HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT JAIPUR

1. D.B. Income Tax Appeal No. 232 / 2016

Pr. Commissioner of Income Tax, Jaipur-3, Statue Circle, C-scheme,Jaipur

----Appellant

Versus

M/s GVK Jaipur Expressway Ltd., 286, KM, Toll Plaza, Ajmer Road, NH-8, Village, Thikaria, Jaipur, AY: 2009-10

----Respondent

2. D.B. Income Tax Appeal No. 626 / 2011

COMMISSIONER OF INCOME TAX, JAIPUR-III, JAIPUR

----Appellant

Versus

M/S G.V.K. JAIPUR KISHANGARH EXPRESS LTD., 286 KMS, TOLL PLAZA, AJMER ROAD, NH-08, VILLAGE THIKARIYA, JAIPUR

----Respondent

3. D.B. Income Tax Appeal No. 124 / 2010

Commissioner of Income Tax, Jaipur-III, Jaipur.

----Appellant

Versus

M/s. GVK Jaipur Kishangarh Expressway Ltd. Jaipur.

----Respondent

4. D.B. Income Tax Appeal No. 5 / 2015

Commissioner of Income Tax, Jaipur -III, Statute Circle, C-Scheme, Jaipur

----Appellant

Versus

M/s GVK Jaipur Kishangarh Expressway Pvt. Ltd., 286 K.M. Toli Plaza, Ajmer Road, N. H.-8 Village Thikaria Jaipur Raj

----Respondent

5. D.B. Income Tax Appeal No. 142 / 2017

Pr. Commissioner of Income Tax, Jaipur-3, Statute Circle, C-Scheme, Jaipur

----Appellant

Versus

M/s GVK Jaipur Expressway Ltd., 286, KM, Tolla Plaza, Ajmer Road, NH-8, Village, Thikaria, Jaipur, AY: 2010-11

----Respondent

6. D.B. Income Tax Appeal No. 187 / 2017

Pr. Commissioner of Income Tax, Jaipur-3, Statute Circle, C-Scheme, Jaipur

----Appellant

Versus

M/s GVK Jaipur Expressway Ltd., 286, KM, Toll Plaza, Ajmer Road, NH-8, Village Thikaria, Jaipur AY: 2007-08

----Respondent

7. D.B. Income Tax Appeal No. 17/2011

Commissioner of Income Tax, Jaipur-III, Jaipur-I

----Appellant

Versus

M/s GVK Jaipur Expressway Ltd., 286, KM, Toll Plaza, Ajmer Road, Jaipur

---Respondent

For Appellant(s) : Mr. Sameer Jain

For Respondent(s) : Mr. N.M. Ranka, Sr. Advocate with Mr. N.K. Jain

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HON'BLE MR. JUSTICE K.S. JHAVERI

HON'BLE MR. JUSTICE DINESH CHANDRA SOMANI

Judgment

10/10/2017

1. In all these appeals common questions of law and facts are involved hence they are decided by this common judgment.

2. By way of these appeals, the appellant has assailed the judgment and order of the tribunal whereby the tribunal has dismissed the appeal of the department and allowed the appeal preferred by the assessee.

3. This court while admitting the appeals framed following substantial questions of law:-

1. Appeal No. 142/2017 Admitted on 09.05.2017

"1. Whether in the facts and circumstances of the case the Tribunal was justified in allowing the claim of depreciation on public roads treating the same as building which is not permissible in law?

2. Whether on the facts circumstances of the case the Tribunal was justified in allowing the claim of depreciation @ 60% on EDP Equipments treating the same as the computer equipments though depreciation is permissible only @ 15% because EDP equipments are physical structures not computers.

3. Whether in the facts and in circumstance of the case the Tribunal was justified in law in deleting specific disallowances under section 43B(f) being provision for leave encashment?

4. Whether on facts and circumstance of the case Tribunal was justified in law in deleting the disallowance of Rs.1,45,25,700/- u/s 14A read with Rule 8D through the assessee failed to prove that the investment in Mutual Fund was not having any nexus with the funds on which interest was paid by the assessee?"

2. Appeal No. 124/2010 Admitted on 10.08.2011

"(i) Whether on the facts and in the circumstances of the case, the learned ITAT was right in law in allowing the claim of respondents for capitalising the expenditure incurred for the period of prior to incorporation and existence of business?

(ii) Whether in the facts and circumstances of the case Hon'ble ITAT was right in law in allowing the claim for capitalising the expenditure towards tree cutting, tampling removal of deberies etc. inspite of the fact that the assessee

failed to prove the justification of the payment made to the related concern?

(iii) Whether on the facts and circumstances of the case the Hon'ble ITAT was justified in allowing the claim of depreciation @ 60% on EDP Equipments treating the same as the computer equipments which was classifiable under the Head Plant and Machinery wherein depreciation is @ 15%?

(iv) Whether in the facts and circumstances of the case Hon'ble ITAT was justified in allowing the claim of depreciation on public roads treating the same as building which is not permissible in law?"

3. Appeal No. 187/2017 Admitted on 16.08.2017

"Whether on the facts and in the circumstances of the case the Tribunal was justified in law deleting penalty of Rs.24,87,400/- imposed u/s 271(1)(c) for furnishing inaccurate particulars of income ignoring that the assessee filed return claiming exempt dividend income, but revised it to short term capital gain on being detected during the scrutiny proceedings of the wrong claim?"

4. Appeal No. 232/2016 Admitted on 30.11.2016

"(i) Whether in the facts and circumstances of the case, Hon'ble ITAT was justified in allowing the claim of depreciation on public roads treating the same as building which is not permissible in law?"

(ii) Whether on the facts and circumstances of the case the Tribunal was justified in allowing the claim of depreciation @ 60% on EDP Equipments treating the same as depreciation is permissible at the rate of 15%?"

5. Appeal No. 5/2015 Admitted on 18.04.2016

"1. Whether in the facts and circumstances of the case the Income Tax Appellate Tribunal was justified in allowing claim of depreciation @ 60% on EDP equipments treating the same as the computer equipments which were

classifiable under the head 'Plant and Machinery', wherein, depreciation is @ 15%?

2. Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal was justified in allowing claim of depreciation on public roads treating it to be a building?"

6. Appeal No. 626/2011 Admitted on 04.03.2012

"1. Whether the Tribunal was right in law in deleting penalty under section 271(1)(c), when the same was imposed by the assessing officer for taking higher depreciation in the revised return with the intention to evade payment of duty deliberately?

2. Whether the order passed by learned Tribunal can be said to be sustainable as due to the fact of para-phrasing of the order passed by the CIT(A) and it does not show that the Tribunal has applied its mind?"

7. Appeal No. 17/2011 Admitted on 10.08.2011

"(i) Whether on the facts and circumstances of the case the Hon'ble ITAT was justified in allowing the claim of depreciation of public roads, treating the same as building?

(ii) Whether Hon'ble ITAT was justified in allowing the claim of depreciation at the higher rate of 60% classifying the plant and machinery as EDP Equipment as computer equipment instead of plant and machinery entitle for 15% rate?"

4. The facts of the case are that case of the assessee was picked up for scrutiny assessment and the assessment under section 143(3) of the Income-tax Act, 1961 was framed vide order dated 29th March, 2013. While framing the assessment, the Assessing Officer made various disallowances and additions on account of depreciation of Rs.29,71,10,536/- claimed on road and depreciation of Rs.15,08,068/- claimed on EDP Equipments,

disallowance of provision for leave encashment of Rs.19,33,345/- disallowance under section 14A of Rs.1,45,25,700/- disallowance of income not to be considered for the purpose of claim of deduction under section 80IB of Rs.9,06,889/-, interest income of Rs.2,40,27,526/-, hence the AO computed the total income at Rs.2,99,49,355/- against the loss of Rs.4,58,05,585/- and book profit as computed under section 115JB at Rs.58,84,34,128/- for MAT purposes.

4.1 The assessee aggrieved by this order, preferred an appeal before ld. CIT(A), who after considering the submissions partly allowed the appeal. While partly allowing the appeal, the ld. CIT(A) deleted the disallowance made on account of depreciation. The ld. CIT(A) confirmed the disallowance made on account of provision for Leave Encashment, disallowance made under section 14A of Rs. 1,45,25,700/-. In respect of claim under section 80IB, the ld. CIT(A) partly allowed the ground of the assessee and in respect of interest income from other sources, the assessee's appeal was dismissed by the ld. CIT(A) and confirmed the addition.

5. Counsel for the appellant Mr. Jain, for Department has mainly taken us to record of ITA No. 142/2010 wherein the AO observed as under:-

> "2. The assesee company is engaged in construction, operations and maintenance of highways. The assessee, vide agreement dated 8.05.2002 with the National Highways Authority of India (NHAI), entered into a concession agreement for widening of 90.358 Km stretch on NH-8 between Jaipur & Kishangarh, from two

lane road to six lane road on Build operate Transfer (BOT) basis. The work of the widening of the Highway was completed by the assessee and the road was opened to the public on 09.04.2005. since then the assessee is maintaining the said road on toll basis. The relevant previous year was the fourth year of operation of the toll road.

3. The assessee has shown income from toll operations at Rs. 1,70,75,30,832/- during the year and has shown book profit at Rs. 57,39,08,428/- for the MAT purpose.

During the course of assessment procedding, various detail were called for and various points were examined and discussed. Following issues emerged for consideration and have been dealt with as per forthcoming paras.

4. Depreciation on road:-

4.1 In the computation of income the assessee has claimed the total depreciation of Rs. 31,41,09,640/-. From examination of depreciation chart it is noted that assessee has claimed depreciation of Rs. 29,71,10,536/- @10% on account of road, treating the same as building. During the course of the assessement proceeding, it was asked to the assessee as to why the depreciation claimed at road should not be disallowed by the following decision of the Apex Court in the case Indore Municipal Corporation (2001) (247ITR803).

5. Depreciation on tolling & HTMS Machines (EDP Equipments) :-

The assessee has claimed depreciation of Rs. 15,08,068/- on the W.D.V of certain equipments shown as EDP euipments (Electronic data processing equipments). The rate of depreciation has been applied at 60%, by treating these equipments equivalent to Computer and Software.

It is pertinent to mention here that in the original return file for the assessment year 2006-07 these machinery had been shown under normal Plant & Machinery block. However, in the revised return filed for A.Y. 2006-07, equipments amounting to Rs. 9,54,15,351/- out of the same was placed under the 60% depreciation block by showing these as EDP equipments.

5.1 He contended that the view taken by the AO is required to be

upheld and both the authorities namely CIT(A) and Tribunal have committed serious error in holding against the department.

5.2 To substantiate his arguments, Mr. Jain has referred the following provisions of the National Highway Act, 1956 which reads as under:-

Section 2-

2. Declaration of certain highways to be national highways.

1. Each of the highways specified in the Schedule is hereby declared to be a national highway.

2. The Central Government may, by notification in the Official Gazette, declare any other highway to be a national highway and on the publication of such notification such highway shall be deemed to be specified in the Schedule.

3. The Central Government may, by like notification, omit any highway from the Schedule and, on the publication of such notification, the highway so omitted shall cease to be a national highway.

Section 4-

4. National highways to vest in the Union.- All national highways shall vest in the Union, and for the purposes of this Act "highways" include-(i) all lands appurtenant thereto, whether demarcated or not;

(ii) all bridges, culverts, tunnels, causeways, carriageways and other structures constructed on or across such highways; and

(iii) all fences, trees, posts and boundary, furlong and mile stones of such highways or any land appurtenant to such highways.

Section 5-

5. Responsibility for development and maintenance of national highways.- It shall be the responsibility of the Central Government to develop and maintain in proper repair all national highways; but the Central Government may, by notification in the Official Gazette, direct that any function in relation to the development or maintenance of any national highway shall, subject to such conditions, if any, as may be specified in the notification, also be exercisable by the Government of the State within which the national highway is situated or by any officer or authority subordinate to the Central Government

or to the State Government.

Section 8A subsection (2)

8A. Power of Central Government to enter into agreements for development and maintenance of national highways:-

(2) Notwithstanding anything contained in section 7, the person referred to in subsection (1) is entitled to collect and retain fees at such rate, for services or benefits rendered by him as the Central Government may, by notification in the Official Gazette, specify having regard to the expenditure involved in building, maintenance, management and operation of the whole or part of such national highway, interest on the capital invested, reasonable return, the volume of traffic and the period of such agreement.

5.3 He contended that the interpretation which has been put forth by the tribunal is contrary to the Act and the same is required to be quashed and set aside.

5.4 He has further taken rescue to Sec. 32 and explanation 1 of Section 32 of the IT Act as well as definition of Sec.2 Sub Section (2) which reads as under:

32. (1) In respect of depreciation of—

(*i*) buildings, machinery, plant or furniture, being tangible assets;

(*ii*) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—

(*i*) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed;

(*ii*) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed:

Provided that no deduction shall be allowed under this clause in respect of—

(*a*) any motor car manufactured outside India, where such motor car is acquired by the assessee after the 28th day of February, 1975 but before the 1st day of April, 2001, unless it is used—

(*i*) in a business of running it on hire for tourists; or

(*ii*) outside India in his business or profession in another country; and

(*b*) any machinery or plant if the actual cost thereof is allowed as a deduction in one or more years under an agreement entered into by the Central Government under section 42 :

Provided further that where an asset referred to in clause (*i*) or clause (*ii*) or clause (*iia*) [or the first proviso to clause (*iia*)], as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (*i*) or clause (*ii*) or clause (*iia*), as the case may be :

[Provided also that where an asset referred to in clause (*iia*)or the first proviso to clause (*iia*), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business for a period of less than one hundred and eighty days in that previous year, and the deduction under this sub-section in respect of such asset is restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (*iia*)for that previous year, then, the deduction for the balance fifty per cent of the amount calculated at the percentage prescribed for such asset under clause (*iia*)shall be allowed under this sub-section in the immediately succeeding previous year in respect of such asset:]

Provided also that where an asset being commercial vehicle is acquired by the assessee on or after the 1st day of October, 1998 but before the 1st day of April, 1999 and is put to use before the 1st day of April, 1999 for the purposes of business or profession, the deduction in respect of such asset shall be allowed on such percentage on the written down value thereof as may be prescribed.

Explanation.—For the purposes of this proviso,—

(*a*) the expression "commercial vehicle" means "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle" and "medium passenger motor vehicle" but does not include "maxi-cab", "motor-cab", "tractor" and "road-roller";

(*b*) the expressions "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle", "medium passenger motor vehicle", "maxi-cab", "motor-cab", "tractor" and "road roller" shall have the meanings respectively as assigned to them in section 2 of the Motor Vehicles Act, 1988 (59 of 1988):

Provided also that, in respect of the previous year relevant to the assessment year commencing on the 1st day of April, 1991, the deduction in relation to any block of assets under this clause shall, in the case of a company, be restricted to seventy-five per cent of the amount calculated at the percentage, on the written down value of such assets, prescribed under this Act immediately before the commencement of the Taxation Laws (Amendment) Act, 1991:

Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (*xiii*), clause (*xiiib*) and clause (*xiv*)of section 47 or section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the

amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them.

Explanation 1.—Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee.

Section 2 Subsection (2) :-

"annual value" in relation to any property means its annual value as determined under section 23.

5.5 He also referred to the Income Tax Rules framed under Rule 5 which reads as under:

[Effective from assessment year 2006-07 onwards]

[*See* rule 5]

TABLE OF RATES AT WHICH DEPRECIATION IS ADMISSIBLE

Block of assets	*Depreciation allowance as percentage of written down value*
1	*2*
PART A	
TANGIBLE ASSETS	
I. Building [*See* Notes 1 to 4 below this Table]	
(*1*) Buildings which are used mainly for residential purposes except	5

hotels and boarding houses	
(*2*) Buildings other than those used mainly for residential purposes and not covered by sub-items (1) above and (3) below	10
(*3*) Buildings acquired on or after the 1st day of September, 2002 for installing machinery and plant forming part of water supply project or water treatment system and which is put to use for the purpose of business of providing infrastructure facilities under clause (*i*) of sub-section (4) of section 80-IA	**[***40***]**
(*4*) Purely temporary erections such as wooden structures	**[***40***]**
III. Machinery and Plant	
(*6*) Machinery and plant, used in weaving, processing and garment sector of textile industry, which is purchased under TUFS on or after the 1st day of April, 2001 but before the 1st day of April, 2004 and is put to use before the 1st day of April, 2004 [*See* Note 8 below this Table]	[40]

5.6 He has also taken us to the note which is appended thereto which reads as under:-

> *8.* "TUFS" means Technology Upgradation Fund Scheme announced by the Government of India in the form of a Resolution of the Ministry of Textiles *vide* No. 28/1/99-CTI of 31-3-1999.

5.7 He has taken us to the Notification under the Old Act which was applicable for the A.Y. 2003-04 & 2005-06 and tried to distinguish the definition of building and contended that notes which are referred in Schedule reads as under :-

OLD APPENDIX I

[***Applicable for assessment years 2003-04 to 2005-06***]

[*See* rule 5]

TABLE OF RATES AT WHICH DEPRECIATION IS ADMISSIBLE

Block of assets	*Depreciation allowance as percentage of written down value*
1	*2*
PART A	
TANGIBLE ASSETS	
I. BUILDING [*See* Notes 1 to 4 below the Table]	
(*1*) Buildings which are used mainly for residential purposes except hotels and boarding houses	5
(*2*) Buildings other than those used mainly for residential purposes and not covered by sub-items (1) above and (3) below	10
(*3*) Buildings acquired on or after the 1st day of September, 2002 for installing machinery and plant forming part of water supply project or water treatment system and which is put to use for the purpose of business of providing infrastructure facilities under clause (*i*) of sub-section (4) of section 80-IA	100
(*4*) Purely temporary erections such as wooden structures	100

OLD APPENDIX I

[*Applicable for assessment years 1988-89 to 2002-03*]

[*See* rule 5]

TABLE OF RATES AT WHICH DEPRECIATION IS ADMISSIBLE

Block of assets	*Depreciation allowance as percentage of written down*

	value
1	*2*
[2][*PART A* TANGIBLE ASSETS]	
I. BUILDINGS [*See* Notes 1 to 3 below the Table]	
(*1*) Buildings other than those covered by sub-item (3) below which are used mainly for residential purposes	5
(2) Buildings which are not used mainly for residential purposes and which are not covered by sub-item (3) below	10
Buildings used as hotels	
(*i*) Buildings with dwelling units each with plinth area not exceeding 80 square metres	20
[(*iii*) New buildings, other than the buildings covered under entry (*ii*) of this item, with dwelling units each with plinth area not exceeding 80 square metres acquired on or after the 1st day of April, 1999 but before the 1st day of April, 2002	40]
(*4*) Purely temporary erections such as wooden structures	100

5.8 He has also pointed out the Appendix applicable for the years 1984-85 to 1987-88 which reads as under :-

OLD APPENDIX I

[*Applicable for assessment years 1984-85 to 1987-88*]

PART I

[*See* rule 5]

TABLE OF RATES AT WHICH DEPRECIATION IS ADMISSIBLE

Class of asset	*Depreciation allowance as percentage of*— (i) *actual cost in the case of*	*Remarks*

ocean-going ships;

(ii) *written down value in the case of any other asset*

1	*2*	*3*
I. **BUILDINGS**—		
1. General rate	5	"Buildings" include roads, bridges, culverts, wells and tubewells.]
2. Special rate in respect of factory buildings (excluding offices, godowns, officers' and employees' quarters, roads, bridges, culverts, wells and tube wells)	10	
3.] Purely temporary erections such as wooden structures	100	
4.] In respect of any structure or work in or in relation to a building referred to in subsection (1A) of section 32,—	—	

(*a*) where such structure is constructed or such work is done by way of renovation or improvement to any such building	The percentage specified against sub-item [1, 2 or 3] as may be appropriate to the class of building in or in relation to which the renovation or improvement is effected;
(*b*) where the structure is constructed or the work is done by way of extension to any such building	The percentage specified against sub-item [1, 2 or 3] as would be appropriate if the structure or work constituted a separate building.

5.9 He pointed out the depreciation rate which are applicable in the different cases which is reproduced as under :

APPENDIX IA

TABLE OF RATES AT WHICH DEPRECIATION IS ADMISSIBLE

[*See* rule 5(1A)]

Class of assets	*Depreciation allowance as percentage of actual cost*
(*a*) Plant and Machinery in generating stations including plant foundations :—	

(*i*) Hydro-electric	3.4
(*ii*) Steam electric NHRS & Waste heat recovery Boilers/plants	7.84
(*iii*) Diesel electric and Gas plant	8.24
(*b*) Cooling towers and circulating water systems	7.84
(*c*) Hydraulic works forming part of Hydro-electric system including :—	
(*i*) Dams, spillways weirs, canals, reinforced concrete flumes and syphons	1.95
(*ii*) Reinforced concrete pipelines and surge tanks, steel pipelines, sluice gates, steel surge (tanks), hydraulic control valves and other hydraulic works.	3.4
(*d*) Building and civil engineering works of permanent character, not mentioned above	
(*i*) Office and showrooms	3.02
(*ii*) Containing Thermo-electric generating plant	7.84
(*iii*) Containing Hydro-Electric generating plant	3.4
(*iv*) Temporary erection such as wooden structures	33.4
(*v*) Roads other than Kutcha roads	3.02
(*vi*) Others	3.02

5.10 He has also taken us to the item no. 5 in Appendix-I for the year 2006-07 where the definition of Computer includes Computer Software and clause 7 which reads as under :-

> 7. Computers including Computer Software.
>
> "Computer Software" means any computer program recorded on any disc, tape, perforated media or other information storage device."

5.11 To substantiate his arguments, he has also taken help of the Road Traffic Act, 1930 (U.K.) where the Road means any main or

parochial road and includes bridges over which a road passes, and any road-way to which the public are granted access and any road way declared to be a road pursuant to the provisions of sub -section (2).

5.12 He has taken us to the judgment of the Supreme Court in Indore Municipal Corporation vs. Commissioner of Income Tax (2001) 247 ITR 803 wherein it has held as under:-

> "High Court held that expenditure incurred by Assessee towards construction of metal roads on trenching grounds was not an item of revenue deduction and Assessee was not entitled to depreciation on amount of cost of construction of metal roads on trenching grounds – Hence, this Appeal – Whether, judgment of High Court was liable to be set aside – Held, roads were constructed to approach about 500 trenches for dumping waste and night soil in trenches and transporting processed manure – There was no other construction except roads- Therefore, it could not be said that roads by themselves would constitute buildings."

5.13 He contended that the construction of road will not be completed as envisaged by the Supreme Court while interpreting the judgment referred above.

6. Mr. Ranka, Sr. Counsel for the respondent while reiterating the facts has contended that regarding question no.1 for capitalizing the expenditure incurred for the period prior to incorporation of Rs.5.15 Crores, a consortium consisting of (i) GVK International NV, a limited liability Company incorporated in Netherlands Antilles, having its registered office at Chughubiweg 17, Curacao, Netherlands, Antilles, and Indian Office at Kohinoor Road No.1, Bajara Hills, Hyderabad, India (hereinafter referred to as 'GVK') and (ii) M/s. Leighton of

Australia, through their Indian subsidiary Leighton Contractors (India) Pvt. Ltd., Mumbai was formed. The said persons expressed interest in bidding for the Global Tender floated by the National Highways Authority of India (NHAI), for the widening of the existing 2-lane to 6-lanes dividend carriageway facility including the rehabilitation of existing 2 lane from 273/500 to 363/885 on Jaipur – Kishangarh section of the 19 NH-8, in Rajasthan, India. Novapan Industries Limited, a Company within the meaning of the Indian Companies Act, 1956 having its registered office at 'Suryodaya', Begumpet, Hyderabad, India (hereinafter referred to as 'NOVAPAN', a market leader engaged in manufacturing and marketing of pre-laminated particleboard having network of offices located at Hyderabad, New Delhi, Jaipur, Mumbai, Bangalore and other important cities in India offered to support the bidding and liaisoning on behalf of GVK, with the agencies involved in the selection process to ensure getting the bid through successfully. Consequently a success fee agreement dated 4 th November 1999 was entered into by and between GVK and Novapan. The GVK agreed to pay NOVAPAN 'success fee' (hereinafter referred to as 'success fee') equivalent to Rs.20,000,000/- (Rupees Twenty million only) based on the successful outcome of the bid in favor of the GVK lead consortium.

6.1. He contended that another agreement for reimbursement of expenses was entered into by and between the said parties on 4 th November, 1999. In terms of the said agreement, NOVAPAN agreed to carry on the job of review, preparation, compilation & submission of the bid documents for the said project with NHAI and

for the purpose provide all necessary logistics and support for the project including verification of the traffic data, tolling studies, topographic survey, Geo-technical surveys, assessment of bridge/culvert strengthening, assessment of construction difficulties, quarries for construction material, verification of earthwork quantities etc. Novapan agreed to put together and submit the bid documents on behalf of GVK consortium and also undertook negotiations after the selection as preferred bidder up to the point of financial clause. Other assistance and facilities were to be provided and they have to coordinate for finalizing the bid documents. All such expenditure have to be incurred by Novapan and GVK agreed to reimburse subject to a maximum limit of Rs.10 million payable within six months after the date of signing of the Concession Agreement with NHAI or in any case before the final closure of the project. The said amount was to be paid by GVK through Special Purpose Vehicle (SPV) to be formed by the Consortium for the implementation of the project.

6.2. It is contended that the Government of India in the Ministry of Surface Transport (hereinafter referred to as "MOST") had authorized NHAI for the strengthening of existing 2- Lanes from Km. 273/500 to 363/885 on the Jaipur-Kishangarh Section of the National Highway No. 8 ("NH-8") in Rajasthan, India and construction and widening thereof to six lanes and its operation and maintenance through a concession on Build, Operate and Transfer ("BOT") basis and has by its Notification No. RW/NH-37011/34/97- do-I DATED July 7, 1998 issued pursuant to Section 11 of the National Highways Authority of India Act, 1988 vested

the said stretch of NH-8 in NHAI as set forth in the said Notification dated July 7, 1998. NHAI had accordingly invited proposals for short listing of bidders for the aforesaid under its Notice inviting Proposals No. NHAI/12011/17/97-PI dated May 3, 2000 ("the Tender Notice"), inter alia, for the design, engineering, financing, procurement, construction, operation and maintenance of the above section of NH-8 on BOT basis subject to and on the terms and conditions contained in the Tender Notice and had pursuant thereto short listed certain bidders including, inter alia, the consortium comprising GVK International NV and Leighton Contractors (India) Private Limited with GVK International NV as its Leader. Further to a request received from the above consortium, as per 20 provisions of the Tender Notice, NHAI had agreed to permit replacement of Leighton Contractors (India) Private Limited by M/s. B. Seenaiah & Company (Projects) Limited. Accordingly, M/s. GVK International NV and M/s. B. Seenaiah & Company (Projects) Limited constituted the new consortium ("the Consortium").

6.3. It is further contended that initial bid which was given and withdrawn by the short listed bidders and, therefore, after mutual discussions with the prospective bidders, NHAI re-tendered the project. A supplemental success agreement was entered into on 15th day of November 2001 by and between GVK and Novapan whereby an additional supplemental success fee of Rs.1 crore was agreed to (copy enclosed). Similarly supplemental agreement for reimbursement of expenses was also entered into on 15 th day of November, 2001 whereby reimbursement was increased to maximum limit of Rs.5 million

(copy enclosed). Thus, in terms of these two agreements, the Assessee Company became liable for payment to Novapan as follows:-

(i) Success fee Rs.3 crores

(ii) Reimbursement of expenses Rs.1.5 crores

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Total Rs.4.5 crores

6.4 He also stated that Bid success fee and reimbursement of expenditure was paid to Novapan Industries Limited in the following manner:-

Date of Payment	Cheque No/Bank	Amount Rs.	Service Tax Rs.	Total Amount Rs.	Nature of Service.
23.11.2002	334139/OB, Sec'bad	30,000,000	--	30,000,000	Bid Success Fee paid to Novapan Industries Limited.
09.07.2003	972018/IDBI Bank, Hyd.	-	1,500,000	1,500,000	Service Tax on Bid Success Fee paid to Novapan Industries Limited.
23.11.2002	334138/IOB	15,000,000	--	15,000,000	Reimbursem

					ent of Bid related expenses paid to Novapan Industries Limited.

PAYMENT OF BID SUCCESS FEE

6.5. He contended that the consortium, based on the field work done and preparation of tender forms and incidental ancillary ground/research work done by Novapan, submitted the tender. After evaluation of the bids so received NHAI accepted the bid of the consortium and issued its letter of acceptance NO.NHAI/12011/17/97-PI/IX/495 dated March 1, 2002 ('LOA') to the consortium requiring inter alia, the execution of the Concession Agreement within 45 days of the date thereof. The Concession Agreement could be entered into only on account of continuous output, assistance and efforts of Novapan. It was a condition imposed by NHAI to promote and incorporate limited liability Company in the form of a Special Purpose Vehicle (SPV) for executing the Concession Agreement. In the Memorandum and Articles of Association main object of this project has been specified and the Assessee Company has been constituted for the project. The consortium has promoted and incorporated the concessionaire as a limited liability Company to enter into the Concession Agreement pursuant to the LOA for undertaking, inter-alia, the design, engineering, financing, procurement, construction,

operation and maintenance of the project highway, as defined hereinafter on BOT basis as referred to in Recital 'A' to the Concession Agreement and to fulfill other obligations of the concessionaire pursuant to the LOA. They requested NHAI to accept the concessionaire as the entity which shall undertake and fulfill and perform the obligations and exercise the rights of the consortium under the LOA, including the obligation to enter into the Concession Agreement for the design, engineering, financing, procurement, construction, operation and maintenance of the project highway on BOT basis. NHAI agreed to the said request of the consortium and has accordingly entered into the Concession Agreement with the concessionaire pursuant to the LOA for, inter alia, the design, engineering, financing, procurement, construction, operation and maintenance of the said project highway on BOT basis on 8.5.2002.

6.6. It is further contended that the Assessee Company deducted tax deduction at source on amount of Rs. 3 crores at Rs. 15,75,000/-. Certificate of TDS dated 10.12.2002 was provided to the payee. M/s. Novapan Industries Limited is an old existing Assessee with PAN N-2/AAACN7008A and have been assessed to income-tax for the assessment year 2003-04 on 17.3.2006 by Assistant Commissioner of Income-tax, Circle 16 (1), Hyderabad. The above stated amount so paid by the Assessee Company was duly recorded in the books of account of the said Company and has been assessed to tax after scrutiny u/s.143(3) of the Act.

6.7. It is submitted that in respect of bid related financial services, the Assessee Company entered into an agreement dated 15.11.1999 with

M/s. GVK Capital and Finance Limited, Suryodaya, 1-10-60/3, Begunpet, Hyderabad (A.P). The Assessee Company in terms of the agreement paid a sum of Rs.50 lacs by cheque on 23.11.2002. Service tax of Rs.2,50,000/- was paid on 9.7.2003. Thus a total expenditure under the said head was Rs.52,50,000/-. TDS of Rs.2,62,500/- was deducted and deposited. GVK capital and Finance Limited is an old existing Assessee and is assessed to income-tax at PAN AACG7624D presently with Assistant Commissioner of Income-tax, Circle 2(3), Hyderabad. Professional charges so paid to them have been duly credited by the recipient Company in its books of account and have been assessed to tax on 30.12.2005.

6.8. The ld. A.O. has held that (i) These companies are related concerns of the Assessee Company; (ii) The expenses pertained to years 1999 to 2000, before coming into existence or before being awarded the contract.

6.9 It is contended that Novapan is a public limited Company listed at the Bombay Stock Exchange. GVK Capital and finance is a Limited Company. The Assessee Company is not a shareholder of the said companies nor are the said companies shareholder of the Assessee Company. The ld. A.O. has not spelt out as to how the said companies are 'related concerns'. It is only a casual observation. He submited that no disallowance could be made on payment to the said companies when the said companies are distinct, independent, separate, have rendered services, have been assessed and have paid tax on such income.

6.10 He has contended that for the said services rendered by the said two companies over three years, no bid could have been successfully submitted by the consortium and Concession Agreement would not have been entered into between NHAI and the Assessee Company, resulting in the income under assessment. Hence, it was cost to be capitalized. The impugned expenditure is solely related to and was incurred for purposes of business. The liability was incurred and paid in terms of the said agreements. The expenditure by the said companies were incurred earlier but in terms of the agreements they were to be paid on successful acceptance of the bid by NHAI, execution of Concession Agreement and have been paid within the specified period, contained under the said agreements. He submited that the liability commenced immediately on entering into the two agreements and was to be discharged on successful bid and during the specified period. In terms of decision of the Hon'ble Supreme Court in Challapalli Sugars Ltd. V. CIT (1975) 98 ITR 167 wherein it has been held that all expenditure before commencement of the business have to be capitalized and accordingly the above stated amount has been debited to work in progress and capitalized. The Hon'ble Supreme Court stated: ' The accepted accountancy rule for determining cost of fixed assets is to include all expenditure necessary to bring such assets into existence and to put them in working condition. In case money is borrowed by a newly started Company which is in the process of constructing and erecting its plant, the interest incurred before the commencement of production on such borrowed money can

be capitalized and added to the cost of the fixed assets created as a result of such expenditure'.

7. It is contended that the toll project was awarded by NHAI to the consortium and the assessee company was incorporated to take over the project as a "Special Purpose Vehicle" as required under the concession agreement. All field work, bids etc. were by the consortium and they incurred cost and expenditure thereon. There is also no dispute that on its incorporation the assessee company acquired valuable business right from the consortium i.e. the right to construct, maintain, and operate the road to earn revenue in the form of toll fee. It is also found from the memorandum and articles of association of the assessee company that the two members of the consortium mainly M/s. GVK International NV and B. Seenaiah & Co. Projects Ltd. are the promoters of the assessee company and incorporated it.

8. It is contended that the tribunal also found as a fact that the payment have been made for acquiring a commercial right of capital nature as the expenditure incurred is part of the total capital outlay of the project thus on the facts and in the circumstances of the case the expenditure is found to be of capital nature and the amount of Rs. 5,17,50,000/- i.e. Rs. 4,65,00,000/- and Rs. 52,50,000/- paid to Novapan Industries Ltd. and GVK Capital and Finance Ltd. respectively, by virtue of it being incorporated as a "Special Purpose Vehicle" and entrusting with the rights and obligations for a successful bid by the erstwhile consortium together with the liabilities is held to be the expenditure of capital in nature in the hands of the appellant company.

8.1 It is argued that Payees have been assessed on such payments. Creation of "SPV" was a condition precedent in Letter of Intent issued by NHAI. Memorandum contains the clause. Otherwise also the business/commercial rights acquired are "intangible assets" as contained in Section 32(1)(ii) of the Act.

9. With regard to Question No.2 for Capitalizing expenditure on tree cutting etc. of Rs. 4.11 Crores, It is contended that in terms of the agreement with the NHAI, the Assessee Company had to do the followings:-

> (i) Cleaning of the ground, cutting of trees, removal of stumps etc. of about 12,000 trees with girth above 300 mm and its removal from the project site.
>
> (ii) To demolish existing structures on the land acquired by NHAI for construction of the road and removal of debris as also to reconstruct, rehabilitate and resettle various existing structures including religious structures such as Temples.

9.1. He contended that in accordance with the agreement the Assessee Company got executed the following works through six contractors:-

> (a) Cutting of Trees whose growth was 300 mm, removal of Slumps, and backfilling and compacting the earth;
>
> (b) Removal of Buildings (residential, shops, dhabas, Police Chowkis etc.) on the land acquired by NHAI and disposal of debris;
>
> (c) Removal of boundary walls on the land acquired by NHAI;

(d) Removal of temples and religious structures on the land acquired by NHAI and rehabilitation thereof;

(e) Removal of utilities – electrical, telephones etc.;

(f) Disposal of debris and leveling the land.

An amount of Rs.11,09,15,195/- was paid to the contractors.

9.2 He submitted that M/s. B. Seenaiah and Co. Projects Ltd.,6-2-913/914, 4 th & 5th Floor, Progressive Towers, Khairatabad, Hyderabad-4 were given work orders for executing the above stated work comprising of 'a' to 'f' above. After executing the work, the said Company submitted their bills/invoices as under:-

1.	Bill No. BSC/PM/DUDU/5/006	Dt. 16th April, 2003	Rs. 7,52,23,769
2.	Bill No. BSC/PM/DUDU/5/993	Dt. 13th April, 2005	Rs. 30,00,000
3.	Bill No. BSC/PM/DUDU/5/991	Dt. 10th April, 2005	Rs. 29,76,636
4.	Bill No. BSC/PM/DUDU/5/992	Dt. 11th April, 2005	Rs. 2,02,858
5.	Bill No. BSC/PM/DUDU/5/997	Dt. 13th April, 2005	Rs. 8,83,840
		Total	Rs. 8,22,87,103

After scrutiny, verification and satisfaction, the payments were made by cheques.

9.3 It is submitted that the remaining amount of Rs. 2,86,28,092/- was paid to other five Contractors for various works comprising of 'b to f' above. While the nature of work at 'a' above was executed by BSCPL, the remaining work at 'b to e' above were executed by six different parties, including BSCPL, across 90.385 Km. of the Project Highway.

9.4. It is further submitted that from the bills and details submitted, the AO correctly inferred the total amount paid to BSCPL at Rs. 8,22,87,103/-. However the various works for which it was paid was wrongly inferred despite the various bills and details being on record.

9.5. He pointed out the various works executed and paid to BSCPL which reads as under:-

(i) Towards Scope detailed at 'a-f' above, Rs. 7,52,23,769.

(ii) Towards KU-1 Merging Rs. 30,00,000. It is a new connecting 2 lane road for a small patch between the Project High Way 90.385 KM ending at Kishangarh and the start of the Road (NH-79) going to Nasirabad. It is totally different work unconnected with the work detailed at 'a-f' above.

(iii) Towards construction of slip lane at Kishangarh Trumpet interchange Rs.29,76,636/-, again unconnected with the work detailed at 'a-f' above.

(iv) Towards false ceiling in Toll Plaza Building Rs. 2,02,858, which was not specified in the original scope of EPC Contract again unconnected with the work detailed at 'a-f' above.

(v) Towards change of Roofing of Bus shelters across 90.385 KM Road, from asbestos to FRP sheets Rs. 8,83,840, again unconnected with the work detailed at 'a-f' above.

9.6 However, he contended that the Assessing Officer attributed the total amount of Rs. 8,22,87,103 paid to BSCPL towards Tree cutting, trumping and transportation and disallowed 50% i.e. Rs.

4,11,43,551/-. He misunderstood and erroneously disallowed adhoc amount without any reasons.

10 Of the Rs. 7,52,23,769/- paid towards the scope of work mentioned at 'a-f' of above, the break up is as under :

(i) Towards – scope of work detailed at (a) above - removal of Trees, stumps and backfilling of 11,700 trees of different sizes Girth (circumference above 1 Mtr. From ground level) ranging between 300mm to 1800 mm, amounting to Rs.3,33,27,500/-, averaging to Rs. 2,849 per tree.

(ii) The remaining amount (Rs. 7,52,23,769/- less Rs. 3,33,27,500) Rs. 4,18,96,269 was paid towards the scope of work detailed at 'b-f' viz., removal and relocation of religious structures, Electrical Cables, Storage Tanks, Pump Houses & Electrical Rooms, Hand Pumps, filling of open Wells, demolition of boundary walls, removal of utilities like telephone/electrical lines and poles etc.

10.1 He contended that the AO has disallowed 50% of the said amount paid to BSCPL and has not allowed it to be capitalized. The ld. AO has disallowed the expenditure for the reasons :- (i) The recipient Company is a shareholder in the Assessee Company; (ii) As per the Engineering Procurement & Construction (EPC) contract entire construction work is to be undertaken by the contractor and thereby a separate payment was required to be made which are allied to the construction activity; and (iii) The rates for cutting of trees, removal

and transport is about 4500 per tree which is highly excessive and even more than the cost of the tree.

10.2. He submitted that no adverse inference should or could have been drawn on account of BSCPL being a shareholder of the Assessee Company. Admittedly, the Said Company is an old existing Assessee with PAN: AAACB8316K has shown such receipts in its books of account and have been assessed to income-tax. The work was allotted and executed at arm's length. There is no evidence of excessive or unreasonable expenditure. The total expenditure incurred for tree cutting/stumps removal and transportation is Rs. 3,33,27,500 only, averaging Rs. 2849 per tree against calculated by the learned Assessing Officer at Rs. 4,500/- per tree. It may also be clarified that the work executed by the six contractors was not covered by the scope of EPC contract. The ld. A.O. has misunderstood or not properly understood the nature of expenditure.

10.3 He contended that the total claim was of Rs.8,22,87,103 for tree cutting, trumping and removal of debris etc. The AO disallowed 50% on ad hoc basis. The CIT (Appeals) found base of disallowance wrong. But he restricted the disallowance to Rs.1,73,90,250.

10.4 It is further contended that the variation of price and the quantity in the work order and its schedules enclosed therewith have been properly explained by the assessee as the assessee had led evidence before the lower authorities to justify the payment for higher quantities from the work schedule as in a situation the assessee is placed particularly when due exercise with precision cannot be undertaken before making work schedules in view of wide stretch of work done

across 90 Kms. and most difficult access to the existing houses, religious structures etc. to precisely measure the removable projects.

10.5 He also contended that the expenditure was part of the project and work had to be executed. It was approved by NHAI also. Hence it is appreciation of evidence on material on record. It is a question of fact. Onus stands discharged.

10.6 He relied on the judgment in Addl. C.I.T. Vs. Noor Mohd. & Co. and Others (1974) 97-ITR- 705.

11. With regard to Question No.3 relating to Depreciation on Electronic Data Processing Equipments @ 60% against 15%, Counsel for the respondent contended that the Toll Collection is processed by ED Equipment as under:-

(a) When a Vehicle makes payment of Toll fee at the Tool Booth, the vehicle is classified on a Computer (by the Toll Operator). The Software applies the rate and a Toll Fee receipt is generated. Simultaneously the data is processed through a Network and a server, whereby the Metal boom automatically opens on a Toll fee receipt being generated. Local Traffic/Cash less smartcard is also accepted and processed through Computer.

(b) On the payment around the Metal boom, fiber optic sessions are embedded and sealed by seatant block lines and visible to the naked eye.

(c) A Sensor in the form of and 6 feet height black poles installed adjacent to the Fiber Optic Sensors.

(d) The Fiber optic sensors (b) and the Height Sensor (c) both are connected to Computers in Tunnel under the toll booth.

(e) Fiber Optic Sensors (b) transmits data relating to number of Axles, inter Axle Distance of the vehicle. Length of the vehicle etc. And the height sensor (c) measures and transmits data relating to the height of the vehicle, to the Computer in the tunnel.

(f) The Computer in the Tunnel determines the class of vehicle automatically.

(g) Once the vehicle passes through instructions are passed on by the Computer in the Tunnel to the metal boom to close, thus facilitating the next transaction.

(h) Each of the computers in the Toll booth and in the Tunnel (under the Toll Booth) is connected to a main frame computer called server at each plaza.

(i) The two servers, Jaipur and Kishangarh, are further networked to a control server, thus integrating the data, data processing and facilitating maintaining and MIS Reporting.

11.1. He has taken us to the Tolling Operations - Back Office which provides as under:-

> The servers process the data and keep it ready for benighted by back office.
>
> (a) Cash and banking: Toll collector-wise Account is maintained. At the end of shift each Toll Collector is required to remit the amount shown against his name for the transaction executed by him.
>
> (b) Discrepancies: The data from the computer in the Toll Booth and the Computer in the Tanner is compared and any under classification of vehicle and resultant less to company is recovered from the Toll Collector.

(c) Vehicles without paying Toll: Vehicles exempt under the concession agreement are photographed and documents collected by Toll Collector are also processed and reports generated.

(d) Reparting: Various contractual reports under the concession agreement and reports required for internal monitoring and decision making are also generated.

11.2. He further invited our attention towards Highway Traffic Management System (HTMS) which lays down as under:-

(a) Computers and data processing is extensively used for Emergency Communication by road users across 90 Kms. Highway (45 emergency call boxes connected to Computer) and a Central Server for Accident and incident management.

(b) At two locations the data relating to weather, wind speed, visibility etc is compiled and transferred to the computers in the Control Room.

(c) Electronic Variable Message Display Boards are installed at 6 locations (12 Boards), which are remotely operated and controlled through computers, by processing and displaying pre-stored data/messages.

(d) The communication network across 90 Kms. (VHF through hand sets) - The voice communications are recorded and processed through computers.

11.3. It is contended that all the above are mandatory requirements under the Concession Agreement. The AO while considering the matter held as under:-

> "Having considered the facts and the circumstances of the case, we are of the view that items as claimed by the

> appellant as EDP equipment are peripherals to the computer system installed by the appellant to manage, control and regulate the traffic system on its tolls to generate revenue which has been accounted for as income in the hands of the appellant. The department has brought no material on record to show that the said items are not computer peripherals. We also find support from the decision relied upon by the assessee of Delhi Bench in case of Expeditors International Ltd. (supra). It was followed in Bses Yamuna Powers Ltd. and approved in C.I.T. v. Bses Yamuna Power Ltd. (2013) 358-ITR- 47 (Delhi)."

11.4 It is contended that Computers servers, computer software's etc. depreciate and become obsolete in shorter period and therefore are covered by entry. (5) – III Machinery. Even for Air Pollution and; Water Pollution Equipment. Rate is 100% and for Electrical equipment is 80%.

11.5 It is argued that for Head Plant & Machinery general rate is 15% but specific rate should prevail for the general rate and general entry.

12. With regard to Question No. 4 relating to Depreciation on public road treating the same as building, counsel for the respondent has relied on sec.32 (1) of the Act, where depreciation is to be statutorily allowed when the tangible or intangible as set is 'owned wholly or partly', by the assessee. Explanation 1 expands the ownership in respect of such assessee where the assessee holds lease or other right of occupancy and any capital expenditure is incurred on the construction of any structure or doing of any work. It seems that such structure or work is owned by the assessee. He contended that the ld. A.O. has either not read the concession agreement or has misunderstood the terms and conditions of the said agreement. It may be further mentioned that sub-clauses (v) and (vi) have been

inserted in sec.2 (47) of the Act from 1.4.1988 expanding the definition of 'transfer'. Simultaneous sub-clauses (iii) and (iii)(a) were inserted in sec.27 expanding the ownership and making income of such assessee as income from house property liable to be taxed in their hands though they might not be having any legal title as contained in the Transfer of Property Act. He contended the the ld. A.O. has ignored the change in law from 1.4.1988 and the philosophy contained in the amendments/insertions.

12.1 He invited our attention to the concession agreement on the followings points:-

- Article 3.1 - exclusive right, license and authority during the subsistence of the agreement;
- Article 3.2 – the concession granted shall entitle to enjoy, to develop, design, engineer, finance, procure, construct operate and maintain the project Highway during the concession period.
- Article 6 & 7 – concession fee and excess revenue sharing.
- Article 10 – obligations of NHAI Article 10.1 (i), (ii) – Access to site and peaceful use. Article 18 – Operation and Maintenance,
- Article 32 – Termination.
- Article 32.5 – NHAI shall take possession and control of the project, any materials, construction plant, implements, stores etc.
- Article 33 – Divestment of rights and interests. Article 33.1(b) – deliver forthwith actual or constructive possession of the project

and to execute writings and documents as may be required by the NHAI, (d) – pay all transfer costs and stamp duty etc.

- Article 38 – Rights and Title over the Site.
- Article 38.1 – Exclusive rights to use.
- Article 38.4 – For the purpose of claiming tax depreciation, the property representing the capital investment made by the Concessioner shall be deemed to be acquired and owned by the Concessioner.

12.2 He contended that in the light of such clauses in the concession agreement, it is apparent and patent on the face of the record, that exclusive possession of the site was transferred by NHAI, to the assessee; the assessee was authorized to build the project, operate the project, enjoy its usufruct and to transfer the possession with all its rights in favor of NHAI on termination of the agreement. The total cost of the project was borne and met by the assessee. The net capital cost to the assessee was Rs. 4,44,67,34,578/- on which depreciation at 10% was claimed and is allowable which is statutory allowance.

12.3 He contended that the claim of the assessee is fully supported by the binding judgment of the Hon'ble S.C. in Mysore Minerals Limited and Poddar Cement Ltd. which are referred below.

12.4 He contended that the A.O. has referred to number of decisions of various High Courts which are no more good law in the light of the above stated judgments of the Hon'ble S.C. The

A.O. has also mentioned that clause No.38.4 of the concession agreement cannot be deemed to be a conveyance deed for the transfer of immovable property. He submitted that the title over the land was not transferred to the assessee but rights thereon were transferred with an authority to build, operate and transfer the project in a running condition on termination. The assessee is owner of the super structure including the road constructed by it and its right, title and interest has been clearly spelt out in the concession agreement. It may again be clarified that "land" and "building" are two separate assets in India. The land may belong to A and the super structure may belong/owned by 'B'. The jurisdictional High Court in CIT vs. Mohd. Bux Shokat Ali (2002) 256 ITR 357 at 359 observed: 'It is well settled that there cannot be two owners of the property simultaneously and in the same sense of the term. The intention of the legislature in enacting sec. 32 of the Act would be best fulfilled by allowing deduction in respect of depreciation to the person in whom for the time being vests the dominion over the building and who is entitled to use it in his own right and is using the same for the purposes of his business or profession. Assigning any different meaning would not sub serve the legislative intent'. (Emphasis supplied).

12.5 It is contended that the ld. AO has also referred to the Explanation 1 below sec.32 (1) of the Act but has not given due weight to the expression 'other right of occupancy'. Hence mere occupancy makes entitled to depreciation. Though the assessee was not a lessee but was a licensee with right to possess, built,

operates earn income and to transfer the asset so built in favor of NHAI on the expiry of the specified period. He contended that on termination even transfer deed has to be executed by the assessee in favor of NHAI because the ownership over the project built/constructed by the assessee vests in the assessee, not in NHAI, and the assessee would be divested by proper documentation on termination. Till then he is the absolute, exclusive, individual, sole owner with all rights to possess, maintain, domain and earn income. He contended that Explanation (1) to section 32 of the Income-tax Act, which were inserted w.e.f. 1.4.1988 by Taxation Laws (Amendment and Miscellaneous Provision) Act, 1986 which reads as under :-

> Explanation 1.- Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure of any work in or in relation to and by way of renovation or extension of or improvement to the building, then the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee;.
>
> (Emphasis supplied).

12.6 He contended that as part of the scope of the project specified in the concession agreement, the assessee repaired / strengthened the existing two lanes of the road, constructed new lanes numbering four, buildings, super structures, toilets with drinking water facility across 90 kms., bus bays and bus shelters, pedestrian/service roads for village traffic, toll booths etc. at the risk and cost of the assessee and operating and maintaining all these structures during the concession

period for the uses of which by the traffic, the assessee collects toll fee thereby earning revenue to meet the operating and maintenance expenditure, interest on loans, recover the investment and repay the loans. He contended that new Appendix 1 of Income-tax Rules contains rates of depreciation. Under the head building item (2) rate of depreciation is 10%. In respect of building, there is a note No.1 which provides as under:

12.7 'Buildings' include roads, bridges, culverts, wells and tube wells. The roads, bridges, culverts; flyovers etc. fall within the meaning of 'Building'. The expression used is 'include' which is wider, meaning thereby 'roads, bridges, culverts' are considered as 'building' for purposes of depreciation.

12.8 He also invited our attention to the facts of the case of Indore Municipal Corporation Vs. CIT (2001) 247 ITR 803 (SC) and contended that they are completely distinguishable to the facts of the case of the assessee and said ratio is inapplicable. In that case there was no other construction except the roads. Further in that decision, he submitted that the note to the schedule was not considered / as it did not exist during the year in question. He contended that admittedly, the ownership over the asset would be required to be transferred by the appellant company to NHAI by documentation and thereafter the appellant company shall be divested of its ownership without any consideration. It may further be mentioned that if the concession agreement is terminated by NHAI before the specified period, the

appellant company shall become entitled to receive its value/compensation.

13. He contended that the decision of the Hon'ble Supreme Court in the case of Indore Municipal Corporation vs. CIT (Supra) would not be in conformity with the amended law. He further submitted that the appendix 1 applicable for assessment year 1984-85 to 1987-88 did not mention in the notes that building includes roads, bridges, culverts, wells and tube wells. In the latter appendices which is applicable from assessment year 1988-89 to 2002-03 and 2005-06 and the latest appendices which is applicable for the A.Y. 2006-07. He contended that on the facts the project having been constructed/built on the land/road handed over to the Assessee; cost for building/strengthening of road, super-structures having been met by the Assessee; the project vested with the Assessee for 20 years; to be maintained, operated and toll fee collected as own; to be divested on expiry of 20 years and on early termination entitled to compensation the issue is fully covered by the stated finding precedents and Explanation-1.

13.1 He contended that the Tribunal while considering the issue of 43BF has relied on decision of the Supreme Court and has considered the same on the basis of 14A & 80. He has also relied upon the following decisions of the Supreme Court wherein it has been held as under:-

1. Sutlej Cotton Mills Limited vs. Commissioner of Income Tax, Calcutta (27.09.1978 – SC), (1979) 116-ITR-01 (SC)

10. The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as part of circulating capital embarked in the business. But if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature. Now, in the present case, no finding appears to have been given by the Tribunal as to whether the sums of Rs. 25 lakhs and Rs. 12,50,000/- were held by the assessee in West Pakistan on capital account or Revenue account and whether they were part of fixed capital or of circulating capital embarked and adventured in the business in West Pakistan. If these two amounts were employed in the business in West Pakistan and formed part of the circulating capital of that business, the loss of Rs. 11 lakhs and Rs. 5,50,000/- resulting to the assessee on remission of these two amounts to India, on account of alteration in the rate of exchange, would be a trading loss, but if, instead, these two amounts were held on capital account and were part of fixed capital, the loss would plainly be a capital loss. The question whether the loss suffered by the assessee was a trading loss or a capital loss cannot therefore, be answered unless it is first determined whether these two amounts were held by the assessee on capital account or on revenue account or to put it differently, as part of fixed capital or of circulating capital. We would have ordinarily, in these circumstances, called for a supplementary statement of case from the Tribunal giving its finding on this question, but both the parties agreed before us that their attention was not directed to this aspect of the matter when the case was heard before the Revenue Authorities and the Tribunal and hence it would be desirable that the matter should go back to the Tribunal with a direction to the Tribunal either to take additional evidence itself or to direct the Income Tax Officer to take additional evidence and make a report to it, on the question whether the sums of Rs. 25 lakhs and Rs. 12,50.000/- were held in West Pakistan as capital asset or as trading asset or in other words, as part of fixed capital or part of circulating capital in the business. The Tribunal will, on the basis of this additional evidence and in the light of the law laid down by us in this judgment determine whether the loss suffered by the assessee on remittance of the

two sums of Rs. 25 lakhs and Rs. 12,50,000/- was a trading loss or a capital loss.

2. Challapalli Sugar Ltd. vs. The Commissioner of Income Tax, A.P., Hyderabad (31.10.1974 – SC), (1975) 98-ITR-167 (SC)

28. There is, in our opinion, force in the submission of Mr. Palkhivala. As stated above, arguments were heard together on February 1, 1972 in civil appeals Nos. 1784, 1694, 1730 and 1831 on the question as to whether the wealth-tax paid by the assessee was a permissible deduction under Section 10(2)(xv) of the Indian Income-tax Act. On the conclusion of the arguments on that point, this Court found that an additional question arose in civil appeal No. 1784 on the point as to whether the interest payable on loan was part of the actual cost of the assets. The Constitution Bench after hearing arguments on this additional point for some time directed that civil appeal No. 1784 along with the connected civil appeal 1785 should be posted for hearing before a Division Bench after pronouncement of judgments in civil appeals Nos. 1694, 1730 and 1831. The effect of the above order which was made on February 1, 1972 was that the decision in civil appeals Nos. 1694, 1730 and 1831 on the point as to whether the wealth-tax paid by the assessee was a permissible deduction, was also to be the decision in civil appeal No. 1784. After the judgments of the Constitution Bench in civil appeals Nos. 1694, 1730 and 1831 on March 29, 1972 the question as to whether the wealth-tax paid by the assessee was a permissible deduction under Section 10(2)(xv) of the Act no longer remained subject of controversy in civil appeal No. 1784 as the decision on that point in the three appeals was also to govern the decision in appeal No. 1784. It is no doubt true that civil appeal No. 1784 was not disposed of before July 15, 1972 but that fact would not prevent the case of the assessee in that appeal being covered by Section 5 of-the amending Act. What is necessary to attract that section is that this Court should have held before July 15, 1972 on an appeal in respect of an assessment of the assessee for any particular assessment year that the wealth-tax paid by the assessee is deductible in computing the total income of that year. Once that is the effect of a decision given by this Court before July 15, 1972 the fact that the judgment in which the above finding is recorded is given in other appeals,

which are heard together along with the appeal of the assessee, and the further fact that assessee's appeal is not disposed of before July 15, 1972 would not take the case of the assesses out of the purview of Motion 5. We would, therefore, hold that the case of the assessee in civil appeal No. 1784 is covered by Section 5 of the amending Act.

3. Calcutta Company Ltd. vs. The Commissioner of Income Tax, West Bengal (12.05.1959 – SC), (1959) 37-ITR-1 (SC)

29. The High Court in disallowing the claim of the appellant in the present case only considered the provisions of s. 10(2)(xv) of the Act and came to the conclusion that on a strict interpretation of those provisions the sum of Rs. 24,809 was not an allowable deduction. Its attention was drawn by the learned Counsel for the appellant to the provisions of s. 10(1) of the Act also but it negatived this argument observing that under the Indian Act, the profits must be determined by the method of making the statutory deductions from the receipts and any deduction from the business receipts, if it was to be allowed, must be brought under one or the other of the deductions mentioned in s. 10(2) and that there was no scope for any preliminary deduction under general principles. It was, however, held by this Court in Badridas Daga v. The Commissioner of Income-tax [1958]34ITR10(SC)

"It is to be noted that while s. 10(1) imposes a charge on the profits or gains of a trade, it does not provide how those profits are to be computed. Section 10(2) enumerates various items which are admissible as deductions, but it is well settled that they are not exhaustive of all allowances which could be made in ascertaining profits taxable under s. 10(1)."

4. Metal Box Company of India Ltd. vs. Their Workmen (20.08.1968 – SC), (1969) 73-ITR-53

26. There remains now the question regarding computation of direct taxes. Section 6(c) of the Act provides :

"subject to the provisions of section 7, any direct tax which the employer is liable to pay for the

accounting year in respect of his income, profits and gains during that year..."

27. Section 7, inter alia, provides :

"For the purpose of clause (c) of section 6, any direct tax payable by the employer for any accounting year shall, subject to the following provision, be calculated at the rates applicable to the income of the employer for that year,....."

35. Coming now to clause (c) of section 6, is it the actual taxable income, the direct tax on which is prior charge, which is to be worked out, or the tax on the estimated balance of gross profits after deducting depreciation and development charges but without deducting the bonus payable during the year ? In other words, when the Tribunal reaches the stage of clause (c), does it have to assess the taxable income in accordance with the various provisions of the Income-tax Act just as an Income-tax Officer would do and assess the liability of income tax on such taxable income according to the rates applicable during the particular accounting year, or should it compute the balance of gross profits as stated above and apply the said rates and estimate the amount of direct taxes and deduct them from the remaining gross profits ? Bonus being payable within eight months after the close of the accounting year in cases where there is no dispute pending before an authority under section 22 of the Act as provided by section 19, it is hardly possible, except in rare cases, that assessment under the Income-tax Act and other such Acts would be completed by the time bonus has to be paid. Therefore, the Tribunal would not have before it the taxable income assessed by the Income-tax Officer and other such officers. If the unions' contention were to be right, there would be two or more parallel authorities working under this Act and the Income-tax Act and other such Acts who would have to assess taxable income and the tax payable thereon, before all of whom the employer would have to prove his taxable income. Prima facie, it would seem that the Bonus Act could not intend an enquiry into the actual taxable income worked out under all the elaborate provisions relating to deductions, allowances, reliefs, rebates, etc., provided by the Income-tax Act and other such Acts. This is particularly so as in each bonus dispute the Tribunal not equipped with the detailed knowledge of all such

Acts would have to undertake an enquiry into the various deductions, rebates, reliefs, etc., claimable by the employer under those Acts. The fact that payment of bonus cannot brook delay without causing hardship to labour would seem to militate against the possibility of such prolonged enquiries.

36. The key to the words in section 6(c), namely, "is liable to pay" emphasised on behalf of the unions and some of the interveners lies in the opening words "subject to the provisions of section 7" in clause (c). These words are used, whether the tax liability is to be calculated on actual taxable income or on the notional amount worked out under sections 4 and 6 and Schedule II, because the direct taxes payable by the employer are to be calculated at the rates applicable during that year as provided by section 7. That both such amounts cannot be the same is clear because section 7 in express terms prohibits taking into account unabsorbed losses and arrears of depreciation allowable under section 32(2), the exemption allowed under section 84 and the deduction allowed under section 101(1) of the Income-tax Act. Similarly, where an assessee is a religious or charitable institution and its income either wholly or partly, as the case may be, is exempt under the Income-tax Act, such an employer to whom section 32 of the Act does not apply is treated as a company in which the public are substantially interested and its income is to be assessed accordingly by the Tribunal and compute its liability for direct taxes. Clause (c) of section 7 does away, for the purposes of sections 6 and 7, the distinction between the liability of an individual and a Hindu undivided family under the Income-tax Act and provides that the income derived by such a Hindu undivided family is to be treated as the income of that employer as an individual. Likewise, where profits and gains of an employer include profits from export, a rebate allowed under the Income-tax Act on such profits is not to be taken into account while working out the tax liability under section 6(c). Also, the rebate allowed under any of the Acts levying direct taxes on sums spent on development of an industry is also not to be taken into account while computing the tax liability. It was, however, argued that the provisions of section 7 lay down the only departure from the Income-tax Act and that except for that departure the Tribunal must assess the actual taxable income and arrive at the tax liability thereon at rates prevailing during the accounting year in question. In our view this submission is not correct. What section 7 really means is that the Tribunal has

to compute the direct taxes at the rates at which the income, gains and profits of the employer are taxed under the Income-tax Act and other such Acts during the accounting year in question. That is the reason why section 6(c) has the words "is liable for " and the words "income, gains and profits". These words do not, however, mean that the Tribunal while computing direct taxes as a prior charge has to assess the actual taxable income and the taxes thereon. How can the Tribunal arrive at the amount of bonus to be paid to labour without first estimating the amount of taxes and deducting it from the gross profits and thus ascertaining the available surplus ? If it were to reverse the process and first deduct bonus and ascertain the tax amount, it would have to do so on a somewhat ad hoc figure thus bringing about the same result deprecated by this court in decisions referred to above. This and the other difficulties already pointed out must lead to the result that the Tribunal must estimate the amount of direct taxes on the balance of gross profits as worked out under sections 4 and 6, but without deducting the bonus, then work out the quantum of taxes thereon at rates applicable during that year to the income, gains and profits of the employer and after deducting the amount of taxes so worked out arrive at the available surplus. Section 6(c) being subject to section 7 the computation has to be done without taking into account the items specified in section 7(a) and in the manner prescribed by the remaining clauses of that section. This interpretation is commendable because: (1) it is consistent with the words " is liable to pay " in section 6(c)(2) it is in harmony with the provisions of sections 4 and 6 and Schedule II, and (3) it is consistent with the intention of Parliament apparent from the scheme of computation of available surplus in the Act. The Act recognises the principle laid down in the Full Bench Formula that both labour and capital are entitled to a share in the profits. That is why 40 per cent of the available surplus is left to the capital and interest is. allowed to the employer on paid up and working capitals while working out the gross profits. Parliament besides was or at any rate is presumed to have been aware that depreciation allowed under the Income-tax Act would not be sufficient for rehabilitation purposes.. It did away with rehabilitation as a prior charge partly because there were complaints that it was being ill-used, but partly also because it knew that the rebate in the Income-tax Act on bonus paid would go to the employer with which he could recoup the depreciation which would be larger than the one

allowed under section 32 of the Income-tax Act. In our view it was for that it did not lay down that bonus is to be deducted before computing the amount on which direct taxes are to be calculated under section 6(c). If Parliament intended to make a department from the rule laid down by courts and tribunals that the bonus amount should be calculated after provision for tax was made and not before, we would have expected an express provision to that effect either in the Act or in the Schedules. In our view the contention urged by the company that the tax liability is to be worked out by first working out the gross profits and deducting therefrom the prior charges under section 6 but not the bonus payable to the employees is right.

37. In the result, the appellant company succeeds on the questions of development rebate and the provision for gratuity amount. Its appeal on those questions is, therefore, allowed and to that extent the award is set aside. As regards the question of depreciation amount, the Tribunal will ascertain the amount afresh after giving the parties opportunity to lead such evidence as they desire and taking that amount and the amounts of development rebate and of the provision for gratuity in the light of this judgment, the Tribunal will adjust its award and arrive at the quantum on bonus payable to the workmen.

5. Bharat Earth Movers vs. Commissioner of Income Tax, Karnataka (09.08.2000 – SC), 245-ITR-428

4. The law is settled if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in present though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain.

5. In Metal Box Company of India Ltd. v. Their Workmen (1969)ILLJ785SC the appellant company estimated its liability under two gratuity schemes framed by the company and the amount of liability

was deducted from the gross receipts in the P&L account. The company had worked out on an actuarial valuation its estimated liability and made provision for such liability not all at once but spread over a number of years. The practice followed by the company was that every year the company worked out the additional liability incurred by it on the employees putting in every additional year of service. The gratuity was payable on the termination of an employee's service either due to retirement, death or termination of service - the exact time of occurrence of the latter two events being not determinable with exactitude before hand. A few principles were laid down by this Court, the relevant of which for our purpose are extracted and reproduced as under :

(i) For an assessee maintaining his accounts on mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. It is not as if such deduction is permissible only in case of amounts actually expended or paid;

(ii) Just as receipts, though not actual receipts but accrued due are brought in for income-tax assessment, so also liabilities accrued due would be taken into account while working out the profits and gains of the business;

(iii) A condition subsequent, the fulfilment of which may result in the reduction or even extinction of the liability, would not have the effect of converting that liability into a contingent liability;

(iv) A trader computing his taxable profits for a particular year may properly deduct not only the payments actually made to his employees but also the present value of any payments in respect of their services in that year to be made in a subsequent year if it can be satisfactorily estimated.

6. So is the view taken in Calcutta Co. Ltd. v. Commissioner of Income-Tax, West Bengal [1959]37ITR1(SC) wherein this Court has held that the liability on the assessee having been imported, the liability would be an accrued liability and would not convert into a conditional one merely because the

liability was to be discharged at a future date. There may be some difficulty in the estimation there of but that would not convert the accrued liability into a conditional one; it was always open to the tax authorities concerned to arrive at a proper estimate of the liability having regard to all the circumstances of the case.

7. Applying the above said settled principles to the facts of the case at hand we are satisfied that provision made by the appellant company for meeting the liability incurred by it under the leave encashment scheme proportionate with the entitlement earned by employees of the company, inclusive of the officers and the staff, subject to the ceiling on accumulation as applicable on the relevant date is entitled to deduction out of the gross receipts for the accounting year during which the provision is made for the liability. The liability is not a contingent liability. The High Court was not right in taking the view to the contrary.

6. M/s. Madras Industrial Investment Corporation Ltd. vs. The Commissioner of Income Tax, Tamil Nadu-I, Madras (04.04.1997 – SC), 225-ITR-802

The department disallowed this expenditure. Upholding the claim of the assessee to deduction, this Court said that the undertaking given by the assessee imported a liability on the assessee which accrued on the dates of the deeds of sale though that liability was to be discharged at a future date. It was thus an accrued liability and the estimated expenditure which would be incurred in discharging the same could be deducted from the profits and gains of business. The difficulty in the estimation of liability did not convert the accrued liability into a conditional one. This Court said that the expression 'profits or gains' in Section 10(1) of the Income-tax Act, 1922 had to be understood in its commercial sense; and there could be no computation of such profits and gains until the expenditure which is necessary for the purpose of earning the receipt is deducted therefrom, whether the expenditure is actually incurred or the liability in respect thereof has accrued even though it may have to be discharged at some future date.

7. Thus "expenditure" is not necessarily confined to the money which has been actually paid out. It covers a liability which has accrued or which has

been incurred although it may have to be discharged at a future date. However, a contingent liability which may have to be discharged in future cannot be considered as expenditure.

7. Udaipur Mineral Development Syndicate Pvt. Ltd. vs. Deputy Commissioner of Income Tax (Assessment) and Anr. (29.08.2002 – RAJHC), (2003) 261-ITR-706

8. Taparia Tools Ltd. vs. Joint Commissioner of Income Tax (08.01.2003 – BOMHC), 261-ITR-102

In this case, we are concerned with Deferred Revenue Expenditure, which is a special type of asset. In this case, we are not concerned with the nature of profits. In this case, we are concerned with ascertainment of true profits under the Income Tax Act and in order to ascertain such profits, we have to follow true accounting principles and we have to apply those principles in the light of the method of accounting followed by the assessee. In cases involving special types of assets, where profits cannot be deduced by following the method adopted by the assessee, the Assessing Officer is free to make adjustments as done in this case. Lastly, as stated above, in this matter, we are concerned with computation of taxable income and, therefore, true accounting principles will have to be taken into account.

9. Commissioner of Income Tax, Chennai vs. Bilahari Investment (P) Ltd. (27.02.2008 - SC) 299-ITR-1

16. In the judgment of the Bombay High Court in Taparia Tools Ltd. (supra) it has been held that in every case of substitution of one method by another method, the burden is on the Department to prove that the method in vogue is not correct and it distorts the profits of a particular year. Under the mercantile

system of accounting based on the concept of accrual, the method of accounting followed by the assessees is relevant. In the present case, there is no finding recorded by the AO that the completed contract method distorts the profits of a particular year. Moreover, as held in various judgments, the Chit Scheme is one integrated scheme spread over a period of time, sometimes exceeding 12 months. We have examined computation of tax effect in these cases and we find that the entire exercise is revenue neutral, particularly when the scheme is read as one integrated scheme spread over a period of time.

17. As stated above, we are concerned with assessment years 1991-1992 to 1997-1998. In the past, the Department had accepted the completed contract method and because of such acceptance, the assessees, in these cases, have followed the same method of accounting, particularly in the context of chit discount. Every assessee is entitled to arrange its affairs and follow the method of accounting, which the Department has earlier accepted. It is only in those cases where the Department records a finding that the method adopted by the assessee results in distortion of profits, the Department can insist on substitution of the existing method. Further, in the present cases, we find from the various statements produced before us, that the entire exercise, arising out of change of method from completed contract method to deferred revenue expenditure, is revenue neutral. Therefore, we do not wish to interfere with the impugned judgment of the High Court.

18. Before concluding, we may point out that under Section 211(2) of the Companies Act, Accounting Standards ("AS") enacted by the Institute of Chartered Accountants have now been adopted [see: judgment of this Court in J.K. Industries case (supra)]. Shri Tripathi, learned Counsel for the Department, has placed reliance on AS 22 as the basis of his argument that the completed contract method should be substituted by deferred revenue expenditure (spreading the said expenditure on proportionate basis over a period of time). He also relied upon the concept of timing difference introduced by AS 22. It may be stated that all these developments are of recent origin. It is open to the Department to consider these new accounting standards and concepts in future cases of chit transactions. We express no opinion in that regard. Suffice it to state that, these new concepts and

accounting standards have not been invoked by the Department in the present batch of civil appeals.

19. Subject to above, we see no reason to interfere with the impugned judgment of the High Court and accordingly the civil appeals are dismissed with no order as to costs.

10. Exide Industries Limited and Anr. vs. Union of India (UOI) and Ors. (27.06.2007 – CALHC), 292-ITR-1

9. The objects and reasons as disclosed by the Finance Act, 1983, for enacting Section 43B are quoted below:

"59. Under the IT Act, profits and gains of business and profession are computed in accordance with the method of accounting regularly employed by the assessee. Broadly stated, under the mercantile system of accounting, income and outgo are accounted for on the basis of accrual and not on the basis of actual disbursements or receipts. For the purposes of computation of profits and gains of business and profession, the IT Act defines the word 'paid' to mean 'actually paid or incurred' according to the method of accounting on the basis of which the profits or gains are computed.

60. Several cases have come to notice where taxpayers do not discharge their statutory liability such as in respect of excise duty, employer's contribution to provident fund, Employees State Insurance Scheme, etc., for long periods of time, extending sometimes to several years. For the purpose of their Income Tax assessments, they claim the liability as deduction on the ground that they maintain accounts on mercantile or accrual basis. On the other hand, they dispute the liability and do not discharge the same. For some reason or the other undisputed liabilities also are not paid. To curb this practice, it is proposed to provide that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force (irrespective of whether such tax or duty is disputed or not) or any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees shall be allowed only in computing the income of that

previous year in which such sum is actually paid by him.

On perusal of the said object it would appear that the legislature expressed concern about the unreasonable deduction claim on the basis of mercantile accounting method without discharging statutory liabilities. It was observed by the legislature that there had been a trend to evade statutory liabilities on the one hand and claim appropriate benefit under the said Act of 1961 on the other hand. Hence, such enactment was necessary.

10. The said section had undergone several changes from time to time and on each and every occasion the legislature came out with the objects and reasons disclosed therefor. In 1990 deduction on account of unpaid loan to any public financial institution or a State financial institution was roped in. By a further amendment in 1996 unpaid loan of scheduled bank was also incorporated. On each such occasion objects and reasons were disclosed. While inserting Clause (f) no special reasons were disclosed. His Lordship held that such disclosure was not mandatory. We do not have any reason for disagreement on such issue provided the subject amendment could be termed as in furtherance to widen the scope of the original section on the identical objects and reasons as disclosed at the time of enacting the original provision. As we find, the original section was incorporated to plug in deductions claimed by not discharging statutory liabilities. We also find that provision was subsequently made to restrict deductions on account of unpaid loan to the financial institutions. Leave encashment is neither statutory liability nor a contingent liability. It was a provision to be made for the entitlement of an employee achieved in a particular financial year. An employee earns certain amount by not taking leave which he or she is otherwise entitled to in that particular year. Hence, the employer is obliged to make appropriate provision for the said amount. Once the employee retires he or she has to be paid such sum on cumulative basis which the employee earns throughout his or her service career unless he or she avails the leave earned by him or her. That, in our view, could not have any nexus with the original enactment. An employer is entitled to deduction for the expenditure he incurs for running his business which includes payment of salary and other perquisites to his employees. Hence, it is a trading

liability. As such he is otherwise entitled to have deduction of such amount by showing the same as a provisional expenditure in his accounts. The legislature by way of amendment restricts such deduction in case of leave encashment unless it is actually paid in that particular financial year. The legislature is free to do so after they disclose reasons for that and such reasons are not inconsistent with the main object of the enactment. We are deprived of such reasons for our perusal. Mr. Banerjee, appearing for the Revenue, could not enlighten us on that score. We also do not find such enactment consistent with the original provision being Section 43B which was originally inserted to plug in evasion of statutory liability. The apex Court considered the situation in the case of Bharat Earth Movers (supra), when Clause (f) was not there. The apex Court, considering all aspects as disclosed by us hereinbefore, rejected the contention of the Revenue and granted appropriate deduction to the concerned assessee. The legislature to get rid of the decision of the apex Court brought out the amendment which would otherwise nullify the Judge made law. The apex Court decisions are Judge-made law and are applicable to all under the Constitution. We, not for a single moment, observe that legislature was not entitled to bring such amendment. They were within their power to bring such amendment. However, they must disclose reason which would be consistent with the provisions of the Constitution and the laws of the land and not for the sole object of nullifying the apex Court decision.

11. In this regard the observation of the apex Court in the case of Bharat Earth Movers (supra) is quoted below:

The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain....

Applying the abovesaid settled principles to the facts of the case at hand we are satisfied that the provision made by the appellant company for meeting the liability incurred by it under the leave encashment scheme proportionate with the entitlement earned by employees of the company, inclusive of the officers and the staff, subject to the ceiling on accumulation as applicable on the relevant date, is entitled to deduction out of the gross receipts for the accounting year during which the provision is made for the liability. The liability is not a contingent liability. The High Court was not right in taking the view to the contrary.

12. With deepest regard we have for his Lordship, we are unable to agree with his Lordship on this issue.

13. The appeal succeeds and is allowed. Section 43B(f) is struck down being arbitrary, unconscionable and de hors the apex Court decision in the case of Bharat Earth Movers (supra).

11. Commissioner of Income Tax vs. Siwakami Mills Ltd. (04.02.1997 - SC)

4. The question is regarding the deduction of interest on deferred payment and guarantee commission paid to the bank. The High Court followed its earlier decision in Sivakami Mills Ltd. v. CIT : [1979]120ITR211(Mad) and answered the question in favour of the assessee.

> "we may observe that the various decisions bearing on capitalisation of business expenditure have arisen in the different contexts of determining what the actual cost to any given assessee was of items of depreciable machinery, plant, etc., acquired by him. Such expenditure considered for capitalisation might itself be expenditure of a capital nature or it might be expenditure of a revenue nature. In either case, it would be subject to the principles enunciated in the decisions aforesaid. But those principles have no direct bearing on the question of a claim for a straightforward allowance as an expenditure of a revenue nature in the computation of business profits. Nor is it the law that only those expenses which

cannot be capitalised can come in for straight deduction as revenue expenditure, for, as we have earlier seen, the accountancy principles, relating to capitalization are themselves not hard and fast rules, but are to be adopted only at the option of the owner of the capital asset.

26. The expenditure incurred for the purchase of the machinery was undoubtedly capital expenditure, for it brought in an asset of enduring advantage. But the guarantee commission stands on a different footing. By itself, it does not bring into existence any asset of an enduring nature ; nor did it bring in any other advantage of an enduring benefit. The acquisition of the machinery on instalment terms was only a business exigency. If interest paid on a credit purchase of machinery could be held to be revenue expenditure, we fail to see how guarantee commission paid to a bank for obtaining easy terms for acquisition of the machinery could be regarded as capital payments".

It was held that both the payments are of revenue nature.

12. Commissioner of Income Tax vs. Rajasthan Spg. and Wvg. Mills Ltd. (RAJHC),2004, 281-ITR-408

4. The AO has not applied the test of expenses incurred wholly and exclusively correctly for the purpose of assessee's business by referring to the expenses incurred by the assessee and the benefit derived by the spender in exclusivity.

The motivation which led the assessee to spend the amount on bus and handing over it to the school by CIT(A) in assessee's own language reads as under :

"As per facts of the case this expense is allowable under Section 37(1) because the bus has been given to the school to remove the difficulty of staff/workmen's children in going to the school as the bus available with school was not sufficient to accommodate the children of workmen and as the children of workmen of company were placed at

different destination, they entered the bus after others at nearer destination, hence mill-staff children could not get place in the bus and the bus took more time to collect and drop the mill children. Hence to solve these problems of staff children at the request of school, the bus was given to school by the company, thereafter which the bus problem of workmen's children was solved.

Since the bus has been surrendered to the school no benefit of enduring nature was derived by the company as the right of ownership was transferred to school and, therefore, it is not a capital expenditure and by incurring this expense the assessee acquired a right from the school for its workmen's children for first point of departure and never the last point of arrival at the mills gate thereby the mill-men's children got first preference in getting into bus, leaving and reaching home in time. This benefited in turn the assessee and has to be, therefore, treated as business expenditure."

5. The motivation of expenditure incurred for acquiring the bus and surrendering it to school has not been found to be other than what has been stated by the assessee i.e., to say the expenses were incurred for the benefit of welfare of the children of staff/workmen of the company as a part of employees' welfare expenses incurred for the purpose of securing healthy services for staff members. Applying the test indicated by this Court in the order referred to above, it is not difficult to reach to the conclusion that the Tribunal was right in holding the expenses to be incurred wholly and exclusively for the purpose of assessee's business and since the assessee has not acquired any asset, it is not capital expenditure either and, therefore, the assessee is entitled to claim deduction in full under Section 37(1). It is not being contended by the learned counsel for the appellant that the allowance of expenditure is otherwise not provided under any provision of the Act. Consequently, the principle of law was correctly enunciated and application of law has been correctly made by the " Tribunal.

6. In our opinion, no substantial question of law arises in examining the issue again about the test of applicability of allowable expenses claimed by the assessee and the benefits derived from it so far as the present case is concerned.

13. Commissioner of Income Tax - IV vs. Hindustan Coca Cola Beverages Pvt. Ltd. (2011 – DELHC), 331-ITR-192

24. It is worth noting that the meaning of business or commercial rights of similar nature has to be understood in the backdrop of Section 32(1)(ii) of the Act. Commercial rights are such rights which are obtained for effectively carrying on the business and commerce, and commerce, as is understood, is a wider term which encompasses in its fold many a facet. Studied in this background, any right which is obtained for carrying on the business with effectiveness is likely to fall or come within the sweep of meaning of intangible asset. The dictionary clause clearly stipulates that business or commercial rights should be of similar nature as know-how, patents, copyrights, trademarks, licences, franchises, etc. and all these assets which are not manufactured or produced overnight but are brought into existence by experience and reputation. They gain significance in the commercial world as they represent a particular benefit or advantage or reputation built over a certain span of time and the customers associate with such assets. Goodwill, when appositely understood, does convey a positive reputation built by a person / company / business concern over a period of time. Regard being had to the wider expansion of the definition after the amendment of Section 32 by the Finance Act (2) 1998 and the auditor's report and the explanation offered before the assessing officer, we are of the considered opinion that the tribunal is justified in holding that if two views were possible and when the assessing officer had accepted one view which is a plausible one, it was not appropriate on the part of the Commissioner to exercise his power under Section 263 solely on the ground that in the books of accounts it was mentioned as "goodwill" and nothing else. As has been held by the Apex Court in Malabar Industrial Co. Ltd. (supra), Max India Ltd. (supra) and Commissioner of Income Tax v. Vimgi Investment P. Ltd. : [2007] 290 ITR 505 (Delhi) once a plausible view is taken, it is not open to the Commissioner to exercise the power under Section 263 of the Act.

14. M/s Mysore Minerals Limited, M.G. Road, Bangalore vs. The Commissioners of Income Tax, Karnataka, Bangalore (01.09.1999 – SC), 239-ITR-775

14. In our opinion, the term owned as occurring in Section 32(1) of the Income -Tax Act, 1961 must be assigned a wider meaning. Any one in possession of property in his own title exercising such dominion over the property as would enable other being excluded therefrom and having right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings though a formal deed of title may not have been executed and registered as contemplated by Transfer of Property Act, Registration Act etc. 'Building owned by the assessee' the expression as occurring in Section 32(1) of the Income-Tax Act means the person who having acquired possession over the building in his own right uses the same for the purposes of the business or profession though a legal title has not been conveyed to him consistently with the requirements of laws such as Transfer of Property Act., and Registration Act etc. but nevertheless is entitled to hold the property to the exclusion of all others.

15. Generally speaking depreciation is an allowance for the diminution in the value due to wear and tear of capital asset employed by an assessee in his business. Black's Law Dictionary (Fifth Edn.) defines depreciation to mean, inter alia:

A fall in value; reduction of worth. The deterioration or the loss or lessening in value, arising from age, use, and improvements, due to better methods. A decline in value of property caused by wear or obsolescence and is usually measured by a set formula which reflects these elements over a given period of useful life of property.... Consistent gradual process of estimating and allocating cost of capital investments over estimated useful life of asset in order to match cost against earnings....

19. It is well-settled that there cannot be two owners of the property simultaneously and in the same sense of the term. The intention of the Legislature in enacting Section 32 of the Act would be best fulfilled by allowing deduction in respect of depreciation to

the person in whom for the time-being vests the dominion over the building and who is entitled to use it in his own right and is using the same for the purposes of his business or profession. Assigning any different meaning would not subserve the legislative intent. To take the case at hand it is the appellant-assessee who having paid part of the price, has been placed in possession of the houses as an owner and is using the buildings for the purpose of its business in its own right. Still the assessee has been denied the benefit of Section 32. On the other hand, the Housing Board would be denied the benefit of Section 32 because inspite of its being the legal owner it was not using the building for its business or profession. We do not think such a benefit-to-none situation could have been intended by the Legislature. The finding of fact arrived at in the case at hand is that though a document of title was not executed by Housing Board in favour of the assessee, but the houses were allotted to the assessee by the Housing Board, part payment received and possession delivered so as to confer dominion over the property on the assessee whereafter the assessee had in its own right allotted the quarters to the staff and they were being actually used by the staff of the assessee. It is common knowledge, under the various scheme floated by bodies like housing boards, houses are constructed on large scale and allotted on part payment to those who have booked. Possession is also delivered to the allottee so as to enable enjoyment of the property. Execution of document transferring title necessarily follows if the schedule of payment is observed by allottee. If only the allottee may default the property may revert back to the Board. That is a matter only between the Housing Board and the allottee. No third person intervenes. The part payment made by allottee are with the intention of acquiring title. The delivery of possession by Housing Board to allottee is also a step towards conferring ownership. Documentation is delayed only with the idea of compelling the allottee to observe the schedule of payment.

15. Commissioner of Income Tax, Bombay etc. vs. M/s. Podar Cement Pvt. Ltd. etc. (27.05.1997 – SC), 226-ITR-625

64. We are conscious of the settled position that under the common law owner means a person who has not valid title legally conveyed to him after complying with the requirements of law such as Transfer of Property Act, Registration Act etc. But in

the context of Section 22 of the Income-tax Act having regard to the ground realities and further having regard to the object of the Income-tax Act, namely, 'to tax the income', we are of the view, owner' is a person who is entitled to receive income from the property in his own right.

17. Moradabad Toll Road Co. Ltd. vs. Assistant Commissioner of Income Tax (05.11.2014 – DELHC), 369-ITR-403

26. The word 'build' signifies construction of a road, whereby the tax payer brings into existence a structure/surface and nothing more. The word 'operate' signifies the understanding between the assessee and the public authority to collect charges for the usage of the road. The road is a surface on which the vehicles ply. No special features have been pointed out which serves as tool or apparatus while operating the road. No doubt in some roads toll plazas are erected for collecting the usage charges. These are small booths which are manned at some places and unmanned at some, where the user deposits the money in a machine which opens the gate. To cut costs and minimize the time delay, the usage charges are collected by some form of automatic or electronic toll collection equipment. In any case, the manned toll booths/toll plazas are primarily a facility/convenience for collecting the usage charges of the road and nothing more. That would not change the characteristic of 'road'.

27. To sum up it is clarified that 'plant' as defined and understood for tax purposes means tool or equipment used for purposes of business or profession. Toll road would not be a plant in that sense, for, it is a capital asset which when used by any person, who makes payment for the said use, generates and results in accrual of income. It is a capital asset which is the very business of the assessee and not a implement or a tool used by the assessee for his business. In the facts of the case, we are of the view that the toll road would not qualify as a 'plant' so as to entitle the assessee a higher rate of depreciation.

18. Commissioner of Income Tax vs. Noida Toll Bridge Co. Ltd. (08.11.2012 – ALLHC), (2013) 255 CTR 88

21. The depreciation represents the diminution in value of a capital asset when applied to the parties of

making profit or gain. The object is to get the true picture of the real income of the business. The respondent-assessee is engaged in the business of constructing roads and bridges. Under the concession-agreement the land is provided on lease initially for a period of 30 years which can be extended. The respondent-assessee company is a special purpose vehicle, engaged in the business of building, infrastructure/roads to generate revenues by collecting tolls to meet the cost of constructions and to earn profits. The construction of road on the leased land is the capital asset of the company, which remains under its ownership for the concession period. The respondent-assessee exercises its full ownership rights on the road which include charging of tolls which is ordinarily a sovereign function. The operation, maintenance and use of the road during the concession period is with the respondent-assessee. It has been given exclusive rights to regulate the use of the Noida-Bridge. The road is not simply a road laid out on the land. It includes all allied constructions, which includes the bridge site. The control of the land identified as constituting the bridge site is in complete and uninterrupted possession and use of the respondent-company. It has powers to determine, demand, collect, retain and appropriate fees from the users of the bridge and also has the power to restrict the use of the bridge to motorised vehicles, bicycle and pedestrians, and to debar animal driven vehicles, cycle rickshaw and cattle.

22. In Mysore Minerals Ltd. (supra), after considering all the previous cases decided by it, the Supreme Court considered the term "owned" as occurring in Section 32(1) of the Act and held that it must be assigned a wider meaning. The Supreme Court held that any one in possession of property in his own title exercising such dominion over the property as would enable others being excluded there from and having the right to use and occupy the property and/ or to enjoy its usufruct in his own right would be the owner of the buildings, though a formal deed of title may not have been executed and registered as contemplated by the Transfer of Property Act, the Registration Act, etc. The person, who having acquired possession over the building in his own right, uses the same for the purposes of the business or profession though a legal title has not been conveyed to him, but nevertheless is entitled to hold the property to the exclusion of all others.

23. The Supreme Court further held that depreciation generally speaking is an allowance for the diminution in the value due to wear and tear of the capital asset employed by the assessee in his business. As for building, depreciation is the measurement of wearing out through consumption or use by effluxion of time. The depreciation charge is merely the periodic operating aspect of fixed asset costs.

24. With the insertion of the Explanation I to Section 32 w.e.f. 1.4.1998 there is no doubt that where the assessee is the lessee of the building in which he carries on business which is not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee of any structure or doing of any work in or in relation to by way of renovation, extension or for improvement to the building, then the provisions of the Income-tax Act, will apply as if the said structure or work is a building owned by the assessee. Explanation-I may apply to renovation or extension or improvement to the building; the object is to extend the application of depreciation, it such buildings which are not owned by the assessee but in which the assessee holds a lease or other right of occupancy. The present case stands on a better footing, in which the land is held on lease and the road as capital asset has been built on it with exclusive ownership of the road, and the bridge in the assessee-company for the concession period, and which also includes the right to collect lolls and to regulate use of the bridge. Section 32 would, therefore, apply for the purpose of providing depreciation to be worked out in accordance with the law. For removal of doubts the legislature has provided that the building includes roads in Note (1) to Appendix-I providing for the table of rates at which the depreciation is admissible.

19. Commissioner of Income Tax vs. V.G.P. Housing (P.) Ltd. (04.08.2014 – MADHC), 368 ITR 565

7.3. To controvert the view taken by the Commissioner of Income-tax (Appeals) and the Tribunal, the learned standing counsel for the Department relied upon the statement made by one

of the directors and we extract the same hereunder for better clarity on this issue:

"Whenever any personal expenses (not incidental to the business) is incurred by any director, the expenses are recorded by debiting personal account of the director and the amounts are transferred as loan to the partnership firms (VGP and Co., VGP Investments) and, subsequently, booked as drawings in the partner's capital/current account. However, no actual transfer of funds to the partnership firms and drawings from the firms takes place. Personal expenses are met out of the bank accounts of VGP Housing Pvt. Ltd. only. Apart from this, the personal expenses such as credit card expenses, foreign travel expenses of directors, household expenses, etc., are debited under the head 'Sales promotion and travelling expenses' in the VGP Housing (P.) Ltd./VGP and Co. Pvt. Ltd. books of account. I admit that the extent of such personal expenses (consolidated for all group concerns) debited under these heads of account would be around Rs. 1 crore for the period 2003-04 to 2008-09."

7.4. A reading of the above said statement makes it clear that there is a clear admission by the director that the personal expenses are met out of the bank accounts of the assessee only. It is also stated that credit card expenses, foreign travel expenses of directors, household expenses, etc., are debited under the head "Sales promotion and travelling expenses" in the VGP Housing (P.) Ltd./VGP and Co. Pvt. Ltd. books of account.

7.5. The Assessing Officer, on the basis of the said statement, held that the expenses under the head "Sales promotion and travelling expenses" are purely personal expenditure of the individual directors and the same cannot be debited in the company's accounts. We find that the there is a clear contradiction between the statement made by the director, referred to above and the findings of the Commissioner of Income-tax (Appeals) and the Tribunal. The facts do not support the finding rendered by the appellate authorities.

7.6. The learned counsel for the assessee states that there are materials to substantiate the plea that there was reversal of entries relating to monies transferred from the assessee-company to the firm.

No material has been placed before us, except the said statement made by the learned counsel for the assessee. In any event, that is an issue which has to be decided on facts by the competent authority, by considering the materials that may be produced by the assessee in contradiction to the stand taken by the Department on the basis of the statement made by one of the directors of the assessee.

7.7. In such view of the matter, we hold that the issue relating to deleting the addition on account of drawings of directors should be considered by the Assessing Officer on the merits based on materials to be produced by the assessee. Only to determine this issue, the matter is remanded to the Assessing Officer.

20. Commissioner of Income Tax vs. Jawahar Kala Kendra (18.09.2014 – RAJHC), 362 ITR 515

It was held that Although the claim of depreciation was disallowed by AO and partly allowed by CIT(A) but possession over the property was being enjoyed by assessee and no claim of reclaiming the assets had been made by the State Government subsequent to transfer of the assets to assessee. Merely because title has not been transferred or properties not registered in the name of assessee, depreciation cannot be disallowed. Moreover, there was no concealment of income on part of assessee when the assets were brought into the books of account and details of all assets were provided by assessee. Therefore, imposition of penalty under section 271(1)(c) for concealment of income was not sustainable merely because depreciation claim of assessee was disallowed.

21. Commissioner of Income Tax vs. Mohd. Bux Shokat Ali (13.02.2001 – RAJHC), 256-ITR-357

5. It has been brought to our notice by the learned counsel for the respondent that the principle has been settled by the Supreme Court while considering the question of ownership of an asset subject to claim of depreciation allowance under section 32 of the Act in Mysore Minerals Ltd. v. CIT:

[1999]239ITR775(SC) , wherein the court was considering the case of building which was in possession of the assessee-company, the possession having been acquired on payment of price but actually deed of conveyance was not executed by the Housing Board in favour of the company, thus there was no vesture of legal title of the company in terms of the Transfer of Property Act required for transfer of ownership. Yet considering the meaning of word "owned" as used in section 32, the court answered the question. The court posed a question for itself :

It is the word owned as occurring in sub-section (1) of section 32 which is the core of controversy. Is it only an absolute owner or an owner of the asset as understood in its legal sense who can claim depreciation ? Or, a vesting of title short of full-fledged or legal ownership can also entitle an assessee to claim depreciation under section 32 ?

Then the court after considering the various aspects of the terms ownership concluded that:

In our opinion, the term owned as occurring in section 32(1) of the Income Tax Act, 1961, must be assigned a wider meaning. Anyone in possession of property in his own title exercising such dominion over the property as would enable others being excluded therefrom and having right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings though a formal deed of title may not have been executed and registered as contemplated by Transfer of Property Act, Registration Act, etc. . . . . .

6. It is well settled that there cannot be two owners of the property simultaneously and in the same sense of the term. The intention of the legislature in enacting section 32 of the Act would be best fulfilled by allowing deduction in respect of depreciation to the person in whom for the time being vests the dominion over the building and who is entitled to use it in his own right and is using the same for the purposes of his business or profession. Assigning any different meaning would not subserve the legislative intent.

Thus the principle has been settled by the Supreme Court and on the application of the aforesaid principle the answer in the present case to the question raised is self-evident on the facts found by the Tribunal. We, therefore, declined to require the Tribunal to refer the aforesaid question of law to this court notwithstanding that it is being a question of law.

14. We have heard counsel for the parties.

14.1 The interpretation which has been putforward by the counsel for the department that the National Highway is not road, in that view of the matter, the same will not be governed by the Schedule of Appendix-I and they will not be entitled for the expenses under the capital account.

14.2 While considering the matter, we have to go by the common parlance of road where public at large has an access. The assessee was granted license for construction against which he has right to use and collect license fee to use of the land. In that view of the matter, he has right to restrict the people without non payment of toll tax.

14.3 In that view of the matter, if we look at the definition which is given under the Income Tax Act, even a development made while occupying the premises and development of a road was the main agreement MOU referred by us.

14.4 In view of written submissions submitted by Mr. Ranka, it is not only road, they have to construct toll booth and provide facilities for the staff for the purpose of their accommodation.

14.5 In that view of the matter, the Supreme Court judgment which is sought to be relied upon by the department will not apply and the tribunal has rightly interpreted the change in law and more particularly under the law which has been inducted after year 1983.

14.6. Thus, on the first issue, we are in complete agreement with the view taken by the tribunal.

15. Regarding issue no.2, the contention which has been raised that equipment which are attached with the power equipment are not

entitled under item no.5 of Schedule-I, in view of the fact that note 7 will not cover complete equipment which are attached with the system but in our considered opinion the optical fibers which are used exclusively for the computer configuration and it is mandatory for the operation. It is part of computer system.

15.1 In that view of the matter, the view taken by the tribunal is just and proper.

16. Regarding issue no.3 for diasallowance under 43BF while considering the case, the tribunal observed as under:-

> 5.3 We have heard rival contentions and perused the material available on record. We find that the Hon'ble Calcutta High Court in para 16 of its judgment has struck down section 43B(f) being arbitrary, unconscionable and de hors the Apex Court decision in the case of Bharat Earth Movers (2000) 245 ITR 428 (SC). This judgment was duly brought into the notice of the ld. CIT(A). However, the ld. CIT(A) without taking note of the ratio laid down by the Hon'ble Calcutta High Court proceeded to sustain the finding of the AO. The ld. CIT(A) has recorded the fact that the AO has disallowed the claim as per provisions of section 43B(f) of the Act and it has been struck down by the Hon'ble Calcutta High Court. In our considered view, the ld. CIT(A) was not justified and acted this issue is set aside. The AO is directed to delete the disallowance in the light of judgment of Hon'ble Calcutta High Court rendered in the case of Exide Industries Ltd. & Others vs. Union of India & Others (supra). Ground no. 1 and 1.1 are allowed.

16.1 We are in complete agreement with the view taken by the tribunal.

17. Regarding issue no.4, the Tribunal observed as under:

> 6.1.The ld. Counsel for the assessee has reiterated the submissions as made in the written submissions. The ld. Counsel has drawn our

attention to page 9 of his written submission where it has tabulated the details related to Own Funds, Borrowed funds & Investment made in mutual funds starting from A.Y. 2005-06. The ld. Counsel submitted that the requirement for this disallowance under section 14A is that first the Assessing Officer has to determine as to whether the assessee has incurred expenditure direct or indirect in relation to the income which is not forming part of the total income of the assessee. He submitted that no satisfaction is recorded by the AO. He further submitted that there is no nexus between the borrowed funds and the investment. The AO has failed to establish such nexus. The assessee has demonstrated before the AO that it has sufficient own interest free funds to make such investment. Therefore, the disallowance under section 14A in respect of the interest cannot be sustained. In support of the contention, ld. Counsel has relied upon the judgment of Hon'ble Punjab & Haryana High Court rendered in the case of CIT vs. Hero Cycles, 323 ITR 518 (P&H), judgment of the Hon'ble Bombay High Court rendered in the case of Godrej & Boyce Manufacturing Co. Ltd. vs. DCIT, 328 ITR 81 (Bom.), decision of the Coordinate Bench rendered in the case of Yathish Trading Co. P. Ltd. vs. ACIT, 129 ITD 237 and the judgment of Hon'ble Bombay High Court rendered in the case of CIT vs. K. Raheja Corporation P. Ltd. ITA No. 1260 of 2009 (Bom HC) in support of the contention that in the absence of any material or basis to hold that the interest expenditure directly or indirectly was attributable for earning the dividend income. The AO ought not to have invoked the provisions of section 14A for making the disallowance. The ld. Counsel submitted that the AO has made disallowance on the basis of conjectures and surmises."

17.1 We are in complete agreement with the view taken by the tribunal.

18. Regarding issue of Sec. 271 in one of the matter since the other issues in the connected appeals has been decided in favour of the assessee, the issue of Sec.271 is also decided in favour of the assessee and against the department.

19. In view of the above, all the issues in all these appeals are decided in favour of the assessee and against the department.

20. The appeals stand dismissed.

(DINESH CHANDRA SOMANI),J. (K.S. JHAVERI),J.

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