आयकर अपीलीय अधिकरण, 'बी' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL,MUMBAI "B" BENCH
सर्वश्री राजेन्द्र, लेखा सदस्य एवं शक्तिजीत डे, न्यायिक सदस्य
Before S/Sh. Rajendra,Accountant Member & Saktijit Dey,Judicial Member
आयकर अपील सं/.ITA No.3813/Mum/2009,निर्धारण वर्ष/Assessment Year-2001-02
आयकर अपील सं/.ITA No.1647/Mum/2010,निर्धारण वर्ष/Assessment Year-2002-03
आयकर अपील सं/.ITA No.1648/Mum/2010,निर्धारण वर्ष/Assessment Year-2003-04

DCIT-1(2) Room No.535, 5th Floor Aayakar Bhavan, M.K. Road Mumbai-400 020.	Vs	M/s. Maharashtra State Electricity Board,B.A.Section 6th Floor, Prakashganga,PlotNo.C-19E block Block, Bandra Kurla Complex, Bandra (E),Mumbai-400 051. **PAN: AAACM 7507 P**

(अपीलार्थी /Appellant) (प्रत्यर्थी / Respondent)

CO No.11/Mum/2010

[Arising out of आयकर अपील सं/.ITA No.3813/Mum/2009,निर्धारण वर्ष/Assessment Year-2001-02]

CO No.196/Mum/2010

[Arisng out of आयकर अपील सं/.ITA No.1647/Mum/2010,निर्धारण वर्ष/Assessment Year-2002-03]

CO No.197/Mum/2010

[Arisng out of आयकर अपील सं/.ITA No.1648/Mum/2010,निर्धारण वर्ष/Assessment Year-2003-04]

M/s. Maharashtra State Electricity Board,Mumbai-400 051.	Vs	DCIT-1(2) Mumbai-400 020.

(अपीलार्थी /Appellant) (प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : Shri S.E. Dastur
राजस्व की ओर से/ **Revenue by : Shri N.P. Singh-CIT-DR**
सुनवाई की तारीख/ Date of Hearing : 23-09-2015
घोषणा की तारीख / Date of Pronouncement : **30**-09-2015

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश
Order u/s.254(1)of the Income-tax Act,1961(Act)लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the orders of the CIT(A)-I,Mumbai,the Aseesing Officers(AO.s.)have filed appeals for the above mentioned years.The assessee has filed Cross-Objections(CO.s.).Grounds of the Appeals and CO.s.filed by both the parties for the above three Assessment Years(AY.s.)are almost same,so,we are adjudicating them by a common order.Ground of appeals filed by them read as under:

ITA/3813/Mum/2009-AY.01-02

"1.Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in directing the Assessing Officer to allow the deduction of Rs.373.25 crores in A.Y.2001-02 whereas the claim actually pertains to earlier years.

2. On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs.1,61,64,03,000/- being interest in borrowed capital disallowed by the Assessing Officer .

3. On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in allowing the deduction on account of prior period expenditure which was not in accordance with the method of accounting stipulated in section 145 of the Act.

4.The appellant craves leave to add to, amend or withdraw the aforesaid ground of appeal."

ITA/1647/Mum/2010-AY.02-03:

"1.Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in allowing the deduction of Rs.254,38,67, 152/- on account of prior period expenditure which was not in accordance with the method of accounting stipulated in section 145 of the Act.

2. The appellant craves leave to add to, amend or withdraw the aforesaid ground of appeal."

ITA/1648/Mum/2010-AY.03-04:

"1.Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in allowing the deduction of Rs.39,45,99,179/- on account of prior period expenditure which was not in accordance with the method of accounting stipulated in section 145 of the Act.

2. The appellant craves leave to add to, amend or withdraw the aforesaid ground of appeal."

CO No.11/Mum/10-AY.2001-02:

1 : 0 Re.: Disallowance of electricity duty of Rs.4,55,41,39,280/- by applying the provisions of section 43B:

1.1 The Commissioner of Income-tax (Appeals) has erred in confirming the stand the Assessing Officer that the provisions of section 43B the Income-tax Act. 1961 are applicable to the electricity duty collected by assessee on behalf of the State Government and in thereby confirming the disallowance of Rs.4.55,41,39,280/- made by the Assessing Officer.

1 : 2 The assessee submits that considering the facts and circumstances of its case and the law, prevailing on the subject the provisions of section 43B are not applicable to the electricity duty collected by it and the stand taken by the Assessing Officer in this regard is erroneous and not in accordance with law and the Commissioner of Income-tax (Appeals) ought to have held as such.

1 : 3 The assessee submits that the Assessing Officer be directed to delete the disallowance so made by him and to re-compute its total income accordingly.

2 : 0 Re.: Disallowance of loss amounting to Rs. 6,95,876/- suffered by the Appellant on account of flood, cyclone, fire, etc.:

2 : 1 The Commissioner of Income-tax (Appeals) has erred in confirming the disallowance of Rs. 6,95,876/- made by the Assessing Officer representing losses suffered by the assessee on account of flood, cyclone, fire, etc.

2 : 2 The assessee submits that considering the facts and circumstances or its case and the law prevailing on the subject the losses suffered by it on account of flood, cyclone, fire. etc .. were incurred by it during the course of its business and are allowable while computing its total income and the Commissioner of Income-tax (Appeals) ought to have held as such.

2: 3 The assessee submits that the Assessing Officer be directed to delete the disallowance so made by him and to re-compute its total income accordingly.

3 : 0 Re.: Disallowance of loss amounting to Rs.4,08,168 /- suffered by the Appellant on account of storm, theft, accident, fire, etc.

3 : 1 The Commissioner of Income-tax (Appeals) has erred in partially confirming the disallowance made by the Assessing Officer out of the losses suffered b) the assessee on account of storm, theft, accident, etc.

3 : 2 The assessee submits that considering the facts and circumstances 01' its case and the la» prevailing on the subject the losses suffered by it on account or storm, theft. accident. ctc .. are wholly and exclusively for the purpose or its business and is therefore allowable as such and the Commissioner of Income-tax (Appeals) ought to have held as such.

3 : 3 The a se see submits that the Assessing Officer be directed to delete the disallowance so made by him and to re-compute its total income accordingly.

4 : 0 Re.: Disallowance of a sum of Rs. 1,95,04,370/- being write off of intangible assets:

4: 1 The Commissioner of Income-tax (Appeals) has erred in confirming the disallowance Rs. 1,95,04,370/- made by the Assessing Officer representing intangible assets written off during the year.

4 : 2 The assessee submits that considering the facts and circumstances or its case and the law prevailing on the subject the amounts of intangible assets written off during the year are allowable while computing its total income and the Commissioner or Income-tax (Appeals) ought to have held as such.

4: 3 The assesee submits that the Assessing Officer be directed to delete the disallowance so made by him and to re-compute its total income accordingly

4 : 4 Without prejudice to the foregoing, the assessee submits that in case it is held that the intangible assets written off during the year under consideration are not allowable as a deduction during the year under consideration then the Assessing Officer be directed to allow the same as a deduction during the year in which the said expenses were incurred.

5: 0 Re.: General:

5 :1 The Appellant craves leave to add. alter, amend, substitute and/or otherwise modify in any manner whatsoever all or any of the foregoing grounds or appeal at or before the hearing or the appeal.

CO No.196/Mum/10-AY.2002-03:

1 : 0 Re.: Disallowance of electricity duty of Rs.4,90,00,09,277/- by applying the provisions of section 43B:

1.1 The Commissioner of Income-tax (Appeals) has erred in confirming the stand the Assessing Officer that the provisions of section 43B the Income-tax Act. 1961 are applicable to the electricity duty collected by assessee on behalf of the State Government and in thereby confirming the disallowance of Rs.4,90,00,09,277/- made by the Assessing Officer.

1 : 2 The assessee submits that considering the facts and circumstances of its case and the law, prevailing on the subject the provisions of section 43B are not applicable to the electricity duty collected by it and the stand taken by the Assessing Officer in this regard is erroneous and not in accordance with law and the Commissioner of Income-tax (Appeals) ought to have held as such.

1 : 3 The assessee submits that the Assessing Officer be directed to delete the disallowance so made by him and to re-compute its total income accordingly.

2 : 0 Re.: Disallowance of loss amounting to Rs.22,392/- on account of obsolescence of fixed assets:

2 : 1 The assessee submits that considering the facts and circumstances or its case and the law prevailing on the subject the losses suffered by it on account of obsolescence of fixed assets is wholly and exclusively for the purpose of business and its therefore allowable as such and the CIT (A) ought to have held as such.

2.3 The assessee submits that the Assessing Officer be directed to delete the disallowance so made by him and to re-compute its total income accordingly.

3.0 Re: Disallowance of loss amounting to Rs.58,80,940/- suffered by the Appellant on account of flood, cyclone, fire etc.

3.1 The Commissioner of Income-tax (Appeals) has erred in confirming the disallowance of Rs. 58,90,940/- made by the Assessing Officer representing losses suffered by the assessee on account of flood, cyclone, fire, etc.

3 : 2 The assessee submits that considering the facts and circumstances or its case and the law prevailing on the subject the losses suffered by it on account of flood, cyclone, fire. etc .. were incurred by it during the course of its business and are allowable while computing its total income and the Commissioner of Income-tax (Appeals) ought to have held as such.

3: 3 The assessee submits that the Assessing Officer be directed to delete the disallowance so made by him and to re-compute its total income accordingly.

4.0 Re.: General:

4 :1 The Appellant craves leave to add. alter, amend, substitute and/or otherwise modify in any manner whatsoever all or any of the foregoing grounds or appeal at or before the hearing or the appeal.

CO No.197/Mum/10-AY.2003-04:

"1 : 0 Re.: Disallowance of loss amounting to Rs. 1,04,70,059/- on account of storm, theft, accident, fire, etc.:

1 : 1 The Commissioner of Income-tax (Appeals) has erred in confirming the disallowance made by the Assessing Officer out of the losses suffered by the assessee on account of storm, theft, accident, etc.

1 : 2 The assessee submits that considering the facts and circumstances of its case and the law prevailing on the subject the losses suffered by it on account of storm, theft, accident, etc., are wholly and exclusively for the purpose of its business and are therefore allowable as such and the Commissioner of Income-tax (Appeals) ought to have held as such.

1 : 3 The assessee submits that the Assessing Officer be directed to delete the disallowance so made by him and to re-compute its total income accordingly.

2 : 0 Re.: Disallowance of loss amounting to Rs. 17,768/- on account of obsolescence of fixed assets:

2 : 1 The Commissioner of Income-tax (Appeals) has erred in confirming the disallowance made by the Assessing Officer out of the losses suffered by the assessee on account of obsolescence of fixed assets.

2 : 2 The assessee submits that considering the facts and circumstances of its case and the law prevailing on the subject the loss suffered by it on account of obsolescence of fixed assets is wholly and exclusively for the purpose of its business and is therefore allowable as such and the Commissioner of Income-tax (Appeals) ought to have held as such.

2: 3 The assessee submits that the Assessing Officer be directed to delete the disallowance so made by him and to re-compute its total income accordingly.

3 : 0 Re.: Disallowance of a sum of Rs. 2,11,84,943/- being write off of intangible assets:

3 : 1 The Commissioner of Income-tax (Appeals) has erred in confirming the disallowance Rs. 2,11,84,943/- made by the Assessing Officer representing intangible assets written off during the year.

3 : 2 The assessee submits that considering the facts and circumstances of its case and the law prevailing on the subject the amounts of intangible assets written off during the year are allowable while computing its total income and the Commissioner of Income-tax (Appeals) ought to have held as such.

3 : 3 The assessee submits that the Assessing Officer be directed to delete the disallowance so made by him and to re-compute its total income accordingly.

3 : 4 Without prejudice to the foregoing, the assessee submits that in case it is held that the intangible assets written off during the year under consideration are not allowable as a deduction during the year under consideration then the Assessing Officer be directed to allow the same as a deduction during the year in which the said expenses were incurred.

4: 0 Re.: General:

4 : 1 The assessee craves leave to add, alter, amend, substitute and/or otherwise modify in any manner whatsoever all or any of the foregoing grounds of cross objection at or before the hearing."

Assessee is a state government undertaking and is engaged in the business of generation and distribution of electricity.Details of dates of filing of returns,incomes returned,dates of assessme -nts,assessed incomes,dates of orders of the CIT(A)can be summarised as under :

A.Y.	ROI filed on	Returned Income(Rs.)	Assessment dt.	Assessed Income(Rs.)	Dt. of orders of CIT(A)
2001-02	03.07.2002)	(-)28,14,99,90,586/-	28.11.2003	(-)11,42,23,44,130	18.03.2009
2002-03	30.10.2001	(-)419,59,15,168/-	28/03/2005	889,58,44,328/-	09.12.2009
2003-04	28.11.2003	Nil	13.9.2005	Nil	09.12.2009

ITA/3813/Mum/2009-AY.01-02

2.First ground of appeal pertains to allowance of deduction of Rs.373.25 Crores.During the assessment proceedings the AO found that it has shown revenue subsidies and grants and Rs.(-) 373.25 crores,that same was short receipt of earlier years'income,that it was not expenditure of the year under appeal.He therefore,asked the assessee to explain why the same should not be disallowed and added back to its total income.After considering the submission of the assessee dated 24.11.2003, the AO held that the assessee had not claimed the disputed expenditure as bad debts.He disallowed the claim made by it.

2.1.Aggrieved by the order of the AO,the assessee preferred an appeal before the First Appellate Authority(FAA).After considering the submissions of the assessee and the assessment order,he held that the assessee,being a government undertaking,was governed by Specific Acts and the orders of the State Government,that the Electricity Supply Act,1948 prescribed that its net revenue should not be less than 3% and electricity tariff to be collected from the customers was to be adjusted accordingly,that the State Govt.would give subsidy to the assessee so as to maintain the revenue of 3%,that it was regularly accounting for revenue of 3% only in the earlier years,that for the AY.1998-99 to 2000-01 it accounted for the revenue for the first time @ 4.5%,that same was necessitated because of loan taken from World Bank(WB),that as per the condition of the WB it had to show revenue @4.5%, that it filed its return of income for earlier years showing subsidy @4.5%,that later on State Govt. decided that it would be given subsidy @ 3% only,that the assessee had filed documentary evidence in that regard,that initially the assessee had credited subsidy @4.5 % and actually it received subsidy @ 3%,that it had written back 1.5% and claimed as expenditure in the year under appeal, that the observation made by the AO that it was a reduction of the receipt of earlier year was rather erroneous,that the receipt had been disclosed in the returns of income on mercantile basis, that it received less than what was disclosed earlier in view of the decision of the state government taken during the year,that loss claimed by the assessee was allowable.Finally,he deleted the addition made by the AO.

2.2. Before us,the Departmental Representative(DR)supported the order of the AO.Authorised Representative(AR)stated that the Govt.of Maharashtra had paid subsidy @4.5%for initial two AY.s.,that later on it informed the assessee that subsidy would be paid @3%,that the assessee had overlooked the profits reversed,that while filing the return it made necessary amendments.He referred to page no.26,320 and 131 of the Paper book.

2.3. We have heard the rival submissions and perused the material before us.We find that the assessee was entitled to get subsidy @3% from the state government,that as per the agreement

with WB it was decided that it would get higher subsidy i.e.@4.5%, that subsequently the state government reduced the subsidy to 3%,that the assessee had,in pursuance of the agreement, showed subsidy at higher rate,that after resolution of the state government it decided to reverse the entries of subsidy disclosed in the earlier years.We have perused the resolution and it clearly shows that the assessee was informed by the state government about reduction in subsidy during the year under consideration only.Therefore,if the reduced the unrealised subsidy-that was disclosed in the returns of incomes of earlier years,in the books of accounts for the year under appeal-it was justified.In our opinion,income shown in the returns in anticipation and not realised finally cannot be taxed.Basic principle of taxation jurisprudence lays down that income which an assessee could have,but has not earned cannot be made taxable as income accrued to him.In other words,what has really accrued to an assessee has to be found out and what has accrued must be considered from the point of view of real income taking the probability or improbability of realisation in a realistic manner.We would like to refer to the matter of Motor Credit Co. Pvt. Ltd.(127ITR572)of the Hon'ble Madras High Court wherein the court has observed as under:

> *"The regular mode of accounting determines only the mode of computing the taxable income and the point of time at which the tax liability is attracted. It cannot determine or affect the range of taxable income or the ambit of taxation. Where no income has resulted it cannot be said that income has accrued merely on the ground that the assessee had been following the mercantile system of accounting. Even if the assessee makes a debit entry to that effect, still no income can be said to have accrued to the assessee. If no income has materialised, there can be no liability to tax on a hypothetical income. It is not the hypothetical accrual of income based on the mercantile system of accounting followed by the assessee that has to be taken into account, but what should be considered is whether the income has really materialised or resulted to the assessee. The question whether real income has materialised to the assessee has to be considered with reference to commercial and business realities of the situation in which the assessee has been placed and not with reference to his system of accounting."*

In the case before us,the assessee came to know about the fact-that the income accrued to,it in pursuance of agreement entered in to with World Bank,would not be received-during the year under appeal.Therefore,in our opinion,the FAA has rightly held that the assessee was entitled to show lesser receipt during the year.Confirming his order,we decide first ground of appeal against the AO.

3.Next ground of appeal pertains to deletion of addition of Rs.161.64 Crores,being interest of borrowed capital.During the assessment proceedings,the AO found that the assessee had claimed expenditure of Rs.1,61,64,03,000/-in respect of various capital projects undertaken by it and which were capitalised in the books of accounts,that same expenditure was claimed u/s.36(1)(iii) of the Act.He rejected the claim made by the assessee,on the ground that that the same could be allowed only if it is payable in respect of the period after the assets have been put to use in terms of the provisions of Explanation 8 to section 43(1) of the Act, that the assessee could not follow two methods of accounting one for the purposes of its books and the other for the purposes of computing its total income,that even if the interest is allowable it would be disallowed u/s. 43B of the Act as proof of payment has not been produced.

3.1. Aggrieved by the order of the AO,the assessee preferred an appeal before the First Appellate Authority(FAA).Referring to the provisions of section 36(1)(iii),the FAA held that the proviso to the section was inserted w.e.f.01.04.2004,that same was not applicable for the year under appeal. He relied upon the case of Core Health Care Ltd.(298ITR194).He further held that the claim could not disallowed u/s.43B of the Act,that the auditors in their tax report had given a

categorical finding report that no amount of interest was disallowable u/s.43B of the Act,that the interest outstanding on 31.03.2001 was for Rs.26.10 lakhs,that the assessee had made claim for Rs.162.64 crores,that there was no valid reason for disallowing claim of deduction of the interest. He allowed the appeal filed by the assessee in that regard.

3.2. Before us,the Departmental Representative(DR)fairly conceded that the issue is directly covered by the judgment of the Hon'ble Apex court delivered in the case of Core Health Care Ltd.(supra).We find that the applicability of the proviso to the section 36(1)(iii)was decided by the Hon'ble Court as under:

> "*Section 36(1)(iii) of the Income-tax Act, 1961, has to be read on its own terms : it is a code by itself. It makes no distinction between money borrowed to acquire a capital asset or a revenue asset. All that the section requires is that the assessee must borrow capital and the purpose of the borrowing must be for business which is carried on by the assessee in the year of account. Unlike section 37 which expressly excludes an expense of a capital nature, section 36(1)(iii) emphasises the user of the capital and not the user of the asset which comes into existence as a result of the borrowed capital.The Legislature has,therefore, made no distinction in section 36(1)(iii) between "capital borrowed for a revenue purpose" and "capital borrowed for a capital purpose". An assessee is entitled to claim interest paid on borrowed capital provided that the capital is used for business purpose irrespective of what may be the result of using the capital which the assessee has borrowed. "Actual cost" of an asset has no relevancy in relation to section 36(1)(iii) .*
>
> *The proviso inserted in section 36(1)(iii) by the Finance Act, 2003, with effect from April 1, 2004, will operate prospectively."*

Respectfully,following the above judgment we decide ground no.2 against the AO.

4.Last ground of appeal deals with disallowance of prior period expenses.During the assessment proceedings the AO found that the assessee had debited a sum of Rs.9,44,00,69,767/-as prior period expenses.He asked the assessee as to why the expenses should not be disallowed as prior period expenses unless crystallised during the year were not allowable u/s.37(1)of the Act.He also asked the assesse as to why the prior period income should not be taxed u/s.41(1)of the Act. The assessee vide its letter,dated 24.11.2003,filed its reply.After considering the submissions of the assessee ,the AO held that prior period expenses/loss of Rs.944 crores could not be allowed as deduction in absence of any details filed by the assessee stating whether they were crystallised during the year.

4.1. Before the First Appellate Authority(FAA),the assessee contended that the expenses had crystallised during the year under consideration, that same was in accordance with the method of accounting regularly followed by the assessee in the earlier years, that it was the state wide organization having big network of number of offices,it had number of zonal officer, station offices etc. spread throughout Maharashtra,that there was always a communication gap and some of the payments/income due or accrued of the year might not be accounted for during that year, that inspite of the proper system of internal control and pre audit such incidences occurred, that assessee 's audit was conducted by CAG,that certain items of expenses pertaining to earlier period were required to be accounted for,that those items were nothing but spill over of the earlier period and they were not considered while submitting returns for the earlier period, that its accounts were prepared in accordance with the rules of electricity (supply) (annual account), Rule, 1985, that CAG also accepted the accounting system followed by the assessee,that it was following the accounting standard as prescribed by the CBDT.Without prejudice to the above the assessee submitted that out of the total prior period expenses two items namely,depreciation

under provided(Rs.31,02,01,481/-)and excess provision of income tax /short provision (Rs.1,56, 66,42,865/-) had been disallowed suo moto.

After considering the submissions of the assessee and the assessment order,the FAA held that the assessee had computed the loss after disallowing and adding back short provisions for income tax amounting to Rs.156.66 crores and short provision of depreciation of Rs.31.02 crores, that the two amounts could not be added back again to the returned loss as done by the AO.With regard to other items he held that the treatment given to them by the assessee was in accordance with the guidelines framed for preparing the accounts of the electricity companies, that entirety of the assessee's operations and its huge network resulted in taking time to account for various expenses,that the accounts of the assessee were audited by internal auditors and the statutory auditors under the Company Act and the Act,that the Board Circular was also in favour of the assessee,that the AO had not come out with any finding that any of those expenses was not allowable as deduction, that assessee could not be denied the deduction which had been claimed by following proper accounting standard.

4.2. Before us,the Departmental Representative(DR) argued that the assessee had not proved the crystallisation of prior period expenses.The Authorised Representative(AR) supported the order of the FAA and relied upon the cases of Nagri Mills Co. Ltd. (33 ITR 681);Vishnu Industrial Gases Pvt. Ltd.(229 ITR 1988 6 May 2008) ;Excel Industries(38 Taxmann.com 100) and Toyo Engineering Ltd.(5 SOT 616), Bank of India(27taxmann335).

4.3. We have heard the rival submissions and perused the material before us.We find that the AO had disallowed the claim of the assessee as it had not filed any evidence in that regard,that the FAA had held that the assessee had itself disallowed two item,that the expenditure of earlier years' could be allowed in subsequent years.As fare as the suo motto disallowance is made,we are of the opinion that the FAA was correct in holding that no addition could be made in that regard.

But,for other expenses we have to consider the relevant facts.Before that it would be useful to deliberate upon the cases relied upon by the assessee.In the case of Nagri Mills Co. Ltd. (supra) facts were that the assessee-company which maintained its accounts on the mercantile basis did not make any entry towards bonus for the calendar year 1951,that on a dispute regarding bonus payable to the workers for that year being referred to the conciliation board, the board, by its award in June, 1952, directed the company to pay bonus out of the profits for that year,that the company in making the return claimed to deduct for the year 1951 the bonus which it distributed in December,1952.Deciding the matter the Hon'ble Bombay High Court held as under:

> "*.....under section 10(5) of the Income-tax Act actual payment was not necessary for the purpose of deduction and it was sufficient if the liability to bonus was incurred according to the method of accounting upon the basis of which the profits or gains were computed, the company was entitled to the deduction under section 10(2)(x) of the bonus paid from the profits for the year 1951, even though the amount had not been entered in its accounts fo*r that year."

We find that the above judgment was treated as overruled by the judgment of Hon'ble Allahabad High Court,delivered in the case of New Victoria Mills Co.Ltd.(61ITR395).

In the case of Vishnu Industrial Gases Pvt.Ltd.the question of law referred to the Hon'ble Court read as follow:

> *"1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee had correctly charged to its Profit and Loss account for the assessment year 1982-83, the expenditure on account enhanced rate of purchase of gas for the period 1.7.79 to 15.9.80?"*

In the case of Toyo Engineering Ltd.(supra)the Tribunal had given a categorical finding that certain items like interest payment made overseas(Rs.2.61 Crores) and payment towards sub-contractors' claims(5.94 lakhs) crystallized during the year.The tribunal had disallowed one of the items and restored back on of the issue to the file of the AO.In the matter of Excel Industries (supra)the issue before the Hon'ble Apex Court was income to be assessed u/s.28(iv)of the Act. As far as matter of Bank of India(supra)in concerned it was held by the Tribunal that expenses of last year can be allowed in the subsequent year if the bills were not received in that particular year.

4.3.a. We are aware that it is one of the well recognised principle of taxation that earlier years' expenses can be allowed,in the mercantile method of accounting,in the year in which the liability is accepted and paid.But,at the same time it is also accepted principle of taxation that even when the assessee is following the mercantile system of accounting,it is supposed to file an explanation that the expenses were not booked in earlier years due to some reasonable cause like to non-receipt of details,pending litigation,decision regarding unliquidated damages,an agreement entered in to for making payments for earlier period etc.and that such expenses got crystallised during subsequent assessment year.Thus,there are two limbs for allowing prior period expenses-firstly the expenses should have been incurred in earlier years and should not have been claimed in those years as same were not quantified and crystallised and seconldly crystallisation of such expenses should take place in the subsequent years.Like any other expense to be allowed u/s.37 of the Act,claim for prior period expenses has to be supported by documentary evidence.If there is no evidence that the expenses were crystallised in a particular year then same would not be allowed as an deductible expenditure for that year.Mere making a claim that certain expenditure is prior period expense is not sufficient.It has to be supported by evidences.
In the case under consideration,the AO has given a categorical finding of fact that in spite of given a chance,the assessee choose not file any detail to prove that crystallisation of prior period expenses had taken place during the year under appeal.The assessee had not filed any application before the AO u/s.154 of the Act stating that the fact mentioned about not furnishing details about prior period expenses was incorrect i.e.that the assessee has actually filed details of crystallization of expenses during the year under consideration.In the statement of facts filed by the assessee,along with the form no.35,there is no mention of filing of such details.From the order of the FAA we do not find that such details were made available to him.Even if such details were filed he has not mentioned a single word about it.He has allowed the expenditure because law permits prior period expenses to be allowed.He totally forgot that the AO had made the disallowance because the claim made by the assessee was not substantiated by evidences. Before us,also no material was produced to prove that crystallization had actually taken place during the year.In our opinion,an assessee has to show the manner in which the earlier years' expenditure was quantified in the year under appeal.Without these facts no expense can be allowed.Following particular guide line or rule governing a particular activity does not absolve the assessee from filing of documentary evidence in support of its claim for an expenditure-especially when the AO had directed it to file the same during the assessment proceedings.In the cases relied upon by the assessee,the Hon'ble courts or the Tribunal had not dealt with the issue of crystallisation of expenses in a particular year.Thus, the facts are totally distinguishable. Considering the peculiar facts of the issue before us,we hold that the AO was justified in disallowing the of prior period expenses,because the assessee had failed to establish that these expenses actually crystallised during the year under consideration. Since it was following the

mercantile system of accounting it had to establish that these liabilities pertaining to the previous year actually crystallised during the year under appeal.So,partly revering the order of the FAA we decide ground no.3 in favour of the AO,in part.

CO No.11/Mum/10-AY.2001-02:

5.First ground is about disallowance of electricity duty of Rs.455.41 crores.During the assessment proceedings,the AO found that in the note -5 to computation of income the assessee had stated that the provisions of section 43(b) of the Act was not applicable to electricity duty.He directed the assessee to furnish the details of electricity duty collected and to state as to why same should not be disallowed u/s. 43B of the Act in view of the decision of the HSC deliverd in the case of Chowranghee Sales Bureau (222 ITR 344).In its reply the assessee stated that the electricity duty was payable by the consumers for consumption of energy, that as a licencee it had to recover the amount from the consumers on behalf of the state government, that in event of default by the consumer it was not liable to pay any amount to State government, that it was acting as an agent to collect electricity duty from the consumers on behalf of the State Govt., that it was neither direct not indirect expense of the assessee,that it had not claimed excise duty in its revenue account, that provisions of section 43B applied to a deduction allowable under the Act, that item which was not allowable for purpose of computing total income was outside the purview of section 43B,that the sales tax and electricity duty could not be compared in light of the section 4 of the Bombay Electricity Duty Act, 1948.

After considering the submission of the assessee,the AO held that the facts of the case were similar to the facts of the Chowranghee Sales Bureau,that the provisions of section 43B were applicable to electricity duty also, accordingly he reduced a sum of Rs.445.41 crores from the total loss claimed by the assessee.

5.1. Aggrieved by the order of the AO,the assessee preferred an appeal before the FAA .Before him,it was contended that it would collect electricity duty on behalf of the state government as part of its receipts for sale of power at the rates approved the prescribed authority, that it was collecting the duty in terms of the provisions of section 4 of the Bombay electricity Duty Act, 1958,that electricity duty was neither a direct nor indirect expenditure of the assessee,that it did not claim the same in its revenue account, that an item which was not allowable for the purposes of computing total income was outside the purview of section 43B.Alternatively,it was argued that if it was held that the provisions of section 43B of the Act were applicable to the electricity duty then AO should be directed to allow the duty paid during the year under consideration.

After considering the submission of the assessee and assessment order,the FAA held that electricity duty was collected by the assessee as per the bills issued by it to its consumers. Referring to the case of Chowranghee Sales Bureau (supra), he held that provisions of section 43B would be applicable to unpaid electricity duty,that whenever the amounts had not been paid within a specified period no deduction could be allowed.Finally,he partly upheld the order of the AO.

5.2. Before us,the AR argued that assessee was not accounting for the duty collected by it, that it had not claimed same in the books of account, that duty was paid to the government in the year under appeal or the subsequent year, that for applicability of section 43B there should be some allowance.He referred to cases of Kerala State Electricity Board (329 ITR 91),Maharashtra State Electricity Distribution Co. Ltd.(ITA/762/Mum/2010-AY-06-07 dated 12.8.2015).DR supported the order of the FAA .

5.3. We have heard the rival submissions and perused the material before us.We find that issue of applicability of the provisions of section 43B of the Act has been discussed and decided by the Hon'ble Kerala High Court in the case of Kerala State Electricity Board(supra) as under:

> "*Section 43B(a) deals with "any sum payable by the assessee by way of tax, duty, . . . under any law for the time being in force". The words, "by way of tax" are indicative of the nature of liability.The liability to pay and the corresponding authority of the State to collect the tax (flowing from a statute) is essentially in the realm of the rights of the sovereign, whereas the obligation of the agent to account for and pay the amounts collected by him on behalf of the principal is purely fiduciary. The nature of the obligation continues to be fiduciary even in a case wherein the relationship of principal and agent is created by a statute. Section 43B(a) deals with amounts payable to the sovereign qua sovereign,not amounts payable to the sovereign qua principal. Therefore section 43B cannot be invoked in the case of the Electricity Board with regard to electricity duty collected by it pursuant to the obligation under section 5 of the Kerala Electricity Duty Act, 1963."*

In the matter of Maharashtra State Electricity Distribution Co. Ltd.(supra)the Tribunal has decided the issue follow:

> *"28. Ground no.2,this ground deals with the action of Ld. CIT(A) in holding that electricity duty collected and paid/adjusted by the assessee company amounting to Rs.23291.59 lakhs is covered under the provisions of section 43B of the Income Tax Act 1961. The ld. AO has discussed this issue at para no.12.1 to 12.2 on pages 3 to 4 of the assessment order whereas the Ld. CIT(A) has discussed this issue in para no.12 to 12.3 on page no.25 to 27 of the order. During the course of assessment proceedings the AO noticed that the assessee company had shown liability to the tune of aforesaid amount Accordingly, he was of the opinion that the said amount of duty was collected but was not paid to the Government and consequently the provisions of section 43B were attracted and the impugned amount was disallowable and accordingly, the AO made an addition of this amount to the income of the assessee. The assessee carried the matter before the Ld. CIT(A) and submitted before Ld. CIT(A) that the assessee collected electricity duty from the consumers on behalf of the Government of Maharashtra and was required to pay the same to the Government. It was further submitted that since the GOM itself was required to make payment to the appellant under a variety of accounts, or to certain poor or backward region/section of society, at Nil or subsidized charges, to be recovered from the government, the GOM settles its inter se accounts with the appellant on account of electricity duty by setting off/adjusting the amount receivable against the amount payable. The inter se payments were thus effected through set off of mutually receivable/payable balances, for which notifications were issued by the GOM from time to time. The process of issue of such notification was complex and time consuming, since it involved a variety of procedure with various authorities. During the appellate proceedings the appellant furnished a copy of notification dt.31.03.2008 issued by the GOM in support of its contention.*
>
> *29. It is further submitted before the Ld. CIT(A) that the assessee did not account for this amount through its profit and loss account and only the net amount was duly effected in the balance sheet and thus electricity duty was not expenditure of the assessee and therefore, it was outside the preview of section 43B of the Income Tax Act. It was further argued that the ration of Chouranghee Sales Bureau could not be applied in the case of appellant since that case was pertaining to Sales tax collected, whereas the appellant's case was in respect of collection of electricity duty in the light of section 4 of Bombay Electricity Act 1958.*
>
> *30. It was further argued by the assessee before the Ld. CIT(A) without prejudice that in case if the provisions of section 43B are held to be applicable to the electricity duty, then in the alternative appropriate direction must be given to the AO to allow as deduction the electricity duty paid upto the date of filing of the return. For the purpose of payment of electricity duty the appellant argued that since the duty payable to GOM are settled by adjustment of the amount receivable by it*

towards the sale of power, the adjustment of such amount between the appellant and Govt. be considered as payment of electricity duty in this regard.

31. The Ld. CIT(A) considered the arguments of the assessee but did not accept its claim but with a partial relief by giving a direction that payment by way of adjustment made and actual payment both till date of filing of return should be allowed. The operative para of Ld. CIT(A)'s order is reproduced as under :

> *"I have considered the facts of the case. The appellant company came into existence as a result of trifurcation of MSEB. Earlier MSEB was paying electricity duty to Govt. and the issue of disallowance u/s.43B of unpaid electricity duty was also there. In the appellant proceedings of MSEB, it was held that the provision of section 43B were applicable in respect of unpaid electricity duty. As a result, the provisions of section 43B are also applicable in case of appellant being successor company of MSEB. Therefore, it is held that provision of section 43B are applicable in respect of appellant's unpaid electrify duty. However, the AO is directed that the unpaid electricity duty settled by way of adjustment with Govt. of Maharashtra should be treated as payment of electricity duty."*

32. Before us, Ld. Counsel of the assessee argued the matter at length and submitted that the provisions of section 43B are not applicable in this case and reliance was placed by him on the following judgments:

(i)CESC Ldt. Vs. CIT in ITA No.82/110/83/84 of 2004/2005
(ii) Kerala State Electricity Board vs. DCIT reported in (2010) 329 ITR 91
(iii) A.W. Figgis & Co. Ltd. vs. CIT reported in (2003) 256 ITR 268
(iv) CIT vs Ovira Logistics Pvt. Ltd. reported in (2015) 58 taxmann.com 206

33. It was further submitted by Ld. Counsel that the credit for the similar amount was granted by the AO in the assessment order passed for A.Y. 2007-08 copy of the assessment order is placed in paper book at page no.161 to 175 on our attention has been drawn on page no.174. On the other hand, Ld. DR relied upon the orders of authorities below and requested for confirming the order of Ld. CIT(A). 33A.

We have gone through the arguments made by both the sides as well as the material placed before us.We have also considered the case laws relied upon by the ld. Counsel on this issue, copies of which have also been placed before us. It is seen that in the case of 'Kerala State Electricity Board'(su.),it was held by the Hon'ble High Court that in these circumstances the provisions of s.43B would not be applicable. We also placed reliance on the judgment of Hon'ble Bombay High Court in the case of 'CIT vs. Ovira Logistics Pvt. Ltd.' (su.),wherein their Lordships have held that in the case of service tax payment by that assessee where it was found that before end of the year,amount on which service tax was payable have not been received from the parties to whom services were rendered, the claim of service tax paid could not be disallowed. It was held that s.43B does not contemplate liability to pay the service tax before actual receipt of funds in the account of the assessee and it was further held that the liability to pay service into the treasury will arise only upon the assessee receiving funds and not otherwise,and it was accordingly held that liability to pay the service tax in respect of consideration payable will arise only upon receipt of such consideration, and not otherwise. In the case before us, the admitted position is that because of some settlements pending between the assessee company and the Government of Maharashtra, payments could not be made during the financial year.It is further seen that the admitted facts are that the assessee has not routed this amount through the P&L account.We rely with the judgment of Hon'ble Calcutta High Court in the case of CESC Ltd.(su.) and Hon'ble Kerala High Court in the case of 'Kerala State Electricity Board' (supra) to hold that the electricity duty is not being a sum payable by the assessee as a primary liability by way of tax, duty cess or fee, section 43B is not attracted to the assessee in respect of electricity duty collected by it for being passed on the State Govt. Two relevant paras from the recent order of the Hon'ble Calcutta High Court in the case of 'CESC Ltd. (supra), vide its order dated 14.05.2015 are reproduced hereunder:

> "19. Thus, in our view, the electricity duty, not being a sum payable by the assessee as a primary liability by way of tax, duty, cess or fee, Section 43B is not attracted to the licencee/assessee in respect of electricity duty collected by it for being passed on the State Government. On this point we are in

respectful disagreement with the decision of the Gujarat High Court in the case of Commissioner of Incme Tax-vs-Ahmedabad Electricity Co. Ltd. (supra) and we are in agreement with the decision of the Kerala High Court in the case of Kerala State Electricity Board-vs-Deputy Commissioner of Income Tax (supra). We are of the opinion that Section 43B of the Income Tax Act is attracted to a case where payable is to be made to the State Government in the capacity of the State as a sovereign and not to a case where payment is to be made to the State Government in its capacity as a principal by an agent. In the instant case, the relationship between the State and the licensee is of a principal and agent/fiduciary and not that of a sovereign and a subject.

20) Looking at the issue from another angle, the electricity duty collected by the licensee from the consumers is so done by the licensee as an agent of the State and, hence, the same cannot be considered to a trading receipt in the hands of the licensee. It does not constitute income of the licensee and cannot be included in the licensee's income for the purpose of computation of income tax. It is not a business receipt of the licensee which the licensee collects on its own behalf in connection with its business of generating and supplying electricity. The licensee does not collect the electricity duty for its own consumption or utilization. If the licensee collects the duty but does not pay the same to the Government, the statute provides mechanism for the Government to recover the same from the licensee. Even iii a case where the licensee is unable to recover the duty but recovers the energy charges, the statutes still provides a procedure for the Government to recover the duty either from the consumer or from the licensee. This view of ours finds support from the decision of the Andhra Pradesh High Court in the case of Commissioner of Income Tax-vs.-Devatha Chandraiah (supra). Though the said case deals with sales tax, the principle laid down in that case supports our view. The mischief that Section 43B of the Income Tax Act intended to present, is taken care of by the provisions of the Bengal Electricity Duty Act itself."

34. Thus, in our considered view, the assessee deserves to succeed. The disallowance made by Ld. AO on this ground for Rs.23291.59 lakhs is hereby deleted and ground no.2 of the assessee is allowed."

Following the above mentioned two decisions,we reverse the order of the FAA and decide ground no.1 in favour of the assessee .

6.Second and third grounds are about disallowance of loss of Rs.6.95 lacs and Rs.4.08 lacs respectively suffered by the assessee on account of flood,cyclone/storm, theft etc.During the assessment proceedings the AO found that the assessee had incurred loss of properties to the extent of Rs.6.80 crores due to storm, theft, accident. As per the AO,detailed nature of the assets was not furnished by the assessee.He held that the loss was capital in nature and hence not allowable as deduction.

6.1. Before the FAA it was contended that under the electricity supply Rules losses incurred on account of natural calamities were to be treated as losses for the year in which they had occurred, that assessee had claimed losses of Rs.11.00 lacs only. After considering the submission of the assessee,he held that the details of the actual loss was not available, that nature of loss claimed by it appeared to be loss of capital asset and accordingly the AO was correct to disallow the deduction, that AO had wrongly disallowed an amount of Rs.68.00 lacs, that the assessee had made actual claim of Rs.11.04 lacs only (Rs.6.95 lacs and Rs.4.08 lacs).The FAA upheld the disallowance of loss of Rs.11,04,040/- and deleted the balance addition.

6.2. Before us the AR argued that loss had occurred during the year under appeal, that the AO had allowed depreciation on the assets,that the assets were part of the block of assets,that depreciation should be allowed as per provisions of section 43(6)(c) of the Act,that loss of Rs.4.06 pertained to loss of stock-in-trade, that same was allowable.He referred to page no.254 and 370 of the paper book and relied upon the cases of Unitex Products Ltd. (22 SOT 429); Packwell Printers (359 ITD 340).Departmental Representative(DR) supported the order of the FAA .

6.3. We have heard the rival submission.As far as loss of stock in concerned,we are opinion that

same is to be allowed as revenue expenditure.So,the order of the FAA is reversed to that extent. For the balance amount we hold that the assets were forming part of block of assets.Therefore, depreciation should be allowed with regard to them.We find that issue of the claim of depreciation about assets of block has been decided in favour of the assessee by the decision of Tribunal relied upon by the assessee.Ground no.2-3 are allowed in favour of the assessee,in part.

7.Last ground of appeal is about write off of intangible assets of Rs.1.95 crores.During the assessment proceedings the AO found that the assessee had claimed that it would amortise intangible assets over the estimated period during which it was going derive benefits therefrom, that a proportionate amount calculated with reference to the benefits during the year such as additional revenue arising as a result of the asset was being charged to revenue account for each of the years benefitted.However, the AO disallowed the claim on the ground that the same was capital in nature.

7.1. Before the FAA ,during the appellate proceedings the assessee submitted that treatment given to the intangible assets was in accordance with the electricity rules.It relied upon the case of Tapadia Tools Ltd.(260 ITR 102).It was also stated that similar issue was decided in favour of the assessee by the then FAA while deciding the appeal for A.Y. 97-98.

The FAA ,after considering the submission of the assessee and the assessment order,held that the details of the calculation of amounts written off towards intangible assets were not available,that the assessee was writing off a part of the costs of the fixed assets every year, it was not allowable as revenue expenditure,that the similar claim was disallowed by the FAA in the AYs.99-00 and 00-01.Following them,he upheld the order of the AO and dismissed the ground raised by the assessee .

7.2. Before us,the AR contended that the assessee was amortising the expenses,that those expenses pertained to purchase of software and payment lawyer's fee etc,that the assessee had incurred expenses towards fee paid with regard to Dabhol Project.He referred to page No.340 of the paper book.He relied upon the case of Tapadia Tools(372ITR 605),Raychem RPG Ltd.(346 ITR138), Richardson Hindustan Ltd.(169 ITR 516)and Bombay Cycle and Motor agencies Ltd. (118 ITR 42).DR supported the order of the FAA .

7.3. We have heard the rival submissions.We find that the judgment of Tapadia Tools,delivered by the Hon'ble Bombay High Court(supra)and relied upon by the FAA has been reversed by the Hon'ble Supreme Court.In the matter of Raychem RPG Ltd.(supra),the Hon'ble Bombay high Court has held that of the software facilitated the assessee's trading operations or enabled the management to conduct the assessee's business more efficiently or more profitably then it was not in the nature of profit-making apparatus and that the expenditure was to be allowed.We find that lawyer's fees has been held to allowable expenditure in the matter of Bombay Cycle and Motor agencies Ltd.(supra).In that matter fees was paid to draw up lease agreement.We find that the FAA has followed the orders for AY.99-00 and 2000-01,but has not distinguished the facts of the case of AY.1997-98 and the facts of the matter under appeal.Order passed without giving any reason,for not following the decision favouring the assessee,comes under the category of non speaking order.The order of the FAA falls under that category,hence cannot be endorsed. So, reversing his order,we decide last ground in favour of the assessee.

8.As the grounds raised by the AO.s and the assessee in the appeals and in the CO.s are almost similar to the ground raised by the them in the appeal and CO for the AY.2001-02,so following our order for that year,we partly allow their Appeals/CO.s for the above mentioned two years.

As a result appeals filed by the AO and CO.s by the assessee filed for all the three AY.s.stand partly allowed.
फलतःनिर्धारिती अधिकारी और निर्धारिती द्वारा दाखिल तीनों नि.व.की अपीलें और प्रत्याक्षेप अंशतः मंजूर किए जाते हैं.

Order pronounced in the open court on 30th September,2015.
आदेश की घोषणा खुले न्यायालय में दिनांक 30 सितंबर,2015 को की गई।

Sd/- Sd/-

(शक्तिजीत डे / Saktijit Dey) **(राजेन्द्र / RAJENDRA)**
न्यायिक सदस्य / **JUDICIAL MEMBER** **लेखा सदस्य / ACCOUNTANT MEMBER**
मुंबई/Mumbai,दिनांक/Date: 30 .09. 2015
व.नि.स.*Jv.Sr.PS.*
आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :
1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//
आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई /**ITAT, Mumbai.**