefore, without establishing the nexus between the borrowed funds and the investment, no expenditure on account of interest can be apportioned against the dividend income for the purpose of deduction u/s 80M. He has relied upon the decision of the jurisdictional High Court in the case Commissioner of Income-tax v. General Insurance Corporation of India (No.1) reported in 254 ITR 203 as well as in the case of Commissioner of Income-tax v. Central Bank of India reported in 264 ITR 522. The ld AR has further submitted that only the actual expenses incurred can be

disallowed for the purpose of deduction u/s 80M and there is no scope of allocation of notional expenses. He has relied upon the decision of the jurisdictional High Court in the case of Commissioner of Income-tax v. Reliance Utilities and Power Ltd. reported in 313 ITR 340 and submitted that when the interest free funds were available to the assessee which a re sufficient to meet its investment, then it can be presumed that the investments have been made from the interest free funds; even though at the same time loans have been raised by the assessee.

26.1 On the other hand, the ld DR has submitted that the Assessing Officer has brought out the details of borrowed funds and the investments; therefore, the interest attributable to the funds used for investment has to be reduced from the dividend income for the purpose of deduction u/s 80M. He has relied upon the orders of the authorities below.

27 We have considered the rival submissions as well as the relevant material on record. There is no quarrels on this issue that the deduction u/s 80M is allowed on the net dividend income; however, the expenditure which is directly related to the earning of the dividend income has to be deducted. The Assessing Officer has apportioned the interest expenditure on the basis of borrowed funds and the total investments and accordingly, worked out the interest of the borrowed funds at 8.32% and applied the same in respect of the investment amount for apportionment of the interest expenditure towards the dividend income. Further, the Assessing Officer while allocating the pro-rata interest attributable to the dividend income has not disallowed the corresponding amount of interest expenditure from the business income of the assessee u/s 36. When the Assessing Officer has accepted the entire expenditure as business expenditure u/s 36, then the apportionment of the interest

without establishing the nexus between the borrowed funds and the investment is not justified. Further, no disallowance has been made in the earlier year on this account and the investments on which dividend income has been earned by the assessee is not made during the year under consideration; but the same has been carried forward in the earlier year. Thus, in view of the decisions as relied upon by the ld AR of the assessee, apportionment made by the Assessing Officer towards interest expenditure against the dividend income is not sustainable. Accordingly, we allow the claim of the assessee u'/s 80M to the extent of ₹ 25,19,530/-.

28 As regard the deduction u/s 80M with respect to the dividend income of ₹ 1,58,136/-, the assessee has failed to prove that the said dividend on mutual fund is received from domestic company. Accordingly, we confirm the disallowance of deduction u/s 80M of ₹ 1,58,136/-. Accordingly, this issue is partly allowed.

29 Ground no. 8 is regarding computation of book profit u/s 115JB.

29.1 In the return of income, the assessee has computed the tax liability u/s 115JB by adding back the loss of ₹ 2,85,68,373/- being the share of loss from AOP in the book profit. However, vide letter dated 10.3.2005, the assessee contended that no adjustment can be made with respect to the amount of share of loss in the AOP when the department has rejected the assessee's stand of excluding the share of profit from AOP from the book profit in the earlier years. Since the assessee challenged the revenue's decision in the earlier year, the Assessing Officer did not accept the contention of the assessee and computed the book profit u/s 115JB as it was admitted in the return of income by the assessee.

29.2 On appeal, the Commissioner of Income Tax(Appeals) has confirmed the action of the Assessing Officer.

30 Before us, the ld AR of the assessee has submitted that the Assessing Officer cannot make any adjustment in the book profit as per the provisions of sec. 115JB except referred to in Explanation to sec 115JB, which is only in respect of the income to which the provisions of sec. 10 to 12 apply. He has relied upon the decision of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. v. Commissioner of Income-tax reported in 255 ITR 273 (SC).

31. On the other hand, the ld DR has relied upon the orders of the authority below and submitted that when the assessee has claimed the exclusion of the share in the profit of AOP while computing the book profit u/s 115JB in the earlier years, then the shares in the loss is also not allowed to be reduced.

32 We have considered the rival submissions as well as the relevant material on record. There is no quarrel on the point that other than the adjustments as provided under section 115JB, the Assessing Officer cannot make any adjustment in the book profit arrived at as per the accounts prepared in accordance with Schedule VI of the Companies Act. However, in the earlier years, the assessee itself has claimed that the shares in the AOP should be excluded while computing the book profit as per the provisions of sec. 115JB and on the similar analogy, the assessee itself has added back the amount of share in the loss of AOP for the year under consideration while computing the book profit u/s 115JB.

32.1 In order to maintain the consistency on this issue, which depend on the final outcome on the issue in the appeals of the earlier years and consequently, the

amount of share in profit and loss of AOP has to be taken in the account while computing the book profit u/s115JB. Accordingly, we set aside this issue to the record of the Assessing Officer to decide the same as per the outcome of the similar issue in the earlier years.

ITA No. 6439 (Assessment Year 2004-05)

33 The assessee has raised the following grounds in this appeal:

1 On facts and in the circumstances of the case and in law, the learned CIT (A) has erred in upholding the view of the assessing officer, that claim in respect of capital expenditure incurred on scientific research but awaiting capitalization was premature and thereby disallowing the deduction of Rs.27,25,243/- under section 35 of the Income Tax Act, 1961.

2 On facts and in the circumstances of the case and in law, the learned CIT (A) erred in upholding the view of the assessing officer with regard to expenses incurred on development of software of Rs.3,46,81 400/- as capital in nature.

Without prejudice to the above the learned CIT(A) erred in directing the AO to allow depreciation at 25% instead of 60% as applicable to Computers

3 On facts and in the circumstances of the case and in law, the learned CIT (A) erred in upholding the addition made by the assessing officer, disallowing general expenses of Rs.6,20,571/-, holding it as non business expenses.

4. On facts and in the circumstances of the case and in law, the learned CIT (A) erred in upholding the addition made by the assessing officer, in imputing interest expenditure of Rs.2,76,46,000/- against dividend income under section 14A of the IT. Act.

5 On the facts and in the circumstances of the case and in law the ld Commissioner of Income Tax(Appeals) has erred in directing the Assessing Officer to disallow payments to Clubs if the nature of entrance fees restricting the deductions only monthly/annual subsection.

6 On facts and in the circumstances of the case and in law, the learned CIT (A) has erred in upholding the disallowance made by the assessing officer under section 43B of the Income Tax Act, 1961 in respect of interest accrued but not due of Rs. 36,49,315/-.

7 On facts and in the circumstances the case and in law, the learned CIT (A) erred1n holding that the claim of share of loss from AOP amounting to

Rs.4,73,00,000/-, under the provisions of section 70 of the Income Tax Act, 1961 is not allowable, thereby confirming the action of the assessing officer.

8 On facts and in circumstances of the case and in law, the learned CIT (A) erred in confirming disallowance of Appellant's claim for deduction u/s 80-IA(4) of the Income tax Act on the ground that the Appellant had developed infrastructure facilities in the status of a Works Contractor' and not as an 'Enterprise' engaged in the business of development of such infrastructure facilities as contended by the Appellant; the claim of the Appellant for deduction of profits derived from the eligible profits be upheld, it having satisfied all the conditions prescribed in the said section.

9 The learned CIT (A) erred in upholding non allowance of relief in full under section 91 of the I.T. Act, made by the assessing officer, being credit for taxes paid in Bhutan, as claimed by the Appellant.

10 On facts and in circumstances of the case and in law, the learned CIT (A) erred in confirming levy of interest u/s 234D of the Act rejecting the contention of the Appellant that the said section was not applicable to year under appeal;

34 Ground no. 1 is regarding disallowance of claim u/s 35 of I T Act with respect to the capital expenditure incurred scientific research but awaiting capitalization.

35 This ground is common to the ground no.3 for Assessment Year 2003-4. Therefore, in view of our finding in ground no.3 for Assessment Year 2003-04, this ground is allowed.

36 Ground no.2 is regarding software expenditure.

36.1 The assessee has claimed software expenditure of ₹ 3,46,81,400/- as revenue expenditure The Assessing Officer disallowed the claim of the assessee by treating the same as capital in nature and allowed 25% depreciation on the same. The ld Commissioner of Income Tax(Appeals) has confirmed the action of the Assessing Officer and held that the assessee is entitled for 25% on intangible assets.

37 Before us, the ld AR of the assessee has submitted that the benefit arising from incurring such expenses definitely give commercial benefit to the company; but it

cannot be said that it gives enduring benefit. He has relied upon the decision of the Tribunal in the case of Raychem RPG Ltd in ITA No.4176 of 2009 vide order dated 4.7.2011 as well as in the case of Asahi India Safety Glass Ltd .

38 Alternatively, the ld AR has submitted that since computer software has been specifically included as part of the computers and, therefore, higher rate of deprecation at 60% is allowable from Assessment Year 2004-05. He has relied upon the decision of Special Bench of the Tribunal in the case of Datacraft India Ltd reported in 40 SOT 295 (Bom)(SB).

38.1 On the other hand, the ld DR has relied upon the orders of the authorities below and submitted that the details of the expenditure clearly shows that the same is capital in nature and therefore, the assessee is entitled only depreciation on the said amount.

39 We have considered the rival submissions as well as the relevant material on record. The assessee incurred the expenses for purchase of software development of E-Construct suit. The nature of the programme purchased by the assessee clearly shows that these programme were specifically and exclusively designed for the purpose of the business of the assessee and not a general software. Accordingly, the expenditure has been laid out for acquiring the intangible assets to be used by the assessee for a number of years and therefore, the same will have an enduring benefit. However, since this intangible asset is part and parcel of computation; therefore, the assessee is entitled for depreciation for the year under consideration at 60%. Accordingly, we direct the Assessing Officer to allow the deprecation on this

amount at 60% in view of the decision of the Special Bench of this Tribunal in the case of Datacraft India Ltd reported in 40 SOT 295 (Bom)(SB).

40 Ground no.3 is regarding disallowance of general expenses being non business expenses.

40.1 The assessee has claimed general expenses of ₹ 6,20,571/- incurred at Bhutan Site. The nature of expenses is payment for various pooja, donation for local festivals and other benevolent activities. The Assessing Officer disallowed these expenses holding that these are not incurred wholly and exclusively for the purpose of the business of the assessee company and hence, not allowable. On appeal, the Commissioner of Income Tax(Appeals) has confirmed the disallowance made by the Assessing Officer.

41 Before us, the ld AR has submitted that the expenses are incurred in the ordinary course of the business of the assessee. He has referred the details of the expenses at pages52 of the paper book and submitted that the list of expenses also include funeral expenses on the death of the employee working at site. Therefore, the expenses were incurred by the assessee for creating a good image of the assessee company. He has also relied upon the decision of the Hon'ble Supreme Court in the case of Aluminium Corporation of India Ltd. v. Commissioner of Income-tax reported in 86 ITR 11 and submitted that in order to determine whether the expenses was wholly and exclusively laid out for the purpose of business, the reasonableness of the expenditure has to be considered from the point of view of the business and not revenue. He has relied upon the decision of the Hon'ble Supreme Court in the case of Shahzada Nand and Sons v. Commissioner of Income-

tax reported in 108 ITR 357 (SC) and submitted that the Hon'ble Supreme Court has held that the requirement of commercial expediency must be judged in the context of current socio economic thinking.

41.1 On the other hand, the ld DR has submitted that when the expenditure has been incurred on the activity which has no direct connection with the business activity of the assessee, then the same cannot be allowed.

42 We have considered the rival submissions as well as the relevant material on record. From the details of the expenses, it is clear that these expenses were incurred by the assessee in respect of pooja, donation for local festivals and other such local activities. It is an undisputed fact that no business can be conducted in hostile, socioeconomic environment. The expenses incurred on the activities which create a suitable environment and impression with reference to image and smooth functioning of the business activity of the assessee by gaining the trust of the employees as well as the local public in the affairs of the assessee company. Therefore, as held by the Hon'ble Supreme Court in the case of Shazada Nand & Sons (supra), the requirement of commercial expediency must be judged in the context of current socioeconomic thinking. Accordingly, we are of the view that the purpose of incurring the said expenses in question by the assessee are for the business of the assessee are for the business of the assessee and therefore, the same is allowable.

43 Ground no.4 is regarding disallowance of interest u/s 14A.

44 We have heard the ld AR as well as the ld DR and considered the relevant material on record. This issue is required to be reconsidered by the Assessing Officer

in view of the decision of the Hon'ble Bombay High Court in the case of Godrej and Boyce Mfg. Co. Ltd. v. Deputy Commissioner of Income-tax reported in 328 ITR 81 (Bom). Accordingly, we set aside this issue to the file of the Assessing Officer for deciding the same afresh In the light of the decision of the Hon'ble Bombay High Court cited supra.

45 Ground no.5 is regarding disallowance of payment to club.

46 This issue is common to the ground No. 4 raised for the Assessment Year 2003-04. Therefore, when the CIT(A) has allowed the claim of the assessee for the Assessment Year 2003-04, then in view of the decision as relied upon by the ld. AR, we decide this issue in favour of the assessee.

47 Ground no.6 is regarding disallowance made u/s 43B in respect of interest accrued but not due.

48 We have heard the parties. This ground is common to the ground no. 2 raised by the assessee for the Assessment Year 2003-04. Accordingly, in view of the findings for the Assessment Year 2003-04, we decide this issue in favour of the assessee and against the revenue.

49 Ground no. 7 is regarding share of loss from AOP.

50 We have heard the parties. This ground is common to the ground no. 5 raised by the assessee for the Assessment Year 2003-04. Accordingly, in view of the findings for the Assessment Year 2003-04, we decide this issue in favour of the revenue and against the assessee.

51 Ground no.8 is regarding disallowance u/s 80IA(4)

52 We have heard the parties. This ground is common to the ground no. 6 raised by the assessee for the Assessment Year 2003-04. Accordingly, in view of the findings for the Assessment Year 2003-04, we decide this issue in favour of the revenue and against the assessee.

53 Ground no. 9 is regarding disallowance of relief u/s 91 of the I T Act being the tax paid in Bhutan as claimed by the assessee,

54 The assessee has earned income in respect of hydroelectric project and paid tax under Bhutan Tax Law. The same income is again subjected to Indian tax law by virtue of residence status of the assessee. Accordingly, the assessee claimed relief u/s 91 of the IT act on the tax paid in Bhutan at ₹ 6,22,69,958/- as there was no DTTTA between India and Bhutan. The Assessing Officer granted relief u/s 91 for the tax paid in Bhutan to the extent of ₹ 3,10,64,236/- by working out the average rate of tax in India at 35.87% and comparing the same with the average rate of tax in Bhutan, which is at 8.53%. Accordingly, the Assessing Officer has granted the relief u/s 91 @ 8.53% of the income tax payable in India at ₹ 3,10,64,236/-. On appeal, the Commissioner of Income Tax(Appeals) has confirmed the action of the Assessing Officer.

55 Before us, the ld AR has submitted that as per the provisions of section 91, relief in respect of tax paid in Bhutan is allowable at the average rate of tax in Bhutan, which is lower than the Indian tax rate and therefore, the benefit is required to be computed @ 8.53% on the income from Bhutan operations included to the total income of the assessee. Thus, the ld AR has submitted that 8.53% should be calculated on ₹ 68.36 crores instead of ₹ 36.41 crores.

55.1 On the other hand, the ld DR has relief upon the orders of the authorities below.

57 We have considered the rival submissions as well as the relevant material on record. Section 91 stipulates the relief in respect of the income, which is subjected to double tax in the courtiers outside India as well as in India and there is no agreement u/s 90 of the I T Act for the relief or avoidance of double taxation. We quote sec 91(1) as under:

> [97]**91.** *(1) If any person who is resident in India in any previous year proves that, in respect of his income which accrued or arose during that previous year outside India (and which is not deemed to accrue or arise in India), he has paid in any country with which there is no agreement under section 90 for the relief or avoidance of double taxation, income-tax, by deduction or otherwise, under the law in force in that country, he shall be entitled to the deduction from the Indian income-tax payable by him of a sum calculated on such doubly taxed income[98] at the Indian rate of tax or the rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal.*

57.1 The benefit of tax paid outside India is calculated by taking into account the rate of tax in India and rate of tax in the other such country whichever is lower in respect of the income which is subjected to double taxation. The Assessing Officer has computed the relief u/s 91 which is reproduced by the CIT(A) in para 59 as under:

4	*Book profits from operations in Bhutan*	*Rs.72,97,38,000/-*
	Tax paid in Bhutan	*Rs.6,22,69,958/-*
	Average rate of tax on income paid in Bhutan	*8.53%*
	Profits from Bhutan operation after attributing Proportionate additional depreciation as per Act	*Rs.68,63,57,400/-*
	Bhutan Income doubly taxed in India subject to Total business Income	*Rs.36,41,76,280/-*
	Tax and surcharge payable in India on doubly Taxed income (Tax on total income as the same is Lower than Bhutan Income)	*Rs.13,06,48,240/-*
	Average rate of tax in India	*35.87%*
	As the average rate of tax in Bhutan is lower than Tax rate in India, relief allowable u/s.91 in India @ 8.53% of income taxed in India subject to total Tax paid in Bhutan	*Rs.3,10,64,236/-"*

57.2 The working of the Assessing Officer clearly shows that the assessee paid the tax in Bhutan at ₹6,22,69,958/- on profit of ₹ 72,97,38,000/- from operation in Bhutan at the average rate of 8.53%. The profit from the Bhutan operations are included in the total income of the assessee after granting the deduction of additional depreciation at ₹ 68,63,57,400/-. Though the total business income of the assessee was computed by the Assessing Officer at ₹ 36,41,76,280/- on which the tax payable has been worked out to ₹ 13,06,48,240/-. Since the average rate of tax in India is higher than the Bhutan; therefore, the relief u/s 91 is allowable at the rate of average tax paid in Bhutan being lower rate of tax than in India. The Assessing Officer computed the relief @ 8.53% being the average rate of tax paid in Bhutan on the total income computed by the Assessing Officer at ₹ 36.41.crores and not on

the income from Bhutan operations which is subjected to double taxation. Therefore, the computation of relief by the Assessing Officer is contrary to the relevant provisions of the Act as provided u/s 91 of the act. The Assessing Officer has computed the income from Bhutan operations at ₹ 68,63,57,400/- and included the same in the total income of the assessee, then the relief u/s 91 of the I T Act is allowable @ 8.53% on the said income, which is subjected to tax in both the countries. Accordingly, we direct the Assessing Officer to give relief u/s 91 by calculating the average rate of tax of 8.53% on ₹ 68,63,57,400/- subject to the total tax paid /payable in either of the countries.

58 Ground no.10 is regarding levy of interest u/s 234D.

59 We have heard the ld AR of the assessee as well as the ld DR and considered the relevant material on record. The ld AR has submitted that the return of income was processed u/s 143(1) on 15.3.2003 quantifying the refund of ₹ 9,06,02,130/-. However, no refund order was issued till the completion of the assessment u/s 143(3). The ld AR has further contended that till date, the assessee is not in receipt of the money of refund quantified before the intimation passed u/s 143(1) of the Act. Therefore, no interest is chargeable to tax u/s 234D of the Act when the assessee has not received any refund.

59.1 On the other hand, the ld DR has relied upon the orders of the authorities below and submitted that in view of the retrospective amended provisions of section 234D by the Finance Act, 2012 w.e.f 1.4.2003, the interest is levyable in the case where the assessments were completed after 1.4.2003.

60 We have considered the rival submissions and perused the relevant material on record. There is an amendment in section 234D by the Finance Act 2012 w.e.f 1.4.2003 whereby the Explanation 2 has been inserted as under:

> [6a]*[Explanation 2.—For the removal of doubts, it is hereby declared that the provisions of this section shall also apply to an assessment year commencing before the 1st day of June, 2003 if the proceedings in respect of such assessment year is completed after the said date.]*

60.1 In view of the retrospective amendment, the provisions of sec. 2334D are applicable in respect of the assessments which are completed after 1.6.2003. In the case of the assessee, the assessment has been completed on 14.3.2006; therefore, there is no doubt that the provisions of sec. 234D are applicable in the case of the assessee. However, since the assessee has contended that the assessee has not received any amount of refund granted u/s143(1); therefore, no interest is chargeable u/s 234D; even when the amount of refund is reduced at the time of assessment passed u/s 143(3). Accordingly, we direct the Assessing Officer to verify the same and then decide the issue afresh.

ITA No. 6440/Mum/2008 (Assessment Year 2005-06)

61 The assessee has raised the following grounds in this appeal:

> *1 On facts and in the circumstances of the case and in law, the learned CIT (A) has erred in upholding the disallowance made by the assessing officer under section 14A of the Income Tax Act, 1961 amounting to Rs.3,19,51 ,000/-.*
>
> *On facts and in the circumstances of the case and in law, the learned CIT (A) has erred in directing the Assessing officer to disallow payments to Clubs if the nature of entrance fees restricting the deduction to only monthly/annual subscription.*
>
> *2 On facts and in the circumstances of the case and in law, the learned CIT (A) has erred in upholding the addition of Rs.3 94 404/- made by the*

assessing officer, out of general expenses, being old debit balances written off.

3 On facts and in the circumstances of the case and in law, the learned CIT (A) erred in holding that the claim of share of loss from AOP amounting to Rs.4,73,00,000/-, under the provisions of section 70 of the Income Tax Act, 1961 is not allowable, thereby confirming the action of the assessing officer.

4 On facts and in circumstances of the case and in law, the learned CIT (A) erred in confirming disallowance of Appellant's claim for deduction u/s 80-IA(4) of the Income tax Act on the ground that the Appellant had developed infrastructure facilities in the status of a 'Works Contractor' and not as an 'Enterprise' engaged in the business of development of such infrastructure facilities as contended by the Appellant; the claim of the Appellant for deduction of profits derived from the eligible profits be upheld, it having satisfied all the conditions prescribed in the said section.

5 On facts and in the circumstances of the case and in law, the learned CIT (A) erred in not accepting the adjustments made by the Appellant in the computation of its book profits u/s 11 5JB of the Income Tax Act, 1961

62 Ground no.1 is regarding disallowance u/s 14A, which is common as ground no.4 for the Assessment Year 2004-05. Accordingly, in view of our finding for the Assessment Year 2004-05, we set aside this issue to the file of the Assessing Officer.

63 Ground no.2 is regarding disallowance of club expenses which is also common as ground no. 4 for the Assessment Year 2003-04. Therefore, in view of our findings for the AY 2003-04 & 2004-05, we decide this issue in favour of the assessee for the year under consideration also.

64 Ground no.3 is regarding disallowance of old debit balance written off.

65 The Assessing Officer disallowed the claim of ₹. 3,94,404/- in respect of the old debit balances written off by the assessee pertaining to the closed projects. On appeal, the Commissioner of Income Tax(Appeals) has confirmed the disallowance

made by the Assessing Officer on the ground that in the absence of details, the claim of the assessee cannot be allowed.

66 Before us, the ld AR has submitted that these write offs pertain to old debit balances of closed projects which are not recoverable. The ld AR has further contended that this expenditure has been charged to P&L account under the head 'general expenses' as per the commercial expediency since the corresponding income was brought to tax from year to year. He has relied upon the decision of the Hon'ble Supreme Court in the case of Vijaya Bank Ltd reported in 323 ITR 166 (SC) as well as the decision of the Hon'ble jurisdictional High Court in the case of Oman International Ltd reported in 313 ITR 128 (Bom).

66.1 On the other hand, the ld DR has relief upon the orders of the authorities below and submitted that the Assessing Officer and the Commissioner of Income Tax(Appeals) have disallowed the claim of the assessee in the absence of complete details. Therefore, when the assessee failed to establish that this amount representing the trade debt had already subjected to tax in the earlier years for claiming the deduction as bad debts.

67 We have considered the rival contention as well as the relevant material on record. The amount in question has been written off in the account as bad debts by the assessee; therefore, it is necessary for claiming the writing off of bad debts that the said amount was included in the income for the earlier years as provided u/s 36(2).

67.1 As far as the legal principle on the issue is concerned, there is no quarrel that once the assessee has decided to write off the amount as not recoverable and the

decision of writing off is honest one then it is not required to establish that this amount has actually gone bad. Since the Assessing Officer as well as the Commissioner of Income Tax(Appeals) has disallowed the claim of the assessee for want of details and particularly the compliance of conditions u/s 36(2). Even before us, the assessee has not produced any records to show that this amount has already included in the income of the assessee in the earlier year. Therefore, in the absence of the relevant details to show the compliance of mandatory conditions as prescribed u/s 36(2), we do not find any reason to interfere with the order of the lower authorities on this issue.

68 Ground no.3 is regarding disallowance of loss from AOP, which is common as ground no.5 for the Assessment Year 2003-04. Accordingly, in view of our findings for the Assessment Year 2003-04 & 2004-05, we decide this issue in favour of the revenue and against the assessee.

69 Ground no.4 is regarding disallowance u/s 80IA(4) which is common as ground no.6 for the Assessment Year 2003-04. Accordingly, in view of our findings for the Assessment Year 2003-04 and 2004-05, we decide this issue in favour of the revenue and against the assessee.

70 Ground no.5 is regarding adjustment made in respect of the amount of disallowance u/s 14A while computing book profit u/s 115JB.

71 The Assessing Officer has made the addition of Rs. 319.51 lacs being disallowance u/s 14A while computing the book profit u/s 115JB. On appeal, the Commissioner of Income Tax(Appeals) confirmed the action of the Assessing Officer.

71 Before us, the ld AR has submitted that even if any expenditure is disallowed u/s 14A there can be no adjustment to book profits u/s 115JB in respect thereof. In support of his contention, he has relied upon the decision of the Delhi Benches of the Tribunal in the case of Cadila Healthcare Ltd dated 25.5.2012. On the other hand, the ld DR has relied upon the orders of the authorities below.

72 We have considered the rival submissions and carefully perused the relevant record. There is no dispute that as per the clause (f) of Explanation I to sec. 115JB the expenditure debited to P&L Account incurred in relation to the income exempt u/s 10 is to be added for computation of book profit. The Delhi Bench of the Tribunal in the case of Goetze Ltd reported in 32 SOT 101 (Del) has taken a view that sub. Section 2 & 3 of sec. 14 cannot be imported to clause (f) though, sub, sec. (i) of section 14A is having the same word 'expenditure incurred' by the assessee in relation to the income as used in clause (f) of Explanation I to sec 115JB.

71.1 The Hon'ble jurisdictional High Court in the case of Godrej Boyce Mfg Ltd (supra) has clearly held that section 14A has implicit within it a notion of apportionment. Sub sec 2 & 3 are only machinery provisions for the purpose of computation of the amount of expenditure incurred in relation to such income. Therefore, so far as the expenditure incurred in relation to the income which does not form part of the total income as per section 10 of the I T Act, the said expenditure clearly falls under clause (f) of Explanation I to sec. 115JB. Therefore, in view of the decision of the Hon'ble High Court in the case of Godrej Boyce (supra), any expenditure which is disallowed u/s 14A and attained the finality has to be added back while computing the book profit. Since as far as the quantum of expenditure disallowed u/s 14A is concerned, we have already set aside the issue to

the record of the Assessing Officer; therefore, for the limited purpose of re-computation of the quantum, this issue is also set aside to the record of the Assessing Officer.

ITA No. 6441/Mum/2008 (Assessment Year 2006-07)

72 The assessee has raised the following grounds in this appeal:

1 On facts and in the circumstances of the case and in law, the learned CIT (A) has erred in upholding the disallowance made by the assessing officer under section 14A of the Income Tax Act, 1961 amounting to Rs.2,79,50,000l-.

On facts and in the circumstances of the case and in law, the learned CIT (A) erred in not accepting the adjustments made by the Appellant in the computation of its book profits u/s 1I5JB of the Income Tax Act,

2 On facts and in the circumstances of the case and in law, the ld Cit(A) erred in holding that the claim of share of loss from AOP amounting to Rs.4,73,00,000/-, under the provisions of section 70 of the Income Tax Act, 1961 is not allowable, thereby confirming the action of the assessing officer.

3 On facts and in circumstances of the case and in law, the learned CIT (A) erred in confirming disallowance of Appellant's claim for deduction u/s 80-IA(4) of the Income tax Act on the ground that the Appellant had developed infrastructure facilities in the status of a 'Works Contractor' and not as an 'Enterprise' engaged in the business of development of such infrastructure facilities as contended by the Appellant; the claim of the Appellant for deduction of profits derived from the eligible profits be upheld, it having satisfied all the conditions prescribed in the said section.

4 On facts and in circumstances of the case and in law, the learned CIT (A) erred in accepting the contention of the assessing officer in disregarding the claim of the appellant company with regard to exempt income earned from investments amounting toRs.1 15,87,661/- on the ground that since revised return was not filed claim could not be entertained; the learned CIT(A) ought to have herself allowed deduction as claimed by the Appellant on an application of the relevant provisions of the Act

73 Ground no.1 is regarding disallowance u/s 14A, which is common as ground no.4 for the Assessment Year 2004-05. Accordingly, in view of our finding for the Assessment Year 2004-05, we set aside this issue to the record of the Assessing Officer for adjudication.

74 Ground no.2 is regarding disallowance of loss from AOP, which is common as ground no.5 for the Assessment Year 2003-04. Accordingly, in view of our findings for the Assessment Year 2003-04 & 2004-05, we decide this issue in favour of the revenue and against the assessee.

75 Ground no.3 is regarding disallowance u/s 80IA(4) which is common as ground no.6 for the Assessment Year 2003-04. Accordingly, in view of our findings for the Assessment Year 2003-04 and 2004-05, we decide this issue in favour of the revenue and against the assessee.

76 Ground no.4 is regarding the disallowance of the claim with regard to the exempt income earned from investments.

77 The assessee has received dividend income from investment though no claim of exemption u/s 10(35) of the I T Act first time during the course of assessment proceedings. The Assessing Officer rejected the claim of the assessee as the assessee has not made such claim in the return of income and in the absence of revised return of income, the same cannot be admitted. On appeal, the Commissioner of Income Tax(Appeals) has also rejected the claim of the assessee by following the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd reported in 284 ITR 323(SC).

78 We have heard the ld AR as well as the ld DR and considered the relevant material on record. The authorities below have not entertained the claim of the assessee in the absence of revised return. Since the bar for entertain the fresh claim without filing the revised return is only with the jurisdiction of the Assessing Officer and not the jurisdiction of the appellate authorities. The Tribunal as taken this view in

series of decisions that such claim can be entertain by the appellate authority even without filling the revised return. Therefore, in the interest of justice, we remit this issue to the record of the Assessing Officer to decide the same on merit after considering and verification of the relevant facts.

79 In the result, the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on the 28th day of Sept 2012.

Sd/- Sd/-

(RAJENDRA) Accountant Member	**(VIJAY PAL RAO)** Judicial Member

Place: Mumbai : Dated: 28th Sept 2012

Raj*

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumbai