आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

BEFORE SHRI C.M. GARG, JM & SHRI L.P. SAHU, AM

आयकर अपील सं./**ITA No.338/CTK/2017**

आयकर अपील सं./**ITA No.39/CTK/2019**

आयकर अपील सं./**ITA No.01/CTK/2020**

(**निर्धारण वर्ष /** Assessment Years :2009-2010, 2015-2016 & 2016-2017)

National Aluminium Company Limited, NALCO Bhawan, P/1, Nayapalli, Bhubaneswar PAN No. : **AAACN 7449 M**	Vs.	ACIT, Corporate Circle-1(2), Bhubaneswar

AND

आयकर अपील सं./**ITA No.331/CTK/2017**

आयकर अपील सं./**ITA No.69/CTK/2019**

आयकर अपील सं./**ITA No.65/CTK/2020**

(**निर्धारण वर्ष /** Assessment Years :2009-2010, 2015-2016 & 2016-2017)

National Aluminium Company Limited, NALCO Bhawan, P/1, Nayapalli, Bhubaneswar PAN No. : **AAACN 7449 M**	Vs.	DCIT/ACIT, Corporate Circle-1(2), Bhubaneswar

AND

Cross Objection No.11/CTK/2019

Cross Objection No.02/CTK/2020

(Arising out of ITA Nos.69/CTK/2019 & 65/CTK/2020)

(**निर्धारण वर्ष /** Assessment Years :2015-2016 & 2016-2017)

National Aluminium Company Limited, NALCO Bhavan, P/1, Nayapalli, Bhubaneswar PAN No. : **AAACN 7449 M**	Vs.	DCIT/ACIT, Corporate Circle-1(2), Bhubaneswar
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by	:	Shri A.K.Sabat & B.K.Mahapatra, CAs
राजस्व **की ओर से** /Revenue by	:	Shri M.K.Gautam, CIT DR

सुनवाई की तारीख **/ Date of Hearing**	:	06/10/2020
घोषणा की तारीख**/Date of Pronouncement**	:	28/10/2020

आदेश / O R D E R

Per Bench :

These are the cross appeals filed by the assessee and Revenue and cross objections by the assessee, against the separate orders of the CIT(A)-1, Bhubaneswar, dated 30.12.2017, 27.12.2018 & 24.10.2019

for the assessment years 2009-2010, 2015-2016 & 2016-2017, respectively.

2. Out of the six appeals, one appeal i.e. ITA No.65/CTK/2020, which has been filed by the Revenue for assessment year 2016-2017, is barred by limitation of 19 days. In this regard, the department has filed an application dated 30.01.2020 for condonation of delay stating therein the cause for delay in filing the present appeal, to which ld. AR did not object to it. After considering the application of the department, we find that the department has explained the sufficient cause for condonation of delay. Accordingly, we condone the delay of 19 days in filing the present appeal and the appeal is heard finally along with other connected appeals.

3. First of all, we would like to take on record the following paper books filed by the assessee in the appeals under consideration which have been perused and relevant part of the same have been considered for deciding the above appeals :-

Sl.No.	ITA Nos.	Assessment Year	Volume of the Paper Book	Pages of the Paper Book
1	331&338/CTK/2017	2009-2010	I	1 to 202
2	-do-	-do-	II	1 to 372
3	-do-	-do-	-	1 to 35
4	-do-	-do-	-	1 to 20
5	39 & 69/CTK/2019	2015-2016	I & II	1 to 596
6	-do-	-do-	III	597 to 704
7	01&65/CTK/2020	2016-2017	I, II & III	1 to 531
8	-do-	-do-	II	1 to 49

4. Since the issues involved in all the appeals are mostly common except some grounds which will be adjudicated separately, therefore, all the appeals are heard altogether and disposed off by this common order. For the sake of convenience and brevity, first we shall take into consideration the facts narrated in the appeal of the assessee for A.Y.2009-2010 in ITA No.338/CTK/2017 and the grounds raised therein are as under :-

1. *That the order dated 30.05.2017 passed by the Learned Commissioner of Income Tax (Appeals) [in short **"CIT(Appeals)"],** in so far as enhancements and sustaining the additions and disallowance made by the Learned Assessing Officer, is based on irrelevant considerations, against natural justice, contrary to facts, arbitrary, erroneous and bad in law.*
2. ***Disallowance of Interest on disputed Govt, duty (Electricity Duty and water charges -Rs.76,56,75,884/-***

a. *That on the facts and in the circumstances the case, sustaining the addition/disallowance of Rs.76,56,75,884/- under 'Interest on Disputed Govt, duty (Electricity Duty and water charges)' by the learned CIT (Appeals), ignoring the written submissions and the orders of the jurisdictional ITAT Bench, is against the principles of natural justice, arbitrary, erroneous, bad in law and legally untenable.*

b. *That the learned CIT (Appeals) ignoring and not following the order of the Jurisdictional ITAT (Hon'ble ITAT Cuttack Bench, Cuttack) for the Asst. Year 2005-06 in appellant's own case), wherein in similar circumstances, the issue of allowbility of 'Interest on Disputed Govt, duty (Electricity Duty and water charges)' having been decided in favour of the assessee, his order in confirming the addition/disallowance of Rs.76,56,75,884/-under 'Interest on Disputed Govt, duty (Electricity Duty and water charges)' is an act of judicial impropriety, bad in law and illegal and deserves to be set aside on this ground alone.*

c. *That in similar facts and circumstances, for the Asst. Year 2005-06 and in the past years, in assessee's own case, the Hon'ble ITAT Cuttack Bench having held that "Interest on unpaid Electricity Duty and water charges" is fully allowable, the learned CIT (Appeals) in not deleting the said addition/disallowance of Rs.76,56,75,884/- under 'Interest on Disputed Govt, duty (Electricity Duty and water*

charges)' is arbitrary, erroneous, and bad, both in the eye of law and on facts and legally untenable.

d. *That the aforesaid Rs.76,56,75,884/- under "Interest on unpaid Electricity Duty and water charges, although a statutory liability, the learned CIT (Appeals) holding that the same is a provision and disallowable because the same is under dispute and no demand has been raised in respect thereof, is arbitrary, erroneous, and bad, both in the eye of law and on facts and legally untenable.*

3. Increasing the additions/disallowance under "Peripheral Development Expenses" to Rs.7,25,83,189/-

a. *That on the facts and in the circumstances the case, the order of the learned CIT(Appeals) in increasing the additions/disallowance to Rs.7,25,83,189/- under 'Peripheral Development Expenses' as against the disallowance of Rs.50,42,549/- made in the order dated is unjustified based on irrelevant considerations, contrary to facts, arbitrary, erroneous and bad, both in the eye of law and on facts and legally untenable. The addition was made without giving a reasonable period to defend it's position and violates the principle of natural justice.*

b. *That on the facts and in the circumstances the case, the order of the learned CIT(Appeals) in disallowing Rs.7,25,83,189/- under 'Peripheral Development Expenses' is unjustified based on irrelevant considerations, contrary to facts, arbitrary, erroneous and bad, both in the eye of law and on facts and legally untenable.*

c. *That out of the aforesaid disallowance of Rs.7,25,83,189/- under 'Peripheral Development Expenses' expenditure of Rs.7,22,76,640/- incurred through Corporate Office of the asseseee is wholly and exclusively for the purpose of its business and the disallowance by the learned CIT(Appeals) is on mis-appreciation of facts, arbitrary, erroneous and bad, both in the eye of law and on facts.*

d. *That in similar facts and circumstances, in the past years, in assessee's own case, the Hon'ble ITAT having held that the aforesaid expenditure are fully allowable, the learned CIT (Appeals)'s order in disallowing the same is, arbitrary, erroneous and bad both on facts and in law.*

e. *That the learned CIT(Appeals) in holding that the aforesaid Rs.7,22,76,640/- are not in the nature of business expenditure, and in the nature of donations and charity and not connected to running of business and not in accordance with notification of Govt, of Odisha is on mis-appreciation of facts, arbitrary, erroneous and bad, both in the eye of law and on facts.*

4. Disallowance u/s.40(a)(l) of the Act - Rs.5,58,82.675/-

a. *That on the facts and in the circumstances the case, the sustaining of the addition/ disallowance of Rs.5,58,82,675/- u/s.40(a)(i) of the Act by the learned CIT(Appeals) is arbitrary, erroneous, bad, both in the eye of law and on facts.*

b. *That the Assessee having not violated any provisions of section 195 of the Act, there ought not be any addition/ disallowance u/s.40(a)(i)*

of the Act and the disallowance of the said Rs.5,58,82,675/- is contrary to facts, arbitrary, unjustified, erroneous and bad in law.

c. That the learned CIT(Appeals) holding that the assessee itself has stated that on payment of foreign currency of Rs.5,58,82,675/- no TDS was deducted as per section 195 is wrong, incorrect contrary to facts on record, arbitrary, unjustified, erroneous and bad in law.

d. The A.Q having not specified on which amount the TDS were not made and which are required to be made by NALCO and merely on a working made by A.O himself without any material on record and evidence, but on the basis of assumptions, surmises and conjectures, the disallowance made in order dated 30.3.2015, sustained by the learned CIT(Appeals) is arbitrary, unjustified, erroneous and bad, both in the eye of law and on facts and legally untenable.

5. Disallowance of Provision for Leave Encashment'- u/s.43B(f) of the Act Rs.43,44,18,199/-

That on the facts and in the circumstances the case, the sustaining of the disallowance of Rs.43,44,18,199/- u/s.43B(f) of the Act in respect of Provision for Leave Encashment by the learned CIT(Appeals) is erroneous and bad in law.

6. Claim of Addl. Depreciation u/s.32(i)(iia) of the Act- Rs.72,49,60,074/-

That on the facts and in the circumstances the case, the learned CIT(Appeals) ought to have allowed the disallowance of claim of Addl. Depreciation of Rs.72,49,60,074/-u/s.32(i)(iia) of the Act.

7. Disallowance U/s,43B of the Act - Under 'Electricity Duty' & water Charges - Rs.46,28,87,187/-.

That on the facts and in the circumstances the case, the sustaining of disallowance of Rs.46,28,87,187/- under 'Electricity Duty' & water Charges u/s. 43B of the I.T Act by the learned Commissioner of Income Tax (Appeals) is erroneous and bad both on facts and in law.

8. That the appellant craves leave to add, supplement, modify the grounds here-in-above before or at the hearing of the appeal.

5. Brief facts of the case are that the assessee is a public sector company, engaged in the business of bauxite mining, manufacture of Alumina and Aluminum & Power Generation. The corporate office of the assessee is situated at Bhubaneswar and the manufacturing unit of the assessee company is at different places of Odisha which is more than 50 Kms from the corporate office and it is a public sector undertaking wherein 87.15% of the shares are owned by the

Government of India. The company owns a captive power plant and most of the power produced is utilized by the company and the surplus is sold to the Grid Corporation of Orissa. The assessee filed its return of income on 30.09.2009 showing a total income of Rs.1792,11,39,406/-. Thereafter the return was revised on 30.03.2011 disclosing the same income as originally filed by the assessee. The case was selected for scrutiny within the specified time as per the Income Tax Act. 1961 and statutory notices were issued to the assessee. In this regard, the ld. AR of the assessee submitted the details as required by the AO. The AO completed the assessment u/s.143(3) of the Act originally on 30.12.2011 determining the total income at Rs.2042,54,11,240/- after making following additions/disallowances :-

Disallowance of the loss on account of revaluation of Non-moving Stores and Spares	***4,95,31,377/-***
Claim of Additional Depreciation	***72,49,61,074/-***
Peripheral Development Expenses	***50,42,549/-***
Provision for Leave Encashment	***43,44,18,199/-***
Claims, receivables, debts, shortages etc. written off	***3,33,22,664/-***
Disallowance u/s.40(a)(ia)	***2,84,32,895/-***
Payment of Electricity Duty and Water Charges – Disallowance u/s.43B	***46,28,87,187/-***
Interest on disputed Govt, dues (Electricity Duty and Water Charges)	***76,56,75,884/-***
	2042,54,11,235/-

Subsequently, the CIT, Bhubaneswar cancelled the assessment order with a direction to pass fresh assessment order. Thereafter the AO

passed the assessment order u/s.143(3)/263 of the Act dt.30.03.2015 making the same additions as were made in the cancelled assessment order and a further addition of Rs.5,58,82,675/- u/s.40(a)(ia) of the Act.

6. Against the above additions and the order of the AO, the assessee filed an appeal before the CIT(A). In the appellate proceedings the assessee reiterated the submissions made before the AO and filed detailed written submissions. The CIT(A) after considering the submissions of assessee and findings of AO has partly allowed the appeal of the assessee.

7. Feeling aggrieved by the order of CIT(A), both the assessee and Revenue are in appeals before the Income Tax Appellate Tribunal.

8. Ground No.1 & 8 are general in nature.

Ground No.2 : Disallowance of interest on disputed Govt. duty (Electricity Duty and water charges at Rs.76,56,75,884/-

9. The AO in the assessment order stated that the payments of interest on such dispute of electricity duty and water charges are not ascertained liabilities, and, therefore, such unascertained liabilities are not allowable as business expenditure. The AO further noted that in the earlier years the issue is pending before the higher appellate stage and the matter has not yet been finalised, therefore, disallowed interest

on disputed govt. duty and added to the total income of the assessee. In appeal, the CIT(A) observed that the amount is a provision and has been calculated on the basis of the enhanced electricity duty which itself is in dispute. Since the amount has not been arisen out of any demand raised by any authority and is in the nature of provisions, therefore, the CIT(A) confirmed the disallowance made by the AO.

10. Ld. AR before us submitted that the issue is squarely covered by the decision of the Tribunal in assessee's own case in ITA Nos.106& 110/CTK/2018, order dated 23.09.2019, wherein the Tribunal has followed its earlier order dated 29.06.2018, passed in No.211/CTK/2017.

11. On the other hand the Ld. CIT-DR relied on the order of lower authorities and submitted that it is a government dues and the liability has not been crystallized during the year. The matter is disputed before the Hon'ble High Court. There is no demand notice has been issued by the Government in this regard. In regard to principal amount as well as interest thereon till date, if the principal amount itself is in dispute then how the interest can be allowed, which are unascertained liabilities.

12. The similar issue has been decided by the coordinate bench of the Tribunal in assessee's own case for the assessment year 2014-2015 in ITA Nos.106 & 110/CTK/2018, vide order dated 23.09.2019,

wherein the Tribunal relying its earlier order dated 29.06.2018 passed in ITA No.211/CTK/2017 has allowed the issue in favour of the assessee. The relevant observations of the Tribunal in order dated 29.06.2018 at para 11 as under :-

> *"11. On further appeal to the Tribunal, the ld. AR of the assessee before us submitted that the issue under consideration is squarely covered by the order of this Tribunal in assessee's own case for A.Y. 2006-07 and 2007-08 in ITA Nos. 233, 234/CTK/2011 dated 20.07.2012 and in ITA Nos. 66-68, 459, 511-512/CTK/2003 dated 20.11.2005 in respect of A.Y. 1994-95 to 1998-99 and 2000-01. Ld. AR further stated that the interest liability is as per Statute and has been charged to the Profit & Loss account on accrual basis and comply the mercantile system of accounting, and is allowable u/s 37 of the Act and prayed that addition by the lower authorities be deleted. The ld. AR filed a copy of order of the Tribunal in assessee's own case for the assessment year 2010-2011 in ITA No.352/CTK/2016 and other connected appeals, dated 27.04.2018, wherein the Tribunal has decided the issue in favour of the assessee relying on the earlier decision of the Tribunal in assessee's own case for the assessment years 2006-2007 & 2007-2008 in ITA Nos.233&234/CTK/2011, dated 20.07.2012 and also for the assessment year 2005-06 in ITA No.286/CTK/2013, order dated 11.05.2016. The observations of the Tribunal in this regard are as under:-*
>
> > *"12. We have heard rival submissions and perused the material available on record. We find that the issue under consideration is covered by the order of the Tribunal in assessee's own case for the assessment year 2006-07 & 2007-08 in ITA No.233 & 234/CTK/2011, order dated 20.07.2012 and also for the assessment year 2005-06 in ITA No.286/CTK/2013, order dated 11.05.2016 has followed the above order of Tribunal and decided in favour of the assessee. The observation of the Tribunal for the assessment year 2005-06 are as under :-*
> >
> > > *"4. We have considered rival contentions and found that the issue under consideration is covered by the order of the Tribunal in assessee's own case vide order dated 20-07-2012 for the assessment year 2006-07 & 2007-08, wherein the Tribunal on merit allowed such interest after observing as under :-*
> > >
> > > *6.1With respect to the interest on electricity duty provided for by the assessee was in consequence to the preference and not claimed as prior period*

expenses on the basis of statutory auditors pointing out that the amount held by the assessee to be paid as statutory duty in a bank was for earning interest. Therefore, corresponding payment of interest was to be provided for. When the issue is subjudice, neither the assessee nor the Department may sit on the judgment to award interest. Therefore, interest being a period payment for the impugned year, has been provided for in the impugned Assessment year cannot be subjected to disallowance for claiming deduction u/s.37. The Assessing Officer after having applied his mind allowed the claim in the impugned Assessment Year on both these issues therefore cannot be thrust upon by the learned CIT holding a view other than the view which was legitimately accepted by the Assessing Officer but on the basis of arithmetical finding of the learned CIT which rather leans in favour of the assessee.

5.The issue under consideration are same, respectfully following the order of the Tribunal, we direct the AO to allow assessee's claim of interest insofar as assessee is also offering interest on the amount deposited in the bank account as per the direction of the Hon'ble High Court. When interest on such deposit is brought to tax, there is no reason for disallowing interest payable to Government for non-payment of such duty in Government account.

6.The reasoning given by the AO for disallowing interest on non/delayed payment of water charges are that it was a contingent liability. We found that Tribunal in assessee's own case in earlier years had allowed this claim under similar circumstances and held that interest on unpaid electricity duty and water charges is fully allowable u/s.37 of the Act and provisions of Section 44A of the Act for disallowance is not attracted.

7.It is pertinent to mention here that the ITAT Cuttack Bench in the case of NALCO in the combined order dated 30-11-2005 has held that interest on disputed Electricity Duty are allowable u/s.37 of the Act and further the interest on Electricity Duty, even if a statutory liability, the same do not fall under the ambit of Section 43B of the Act and therefore, even if such interest is not paid the same is not to be disallowed under section 43B.

8.Following the reasoning given hereinabove with regard to the interest on delayed payment of electricity bill, we

> *direct the AO to allow interest on the water bill. We direct accordingly."*
>
> *We respectfully follow the above orders of the Tribunal and direct the AO to allow the claim of the assessee on account of interest on disputed Govt. duty (Electricity duty and water charges) and this ground of assessee is allowed."*
>
> *We respectfully follow the reasoning and observation of the judicial decision and direct the AO to delete the disallowance of interest on disputed Govt. duty (Electricity duty and water charges) and this ground of appeal of assessee is allowed.*

Respectfully following the above observations of the Tribunal, we direct the AO to delete the disallowance made on account of interest on disputed Govt. duty (Electricity duty and Water Charges. Thus, ground No.2 of appeal of the assessee is allowed.

Ground No.3 : Increasing the additions/disallowance under "Peripheral Development Expenses" to Rs.7,25,83,189/-

13. During the course of assessment proceedings, the AO observed that the peripheral development claimed by the assessee are not incurred wholly and exclusively for the business purpose and disallowed the claim. In appeal the CIT(A) observed that the assessee has claimed expenditure of Rs.7,22,76,640/- incurred towards through the corporate office at Bhubaneswar, which cannot be categorized as peripheral development expenses since the same is not covered by the notification of the Government of Odisha and not spent in the periphery of the assessee's industrial establishments. Further the CIT(A) observed that the some of the major expenses claimed by the

assessee incurred through corporate office, are not in the nature of business expenditure and they are in the nature of donations, charity and not connected with the running of assessee's business. Such expenditure is also not periphery development in the districts of Angul and Koraput and not in accordance with the notification of Govt. of Odisha. The assessee before the CIT(A) has also taken alternative plea that benefit u/s.80G of the Act for donations included in PDE which are eligible for such deduction, should be allowed. In this regard, the CIT(A) directed the assessee to claim deduction u/s.80G of the Act before the AO with necessary evidence. Finally, the CIT(A) enhanced the disallowance made by the AO from Rs.50,42,549/- to Rs.7,25,83,189/-.

14. Ld. AR relied reiterated the submissions made before the authorities below and further submitted that out of the total disallowance of Rs.7,25,83,189/- under 'Peripheral Development Expenses', expenditure of Rs.7,22,76,640/- incurred through Corporate Office of the assessee, which is wholly and exclusively for the purpose of its business. The CIT(A) has categorised that the peripheral development expenditure does not cover as per the Govt. of Odisha Notification and the expenses are in the nature of donation, charity and are not connected with the business and the substantial payments

were made to various institutions are also not correct. Further the ld. AR also stated that the peripheral development expenses of the past years incurred by the corporate office has been allowed by the CIT(A) in assessee's own case and the assessee has disclosed these facts in both assessment and in the appellate proceedings. Further the peripheral expenditure was allowed in assessee's own case in ITA No.66-68, 459, 511 & 512/CTK/2003 order dated 30.11.2015 and in subsequent years. To support his view, ld. AR also relied on various case laws, copies of which are filed in the paper book.

15. On the other hand, ld. CIT-DR relied on the CIT(A)'s order and further submitted that the entire expenditure has not been expended as per notification issued by the Govt. of Odisha. The assessee has incurred some expenditure through corporate office which is beyond the radius of 50 K.Ms. from the mines / factory situated. The ld.CIT-DR also drew our attention on the details of expenses incurred by the Corporate Office of Rs.7,22,76,640/- out of which all the expenses relate to either for charity or donation and the measure amount has been given as donation to CM's relief fund and temple and trust. These are not related to exclusively business expenditures of the assessee. Even from the details of the expenditures as narrated by the CIT(A) the employees of the assessee are also not getting any benefits. These

expenditures are not in consonance with the Notification issued by the Government of Odisha dated 15.01.20004 & 20.02.2004 and order No.33167, dated 21.07.2004 issued in P&RE/1-49 by the Additional Secretary to the Government of Odisha, Revenue Department. Such above expenditures are also not for periphery development in the district of Angul and Koraput and not in accordance with the notification issued by the Government of Odisha. The ld. CIT(A) has also found excess claim of Rs.3,06,549/- which is also correct. Therefore, the CIT(A) has righty enhanced the disallowance of peripheral developmental expenses.

16. After considering the submissions of both the parties and perusing the entire material available on record, we find that the assessee has claimed the expenditure towards peripheral development and the AO has made the additions without considering the nature of expenditure and its benefit to the assessee, to which the CIT(A) upheld the same. Ld. AR referred to the paper book and the nature of expenditure incurred by the corporate office. Ld. AR submitted that this issue is covered in favour of the assessee by the earlier order of the Tribunal. During the course of hearing, ld.AR referred to the paper book and submitted that assessee has complete information of the expenditure incurred in peripheral area of various districts and the

area includes Taluka and villages where company's activities are carried out and this expenditure is incurred on the order of the Government of Odisha. It is wholly and exclusively used for the purpose of business. The ld. AR referred to the nature of the expenditure incurred through the corporate office at Bhubaneswar and further submitted that the assessee has evidence to prove the claim. Considering the above facts and submission put forth by the ld. AR of the assessee and findings recorded by the CIT(A) in details, it would be pertinent to reconsider the matter at the level of AO. Therefore, the issue is remitted back to the file of Assessing Officer for re-examination and the assessee is also given liberty to produce supporting evidence with regard to peripheral expenditure before the AO. We also observe that the assessee has taken alternative plea before the CIT(A) that if the peripheral development expenses incurred in the corporate office are not allowed as not incurred for the purpose of business, then it should be allowed the benefit u/s.80G of the Act for the donations included in the peripheral development expenses which are eligible for such deduction. In this regard, we direct the AO to considering the above alternative plea of the assessee on production of supporting documents by the assessee to substantiate the claim for deduction u/s.80G of the

I.T. Act,1961. A reasonable opportunity of being heard is to be provided to the assessee. Thus, ground No.3 is allowed for statistical purposes.

Ground No.4 : Disallowance u/s.40(a)(i) of the Act – Rs.5,58,82,675/-

17. This expenditure claimed by the assessee was disallowed by the AO on the direction of the CIT and in the assessment framed u/s.143(3)/263 of the Act, the AO found that the assessee failed to make TDS from the payment in foreign currency an amount of rupees 27,38,71,725/-. If the assessee fails to make TDS, the expenses booked under such head should be disallowed u/s. 40(a)(ia) in the light of provision of section 9 r.w.s. 1(i) and 1(ii) of the ITAct. As per the AO, the assessee submitted explanation that TDS has been deducted on the foreign payments of Rs.21,79,89,050/- @10% amounting to Rs.2,17,98,905/-. However, the AO observed that the balance payment of Rs.5,58,82,675/- (27,38,71,725 – 21,79,89,050) has not been considered for TDS. After due verification the AO disallowed Rs.5,58,82,675/- u/s.40(a)(ia) of the Act and added back to the total income of the assessee.

18. On appeal, the CIT(A) did not accept the submissions of the assessee and confirmed the findings of the AO.

19. Before us, ld. AR submitted that the amount of Rs.27,38,71,725/- has been picked up by the A.O from the printed Annual reports of NALCO, the data was given under additional information and disclosures as required by the Companies Act, 1956. As per the Companies Act the disclosure of Foreign currency payments are made on 'cash basis', whereas the accounting result as per P&L A/C these are on 'mercantile basis'. Therefore the gross amount of the said Rs.27,38,71,725/- i.e liable for TDS u/s.195 for F.Y.2008-09(Asst, Yr 2009-10) considered by the A.O for the amount disallowed of Rs.5,58,82,675/- u/s.40(a)(ia) of the Act is factually incorrect. The A.O disallowed the aforesaid amount of Rs.5,58,82,675/- computing in his own manner (10% of Rs.27,38,71,725,-21,79,89,050) for which the TDS particular the details has been furnished by NALCO. It is pertinent to note that for making any disallowance/ addition U/S. 40(a)(ia) of the Act for the non deduction of TDS U/S-195 of the Act, It is but necessary that specific non- deduction of TDS U/S-195 of the Act is to be brought on record by the A.O before making any disallowance u/s. 40(a)(ia) of the Act. Further, the ld. AR submitted that the A.O has not specified on which amount the TDS were not made and which are required to be made by NALCO and merely on a working made by A.O himself without any material on record and evidence, but merely on the basis of

assumptions, surmises and conjectures, the disallowance made in order u/s.263/143(3) of the Act is arbitrary, unjustified, erroneous and bad, both in the eye of law and on facts, and hence, ought to be fully deleted Ld. AR also referred to the details of TDS deductions submitted in the form of paper books. Ld. AR further requested for the reverification of the payments made in the foreign currency which are required to be TDS deduction.

20. On the other hand, ld. DR relied on the orders of authorities below. Ld. DR also submitted that the assessee could not explain with regard to payments made to the non-resident, only the payments of details were submitted but nature were not explained. Therefore, the authorities below were justified to disallow the amounts paid.

21. After hearing the submissions of both the parties and perusing the entire material available on record, we find that during the course of assessment proceedings u/s.143(3)/263 of the Act, as per the AO, the assessee could not deduct TDS from the payment in foreign currency. The contention of the assessee before us that the A.O has not specified on which amount the TDS were not made and which are required to be made by NALCO and merely on a working made by A.O himself without any material on record and evidence. Ld. AR also drew our attention to page Nos.281 & 282 of the paper book and submitted

that the assessee has made TDS wherever applicable on the said amount of Rs.27,38,71,725/- on which appropriate tax amounting to Rs.2,17,98,905/- has been deducted and paid to the Central Government, however, the AO without considering the same disallowed Rs.5,58,82,675/-. Accordingly, we are of the opinion that the matter needs to be examined by the AO and, thus we remit this issue to the file of the AO to examine as to whether the assessee has deducted appropriate TDS from the payment in foreign currency as per Section 195 read with Section 9(1)(i) and 9 (1)(ii) of the Income Tax Act, 1961. In this regard, the assessee is directed to submit the relevant documents relating to foreign remittance and TDS and cooperate with the AO for early disposal of the case. Needless to say, the assessee shall be provided a reasonable opportunity of being heard. Thus, ground No.4 is allowed for statistical purposes.

Ground No.5 : Disallowance of provision for Leave Encashment u/s.43B(f) of the Act at Rs.43,44,18,199/-

22. During the course of assessment proceedings, the AO observed that the provision for leave encashment has not been added back to the income as per the provisions of Section 43B of the Act. Therefore, the AO added the unpaid liabilities to the total income of the assessee. In appeal, the CIT(A) upheld the same.

23. Before us, ld. AR submitted that the issue is squarely covered by the decision of the Tribunal in assessee's own case in ITA Nos.106& 110/CTK/2018, order dated 23.09.2019, wherein the Tribunal has followed its earlier order dated 29.06.2018, passed in No.211/CTK/2017, thereby restoring the issue to the file of AO to examine and allow the claim of the assessee. Further the ld. AR submitted that the Hon'ble Supreme Court in the case of Union of India Vs. Exide Industries Ltd. [2020] 116 taxman.com 378 (SC), wherein it is held that the provision of Section 43B(f) of the Act to be constitutionally valid and operative for all purposes.

24. On the other hand, ld.DR relied on the orders of authorities below and submitted that similar amounts were offered to tax by the assessee in some of the earlier assessment years. In support of his arguments he relied on the decision of Hon'ble Supreme Court of India in the case of Union of India vs. Exide industries Ltd. Vs. (2020) 116 taxmann.com 378 and referred to the relevant paragraphs and submitted that it is in favour of revenue, therefore, the order of the authorities below should be upheld.

25. After hearing both the sides and perusing the entire material available on record, we find that this issue has been decided by the coordinate bench of the Tribunal in assessee's own case in ITA

Nos.106& 110/CTK/2018, order dated 23.09.2019, wherein the Tribunal has followed its earlier order dated 29.06.2018, passed in No.211/CTK/2017, thereby restoring the issue to the file of AO to examine and allow the claim of the assessee. The relevant observations of the Tribunal at para 28 read as under :-

> *"28. We have heard rival submissions and perused the material available on record. We find that the Tribunal in assessee's own case for the assessment year 2010-2011 in ITA No.352/CTK/2016 along with other appeals, order dated 27.04.2018 relying on its earlier order has restored the disputed issue to the file of AO. The observations of the Tribunal in this regard are as under :-*
>
> > *"31. We have heard rival submissions and perused the material on record. We found that the similar issue has been decided by the Tribunal in assessee's own case for the assessment years 2007-08 & 2008-2009 in ITA No.343 & 392/CTK/2015, order dated 23.04.2018, wherein the Tribunal has observed as under :-*
> >
> > > *"28. We have heard rival submissions and perused the material on record. The assessee has made the provision for leave encashment and the provision was not added back in the computation of income. As the ld. AR submitted that the above issue is covered by the order of the coordinate bench of the Tribunal in the case of Baitarani Gramya Bank in ITA Nos.318 & 319/CTK/2013 for assessment years 2008-09 & 2009-10, wherein the Tribunal held as under :-*
> > >
> > > > *"19.1The DR also agreed with the submission of ld. AR of the assessee. In the circumstances of the case, we set aside the order of the CIT(A) and remit the matter to the file of the Assessing officer to re-adjudicate the issue in the light of the Hon'ble Supreme Court decision. Hence, this ground is allowed for statistical purposes.*
> > > >
> > > > *20.In the result, appeal for the assessment year 2008-09 is partly allowed for statistical purposes."*
> > >
> > > *29. We considering the ratio of the decision and the facts to the present case, remit this issue to the file of the AO to examine and allow the claim and this ground of appeal is allowed for statistical purposes."*
> >
> > *Respectfully following the order of the Tribunal and we restore this issue to the file of AO to examine and allow the claim of the*

assessee and we allow this ground of appeal of the assessee for statistical purposes."

We follow the reasoning of the Tribunal and accept the judicial precedence and remit the disputed issue to the file of AO to examine and allow the claim of the assessee. Accordingly, this ground of appeal is allowed for statistical purposes."

26. Further, the Hon'ble Supreme Court in the case of Union of India Vs. Exide Industries Ltd. [2020] 116 taxmann.com 378 (SC) has observed in para 42 as under :-

Constitutional validity of clause (f)

- *The approach of the Court in testing the constitutional validity of a provision is well settled and the fundamental concern of the Court is to inspect the existence of enacting power and once such power is found to be present, the next examination is to ascertain whether the enacted provision impinges upon any right enshrined in Part III of the Constitution. Broadly speaking, the process of examining validity of a duly enacted provision, as envisaged under article 13 of the Constitution, is premised on these two steps. No doubt, the second test of infringement of Part III is a deeper test undertaken in light of settled constitutional principles. [Para 11]*

- *In furtherance of the two-fold approach stated above, the Court in State of Madhya Pradesh v. Rakesh Kohli [2012] 21 taxmann.com 255/113 SCL 550 also called for a prudent approach. [Para 12]*

- *In the present case, the legislative power of the Parliament to enact clause (f) in the light of article 245 is not doubted at all. That brings to the next step of examination i.e. whether the said clause contravenes any right enshrined in Part III of the Constitution, either in its form, substance or effect. It is no more res integra that the examination of the Court begins with a presumption in favour of constitutionality. This presumption is not just borne out of judicial discipline and prudence, but also out of the basic scheme of the Constitution wherein the power to legislate is the exclusive domain of the Legislature/Parliament. This power is clothed with power to decide when to legislate, what to legislate and how much to legislate. Thus, to decide the timing, content and extent of legislation is a function primarily entrusted to the legislature and in exercise of judicial review, the Court starts with a basic presumption in favour of the proper exercise of such power. [Para 13]*

- *Generally, the heads of income to be subjected to taxability under the 1961 Act are enumerated in section 14 which starts with a saving clause and expressly predicates that profits and gains of business or profession shall be chargeable to income tax. This general declaration of chargeability is followed by section 145. [Para 14]*

- *Sub-section (1) of section 145 explicitly provides that the method of*

accounting is a prerogative falling in the domain of the assessee and an assessee is well within its rights to follow the mercantile system of accounting. Be it noted that as per the mercantile system of accounting, the assessment of income is made on the basis of accrual of liability and not on the basis of actual expenditure in lieu thereof. The expression "either cash or mercantile system of accounting" offers guidance on the nature of this accounting system. Be that as it may, it is noteworthy that the right flowing from sub-section (1) is "subject to the provisions of sub-section (2)", which unambiguously empowers the Central Government to prescribe income computation and disclosure standards for accounting. Concededly, sub-section (2) is an enabling provision. It signifies that the general principle of autonomy of the assessee in adopting a system of accounting, is controlled by the regulation notified by the Central Government and must be adhered to by the class of assessee governed thereunder. [Para 15]

- *Section 43B, however, is enacted to provide for deductions to be availed by the assessee in lieu of liabilities accruing in previous year without making actual payment to discharge the same. It is not a provision to place any embargo upon the autonomy of the assessee in adopting a particular method of accounting, nor deprives the assessee of any lawful deduction. Instead, it merely operates as an additional condition for the availment of deduction qua the specified head. [Para 16]*

- *Section 43B bears heading "certain deductions to be only on actual payment". It opens with a non-obstante clause. As per settled principles of interpretation, a non obstante clause assumes an overriding character against any other provision of general application. It declares that within the sphere allotted to it by the Parliament, it shall not be controlled or overridden by any other provision unless specifically provided for. Out of the allowable deductions, the legislature consciously earmarked certain deductions from time-to-time and included them in the ambit of section 43B so as to subject such deductions to conditionality of actual payment. Such conditionality may have the inevitable effect of being different from the theme of mercantile system of accounting on accrual of liability basis qua the specific head of deduction covered therein and not to other heads. But that is a matter for the legislature and its wisdom in doing so. [Para 17]*

- *The existence of section 43B traces back to 1983 when the legislature conceptualised the idea of such a provision in the 1961 Act. Initially, the provision included deductions in respect of sum payable by the assessee by way of tax or duty or any sum payable by the employer by way of contribution to any provident fund or superannuation fund. It is noteworthy that the legislature explained the inclusion of these deductions by citing certain practices of evasion of statutory liabilities and other liabilities for the welfare of employees.*

- *With the passage of time, the legislature inserted more deductions to section 43B including cess, bonus or commission payable by employer, interest on loans payable to financial institutions, scheduled banks etc., payment in lieu of leave encashment by the employer and repayment of dues to the railways. Thus understood, there is no oneness or uniformity in the nature of deductions included in section 43B. It holds no merit to urge that this section*

only provides for deductions concerning statutory liabilities. Section 43B is a mix bag and new and dissimilar entries have been inserted therein from time-to- time to cater to different fiscal scenarios, which are best determined by the government of the day. It is not unusual or abnormal for the legislature to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to override regulations or conditions. [Para 18]

- *The leave encashment scheme envisages the payment of a certain amount to the employees in lieu of their unused paid leaves in a year. The nature of this payment is beneficial and pro-employee. However, it is not in the form of a bounty and forms a part of the conditions of service of the employee. An employer seeking deduction from tax liability in advance, in the name of discharging the liability of leave encashment, without actually extending such payment to the employee as and when the time for payment arises may lead to abhorrent consequences. When time for such payment arises upon retirement (or otherwise) of the employee, an employer may simply refuse to pay. Consequently, the innocent employee will be entangled in litigation in the evening of his/her life for claiming a hard-earned right without any fault on his part. Concomitantly, it would entail in double benefit to the employer advance deduction from tax liability without any burden of actual payment and refusal to pay as and when occasion arises. It is this mischief clause (f) seeks to subjugate. [Para 19]*

- *The argument advanced by the respondents that the nature of leave encashment liability is such that it is impossible to make the actual payment in the same year, adds no weight to the claim of invalidity of the clause. It is so because the thrust of the provision is not to control the timing of payment, rather, it is strictly targeted to control the timing of claiming deduction in the name of such liability. The mischief sought to be remedied by this clause, clarifies the position. [Para 20]*

- *Be it noted that the interpretation of a statute cannot be unrelated to the nature of the statute. In line with other clauses under section 43B, clause (f) was enacted to remedy a particular mischief and the concerns of public good, employees' welfare and prevention of fraud upon revenue is writ large in the said clause. Such statutes are to be viewed through the prism of the mischief they seek to suppress, that is, the Heydon's case [1584] 3 Co Rep 7 principle. In CRAWFORD, Statutory Construction (CRAWFORD, Statutory Construction p. 508), it has been gainfully delineated that "an enactment designed to prevent fraud upon the revenue is more properly a statute against fraud rather than a taxing statute, and hence should receive a liberal construction in the government's favour. [Para 21]*

Allegation of non-disclosure of objects and reasons

- *The objects and reasons behind the enactment of a statute signify the intention of the legislature behind the enactment of a statutory provision. Indubitably, the purpose or underlying aim of a law can be discerned when interpreted in the light of stated objects and reasons. Inasmuch as, the settled canon of interpretation is to deduce the true intent of the legislature, as the will of the people is constitutionally bestowed in the legislature. It is true that an express objects and reasons would be useful in understanding*

the import of an enacted provision as and when the Court is called upon to interpret the same. [Para 24]

- *Whereas, when there is no ambiguity about the legislative competence and of the import of the enactment, no rule, authority or convention to support the view that publication of objects and reasons is quintessence for the sustenance of a duly enacted provision has been brought to notice. In fact, objects and reasons feature in the list of external aids to interpretation and can be looked into for the limited purpose in the process of interpretation.*

- *The express objects and reasons, serves a limited purpose of assisting the Court in examining the validity of a provision, especially when the Court is sitting over the interpretation of an ambiguous provision. [Para 25]*

- *Indubitably, when the Court examines the validity of a provision, its primary concern is the literal text of the provision. It is so because the legislature speaks through the text and as long as it is not speaking in an equivocal manner, there is limited space for the Court to venture beyond the text. This constitutes the first test of interpretation, often termed as the literal interpretation. If the text of the provision is unambiguous, the legislative intent gets coalesced and is epitomised therefrom. [Para 26]*

- *In other words, when the textual element of the provision reeks of ambiguity and is susceptible to multiple meanings, the Court enters into a proactive examination to find out the real meaning of the provision. This proactive examination by the Court offers multiple avenues and methods to achieve the ultimate purpose of interpretation. Adverting to the express objects and reasons may be useful for limited purpose to understand the surrounding circumstances at the time of enactment. The Court is not bound by such external elements, as discussed above. Therefore, the presence or absence of objects and reasons has no impact upon the constitutional validity of a provision as long as the literal features of the provision enable the Court to comprehend its true meaning with sufficient clarity. [Para 27]*

- *The Division Bench of the High Court, in the present case, plainly glossed over the fundamental presumption of constitutionality in favour of clause (f) and based its judgment upon the absence of objects and reasons as striking at the root of its validity. This approach is flawed for at least three reasons. First, it steers clear from the necessary attempt to discover any constitutional infirmities in the enacted provision. Second, it makes no attempt to dissect the text of the provision so as to display the need to go beyond the text. Third, it goes into the background of the enactment and ventures into a sphere which is out of bounds for the Court as long as the need for interpretation borne out of any ambiguity arises. [Para 28]*

- *The process of testing validity is not to sneak into the prudence or proprieties of the legislature in enacting the impugned provision. Nor, is it to examine the culpable conduct of the legislature as an appellate authority over the legislature. The only examination of the Court is restricted to the finding of a constitutional infirmity in the provision, as is placed before the Court. Thus, the non-disclosure of objects and reasons per se would not impinge upon the constitutionality of a provision unless the provision is ambiguous and the possible interpretation violate Part III of the*

Constitution. In the absence of any finding of any constitutional infirmity in a provision, the Court is not empowered to invalidate a provision. [Para 29]

- *To hold a provision as violative of the Constitution on account of failure of the legislature to state the objects and reasons would amount to an indirect scrutiny of the motives of the legislature behind the enactment. Such a course of action, is unwarranted. The raison d'etre behind this self-imposed restriction is because of the fundamental reason that different organs of the State do not scrutinise each other's wisdom in the exercise of their duties. In other words, the time-tested principle of checks and balances does not empower the Court to question the motives or wisdom of the legislature, except in circumstances when the same is demonstrated from the enacted law.*

- *The High Court has characterised clause (f) as "arbitrary" and "unconscionable" while imputing it with unconstitutionality. It is pertinent to note that the High Court reaches this conclusion without undertaking an actual examination of clause (f). Instead, the declaration is preceded by an enquiry into the circumstances leading upto the enactment. As discussed above, the constitutional power of judicial review contemplates a review of the provision, as it stands, and not a review of the circumstances in which the enactment was made. Be it noted that merely holding an enacted provision as unconscionable or arbitrary is not sufficient to hold it as unconstitutional unless such infirmities are sufficiently shown to exist in the form, substance or functioning of the impugned provision. No such infirmity has been exhibited and adverted to in the impugned judgment. [Para 30]*

Inconsistency of clause (f) and absence of nexus with section 43B

- *The High Court has supported its finding of invalidity by recording two observations vis-a-vis the previously existing (unamended) clauses of section 43B - first, that clause (f) is inconsistent with other clauses and nature of deduction targeted in clause (f) is distinct from other deductions. Second, that clause (f) has no nexus with the objects and reasons behind the enactment of original section 43B and therefore, the objects and reasons attributed to section 43B cannot be used to deduce the object and purpose of clause (f). [Para 31]*

- *Both the grounds are ill-founded. In the basic scheme of section 43B, there is no direct or indirect limitation upon the power of legislature to include only particular type of deductions in the ambit of section 43B. To say that section 43B is restricted to deductions of a statutory nature would be nothing short of reading the provision in a purely imaginative manner. As already discussed above, from 1983 onwards, section 43B had taken within its fold diverse nature of deductions, ranging from tax, duty to bonus, commission, railway fee, interest on loans and general provisions for welfare of employees. An external examination of this journey of section 43B reveals that the legislature never restricted it to a particular category of deduction and that intent cannot be read into the main section by the Court, while sitting in judicial review. Concededly, it is a provision to attach conditionality on deductions otherwise allowable under the Act in respect of specified heads, in that previous year in which the sum is actually paid irrespective of method of accounting. [Para 32]*

- *Further, it may be noted that the broad objective of enacting section 43B concerning specified deductions referred to therein was to protect larger public interest primarily of revenue including welfare of the employees. Clause (f) fits into that scheme and shares sufficient nexus with the broad objective. [Para 33]*

- *The approach of constitutional courts ought to be different while dealing with fiscal statutes. It is trite that the legislature is the best forum to weigh different problems in the fiscal domain and form policies to address the same including to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to new regulatory measures. In the very nature of taxing statutes, legislature holds the power to frame laws to plug in specific leakages. Such laws are always pin-pointed in nature and are only meant to target a specific avenue of taxability depending upon the experiences of tax evasion and tax avoidance at the ground level. The general principles of exclusion and inclusion do not apply to taxing statutes with the same vigour unless the law reeks of constitutional infirmities. No doubt, fiscal statutes must comply with the tenets of article 14. However, a larger discretion is given to the legislature in taxing statutes than in other spheres.*

- *Viewed thus, the reason submitted by the Division Bench of the High Court in the impugned judgment is untenable. [Para 34]*

Allegation of defeating the dictum in Bharat Earth Movers case

- *The legislature cannot sit over a judgment of this Court or so to speak overrule it. There cannot be any declaration of invalidating a judgment of the Court without altering the legal basis of the judgment as a judgment is delivered with strict regard to the enactment as applicable at the relevant time. However, once the enactment itself stands corrected, the basic cause of adjudication stands altered and necessary effect follows the same. A legislative body is not supposed to be in possession of a heavenly wisdom so as to contemplate all possible exigencies of their enactment. As and when the legislature decides to solve a problem, it has multiple solutions on the table. At this stage, the Parliament exercises its legislative wisdom to shortlist the most desirable solution and enacts a law to that effect. It is in the nature of a 'trial and error' exercise and it must be noted that a law-making body, particularly in statutes of fiscal nature, is duly empowered to undertake such an exercise as long as the concern of legislative competence does not come into doubt. Upon the law coming into force, it becomes operative in the public domain and opens itself to any review under Part III as and when it is found to be plagued with infirmities. Upon being invalidated by the Court, the legislature is free to diagnose such law and alter the invalid elements thereof. In doing so, the legislature is not declaring the opinion of the Court to be invalid. [Para 37]*

- *The instant case was rendered in light of general dispensation of autonomy of the assessee to follow cash or mercantile system of accounting prevailing at the relevant time, in absence of an express statutory provision to do so differently. It is an authority on the nature of the liability of leave encashment in terms of the earlier dispensation. In absence of any such provision, the sole operative provision was section 145(1) that allowed*

complete autonomy to the assessee to follow the mercantile system. Now a limited change has been brought about by the insertion of clause (f) in section 43B and nothing more. It applies prospectively. Merely because a liability has been held to be a present liability qualifying for instant deduction in terms of the applicable provisions at the relevant time does not ipso facto signify that deduction against such liability cannot be regulated by a law made by Parliament prospectively. In matter of statutory deductions, it is open to the legislature to withdraw the same prospectively. In other words, once the Finance Act, 2001 was duly passed by the Parliament inserting clause (f) in section 43B with prospective effect, the deduction against the liability of leave encashment stood regulated in the manner so prescribed. Be it noted that the amendment does not reverse the nature of the liability nor has it taken away the deduction as such. The liability of leave encashment continues to be a present liability as per the mercantile system of accounting. Further, the insertion of clause (f) has not extinguished the autonomy of the assessee to follow the mercantile system. It merely defers the benefit of deduction to be availed by the assessee for the purpose of computing his taxable income and links it to the date of actual payment thereof to the employee concerned. Thus, the only effect of the insertion of clause (f) is to regulate the stated deduction by putting it in a special provision. [Para 39]

- *Notably, this regulatory measure is in sync with other deductions specified in section 43B, which are also present and accrued liabilities. To wit, the liability in lieu of tax, duty, cess, bonus, commission etc. also arise in the present as per the mercantile system, but assessees used to defer payment thereof despite claiming deductions there against under the guise of mercantile system of accounting. Resultantly, irrespective of the category of liability, such deductions were regulated by law under the aegis of section 43B, keeping in mind the peculiar exigencies of fiscal affairs and underlying concerns of public revenue. A priori, merely because a certain liability has been declared to be a present liability by the Court as per the prevailing enactment, it does not follow that legislature is denuded of its power to correct the mischief with prospective effect, including to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to new regulatory measures. Strictly speaking, the Court cannot venture into hypothetical spheres while adjudging constitutionality of a duly enacted provision and unfounded limitations cannot be read into the process of judicial review. A priori, the plea that clause (f) has been enacted with the sole purpose to defeat the judgment of this Court is misconceived. [Para 40]*

- *The position of law discussed above leaves no manner of doubt as regards the legitimacy of enacting clause (f). The respondents have neither made a case of non-existence of competence nor demonstrated any constitutional infirmity in clause (f). [Para 41]*

- *In view of the clear legal position this appeal deserves to be allowed. Accordingly, the impugned judgment of the Division Bench of the High Court is reversed and clause (f) in section 43B is held to be constitutionally valid and operative for all purposes. [Para 42]*

27. Respectfully following the above observations of the Hon'ble Apex Court as well as the coordinate bench of the Tribunal, we remit the issue to the file of AO to examine and allow the claim of the assessee as per Section 43B(f) of the Act in terms of the observations made by the Hon'ble Supreme Court in the case of Exide Industries Ltd. (supra) in this regard. Ground No.4 is allowed for statistical purposes.

Ground No.6 : Additional Depreciation u/s.32(i)(iia) of the Act at Rs.72,49,60,074/-.

28. Ld. AR before us submitted that the assessee is eligible for claim of additional depreciation and the assessee had also substantiated its claim before the lower authorities. Ld. AR relied on the order of the coordinate bench of the Tribunal in assessee's own case for A.Y.2014-2015 in ITA Nos.106/CTK/2018, order dated 23.09.2019. Ld.AR further submitted that the very same issue has been decided by the Hon'ble Gujarat High Court in the case of PCIT Vs. IDMC Ltd. [2017] 78 taxmann.com 285 (Gujarat), therefore, observations of the Hon'ble Gujarat High Court are also squarely applicable in the case of assessee in the present case and the claim of additional depreciation may kindly be allowed. On the other hand, ld. DR relied on the order of AO.

29. After hearing both the parties and perusing the entire material on record along with orders of authorities below, we find that the

assessee has claimed additional deprecation u/s.32(1)(iia) of the Act, however, the AO disallowed the same on account of the fact that the assessee could not produce the particulars/details of actual cost during the course of assessment proceedings. The CIT(A) has dealt with the issue in details and restore the issue to the file of AO for verification of claim of depreciation as per the necessary details to be filed by the assessee to ascertain the date of acquisition and directed the AO to allow the additional depreciation as per the law after such verification. The relevant observations of the CIT(A) read as under :-

> *"5.2 I have considered the matter. Similar issue has been decided by the CIT(A)-II, Bhubaneswar vide her order dt.16.7.2014 in ITA No.0700/2013-14 for the AY 2011-12 with the following observations:*
>
> *"xxx xxx xxx*
>
> *"The appellant company submitted that the majority of the plant and machinery installed in a manufacturing plant like theirs; are commissioned in the premises of the appellant company and are not tailor-made, rather assembled in their premises over a period and commissioned on a specific date. Since date of acquisition of the individual components running in to thousands of numbers and construction and commissioning of the plant itself running over years together, date of acquisition is construed to be the date-put-to-use. The appellant further submitted that additional depreciation has been claimed rightly on the additions to its plants and not in respect of individual machinery as per the provisions of the act. The appellant further submitted full details of plants acquired and installed and the summary statements of particulars of purchase order. The appellant had given an example of the account of work in progress where capitalization has already been made for assets acquired before F/Y. 2005-06. The appellant company emphasized that the assets for which the additional depreciation are claimed have been acquired after 31.03.2005 and assembled over the period and capitalize as and when complete.*
>
> *The AO had referred to the order to the Ld. ITAT for the AY. 2003-04 which was passed before the amendment to the act w.e.f. 01.04.2005. For the AY. 2006-07, the Hon'ble Tribunal have*

> *restored the matter to the file of the AO observing that the AO should find out whether the assets were acquired or installed after 01.04.2005. The AO is therefore once again directed to verify the same and find out whether the main assets to which additions of further assets were made and additional depreciation were claimed have been acquired after 01.04.2005 and allow additional depreciation to such part of the additional assets for which the main assets have been acquired after 01.04.2005."*
>
> *My predecessor has also decided the issue under similar facts and circumstances for the AY 2007-08 vide order dt.7.5.2015 in appeal No.0176/14-15 and for the AY 2008-09 vide order dt.8.6.2015 in appeal No.0544/14-15, directing the AO for necessary verification.* ***The issues being similar in the assessment year, the AO is directed to call for the relevant details from the assessee and after necessary verification, allow additional depreciation as per law on those machineries, the components of which were acquired as well as installed after 1.4.2005.***

30. From the above observations of the CIT(A), we are of the considered opinion, that the CIT(A) has already remitted the issue to the file of AO to allow the claim of the assessee after verification of necessary details. Therefore, any order/direction by us, at this stage, on this issue, would be futile exercise. However, a reasonable order is expected from the AO on the above observations of CIT(A). Thus, ground No.6 is allowed for statistical purposes.

Ground No.7 : Disallowance u/s.43B of the Act – Under 'Electricity Duty' & water charges- Rs.46,28,87,187/-

31. The AO on perusal of financial statements found that the assessee has debited a sum of Rs.127,98,00,241/- to the profit and loss account on account of electricity duty on self generation. Since the assessee deposited an amount of Rs.46,28,87,187/- in the specified account as

per the direction of the Hon'ble High Court and the assessee claimed deductions u/s.43B of the Act. The AO was of the opinion that the amount of Rs.46,28,87,187/- deposited in the bank as per the Direction of the Hon'ble Odisha High Court does not comply the requisite provisions of Section 43B of the Act, and made addition and on appeal the CIT(A) confirmed the disallowance.

32. Ld. AR submitted before us that this issue has already decided by the Tribunal in assessee's own case and the matter is pending before the Hon'ble jurisdictional High Court. On the other hand, ld. DR supported the orders of authorities below and he further submitted that the assessee is making payment on the direction of the Hon'ble jurisdictional High Court without attaining the finality of the case and deposing into the bank account is not covered under section 43B of the Act. The designated bank account is also in the name of NALCO, therefore, it cannot be said that the payment has been made actually for the payment of electricity duty.

33. After hearing both the sides and perusing the entire material available on record, we find that the liability of Rs.46,28,87,187/- under the provisions of Section 43B of the Act disallowed by the AO has already been decided by the coordinate bench of the Tribunal in assessee's own case and matter is pending before the Hon'ble High

Court. The Tribunal in ITA Nos.196&91/CTK/2010, order dated 29.06.2012, para 16 to 23 at pages 10 to 13 has held as under :-

> *"23. We have considered the rival submissions and have perused the material available on record. To set the controversy at rest, we are of the considered view that a disallowance u/s.43B has to be primarily when such electricity duty has been claimed as expenditure in the impugned assessment year. The assessee could not override the Hon'ble High Court directions. The expenditure remained unpaid for both the years in spite of these directions, therefore, was rightly brought to tax by the ld AO u/s.43B, we uphold the confirmation thereof by the ld CIT(A). This ground for both years stands dismissed."*

Respectfully following the decision of the coordinate bench of the Tribunal in assessee's own case for earlier year, we dismiss the ground No.7 of the assessee.

34. Thus, the appeal of the assessee in ITA No.338/CTK/2017 is allowed partly for statistical purposes.

35. Now, we shall decide the appeal of Revenue in ITA No.331/CTK/2017 for the assessment year 2009-2010, wherein the Revenue has raised the following grounds :-

1. *On the facts and in the circumstances of the case, the Ld. CIT(A) is not justified on facts and in law in deleting the addition of Rs.4,95,31,377/- under the head 'revaluation of non moving Stores & Spares'.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) is not justified on facts and in law in deleting the addition of Rs. 2,84,32,895/- u/s. 40(a)(ia) of the I.T. Act, 1961.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) is not justified on facts and in law in deleting the addition of Rs. 3,33,22,664/- made under the head claims, receivables, debts, shortages etc written off. '*
4. *On the facts and in the circumstances of the case and having regard to the findings given by the AO in the assessment order, the*

Ld. CIT(A) ought to have upheld the above additions made by the Assessing Officer.

5. *The appellant craves to alter, amend or add any other ground that may be considered necessary in course of the appeal proceedings.*

36. Ground No.1 is relating to disallowance of the loss claimed on account of re-valuation of non-moving stores and spares. Ld. CIT-DR submitted that the CIT(A) is not justified in deleting the addition made by the AO towards 'disallowance of loss on revaluation of non-moving stores and spares' when the assessee, during the assessment proceedings, could not explain properly, the method adopted for valuation of non moving stores and spares at the rate of 5% of the original cost. Further he submitted that the assessee did not submit the actual date of purchase of the undervalued assets. Upto the assessment year 1997-98 the assessee was valuing the non-moving stores and spares at 80% of the original cost but without giving any reasonable explanation, he is valuing it at 5% of the original cost. The Accounting Standard-1 was relying on by the assessee before the AO does not help the assessee. The policy and practice followed by the Steel Authority of India is a premier manufacturing concern of the country for valuing the non-moving stores and spare parts, is different, which is as under :-

- not moved for 5 years or more	:	25%
- not moved for 10 years or more	:	50%
- not moved for 15 years or more	:	90%
- obsolete/surplus stores and spares	:	90%

In this case, the company is valuing for not moving stores and spares for 5 years or more is valuing at 25% but in the impugned case, the assessee is following 5% which is without the reasonable expenses. Therefore, the policy adopted by the assessee company is highly arbitrary and unreasonable for undervaluing of the non-moving stores and spares. Therefore, the matter should be restored to the AO for explaining the details of under valuing assets.

37. On the other hand, ld. AR relied on the order of CIT(A) and reiterated the submission made before the AO. He further submitted that the CIT(A) has rightly followed its earlier years order and directed the AO to allow the loss on valuation of non-moving stores and spares. Ld. AR further submitted that this Bench of the Tribunal in assessee's own case in ITA Nos.106&110/CTK/2018 for A.Y.2014-2015 has decided the issue relying on its earlier order passed in ITA No.197/CTK/2017, order dated 29.06.2018 wherein the Tribunal has followed the decision rendered in its order for the assessment year 2011-2012. Therefore, appeal of the Revenue deserves to be dismissed.

38. After hearing submissions of the both the parties and perusing the entire material on record as well as orders of authorities below along with the order of the Tribunal on which reliance has been placed by the ld. AR, we found that the Tribunal in assessee's own case in ITA

No.106&110/CTK/2018, order dated 23.09.2019 has already decided the issue against the Revenue confirming the observations made by the CIT(A) thereby deleing the addition made on account of loss on revaluation of non-moving stores and spares. In this order, Tribunal has followed the decision taken in ITA No.197/CTK/2017, order dated 29.06.2018. The relevant observations of the Tribunal read as under :-

> *We have decided this issue in assessee's own case for the assessment year 2011-2012 in ITA Nos.374/CTK/2014, wherein the Tribunal has observed as under :-*
>
> > *"We have decided this issue in appeal of the assessee for assessment year 2011-2012 (ITA No.374/CTK/2014) in favour of the assessee and against the Revenue relying on the decision of the Tribunal in assessee's own case for the earlier assessment years. We follow the same reasoning given in the aforesaid appeal and we do not see any reason to interfere with the order of the CIT(A), who has passed a reasoned. Accordingly, we dismiss this ground of Revenue raised in both the years under consideration."*
>
> *We respectfully follow the decision of the Tribunal in assessee's own case for earlier year and dismiss this ground of appeal of Revenue.*

Following the above observations of the coordinate bench of the Tribunal, we dismiss the ground No.1 raised by the Revenue.

39. With regard to Ground No.2 which is relating to addition of Rs.2,84,32,895/- u/s.40(a)(ia) of the Act, ld. DR submitted that the assessee has failed to deduct the tax at source u/s.194-I of the Act on the above payment to GRIDCO, therefore, the AO has rightly disallowed the above payment u/s.40(a)(ia) of the Act. Accordingly, ld. DR submitted that the addition made by the AO should be restored.

40. On the other hand, ld. AR relied on the order of CIT(A) and submitted that the assessee has paid wheeling charges to GRIDCO and the TDS provisions under Section 194I of the Act does not apply and in the subsequent assessment year the expenditure of wheeling charges where the interpretation was made on applicability of provisions u/s.194-I and 194-J of the Act and the CIT(A) has allowed in assessee's own case in the immediately preceding assessment years. Further, the ld. AR submitted that in the case of recipient of wheeling charges the coordinate bench of the Tribunal in the case of GRIDCO vs. ACIT in ITA No.404/CTK/2011 order dated 07.11.2011 has allowed the claim. Ld. AR of the assessee also relied on the may case laws which have been filed in the paper book and submitted that in those cases it has been held that payment of transmission/wheeling charges, neither attracts the provision of Section 194-I of the Act nor Section 194C & 194J of the Act. Therefore, ld. AR submitted that on the above observations of the Tribunal in its earlier orders, this ground of Revenue may kindly be dismissed.

41. After considering the submissions of both the sides and perusing the entire material available on record, we find that during the course of assessment proceedings the AO found that the assessee has paid wheeling charges for transmission of power which has been paid to

GRIDCO without deducting TDS under the provisions of Section 194I of the Act. The assessee explained before the AO as to why the wheeling charges are paid as per the tariff fixed by the GRIDCO for the transmission of power and submitted that power transmission charges does not attract the provisions of Section 194I and no deduction is made, whereas the AO found the wheeling charges are clearly subject to provisions of Section 194I of the Act as use of transmission network and equipments of GRIDCO attracts TDS deduction u/s.194-I of the Act by the assessee. It was submitted by the ld. AR that wheeling charges does not attract the provision of Section 194-I of the Act as has been held by the coordinate bench of the Tribunal in the case of GRIDCO vs. ACIT in ITA No.404/CTK/2011 order dated 07.11.2011. We have perused the observations of the CIT(A) in this regard and the found that the CIT(A) at para 7.1 has deleted the addition made u/s.40(a)(ia) of the Act after holding as under :-

> *7.1 I have considered the matter with reference to the facts on record and the decisions of various judicial forums on the issue at hand. I find that in the case of GRIDCO Ltd. v. ACIT in ITA No.404/CTK/2011 dt.7.11.2011, the Hon'ble ITAT Cuttack Bench has decided that no tax is deductible u/s. 1941 in the case of payment for wheeling or transmission charges. The ITAT, Lucknow 'A' Bench, in the case of ACIT v. Madhyanchal Vidyut Vitran Nagam Ltd. has rendered similar decision. In the case of CIT v. Maharashtra State Electricity Distribution Co. Ltd. in ITA No. 336 of 2013, the Hon'ble Bombay High Court has also decided that in case of wheeling charges, no TDS is deductible either u/s.1941 or U/S.194J. Since tax is not deductible on the payments made as transmission/wheeling charges, no addition u/s.40(a)(ia) can be made. Accordingly; the addition of Rs.2,84,32,895/- u/s.40(a)(ia) is deleted.*

42. On perusal of the above observations of the CIT(A), we find that the CIT(A) has decided the issue and deleted the addition made by the AO u/s.40(a)(ia) of the Act considering the decision of coordinate bench of the Tribunal in the case of GRIDCO, ITA No.404/CTK/2011, order dated 07.11.2011, in the case of Madhyanchal Vidyut Vitran Nagam Ltd (ITAT Lucknow Bench) and the decision of Hon'ble Bombay High Court in the case of Maharashtra State Electricity Distribution Co. Ltd. in ITA No. 336 of 2013. Ld. DR could not controvert the above findings of the CIT(A). Accordingly, we do not see any good reason to interfere with the above findings recorded by the CIT(A) in this regard and we uphold the same. Thus, ground No.2 of the Revenue is dismissed.

43. Ground No.3 is relating to deletion of addition of Rs.3,33,22,664/- made under the head claims, receivables, debts, shortages etc. written off. In this regard, ld. DR submitted that the assessee could not explain the claim properly before the AO during the course of assessment proceedings,. The assessee has written off of loss on coal without any proper explanation behind the decision and any supporting documents and evidences, to which the ld. CIT(A) has accepted the claim of the assessee by holding that the assessee has proper internal control system and the books of accounts are audited

by a statutory auditor and C&AG auditor. But without considering the coal supply by MCL through the linkage coal and open auction. The supplier of the coal is also government of India enterprises, therefore, there should not be any difference in the supply of coal. therefore, the ld. CIT(A) is not justified deleting the addition made by the AO. Accordingly, ld. DR submitted that the order of the AO should be upheld.

44. On the other hand, the ld. AR of the assessee reiterated the submissions made before the authorities below and relied on the order of CIT(A) to the extent of deleting the addition made on account of claims, receivables, debts, shortages etc. written off. It was also contended by the ld. AR that the amount in question is for shortage in coal written off which is revenue/trading loss, therefore, the CIT(A) has rightly deleted the same. Further, the ld. AR pointed out that shortage of coal worked out to 0.498% of the total coal purchased which is very reasonable in the nature of business of the assessee and also submitted that this fact has also been considered by the CIT(A) while deleting the addition.

45. After hearing the submissions of both the sides and perusing the entire material available on record, we find that the assessee has claimed Rs.3,33,22,664/- on account of claims, receivables, debts and

shortages, etc. written off and the same was considered by the CIT(A) after observing as under :-

> *"8.2 I have considered the matter with reference to the facts on record. It appears that all the relevant details on the loss on account of shortage of coal supplied by MCL through 'linkage coal' and 'open auction' were filed before the AO. These details filed before the AO have been submitted at the time of appeal hearing. On examination of the details, it is seen that the assessee has kept proper records about the loss on account 'of shortage of coal. The assessee has proper internal control system for accounting and finances. The accounts of the assessee are also subjected to audit by the statutory auditors as well as by the C&AG. Going by the details, I find that the loss has been properly quantified and such loss is very much allowable as an expenditure. In view of this, the loss written off on account of coal shortage cannot be disallowed on the flimsy ground that no satisfactory explanation was furnished at the time of assessment. In this view of the matter, the disallowance of Rs.3,33,22,664/-is directed to be deleted."*

46. On perusal of the above observations of the CIT(A), we find that the assessee has purchased coal from Mahanadi Coal Field Limited which is Government of India Enterprises and the assessee after purchasing coal it is transported upto the destination where the coal measurements are taken by the assessee and shortages are also properly recorded but the CIT(A) has not observed as to whether the shortage are claimed by the assessee to the transporters and without examining the above facts the CIT(A) deleted the addition made by the AO, which in our opinion is not plausible. Neither the assessee has made any effort with regard to the above fact nor he has filed any supporting documents or evidence before us. The assessee has just explained before us that the shortage of coal worked out to 0.498% of

the total coal purchased and simply accepted that the above percentage of shortage is very reasonable nor the auditors have made any adverse comments. Stating this fact, the assessee company has kept itself mum. It is also a fact that the coal is not an evaporated item, rather it is solid items for which, the quantity dispatched from the weighbridge at the loading point should be received with the same weight at the weighbridge of the destination point. As per our considered opinion and looking to the facts of the case, the assessee must have claimed to the responsible transporters which is lack in this case. The ld. AR of the assessee was unable to explain about the shortage during the course of hearing before us. What is the internal control system adopted by the assessee is also not explained before us by the assessee. Therefore, the shortage of the coal claimed by the assessee of Rs.3,33,22,664/- is not accepted. Thus, CIT(A) is not justified in deleting the addition made in this regard. Accordingly, we allow the ground No.3 raised by the Revenue.

47. Ground Nos.4 & 5 are general in nature, which require no adjudication.

48. Thus, the appeal of Revenue in ITA No.331/CTK/2017 is partly allowed.

49. Now, we shall take up the appeal of the assessee for assessment year 2015-2016 in ITA No.39/CTK/2019, wherein the assessee has raised the following grounds :-

1. *That the order dated 27.12.2018 passed by the Learned Commissioner of Income Tax (Appeals) [in short **"CIT(Appeals)"],** in so far as sustaining the additions and disallowance made by the Learned Assessing Officer, is based on irrelevant considerations, against the principles of natural justice, contrary to facts, arbitrary, erroneous and bad in law.*
2. ***Disallowance of claim of Addl. Depreciation u/s.32(i)(iia) of the Act- Rs.43,48,202/-***

a. *That the learned CIT (Appeals) has mis-appreciated the facts and the sustaining of disallowance of Rs.43,48,202/- under 'Additional Deprecation u/s.32(l)(iia) of the I.T Act and dismissing the ground of the assessee is contrary to facts, erroneous and bad, both in the eye of law and on facts.*

b. *That the acquisition and installation in respect'New Plants'having been made after 01.04.2005, the claim of Addl. Depreciation of Rs.43,48,202/- u/s.32(i)(iia) of the Act ought to be fully allowed.*

c. *That in similar facts and circumstances, for the Asst. Year 2007-08 and subsequent years upto Asst. Year 2012-13, in assessee's own case, the Jurisdictional ITAT (Hon'ble ITAT Cuttack Bench, Cuttack) having not accepted the findings of the learned CIT (Appeals) in respect of 'Additional Deprecation u/s.32(l)(iia) of the I.T Act, the learned CIT (Appeals) ignoring and not following the order of the Jurisdictional ITAT and in confirming the addition/disallowance of Rs.43,48,202/-under 'Additional Deprecation u/s.32(i)(iia) of the I.T Act is arbitrary, erroneous, and bad, both in the eye of law and on facts and legally untenable and deserves to be set aside on this ground alone.*

d. *That the details in respect of Additions to 'New Plants' having been furnished, the. learned CIT(Appeals) holding that:*

i. *the appellant has failed to furnish the details in the form of dates of acquisition and dates of installation of plant and machineries after 31.03.2005;and*

ii. *that there is no concrete evidence regarding the claim of additional depreciation is on mis-appreciation/ misconstruing the facts, contrary to facts, arbitrary, erroneous and bad, both in the eye of law and on facts.*

e. *That on the facts and in the circumstances the case, the learned CIT(Appeals) ought to have allowed the claim of Addl. Depreciation of Rs.43,48,202/- u/s.32(i)(iia) of the Act.*

3. ***Disallowance of Provision for Leave Encashment'-u/s.43B(f) of the Act - Rs.30,66,15,443/-***

a. *That on the facts and in the circumstances the case, the sustaining of the disallowance of Rs.30,66,15,443/- u/s.43B(f) of the Act and dismissing the ground of the assessee by the learned ClT(Appeals) is erroneous and bad, both in the eye of law and on facts.*

b. *That in similar facts and circumstances, for the Asst. Year 2007-08 and subsequent years upto Asst. Year 2012-13, in assessee's own case, the Jurisdictional ITAT (Hon'ble IT AT Cuttack Bench, Cuttack) having not accepted the findings of the learned CIT (Appeals) in respect of 'Provision for Leave Encashment' u/s.43B(f) of the Act, the learned CIT (Appeals) ignoring and not following the order of the Jurisdictional ITAT and in confirming the addition/disallowance of Rs.30,66,15,443/-under 'Provision for Leave Encashment' u/s.43B(f) of the Act is arbitrary, erroneous, and bad, both in the eye of law and on facts and legally untenable and deserves to be set aside on this ground alone.*

4. ***Disallowance u/s. 14A- Rs.5,47,52,850/-***

a. *That on the facts and in the circumstances the case, the order of the learned CIT (Appeals) in sustaining the disallowance of Rs.5,47,52,850/- u/s.l4A of the Act and dismissing the ground of the assessee is on based on irrelevant considerations, presumptions, conjectures and surmises, without any material evidence on record, contrary to facts, arbitrary, erroneous and bad, both in the eye of law and on facts.*

b. *That in similar facts and circumstances, for the Asst. Year 2011-12, the learned predecessor CIT (Appeals) having fully deleted similar addition u/s. 14A of the Act, the order of the learned CIT (Appeals) in ignoring/not following the order and sustaining the disallowance of Rs.5,47,52,850/- is unjustified, arbitrary, erroneous and bad in law.*

c. *That the assessee having already added sum of Rs.97,150/-u/s.14A of the Act in the computation of income (returned income), Rule 8D is not applicable and the sustaining of the addition of Rs.5,47,52,850/- U/S.14A of the Act is unjustified, arbitrary, contrary to facts, erroneous and bad in law.*

d. *The appellant's computation of the aforesaid Rs.97,150/-u/s. 14A of the Act is based on its books of accounts and is worked out in a reasonable and fair manner, the learned lower authorities have mis-appreciated/misconstrued the same and the disallowance u/s.l4A of the Act is incorrect, arbitrary, erroneous and bad in law.*

e. *That in similar facts and circumstances, for the Asst. Years 2010-11 and 2012-13, in assessee's own case, the Jurisdictional ITAT (Hon'ble ITAT Cuttack Bench, Cuttack) having not accepted the findings of the learned CIT (Appeals) in respect of disallowance U/S.14A of the Act, the learned CIT (Appeals) ignoring and not following the order of the Jurisdictional ITAT and the CIT (Appeals)'s order for Asst. Year 2011-12, in confirming the addition/disallowance of Rs.5,47,52,850/- u/s.14A of the Act is arbitrary, erroneous, and bad, both in the eye of law and on facts*

and legally untenable and deserves to be set aside on this ground alone.

5. <u>Disallowance of claim of Investment Allowance u/s.32AC of Act- Rs.34,12,08,111/-</u>

a. That on the facts and in the circumstances the case, the learned CIT(Appeals) has mis-appreciated the facts and the sustaining of disallowance of claim of Investment Allowance of Rs.34,12,08,111/-u/s.32AC of the I.T Act and dismissing the ground of the assessee is contrary to facts, erroneous and bad, both in the eye of law and on facts.

b. That on the facts and in the circumstances the case, the learned CIT(Appeals) holding that:

i. the details of the assets for the claimed investment allowance u/s 32AC are vague, sketchy, lacks clarity and has no linkage with the assets against which investment allowance u/s 3 2AC of the Act is claimed and cannot be taken as the base for claiming investment allowance;

ii. the appellant could not provide any conclusive evidences to prove its acquisition within the stipulated period 31.03.2013 but before 1.4.2015 neither before the AO nor before her;

iii. the reconciliation of capital works account submitted by assessee for claiming the benefit is not scientifically acceptable, tenable for passing the benefit; and

iv. the disallowance made by the AO u/s 3 2AC is in accordance with law.

is on mis-appreciation /misconstruing the facts, contrary to facts, arbitrary, erroneous and bad, both in the eye of law and on facts.

c. That on the facts and in the circumstances the case, the learned CIT(Appeals) ought to have allowed the claim of Investment Allowance of Rs.34,12,08,111/- u/s.32AC of the ITAct.

6. That the appellant craves leave to add, supplement, modify the grounds here-in-above before or at the hearing of the appeal.

50. Ground No.1 & 6 are general in nature. The issue raised by the assessee in Ground No.2 in respect of additional depreciation has already been decided by us while deciding the appeal of the assessee for A.Y.2009-2010 in ITA No.338/CTK/2017, wherein we have observed that the CIT(A) has already remitted the issue to the file of AO to allow the claim of the assessee after verification of necessary details, therefore, any order/direction by us, at this stage, on this issue, would

be futile exercise. However, a reasonable order is expected from the AO on the above observations of CIT(A). Accordingly, the issue raised in ground No.1 being similar to the issue decided by us in ITA No.338/CTK/2017, therefore, our observations made therein shall apply *mutatis mutandis* to this ground also. Thus, ground No.2 is allowed for statistical purposes.

51. Ground No.3 relates to disallowance of provision for leave encashment u/s.43B(f) of the Act. This issue has also been decided by us while deciding the appeal of the assessee for A.Y.2009-2010 in ITA No.338/CTK/2017, wherein we have observed that the issue is squarely covered by the decision of the Tribunal in assessee's own case in ITA Nos.106& 110/CTK/2018, order dated 23.09.2019, wherein the Tribunal has followed its earlier order dated 29.06.2018, passed in No.211/CTK/2017, thereby restoring the issue to the file of AO to examine and allow the claim of the assessee. Accordingly, the issue raised in ground No.3 being similar to the issue decided by us in ITA No.338/CTK/2017, therefore, our observations made therein shall apply *mutatis mutandis* to this ground also. Thus, ground No.3 is allowed for statistical purposes.

52. With regard to ground No.4, in respect of disallowance u/s.14A of the Act, the ld.AR submitted that this issue has already been decided by

the Tribunal in assessee's own case for A.Y.2014-2015 in ITA No.106&110/CTK/2018, vide order dated 23.09.2019, therefore, following the observations made by the Tribunal in the said order, this ground of assessee deserves to be allowed.

53. We have also gone through the order dated 23.09.2019 passed by the Tribunal in ITA Nos.106&110/CTK/2018, wherein the Tribunal while deciding the similar issue has observed as under :-

> *11. Invoking the provisions of Section 14A r.w.Rule 8D, the AO has made the disallowance of Rs.6,82,43,072/- by observing that the disallowance suo-moto made by the assessee is very less compared to the administrative and employee cost devoted to earn the exempt income. In appeal, the CIT(A) has confirmed the disallowance as there may not be any direct expense and that the assessee has not made any interest payments related to earning of exempted dividends and accordingly, the only way disallowance can be computed proportionately as per Rule 8D(2)(iii) of I.T.Rules.*
>
> *12. Ld. AR before us submitted that the assessee has already added the sum of Rs.82,378/- in the computation of income with the (return of income) u/s.14A of the Act in respect of expenses incurred relating to its exempted income and Rule 8D is not applicable. Ld. AR further submitted that this issue has been decided by the Tribunal in ITA No.211/CTK/2016 along with other connected appeals, order dated 29.06.2018 for the assessment year 2013-2014. On the other hand, ld. DR relied on the order of AO.*
>
> *13. We find that this issue has been decided by the Tribunal in assessee's own case for the assessment year 2010-2011 in ITA No.211/CTK/2016 along with other connected appeals, order dated 29.06.2018 for the assessment year 2013-2014, wherein the Tribunal relying its earlier order dated 27.04.2018, passed in ITA No.352/CTK/2016 for the assessment year 2010-2011 along with other connected appeals has observed as under :-*
>
> > *22. From the above judicial decisions, we find that the Tribunal has restored the disputed issue to the file of AO for re-examination and re-verification and apply the provisions of Section 14A r.w.rule 8D and in the instant case, the issue being similar, we find that the AO has not complied with the mandatory requirement of Section 14A*

> *(2) of the Act read with Rule 8D (1) (a) of the Rules and we respectfully follow the above judicial decision of the Tribunal and remit the disputed issue to the file of AO for re-examination and verification and to decide the issue on merits after complying the mandatory requirement of the provisions of Section 14A of the Act and this ground of appeal is allowed for statistical purposes.*
>
> *14. From the orders both the authorities below, we observe that the assessee is earning income under different heads, as mentioned above. During the year, the assessee has received dividend of Rs.110,068,076/- and claimed such income as exempt income. The assessee has only made disallowance at Rs.1,20,828/- u/s.14A to earn the exempt income. The Assessing Officer has applied section 14A read with Rule 8D and disallowed the expenditure as per formula provided under rule 8D. The assessee is stated to have made no fresh investments out of borrowed funds. The Assessing Officer appears to have calculated the disallowance as per Rule 8D(2)(iii) observing that administrative expenses cannot be denied to earn exempt income. We, however, find that the Assessing Officer has considered average total investment appearing on the first day and last day of the financial year, which in our opinion is not justified. These investments may also include such investments from which no exempt income would have been earned by the assessee. As is clear from the Rule itself, the average of only such investments have to be taken into account, which yielded the income not forming part of the total income. Therefore, the AO was required to work out the average of such investment, the income from which did not form part of the total income instead of total value of investment. For this view, our stand is fortified by the decision of Special Bench in the case of ACIT vs. Vireet Investment (P) Ltd., (2017) 82 Taxman.com 415 (Delhi Trib.)(SB). None of the parties before us, however, have laid any details to examine as to which of the investments have yielded such income which did not form part of the total income. We, therefore, restore the matter back to the file of the Assessing Officer for calculating the disallowance u/s. 14A read with Rule 8D afresh, in the light of observations made in the body of this order above. Accordingly, ground No.4 is allowed for statistical purposes.*

Respectfully following the above observations of the Tribunal, we also restore this issue to the file of AO for calculating the disallowance u/s.14A read with Rule 8D afresh in the light of the observations made by us in the earlier order as quoted above. Thus, ground No.4 is allowed for statistical purposes.

54. **Ground No.5 relates to disallowance of claim of investment allowance u/s.32AC of the Act.**

55. During the course of assessment proceedings, the AO has noticed that the assessee has claimed deduction of Rs.34,12,08,111/- u/s.32AC of the I.T. Act by way of filing of revised return. The AO has assessed on the basis of revised return filed by the assessee. In the revised return the assessee claimed deduction @15% of Rs.227.47 crores on new plant and machinery installed during the year. In this regard, the AO asked the assessee to justify the claim made by him. In this regard, the assessee submitted detailed written submission before him , which has been incorporated by the AO in its assessment order but the AO was not satisfied from the submissions of the assessee as required by him, which is clear from as per para No.10.1 to 10.6.10. He has issued some questionnaires to the assessee for justifying the claim which are as under :-

1. *Whether the assessee is a company or not.*
2. *Whether the company is manufacturing of an article or thing or not.*
3. *Whether the assets in question are used by the assessee in manufacture of the company or not.*
4. *Whether the assets for which the benefit is claimed, acquired and installed during the period specified to the provision u/s.32AC(1)(b)(1.4.2013 to 31.3.2015)*

In examination to the above points, the AO observed that the first three points are established and does not need any elaboration. It was also

found by the AO that the addition/installation of assets are also prima facie supported by the Tax Audit report which may be taken as a base for ascertaining the installation of asset as per para No.10.6.1. On being asked by the AO, the assessee produced a reconciliation of CWIP claiming that the assets acquired during and after 01.04.2013 and installed during the current year. Finally, the AO found that the assessee in his claim for the year has not complied to the requirement of acquisition of assets. Further the AO asked the assessee for details of assets, year of placement of order, date(s) of acquisition of assets and other details in support of their claim, which was partly complied by the assessee but in majority of the cases he noticed as under :-

> *a. In majority of the cases, work orders/contracts placed much before that times stipulated u/s.32AC 1 i.e. 1.4.2013. This prima facie establishes that the acquisition of assets must have started much before, in the absence of a conclusive proof otherwise.*
>
> *b. On query, the assessee also couldn't provide conclusive evidence to prove its acquisition, within the stipulated period, which could stand in the test of law (as provided u/s.32AC(1)(b).*

The AO observed that the provisions of law, *inter alia,* other requirements does not entitled one to claim investment allowance on assets, acquisition of which does not happen within the stipulated period of 01.04.2013 and 31.03.2015. Accordingly, the AO disallowed

the claim of the assessee under the head investment allowance and added to the total income of the assessee.

56. In appeal, the CIT(A) observed that the details of the assets against which the assessee has claimed investment allowance u/s.32AC of the Act are vague, sketchy, lacks clarity, and has no linkage with the assets against which investment allowance u/s.32AC of the Act is claimed, therefore, the same cannot be taken as the base for claiming investment allowance. Accordingly, the CIT(A) has confirmed the action of the AO.

57. Ld. AR before us reiterated the submissions made before both the authorities below and submitted that provisions of section 32AC of the Act stipulates that both acquisition and installation of any eligible Plant & Machinery have to be taken place on or after 1.4.2013 and on installation, the assessee is entitled to claim investment allowance. The assessee for the assessment year 2015-2016 has claimed investment allowance for the first time although the provisions of Section 32AC of the Act came into force with effect from 1.4.2014 i.e A.Y. 2014-15, because of the fact that the Capital work In Progress(CWIP) of the assessee company as on 1.4.2013 stood at Rs.714.86 crore and therefore, all the acquisition made upto 31.3.2013, has been excluded from the purview of claim of deduction under investment allowance

u/s.32AC of the Act, thus, the assessee claimed only on the Plant & Machinery i.e. acquired and installed on or after the said date of 1.4.2013. This fact was also brought before the Assessing Officer during the course of assessment which the AO has reproduced the same in page 30 as under :-

(Rs.)

Particulars	Amt. in Crore
WIP as on 31.03.13	714.86
Less: Additions in 13-14	612.24
Balance WIP from 1.4.13	102.62
Additions in 14-15	329.46
(Balance figure of Addition after excluding fully WIP figure as of 31.03.13)	226.84
Claimed by Assessee for Investment allowance	227.47

It was also contended by the ld. AR of the assessee that during the financial year 2013-2014 relevant to assessment year 2014-2015 on which no investment allowance has been claimed by the assessee. Further, the ld. AR of the assessee relied on the assessee's own case for the assessment year 2005-2006, wherein in similar circumstances for the purpose of claim of additional depreciation u/s.32(1)(iia) of the Act, wherein similar stipulation of both acquisition and installation on or after 1.4.2002 was envisaged and the coordinate bench of the Tribunal has accepted the same. Ld.AR further submitted that the Hon'ble Gujarat High Court in the case of PCIT Vs. IDMC Ltd. [2017] 393 ITR 441 (Gujarat), has held that the additional depreciation is a

beneficial provision and has to be interpreted purposefully and accordingly even if acquisition has taken place in a previous year when the provisions of Section 32(1)(iia) of the Act has not come into effect but installation of Plant & machinery has taken place after the said date, additional depreciation claimed is allowable u/s.32(1)(iia) of the Act. Therefore, ld. AR submitted that the provisions of Section 32AC and additional depreciation u/s.32(1)(iia) of the Act, being *pari materia*, therefore, the claim of the assessee of investment allowance u/s.32AC of the Act deserves to be allowed.

58. On the other hand, ld. DR, at the outset of his argument, firstly he vehemently challenged the claim of the assessee by way of filing of revised return and submitted that there must be mistake in the original return filed by the assessee due to bonafide mistake which is not in this case, therefore, the claim made by the assessee u/s.32AC of the Act should not be accepted. In support of his arguments, he relied on the decision of Hon'ble Gauhati High Court in the case of Sunanda Ram Deka Vs. CIT, [1994] 210 ITR 988 (Gau). Further he relied on the orders of authorities below and submitted that the assessee also could not provide any conclusive evidence to prove its acquisition within the stipulated period i.e. after 31.03.2013 but before 01.04.2015, neither before the AO nor before the CIT(A), to satisfy the provisions of Section

32AC(1)(b) of the Act. It was further submitted by the ld. DR that reconciliation of capital work account for claiming the benefit is not scientifically acceptable for passing the benefit. Further the details provided has no linkage with the assets against which the investment allowance is claimed, therefore, the same cannot be taken as the base for claiming the investment allowance u/s.32AC of the Act. As per this section the assessee has to fulfil twin conditions, i.e. acquired and installed during the period from 01.04.2013 to 31.03.2015 but the assessee was unable to provide the details for claiming the deduction as per the Section 32ACof the I.T.Act. He has simply filed a reconciliation statement before the AO, which should not be accepted. He further submitted that in the tax audit report the installation of new machineries has not been given separately. The ld. CIT-DR submitted that the assessee is not entitled to claim investment allowance on assets, acquisition of which does not happen within the stipulated period of 01.04.2013 and 31.03.2015. Further he submitted that a large amount of stores and spares has been undervalued i.e. 5% of the cost for more than 5 years lying with the stock of the assessee, which may have been used for the purpose of capital work-in-progress, therefore, it would amount to double deduction, which needs to be verified by the Assessing Officer regarding the date of purchase of the assets which

has been used by the assessee as a capital work for claiming deduction u/s.32AC of the Act. These details were not provided at any level of assessment proceedings as well as the appellate proceedings. It was also contended by the ld. CIT-DR that the case laws relied on by the ld. AR of the assessee are not applicable in the present facts of the case. Therefore, the ld. DR submitted that the issue should be restored to AO for fresh adjudication.

59. On the rejoinder, the ld. AR of the assessee submitted that the revised return was filed as per the Income Tax Act. There was a bonafide claim made in the revised return of income, for which was legally entitled to claim deduction u/s.32AC of the I.T.Act. It was also contended by the l d. AR of the assessee that due to the mistake of the tax consultant in not claiming the deduction in the original return of income, for which the assessee was legally entitled, therefore, the assessee shall not be deprived of its benefit available to it legally. The assessee should not suffer due to the mistake of the tax consultant at the filing of original return of income or any other mistakes. The assessee has filed return of income before the competition of the assessment which is as per the Income Tax Act. The case laws relied on by the ld. CIT-DR are not applicable in the present case of the assessee.

60. After hearing both the sides and perusing the entire material available on record in regard to fresh claim made by the assessee u/s.32AC of the Act by way of filing of revised return of income, we observe from the assessment order that the AO has accepted the revised return of income filed by the assessee and has disallowed fresh claimed made by the assessee as per Section 32AC of the Act. The ld. CIT-DR has raised this issue before us without taking any grounds in his appeal or by way of filing any cross objections regarding the revised return filed by the assessee. It was the bonafide claim made by the assessee which is legally if he has fulfilled entitled as per Section 32AC of the Income Tax Act. We also noted that the revised return was filed by the assessee on 29.03.2017, whereas the assessment proceedings have been completed 30.03.2017. Therefore, it is within the purview of the Income Tax Act. We found substance on the submission of the ld. AR in this regard, therefore, the arguments advanced by the ld. CIT-DR on this issue cannot be accepted.

61. With regard to arguments advanced by both the sides in respect of claiming of deduction u/s.32AC of the Act, we find that the assessee before the AO has produced a reconciliation of CWIP claiming that the assets acquired during on or after 01.04.2013 and installed during the current year. Before the Assessing Officer the assessee could not fulfill

the requirements made by the AO which has been narrated by the AO at para No.10.6.3 of the assessment order. We also found substance on the arguments advanced by the ld. CIT-DR. For better appreciation of the claim made by the assessee, we are going to reproduce the commentaries on Finance Act, 2013 by which this new section has been inserted which reads as under :-

5.1 Investment Allowance for Manufacturing Companies for Investment in new Plant and Machinery [New Section 32AC]

In Paras 59 and 136 of his Speech moving the Finance Bill, 2013, the Finance Minister announced an investment allowance at the rate of 15% to a manufacturing company that invests more than Rs.100 crores in new plant and machinery during the period 1.4.2013 to 31.3.2015. This investment allowance will be in addition to the current rates of depreciation. Accordingly, the Finance Act, 2013 inserts new section 32AC 'Investment in new plant or machinery' with effect from 1-4-2014.

5.1-1 Condition to be satisfied for availing investment allowance deduction

To avail benefit of the investment allowance incentive under new section 32AC, following conditions need to be satisfied by the assessee:

Assessee is a company.
Assessee-company is engaged in the business of manufacture or production of any article or thing.
*Assessee acquires and installs new asset (see **para 5.1-2**) after 31-3-2013 but before 1-4-2015 (see **para 5.1-3**).*
Aggregate amount of cost of such new assets acquired and installed after 31-3-2013 but before 1-4-2015 should exceed Rs. 100 crores.

If above conditions are satisfied, then, there shall be allowed :

for assessment year 2014-15, a deduction of 15% of aggregate amount of actual cost of new assets acquired and installed during the financial year 2013-14, if the cost of such assets exceeds Rs. 100 crore;
for assessment year 2015-16, a deduction of 15% of aggregate amount of actual cost of new assets, acquired and installed during the period beginning on 1-4-2013 and ending on 31-3-2015, as reduced by the deduction allowed, if any, for assessment year 2014-15.

Illustration 1

ABC Ltd., a manufacturing company, acquires and installs new plant and machinery of Rs. 300 crores during financial year 2013-14 and Rs. 200 crores during financial year 2014-15.

In this case, deduction will be allowed as under:

	Deduction that will be allowed for assessment year 2014-15 in terms of new section 32AC(1)(a)=15% of Rs. 300 crores = Rs. 45 crores
	Deduction that will be allowed for assessment year 2015-16 in terms of new section 32AC(1)(b)

Rs. 75 crores
Rs. 45 crores
Rs. 30 crores

Illustration 2

ABC Ltd., a manufacturing company, acquires and installs new plant and machinery of Rs. 100 crores during financial year 2013-14 and Rs. 200 crores during financial year 2014-15.

In this case, deduction will be allowed as under:

		No deduction under section 32AC(1)(a) for assessment year 2014-15 as investment during financial year 2013-14 does not exceed Rs. 100 crores
		Total investment for both financial years 2013-14 & 2014-15 exceeds Rs. 100 crores.

		Therefore, deduction allowed in assessment year 2015-16 shall be as under :
15% of Rs. 300 crores		*Rs. 45 crores*
Less: Deduction allowed in assessment year 2014-15		*Nil*
Deduction allowable in assessment year 2015-16		*Rs. 45 crores*

Illustration 3

What will be the amount of investment allowance under section 32AC in the following cases ?

Actual cost of new asset acquired and installed during previous year 2013-14 (A)
Actual cost of new asset acquired and installed during previous year 2014-15 (B)

Deduction under section 32AC for assessment year 2014-15
Whether deduction available? i.e. whether actual cost of new asset acquired and installed during previous year 2013-14 exceeds Rs. 100 Cr
Deduction
Deduction under section 32AC for assessment year 2014-15
Actual cost of assets installed between 1-4-2013 and 31-3-2015 (C)
Whether deduction available ? i.e. whether (C) exceeds Rs. 100 Cr
15% of (C) (D)
Deduction allowed in assessment year 2014-15 (E)
Deduction allowed in assessment year 2015-16 (F)=(D)-(E)

5.1-2 New asset

The phrase 'new asset' has been defined as new plant or machinery but does not include—
any plant or machinery which before its installation by the assessee was used either within or outside India by any other person;
any plant or machinery installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house;
any office appliances including computers or computer software;
any vehicle;
ship or aircraft; or
any plant or machinery, the whole of the actual cost of which is allowed as deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head 'Profits and gains of business or profession' of any previous year.

5.1-3 Acquires and installs new asset after 31-3-2013 but before 1-4-2015

The new asset should be both acquired ***and*** *installed after 31-3-2013 but before 1-4-2015. If both acquisition and installation are not completed during the said period, deduction will not be allowable. This is clear from the ITAT's ruling in International Cars & Motors Ltd. v. ITO [2013] 30 taxmann.com 5 (Delhi - Trib.) in the context of the phrase 'acquired and installed after 31-3-2005' in section 32(1)(iia) dealing with additional depreciation, the Tribunal held as under:*

On the plain reading of these provisions it is obvious and apparent that both the words "acquired" and "installed" are linked with "and". Thus requirement of both these words cannot be seen fulfilled even if either of the two is only fulfilled. In other words both the "acquisition" and "installation" of the new machinery or plant are required to be made after 31-3-2005 by an assessee engaged in the business of manufacture or production of an article or thing.
There is no doubt that incentive provisions of the Act should be read liberally.
However, that does not mean that liberal approach should be applied at the cost of literal and obvious meaning of the statute, fulfilment of which is the primary requirement to qualify for the benefit of claimed depreciation.
Liberal approach is required to be given while interpreting a provision, where possibility of more than one interpretations is there and one of them appears favourable to the assessee.
In the present case when the requirement of fulfilment of the conditions of acquisition and installation to grant the benefit of the claimed additional depreciation is so obvious and apparent that there is no scope of different interpretation that acquisition and installation should not be read together and simultaneously.
The purpose of the word "acquisition" and "installation" may be different but both are required to be fulfilled only after 31-3-2005 to make the assessee eligible for the benefit of the claimed additional depreciation u/s 32(1)(iia) of the Act.

Thus, both acquisition and installation should be completed in the period 1-4-2013 to 31-3-2015. If any deduction is to be availed in assessment year 2014-15, the aggregate cost of new assets acquired and installed during 1-4-2013 to 31-3-2015 should exceed Rs. 100 crores. However, 'acquires and installs' does not suggest 'put to use' or 'commences production'.

5.1-4 Five year lock-in-period in respect of new assets

If any new asset acquired and installed by the assessee is sold or otherwise transferred, except in connection with the amalgamation or demerger, within a period of five years from the date of its installation, the amount of deduction allowed in respect of such new asset shall be deemed to be the income of the assessee chargeable under the head "Profits and gains of business or profession" of the previous year in which such new asset is sold or otherwise transferred, in addition to taxability of gains, arising on account of transfer of such new asset.

Where the new asset is sold or otherwise transferred in connection with the amalgamation or demerger within a period of five years from the date of its installation, the restrictions on non-transfer within 5 years shall apply to the amalgamated company or the resulting company, as the case may be, as they would have applied to the amalgamating company or the demerged company.

62. As per our considered opinion, this new incentive section have been inserted in the Income Tax Act to encourage substantially investment in plant and machinery which will result in a increased capital flow to the manufacturing sector for acquired and installed during the period from 01.04.2013 to 31.03.2015. While introducing this section the decision of Hon'ble coordinate bench of ITAT Delhi in case of *International Cars & Motors Ltd.* v. ITO [2013] 30 taxmann.com 5 (Delhi - Trib.) has been considered. Respectfully following the above decision of the Tribunal, and the commentaries of the Finance Act as reproduced hereinabove, we think it fit to send back to the file of AO for re-examination of the claim made by the assessee u/s. 32AC of the I.T.Act after considering the above commentaries of the Finance Act and the decision of the coordinate bench of the Tribunal. The assessee is also directed to provide the necessary details for fulfilling the above twin conditions in the light of the above commentaries and the decision of the coordinate bench of the Tribunal, quoted supra. Needless to say, that reasonable opportunity of being heard be given to the assessee.

Thus, this ground of appeal of the assessee is allowed for statistical purposes.

63. Thus, ITA No.39/CTK/2019 is allowed for statistical purposes.

64. Now, we shall take up the appeal of the Revenue in ITA No.69/CTK/2019 for the assessment year 2015-2016, wherein the Revenue has raised the following grounds :-

1. *The order of the Ld. CIT(A) is erroneous on facts and in law.*
2. *On the facts and the circumstances of the case and in law, ld. CIT(A) is not justified in deleting the addition of Rs. 7,09,23,893/- made by the AO towards 'disallowance of loss on revaluation of non-moving stores and spares' ignoring the fact that the claim of the assessee was not based on any sound accounting principles?*
3. *On the facts and the circumstances of the case and in law, ld. CIT(A) is not justified in deleting the addition of Rs.110,03,59,666/- made on account of "interest on disputed Govt, dues (Water Charges)"?*
4. *The appellant craves to alter, amend or add any other ground that may be considered necessary in course of the appeal proceedings.*

65. Ground Nos.1 & 4 are general in nature. Ground No.2 relates to deleting the addition of Rs.7,09,23,893/- made by the AO on account of disallowance of loss on revaluation of non-moving stores and spares.

66. We have already decided this issue while deciding the appeal of Revenue for assessment year 2009-2010 in ITA No.331/CTK/2017, wherein we have observed that the coordinate bench of the Tribunal in assessee's own case in ITA No.106&110/CTK/2018, order dated 23.09.2019 has already decided the issue against the Revenue confirming the observations made by the CIT(A) thereby deleing the

addition made on account of loss on revaluation of non-moving stores and spares. In this order, Tribunal has followed the decision taken in ITA No.197/CTK/2017, order dated 29.06.2018. Respectfully following the observations of the coordinate bench of the Tribunal in the said appeal, we dismiss the ground No.2 raised by the Revenue.

67. Ground No.3 relates to deleting the addition of Rs.110,03,59,666/- by the CIT(A) which was made by the AO on account of interest on disputed Govt. dues (Water Charges).

68. We have already decided this issue while deciding the appeal of assessee for assessment year 2009-2010 in ITA No.338/CTK/2017, wherein we have observed that the coordinate bench of the Tribunal in assessee's own case in ITA Nos.106& 110/CTK/2018, order dated 23.09.2019, has followed its earlier order dated 29.06.2018, passed in No.211/CTK/2017 wherein the claim of the assessee on account of interest on disputed Govt. duty (Electricity duty and water charges) was allowed. The CIT(A) has considered the above observations of the Tribunal and deleted the addition made in this regard. Accordingly, we do not see any reason to interfere in the findings recorded by the CIT(A) and we uphold the same. Hence, ground No.3 of Revenue is dismissed.

69. Thus, ITA No.69/CTK/2019 filed by Revenue is dismissed.

70. Now, we shall take up the appeal of the assessee filed for assessment year 2016-2017 in ITA No.01/CTK/2020, wherein the assessee has raised the following grounds :-

1. *That the order dated 21.10.2019 passed by the Learned Commissioner of Income Tax (Appeals) [in short "CIT(Appeals)"], in so far as sustaining the additions and disallowance made by the Learned Assessing Officer, is based on irrelevant considerations, against the principles of natural justice, contrary to facts, arbitrary, erroneous and bad in law.*

2. *Disallowance of claim of Addl. Depreciation u/s.32(i)(iia) of the Act- Rs. 88,15,717/-*

a. *That the learned CIT (Appeals) has mis-appreciated the facts and the sustaining of disallowance of Rs.88,15,717/- under 'Additional Deprecation u/s.32(l)(iia) of the I.T Act and dismissing the ground of the assessee is contrary to facts, erroneous and bad, both in the eye of law and on facts.*

b. *That the acquisition and installation in respect 'New Plants' having been made after 01.04.2005, the claim of Addl. Depreciation of Rs.88,15,717/- u/s.32(i)(iia) of the Act ought to be fully allowed.*

c. *That in similar facts and circumstances, for the Asst. Year 2007-08 and subsequent years up to Asst. Year 2014-15, in assesse's own case, the Jurisdictional IT AT (Hon'ble ITAT Cuttack Bench, Cuttack) having not accepted the findings of the learned CIT (Appeals) in respect of 'Additional Deprecation u/s.32(l)(iia) of the I.T Act, the learned CIT (Appeals) ignoring and not following the order of the Jurisdictional ITAT and in confirming the addition/disallowance of Rs.88,15,717/-under 'Additional Deprecation u/s.32(l)(iia) of the I.T Act is arbitrary, is erroneous and bad, both in the eye of law and on facts and legally untenable and deserves to be set aside on this ground alone.*

d. *That the details in respect of Additions to 'New Plants' having been furnished, the. learned CIT(Appeals) holding that:*

i. *the appellant has failed to furnish the details in the form of dates of acquisition and dates of installation of plant and machineries after 31.03.2005;and*

ii. *that there is no concrete evidence regarding the claim of additional depreciation is on mis-appreciation / misconstruing the facts, contrary to facts, arbitrary, erroneous and bad, both in the eye of law and on facts.*

e. *That on the facts and in the circumstances the case, the learned CIT(Appeals) ought to have allowed the claim of Addl. Depreciation of Rs.88,15,717/- u/s.32(i)(iia) of the Act.*

3. *Disallowance u/s. 14A- Rs.4,57,03,000/-*

a. *That on the facts and in the circumstances of the case, the order of the learned CIT (Appeals) in sustaining the disallowance of Rs.4,57,03,000/- u/s.l4A of the Act and dismissing the ground of the assesse is based on irrelevant considerations, presumptions, conjectures and surmises, without any material evidence on record, contrary to facts, arbitrary, erroneous and bad both in the eye of law and on facts.*

b. *That in similar facts and circumstances, for the Asst. Year 2011 -12, the learned predecessor CIT (Appeals) having fully deleted similar addition u/s. 14A of the Act, the order of the learned CIT (Appeals) in ignoring/not following the order and sustaining the disallowance of Rs.4,57,03,000/- is unjustified, arbitrary, erroneous and bad in law.*

c. *That the assessee having already added certain sum u/s.l4A of the Act in the computation of income (returned income), Rule 8D is not applicable and sustaining of the addition of Rs.4,57,03,000/-u/s. 14A of the Act is unjustified, arbitrary, contrary to facts, erroneous and bad in law.*

d. *The appellant's computation of the aforesaid sum u/s. 14A of the Act is based on its books of accounts and is worked out in a reasonable and fair manner, the learned lower authorities have mis appreciated / misconstrued the same and the disallowance u/s.l4A of the Act is incorrect, arbitrary, erroneous and bad in law.*

e. *That in similar facts and circumstances, for the Asst. Years 2010-11 and 2012-13, in assessee's own case, the Jurisdictional IT AT (Hon'ble IT AT Cuttack Bench, Cuttack) having not accepted the findings of the learned CIT (Appeals) in respect of disallowance U/S.14A of the Act, the learned CIT (Appeals) ignoring and not following the order of the Jurisdictional IT AT and the CIT (Appeals)'s order for Asst. Year 2011-12, in confirming the addition/disallowance of Rs.4,57,03,000/- U/S.14A of the Act is arbitrary, erroneous, and bad, both in the eye of law and on facts and legally untenable and deserves to be set aside on this ground alone.*

4. *Additions under "Provision for Leave Encashment'-u/s.43B(f) of the Act - Rs. Rs.1,30,66,93,385/-*

a. *That on the facts and in the circumstances the case, the confirming of addition under "Provision for Leave Encashment' of Rs. 1,30,66,93,385/- u/s.43B(f) of the Act and dismissing the ground of the assessee by the learned CIT(Appeals) is erroneous and bad, both in the eye of law and on facts.*

b. *That during the accounting year 2015-16, the assessee in its annual audited accounts (Statement of Profit and Loss) having not debited any sum under 'Provision for Leave Encashment' and on the contrary, there being a credit of Rs.32,09,59,743/- under 'Provision for Leave Encashment', the Lower authorities have mis-appreciated/ misconstrued the facts and the sustaining of the*

Addition of Rs. 1,30,66,93,385/-under 'Provision for Leave Encashment' u/s.43B(f) of the Act is erroneous and bad, both in the eye of law and on facts and is to be deleted on this ground alone.

c. That during the accounting year 2015-16, the assessee in its annual audited accounts (Statement of Profit and Loss) having debited Rs. 1,30,66,93,385/- being the actual amount paid during the accounting year 2015-16, under "Leave Encashment", the Lower authorities have mis-appreciated/ misconstrued the facts and the sustaining of the Addition of Rs. 1,30,66,93,385/- under 'Provision for Leave Encashment' u/s.43B(f) of the Act is erroneous and bad, both in the eye of law and on facts and is to be deleted on this ground alone.

d. That in the Tax Audit Report it is nowhere stated that the an amount of Rs. 1,30,66,93,385/- under 'Provision for Leave Encashment' is outstanding as on Balance Sheet date and not paid before the due date of filing return and the same having brought to the notice of the Lower authorities, the sustaining of the Addition of Rs.1,30,66,93,385/- under 'Provision for Leave Encashment' u/s.43B(f) of the Act by the learned CIT(Appeals) is erroneous and bad, both in law and on facts.

e. That without prejudice to Grounds (a) and (d) above, on the facts and in the circumstances the case, during the accounting year 2015-16, there being a credit of Rs.32,09,59,743 under 'Provision for Leave Encashment' and in the past assessment years Learned Assessing officer having already disallowed the amounts debited under 'Provision for Leave Encashment' u/s.43B(f) of the Act., the Lower authorities ought to have deducted the said Rs.32,09,59,743/- while passing the orders.

5. That the appellant craves leave to add, supplement, modify the grounds here-in-above before or at the hearing of the appeal.

71. Ground Nos.1 & 5 are general in nature. Ground No.2 relates to disallowance of claim of additional depreciation u/s.32(i)(iia) of the Act. The issue raised by the assessee has already been decided by us while deciding the appeal of the assessee for A.Y.2009-2010 in ITA No.338/CTK/2017, wherein we have observed that the CIT(A) has already remitted the issue to the file of AO to allow the claim of the assessee after verification of necessary details, therefore, any

order/direction by us, at this stage, on this issue, would be futile exercise. However, a reasonable order is expected from the AO on the above observations of CIT(A). Accordingly, the issue raised in ground No.1 being similar to the issue decided by us in ITA No.338/CTK/2017, therefore, our observations made therein shall apply *mutatis mutandis* to this ground also. Thus, ground No.2 is allowed for statistical purposes.

72. With regard to ground No.3, which relates to disallowance u/s.14A of the Act, the ld.AR submitted that this issue has already been decided by the Tribunal in assessee's own case for A.Y.2014-2015 in ITA No.106&110/CTK/2018, vide order dated 23.09.2019, therefore, following the observations made by the Tribunal in the said order, this ground of assessee deserves to be allowed.

73. We have also gone through the order dated 23.09.2019 passed by the Tribunal in ITA Nos.106&110/CTK/2018, wherein the Tribunal while deciding the similar issue has observed as under :-

> *11. Invoking the provisions of Section 14A r.w.Rule 8D, the AO has made the disallowance of Rs.6,82,43,072/- by observing that the disallowance suo-moto made by the assessee is very less compared to the administrative and employee cost devoted to earn the exempt income. In appeal, the CIT(A) has confirmed the disallowance as there may not be any direct expense and that the assessee has not made any interest payments related to earning of exempted dividends and accordingly, the only way disallowance can be computed proportionately as per Rule 8D(2)(iii) of I.T.Rules.*

12. Ld. AR before us submitted that the assessee has already added the sum of Rs.82,378/- in the computation of income with the (return of income) u/s.14A of the Act in respect of expenses incurred relating to its exempted income and Rule 8D is not applicable. Ld. AR further submitted that this issue has been decided by the Tribunal in ITA No.211/CTK/2016 along with other connected appeals, order dated 29.06.2018 for the assessment year 2013-2014. On the other hand, ld. DR relied on the order of AO.

13. We find that this issue has been decided by the Tribunal in assessee's own case for the assessment year 2010-2011 in ITA No.211/CTK/2016 along with other connected appeals, order dated 29.06.2018 for the assessment year 2013-2014, wherein the Tribunal relying its earlier order dated 27.04.2018, passed in ITA No.352/CTK/2016 for the assessment year 2010-2011 along with other connected appeals has observed as under :-

> *22. From the above judicial decisions, we find that the Tribunal has restored the disputed issue to the file of AO for re-examination and re-verification and apply the provisions of Section 14A r.w.rule 8D and in the instant case, the issue being similar, we find that the AO has not complied with the mandatory requirement of Section 14A (2) of the Act read with Rule 8D (1) (a) of the Rules and we respectfully follow the above judicial decision of the Tribunal and remit the disputed issue to the file of AO for re-examination and verification and to decide the issue on merits after complying the mandatory requirement of the provisions of Section 14A of the Act and this ground of appeal is allowed for statistical purposes.*

14. From the orders both the authorities below, we observe that the assessee is earning income under different heads, as mentioned above. During the year, the assessee has received dividend of Rs.110,068,076/- and claimed such income as exempt income. The assessee has only made disallowance at Rs.1,20,828/- u/s.14A to earn the exempt income. The Assessing Officer has applied section 14A read with Rule 8D and disallowed the expenditure as per formula provided under rule 8D. The assessee is stated to have made no fresh investments out of borrowed funds. The Assessing Officer appears to have calculated the disallowance as per Rule 8D(2)(iii) observing that administrative expenses cannot be denied to earn exempt income. We, however, find that the Assessing Officer has considered average total investment appearing on the first day and last day of the financial year, which in our opinion is not justified. These investments may also include such investments from which no exempt income would have been earned by the assessee. As is clear from the Rule itself, the average of only such investments have to be taken into account, which yielded the income not forming part of the total income. Therefore, the AO was required to work out the average of such investment, the income from which did not form part of the total

> *income instead of total value of investment. For this view, our stand is fortified by the decision of Special Bench in the case of ACIT vs. Vireet Investment (P) Ltd., (2017) 82 Taxman.com 415 (Delhi Trib.)(SB). None of the parties before us, however, have laid any details to examine as to which of the investments have yielded such income which did not form part of the total income. We, therefore, restore the matter back to the file of the Assessing Officer for calculating the disallowance u/s. 14A read with Rule 8D afresh, in the light of observations made in the body of this order above. Accordingly, ground No.4 is allowed for statistical purposes.*

Respectfully following the above observations of the Tribunal, we also restore this issue to the file of AO for calculating the disallowance u/s.14A read with Rule 8D afresh in the light of the observations made by us in the earlier order as quoted above. Thus, ground No.3 is allowed for statistical purposes.

74. Ground No.4 relates to disallowance of provision for leave encashment u/s.43B(f) of the Act. In this regard, ld.AR of the assessee submitted that the issue is very similar to the issue raised by the assessee in the appeal for A.Y.2009-2010, however, the facts of the present year i.e. A.Y.2015-2016 is that there is no amount has been debited to the statement of profit and loss account under the provision for leave encashment, therefore, no disallowance u/s.43B(f) of the Act can be made. It was further contended by the ld. AR that the AO has erroneously added the impugned amount under the provisions of leave encashment whereas the fact remains that this amount is not relating to provision for leave encashment but it is an actual payment made for

leave encashment during the financial year 2015-2016, therefore, no such amount ought to have been added u/s.43B(f) of the Act.

75. On the other hand, ld. DR relied on the orders of authorities below.

76. This issue has also been decided by us while deciding the appeal of the assessee for A.Y.2009-2010 in ITA No.338/CTK/2017, wherein we have observed that the issue is squarely covered by the decision of the Tribunal in assessee's own case in ITA Nos.106& 110/CTK/2018, order dated 23.09.2019, wherein the Tribunal has followed its earlier order dated 29.06.2018, passed in No.211/CTK/2017, thereby restoring the issue to the file of AO further verification and examination of the issue. Thus, we direct the AO to examine as to whether the payment has been made towards leave encashment during the financial year 2015-2016 as claimed by the assessee before us and decide the issue as per law. Accordingly, the issue raised in ground No.3 being similar to the issue decided by us in ITA No.338/CTK/2017, therefore, our observations made therein shall apply *mutatis mutandis* to this ground also. Thus, ground No.4 is allowed for statistical purposes.

77. Thus, the appeal of the assessee in ITA No.01/CTK/2020 is allowed for statistical purposes.

78. Now, we shall take up the appeal of the Revenue filed for assessment year 2016-2017 in ITA No.65/CTK/2020, wherein the grounds raised by the Revenue read as under :-

> *(i) On the facts and in the circumstances of the case, the order of the Ld. CIT(A)-1, Bhubaneswar is erroneous both on facts and in law.*
>
> *(ii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal is right in deleting the addition of Rs.**8,56,12,086/-** made on account of revaluation of non-moving stores and spares as the assessee had adopted diminution value at @ 5% of cost thereof in this assessment year 2016-17 as against 80% applied in the initial years upto AY 1998-99?*
>
> *(iii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal is right in concurring with the changed method of valuation adopted by the assessee for its unmoved stores and spares which have not moved for 5 years from 20% of cost to 5% of cost accepting the estimation of the assessee that 5% of the cost thereof would be the Net Realizable Value NRV)-and-the-loss-chargeable to P&L Account as revenue loss ?*
>
> *(iv) The appellant craves to alter, amend or add any other ground that may be considered necessary in course of the appeal proceedings.*

79. Ground Nos.(i) & (iv) are general in nature. Ground No.(ii) & (iii) relate to deleting the addition of Rs.8,56,12,086/- made by the AO on account of disallowance of loss on revaluation of non-moving stores and spares.

80. We have already decided this issue while deciding the appeal of Revenue for assessment year 2009-2010 in ITA No.331/CTK/2017, wherein we have observed that the coordinate bench of the Tribunal in assessee's own case in ITA No.106&110/CTK/2018, order dated

23.09.2019 has already decided the issue against the Revenue confirming the observations made by the CIT(A) thereby deleing the addition made on account of loss on revaluation of non-moving stores and spares. In this order, Tribunal has followed the decision taken in ITA No.197/CTK/2017, order dated 29.06.2018. Respectfully following the observations of the coordinate bench of the Tribunal in the said appeal, we dismiss the ground No.(ii) & (iii) raised by the Revenue.

81. Thus, the appeal of the Revenue in ITA No.65/CTK/2020 is dismissed.

82. Now, we shall take up the cross objections filed by the assessee in CO Nos.11/CTK/2019 & 08/CTK/2020, wherein the assessee has supported the order of the CIT(A). Since, we have already dismissed this ground as raised by the Revenue in its respective appeals, therefore, the grounds taken by the assessee in its cross objections for the both the years under consideration have become infructuous and the same are dismissed.

83. In the result, all the appeals of the assessee and Revenue along with the cross Objections filed by the assessee are decided in the following manner :-

i) ITA No.338/CTK/2017 filed by the assessee for A.Y.2009-2010 is partly allowed for statistical purposes;

ii) ITA No.331/CTK/2017 filed by the Revenue for A.Y.2009-2010 is partly allowed;

iii) ITA No.39/CTK/2019 filed by the assessee for A.Y.2015-2016 is allowed for statistical purposes;

iv) ITA No.69/CTK/2019 filed by the Revenue for A.Y.2015-2016 is dismissed;

v) ITA No.01/CTK/2020 filed by the assessee for A.Y.2016-2017 is allowed for statistical purposes;

vi) ITA No.65/CTK/2020 filed by the Revenue for A.Y.2016-2017 is dismissed; and

vii) CO No.11/CTK/2019 filed by the assessee is dismissed.

viii) CO No.08/CTK/2020 filed by the assessee is dismissed.

Order pronounced in the open court on 28/10/2020.

Sd/-	**Sd/-**
(C.M.GARG)	**(L.P.SAHU)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

कटक Cuttack; दिनांक Dated 28/10/2020

Prakash Kumar Mishra, Sr.P.S.

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

1. Appellant-
2. Respondent
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Senior Private Secretary)
आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack