

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

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

ITA Nos. 2182/Kol/2006, 1876/Kol/2007 & 196/Kol/2010
A.Ys 2003-04, 2004-05 & 2005-06

DCIT, Cir-8, Kolkata Vs. **M/s. E I H Limited**
(Appellant) PAN:AAACE6898B
(Respondent)

ITA Nos.57, 1846/Kol/2007 & 299/Kol/2010
AYs. 2003-04, 2004-05 & 2005-06

M/s. E I H Limited Vs. **JCIT (OSD) Incharge/DCIT, Cir-8, Kolkata**
(Appellant) (Respondent)

For the Appellant/department: Shri Rajat Subhra Biswas, Id.CIT/DR
For the Respondent/Assessee : Shri R.N Bajoria, Sr.Advocate &
Shri A.K Gupta, FCA, Id.ARs

Date of Hearing: 03-12 -2015

Date of Pronouncement: 9 -12-2015

ORDER

SHRI M.BALAGANESH, AM :

These appeals of the assessee and the revenue arise out of the orders of the Learned CIT(A)-XIII, Kolkata in Appeal No. 47/CIT(A)-VIII/KOL./CIR.-8/2006-07 dated 20.10.2006 for Asst Year 2003-04 ; Appeal No. 215/CIT(A)-VIII/KOL/CIR-8/2006-07 dated 21.05.2007 for Asst Year 2004-05 and; Appeal No. 292/CIT[A]-XIII/Cir-8/08-09 dated 23.11.2009 for Asst Year 2005-06 against the orders of assessment framed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

2. Since common issues are involved in all these appeals, they are taken up together for adjudication and disposed off by this common order for the sake of convenience.

ITA NO. 57 / KOL / 2007 – ASST YEAR 2003-04 – ASSESSEE’S APPEAL

3. Disallowance u/s 40(a) (i) of the Act in respect of Professional and Consultancy fees paid to non-residents – Rs. 12,99,57,302/-

The brief facts of this issue is that during the course of assessment proceedings, the Learned AO observed huge payments made by the assessee and reflected under ‘Expenditure in foreign currency’ in Note No. 26(a) to Notes on Accounts to the financial statements relating to professional, consultancy and other matters. The assessee was asked to furnish the details of the same together with compliance of TDS provisions thereon. The assessee filed replies vide letters dated 21.11.2005 and 3.3.2006. The break up of the aforesaid expenditure of Rs. 12,99,57,302/- is as below:-

Professional Charges	4,95,97,116
Consultancy Charges	2,49,99,455
Amounts remitted on behalf of Head office by The Oberoi Grand, Kolkata	4,51,65,514

Amounts remitted on behalf of other units

The Oberoi New Delhi	19,58,824 (Tax deducted wherever applicable)
Oberoi Grand Kolkata	1,49,914 (Tax deducted)
Oberoi Towers Mumbai	12,27,111 (Tax deducted)
The Oberoi Mumbai	4,84,906 (Tax deducted)
The Oberoi Bangalore	3,37,195 (Tax deducted)
CECIL Shimla	1,13,655 (Tax deducted)
EIH Delhi	27,51,051 (Tax deducted)
Udaivilas Udaipur	31,72,561 (Tax deducted wherever applicable)

	1,01,95,217

Total	12,99,57,302

3.1. The Learned AO disallowed the aforesaid expenditure on the ground that TDS obligations were not complied with by the assessee in respect of the said payments which was also upheld by the Learned CIT(A). Aggrieved, 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) was not justified in confirming the disallowance of Rs.12,99,57,302/- made under section 40(a)(i) of the Income Tax Act, 1961 (hereinafter referred to as the ‘Act’) on Professional & Consultancy Fees paid to non residents ignoring the fact that such fees was not subject to tax in India requiring no tax withholding under section 195.

2. That on the facts and in the circumstances of the case, the Learned CIT(Appeals) failed to appreciate the fact that disallowance u/s. 40(a)(i) could only be made where tax is deductible u/s. 195 and the assessee had failed to deduct such tax.

3. That on the facts and in the circumstances of the case, the Learned CIT(Appeals) erred in not considering that legal fees and other professional fees rendered from outside India is not taxable in India even under section 9(1)(vii) of the Act. “

3.2. The Learned AR stated that in respect of some professional charges, the actual services were rendered outside India by the non-resident consultants and none of them have any permanent establishment in India and as such it resulted in no income accruing and arising in India and accordingly not taxable in India. The Learned AR took us to the relevant pages of the Paper Book filed by the assessee to explain the contentions of the assessee and also stated that these details were also duly filed before the lower authorities. He argued that the assessee cannot be expected to foresee an amendment in the statute with regard to TDS obligations and any retrospective amendment in the law could only disturb the computation mechanism of determination

of income. Accordingly, he argued that by virtue of a retrospective amendment, the income of an assessee could be disturbed on a higher side or lower side. But the TDS obligations that are cast on the assessee are only procedural in nature and assessee could maximum be expected to follow the law as it stood at the time of making payment or crediting the account of payee whichever is earlier. Hence the assessee cannot be faulted with due to retrospective amendment in procedural law. In response to this, the Learned DR vehemently supported the order of the Learned AO.

3.3. We have heard the rival submissions and perused the materials available on record including the detailed paper books filed by the assessee in two volumes. The break up of Rs. 12,99,57,302/- being the amount disallowed by the Learned AO is stated hereinabove. It would be advisable to get into each and every item contained in the said break up as below:-

3.3.1. Professional Charges – Rs. 4,95,97,115

The assessee had made payments to Atanaskovic Hartnell, Sydney, NSW, Australia on various dates during the financial year 2002-03 relevant to Asst Year 2003-04 towards Lawyer's Professional fees for services rendered outside India. The details of the same are submitted in page 251 of the Paper Book filed by the assessee. Since the income thereon is not chargeable to tax in India in the hands of the payee and they do not have any permanent establishment in India, there is no obligation on the part of the assessee to deduct tax at source in terms of section 195 of the Act. This issue is squarely covered in favour of the assessee by the decision of the *Hon'ble Apex Court in the case of GE India Technology Centre (P) Ltd vs CIT reported in (2010) 327 ITR 456 (SC)*. Hence no disallowance could be made u/s 40(a)(i) of the Act for the same.

We also find that the said services are governed by Article 14 of DTAA as per which the said payments are not liable to be taxed in India. It is well settled that the provisions of DTAA would prevail over the Act and the assessee is entitled to use the same whenever it is found beneficial to the assessee which is provided in the statute itself.

3.3.2. Consultancy Charges – Rs. 2,49,99,455/-

The assessee had made payments to various parties in Bangkok and Mauritius and the details of the same were duly submitted in Page 253 of the Paper Book filed by the assessee. The assessee totally claimed a sum of Rs. 2,72,93,733/- and out of this, a sum of Rs. 22,94,278/- being payment made to Hooloomann Project Services Ltd, Mauritius to services utilized in India which was duly subjected to deduction of tax at source and accordingly, the Learned AO granted deduction for this portion. We find that the payments made to the various parties in Bangkok and Mauritius for services rendered outside India and no part of these services have been utilized in India and hence the same does not become chargeable to tax in India in the hands of the payee and hence there is no obligation on the part of the assessee to deduct tax at source in terms of section 195 of the Act.

3.3.3. Amounts remitted on behalf of Head office by The Oberoi Grand, Kolkata – Rs. 4,51,65,514/-

The assessee had made payments to Creative Kitchen Planers Asia Pacific Ltd, Hongkong towards consultancy services rendered abroad ; Atanaskovic Hartnell, Australia towards Lawyers Professional fees for services rendered abroad ; P Interior & Associates Co Ltd, Bangkok towards design and drawing services rendered abroad and to Tino-kwan Lighting Consultants, Hongkong towards professional services rendered abroad totaling to the tune of Rs. 4,51,65,514/-. The details of all these

payments were duly furnished in Page 254 of the Paper Book filed by the assessee. We find that in all these cases, the services were rendered outside India and accordingly no part of the said payments are chargeable to tax in India in the hands of the payee and hence there is no obligation on the part of the assessee to deduct tax at source in terms of section 195 of the Act.

3.3.4. Amounts paid on behalf of other units – Rs. 1,01,95,217/-

The assessee had made payments to various parties in Australia, England, Singapore and Thailand towards professional services, design services, landscaping and architectural services, interior design services etc. The details of all these payments were duly furnished in page 255 of the Paper book filed by the assessee wherein it is found that the assessee had duly complied with the TDS obligations wherever applicable in respect of payments made to Micros Fidelio Asia Pacific Pty Ltd Australia towards annual maintenance charges for central reservations system and customer information system support fees. We find that in all these cases, the services were rendered outside India and accordingly no part of the said payments are chargeable to tax in India in the hands of the payee and hence there is no obligation on the part of the assessee to deduct tax at source in terms of section 195 of the Act.

3.4. ON SERVICES NOT PERFORMED IN INDIA

It is undisputed that the services rendered by the professional consultants outside India and none of them were neither utilized in India nor rendered in India. In these circumstances, the payments made to them would not come under the ambit of taxation in India irrespective of the fact whether the said parties have permanent establishment in India or not. Reliance in this regard is placed on the decision of the **Hon'ble Apex Court in the case of Ishikawajima-Harima Heavy Industries Ltd vs DIT reported in (2007) 288 ITR 408 (SC)**.

3.5. ON RETROSPECTIVE AMENDMENT WITH EFFECT FROM 1.6.1976 BY WAY OF EXPLANATION IN SECTION 9(2) OF THE ACT

Now let us see whether the amendment in section 9(2) of the Act by way of an Explanation introduced by the Finance Act 2010 with retrospective effect from 1.6.1976 could be invoked on the assessee for violation of TDS obligations. For the sake of convenience, the said Explanation is reproduced herein below:-

Explanation – For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,-

- (i) the non-resident has a residence or place of business or business connection in India; or*
- (ii) the non-resident has rendered services in India.*

3.5.1. We find that this issue has been elaborately dealt with by the **co-ordinate bench decision of this tribunal in the case of ACIT vs Subhotosh Majumder in ITA Nos. 1629/Kol/2012 for Asst Year 2009-10 ; ITA No. 366/Kol/2012 for Asst Year 2008-09 and ITA No. 2058 /Kol/2009 for Asst Year 2006-07 dated 27.11.2015** wherein, it was held that :-

“From the above facts and circumstances of the case and also precedents cited above, we are of the view that till amendment in explanation to section (2) of the Act, the prevailing legal position was that unless the technical services were rendered in India, the fees for such services could not be brought to tax under section 9(1)(vii) of the Act. The law amended was undoubtedly retrospective in nature but so far as tax withholding liability is concerned, it depends on the law as it existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax deductor is not expected to know how the law will change in future. A retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. The tax withholding obligations from payments to non-residents, as set out in section 195 of the Act, require that the person making the payment ‘at the time of credit of

such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force'. When these obligations are to be charged at the point of time when payment is made or credited, whichever is earlier, such obligations can only be discharged in the light of the law as it stands at that point of time."

3.5.2. We also place reliance on the following decision of the Hon'ble Apex Court in the case of **CIT vs Hindustan Electro Graphites Ltd reported in (2000) 243 ITR 48 (SC)** in this regard.

In this case, the assessee company filed a writ petition in the High Court challenging the very constitutionality of section 143(1)(a) read with section 143(1A) and section 4 and also the intimation sent by the AO levying additional tax. High court speaking through one of us (Ruma Pal, J.) noticed that section 28 of the Act was amended with retrospective effect from 1st April 1967. It said:

"An assessee cannot be imputed with clairvoyance. When the return was filed, the assessee could not possibly have known that the decision on the basis of which cash compensatory support has been claimed as not amounting to the assessee's income ceased to be operative by reason of retrospective legislation."

3.6. We find that the genuinity of the expenditure has not been doubted by the revenue. It is not the case of the revenue that the said expenditure is not incurred wholly and exclusively for the purpose of business of the assessee. The only ground on which disallowance was made is that the said payments were not subjected to deduction of tax at source and thereby provisions of section 40(a)(i) of the Act would get attracted. But we find that in all these cases, the services were rendered outside India and had not been utilized in India and hence no income accrue or arise in India and accordingly they are not chargeable to tax in India. Hence there is no obligation on the part of the assessee to deduct tax at source in terms of section 195 of the Act.

3.7. In view of the aforesaid findings and judicial precedents relied upon including the co-ordinate bench decision of this tribunal, we hold as under:-

- a) The payments made, towards professional charges, consultancy charges and amounts paid on behalf of other units in respect of services rendered only outside India and were not utilized in India, are not chargeable to tax in India in terms of section 195(1) of the Act and hence there is no obligation that could be cast on the assessee to deduct tax at source.
- b) Even otherwise, the payments are governed by the provisions of Article 14 of DTAA which would prevail over the other provisions of the Act , wherein the said payments are liable to be taxed only in abroad and not in India.
- c) A retrospective amendment in statute does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability with retrospective effect.

Accordingly the ground nos. 1 to 3 raised by the assessee are allowed.

4. Disallowance of expenses incurred towards overseas office maintenance, sales promotion, sales office expenses , aircraft maintenance expenses and others – Rs. 16,75,13,445/-

The brief facts of this issue is that during the course of assessment proceedings, the Learned AO observed huge payments made by the assessee and reflected under 'Expenditure in foreign currency' in Note No. 26(a) to Notes on Accounts to the financial statements relating to office maintenance, sales promotion expenses, remittance for sales office, remittance for aircraft maintenance and other matters. The assessee was asked to furnish the details of the same and show caused as to how the

aforesaid expenditure are allowable u/s 37 of the Act. The break up of the aforesaid expenditure of Rs. 16,75,13,445/- is as below:-

Office maintenance	14,95,766
Sales Promotion expenses	1,30,26,127
Remittance for Sales Office	13,07,04,565
Remittance for Air craft maintenance	1,07,58,197
Forex remittance 'other matters'	1,15,28,790

	16,75,13,445

4.1. The Learned AO disallowed the aforesaid expenditure on the ground since no details were filed with supporting evidences before him and hence the same are not incurred wholly and exclusively for business purposes and hence not allowable u/s 37 of the Act which was also upheld by the Learned CIT(A). Aggrieved, the assessee is in appeal before us on the following ground:-

“4. That on the facts and in the circumstances of the case, the Learned CIT(Appeals) erred in confirming the disallowance of Rs.16,75,13,445/- claimed by the assessee overseas office maintenance, sales promotion, sales office expenses, aircraft maintenance and other matters for which remittances were made in foreign exchange and spent wholly and exclusively for the business purpose. “

4.2. The Learned AR took us to the relevant pages of the Paper book filed by the assessee wherein the entire details of the aforesaid expenditures were submitted date wise mentioning the name of the parties to whom payments were made together with the purpose of payments. He argued that all these payments were duly subjected to independent audit by a chartered accountant and CA certificates were duly submitted before the lower authorities and hence the genuinity of the expenditures cannot be

doubted with. Moreover, all these expenses are incurred for rendering of services outside India and there is no obligation for the assessee to deduct tax at source as the same are not chargeable to tax in the hands of the payee. He stated that no disallowance on this account was made by the Learned AO in the earlier years and also in subsequent years. He argued that the same are incurred wholly and exclusively for the purpose of business of the assessee and accordingly pleaded for deletion of the additions. In response to this, the Learned DR vehemently supported the orders of the lower authorities.

4.3. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. The relevant pages of the paper book on the impugned issue is from pages 256 – 279 in respect of each of the aforesaid expenditures. We find from the said details that the major expenditure has been incurred in respect of cost of spare parts for maintenance of aircrafts, import of articles such as mineral water, raw meat, liquor etc, expenditure incurred for obtaining fitness certificate after every hours of flying as per international aviation rules, import of spare parts from abroad, promotion and marketing expenses abroad, charges, sales promotion expenses towards redemption of points under Oberoi Top programme, participation fee of IN ASIA MILES programme, expenses for media coverage of the programme, cost of space and stand for ITB Berlin in Germany, charges for stand and space booked for Arabia Travel Market in Dubai, charges for stand decoration for IBTM Exhibition at Geneva, cost of space and stand for WTM in London, entire expenses incurred in foreign sales offices in London, Newyork, Sydney, Singapore and Dammam on various dates throughout the year etc. From the details furnished, we also see that the entire foreign sales office receipts and expenses and statement of assets and liabilities were duly subjected to an independent audit by a chartered accountant in order to give comfort level to the assessee herein for adoption of those figures in the consolidated financial statements of the assessee. We find lot of force in the arguments of the Learned AR that no disallowance on this count was made in the

earlier years and also in subsequent years by the revenue. Hence we hold that the principle of consistency should be followed by the revenue. Reliance in this regard is placed on the decision of the **Hon'ble Apex Court in the case of Radhasoami Satsang vs CIT reported in 193 ITR 321 (SC)**. From the details furnished, we are completely satisfied that the entire expenditures are incurred wholly and exclusively for the purpose of business of the assessee and accordingly direct the Learned AO to grant deduction for the whole amount as deduction. Hence the ground no. 4 raised by the assessee is allowed.

5. Disallowance of Rs. 7,31,507/- u/s 80HHC of the Act in respect of export of food and beverages to out bound flights of foreign airlines , the payments for which were received in convertible foreign exchange

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 convertible foreign exchange. Since it has been held in Asst Year 1998-99 by this tribunal that assessee is not entitled for deduction u/s 80HHC of the Act in respect of this transaction, the Learned AO denied deduction u/s 80HHC of the Act which was also upheld by the Learned CIT(A). Aggrieved, the assessee is in appeal before us on the following ground:-

“5. That on the facts and in the circumstances of the case, the learned CIT (Appeals) erred in rejecting the claim of the assessee for Rs.7,31,507/- under section 80HHC of the Act on export of food and beverages to out bound flights of foreign airlines, the payments for which were received in convertible foreign exchange.”

5.1. The Learned AR argued that this issue is directly covered by the order of this tribunal in assessee's own case for the Asst Year 2002-03 in ITA No. 316/Kol/2006 dated 11.9.2015. In response to this, the Learned DR fairly conceded to the point that this issue is covered in favour of the assessee by the order of this tribunal.

5.2. We have heard the rival submissions and find that this issue is squarely covered by the decision of the **Jurisdictional High Court in assessee's own case reported in (2011) 338 ITR 503 (Cal)** which has been relied upon while rendering the judgement for the Asst Year 2002-03 by this tribunal. The questions raised before the Hon'ble Calcutta High Court are reproduced below for the sake of convenience :-

“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 684 where 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 HI-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 flight s 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”.

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 No. 5 raised by the assessee is allowed.

6. Disallowance of 50% of aggregate expenditure incurred on running and maintenance of aircraft – Rs. 52,05,217/- (50% of 1,04,10,435/-)

The brief facts of this issue is that the assessee maintains two aircrafts bearing registration no. VT EJZ (King Air) and VT OBE (HS-125-700) (Jet Aircraft) which were acquired during financial years relevant to Asst Years 1995-96 and 1996-97 respectively. These aircrafts are mainly used for providing services to the tourists who chartered them according to their requirement. It is part and parcel of the total business package offered to the foreign tourist who wants to enjoy five star luxury of the international standard in all respects. Copies of the log book for both the aircrafts were enclosed before the Learned AO together with the monthly break up of repairs, running and maintenance of the said aircrafts. The following details were also filed before the Learned AO:-

- a) Statement of chartered flights effected during the period April 2002 to March 2003 indicating the flying time effected for the respective aircrafts .
- b) Statement of Corporate Flights of Jet Aircraft effected during the period April 2002 to March 2003 indicating the flying time.
- c) Statement of Corporate Flights of King Aircraft effected during the period April 2002 to March 2003 indicating the flying time.
- d) Month wise income from chartering of aircrafts for the period April 2002 to March 2003.

- e) The details of total fuel uploaded during the period April 2002 to March 2003 together with the details of average fuel consumption per hour of flight for each aircraft together with its price were filed.
- f) The detailed statement of expenditure amounting to Rs. 1,04,10,435/- incurred for running, repair and maintenance of the aircrafts was filed.

6.1. The Learned not being satisfied with the aforesaid details held that no satisfactory explanation has been forwarded by the assessee which leaves ample scope for belief that there has been non-business use of the aircrafts by the directors or their relatives or family members. He further stated that in the assessment orders of earlier years it has been noticed that the Assessing Officers had found that 4-seater aircrafts owned by the assessee was mostly used by the Oberois and their close relatives for personal trips. In the current year also there do not appear any reason to deviate from the earlier observation of the department in this respect. Accordingly, he disallowed 50% of total expenses of Rs. 1,04,10,435/- and added a sum of Rs. 52,05,217/- to the total income of the assessee. This action of the Learned AO was upheld by the Learned CIT(A). Aggrieved, the assessee is in appeal before us on the following grounds:-

“6. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming the disallowance of Rs.52,05,217/- being 50% of aggregate expenditure incurred on running and maintenance of aircraft ignoring that the aircrafts were exclusively used for the purpose of business.

7. That the learned CIT(Appeals) erred in not appreciating that the observation of the Assessing officer that the aircraft was used for personal purposes was wild guess but not based on any specific finding. “

6.2. The Learned AR argued that this issue is directly covered by the order of this tribunal in assessee's own case for the Asst Year 2002-03 in ITA No. 316/Kol/2006

dated 11.9.2015. In response to this, the Learned DR fairly conceded to the point that this issue is covered in favour of the assessee by the order of this tribunal.

6.3. We have heard the rival submissions and perused the materials available on record. We find that this issue is squarely covered by the decision of the co-ordinate bench decision of this tribunal in assessee's own case for Asst Year 2002-03 in ITA No. 316/Kol/2006 dated 11.9.2015 in para 4.4 had held as under:-

“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 AO 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 AO and hence there is absolutely no case for the Learned AO 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 AO. 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 AO had made the entire addition based on surmises and conjectures and made on adhoc 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:-

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

Sukhdayal Rambilas vs CIT (1982) 136 ITR 414

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.

In view of the aforesaid facts of the case and respectfully following the co-ordinate bench decision (supra), we hold that no addition need to be made on an estimated basis towards running and maintenance of aircrafts. Accordingly, the ground nos. 6 & 7 raised by the assessee are allowed.

7. Disallowance of interest on borrowed capital to the extent of interest free advances made to Associated Enterprises – Rs. 3,73,32,024/-

7.1. 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 31.3.2003 towards that account are as below:-

(i) Lake Palace Hotels & Motels Ltd	-	2,50,00,000
(ii) Advance against shares	-	9,71,00,200
(iii) Green Fields Hotels & Resorts P Ltd	-	8,00,00,000
(iv) Advance towards equity participation in Mashobra Resort Ltd	-	13,00,00,000
(v) Loan to Mumtaz Hotels Ltd (subsidiary co.)	-	5,33,91,181
(viii) Oberoi Kerala Hotels & Resort Ltd	-	40,00,000

Total

38,94,91,381

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 .

Advance against shares – Rs. 9,71,00,200/-

This includes a sum of Rs. 9,01,50,000/- paid to Nandi Hills & Resorts Limited for the joint venture project with the Janson Group of Bangalore, Karnataka. The amount was advanced for acquisition of land for the project out of own generation of funds.

Amounts paid to Green Fields Hotels & Resorts P Ltd – Rs. 8,00,00,000/-

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

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.

Amounts paid to Mumtaz Hotel Ltd (formerly known as Goyal's International Hotels & Resorts Ltd – Rs. 5,33,91,181/-

This is a Joint Venture Company owning Hotel Amarvilas at Agra. The assessee has controlling interest to the extent of 60% of the issued equity capital of the company. This was paid as loan and interest is charged on the same by the assessee.

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.

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.

7.2. The Learned AO 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 grounds:-

“8. That on the facts and in the circumstances of the case, the learned CIT(Appeals) was not justified in restricting the disallowance of interest to Rs.3,73,32,024 being 12% of interest free advances ignoring the fact that the said advances were made to Associate Enterprises solely for commercial expediency and related to the business interest of the assessee.

9. That without prejudice to Ground No. 8 as above, the learned CIT(Appeals) had failed to appreciate that the advances made to the Associated Enterprises were made

wholly out of owned funds and the question of disallowance of interest incurred on borrowed funds did not arise.”

7.3. The Learned AR referred to the relevant pages of the paper book filed by the assessee containing the various submissions of the assessee on the impugned issue before the lower authorities and argued that the assessee had sufficient funds at its disposal for making these advances and hence the finding of the Learned AO that borrowed funds were utilized for making these advances is factually incorrect which has been further endorsed by the Learned CIT(A). He further argued that this issue is directly covered by the order of this tribunal in assessee's own case for the Asst Year 2002-03 in ITA No. 316/Kol/2006 dated 11.9.2015. In response to this, the Learned DR fairly conceded to the point that this issue is covered in favour of the assessee by the order of this tribunal.

7.4. We have heard the rival submissions and perused the materials available on record. We find from the paper book filed by the assessee 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 AO . We find that 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. The Learned AO simply states that similar disallowances were made in the earlier years and accordingly the same is to be made for this asst year also brushing aside all the submissions of the assessee. In the instant case, the assessee 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. The own funds available with the assessee company is worked out as below:-

	31.3.2003	31.3.2002
	(Rupees in Crores)	
Share Capital	152.39	152.39
General Reserve	451.21	446.21
Surplus in Profit and Loss A/c	29.34	38.75
Capital Redemption Reserve	2.42	2.42
Foreign Exchange Earnings Reserve	0.00	5.00
Debenture Redemption Reserve	0.00	1.95
	-----	-----
Total Own Funds	635.36	646.72
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7.4.1. Moreover, it is well settled proposition that it is not for the income tax department to suggest 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.

7.4.2. From the above workings of availability of own funds, it could safely be concluded that the borrowed funds were not utilized for making the interest free advances by the assessee. This finding is given irrespective of the fact that the same were advanced as a measure of commercial expediency and for the purpose of business. We find 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.

7.4.3. We draw our support from the following decisions in support of our findings :-

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

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

c) CIT vs Hotel Savera reported in 239 ITR 795 (MAD)

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

e) S A Builders Ltd vs CIT reported in 288 ITR 1 (SC)

f) 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.

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

h) CIT vs Reliance Utilities and Power Ltd reported in 313 ITR 340 (BOM)

i) Recent decision of the Hon'ble Apex Court in the case of Hero Cycles (P) Ltd vs CIT reported in (2015) 63 taxmann.com 308 (SC) dated 5.11.2015.

The operative portion of the aforesaid judgements are not reproduced herein for the sake of brevity. However the principles laid down by the various courts including the apex court is considered in our final decision rendered herein.

7.4.4. We also find that this issue is squarely covered by the decision of the coordinate bench decision of this tribunal in assessee's own case in favour of the assessee for Asst Year 2002-03 in ITA No. 316/Kol/2006 dated 11.9.2015 in para 6 of the said order.

7.4.5. In view of the aforesaid facts and circumstances and the judicial precedents on the impugned issue, we hold as under:-

- that the interest free advances were made by the assessee to various parties during the course of its business and are strategic investments.
- 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.
- 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.

- 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.
- 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.

Accordingly we hold that the action of the Learned AO in disallowing a sum of Rs. 4,67,38,966/- and Learned CITA restricting the said disallowance to Rs. 3,73,32,024/- is not warranted and Ground Nos. 8 & 9 raised by the assessee are allowed.

8. Disallowance of depreciation on addition to fixed assets – Rs. 7,84,550/-

The brief facts of this issue is that during the course of assessment proceedings, the Learned AO observed that the assessee had shown additions to Buildings and Computers to the tune of Rs. 30,94,172/- and Rs., 19,79,476/- respectively during the year under appeal and claimed depreciation thereon among others. The assessee submitted that the bills for the entire additions to fixed assets have been duly subjected to statutory and tax audit by chartered accountants and income tax depreciation figures were certified by them accordingly prayed for acceptance of the depreciation figure based on the said certification. The Learned AO not being satisfied with this reply sought to disallow depreciation on buildings and computers to the tune of Rs. 7,84,550/- while accepting the income tax depreciation figure in respect of other assets as per the certification done by tax auditor. This action was upheld by the

Learned CIT(A) in first appellate proceedings. Aggrieved, the assessee is in appeal before us on the following ground:-

“10. That on the facts and in the circumstances of the case, the learned CIT(Appeals) was not justified in confirming the disallowance of depreciation of Rs.7,48,550/- on addition to fixed assets despite the fact that all such additions were duly certified by the Chartered Accountant and invoice copies were produced at the time of assessment proceedings”

8.1. The Learned AR reiterated what has been stated before the lower authorities and referred to the relevant pages of the paper book of the assessee numbering from pages 307 to 362 in respect of the impugned issue containing the various details of all the fixed assets of the assessee date wise and prayed for deletion of this addition . In response to this, the Learned DR vehemently supported the orders of the lower authorities.

8.2. We have heard the rival submissions and perused the materials available on record. We find that the assessee had filed the details of entire fixed assets which is part of the paper book in pages 307 to 362 and we find that the entire additions together with the income tax depreciation figures were duly subjected to certification by the tax auditor in the tax audit report and the Learned AO had indeed granted income tax depreciation for other assets except Rs. 7,84,550/- being depreciation on buildings and computers. We find that this action of the Learned AO is not appreciated and it is also stated in the grounds that the assessee had submitted the bills before the Learned AO. In these circumstances, we have no hesitation to delete this addition made in the sum of Rs. 7,84,550/- towards depreciation on buildings and computers and accordingly the ground no. 10 raised by the assessee is allowed.

**9. Disallowance of notional foreign exchange loss on foreign currency loan –
Rs. 7,87,63,270/-**

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 31.3.2003 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 loss on such restatement in view of increase in liability payable on the loan account amounting to Rs. 7,87,63,270/-. The same is worked out as below:-

Loan balance as on 31.3.2002	-	95,84,63,619
Less: Value of loan as on 31.3.2003 2603.99 Million JPY @ 0.39832215	-	103,72,26,889

Difference representing loss by way of increase in liability		7,87,63,270

9.1. The assessee added the same to its taxable income as the same was notional loss which was not incurred as on the date of balance sheet date and accordingly filed its return of income.

9.2. But during the Asst Year 2002-03, the assessee on similar restatement of foreign currency loan earned a notional gain due to decrease in foreign currency loan to the extent of Rs. 4,15,36,381/- which was reduced from the taxable income by the assessee while filing the return for the Asst Year 2002-03.

9.3. The Learned AO having added the notional exchange gain for the Asst Year 2002-03 amounting to Rs. 4,15,36,381/- sought to remain silent on the notional

exchange loss which was voluntarily disallowed by the assessee in the return and did not give any finding in this regard in his assessment order. This silent action was also confirmed by the Learned CITA. Aggrieved, the assessee is in appeal before us on the following ground:-

“11. That on the facts and in the circumstances of the case, the learned CIT(Appeals) was not justified in rejecting the appellant’s plea that notional gain on foreign currency swap amounting to Rs.4,15,36,381/- having been taxed in AY 2002-03, the notional loss of Rs.7,87,63,270/- on account of currency swap incurred during the year should have been allowed as business expenditure.”

9.4. The Learned AR argued that this issue is directly covered by the order of this tribunal in assessee’s own case for the Asst Year 2002-03 in ITA No. 316/Kol/2006 dated 11.9.2015. In response to this, the Learned DR fairly conceded to the point that this issue is covered in favour of the assessee by the order of this tribunal.

9.5. We have heard the rival submissions and perused the materials available on record. We find that 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 purposes and hence it could safely be concluded that the loan was borrowed on revenue account. Hence 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 **Hon’ble Supreme Court in the case of CIT vs Woodward Governor India P Ltd reported in 312 ITR 254 (SC)**, wherein 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.

9.5.1. We find that this issue is squarely covered by the decision of the coordinate bench decision of this tribunal in assessee's own case for Asst Year 2002-03 in ITA No. 316/Kol/2006 dated 11.9.2015 , wherein in Para 5 of our order, we had held as below:-

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.

9.5.2. Hence in view of our clear finding given in Asst year 2002-03 in ITA No. 316/Kol/2006 dated 11.9.2015 , we hold that the assessee is indeed entitled to claim exchange loss of Rs. 7,87,63,270/- arising out of restatement of foreign currency loan at the end of the accounting year which has been utilized on revenue account. Accordingly, the ground no.11 raised by the assessee is allowed.

10. Charging of Interest u/s 234 B of Rs. 3,69,21,375/- and u/s 234 D of Rs. 42,49,712/- of the Act

We find that this issue is only consequential in nature and hence does not require any adjudication.

In the result, the appeal of the assessee in ITA No. 57 / Kol / 2007 for the Asst Year 2003-04 is allowed.

ITA No. 2182 / Kol / 2006 – Asst Year 2003-04 – DEPARTMENT APPEAL

11. Disallowance of Deduction u/s 80HHD – Exclusion of payments received in Indian Rupees from Foreign Airlines and Embassies - Rs. 12,90,46,618/-

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. 194,45,11,547/- for the purpose of computing deduction u/s 80HHD of the Act. Out of this, the Learned AO observed that a sum of Rs. 12,90,46,618/- 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 CITA who deleted the disallowance of the Learned AO. Aggrieved, the revenue preferred further 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 exclusion of the amount of receipts at Rs.12,90,46,618/- in Indian Rupee for foreign airlines and embassies in question in the computation of total turnover for the purpose of calculation fo deduction u/s. 80HHC of the I.T Act, 1961.”

11.1. The Learned AR argued that the assessee company has received a sum of Rs. 3,19,32,343/- is received from foreign embassies in Indian rupees which fall under the ‘exempted category’ and Rs. 9,71,14,275/- received from foreign airlines in Indian rupees. The Learned AR further argued that similar disallowance made in Asst Year 2002-03 by the Learned AO in assessee’s own case came up before this Tribunal and the same in ITA No. 426 / Kol / 2006 (revenue appeal) dated 11.9.2015 had held this issue in favour of the assessee. In response to this, the Learned DR fairly conceded

to the point that this issue is covered in favour of the assessee by the order of this tribunal.

11.2. We have heard the rival submissions and perused the detailed paper book of the assessee and perused the materials available on record. We find that this issue is squarely covered by the decision of this tribunal in assessee's own case for the Asst Year 2002-03 in ITA No. 426 / Kol / 2006 (revenue appeal) dated 11.9.2015 , wherein in para 2, it has been held as under:-

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 assessee. 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 AO 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 AO to grant deduction u/s 80HHD of the Act to the assessee. Hence Ground No.1 raised by the assessee is allowed.

11.3. Respectfully following the co-ordinate bench decision of this tribunal for the Asst Year 2002-03 as stated supra, we find no infirmity in the order of the Learned CIT(A) in this regard and accordingly the ground no. 1 raised by the revenue is dismissed.

12. Addition of indirect taxes such as sales tax, expenditure tax, etc as part of turnover for the purpose of deduction u/s 80HHD – Rs. 59,98,77,014/-

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. 383,33,90,705/- . 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. 59,98,77,014/- representing indirect taxes such as sales tax (Rs. 22,42,39,745/-) , expenditure tax (Rs. 19,86,03,409/-) , luxury tax (Rs. 17,32,70,625/-), service tax (Rs. 21,34,376/-), entertainment tax (Rs. 54,277/-) and work contract tax (Rs. 15,74,582/-) 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(A) deleted the addition made on this count. 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 deleting the exclusion of indirect cost of Rs.59,98,77,014/- in the computation of deduction u/s. 80HHD of the I.T Act, 1961. “

12.1. The Learned AR further argued that similar addition made in Asst Year 2002-03 by the Learned AO in assessee's own case came up before this Tribunal and the same in ITA No. 426 / Kol / 2006 (revenue appeal) dated 11.9.2015 had held this issue in favour of the assessee. In response to this, the Learned DR fairly conceded to the point that this issue is covered in favour of the assessee by the order of this tribunal.

12.2. We have heard the rival submissions and perused the detailed paper book of the assessee and perused the materials available on record. We find that this issue is squarely covered by the decision of this tribunal in assessee's own case for the Asst Year 2002-03 in ITA No. 426 / Kol / 2006 (revenue appeal) dated 11.9.2015 , wherein in para 9, it has been held as under:-

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 31.3.2011, 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 recomputing 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 CITA on this issue. Accordingly, the Ground No. 1 raised by the revenue is dismissed.

12.3. Respectfully following the co-ordinate bench decision of this tribunal for the Asst Year 2002-03 as stated supra, we find no infirmity in the order of the Learned CIT(A) in this regard and accordingly the ground no. 2 raised by the revenue is dismissed.

13. Disallowance of Pre-opening expenses as capital in nature relating to new hotel “The Oberoi Udayvilas” – Rs. 1,66,62,614/-

The brief facts of this issue are that the assessee had incurred a sum of Rs. 1,66,62,614/- pertaining to new hotel “The Oberoi Udayvilas” 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 AO 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 AO sought to disallow the sum of Rs. 1,66,62,614/- in the assessment by treating the same as capital expenditure. In first appeal, the Learned CIT(A) appreciated the contentions of the assessee and deleted the addition. Aggrieved, the revenue is in appeal before us 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 pre-opening expenses amounting to Rs.1,66,62,614/- treating the same as revenue expenditure as against treated by AO as capital expenditure.”

13.1. The Learned AR further argued that similar addition made in Asst Year 2002-03 by the Learned AO in assessee’s own case came up before this Tribunal and the same in ITA No. 426 / Kol / 2006 (revenue appeal) dated 11.9.2015 had held this issue in favour of the assessee. In response to this, the Learned DR fairly conceded to the point that this issue is covered in favour of the assessee by the order of this tribunal.

13.2. We have heard the rival submissions and perused the detailed paper book of the assessee and perused the materials available on record. We find that this issue is squarely covered by the decision of this tribunal in assessee's own case for the Asst Year 2002-03 in ITA No. 426 / Kol / 2006 (revenue appeal) dated 11.9.2015 , wherein in para 11, it has been held as under:-

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 expenditure 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 :-

- a) CIT vs Kanoria General Dealers P Ltd – (1986) 159 ITR 524 (Cal)*
- b) CIT vs Ramaraju Surgical Cotton Mills Ltd (1967) 63 ITR 478 (SC)*
- c) CIT vs Hughes Escorts Communications Ltd (2009) 311 ITR 253 (Del)*
- d) CIT vs Relaxo Footwears Ltd (2007) 293 ITR 231 (Del) – SLP by revenue against this order dismissed.*

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

- e) Delhi ITAT – 15 SOT 348 (Del) Hotel Hans P Ltd vs ACIT*

f) Kesoram Industries and Cotton Mills Ltd vs CIT (1992) 196 ITR 845 (Cal)

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 taised by the revenue is dismissed.

13.3. Respectfully following the co-ordinate bench decision of this tribunal for the Asst Year 2002-03 as stated supra, we find no infirmity in the order of the Learned CITA in this regard and accordingly the ground no. 3 raised by the revenue is dismissed.

14. Addition on account of excess provision of technical fees – Rs. 24,37,804/-

The Learned AO added back an amount of Rs. 24,37,804/- 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 offered for taxation in earlier years it was claimed as deduction.

14.1. The Learned CITA found that this issue has been allowed by his predecessor in Asst Year 2002-03 and accordingly proceeded to delete the addition made in the sum of Rs. 24,37,804/- by the Learned AO. 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 disallowance of provisions debited for expenses on account of repairs, bad debts etc amounting to Rs.24,37,804/- as against earning of income from technical assistance fee of Rs. 74,65,349/-.”

14.2. The Learned AR further argued that similar addition made in Asst Year 2002-03 by the Learned AO in assessee's own case came up before this Tribunal and the same in ITA No. 426 / Kol / 2006 (revenue appeal) dated 11.9.2015 had held this issue in favour of the assessee. In response to this, the Learned DR fairly conceded to the point that this issue is covered in favour of the assessee by the order of this tribunal.

14.3. We have heard the rival submissions and perused the detailed paper book of the assessee and perused the materials available on record. We find that this issue is squarely covered by the decision of this tribunal in assessee's own case for the Asst Year 2002-03 in ITA No. 426 / Kol / 2006 (revenue appeal) dated 11.9.2015 , wherein in para 13, it has been held as under:-

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.

14.4. Respectfully following the co-ordinate bench decision of this tribunal for the Asst Year 2002-03 as stated supra, we find no infirmity in the order of the Learned CIT(A) in this regard and accordingly the ground no. 4 raised by the revenue is dismissed.

15. Disallowance of Advances written off – Rs. 6,41,636/-

The brief facts of this issue is that the assessee has debited a sum of Rs. 6,41,636/- towards 'Advances written off' and claimed the same as deduction in the return. The Learned AO without bringing out the facts in this regard proceeded to make the disallowance by making the following observations:-

The assessee has debited Rs. 6,41,636/- under the head 'Advances Written-Off'. Written Off advances is not an allowable expenditure under the Income Tax Act, 1961 and hence is being disallowed.

On first appeal, the assessee filed fresh evidences in support of its contentions which were subjected to remand proceedings before the Learned AO. By filing the fresh evidences, the assessee pleaded that the matter relates to payment of sales tax for the financial years 1972-73 and 1973-74. The assessee claimed that Oberoi, New Delhi had deposited sales tax demand for these financial years and debited the same to 'advance payment account'. Further the assessee claimed that the cases were finally decided and some refund was due to the assessee on the basis of excess payment. The balance payment of Rs. 3,30,730/- and Rs. 3,01,324/- for the above two financial years respectively was written off as irrecoverable in financial year 2002-03 relevant to Asst Year 2003-04. The assessee produced copies of assessment orders for these two years passed by Delhi Sales Tax Authorities. Based on these evidences, the Learned CIT(A) held that the action of the Learned AO in adding back the amount of Rs. 6,41,636/- on the ground that the liability to pay sales tax neither related to the assessment year in

question nor was crystallized during the year cannot be sustained and is deleted.

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 disallowance of advance written off during the financial year relevant to the assessment year 2003-04 to the extent of Rs. 6,41,636/- on account of sales tax demand deposited for financial year 1972-73 & 1973-74 in earlier years against the demand finalized by Delhi Sales Tax Authority on 26.2.90 & 30.06.87.”

15.1. The Learned AR vehemently supported the order of the Learned CIT(A). In response to this, the Learned DR vehemently supported the order of the Learned AO.

15.2. We have heard the rival submissions and perused the materials available on record including the relevant pages of the paper book filed by the assessee. We find that the sales tax payments made for the financial years 1972-73 and 1973-74 by Oberoi Delhi which had been kept in ‘advance payment account’ has been written off during the financial year 2002-03 treating the same as irrecoverable. The same is also supported by the sales tax assessment orders passed by the Delhi Sales Tax department. No doubt that any legitimate sales tax paid by an assessee is entitled for reimbursement from the customers through sales invoices or otherwise, since the matter pertains to financial years 1972-73 and 1973-74, it is practically impossible to search the relevant customer and recover the sales tax from them. Hence in these circumstances, the decision of the assessee to treat the said sales tax payments retained under advance payment account, as irrecoverable cannot be doubted with. We hold that this is nothing but a trading loss incurred by the assessee and allowable as deduction u/s 28 of the Act. Hence we find no infirmity in the order of the Learned CIT(A) in this regard. Accordingly, the ground no. 5 raised by the revenue is dismissed.

16. Disallowance of interest on borrowed funds – Rs. 94,06,942 /- (46738966-37332024)

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. 5,33,31,181/-) 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(A) 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:-

“6. On the facts and in the circumstances of the case ld. CIT(A) has erred in deleting the disallowance of interest on loans amounting to Rs.4,67,38,966/- on the amount of interest free loans given to its five subsidiaries of Rs.38,54,91,3881/- out of borrowed funds on which interest expenditure @ 12% was claimed by the assessee. Though the said interest on interest free advances in the case of two subsidiaries viz. Lake Palace Hotel & Motels Ltd and Mumtaz Hotels Ltd on the interest free loan amounting to Rs.31,11,00,200/-.”

16.1. We have heard the rival submissions. This issue has been elaborately dealt with in Ground Nos. 8 & 9 raised by the assessee in this order. The decision rendered thereon will be equally applicable to Ground No. 6 raised by the revenue. Accordingly, ground no. 6 raised by the revenue is dismissed.

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

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 AO proceeded to disallow a sum of Rs. 50,00,000/- on account of staff welfare expenses on an adhoc basis based on the disallowances made in the earlier years i.e Asst Years 2001-02 &

2002-03. On first appeal, the Learned CIT(A) on the basis of earlier year's order of his predecessor deleted the addition made towards staff welfare expenses on an adhoc 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. Aggrieved, the revenue is in appeal before us on the following ground:-

“7. On the facts and in the circumstances of the case Id. CIT(A) has erred in deleting the disallowance of Rs.50,00,000/- out of staff welfare expenses as against Rs.10,62,83,448/- debited under the head.”

17.1. The Learned AR further argued that similar addition made in Asst Year 2002-03 by the Learned AO in assessee's own case came up before this Tribunal and the same in ITA No. 426 / Kol / 2006 (revenue appeal) dated 11.9.2015 had held this issue in favour of the assessee. In response to this, the Learned DR fairly conceded to the point that this issue is covered in favour of the assessee by the order of this tribunal.

17.2. We have heard the rival submissions and perused the detailed paper book of the assessee and perused the materials available on record. We find that this issue is squarely covered by the decision of this tribunal in assessee's own case for the Asst Year 2002-03 in ITA No. 426 / Kol / 2006 (revenue appeal) dated 11.9.2015 , wherein in para 16, it has been held as under:-

16.3. We have heard the rival submissions. It is seen that the addition has been made only on an adhoc basis by the Learned AO . 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 considered .

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 CITA on this issue. Accordingly, ground no. 8 raised by the revenue is dismissed.

17.3. Respectfully following the co-ordinate bench decision of this tribunal for the Asst Year 2002-03 as stated supra, we find no infirmity in the order of the Learned CIT(A) in this regard and accordingly the ground no. 7 raised by the revenue is dismissed.

18. Disallowance of repairs, renewals, replacement and advertisement – Rs. 1,08,30,147/-

The brief facts of this issue is that the assessee has debited the following expenses in its profit and loss account:-

Renewal and Replacement	3,84,03,196	
Repairs	24,44,19,284	
Advertisement, Publicity etc	10,25,47,306	
Passage & Travelling	15,61,37,573	
	-----	54,15,07,359

The Learned AO observed from the assessment orders of earlier assessment years , the genuineness and allowability of the aforesaid expenditure is not free from doubt and accordingly as in earlier years proceeded to disallow 2% of the aforesaid expenditure. On first appeal, the Learned CIT(A) deleted the disallowance. 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 disallowance of rs.1,08,30,147/- @ 2% of the total expenses incurred under the head Repairs, Renewal, Replacement, Advertisement, Passage and Travelling though the assessee failed to produce details of such expenses and prove the genuineness of the

allowability of the business expenditure before the AO during the assessment proceedings for the year. “

18.1. The Learned AR further argued that similar addition made in Asst Year 2002-03 by the Learned AO in assessee's own case came up before this Tribunal and the same in ITA No. 426 / Kol / 2006 (revenue appeal) dated 11.9.2015 had held this issue in favour of the assessee. In response to this, the Learned DR fairly conceded to the point that this issue is covered in favour of the assessee by the order of this tribunal.

18.2. We have heard the rival submissions and perused the detailed paper book of the assessee and perused the materials available on record. We find that this issue is squarely covered by the decision of this tribunal in assessee's own case for the Asst Year 2002-03 in ITA No. 426 / Kol / 2006 (revenue appeal) dated 11.9.2015 , wherein in para 17, it has been held as under:-

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 adhoc 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.

18.3. Respectfully following the co-ordinate bench decision of this tribunal for the Asst Year 2002-03 as stated supra, we find no infirmity in the order of the Learned CIT(A) in this regard and accordingly the ground no. 8 raised by the revenue is dismissed.

19. Disallowance of General Charges – Rs. 1,01,42,417/-

During the course of assessment proceedings, the Learned AO observed that the assessee had debited a sum of Rs. 4,05,69,671/- on account of General Charges. He observed that no details or explanation has been filed in this regard and accordingly proceeded to disallow 25% of the same as unverifiable and not related to the business and made disallowance of Rs. 1,01,42,417/-. On first appeal, the assessee pleaded that all the details were indeed filed before the Learned AO and the observation of the Learned AO is factually incorrect. It was also pleaded that out of Rs. 4,05,69,671/-, a sum of Rs. 3,99,61,272/- debited in the Head Office relates to amounts paid to different associations like Hotel Association of India , World Economic Forum, Membership fees and annual subscription for various stock exchanges. Based on these submissions, the Learned CIT(A) deleted the addition. 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.1,01,42,417/- being 25% of the total expenses incurred under the head ‘General Charges’ by accepting assessee’s explanation and other details which were not produced and not verified before the AO during the assessment proceedings. “

19.1. The Learned DR vehemently supported the order of the Learned AO and in response to this, the Learned AR referred to the relevant page of the paper book which contained the details of the entire general charges. He further argued that no disallowance was made by the Learned AO in the assessment year 2002-03 (earlier year) and assessment year 2005-06 (subsequent year) on this account and vehemently supported the order of the Learned CIT(A).

19.2. We have heard the rival submissions and perused the materials available on record including the relevant page of the paper book filed by the assessee. We find from the paper book, the details of general charges are as follows:-

Head office	3,99,61,272	
Chowringhee Properties	140	
Oberoi Mount Everest, Darjeeling	4,558	
Palm Beach, Gopalpur	2,04,496	
Calcutta Deposit	813	
Delhi Deposit	7,221	
Mumbai Deposit	5,510	
Central Purchase, Delhi	561	
Goa Project	15,052	
Oberoi Airport Services, Kolkata	3,70,049	
	-----	4,05,69,672

We also find that the assessee had submitted before the Learned CIT(A) that the amounts debited in Head office represents amounts paid to different associations like Hotel Association of India , World Economic Forum, Membership fees and annual subscription for various stock exchanges. These are expenses incurred wholly and exclusively for the purpose of business of the assessee. We also find that this disallowance is not made by the Learned AO for the Asst Year 2002-03 (i.e the earlier year) and in Asst Year 2005-06 (in subsequent year). Moreover, there is absolutely no basis for making the disallowance at the rate of 25% of total general charges by the Learned AO. Accordingly, we find no infirmity in the order of the Learned CITA and hence the ground no. 9 raised by the revenue is dismissed.

20. Disallowance of Prior Period Expenses – Rs. 1,00,000/-

The brief facts of this issue is that the tax auditor had remarked in his tax audit report for the Asst Year 2004-05 that a sum of Rs. 1,00,000/- represents expenditure pertaining to Asst Year 2003-04 and accordingly reported the same under prior period expenses in tax audit report. Based on this, the assessee made a claim before the Learned AO that the said expenditure of Rs. 1,00,000/- be allowed as deduction in Asst Year 2003-04 (i.e the assessment year under appeal). The Learned AO did not consider this request of the assessee. On first appeal, the Learned CIT (A)

appreciated the contentions of the assessee and on going through the tax audit report for the Asst Year 2004-05 and in line with the mercantile system of accounting followed by the assessee, allowed the claim of the assessee by stating that the assessee's time for filing revised return had expired and accordingly had made a claim by way of a letter before the completion of assessment proceedings. 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 of expenses of Rs.1,00,000/- claimed before the AO during assessment proceedings for the financial year relevant to the assessment year 2003-04 by their letter dated 27.01.06 though the said expenses related to the financial year relevant to the assessment year 2004-05 as per Tax Audit Report not debited to the P & L A/c for the assessment year 2003-04. “

20.1. The Learned DR vehemently supported the order of the Learned AO and in response to this, the Learned AR vehemently supported the order of the Learned CIT(A).

20.2. We have heard the rival submissions and perused the materials available on record including the relevant page of the paper book filed by the assessee. We find from the paper book that the assessee had genuinely made this claim before the Learned AO based on the tax auditor reflecting a figure of Rs. 1,00,000/- under prior period expenses in the tax audit report for Asst Year 2004-05. It is not the case of the revenue that the said expenditure is not incurred wholly and exclusively for the purpose of business of the assessee. The assessee in line with the mercantile system of accounting regularly employed by it, had sought to rectify its genuine omission and claim the same in the assessment proceedings by way of a letter dated 27.1.2006. We are aware at this juncture that any claim could be made only by filing a valid return as has been held by the **Hon'ble Apex Court in the case of Goetze India Ltd reported in 284 ITR 323 (SC)**. But the same judgement states in the last para that the said finding

is not applicable to appellate authorities more especially to tribunals. Hence respectfully following the judgement of the Hon'ble Apex Court (supra) and in view of the fact that the said expenditure of Rs. 1,00,000/- is genuinely incurred by the assessee for the purpose of its business, we hold that the action of the Learned CIT(A) does not require any interference in this regard. Hence the ground no. 10 raised by the revenue is dismissed.

20.2.1 In the result, the appeal of the revenue in ITA NO. 2182 / Kol / 2006 for Asst Year 2003-04 is dismissed.

ITA NO. 1846 / KOL / 2007 – ASST YEAR 2004-05 – ASSESSEE'S APPEAL

21. The assessee has raised the following grounds before us :-

1) That on the facts and in the circumstances of the case, the Learned CIT(Appeals) was not justified in confirming the disallowance of Rs. 88,506,749/- made under section 40(a)(i) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') on Professional & Consultancy Fees paid to non residents ignoring the fact that such fees being not subject to tax in India required no tax withholding under section 195.

2) That on the facts and in the circumstances of the case, the Learned CIT(Appeals) failed to appreciate the fact that disallowance u/s 40(a)(i) could only be made where tax is deductible u/s 195 and the appellant had failed to deduct such tax.

3) That on the facts and in the circumstances of the case, the Learned CIT(Appeals) erred in not considering that legal fees, commission to foreign travel agents, payments on account of advertisement, subscription and listing fees of trade associations and fees for other professional services rendered from outside India cannot be treated as "fees for technical services" to attract the deeming provisions under section 9(1)(vii) of the Act.

4) That the Learned CIT(A) erred in enhancing the disallowance u/s 40(a)(i) by another RsA,453,580/- during the appeal proceedings for non deduction of tax at source on commission paid to foreign

travel agents ignoring the fact that such commission being not subject to tax in India required no tax withholding under section 195.

5) *That on the facts and in the circumstances of the case, the Learned CIT(Appeals) erred in confirming the disallowance of Rs.167, 134,707/- claimed by the appellant as overseas office maintenance, sales promotion, sales office expenses, aircraft maintenance and other matters for which remittances were made in foreign exchange and spent wholly and exclusively for the business purpose.*

6) *That on the facts and in the circumstances of the case, the Learned CIT(Appeals) erred in alleging non-compliance of detailed records/evidences of payments alongwith justification ignoring the fact that each and every item of details had been furnished before the assessing officer which was communicated in the written submission before the Learned CIT(A).*

7) *That on the facts and in the circumstances of the case, the Learned CIT(Appeals) erred in rejecting the claim of the appellant for Rs 4,001,630/- under section 80HHC of the Act on export of food and beverages to out bound flights of foreign airlines payments for which were received in convertible foreign exchange.*

8) *That on the facts and in the circumstances of the case, the Learned CIT(Appeals) erred in confirming the disallowance of Rs.5,492,786/- being 20% of aggregate expenditure incurred on running and maintenance of aircraft ignoring the fact that the aircrafts were exclusively used for the purpose of business and there was total compliance before the Assessing Officer so far as the submission of details was concerned and also there was a net profit of Rs.9, 158,600/- from the business of chartering of aircrafts.*

9) *That the Learned CIT(Appeals) erred in not appreciating that the observation of the Assessing Officer that the aircraft was used for personal purposes was a wild guess but not based on any specific finding.*

10) *That on the facts and in the circumstances of the case, the Learned CIT(Appeals) was not justified in restricting the disallowance of interest to Rs. 40,003,060/-, being 12% of interest free advances ignoring the fact that said advances were made to*

Associate Enterprises solely for commercial expediency and related to the business interest of the assessee.

11) That without prejudice to Ground No 10 as above, the Learned CIT(Appeals) had failed to appreciate that the advances made to the Associate Enterprises were made wholly out of owned funds and the question of disallowance of interest incurred on borrowed funds did not arise.

12) That without prejudice to Ground Nos. 10 & 11 as above, the Learned CIT(Appeals) should have realised that no interest is chargeable in case of advances, which are not in the nature of loan.

13) That on the facts and in the circumstances of the case, the Learned CIT(Appeals) was not justified in confirming the disallowance of Rs. 2,500,000/- on account of legal expenses ignoring the fact that such disallowance was made purely on surmise and conjecture.

14) That on the facts and in the circumstances of the case, the Learned CIT(Appeals) erred in confirming the disallowance of bad debts written off amounting to Rs.155,577/- on incorrect appreciation of factual position.

15) That on the facts and in the circumstances of the case, the Learned CIT(Appeals) was wrong in confirming the disallowance of RS.250,000/- U/s.14A when no expenditure was actually incurred in relation to exempt dividend income.

16) That without prejudice to the ground as stated above, the addition of Rs.250,000/- made u/s.14A of the Act is highly excessive.

17) 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.”

22. We find that most of the grounds raised by the assessee hereinabove are covered by the decisions rendered by us for the Asst Year 2003-04 in ITA No. 57/ Kol/ 2007.

23. The ground nos. 1 to 4 raised by the assessee are similar to the ground nos. 1 to 3 raised by the assessee for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issues except with certain changes in the name of the parties, change in place of those parties and change in amounts paid to those parties. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2004-05 also.

23.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CIT(A) are enclosed in Pages 66 , 70,71 , 72 , 97, 98 , 105 , 106 & 107 of Paper Book 1 and Pages 231, 232 , 233 , 234, 235 to 258, 286 to 289 of Paper Book 2. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground nos. 1 to 3 in para 3 would apply with equal force for the grounds 1 to 4 for the Asst Year 2004-05. Hence the ground nos. 1 to 4 raised by the assessee are allowed.

24. The ground nos. 5 & 6 raised by the assessee are similar to the ground no. 4 raised by the assessee for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issues except change in amounts paid to those parties. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2004-05 also.

24.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CIT(A) are enclosed in Pages 66 , 67, 97, 98 , 107 & 108 of Paper Book 1 and Pages 259 to 285

of Paper Book 2. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground no. 4 in para 4 would apply with equal force for the grounds 5 and 6 for the Asst Year 2004-05. Hence the ground nos. 5 & 6 raised by the assessee are allowed.

25. The ground no. 7 raised by the assessee is similar to the ground no. 5 raised by the assessee for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issues except change in amounts received in convertible foreign exchange towards export of food and beverages to outbound flights of foreign airlines. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2004-05 also.

25.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CIT(A) are enclosed in Pages 54 , 61, 99 , 108 & 109 of Paper Book 1 and Pages 291 to 294 of Paper Book 2. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground no. 5 in para 5 would apply with equal force for the ground no. 7 for the Asst Year 2004-05. Hence the ground no. 7 raised by the assessee is allowed.

26. The ground nos. 8 & 9 raised by the assessee are similar to the ground nos. 6 & 7 raised by the assessee for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issues except change in amounts and percentage of amounts disallowed. He argued that in Asst Year 2004-05, 20% of the impugned expenditure was disallowed by the Learned AO as against 50% disallowed in Asst Year 2003-04. In response to this, the Learned DR also conceded that the facts are

similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2004-05 also.

26.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CIT(A) are enclosed in Pages 51 , 56, 63, 99, 109 to 110 of Paper Book 1 and Pages 295 to 311 of Paper Book 2. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground nos. 6 & 7 in para 6 would apply with equal force for the ground nos. 8 & 9 for the Asst Year 2004-05. Hence the ground nos. 8 & 9 raised by the assessee are allowed.

27. The ground nos. 10, 11 & 12 raised by the assessee are similar to the ground nos. 8 & 9 raised by the assessee for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issues except change in amounts and change in names of the parties. He further argued that these advances were made only for furthering the business interests of the assessee. He also pointed out to the relevant page of the paper book filed by the assessee wherein in respect of amounts due from certain parties, it only represents reimbursement of expenses and not any advances made to them. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2004-05 also.

27.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CITA are enclosed in Pages 52 , 57 to 59, 74, 100, 110, 111 of Paper Book 1 and Pages 311A, 311B , 312 to 315 of Paper Book 2. We hold that the findings given, case

laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground nos. 8 & 9 in para 7 would apply with equal force for the ground nos. 10 , 11 & 12 for the Asst Year 2004-05. Hence the ground nos. 10 , 11 & 12 raised by the assessee are allowed.

28. Disallowance on account of legal expenses on adhoc basis – Rs. 25,00,000/-

The brief facts of this issue is that the assessee debited a sum of Rs. 1,24,40,594/- on account of legal expenses grouped under the head ‘other expenses’ in the profit and loss account. The Learned AO observed that the assessee filed a list of persons and amounts paid. However, he observed that the necessity of incurring these expenses vis a vis the business of the assessee was not proved with any evidences. Accordingly, he resorted to make an adhoc disallowance of Rs. 25,00,000/- out of the same. This addition was upheld by the Learned CITA as he observed that the assessee did not bother to file any evidences even before him. Aggrieved, the assessee is in appeal before us on the following ground:-

13) That on the facts and in the circumstances of the case, the Learned CIT(Appeals) was not justified in confirming the disallowance of Rs. 2,500,000/- on account of legal expenses ignoring the fact that such disallowance was made purely on surmise and conjecture.

28.1. The Learned AR took us to the relevant pages of the paper book filed by the assessee and vehemently argued that the entire expenses were incurred only for handling the legal disputes arising out of the business of the assessee. In response to this, the Learned DR vehemently supported the orders of the lower authorities.

28.2. We have heard the rival submissions and perused the materials available on record including the paper books filed by the assessee. The relevant pages of the paper

book on this impugned issue are pages 59, 68, 102, 111 of Paper Book 1 and Pages 316 to 334 of Paper book 2. We find that from the relevant pages of the paper book that the date wise and unit wise details regarding the name of the parties to whom payments are made, purpose of the payment, petition numbers in some cases, etc are available. However, it is not clear that whether the entire details of legal expenses were filed before the lower authorities for their verification. Hence we deem it fit and appropriate, in the interest of justice and fairplay, to set aside this issue to the file of the Learned AO to decide this issue afresh in accordance with law. The assessee is directed to submit all these details before the Learned AO and such other evidences and documents as may be required in support of its contentions. Hence the ground no. 13 raised by the assessee is allowed for statistical purposes.

29. Disallowance of bad debts – Rs. 1,55,577/-

The Learned AR stated that in view of the smallness of the amount involved, he is not willing to press this ground. The Learned DR did not object to the same.

29.1. We have heard the rival submissions. In view of the above, the ground no. 14 raised by the assessee is dismissed as not pressed.

30. Disallowance u/s 14A of the Act towards proportionate management expenses– Rs. 2,50,000/-

The brief facts of this issue is that the assessee had claimed exempt income of Rs. 56,28,218/- and claimed that no expenditure was incurred by the assessee for the purpose of earning this exempt income. During the course of assessment proceedings, the Learned AO observed that it is not possible that any income can be earned without incurring any administrative expenses. Accordingly, he made disallowance u/s 14A of the Act a sum of Rs. 2,50,000/- on an adhoc basis. The action of the Learned AO

was upheld by the Learned CITA. Aggrieved, the assessee is in appeal before us on the following grounds:-

15) That on the facts and in the circumstances of the case, the Learned CIT(Appeals) was wrong in confirming the disallowance of RS.250,000/- U/s.14A when no expenditure was actually incurred in relation to exempt dividend income.

16) That without prejudice to the ground as stated above, the addition of Rs.250,000/- made u/s.14A of the Act is highly excessive.

30.1. The Learned AR argued that the provisions of Rule 8D of the IT Rules could be made applicable only from Asst Year 2008-09 as has been held by the Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing case reported in 328 ITR 81 (Bom) and fairly pleaded that since provisions of section 14A of the Act has got retrospective application in the statute, disallowance thereon could be restricted to 1% of exempt income as has been held by the Jurisdictional High Court in the case of CIT vs R.R.Sen & Brothers P Ltd in G.A.No. 3019 of 2012 in ITAT No. 243 of 2012 dated 4.1.2013. In response to this, the Learned DR fairly conceded to the submission of the Learned AR.

30.2. We have heard the rival submissions. The relevant assessment year under appeal is 2004-05 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 exempt income under this issue and accordingly, the Ground Nos. 15 & 16 raised by the assessee are partly allowed.

In the result, the appeal of the assessee in ITA No. 1846 / Kol / 2007 for the Asst Year 2004-05 is partly allowed.

ITA No. 1876 / Kol / 2007 – Asst Year 2004-05 – DEPARTMENT APPEAL

31. The revenue has raised the following grounds :-

I. That on the facts and in the circumstances of the case, Id.CIT(A) has erred in excluding Rs.10,49,30,539/-, representing receipts in foreign currency from foreign airlines and embassies, for the purpose of computation of allowable deduction u/s.80HHD and in placing reliance on hon'ble ITAT's decision dated 29.06.2005 in the assessee's own case for assessment year 1999-2000 in ITA Nos.891 & 8011K0V04 vide which the issue was restored back to the file of the Assessing Officer with specific directions. In doing so, Id.CIT(A) has failed to appreciate the observations of the Assessing Officer on the issue.

2. That on the facts and in the circumstances of the case, Id.CIT(A) has wrongly directed to exclude RsA7,46,00,021/- representing

Excise Duty, Sales Tax, Luxury Tax, etc., from the Total Turnover for the purpose of computation of deduction u/s.80HHD by observing that the provisions under Chapter VIA have independent code of computation of relief available under relevant provisions and that there was no scope of importing any issue unless it was in the said sections and in doing so Id.CIT(A) failed to appreciate the action of the Assessing Officer that was based on the judgement of hon'ble Supreme Court in the case of Chowringhee Sales Bureau vs. CIT reported in 1871TR 542.

3. That on the facts and in the circumstances of the case, Id.CIT(A) erred in deleting the addition of Rs.36,03,743/- relating to excess provision made towards Technical Assistance Fees by relying on hon'ble ITAT's decision dated 29.06.2005 in the assessee's own case for assessment year 1999-2000 in ITA Nos.891 & 8011 Kol/ 2006 and not appreciating the Assessing Officer's observation made in the relevant assessment order for arriving at the operational profit of the hotels under consideration. The assessee calculated its receipts @ 12.5% of operational profit of several group hotels who in turn claimed provision for repairs as well as bad & doubtful debts.

4. That on the facts and in the circumstances of the case, Id.CIT(A) erred in restricting the addition made on account of interest-free loans to Rs.4,00,03,060/- by accepting the assessee's argument that only Rs.33,33,58,828/- represented interest-free loan advanced to M/s. Balaji Hotels & Enterprises Ltd. and the balance Rs.17,83,91,145/- was advanced not free of interest although the assessee had failed to substantiate its claim before the Assessing Officer during assessment proceedings or subsequently and which, therefore, remained unverifiable.

5. That on the facts and in the circumstances of the case, Id.CIT(A) erred in deleting the addition of Rs.58,29,681/- relating to Staff Welfare Expenses by placing reliance on the order of hon'ble IT AT dated 08.09.2006 in the assessee's own case for assessment years 2000-01 & 2001-02 in ITA Nos.833 & 10901K0V05 and failing to appreciate the observations of the Assessing Officer on the issue.

6. That on the facts and in the circumstances of the case, Id.CIT(A) erred in deleting the disallowance/addition made by the Assessing Officer of Rs.8J,43,698/- on account of expenses towards Repairs, Renewals, Replacements, etc., by not appreciating the Assessing Officer's observation that the expenses remained unverifiable before him during assessment proceedings for the year since the assessee

failed to explain the individual expenses in the manner requisitioned by the Assessing Officer along with supporting documents.

7. That on the facts and in the circumstances of the case, Id.CIT(A) erred in deleting the disallowance/addition made by the Assessing Officer of Rs.50,33,347/- on account of General Expenses by not appreciating the Assessing Officer's observation that the assessee had failed to substantiate the said expenses in the manner called for with supporting evidence during assessment proceedings for the year.

8. That, the petitioner craves leave to add, alter or modify any or all of the above grounds of appeal any time before or at the time of hearing.

32. We find that most of the grounds raised by the revenue hereinabove are covered by the decisions rendered by us for the Asst Year 2003-04 in ITA No. 2182 / Kol/ 2006.

33. The ground no. 1 raised by the revenue is similar to the ground no. 1 raised by the revenue for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issue except change in amounts received in convertible foreign exchange from foreign airlines and embassies for the purpose of computation of allowable deduction u/s 80HHD of the Act. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2004-05 also.

33.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CITA are enclosed in Pages 335 to 345 of Paper Book 2. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the

ground no. 1 in para 11 would apply with equal force for the ground no. 1 for the Asst Year 2004-05. Hence the ground no. 1 raised by the revenue is dismissed.

34. The ground no. 2 raised by the revenue is similar to the ground no. 2 raised by the revenue for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issue except change in amounts in respect of exclusion of service tax, sales tax and other indirect taxes for the purpose of computation of allowable deduction u/s 80HHD of the Act. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2004-05 also.

34.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CITA are enclosed in Pages 382 to 389 of Paper Book 2. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground no. 2 in para 12 would apply with equal force for the ground no. 2 for the Asst Year 2004-05. Hence the ground no. 2 raised by the revenue is dismissed.

35. Excess provision for technical fees – Rs. 36,03,743 - The ground no. 3 raised by the revenue is similar to the ground no. 4 raised by the revenue for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issue except change in figures. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2004-05 also.

35.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CITA are enclosed in Pages 382 to 389 of Paper Book 2. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground no. 4 in para 14 would apply with equal force for the ground no. 3 for the Asst Year 2004-05. Hence the ground no. 3 raised by the revenue is dismissed.

36. Disallowance of interest on borrowed funds – Rs. 4,00,03,060/- The ground no. 4 raised by the revenue is similar to the ground no. 6 raised by the revenue for Asst Year 2003-04. This issue is also similar to ground nos. 10 to 12 raised by the assessee for the Asst Year 2004-05 . The Learned AR argued that there is absolutely no change in the issue except change in figures and change in parties with regard to the earlier year. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2004-05 also.

36.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CITA are enclosed in Pages 314 and 315 of Paper Book 2. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground no. 6 in para 16 and for the ground nos. 10 to 12 in Para 27 for the Asst Year 2004-05 would apply with equal force for the ground no. 4 for the Asst Year 2004-05. Hence the ground no. 4 raised by the revenue is dismissed.

37. Disallowance on account of staff welfare expenses – Rs. 58,29,681/-

The ground no. 5 raised by the revenue is similar to the ground no. 7 raised by the revenue for Asst Year 2003-04. The Learned AR argued that there is absolutely no

change in the issue except change in figures. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2004-05 also.

37.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CITA are enclosed in Pages 346 to 349, 349A, 350 & 351 of Paper Book 2. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground no. 7 in para 17 would apply with equal force for the ground no. 5 for the Asst Year 2004-05. Hence the ground no. 5 raised by the revenue is dismissed.

38. Disallowance on account of expenses towards repairs, renewals and replacements – Rs. 81,43,698/-

The ground no. 6 raised by the revenue is similar to the ground no. 8 raised by the revenue for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issue except change in figures. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2004-05 also.

37.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CIT(A) are enclosed in Pages 352 to 420 of Paper Book 2. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground no. 8 in para 18 would apply with equal force for the ground no. 6 for the Asst Year 2004-05. Hence the ground no. 6 raised by the revenue is dismissed.

38. Disallowance on account of General Expenses – Rs. 50,33,347/-

The ground no. 7 raised by the revenue is similar to the ground no. 9 raised by the revenue for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issue except change in figures. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2004-05 also.

38.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CIT(A) are enclosed in Pages 421 & 422 of Paper Book 2. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground no. 9 in para 19 would apply with equal force for the ground no. 7 for the Asst Year 2004-05. Hence the ground no. 7 raised by the revenue is dismissed.

In the result, the appeal of the revenue in ITA NO. 1876 / Kol / 2007 for Asst Year 2004-05 is dismissed.

ITA NO. 299 / KOL / 2010 – ASST YEAR 2005-06 – ASSESSEE APPEAL

39. The assessee has raised the following grounds before us :-

1. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming the disallowance made by the Assessing Officer u/s 40(a)(i) of the Act to the extent of Rs. 2,46,85,226/- out of the professional & consultancy fees of Rs 3,18,83,520/- paid to non-residents.

2. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in not appreciating the fact that under the domestic tax laws of India the payments made on account of services rendered

from outside India are not subject to Indian income tax and the principles laid down by the Hon'ble Supreme Court in Ishikawajima Harima

Heavy Industries Ltd -vs.- Director Of Income Tax 288 ITR 408(SC) is valid even after the introduction of the explanation introduced after section 9(2) of the IT Act.

3. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in holding that marketing commission payable to overseas agents for services rendered outside India is taxable in India.

4. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in not appreciating that 'legal charges' is not covered by the definition 'Fees for Technical services' and any remittance abroad on account of such legal fees rendered from outside India, being a professional charge should not be subject to Indian tax under the domestic tax laws of India.

5. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in not appreciating that as per the tax treaties India has entered into with the UK, the USA etc. the definition of 'Fees for Technical Services (FTS)' is very narrow and a service should be considered as FTS, only if a new technology is made available to the payee.

6. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in not appreciating that the tax treaties with Thailand and Australia do not have FTS clause and consequently further erred in considering business incomes rendered not through a permanent establishment in India as income subject to tax in India.

7. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in holding that M/s. Ann Scott & Associates Ltd., UK had rendered professional services in India exceeding 180 days during FY 2004-05.

8 That on the facts and in the circumstances of the case, the learned Cl T(Appeals) erred in holding that M/s. Antaskovic Hartnell, Australia had rendered professional services in India exceeding 180 days during FY 2004-05.

9. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in not appreciating that payments for purchase of drawings are not taxable under India - Thailand tax treaty.

10 That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming the disallowance made by the Assessing Officer u/s 40(a)(i) of the Act of Rs. 1,50,10,962/- paid to foreign company towards sales promotion services rendered outside India due to alleged non deduction of tax u/s 195 from such payment.

11. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in not appreciating that Rs. 1,50,10,962/- paid on account of sales promotion expenses is not taxable in India neither under the domestic law nor under the applicable tax treaty

12. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming the disallowance made by the Assessing Officer of Rs. 67,62,092/- being 10% of total expenditure of Rs. 6,76,20,915/- on account of aircraft maintenance and running expenses on an ad-hoc basis, based on mere surmise and conjecture; ignoring the fact that the aircrafts were exclusively used for the purpose of the business.

13 That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming the addition made by the Assessing Officer as notional interest amounting to Rs. 5,84,87,705/- on advances given to the subsidiaries /associates companies solely for commercial expediency and related to the business interest of the appellant.

14. That without prejudice to the ground no. 13 herein above, the learned CIT(Appeals) erred in not appreciating the fact that the rate of interest as considered by the Assessing Officer, for notional disallowance of advances given to subsidiaries/associates companies solely for commercial expediency, is too high and arbitrary.

15. That without prejudice to the ground no. 13 & 14 herein above, the learned CIT(Appeals) erred in not appreciating the fact that the advances made to the subsidiaries/associates companies were made wholly out of the owned funds and therefore, the question of disallowance of interest on borrowed funds did not arise.

17. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming the disallowance made by the Assessing Officer of Rs. 1,93,558/- on account of bad debts written off and offered to tax earlier.

40. We find that most of the grounds raised by the assessee hereinabove are covered by the decisions rendered by us for the Asst Year 2003-04 in ITA No. 57/ Kol/ 2007.

41. Disallowance of Professional fees (Rs. 2,46,85,226/-) ; Consultancy fees (Rs. 3,18,83,520/-) and Sales promotion expenses (Rs. 1,50,10,962/-) paid to non-residents

The ground nos. 1 to 11 raised by the assessee are similar to the ground nos. 1 to 3 raised by the assessee for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issues except with certain changes in the name of the parties, change in place of those parties and change in amounts paid to those parties. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2005-06 also.

41.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CITA are enclosed in Pages 1 to 4, 22, 29, 30, 35 to 37, 39 to 135, 244 to 356, 374 to 425 of Paper Book . We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground nos. 1 to 3 in para 3 and ground no. 4 in para 4 with regard to sales promotion expenses would apply with equal force for the grounds 1 to 11 for the Asst Year 2005-06. Hence the ground nos. 1 to 11 raised by the assessee are allowed.

42. Disallowance towards repairs , running and maintenance of aircrafts – Rs. 67,62,092

The ground no. 12 raised by the assessee is similar to the ground nos. 6 & 7 raised by the assessee for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issues except change in amounts and percentage of amounts disallowed. He argued that in Asst Year 2005-06, 10% of the impugned expenditure was disallowed by the Learned AO as against 50% disallowed in Asst Year 2003-04. In response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2005-06 also.

42.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CITA are enclosed in Pages 4, 5, 19, 27, 30, 37, 136 to 151, 244, 357 to 373 of Paper Book. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground nos. 6 & 7 in para 6 would apply with equal force for the ground no. 12 for the Asst Year 2005-06. Hence the ground no. 12 raised by the assessee is allowed.

43. Disallowance of interest on borrowed funds in respect of interest free advances given by the assessee – Rs. 5,84,87,705/-

The ground nos. 13,14 & 15 raised by the assessee are similar to the ground nos. 8 & 9 raised by the assessee for Asst Year 2003-04. The Learned AR argued that there is absolutely no change in the issues except change in amounts and change in names of the parties. He further argued that these advances were made only for furthering the business interests of the assessee. He also pointed out to the relevant page of the paper book filed by the assessee wherein in respect of amounts due from certain parties, it only represents reimbursement of expenses and not any advances made to them. In

response to this, the Learned DR also conceded that the facts are similar to Asst Year 2003-04 and decision rendered in Asst Year 2003-04 on these issues could be followed for Asst Year 2005-06 also.

43.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CIT(A) are enclosed in Pages 5, 6, 27, 28, 30 to 34, 152 to 167 of Paper Book. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2003-04 for the ground nos. 8 & 9 in para 7 would apply with equal force for the ground nos. 13, 14 & 15 for the Asst Year 2005-06. Hence the ground nos. 13, 14 & 15 raised by the assessee are allowed.

44. Disallowance on account of specific general charges – Rs. 7,00,000/-

The brief facts of this issue is that the Learned AO during the course of assessment proceedings found that expenses to the tune of Rs. 14,99,285/- out of total general charges of Rs. 3,29,66,709/- are not relatable to the business of the assessee. He had listed out the same in the assessment order. Accordingly the Learned AO disallowed a sum of Rs. 14,99,285/- in the assessment. On first appeal, the Learned CITA restricted the said disallowance to Rs. 7,00,000/- after holding that some expenses listed by the Learned AO cannot be related to the business of the assessee. Aggrieved, the assessee is in appeal before us on the following ground:-

16. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming the disallowance made by the Assessing Officer under the head 'General Charges' to the extent of Rs. 7,00,000/- as not being related to the business of the appellant.

44.1. The Learned AR argued that the disallowance confirmed by Learned CIT(A) for Rs. 7,00,000/- mainly represents gifts given to employees on various occasions

resulting in higher output and productivity and gifts to VIP guests on special occasions with a view to generate goodwill and are incurred as a measure of commercial expediency. With regard to expenditure incurred on horse feeds , the same are incurred for horses which were made available to the hotel guests of assessee in Rajasthan for joy rides. In response to this, the Learned DR vehemently supported the order of the Learned AO.

44.2. We have heard the rival submissions and perused the materials available on record. We find from the details listed in the assessment order by the Learned AO, the following expenses to be not attributable to the business of the assessee:-

Animesh Karmakar	No details	1,50,000
HSBC	Credit Card Payment	5,362
HSBC	Credit Card Payment	57,449
HSBC	Credit Card Payment	99,364
		----- 3,12,175

In view of the same, we direct the Learned AO to restrict the disallowance to Rs. 3,12,175/- as not relatable to the business of the assessee . Hence the ground no. 16 raised by the assessee is partly allowed.

45. Disallowance of Bad debts written off – Rs. 1,93,558/-

The Learned AR stated that in view of the smallness of the amount involved, he is not willing to press this ground. The Learned DR did not object to the same.

45.1. We have heard the rival submissions. In view of the above, the ground no. 17 raised by the assessee is dismissed as not pressed.

46. Disallowance u/s 14A of the Act towards proportionate management expenses– Rs. 20,08,159/-

The brief facts of this issue is that the assessee had claimed exempt income of Rs. 87,75,238/- and claimed that no expenditure was incurred by the assessee for the purpose of earning this exempt income. During the course of assessment proceedings, the Learned AO observed that it is not possible that any income can be earned without incurring any administrative expenses. Accordingly, he made disallowance u/s 14A of the Act a sum of Rs. 20,08,159/- by apportioning the exempt income of Rs. 87,75,238/- in the ratio of total personnel expenses of Rs. 143,08,40,079/- to total income of Rs. 625,24,71,054/-. In other words, the disallowance was worked out in the following manner by the Learned AO:-

Exempt income	-	87,75,238 (A)
Total personnel expenses	-	143,08,40,079 (B)
Total income	-	625,24,71,054 (C)

Disallowance u/s 14A = (A) * (B) / (C) = Rs. 20,08,159

The action of the Learned AO was upheld by the Learned CIT(A). Aggrieved, the assessee is in appeal before us on the following ground:-

18. That on the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming the arbitrary disallowance made by the Assessing Officer of Rs. 20,08,159/- u/s 14A of the Act as being proportionate management expenses incurred for earning exempt income.

47.1. The Learned AR argued that the provisions of Rule 8D of the IT Rules could be made applicable only from Asst Year 2008-09 as has been held by the

Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing case reported in 328 ITR 81 (Bom) and fairly pleaded that since provisions of section 14A of the Act has got retrospective application in the statute, disallowance thereon could be restricted to 1% of exempt income as has been held by the Jurisdictional High Court in the case of CIT vs R.R.Sen & Brothers P Ltd in G.A.No. 3019 of 2012 in ITAT No. 243 of 2012 dated 4.1.2013. In response to this, the Learned DR fairly conceded to the submission of the lower authorities.

48.2. We have heard the rival submissions. The relevant assessment year under appeal is 2005-06 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 exempt income under this issue and accordingly, the Ground No. 18 raised by the assessee is partly allowed.

In the result, the appeal of the assessee in ITA No. 299 / Kol / 2010 for the Asst Year 2005-06 is partly allowed.

ITA No. 196 / Kol / 2010 – Asst Year 2005-06 – DEPARTMENT APPEAL

49. The revenue has raised the following ground :-

“1. That ld. CIT(A) erred on facts and circumstances of the case and in law in allowing the claim of expenditure of Rs.43,34,707/- of staff welfare expenses because it was found during the course of assessment proceeding that a substantial part of the expenses booked under staff welfare expenses related to meals on duty and the assessee did not maintain any proper account in respect of these expenses. “

Disallowance on account of staff welfare expenses – Rs. 43,34,707/-

The ground no. 1 raised by the revenue is similar to the ground no. 5 raised by the revenue for Asst Year 2004-05. The Learned AR argued that there is absolutely no change in the issue except change in figures. In response to this, the Learned DR also conceded that the fact is similar to Asst Year 2004-05 and decision rendered in Asst Year 2004-05 on this issue could be followed for Asst Year 2005-06 also.

49.1. We have heard the rival submissions and perused the materials available on record including the detailed paper book filed by the assessee. We find that the submissions filed by the assessee before the Learned AO / Learned CIT(A) are enclosed in Pages 6, 29, 35, 236 to 243 of Paper Book. We hold that the findings given, case laws relied upon therein and the decision rendered by us for the Asst Year 2004-05 for the ground no. 5 in para 37 would apply with equal force for the ground no. 1 for the Asst Year 2005-06. Hence the ground no. 1 raised by the revenue is dismissed.

49.2 In the result, the appeal of the revenue in ITA NO. 196 / Kol / 2010 for Asst Year 2005-06 is dismissed.

50. To Sum up, the outcome of the aforesaid appeals are tabulated below:-

Assessment Year	Appeal No.	Appeal filed by	Result
2003-04	ITA No.57/Kol/07	Assessee	Allowed
-Do-	ITA No.2182/Kol/06	Department	Dismissed
2004-05	ITA No.1846/Kol/07	Assessee	Partly Allowed
-Do-	ITA No.1876/Kol/07	Department	Dismissed
2005-06	ITA No.299/Kol/10	Assessee	Partly Allowed
-Do-	ITA No.196/Kol/10	Department	Dismissed

Order pronounced in the open court on 9 -12-2015.

Sd/-
(Mahavir Singh, Judicial Member)

Sd/-
(M. Balaganesh, Accountant Member)

Date 9 /12/2015
**PRADIP/SPS

Copy of the order forwarded to:-

- 1.. The Appellant/Department: DCIT, Cir-8/JCIT (OSD), Incharge, Aaykar Bhawan, P-7 Chowringhee Sq, Kol-69. Kol-1.
- 2 The Respondent/Assessee-M/s. EIH Limited 4 Mangoe Lane, Kol-1
- 3 /The CIT, 4.The CIT(A)
5. DR, Kolkata Bench
6. Guard file.

True Copy,

By order,

Asstt Registrar