IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA
[Before Shri Mahavir Singh, JM & Shri M. Balaganesh, AM]

I.T.A No.230/Kol/2012
Assessment Year: 2007-08

Oberoi Hotels Pvt. Ltd. (PAN: AAACO3408K)	Vs.	Deputy Commissioner of Income-tax, Circle-8, Kolkata.
(Appellant)		(Respondent)

&

I.T.A No.233/Kol/2012
Assessment Year: 2007-08

Joint Commissioner of Income-tax(OSD), Circle-8, Kolkata.	Vs.	Oberoi Hotels Pvt. Ltd.
(Appellant)		(Respondent)

&

I.T.A No.1030/Kol/2012
Assessment Year: 2008-09

Oberoi Hotels Pvt. Ltd. (PAN: AAACO3408K)	Vs.	Deputy Commissioner of Income-tax, Circle-8, Kolkata.
(Appellant)		(Respondent)

&

I.T.A No.1041/Kol/2012
Assessment Year: 2008-09

Deputy Commissioner of Income-tax, Circle-8, Kolkata.	Vs.	Oberoi Hotels Pvt. Ltd.
(Appellant)		(Respondent)

Date of hearing: 20.08.2015
Date of pronouncement: 15.10.2015

For the Assessee: Shri R. N. Bajoria, Sr. Advocate &
Shri A. K. Gupta, FCA
For the Revenue: Shri Debasish Roy, JCIT, Sr. DR

ORDER

Per Mahavir Singh, JM:

These four cross appeals by assessee and revenue are arising out of order of CIT(A)-VIII, Kolkata in appeal Nos. 294/CIT(A)-VIII/Kol/09-10 for AY 2007-08 dated 18.11.2011 and ITA No.246/CIT(A)-VIII/10-11 for AY 2008-09 dated 27.04.2012. Assessments were framed separately by DCIT, Circle-8, Kolkata u/s.143(3) of the

Income-tax Act, 1961 (hereinafter referred to as "the Act") for AY 2007-08 and 2008-09 vide its order dated 29.12.2009. and 30.12.2010 respectively.

2. First we take up ITA No. 230/Kol/2012 of assessee's appeal and ITA No. 233/Kol/2012 of Revenue's appeal for AY 2007-08. The first common issue in these cross appeals is as regards to the order of CIT(A) restricting the disallowance made by AO by invoking the provisions of section 14A of the Act read with Rule 8D of the I. T. Rules, 1962(herein after referred to as the 'Rules') for exempted income @ 1%. For this, assessee has raised following ground no.1 and revenue has raised following ground no.1:

> *"Assessee's ground No. 1(a). That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in sustaining disallowance to the extent of Rs.6,44,193/- u/s. 14A of the Income-tax Act, 1961 (hereinafter referred to as 'Act'.*
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> *1(b) That on the facts and in the circumstances of the case the Ld. CIT(A) failed to appreciate that the investment made by the appellant was to retain management control in such companies.*
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> *1(c) That on the facts and in the circumstances of the case the Ld. CIT(A0 failed to appreciate that no management expenses was actually incurred to earn exempt income."*

3. Briefly stated facts are that the assessee earned dividend income of Rs.6,26,69,394/- and long term capital gains of Rs.17,49,975/- aggregating to Rs.6,44,19,369/-. The assessee claimed both the incomes as exempt. The AO during the course of assessment proceedings required the assessee to explain as to why the expenditure relatable to the exempted income should not be disallowed by invoking the provisions of section 14A of the Act read with Rule 8D of the Rules. The assessee explained before the AO that it had already offered a sum of Rs.12,73,10,367/- and Rs.7,51,731/- being interest on loan and demat charges respectively incurred in connection with earning of dividend income and long term capital gains. Hence, no other expenditure was incurred by it for earning exempted income. According to him, the dividend income earned by assessee was only from EIH Ltd., a group company of the assessee. The assessee before the AO also contended that he has empowered to determine the amount of expenditure in relation to exempted income only if he is not satisfied about the correctness of the claim made in the return of income regarding accounts of the assessee. He also stated that the assessee has made disallowance of

expenses on a reasonable basis and this practice is being consistently followed. The AO was not satisfied by the explanation of the assessee and he made further disallowance of Rs.83,93,827/- by invoking the provisions of section 14A of the Act on account of proportionate management expenses. Aggrieved, assessee preferred appeal before CIT(A), who restricted the disallowance at 1% of the exempted income and ordered accordingly, by observing as under:

> *"I have carefully gone through 'the assessment order and the submissions made by the appellant. Here 1 find that section 14A of the Act has been inserted by the Finance Act 2001 with the intention of not allowing expenditure incurred for earning tax free incomes by assessee deriving income from sources which are not taxable as well as exempt, from income tax and provides that no deduction shall be allowed in respect of the expenditure incurred in relation to income which does not form part of total income .*
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> *Based on the above mentioned position of law, in my view, there is no reason to differ from the AO that some management expenses were incurred by the appellant company for earning tax free income. Hence, this fact is above doubt that a part of the expenditure claimed by the appellant in its Profit and Loss Account should be relatable, to earning of the exempted income and thus should be disallowed u/s. 14A of the Act. Now comes the question of computing the quantum of disallowance. Rule 8D has been inserted in the income tax rules to compute the quantum of disallowance under section 14A.*
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> *However, on perusal of the Judgment of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd (supra), I am of the considered view that Rule 8D should not be applicable in the case of the appellant in the instant assessment year i.e. AY 2007-08 since Rule 8D should be applicable from the AY 2008-09. Thus, the AO was wrong in applying Rule 8D in the case of the appellant.*
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> *I find that AO was not reasonable in disallowing Rs. 83,93,827/- which, in my view, is very high. Based on the facts of the appellant's case and relying on my own order in the case of EIH Limited , one of the group companies of the appellant, for the Assessment Year 2007-08, I restrict the disallowance to 1% of the exempt income of Rs.6,44,19,369/~ i.e. Rs 6,44,193/-. My order in the case of EIH Limited is based on the order of Hon'ble ITAT, Kolkata, in the case of DCIT Vs. EIH Associated Hotels Limited 126 TTJ 246, which is another group company of the appellant. Hence, I direct the AO to reduce the disallowance u/s. 14A from 83,93,827/- to 6,44,193/-."*

Aggrieved, now revenue as well as assessee came in appeal before Tribunal against restriction of disallowance at 1%.

4. We have heard rival submissions and gone through facts and circumstances of the case. We find that for the relevant AY 2007-08 Rule 8D is not applicable because the same was introduced by the I. T. (5th amendment) Rules 2008 w.e.f. 24.03.2008. Hon'ble Bombay High Court in the case of Godrej & Boycee Mfg. Co. Ltd. Vs. DCIT (2010) 328 ITR 81 (Bom) has held that applicability of Rule 8D as prospective for and from AY 2008-09 and not retrospective. We further find that the assessee had already

offered and identified an amount of Rs.12,73,10,367/- and Rs.7,51,731/- being interest on loan and de mat charges respectively for disallowance being related to exempted income. According to us, in view of the above facts and circumstances, no further disallowance can be called for in respect of exempted income. Even otherwise, the assessee company has received the dividend income from one of its group company i.e. EIH Ltd., which has the same registered office as that of the assessee and there is no specific management cost incurred for earning this dividend income. Further, the AO failed to appreciate the facts of the case that there is no satisfaction recorded by the AO with regard to correctness or otherwise of the claim of the assessee made in return having regard to the accounts of the assessee. According to us, assessee's claim is reasonable and is to be accepted. There is no scope for further disallowance of 1% of the exempted income in view of the above reasons and facts of the case. Accordingly, this issue of revenue's appeal is dismissed and that of the assessee is allowed.

5. Coming to assessee's appeal in ITA No. 1030/Kol/2012 for AY 2008-09. Similar is the issue as regards to disallowance of expenses qua exempted income by invoking the provisions of section 14A of the Act read with Rule 8D of the Rules. For this, assessee has raised following ground no.1:

> *"1(a) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in sustaining the disallowance u/s 14A of the Income Tax Act, 1961 (hereinafter referred to as the "Act") by applying the deeming provisions under Rule 80.*
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> *1(b) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) failed to appreciate that the investment made by the appellant was to retain management control in group companies.*
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> *1(c) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) failed to appreciate that no additional expenses were actually incurred to earn exempt income and accordingly erred in rejecting the 'assessee's computation without any valid reason.*
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> *1(d) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in upholding the action of the A.O. in applying the deeming provisions specified in Rule 8D which was introduced w.e.f.,24.03.2008, i.e. towards the fag end of the relevant previous year and was not in existence in the beginning of the previous year."*

6. Briefly stated facts are that the assessee company during the assessment year 2008-09 earned dividend income of Rs.13,44,01,081/- and long term capital gains of Rs.1,52,47,379/- and claimed the same as exempted from tax. The assessee also claimed to have added back interest on loan of Rs.14,21,34,269/- and de mat charges of

Rs.6,85,115/- relatable to exempted income and added to total income as expenditure disallowable u/s. 14A of the Act. The AO during the course of assessment proceedings considered the explanation of the assessee and noted that, "*it is not possible that the investment activity would not have required any time and energy of any employee, resources etc. of the company. Somebody has to take the effort to decide the investment pattern and the nature of shares, securities units etc. where investment has to be made.*" Accordingly, he invoked the provisions of section 14A of the Act read with Rule 8D of the Rules made further disallowance of 0.5% of average investment being value of expenditure incurred for exempted income and made disallowance of expenditure to the extent of Rs.83,25,042/-. Aggrieved, assessee preferred appeal before CIT(A), who directed the AO to recomputed the disallowance by ignoring the investment made in foreign companies while computing the disallowance u/s. 14A of the Act read with Rule 8D of the Rules. Aggrieved, assessee came in appeal before Tribunal.

7. We have heard rival submissions and gone through facts and circumstances of the case. We find that the assessee company has already identified and disallowed interest on loan amounting to Rs.14,21,35,269/- and de mat charges at Rs.6,85,115/- under the provisions of section 14A of the Act read with Rule 8D of the Rules being expenses relatable to earning of exempted income. The assessee has earned total exempt income at Rs.14,96,64,407/- and disallowance was made by invoking the provisions of section 14A read with Rule 8D of the Rules at Rs.14,28,20,364/-. We further find that the assessee has already identified the expenditure relatable to earning of exempted income but could not find any other expenditure debited in the P&L Account which had nexus with earning of exempted income. Even from the order of AO or that of the CIT(A), we could not find that there is any specific item of expenditure is related to earning of exempt income. Unless there is a direct or proximate connection between the exempt income and that of the expenditure incurred, the provisions of section 14A read with Rule 8D of the Rules cannot be attracted or invoked. It is also a fact that there is no fresh investment made by the assessee during the year and these investments are primarily made in group companies with the intention to acquire and retain controlling stakes and even dividend is received through ECS. This practice assessee is following consistently and the same has not been disputed in the past assessments. Now it is well

settled that even after insertion of rule 8D of the Rules, the AO must satisfy himself that the claim of expenditure made by assessee is incurred before invoking this provision. The AO has simply given a finding that some expenditure might have been incurred for earning this exempted income thereby Rule 8D of the Rules was invoked. There is no satisfaction recorded by the AO for invoking Rule 8D of the Rules despite the fact that the assessee has disclosed huge expenditure for earning of exempted income and the same was disallowed himself, the correctness of which is not in doubt. The assessee has enclosed details of investment made in group concerns and subsidiary companies in its paper book at page 8 and details of dividend income earned at page 13. In view of the above facts and circumstances, we are of the view that the AO has not recorded any satisfaction about the correctness or otherwise of the accounts of the assessee wherein the assessee himself has made disallowance of expenses relatable to earning of exempted income and secondly, we are also of the view that the primary object of investment of assessee is for holding controlling stake in group concerns and not for earning of income out of that investment. In both the eventualities, no disallowance can made u/s. 14A of the Act read with Rule 8D of the Rules. Accordingly, this issue of assessee's appeal is allowed.

8. The next common issue in both the appeals of assessee in ITA Nos. 230 & 1030/Kol/2012 is as regards to the order of CIT(A) confirming the disallowance made by AO on account of claim of provisions for leave encashment. The issue and grounds raised by assessee in both the years is identical. Hence, we will take the facts from AY 2007-08 in ITA No. 230/Kol/2012 and decide the issue. The ground No. 2 raised by the assessee qua this issue reads as under:

> *"2(a) That on the facts and in the circumstances of the case the Ld. CIT(A) erred in sustaining the disallowance made by the Assessing Officer on account of claim of provision for leave encashment of Rs.2,80,926/-.*
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> *2(b) That the Ld. CIT(A) failed to appreciate that the action of the Assessing Officer is against the principle laid down by the jurisdictional High Court in the case of Exide Industries Limited 292 ITR 470."*

9. Briefly stated facts are that the assessee claimed deduction on account of provision for leave encashment based on the decision of Hon'ble Calcutta High court amounting to Rs.2,80,926/- in the case of Exide Industries Ltd. Vs. Union of India

(2007) 292 ITR 470 (Cal). The AO while framing assessment u/s. 143(3) of the Act rejected the claim of the assessee on the premises that the decision of Hon'ble Calcutta High Court is pending before Hon'ble Supreme Court. The CIT(A) also confirmed the action of AO. Aggrieved, assessee is now in appeal before us.

10. We have heard rival submissions and gone through facts and circumstances of the case. We find that Ld. counsel for the assessee stated that the deduction on account of provision of leave encashment was made on the basis of the judgment of Hon'ble jurisdictional High Court in the case of Exide Industries Ltd. Vs. Union of India (2007) 292 ITR 470, but he fairly conceded that subsequently Hon'ble Supreme Court has stayed this judgment of Hon'ble jurisdictional High Court vide order 08-05-2009 by following observations:-

> *"Pending hearing and final disposal of the Civil Appeals, Department is restrained from recovering penalty and interest which has accrued till date. It is made clear that as far as the outstanding interest demand as of date is concerned, it would be open to the Department to recover that amount in case Civil Appeal of the Department is allowed.*
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> *We further make it clear that the assessee would, during the pendency of this Civil Appeal, pay tax as if section 43B(f) is on the Statue Book but at the same time it would be entitled to make a claim in its returns."*

In view of the above, Ld. counsel for the assessee fairly stated that let Hon'ble Supreme Court decide the issue and by that time the matter can be remitted back to the file of AO for fresh adjudication in term of the decision of Hon'ble Supreme Court. On this, Ld. CIT DR has not objected to the same. Accordingly, we set aside this issue to the file of the AO to await the decision of Hon'ble Supreme Court and decide the issue accordingly. This issue of assessee's appeal is remitted back to the file of AO and allowed for statistical purposes.

11. The next common issue in these two appeals of the assessee in ITA Nos. 230 & 1030/Kol/2012 is against the order of CIT(A) confirming the addition made by AO on account of loan received from a company in which assessee has shares by invoking the provisions of section 2(22)(e) of the Act i.e. the deemed dividend. For this, assessee in AY 2007-08 in ITA No. 230/Kol/2012 has raised following ground no.3:

> *"3(a) That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in not deciding that advances received by the appellant from Oberoi Investments Private Limited did not qualify as deemed dividend as per the provisions of section 2(22)(e) of the Act.*

3(b) That on the facts and in the circumstances of the case, the Ld. Cit(A)'s action of referring back the matter mentioned in 3(a) above to the Assessing Officer for necessary verification, is not permissible under the provision of section 251(1)(a) of the Act."

The facts and circumstances are exactly identical and the grounds raised are identically worded except the amount, hence we will take the facts from AY 2007-08 and decide the issue.

12. Briefly stated facts are that the assessee company during FY 2006-07 relevant to this AY 2007-08 received advances from its associate concerns as under:

"Oberoi Investments Private Limited	Rs.1,00,00,000/-
Oberoi Holdings Private Limited	Rs.2,50,00,000/-
Oberoi Buildings & Investments Pvt. Ltd.	Rs.1,50,00,000/-
Total :	Rs.5,00,00,000/-"

The AO during the course of assessment proceedings required the assessee to file details in respect of such advances from the aforesaid companies. The assessee before AO stated that these advances were accepted from various group companies only on pure commercial exigency and such advances were also repaid according to availability of funds. But the AO treated the above advances as deemed dividend in the hands of the assessee by invoking the provisions of section 2(22)(e) of the Act by noting the following reasons:

"1) Through Oberoi properties Private Limited, the shareholders of the company (Mr. Prithvi Raj Singh Oberoi, Mr. Vikramjit Singh Oberoi and Mr. Arjun Singh Oberoi) have substantial holding in Oberoi Holdings Private Limited and Oberioi Buildings and Investments Private Limited.

2) The appellant company owns 33.38% of shares of Oberoi Investments Private Limited .

3) Perusal of audited accounts of Oberoi Private Limited, Oberoi Buildings & Investments Private Limited and Oberoi Investments Private Limited shows that the concerns are not in the business of lending of the money.

4) The said companies do not have certificates of NBFC.

5) The said companies do not have any certificate from any Government Authority showing that they are engaged in money lending business."

13. Aggrieved, assessee preferred appeal before CIT(A), who deleted the disallowance in respect of advances received from Oberoi Holdings Pvt. Ltd., the

registered and beneficial shareholders for this concern are Oberoi Properties Pvt. Ltd., Oberoi Investments Pvt. Ltd. and Oberoi Building and Investments Pvt. Ltd. Similarly, the registered and beneficial shareholders for Oberoi Building & Investment Pvt. Ltd. are Oberoi Investment Pvt. Ltd., Oberoi Holding Pvt. Ltd. and Oberoi Properties Pvt. Ltd. Thus analyzing the provision of section 2(22)(e) of the Act, the CIT(A) stated that in respect to these two companies i.e. Oberoi Holding Pvt. Ltd. and Oberoi Building & Investment Pvt. Ltd. provisions of section 2(22)(e) of the Act will not be attracted. Accordingly, he deleted the addition. Hence, there is no dispute in respect to this aspect of the case. None of the parties are in appeal on this issue. In respect to advances received from Oberoi Investment Pvt. Ltd., the CIT(A) set aside the issue to the AO for examining whether the lender is in the business of money lending? The assessee during appellate proceedings before CIT(A) filed NBFC certificate of Oberoi Investment Pvt. Ltd. and also submitted that as per Memorandum of Association of lender company, it is one of the objects to carry on money lending business and accordingly, the provisions of section 2(22)(e) of the Act will not apply but the CIT(A) set aside the issue for re-examination after considering the NBFC certificate. Aggrieved against setting aside of the issue to the file of the AO, revenue as well as assessee, both are in cross appeals before Tribunal.

14. We have heard rival submissions and gone through facts and circumstances of the case. We find from the findings of CIT(A) that he has admitted the additional evidence submitted before him in the shape of NBFC certificate of Oberoi Investment Pvt. Ltd. and remanded the matter back to the file of the AO. Now before us also Ld. Sr. counsel Shri R. N. Bajoria stated that the issue can be set aside to the file of AO, who will consider the certificate of NBFC of Oberoi Investment Pvt. Ltd. and also Memorandum of Association of the lender company explaining that one of the objects is to carry on money lending business. Once there is money lending business, according to ld. Counsel, the assessee is out of the mischief of the provisions of section 2(22)(e) of the Act i.e. the deemed dividend. In terms of the above, we remit the issue to the file of AO to re-decide after considering the clauses of Memorandum of Association of the lender company and also NBFC certificate of Oberoi Investment Pvt. Ltd.. Accordingly, this issue of both the appeals assessee is set aside and allowed for statistical purposes.

15. Similar is the issue in AY 2008-09 of assessee's appeal in ITA No. 1030/Kol/2012 wherein the ground no. 4 raised by the assessee reads as under:

> *"4. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in not deleting the additions made u/s. 2(22)(e) of the Act by the Assessing Officer amounting to Rs.25,000,000/- on account of advance received from Oberoi Plaza Pvt. Ltd. and Rs.12,500,000/- from M/s. Bombay Plaza Pvt. Ltd. and instead referring the issue back to the Assessing Officer for fresh adjudication."*

16. We find from the facts of the case that the AO applied the provisions of section 2(22)(e) of the Act in case of loan taken by assessee from Oberoi Plaza Pvt. Ltd. and Bombay Plaza Pvt. Ltd. since Oberoi Plaza Pvt. Ltd. is a 100% subsidiary of the assessee and Bombay Plaza Pvt. Ltd. is a 100% subsidiary of Oberoi Plaza Pvt. Ltd. During the course of appellate proceedings, the assessee filed fresh evidence before CIT(A) in the shape of Memorandum of Association which establishes that the object ancillary to the main object includes money lending, thus, for both the companies the business includes lending of money/advance. These documents were not examined by the AO, hence, we are of the view that let it be examined by the AO and decide the issue afresh. Accordingly, this issue of both the appeals of assessee and one appeal of revenue is set aside to the file of AO and allowed for statistical purposes.

17. The next common issue in these two appeals of assessee in ITA Nos. 230 & 1030/K/2012 for AY 2007-08 and 2008-09 is as regards to the order of CIT(A) confirming the action of AO in disallowing depreciation in respect of premise forming part of block of assets, which was earlier used as guest house. For this, assessee has raised ground no. 4 in AY 2007-08 as under:

> *"4. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in confirming the disallowance of Rs.10,76,681 made by the Assessing Officer allegedly as depreciation on Naila Fort Guest House, ignoring the basic principles under the 'Block of Assets concept' that assets once entering the 'block' loses its identity and cannot be taken back."*

Identically worded ground is raised in AY 2008-09 also and Ld. Counsel for the assessee stated that the facts and circumstances are exactly identical and issue is similar. Hence, for the sake of brevity, we are deciding the issue by taking the facts from AY 2007-08.

18. Briefly stated facts are that the AO during the course of assessment proceedings disallowed depreciation on building house as guest house at Naila Fort and other fixed assets used therein at Rs.10,76,681/-. Before AO, assessee claimed that depreciation is otherwise allowable u/s. 32(1) of the Act. For this, he explained that the mode of computation of depreciation is allowable under the Act has been shifted to the concept of 'block of assets' whereby the identity of an individual asset is completely lost. According to assessee, this building used as guest house at Naila Fort is part of block of assets and accordingly, depreciation is allowable. But the AO disallowed the depreciation being depreciation claimed on guest house. Aggrieved, assessee preferred appeal before CIT(A), who confirmed the disallowance of depreciation by observing as under:

> *"While passing the assessment order the AO had duly added back the depreciation on guest house based on appellant's submission. Thus, in my considered view the contention of the appellant that the original assets used in Naila fort were very old and in most cases the values had been exhausted from the block is not acceptable. Had it been really the case the appellant would not have quantified the depreciation and offered the same to tax during the assessment proceedings."*

Aggrieved, now assessee is in appeal before Tribunal.

19. We have heard rival submissions and gone through facts and circumstances of the case. Before us it was explained that the mode of computation of depreciation allowable under the Act had been shifted to 'Block of assets' concept, whereby the identity of an individual asset is completely lost. Now all assets having same classification and rate of depreciation would be clubbed together and the depreciation is to be computed on the entire block without distinguishing the same with reference to actual use, It may so happen that the asset may be in use but the value may be 'NIL' for reason that it's WDV is adjusted against the sale proceeds. Thus there is no provision in the Act which discriminates the allowability of depreciation on fixed assets on the basis of its use or any restriction had been provided in the statute as in the case of section 37(4); which has been deleted. The original assets used in Naila Fort are very old and in most cases the values have been exhausted from the block. The disallowance made by the AO is ad hoc, not based on any logic. Accordingly, we are of the view that the depreciation cannot be disallowed. For this proposition we are relying on the judgment of Hon'ble

Delhi High court in the case of CIT Vs. 1. Oswal Agro Mills Ltd. 2. Oswal Chemicals & Fertilizers Ltd. (2012) 341 ITR 467 (Del.) wherein it has held that –

> *29. As per amended Section 32, deduction is to be allowed - "In the case of any block of assets, such percentage on the written down value thereof as may be prescribed". Thus, the depreciation is allowed on block of assets, and the Revenue cannot segregate a particular asset therefrom on the ground that it was not put to use.*
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> *30. With the aforesaid amendment, the depreciation is now to be allowed on the written down value of the „block of assets" at such percentage as may be prescribed. With this amendment, individual assets have lost their identity and concept of „block of assets" has been introduced, which is relevant for calculating the deprecation. It would be of benefit to take note of the Circular issued by the Revenue itself explaining the purpose behind the amended provision. The same is contained in CBDT Circular No.469 dated 23.09.1986, wherein the rationale behind the aforesaid amendment is described as under:*
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> *"6.3 As mentioned by the Economic Administration Reforms Commission (Report No. 12, para 20), the existing system in this regard requires the calculation of depreciation in respect of each capital asset separately and not in respect of block of assets. This requires elaborate book-keeping and the process of checking by the Assessing Officer is time consuming. The greater differentiation in rates, according to the date of purchase, the type of asset, the intensity of use, etc., the more disaggregated has to be the record- keeping. Moreover, the practice of granting the terminal allowance as persection 32(1)(iii) or taxing the balancing charge as per section 41(2) of the Income-tax Act necessitate the keeping of records of depreciation already availed of by each asset eligible for depreciation. In order to simplify the existing cumbersome provisions, the Amending Act has introduced a system of allowing depreciation on block of assets. This will mean the calculation lump sum amount of depreciation for the entire block of depreciable assets in each of the four classes of assets, namely, buildings, machinery, plant and furniture."*
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> *31. It becomes manifest from the reading of the aforesaid Circular that the Legislature felt that keeping the details with regard to each and every depreciable assets was time consuming both for the assessee and the Assessing Officer. Therefore, they amended the law to provide for allowing of the depreciation on the entire block of assets instead of each individual asset. The block of assets has also been defined to include the group of asset falling within the same class of assets.*

In view of the above proposition of law laid down by Hon'ble Delhi High Court and the facts of the case that this asset forms part of block of assets, the depreciation cannot be disallowed. Accordingly, we allow the claim of assessee and reverse the orders of lower authorities. This common issue of assessee's appeals is allowed.

20. The next issue in ITA No. 230/Kol/2012 of assessee's appeal is as regards to the order of CIT(A) in confirming the disallowance of depreciation of residential property let out. At the outset, Ld. Counsel for the assessee stated that he has instructions from the assessee not to press this issue. Hence, the same is dismissed as not pressed.

21. The next common issue in these appeals of revenue in ITA Nos. 233 & 1041/Kol/2012 is as regards to the order of CIT(A) in deleting the addition made by AO by enhancing the annual value of property already let out on the basis of Internet information. For this, revenue has raised identically worded ground but for the sake of convenience and brevity, we are reproducing the ground raised in AY 2007-08, which reads as under:

> *"3. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the assessee's appeal regarding the ALV of the house property by admitting three additional grounds in course of appellate proceedings in respect of which no opportunity was afforded to the Assessing Officer to make his submissions or comments thereon."*

22. Briefly stated facts are that the assessee company is owner of a property at Oberoi farm, village Kapashera, New Delhi. The assessee for this property entered into an agreement with EIH Ltd., a group company, letting out this property on rent. As per agreement, the property is to be used by EIH Ltd. as residence and office of one of its Dy. M.D for a rental of Rs.30,000/- per month. The AO during the course of assessment proceedings conducted search in certain private website and based on said search, the AO came to conclusion that the rental income of this property is about Rs. 10 lacs per month ignoring the rental value of Rs.30,000/- per month offered by the assessee. Accordingly, the AO determined the annual value of this property at Rs.1,20,00,000/- and made addition. Aggrieved, assessee preferred appeal before CIT(A), who deleted the addition by observing as under:

> *"I have carefully gone through the assessment order, the submissions made by the appellant and various judgments referred. Based on the above I decide these grounds of appeal as under:*
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> *In the assessment order the AO has concluded that the rent agreement entered into between the appellant company and EIH Limited was not at arm's length. In his view, the rental value of the subject property cannot be Rs,30,000/- per month and it should be much higher than this amount. He tried to substantiate his claim by performing internet searches and based on various assumptions have concluded that the monthly rental value for the subject property should be Rs 10,00,000/- per month.*
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> *The appellant has contended the conclusion drawn by the AO by citing the judgement of Hon'ble jurisdictional High Court in the case of CIT vs. Kishanlal & Sons (Udyog) P Ltd. and claimed that under the identical fact Hon'ble High Court has decided the matter in favour of the assessee by concluding that in order to determine the income of assessee from house property amount actually received by it from its tenant has to be taken into consideration and not an amount at which the property might expect to let out.*

I have carefully considered the judgment of the Hon'ble jurisdictional High Court and found that the facts of that case are quite similar to that of the appellant's case. Thus, in my view the said judgement should be applied in the present case.

In my considered view, the appellant has rightly contended that if a property is actually let out the expectation of letting out becomes an actual reality. Thus, such property cannot be expected to let from year to year at any figure higher than the rent which is being produced actually by the subject property. There is no finding in record that the appellant has received an additional amount, which was not recorded in the books. Based on the above, I feel, only the actual rent received by the appellant should be considered as income in its hand.

I also find merit in the contention of the appellant that only real income should be taxable in the hands of the appellant, In support of its contention the appellant placed reliance on a number of decisions of various appellate authorities including the Apex Court, which in my view bears substantial relevance in appellant's case. The AO in the assessment order has failed to prove that the appellant has actually earned any income in excess of Rs. 30,000/- per month against the subject property which has actually evaded tax. Hence, in my view, the appellant was justified in offering to tax the rental income of Rs.30,000/- per month which it actually earned during the relevant year under appeal.

Further, the appellant submitted that EIH Limited, in computing its taxable income has claimed Rs.30,000/- per month as tax deductible expenses. Since the appellant and EIH Limited both had taxable income and the applicable tax rates were also same, there was no revenue leakage. I find justification in this contention. Moreover, on enquiry I find that EIH Limited is also assessable to income tax by the same Assessing Officer. The assessment proceeding of EIH Limited for the FY 2007-08 has already been concluded and the AO has accepted the rent expenses incurred by EIH Limited. Thus, in reality, the same AO has verified and was satisfied with the claim of rent expenses in the hands of EIH Ltd. which was Rs. 30,000/- per month. In my considered view, the AO cannot deviate from his position merely based on assumptions, surmise and conjecture and with the allegation that the appellant must have fetched more rental value from the subject property.

Based on the above discussion, I order that the addition of Rs 1,20,00,000/- should be deleted."

Aggrieved, now revenue is in appeal before us.

23. We have heard rival submissions and gone through facts and circumstances of the case. We find that the AO erred in determining an arbitrary annual value of property by holding that Section 23 is a deeming provision and determination of annual value does not depend on actual realization of rent. The AO while applying clause (a) of Section 1 to Section 23 in the assessee case failed to appreciate that in the present case actually let out the property being a farm house is on rent to EIH Limited and if a property is actually let out, then the expectation of its letting out becomes an actual reality and such property cannot be expected to let from year to year at any figure higher than the rent which is being produced actually by the property in question. Hence, even as per the

deeming provision of Section 23(l)(a), in the case of let out property, only the actual rent received was required to be considered as annual value of property. The AO failed to appreciate such estimation of annual letable value as per provision of Section 23(1)(a) was called for only in case of vacant property and not where the property was actually let out since in the case of let out property, the assessee was not entitled to anything over and above the agreed rent. The said action of the AO has resulted in taxing notional income in the hands of the assessee, which never accrued and hence cannot be brought to tax. Accordingly, we are of the view that the CIT(A) has rightly deleted the addition and hence, we confirm the order of CIT(A) on this issue. This common issue of revenue's appeal is dismissed.

24. The last issue in revenue's appeal for AY 2008-09 in ITA No. 1041/Kol/2012 is as regards to the order of CIT(A) deleting the disallowance made by AO by invoking the provisions of section 40(a)(ia) of the Act on account of non-deduction of tax u/s. 195 of the Act for legal services to residence of Thailand and Australia. For this, revenue has raised following ground nos. 2 and 3:

> *"2. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance u/s. 40(a)(ia) of professional and consultancy charges amounting to Rs.2,20,65,587/- paid by the assessee to various non-resident parties without deducting tax at source u/s. 195 solely relying upon the fresh evidences filed by the assessee before him in relation to AY 2008-09.*
>
> *That on the facts and circumstances of the case and in law, the Ld. Cit(A) has violated rule 46A by non affording the AO to give his comments on the fresh evidences or counter the same before deleting the disallowance u/s. 40(a)(ia) of Rs.2,20,65,587/-."*

25. Brief facts are that the assessee claimed total expenditure under the head professional and consultancy fees, during the year under consideration, at Rs.3,42,91,086/- out of which a sum of Rs.2,20,65,567/- represents expenses in foreign currencies on account of professional services rendered outside India by non-residents from their offices in foreign countries. The AO noted that this professional and consultancy fee amounting to Rs.2,20,65,567/- is subject to TDS u/s. 194J read with 195 of the Act. As the assessee has not deducted the TDS, he disallowed this foreign payments claimed by the assessee under the head professional consultancy fees by invoking the provisions of section 40(a)(i) of the Act. Aggrieved, assessee preferred

appeal before CIT(A), who allowed the claim of the assessee by observing, in his appellate order, as under:

> *"I have perused the submission of the appellant in detail. In fact, the A.O. while applying the provisions of section 40(a)(i) did not offer any specific reason for making the disallowance. Vide Annexure-1 & the written submission, the appellant had expressly explained why the remittances should not be taxed in India as per the provisions of the respective tax treaties (Annexure -1 is also to this respect for ready reference). I agree with the appellant that following the applicable treaty provisions, the remittances were not in the nature of fees for technical services or received on account of independent professional services. I also note that the professional services involved, such as registration. of the trade marks etc. or providing of consultancy services were fully provided from outside India. Therefore, as per the treaty provisions, in my view, the remittances in question can only be taxed in India, if the recipients have a permanent establishment or provide services through a fixed base in India. In other words, the remittances made abroad can be taxed in India only under the 'Residency rule' and not under the 'Source rule' principle. Since the services were rendered from outside India and in the absence of any evidence that the payees have any P.E. in India, in my view, the remittances should not be subject to tax in India. Therefore, the appellant had no obligation to withhold tax while making the remittances outside India and the A.O. was not correct in applying the provisions of section 40(a)(i) of the Act. I, therefore, direct the A.O to delete the disallowance of Rs.2,20,65,587/- under the head "professional and consultancy charges" since there was no liability to deduct tax by the A.O."*

26. We have heard rival contentions and gone through facts and circumstances of the case. We find that the assessee has filed complete address of each party including the country of residence had been clearly specified. The specimen copies of the bills raised by the foreign parties were filed as well. So countries of residence of the parties were established. The assessee before AO stated the reasons as to why tax had not been deducted at source, which had been spelt out by referring to the relevant articles of DTAA under which tax liability did not accrue in India. At the time of hearing, during assessment proceedings, it was clarified that the non-residents are not assessable in respect of income accruing and received abroad provided the services are rendered abroad and they do not have any permanent establishment in India. The AO did not dispute the fact that services had been rendered outside India and that the payees did not have any permanent establishment or 'fixed base' in India. Therefore, it was claimed before the AO that in terms of provisions of section 195 of the Act it was not required to deduct tax at source from the foreign remittances made during the year. Before CIT(A) also it was clarified that when services rendered are in the nature of professional services, then those provisions of DTAA are to be applied which specifically deal with 'professional services'. Under the tax treaties "professional services" include legal

services and the same could only be taxed in the countries of residence of the non-residents unless the services are rendered from a fixed base in India. Since the bills of the parties were also filed the nature of services were easily verifiable. Besides this, it was pointed out that if any sum is not taxable under DTAA, the same cannot be taxed even if it is taxable under domestic law. It was also clarified that though professional & consultancy services may be considered as 'fees for technical services" (FTS) under domestic law yet under the provisions of DTAA the same would be treated as FTS only if the said services "make available" to the recipient of services technical knowledge, skills etc. possessed or deployed by the provider of services. This "make available" clause is present in all the DTAAs which are applicable to the non-resident payees in the assessee's case also. Evidently, the AO himself, had not verified the details. We further find that no such disallowance had been made in the past as well as in subsequent assessment year even though the details were filed in the same format as in the present assessment year, this was argued by Ld Sr Counsel before us. The assessee before CIT(A) also filed details in respect to payee, the amount, the nature of payment and the reasons why the remittances abroad were not taxable in India and even now before us in its paper book at pages 23 to 36. These details were filed before AO in response to query No.21 of requisition dated 13.08.2010 in the shape of sample bills of the parties.

27. We find that admittedly, these expenses in foreign currency represent on account of professional services rendered by non-residents from their offices in foreign countries. The parties reside in foreign countries namely, Thailand and Australia. Admitted position is that to these payments the provisions of DTAA will apply because with both the countries India have DTAAs. Under the tax treaties ‘professional services’ includes legal services and the same could only be taxed in the countries of residence of the non-residents unless the services are rendered from a fixed base in India. In these facts, the assessee relied on the decision of Coordinate bench of this Tribunal of Delhi bench in the case of Right Tunnelling Co. Ltd. Vs. ADIT (2014) 45 Taxman.com 196 (Del. Trib.) wherein the similar issue was adjudicated vide para 8 and 9 as under:

> *“8. For the Assessment Year 2008-09 there are other grounds of appeal. The first ground is allowability of legal expenses, paid in Thailand, in relation to arbitration proceedings held in Thailand, and second is claim for deduction u/s. 40(a)(iii). As*

regards legal expenses paid in Thailand. We find that the assessee submitted before the DRP, that the law firm to whom the payment was made in Thailand is (a) a resident of Thailand; (b) does not have any office or agent or branch in India, (c) none of the partners or employees are present in India during any of the arbitration proceedings, 9d) that the entire arbitration proceeds were held in Thailand in terms of the agreement between the parties, (e) the payment to the law firm was made by head office in Thailand, (e) the services were performed in Thailand.

9. After hearing rival contentions we find that the DRP has not applied its mind to the facts of this case or considered the arguments raised by the assessee.

It is dismissed the submissions of the assessee on the ground that the facts are para material to hire charges paid on machinery, which was considered by us in ground no. 2 above. There is no comparison between the two issues. As on facts the Ld. DR could not controvert the submissions of the assessee, and as the services were rendered outside India and the payment was made outside India by the head office of the company, in our view S. 195 is not attracted. The Hon'ble Bombay High court in the case of CIT Vs. Sri Chirag and Bhakta in (IT Appeal 1073 of 2012) has held that when services were not rendered in India, the amount shall not be taxable and consequently S. 195 is not attracted and consequently the disallowance made u/s. 40(a)(ia) is bad in law. Respectfully following the same we allow this ground of the assessee."

Similarly, Hon'ble Madras High Court in the case of Bangkok Glass Industry Co. Ltd. Vs. ACIT (2013) 34 Taxman.com 77 (Mad), wherein it has been held that the assessee, a non-resident company of Thailand, entered into technical assistance know-how agreement with MBDL, in India for transfer of glass technology know-how. The assessee received technical know-how fees for five years, which was treated as not taxable as per article 12 of DTAA between India and Thailand. In view of the above facts and circumstances of the case and following the decisions cited supra, we confirm the order of CIT(A) deleting the disallowance. This issue of revenue's appeal is dismissed.

28. In the result, assessee's appeals in ITA Nos. 230 & 1030/K/2012 are partly allowed for statistical purposes, revenue's appeals in ITA Nos. 233 & 1041/K/2012 are dismissed.

29. Order is pronounced in the open court on 15.10.2015

Sd/-	Sd/-
(M. Balaganesh)	(Mahavir Singh)
Accountant Member	Judicial Member

Dated : 15th October, 2015

Jd. Sr. P.S

Copy of the order forwarded to:

1. APPELLANT –Oberoi Hotels Pvt. Ltd., 4, Mangoe Lane, Kolkata-700 001.
2 Respondent – D CIT, Circle-8, Kolkata.
3. The CIT(A), Kolkata
4. CIT Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.