IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA

Before Shri Mahavir Singh, Judicial Member and
Shri M. Balaganesh, Accountant Member

I.T.A. No. 316/KOL/ 2006
Assessment year : 2002-2003
&
I.T.A. No. 1808/KOL/ 2007
Assessment year : 2002-2003

EIH Limited,……Appellant
4, Mangoe Lane,
Kolkata-700 001
[PAN : AAACE 6898 B]

-Vs.-

Deputy Commissioner of Income Tax,……Respondent
Circle-8, Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700 069

&

I.T.A. No. 426/KOL/ 2006
Assessment year : 2002-2003

Deputy Commissioner of Income Tax,……Appellant
Circle-8, Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700 069
-Vs.-
EIH Limited,……Respondent
4, Mangoe Lane,
Kolkata-700 001
[PAN : AAACE 6898 B]

Appearances by:
Dr. Adhir Kumar Bar, CIT, D.R., for the Department
Shri R.N. Bajoria, Senior Advocate & Shri A.K. Gupta, FCA, for the assessee

Date of concluding the hearing : August 20, 2015
Date of pronouncing the order : September 11, 2015

O R D E R

Per Shri M. Balaganesh, A.M.:

1. These appeals arise out of the orders of the Learned Commissioner of Income Tax (Appeals)-VIII, Kolkata in Appeal Nos. 44/CIT(A)-VIII/KOL./CIR.8/2005-06 dated 22.12.2005. The assessment for the Asst Year 2002-03 was framed by the Learned Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the "Act") making various disallowances. Aggrieved, the assessee preferred an appeal before the Learned CIT(Appeals) who gave partial relief to the assessee company against which both the assessee and the Revenue are in appeal before us and hence they are taken up together for the purpose of convenience and disposed off accordingly by a common order.

I.T.A. No. 316/Kol/2006 – ASSESSEE's APPEAL

2. Disallowance of Deduction u/s 80HHD – Exclusion of payments received in Indian Rupees from Foreign Airlines and Embassies - Rs.2,20,87,392/-

2.1. The brief facts of the case are that the assessee claimed deduction u/s 80HHD of the Act in respect of profit derived from the services provided to the foreign tourists in accordance with the provisions of section 80HHD of the Act. The assessee company claimed total foreign exchange receipts of Rs.182,77,99,427/- for the purpose of computing deduction u/s 80HHD of the Act. Out of this, the Learned Assessing Officer observed that a sum of Rs.2,20,87,392/- made by the Foreign Embassies received in Indian Rupees and accordingly held that the same should not be considered for deduction u/s 80HHD of the Act as the same was not received in foreign currency. Aggrieved, the assessee preferred an appeal before the Learned CIT(Appeals) who upheld the disallowance of the Learned Assessing Officer.

Aggrieved, the assessee preferred further appeal before this Tribunal on the following ground:-

> *"1. That on law as well as on the facts and in the circumstances 'of the case the Learned Commissioner of Income Tax (A)-VIII, Kolkata erred in confirming the disallowance of Rs.22,087,392 paid in Indian Rupee by Foreign Airlines out of their repatriable amount and RS.171 ,829.661 paid by the Diplomats of foreign countries who are exempted from making payment in Foreign Currency for the purpose of deduction U/s, 80HHD of the Act, ignoring the fact that definition of "Convertible Foreign Exchange" has been provided in the statute, which includes payments, which are recognised by Reserve Bank of India as payment in foreign exchange and these payments are so considered by Circular No. 60/97-2002 dated 24.12.98 issued by the Joint Director General of Foreign Trade, Govt. of India and confirmed by Reserve Bank Of India, Foreign Exchange Department, New Delhi".*

2.2. Shri R.N. Bajoria, Senior Advocate, the Learned A.R., appeared on behalf of the assessee and Dr. Adhir Kumar Bar, Learned CIT, D.R., appeared on behalf of the Revenue.

2.3. The Learned AR argued that the assessee company has received a sum of Rs.2,20,87,392/- from Foreign Embassies who are exempted from making payment in Foreign Exchange under the Vienna Convention where India is also one of the signatories. He further argued that the term "Convertible Foreign Exchange" as per explanation in clause (b) of Section 80HHD(7) read with clause (a) of Explanation to Section 80HHC means, "foreign exchange which is for the time being treated by the Reserve Bank of India as Convertible Foreign Exchange for the purposes of the Foreign Exchange Regulation Act, 1973 and any rules made thereunder." He placed reliance on the Circular No. 60 / 97-2002 dated 24.12.1998 issued by the Joint Director General, Foreign Trade, Ministry of Commerce that the aforesaid two rupee receipts shall be considered by the RBI as payment made in Foreign Exchange and accordingly all the

benefits available under EPCG scheme shall be available to the Hotels. Accordingly, he pleaded that the monies were received by the assessee company in accordance with a scheme approved by RBI and hence the assessee should be granted deduction u/s 80HHD of the Act. The Learned AR further argued that similar disallowance made in Asst Year 1999-2000 by the Learned Assessing Officer in assessee's own case came up before this Tribunal and the same in ITA No. 891/Kol/2004 dated 29.6.2005 had set aside the matter to the file of the Learned Assessing Officer to verify the nature of receipt with RBI and directed the Learned Assessing Officer to grant deduction u/s 80HHD if the RBI confirms that the said receipt to have come in agreed mode as per the Circular. The Learned AR stated that in the said set aside assessment, the Learned Assessing Officer had granted deduction u/s 80HHD of the Act in respect of the amount received in Indian Rupees by agreeing to the RBI Circular.

2.4. In response to this, the Learned DR argued that the RBI Circular is issued in the context of EPCG scheme and not applicable for income tax purposes and pleaded that the payments received in Indian currency from foreign airlines and embassies does not fall in the category of convertible foreign exchange as defined in FERA and the Income Tax Act does not permit to go beyond this provision to look for the definition of foreign exchange eligible for deduction u/s 80HHD. He further argued that foreign exchange eligible for a particular scheme of the Ministry of Commerce may not be regarded as foreign exchange for the purpose of Income tax, more so, when the Circular of the Commerce Ministry seeks for a larger definition of foreign exchange for the purpose of EPCG scheme including the definition of foreign exchange u/s 80HHD as one of the parameters provided for the same. He further argued that similar issue for the Asst Year 2000-01 in ITA No. 490/Kol/2005 and for Asst Year 2001-02 in ITA No. 833/Kol/2005 was restored to the file of the Learned Assessing Officer by this Tribunal.

2.5. We have heard the rival submissions and perused the detailed paper books of the assessee, chart filed by the Learned AR at the time of hearing, written submissions of the Learned DR and perused the materials available on record. The short point that arises for consideration is that whether the monies received in Indian rupees by assessee from foreign airlines and embassies which were accepted as amounts received in convertible foreign exchange by the RBI pursuant to its Circular issued in the context of EPCG scheme, could be applied for the purpose of granting deduction u/s 80HHD of the Act. In this connection, it is relevant to look into the purpose behind granting deduction u/s 80HHD of the Act by the legislature to an assesssee. From the said intention, it could be easily inferred that the provisions of section 80HHD being beneficial in nature needs to be viewed liberally. Moreover, the provisions of section 80HHD relies on the meaning of "convertible foreign exchange" in clause (a) of Explanation to section 80HHC. It is relevant to reproduce clause (a) of Explanation to section 80HHC here:-

> *"**convertible foreign exchange"** means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999 and any rules made thereunder.*

From the above meaning, it is very clear that once the RBI accepts a particular receipt to have been received in convertible foreign exchange, the deduction u/s 80HHC and 80HHD should be granted to the assessee. In the instant case, admittedly, the assessee had received monies in accordance with the scheme approved by RBI and hence the assessee is entitled for deduction u/s 80HHD of the Act in respect of amounts received in Indian Rupees from Foreign Airlines and Foreign Embassies. It is pertinent to note that the Learned Assessing Officer had granted deduction u/s 80HHD of the Act in the set aside assessment proceedings for the Asst Year 1999-2000 on the same issue to the same assessee.

Hence in view of the aforesaid facts and circumstances and provisions of the Act, we direct the Learned Assessing Officer to grant deduction u/s 80HHD of the Act to the assessee. Hence Ground No.1 raised by the assessee is allowed.

3. **Disallowance of deduction u/s 80HHC for sale proceeds of Flight Kitchen Services – Rs.1,96,89,591/-**

3.1. The brief facts of this issue are that the assessee derived sale proceeds on account of flight kitchen services (sale of food and beverages) to out bound flights of Foreign Airlines and claimed deduction u/s 80HHC of the Act and proceeds received thereon in Indian Rupees. As the proceeds were not received in convertible foreign exchange, the Learned Assessing Officer denied deduction u/s 80HHC on the said turnover which was also in line with the decision taken by him in the earlier years which was later upheld upto ITAT.

However, the assessee had preferred an appeal against ITAT order before the Hon'ble Calcutta High Court and it was pending at that time. The addition made by the Learned Assessing Officer was also upheld by the Learned CIT(Appeals) on the similar grounds mentioned hereinabove.

Aggrieved, the assessee is in appeal before us on the following grounds:-

> *"2. That on law as well as on the facts and in the circumstances of the case the Learned CIT (A) erred in confirming disallowance of the deduction claimed U/s. 80HHC based on the judgment of the Tribunal in earlier years even though the principle of RES JUDICATA has no application in the tax statute and each claim shall be decided on the basis of its own merit.*
>
> *3. Alternatively, following the principle suggested U/s.158A for avoiding repetitive appeals on the same issue*

the matter may be referred back to the file of the A.O. with direction to follow the judgment of the High Court for earlier year".

3.2. The Learned AR argued that the assessee had exported food and beverages to out bound flights of International Airlines and received the proceeds thereon in Indian Rupees and the same amounts to receipt in convertible foreign exchange by virtue of Explanation (a) and (aa) of Section 80HHC of the Act. He also further pleaded that the very fact that the customs authorities had cleared those articles to the aircraft at the airport which is a customs station within the meaning of Customs Act itself indicates that the aforesaid transportation of food items to the foreign bound aircrafts amounts to export of those articles and as such, the benefit of deduction u/s 80HHC should be granted. He further argued that in any case, this issue is now squarely covered in favour of the assessee by the decision of the Jurisdictional High Court for the Asst Year 1998-99 in assessee's own case of EIH Ltd vs CIT reported in (2011) 338 ITR 503 (Cal) dated 12.8.2011 and pleaded that the same may kindly be followed. In response to this, the Learned DR fairly conceded to the same.

3.3. We have heard the rival submissions and hold that the issue is squarely covered by the decision of the Jurisdictional High Court in assessee's own case reported in 338 ITR 503 (Cal). The questions raised before the Hon'ble Calcutta High Court are reproduced below for the sake of convenience :-

(a) Whether on the facts and in the circumstances of the case the supply of food and beverages to the international airlines in sealed containers constitutes export of goods out of India for the purposes of section 80HHC of the Act?

(b) Whether on the facts and in the circumstances of the case the sale proceeds received for supply of such food and beverages was in convertible foreign exchange within the meaning of section 80HHC of the Act?

(c) Whether on the facts and in the circumstances of the case your petitioner is entitled to the deduction claimed under section 80HHC of the Act?

The relevant operative portion of the said judgement is reproduced below:-

"13. After hearing the learned Counsel for the parties and after going through the aforesaid provisions of law, we find that in order to get the benefit of deduction under Section 80HHC of the Act, the assessee must comply with the terms of the said section. In the case before us, the only grounds of refusal of the benefit are that first, that the sale of such food and beverages to the foreign airlines did not amount to export out of India and secondly, that the payment received from the said foreign airlines in India in the form of Indian rupees could not be treated as payment in convertible foreign exchange within the meaning of the provisions of Section 80HHC of the Act. The word "export" has not been defined in the Act and thus, the said word is to be interpreted in the light of the language of Section 80HHC of the Act including the explanation added thereto and if the formalities required in Section 80HHC are fully complied with, in our opinion, it is not necessary that all the other formalities prescribed in the Customs Act for export of the articles are also required to be fully complied with by an assessee in addition to those prescribed under Section 80HHC.

14. As for instance, under the Customs Act, a transaction by way of sale or otherwise in a shop, emporium or any other establishment situate in India in exchange of Indian currency does not amount to export but for the purpose of getting benefit of deduction under Section 80HHC, if a transaction takes place by way of sale or otherwise in a shop or establishment situate in India involving clearance at any customs station as defined in the Customs Act and at the same time, the Reserve Bank of India treats such transaction in lieu of Indian currency as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder, the transaction should be treated as export out of India for the purpose of Section 80HHC of the Act by virtue of the added Explanations (a) and (aa) quoted above.

15. In this connection, we may profitably refer to the decision of the Supreme Court in the case of CIT Vs. Silver and Arts Palace, reported in (2003) 259 ITR 684where the said Court has approved the decision of the Allahabad High Court in the case of Ram Babu and sons Vs. Union of India, reported in (1996) 222 ITR 606 laying down the proposition of law that if both the conditions mentioned in Explanations (a) and (aa) are complied with in a given situation, the transaction should be treated to be an export out of India for the purpose of Section 80HHC of the Act.

21. Now the most vital question that arises for determination in this appeal is whether the appellant has complied with the conditions prescribed in both the Explanations (a) and (aa) of the Act.

22. We have already indicated that in this appeal we have on the prayer of the appellant admitted some additional pieces of evidence in support of its contention that it has complied with both the above conditions. In spite of giving opportunity to lead evidence in rebuttal to the Revenue for the purpose of disputing the genuineness of those additional pieces of evidence, the Revenue did not lead any evidence. We, therefore, accept the veracity of the statements contained in the additional pieces of evidence as well as the authority of the persons who issued the letters admitted as additional evidence and proceed to consider whether the appellant has complied with the conditions mentioned in both the Explanations (a) and (aa).

23. The Certificate issued by the office of the Commissioner of Customs dated April 13, 2004 certifies that all bonded goods and catering food supplies are carried in a sealed Hl-Lift of M/s. Oberoi Flight Services, the appellant before us, which is escorted by the Customs Preventive Officer on duty, to the Air Crafts of International Airlines catered by them at the tarmac at Chhatrapati Shivaji International Airport, Mumbai, as required under the regulations of the Customs Act, 1963. In our opinion, the aforesaid certificate indicates that the appellant in the process of selling the food and beverage in the said airport has complied with the condition mentioned in Explanation (aa) of the Section 80HHC.

24. Similarly in reply to the letter written by the assessee to the General Manager of the Reserve Bank of India to issue a certificate showing that the payments made in Indian rupees to the hotels by Foreign Airlines and diplomats are being treated by Reserve Bank as Convertible Foreign Exchange for the purpose of Foreign Exchange Regulation Act, 1973 and the Rules made thereunder as also the Foreign Exchange Management Act, it appears that the Assistant General Manager, Foreign Exchange Department has written a letter dated November 7, 2005. By the said letter the said officer has certified that the provisions of the DGFT Circular No.60/97-2002 dated December 24, 1998 regarding treatment of the amounts received in rupees by a hotel company out of repatriable funds would also apply under the FEMA Regulations. In the absence of any evidence disputing the said assertion of the officer concerned, we hold that the appellant has also complied with the condition mentioned in Explanation (a) added to section 80HHC of the Act.

25. We, thus, find that the appellant has successfully established before this Court by uncontroverted additional evidence that the transaction in question satisfies the conditions indicated in both the Explanations (a) and (aa) of section 80 HHC of the Act in respect of the disputed items at the Chhatrapati Shivaji International Airport, Mumbai, and thus, it is a fit case where the orders passed by the authorities below should be set aside and the Assessing Officer should be directed to consider the claim of deductions under Section 80HHC of the Act on merit as the appellant has proved that the transaction in question from the said airport amounts to export out of India.

> *27. We, therefore, allow this appeal by setting aside the orders of the authorities below and by answering all the three formulated questions indicated above in the affirmative and against the Revenue".*

Respectfully following the decision of the Jurisdictional High Court, we hold that the assessee is entitled for deduction u/s 80HHC of the Act in respect of export of food and beverages to out bound flights of International Airlines and for the proceeds received thereon in convertible foreign exchange and hold that the assessee had complied with the provisions of section 80HHC of the Act in this regard. Accordingly, the Ground Nos. 2 & 3 raised by the assessee are allowed.

4. Disallowance of running and maintenance expenditure of aircrafts – Rs.42,80,883/-

4.1. The brief facts of the case are that the assessee incurred running and maintenance expenditure of its aircrafts to the tune of Rs. 2,14,04,416/- during the assessment year under appeal. The Learned Assessing Officer in line with the decision taken by him in the earlier years sought to disallow 20% of the same amounting to Rs. 42,80,883/- on account of personal element of usage of aircrafts by the Directors and their relatives for personal purposes.

This was also upheld by the Learned CIT(Appeals). Aggrieved, the assessee had preferred an appeal before us on the following ground:-

> *"4. That on law as well as on the facts and in the circumstances of the case the Learned CIT(A) erred in confirming the estimated disallowance of Rs.4,280,883/-, being 20% of Rs.21,404,416 as against the actual maintenance and running expenditure of aircrafts amounting to Rs.9.465,892 even though the aircrafts were exclusively used for the purpose of business".*

4.2. The Learned AR argued that there cannot be any personal element of expenditure in the hands of the company as the company being a non-

natural person. He relied on the decision of the Gujarat High Court in the case of Sayaji Iron and Engineering Co. –vs.- CIT reported in 253 ITR 749 in support of this contention. He further argued that even assuming without conceding that if at all, the same is prevalent, then the same could have to be taxed as perquisite in the hands of the respective directors and TDS provisions thereon could become applicable, and that cannot become a deterrent for the assessee to claim the same as legitimate business expenditure. The Learned AR further argued that the assessee's main business is to run luxury hotels of international standard and to meet the requirement of the international guests of the hotels, and for that purpose, the assessee maintains two aircrafts for business convenience. The expenditure for maintenance of the aircraft has no direct nexus with its earning as even though, no customer is available for chartering the aircrafts, the assessee is required to incur expenditure for maintenance and repair which includes undergo process of fitness certificate from International Authority as per Aviation rules. It was also further argued by the Learned AR that the Learned Assessing Officer had inadvertently calculated 20% on Rs. 2,14,04,416/- and disallowed Rs. 42,80,883/-, whereas running and maintenance expenditure ultimately debited to profit and loss account was only Rs. 95,64,995/- and hence the disallowance, if any, without prejudice to the main ground, ought to have been restricted to Rs. 18,92,999/- (20% of Rs. 95,64,995) only. He also stated that the details of running and maintenance incurred is filed at page 185 of the Paper Book. The Learned AR further argued that the version of the Learned Assessing Officer as to revenue generated from chartering of aircrafts amounting to Rs. 1,19,39,421/- was basically incorrect and also objected to the statement of the Learned Assessing Officer that the assessee could not link the revenue generated by the aircrafts with the flights undertaken. He argued that according to Learned AO the total expenditure on maintenance and running of aircrafts was Rs.2,14,04,416/- ,whereas the revenue generated therefrom was only Rs. 1,19,39,421/-. The Learned AR argued that this comparison is basically

incorrect. He stated that the net expenditure on maintenance and running of aircrafts after recovery from parties amounted to Rs. 95,64,995/- which was debited to profit and loss account and total income generated by the assessee out of chartering of aircrafts was RS. 2,02,52,452/- (details given in page 186 of paper book) and thereby , the assessee had only derived a surplus of Rs. 1,07,87,457/- (20252452-9564995). The Learned AR further argued that full details of expenses and the log book of flights undertaken by the aircraft has been provided from where it could be seen that the expenditure was incurred only for business purposes. He further argued that in Asst Years 1999-2000 and in Asst Year 2001-2002, on the same set of facts, this tribunal had restored the issue to the file of the Learned Assessing Officer for verification of details to find out whether the same has been incurred for business purposes only. He also stated that during the assessment year under appeal, the assessee had furnished all the details of the said expenditure before the Learned Assessing Officer and without giving any categorical finding on the same, the Learned Assessing Officer resorted to make the disallowance on estimated basis on the basis of surmise and conjectures.

4.3. In response to this, the Learned DR heavily relied on the written submissions filed by him on this ground.

4.4. We have heard the rival submissions and perused the materials available on record. It is seen that the net expenditure towards running and maintenance of aircrafts debited in profit and loss account is only Rs. 95,64,995/- and hence the premise of the Learned Assessing Officer that a sum of Rs. 2,14,04,416/- is debited to profit and loss account is grossly incorrect.

It is observed that ultimately the assessee had derived surplus of Rs. 1,07,87,457/- being the difference between the chartering income of Rs. 2,02,52,452/- and maintenance and running of aircrafts expenditure

to the tune of Rs. 95,64,995/-, even though deriving surplus thereon is not a pre-requisite for allowance of expenditure incurred. We also find that complete details of the entire expenditure towards running and maintenance of aircrafts together with the log book has been filed before the Learned Assessing Officer and hence there is absolutely no case for the Learned Assessing Officer to reject the same and proceed to make disallowance on estimated basis to be in line with the disallowances made in earlier years. We also find that the earlier years ITAT order on this issue need not be followed for the asst year under appeal as in this year, the entire details were very much before the Learned Assessing Officer. We also find lot of force in the arguments of the Learned AR that the assessee company being a non-natural person cannot have any personal element thereon and all the expenditure incurred thereon had to be construed only for business purposes.

To this extent, the reliance on the Gujarat High Court decision in 253 ITR 749 is well placed and supports the case of the assessee. We also find lot of force in the arguments of the Learned AR that if at all there is any personal element involved in the aforesaid expenditure, the same have to be taxed as perquisite in the hands of the directors and it is only for the TDS officer to look into the violations, if any, on the same and hence on that ground also, no disallowance of expenditure could be appreciated. We find that the Learned Assessing Officer had made the entire addition based on surmises and conjectures and made on *ad hoc* basis. It is well founded proposition that what is apparent is real and the allegation to prove the contrary is on the person making such allegation. The following decisions support our view in this regard:-

(i) CIT vs Daulat Ram Rawatmull (1973) 87 ITR 349 (SC);

(ii) Sukhdayal Rambilas vs CIT (1982) 136 ITR 414 (Bom.);

(iii) Madura Knitting Co vs CIT (1956) 30 ITR 764 (Mad);

In view of the aforesaid facts and circumstances and respectfully following the judicial precedents thereon, we have no hesitation in deleting the addition made in the sum of Rs.42,80,883/- on an estimated basis. Accordingly, the Ground No. 4 raised by the assessee is allowed.

5. Addition towards notional gain on foreign currency loan – Rs.4,15,36,381/-

5.1. The brief facts of this issue is that the assessee company availed 2603.99 Million in Japanese Yen on 13th August 2001 (equivalent to Rs 100 crores) under Foreign Currency Non Resident – Bank Scheme (in short FCNR(B)) Loan for the purpose of its working capital business. Hence this goes to prove that the loan has been obtained for revenue account. This loan was outstanding as on 31.3.2002 and the same was restated at the exchange rate prevailing at the end of the year in consonance with the Accounting Standard 11 (AS-11) issued by the Institute of Chartered Accountants of India (ICAI) by the assessee company. The assessee derived a notional gain on such restatement in view of decrease in liability payable on the loan account amounting to Rs. 4,15,36,381/-. This is worked out as under:-

Loan balance -		Rs.100,00,00,000/-
Less: Value of loan as on 31.3.2002		
2603.99 Million JPY @ 0.368075	-	Rs. 95,84,63,619/-
Difference representing gain by way of reduction in liability		Rs. 4,15,36,381/-

The assessee reduced the same from its taxable income as the same was notional gain which was unrealized as on the date of balance sheet date and accordingly filed its return of income.

5.2. The Learned Assessing Officer added the same as income earned as the foreign exchange fluctuation was earned on revenue account relying

on the decision of the Supreme Court in the case of Sutlej Cotton Mills Ltd vs CIT reported in 116 ITR 1 (SC). Aggrieved, the assessee preferred an appeal before the Learned CITA who upheld the decision of the Learned Assessing Officer. Aggrieved, the assessee is in appeal before us on the following ground:-

> *"5. That on law as well as on the facts and in the circumstances of the case the Learned CIT (A) erred in confirming addition made by the Assessing Officer of Rs.41,536,381 on account of notional gain on foreign currency swap overlooking the fact that reduction in liability of the existing loan in terms of Indian Rupee was not actual and the company was not entitled to claim any refund or adjustment on that account".*

5.3. The Learned AR argued that the gain derived on account of foreign exchange fluctuation by restating the foreign currency loan at the year end and hence the same cannot be brought to tax by the Learned Assessing Officer as it is only notional and not realized by the assessee. The Learned AR further argued that similar foreign exchange fluctuation on restatement of foreign currency loan in Asst Year 2003-04 (i.e. immediately succeeding assessment year), the exchange fluctuation resulted in a loss and the assessee had *suo moto* not claimed the same as deduction, being a notional loss, as it had not offered the notional gain to tax in the asst year under appeal. Alternatively, he argued that if the notional gain in asst year under appeal is brought to tax, then a direction be given to the Learned Assessing Officer to allow the notional loss in Asst Year 2003-04 to meet the ends of justice.

In response to this, the Learned DR relied on the orders of the lower authorities.

5.4. We have heard the rival submissions and perused the materials available on record. Admittedly, the assessee on 13.8.2001 had availed

foreign currency loan of JPY 2603.99 Million (equivalent to Rs.100 crores) for the purpose of its working capital business.

Hence it can be safely concluded that the loan was borrowed on revenue account. Based on this, it could logically be concluded that any exchange fluctuation arising out of restatement of the said loan at the end of the year, be it gain or loss, would also fall on revenue account and hence automatically comes under the ambit of taxation if it is a gain and allowable as an expenditure if it is a loss. This issue is squarely covered by the decision of the Supreme Court in the case of CIT vs Woodward Governor India P. Ltd reported in 312 ITR 254 (SC) wherein the questions raised before their Lordships were as under:-

> *(i) Whether, on the facts and circumstances of the case and in law, the additional liability arising on account of fluctuation in the rate of exchange in respect of loans taken for revenue purposes could be allowed as deduction under section 37(1) in the year of fluctuation in the rate of exchange or whether the same could only be allowed in the year of repayment of such loans?*
>
> *(ii) Whether, the assessee is entitled to adjust the actual cost of imported assets acquired in foreign currency on account of fluctuation in the rate of exchange at each balance sheet date, pending actual payment of the varied liability?*

Their Lordships had categorically held that since the loan was borrowed for working capital purposes i.e. on revenue account, any loss arising out of restatement at the end of the year would be squarely allowable u/s 37(1) of the act. In the instant case, the situation is reverse as the exchange fluctuation results in a gain which would definitely become taxable.

We Reproduce Para 13-15 of the Hon'ble Supreme Court judgement as under:-

> *"13. As stated above, one of the main arguments advanced by the learned Additional Solicitor General on behalf of the Department before*

us was that the word "expenditure" in Section 37(1) connotes "what is paid out" and that which has gone irretrievably. In this connection, heavy reliance was placed on the judgment of this Court in the case of Indian Molasses Company (supra). Relying on the said judgment, it was sought to be argued that the increase in liability at any point of time prior to the date of payment cannot be said to have gone irretrievably as it can always come back. According to the learned counsel, in the case of increase in liability due to foreign exchange fluctuations, if there is a revaluation of the rupee vis-`-vis foreign exchange at or prior to the point of payment, then there would be no question of money having gone irretrievably and consequently, the requirement of "expenditure" is not met. Consequently, the additional liability arising on account of fluctuation in the rate of foreign exchange was merely a contingent/notional liability which does not crystallize till payment. In that case, the Supreme Court was considering the meaning of the expression "expenditure incurred" while dealing with the question as to whether there was a distinction between the actual liability in presenti and a liability de futuro. The word "expenditure" is not defined in the 1961 Act. The word "expenditure" is, therefore, required to be understood in the context in which it is used. Section 37 enjoins that any expenditure not being expenditure of the nature described in Sections 30 to 36 laid out or expended wholly and exclusively for the purposes of the business should be allowed in computing the income chargeable under the head "profits and gains of business". In Sections 30 to 36, the expressions "expenses incurred" as well as "allowances and depreciation" has also been used. For example, depreciation and allowances are dealt with in Section 32. Therefore, Parliament has used the expression "any expenditure" in Section 37 to cover both. Therefore, the expression "expenditure" as used in Section 37 may, in the circumstances of a particular case, cover an amount which is really a "loss" even though the said amount has not gone out from the pocket of the assessee.

14. In the case of M.P. Financial Corporation v. CIT reported in 165 ITR 765 the Madhya Pradesh High Court has held that the expression "expenditure" as used in Section 37 may, in the circumstances of a particular case, cover an amount which is a "loss" even though the said amount has not gone out from the pocket of the assessee. This view of the Madhya Pradesh High Court has been approved by this Court in the case of Madras Industrial Investment Corporation Ltd. v. CIT reported in 225 ITR 802. According to the Law and Practice of Income Tax by Kanga and Palkhivala, Section 37(1) is a residuary section extending the allowance to items of business expenditure not covered by Sections 30 to 36. This Section, according to the learned Author, covers cases of business expenditure only, and not of business losses which are, however, deductible on ordinary principles of commercial accounting. (see page 617 of the eighth edition). It is this principle which attracts

the provisions of Section 145. That section recognizes the rights of a trader to adopt either the cash system or the mercantile system of accounting. The quantum of allowances permitted to be deducted under diverse heads under Sections 30 to 43C from the income, profits and gains of a business would differ according to the system adopted. This is made clear by defining the word "paid" in Section 43(2), which is used in several Sections 30 to 43C, as meaning actually paid or incurred according to the method of accounting upon the basis on which profits or gains are computed under Section 28/29. That is why in deciding the question as to whether the word "expenditure" in Section 37(1) includes the word "loss" one has to read Section 37(1) with Section 28, Section 29 and Section 145(1). One more principle needs to be kept in mind. Accounts regularly maintained in the course of business are to be taken as correct unless there are strong and sufficient reasons to indicate that they are unreliable. One more aspect needs to be highlighted. Under Section 28(i), one needs to decide the profits and gains of any business which is carried on by the assessee during the previous year. Therefore, one has to take into account stock-in-trade for determination of profits. The 1961 Act makes no provision with regard to valuation of stock. But the ordinary principle of commercial accounting requires that in the P&L account the value of the stock-in- trade at the beginning and at the end of the year should be entered at cost or market price, whichever is the lower. This is how business profits arising during the year needs to be computed. This is one more reason for reading Section 37(1) with Section 145. For valuing the closing stock at the end of a particular year, the value prevailing on the last date is relevant. This is because profits/loss is embedded in the closing stock. While anticipated loss is taken into account, anticipated profit in the shape of appreciated value of the closing stock is not brought into account, as no prudent trader would care to show increase profits before actual realization. This is the theory underlying the Rule that closing stock is to be valued at cost or market price, whichever is the lower. As profits for income-tax purposes are to be computed in accordance with ordinary principles of commercial accounting, unless, such principles stand superseded or modified by legislative enactments, unrealized profits in the shape of appreciated value of goods remaining unsold at the end of the accounting year and carried over to the following years account in a continuing business are not brought to the charge as a matter of practice, though, as stated above, loss due to fall in the price below cost is allowed even though such loss has not been realized actually. At this stage, we need to emphasise once again that the above system of commercial accounting can be superseded or modified by legislative enactment. This is where Section 145(2) comes into play. Under that section, the Central Government is empowered to notify from time to time the Accounting Standards to be followed by any class of assessees or in respect of any class of income. Accordingly, under Section 209 of the Companies Act, mercantile system of accounting is made mandatory

for companies. In other words, accounting standard which is continuously adopted by an assessee can be superseded or modified by Legislative intervention. However, but for such intervention or in cases falling under Section 145(3), the method of accounting undertaken by the assessee continuously is supreme. In the present batch of cases, there is no finding given by the AO on the correctness or completeness of the accounts of the assessee. Equally, there is no finding given by the AO stating that the assessee has not complied with the accounting standards.

15. For the reasons given hereinabove, we hold that, in the present case, the "loss" suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure under Section 37(1) of the 1961 Act".

In view of the aforesaid judgement of the apex court, we hold that the sum of Rs.4,15,36,381/- being the exchange gain would be taxable in the hands of the assessee for the Asst Year 2002-03 and correspondingly the Learned AO is also directed to grant deduction for the exchange loss due to restatement for the Asst Year 2003-04.

Accordingly, the Ground No. 5 raised by the assessee is dismissed.

6. Disallowance of Interest on borrowed funds used for non-business purposes– Rs.6,27,16,642/-

6.1. The brief facts of this issue is that the assessee had advanced the following sums to the following parties and the sums outstanding as on 31.3.2002 towards that account are as below:-

(i) Lake Palace Hotels & Motels Ltd - Rs.2,50,00,000/-
(ii) Jyoti Pvt Ltd - .....Rs. 58,28,690/-
(iii) Nandi Hills & Resorts Ltd -.....Rs.9,01,50,000/-
(iv) Balamurie Island Resort Pvt Ltd -.....Rs. 69,60,000/-
(v) Balaji Hotels & Enterprises Ltd.....Rs.15,12,00,000/-
(vi) Green Fields Hotels & Resorts P Ltd..... Rs.10,00,00,000/-
Advance towards equity participation in
(vii) Mashobra Resort Ltd.....Rs.13,00,00,000/-

(viii) Oberoi Kerala Hotels & Resort Ltd.....Rs. 40,00,000/-

(ix) Loan to Mumtaz Hotel Ltd.....Rs.9,50,00,000/-

(i) Amounts paid to Lake Palace Hotels & Motels Ltd...Rs.2,50,00,000/-

This was paid as security deposit for taking land of the Hotels at Udaipur, Rajasthan and interest @ 9% has been charged for such deposit. The said party had also duly deducted tax at source on the interest payment made to the assessee .

(ii) Amounts paid to Jyoti Pvt Ltd - Rs.58,28,690/-

The amount represents the balance recoverable from the company which was pending for certain disputes. The assessee has duly charged interest @ 18% on the loan amount both for FY 2001-02 & 2002-03 and the amount was received in full in the FY 2002-03.

(iii) Amounts paid to Nandi Hills & Resorts Ltd – Rs. 9,01,50,000/-

This represents advance given for the Joint Venture project with Janson Group of Bangalore to construct and operate Golf course in Bangalore. The amount paid is towards advance for acquisition of land for the project.

(iv) Amounts paid to Balamurie Island Resort Pvt Ltd – Rs. 69,60,000/-

This was paid towards advance for purchase of shares.

(v) Amounts paid to Balaji Hotels & Enterprises Ltd.– Rs.15,12,00,000/-

The amount was advanced for construction of hotel cum commercial complex at Chennai in Tamilnadu. The Hotel was under construction but due to financial problem the owner could not complete the same and was in litigation with the Financial Institutions who had initially lent fund for the project. The loan

given is interest bearing and the company has Agreement to operate the Hotel to be constructed till such time the loan with interest is not repaid.

(vi) Amounts paid to Green Fields Hotels & Resorts P Ltd.– Rs.10,00,00,000/-

The amount was advanced for acquisition of land for Golf course in Khandala for the Joint Venture project out of own generation of fund.

(vii) Amounts paid to Mashobra Resort Ltd – Rs. 13,00,00,000/-

The company is a joint venture company owning Hotel Wildflower Hall at Shimla. According to Joint Venture Agreement, the Company is required to finance for construction of hotel which was initially considered as advance for equity shares. The amount paid shall be adjusted against equity shares to be issued to the company.

(viii) Amounts paid to Oberoi Kerala Hotels & Resort Ltd – Rs.40,00,000/-

The same is also a Joint Venture Company and according to the agreement the company is required to advance on equity shares participation. The company has also been allotted 400000 shares of Rs. 10 in Asst Year 2003-04.

(ix) Amounts paid to Mumtaz Hotel Ltd – Rs.9,50,00,000/-

This was paid as loan and interest is charged on the same by the assessee. During the course of assessment proceedings , the assessee mentioned the purpose of advancing monies to aforesaid parties and pleaded that the same were advanced during the course of their business and to pursue further business interests of the assessee and also pleaded that own funds were very much available with the assessee and no borrowed funds were used for advancing the monies to aforesaid parties and hence no interest disallowance should be invoked on the assessee.

6.2. The Learned Assessing Officer disallowed interest paid on borrowed funds @ 12% per annum to the extent of the aforesaid monies advanced to various parties by concluding that the same were advanced for non-business purposes. Aggrieved, the assessee challenged this issue before the Learned CITA who upheld the disallowance of interest made by the Learned AO except in respect of amounts advanced to Lake Palace Hotels & Motels Ltd; Jyoti Pvt Ltd and Mumtaz Hotel Ltd from whom the assessee had charged interest.

Aggrieved, the assessee has preferred further appeal before us on the following ground:-

> *"6. That the Learned CIT(A) was not justified in restricting the addition on account of interest to Rs.51,401,920/- being 12% of interest free advances given to Associate Enterprises having business connections in operating the hotels owned by such Enterprises".*

6.3. The Learned AR argued that the entire details as to for what purpose the monies were paid by the assessee company to the aforesaid parties were given before the Learned Assessing Officer. He argued that the assessee had sufficient own funds at its disposal and hence the borrowed funds were not utilized for advancing monies to aforesaid parties and hence there should not be any disallowance of interest on borrowed funds. He further argued that all the advances were made in the nature of advances pursuant to either joint venture agreements or advance for shares and is not paid as loans and hence there is no question of charging any interest on the advances. The Learned AR further argued that all the advances were made as Strategic Investments to pursue its further business interests and those companies were also using the brand of the assessee, rendering technical services and assessee's staff were used by the group companies and hence had to be construed as advances

made during the course of assessee's business. He also relied on the following decisions in support of his contentions:-

(i) CIT –Vs.- Britannia Industries Ltd reported in 280 ITR 525 (Cal);

(ii) CIT- vs.- Texmaco Ltd – ITA No. 607 & 641 / Kol / 2012 for Asst Years 2006-07 & 2007-08 dated 9.6.2015 rendered by Kolkata Tribunal "A" Bench.

In response to this, the Learned DR apart from placing reliance on the written submissions filed, vehemently supported the orders of the lower authorities.

6.4. We have heard the rival submissions and perused the materials and case laws available on record. It is seen that the assessee had on one hand admittedly advanced interest free funds to certain group companies and interest bearing loans to certain group companies. On the other hand the assessee has been paying interest on its borrowed capital. In respect of amounts advanced by the assessee to certain group companies where interest is charged by it, there is absolutely no dispute. In respect of interest free advances, it has to be seen whether the same were advanced out of own funds or out of borrowed funds by the assessee. It is seen from the assessment order that the Learned Assessing Officer had neither disputed the availability of own funds with the assessee to the tune of Rs.646.65 crores (being the net owned funds at the beginning of the year to the tune of Rs.574.46 crores plus cash profit for the year amounting to Rs. 72.19 crores), nor brought out the nexus between the borrowed funds and the interest free advances made by the assessee. The Learned Assessing Officer simply states that the assessee on one hand is paying interest on its borrowed funds and on the other hand advances interest free monies to its group companies. Moreover, it is well settled

proposition that it is not for the income tax department to sermonize how the businessman should conduct his business and have his affairs. The businessman knows his interest best. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of CIT vs Dhanraj Girji Raja Narasingherji (1973) 91 ITR 544 (SC). Further reliance is also placed on the decision of the Hon'ble Apex Court in the case of CIT vs Walchand and Co. (1967) 65 ITR 381 (SC), wherein it was held that in applying the test of commercial expediency whether the expenditure was excessively laid down for the purpose of business, reasonableness of the expenditure is to be judged from the point of view of a businessman and not that of the revenue. It is well decided that what is to be seen for the purpose of allowability of interest u/s 36(1)(iii) of the Act is as to whether the borrowed funds were utilized for the purpose of business. In the instant case, the assesee had in fact made borrowings and utilised the same for the purpose of its business. The borrowed funds and the own funds in the form of share capital, reserves & surplus, cash profits derived during the year, etc were inextricably mixed in the same bank account and hence presumption could be drawn that interest free advances were made out of own funds provided the own funds are more than the amounts advanced interest free to parties. It is relevant to get into the few decisions on this subject:-

CIT vs Gopalakrishna Muralidhar reported in (1963) 47 ITR 469 (AP)

"The learned counsel maintains that since the capital borrowed was utilised by the family for personal use, no relief could be claimed under that clause.

We do not think that we can give effect to this argument. Indisputably, these amounts were borrowed only for the purpose of the business of the family. The assessee drew out from time to time various sums of money aggregating to Rs.1,77,984/- from the business. It is not a case where any particular sum purporting to be borrowed on behalf of the business was spent for household expenses. This is a case where the loans were taken for carrying on the business but the family used to withdraw some amounts from

the business whenever occasions arose. The family was surely entitled to withdraw from the capital supplied by it with th result of the capital being depleted. There is, therefore, no substance in the submissions that the fact, that part of the amount borrowed was later on used for personal expenses, would deprive the assessee of the benefits of clause (iii) of sub-section (2) of section 10".

Woolcombers of India Ltd vs CIT reported in 134 ITR 219 (CAL)-

"The assessee had an overdraft account with a bank. On December 12, 1969, i.e. a few days before the end o] the assessee's accounting year on December 31, 1969, the account showed a debit balance of Rs.I,39,412. The assessee paid advance of Rs.18,05,000 on December 15, 1969. which increased the overdraft to Rs.14,63,593/-by December 31, 1969. The ITO held that the payment of advance tax was not a business expenditure and disallowed the proportionate interest amounting to Rs.6,769 payable by the assessee to the bank. On appeal, the AAC held that though the profits of the business were embedded in the combined financial transactions, yet at the time of payment of advance tax, the assessee had not adequate cash surplus and it had resorted to the overdraft facility specifically for the purpose of payment of advance tax, and affirmed the order of the ITO. On further appeal, the Tribunal affirmed the order of the AAC. On a reference, the assessee contended that where the profits of the assessee's business was sufficient to cover the payment of advance tax during the relevant accounting year, if such amount was paid from an account which included the amounts of profits as well as the overdraft taken for the purpose of the business, the presumption was that the tax was paid out of the profits and not out of the overdraft amount and since the amount of the profits for the relevant year far exceeded the liability for advance tax and the entire amount of profits of Rs. 27 lakhs was deposited in the overdraft account out of which the bank remitted the advance tax, the tax was paid out of the earning of the profits and not out of the overdraft amount taken Jar other business purposes. The revenue contended that the contention, viz., where there was a mixed account and the profits were sufficient to meet the tax liability from the said account then the presumption should not be drawn that the tax liability was met out of the overdraft account and not out of the profits, was not raised before the Tribunal and, therefore, that contention should not be allowed to be agitated for the first time before the High Court:

Held, (i) that though a contention which was not urged before the Tribunal could not be agitated for the first time before the High Court in a reference, yet it was apparent from the Tribunal's order that the contention that the profits were sufficient to meet the advance tax liability was urged before the I.T. authorities and, therefore, in view of the amplitude of the question posed before the High

Court it could not be said that the contention was not urged before the I.T. authorities.

(ii)That, on the facts of the case, the profits were sufficient to meet the advance tax liability. The entire profits were deposited in the overdraft account, it should be presumed that in its essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business. Therefore, the interest amounting to Rs.6,769/- paid by the assessee on the bank overdraft account which was disallowed as being relatable to payment of advance lax should also have been allowed as an admissible deduction in the computation of the assessee's business income".

CIT –vs.- Hotel Savera [1999] 239 ITR 795 (Madras)-

"We have carefully considered the submissions made by learned counsel for the Revenue as well as learned counsel for the assessee. The fact remains that there was a total amount credited in the partners' capital as well as current account. A sum of Rs.10,95,010/- was arrived at in the partners' account after taking note of all the drawings made by them and the losses that were incurred in the business for the year ended March 31, 1972. Even after debiting the drawings and the loss in the business, the facts show that there are sufficient funds with the firm to cover the entire advance to the hotel. The Revenue has not made any attempt before the Tribunal to show that the firm has paid interest on the amount outstanding in the accounts of the partner. Though the third question raised proceeds on the basis that the firm had paid interest to the partner on the credit balance, there was no finding either by the assessing authority or by the Appellate Assistant Commissioner that the firm had paid interest to the partners on the credit balance. It is significant to note that there is also no finding by the Appellate Tribunal that the firm had paid interest on the credit balance to the partners. In such a situation, the position that remains is that the firm had its own funds as well as borrowed funds. It is not clear that the firm had not advanced money out of its own funds and in the absence of any material or evidence to indicate that the firm had advanced moneys to the hotel out of funds borrowed for business purpose the presumption would arise, where there is a common fund that the money advanced came only out of its own funds. The decision of the Andhra Pradesh High Court in the case of Gopikrishna Muralidar [1963] 47 ITR 469, would support the ease of the Revenue (?) to that extent. In that case, the assessee--a Hindu undivided family--had a large capital of Rs. 20 lakhs and also made large borrowings during the relevant year and had paid interest amounting to Rs. 93,611. During the relevant previous year a sum of Rs. 1,77,984 was withdrawn from time to time for household expenses and the question that arose before the Andhra Pradesh High Court was whethera part of interest paid on the borrowed capital could be disallowed. The Andhra Pradesh High Court held that it was not a case that where any particular sum purported to be borrowed on behalf of the business was spent for household expenses and this was a case where the loans were taken for

carrying on the business of the assessee-firm, but the family used to withdraw some amounts from the business and which were within the limit of capital supplied by the family. In that situation the court held that presumption can arise that where the assessee had both his own money as well as borrowed capital, the money lent came out of his own funds.

The above decision of the Andhra Pradesh High Court was followed by the Gujarat High Court in the case of Shree Digvijay Cement Co. Ltd. v. CIT [19821 158 ITR 45, and the Gujarat High Court held that where the material on record showed that the assessee had a common fund it cannot be predicated that the money lent came only out of borrowed funds. The learned author, Sampath Iyengar in his book Sampath lyengar's Law of Income-tax, 9th edition, at page 2349, observed as under :

> *"For the same reason a presumption appears to be permissible that where the assessee has his own capital as also the borrowed funds, the former rather than latter to have been utilised for the non-business or personal expenses."*

In the facts of the case the Tribunal has found that the money borrowed has been inextricably mixed up with the own funds of the assesses and it was impossible to delineate whichever funds were advanced to Savera Hotels (P.) Ltd,, free of interest, and in that factual situation, we are of the opinion that the finding of the Appellate Tribunal that no disallowance is called for is a finding of fact and the finding of the Tribunal that it can be inferred that Savera Hotels made the advance out of its own funds and not the borrowed capital is sustainable in law.

.....

We hold that the Appellate Tribunal was correct in deleting the sum of Rs. 30,063 and it is also right in holding that no part of the interest should be disallowed especially in the absence of any finding that the money borrowed was advanced to Savera Hotels (P.) Ltd., free of interest.

The questions raised need reframing as they proceed on some wrong assumption and accordingly we reframe the first question as under :

> *"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in deleting the sum of Rs. 30,063 sustained by the Appellate Assistant Commissioner?"*

In so far as the second question is concerned, that also is reframed as under :

> *"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that no part of interest should be disallowed?"*

The third question is also reframed as under :

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in holding that there was sufficient credit balance and, therefore, the amount advanced to Savera Hotels (P.) Ltd., were not out of the borrowed amount was not based on valid and relevant materials?"

We answer the questions referred to us in the affirmative and against the Revenue. However, in the circumstances, there will be no order as to costs".

CIT vs Britannia Industries Ltd reported in 280 ITR 525 (CAL)

"The assessee had a packing credit sanctioned by Syndicate Bank, to the extent of Rs. 25lakhs. This was enhanced to Rs. 175 lakhs. One the very dateof enhancement of the packing credit, a sum of Rs. 165 lakhs was advanced to M through a cheque drawn on Syndicate Bank. The Assessing Officer found that the firm to which interest free loan was advanced was constituted by the relatives of the directors of the assessee. The Assessing Officer pointed out that the advance was made to M without any security and without any stipulation for payment of interest, whereas the assessee had paid 12 per cent, interest on the packing credit to Syndicate Bank. The Assessing Officer disallowed the interest. The Tribunal found that the total sale proceed of the relevant financial year were Rs. 114.08 crores and that the entire sale proceeds used to be deposited in the mixed account and the advance was also granted from the mixed account. Therefore, there were sufficient funds for making advance of Rs.1.65 crores out of total transaction ofRs.114.08 crores. The Tribunal also found that out of the total export of the cashew-nut kernels of Rs.129 la.khs in the assessment year 1985-86, an extent of Rs. 91lakhs was supplied by M and that there was regular course of business between the assessee and M and the advances were made to M in the regular course of business. The relatives of directors did not come within the definition of relatives as defined in section 2(41). It held that interest was deductible. On appeal:

Held, dismissing the appeal, that in relation to each of the assessment years involved in the appeal, the recipient of interest-free loan was not a firm of relatives; the advance was made for obtaining supply of raw materials and the advance was made for the purpose of business within the meaning of section 36(1)(iii) and not for any other consideration; there was regular course of business between the assessee and the firm; and the advances were made to M in the regular course of business; such advances were made in the course of business for commercial expedience and for the purpose of business; the findings arrived at by the Tribunal were not perverse; the entire expenditure was made from the mixed account. Therefore, there would be a presumption that the advance was made out of the assessee's own funds and not from the borrowed capital. Therefore, the Commissioner (Appeals) and the Tribunal were right in presuming that the assessee was eligible for the benefit of section 36(1)(iii)".

S.A. Builders Ltd. –vs.- CIT(Appeals) & Another reported in 288 ITR 1 (SC):

"In order to decide whether interest on funds borrowed by the assessee to give an interest-free loan to a sister concern (e.g., a subsidiary of the assessee) should be allowed as a deduction under section 36(1)(iii) of the Income-tax Act, 1961, one has to enquire whether the loan was given by the assessee as a measure of commercial expediency. The expression "commercial expediency" is one of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as business expenditure if it was incurred on grounds of commercial expediency.

Decisions relating to section 37 will also be applicable to section 36(1)(iii) because in section 37 also the expression used is "for the purpose of business". "For the purpose of business" includes expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits thereby.

ATHERTON (H. M. INSPECTOR OF TAXES) V. BRITISH INSULATED AND HELSBY CABLES LTD. [1925] 10 TC 155 (HL), EASTERN INVESTMENTS LTD. v. CIT [1951] 20 ITR 1 (SC) ; [1951] 21 Camp Cas 194 AND CIT -VS.- CHANDULAL KESHAVLAL AND CO. [1960] 38 ITR 601 (SC)followed.

The expression "for the purpose of business" is wider in scope than the expression "for the purpose of earning profits".

CIT v. MALAYALAM PLANTATIONS LTD. [1964] 53 ITR 140 (SC) and CIT v. BIRLA COTTON SPINNING AND WEAVING MILLS LTD. [1971] 82 ITR 166 (SC) followed.

To consider whether one should allow deduction under section 36(1)(iii) of interest paid by the assessee on amounts borrowed by it for advancing to a sister concern, the authorities and the courts should examine the purpose for which the assessee advanced the money and what the sister concern did with the money. That the borrowed amount is not utilized by the assessee in its own business but had been advanced as interest free loan to its sister concern is not relevant. What is relevant is whether the amount was advanced as a measure of commercial expediency and not from the point of view whether the amount was advanced for earning profits.

> *Once it is established that there was nexus between the expenditure and purpose of the business (which need not necessarily be the business of the assessee itself) the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profits".*

Addl. CIT vs Tulip Star Hotels Ltd in CC No. 7138-7140 / 2012 dated 30.4.2012 by the Supreme Court , wherein it was held as below:-

> *"In our view, S.A. Builders Ltd vs CIT reported in 288 ITR 1, needs reconsideration".*

Though it is stated that the decision in S.A. Builders Ltd in 288 ITR 1 (SC) requires reconsideration, notice has been ordered to be issued to both the parties and the matter is still pending before the Supreme Court as on date. Hence the decision in 288 ITR 1 (SC) is very much applicable as on date until the judgement in Tulip Star Hotels Ltd is pronounced by the Supreme Court.

Munjal Sales Corporation vs CIT and Another reported in 298 ITR 298 (SC)

> *"16. As stated above, in this batch of civil appeals we are concerned with the Assessment Years 1993-94, 1994-95, 1995-96, 1996-97 and 1997-98. At this stage, it may be mentioned that as far back as in August/September 1991 assessee herein had given interest free advances to its sister concerns. These advances stood reduced over a period, till AY 1997-98. Each year the balances stood reduced. Further, vide Order dt.3.1.03 the Tribunal held, for AY 1992-93, that the assessee had given interest free loans from its Own Funds and not from interest bearing loans taken by the firm from third parties and consequently the assessee was entitled to claim deduction under 36(1)(iii). In other words, the Tribunal held that loans were given for business purposes. Similarly, for AY 1993-94, the Tribunal had taken the view that the said loans given to the firm's sister concerns were for business purposes. Accordingly, the Tribunal had deleted the disallowances during the AYs 1992-93 and 1993-94. It is equally true that for the AY 1994-95 the Tribunal took a contrary view in view of change in law brought about by Finance Act 1992. Prior to 1.4.93 payment of interest to the partner had to be added back to the assessable income of the firm whereas after Finance Act 1992 such payment became an item of deduction for computing the assessable income of the firm and it became part of the business income of the partner. In view of this change of law, the Tribunal disallowed payment of the interest in the present case for AYs*

1994-95, 1995-96, 1996-97 and 1997-98. However, the point which has been left out from consideration is that the loans which were given in August/September 1991 to the sister concerns got wiped out only in AY 1997-98. As stated above, for AY 1992-93 and AY 1993-94, the Tribunal held that the loans given to the sister concerns were out of the firm's Funds and that they were advanced for business purposes. Once it is found that the loans granted in August/September 1991 continued upto AY 1997-98 and that the said loans were advanced for business purposes and that interest paid thereon did not exceed 18/12% per annum, the assessee was entitled to deductions under Section 36(1)(iii) read with Section 40(b)(iv) of the 1961 Act.

17. One aspect needs to be mentioned during the AY 1995- 96, apart from the loan given in August/September 1991, the assessee advanced interest free loan to its sister concern amounting to Rs.5 lacs. According to the Tribunal, there was nothing on record to show that the loans were given to the sister concern by the assessee-firm out of its Own Funds and, therefore, it was not entitled to claim deduction under Section 36(1)(iii). This finding is erroneous. The Opening Balance as on 1.4.94 was Rs.1.91 crores whereas the loan given to the sister concern was a small amount of Rs.5 lacs. In our view, the profits earned by the assessee during the relevant year were sufficient to cover the impugned loan of Rs.5 lacs".

CIT –vs.- Reliance Utilities & Power Limited [2009] 313 ITR 340 (Bom.)-

"The assessee claimed deduction of interest on borrowed capital. The Assessing Officer recorded a finding that the sum of Rs.213 crores was invested out of its own funds and Rs. 147 crores was invested out of the borrowed funds. Accordingly he disallowed interest amounting to Rs.4.40 croes calculated at 12 per cent. per annum for three months from January, 2000 to March, 2000. The Commissioner (Appeals) found that the assessee had enough interest-free funds at its disposal for investment and accordingly deleted the addition of Rs. 4.40 cores made by the Assessing Officer and directed him to allow the deduction under section 36(1)(iii). The order of the Commissioner (Appeals) was upheld by the Tribunal. On appeal to the High Court:

Held, dismissing the appeal, that if there were funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free funds generated or available with the company, if the interest-free funds were sufficient to meet the investments. In this case this presumption was established considering the finding of fact both by the Commissioner (Appeals) and the Tribunal. The interest was deductible".

In view of the aforesaid facts and circumstances and the judicial precedents on the impugned issue, we hold that the advances were made by the assessee to various parties during the course of its business and are strategic investments. We also hold that the borrowed funds were not diverted for non-business purposes as sufficient own funds were available with the assessee to make interest free advances to its group concerns. We also hold that when borrowed funds and own funds were inextricably mixed in the same bank account and if the own funds are more than the amounts advanced interest free to sister concerns, then the presumption could be drawn in favour of the assessee that those advances were made only out of own funds of the assessee. We further hold that from the aforesaid facts available on record, the assessee had advanced monies to various concerns during the course of its business to further strengthen its business interests with the said parties and as a measure of commercial expediency. Accordingly we hold that the action of the Learned Assessing Officer in disallowing a sum of Rs.6,27,16,642/- is not warranted and Ground No. 6 raised by the assessee is allowed.

7. <u>Disallowance of legal expenses – Rs.38,49,317/-</u>

7.1. The brief facts of this issue is that the assessee debited a sum of Rs.1,18,63,401/- in its profit and loss account and out of this, the Learned AO disallowed a sum of Rs.38,49,317/- for want of bills / evidences. The bills / evidences were filed by the assessee during the course of appellate proceedings before the Learned CIT(Appeals) which were verified by the Learned Assessing Officer during remand proceedings. However, the Learned Assessing Officer gave a comment in the remand report that original bills were not produced by the assessee for authentication. The assessee pleaded that the original bills were never called for by the Learned AO during remand proceedings and hence the same could not be submitted before him. The Learned CIT(Appeals) upheld the disallowance made by the Learned AO in this regard. Aggrieved, the assessee has preferred an appeal against this issue before us on the following ground:-

> *"7. That the Learned CIT(A) was not justified in confirming the disallowance by the Assessing Officer an amount of Rs.3,849,317 out of Legal expenses when the full details of the aforesaid expenditure were filed".*

7.2. The Learned AR argued that the Learned CIT(Appeals) erred in not admitting the additional evidences filed in terms of Rule 46A of the IT Rules in the form of details of legal expenses of Rs.38,49,317/- together with the copies of the bills thereon. He further argued that the Learned CIT(Appeals) having called for a remand report from the Learned Assessing Officer in this regard ought not to have rejected the admission of additional evidences. In fact only on admission of additional evidences filed before him, he sought to give an opportunity to the Learned Assessing Officer in remand proceedings seeking for his comments. Hence on this ground itself, the assessee is entitled for relief. Even otherwise, the entire details filed before the lower authorities are filed before this tribunal and from the said details, it could be seen that the entire payments were made to renowned counsels for pursuing the legal disputes of the assessee company and accordingly he prayed for allowance of the same. In response to this, the Learned DR vehemently supported the orders of the lower authorities.

7.3. We have heard the rival submissions and it is seen from the details filed in the form of Paper Book by the assessee, the legal expenses incurred by the assessee were in respect of payments made to various renowned counsels for pursuing the various legal disputes of the assessee arising out of its business. We do not appreciate the view of the Learned CITA that additional evidences filed by the assessee in the form of details and bills for legal expenses were not admitted by him after calling for a remand report from the Learned Assessing Officer. In fact the remand report itself was called for from the Learned Assessing Officer only after admission of additional evidences by the Learned CIT(Appeals). Moreover, the assessee had duly filed objections to the remand report

that had the original bills for legal expenses been called for by the Learned Assessing Officer, it could have been filed by the assessee. It is also observed that no adverse comments were given by the Learned AO regarding the incurrence of legal expenses except stating that original bills were not filed. In view of this, we have no hesitation in deleting the addition made towards disallowance of legal expenses of Rs.38,49,317/- and accordingly the Ground No. 7 raised by the assessee is allowed.

8. Disallowance of proportionate management expenses u/s 14A of the Act -Rs.10,00,000/-

8.1. The brief facts of this issue is that the assessee had earned dividend income of Rs.2,45,84,822/- out of the investment of Rs. 280,01,93,396/-. The Learned Assessing Officer disallowed a sum of Rs.50,00,000/- towards proportionate management expenses for earning dividend income which was brought down to Rs.10,00,000/- by the Learned CIT(Appeals) in first appeal. Aggrieved, the assessee has preferred an appeal before us on the following ground:-

> *"8. That on law as well as on the facts and in the circumstances of the case the Learned CIT (A) erred in restricting disallowance U/s.14A of the Act to Rs.10,00,000/- on account of expenditure relatable to earning of dividend income".*

8.2. The Learned AR argued that most of the investment in shares were made in earlier years and are practically old investments and most of them were made in group companies which does not require any incurrence of any management expenses. He also argued that onus is on the revenue to prove that the interest paid on borrowed funds related to acquisition of shares yielding tax free income and placed reliance on the following decision in support of his contentions:-

Maruti Udyog Ltd vs DCIT reported in (2003) 92 ITD 119 (Del)

"Regarding burden of proof, it is the settled legal position that burden is on the person who alleges the existence of a fact. If the question of genuineness of expenditure is raised, the burden would be on assessee to prove the same Hence, where assessee claims deduction in respect of any expenditure, than onus would be on the assessee to prove that conditions for its allowability are satisfied. Reference can be made to Supreme Court judgment 111 the case of ClT v Calcutta Agency Ltd. [1951] 19 ITR 191 On the other hand. If the revenue wants to disallow an expenditure under a particular provision, then the onus would be on the department to prove that conditions for disallowance are satisfied. Reference can be made to Judgment of Punjab & Haryana High Court 111 the case of Saraswati Industrial Syndicate Ltd. vs. CIT[1982] 136 ITR 361. In the present case, it is the revenue who wants to disallow the expenditure under section 14A. Hence the onus is on the revenue to prove that interest paid by assessee on borrowed funds related to acquisition of shares yielding tax free income".

The Learned AR further argued that the assesee had sufficient funds in the form of share capital, reserves and surplus and cash profit for the year which worked out to Rs.646.65 crores (being the net owned funds at the beginning of the year to the tune of Rs.574.46 crores plus cash profit for the year amounting to Rs.72.19 crores) and the total investments made by the assessee is only Rs.280.01 crores and hence it could be easily inferred that the investments were made only out of own funds.

In response to this, the Learned DR supported the orders of the lower authorities.

8.3. We have heard the rival submissions and perused the materials available on record. The relevant assessment year under appeal is 2002-03 at which point of time, the provisions of Rule 8D was not in force and the same was made applicable only from Asst Year 2008-09 as decided in the decision of Godrej & Boyce Manufacturing. However, it is not in dispute that the assessee had derived taxable income as well as tax free income and incurred expenditure for deriving both the incomes and hence disallowance is definitely warranted in terms of section 14A which is brought in the statute book with retrospective effect from 1.4.1962. The disallowance had to be made only on an estimated basis with regard to

the expenditure incurred for the purpose of earning tax free income. The Hon'ble Jurisdictional High Court in the case of CIT vs M/s R.R. Sen & Brothers P Ltd in GA No. 3019 of 2012 in ITAT NO. 243 of 2012 dated 4.1.2013 had held as under:-

> *"The assessee did not show any expenditure incurred by him for the purpose of earning the money which is exempted under income tax. The Tribunal has computed expenditure at 1% of such dividend income, which, according to them, is the thumb rule applied consistently. We find no reason to interfere.*
> *The appeal is dismissed."*

Respectfully following the judicial precedent, we direct the Learned AO to disallow 1% of dividend income under this issue and accordingly, the Ground No. 8 raised by the assessee is set aside to the file of Learned Assessing Officer to make addition as directed above.

In the result, the appeal of the assessee in ITA No. 316/Kol/2006 is partly allowed.

I.T.A. No. 426/KOL/2006 – Departmental Appeal

9. **Addition of indirect taxes such as sales tax, expenditure tax, etc as part of turnover for the purpose of deduction u/s 80HHD – Rs.73,61,14,470/-**

9.1. The brief facts of this issue is that from the tax audit report filed by the assessee, it was seen that the assessee is following the practice of excluding indirect taxes from the total turnover of Rs.374,71,95,919/-. The Learned AO in the computation u/s 80HHD of the Act added indirect taxes to the total turnover on the contention that the practice of excluding the indirect taxes is in violation of section 145A of the Act and the verdict of the Supreme Court in the case of Chowringhee Sales Bureau vs CIT reported in 87 ITR 542 (SC) wherein it was held that indirect taxes collected should form part of trading receipts and should be included in the total receipts of the assessee. Accordingly a sum of Rs.73,61,14,470/-

representing indirect taxes such as sales tax (Rs.20,63,24,681/-) , expenditure tax (Rs.29,91,32,503/-) , luxury tax (Rs.22,26,24,683/-), service tax (Rs.68,13,106/-), entertainment tax (Rs.10,500/-) and work contract tax (Rs.12,08,997/-) was added to the total turnover for the purpose of ascertaining the percentage of receipt in foreign currency for granting deduction u/s 80HHD of the Act. The Learned CIT(Appeals) deleted the addition made on this count. Aggrieved, the revenue is in appeal before us on the following ground:-

> *"1. On the facts and in the circumstances of the case Ld. CIT[A] has erred in deleting the Assessing Officer's additions of Rs.73,61,14,470/- on account of collections of sales tax, expenditure tax, luxury tax, service tax, entertainment tax and work contract tax forms part of total turnover in computing deduction u/s.80HHD of I.T. Act in reliance with provisions of section 145A of I.T. Act and verdict of Hon'ble Supreme Court in the case of Chowringhee Sales Bureau -vs- CIT [87 ITR 542.]".*

9.2. The Learned DR vehemently supported the orders of the Learned AO and relied on the decision of the apex court in Chowringhee Sales Bureau vs CIT (87 ITR 542). In response to this , the Learned AR argued that it is now well settled law that computation of deduction under Chapter VIA is an independent code by itself for computing relief available under the relevant provisions and indirect taxes are not included in the total turnover for computation of deduction u/s 80HHC and 80HHD of the Act as no element of profit is involved in it and placed reliance on the decision of the Supreme Court in the case of CIT vs Lakshmi Machine Works Ltd (2007) 290 ITR 667 (SC).

9.3. We have heard the rival submissions and we find that this issue is now squarely covered by the decision of the apex court in the case of CIT vs Lakshmi Machine Works Ltd (2007) 290 ITR 667 (SC) wherein it was held that *"Section 80HHC(3) is a beneficial section. It was intended to provide incentives to promote exports. The incentive was to exempt profits*

relatable to exports. In the case of combined business of an assessee having export business and domestic business, the Legislature intended to have a formula to ascertain export profits by apportioning the total business profits on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. This method earlier existed under the Excess Profits Tax Act and it existed in the Business Profits Tax Act. Therefore, just as commission received by an assessee is relatable to exports and yet it cannot form part of turnover, excise duty and sales tax also cannot form part of the "turnover". The excise duty and sales tax are indirect taxes and are recovered by the assessee on behalf of the Government. Therefore, if they are made relatable to exports, the formula u/s 80HHC would become unworkable."

This issue is also covered by the decision of the Jurisdictional High Court in assessee's own case of CIT vs EIH Ltd in ITA No. 3 of 2001 dated 31.03.2011, wherein their Lordships of Calcutta High Court had held as under:-

> *"The last question before us is whether the tribunal below committed substantial error of law in re-computing deduction u/s 80HHD of the Act at Rs.77,62,17,303/- by not including 'receivables' in its computation although the receipt includes receivables as per mercantile system of accounting.*
>
> *A plain reading of the section 80HHD makes it clear that for computation of the relief u/s.80HHD, the total turnover alone is inconsequential but the AO has relied upon it. In our opinion, for computation of gross total receipt in business, the opening sundry debtor should be added to the total turnover and from that the closing sundry debtor should be deducted in order to arrive at the correct figure and that has been followed by the Auditor who has certified the entitlement of 61.07% of the business profit. Our aforesaid view finds support from the decision of the Supreme Court in the case of CIT vs Lakshmi Machine Works reported in (2007) 290 ITR 667 while interpreting the similar provision of section 80HHC(3) of the Act. It further appears that copy of Accountant's certificate in Form 10CCAD has also been produced. Therefore, the Assessing Officer*

wrongly considered the total turnover of Rs. 395,62,34,559/- instead of gross receipt in business amounting to Rs.390,93,27,318/- certified by the Auditor and accordingly, the relief allowed u/s 80HHD should be enhanced to Rs.77,62,17,303/- instead of Rs.77,53,58,471/- allowed by the Assessing Officer."

In view of the aforesaid decisions, we are not inclined to interfere with the decision of the Learned CIT(Appeals) on this issue. Accordingly, the Ground No. 1 raised by the revenue is dismissed.

10. Apportionment of common expenses to Bangalore unit for claiming deduction u/s. 80IA of the Act – Rs.2,70,86,842/-

10.1. The brief facts of this issue are that the assesee had incurred head office expenses and had allocated the same to the respective company or unit of the group. The remaining common expenses which is not directly allocable are apportioned as per ratio of saleable hotel room available in the respective units, average room rate of such unit, nature and mixture of inward traffic –whether domestic or foreign tourist, corporate client or free inward tourist etc. Based on the aforesaid ratio, the common expenses are allocated to different units and recovered out of their Gross Operating Profit.

Accordingly such contributions towards common expenses are considered as expenditure chargeable to the Gross Operating Profit of the respective units. Accordingly a sum of Rs.2,07,72,000/- was allocated as common expenses towards Bangalore unit by the assessee.

10.2. The Learned AO found that the total rooms of the assessee comes to 1626 and the rooms in respect of Oberoi, Bangalore come to 158 and therefore the proportionate average room revenue for Bangalore unit was worked out at 9.71% (158 / 1626 * 100). Based on this percentage, the proportionate head office expenses attributable to Bangalore unit was

worked out at Rs.4,78,58,842/- and since the assessee had allocated Rs.2,07,72,000/- , a sum of Rs.2,70,86,842/- was treated as common expenses attributable to Bangalore unit and accordingly the eligible profit of Bangalore unit has been reduced by the same amount for the purpose of calculation of deduction u/s 80IA of the Act. The Learned CIT(Appeals) deleted this addition by relying the decision of his predecessor on the same issue passed for the Asst Year 2001-02. Aggrieved, the revenue is in appeal before us on the following ground:-

> *"2. On the facts and in the circumstances of the case Ld. CIT[A] has erred in allowing proportionate head office expenses for Bangalore Unit of Rs.2,07,72,000/- for the purpose of computation of deduction uls.80IA of I.T. Act calculated by the assessee relying on assessee's explanation as well as decision of Ld.CIT[A] in appeal No.11/CIT[A]-VIII/Cir-8/2004-05 dated 07.02.2005 for assessment year 2001-02 in assessee's own case on the similar issue instead of Assessing Officer's allocation of Rs.2,70,86,842/- with reference to specific findings recorded in his assessment order".*

10.3. The Learned DR argued that for the Asst Years 2000-2001 & 2001-02 in ITA No. 833/Kol/2005 and ITA No. 1090/Kol/2005 respectively vide order dated 8.9.2006, this Tribunal had set aside this issue to the file of the Learned AO and prayed for similar direction for this asst year also. In response to this, the Learned AR pleaded that no order has been passed by the Learned AO for the Asst Years 2000-01 & 2001-02 pursuant to old tribunal orders. However, he also agreed for set aside of this issue to the file of the Learned AO to consider this issue in line with the directions given by this Tribunal for the Asst Years 2000-01 & 2001-02.

10.4. We have heard the rival submissions and perused the materials available on record. We find that this tribunal on a similar issue for the Asst Years 2000-01 & 2001-02 had set aside to the file of the Learned Assessing Officer in ITA No. 833/Kol/2005 and ITA No. 1090/Kol/2005 respectively vide order dated 8.9.2006 with the following directions :-

> *"Considering the totality of the facts of the case and following the decision of the Tribunal in assessee's own case for A.Y. 2000-01, we restore the matter back to the file of the AO to decide the issue afresh on the basis of the details filed by the assessee. The A.O. should give adequate opportunity of being heard to the assessee as per law. We direct accordingly. Ground of appeal no. 1 by the revenue is allowed for statistical purposes."*

Respectfully following the decision of the co-ordinate bench of the Tribunal, we restore this issue to the file of the Learned Assessing Officer to decide the issue afresh on the basis of details filed by the assessee. Needless to mention that the assessee be given reasonable opportunity of being heard. Accordingly, the ground no. 2 raised by the revenue is allowed for statistical purposes.

11. Disallowance of Pre-opening expenses as capital in nature relating to Vanyavilas – Rs.1,61,98,830/- and relating to Udayvilas – Rs.1,42,67,177/-

11.1. The brief facts of this issue are that the assessee had incurred a sum of Rs.1,61,98,830/- pertaining to Vanyavilas hotel and Rs.1,42,67,177/- pertaining to Udayvilas hotel and it relates to the period prior to the date of commencement of commercial production of the said hotels but after the setting up of the said hotels. The Learned Assessing Officer observed that in the books of accounts, these expenses were written off over a period of 5 years treating the same as deferred revenue expenses and for the purpose of income tax had claimed the full amount as expenditure on the pretext that the same are only pre-commencement business expenditure incurred on training of employees, advertisement expenditure, etc to make them fit for taking up the job on commencement of the activities for which the assessee also relied on certain decisions in its support. But the Learned Assessing Officer sought to disallow the sum of Rs. 3,04,66,007/- in the assessment by treating the same as capital expenditure. In first appeal, the Learned CIT(Appeals) appreciated the

contentions of the assessee and deleted the addition. Aggrieved, the revenue is in appeal before us on this issue on the following ground:-

> *"3. On the facts and in the circumstances of the case Ld. CIT[A] has erred in deleting the disallowance of Rs.3,04,66,007/- treating revenue expenditure as against Assessing Officer's disallowance uls.37(1) of the I.T. Act treating capital expenditure with reference to specific findings recorded in the Assessing Officer's assessment order".*

11.2. The Learned DR argued that the assessee had set up a new unit and all the expenses incurred upto the date of commencement of commercial production are to be capitalized and argued that the pre-opening expenses are at par with pre-operative expenses and are only capital in nature. In response to this, the Learned AR argued that the assessee had set up two seven star hotels and all the expenses for construction of the said hotels were duly capitalized by the assessee. The subject mentioned pre-opening expenses are nothing but expenses incurred on salaries, recruitment, training and development etc of General Managers, Service Engineers etc who are directly related to the operation of the Hotel after opening so that no obstruction arises while providing services to the guests when the hotel commences its business. Hence these are only expenditure incurred from the time of set up of business to the time of commencement of business. He further argued that these expenses are necessarily to be incurred for smooth functioning of the post commencement of business of the hotel and no way it is connected with the construction of the project. He argued that the expenditure incurred on the personnel are considered as revenue expenditure for income tax purposes and treated as deferred revenue expenditure in the books of accounts as the Income Tax Act does not recognize deferred revenue expenditure other than those contemplated in the specific provisions such as section 35D of the Act. He relied on the decision of the Jurisdictional High court in the case of CIT vs Kanoria General Dealers P

Ltd reported in 159 ITR 524 (CAL) and the decision of the Delhi High Court in the case of CIT vs Relaxo Footwears Ltd reported in (2007) 293 ITR 231 (Del) in support of his contentions. He further argued that the Special Leave Petition preferred by the revenue against this Delhi High Court order has been dismissed by the Hon'ble Supreme Court in CC No. 12361/2007 dated 3.1.2008. Accordingly, he pleaded for allowance of the entire expenditure as deduction in the year of incurrence.

11.3. We have heard the rival submissions and perused the materials available on record. We find that the assessee had set up two star hotels (Vanyavilas and Udayvilas) during the assessment year under appeal and certain expenses in the form of salaries, training and development of general managers, service engineers etc, were incurred by the assessee after the setting up of its business but before the date of commencement of business to enable smooth functioning of the activities post commencement of business to provide uninterrupted and better services to the guests in the hotel without any obstruction. These expenses though treated as deferred revenue expenditure in the books of accounts, as according to the assessee, the benefit out of these expenditures could be spread over a period of 5 years, but for the purpose of income tax, the same were claimed as revenue expenditure in full in the year of incurrence. Now the short point that arises for our consideration is as to whether the expenditure incurred from the date of setting up of business till the date of commencement of business could be charged off as revenue expenditure or not. We find that this issue has been elaborately dealt with in the following cases:-

CIT –vs.- Kanoria General Dealers (P) Ltd. [1986] 159 ITR 524 (Cal.)

> *"Where a business unit has been set up by the assessee which is ready to commence production, the assessee will be entitled to claim deduction of expenditure and the expenditure cannot be disallowed on the ground that the same had been incurred prior to the commencement of the actual business of commercial production.*

(2nd para at page 525) : Held, that the Tribunal had found that the assesese had set up its business in the assessment year 1966-67. The finding of the Tribunal had not been challenged as perverse. Therefore, the assessee was entitled to depreciation and deduction of expenditure for the assessment year 1966-67 and depreciation for the assessment year 1969-70".

CIT vs Ramaraju Surgical Cotton Mills Ltd (1967) 63 ITR 478 (SC)

Held that *"where a business had been set up by the assessee, the expenses incurred in such setting up could not be disallowed on the ground that the assessee had not commenced commercial production in such business".*

CIT –vs.- Hughes Escorts Communications Limited [2009] 311 ITR 253 (Delhi)

"A plain reading of section 2(34) of the Income-tax Act, 1961, shows that for a new business the previous year is the period beginning with the date of setting up of the business. There is a distinction between setting up and commencement of a business. When a business is established and is ready to compliance business then it can be said of that business that it is set up. But before it is ready to commence business it is not set up. But there may be an interregnum, there may be an interval between a business which is set up and a business which is commenced and all expenses incurred during the interregnum after the setting up of the business and before the commencement of the business, all expenses would be permissible deductions".

Held, dismissing the appeal, that the business of the assessee involved different activities in which the first step was the purchase of the VSAT equipment. There was no question of the assessee having to place a purchase order with H, for a purpose other than that of its business. The purchase order was placed on July 28, 1994. The application to the Department of Telecommunications for licence and the receipt of the satellite signals were the consequential stages. The signals were to be received after the VSAT equipment was installed in the premises of the customer. In the circumstances, the business of the assessee should be held to have been set up on July 28, 1994. This was the relevant date for determining the nature of the expenses incurred thereafter. The expenses incurred in the previous year, prior to the commencement of the business but after the setting up its business, which two dates need not be the same, would be deductible as revenue expenses.

CIT –vs.- Relaxo Footwares Limited [2007] 293 ITR 231 (Delhi) – SLP by revenue against this order dismissed.

"The assessee-company, engaged in trading in all kinds of rubber footwear, in the assessment year 1995-96, commenced the business of manufacture and sale of hawai cahhaps. The assessee claimed deduction of pre-operative expenses in the computation of total income, expenses occurred on the new factory and capital issue expenses. The Assessing Officer disallowed these claims. The appeal filed by the assessee was partly allowed by the Commissioner of Income Tax (Appeals). This order was challenged by the Revenue as well as the assessee. The Tribunal allowed the appeal filed by the assessee and dismissed the appeal of the Revenue. On further appeal by the Revenue contending that (i) the expenses incurred in a new unit earlier to the commencement of the manufacturing process had to be capitalised and the new business of the assessee could not be said to be an extension of the existing business, (ii) the expenditure incurred in connection with the purchase and installation of plant and machinery was capital in nature and thus disallowable, and (iii) the pre-operative expenses could not be written off at one go but had to be capitalised and admissible depreciation allowed thereon:

Held, dismissing the appeal, that the new unit was a part of the existing business and there was no dispute that there was unity of control and interlacing of the units. Thus the expenses incurred by the assessee for the setting up of the new unit which was a part of the existing business were therefore to be allowed as a revenue expenditure".

The special leave petition filed by the revenue against this order is dismissed by the Supreme Court in CC 12361/2007 dated 3.1.2008.

<u>Delhi ITAT – 15 SOT 348 (Del) Hotel Hans P Ltd vs ACIT</u>

"It is well-settled proposition of law that setting up of business and commencement of business are two separate activities. Once a business is set up, all the expenses of revenue nature are to be allowed, notwithstanding the fact that commercial operation started subsequently. When a business is established and is ready to be commenced, then it can be said that business is set up, but before it is ready to be commenced, there may be interval between a business which is set up and a business which is commenced. All the revenue expenditures incurred after setting up of the

business but before its commencement are permissible deductions while computing the income under the head 'Income from business and profession. Thus, a business can be said to have commenced as soon as it is being set up. In the instant case, the assessee was already in hotel and the hotel building was already in existence. After renovation, the hotel rooms were let out with effect from 16-9-2000 and, thus, the same were also put for commercial use. Therefore, there was no reason to disallow the expenditure incurred after 16-9-2000. If the date of 16-9-2000 was taken as the date of setting up of the business, the assets of the hotel could be said to have been used for more than 180 days. Therefore, there was no reason to disallow claim of depreciation. [Para 5 J

Therefore, the matter was restored back to the file of the Assessing Officer with a direction to allow proportionate expenditure incurred after 16-9-2000, as revenue expenditure". [Para 6 J

Kerosam Industries & Cotton Mills –vs.- CIT (1992) 196 ITR 845(Cal.)

"If expenses are incurred in connection with the setting up of a new business, such expenses will be on capital account. But, where the setting up does not amount to starting of a new business but expansion or extension of the business already being carried on by the assessee, expenses in connection with such expansion or extension of the business must be held to be deductible as revenue expenses".

We hold that the expenditure were incurred for expansion of the same business and not for setting up of the new business. Instead these expenditures were incurred by the assessee after the business is set up. It is ultimately only a new unit of the assessee by way of two fresh hotels (Vanyavilas and Udayvilas) which is nothing but an expansion of the existing hotel business of the assessee with complete interconnection and interlacing of funds with common administration, common management, common fund and common place of business.

Respectfully following the aforesaid judicial precedents on the impugned issue, we hold that the entire expenditure of Rs.1,61,98,830/-

relating to Hotel Vanyavilas and Rs.1,42,67,177/- relating to Hotel Udayvilas to be treated as revenue expenditure. Accordingly, the ground no. 3 raised by the revenue is dismissed.

12. **Addition on account of provision for repairs and replacement of bad and doubtful debts – Rs.28,91,127/-**

12.1. The Learned AO added back an amount of Rs. 28,91,127/- while computing income from technical fees receivable from hotels under the agreement for technical assistance on the ground that such amounts represent provision for repairs and replacement of bad and doubtful debts which are not allowable under the Act. This addition was deleted by the Learned CIT(Appeals) by relying on the order of his predecessor on the same issue for the earlier year. Aggrieved, the revenue is in appeal before us on the following ground:-

> *"4. On the facts and in the circumstances of the case Ld. CIT[A] has erred in deleting the addition of Rs.28,91,127/- on account of provision for repairs and replacement of bad and doubtful debts in relying on the decision of Ld. CIT[A]'s order in appeal No.11/CIT[A]-VIII/Cir-8/04-05 dated 07.02.2005 for asstt. year 2001-02 and the decision of Hon'ble ITAT in ITA No.891/Kolkata/2004 dated 29.06.2005 for asstt. year 1999-2000 both in assesses's own case not appreciating the Assessing Officer's addition under the head with reference to specific findings recorded in his asstt. order".*

12.2. The Learned DR argued that the provision for repairs and replacement of bad and doubtful debts is not allowable as deduction under the Act and accordingly pleaded for setting aside of Learned CITA's order on this issue. In response to this, the Learned AR argued that technical assistance fees were determined by the terms of the contracts with the hotel owning companies. He further argued that this issue was covered by the decision of this tribunal in ITA No. 833/Kol/2005 dated 8.9.2006 for the Asst Year 2001-02 in assessee's own case.

12.3. We have heard the rival submissions and perused the materials available on record. It is seen that this issue is squarely covered by the decision of this Tribunal in assessee's own case for the Asst Year 2001-02 in ITA No. 833/Kol/2005 dated 8.9.2006. The operative portion of the said judgement is reproduced hereinbelow:-

> *""25.1. We further find that the above issue is covered in favour of assessee by the decision of the Tribunal in assessee's own case vide ITA No. 891/K/2004 dated 29th June, 2005 for assessment year 1999-2000 where the ITAT dismissed the appeal filed by the revenue against the order of the CIT(A). We find that the Tribunal at para 15 of the order has held as under:-*
>
> > *"15. We have heard both the parties and perused the orders of tax authorities. We have also considered the paper book filed by the ld. counsel for the assessee. From the perusal of the agreement between the assessee and Hotel Raj Bilash, it is apparent that the disallowance was made by the AO out of misconception about contractual obligation in earning management fees and arbitrarily added back an amount of Rs.5,55,639/- on account of management fees from Hotel Raj Bilash. It is a contractual obligations as well as entitlement of assessee-company and which was in no way comparable with the computation of taxable income under the Income Tax Act. Therefore, in our considered opinion, the ld. CIT(A) was justified in deleting the addition made by the AO. We, therefore, uphold the same and reject the ground raised by the revenue.*
>
> *25.2. We also find that the Tribunal vide ITA No. 607/K/2005 dated 30.06.2000 in assessee's own case for AY 2000-01 had dismissed the ground raised by the revenue on this issue.*
>
> *26. Considering the totality of the facts of the case and following the decision of the Tribunal in assessee's own case in the immediately preceding two assessment years, we do not find any infirmity in the order of the ld. CIT(A) and accordingly uphold the same. Grounds of appeal No. 2 by the revenue is therefore dismissed".*

In view of the fact that there is no change in the facts and circumstances of this issue, respectfully following the decision of the coordinate bench of the Tribunal, we are not inclined to interfere with the decision of the Learned CITA on this issue. Accordingly, the ground no. 4 raised by the revenue is dismissed.

13. **Addition on account of excess provision of technical fees – Rs.4,62,806/-**

13.1. The Learned Assessing Officer added back an amount of Rs. 4,62,806/- on account of excess provision of technical fees for earlier years written back ignoring the clarification given at the time of assessment proceedings that the said amount was provided in accounts of that year on the provisional basis pending audited accounts and as such excess amount was offered for taxation in that year. After audit was over and the amount recovered was determined, the excess provision was written back during the year under assessment and since the amount was deleted and offered for taxation in earlier years it was claimed as deduction.

13.2. The Learned CIT(Appeals) found that the assessee has placed on record a statement showing that a provision of Rs.1,31,58,251/- from which Rs.4,09,037/- had been adjusted on account of excess provision of earlier years and that the technical fees for the year was determined and certified by a Chartered Accountant at Rs.1,32,12,020/-. The learned CITA also held that the assessee had pleaded that the difference of Rs.4,62,806/- has been similarly accounted for in the next year. Aggrieved, the revenue is in appeal before us on the following ground:-

> *"5. On the facts and in the circumstances of the case Ld. CIT[A] has erred in deleting the addition of Rs.4,62,806/- on account of excess provision of technical fees on accepting fresh explanation of assessee which the assessee has failed to explain before the Assessing Officer for verification during assessment proceedings for the year".*

13.3. The Learned DR vehemently supported the orders of the Learned Assessing Officer. In response to this, the Learned AR argued that in the absence of audited accounts of managed hotels at the time of finalization of accounts, the assessee accounts for income on account of technical fees on provisional basis and on final computation, the entitlement of the company is either reduced or increased. The excess provision made or short provision is adjusted accordingly. This is the regular system followed by the assessee and which has been accepted by the revenue. He accordingly pleaded that the addition made on this account be deleted.

13.4. We have heard the rival submissions and perused the materials available on record and we find lot of force in the arguments of the Learned AR that the income on account of technical services in respect of managed hotels are initially booked on provisional basis by the assessee for want of finalization of accounts of those managed hotels, and later based on Chartered Accountant's certificate the correct income is booked and provision already made is adjusted accordingly. It may either be increased or reduced. Hence we have no hesitation to delete this addition made in the sum of Rs. 4,62,806/-. Accordingly, the ground no. 5 raised by the revenue is dismissed.

14. **Addition on account of advances written off – Rs. 86,21,700/-**

14.1. The brief facts of this issue is that the assessee had paid certain advances as per the directions of the Delhi High Court in the earlier years towards a possible claim that might arise in the form of compensation due to the death of a guest in the swimming pool of the hotel in the year 1997-98 and this issue was under litigation before the Hon'ble Delhi High Court. During the Asst Year 2002-03, the assessee received the final order from the Delhi High Court wherein, it was held that the advances

already paid shall be treated as compensation paid by the assessee. Accordingly, this advance was written off in the books of the assessee during Asst Year 2002-03 and deduction claimed accordingly as expenditure incurred wholly and exclusively for the purpose of business. The Learned Assessing Officer records this fact but proceeded to disallow the same as the copy of the Delhi High Court order was not placed before him. Aggrieved, the assessee challenged this issue before the Learned CIT(Appeals), before whom the Delhi High Court order was placed by the assessee wherein, the assessee accepted the advance paid of Rs.86,21,700/- to the respondent of the claim case on their agreeing not to lay any further claim in future arising out of the death of the plaintiff. Accordingly, the Learned CIT(Appeals) deleted this addition. Aggrieved, the revenue is in appeal before us on the following ground:-

> *"6. On the facts and in the circumstances of the case Ld. CIT[A] has erred in deleting the addition of Rs.86,21,700/- on account of advance written off on accepting fresh evidence and fresh explanation made by assessee in violation of Rule 46A of I.T. Rules".*

14.2. The Learned DR argued that the order of Delhi High Court in the claim case was filed before the Learned CIT(Appeals) by the assessee and the Learned CIT(Appeals) did not resort to obtain the remand report from the Learned Assessing Officer for his comments and thereby leading to violation of Rule 46A of the Income Tax Rules. Accordingly he pleaded for set aside of this issue to the file of the Learned Assessing Officer.

14.3. We have heard the rival submissions and perused the materials available on record. It is seen that the assessee has debited the sum of Rs.86,21,700/- in its profit and loss account under the head "Advances written off" pursuant to the directions of the Delhi High Court order received during the Asst Year 2002-03 (i.e. the year under appeal). This court order is very much in the public domain and cannot be construed as an additional evidence filed by the assessee before the Learned

CIT(Appeals). Even otherwise, we find that the revenue's case is not going to get strengthened by setting aside this issue to the file of the Learned AO as the conclusion could not be anything different in this issue.

We hold that the Learned CIT(Appeals) had adjudicated this issue and granted relief to the assessee with proper reasoning. Hence we are not inclined to interfere with the Learned CIT(Appeals)'s order on this issue. Accordingly, the ground no. 6 raised by the revenue is dismissed.

15. **Disallowance of interest on borrowed funds as diverted for <u>non-business purposes</u>**

15.1. The brief facts of this issue are that the assessee had advanced monies to two parties namely Lake Palace Hotels & Motels Ltd (Rs.2,50,00,000/-) ; Mumtaz Hotel Ltd (Rs.9,50,00,000/-) wherein assessee had duly charged interest and offered the same to tax. Accordingly, it was pleaded by Learned AR that no disallowance of interest should be made. The Learned CIT(Appeals) deleted the addition made towards disallowance of interest on borrowed funds in respect of funds advanced to aforesaid two parties as the same are interest bearing and confirmed the addition towards interest disallowance in respect of other parties. Against this relief granted to assessee, the revenue is in appeal before us on the following ground:-

> *"7. On the facts and in the circumstances of the case Ld. CIT[A] has erred in restricting the addition to the extent of Rs.5,14,01,920/- as against Assessing Officer's addition of Rs.6,27,16,642/- on account of interest paid on loan free advances made to sister concern on accepting fresh explanation made by assessee without appreciating the fact and circumstances of the loan transactions recorded by Assessing Officer in his assessment order".*

15.2. We have heard the rival submissions. This issue has been elaborately dealt with in Ground No. 6 raised by the assessee in this order. The decision rendered thereon will be equally applicable to Ground No. 7 raised by the revenue. Accordingly, ground no. 7 raised by the revenue is dismissed.

16. **Disallowance on account of staff welfare expenses – Rs.50,00,000/-**

16.1. The brief facts of this issue is that the assessee company is in the habit of providing free / subsidized meals to its employees on duty. The Learned Assessing Officer proceeded to disallow a sum of Rs.50,00,000/- on account of staff welfare expenses on an *ad hoc* basis based on the disallowances made in the earlier years i.e. Asst Years 2000-01 & 2001-02. On first appeal, the Learned CIT(Appeals) on the basis of earlier year's order of his predecessor deleted the addition made towards staff welfare expenses on an *ad hoc* basis with a finding that it is quite usual and standard practice in hotel business to provide meals to its employees and there was no dispute on the facts that expenditure on such meal was allowable business expenditure. He also gave further finding that the Learned AO did not dispute the fact that the expenditure had been incurred and that being so, he had no occasion to disallow a part of the same. Aggrieved, the Revenue is in appeal before us on the following ground:-

> *"8. On the facts and in the circumstances of the case Ld. CIT[A] has erred in deleting the Assessing -Officer's disallowance of Rs.50,00,000/- on account of 5Uif welfare expenses relying on the decision of Ld. CIT[A]'s order in appeal No.11/CIT[A]-VIII/Cir-8/04-05 dated 07.02.2005 for asstt. year 2001-02 in the case of assessee on the similar issue not appreciating the facts and circumstances recorded by Assessing Officer in his asstt. order".*

16.2. The Learned DR relied on the order of the Learned Assessing Officer on this issue. In response to this, the Learned AR argued that the

assessee had only provided meals to its employees on duty pursuant to a memorandum of settlement dated 27.9.99 entered into with the employees of Oberoi Tower and Oberoi Mumbai u/s 18(1) r.w.s. 2(p) of Industrial Disputes Act, 1947 Rule 62 of Industrial Disputes (Bombay) Rules, 1957 and also stated that this issue is covered in favour of the assessee in its own case by the order of this Tribunal for the earlier year. He also argued that the revenue having agitated this issue before the Hon'ble Calcutta High Court in the earlier year by raising substantial question of law in ITA No. 3 of 2001 dated 28.3.2001 at the time of admission of appeal before the High Court, the learned counsel for the revenue sought to withdraw the same on instructions from the income tax department at the time of final disposal of appeal by the Hon'ble High Court.

16.3. We have heard the rival submissions. It is seen that the addition has been made only on an *ad hoc* basis by the Learned Assessing Officer. It is seen that the learned counsel for the revenue had sought to withdraw this ground before the Hon'ble High Court while pursuing the appeal in the earlier year based on the instructions from the Income Tax Department which is clearly stated in para 2 of the order of the High Court. This only leads to a situation that probably the revenue in its wisdom thought it fit not to pursue this issue before the High Court as the addition made thereon may not get sustained in the High Court. We find that this issue is covered in favour of the assessee by the decision of this Tribunal in assessee's own case for the Asst Year 2001-02 in ITA No. 833/Kol/2005 dated 8.9.2006 . The operative portion of the said judgement is reproduced hereunder:-

> *"32. After hearing both the sides we find that the company has entered into a memorandum of settlement dated 27th September, 1999 with the employees of Oberoi Tower, and Oberoi Mumbai under section 18(1) read with section 2(P) of the Industrial Dispute Act, 1947 and Rule 62 of the Industrial Disputes (Bombay) Rules, 1957. We find that Clause No. 13 of the said settlement reads as under:-*

> *"13. Outdoor Allowance/Lunch Allowance –*
> *The Lunch allowance of the staff who are required to go on outdoor duty during lunch hours will be increased from Rs.40/- to Rs.75/- per day from the date of signing the Settlement, subject to having their meals outside the hotel".*

32.1. Further we find that Clause No. 22 of the said settlement reads as under:-

> *"22. It is agreed by and between the parties that a sum of Rs.70/- per month will be deducted towards breakfast, tea, snacks and meals served in the cafeteria from the salaries of the employees w.e.f. 1st January, 2000".*

32.2. We further find that the ITAT in assessee's own case vide ITA No. 607/K/2005 dated 30.06.2006 for the AY 2000-01 dismissed the ground raised by the revenue holding as under:-

> *"55. Considering the totality of the facts of the case and considering the Memorandum of Settlement entered into between the management and the employees union for provision of meal to employees on duty and in absence of any contrary material brought on record by the revenue against the findings of the ld. CIT(A) and further considering that the addition made by the AO is based purely on estimate basis. We do not find any infirmity in the order of the ld. CIT(A) deleting such addition and accordingly uphold the same. Grounds of appal no. 7 by the revenue is therefore, dismissed".*

33. Considering the totality of the facts of the case and following on the order of the ITAT in assessee's own case in the immediately preceding assessment where the ground raised by the revenue was dismissed, the grounds of appeal No. 4 by the revenue is dismissed".

Respectfully following the coordinate bench of the Tribunal on this impugned issue in assessee's own case for the earlier year, we are not inclined to interfere with the decision of the Learned CIT(Appeals) on this issue. Accordingly, ground no. 8 raised by the revenue is dismissed.

17. **Disallowance of repairs, renewals, replacement and <u>advertisement – Rs.1,07,42,335/-</u>**

17.1. The brief facts of this issue are that the assessee was asked by the Learned Assessing Officer to furnish the details as requisitioned in the questionnaire u/s 142(1) of the Act. In response, the assessee submitted that the information is not readily available in their systems and offered to give the details in electronic media which was also not given by assessee later during assessment proceedings. But the assessee submitted the unit wise details of expenses incurred on this account. The Learned Assessing Officer felt that the details furnished by assessee are of no use as the details simply indicate the amount incurred by an individual unit but the details of expenses are not available and hence genuinity of the same could not be verified. Accordingly he disallowed a sum of Rs.1,07,42,335/- being 2% of total expenditure on that account on an estimated basis. On first appeal, the Learned CIT(Appeals) deleted this addition on the ground that the reasons given by the Learned Assessing Officer for making the disallowance is vague and cannot be sustained. Aggrieved, the revenue is in appeal before us on the following ground:-

> *"9. On the facts and in the circumstances of the case Ld. CIT[A] has erred in deleting the disallowance of Rs.1,07,42,335/- out of total expenses incurred on repairs, renewals, replacement and advertisement etc. on the basis of fresh explanation made by assessee which was unverifiable during asstt. proceedings for the year due to failure on the part of assessee to produce before Assessing Officer".*

17.2. The Learned DR relied on the order of the Learned Assessing Officer. In response to this, the Learned AR argued that no disallowance could be made on an *ad hoc* basis and placed reliance on the decisions of Mumbai ITAT in the case of ACIT vs Arthur Andersen & Co (2005) 94 TTJ 736 (Mumbai) and assessee's own case in DCIT vs EIH Ltd in ITA No. 1760/Cal/1999 for Asst Year 1996-97 in support of his contentions.

17.3. We have heard the rival submissions and perused the materials available on record. We find that the addition of Rs.1,07,42,335/- has been made only on an *ad hoc* basis which is not in accordance with law. We also find that this issue has been dealt with by this Tribunal in assessee's own case in ITA No. 1760/Cal/1999 for Asst Year 1996-97.

Respectfully following the decision of the coordinate bench of the Tribunal on this impugned issue in assessee's own case for the Asst Year 1996-97, we are not inclined to interfere with the decision of the Learned CITA on this issue. Accordingly, ground no. 9 raised by the revenue is dismissed.

18. **Disallowance of interest u/s 14A on the ground that loan has been utilized for investment in shares for earning dividend which is exempt – Rs.3,47,34,798/-**

18.1. The brief facts of this issue is that from the Balance sheet of the assessee, it could be seen that the assessee has a total investment in shares amounting to Rs.280.02 crores on which dividend was derived to the extent of Rs.2.46 crores which was exempt. The Learned Assessing Officer held that from the balance sheet it appears that the assessee has utilized loan funds amounting to Rs.464.80 crores that comes to 31% of total fund utilized. Therefore, the Learned Assessing Officer assumed that 31% of total fund invested in shares has been utilized from borrowed fund. In the profit and loss account, the assessee has debited total interest amounting to Rs.18.60 crores and hence interest relatable to 31% of investment in shares is Rs.3,47,34,798/- was disallowed u/s 14A of the Act. On first appeal, the Learned CIT(Appeals) deleted the addition made u/s 14A on this account on the ground that no evidence has been brought on record by the Learned AO to prove that the borrowed funds were utilized for investment in shares for earning tax free dividend income. Aggrieved, the revenue is in appeal before us on the following ground:-

> *"10. On the facts and in the circumstances of the case Ld. CIT[A] has erred in deleting the disallowance u/s.14A of the I.T. Act the proportionate interest on loan fund utilized in shares for earning exempted dividend income on the basis of facts and circumstances pleaded before him which was unverifiable during asstt. proceedings for the year due to failure on the part of assessee to produce before the Assessing Officer".*

18.2. The Learned DR relied on the order of the Learned Assessing Officer. In response to this, the Learned AR argued that most of the investments in shares were made in earlier years and are practically old investments. He also argued that onus is on the revenue to prove that the interest paid on borrowed funds related to acquisition of shares yielding tax free income. The Learned AR further argued that the assesee had sufficient funds in the form of share capital, reserves and surplus and cash profit for the year which worked out to Rs.646.65 crores (being the net owned funds at the beginning of the year to the tune of Rs.574.46 crores plus cash profit for the year amounting to Rs.72.19 crores) and the total investments made by the assessee is only Rs.280.01 crores and hence it could be easily inferred that the investments were made only out of own funds. Even assuming without conceding, he further argued that out of the total investments of Rs.280.01 crores, a sum of Rs.120.91 crores has been invested in foreign companies, wherein the dividend derived , if any, would become taxable and hence is automatically outside the ambit of disallowance of section 14A of the Act.

18.3. We have heard the rival submissions and perused the materials available on record. The relevant assessment year under appeal is 2002-03 at which point of time , the provisions of Rule 8D was not in force and the same was made applicable only from Asst Year 2008-09 as decided in the decision of Godrej & Boyce Manufacturing. However, it is not in dispute that the assessee had derived taxable income as well as tax free income and incurred expenditure for deriving both the incomes and hence

disallowance is definitely warranted in terms of section 14A which is brought in the statute book with retrospective effect from 1.4.1962. We also find lot of force in the arguments of the Learned AR that the investments made by the assessee are strategic investments and out of commercial expediency to further the business interests and obtain controlling stake in the respective companies. Accordingly we hold no disallowance u/s 14A of the Act could operate on the same for which reliance is placed on the following decisions:-

EIH Associated Hotels Ltd vs DCIT – Chennai Tribunal decision:-

"Investments made by the assessee in subsidiary company were not on account of investment for earning capital gains or dividend income. Such investments had been made by the assessee to promote subsidiary company into the hotel industry and were on account of business expediency and dividend therefrom is purely incidental. Therefore, the investment made by the assessee in its subsidiary is not to be reckoned for disallowance u/s 14A read with Rule 8D".

Interglobe Enterprises Ltd vs DCIT – Delhi Tribunal decision:-

"Assessee had utilized interest free funds for making fresh investments and that too into its subsidiaries which were not for the purpose of earning exempt income but for strategic purposes only. No disallowance of interest is required to be made under Rule 8D (i) or (ii) as no direct or indirect interest expenditure has incurred for making investments. Strategic investment has to be excluded for the purpose of arriving at disallowance under Rule 8D(iii)".

However, when it is found that the assessee has got sufficient own funds in the form of share capital, reserves and surplus to the tune of Rs.646.65 crores and cash profit for the year amounting to Rs.72.19 crores and the total investments (including foreign company investments) is only Rs.280.01 crores, and more so when these investments were made years ago by the assessee, it could easily be concluded that no disallowance u/s 14A of the Act could operate in the

facts and circumstances of the case. We draw support from the decision of Delhi Tribunal in the case of Maruti Udyog Ltd vs DCIT reported in (2003) 92 ITD 119 (Del), wherein it was held as below:-

> *"Regarding burden of proof, it IS the settled legal position that burden is on the person who alleges the existence of a fact. If the question of genuineness of expenditure is raised, the burden would be on assessee to prove the same Hence, where assessee claims deduction in respect of any expenditure, than onus would be on the assessee to prove that conditions for its allowability are satisfied. Reference can be made to Supreme Court judgment 111 the case of ClT v Calcutta Agency Ltd. [1951 19 ITR 191 On the other hand. If the revenue wants to disallow an expenditure under a particular provision, then the onus would be on the department to prove that conditions for disallowance are satisfied. Reference can be made to Judgment of Punjab & Haryana High Court 111 the case of Saraswati Industrial Syndicate Ltd. vs. CIT[1982] 136 ITR 361. In the present case, it is the revenue who wants to disallow the expenditure under section 14A. Hence the onus is on the revenue to prove that interest paid by assessee on borrowed funds related to acquisition of shares yielding tax free income".*

> *62. .....Admittedly, this is a case of mixed accounts wherein all kinds of receipts are deposited. Assessee's counsel has specifically raised the plea at page 94 of the written submissions that at "the beginning of the year there were interest-free funds of Rs.2143.35 crores while at the end of the year at Rs. 2622.37 crores. Thus, there was increase in the interest, the extent of Rs. 479 crores. Besides this, profits of the year amounting to Rs. 975 crores were also pumped in such accounts. Thus, interest-free funds of Rs. 1454 crores were available to assessee for making investment which far exceeded investment in shares of Rs.217 crores. This fact stated by assessee remains uncontroverted. The CJT(A) could not ignore such facts. The nexus between borrowed funds and investment can be said to be established only where it is shown that interest free funds were not available with the assessee. The failure to take into account has completely vitiated the working made by CIT(A). We are not concerned with the disallowance under section 36(1)(iii) as no such disallowance was made. The disallowance was sought to be made under section 14A. Hence, it was for the revenue to discharge the onus which the revenue has miserably failed to discharge. Accordingly, the order of CIT(A) is set aside on this issue and consequently, the addition of Rs. 4,59,08,287 sustained by her is hereby deleted".*

Respectfully following the decision of the coordinate bench of Chennai and Delhi Tribunal as cited above, we hold that the assessee is having sufficient interest free funds to make investment in shares of domestic companies to the tune of Rs.144.08 crores, wherein the dividend earned would be tax free and in view of the fact that the Learned Assessing Officer had not brought the nexus between the borrowed funds and the amount invested in the shares of domestic companies, and in view of the fact that the investments in subsidiaries were made out of strategic investments, we are not inclined to interfere with the decision of the Learned CIT(Appeals) on this issue.

We also hold that dividend, if any, derived from investment in shares of foreign companies made by the assessee would become taxable and hence disallowance u/s 14A would not operate in this regard. We place reliance on the following decisions in this regard :-

(i) CIT- vs- Suzlon Energy Ltd (2013) 354 ITR 630 (Guj);

(ii) Birla Group Holdings Ltd –vs- DCIT (2007) 13 SOT 642 (Mum. Trib);

(iii) ITO –vs- Strides Acrolab Ltd (2012) 138 ITD 323 (Mum. Trib).

Accordingly, ground no. 10 raised by the revenue is dismissed.

19. **Disallowance of proportionate management expenses u/s 14A – Rs.50,00,000/-**

19.1. The brief facts of this issue is that the assessee had earned dividend income of Rs.2,45,84,822/- out of the investment of Rs.280,01,93,396/-. The Learned AO disallowed a sum of Rs.50,00,000/- towards proportionate management expenses for earning dividend income which was brought down to Rs.10,00,000/- by the Learned

CIT(Appeals) in first appeal. Aggrieved, the revenue is in appeal before us on the following ground:-

> *"11. On the facts and in the circumstances of the case Ld. CIT[A] has erred in restricting the disallowance u/s.14A of the I.T. Act to the extent of Rs.I0,00,000/- on account or proportionate management expenses as against Assessing Officer's disallowance of Rs.50,00,000/- without appreciating the finding recorded by Assessing Officer in his assessment order".*

19.2. We have heard the rival submissions and we find that this issue is elaborately dealt with in this order in Ground No. 8 raised by the assessee in ITA No. 316/ Kol/ 2006, wherein we have held that 1% of dividend income is to be disallowed u/s 14A in accordance with the decision of Jurisdictional High Court in the case of CIT vs R.R. Sen & Brothers P Ltd in GA No. 3019 of 2012 in ITAT NO. 243 of 2012 dated 4.1.2013. Accordingly, the ground no. 11 raised by the revenue is partly allowed.

20. **Disallowance of depreciation on additions of assets – Rs.11,33,20,825/-**

20.1. The Learned Assessing Officer disallowed the depreciation on additions to fixed assets to the tune of Rs.11,33,20,825/- on the ground that the bills for the same were not produced by the assessee during assessment proceedings. However, before the Learned CIT(Appeals), the same were produced as an additional evidence. Hence in terms of Rule 46A of Income Tax Rules, the Learned CIT(Appeals) sought for a remand report from the Learned Assessing Officer with regard to the impugned issue. Since the Learned Assessing Officer did not make any adverse remarks on this issue but simply stated that only Xerox copies of the bills were produced by the assessee, the Learned CIT(Appeals) sought to delete the addition made in the sum of Rs.11,33,20,825/- towards disallowance of depreciation. Aggrieved, the revenue is in appeal before us on the following ground:-

> *"12. On the facts and in the circumstances of the case Ld. CIT[A] has erred in deleting the disallowance of Rs.11,33,20,825/- on account of depreciation on the amount of additions in assets on accepting assessee's explanation without appreciating the facts and circumstances recorded by Assessing Officer in his assessment order as well as remand report dated 06.12.2005".*

20.2. The Learned DR relied on the order of the Learned Assessing Officer. In response to this, the Learned AR argued that since no adverse findings were given by the Learned Assessing Officer during remand proceedings towards this issue, he prayed for deletion of this disallowance.

20.3. We have heard the rival submissions and perused the materials available on record. It is not in dispute that the bills for additions to fixed assets were filed by the assessee before the Learned CIT(Appeals) for the first time and accordingly a remand report was called for from the Learned Assessing Officer who had not given any adverse findings with regard to this issue. Hence there cannot be any grievance on the part of the revenue to agitate this ground before us. Accordingly, we are not inclined to interfere with the decision of the Learned CIT(Appeals) on this issue. Accordingly, ground no. 12 raised by the revenue is dismissed.

In the result, the revenue's appeal in ITA NO. 426/Kol/2006 is Partly Allowed.

ITA No. 1808/KOL/2007 – ASSESSEE's APPEAL

21. This appeal of the assessee arises out of the order of the Learned CIT(Appeals) u/s 154 of the Income Tax Act, 1961 (hereinafter referred to as the "Act") dated 16.5.2007 for the Asst Year 2002-03. The brief background of this appeal is that the assessment was framed u/s 143(3)

of the Act for the Asst Year 2002-03 on 28.3.2005 making various additions to the returned income. All the additions were contested by the assessee before the Learned CIT(Appeals). The Learned CIT(Appeals) had disposed off the appeal in Appeal No. 44/CIT(A)-VIII/KOL/CIR.8/2005-06 dated 22.12.2005 without disposing off Ground No. 4 raised by the assessee before him. This mistake was brought to the notice of the Learned CIT(Appeals) by preferring a rectification petition u/s 154 of the Act by the assessee on 21.2.2006 and in response to the same, the Learned CIT(Appeals) passed an order u/s 154 of the Act on 16.5.2007 modifying his earlier order by adjudicating Ground No. 4 raised by the assessee in the original grounds of appeal. For the sake of convenience, the Ground No. 4 raised before the Learned CIT(Appeals) is reproduced herein:-

> *"That on law as well as on the facts and in the circumstances of the case the Learned Assessing Officer while computing the deduction u/s 80IA had wrongly reduced the eligible profit of Bangalore Unit by 36.21% on the ground that the same had already been allowed as deduction u/s 80HHD."*

21.1. The Learned CIT(Appeals) held this ground against the assessee by a detailed order, The relevant operative portion is in pages 3 to 6 of the Section 154 Order of the Learned CIT(Appeals). Aggrieved against this section 154 order, the assessee is in appeal before us on the following grounds:-

> *"1. That on the facts and in the circumstances of the case, the Learned CIT(Appeals) erred in holding that if deduction is claimed u/s.80HHD of the Income Tax Act, 1961 (herein after referred to as Act) on profits of a unit deduction under any other section of Chapter VIA cannot be allowed on the profits of the same unit.*
>
> *2. That on the facts and in the circumstances of the case, the Learned CIT(Appeals) was not justified in confirming the action of the AO in reducing the eligible profit of Bangalore unit by 36.21 % while computing deduction u/s. 80IA on the ground that the same had already been allowed as deduction u/s. 80HHD.*

3. That on the facts and in the circumstances of the case, the Learned CIT(Appeals) failed to appreciate the fact that deduction claimed u/s. 80HHD and that under section 80IA in the aggregate did not exceed the profits of the unit eligible for deduction under these sections and hence there was no double deduction.

4. That without prejudice to the grounds taken herein above, the Learned CIT(Appeals) erred in confirming the action of the AO in reducing 36.21% of the eligible profit of the Bangalore unit while computing deduction u/s. 80IA ignoring the fact that the actual relief granted u/s. 80HHD was restricted to only 30% of the eligible profits.

5. That without prejudice to the grounds taken here-in-above, the Learned CIT(Appeals) should have held that deduction u/s. 80IA should be first computed and deducted from the profits and gains of the business before computing deduction u/s. 80HHD of the Act.

6. That the appellant craves leave to add, amend, modify, rescind, supplement or alter any of the grounds stated here-in-above either before or at the time of hearing of the appeal".

21.2. The Learned AR argued that the issue is covered by the decision of the Supreme Court in the case of JCIT vs Mandideep Engineering & Packaging India P Ltd reported in (2007) 292 ITR 1 (SC) and accordingly pleaded for allowance of the issue under appeal.

In response to this, the Learned DR vehemently supported the orders of the lower authorities.

21.3. We have heard the rival submissions and perused the materials available on record. Chapter VI-A of the Income Tax Act, 1961 deals with various deductions. Part 'A' of this Chapter details the scheme of deduction, while Part 'C' contains the provisions for allowing certain deductions in respect to profits and gains from a business. Section 80A falling in Part 'A', provides that deductions are to be made from the gross

total income, and that the aggregate amount of the deductions shall not exceed the gross total income.

21.4. Section 80AB, also falling in Chapter of VIA, provides that where any deduction is required to be made or allowed under any section falling in Part 'C' of that Chapter, in respect of any income of the nature specified in any of the relevant section which is included in the gross total income, the amount of income of that nature as computed in accordance with the provisions of the Income Tax Act shall be deemed to be the amount of income of that nature derived or received by the assessee and included in his gross total income.

21.5. Section 80IA(9) which falls in Part 'C' of Chapter VIA, provides as under:-

> *"Where any amount of profits and gains of an Undertaking or an enterprise is claimed and allowed under this section for any assessment year, deduction to the extent of such profits and gains shall not be allowed under any other provisions of this Chapter under the heading 'C'- Deductions in respect of certain incomes", and shall in no case exceed the profits and gains of such eligible business of Undertaking or Enterprise, as the case may be".*

21.6. The question that repeatedly arises for the consideration of the Court is about that quantum of deduction in case where an assessee is eligible to claim deduction under more than one Section of Part 'C' of Chapter VI-A based on different criteria, for instance, under section 80HHC for export profits and section 80IA for new Industrial Undertaking, and the manner of computation of deductions under both these sections. Hon'ble Bombay High Court in the case of Associated Capsules Pvt. Ltd. –vs.- DCIT reported in 237 CTR (Bom.) 408 considered the decision of the Hon'ble Delhi High Court in the case of Great Eastern

Export –vs.- CIT reported in 237 CTR 264 noted that the Hon'ble Delhi High Court had failed to consider one of the arguments of the ld. counsel for the revenue in that case. Ld. counsel had argued that in the matter of grant of deduction, the first stage was computation of deduction and second stage was the allowance of deduction, and that computation of deduction had to be made as provided in their respective sections and it was only at the stage in allowing deduction under section 80IA(1) and also under other provisions of Part 'C' of Chapter VIA, that the provisions of section 80IA(9) came into operation. The Hon'ble Bombay High Court noted that the Hon'ble Delhi High Court had not rejected this argument and therefore could not have arrived at the conclusion that indeed without rejecting that argument. The Hon'ble Bombay High Court expressed its decent with the views that Hon'ble Kerala High Court in the case of Olem Exports (India) Limited –vs.- CIT reported in 229 CTR (Ker.) 206 for the same reasons.

21.7. The Hon'ble Bombay High Court noted that the object of section 80IA(9) was to prevent tax payers from claiming repeated deductions in respect of the same amount of the eligible income and in excess of the eligible profits, and not to curtail deduction allowable under various provisions of Part 'C' of Chapter VIA. The Hon'ble Bombay High Court, therefore, held that section 80IA(9) did not affect the computation of deduction under various provisions of Part 'C of Chapter VIA, but affected the allowability of such deductions, so that the aggregate deduction under section 80IA and other provisions under part 'C' of Chapter VI-A did not exceed 100% of the profits of the business of the assessee. We hold that a provision introduced for restricting the scope of a benefit another provision has to contain a *non-obstante* clause which is found in section 80HHD and on this count alone, any attempt to curtail the basis of the profit eligible for deduction under section 80HHD should be avoided.

21.8. Section 80IA(9) should at the most be seem to be achieving the same thing as is achieved by section 80AB and may be taken as a provision introduced to achieve greater clarity on this subject.

22. We are of the view that Redundancy should not be attributed to the legislature. This is a cardinal principle of construction of statutes. Further, if there is ambiguity, it is an equally accepted principle of interpretation that such ambiguity should be resolved in favour of the assessee paying taxes and not in favour of the revenue. At this juncture, it is relevant to get into the notes on clauses on the impugned issue of amendment in section 80IA and section 80HHD to prevent double deduction of same profit:-

"Under any provisions of Chapter VIA of the Income Tax Act, various deductions from the profits and gains were allowed to specified assesses, subject to fulfilling certain requirements specified under the relevant sections. The total deductions under Chapter VIA of the Income Tax Act were restricted to the gross total income in respect of assessee as a whole".

"However, in certain cases, it was noticed that certain assessee's claim more than 100% deduction on such profits and gains of the same Undertaking, when they were entitled to deduction under more than one section of Chapter VIA. With a view to providing suitable statutory safeguard in the Income Tax Act to prevent tax payers from taking undue advantage of existing provisions of the Act by claiming repeated deductions in respect of the same amount of eligible income, even in cases where it exceeds such eligible profit of an Undertaking or Hotel, it is proposed to provide inbuilt restrictions in section 80HHD and 80IA, so that such unintended benefits are not passed on to the assessee.

This amendment is sought to be introduced retrospectively w.e.f. 1.4.1990 (emphasis supplied)".

23. It is also pertinent to get into the provisions of section 80P(3) of the Act at this juncture. Section 80P(3) reads as under:-

> *"In a case where the assessee is entitled also to the deduction under section 80HH or section 80HHA or section 80HHB or section 80HHC or section 80HHD or section 80I or section 80IA or section 80J the deduction under sub-section (1) of this section, in relation to the sums specified in clause (a) or clause (b) or clause (c) of sub-section (2) shall be allowed with reference to the income, if any, as referred to in those clauses included in the gross total income as reduced by the deductions under section 80HH, section 80HHA, section 80hhB, section 80HHC, section 80HHD, section 80I, section 80IA section 80J, and section 80JJ".*

23.1. From the above, it could be seen that similar language "as reduced by" is missing in section 80IA(9). This goes to prove that it was never the intention of the legislature that the deductions under section 80IA should be granted on the profits after reducing the deduction under section 80HHD of the Act.

23.2. We are also of the opinion that deductions under Chapter VI-A are objective specific. It is possible that an assessee's business fulfils more than one object sought to be achieved. In such a situation, an assessee should be entitled to claim deduction under another section covering the different objective, although with reference to each of the objectives, he cannot claim more than one deduction. In other words, for different objectives, separate deduction may be simultaneously claimed. What is prohibited is that in respect of the same objective, more than one deduction should not be claimed. If an assessee claims a deduction under section 80I, it should not be able to claim a deduction under section 80HH. If an assessee claims deduction under section 80HHE, it should not be able to claim a deduction under section 80HHF.

23.3. The whole issue cannot also be looked into from another angle. Section 80IA postulates a fiction that in determining the profits eligible for deduction, the eligible undertaking shall be deemed to be the only source of income. Consequently, therefore, one would have to ignore the profits made by other Undertaking or activities of the assessee. Quantum of deduction under section 80IA would therefore, be uninfluenced by the result of other operation of the assessee. There is also no prioritisation of deduction under section 80HHD or under section 80IA. This is unlike section 80G for example, where specific provisions have been inserted that the deduction shall be given only after allowing or giving effect to all other deductions. In the absence of such prioritisation and keeping in view the fact that the computation mechanism under the sections have nothing in common, as also the fact that the objectives sought to be achieved or different, there should be no occasion to take one deduction into the other.

23.4. The rule of harmonious interpretation is a well accepted rule of interpretation. A section or part of section should be interpreted so that it is in harmony with other provisions of the Act. Further no part of the statute should be regarded as a surplus age. Allowing deduction under only one section will make the later part of sub-section (9) of section 80IA redundant. Such an interpretation should be avoided.

23.5. The Hon'ble MP High court decision in JP tobacco Products Pvt. Ltd. case reported in [1998] 229 ITR 123 held as under: –

> *"Section 80HH(9) as it stood prior to insertion of section 80-1 by the Finance (No. 2) Act, 1980, with effect from 1-4-1981 originally included only section 80J. Section 80) providing for deduction in respect of the profits and gains from newly established industrial undertakings or ships or hotel business in certain cases did not make any provision for reduction of the gross total income by the amount of deduction admissible to the assessee under section 80HH. It was only by an amendment of the said section 80J that the provision for reducing the gross total income by the amount of deduction under*

section 80HH by the Direct Taxes (Amendment) Act. 1974. with effect from 1-4-1974 was inserted. Section 80-I was inserted in its present form by the Finance (No. 2) Act, 1980 with effect from 1-1-1981, and by the same Finance (No. 2) Act. Section 80HH(9) was amended and the words section 80-I or were inserted to make the same provision applicable to section 80-I as well. However, no provision was made in section 80-I to provide for deduction of the gross total income by deduction allowed under section 80HH for the purpose of allowing deduction under section 80-I. It would thus, be seen that when section 80J already existed in sub-section (9) of section 80HH, an amendment was made in section 80J in the year 1974 but no such provision was made in so far as section 80-I was concerned. This clearly contra-indicates that section 80HH(9) by itself meant that deduction allowed under section 80HH is to be reduced from the gross total income for granting the benefit of section 80J and, for the matter, of section 80-I. It was provided in section 80J itself by later amendment while no such provision was made in section 80-I even though inserted on a later date. The provision of law, is, therefore clear that in so far as the benefit of section 80-I is concerned, it has to be granted on the gross total income and not on the income reduced by the amount allowed under section 80HH. In the result the Tribunal was not right in holding that deduction under section 80-I was to be allowed only on the balance of the income after deducting the relief under section 80HH from the gross total income.

23.6. In the case of Bajaj Tempo Ltd vs CIT - 196 ITR 188 (SC) it was held that "Sections conferring a deduction or an incentive have to be construed in a manner that promotes the objectives sought to be achieved and not frustrate it".

23.7. We also find that the impugned issue is squarely covered by the decision of the apex court in the case of JCIT vs Mandideep Engineering & Packaging India P Ltd reported in (2007) 292 ITR 1 (SC). The question raised before the Hon'ble Supreme Court and the decision taken thereon is reproduced herewith for the sake of convenience and clarity:-

"The point involved in the present case is: whether Sections 80-HH and 80-I of the Income Tax Act, 1961 are independent of each other and therefore a new industrial unit can claim deductions under both the sections on the gross total income independently or that deduction under Section 80-I can be taken on the reduced balance after taking into account the benefit taken under Section 80-HH.

The Madhya Pradesh High Court in J.P. Tobacco Products Pvt. Ltd. vs CIT, Jabalpur reported in 229 ITR 123 took the view that both the sections are

independent and, therefore, the deductions could be claimed both under Sections 80-HH and 80-I on the gross total. Against this judgment a Special Leave Petition was filed in this Court which was dismissed on the ground of delay on 21.07.2000 [see 245 ITR 71 (St.)]. The decision in J.P. Tobacco Products Pvt. Ltd. (supra) was followed by the same High Court in the case of CIT vs. Alpine Solvex (P) Ltd. in ITA No. 92 of 1999 decided on May 2, 2000. Special Leave Petition against this decision was dismissed by this Court on 12.01.2001 (see 247 ITR 36 (St.)). This view has been followed repeatedly by different High Courts in a number of cases against which no Special leave Petitions were filed meaning thereby that the department has accepted the view taken in these judgments. See CIT vs. Nima Specific Family Trust reported in 248 ITR 29 (Bom.); CIT vs. Chokshi Contacts P. Ltd. 251 ITR 587(Raj.); CIT vs. Amod Stamping 274 ITR 176(Guj.); CIT vs. Mittal Appliances P. Ltd. 270 ITR 65 (MP); CIT vs. Rochiram & Sons 271 ITR 444 (Raj.); CIT vs. Prakash Chandra Basant Kumar 276 ITR 664 (MP); CIT vs. SB Oil Industries 274 ITR 495 (P&H); CIT vs. M/.s SKG Engineering Pvt. Ltd. 119 (2005) DLT 673; and CIT vs. Lucky Laboratories 200 CTR 305 (All.).

Since the special leave petitions filed against the judgment of the Madhya Pradesh High Court have been dismissed and the department has not filed the special leave petitions against the judgments of different High Courts following the view taken by the Madhya Pradesh High Court, we do not find any merit in this appeal. The department having accepted the view taken in those judgments cannot be permitted to take a contrary view in the present case involving the same point. Accordingly, Civil Appeal is dismissed. No costs".

In view of the aforesaid provisions of the Act and respectfully following the decision of the Hon'ble Apex Court stated supra, we hold that for the purpose of computing deduction u/s 80IA, the deduction u/s 80HHD need not be reduced as both the deductions are independent and accordingly the grounds of appeal raised by the assessee in this regard are allowed.

23.8. In the result, the appeal of the assessee in ITA No. 1808/Kol/2007 is allowed.

24. To sum up, the appeal being ITA No. 316/KOL/2006 filed by the assessee is partly allowed. The appeal being ITA No.

426/KOL/2006 filed by the Revenue is partly allowed. The appeal being ITA No. 1808/KOL/2007 filed by the assessee is allowed.

Order pronounced in the open Court on September 11, 2015.

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

Kolkata, the 11th day of September, 2015

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(4) *Commissioner of Income Tax, Kolkata*
(5) *The Departmental Representative*
(6) *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.