

आयकर अपीलीय अधिकरण] पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE MS. SUSHMA CHOWLA, JM AND
SHRI ANIL CHATURVEDI, AM

आयकर अपील स० / ITA No.624/PUN/2004
निर्धारण वर्ष / Assessment Year : 1996-97

The Dy.Commissioner of Income Tax,
Circle 1(1), Pune.

..... अपीलार्थी /
Appellant

बनाम v/s

M/s. Global Infrastructure & Technologies
Ltd., 929, Mantri House,
F.C. Road, Pune.

..... प्रत्यर्थी /
Respondent

PAN : AAACM8350N.

आयकर अपील स० / ITA No.722/PUN/2004
निर्धारण वर्ष / Assessment Year : 1996-97

M/s. Global Infrastructure & Technologies
Ltd., 929, Mantri House,
F.C. Road, Pune

..... अपीलार्थी /
Appellant

बनाम v/s

The Dy.Commissioner of Income Tax,
Circle 1(1), Pune.

..... प्रत्यर्थी /
Respondent

आयकर अपील स० / ITA No.351/PUN/2007
निर्धारण वर्ष / Assessment Year : 1996-97

The Dy.Commissioner of Income Tax,
Circle 1(1), Pune.

..... अपीलार्थी /
Appellant

बनाम v/s

M/s. Global Infrastructure & Technologies
Ltd., S.No.137/4, Plot No.47, Kothrud
Paud, Pune – 411029.

..... प्रत्यर्थी /
Respondent

PAN : AAACM8350N.

आयकर अपील स / ITA No.1027/PUN/2004**निर्धारण वर्ष / Assessment Year : 1998-99**The Dy.Commissioner of Income Tax,
Circle 1(1), Pune...... अपीलार्थी /
Appellant**बनाम v/s**Mantri Housing & Constructions Ltd.,
Pune (formerly known as Global
Infrastructure & Technologies Ltd.) 929,
Mantri House, F.C. Road, Pune – 4...... प्रत्यर्थी /
Respondent

PAN : AAACM8350N.

Assessee by : None

Revenue by : Mrs. Nirupama Kotru.

सुनवाई की तारीख / Date of Hearing : 27.12.2017	घोषणा की तारीख / Date of Pronouncement: 28.02.2018
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आदेश / ORDER**PER ANIL CHATURVEDI, AM :**

1. The cross-appeals in quantum proceedings filed by assessee and Revenue for A.Y. 1996-97 emanates out of order of Commissioner of Income-Tax (A) – 1, Pune dt.16.01.2004. Revenue is in appeal for A.Y. 1996-97 against the deletion of penalty u/s 271(1)(c) by Ld.CIT(A) vide order dt.22.12.2006. Revenue is also in appeal for A.Y. 1998-99 in quantum proceedings against the order of Ld.CIT(A) dt.30.03.2004. Since the aforesaid appeals pertain to same assessee, all appeals are considered together. The relevant facts as culled out from the material on record are as under :-

Assessee is a company (formerly known as Mantri Housing & Construction Limited) stated to be engaged in the business of construction and leasing activity. Assessee filed its return of income for A.Y. 1996-97 on 30.11.1996 declaring loss of Rs.1,10,87,540/-. Subsequently, a revised return was filed on 31.07.1997 revising the loss at Rs.1,10,23,022/-. Thereafter, assessment was framed u/s 143(3) of the Act vide order dt.16.02.1999 and the total taxable income was determined at Rs.6,98,88,900/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dt.03.01.2000 allowed certain grounds, rejected some grounds and with respect to certain grounds set aside the assessment order and directed the AO to re-decide the matter. Pursuant to the directions of Ld.CIT(A), order was passed u/s 143(3) r.w.s. 250 of the Act vide order dt.27.03.2002 and the total revised income was determined at Rs.6,89,50,462/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A) in 2nd round, who vide order dt.16.01.2004 (in appeal No.PN/CIT(A)-I/DCIT Cir.1(1)/138/2002-03) granted partial relief to the assessee. Aggrieved by the order of Ld.CIT(A), assessee and Revenue are now in appeal before us.

2. The grounds raised by the assessee in ITA No.722/PUN/2004 reads as under :

“1. The learned CIT(A) erred in holding that the appellant was not entitled to depreciation on the pollution control equipments amounting to Rs.5,88,13,905/- which have been purchased from and leased to AP State Electricity Board.

2. The learned CIT(A) failed to appreciate that the appellant was not given the report of DDIT (Inv.) Hyderabad which has been used against the appellant by the A.O. and therefore, as the appellant has not been given an opportunity to make the submission thereon or cross examine DDI (Inv.), the same report cannot be used against the appellant.

3. The learned CIT(A) erred in following the decision of ITAT Spl. Bench Mumbai in the case of Mid East Port Folio Management Ltd. for disallowing the claim of depreciation of Rs.5,88,13,905/-.

4. The learned CIT(A) erred in confirming the disallowance of depreciation of Rs. 1,75,59,550/- on Cinematographic Films just because in the asst. year 1995-96, the appellant had not pressed the claim before the CIT(A).

4A. The learned CIT(A) erred in not deciding the above issue on merits and therefore, his decision of disallowance of depreciation on the ground that in the year the appellant had not pressed the claim, is not justified.

5. The learned CIT(A) erred in confirming the disallowance of professional fee of Rs.17,64,417/- paid by the appellant to M/s. Securex Financial Services Ltd. for arranging the lease transaction with AP State Electricity Board.”

3. On the other hand, the grounds raised by the Revenue in ITA No.624/PUN/2004 reads as under :

“1. On the facts and in the circumstances of the case and in law the CIT(A) erred in deleting the income of Rs.7,91,64,864/- credited by the assessee in the original return of income on account of projects namely Mantri Commerce (Rs.2,06,85,638), Mantri Pride (Rs.2,37,50,433) and Mantri East (Rs.3,47,26,793), and he has failed to appreciate that claim of the deduction of Rs.7,91,64,864/-, was made by the assessee by filing a third return on 16.02.99, the date on which assessment u/s. 143(3) was already completed.

2. On the facts and in the circumstances of the case and in law the CIT(A) erred in concluding that no real income accrued to the assessee. He has failed to appreciate that the assessee in following the mercantile system of accounting and the income accrued as per the joint venture agreement and rightly shown by the assessee in P & L Account, he has further failed to appreciate that the assessee cannot go back to earlier assessment year, to reverse the entries, if the agreement were cancelled after 2-3 years. The accrual of income in earlier years cannot be allowed to be foregone by relying on principle of real income.

3. On the facts and in the circumstances of the case and in law the CIT(A) has failed to appreciate that similar claim was made by the assessee in A.Y. 1995-96 which was rejected by the A.O. in the order u/s.143(3) r.w.s 148 and CIT(A) on merits, confirmed the

decision taken by the A.O. The CIT(A) has failed to appreciate the decision of his predecessor, taken on merits, for A.Y. 1995-96.

4. On the facts and in the circumstances of the case and in law the CIT(A) has erred in relying on the following decision which are factually distinguishable,

<i>i) Dhun Kapadia</i>	<i>63 ITR 651(SC)</i>
<i>ii) State Bank of Travancore</i>	<i>158 ITR 102(SC)</i>
<i>iii) Birla Gawlior Pvt. Ltd.</i>	<i>89 ITR 266 (SC)</i>
<i>iv) Shoorji Vallabhadas & Co.</i>	<i>46 ITR 144(SC)</i>

All these decisions were distinguishable by the CIT(A) in A.Y. 95-96 and not applicable to the facts of case of the assessee. He has erred in not appreciating the principle laid down by the Supreme Court in the case of Shiv Prakash Janak Raj & Co. reported in 222 ITR 583.

5. The order of the CIT(A), may be vacated and the order of A.O. be restored.”

4. On the disallowances that were made by the AO in the 2nd round for A.Y. 1996-97 vide order dt.27.03.2002, AO vide penalty order dt.31.03.2005 levied penalty of Rs.7,25,34,996/- u/s 271(1)(c) of the Act. Aggrieved by the penalty order, assessee carried the matter before Ld.CIT(A), who vide order dt.22.12.2006 (in appeal No.PN/CIT(A)-I/DC. Cir.1(1), Pn/43/05-06) granted partial relief to the assessee. Aggrieved by the relief granted by Ld.CIT(A), Revenue is now in appeal before us in appeal No.351/PUN/2007 and has raised the following grounds :

“1. The CIT(A) erred in deleting the penalty to the tune of Rs.3,64,15,837/- u/s 271(1)(c) of the I.T. Act, 1961.

2. The order of the CIT(A) be vacated and that of the Assessing Officer be restored.”

5. As far as A.Y. 1998-99 is concerned, assessee filed its return of income for A.Y. 1998-99 on 30.11.1998 declaring loss of Rs.5,57,39,245/- and profit under MAT at Rs.25,19,445/-. The case was selected for scrutiny and thereafter by the order passed by

AO u/s 143(3) dated 16.01.2001, the total loss was determined at Rs.4,33,02,051/- and profit under MAT at Rs.25,19,445/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dt.30.03.2004 (in appeal No.PN/CIT(A)-I/Jt.CIT SR-2/895/2001-02) granted partial relief to the assessee. Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us in ITA No.1027/PUN/2004 and has raised the following grounds :

“1. On the facts and in the circumstances of the case, the CIT(A) erred in directing the A.O. to allow bond and debenture issue expenses of Rs. 63.83 Lakhs, treating the same as revenue expenditure.

2. On the facts and in the circumstances of the case, the CIT(A) erred in not following his predecessors decision on similar issue in earlier year i.e. A.Y. 97-98 of allowing 1/5th of bond issue expenses every year considering the expenditure to be deferred revenue expenses in light of decision of Hon’ble Supreme Court in the case of Madras Industrial Investment Corpn Ltd. 225 ITR 802.

3. On the facts and in the circumstances of the case, the CIT(A) erred in allowing preliminary expenses of Rs.1,78,432/- u/s. 35D of the Income Tax Act,1961.

4. On the facts and in the circumstances of the case, the CIT(A) erred in not following the decision of his predecessor on the same issue for A.Y.97-98 wherein the deduction u/s. 35D of the income Tax Act, 1961 was denied to the assessee, as the assessee could not prove the case of expansion of business.

5. The order of the CIT(A) be vacated and that of the A.O. be restored.”

6. The case file reveals that these are old matters and they are continuously getting adjourned since 2013. The case file further reveals that by order passed by Hon’ble Bombay High Court dt.15.12.2014 (in company petition 124 of 2014), the assessee company was ordered to be wound up and the official liquidator

was appointed. The file further reveals that the earlier counsel Shri M.K. Kulkarni, vide letter dt.13.01.2016, has informed that since the Official Liquidator has been appointed to take charge of books, assets and business of the company and to exercise all necessary powers under the Companies Act, 1956 and in the absence of authorization by the Liquidator in his favour, he has withdrawn his Power of Attorney. The file further reveals that no representative has been thereafter appointed by the Liquidator. The case file further reveals that the assessee company is under liquidation and that last notice for hearing of the appeal was served on the Official Liquidator on 22.07.2017 but none has been appeared on its behalf. In view of the aforesaid facts and since the matters being old, we proceed to dispose of the appeals, ex-parte qua the assessee, on the basis of material on record and after hearing the Ld.D.R.

7. We first take up assessee's appeal in ITA No.722/PUN/2004 for A.Y. 1996-97.

7.1 Grounds 1 to 3 are inter-connected and are considered together.

7.2 On 06.09.1995 an equipment described as "Water Pollution Control Equipment" was purchased by the assessee from Andhra Pradesh State Electricity Board (APSEB) at a total cost of Rs.5,88,13,905/-. The said equipment was leased back to APSEB under lease agreement dt.06.09.1995. According to the AO, the

lease agreement was a colourable device and a collusive transaction. He further held that the equipment was not a pollution control equipment but merely a water treatment plant. The assessee had claimed 100% depreciation on the said equipment. The claim of depreciation was disallowed by the AO for the reason that the assessee was attempting to avoid tax and there was no real transfer of the equipment and therefore the lessee was the real owner. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who remanded the issue back to the AO. In the second round, the AO while disallowing the claim of depreciation has noted that assessee did not file any statement to demonstrate as to how the depreciation was allowable. According to AO, for claiming depreciation u/s 32 of the Act, the onus is on the assessee to establish that the assets were in existence, assessee was the owner of the assets and the cost of acquisition was proved and the fact that the assets were being used in the business of the assessee. AO noticed that assessee has not filed any evidence to support the existence of asset being used for business and thus the assessee failed to prove the compliance of conditions u/s 32 of the Act. He accordingly once again disallowed the claim of depreciation of Rs.5,88,13,905/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who upheld the order of AO by observing as under :

“6.2 I have considered the submission of the appellant. At this stage, it has to be pointed out that the appellant is not only fully aware of the report of the DDIT (Inv.), Hyderabad but there is also the decision of the Hon'ble ITAT, Special Bench-C, Mumbai in the case of M/s. Mid East Port Folio Management Ltd. Vs. DCIT, SR-28, Mumbai in ITA No.5616/MUM/1999 dated 14-02-2003, wherein the

facts of the case are exactly similar. Even the valuer in that case is also M/s. Choudhary & Co. The nature of alleged equipments leased out is also the same. The relevant portion of the decision of Hon'ble ITAT, Special Bench-C, Mumbai is given as Annexure to this appellate order; Following the same, there is no case in favour of the appellant and the addition made by the A.O. is directed to be sustained. Grounds No.7, 8, 9, 10, 11, 12 & 13 are decided against the appellant."

Aggrieved by the order of Ld.CIT(A), assessee is now in appeal before us.

8. Before us, Ld.D.R. took us through the order of lower authorities and supported the order of Ld.CIT(A). She further submitted that assessee has failed to prove the existence of asset and that assessee was owner of the assets even in the 2nd round. She therefore submitted that the depreciation was rightly disallowed.

9. We have heard the Ld.D.R. and perused the material on record. The issue in the present ground is with respect to the claim of depreciation. We find that Ld.CIT(A) after relying on the decision of Special Bench of the Tribunal in the case of Mid East Portfolio Management Ltd. Vs DCIT in ITA No.5616/Mum/1999 dt. 14.02.2003 has noted that the facts of the present case are similar to that of Mid East Portfolio Management (supra), the nature of equipment leased out is also the same. He accordingly, following the decision of Special Bench of Tribunal in the case of Mid East Portfolio (supra), upheld the order of AO. We find that in the case of Mid East Portfolio Management (supra), the Special Bench of the Tribunal after considering the details has given a finding that the intention of the parties from the very inception was not to sell /

purchase the equipments in real and true sense but was only to prepare documentation to show that the assets were actually sold / purchased and then leased back. Before us, no material has been placed on record by assessee to point out any distinguishing feature in the facts of the present case and that of Mid East Portfolio Management (supra). In such a situation, we do not find any reason to interfere with the order of Ld.CIT(A). **Thus, the grounds of the assessee are dismissed.**

10. Ground Nos.4 and 4A are inter-connected and are with respect to disallowance of depreciation of Rs.1,75,59,550/- on Cinematographic Films.

11. During the previous year relevant to A.Y. 1995-96, assessee had purchased Cinematographic Films from M/s. Sujatha Productions Pvt. Ltd., at a cost of Rs.3,51,19,100/- and it was leased out to M/s. G.V. Films. The assessee had claimed 50% depreciation in A.Y. 1995-96. For A.Y. 1996-97 assessee has claimed balance depreciation of 50% amounting to Rs.1,75,59,550/-. The AO in the first round disallowed the claim of depreciation for the reason that according to AO, the entire transaction of lease of films was a paper transaction entered with the sole purpose of avoiding tax. AO also observed that M/s. G.V. Films and M/s. Sujatha Productions Pvt. Ltd., in order to claim higher depreciation, had entered into circular trading and overinvoicing pattern. AO therefore disallowed the claim of depreciation. Aggrieved by the order of AO, assessee carried the

matter before Ld.CIT(A), who in the first round set aside the issue back to the AO. In the second round, AO has noted that assessee was asked to make submissions to demonstrate the fulfillment of conditions stipulated u/s 32 of the Act for claiming depreciation. AO noted that no submissions were made by the assessee and assessee had failed to discharge its primary onus to establish that the claim of depreciation was allowable u/s 32 of the Act. He accordingly in the 2nd round once again denied the claim of depreciation. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who in the second round upheld the order of AO by observing as under :

“7.2 I have considered the submission of the appellant. However, it is seen that during the appellate proceedings for A.Y. 1995-96, on the same issue that is the claim of M/s. G.V. Films, the appellant had not pressed the claim before the CIT(A)-I, Pune. Even this year, the position being similar and these grounds are required to be decided against the appellant.”

Aggrieved by the order of Ld.CIT(A), assessee is now in appeal before us.

12. Before us, Ld.D.R. supported the order of Ld.CIT(A) and submitted that the claim of depreciation was disallowed by AO as it was a sham transaction. She further submitted that during the year A.Y. 1995-96, the assessee did not press the claim for depreciation before Ld.CIT(A) and Ld.CIT(A) has noted that the facts of the case for the year under consideration are similar to that of A.Y. 1995-96. She thus supported the order of Ld.CIT(A).

13. We have heard the Ld.D.R and perused the material on record. The issue in the present ground is with respect to the claim of depreciation on Cinematographic Films. We find that AO while disallowing the claim of depreciation has noted that assessee has not placed any material to demonstrate the fulfillment of required conditions u/s 32 of the Act for claiming depreciation. AO noted that no submissions were made by the assessee and assessee has failed to discharge its primary onus to establish that the claim was allowable u/s 32 of the Act. No material has been placed on record by the assessee to controvert the findings of AO and Ld.CIT(A). In such a situation, we find no reason to interfere with the order of Ld.CIT(A) and **thus, the grounds of the assessee are dismissed.**

14. Ground No.5 is with respect to disallowance of Professional Fee of Rs.17,64,417/- paid to M/s. Securex Financial Services Ltd.

14.1 AO has noted that Professional Fee of Rs.17,64,417/- was paid by assessee to M/s. Securex Financial Services Ltd., for arranging the lease transactions between the assessee and APSEB for water pollution control equipment. AO disallowed the claim of professional fee for the reason that the transaction with APSEB was found to be bogus. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who restored the issue back to the file of AO. In the second round, AO has noted that assessee did not file any details to support the genuineness of the transactions and further the claim of depreciation on water pollution control equipment was also disallowed by him by holding that the

transaction to be a sham transaction. Accordingly, the claim for professional fee was also disallowed in 2nd round by AO. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A) in 2nd round. Ld.CIT(A) upheld the order of AO. Aggrieved by the order of Ld.CIT(A), assessee is now in appeal before us.

15. Before us Ld.D.R. submitted that that since the transaction of purchasing of water pollution control equipment from APSEB is held to be a sham transaction, the allowability of expenses on account of professional fee on such sham transaction does not arise. She thus supported the order of AO.

16. We have heard the Ld.D.R and perused the material on record. The issue in the present ground is with respect to disallowance of professional fees. The professional fees is stated to have been paid for arranging the lease transaction between the assessee and APSEB for water pollution control equipment. Since the transaction of lease between assessee and APSEB for water pollution control equipment is held to be not genuine, the question of allowance of professional fees does not arise. Before us, no material has been placed by assessee to controvert the findings of AO and Ld.CIT(A). We therefore find no reason to interfere with the order of Ld.CIT(A) and **thus the ground of the assessee is dismissed.**

17. **In the result, the appeal of the assessee in ITA No.722/PUN/2004 for A.Y. 1996-97 is dismissed.**

18. Now we take up appeal of Revenue's appeal in ITA No.624/PUN/2004 for A.Y. 1996-97.

19. Before us, at the outset, Ld.D.R. submitted that though Revenue has raised various grounds but all the grounds are interconnected and that the first ground is the only effective ground.

19.1 Assessee is stated to be in the business of construction and leasing activity. It was assessee's submission that for carrying on the business of construction of housing projects it acquires land and rights to develop the land and the projects are often carried out either in partnership or in Joint Venture basis with outside parties. For the purpose of the development, rights in the plot of the land which are owned by the assessee are transferred to the joint venture / partnership firm at an agreed price. The profits arising on account of transfer of rights (being the difference of the cost to the assessee of such rights and the value at which it is transferred) is then transferred to the partnership firm. It is the claim of the assessee that though the profits arising on account of transfer of rights was offered for taxation in the return of income, the same is not taxable under the Act. Assessee made a claim of deduction of such notional gain on account of un-realised profit in respect of its Projects namely, Mantri Commerce, Mantri Pride and Mantri East. With respect to Mantri Commerce, it was submitted that the project was abandoned at the initial stage itself and the agreement was put to an end and since the project never started,

there could not be any income. Similar facts were stated with respect to Mantri Pride which has got delayed by more than 3 ½ years. Accordingly, assessee claimed deduction of unrealized profit of the 3 projects as under :-

Mantri Commerce Project	Rs.2,06,85,638/-
Mantri Pride Project	Rs.2,37,50,443/-
Mantri East Project	<u>Rs.3,47,28,793/-</u>
Total :	<u>Rs.7,91,64,864/-</u>

20. AO noted that no claim for deduction was made by the assessee in the original return as well as the revised return. The assessee made the claim for deduction for the first time in the second revised return filed on 16.02.1999 i.e., on the date on which the assessment order was passed. The second revised return filed by the assessee was invalid since it was beyond the time prescribed u/s 139(4) of the Act. AO thus denied the claim for deduction of unrealized gains. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who set aside the issue back to the file of AO and directed the AO to consider the submissions made by the assessee vide letter accompanying the revised return. AO in the 2nd round noted that the assessee's main plea was that similar claim was allowed in A.Y. 1995-96. The plea of the assessee was not found acceptable to AO in the 2nd round because he noted that the claim was disallowed in A.Y. 1995-96 in the order passed u/s 143(3) r.w.s. 147 of the Act vide order dt.26.12.2000 and the action of the AO was confirmed by Ld.CIT(A) vide order dt.08.11.2001. He

accordingly, following the decision of his Predecessor for A.Y. 1995-96, disallowed the claim of unrealized profit of Rs.7,91,64,864/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who granted partial relief to the assessee by holding as under :-

“5.2 I have considered the submission of the appellant. First of all, it would be relevant to look at the nature of set-aside proceedings and the directions given by the CIT(A)-V, Mumbai in his order dated 03.02.2000 setting aside the original assessment. In para-18 and 19 of the said order, my learned predecessor has held as under :-

“I have carefully gone through the submissions, facts of the matter, relevant papers and the assessment order in this regard. It is true that in the immediately preceding Assessing Year, the appellant had staked an identical claim which was duly allowed by the Department after a rather detailed discussion. There are no significant difference in regard to the facts of A.Y.1995-96, and that of A.Y. 1996-97, i.e. the year under appeal. The assessee has certain rights for development of land which have been transferred to a Joint Venture or, partnership firm at a higher price and the issue is whether such excess price can be taxed under the Act, or not. Strictly speaking , as stated by the A.O himself, in his order for A.Y.1995-96, the issue is fully covered in favour of the assessee by the decision of Supreme Court in the case of Sunil Siddarthbhai, cited supra. Further, the authorized representative has raised an argument to the effect that no real income has been generated out of the above transaction. On this count, it is seen that the decision of the Supreme Court in the case of Godhra Electricity Co. cited supra, fully, supports the stand taken by the assessee. In that case, the Apex Court was considering the actual income concept and the principles of real income. The Electricity Undertaking had enhanced its rates and such enhanced rates were shown as receipts in accounts , but in actual effect, the amount unrealized was accounted for, and could not be realised due to litigation and due to subsequent takeover by the Government. The Honourable Supreme Court pronounced that the amount due on such enhancement had not accrued and was not assessable.

In the instant case, the following amounts of unrealized profit could not have been included in the total assessed income. The amount of Rs.2,06,85,638/- in respect of the entire profit of Project “ Mantri Commerce”, Rs.2,37,50,433/- in respect of 50% of the profit in respect of project “ Mantri Pride”, and Rs. 3,47,28,793/- in respect of the entire profit of project “ Mantri East”.

5.2.1 After recording such a finding in the appellate order, in para 20, my learned predecessor sent the issue back to the file of A.O. to

look into all aspects of the matter and not to penalize the assessee merely because a claim was made late. There was a specific direction of the CIT(A) in the last two line of the aforesaid order quoted as under :-

“While deciding the above issue, the A.O. shall also keep in mind, my various observations contained hereinabove. This ground is decided accordingly.”

5.2.2. *In the light of such clear cut directions, I fail to understand as to why the A.O. took it upon himself the task not assigned to him in the set-aside order, as per merger of principle, the appellate order of the CIT(A) had merged with the assessment proceedings and as such without bringing out any further facts on record, the A.O. has merely referred to the appellate proceedings for A.Y. 1995-96 on a similar issue and decided this issue against the appellant. I do not think this is legally permissible. However, looking at the gravity of the matter, I have also gone through the appellate order for A.Y. 1995-96 against order u/s 143(3) / 147 as well as the submissions of the appellant. While the stand of the CIT(A)-I, Pune in the aforesaid appellate order, where the proceedings before him were proceedings u/s 147, cannot be faulted with as the appellant was not entitled to raise such issues in the proceedings u/s 147 which has the effect of reducing the total income, as the very nature of the proceedings u/s 147 are for the purposes of assessing income escaping assessment. The same stand cannot be simply borrowed in the proceedings for A.Y. 1996-97 as there is no re-assessment in this case and all the details were available during the original assessment proceedings / set-aside proceedings.*

5.2.3 *Having said this, I have also gone through the concept of real income as enunciated by the Hon'ble Supreme Court in a series of decisions commencing from Miss Dhun Dadabhoy Kapadia v. CIT, 63 ITR 651 (SC). In fact, the concept of real income came for critical analysis in the State Bank of Travancore v. CIT (1986) 158 ITR 102 (SC) where the issue related to the deductibility or otherwise of a provision by way of interest suspense account, majority decisions holding that the concept of real income does not extend to a situation, where such provision is made on an ad hoc basis. The Supreme Court in the judgment of Sabyasachi Mukharji J in the leading judgment had laid down the following propositions as to what constitutes real income in the following words in/State Bank of Travancore v. CIT (1986) 158 ITR 102 at page 155:*

“(1) It is the income which has really accrued or arisen to the assessee that is taxable. Whether the income has, really accrued or arisen to the assessee must be judged in the light of the reality of the situation.

(2) The concept of real income would apply where there has been a surrender of income which in theory may have accrued but in the reality of the situation, no income had resulted because the income did not really accrue.

(3) Where a debt has become bad, deduction in compliance with the provisions of the Act should be claimed and allowed.

(4) *Where the Act applies, the concept of real income should not be so read as to defeat the provisions of the Act.*

(5) *If there is any diversion of income at source under any statute or by overriding title, then there is no income to the assessee.*

(6) *The conduct of the parties in treating the income in a particular manner is material evidence of the fact whether income has accrued or not.*

(7) *Mere improbability of recovery, where the conduct of the assessee is unequivocal, cannot be treated as evidence of the fact that income has not resulted or accrued to the assessee. After debiting the debtor's account and not reversing that entry - but taking the interest merely in suspense account cannot be such evidence to show that no real income has accrued to the assessee or been treated as such by the assessee.*

(8) *The concept of real income is certainly applicable in judging whether there has been income or not but, in every case, it must be applied with care and within well-recognised limits."*

It was, however, conceded that application of the above principles in a particular case is not easy.

5.2.4 *In the case of CIT Vs. Birla Gwalior Pvt. Ltd., 89 ITR 266 (SC), where such waiver of a managing agency commission made even after the financial year but before the accounts were made up by the managing company was found to be not taxable on application of the theory of real income. But it was because there was no stipulated date for the payment. It was found that under the circumstances the principle laid down in CIT v. Shoorji Vallabhdas & Co. (1962) 46 ITR 144 (SC), would have no application in the following words:*

"The principle of real income is not to be so subordinated as to amount virtually to a negation of it when a surrender or concession or rebate in respect of managing agency commission is made, agreed to or given on grounds of commercial expediency, simply because it takes place some time after the close of an accounting year. In examining any transaction and situation of this nature the court would have more regard to the reality and speciality of the situation rather than the purely theoretical or doctrinaire aspect of it. It will lay greater emphasis on the business aspect of the matter viewed as a whole when that can be done without disregarding statutory language."

The Supreme Court in Shiv Prakash Janak Raj's case (supra) found that in Biral Gwalior Pvt Ltd.'s case (1973) 89 ITR 266, various grounds like commercial expediency indicating not only reality but the speciality of the situation was considered, when the waiver after the end of the financial year was found acceptable. The Supreme Court in the light of the three leading decisions on the subject CIT v. Shoorji Vallabhdas & Co.'s case, (1962) 46 ITR 144, Morvi Industries Ltd.'s case (1971) 82 ITR 835 (SC) and CIT v. Birla Gwalior Pvt. Ltd. (1973) 89 ITR 266 found that the hypothetical income, even if

credited as income in the books may not be taxable in view of the theory of real income.

5.2.5 In the case of the appellant as is apparent, from the very nature of the transactions, no real income has accrued on the account of merely transferring the stock-in-trade at an inflated value to Joint Venture etc. As such, I have to concur with my learned predecessor CIT(A)-V, Mumbai as for his decision in the appellate order dated 03-02-2000 and as such the addition made by the AO on this account is directed to be deleted.”

Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us.

21. Before us, Ld.D.R. submitted that in the original return of income that was filed by the assessee on 30.11.1996, no claim of deduction of unrealised gains was made by the assessee. Even in the first revised return filed on 31.07.1997, the assessee did not make any claim for the deduction of unrealized gains. Thereafter, in the second revised return filed on 16.02.1999, assessee for the 1st time made a claim for deduction of unrealized gains. She submitted that the 2nd revised return who filed on 16.02.1999 being the date on which the assessment order for A.Y. 1996-97 was passed by the AO. She submitted that since the revised return of income filed by the assessee was a non-est return, the claim of the assessee cannot be considered. She further submitted that while deciding the issue in A.Y. 1995-96 that the Co-ordinate Bench of the Tribunal has held that once the issue has reached finality in the original assessment, the assessee cannot reagitate the issue. She further submitted that on the merits, the assessee did not press the claim in A.Y. 1995-96. She therefore submitted that Ld.CIT(A) has erred in directing the AO to allow the claim of unrealized gains. She thus supported the order of AO.

22. We have heard the Ld.D.R and perused the material on record. The issue in the present ground is with respect to the claim of deduction of the unrealized gains aggregating to Rs.7,91,64,864/- made by the assessee for the first time in the second revised return. It is an undisputed fact that assessee filed its original return of income for A.Y. 1996-97 on 30.06.1996 declaring loss of Rs.1,10,87,540/-. Thereafter assessee revised the return of income on 31.07.1997 wherein the loss was revised to Rs.1,10,23,022/-. In both these returns of income filed, assessee did not make the claim of the deduction of the unrealized profits. Assessee thereafter filed a 2nd return of income on 16.02.1999 wherein the claim of the unrealized profits was made for the first time. Here it would be relevant to note that the 2nd revised return was filed on 16.02.1999, being the same date on which AO passed order u/s 143(3) of the Act. AO has noted that 2nd revised return filed by the assessee on 16.02.1999 was an invalid return as it was filed beyond the time prescribed u/s 139(4) of the Act. It is an undisputed fact that u/s 139(5) of the Act, a revised return of income can be filed when a person discovers any omission or any wrong statement therein. Thus the prerequisite condition for revising a return of income u/s 139(5) of the Act is discovery of omission or any wrong statement in the return of income furnished in pursuance of a notice u/s 139(1) of the Act or in pursuance of notice under sub-section (1) of Sec.142 of the Act. We find that Hon'ble Allahabad High Court in the case of Amjad Ali Nazar Ali Vs. CIT (1977) 110 ITR 419 has observed that the use of the word "discovers" in Sec.139(5) cannotes discovery of some omission or

wrong statement in the return, of which the assessee was not aware at the time of filing of the original return of income. It further observed that it cannot covers a case where the omission or wrong statement contained in the first return was deliberate. In cases where an assessee has deliberately omitted particulars of his income or made wrong statement in the return of income, the revised return filed by him would be outside the pale of Sec.139(5) of the Act and it would not be a revised return as contemplated by the Act. Before us, no material has been placed by the assessee to demonstrate that assessee was not aware about not claiming the deduction of unrealized gain in the original return of income or while filing the return of income in the 1st revised return of income and that he became aware about it only at the time of filing of 2nd revised return of income. Further, the finding of AO that the return filed by the assessee was an invalid return has not been controverted by assessee. Considering the totality of aforesaid facts and in the light of the aforesaid decision of Hon'ble Allahabad High Court in the case of Amjad Ali Nazir Ali (supra), we are of the view that Ld.CIT(A) was not justified in directing the AO to grant deduction of unrealized profit. We thus set aside the order of Ld.CIT(A) and uphold the order of AO. **Thus the ground of Revenue is allowed.**

23. **In the result, the appeal of Revenue is allowed.**

24. Now we take up Revenue's appeal in ITA No.1027/PUN/2004 for A.Y. 1998-99.

25. Ground Nos. 1 and 2 are inter connected and are with respect to allowing the issue of expenditure of Rs.63.83 lakhs on account of bond and debenture issue expenses.

26. AO noted that assessee has claimed expenditure of Rs.63,83,664/- on account of issue of claim of secured redeemable non convertible bonds. He noted that similar issue arose in A.Y. 1997-98. He was of the view that the expenses were incurred for raising additional source of finance and therefore the expenses was of capital in nature and therefore relying on the decision of the Hon'ble Apex Court in Brooke Bond (India) Ltd., reported in 225 ITR 798 (SC) denied the claim of expenses. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A) who decided the issue in favour of assessee by observing as under :

“ As such, after considering the submission of the appellant and the facts of the case, the claim of the appellant is allowable in principle as the decision of the Hon'ble Supreme Court in the case of Brooke Bond (India) Ltd. is with regard to the Share issue expenses and not Bond issue expenses. The appellant has also submitted the details of the payments for various projects which have been funded through the receipts of the bonds. Considering the facts of the case and the submission of the appellant, the issue is decided in favour of the appellant. Ground No. 7 is decided in favour of the appellant.”

Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us.

27. Before us, Ld.D.R. supported the order of AO. She further submitted that on identical facts in A.Y. 1997-98, the Ld.CIT(A), by

relying on the decision of Apex Court in the case of Madras Industrial Investment Corporation reported in 225 ITR 802 has held that bond issue expenses have to be treated as deferred revenue expenses and only 1/5th of expenses be allowed. She submitted that Ld.CIT(A) erred in not following the decision of his Predecessor for A.Y. 1997-98. She thus supported the order of AO.

28. We have heard the Ld.D.R and perused the material on record. The issue in the present ground is with respect to allowability of claim of bond and debenture issue expenses. AO had disallowed the claim of bond and debenture issue expenses as he was of the view that the expenses were of capital in nature and in support of his view, he placed reliance on the decision in the case of Brooke Bond (India) Ltd., (supra). We find that Ld.CIT(A) while allowing the claim of bond and debenture issue expenses has held that the decision in the case of Brooke Bond (supra) was with respect to share issue expenses and not with bond issue expenses and therefore not applicable to the facts in the case of assessee. Before us Ld.D.R. has placed reliance on the decision of Supreme Court in the case of Madras Industrial Investment Corporation Ltd., Vs. CIT reported in 225 ITR 802 (SC). We find that facts in the case of Madras Industrial Investment (supra) are different and are not applicable to the facts of the case for the year under consideration. In the case of Madras Industrial Investment (supra) the issue was with respect to the claim of deduction of discount of debentures issued by the assessee. On the other hand, we find that the Hon'ble Rajasthan High Court recently in the case of CIT Vs.

Modern Threads (2018) 400 ITR 381, has held the expenditure on issue of debentures is deductible, irrespective the nature of debentures. Similar view has also been taken by Hon'ble Gujarat High Court in the case of CIT Vs. Office of Official Liquidator (2009) 316 ITR 181 (Guj). In view of the aforesaid facts, we find no reason to interfere with the order of Ld.CIT(A) and **thus, the grounds of Revenue are dismissed.**

29. Ground Nos.3 and 4 are inter-connected and are with respect to allowability of preliminary expenses of Rs.1,78,432/- u/s 35D of the Act.

30. AO noted that assessee had claimed preliminary expenses of Rs.1,78,432/- u/s 35(D) of the Act. He noted that similar issue arose in A.Y. 1997-98 and the expenditure was disallowed by the AO and the matter was contested in appeal. He therefore following the order of his Predecessor, disallowed the claim of the assessee. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who granted partial relief to the assessee by holding as under :

“4. Ground No. 5 taken by the appellant is against disallowance of preliminary expenses of Rs.1,78,432/- u/s. 35D of the I.T Act, 1961. The A.O. has decided this issue against the appellant on the basis of past records. The submission of the appellant dated 16.07.2003 reveals that this is the sixth year of deduction claimed by the appellant for preliminary expenses on the equity issue raised in A.Y.1993-94. As such, in such a situation, the decision taken by the A.O. cannot be upheld. Ground No. 5 is decided in favour of the appellant.”

Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us.

31. Before us, Ld.D.R. supported the order of AO.

32. We have heard the Ld.D.R. and perused the material on record. We find that Ld.CIT(A) while deciding the issue has given a finding that the equity issue was raised in A.Y. 1993-94 and this was the 6th year of deduction claimed by the assessee and therefore the disallowance cannot be upheld. Before us, Revenue has not placed any material on record to point out any fallacy in the findings of Ld.CIT(A) **and thus, the grounds of Revenue are dismissed.**

33. In the result, the appeal of the Revenue in ITA No.1027/PUN/2004 is dismissed.

34. Now we take up Revenue's appeal in ITA No.351/PUN/2007 for A.Y. 1996-97.

35. Assessee had filed return of income for A.Y. 1996-97 on 30.11.1996 declaring loss of Rs. 1,10,87,540/-. Subsequently, assessee filed revised return on 31.07.1997 revising the loss at Rs. 1,10,23,022/-. Thereafter, assessment was framed u/s 143(3) of the Act vide order dt.16.02.1999 and the total income was determined at Rs.6,98,88,900/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who allowed some of the grounds, rejected some grounds and set aside the assessment order and directed the AO to re-decide the issue on certain grounds. Thereafter, assessment was framed u/s 143(3) r.w.s. 250 of the Act vide order dt.27.03.2002 and the total taxable income was

computed at Rs.6,89,50,462/- by making various disallowances. On the disallowances made, AO vide order dt.31.03.2005 levied penalty of Rs.7,25,34,996/- u/s 271(1)(c) of the Act. Aggrieved by the penalty order of AO assessee carried the matter before Ld.CIT(A). Ld.CIT(A) vide order dt.22.12.2006 (in appeal No.PN/CIT(A)-I/DC. Cir.1(1),Pn/43/05-06) on some of the additions made by AO upheld the levy of penalty and on some of the additions / disallowances deleted the penalty. On the issue of penalty on denial of deduction of unrealized profit of Rs.7.91 crores (rounded off), Ld.CIT(A) deleted the penalty by holding as under :

“4.2 I have carefully considered the submissions of the appellant and perused the materials on record. The CIT(A)-1, Pune in the appellate order dated 16.01.2004 after placing reliance on various judicial pronouncements has deleted the addition of Rs.7,91,64,864/-. The conclusion of the CIT(A) is contained at Para 5.2.5 of the appellate order and the same is reproduced as under :

“In the case of the appellant as is apparent, from the very nature of transaction, no real income has accrued on the account of merely transferring the stock-in-trade at an inflated value to Joint Venture etc. As such, I have to concur with my learned predecessor CIT(A)-V, Mumbai as for his decision in the appellate order dated 3-2-2000 and as such the addition made by the A.O. on this account is directed to be deleted.”

Since the very basis of penalty which is quantum addition stands deleted by CIT(A)-I, Pune following judicial precedents as mentioned in quantum appeal, the very basis of penalty disappears. Thus, it is held that once the very foundation of imposition of penalty has become non existent, imposition of penalty shall not be justified as held by Hon'ble Rajasthan High Court in the case of CIT Vs. Shishpal as reported in 255 ITR 187. Accordingly, concealment penalty in respect of Rs.7,91,64,864/- is directed to be deleted.”

36. Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us.

37. Before us, Ld.D.R. supported the order of AO.

38. We have heard the Ld.D.R. and perused the material on record. We find that various disallowances / additions were made by AO while framing the assessment. On the disallowances / additions made, AO levied penalty u/s 271(1)(c) of the Act. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who upheld the levy of penalty on most of the additions but deleted the penalty on the denial of deduction on account of unrealized gains. On the issues on which Ld.CIT(A) has confirmed the levy of penalty, assessee is not in appeal before us meaning thereby that it has accepted the decision of levy of penalty on those issues. Therefore the only issue that remains before us is the deletion of penalty on denial of deduction of unrealized gains. Ld.CIT(A) deleted the penalty because the addition on which the penalty was levied, had been deleted by Ld.CIT(A) and against which Revenue is aggrieved. While deciding the issue of denial of deduction on unrealized gains in Revenue's appeal hereinabove, we have upheld the order of AO and set aside the relief granted by Ld.CIT(A). Since the quantum relief granted by Ld.CIT(A) has been set aside, the penalty levied u/s 271(1)(c) of the Act by AO is therefore upheld more so because the reason for deleting the penalty by Ld.CIT(A) was on account of relief granted with respect to unrealized gains. **Thus, the ground of Revenue is allowed.**

39. In the result, the appeal of Revenue in ITA No.351/PUN/2007 is allowed.

40. In nutshell, the appeal of assessee in ITA No.722/PUN/2004 is dismissed. The appeals of revenue in ITA

No.624/PUN/2004 and ITA No.351/PUN/2007 are allowed and the appeal of revenue in ITA Nos.1027/PUN/2004 is dismissed.

Order pronounced on 28th day of February, 2018.

Sd/- (SUSHMA CHOWLA) न्यायिक सदस्य / JUDICIAL MEMBER	Sd/- (ANIL CHATURVEDI) लेखा सदस्य / ACCOUNTANT MEMBER
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पुणे Pune; दिनांक Dated : 28th February, 2018.

Yamini

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-1, Pune.
4. CIT-I, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" / DR, ITAT, "B" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.