

आयकर अपीलीय अधिकरण "H" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.1306/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2012-13)

M/s Hagwood Commercial Developers Pvt. Ltd., 105/106, Provogue House, Off. New Link Road, Andheri (West), Mumbai - 400 053.	बनाम/ v.	ACIT, CC -13, Old CGO, M.K. Road, Churchgate, Mumbai.
स्थायी लेखा सं./PAN : AABCH7508Q		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.1540/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2012-13)

DCIT, CC -2(3), Room No. 803, 8 th floor, Old CGO Annexe Bldg., Mumbai- 400 020.	बनाम/ v.	M/s Hagwood Commercial Developers Pvt. Ltd., 105/106, Provogue House, Off. New Link Road, Andheri (West), Mumbai - 400 053.
स्थायी लेखा सं./PAN : AABCH7508Q		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.1308/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2012-13)

M/s Alliance Mall Developers Co. Pvt. Ltd., 105/106, Provogue House, Off. New Link Road, Andheri (West), Mumbai - 400 053.	बनाम/ v.	ACIT, CC -13, Old CGO, M.K. Road, Churchgate, Mumbai.
स्थायी लेखा सं./PAN : AAGCA5970N		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No. 1539/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2012-13)

DCIT, CC -2(3), Room No. 803, 8 th floor, Old CGO Annexe Bldg., Mumbai- 400 020.	बनाम/ v.	M/s Alliance Mall Developers Co. Pvt. Ltd., 105/106, Provogue House, Off. New Link Road, Andheri (West), Mumbai - 400 053.
स्थायी लेखा सं./PAN : AAGCA5970N		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by :	Shri Rushabh Mehta
Revenue by :	Dr. Santosh Mankaskar,DR

सुनवाई की तारीख /**Date of Hearing** : 10-11-2016

घोषणा की तारीख /**Date of Pronouncement** : 08-02-2017

आदेश / ORDER

PER Bench

These are bunch of four appeals pertaining to two different assessee's consisting of cross appeals by the assessee as well Revenue. Out of these four appeals, two appeals are by two different assessees' being ITA Nos. 1306/Mum/2015 and 1308/Mum/2015 and other two appeals by the Revenue are with respect to those two different assessees' being ITA Nos. 1540/Mum/2015 and ITA No. 1539/Mum/2015 are cross appeals for the assessment year 2012-13 which are directed against separate appellate orders both dated 29-12-2014 passed by the learned Commissioner of Income Tax(Appeal)-48, Mumbai (hereinafter called "the CIT(A)"), the appellate proceedings before learned CIT(A) has arisen out of two different assessment orders both dated 09-01-2014 passed by learned ACIT, Central Circle-13, Mumbai(hereinafter called " the AO") u/s 143(3) of the Income-tax Act,1961(hereinafter called "the Act"). The issues involved in these appeals

are common; the same have been heard together and are being disposed of by this single consolidated order for the sake of convenience.

First we shall take up Revenue's appeal in ITA No. 1540/Mum/2015 for assessment year 2012-13.

2. The Revenue has raised following grounds of appeal in the memo of appeal filed with the Income-Tax Appellate Tribunal (hereinafter called " the tribunal") :

"(i) "Whether on facts and circumstances of the case the learned CIT(A) was justified in deleting the disallowance of Rs.1,05,70,443/- on account of administrative & other overheads without appreciating the fact that the assessee had not commenced its business as construction of Mall was not started up to A.Y.2012-13, therefore, the expenditure incurred by it should have been capitalized under the head 'Capital work-in-progress' as against revenue expenditure claimed by the assessee?"

(ii) The Appellant craves leave to add, to amend and /or to alter any of the grounds of appeal, if need be.

(iii) The Appellant, therefore, prays that on the grounds stated above, the order of the CIT(A)-37 , Mumbai be set aside and that of the Assessing Officer restored."

3. The brief facts of the case are that the assessee is engaged in construction of a mall at Nagpur. A search and seizure action u/s 132 of the Act was carried out on 20th January, 2012 at the offices of Provogue India Ltd. and residence of its directors, etc.. The search was concluded on 17th March, 2012. During the course of search of the office premises of Provogue (India) Ltd. Located at 105/106, Provogue House, loose papers from serial no. 9 to 32 were found and seized , which were trial balances of following three companies:-

- (i) Alliance Mall Developers Co. Pvt. Ltd.
- (ii) Hagwood Commercial Developers P. Ltd.
- (iii) Empire Mall Pvt. Ltd.

The Revenue invoked Section 153C of the Act after satisfaction note has been recorded against the assessee company, as the documents belonging to the assessee company had been seized in the search action in the case of M/s Provogue (India) Limited. Notices dated 13-08-2013 were issued to the assessee u/s 153A r.w.s. 153C of the Act . The assessee filed return of income on 22-08-2013 declaring income of Rs.13,29,532/- which included undisclosed income of Rs. NIL. The AO , thereafter , issued notices u/s 143(2) on 23.08.2013 which was duly served on the assessee which was followed with notices u/s 142(1)of the Act along with detailed questionnaire.

During the course of assessment proceedings, the A.O. observed that the assessee has debited expenses of Rs. 1,08,25,966/- to P&L account. The A.O. asked the assessee as to why expenses debited to P&L account should not be disallowed since there was no business activity and there was no business income and the project is still under progress. The assessee in reply submitted before the AO , submissions dated 18.11.2013 wherein it was contended as under:-

“With reference to your query regarding allowability of expenses claimed by debiting to Profit & Loss Account and not to capitalise it as project cost, we wish to state that expenses which are directly attributable to the project undertaken are classified under Work in Progress and the balance common expenses are debited to Profit & Loss Account.

With respect to claiming of expenses in the profit and loss account, we further wish to submit as under:-

a) The assessee company is a builder and developer and is developing a residential project at Nagpur named "Royal Palms" and a mall.

b) As regards accumulation of cost in WIP account, the cost of land, construction expenses and other direct expenses relating to the project are accumulated and balance expenses being in nature of period cost are debited to profit and loss account. It will be appreciated that such a treatment is supported by two basic principles of determination of business income both for the purposes of accounting as well as income tax.

c) The first principle is regarding treating of project expenses as Capital Work-in-Progress. It is pertinent to note that the assessee is in business of development and construction of malls and residential projects. Your Honour would appreciate that the assessee has adopted the method of treating all the construction expenses as Capital Work-in-Progress. The administrative costs are not added to capital work-in-progress as the same is not incurred for the purpose of the project.

d) Secondly, administrative costs are period costs and cannot be recouped, therefore, are debited to the profit and loss account of the year in which they are incurred.

e) In regard to the above referred expenses debited in the Profit & Loss account as revenue expenditure, it will be appreciated that they are in nature of administrative expenses. Also some of the expenses like auditors remuneration are incidental expenses for the functioning of the assessee company. They are neither expenses incurred in relation to the projects undertaken nor they can be recouped. As such they have to be debited to profit and loss account and are allowable in the year in which they are incurred.

f) The assessee further submits that keeping in view the business of the assessee company, it is consistently following the accounting standards as required u/s. 145 of the Income Tax Act, 1961.

g) In this regard, we wish to further state that Cost of the construction contract needs to be accounted as per the Accounting Standard -7 issued by the ICAI. According to the said AS-7, the Contract Costs should comprise of:-

- (i) Costs that relate directly to the specific contract;
- (ii) Costs that are attributable to contract activity in general and can be allocated to the contract; and
- (iii) Such other costs as are specifically chargeable to the customer under the terms of the contract.

h) Further, AS-7 also provides that "Costs that cannot be attributed to contract activity or cannot be allocated to a contract are excluded from the costs of a construction contract. Such costs include:

- (i) General administration costs for which re-imburement is not specified in the contract;
- (ii) Selling costs;
- (iii) Research & development costs for which reimbursement is not specified in the contract; and
- (iv) Depreciation of idle plant and equipment that is not used on a particular contract.

i) Thus, in view of the Accounting Standard-7, the assessee company in computing the contract costs under the head "Work-in-Progress" has excluded the administrative expenses. These expenses are incurred for the purpose of carrying the day-to-day activities of the company.

j) In view of the above, the treatment adopted by the assessee for valuation of the Work-in-progress and debiting the above expenses in the Profit & Loss A/c as revenue expenditure is correct and is in line with the AS-7.

k) Moreover, we also wish to submit that the valuation of work in progress is governed by AS-2 "valuation of Inventories". As per AS-2 on valuation of Inventories issued by the ICAI, cost of inventories comprises of all cost of production, cost of conversion and other cost incurred in bringing the inventories to their present location and condition. It further specifically excludes administration and selling & distribution costs incurred from the cost of the inventory.

l) Alternatively, we also wish to state that the assessee is maintaining its accounts following the accounting system as contemplated in AS-2 by the ICAI duly audited by a qualified chartered accountant. Maintenance of the accounts as well as the valuation of the work-in-progress would not prejudice either side. Further, we would like to draw your kind attention towards the judicial pronouncement given by the Hon'ble Guwahati High Court in the case of MKB (Asia) (P.) Ltd. v. CIT, whereby it held as under:-

"The income tax authority has no option/jurisdiction to meddle in the matter either by directing the assessee to maintain its accounts in a particular manner or adopt a different method for valuing the work-in-progress. An assessee has the option / liberty to adopt any recognized method of accounting for its business and the income should be computed in accordance with such regularly maintained accounting system. Thus) the Tribunal was not right in not accepting the valuation of closing work-in-progress in accordance with the Accounting Standard-7."

m) The assessee further submits that even as per S. 37 read with 43(2) of the Income-Tax Act, expenses incurred during the year have to be allowed as deduction. The above referred expenses have been incurred during the year and are allowable as deduction.

We, therefore wish to state that the Work-in-Progress has been valued correctly and the revenue expenses have been rightly claimed in the Profit & Loss account during the year under consideration.

Without prejudice to the above, if any such expenditure, being revenue in nature, is disallowed on any ground, the said expenditure as disallowed has to be added to the cost and accordingly the cost of the project will be increased to that extent."

The A.O. rejected the contentions of the assessee by holding as under:-

"(i) The assessee has claimed in its submissions that he is a builder & developer and is developing a residential project at

Nagpur named "Royal Palms" and a mall. The contention of the assessee is not correct.

(ii) In clause-B8 appended to Schedule-13 of the annual accounts for the F.Y. 2007-08 and in clause-B9 appended to Schedule-13 of the annual accounts for the F.Y. 2008-09, it is mentioned as under:

"The company is constructing a Mall at Nagpur. The expenditure incurred during the construction period are classified as project development expenditure pending capitalization included in capital work-in-progress and will be apportioned to the assets on the completion of the project. "

(iii) In clause- II9 appended to Schedule-10 of the annual accounts for the F.Y. 2009-10 and in clause B11 appended to Schedule 11 of the annual accounts for the F.Y. 2010-11, it is mentioned as under:

"The company is planning a retail centric mixed used development project at Nagpur. The expenditure incurred during the construction period are classified as project development expenditure pending capitalization included in capital work-in-progress and will be apportioned to the assets on the completion of the project. »

In clause (8) of Note 1 of the annual accounts for the F.Y. 2011-12, it is mentioned as under:-

"i. Expenditure of capital nature incurred during the construction period in respect of a project being executed by the company is grouped under capital work in progress. Such expenditure would be capitalized upon the commencement of commercial operations of the Project.

ii. Incidental expenditure during construction period pending allocation included in capital work in progress represents expenditure incurred in connection with the project which is intended to be capitalized to the project. Expenditure not attributable to project are charged to revenue account.

iii. Common expenditure is allocated to project cost on certain basis as considered appropriate by management.”

(iv) It is evident from the above-referred notes to account forming part of audited annual accounts of the assessee reproduced above that the assessee is not a builder & developer. The assessee is actually constructing a capital asset and that is why, the expenditure incurred by it have been classified under the head 'Capital Work-in-Progress' forming part of 'Fixed Assets' in the Balance Sheet. Notwithstanding the assessee classifying the rent and other receipts from the impugned mall on its completion, under the head 'Income from House Property' or under the head 'Profit & Gains from Business or Profession', the mall will remain a capital asset and not its stock-in-trade. The other details filed during the course of assessment proceedings on 19.09.2013 also confirms that the assessee is neither a builder & developer engaged in developing real estate for sale to consumers nor a contractor engaged in construction activity. Therefore, the claim of the assessee that AS-7 and AS-9 apply to the facts of the assessee is not correct. In its books of account the assessee itself is showing the construction expenses incurred as capital work-in-progress and not as work-in-progress forming part of Inventory or stock-in-trade.

(v) In subsequent years, the assessee may show income from the Mall under the head Profit & Gains from Business. But during the year, the business has not been set-up and, therefore, the expenses incurred prior to setting up of the business and commencement of the business falls under the category of pre-operative expenses. The proviso to section 3 clearly specify the "previous year" as under:-

"Provided that, in the case of a business or profession newly set up, or a source of income newly coming into existence) in the said financial year) the previous year shall be the period beginning with the date of setting up of the business or profession or, as the case may be, the date on which the source of income newly comes into existence and ending with the said financial year. »

(vi] Further, once the expenses like salary & wages, professional fees, management consultancy, foreign travelling, site development costs, etc. have been classified by the assessee itself as Project Development expenses and included in capital work-in-

progress, there is no reason as to why the assessee has claimed administrative and other expenses like professional fees, auditors remuneration, advertisement & business promotion, etc. in P&L a/c and further claimed the same as loss under the head profits & gains of business.

(vii) Further, the claim of the assessee that the valuation of inventories is governed by Accounting Standards (AS)-2 is not relevant as the assessee has not shown the construction as stock-in-trade. Therefore, the decision of the Hon'ble Gauhati High Court in the case of MKB (Asia) Pvt. Ltd. Vs. CIT (supra) quoted by the assessee is also not applicable to the facts of the assessee.

(viii) Further the claim of the assessee that the administrative expenses should have been allowed as per section 37 r.w.s. 43(2) of the Act is also not correct. Since the business of the assessee has not commenced, the expenses cannot be held as wholly and exclusively incurred for the purpose of business.

(ix) Further, the contention of the assessee fails on account of the fact that there also prevails a concept called "matching concept". On one side, the assessee has not been earning any business income in the year and on other side, it is claiming expenses which are factually in connection with the construction activity undertaken by the assessee. In view of this, the assessee would be eligible to claim the expenditure only when any income is offered out of the business and upto that stage, no claim of expense shall be given.

(x) Further, reliance is placed on the following decisions:

(a) Kingfisher Training & Aviation Services Ltd. vs. ACIT (2011) 15 Taxman.com 325 Bangalore.

(b) MAC Industrial Products vs. ACIT CC-1(5) Chennai. (2006) 101 ITD (Chennai) (TM)

(c) C.I.T. Vs. Sunil Synchem Ltd. (2002) 123 Taxman 593 (Raj). “

Hence, expenses of Rs. 1,08,25,966/- was disallowed by the A.O. after giving credit for the amount of Rs. 2,55,523/-, voluntarily disallowed by the assessee, wherein disallowance of expenses worked out to

Rs.1,05,70,443/- by the AO vide assessment order dated 09-01-2014 passed by the AO u/s 143(3) of the Act.

4. Aggrieved by the assessment order dated 09-01-2014 passed by the A.O. u/s 143(3) of the Act, the assessee carried the matter before the Id. CIT(A) by filing first appeal. The Id. CIT(A) after considering the facts of the case allowed the appeal of the assessee vide appellate orders dated 29-12-2014 by holding as under:-

“5.6 Ground of appeal no. 3 and 6(b) is in respect of disallowance of expenses of Rs.10,04,082/-. The appellant argued that it was in the business of development and construction of Malls and residential projects. The method of accounting adopted was of treating all the construction expenses as capital work in progress. The administrative cost were not added to capital work in progress as it was not incurred specifically for the project and that it was period cost. The expenses like auditors remuneration , advertisement , business promotion expenses are incidental expenses and are not incurred in relation to the Projects undertaken. The business promotion expenses are incurred year after year to create awareness in respect of prospective customers about the project. These are neither deferred revenue expenditure nor capital in nature since there are incurred repetitively to promote the project. As regards the view of the A.O. that the appellant Company had not set up and commenced its business and the nature of work performed was purchase of land . It was not necessary that all categories of business activities must support simultaneously . Unless the land is purchases, approval obtained in construction etc., the Mall cannot be constructed and the property cannot be sold.

5.7 In considering whether business 'is established, it must be noted that business connotes a continuous course of activities but it is not necessary that all the activities should be started at the same time, The appellant relied on the Apex Court decision in the course of CIT v/s Sarabhai Management Corpn. Ltd. (192 ITR 151) where it was held that what is material is the date when the company went

into or started one or the other of its component activities. In the present case, the appellant set up its business in AY 2008-09. Reliance was placed on the decision of Bombay High Court in the case of M/s Western India Vegetable Products (26 ITR 151) wherein it was held that the expenses should be allowed in the year in which business is set up, and a distinction was drawn between business being setup and commencement of business. It is not necessary that income should be earned for expenses to be claimed as held by Delhi High Court in the case of CIT v/s E. Funds International India (162 Taxman 1) (Delhi). The appellant again relied on Accounting Standard 7, Accounting Standard 2 for its computation of income and accounting method followed. The appellant relied on Guwahati High Court decision in the case of MKG (Asia) (P) Ltd. v/s CIT, wherein it was held, "The income tax authority has no option/jurisdiction to meddle in the matter either by directing the assessee to maintain its accounts in the particular manner or adopt a different method for valuing the work-in-progress. An assessee has the option/liberty to adopt any recognized method of accounting for its business and the income should be computed in accordance with such regularly maintained accounting system. Thus, the Tribunal was not right in not accepting the valuation of closing work-in-progress in accordance with the Accounting Standard 7."

5.8. It is seen that land was acquired, clearing of plot, leveling and excavation work began in AY 2008-09. This is a case of a company which is already formed and it is mandatory to get its accounts audited and comply with statutory liabilities. It has commenced activities for setting up the Mall. Thus the business activities have commenced.

5.9. The direct costs have been capitalized as work in progress. The assessee has followed the Accounting Standards prescribed, and the assessing officer has not shown any violation of the accounting standards. Even in the Guidance Note on Accounting for Real Estate Transactions (Revised) 2012, the terms Project Costs has been defined. It is categorically mentioned in Para 2.4. that:

"2.4. The following cost should not be considered part of construction cost and development costs if they are material:

- (a) General administration costs
- (b) Selling costs
- (c) Research and development costs
- (d) Depreciation of idle plant and equipment
- (e) Cost unconsumed or uninstalled material delivered at site; and
- (f) Payments made to sub contractors in advance of work performed.

5.10. Thus, the items of expenditure not added to work in progress account is as per the Accounting Standards. It is also seen that in subsequent years, from the balance sheet filed with return for AY 2013-14, which was available with AO before assessment order was passed, advances of Rs 789.64 lakhs was received as advance from customers.

5.11. Insofar as the method of accounting is concerned, it should be a method recognized under section 145 of the Act and it should be used consistently. The choice of the method has been left to the assessee. In this context, the following observation of the Hon'ble Gujarat High Court, made while rendering its decision in the case of CIT v. Advanced Construction Co. (P) Ltd. (275 ITR 30), would be contextually important.

"The provision therefore specifically provides that the choice of method of accounting lies with the assessee, the only caveat being that it has to show that the method has been regularly followed. The section is couched in mandatory terms and the Department is bound to accept the assessee's choice of method regularly employed, except for the situation, wherein the Assessing Officer is permitted to intervene, in case it is found that true income, profits and gains cannot be arrived at by the method."

5.12. In the present case, the accounting treatment followed by assessee is as per the prescribed accounting standards. The disallowance made by assessing officer is therefore deleted. Ground of appeal no 3 and 6(b) are allowed.

5. Aggrieved by the appellate order dated 29-12-2014 passed by the Id. CIT(A), the Revenue is in appeal before the tribunal.

6. The Id. D.R. submitted that the assessee has not set up any business during the impugned assessment year as the malls were under construction and no business was set up. The assessee is not a builder, the assessee set up a mall as a capital asset. The assessee had shown the said construction as 'capital work-in progress' and hence the assessee is not constructing malls as stock-in-trade. Hence, it is submitted that all the administrative expenses need to be capitalized. The Id. D.R. further relied on the order of the A.O.

7. The Id. Counsel for the assessee submitted that the assessee is a Private Limited Company. The assessee is constructing a mall and residential complex at Nagpur which is under construction. It was submitted that various approvals were obtained by the assessee for construction of mall and residential complex. He submitted that the assessee is bound to follow the Accounting Standards notified in accordance with section 211(3C) of The Companies Act,1956 as were applicable during the impugned assessment year. The assessee is following the Accounting Standard consistently in accordance with law and it could not be said that by following the said accounting standards so mandatorily required to be followed by the assessee company the profits of the assessee company could not be computed. It was submitted that the assessee had set up the business by acquiring the land and obtaining various approvals from various government

authorities . The Id. Counsel drew our attention to the orders of authorities below which detailed the activities undertaken by the company till the end of the relevant previous year in connection with the construction of Mall at Nagpur as under:

“A.Y. 2008-09

Cleaning of plot and leveling of land, earth excavation and other land development activities , etc. Also, land dividation and barbed wire fencing were carried out.

A.Y.2010-11

The No Objection Certificate (NOC) has been received from the Tehsildar’s Office.

A.Y.2011-12

Construction of the boundary wall surrounding the plot of construction and other allied land development activities.

AY 2012-13

Construction of Water Bound Macadem road, leveling of site and laying hard murum. Further, height clearance was also received from the Airports Authority of India(AAI) and Bharat Sanchar Nigam Lid(BSNL)”

The assessee’s counsel submitted that the is entitled to claim the administrative and other expenses which are not connected specifically to construction activities but are general overhead as business expenses as per section 3 of the Act as the assessee’s business was duly set up in the previous year relevant to the assessment year 2008-09 itself, which is reproduced below:-

"Previous year" defined.

3. For the purposes of this Act, "previous year" means the financial year immediately preceding the assessment year :

Provided that, in the case of a business or profession newly set up, or a source of income newly coming into existence, in the said financial year, the previous

year shall be the period beginning with the date of setting up of the business or profession or, as the case may be, the date on which the source of income newly comes into existence and ending with the said financial year”.

The learned counsel for the assessee submitted that the assessee had set up its business from the date when one of its business activities was started in assessment year 2008-09 and it is not necessary that all business should commence before claiming expenses. He submitted that all the direct expenses are capitalized while the indirect expenses are being claimed as business expenses in accordance with AS-2 and AS-7 issued by ICAI and notified by Central Government in exercise of powers u/s 211(3C) of the Companies Act,1956 which the assessee company is mandatorily required to follow. It was submitted that now the project is converted into Mall and residential project . He submitted that the assessee has received advances from various parties and the mall/residential complex is still under construction. The civil engineer certificate is placed on record at page 38/paper book which was also placed before authorities below The Id. Counsel relied on the following judicial decisions and submitted that the business expenses are to be allowed:-

1. CIT v. Dhoomketu Builders & Development (P.) Ltd. [2013] 34 taxmann.com 18 (Delhi).
2. CIT v. Sarabhai Management Corpn. Ltd. [1991] 192 ITR 151 (SC) wherein Hon'ble Supreme Court affirmed the decision of Hon'ble Gujarat High Court in Sarabhai Management Corp. Ltd. v. CIT in (1976) 102 ITR 25(Guj.)

The Id. Counsel submitted that in the instant case business was set up when the assessee acquired land and obtained permissions from Government to construct Mall and residential project at Nagpur. He also drew our attention to paper book page No. 11 whereby it is certified by the Auditors that the applicable accounting standards referred to in

Section 211(3C) of the Companies Act, 1956 were followed regularly by the assessee. It was submitted that the assessee was following mandatory accounting standards AS-7 and AS-2 issued by ICAI and it could not be said that by following said accounting standards , the profit of the assessee could not be computed correctly as provided u/s 145 of the Act. In support, the ld. Counsel also relied on the following decisions:-

1. CIT v. Woodward Governor India (P.) Ltd. [2009]179 Taxman 326 (SC).
2. MKB (Asia) (P.) Ltd. v. CIT [2008] 167 Taxman 256 (Gau-HC)
3. Western India Vegetable Products Ltd. v. CIT (1954) 26 ITR 151(Bom.)

8. We have considered rival contentions and also perused the material available on record. We have also carefully gone through the judicial precedents placed on record. We have observed that the assessee is a private limited company engaged in constructing a mall and residential complex at Nagpur. The assessee purchased land and obtained various government approvals from time to time in preceding assessment years . The construction of the mall and residential complex is in progress during the previous year relevant to the impugned assessment year. The activity chart as detailed by the assessee before the authorities below as under could not be controverted by authorities below/ DR , the said activity chart as extracted from the orders of the authorities below is as under:-

“A.Y. 2008-09

Cleaning of plot and leveling of land, earth excavation and other land development activities , etc. Also, land divication and barbed wire fencing were carried out.

A.Y.2010-11

The No Objection Certificate (NOC) has been received from the Tehsildar's Office.

A.Y.2011-12

Construction of the boundary wall surrounding the plot of construction and other allied land development activities.

AY 2012-13

Construction of Water Bound Macadem road, leveling of site and laying hard murum. Further, height clearance was also received from the Airports Authority of India(AAI) and Bharat Sanchar Nigam Lid(BSNL)

We have observed that activity towards construction of mall and residential complex was started way back in assessment year 2008-09 onwards as emerging from the records. We find that the assessee is consistently following AS-2 & AS-7 issued by ICAI which are mandatory standards whereby the direct costs are added to the capital work-in-progress being construction of the mall and residential complex and all the indirect expenses being general overhead are charged to the P&L account. We have observed that the assessee has set up the business by acquiring land and obtaining approval for construction of mall and residential complex although the mall has not commenced business till the end of the relevant previous year . The assessee has rightly charged the general overhead expenses being indirect expenses incurred in the P&L account in compliance with AS-2 & AS-7 which is mandatory as per ICAI and notified by Central Government as per Section 211(3C) of the Companies Act, 1956 wherein the Companies are statutorily required to follow the same. It could not be pointed out by learned DR that how by following the afore-stated Accounting Standards which are mandatory accounting standards, profits of the assessee could not be computed correctly. The Accounting Standards issued by ICAI which is

an expert body cannot be discarded lightly unless it is shown that by following the said accounting standards the profits could not be computed correctly in accordance with provisions of Section 145 of the Act or the said Accounting Standards are directly in conflict with provisions of the Act. Section 3 of the Act stipulate that the previous year shall be the period beginning with the date of setting up of the business or profession or, as the case may be, the date on which the source of income newly comes into existence and ending with the said financial year and thus it is not necessary the business had actually commenced for claiming the expenses but the relevant is the setting up of the business which in our considered view in the instant appeal business was set-up when the assessee took steps to purchase land and obtained necessary approvals for setting up of Mall and Residential complex at Nagpur. In our considered view, there is no infirmity in the well reasoned order of the Id. CIT(A) which we are not inclined to interfere with whom we agree as in our considered view the general overhead expenses being indirect expenses were rightly debited by the assessee to the P&L account as normal business expenses, keeping in view facts and circumstances of the case. We order accordingly.

9. In the result, Revenue's appeal in ITA No. 1540/Mum2015 for the assessment year 2012-13 is dismissed.

Now, we shall take up assessee's appeal in ITA No. 1306/Mum/2015 for assessment year 2012-13.

10. The Brief facts of the case are that on perusal of the P&L account, it was observed by the A.O. that the assessee has investment in shares and mutual funds amounting to Rs. 56,00,10,000/- income from which is exempt from tax u/s. 10 of the Act. The assessee was asked to

furnish detail of the expenses disallowed u/s 14A of the Act out of the expenses debited under various heads in P&L account in relation to earning of exempted income. In response, the assessee replied as under:-

“We wish to state that total expenditure during the year amounts to Rs. 1,12,35,654/- . Also, a sum of Rs. 45,178/- relates to depreciation, which is an allowance and neither related to Investment and not any expenditure which attracts any disallowance u/ s. 14A.

Employee benefits expense incurred of Rs. 10,90,195/- is directly connected to the business activities of the assessee company and not to the investments made from which exempt income is earned. Further, it may be noted that the investment decisions are solely taken care of by the portfolio manager - "Trust Capital Services Pvt. Ltd.”.

Other Expenses claimed of Rs. 1,01,12,014/- is bifurcated as below:

S No.	Particulars	Amount	Status
a)	Professional fees	7,50,690	Out of this Rs. 4,09,690/- towards portfolio management fees of Trust Capital Services P.Ltd. is already disallowed.
b)	Rates & Taxes	3,201	
c)	Advertisement and Business Promotion Expenses	89,61,150	Refer note below
d)	Travelling expenses	2,52,878	
e)	Communication expenses	7,689	
f)	Printing & Stationery expenses	4,447	
g)	Auditors remuneration	1,00,000	
h)	Office expenses	18,496	
i)	Miscellaneous expenses	13,462	
	Total expenses	1,01,12,014	

Note

In regard to the claim of the aforesaid expenses, we have to state as under:-

a) The assessee has already disallowed the amount of Rs. 2,00,000/- u/s 14A in furtherance to the legal & Professional fees incurred amounting to Rs. 4,09,690/- incurred in relation to the portfolio management fees (broker) who takes care of the investment decisions. For the purpose of said disallowance, the assessee has considered the common expenses which may be said to have attributable towards taxable income as well as exempt income. Accordingly, the working of the disallowance is as under:-

Pareticulars of common expenses	Amount
Rates & Taxes	3,201
Travelling expenses	2,52,878
Communication expenses	7,689
Printing & Stationery expenses	4,447
Legal and Professional fees (7,50,690 – 4,09,690)	3,41,000
Auditors remuneration	1,00,000
Office expenses	18,496
Miscellaneous expenses	13,462
Total expenses	7,41,173
Total income (A)	1,37,16,615
Dividend income (B)	14,06,951
Total expenses as per above (C)	7,41,173
Proportionate disallowance (D=C*B/A)	76,024

b) Further, as regards the expenses pertaining to advertisement & business promotion expenses of Rs. 89,61,150/-, we wish to state that the same are directly attributable to the taxable business income earned and hence, shall not be considered for the purpose of 14A disallowance. In this regard, we wish to state that the party-wise details of the advertisement & business promotion expenses incurred in the year under consideration has already been submitted in our earlier submission.

c) Your Honour may also note that no interest expenses are claimed by the assessee.

In view of the above submission, we request Your Honour not to make any disallowance u/ s. 14A r. w. r. 8D as the assessee has adopted the appropriate method in making such disallowance in the return of income.”

The A.O. rejected the contentions of the assessee on the ground that the assessee has not done any business during the year and had not earned any income from its regular business. It was observed by the AO that during the relevant previous year, the assessee has made an investment in the shares of another companies and incurred expenses on construction of mall and capitalized the same under the head capital work-in-progress . The expenses incurred on salary and wages(Rs. 47,72,015) , bonus (Rs. 71,076) , Boarding and Lodging (Rs.16,701) , travelling (Rs. 98,240) etc. have been transferred to capital work-in-progress. The AO observed that the assessee incurred expenses on construction of mall and capitalized the same under the head capital work-in-progress. The AO observed that some portion of expenses incurred by the assessee on salary, administrative expenses, business promotion expenses, which are either debited to profit and loss account or transferred to Capital work-in-progress , pertain to the activity of investment in shares liable to earn exempt income. The AO observed that the assessee has not bifurcated satisfactorily the relevant expenses out of the total expenses incurred. It was also observed by the AO that the assessee has wrongly stated that the legal and professional fees of Rs. 4,09,690/- was disallowed u/s 14A of the Act but the said expenses had been claimed u/s 57 of the Act under the head-income from other sources. The AO observed that he is satisfied that the disallowance of expenses of Rs. 2,00,000/- by the assessee u/s 14A of the Act in relation to income which does not form part of total income is not correct having regards to the accounts of the assessee, dividend income earned of Rs.14,06,951/- and huge investments in shares. The AO invoked the provisions of Section 14A of the Act read with Rule 8D of Income-tax Rules, 1962 and made the disallowance as under:-

Particulars	Amount (Rs.)
(i) Direct expenses in connection to the income which does not form part of total income as per Rule 8D((2)(i)	Nil

(ii) Interest expenses in connection to the income which does not form part of total income as per Rule 8D((2)(ii)	Nil
(iii) An amount equal to half percent of the average of the value of investment, income from which does not or shall not form part of total income as appearing in the balance sheet of the assessee on the first and last day of the previous year as per Rule 8D((2)(iii) $\{[(68,69,81,000+56,00,10,000)/2] * 0.5\%$ }	31,17,478
Total Disallowance u/s. 14A r.w.r. 8D	31,17,478
Less : Expenses disallowed u/s14A	2,00,000
Net Disallowance u/s. 14A r.w.r.8D	29,17,478

Since, the AO disallowed whole of expenditure debited to Profit and Loss account on the grounds that no business had been set up by the assessee, no separate disallowance was made on account of Section 14A of the Act in computation of Income. However, since the assessee also debited expenses to capital work-in-progress, it was assumed by the AO that 50% of the above disallowance is to be apportioned to capital work-in-progress and hence capital work-in-progress was reduced accordingly by 50% of the above disallowance , vide assessment order dated 09-01-2014 passed by the AO u/s 143(3) of the Act.

11. Aggrieved by the assessment order dated 09-01-2014 passed by the A.O. u/s 143(3) of the Act, the assessee carried the matter before the Id. CIT(A) in first appeal, who rejected the contentions of the assessee. However , learned CIT(A) accepted the contentions of the assessee that the disallowance of expenses u/s 14A of the Act is to restricted out of the expenses debited to

Profit and Loss Account and the same cannot be extended to the direct cost incurred towards the construction of Mall which is capitalized to capital work-in-progress account as the said expenses are direct expenses towards the project , vide appellate orders dated 29-12-2014 .

12. Aggrieved by the appellate order dated 29-12-2014 passed by the ld. CIT(A), the assessee is in appeal before the Tribunal. It is pertinent to mention that the Revenue is not in appeal w.r.t. relief granted by learned CIT(A) w.r.t. disallowance of expenses u/s 14A of the Act made by the AO w.r.t. direct expenses capitalized to the capital work-in-progress which were not debited to Profit and Loss Account.

13. It is the contention of the ld. Counsel for the assessee that the A.O. has disallowed the expenses u/s 14A of the Act by invoking Rule 8D of Income-tax Rules, 1962. The AO has also included the direct expenses incurred for construction of mall and residential complex which were debited by the assessee to the capital work-in-progress against which learned CIT(A) has given relief vide appellate orders dated 29-12-2104 . Rule 8D of Income-tax Rules, 1962 was invoked by the A.O. for making disallowance u/s 14A of the Act. The disallowance were made to the tune of Rs. 29,17,478/- by the AO u/r 8D(2)(iii) of Income-tax Rules, 1962 read with Section 14A of the Act , as against which the assessee had made voluntary disallowance of Rs. 2 lacs. It is submitted that dividend income earned of Rs. 14,06,951/- and the assessee had made suo-motu disallowance of Rs. 2 lacs. It was submitted that the assessee submitted all details of expenses debited to Profit and Loss Account and after explaining in details nature of each of such expenses , the assessee worked out disallowance of Rs. 76,024/- u/s 14A of the Act having regard to the accounts of the assessee against which voluntary disallowance of Rs.2,00,000/- were made. The details are enumerated in the orders of authorities below and it was submitted that Advertisement and business

promotion expenses of Rs. 89,61,150/- were not included for the purpose of disallowance u/s 14A of the Act as the same were directly attributable to the taxable business income earned by the assessee for which complete details were submitted before the authorities below and the authorities below could not point out any defect in the same. It is submitted that there are no fresh investments made during the year. Our attention was drawn to page 16 and 25/paper book filed with the tribunal . The ld. Counsel submitted that the A.O. has not given any cogent reasons hence the order of the A.O. is bad in law. The ld. Counsel relied on the decision of the Delhi Tribunal in the case of Power Grid Corporation of India Limited v. DCIT in ITA No. 2397 an 2398/Del/2014 vide orders dated 06.10.2016.

14. The ld. D.R. relied on the order of ld. CIT(A).

15. We have considered the rival contentions and also perused the material available on record including the case laws. We have observed that the assessee is a Private Limited Company which is engaged in constructing a mall and residential complex at Nagpur. The assessee has set up business of constructing mall and residential complex and the expenses are allowed as business expenses as claimed by the assessee by us in the foregoing paras of this common order in ITA no. 1540/Mum/2015 on the grounds that business has been set up and the assessee is entitled for claiming deduction of expenses in accordance with mandate of Section 3 of the Act. We will proceed in this appeal keeping in view our decision in ITA no. 1540/Mum/2015 in preceding para's. The assessee has capitalized direct expenses incurred towards construction of mall and residential complex by transferring the said expenses to capital work-in-progress which were also considered by the AO for disallowance u/s 14A of the Act by invoking Rule 8D(2)(iii) of the Income-tax Rules, 1962 against which learned CIT(A) gave relief to the assessee and the Revenue is not in appeal against the relief granted by learned CIT(A),

thus, the expenses which were capitalized being direct expenses debited to capital work-in-progress being incurred for construction of mall and residential complex cannot be considered for disallowance under Section 14A of the Act . The assessee has elaborately explained the nature and details of expenses which were debited to Profit and Loss Account and its nexus with earning of income which does not form part of the total income and the Revenue could not point out any error in the said explanation offered by the assessee. The assessee while explaining the expenses debited to Profit and Loss Account has submitted that Advertisement and Business Promotion expenses of Rs.89,61,150/- were directly attributable to the earning of taxable business income earned and hence the same shall not be considered for the purposes of disallowance under section 14A of the Act . The Revenue could not point out any discrepancy in the said contention of the assessee. The assessee has also investment in non-current investment of Rs. 56 crores as at 31-03-2012 which is same as in the preceding year as at 31-03-2011. The assessee has also invested in current investments viz. Bonds which yielded interest income as well taxable capital gains chargeable to tax as well the assessee had investments in Mutual funds reflected as current investment which yielded tax-free dividends. The assessee has incurred portfolio management services (PMS) fee of Rs. 4,09,690/- which is to be appropriated between the tax-free instruments and taxable instruments invested by the assessee reflected in current as well non-current investment as charged by portfolio managers and chargeability by portfolio managers of PMS fees be apportioned accordingly for disallowance u/s 14A of the Act between current and non-current investment as also keeping in view investment in taxable as well tax-free instruments , while the assessee has deducted the said PMS expenses u/s 57 of the Act. The Revenue has invoked Rule 8D of Income-tax Rules, 1962 for making disallowance u/s 14A of the Act in a stereo typed manner without having regard to the accounts of the assessee and without satisfying the mandate of Section 14A(2) of the Act

before making disallowance u/r 8D(2)(iii) of Income-tax Rules, 1962 read with Section 14A of the Act which in our considered view cannot be sustained in the instant appeal keeping in view facts and circumstances of the case more-so without pointing out and defect by the Revenue as to how the working of the disallowance submitted by the assessee u/s 14A of the Act is not correct having regard to the accounts of the assessee. The AO did not made any attempt to work out disallowance of expenses incurred in relation to earning of income which does not form part of total income having regards to the accounts of the assessee in accordance with mandate of Section 14A(2) of the Act and also no attempt was made by the AO to dislodge the claim of the assessee in bringing forth and working disallowance u/s 14A of the Act having regard to the accounts of the assessee. In our considered view, the disallowance made by the A.O. in the instant appeal u/s 14A of the Act r.w.r. 8D(2)(iii) of Income-tax Rules, 1962 cannot be sustained and the disallowance of the expenses is to be made keeping in view expenses debited to the Profit and Loss Account (including , inter-alia, PMS Fees) having regard to the accounts of the assessee in accordance with mandate of Section 14A of the Act and hence, the issue is set aside to the file of the AO for making de-novo disallowance of expenses u/s 14A of the Act on merits in accordance with directions in this order in accordance with provisions of Section 14A of the Act. Needless to say that proper and adequate opportunity of being heard shall be provided by the AO to the assessee in accordance with principles of natural justice in accordance with law before de-novo determination of disallowance of expenses u/s 14A of the Act on merits. We order accordingly.

16. In the result appeal of the assessee in ITA no. 1306/Mum/2015 is partly allowed for statistical purposes as indicated above .

17. Out decision in ITA No. 1540/Mum/2015 (Revenue's appeal) shall apply mutatis mutandis to the Revenue's appeal in ITA No. 1539/Mum/2015

in the case of assessee namely M/s Alliance Mall Developers Company Private Limited wherein Revenue appeal is dismissed as facts are identical and our decision in ITA No. 1306/Mum/2015 (assessee's appeal) shall apply mutatis mutandis to the assessee namely M/s Alliance Mall Developers Company Private Limited appeal in ITA No.1308/Mum/2015 wherein assessee appeal is partly allowed for statistical purposes as facts are identical as indicated above .We order accordingly.

18. In the result, appeal's filed by the Revenue in ITA No. 1540/Mum/2015 and 1539/Mum/2015 are dismissed and appeal filed by the assessee's in ITA No. 1306/Mum/2015 and 1308/Mum/2015 are allowed for statistical purposes as indicated above.

Order pronounced in the open court on 8th February, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक: 08-02-2017 को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 08-02-2017

1

व.नि.स./ R.K., Ex. Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "I" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)