आयकर अपीलीय अधिकरण ,' ए ' न्यायपीठ,चेन्नई

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

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं श्री एस जयरामन, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं/.I.T.A. Nos. 1965, 1966, 1967, 1968 /Mds/2016 & 2096/Mds/2017
निर्धारण वर्ष/Assessment Years : 2008-09, 2008-09, 2010-11, 2011-12& 2009-10

M/s. Srinivasa Fashions Pvt. Ltd., 1A, Regency Apartments, No. 5, 1st Lane, Nungambakkam High Road, Chennai - 600 034. **[PAN: AAICS 9511R]**	Vs.	Deputy Commissioner of Income Tax, Corporate Circle -6(2), Aayakar Bhavan, New Block, 7th Floor, 121 M.G. Road, Chennai - 600 034.
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

आयकर अपील सं/.I.T.A. Nos. 1297 & 1130/Mds/2016
&
C.O. No: 85 & 84/Mds/2016
निर्धारण वर्ष/Assessment Years : 2009-10& 2011-12

Deputy Commissioner of Income Tax, Corporate Circle -6(2), AayakarBhavan, New Block, 7th Floor, 121 M.G. Road, Chennai - 600 034.	Vs.	M/s. Srinivasa Fashions Pvt. Ltd., 1A, Regency Apartments, No. 5, 1st Lane, Nungambakkam High Road, Chennai - 600 034. **[PAN: AAICS 9511R]**
(अपीलार्थी/Appellant)		**(त्यर्थी/Respondent/ Cross Objector)**

अपीलार्थीकीओरसे/Assesseeby	:	ShriT. Banusekar, CA
प्रत्यर्थीकीओरसे/Revenue by	:	Shri S. Bharath, CIT
सुनवाईकीतारीख/Date of Hearing	:	23.11.2017
घोषणाकीतारीख/Date of Pronouncement	:	30.11.2017

आदेश/ O R D E R

PER S. JAYARAMAN, ACCOUNTANT MEMBER:

The assessee's appeals are against the orders of the CIT (A) -15, Chennai in ITA No 269 / CIT(A)-15/13-14 against the original assessment made for ay 2008-09 on 30.12.2010 , in ITA No 77/ CIT(A)-15/14-15 against the re-assessment made for ay 2008-09 on 30.3.2014 , respectively, dt 15.02.2016, in ITA Nos 356, 445&78 / CIT(A)-15/13-14 against the assessments made for ays 2009-10, 2010-11& 2011-12 , respectively , on 28.11.2011 , 30.3.2013 & 11.01.2016. The Revenue filed appeals for ays 2009-10 & 2011-12 in ITA No. 1297/2016 & 1130/2016 against the CIT(A) orders mentioned, supra. The assessee also filed CO 85/2016 and 84/2016 for ays 2009-10 & 2011-12 against the CIT(A) orders mentioned above.

2. The assessee's appeals for ay 2008-09 in ITA Nos 1965 & 1966/Chny/2016, the appeal for ay 2010-11 in ITA No. 1967/Chny/2016, the appeal for ay 2011-12 in ITA No. 1968/Chny/2016, each of them are filed belatedly by 30 days and the Revenue's appeal for ay 2011-12 in ITA No. 1130/Chny/2016 is filed belatedly by 12 days. Both the assessee and the Revenue filed condonation petitions. We heard the AR and the DR. We find that there was sufficient cause for not filing these appeals/Cross Objections

before the stipulated time. Therefore, we condone the delay and admit these appeals/CO.

3. M/s. Srinivasa Fashions Pvt. Ltd, the assessee , an export garment manufacturing company is in Special economic Zone (SEZ) and is eligible for tax exemption u/s 10A. It took over all the assets and liabilities of M/s Srinivas Exports International, a partnership firm and a garment manufacturing unit in a domestic tariff area (DTA) , as on 01.03.2008. Thus, as on the year end ie as on 31.3.2008 , the assesse had two units viz SEZ unit & DTA unit. The A O found that the expenditure incurred in DTA unit for one month was high as compared to the expenditure incurred in the SEZ for 12 months. The AO has linked the installed and actual capacity of machinery in SEZ unit and DTA unit and found that the production in DTA unit depends on the work orders received from the SEZ and hence the production in the DTA unit has been transferred to the SEZ unit, which sold and claimed the deduction in SEZ unit. Since the sales are made to related parties , invoking the provisions of section 10AA(9) , the AO took 25% of sales of SEZ unit as that of DTA unit and recalculated eligible profit to be allowed in SEZ unit at Rs. 20,37,21,093/-, after determining the total turnover in DTA unit at Rs.1,61,50,501/- and thus completed the assessment u/s 143(3). Later on , the AO has reopened the above assessment u/s 148 , on the ground that the unabsorbed depreciation of Rs.97,53,913/- claimed by the erstwhile firm M/s Srinivasa Exports

International has been wrongly been allowed when the assessee did not claim depreciation on the assets transferred from M/s Srinivasa Exports International but claimed as unabsorbed depreciation . However as per proviso to sec.32(1)(ii), the depreciation between the predecessor and successor failing under the section 47(xiii) (taken over of business of the firm by company) has to be apportioned for the number of days for which the assets were used by them. Since the assessee company took over the firm only from 01.03.2008 onwards, it can set off depreciation only to the extent of Rs.31/366 x 97,53,913 i.e. Rs.8,26,151/- only as against Rs.97,53,913/- allowed. Further u/s 78(2), there is no provision to set off the losses of the firm against the income of the company taking over it and the assessment of the firm up to 29.02.2008 has to be separately made as the case of dissolution . After giving opportunity to the assessee and after considering its submissions, the AO held that since the assessee company took over the firm only from 01.03.2008 onwards, it can set off depreciation only to the extent of Rs.31/366 x 97,53,913 i.e. Rs.8,26,151/- only as against Rs.97,53,913/- allowed in the original assessment and hence added Rs. 89,27,762/-.

4. Aggrieved , the assesse filed appeals against both the above orders and the CIT(A) dismissed the appeal against the original assessment holding that the processing charges by DTA unit are not at market price. However, on the addition of Rs.89,27,762/- made in the reassessment , being unabsorbed

depreciation of the predecessor firm, the CIT (A) accepted the appellant's submission and held that provision of section 78(2) are not applicable but provision of section 72A(6) r.w.s 47(xii) is applicable and directed the AO to allow claim of set off of unabsorbed depreciation after verification of conditions as laid down in section 47(xii) from the relevant records. Thus, the CIT(A) allowed the assessee's grounds of appeal .

5. Aggrieved against the above orders of the CIT(A) i.e., on the original assessment order as well as against the reassessment order , the assessee filed appeals in ITA nos. 1966 & 1965/ CHNY/ 2016, respectively, with following grounds of appeal :

> *"2. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the order of the Assessing Officer is without jurisdiction.*
> *3. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the Assessing Officer erred in invoking the provisions of section 10AA(9).*
> *4. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the DTA (Domestic Tariff Area) of the appellant merely carried out the job contract for the eligible unit u/s.10AA of the appellant.*
> *5. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the Assessing Officer erred in concluding that the transactions between the DTA unit and eligible unit u/s.10AA were not at market rate.*
> *6. For that the Commissioner of Income Tax (Appeals) erred in upholding the action of the Assessing Officer in adopting 25% of sales of the eligible u/s.10AA as the sales of the DTA unit and consequently recalculating the profits of both the units and the allowable deduction u/s.10AA.*
> *7. For that without prejudice to the above, the Commissioner of Income Tax (Appeals) ought to have appreciated the fact that after setting off of the available losses the total income of appellant was NIL.*

The grounds on the reassessment are :

2. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the order of the Assessing Officer is without jurisdiction.

3. For that the reassessment is bad in law.

4. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the Assessing Officer erred in disallowing depreciation to the tune of Rs.89,27,762/-.

5. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the Assessing Officer erred in invoking proviso to section 32(1)(ii) and holding that the depreciation pertaining to the predecessor firm M/s.Srinivasa Exports International of Rs.97,53,913/- should be allowed in the ratio of number of days of use.

6. For that the Commissioner of Income Tax (Appeals) consequently erred in upholding the action of the Assessing Officer in allowing depreciation only to the extent of Rs.8,26,151/- being proportionate depreciation for 31 days."

6. The issue that the processing charges incurred by the DTA unit are not at market price, is common from ays 2008-09 to 2010-11 and hence, it would be dealt appropriately, infra. With regard to the addition of Rs. 89,27,762/-, unabsorbed depreciation of the predecessor firm, the CIT(A) dealt as under:

"5.2.1 I have considered the findings given by the AO and submissions made by the AR of the appellant. The AO has reopened the assessment u/s 148 on the ground that unabsorbed depreciation of Rs.97,53,913/- as claimed by M/s Srinivasa Exports International which It took over on 01.03.2008 has wrongly been allowed. The AO has stated that the unabsorbed depreciation of Rs.97,53,913/- as claimed by the firm was allowed. However as per proviso to sec.32(1)(ii), the depreciation between the predecessor and successor failing under the section 47(xlii) (taken over of business of the firm by company) has to be apportioned for the number of days for which the assets were used by them. Since the assessee company took over the firm only from 01.03.2008

onwards, It can set off depreciation only to the extent of Rs.31/366 x 97,53,913 i.e. Rs.8,26,151/- only as against Rs.97,53,913/- allowed. Further u/s 78(2), there Is no provision to set off the losses of the firm against the income of the company taking over it. The appellant has submitted that provision of section 72A(6) are applicable and not section 78(2) as the firm no longer exists and has been taken over by the appellant company. The contention of the appellant is acceptable since provision of section 78(2) are not applicable but provision of section 72A(6) r.w.s 47(xii) is applicable. The AO is directed to allow claim of set off of unabsorbed depreciation after verification of conditions as laid down in section 47(xii) from the relevant records. These grounds of appeal are allowed for statistical purpose."

The AR submitted that the order of the CIT(A) is not clear as to whether the unabsorbed depreciation should be set off fully or for 31 days. Per contra, the DR supported the order of the CIT(A).

7. We heard the rival contentions. This issue is remitted back to the CIT(A) for proper adjudication and also for passing a speaking order. Hence, the corresponding grounds of the asseesee in ITA Nos. 1965 of 2016 is treated as allowed for statistical purposes.

ITA Nos. 1297 of 2016 , 2096 of 2016 & CO 85 of 2016 of ay 2009-10 :

8. In the assessment made for ay 2009-10, the AO found that there is a loss claimed in the DTA unit whereas profit is shown in the SEZ unit especially when the entire processing income for the DTA unit is from the services

rendered to SEZ unit. The AO observed that the DTA pays jobwork charges to outsiders at a higher rate. However, it charges at lesser rate to the SEZ unit (as admitted by the AR of the appellant during assessment proceedings), thus incurring huge losses. By this mechanism of under invoicing at a lower rate, the DTA unit is incurring huge losses whereas in the case of the SEZ unit to which deduction u/s 10AA are available, huge profit are being shown. The assessee was asked to give documentary evidence as proof in respect of the services rendered and to prove that services rendered by the DTA unit to the SEZ unit are at market rate. The AR admitted during the assessment proceedings that though the workers are employed throughout the year by the DTA, its cost is not charged to the SEZ unit. The AO observed that profit in the SEZ unit is shown at Rs. 69,088,163/-, whereas loss shown in the DTA unit at Rs. 4,68,22,748/-. Combined profit of two units is Rs.2,22,65,415/- itself proves that the assessee's contention is wrong. The AO observed that consequently in DTA unit, whose income is chargeable to income tax but it does not have any deduction/exemption benefit u/s 10AA , consequently huge artificial losses are created by deliberately keeping the processing charges charged to the SEZ unit at a very low price, extraordinarily lesser than the operating costs and processing charges incurred by the DTA unit, thereby creating huge losses to be set off against 'income from other sources' as well as ensuring that huge losses are carried forward to be set off against any further income of DTA in the subsequent AYs. This modus operandi is

followed by the assessee because the income from the DTA unit is taxable. Since the assessee could not give the comparable market price with regard to the services rendered by DTA to SEZ unit, the provisions of section 10AA(9) are clearly applicable . Therefore, the AO reworked the income of DTA unit and the SEZ units as per provisions of section 10AA(9), as if the processing charges/job work charges charged by the DTA unit are charged so that there is no loss to the DTA unit. The job work charges raised by the DTA unit on the SEZ unit are taken at as if the processing charges are charged at cost of expenditure incurred by the DTA unit and there could be no loss incurred bythe DTA unit. The A O computed the income from the SEZ unit at Rs.1,90,08,126/- and from the DTA unit at Rs.32,05,499/-. Further, while computing the income, the A O set off the unabsorbed depreciation against income of the SEZ unit before allowing deduction u/s 10AA.

9. Aggrieved , the assesse filed appeal before the CIT(A) . Since the assessee has failed to give comparable market price with regard to the services rendered by the DTA to the SEZ unit, the CIT (A) upheld the action of AO . With regard to set off the unabsorbed depreciation against income of the SEZunit before allowing deduction u/s 10AA, following the decision of the Hon'ble ITAT Mumbai in the case of London Infotech P. Ltd. vs. DIT in ITA No.6582/Mum/2012 dated 01.01.2014 which relied on the decision in the Scientific Atlanta India Technology (P) Ltd. vs. ACIT(2010) 38 SOT

252(Chennai)(SB) directed the AO not to set off unabsorbed depreciation against total income while computing deduction u/s 10AA and thus partly allowed the assessee's appeal. Aggrieved against the order of the CIT(A), the Revenue filed an appeal in ITA No 1297 of 2016 and the assesse filed the cross appeal in ITA No. 2096 of 2017 and CO85 of 2016. The Revenue's grounds of appeal are as under :

> *" 2. The Ld CIT(A) directed the AO not to set off unabsorbed depreciation against total income while computing deduction u/s. 10AA.*
>
> *2.1 The ld CIT(A) failed to appreciate even though the profit of the eligible undertaking has to be first computed. Then depreciation is to be treated as current year depreciation and is to be set off against the business income of the eligible unit it before allowing deduction u/s. 10AA.*
>
> *2.2 The Ld CIT(A) failed to appreciate even though the carry forward losses of earlier assessment years have to set off against total income of relevant assessment year and it is out of balance income only that deduction under section 10B can be granted.*
>
> *2.3 The Ld CIT(A) failed to appreciate even though the unabsorbed depreciation of SEZ unit is adjusted against the profit of eligible unit (SEZ Unit) before allowing deduction u/s. 10AA. Hence, the unabsorbed depreciation of Rs. 1,03,02,299/- is set off against income from business and profession arrived at Rs. 1,90,08,126/-*
>
> *2.4 The Ld CIT(A) failed to appreciate, even though the similar issue decided is in favour of Revenue in CIT vs Yokogawa India Ltd 17 Taxmann.com (KTK). The same is being entrusted before the Apex Court.*
>
> *3. For these and other grounds that may be adduced at the time of hearing. It is prayed that the order of the Learned CIT(A) may be set aside and that of the Assessing Officer restored. "*

CO.NO: 85/2016 of ay 2009-10: *The grounds of Cross Objection are extracted as under:*

1. For that the order of the Commissioner of Income Tax (Appeals) is contrary to the law, facts and circumstances of the case to the extent prejudicial to the interest of the assessee and is opposed to the principles of equity, natural justice and fair play.

2. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the Assessing Officer erred in invoking the provisions of section 10AA(9).

3. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the DTA (Domestic Tariff Area) of the respondent merely carried out the job contract for the eligible unit u/s.10AA of the respondent.

4. For that the Commissioner of Income Tax (Appeals) erred in concluding that the transactions between the DTA unit and eligible unit u/s. 10AA were not at market rate.

5. For that the Commissioner of Income Tax (Appeals) consequently erred in upholding the action of the Assessing Officer in treating Rs.5,00,80,038/- as the additional processing charges of the eligible unit. "

10. The issue that the processing charges incurred by the DTA unit are not at market price, huge artificial loss is claimed in the DTA unit while profit is shown in the SEZ unit etc., is common from ays 2008-09 to 2010-11 and hence, it would be dealt appropriately, infra.

11. The assessee had brought forward business loss from the SEZ unit for ays 2006-07 & 2007-08. The assessee also had brought forward depreciation loss in the SEZ unit for ays 2006-07 & 2007-08. While making the computation, the AO arrived the SEZ unit income after allowing the current depreciation, from which he allowed the unabsorbed depreciation of ays

2006-07 & 2007-08 and then arrived the income from the SEZ unit. To which he added the income from the DTA unit and arrived the total income at Rs. 1,19,11,331/-. From which, the AO allowed the SEZ units brought forward business loss of ay 2006-07 & 2007-08 to the extent of Rs. 1,19,11,331/- and then allowed to carry forward the balance business loss of SEZ unit related to ay 2007-08 at Rs. 94,78,204/-. The CIT(A) directed the AO not to set off unabsorbed depreciation against total income while computing the deduction u/s. 10AA. Aggrieved, the Revenue is on appeal.

12. We heard the rival contentions, gone through the orders of the ays 2008-09 & 2009-10. We find from the assessment order of assessment year 2008-09, that the AO has allowed eligible profit to be allowed in the SEZ unit at Rs. 20,37,27,093/- and send a Nill demand notice to the assessee. However, in the assessment order of the assessment year 2009-10, the AO set off the SEZ units, brought forward depreciation and business losses of assessment years 2006-07 & 2007-08. It is known as to how the so called brought forward SEZ units business & depreciation losses of ays 2006-07 & 2007-08 in assessment year 2008-09. Since, the relevant facts are not clear from the orders, this issue is remitted back to the AO for a fresh examination and determination in accordance with law. Before deciding this issue the AO shall afford adequate opportunity to the assessee. The Revenue's appeal is treated as allowed for statistical purposes.

13. ITA NO. 2096 of 2017 for ay 2009-10:

Since, the assessee has not pressed this appeal, it is dismissed.

ITA No 1967 of 2016 for ay 2010-11 :

14. In the assessment made for ay 2010-11, since the assessee could not give the comparable market price with regard to the services rendered by the DTA to the SEZ unit, the AO reworked the income of the DTA unit and the SEZ unit , as was done in ay 2009-10. Further, the AO has disallowed depreciation on land of Rs.64,926/-, depreciation on preoperative expenses Rs.1,05,166/- and disallowed Rs 15,890/- u/s 14 A . Aggrieved , the assesse filed appeal before the CIT(A) . The CIT(A) dismissed the appeal . The assessee filed an appeal in ITA No 1967 of 2016 with following prayers :

"(a) Direct the Assessing Officer to delete the disallowance of depreciation of Rs.64,926/- on leasehold land.

(b) Direct the Assessing Officer to delete the disallowance of amortization of preoperative expenses amounting to RS.1,05,166/-

(c) Direct the Assessing Officer to delete the disallowance of Rs.15,890/- made u/s.14A r.w.r. 8D.

(d) Direct the Assessing Officer to allow the entire claim of the appellant u/s.10AA.

(e) Pass such other order as this Hon'ble Tribunal may deem fit."

15. M/s. Srinivasa Fashions Pvt. Ltd , the assessee , an export garment manufacturing company is in Special economic Zone (SEZ) and is eligible for tax exemption u/s 10A. It took over all the assets and liabilities of M/s Srinivas Exports International, a partnership firm and a garment manufacturing unit in a domestic tariff area (DTA) , as on 01.03.2008. Thus, as on the year end ie as on 31.3.2008 , the assesse had two units viz SEZ unit & DTA unit. The A O found that the expenditure incurred in DTA unit for one month was high as compared to the expenditure incurred in the SEZ for 12 months. The A O has linked the installed and actual capacity of machinery in SEZ unit and DTA unit and found that the production in DTA unit depends on the work orders received from the SEZ and hence the production in the DTA unit has been transferred to the SEZ unit, which sold and claimed the deduction in SEZ unit. Since the sales are made to related parties , invoking the provisions of section 10AA(9) , the AO took 25% of sales of SEZ unit as that of DTA unit and recalculated eligible profit to be allowed in SEZ unit at Rs. 20,37,21,093/-, after determining the total turnover in DTA unit at Rs. 1,61,50,501/- and thus completed the assessment u/s 143(3). In the assessment made for ay 2009-10, the AO found that there is a loss claimed in the DTA unit whereas profit is shown in the SEZ unit especially when the entire processing income for the DTA unit is from the services rendered to SEZ unit. The A O observed that the DTA pays jobwork charges to outsiders at a higher rate. However, it charges at lesser rate to the SEZ unit (as admitted by the AR of the appellant

during assessment proceedings), thus incurring huge losses. By this mechanism of under invoicing at a lower rate, the DTA unit is incurring huge losses whereas in the case of the SEZ unit to which deduction u/s 10AA are available, huge profit are being shown. The assessee was asked to give documentary evidence as proof in respect of the services rendered and to prove that services rendered by the DTA unit to the SEZ unit are at market rate. The AR admitted during the assessment proceedings that though the workers are employed throughout the year by the DTA, its cost is not charged to the SEZ unit. The AO observed that profit in the SEZ unit is shown at Rs. 69,088,163/-, whereas loss shown in the DTA unit at Rs. 4,68,22,748/-. Combined profit of two units is Rs. 2,22,65,415/- itself proves that the assessee's contention is wrong. The AO observed that consequently in DTA unit, whose income is chargeable to income tax but it does not have any deduction/exemption benefit u/s 10AA , consequently huge artificial losses are created by deliberately keeping the processing charges charged to the SEZ unit at a very low price, extraordinarily lesser than the operating costs and processing charges incurred by the DTA unit, thereby creating huge losses to be set off against 'income from other sources' as well as ensuring that huge losses are carried forward to be set off against any further income of DTA in the subsequent AYs. This modus operandi is followed by the assessee because the income from the DTA unit is taxable. Since the assessee could not give the comparable market price with regard to the services

rendered by DTA to SEZ unit, the provisions of section 10AA(9) are clearly applicable . Therefore, the AO reworked the income of DTA unit and the SEZ units as per provisions of section 10AA(9), as if the processing charges/job work charges charged by the DTA unit are charged so that there is no loss to the DTA unit. The job work charges raised by the DTA unit on the SEZ unit are taken at as if the processing charges are charged at cost of expenditure incurred by the DTA unit and there could be no loss incurred by the DTA unit. The A O computed the income from the SEZ unit at Rs.1,90,08,126/- and from the DTA unit at Rs.32,05,499/-. Similarly, he re-worked the income of the DTA unit and the SEZ unit for the ay 2010-11 also. On appeal against this issue, the CIT(A) upheld such re-working made by the AO in all these ays.

16. The AR pleaded that the AO was not consistent in his approach and he made different workings in each of the ays. The Ld. CIT(A) has not appreciated such differences and simply confirmed the position taken by the AO. Per contra, the DR supported the orders of the lower authorities. Since the AO has observed that the DTA unit, whose income is chargeable to income tax but it does not have any deduction/exemption benefit u/s 10AA , consequently huge artificial losses are created by deliberately keeping the processing charges charged to the SEZ unit at a very low price, extraordinarily lesser than the operating costs and processing charges incurred by the DTA

unit, thereby creating huge losses to be set off against 'income from other sources' as well as ensuring that huge losses are carried forward to be set off against any further income of DTA in the subsequent AYs etc, the onus is on the assessee to lay all material in support of its contentions . It would be open to the A O to take into consideration various factors which would go to show whether the amount was paid as required under section10AA (9) . If after taking the relevant factors into consideration, the AO comes to the conclusion that the payment does not correspond to the market value of such goods or services as on the date of transfer, it would be open to him to determine the market value of such goods or services as on the date for the purpose of deduction under this section. On the facts and circumstances , we deem it fit to set aside the orders of the CIT (A) on this issue for ays 2008-09 to 2010-11 and remit this issue to the AO for re-examination. The AO after giving adequate opportunity to the assessee decide this issue in accordance with law. The assessee's appeals, Cos on this issue for ays 2008-09 to 2010-11 are treated as allowed for statistical purposes.

ITA 1130-2016, ITA No 1968 of 2016 & CO 84/2016 for ay 2011-12:

17. In the assessment made for ay 2011-12, the AO has disallowed Rs.68,14,858/- u/s 36(1)(va) on the basis that employees contribution to ESI and PF were made beyond the due date prescribed in the relevant Acts.

Aggrieved , the assesse filed appeal before the CIT(A) . The CIT(A) relying on the decision of the Hon'ble ITAT, Mumbai in the case of ITA vs. LKP Securities Ltd vide ITA No. 638/Mum/2012 and ITA No.1093/Mum/2012 dated 17.05.2013 directed the AO to allow the deduction u/s 36(1) (va) where any payment is made within the grace period and thus partly allowed the appeal. Aggrieved, the Revenue filed the appeal in ITA No 1130 of 2016 and the assessee filed the cross appeal in ITA No 1968 of 2016 . The assessee filed a CO 84/CHNY/2016. The Revenue's grounds of appeal are as under :

"1. The order of the LdCIT(A) is contrary to law and facts of the case.

2. The LdCIT(A) direct the AO to allow deduction u/s 36(1)(va) for Rs. 69,83,315/- Where any payment is made within the grace period.

2.1 The Ld CIT(A) failed to appreciate, eventhough the AO in assessment order mentioned as per Annexure to Form 3CD that the assessee company had not paid the employee's contribution to ESI within the due dates as per the relevant Acts.

2.2 The LdCIT(A) failed to appreciate, eventhough the AO relied upon in Honourable ITAT Kolkatta in the case of DCITVs Bengal Chemicals & Pharmaceuticals Ltd (2011) 10 taxmann .com 26 (Kol) has categorically held that employee's contribution to PF etc. received by the employer is income in his hands as per sec 2(24)(x) and deductible only if paid within the due date as per the respective act as specified in sec 36(1)(va).

2.3 The Ld CIT(A) failed to appreciate, eventhough the provisions of sec 43B which is applicable in respect of employer's contribution is quite different than the provisions of sec 36(1)(va) which is applicable in respect of employee's contribution.

2.4 The LdCIT(A) failed to appreciate, even though the AO relied upon in Rajasthan High Court in the case of CIT Vs Udaipur Distillery Co . The Honourable High Court held that "in order to avail benefits of deduction in respect of contributions to provident fund, superannuation fund and gratuity

fund or any other funds for welfare of employees, sums are not only required to be actually paid before end of the previous year but are required to be paid within time stipulated under relevant statute or notification etc., and if payments have not been made within stipulated time, deduction cannot be claimed at any time thereafter."

3. For these and other grounds that may be adduced at the time of hearing. It is prayed that the order of the Learned CIT (A) may be set aside and that of the Assessing Officer restored.

18. We heard the rival submissions. The AR submitted that the assessee company has complied with the conditions of payment of PF/ESI under the respective statues but there was a delay in payments and assessee is liable for payment of interest also. But under the provisions of Income Tax Act the assessee company has deposited employees contribution of ESI and EPF before time limit specified u/s.139(1) of the Act and covered by the provisions of Sec. 43B of the Act. We found similar issue was considered by the Jurisdictional High Court in the case of CIT vs. M/s. Industrial Security & Intelligence India Pvt. Ltd TCA No. 585 & 586/2015 and has held as under:-

5. 'We find that the Tribunal has rightly relied on the decision of the Supreme Court in the case of CIT V. Alom Extrusions Ltd. reported in 319 ITR 306, whereby, the Supreme Court held that omission of second proviso to Section 43B and amendment to first proviso by Finance Act, 2003 are curative in nature and are effective retrospectively, i.e., with effect from 1.4.1988 i.e., the date of insertion of first proviso. The Delhi High Court in the case of CIT V. Amil Ltd. reported in 321 ITR 508 held that if the assessee had deposited employee's contribution towards Provident Fund and ESI after due date as prescribed under the relevant Act, but before the due date of filing of return under the Income Tax Act, no disallowance could be made in view of the provisions of Section 43B as amended by Finance Act, 2003."

We respectfully follow the jurisdictional High Court decision and direct the AO to delete the addition and accordingly dismiss the grounds of the Revenue and allow the assessee's cross appeal.

19. On the CO the AR submitted that the assessee has entered a 99 year lease agreement with M/S Mahindra Industrial Park of Rs.64,00,000/- which is non refundable and lease premiums is amortized at 1% over the period of lease. The AO has disallowed depreciation on land of Rs.64,926/-. Further it submitted that it claimed pre-operative expenses of Rs.1,05,166/- . The AO in the assessment order held that the Income Tax Act allows only preliminary expenses to be amortized u/s 35D and disallowed the depreciation claim on pre-operative expenses claimed at 15% at Rs 1,05,166/- is disallowed. The assessee submitted that it has been claimed as per Audit Report and pleaded that the AO without re-examination has disallowed them.

20. We heard the rival contentions. Since, the assessee has not pressed the disallowance made u/s. 14A r.w.r. 8D, the corresponding ground is dismissed. We deem it fit to set aside the above issues to the AO for a fresh examination. The AO after giving adequate opportunity to the assessee

decide them, a fresh, in accordance with law. The assessee's CO is treated as partly allowed for statistical purposes.

21. In the result, the assessee's appeals in ITA Nos 1965, 1966 & 1967 are treated as allowed for statistical purposes & ITA No. 2096/2017 is dismissed and the Revenue appeals in ITA Nos. 1297/2016 is treated as allowed for statistical purposes & 1130/2016 is dismissed. The assessee's cross appeal in ITA No. 1968/2016 is allowed and the CO Nos. 84 & 85/2016 are treated as allowed for statistical purposes.

Order pronounced on Thursday, the 30th day of November, 2017 at Chennai.

Sd/-	**Sd/-**
(एन.आर.एस .गणेशन)	**(एसजयरामन)**
(N.R.S. GANESAN)	**(S. JAYARAMAN)**
न्यायिकसदस्य/Judicial Member	**लेखासदस्य/Accountant Member**

चेन्नई/Chennai,
दिनांक/Dated: 30th November, 2017
JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकरआयुक्त) अपील(/CIT(A)
4. आयकरआयुक्त/CIT 5. विभागीयप्रतिनिधि/DR 6. गार्डफाईल/GF