IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI

Before Shri P K Bansal, Vice President &
Shri Pawan Singh, Judicial Member

ITA No.1081/Mum/2013 Assessment Year : 2009-10
ITA No.4911/Mum/2013 Assessment Year : 2010-11
ITA No.4784/Mum/2014 Assessment Year : 2011-12

Mumbai International Airport P Ltd. Finance Department, 1st Floor, Terminal 1B, Chatrapati Shivaji International Airport, Santacruz (E), Mumbai 400 099 PAN : AAECM6285C	Vs.	Addl. CIT Range 8(2) Mumbai
(Appellant)		(Respondent)

ITA No.4675/Mum/2013 Assessment Year: 2009-10
ITA No.5592/Mum/2013 Assessment Year: 2010-11
ITA No.5655/Mum/2014 Assessment Year: 2011-12

Dy CIT Range 8(2) Mumbai	Vs.	Mumbai International Airport P Ltd. Mumbai 400 099 PAN : AAECM6285C
(Appellant)		(Respondent)

For the Assessee : Shri Vijay Mehta
For the Revenue : Shri Anand Mohan

Date of Hearing :13.09.2017		Date of Pronouncement :13.11.2017

O R D E R

Per P K Bansal, Vice-President:

All these cross-appeals in each of the assessment years have been filed against respective orders of the CIT(A).

2. **ITA No.1081/Mum/2013 Assessment Year: 2009-10:**

The assessee in its appeal has taken the following grounds of appeal:

*"**GROUND NO. 1:***
On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the learned Assessing officer of making a disallowance of Rs. 60,85,217/- u/s. 14A r.w.r. 8D of the Income Tax Act, 1961. The Appellant prays that the same may please be deleted.

GROUND NO. 2 :
On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the disallowance of the provision for leave encashment of Rs.2,14,68,986/-- made on the basis of an actuarial valuation by relying on the decision of Calcutta High Court in the case of Exide industries Ltd. v Union of India (292 ITR 470). The appellant prays that the same may be allowed.

GROUND NO. 3 :
On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in restricting the depreciation allowance to 10% as applicable to Buildings instead of 15% as applicable to Plant and Machinery, on the expenditure incurred by the appellant on taxiways, taxi track and parking bays."

The Revenue in **ITA NO. 4675/Mum/2013 for A.Y. 2009-10** has raised the following effective grounds of appeal:

1) "On *the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of refurbishment expenses in the nature of civil works amounting to Rs.40,54,97,763/-- treated by the Assessing Officer as capital expenditure, without considering the fact that the entire - expenditure has been incurred for renovation, expansion and modernization of the Airport.".*

2) *"On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of 25% depreciation on upfront fees of Rs.150 Crores, without considering the fact that the* assesses *has not acquired any absolute rights over the Airport, so as to equate it with a license, but instead the AAI has granted the assessee the right to perform certain functions*

during the contract period of 30 years and hence, the assessee is entitled for deduction of only the proportionate amount i.e. 1130th of Rs. 150 Crores."

3) "*On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in directing the Assessing Officer to treat the expenditure of Rs.20,35,73,477/- incurred towards contribution to MMRDA for construction of Sahar Elevated Road from Western Express Highway, horticulture expenses and other civil works as revenue expenditure without appreciating that these expenses gives enduring benefit to the assessee and hence is capital expenditure.*

4) "*On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in directing the Assessing Officer to treat the expenditure of Rs.20,35,73,477/- incurred towards contribution to MMRDA for construction of Sahar Elevated Road from Western Express Highway, horticulture expenses and other civil works as revenue expenditure ignoring the ratio of the decision of the Hon'ble Supreme Court in the case of CIT Vs. Mangayarkarasi Mills (315 ITR 114) wherein it was held that replacement expenditure is neither current repairs nor revenue in nature and the same is squarely applicable to the assessee's case."*

5) *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of Rs.37,21,91,736/-- made by the Assessing Officer u/s 40(a)(ia), without appreciating that the assessee was liable to deduct tax under various sections i.e. 1941, 194J and 194C but failed to do so."*

6) *"On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of Rs.37,21,91,736/- made by the Assessing Officer u/s 40(a)(ia), without appreciating that the assessee's tax auditors had pointed out that the said amount is disallowable."*

7) *"On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of Rs.39,35,444/-(Rs. 43,72,716 - 10% depreciation thereon = Rs.4,37,272/-), without considering the fact that the Assessing Officer was justified in allocating / apportioning 10% of the said total expenditure of Rs. 4,37,27,160/-."*

3. Subsequently, the assessee for A.Y. 2010-11 has taken similar grounds of appeal as taken in A.Y. 2009-10 except for the change in figures in ground nos. 1 & 2. In ground no.1 the figure of ₹ 60,85,217/- be read as ₹ 30,85,000/- and in ground no.2 the figure of ₹ 2,14,68,986/- be read as 3,19,60,734/-

The Revenue for A.Y. 2010-11 has taken the following effective ground of appeal:

> *1. "On the facts and in the circumstances of the* case *and in law the learned CIT(A) erred in deleting the disallowance of 25% depreciation on upfront fees of Rs.150 Crores, without* considering *the fact that the assessee has not acquired any absolute rights over the Airport, so as to equate it with a license, but instead the AAI has granted the assessee the right to perform certain functions during the contract period of 30 years and hence, the assessee is entitled for deduction of only the proportionate amount i.e. 1/30th of Rs.150 Crores."*
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> 2. *"On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in* directing *the Assessing Officer to treat the expenditure of Rs. 70,25,31,658/- incurred towards contribution to MMRDA for construction of Sahar Elevated Road from Western Express Highway, horticulture expenses and other civil works as revenue expenditure without appreciating that these expenses result in enduring benefit to the assessee and hence is capital expenditure.*
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> *" 3 . "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in directing the Assessing Officer to treat the expenditure of Rs. 70,25,31,658/- incurred towards contribution to MMRDA for construction of Sahar Elevated Road from Western Express Highway, horticulture expenses and other civil works as revenue expenditure ignoring the ratio of the decision of the Hon'ble Supreme Court in the case of CIT Vs. Mangayarkarasi Mills (315 ITR 114) wherein it was held that replacement expenditure is neither current repairs nor revenue in nature which is squarely applicable to the assessee's case."*

4. "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of Rs. 12,31,76,051/- made by the Assessing Officer u/s 40(a)(ia), without appreciating that the assessee was liable to deduct tax under various sections i.e. 1941, 194J and 194C but failed to do so."

5. "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of Rs. 12,31,76,051/- made by the Assessing Officer u/s 40(a)(ia), without appreciating that the assessee's tax auditors had pointed out that the said amount is disallowable."

6. "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of Rs.123,38,55,270/- paid as retrenchment compensation to AAI for the relevant assessment year 2010-11."

7. *"On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that retrenchment compensation is allowable as a deduction u/s 37(1) of the Income Tax Act, 1961."*

8. "On the *facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that Section 35DDA is not applicable without appreciating that such retrenchment* compensation paid by the assessee company is in connection with the *voluntary retirement of employees"*

9. "On the *facts and in the circumstances of the case and in law, the learned CIT(A) erred in relying on the decision of the Hon'ble Bombay High Court in the case of CIT Vs Sinnar Bidi Udyog Ltd (2002 123 Taxman 559 Bom) and CIT Vs Margarine & Refined Oils Co. Ltd (2006 282 ITR 576 (Kar)) without appreciating that the said decisions were rendered for the AY 1989-90 and AY 1981-82 respectively i.e. prior to insertion of Section 35DDA which is applicable for AY 2002-03 onwards as the same was inserted by the Finance Act, 2001 w.e.f. 01-04-2002, and therefore the ratio of the decisions cited supra is not applicable to the Assessment Year under consideration."*

10. "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that Development Fee of Rs. 286,30,14,565/- collected by the assessee from the embarking passengers at the Chhatrapati Shivaji International Airport, Mumbai

during the Financial Year 2009-10, relevant for the assessment year 2010-11, is a capital receipt and not a revenue receipt."

11. "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that Development Fee collected by the assessee company is a capital receipt based on its application for acquisition of capital assets without appreciating the fact that application of receipts does not determine the nature and taxability of the receipts."

12. "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in relying on the decision of the Hon'ble Supreme Court in the case of Consumer Online Foundation Vs Union of India & Others (2011 5 SCC 360) without appreciating that in that case the issue before the Hon'ble Apex Court was whether the assessee company, as a lessee of AAI, can collect development fee from the embarking passengers at the Chhatrapati Shivaji International Airport, Mumbai and the Apex Court did not give any finding regarding the nature of receipt in the *hands of lessees of the Airports, including the assessee company."*

13. "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that once an amount is held to be in the nature of tax, it cannot be subjected to further tax without appreciating that such amount constitutes constructive receipt in the assessee's hands and hence liable to be taxed ."

4. For A.Y. 2011-12, the assessee has taken only one ground of appeal, which is similar to ground no.2 raised in A.Ys. 2009-10 and 2010-11, except for the change in the figure, which may be read as ₹ 2,00,75,274/- in place of ₹ 2,14,68,986/- for A.Y. 2009-10

In the case of the Revenue, for A.Y. 2011-12,

- Ground no.1 is similar to ground no.1 for A.Y. 2010-11;
- Ground no.2 is similar to ground nos. 2 & 3 for A.Y. 2010-11 except for the change in the figure;

- Ground no.3 is similar to ground 4 & 5 for A.Y. 2010-11 except for the change in figure;
- Ground no.4 is similar to ground nos. 6 to 9 for A.Y. 2010-11 except for change in figures;
- Ground no.5 is similar to ground nos. 10 & 11 for A.Y. 2010-11 except for change in figures;

Further the Revenue has also raised the following grounds of appeal

> *6(a) "Whether on the facts and in the circumstances of the case and* in *law, the learned CIT(A) erred* in *deleting the disallowance u/s 14A, without* appreciating the *fact that the AO properly recorded his satisfaction for invoking the provisions of Rule 8D and therefore since Rule 8D is invoked, the disallowance has to be worked out as per the form prescribed therein and there is no scope for any deviation therefrom"?.*
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> *6(b)"Whether on the facts and in the circumstances of the case and in law, the learned CIT(A)* erred in *deleting the disallowance u/s 14A observing that since there is no exempt income no disallowance can be made u/s 14A without appreciating that* as *held in the decision SB-ITAT, Delhi in the case of Cheminvest 121 ITD 318 (Delhi) (SB), provisions of S 14A t applicable even though no exempt income has been earned during the year."?*
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> *7."Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the assessee's claim that capital expenditure incurred by the assess on taxiways, aprons, parking bays and bridges is entitled to depreciation @ 25 % treating the same as Plant & Machinery ignoring that the taxiways, aprons, parking be as akin to Roads and Buildings and therefore, entitled to depreciation @ 10 %.?"*

5. At the outset the learned AR before us pointed out that he has taken additional ground of appeal in each of the assessment years except with the change in figures. The said additional ground for A.Y. 2009-10 read as under:

> *"On the facts and in the circumstances of the case and in law, the learned CIT(A) ought to have held that the Passenger Service Fee – Security Component [PSF (SC)] of Rs 88,57,17,812/- is not the income of the appellant and he ought to have directed the assessing officer to exclude the same from the total income of the appellant."*

The amount of ₹ 88,57,17,812/- be read as ₹ 82,75,79,038/- for A.Y 2010-11 and ₹ 66,62,27,686/- for A.Y. 2011-12.

6. The learned AR before us vehemently contended that the additional ground taken by the assessee is legal ground and it goes to the root of the matter. It does not require any further investigation of the facts therefore, the same may be admitted. In this regard, reliance was placed on the decisions of Hon'ble Supreme Court in the case of National Thermal Power Corporation v. CIT [229 ITR 383 (SC)]; Jute Corporation of India vs. CIT [187 ITR 688(SC)] and that of the Full Bench order in the case of Ahmedabad Electricity Co. Ltd. vs. CIT [199 ITR 351(Bom) (FB)]

7. The learned DR, on the other hand, objected to the admission of the additional ground and contended that this issue has been decided in A.Y. 2008-09 against the assessee. In subsequent years i.e. A.Ys 2009-10 and 2010-11, there were no issue before the Assessing Officer or the CIT(A). This ground is taken for the first time before this Tribunal and with such a conduct the assessee has disentitled itself by suppressing the said claim in assessment proceedings for AYs 2009-10 and 2010-11 till 19.05.2016 and suddenly

raising the same by way of additional ground at a point of time when its appeal on identical issue for A.Y. 2008-09 was substantially heard and the assessee got a sense of the Court that its claim may be held to be allowable, constitutes an unfair means.

8. We have considered the rival submissions and have gone through the case laws as were referred to before us. We noted the facts relating to the said ground taken by the assessee as additional ground before us. The question before us whether the ground taken by the assessee is a legal ground or not. The issue whether the disclosed Passenger Service Fee – Security Component [PSF (SC)] is a income or not? In our opinion, it is a legal issue and as per the decision of Hon'ble Supreme Court in the case of National Thermal Power Corporation v. CIT (supra), the question of law arising from the facts, which are on record, can be raised before the Tribunal for the first time and the Tribunal is bound to consider the said ground to assess the correct tax liability. In the case of Jute Corporation of India vs. CIT (supra), the Hon'ble Supreme Court has held as under:

> *"An appellate authority has all the powers which the original may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provision. In the absence of any statutory provisions, the appellate authority is vested with all the plenary powers, which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer."*

In view of this decision there is no curtailment of the power of the appellate authority in entertaining the additional ground. Not only this, we noted that the Bombay High Court (FB) in the case of Ahmedabad Electricity Co. Ltd. vs. CIT (supra), has observed that the basic purpose of an appeal in income tax matter is to ascertain correct tax liability of the assessee in accordance with the law. Therefore, the Appellate Tribunal being the appellate authority is bound to consider the proceedings before it and the matter on record, for determining the correct tax liability of the assessee. It is not disputed that the facts relating to passenger service fees security component are on record for each of the assessment years. Therefore, it cannot be said that this is a case where further facts have to be investigated. The only question raised by the assessee in its grounds of appeal is whether the impugned receipt is an income chargeable to tax or not. The learned DR, although vehemently contended that additional ground should not be admitted, has not given any justifiable reason for not admitting the same. It is a settled law that the additional ground if it is a legal ground can be taken for the first time before the appellate authority. Therefore, the submissions made by the learned DR that the assessee has not raised this issue before the Assessing Officer or the CIT(A) does not have any legs to stand. We, therefore, admit the additional ground taken by the assessee.

9. **Assessee's appeals**

Now coming to ground no.1 for A.Y. 2009-10, taken by the assessee, whereby it has challenged the action of the CIT(A) in confirming the order of the Assessing Officer making disallowance of ₹ 60,85,217/- u/s. 14A read with Rule 8D of the Income Tax Act. The facts relating to this ground are that the Assessing Officer noted from the profit & loss account that the assessee has earned 'nil' dividend income which has been claimed as exempt u/s. 10(34) of the Income tax Act. Apart from this, the assessee has earned dividend income of ₹ 7,37,57,293, which has been credited to the project cost. The assessee has voluntarily offered disallowance of ₹ 3,25,000/- as expenditure against earning such exempt income in the computation of income in the following manner:

1.	In case of investments done from Operations Surplus funds, interest cost is considered to be NIL	
2.	**Payroll costs are as follows:**	
	AVP Finance - 5% of his CTC	2,00,000
	Mgr. (Fin) -5% of his CTC	50,000
	Total A	2,50,000
3.	Other administrative costs are app.	75,000
	Total B	3,25,000

The Assessing Officer was not satisfied with the working of the assessee and he was of the opinion that in view of the decision of Hon'ble Bombay High Court in the case of Godrej and Boyce Mgf. Co. Ltd. vs. DCIT & Anr. (234 CTR 1), it was obligatory from A Y 2008-09 on the part of the Assessing Officer to compute the disallowance of expenditure by following the method prescribed in Rule 8D in the event the Assessing Officer is not satisfied with the correctness of the amount of expenditure disallowed by the assessee attributing the same to the earning of exempt income. The Assessing Officer since noted that the assessee made huge investment in various shares and mutual funds, therefore, he computed the disallowance as per Rule 8D as under:

(i)	The amount of expenditure directly relating to income which does not form part of total income	-	-
(ii)	Proportionate of interest expenditure computed in accordance with the formula given n Rule 8D(2)(ii) (A x B/C)	-	-
(iii)	Amount equal to one-half percent of the average of the value of investment, income from which does not or shall not form part of the total income as appearing in the Balance Sheet of the assessee, on the first day and the last day of the previous year.	0.5%of ₹ 121.70 Cr.	60,85,217
Total Expenditure disallowed U/S.14A			60,85,217
(i)	A = Interest debited in the Profit -& Loss Account – Nil		
(ii)	B = Average of investments = [200.81 + 42.60 Cr. /2]= ₹ 121.70 Cr.		
(iii)	C = Average of total assets appearing in the Balance Sheet on the first and last day of the previous year [1686.34 Cr. + 2705.70 Cr./2] = 2196.52 Cr.		

10. After hearing both the parties and on perusal of record, we find that the Tribunal, on the same set of facts, in the assessee's own case for A.Y. 2008-09, vide its order dated 30.11.2016, in ITA No. 3232/Mum/2012 deleted the disallowance by holding as under:

"12.4. We have gone through the facts and circumstances of the case, submissions made by both the parties as well as the judgements placed before us. We have noted at the outset that the assessee has mainly made investments in the mutual funds and total number of transactions done during the year was 19. In view of the same, assessee made voluntary disallowance of Rs.1,62,500/-. In support of it, following working was submitted by the assessee before the lower authorities:

1	*In case of investments done from Operations Surplus funds, interest cost is considered to be NIL.*	
2	*Payroll costs are as follows:*	
	AVP Finance -5% of his CTC for 8 months, as investment activity done from August,2008	*1,00,000*
	Mgr.(Fin) – 5% of his CTC for 8 months as he has been appointed since January,2008	*12,500*
	Total A	*1,12,500*
3	*Other administrative costs are app.*	*50,000*
	Total B	*1,62,500*

It is noted from the perusal of the assessment order that the AO did not record any satisfaction about the correctness of the claim or otherwise having regard to the accounts of the assessee. We find that this issue is no more res integra. In the case of Ashish Jhunjhunwalla (supra) authored by one of us, i.e. Hon'ble JM, Hon'ble Kolkatta Bench of the Tribunal after considering umpteen number of judgements available on this issue, held as under :-

> *"6. We find from the facts of the above case that the AO has not examined the accounts of the assessee and there is no satisfaction recorded by the AO about the correctness of the claim of the assessee and without the same he invoked Rule 8D of the Rules. While rejecting the claim of the assessee with regard to expenditure or no expenditure, as the case may be, in relation to exempted income, the AO has to indicate cogent reasons for the same. From the facts of the present case it is noticed that the AO has not considered the claim of the assessee and straight away embarked upon computing disallowance under Rule 8D of the Rules on presuming the average value of investment at ½% of the total value. In view of the above and respectfully following the coordinate bench decision in the case of J. K. Investors (Bombay) Ltd., supra, we uphold the order of CIT(A). This appeal of revenue is dismissed."*

12.5. Subsequently, aforesaid judgment has been approved by the Hon'ble Calcutta High Court in these very words by passing a detailed order which has been mentioned above. In addition to that it is noted by us that similar view has been taken in the other judgements cited by the Ld. Counsel as mentioned by us in earlier part of our order. No contrary judgment was brought to our notice. Thus, we find that this issue is covered in favour of the assessee by these judgments and, therefore, respectfully following the same, disallowance made by the AO without assuming jurisdiction as per law for invoking provisions of Rule 8D(2)(iii) is directed to be deleted."

We noted that in both the A.Ys. 2009-10 and 2010-11, the facts involved are same, which has not been disputed by either of the parties. We, therefore, respectfully following the order of this Tribunal for A.Y. 2008-09 (supra), delete the disallowance made u/s 14A in each of the assessment years under consideration. This ground taken by the assessee is allowed.

11. Ground no.2 in A.Ys. 2009-10 and 2010-11 and ground no.1 in A.Y. 2011-12 are common and relates to disallowance of the provisions for leave

encashment, which was made on the basis of actuarial valuation. We have heard the rival submissions and considered the same carefully along with the orders of the tax authorities below. We have also gone through the order of this Tribunal, dated 30.11.2016, in the assessee's own case for A.Y. 2008-09, in ITA No. 3232/Mum/2012. We noted that while dealing with identical issue the Tribunal has held as under:

> *13.1. The brief facts of the case are that in the assessment order, the AO made addition of the aforesaid amount on account of provision for leave encashment debited to the Profit & Loss Account on the ground that the decision of Calcutta High Court in the case of Excel Industries vs UOI 292 ITR 470 (Cal) has been stayed by the Hon'ble Supreme Court and, therefore, as on that date, the expenses were not allowable.*
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> *13.2. Before the Ld. CIT(A), the assessee challenged this disallowance. But Ld. CIT(A) decided the issue against the assessee.*
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> *13.3. During the course of hearing, the Ld. Counsel of the assessee fairly submitted that this issue should go back and it should be decided on the basis of judgement of the Hon'ble Supreme Court in the case of Excel Industries Ltd (supra). It was also submitted that the amount actually paid should be allowed.*
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> *13.4. Per contra, the Ld. CIT-DR did not raise any objection and submitted that proper appreciation of facts have not been done in this case and he would have no objection if this issue is sent back to the file of the AO.*
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> *13.5. We have gone through the orders passed by lower authorities on this issue. It is noted that none of the authorities have narrated proper facts as to whether the total amount debited under this head was on account of provision or some part of it was paid also. Further, it is also not coming out whether provision for leave encashment has been made on the basis of actuarial basis or not. In our view, this issue needs to go back for proper verification of facts, and therefore, we send this issue back to the file of the AO for proper adjudication after considering all*

> *the facts and the judgments in this regard for which the AO shall give adequate opportunity of hearing to the assessee. The assessee shall submit requisite details and documentary evidences to bring complete facts on record and place all the judgements as may be considered appropriate as per law and facts. The AO shall decide this issue afresh after taking into account all the material held on record and all the judgements as available at that time on this issue. This ground may be treated as allowed for statistical purpose.*

Respectfully following he said decision, we restore the issue to the file of the Assessing Officer with a direction to re-decide the issue afresh after taking into account all the material held on record and all the judgments as available at that time on this issue. Thus, this ground is treated as allowed for statistical purposes.

12. Ground no.3 in A.Ys. 2009-10 & 2010-11 and Ground no.7 in revenue's appeal for A.Y. 2011-12 relates to the restriction of the claim of depreciation @10% instead of 15% in respect of taxiways, taxi track and parking bays. Both the parties agreed that this issue is arising in the case of the assessee in A.Ys 2007-08 and 2008-09 before this Tribunal and the facts involved in both years relating to this issue are the same. We have gone through the order of this Tribunal, dated 30.11.2016, in the assessee's own case for A.Y. 2008-09, in ITA No. 3232/Mum/2012, wherein it has been held as under:

> *"15.5. We have gone through the orders passed by lower authorities. From the details brought before us, it is noticed by us that the assessee had incurred an aggregate amount of Rs.17.52 crores on taxi ways, aprons and runways. It is noted that similar expenditure was incurred by the assessee in A.Y. 2007-08 and depreciation as applicable to plant & machinery was claimed but the same was denied by the AO as well as by the CIT(A). The matter reached upto the Tribunal and Tribunal,*

vide its order dated 14-03-3024 in ITA No.7111/Mum/2011 held as under:-

> *"31. We observe that the assessee in the return filed has treated the asset as of part of building and claimed depreciation at the rate of 10%. AO has accepted the claim of assessee. However, while filing the appeal before the First Appellate Authority, the assessee contended that the said asset is in the form of plant and machinery and therefore, the assessee is entitle for depreciation at the rate of 15%, the rate as applicable to plant and machinery and not at the rate of 10%. The ld. CIT(A) did not accept the contention of the assessee and has stated that assessee, in its computation of income has itself considered the said asset to be a building and it has only by way of note an alternative claim has been made stating that taxiways, aprons, hangar, parking bays and bridges are part of plant on which assessee is entitle for depreciation at the rate of 15%.*
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> *32. The ld. CIT(A) has held that the impugned assets which are basically structures and are in the nature of places which are used by Aircrafts for taxing, parking. Accordingly they are not in the nature of plant. Hence, assessee is in appeal before the Tribunal.*
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> *33. During the course of hearing, ld. AR reiterated the submissions as made before the First Appellate Authority and stated that aprons, taxiways and runway are not only the structures but they are structures for specific purposes which can be considered as tools for the purpose of business of the assessee. Ld AR referred the decision of the Mumbai Bench of Tribunal in the case of National Airports Authority of India V/s CIT [2011] 134 ITD 34 (Delhi), wherein it was held that the terminal place used for regulation of air traffic and communicational and navigational control are part of tool of business of the assessee and therefore they constitute part of the plant. Thus the assessee is accordingly entitled for depreciation as applicable on plant and machinery. The ld. AR referred the decision of the Hon'ble Apex Court in the case of CIT V/s Dr. B. Venkata Rao (2000) 243 ITR 81(SC) and submitted that in the case of an operation theatre in the hospital, it has been held to be a part of plant and not a part*

of building. Ld. AR referred the decision of the Hon'ble Apex Court in the case of CIT V/s Karnataka Power Corpn. (2000) 247 ITR 268 (SC) and submitted that the power generating station building is held to be a plant. He submitted that such structures are specific for the purpose of business of the assessee and the assessee is entitled for depreciation at rate as applicable to plant and machinery.

34. On the other hand, ld. DR supported the orders of authorities below. He submitted that assessee itself has claimed depreciation at the rate of 10% in the return as applicable to building.

35. We have carefully considered the orders of authorities below and submissions of ld. Representatives of the parties. There is no dispute to the facts that runway, taxiway are necessary part of Airport operation and are specific part of infrastructure for use of aircrafts. These are not merely concrete structures. The Hon'ble Bombay High Court in the case of CIT V/s Mazagaon Dock Ltd (1991) 191 ITR 460(Bom) has held that dry dock and wet dock created for ships are to be treated as plant and not building. The Hon'ble Apex Court has held in the case of Karnataka Power Corpn. (supra) that power generating station building is not a simply concrete structure but a specially designed building and is to be treated as part of plant. Similarly, the Hon'ble Apex Court has held in the case of Dr. B. Venkata Rao (supra) that the operation theatre in an hospital building is not simply a concrete structure but 30 necessarily a part for running of the hospital and the assessee is entitled to claim depreciation as applicable to plant and machinery. If we apply the above, decisions to the facts of the case before us, we are of the considered view that taxiways and aprons, parking bays cannot be said to be merely concrete structures but are necessary tools for operating/using the Airport. Hence, the same are to be considered as part of plant and machinery. Therefore, we hold that assessee is entitled for depreciation at the rate as applicable on plant and machinery in respect of taxiways, aprons, parking bays etc. Hence, Ground No.2 of the appeal taken by assessee is allowed."

> *15.6.Thus, from the perusal of the above, it is noted that the Tribunal has allowed the claim of depreciation @15% as applicable to plant & machinery. No distinction has been made by the Ld. DR on facts or on legal position. Therefore, respectfully following the order of the Tribunal for A.Y. 2007-08, this issue is decided in favour of the assessee, and therefore, the claim of depreciation @15% is directed to be allowed. This ground may be treated as allowed."*

Respectfully, following the said decision of this Tribunal, we direct the Assessing Officer to allow depreciation to the assessee @15%. Thus, ground no.3 in A.Ys. 2009-10 & 2010-11 in assessee's appeal are allowed and ground no.7 in Revenue's appeal for A.Y. 2011-12 is dismissed.

13. The additional ground taken by the assessee in all these three years read as under:

> *"On the facts and in the circumstances of the case and in law, the learned CIT(A) ought to have held that the Passenger Service Fee – Security Component [PSF (SC)] of Rs 88,57,17,812/- is not the income of the appellant and he ought to have directed the assessing officer to exclude the same from the total income of the appellant."*

The amount of ₹ 88,57,17,812/- be read as ₹ 82,75,79,038/- for A.Y 2010-11 and ₹ 66,62,27,686/- for A.Y. 2011-12.

14. We have already admitted the additional ground taken by the assessee in all the three years. After hearing the rival submissions and going through the orders of the tax authorities below, we noted that similar issue has been decided by this Tribunal, vide order dated 30.11.2016, in the assessee's own case for A.Y. 2008-09, in ITA No. 3232/Mum/2012, wherein the issue has been dealt exhaustively with the submissions made by both the parties and,

ultimately, framed three issues to be decided in respect of this ground and it has been held as under:

> *"In our considered opinion, we have been called upon to decide the following three issues to decide this ground:*
>
> *(1) Whether, the amount of PSF-SC collected by the assessee will be taxable in the hands of the assessee merely because the same has been offered to tax by the assessee during the course of assessment proceedings irrespective of correct position of its taxability in accordance with law?*
>
> *(2) Whether, office memorandum / clarifications issued by the CBDT or MOCA observing that the aforesaid amount is taxable in the hands of the assessee have been issued after considering provisions of Income-tax Act and whether the opinion expressed therein is binding upon the appellate authorities including the Income-tax Appellate Tribunal?*
>
> *(3) Whether, the impugned amount of PSF-SC collected by the assessee company on behalf of MOCA as per the relevant regulations for the purposes of meeting security expenses can be characterised as income in the hands of the assessee company and made liable to tax in its hands as per provisions of Income Tax Act, 1961?*
>
> *14.7. Having heard both the parties, we have pondered over all the three issues and few other allied issues which were germane to the issues before us and necessary for deciding these grounds, and all these issues are decided hereunder one by one.*
>
> *14.8. With regard to the first issue, the brief facts and background brought before us are that in pursuance to process of privatisation of airports in India, the assessee company had entered into an agreement in the nature of OMDA with Airport Authority of India to operate, maintain, develop, design, construct, upgrade, modernise, finance and manage the Chhatrapati Shivaji International Airport at Mumbai (hereinafter called 'airport', in short). As per Rule 88 of the Aircraft Rules, 1937, the assessee was entitled to collect a fee termed as 'Passenger Services Fee (PSF) from all the passengers embarking at the airport. The said fee was initially collected by the concerned airline and then handed over to the assessee company for the sake of administrative convenience. As per terms, the*

PSF was chargeable @ Rs.200 per passenger, out of which Rs.70/- (i.e. 35% of PSF) was for use of assessee company for passenger facilitation services and the balance amount of Rs.130/- (i.e. 65% of PSF) was to be utilised for payment to security agency designated by the central government for providing security services at airport and the said component was called as Passenger Service Fee-Security Component (in short referred to as PSF-SC). The said portion i.e. Rs.130/- (65% of PSF) was deposited in an 'Escrow Account' pending utilisation.

14.9. During the year under consideration, the assessee included passenger facilitation component of PSF (i.e. Rs.70/- being 35% of PSF) as income of the assessee company. But the balance amount of Rs.130/- (i.e. 65%) portion was kept in separate 'Escrow Account' for which separate books of account were maintained in accordance with the Standard Operating Procedure (SOP) formulated by MOCA and, therefore, the same was not included in the income of the assessee company. The assessee company did not include revenue pertaining to PSFSC as well as the corresponding expenses in the financial statements of the assessee company. During the course of assessment proceedings, the AO confronted to the assessee, an Office Memorandum issued by CBDT to MOCA and clarification from MOCA wherein it was stated that PSF – SC was also taxable in the hands of assessee and tax was to be recovered from the said funds. Under these circumstances, the assessee finally stated that the said amount may be included in its taxable income. The AO accordingly made addition in the income of the assessee. Being aggrieved, the assessee filed appeal before the Ld. CIT(A) wherein addition was confirmed. Still aggrieved, the assessee filed appeal before the Tribunal. During the course of hearing before us, the preliminary objection of the Ld. CIT-DR was that the assessee once having taken a stand during the course of assessment proceedings that the aforesaid amount was taxable, cannot now turn back and cannot claim it to be not taxable. On the other hand, the assessee's Counsel maintains that the said amount was not included as part of its income in the return filed originally and only during the course of assessment proceedings, because of the pressure made by the assessing officer by showing letters of CBDT and MOCA, the said amount was offered for tax. But the assessment should be done strictly in accordance with law and mere acquiescence of the assessee expressed during the course of assessment proceedings would not alter the true position of law and would not make the

aforesaid amount as liable to be taxed in the hands of the assessee, if the same is actually not liable to be taxed as per the provisions of the Income-tax Act.

14.10.We have analysed this issue. It is well settled position of law that an amount can be brought to tax in the hands of an assessee only in accordance with the provisions of Income tax Act. This fundamental position has been well explained and well settled in many judgements. It is well settled that there is no estoppel against law. No tax can be collected except with the authority of law as per clear mandate of Article 265 of Constitution of India. If the taxes are to be collected depending upon consent/concurrence of the taxpayers or otherwise, then it will lead to chaotic situation and administration of tax would become impossible. Therefore, if an amount is taxable under the law, assessee is bound to pay tax thereon and if an amount is not taxable under the Income tax law, then the tax cannot be recovered from the assessee without authority of law merely because assessee offered the same to tax during the course of assessment proceedings. Law in this regard is well settled now, and to begin with, reference is made on the landmark judgment of Hon'ble Delhi High Court in the case of CIT vs Bharat General Reinsurance Co Ltd 81 ITR 303 (Del.) Relevant portion from it is reproduced below:

"It was true that the assessee itself had included that dividend income in its return for the year in question, but there was no estoppel in the Income-tax Act and the assessee having itself challenged the validity of taxing the dividend during the year of assessment in question, it must be taken that it had resiled from the position which it had wrongly taken while filing the return. Quite apart from it, it was incumbent on the income-tax department to find out whether a particular income was assessable in the particular year or not. Merely because the assessee wrongly included the income in its return for a particular year, it could not confer jurisdiction on the department to tax that income in that year even though legally such income did not pertain to that year. Therefore the income from dividend was not assessable during the assessment year 1958-59, but it was assessable in the assessment year 1953-54. It could not, therefore, be taxed in the assessment year 1958-59."

14.11. Our view is further fortified in view of judgment of Hon'ble Gujrat High Court in the case of CIT vs Keiser-EHind Mills Co. Ltd 128 ITR 486 (Guj.) in which their lordships have

relied upon circular of the Board wherein a duty has been cast upon the Revenue officials to guide the assessee for making claims as permissible under the law. Relevant portion is reproduced below:

"In view of the circular No. 14(XI-35) of 1955 dated 11-4-1955, it was clear that for the purpose of the circular, what should be the guiding factor was whether the proceedings or other particulars before the Income-tax officer at the stage of original assessment disclosed any grounds for relief under section 2(5) (a) (iii) of the Finance Act of 1964 or of the Finance Act of 1965, even though no claim was made for that relief by the assessee at the stage of those proceedings before him. Even if there is a deviation on a point of law, so far as the circular of the Board is concerned, that circular will be binding on all officers concerned with the execution of the Act and they must carry out their duties in the light of the circular. In view of this clear position regarding the effect of the circular, it was obvious that in the instant case it was incumbent on the Income-tax officer to advise the assessee to claim relief under section 2(5)(a)(iii) if the proceeding or any other particulars before him at the stage of the original assessment indicated that the assessee was entitled to such relief under the provisions of the relevant Finance Act, 1965, so far as the order under reference was concerned......"

14.12. Further reference is placed upon another judgment in the case of S.R. Koshti 276 ITR 165 (Guj) in which relief was granted to assessee with following observations:

"The authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or on not being properly instructed, is overassessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected." [Para 20]

14.13. In the case of CIT vs Lucknow Public Educational Society 318 ITR 223, it was observed by Hon'ble Allahabad High Court that the income tax department should not take undue advantage of the ignorance of the assessee in view of Board's Circular No. 14(XL-35)/1955, dated 11-4-1955.

14.14. In the case of Nirmala L Mehta vs CIT 269 ITR 1, Hon'ble Bombay High Court, relying upon Article 265 of Constitution of India held that acquiescence cannot take away from

the taxpayer, the relief he is entitled where tax is levied or collected without authority of law and, therefore, merely because the taxpayer offered a receipt to tax, that cannot take away its right in contending that the said amount was not chargeable to tax.

14.15. In the case of Balmukund Acharya vs DCIT 310 ITR 310 (Bom), Hon'ble Bombay High Court observed that the Apex Court and various High Courts have ruled that authorities under the Income-tax law are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate tax dues are collected. If any item of receipt is not taxable under the Act, then tax cannot be levied applying the doctrine of estoppel. The Hon'ble High Court considered the aforesaid judgements while expressing its opinion.

14.16.In the case of Mayank Poddar (HUF) vs WTO 262 ITR 633 (Cal), it was observed by the Hon'ble High Court that there is no estoppel against statute. Thus, if an assessee under misunderstanding, admission or miss-appreciation offered an amount to tax, then the same would not be taxable merely because of wrong understanding of law by the assessee or because of his admission or miss-appreciation of law and facts. It was also observed that there can also not be any waiver of legal right by the assessee.

14.17. Thus, in view of the aforesaid legal discussion and facts of this case as discussed above, it is held that the amount in question cannot be taxed in the hands of the assessee merely because the same was offered to tax during the course of assessment proceedings under certain circumstances. Under these circumstances, we need to examine and determine whether the impugned amount of PSFSC collected by the assessee company is actually taxable in the hands of the assessee as per the provisions of Income-tax Act, 1961.

14.18.The aforesaid discussion takes us to the second issue wherein we have been called upon to decide about the binding legal force of the opinion expressed by CBDT and MOCA vide their office memorandum/ instructions for determining taxability of the impugned amount. It is admitted fact on record that the assessee company collected PSF-SC in view of the order

issued by MOCA vide its order dated 09th May, 2006. The terms of the order have been modified / amended from time to time as per the requirements. One such order issued by MOCA was issued on 20th June, 2007. Subsequently, CBDT issued an Office Memorandum dated 30/06/2008 in pursuance to the request made by the concerned officials of MOCA regarding taxability of PSF–SC, wherein it has been observed that since the assessee company was collecting this amount in the course of business and assessee was rendering facilitation and securities services whether in-house or outsourced, therefore, the amount collected by the assessee in the form of PSF-SC was in the nature of income of the assessee and liable to be taxed in its hands. In support of its view, reliance has been placed by the Board on the judgement of Hon'ble Supreme Court in the case of Chowringhee Sales Bureau vs CIT 87 ITR 547 (SC) with a view to fortify its opinion. Subsequently, Ministry of Civil Aviation's office issued an order dated 19-01-2009 laying down accounting / audit procedure in respect of PSF–SC. It was intended to act as Standard Operating Procedure (SOP) for accounting / audit of PSF–SC by the airport operator. In the aforesaid document, the whole procedure was duly explained how the amount has to be collected and to be kept in escrow account and to be disbursed for the purpose of security. Relying upon the Office Memorandum issued by the CBDT dated 30-06-2008, it was mentioned therein that the tax component may be charged to the PSF–SC account in proportion to its liability on standalone basis. The assessee was of the opinion that the aforesaid amount was not taxable in the hands of the assessee company, and therefore, while filing the return the same was not included in the taxable income by the assessee. But during the course of assessment proceedings, the AO was of the opinion that the said amount was taxable in the hands of the assessee in view of Office Memorandum of CBDT dated 30-06-2008 and instructions dated 19-01-2009 issued by MOCA. With a view to clarify the situation, representation was made before the CBDT as well as MOCA. In response, MOCA issued a letter dated 15-11-2010 wherein it was stated that the matter was examined with the Ministry of Finance and accordingly it is clarified that the whole amount of PSF – SC including security component was revenue receipt, and thus it was taxable under the Income-tax Act.

14.19. The assessee challenged before us, the validity and binding force of the aforesaid Office Memorandum issued by the CBDT and clarification received by MOCA. It has been

noted by us firstly that in none of these documents, there seems to have been made any application of mind by the concerned authorities while expressing their opinion. None of the authorities have considered the aspect that the impugned amount was collected in the fiduciary capacity by the assessee. None of the authorities have stated that under what provisions of law, the aforesaid amount can be brought to tax in the hands of the assessee. The CBDT in its Office Memorandum has made a reference to the judgment of the Hon'ble Supreme Court in the case of Chowringhee Sales Bureau (supra). But facts of that case have not been discussed. The aforesaid judgment has different facts, wherein, the amount of sales-tax was received by the said assessee and deposited in its bank account. The funds got mixed in assessee's accounts. Thus, in case of non payment by the said assessee, the same became income of the seller (the said assessee), whereas the facts are totally different in the case before us. The amount here was collected purely in fiduciary capacity and the same was deposited in escrow account on which assessee had no control at all; the assessee had no discretion at all upon its usage. No reasoning has been made out by the CBDT while issuing its opinion as to how the said judgment was applicable on the facts of this case. It is noted by us that aforesaid judgment came up for consideration before many courts wherein its true meaning and scope of its applicability was explained time to time. In one such matter having similar facts as to the assessee before us, Hon'ble Allahabad High Court explained correct application of aforesaid judgment in the case of CIT vs. Sita Ram Sri Kishan Das 141 ITR 685 (All). In this case, the facts were that said assessee was a commission agent and was accountable for the recovery (called as Market Fee) which he made from the sellers of agricultural produce in terms of Krishi Utpadan Mandi Rules framed under the U.P. Krishi Utpadan Mandi Adhiniyam, 1964. The Revenue treated the amount so collected by the agent as part of its taxable income being a trading receipt in view of judgment of Hon'ble Supreme Court in the case of Chowringhee Sales Bureau vs CIT 87 ITR 547 (SC), supra. After analysing the facts of the case, it was held by the Hon'ble Court that the market fee realised by the commission agent does not form part of his trading receipt as he (the commission agent) held this amount only as a trustee for and on behalf of the Market Committee. Hon'ble Court applied the judgment of Hon'ble Supreme Court in the case of CIT vs. Sitaldas Tirathdas

41 ITR 367 (SC) and distinguished that of Chowringhee Sales Bureau P. Ltd. vs. CIT, supra.

14.20. Thus, at the outset, it is clearly visible that both the authorities expressed their opinions without proper application of mind and without examining the nature of impugned receipt within the framework of provisions of Income-tax Act, 1961.

14.21. Apart from that, the binding effect of Office Memorandum issued by CBDT, clarification issued by MOCA is also under question. It has been argued that it has been held by Hon'ble Supreme Court many times that circulars issued by the Board are binding upon the authorities working under it, viz. the AO, etc. but these are not binding upon the appellate authorities including Income Tax Appellate Tribunal. We have examined this aspect also carefully. It is noted that as per section 119 of the Act, the CBDT has been empowered by the legislature to issue orders, instructions or directions to all the Income-tax authorities working under it for proper administration of the I.T. Act. And it has also been provided that this shall be binding upon the Income-tax authorities.

But it is further noted that a proviso has been added to sub section (1) of section 119 which says that no such orders, instructions or directions shall be issued:- (a) so as to require any income-tax authority to make a particular assessment or to dispose a particular case in a particular manner; or (b) so as to interfere with the discretion of the Commissioner (Appeals) in exercise of his appellate functions . It is clear from the perusal of aforesaid proviso that neither the Board has power to decide the taxability of a particular receipt nor has it got any power to interfere with the appellate functions of Commissioner (Appeals), which is judicial in nature. Thus, in view of the aforesaid legal scenario coupled with facts of this case as discussed above, we have strong doubts if at all the Board could have issued any instructions to decide the taxability of amount collected by the assessee company on account of PSF – SC in a purely fiduciary capacity. This task of determination of taxability has been left by the legislature upon the shoulders of the designated AO, who is obliged under the law to determine the same strictly in accordance with the provisions of the Income-tax Act, 1961.

14.22. Further, aforesaid clarification issued by the Board in this case is actually an "Office Memorandum". It is an

interdepartmental communication. In our view, Office Memorandum would not carry the legal force of binding effect. Further, it has been provided in section 119 that orders, instructions and directions shall be binding upon the income tax authorities. It is noted that Income-tax Appellate Tribunal does not fall under the list of Income-tax Authorities as has been provided in section 116 of the Act. Thus, these orders, instructions and directions shall not be binding upon the Income-tax Appellate Tribunal. Further it is noted that these have been held to be not binding upon the CIT(A) as stated above. Therefore, there is no question of there being any binding effect upon the Income-tax Appellate Tribunal of any such communication issued by the Board.

14.23. It is noted by us that this issue is not res integra, as it has been settled by Hon'ble jurisdictional High Court and Hon'ble Supreme Court in many cases. It was held by Hon'ble Bombay High Court in the case of Banque Nationale De Paris vs CIT (supra) that circulars cannot override or detract from the provisions of the Act in as much as section 119 of the Act has empowered the CBDT to issue orders, instructions or directions for the proper administration of the Act. Hon'ble High Court has taken into consideration various earlier judgments of Hon'ble Supreme Court on this issue. Similarly, the Hon'ble Supreme Court in the case of CIT vs Hero Cycles Pvt Ltd (supra) held that circulars can bind the Income-tax Officer but will not bind the appellate authority or the Tribunal or the Court or even the assessee. It is further noted that law in this regard was further analysed by Hon'ble Supreme Court in the case of UCO Bank (supra). It was observed by the Hon'ble Supreme Court that CBDT has power to tone down the rigour of the law and ensure enforcement of its provisions of issuing circulars. The Board has been given for the purpose of just, proper and efficient management of work of assessment. However, these are not meant for contradicting or nullifying any provision of the statute. Relying upon its earlier judgement comprising of three judges in the case of Keshavji Ravji & Co vs CIT 183 ITR 1 (SC), it was inter-alia observed that Board cannot pre-empt judicial interpretation and the scope and ambit of a provision of the Act. Also, a circular cannot impose on the taxpayer a burden higher than what the Act itself on a true interpretation, envisages. The task of interpretation of the law is exclusively the domain of the Courts. However, the Board has the statutory power u/s 119 to tone down the rigour of the law for the benefit of the assessee by issuing circulars to ensure proper

administration of the fiscal statute and such circulars would be binding on the authorities enshrined in the Act.

14.24. Thus, taking guidance from the aforesaid legal discussion as has been clarified by the Hon'ble jurisdictional High Court as well as by Hon'ble Supreme Court, it is clear that the Office Memorandum issued by CBDT to MOCA cannot hold an amount as taxable, if the same is otherwise not taxable as per the provisions of the Income-tax Act, 1961. Further, as far as the clarification issued by MOCA is concerned, it is noted that the role of MOCA was confined to issuing Standard Operating Procedures and other guidelines to the airport operators to ensure that funds collected by the assessee company in the fiduciary capacity on behalf of MOCA are properly kept and disbursed for the designated purposes only. It has no jurisdiction to determine the taxability of the impugned amount. It clearly had no jurisdiction in holding the same as taxable and, therefore, to that extent its order / clarification has no authority in the eyes of law and the same has been rightly ignored by the assessee as well as by the appellate courts while determining the taxability of the impugned amount.

14.25. Thus, the aforesaid discussion take us to the third issue wherein we have been called upon to decide whether the impugned amount of PSF-SC collected by the assessee company on behalf of MOCA as per the relevant regulations for the purposes of meeting security expenses can be characterised as income in the hands of the assessee company and made liable to tax in its hands.

14.26. The brief facts related to the issue have already been narrated by us in earlier part of our order and just to recapitulate the relevant part of it, the licensee of an airport in terms of provisions of Rule 88 of Aircraft Rule, 1937, is responsible for collecting a fee from embarking passengers referred to as Passenger Service Fee (PSF) @ Rs.200/- per ticket. Portion of PSF being 35% was on account of providing passenger facilitation and was to be retained by the airport operator for providing passenger related services and the balance 65% of PSF represents security component to be utilised for payment of security agency, i.e. CISF, who is designated by the Ministry of Home Affairs for providing security services. The assessee had included aforesaid 35% portion in its income but did not include PSF-Security Component in its income while filing the return of income.

The dispute before us is with regard to this PSF – SC. Further facts brought out before us are that the assessee had collected during the year, total amount of Rs.180.27 crores on account of PSF – SC from the passengers embarking at Chhatrapati Shivaji International Airport, Mumbai. After meting out security deployment cost and various other related (allied) expenses, the net surplus worked out at Rs.133,13,47,580 and after adjustment of depreciation as per Companies' Act and Income-tax Act, it was computed at Rs.132,58,59,023. During the course of assessment proceedings, the AO concluded that the aforesaid amount is part of taxable income of the assessee. The Ld. CIT(A) had confirmed the action of the AO. The assessee has contended before us that the aforesaid amount is not liable to be included in the income of the assessee. Detailed arguments made by the Ld. Counsel of theassessee have already been narrated by us in earlier part of our order and these are not being discussed here again for the sake of brevity.

14.27.We have gone through the assessment order as well as the order of Ld. CIT(A). Perusal of the orders of AO as well as Ld. CIT(A) reveals that none of the authorities have made independent application of mind to independently determine whether the impugned amount could have been characterised as income in the hands of the assessee. Relevant part of order of Ld. CIT(A) is reproduced hereunder, for the sake of ready reference:-

"I have considered the submissions and arguments of the appellant. It is undisputed that the Ministry of Civil Aviation had already issued its guidelines and instructions to the assessee on 19.01.2009, thereby clarifying the taxability aspect of PSF(SC) in the hands of the assessee notwithstanding the assessee's resistance and belief that such receipts are fiduciary in nature and not taxable. Further, the Ministry of civil Aviation reaffirmed its decision once again vide Instruction dated 15.11.2010. Therefore, the appellant had erroneously resisted from offering the receipts on account of PSF(SC) to tax purely on the basis of its own belief that PSF(SC) receipts are fiduciary in nature, thereby ignoring the mandatory instructions issued by the Ministry of Civil Aviation from time to time under which, the assessee functions as an Airport Operator-the receipts being fiduciary in nature, and the mandatory instructions issued by the Ministry of Civil Aviation from time to time under which, the assessee functions as an Airport Operator make it taxable. When confronted by the second reconfirmation

by the Ministry of Civil Aviation on 15.11.2010, the appellant had no other option, but to offer the receipts to tax for A.Y. 2008-09. Thus, as stated by the appellant on merits and in law that although the receipts of PSF (SC) in the hands of the appellant do not partake the character of income and by the 'Doctrine of Overriding Title' as they are to be utilized for security purposes-the issue being highly debatable and a legal difference of opinion being there the same has been offered for taxation. Hence I confirm this addition by the A.O. and thus, this ground of appeal is dismissed."

14.28. It is noted by us that both of the authorities got influenced and swayed away with the opinion expressed by the CBDT/MOCA and admission made by the assessee under certain circumstances emerged during the course of assessment proceedings. Thus, both the authorities abstained from effectively and independently adjudicating the taxability of this amount as per of law in the hands of the assessee. Since related material and all the facts are before us, we shall determine characterisation and taxability of the impugned amount in the hands of assessee-company purely as per law applicable on the facts of this case.

14.29. It is noted by us that Rule 88 of Aircraft Rule, 1937 provides as under:

"88. Passenger Service Fee—The licensee is entitled to collect fees to be called as Passenger Service Fee from the embarking passengers at such rate as the Central Government may specify and is also liable to pay for security component to any security agency designated by the Central Government for providing the security service. Provided that in respect of a major airport such rate shall be as determined under clause (c) of sub-section (1) of section 13 of the Airports Economic Regulatory Authority of India Act, 2008"

14.30.In pursuance to the aforesaid rule, an order dated 09th May, 2006 was issued by concerned official of MOCA which reads as under:-

" ORDER

Subject: Collection of Passenger Service Fee (PSF) at Greenfield / Private airports - regarding

Consequent to allowing private companies, Joint Venture. Companies to own and operate airports in the Country, the manner

and mode of collection of Passenger Service Fee (PSF) at airports have been engaging the attention of the Government for some time. The matter has been deliberated with Airports Authority of India and other airport operators and it has now been decided that:-

i. CISF will be deployed as per the assessment of BCAS at airports operated by JVCs or private operators also.

ii. Passenger Service Fee (PSF) at airports would he collected by the respective Airport Operator, which could be AM, JVC, or a private operator.

iii. The amount of PSF to be collected will he fixed by the Ministry of Civil Aviation. The amount will continue to be Rs.200/- per passenger till further orders. The airport operator would retain Rs.70/- towards passenger facilitation. An Escrow account would be opened whenever the airport operator is a JVC or private operator. This account will be operated by the airport operator (not by AM). Rs.130/- of the PSF collected per passenger by such airport operator would be deposited in the Escrow account by the Airport Operator for payments to be made to CISF. The Escrow account would be subject to Government Audit of CAG.

iv. In case any amount remains, this will be transferred to AAI by the airport operator through a process of mutual consultation for payment to CISF deployed for security purposes at other airports. In case of a dispute, the matter may be referred to the Ministry, of Civil Aviation whose decision will be treated as final and binding on both parties.

2. The new procedure will be effective from 01.042006.

3. This issues with the approval of the Minister of State for Civil Aviation (Independent charge)."

14.31. Subsequently another order was passed by MOCA dated 20th June, 2007 wherein it was inter alia clarified that security component of PSF was not regular revenue of the airport operator and the aforesaid amount will be utilised at the airport concerned only to meet security related expenses of that airport. Relevant part of the order is reproduced below:-

"ORDER

Sub: Collection of Passenger Service Fee (PSF) at Greenfield / Private airports – regarding.

In this Ministry's Order of even no. dated 09.05.2006 on the subject noted above, the following modifications may be made-

(a) Clause (iii) is modified as under-

"The amount of PSF to be collected will be fixed by the Ministry of Civil Aviation. However, after Airports Economic Regulatory Authority (AERA) becomes functional, PSF will be fixed by AERA.The amount will continue to be Rs.200/-. per embarking passenger till further orders'.

(b) Clause (vi) is modified as under-

Security Component of PSF, in short PSF (SC) is not a regular revenue income of an airport-operator. PSF (SC) collected at an airport-operator by a JVC or a private - operator will be utilized at airport concerned only to meet the security related expenses of that airport. However, 'AAI' will be considered as a single licensee in respect of its airports for this purpose with liberty to pool the PSF(SC) collections from such airports and use the same for meeting the security related expenses at any of its airport'.

This issues with the approval of the Minister of State for Civil Aviation (Independent charge)."

14.32. Thus, aforesaid rules and orders issued by MOCA clearly stipulates that security component of passenger service fee was meant exclusively to be utilised at the airport concerned, only to meet security related expenses of that airport. The security agency designated in this regard was CISF. It is further noted that the funds so collected were to be deposited in an Escrow account which was subject to the government audit of CAG. Further, in case of any amount was left in the said account, it was to be mandatorily transferred to Airport Authority of India by the airport operator. Thus, from the above said facts and circumstances of the case and terms and conditions it is clear that the said amount was collected by the assessee on behalf of MOCA to be disbursed for security purposes to CISF deployed by the Ministry of Home Affairs. The amount was collected and retained purely in fiduciary capacity. The assessee had no discretion or freedom at all to utilise the aforesaid amount for any other purposes other than the designated purpose of meeting security expenses. So much so, even the surplus left if any, was not at the disposal of the assessee company but was to be mandatorily transferred to the account of Airport

Authority of India as per the prescribed procedure. Under these circumstances, it is clear that assessee merely acted as a conduit or a trustee for collection and disposal of the impugned amount of PSF-SC.

Under these circumstances, the aforesaid amount could not have been characterised as 'income' u/s 2(24), section 5 or any other provisions of the Income-tax Act, 1961.

14.33. It is noted that subsequently MOCA issued another order dated 19-01-2009 containing Standard Operating Procedures for accounting / audit of Passenger Service Fee (Security Component) by the airport operators. The aforesaid order contained whole procedure in detail for collection and disbursement of the said amount. Relevant portion of the same is reproduced hereunder, for the sake of better clarity on facts related to conditions attached with regard to collection and disbursement of the aforesaid amount:

"2. Nature of Security component of PSF:

2.1 Aviation security is an activity reserved for the Government of India. Force deployment at the airports, security requirements including the requirement of capital items and specifications thereof are laid down by t he Government/Bureau of Civil Aviation Security (BCAS). As stated above, PSF is levied under Rule 88 of the Aircraft Rules, 1937 and covers security component as well as facilitation. While the fee is collected by the license of the airports, i.e., the airport operator, through the airlines, the security component thereof, which constitutes 65% of the total amount, can be used only in terms of directions issued by the Government/ BCAS, from time to time. The amount collected by the airport operator, which is kept separately in an escrow account, is thus held in fiduciary capacity.

2.2. Since the amount is held by the airport operator in fiduciary capacity for the Government, the accounts thereof would have to be maintained separately in accordance with the procedure laid down by the Government and have to be offered for audit by the Comptroller & Auditory General of India (CAG).

3. Escrow Account Operating Procedure:

3.1 For PSF (SC) a separate Escrow Account shall be opened by JVC/Private operator, with a Schedule Nationalized Bank.

3.2 An Escrow Account agreement will be entered with the Escrow Banker by the JVC/Private Operator.

3.3 The format of Escrow Agreement will include details such as, definitions for establishment of Escrow Account and declaration of Trust, the Escrow Account provisions, term and Termination, Representations and Warranties of Escrow Bank and JVC/Private operator and Miscellaneous provisions.

3.4 Parties to the Escrow Agreement would consist of JVC/Private operator and Escrow Bank. However, the Escrow Account Agreement will have a clause by which the MOCA will have supervening power to direct the Escrow Bank on the issues regarding operation as well as withdrawals from Escrow Account.

3.5 Escrow Account shall be maintained, controlled and operated by Escrow Bank under the Escrow Agreement as under:

i) PSF (SC) Account: JVC/Private Operator shall deposit immediately all PSF (SC) collections into the PSF (SC) Account.

ii) Withdrawal from PSF (SC) Account: The Escrow Bank shall allow withdrawal by JVC/Private Operators of amounts deposited into the PSF (SC) account only towards the following purposes, in the order of priority by descending under:

a. To pay amounts towards taxes, including Income Tax on PSF(SC) income as per provisions of Income Tax Act, 1961, Service Tax or any other statutory does.

b. To pay for security related expenses to Central Industrial Security Force (CISF).

c. To pay other security related expenses in terms of MOCA order dated 20.6.2007 or any other decision of MOCA/BCAS or any other Government agency, from time to time.

iii) Deployment of Surplus: Any surplus standing at the credit of the Escrow Account should be deployed by the Escrow Bank in its own Deposit Account. On maturity or otherwise, the proceeds, shall be credited in Escrow Account.

14.34. The perusal of the above order containing SOP makes it clear that the amount collected by the airport operator is to be kept separately in 'Escrow Account' and the same is held by the airport operator in fiduciary capacity. It becomes further clear

that the amount of any surplus left in the said account could not have been utilised for any purpose other than security related expenses. Under these circumstances, it was clearly not having any characteristics of income in the hands of the assessee company. The said SOP also contained certain guidelines with respect to taxability of the impugned amount. In our view, MOCA is not the designated authority to determine the taxability of the said amount as has also been discussed by us in detail in earlier part of our order and, therefore, to that extent, the observations or guidelines issued by MOCA exceed its jurisdiction and, therefore, these were not binding upon the assessee. The assessee was, of course, bound by remaining position of the guidelines as per concerned rules & regulations.

14.35.It has further been argued before us that the impugned amount would not be income in the hands of the assessee company in view of the Doctrine of 'Diversion of Income by Overriding Title'. Few judgments have been relied upon before us in support of this argument, as mentioned above in the earlier part of our order. It has been vehemently argued by the Ld. Counsel of the assessee that the impugned amount could not have been brought to tax in view of diversion of income at the source.

14.36.Per contra, the stand of the Revenue has been that the amount has been disbursed on account of security arrangements, and therefore it amounts to 'application' of income and not 'diversion' of income.

14.37. We have carefully analysed legal intricacies and nuances involved here in this case. Law in this regard was clarified and Hon'ble Supreme Court way back in its landmark judgment in the case of CIT vs Sitaldas Tirathdas 41 ITR 367 (SC) which is still followed in many other judgments by various courts all over the country. The relevant part of the judgment laying down an acid test to decide such issues is reproduced hereunder:

> *"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income*

is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it does so, not as part of his income, but for and on behalf of the person to whom it is payable."

14.38.Subsequently, in many judgments, various courts have, from time to time, analysed the law in this regard and suggested various tests to find out whether in a give facts it was a case of 'diversion' or 'application' of income. We find that the Hon'ble Allahabad High Court in the case of U.P. Bhumi Sudhar Nigam vs CIT 280 ITR 197 (All)formulated a set of four tests to find out whether in a given situation, it would be a case of diversion of income by overriding title or not. The Hon'ble Court, after analysing various other judgments suggested following principles:-

(i) If a third person becomes entitled to receive an amount under an obligation of an assessee even before he could claim to receive it as his income, there would be a diversion of income by overriding title but when after receipt of the income by the assessee, the same is passed on to a third person in discharge of the obligation of the assessee, it will be a case of application of income by the assessee and not of diversion of income by overriding title.

(ii) If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about the hypothetical income which does not materialise.

(iii)The existence or absence of entries in his books of account cannot be decisive or conclusive in the matter.

(iv) The concept of real income must be applied in appropriate cases but with circumspection and must not be called in aid to defeat the fundamental principle of law of income-tax as developed.

14.39. Turning back to the facts of the case before us, if we apply the aforesaid principles, we will find that the impugned amount cannot be treated as taxable income in the hands of

the assessee. If we apply the first principle, we find that as soon as the amount was collected from the passengers @ Rs.200/- per ticket, a portion of it, i.e. Rs.130/- per ticket became payable to CISF and/or any other agency designated for the purposes of security at the airport. The same was liable to be deposited in a separate 'Escrow Account' and the assessee had no right, whatsoever, in the same account. The aforesaid amount was axed or sliced at its very source. The amount was permitted or directed to be collected from the passengers with this clear understanding and prior stipulation that 65% of the same is meant for security agencies. Thus, the assessee merely acted as a collection agent. Thus, applying the first principle, the impugned amount would fall in the category of diversion of income.

14.40. As far as the other three principles are concerned, the crux of these three principles is to find out whether the assessee had, in substance, earned any income. In other words, these three principles suggest application of the concept of 'real income', which suggests that unless the income has been earned by a person in real sense, the same cannot be held as taxable income. There has to be first income and only then its taxability could be determined. It is noted by us that in the facts before us, no portion of the amount collected on behalf of AAI / MOCA is reported to have been retained by the assessee as its income in as much as nothing belonged to it. Thus, the impugned amount is clearly not taxable in the hands of the assessee.

14.41. It is further noted by us that in many cases, wherein under some requirement of law if the amounts were transferred to the designated fund, then in such cases the Courts have held it to be a case of diversion of income by overriding title. In a matter before Hon'ble Bombay High Court in the case of Somaiya Organo Chemicals Ltd vs CIT 216 ITR 291 (Bom),the facts were that a portion of the sales price was transferred to a separate fund for building up adequate storage facilities under a statutory obligation, it was held to be diverted at source by overriding title could not form part of assessee's income.

14.42. Ld. Counsel had also relied upon before us the judgment of Hon'ble Madras High Court in the case of CIT vs Salem Co-operative Sugar Mills Ltd (supra). The facts in this case were that the said assessee was a cooperative society, carrying on business of manufacturing and sale of sugar and

in terms of Molasses Control (Amendment) Order dated 06-02-1972, transferred a sum in conformity with the statutory obligation cast by the above order and claimed it as deduction in the computation of its total income for the assessment year 1975-76, which was disputed by the Revenue but allowed by the Tribunal. Hon'ble High Court affirmed Tribunal's order and observed that even before collection of the amount as directed by the Central Government under the Molasses Control ('Amendment) Order, the assessee was directed to keep this amount under a separate account under the head "Molasses Storage Fund". Though, the assessee collected this amount under the statutory obligation, it did not belong to the assessee, but to the molasses storage fund. The assessee could not utilise the amount lying in the said fund for any other purpose. The amount was to be utilised for the purpose of constructing a storage tank in accordance with the specifications given by the Central Government. If the assessee had failed to collect such amount as directed by the Molasses Control (Amendment) Order, the Central Government would construct a molasses storage tank and recoup the construction charges from the assessee. It was held that there was diversion of title at the source of the income collected under the directions given under the Molasses Control (Amendment) Order. The sum in question was held to be not includible in the assessee's total income.

14.43. Similar view was ultimately upheld by the Hon'ble Supreme Court in the case of CIT vs New Morrisson Sugar Mills Ltd 269 ITR 397 (SC) and CIT vs Ambur Cooperative Sugar Mills Ltd 269 ITR 398 (SC) wherein it was held that the amount set apart towards molasses reserve fund constituted diversion of income by overriding title, and therefore, it was held to be excludible from assessee's total income. Similarly, in the case of CIT vs Bijli Cotton Mills Pvt Ltd 116 ITR 60 (SC), the Hon'ble Supreme Court held that when right from the inception, amount of 'Dharmada' was collected and held by the assessee company under an obligation to spend for charitable purposes only, then those amounts were not its trading receipts and was not taxable as business income.

14.44. Before parting with, we have also analysed the facts about utilization of the impugned amount. The Escrow Account maintained by the assessee is simply a pool created by the MOCA through assessee for meeting security expenses. Under these circumstances, if at all any income can be computed,

that would be possible only if any surplus arises, which is not possible to happen since entire amount collected by Assessee Company is deposited in Escrow Account which is earmarked wholly and exclusively for meeting security expenses. There is no flexibility for using the funds elsewhere. If at all any amount is left unspent from this account, then, the same is to be transferred to the account of Airport Authority of India for meeting security expenses. We had directed the assessee as well as the Ld. CIT-DR to examine requisite facts and inform us whether there was surplus or deficit in the escrow account finally. The information provided by the Assessing Officer, through Ld. CIT-DR, vide his letter dated 06-09-2016 reveals that upto the assessment year 2013-14 though there was surplus in the said account, but from A.Y. 2014-15 onwards, there was huge deficit, meaning thereby, the expenditure was more than the amount of collection. As per the terms of SOP issued by MOCA, if ultimately there was some deficit, then it was required to be funded by Government of India, and if there was ever any surplus (i.e. unspent amount), it was to be transferred to the account of Airport Authority of India (AAI). Thus, viewed from this angle also, there was no question of there being any income in this exercise, much less, any income, which could be characterised as taxable income in the hands of the assessee company. Thus, we have no hesitation in holding that the aforesaid amount is not taxable as income in the hands of the assessee company. The AO is directed to recompute the income of the assessee accordingly. The AO has also the liberty to examine that no portion of amount collected by the assessee on account of PSF-SC is utilised by the assessee for its own purposes or for any purposes which are not permitted by MOCA/other competent authorities. In case any violation is done by the assessee in this regard, then the AO will be at his liberty to treat the amount so misappropriated as income of the assessee but to that extent only. Further, if any refund is received by the assessee on account of TDS deducted on this component, i.e. on PSF-SC, then the same shall also be deposited by the assessee in the Escrow Account, as was fairly agreed by the Ld. Counsel during the course of hearing before us, failing which it would be treated as income of the assessee, to that extent only. We direct accordingly. This ground is allowed subject to directions given above."

From the findings of the Tribunal, it is apparent that the said amount is not taxable in the hands of the assessee and, thereby directed the Assessing Officer to re-compute the income of the assessee while holding so this Tribunal also gave liberty to the Assessing Officer that no portion of amount collected by the assessee on account of PSF-SC is utilized by the assessee for its own purposes or for any purposes which are not permitted by MOCA/other competent authorities. In case any violation is done by the assessee in this regard, then the Assessing Officer will be at his liberty to treat the amount so misappropriated as income of the assessee but to that extent only. Further, if any refund is received by the assessee on account of TDS deducted on this component, i.e. on PSF-SC, then the same shall also be deposited by the assessee in the Escrow Account, as was fairly agreed by the learned Counsel during the course of hearing

15. We have noted that while giving effect to this order, the Assessing Officer, after examination as per the directions given by the Tribunal and ultimately vide his order dated 04.07.2017, deleted the whole addition made in respect of PSF-SC amounting to ₹1,32,58,59,023/- for AY.2008-09. Since the facts involved in the impugned years under consideration are not disputed with the facts involved in A.Y.2008-09 wherein the AO while giving effect to the order of the Tribunal found that the assessee has not utilized any amount of PSF-SC for its own purposes or for any purposes which

are not permitted by MOCA/other competent authorities, we, therefore, respectfully following the decision of this Tribunal for A.Y. 2008-09, hold that the said amount is not taxable in the hands of the assessee and direct the Assessing Officer to re-compute the income of the assessee. We also direct the Assessing Officer to see that no portion of the amount calculated by the assessee on account of PSF-SC is utilized by the assessee for its own purposes or for any purpose which are not permitted by MOCA/other competent authorities. The Assessing Officer is further directed that in case he finds that any violation is done by the assessee in this regard, he will be at his liberty to treat the amount so misappropriated as income of the assessee but to that extent only. Further, if any refund is received by the assessee on account of TDS deducted on this component, i.e. on PSF-SC, the same shall also be deposited by the assessee in the Escrow account, failing which it would be treated as income of the assessee to that extent only. Thus, this ground is allowed subject to these directions in each of the A.Ys 2009-10, 2010-11 and 2011-12.

16. We shall now deal with the **Revenue's appeals.**

Ground no.1 in A.Y 2009-10 relates to the deletion of the disallowance of refurbishment expenses. Both the parties agreed that the issue is covered in favour of the assessee by this Tribunal, vide its order dated 14.02.2014, for A.Y. 2007-08 in ITA No. 7507/Mum/2011 & 7111/Mum/2011, which decision

was followed for A.Y. 2008-09 also. The Tribunal for A.Y. 2007-08 has observed as under:

> *"We have carefully considered the orders of authorities below and the submission of ld. Representatives of the parties. We observe that the authorities below have considered the said expenditure as capital mainly for the reasons that the assessee itself has categorized that expenditure in its books of account as capital in nature. In determining whether the expenditure is a capital expenditure or revenue expenditure, one has to take into consideration the facts and nature of expenditure to decide whether it is made for the initiation of business or extension of business or substantially replacement of existing equipment and treatment given in books of accounts could not decide the nature of expenditure. The expenditure would be capital if the expenditure has been incurred to create new assets. However, it will be revenue in nature, if incurred merely in facilitating assessee's operation or enable assessee's business to be carried on effectively, while leaving capital untouched. The similar view is taken by the Hon'ble Apex Court in the case of CIT V/s Associated Cement Companies Ltd. (1988) 172 ITR 257 (SC). If the expenditure incurred does not bring into existence any new assets but only facilitate operation to ensure that the existing runway is maintained properly ensuring safety of the Aircraft or passenger and also Airport premises and no new asset has come into existence the expenditure is revenue in nature. We are of the considered view that it cannot be said that by incurring the expenditure details given hereinabove, a new asset has come into existence giving rise to the assessee of enduring benefits. There is no dispute to the fact that the said runway /Airport premises does not belong to assessee but belong to "AAI" and the assessee is required to maintain the same under "OMDA". We are of the considered view that the said expenditure has been incurred by assessee only for the purpose of carrying out its one of the object to renovate and/or repair existing runway. The Hon'ble Bombay High Court in the case of New Shorrock Spg. & Mfg. Co. Ltd. V/s CIT (1956) 30 ITR 338 (BOM.) has held that the "the expression "current repairs' means expenditure on building, machinery, plant or furniture which is not for the purpose of renewal or restoration but which is only for the purpose of preserving and maintaining an already existing asset which does not bring new*

asset into existence or does not give the assessee new or different advantage. We observe that the said expenditure has been incurred only for resurfacing the layer of the runway and to put new tiles to replace floors. Therefore, it cannot be said that expenditure is in the nature of capital as it does not bring into existence any new asset, leaving aside the fact that the said runway /premises is not owned by assessee. No doubt, the assessee is to redesign, upgrade, modernize and also to operate and maintain Airport but the expenditure under consideration has been incurred only to ensure that the existing assets continued to be used for use safely and as per norms to enable assessee to run its activity. Hence, we are of the considered view that the said expenditure is incurred to facilitate of carrying on by the assessee its main business for which the assessee has been engaged and pending the expansion of the Airport etc. Hence, we hold that the said expenditure is revenue in nature and cannot be said to be capital in nature irrespective of the fact that the assessee in its books of account has given treatment of it as capital in nature. We may state that the assessee will not be entitled for depreciation thereon as it is held to be revenue in nature. Hence, Ground No.1of the appeal taken by assessee is allowed."

Respectfully following the order of the Tribunal in the assessee's own case, we confirm the order of the CIT(A) deleting the disallowance.

18. Ground no.2 in A.Y. 2009-10 and Ground no.1 in A.Y. 2010-11 and 2011-12 relate to the same issue i.e. deletion of the disallowance of 25% depreciation of upfront fees of ₹ 150 crores. Both the parties agreed that the issue is covered in favour of the assessee by this Tribunal, vide its order dated 14.02.2014, for A.Y. 2007-08 in ITA No. 7507/Mum/2011 & 7111/Mum/2011, which decision was followed for A.Y. 2008-09. The Tribunal for A.Y. 2007-08 has observed as under:

"10.2 That the AO has stated that the assessee has got lease hold rights for a period of 30 years and whereas the assessee has contended that the assessee has got a license for a period of 30

years and as such it is an "intangible assets". Thus, the assessee is entitled for depreciation as per section 32(1)(ii) of the Act. We observe that the said amount of Rs.150 crores paid by assessee is non-refundable. The assessee has got the privilege under "OMDA" to collect charges of the nature as mentioned in the agreement entered into i.e. "OMDA" from the users of Airport premises. We observe that it is not a case where the assessee has got the transfer of a right to enjoy the Airport premises. The assessee only got a license or right to do something at the Airport premises. The Hon'ble Apex Court has held in the case of B. M. Lal (supra) that the transaction is a lease, if it grants the interest in the land and whereas it is a license if it gives a personal privilege with no interest in the land. We are of the considered view that the assessee has got the economic /commercial right under the said agreement to collect charges from the users of the Airport premises which is similar to grant of a license to the assessee. This case is similar to the case of Technoshares and Stocks Ltd and others (supra), wherein the Hon'ble Apex Court has held that a right given to member of Stock-Exchange to carry on the business at the premises of the Stock-Exchange is a business or commercial right which is akin to license in terms of section 32(1)(ii) of the Act, therefore, eligible for depreciation. Their Lordships have held that right to participate in the market is an economic and money value, itself satisfies the test of being a license. There is no dispute to the fact that the said payment of Rs.150 crores paid to "AAI" has not resulted to the assessee in the acquisition of any "tangible assets" like building, machinery, plants or furniture. Therefore the said payment of Rs.150 crores has not resulted into acquisition of "tangible assets". Thus, the assessee has only acquired right to collect charges from the users of the Airport preemies, which is a business or commercial right in the form of license and therefore it is an "intangible assets" as per section 32(1)(ii) of the Act. The Hon'ble Delhi High Court in the case of Hindustan Coca Cola Beverages Pvt Ltd (supra) has also held that the assets which are included in the definition of "intangible assets" include, along with other things, any other business or commercial rights of similar nature. In this regard, it is relevant to state that the decision of Delhi High Court in the case of ONGC Videsh Ltd (supra) has held that the assessee who was assigned the rights to participate in oil exploration in Russia through a consortium for a period of 25 years and paid the total consideration for obtaining 20% membership in the consortium, amounting to Rs. 155.9 crores, was treated to acquire a license, being intangible assets, and thus assessee was entitled to claim depreciation u/s. 32(1)(ii) of the Act. Pune Bench of the Tribunal in the case of Ashoka Info (P) Ltd (supra) has also

held that the expenditure incurred on construction of highway is eligible for depreciation @25%, as this expenditure has given rise to an 'intangible assets' in the hands of the assessee. In view of above decisions and the facts of the case, we hold that the ld. CIT(A) has rightly held that the payment of upfront fee of Rs.150 crores paid by assessee to "AAI" has created capital assets in the form of license to develop and modernize the Airport and collect charges as per terms and conditions as prescribed under the agreement entered into which is an "intangible assets" to the assessee. Thus assessee is entitled for depreciation.

10.3 Hence, the disallowance of Rs.22.50 crores made by AO has rightly been deleted by ld. CIT(A) by directing the AO to allow depreciation at the rate of 25% on the said payment of upfront fee of Rs.150 crores. Thus, Ground No.1 taken by department is rejected."

Respectfully following the order of the Tribunal in the assessee's own case, we confirm the order of the CIT(A) deleting the disallowance for each of the assessment years under consideration.

19. Ground nos.3 & 4 for A.Y. 2009-10, ground nos.2 & 3 for A.Y. 2010-11 and ground no.2 for A.Y. 2011-12 relate to the treatment of the contribution made by the assessee to MMRDA for construction of Sahar Elevated Road from Western Express Highway, horticulture expenses and other civil works as revenue expenditure. Both the parties agreed that this issue is common in all the years (except for the figures) and the facts involved are also identical. Therefore this ground be decided on the basis of the facts for A.Y. 2009-10 and whatever view this Tribunal may take in A.Y. 2009-10 the same shall be applicable for A.Ys 2010-11 and 2011-12.

20. The learned DR before us contended that the assessee has incurred expenditure by way of contribution to MMRDA for construction of Sahar Elevated Road from Western Express Highway, horticulture expenses and other civil works. This expenditure should be considered as integral part of overall capital expenditure incurred by the assessee for renovation, expansion, modernization of the airport. This expenditure enabled the assessee to enjoy enduring benefit from the said asset, in respect of which the assessee has made contribution to MMRDA and had resulted enhanced profitability of the assessee. Thus, the said expenditure has to be capitalized and the assessee's claim of considering the expenditure as revenue expenditure should not be accepted. The CIT(A) has committed an error in treating the said expenditure as revenue expenditure.

21. The learned AR on the other hand, vehemently contended that the assessee during the course of business incurred the said expenditure by way of contribution to MMRDA for the construction of the of Sahar Elevated Road from Western Express Highway, horticulture expenses and other civil works. The asset does not belong to the assessee even after incurring the expenditure. The assessee did not have any right as all the assets are used not only by the assessee but by the public at large. The expenditure has been incurred as a commercial expediency demands such expenditure to be incurred. Reliance was placed on the decision of Hon'ble Supreme Court in the case of Empire Jute Co Ltd. vs. CIT (124 ITR 1) and other High Court

judgments which has been placed before the CIT(A), on that basis, it was contended that all expenditure even if resulting in enduring benefit cannot be termed to be capital expenditure. Before deciding the issue where the expenditure is a capital expenditure or revenue expenditure, all other factors in commercial sense has to be considered. Reliance was placed on the order of the CIT(A) especially para 6.5 to 6.7 and reiterated the submissions that were made before the CIT(A).

22. We have heard the rival submissions and carefully considered the same along with the orders of the authorities below. We have also gone through various judgments as has been referred to before us as well as the CIT(A). It is a settled law, in view of the decision of Kedarnath Jute Manufacturing Co. Ltd. vs. CIT (82 ITR 363), that assessee's entitlement to a particular deduction or not, will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can existence or absence of entries in the books of accounts be decisive or conclusive in the matter. We have also gone through the decision of Hon'ble Supreme court in the case of Empire Jute Co. Ltd. vs CIT (124 ITR 1) wherein the deductibility or otherwise of an expenditure incurred during the course of business activities was decided by observing as under:

> *There may be cases where expenditure, even if incurred for obtaining an advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in*

> *a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test.*
> *...*
> *The Test of enduring benefit is, therefore, no certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particulars facts and circumstances of a given case." (Emphasis Supplied)*

The undisputed facts placed before us are that the assessee under the OMDA agreement with Airport Authority of India is operating, maintaining, managing developing the Mumbai Airport as per the international standard. Other obligations relate to overall management, development etc. As per the terms of OMDA, the assessee has to discharge various obligations in maintaining and operating the airport so as to bring it to the international standard. Thus, the assessee has to incur various expenses for such development and maintenance of the airport. During the year, the assessee has incurred the expenditure on various activities. The assessee has incurred the expenditure in maintaining existing assets which has either been repaired or renovated. Out of the expenditure of ₹ 20,35,73,477/- of sum of ₹ 16,07,30,868/- has been contributed by the assessee to MMRDA for the construction of Sahar Elevated access road from Western Express Highway to Chhatrapati Shivaji International Airport. The ownership of this road would remain with the MMRDA and would not be transferred to the assessee. The assessee's interest, in our view, in this road was that the passengers would have a smooth access to Chhatrapati Shivaji International Airport and provide a look

as per international standard. The rest of the expenditure relate to the maintenance and upkeep of the existing assets. The Assessing Officer treated the whole of the expenses to be capital expenditure as the assessee itself has treated the said expenditure in the books of account as capital expenditure. The allowability of expenses for the purpose of Income tax, as has been held by us in the previous paragraphs, following the decision of Hon'ble Supreme Court in the case of Kedarnath Jute Manufacturing Co. Ltd. vs. CIT (supra), will depend on the provision of income tax Act and not on the view which the assessee might take of his rights nor can existence or absence of entries in the books of accounts be decisive or conclusive in the matter. Since the ownership of the road vest with MMRDA, the assessee in our opinion does not get any direct benefit of enduring nature. No doubt the passengers travelling to the international airport were benefited by way of smooth access to the airport. The assessee made one time contribution for the construction of the said road. By this contribution no asset is created by the assessee but in commercial sense, in our opinion, the incurrence of such expenditure certainly facilitates the business of the assessee. This expenditure cannot be held to be capital expenditure merely because the business of the assessee is getting enduring benefit. In our view, the business exigencies demand the assessee to incur this expenditure by making the contribution to MMRDA.

23. We have gone through the judgment of the Hon'ble Allahabad High Court in the case of Additional CIT vs. Dhampur Sugar Mill P. Ltd. [2015] 370 ITR 194 (All). We noted that the assessee was engaged in the business of manufacture and sale of sugar, chemicals and power and had a distillery. The assessee made payment of Rs. 8.48 crores to the UPPCL, which was the only customer, for construction of a transmission line and other supporting work for supply of power. When the said expenditure was held as capital expenditure by the Assessing Officer, the Hon'ble High Court held as under:

> *"that the power transmission lines which were laid by the assessee were, upon erection, to constitute the exclusive property of the UPPCL. The UPPCL was the only consumer of the electricity generated by the assessee. The assessee incurred the expenditure to facilitate its own business. The fixed capital of the assessee was untouched and there was no capital accretion for the assessee. The expenditure which was incurred by the assessee in the laying of transmission lines was clearly on revenue account. Upon the erection of transmission lines, they were to vest absolutely in the UPPCL. The expenditure which was incurred by the assessee was for facilitating the efficient conduct of its business since the assessee had to supply electricity to its sole consumer the UPPCL. This was not an advantage of a capital nature."*

24. Further, we noted that Hon'ble Bombay High Court in the case of National Organic Chemicals Ltd. vs. CIT [1993] 203 ITR 410 (Bom) took a view that the assessee incurred expenditure for the purpose of construction of jetty for handling, storage and transportation of materials manufactured or handled by the assessee. The assessee was granted license by the state government. Under the terms of license, the assessee was given the right to use the jetty without payment of any charges for a period of three years from

its completion. However, the ownership would remain with the state government. It was held that such expenditure was incurred with a view to obtain commercial advantage and, therefore, it was revenue expenditure.

25. Further, we noted that Hon'ble Rajasthan High Court in the case of CIT vs. Raj Spinning & Weaving Mills Ltd. [2005] 272 ITR 487 (Raj), following the decision of Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. [1980] 124 ITR 1 (SC) held as under:

> *"In determining whether a particular expenditure is capital expenditure or revenue expenditure the test of enduring benefit is not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. The mere fact that the amount spent has been used for construction of a building or structure of permanent nature is not the decisive test for holding the expenses to be capital outlay or revenue outlay. Where such construction does not result in acquisition of any capital assets to the trade of the assessee or the property does not become the property of the assessee, it does not result in acquisition of an asset enduring nature by the assessee. Secondly, it is also clearly discernible that if such expenses are incurred for the purpose of the business for deriving any benefit whether to preserve the business or to facilitate the running of the business more smoothly or to make the business more profitable or to secure any other advantage for the assessee's business such expenses are to be treated as having been incurred wholly and exclusively for the business of the assessee and are revenue expenditure."*

26. We have also gone through the decision of Hon'ble Madras High Court in the case of CIT vs. Coats Viyella India Ltd. [2002] 253 ITR 667 (Mad). We noted that in this case, the Hon'ble High Court following the decision of Hon'ble Supreme Court in the case of L H Sugar Factory And Oil Mills (P.) Ltd. vs. CIT [1980] 125 ITR 293 (SC), held as under:

> *"Held, that, in the present case, the bridge was built by the Government and the assessee did not acquire any ownership over the bridge by paying contribution towards construction of the bridge. The assessee received no addition to the value of any of the assets owned by it for the payment. The bridge merely facilitated the movement of the workmen to gain access to the assessee's factory and for the movement of the goods over the bridge. The payment of contribution was made to the Government for construction of a new bridge in place of the old one which became unserviceable. The expenditure incurred was revenue expenditure in respect of the assessment year 1991-92."*

27. In view of the aforesaid discussion, we do not find any infirmity in the order of the CIT(A) treating the said expenditure to be a revenue expenditure. It is accordingly upheld. Ground nos. 3 & 4 for A.Y. 2009-10, ground nos. 2 & 3 for A.Y. 2010-11 and ground no.2 for A.Y. 2011-12 are dismissed.

28. Ground nos.5 & 6 for A.Y. 2009-10, ground nos. 4 & 5 for A.Y. 2010-11 and ground no.3 for A.Y. 2011-12 relates to deletion of disallowance made u/s. 40(a)(ia) of the Act. Both the parties agreed that this issue is covered in the assessee's own case for A.Y. 2008-09, vide its order dated 30.11.2016, in ITA No. 3232/Mum/2012, wherein the Tribunal on identical facts restored the issued to the file of the CIT(A) with specific directions. We have gone through the said order of the Tribunal and have noted that vide para 6.5 and 6.6, the Tribunal has held as under:

> *6.5. We have gone through the submissions made by both the sides. The case of the assessee is that the impugned amounts represented mere provisions and, therefore, these could not have been properly quantified and further, even names of the*

> *payees were not clear. Therefore, no TDS could be deducted in the year under consideration.*
>
> *6.6. It is noted from the perusal of the order of the Ld. CIT(A) that he has simply accepted the claim of the assessee by stating that the assessee had made only provision and the Ld. Counsel of the assessee had submitted that in the next year when payments were made against the provisions, TDS was deducted and thus disallowance made by the AO was also deleted. We find that, unfortunately, the order of the Ld. CIT(A) on this issue is devoid of factual analysis or proper reasoning. Ld. CIT(A) has not even discussed the details of the expenses for which provision was made by the assessee which has been disallowed by the AO. Nothing has been discussed about the nature of the expenses, position of crystallisation of these expenses, availability of particulars of the payees, etc. It has been observed in the order by Ld. CIT(A) that whenever payments are actually made against these provisions, TDS is deducted as was stated by the Ld. Counsel. But, what are the precise facts in this regard has not been discussed in the order. No details are available or discussed by the Ld.CIT(A) regarding various aspects, e.g. when these expenses were actually incurred, in whose name these are finally credited, who are the actual payees, when the payments were made actually and whether the TDS was deducted at the time of making of payments or not? Nothing has been brought out on record to ensure that finally there was no revenue leakage and full compliance of the TDS provisions was made ultimately. We find that order of Ld. CIT(A) is devoid of any factual narration and, therefore, we find it appropriate to send this issue back to the file of the CIT(A) for complete factual analysis and thereafter applying the correct position of law. Ld. CIT(A) shall provide adequate opportunity of hearing to the assessee. The assessee shall also extend requisite cooperation to the Ld. CIT(A) by filing necessary details / evidences so as to bring complete facts on record. With these directions, this ground may be treated as allowed for statistical purposes.*

Respectfully following the said decision, we restore the issue to the file of the CIT(A) in all the assessment years with a direction to re-decide the issue afresh after giving sufficient opportunity to the assessee on the basis of the directions given in A.Y. 2008-09. Thus, ground nos.5 & 6 for A.Y. 2009-10,

ground nos. 4 & 5 for A.Y. 2010-11 and ground no.3 for A.Y. 2011-12 are treated as allowed for statistical purposes.

29. Ground no.7 in A.Y 2009-10 relates to the disallowance of ₹ 39,35,444/- out of total expenditure. The Assessing Officer found that the assessee has debited a sum of ₹ 4,37,27,160/- as legal fees and claimed it as an expenditure by debiting it to the profit and loss account. From the bifurcation of these expenditure, the Assessing Officer was of the view that the expenditure details should have been considered for capitalization to CWIO as the said expenditure has been incurred relating to the projects undertaken for modernization of the airport. The Assessing Officer, therefore, deemed it fit to disallow 10% of this expenditure and treated it to be capital expenditure. He further allowed depreciation on the said disallowance of ₹ 43,72,716/- @ 10% and disallowed the balance sum of ₹ 39,35,444/-. On appeal, the CIT(A) deleted the disallowed.

30. We noted that similar issue has arisen in the case of the assessee for A.Y. 2008-09 and the Tribunal vide its order dated 30.11.2016, in ITA No. 3232/Mum/2012 set aside the issue to the file of the CIT(A) observing as under:

> *9.5.We have gone through the submissions made before us as well as before the lower authorities. It is noted that on this issue also, Ld. CIT(A) has not given proper reasoning and order passed by him is cryptic. He allowed the relief by merely observing as under:-*

> *"I have considered the above submissions and in view of the facts brought on record – which clearly show that the 'legal and professional' charges which refer to the current year are clearly an allowable expenses u/s 37(1) of the I.T Act and therefore, this is an allowable expense. Hence, this ground of appeal is allowed and A.O. is directed to delete this disallowance / addition."*

> *9.6.Thus, from the above said paragraph of Ld. CIT(A)'s order, it is noted that he has not given proper reasoning while allowing relief to the assessee. The details submitted by the assessee have not been discussed by the Ld. CIT(A). He has made a sweeping and general remark that the details submitted by the assessee show that legal and professional charges are clearly allowable expenses u/s 37(1) of the Act. He has not discussed the details of the legal and professional charges and whether these have been incurred on account of revenue or capital field. Therefore, under these circumstances, we send this issue back to the file of the Ld. CIT(A) with the same directions as have been given with regard to ground 6 above. This ground may be treated as allowed for statistical purposes."*

Respectfully following the said order of the Tribunal, we send this issue back to the file of CIT(A) with the same directions as are given in A.Y. 2008-09. Thus, this ground is allowed for statistical purposes. This disposes of Revenue's appeal for A.Y. 2009-10.

31. Now coming to the remaining grounds of the Revenue's appeal for A.Ys. 2010-11 and 2011-12.

Ground nos. 6 to 9 in A.Y. 2010-11 and ground no.4 in A.Y. 2011-12 relates to the issue regarding deletion of the disallowance of retrenchment compensation. Both the parties agreed that the issue be decided on the basis of the facts involved in A.Y. 2010-11 and whatever view is taken by this Tribunal shall be applicable for A.Y. 2011-12 also. The learned DR before us

contended that the assessee has claimed retrenchment compensation payable to Airport Authority of India as per the terms of OMDA as revenue expenditure. It was submitted that as per clause 6.14 of OMDA, the assessee is obliged to make an offer of employment to a minimum of 60% General Employees at any time during the Operation support period but not later than three months prior to the expiry of the operation support period, that it wants to employ, an option to accept or reject the offer by employees. This clause further provides that if less than 60% of the general employees accept the offer of employment made by the assessee, then assessee shall pay to the Airports Authority of India retrenchment compensation for such number of general employees as represented by the difference between 60% of the general employees accepting the offer of employment made by the assessee. The learned DR further stressed that the said payment made by the assessee to Airports Authority of India is retrenchment compensation and, therefore, the provisions of section 35DDA of the I T Act will apply and only 1/5th of the said expenditure should be allowed to be claimed by the assessee in each of the assessment years.

32. The learned AR, on the other hand, submitted that the payment made by the assessee to the Airports Authority of India is not for the employees of the assessee under any voluntary retirement scheme or its own employees and, therefore, the provisions of section 35DDA of the I T Act would not apply. The said lump sum payment was made by the assessee to Airports

Authority of India and this enable the assessee to avoid annual payment that it would have to make to these employees by way of retirement benefits etc., had they joined the company by accepting the employment offer. If these employees had accepted the assessee's employment offer, the expenditure incurred by way of salary would have been allowed as revenue expenditure. These annual expenditure has been substituted by one time lump sum payment to Airports Authority of India and, therefore, the said expenditure should be allowed as revenue expenditure.

33. We have heard the rival submissions and have carefully considered the same along with the orders of the authorities below. We noted from the facts on record for A Y 2010-11 that the assessee, under an agreement of OMDA with Airports Authority of India, is developing and maintaining Chhatrapati Shivaji International Airport. The assessee has to carry out operations, maintenance and development of the airport with certain terms and conditions. As per clause 6.14 in Chapter 6 of the OMDA, the assessee is obliged to make an offer of employment to a minimum of 60% General Employees at any time during the Operation support period but not later than three months prior to the expiry of the operation support period, that it wants to employ, an option to accept or reject the offer by employees. This clause further provides that if less than 60% of the general employees accept the offer of employment made by the assessee, then assessee shall pay to the Airports Authority of India retrenchment compensation for such number of

general employees as represented by the difference between 60% of the general employees accepting the offer of employment made by the assessee. Thus, this clause specifically deals with the treatment of the retrenchment compensation to be paid to the Airports Authority of India at the occurrence of the events maintained in the said clause. The operational support period of three years has expired during the impugned assessment years under consideration and, accordingly, Airports Authority of India issued invoice dated 08.03.2010 for its claim towards retrenchment compensation amounting to ₹ 260,86,03,400/- The assessee has accordingly capitalized an amount of ₹ 260,86,03,400/- under the head intangible assets in its books of account but for the purpose of income tax he has claim said expenditure in the computation of income but disallowed itself a sum of ₹ 106,62,84,312/- as no tax has been deducted at source during the impugned assessment year but claimed remaining sum of ₹ 154,23,19,088/- as revenue expenditure. The Assessing Officer was of the view that the assessee is eligible only for one fifth of ₹ 154,23,19,088/- as per the provisions of section 35DDA amounting to ₹ 30,84,63,818/- in the year under consideration and the remaining amount is to be allowed in equal installments over the period of four immediately succeeding assessment years.

34. We have gone through the provisions of section 35DDA. We noted that the said provision is applicable only if the assessee has incurred any expenditure in any previous year by way of payment of any sum to a

employee in connection with voluntary retirement. In this case, we noted that the assessee has not incurred any expenditure by way of payment made to employees but the payment has been made by the assessee to Airports Authority of India in accordance with clause 6.14 of the OMDA on account of retrenchment compensation to be paid by Airports Authority of India to its employees. It is not an amount which the assessee is paying to its employees on their retrenchment. Therefore, the provisions of section 35DDA will not apply. It is not denied that the expenditure incurred by the assessee is revenue expenditure. We noted that the CIT(A) while dealing with the issue deleted the said disallowance by observing as under:

> *"8.8 In the backdrop of the above facts, the moot question for decision is whether the expenditure of Rs.154,23,19,088/- which has been paid by the appellant in terms of 6.1.4 of the OMDA to AAI is a revenue expenditure and requires to be allowed in one go instead of allowing the same in five equal installments u/s.35DDA of the Act.*
>
> *8.9 It is noticed that an obligation to pay retrenchment compensation was fastened on appellant in terms of clause 6.1.4 of OMDA as soon as the period mentioned therein is expired and the year happened to be the previous year relevant to AY 2010-11. I further find that the obligation to pay the sum of money to AAI on account of retrenchment compensation in terms of OMDA is a definite obligation and the appellant is bound by the terms of OMDA and has thus to discharge the said obligation within the time stipulated in the OMDA. Further, I find that the retrenchment compensation paid by the appellant is definitely a contractual obligation with the AAI and has been incurred solely and exclusively for the purpose of the business. The appellant has placed reliance on the decision in the case of C1T v Sinnar Bidi Udyog Ltd. [118 Taxman 106], wherein it has been held that deduction claimed towards Retrenchment Compensation would be in the nature of revenue expenditure incurred wholly and exclusively for the purpose of business. The decision further states that where the*

Appellant-company took over another company along with its employees, and later paid Retrenchment Compensation to those employees by taking into account the services rendered by them under the former company such Retrenchment Compensation is allowable as revenue expenditure.

8.10 The appellant has further placed a reliance on the decision of Karnataka High court in the case of CIT v. Margarine & Refined Oils Co. Ltd [154 Taxman 95] wherein the expenditure incurred by the management in paying retrenchment compensation for termination of service was held to be expenditure expended wholly and exclusively for the purpose of business and the said expenditure was allowed to be deducted in computing the business income chargeable under the head 'Profits and gains of business or profession' under section 37(1).

8.11 I also find force in the argument of the appellant that retrenchment compensation is nothing but lump sum amount paid to get rid of recurring payment. A retrenchment payment made to get rid of recurring revenue expenditure in itself is revenue in nature. The payment made under clause 6.1.4 of the OMDA and the invoice raised "by AAI in this regard, is nothing but a lump sum payment to get rid of recurring payment which appellant would have been obligated to make to 60% of the General Employees of AAI for a period upto the effective date of their retirement. In case these employees would have joined the company all recurring payments which would otherwise undoubtedly be allowable as revenue expenditure were got rid of by making the lump sum payment under clause 6.1.4 of the OMDA. The said lump sum payment was therefore clearly a substitute for annual revenues payments.

8.12 The appellant has also relied on the decision in the case of CIT vs. Madras Auto Service Pvt. Lid (1998) 233 1TR 468 - The Supreme Court has held that to decide whether expenditure is revenue or capital one has to look at the expenditure from a commercial point of view. The court has observed "Whatever substitutes for revenue expenditure should normally be considered as revenue expenditure." Had the Appellant chosen to pay rent annually for each and every year of lease such expenditure certainly would have to be regarded as revenue expenditure. The fact that the payment was made in lump sum for the entire duration of the lease does not alter the character of it being revenue expenditure.

8.13 The appellant has also brought to my notice the decision in the case of CIT vs. Gemini Arts Private Ltd (2002) 254 ITR 201. The

Madras High Court relying on the above judgment of the Supreme Court has allowed the claim of a lump sum payment of lease as revenue expenditure. I find from these two decisions that the principle which emerges is that "whatever substitutes for revenue expenditure should normally be considered as revenue expenditure". 8.14 Looking to these facts as well as various court decisions relied upon by the appellant, I find that that the payment of retrenchment compensation is an obligation fastened upon the appellant under OMDA and the liability is a contractual obligation with AAI. The appellant has made the payment in lump sum of Rs.260,86,03,400 as retirement compensation to AAI. The appellant has not made this payment directly to the its own employees as retrenchment compensation, but has made this payment to AAI for paying those employees of AAI who has sought voluntary retrenchment and this payment is part of the OMDA. Had this lump sum payment not been made then the appellant would have made the payment on account of salary as well as other benefits to the employees on annual basis which would have been claimed by the appellant as revenue expenditure. The appellant instead of retaining the number of general employees represented by the difference between 60% of general employees and the number of general employees accepting the offer of employment, is required to pay retirement compensation in respect of those general employees who have not accepted the offer of employment with the appellant. Thus, the expenditure incurred by the appellant on account of retrenchment compensation paid to AAI is in lieu of salary and other benefits which the employees not accepting the employment are eligible under OMDA. The nature of this expenditure is revenue expenditure as it represents salary and wages etc. The principle which had emerged from the said two decisions cited supra, that whatever substitutes for revenue expenditure should normally be considered as revenue expenditure is applicable to the facts of the said expenditure. Accordingly, I find that the lump sum payment of Rs.260,86,03,400/-- is nothing, but a lump sum payment on account of salary and wages of certain employees who have not accepted the employment with the appellant as enumerated in clause 6.1.4 of OMDA. The expenditure certainly is therefore revenue expenditure.

8.15 With regard to the applicability of provisions of-section 35DDA of the Act, I find that the said provisions are not applicable to the facts of the appellant's case as the payment has been made by the appellant to AAI and not to its own employees. The payment has been made out of commercial expediency and under contractual obligation. The appellant has not floated any voluntary retirement

scheme of its own, but the payment has been made under an agreement to AAI. Thus, the provisions of section 35DDA of the Act are not applicable. It is not a voluntary retirement scheme, but the payment is contractual and cannot be amortized. The AO is accepting the contents of the Agreement and no fault has been found in the same. The AO has also not doubted the genuineness of the agreement and the payment made on this issue.

8.16 Considering the facts in its entirety and the various court decisions cited and relied upon by the appellant, I find that the expenditure of Rs.260,86,03,400/- is an allowable expenditure as revenue. Accordingly, the disallowance of Rs.123,38,55,270/- is deleted and the ground of appeal of the appellant is allowed."

35. The learned DR even though vehemently relied on the order of the Assessing Officer, could not bring to our knowledge any decision which has taken a contrary view as has been taken by the learned CIT(A). We, do not find any infirmity in the order of the CIT(A) deleting the disallowance. It is accordingly upheld. Ground nos. 6 to 9 in A.Y. 2010-11 and ground no.4 in A.Y. 2011-12 stands dismissed.

36. Ground no.10 & 11 in A.Y. 2010-11 and ground no.5 in A.Y. 2011-12 relate to the treatment of development fees as capital receipt by the CIT(A). Both the parties agreed that the issue be decided on the basis of the facts involved in A.Y. 2010-11 and whatever view is taken by this Tribunal shall be applicable for A.Y. 2011-12 also. The facts relating to the said issue are that the assessee claimed development fees collected by it as capital receipt. During the impugned assessment year, the assessee has collected a sum of ₹ 287,83,48,538/- . An amount of ₹ 19,85,99,146/- has been reduced from the block of building and ₹ 7,00,70,264 has been reduced from the block of

machinery and plant while computing depreciation. Depreciation has been claimed on the reduced amount of the block of assets. The Assessing Officer asked the assessee why the said amount should not be treated as revenue receipt. The Assessing Officer did not agree with the submissions of the assessee and treated the said amount as revenue receipt. The assessee went in appeal before the CIT(A), who, after going through the agreement entered into between the assessee and the Airports Authority of India, took the view that the said receipt was capital receipt and not revenue receipt.

37. We have heard the rival submissions and have carefully considered the same along with the orders of the authorities below. The learned DR relied on the order of the Assessing Officer while the learned AR vehemently contended that the said development fees has been collected with the permission of the Ministry of Civil Aviation pursuant to the provisions of Rule 22A of the Airports Authority of India Act, 1994 and are in the nature of cess or tax to met the shortfall that arise in the development of aeronautical assets. The development fees so collected are utilized only for purpose of development of capital assets and the same is certified by the chartered accountant. Therefore, the said income is a capital receipt. We noted that the CIT(A) has elaborately discussed the provisions of the agreement entered between both the parties and has held as under:

> *"9.5 I have considered the submissions of the appellant and the order of the AO. The appellant is engaged in operating, managing, developing, designing, constructing, upgrading, modernizing and*

financing the Chhatrapati Shivaji International ("CSI") Airport of Mumbai under an agreement known as "OMDA"' with Airport Authority of India ("AAI"). The estimated cost for modernizing and development of CSI Airport of Mumbai was Rs.9,802/- crores. Against this estimated expenditure which includes the substantial expenditure on account of capital expenditure for modernizing and development of the Airport, the availability of finance from various means with the appellant was less by Rs.2,3507- crores. Thus, there was a short fall of Rs.2,350 crores.

9.6 In view of the shortfall of finance required for the development of the Airport which includes substantial capital expenditure, the appellant approached the Ministry of Civil Aviation; Government of India for levy of Development Fee for meeting out the said shortfall at such rates as may be approved by the Ministry. Pursuant to section 22A of the AAI Act, 1994, the Ministry has conveyed the approval of the Central Government u/s.22A of AAI Act authorizing the appellant to collect the Development Fee vide letter dated 27.02.2009, a copy of which has been filed by the appellant during the appellate proceedings. The appellant has been permitted by the Ministry of Civil Aviation. Government of India to charge fee of Rs.100 from departing domestic passengers and Rs.600 from departing international passengers. There are certain conditions attached with the collection of Development Fee. The fee so collected has to be spent mainly for development of 'Aeronautical Assets' only. The appellant cannot spend any amount from the collected Development Fee at will and has to maintain an account of the same which is subject to supervision and audit from the Central Government. The appellant has been permitted to collect amount only for 48 months and the same cannot be exceeded funding gap of Rs.1,543/- crores. The Ministry of Civil Aviation has vide F.No. AV.24011/001/2009-AD dated February 27, 2009 had in para (g) to (j) has stated as under:

> *"(g) The amount collected through DF would under no circumstances exceed the ceiling of Rs.1543 cores and in case of any cost escalation beyond Rs.9802 crores, the amount representing the escalation would have to be brought in by MIAL, through other sources. The ceiling amount would be exclusive of taxes, if any.*
>
> *(h)Rate and tenure of levy are premised upon the traffic projections and other estimates. In case due*

to actual figures being different than those estimated, the 'collections during levy period exceed the amount of Rs, 1543 crores, or any other amount, which the Regulator/Government may determine, the excess amount so collected shall not be utilized, for any purpose whatsoever, without the prior approval of the Regulator/Central Government.

(i)An independent Auditor appointed by AAI would audit the receipts/accruals of MIAL on periodic basis. Periodicity of the audit would be decided by AAI in consultation with MIAL. AAI would report the results of audit to Government/ Regulator for necessary directions.

(j)MIAL would undertake real estate development programme on a time bound basis through competitive bidding at the earliest. In case, the amount actually received/receivables as a result of competitive bidding is more than the presently estimated amount of Rs.1,000/- crores, the funding gap of Rs. 1543 crores would be revised downwards at the time of review."

The above clearly indicates that the government had worked out the collection of Rs. 1543 crores in the total gap of Rs.2,350 crores by factoring that MIAL can earn around Rs.1,000 crores through the real estate development program.

9.7 As per clause (b) (ii) of the said letter, the AAI and Central Government would have supervision powers in respect of escrow account to ensure that all the receipts are properly accounted for and are utilized only for permitted purposes. Clause (c) of the said letter provides the entire Development Fee receipts would be utilized only for the purpose of development of "Aeronautical Assets", which are "Transfer Assets" as defined under the OMDA and therefore would go to reduce the actual cost of Aeronautical Assets to that extent. I also notice that Clauses (b) (iii) of the said letter dated 27.02.2009 specifically provides that DF would be subject to AAI's supervision from time to time. Further, Clause (g) of this letter stipulates that the amounts collected through Development Fee would under no circumstances exceed the ceiling of Rs. 1,543 crores and in case of cost escalation beyond Rs. 9,802 crores the escalation would have to be brought in by the appellant through other sources. Clause (h) of the said letter provides that in

case of excess collection, the same cannot be utilized by the appellant for any purpose whatsoever without the prior approval of Regulator or the Government. Further, Clause (h) of the said letter also stipulates for downward revision of the amount of Development fee to be calculated in certain case.

9.8 Based on the above, it is evident that the levy of Development Fee is solely for the purpose of bridging the funding gap in connection with the development of Aeronautical Assets. For convenience, such Development Fee would be collected by various Airlines at the time they sell the tickets to the passengers and would be paid to appellant. Accordingly, the airlines are collecting the Development Fee levied u/s 22A of AAI Act from the passengers and paying the same to the appellant towards meeting the funding gap for development of Aeronautical Assets which are transfer assets as per OMDA. In support of the contention that the Development fee so collected has been utilized only for the developing the capital assets i.e. Aeronautical Assets, a copy of the certificate from a chartered accountant has been placed on record certifying the utilisation of Development fee for construction of Aeronautical Assets as per provisions prescribed u/s 22 A of the AAI Act.

9.9 The appellant has placed strong reliance on the judgment of Hon'ble Supreme Court in the case of ***Consumer Online Foundation Vs Union of India & others (2011 5 SCC 360)*** *where Hon'ble Supreme Court bus categorically made the distinction between Section 22 and Section 22A of AAI Act. In the said judgment, Hon'ble Supreme Court has also held that Development Fee is in the nature of Cess or Tax for generating revenue for the specific purposes mentioned in Clause (a), (b) and (c) of Section 22A of AAI Act. The Hon'ble Supreme Court in the said decision held that the nature of levy u/s.22A of 2004 Act is not charges or any other consideration for services for the facilities provided by the Airports Authority. The Supreme Court in this judgment also quoted from the decision in the case of Vijayalashmi Rice Mills & Ors. v. Commercial Tux Officers, Palakot & Ors. (Supra) that a cess is a tax which generates revenue which is utilized for a specific purpose. The levy under Section 22A of AAI Act though described as fees is really in the nature of a cess or a tax for generating revenue for the specific purposes mentioned in clauses (a), (b) and (c) of Section 22A of AAI Act. Further, the appellant also contended once the SC has held that the Development fee is in the nature of tax or cess, no further tax can be levied on the same treating the same as income of the appellant. I find the reliance of*

the appellant on the said Supreme Court decision is a good reliance and the same is squarely applicable to the facts of the appellant's case and therefore, Development Fee collected by the appellant is in the nature of cess or tax and a capital receipt and it cannot be subjected to further tax.

9.10 During the appellate proceedings before me, the appellant was asked to clarify as to how Development Fee and Toll Charges are not similar in nature. The appellant made a detailed submission in the matter, clearly bringing out the distinguishing factors between Development Fee and Toll Charges. After a careful perusal of the distinguishing factors between the two, I find that the Development Fee and Toll Charges are being levied and collected entirely on different footings and context. The origin of the Development Fee is from the provision of section 22A of the AAI, 1994 and the same is held to be cess or tax and to be used strictly for the purpose of sub-section (a), (b) & (c) of section 22A of AAI Act. Thus, 1 notice that the collection of Development Fee has a legal backing and in the nature of cess or tax being collected with the approval of Ministry of Civil Aviation, Government of India/ Regulatory Authority as prescribed U/s.22A of the Act. This view has been confirmed by the Hon'ble Supreme Court in the case of Consumer Online Foundation vs. UOI & Ors (supra). So far as the collection of Toll Charges is concerned, the same is collected to recover the capital cost, operating and maintaining cost along with profit. The Toll Charges are determined as per the policy of the Government of India and are not in the nature of tax or cess. The Toll Charges are treated as revenue receipts in the hands of Developer. Letter dated 27.02.2009 received from the Ministry of Civil Aviation which is on record indicates that Development Fee is a capital receipt.

9.11 I further notice that Airport Regulator has clearly mentioned in its order that for the purpose of allowing return to Airport Operator, it will consider Asset Base (RAB) net off Development Fee amount and no depreciation will be allowed on such assets. I further find from the letter dated 18.12.2012 of Airport Authority of India addressed to the Director, Ministry of Civil Aviation which was placed on record, wherein it is mentioned that the treatment of Development Fee should be as per the guidelines given in AS-12 - Accounting for Government Grants issued by the Institute of "Chartered Accountants regarding grant against the assets. The another important and distinguishing factor is that the collection of Development Fee is required to be kept in a separate Escrow Account and subject to several restrictions whereas there is no such

stipulation in the case of Toll Charges. The Toll Charges cover operating and maintenance cost of a particular facility and the quantum of the same is fixed as per the policy of the Government of India.

9.12 Looking to the distinguishing factors between the Development Fee and Toll Charges, I find that there is no similarity at all. The Toll Charges by itself is a revenue receipt embedded with the recovery of the cost of the assets, administrative expenses as well as the profits and the same is collected after the asset is created and put to use. The Development Fee is collected under the authority of a law meant for utilization of specific purposes and prior to creation of assets. The appellant's hands are completely tied in utilizing the Development Fee whereas the same is not the case of Toll Charges. Thus, the distinguishing factors clearly place the Development Fee in the category of capital receipts and not revenue receipts.

9.13 Looking to the facts of the case in its entirety, I find that Development Fee collected by the appellant with the permission from the Ministry of Civil Aviation, Government of India under the provisions of 22A of AAI Act 2004 is a receipt in the nature of cess or tax and in the nature of capita! receipt. Further, the same has been already considered by the Hon'ble Supreme Court in the case of Consumer Online Foundation Vs Union of India & others, cited supra, wherein it has been held the Development Fee is a receipt in the nature of cess or tax for generating revenue for the specific 'purposes mentioned in clause (a),(b) & (c) of section 22A of the AAI Act. Further, it is pertinent to note once amount held to be in the nature of tax, it cannot be subject to further tax. It is also seen that various restrictions have also been imposed by the Central Government to ensure that the Development fee so collected is utilized only for the purpose of development of 'Aeronautical Assets' as per provisions of section 22A of the AAI Act. Further, a certificate from a Chartered Accountant has also been placed on record certifying the utilization of the Development fee so collected only for the purposes of acquiring /constructing the Aeronautical Assets. Accordingly, the collection of Development fee is therefore, meant only for specific purpose of acquisition / construction of capital assets and therefore, it is on capital account and not on revenue account. Thus, the nature of the receipt is capital and not revenue. Accordingly, I hold that the receipts of Rs.2,87,83,48,538/- on account of Development Fee being in the nature of tax or cess is a capital receipt and therefore the same cannot be brought to tax. Accordingly, the addition of Rs.286,30,14,565/- is deleted. The AO

is also directed to reduce an amount of Rs.19,85,99,146/- from the block of building and Rs.700,70,264 from the block of plant & machinery and recomputed the depreciation after the said reduction as claimed by the appellant in the return of income. Accordingly, Ground Nos. 11 and 12 are allowed."

38. We find that the CIT(A) has elaborately discussed the provisions of section 22A of Airports Authority of India Act 1994, under which the assessee has collected the development fees and also the terms and conditions attached to the said collection as well as its utilization. Not only this, the CIT(A) has also referred to the decision of Hon'ble Supreme Court in the case of Consumer Online Foundation vs. Union Of India & Others [2011] 5 SCC 350 (SC), where the apex court has categorically made the distinction between section 22 and section 22A of Airports Authority of India Act. In the said judgment, the Hon'ble Supreme Court has also held that development fees is in the nature of cess or tax for generating revenue for specific purposes as mentioned in section 22A(a) to section 22A(c) of the Airports Authority of India Act. In the said judgment it was held that the nature of levy u/s. 22A of 2004 Act is not charges or any other consideration for services for the facilities provided by the Airports Authority. The learned DR, even though relied on the order of the Assessing Officer, he did not deny the interpretation given by the Hon'ble Supreme Court in respect of section 22A of the Airports Authority of India Act. It is not denied that the development fees so collected are utilized only for the purpose of aeronautical assets as

per the provisions of section 22A of the Airports Authority of India Act. In view of this fact, we do not find any illegality or infirmity in the order of the CIT(A), which warrant our interference, while holding that the development fees so received by the assessee is a capital receipt. We accordingly, confirm the order of the CIT(A) and dismiss ground nos.10 & 11 in A.Y. 2010-11 and ground no.5 in A.Y. 2011-12. This disposes of all the grounds in the revenue's appeal for A.Y. 2010-11.

39. So far as ground no.6 in A.Y. 2011-12 is concerned, it is similar to ground no.1 in the assessee's appeal for A.Y. 2009-10 and 2010-11, which relates to disallowance made u/s. 14A. After hearing the rival submissions we noted that the assessee has not earned any exempt income during the impugned assessment year and therefore, the CIT(A) has rightly deleted the disallowance made by the Assessing Officer u/s.14A. Our view is duly supported by the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltd. 378 ITR 33 (Del) and that of Hon'ble Bombay High Court (Nagpur Bench) in the case of Principal CIT vs. Ballarpur Industries Limited in ITA No. 51/2016 dated 13.10.2016. Respectfully following these decisions, we dismiss ground no.6 taken by the revenue for A.Y. 2011-12.

40. Ground no.7 relates to the rate of depreciation allowance allowed by the CIT(A) @15% instead of 10% on taxiways, aprons, parking bays and bridges. We have already dismissed this ground while dealing with ground no.3 in assessee's appeal for A.Y. 2009-10-& 2010-11.

41. In the result, assessee's appeals are statistically allowed and revenue's appeals are partly allowed.

Order pronounced in the open court on 13th day of November, 2017.

Sd/-	**Sd/-**
(Pawan Singh)	(P K Bansal)
JUDICIAL MEMBER	**VICE-PRESIDENT**

Mumbai; Dated: 13th November, 2017

SA

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A),Mumbai
4. The CIT
5. DR, 'B' Bench, ITAT, Mumbai

BY ORDER,

#True Copy #

Assistant Registrar
Income Tax Appellate Tribunal, Mumbai