आयकर अपीलीय अधिकरण ,इन्दौर न्यायपीठ ,इन्दौर

IN THE INCOME TAX APPELLATE TRIBUNAL, INDORE BENCH, INDORE

श्री कुल भारत, न्यायिक सदस्य तथा श्री मनीष बोरड, लेखा सदस्य के समक्ष

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER AND SHRI MANISH BORAD, ACCOUNTANT MEMBER

आ.अ.सं /.**I.T.A. No. 347 to 351/Ind/2013, 760 & 761/Ind/2014**		
निर्धारण वर्ष// **A.Ys.: 2003-04, 2004-05, 2006-07 to 2008-09, 2009-10 & 2010-11**		
Madhya Pradesh Audyogik Kendra Vikas Nigam (Indore) Limited, Indore.	**vs.**	Assistant Commissioner of Income-tax, 3(1), Indore.
अपीलार्थी /Appellant		**प्रत्यर्थी /Respondent**
स्था.ले.सं./**PAN: AADCM7525Q**		

आ.अ.सं /.**I.T.A. No. 571/Ind/2014, 205/Ind/2016 & 206/Ind/2016**		
निर्धारण वर्ष **:A.Ys.: 2006-07, 2009-10 & 2010-11**		
SEZ Indore Limited Indore.	**vs.**	CIT-I,,Indore/ Assistant Commissioner of Income-tax, 3(1), Indore.
अपीलार्थी /Appellant		**प्रत्यर्थी /Respondent**
स्था.ले.सं./**PAN: AAJCS7745J**		
आ.अ.सं /.**I.T.A. No. 530 to 534/Ind/2016**		
निर्धारण वर्ष/ **A.Ys.: 2003-04 & 2004-05 and 2006-07 to**		

2008-09		
Assistant Commissioner of Income-tax, 3(1), Indore	**vs.**	Madhya Pradesh Audyogik Kendra Vikas Nigam (Indore) Limited, Indore.
अपीलार्थी /Appellant		**प्रत्यर्थी /Respondent**

निर्धारिती की ओर से/ Assessee by	**:**	**Shri Manoj Munshi, Adv. and Shri S.N. Agrawal, C.A.**
विभाग की ओर से/Department by	**:**	**Shri Lal Chand, CIT DR**

सुनवाई की तारीख/Date of hearing	**:**	**07.03.2018.**
उद्घोषणा की तारीख/Date of pronouncement	**:**	**21.03.2018**

आदेश /O R D E R

PER BENCH :

These are total fifteen appeals filed by the assessee and Revenue. Appeals in I.T.A.Nos. 347/Ind/2013 to 351/Ind/2013 are filed by the assessee Madhya Pradesh Audyogik Kendra Vikas Nigam (Indore) Limited, Indore, (for short – MPAKVN) which relate to assessment years 2003-04 & 2004-05 and 2006-07 to 2008-09 are directed against the order passed by Ld. CIT(A)-I, Indore, dated 26.02.2013 and Appeals in I.T.A.Nos. 760 & 761/Ind/2014 are also

filed by MPAKVN, relating to assessment years 2009-10 & 2010-11 are directed against the order of Ld. CIT(A)-I dated 22.08.2014. Appeals in the case of SEZ Indore Limited, Indore, are filed in I.T.A.Nos. 571/Ind/2014, 205 & 206/Ind/2016 are directed against the orders of Ld. CIT dated 28.03.2014 for assessment year 2006-07 and Ld. CIT(A)-II, Indore, dated 30.11.2015 for assessment years 2009 & 2010-11. Revenue has also filed appeals in I.T.A.Nos. 530 to 534/Ind/2016 relating to assessment years 2003-04, 2004-05 and 2006-07 to 2008-09. The Ld. Representatives of the parties stated that I.T.A.No. 347/Ind/2013 may be taken as a lead case, the decision of which shall cover all appeals. We, therefore, reproduce grounds in I.T.A.No. 347/Ind/2013 :-

I.T.A.No. 347/Ind/2013 : A.Y. 2003-04 :

1. The assessee has taken following grounds :-

1. That the Ld. CIT(A) has erred in confirming the addition of Rs. 2,18,75,469/- in respect of alleged reduction of profit on account of debiting the expenditure in respect of expenses incurred by the appellant with respect to employees remuneration and benefits, administrative and general overheads, etc. to the profit and loss

account . The CIT(A) has erred in not appreciating the fact that the transfer of expenses, which are prima-facie revenue in nature of the profit and loss account is according to the method of accounting consistently followed by appellant and such expenses not attributable to any specific project/fixed assets have been rightly debited to profit and loss account without being capitalized.

2. That the Ld. CIT(A) has erred in law in confirming the addition of Rs. 95,93,720/- in respect of land premium received by the appellant for and on behalf of the Governor of the State of M.P., thereby notionally treating the said amount as income of the appellant.

3. Further, the Ld. CIT(A) failed to see that the receipts in respect of land premium having been receive d by the appellant on behalf of the State Government was in the nature of a liability to the State Government, which by no stretch of imagination could be treated as income of the appellant.

4. That the Ld. CIT(A) has erred in arriving at a finding that the appellant is a lawful owner of the land in question of treating the appellant at par with the owner of the land and on that basis arriving at the conclusion that the receipts in respect of the land premium constitute income of the appellant taxable in the hands of the appellant. The said finding arrived at by the Ld. CIT(A) being based on pure surmises and conjectures without any lawful basis for the same constitute perverse finding in law and vitiates the decision/conclusion arrived at by the Ld. CIT(A) on that basis.

5. That Ld. CIT(A) has also erred in law in arriving at the findings that the appellant is engaged in the business of development of land for industrialization with profit motive. The said finding is contrary to the decision of Supreme Court in the case of Gujarat Industrial Development Corporation (227 ITR 414) and hence vitiated in law. The Ld. CIT(A) failed to appreciate that the functions and powers of the

present appellant which acts as a wing of the State Government in establishing and managing the industrial areas does not carry on any business or trade but its sole purpose of establishment is the growth and development of industries in the area assigned to it. The Ld. CIT(A) also failed to appreciate that since the appellant merely acts for an on behalf of the State of MP, the receipts in respect of land premium etc. constitute income of the State of M.P. and as such same cannot be brought to tax in the hand of appellant.

6. Without prejudice to above grounds regarding non taxability of land premium in the hands of the appellant, the receipts in respect of land premium being capital receipts, cannot be brought to tax in the hands of the appellant. The Ld. CIT(A) has also erred in not appreciating the fact, that the treatment of particular receipt in the books of account of the appellant is not decisive and conclusive of the nature of receipt and if the receipt in question is a capital

receipt, the same cannot be brought to tax only on the basis of the treatment by appellant in its accounts.

7. That the Ld. CIT(A) also failed to appreciate that since the grant of lease for a period 99 years is a transfer of property under the provisions of the Transfer of Properties Act, 1882, the consideration for such transfer in the shape of premium in addition to the yearly rent reserved clearly constitutes capital receipt and cannot be brought to tax as a revenue receipt or income.

8. That the Ld. CIT(A) has also erred in law in treating the land premium receipts as advance rents and has also erred in law in considering the same as revenue receipt liable to tax in hands of the appellant.

It is, therefore, prayed that the present appeal be allowed and the order under appeal be set aside in toto."

2. The grounds of appeal as taken by the assessee before this bench for adjudication in different years are summarized as under for clarity :-

M/s M.P Audyogik Kendra Vikas Nigam (I) Ltd.,Indore

143(3) Appeal

S.No	Nature of Grounds	2003-04		2004-05		2006-07		2007-08		2008-09		2009-10		2010-11	
		347/Ind-2013		348/Ind-2013		349/Ind-2013		350/Ind-2013		351/Ind-2013		760/Ind-2014		761/Ind-2014	
		G Nos	Addition	G Nos	Addition	G Nos	Addition	G Nos	Addition	G Nos	Addition	G Nos	Addition	G Nos	Addition
	Grounds challenged in Appeal														
1	Under Statement of Profit	1	21875469												
2	Land Premium	2 to 8	9593720	1 to7	17171895	1 to 7	46118381	1 to 7	120602535			1 to 2	61737187	1 to 2	75068498
Additional Ground of Appeals															
3	Exclusion of Lease Rent	1	10163368	1	10330634	1	15462151	1	18979813	1	24759767	1	31905790	1	30705643
4	Exclusion of Land Premium	2	413878	2	3659868	-	-	-	-	-	-	-	-	-	-
5	Exclusion of Interest on Deposit	3	9184362	3	2815235	2	7298375	2	11993632	2	35156830	2	103034406	2	95754656

M/s SEZ Indore Limited

143(3) Appeal

S.No	Nature of Grounds	2009-10		2010-11		2006-07	
		205/Ind -2016		206/Ind-2016		571/Ind-2014	
		Ground No.	Addition	Ground No.	Addition	Ground No.	Addition

	Grounds challenged in Appeal						
1	Lease premium	1 to 2	58503365	1 to 2	13,60,81,476		8,98,42,251
Additional Ground of Appeals							
2	Lease rent	1	1,99,95,758	1	2,64,95,713		

3. Since the grounds as taken in the appeal of the assessee MPAKVN and also in the appeal of M/s SEZ Indore Limited, were more or less similar in all the appeals except one or two other grounds, we dispose of all these appeals by this common order for the sake of convenience.

4. In all these appeals additional grounds of appeal were taken. The Ld. Counsel for the assessee filed application in each appeal for admission of the additional grounds of appeal. The Ld. Counsel stated that no fresh material was required for deciding the same. All the materials were available before the AO. The Ld. Counsel for the assessee placed reliance on the various decisions of the Hon'ble High Court and also Hon'ble Supreme Court.

5. The Ld. Counsel for the assessee has submitted the identical written submissions dated 20.03.2017 in all the appeals.

6. Additional grounds of appeal taken in I.T.A.No. 347/Ind/2013 for the A.Y. 2003-04, read as under :-

"1] *That on the facts and in the circumstances of the case the amount of lease rent of Rs 1,01,63,368/- as included in the figure of total income be treated as capital receipt and requires to be excluded from the total income of the assessee being not liable to tax.*

2] That on the facts and in the circumstances of the case the amount of land premium earned from areas of Rs 4,13,878/- as included in the figure of total income be treated as a capital receipt and requires to be excluded from the total income of the assessee being not liable to tax.

3] That on the facts and in the circumstances of the case the amount of interest on deposit of Rs 91,84,362/- as received by the assessee in the capacity of the nodal agencies of the state government, included in the figure of total income, not liable to tax and therefore requires to be excluded from the total income of the assessee."

7. The Ld. Counsel for the assessee submitted a written submission in I.T.A.No. 347/Ind/2013 on additional grounds of appeal, which reads as under:-

1. "*Income Tax appeal in the case of the above assessee for the Assessment Year 2003-04 has been fixed for hearing on 23-03-2017. In the said appeal, the assessee has agitated appeals on various grounds. However, few grounds remains to be incorporated in the appeal which are very relevant and decided on the basis of documents as available on the file of the assessee.*
2. *The assessee being a state government company formed by the State Government for specific purpose for development of the Industrial area on the land as provided by the state government. That similar activities were carried out by all the corporation in different states and registration were also granted U/s 12AA of the Income Tax act and the amount as received by them was also not liable to tax.*
3. *The assessee company is wholly owned by the state government and all the policy matter decisions regarding*

allotment of land and land premium were also taken at ministry level. The assessee company merely act on behalf of the state government.

4. *The assessee company worked as a nodal agency of the state government, the entire funds as available with the assessee company was actually belonging to the state government.*
5. *That while finalization the books of account of the assessee company, following amount was credited in the Profit & Loss account even when the same was not liable to tax under the Income tax Act:-*

S.No	*Nature of receipt*	*Remarks*
1	*Land Premium*	*Cost of the land was borne by the state government and the amount as received on behalf of the state government. Hence, not liable to tax but 1/99 of the land premium amount was inadvertently offered for tax*
2	*Lease Rent*	*Lease rent received in connection with the land of State government as allotted by the assessee requires to be credited as liability in the books of the assessee but inadvertently credited in the Profit & Loss account*

3	*Interest on Fixed deposit*	*The amount of state government received in form of grants and land premium / Lease rent as received on account of the state government was deposited with the bank during the period in which the same was not used by the assessee. The assessee being a nodal agencies not liable to pay tax on the amount of Interest on deposit*

6] That as per Article 265 of the Constitution of India, 1949, which reads as under:-

> *265. Taxes not to be imposed save by authority of law no tax shall be levied or collected except by authority of law.*

7.1] *That Hon'ble Delhi High Court in the case of CIT vs Jai Parabolic Springs Ltd as reported in 306 ITR 0042 [Delhi] has held that :-*

> ***"18.*** *Further, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety in the year in which it is incurred. It cannot be spread over a number of*

years even if the assessee has written it off in his books over a period of years. Reliance can be placed on Madras Industrial Investment Corporation Ltd. vs. CIT (1997) 139 CTR (SC) 555 : (1997) 225 ITR 802 (SC)."

19. In view of the above discussion, it is very clear that there is no prohibition on the powers of the Tribunal to entertain an additional ground which according to the Tribunal arises in the matter and for the just decision of the case. Therefore, there is no infirmity in the order of the Tribunal.

7.2] *That Hon'ble Apex Court in the case of Jute Corporation of India Ltd. vs. CIT (1990) 88 CTR (SC) 66 : (1991) 187 ITR 688 (SC) while dealing with the powers of the AAC, the Supreme Court observed that :*

"An appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if

any, prescribed by the statutory provisions. in the absence of any statutory provision, 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 AAC in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the ITO. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The AAC must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The AAC should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also."

7.3] *That Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. vs. CIT (1999) 157 CTR (SC) 249 : (1998) 229 ITR 383 (SC), where the Hon'ble Supreme Court observed that :-*

> *"The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. We do not see any reason to restrict the power of the Tribunal under s. 254 only to decide the grounds which arise from the order of the CIT(A). Both the assessee as well as the Department have a right to file an appeal/cross-objection before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."*

7.4] Hon'ble Bombay High Court in the case of Nirmala L. Mehta v. A. Balasubramaniam, Commissioner of Income-tax 269 ITR 1 (Bom) wherein it was held as under:-

> *"There cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. _____".*

***7.5]** That Hon'ble Bombay High Court in the case of Balmukund Acharya Vs DCIT as reported in 310 ITR 310 has held that :-*

> ***"31.** Having said so, we must observe that the apex Court and the various High Courts have ruled that 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 any assessee,*

under a mistake, misconception or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected [see S.R. Koshti vs. CIT (2005) 193 CTR (Guj) 518 : (2005) 276 ITR 165 (Guj), C.P.A. Yoosuf vs. ITO (1970) 77 ITR 237 (Ker), CIT vs. Bharat General Reinsurance Co. Ltd. (1971) 81 ITR 303 (Del), CIT vs. Archana R. Dhanwatey (1981) 24 CTR (Bom) 142 : (1982) 136 ITR 355 (Bom)].

32. *If particular levy is not permitted under the Act, tax cannot be levied applying the doctrine of estoppel [see Dy. CST vs. Sreeni Printers (1987) 67 SCC 279].*

33. *This Court in the case of Nirmala L. Mehta vs. A. Balasubramaniam, CIT (2004) 191 CTR (Bom) 8 : (2004) 269 ITR 1 (Bom) has held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by*

authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. In the case on hand, it was obligatory on the part of the AO to apply his mind to the facts disclosed in the return and assess the assessee keeping in mind the law holding the field. "

7.6] That Hon'ble Delhi High Court in the case of DCM Benetton India Limited vs CIT as reported in 173 Taxman 0283 has held that:-

"Assessee is entitled to raise an additional ground of appeal before the Tribunal which was not raised before the CIT (A); matter remanded to the AO.

8] That in view of the above, whether the amount of lease rent, land premium and Interest on deposit are taxable as income of the assessee or not liable to tax is purely a question of law and as per article 265 of the constitution the tax cannot be levied until and

unless the same was expressly provided under the Act. Hence, Hon'ble Bench is hereby requested to admit the additional ground of appeal and oblige."

8. Ld. Departmental Representative opposed the applications for additional grounds of appeal.

9. We have gone through the written submissions on additional grounds of appeal submitted in the appeals by Ld. Counsel for the assessee. We have also gone though the case laws relied upon by the Ld. Counsel for the assessee. The claim as lodged by the assessee by way of additional grounds of appeal relates to exclusion of the lease rent, Land premium and interest on funds of State Government. The decisions of Hon'ble Apex Court in the case of Jute Corporation of India Ltd. vs. CIT [Supra] and National Thermal Power Co. Ltd. vs. CIT [Supra] and various other High courts are squarely applicable on the facts of the present case**.** Respectfully following ratio laid down therein, we admit the additional grounds as filed by the assessee before this Hon'ble Bench for adjudication.

I.T.A.No. 347/Ind/2013 : A.Y. 2003-04: Ground Nos. 2 to 8 :

Issue regarding taxability of land premium as income:

10. The assessee through ground nos. 2 to 8 in the appeal in I.T.A.No. 347/Ind/2013 and other appeals has challenged the taxability of the Land premium as income of the assessee company.

11. The Assessing Officer while passing the assessment order u/s 143(3) r.w.s 254 dated 31-12-2009 added the amount of land premium as income of the assessee company. The facts as noted by the Assessing Officer in his assessment order are summarised as under :-

S.No	Facts	Para No.
1	Land premium received on allotment of Industrial land treated as liability and spread over 99 years of lease for financial year 2001-02 and accordingly accounted for	7.1
2	The ownership of land leased out is belonging to the M.P State Govt and the assessee is to develop land and leased the land as per the instruction of the State Government	7.9
3	In view of the Specific Instruction of the State Govt, it is apparent that the lease rent and the Land Premium received by the assessee especially in respect of the land belonged to the State Govt is remained with it and is not to be	7.10

	parted with the State Govt. However, the same needs to be utilized for the development of the Plots.	
4	It cannot be disputed that the assessee had leased out the land on behalf of the M P State Govt and shown the receipt of lease rent as its income. It was also an admitted fact that the assessee had leased out the plots for 99 years. It is also an admitted fact that on account of leasing out of the plots the assessee had received land premium.	7.12

12. The Ld CIT(A) in his order dated 26-2-2013 has referred the finding as given in his consolidated order dated 26-02-2013 as passed for the assessment years 2004-05, 2006-07 to 2008-09 and confirmed the addition as made to the total income of the assessee on account of land premium. On perusal of the order of the Ld CIT(A), following facts emerged :-

S.No	Facts	Para No
1	I have considered the submission of the assessee and noted that the land is provided to the assessee by Government of Madhya Pradesh through DIC. It is also noted that the	First five lines of Para 2.5 on inner

	M P Government, for development of industries and infrastructure acquires land and makes payment of compensation through collector of the particular area.	Page No 8 of CIT[A]'s order
2	This land is subsequently given at the disposal of audhyogikvikaskendras and other agencies engaged in the process of development of industries, housing and infrastructure	Para 2.5 on inner Page No 9 of CIT[A]'s order
3	It is observed that the land under consideration has been given to the assessee by Government of MP and through an instruction as referred above, any land premium and lease rent received from leased out land will be kept with respective audhyogikkendras for maintenance and further development.	Para 2.5 on inner Page No 9 of CIT[A]'s order

13. It was observed from the facts as noted by the assessing officer and also by the Ld CIT[A], it was very clear that land was not acquired by the assessee company but the same was acquired by the State Government and the amount of compensation was also paid by the State Government through Collector and the ownership

of the land was also in the name of the State Government. The assessee on the basis of guideline of the State Government allotted the land to the eligible industries and the assessee company acted as a nodal agencies on behalf of the State Government, allotted land to the eligible industries and collected amount on account of Land Premium, Lease rent, Maintenance Charges, Development charges, Transfer fee etc.

14. The Ld CIT[A] in his consolidated order passed for assessment years 2004-05 to 2008-09 confirmed the addition as made by the assessing officer on account of land premium as income of the assessee company, the relevant paras of the order of the Ld CIT[A] is reproduced as under:-

> *"2.5 I have considered the submissions of the assessee and noted that the land is provided to the assessee by government of Madhya Pradesh through DIC. It is also noted that the MP government, for development of industries and infrastructures acquire land and makes payment of compensation through collector of the particular area. This land is subsequently given at the disposal of audhogikvikaskendras and other agencies*

engaged in the process of development of industries, housing and infrastructure. It is observed that the land under consideration has been given to the assessee by the government of MP and through an instruction as referred above, any land premium and lease rent received from leased out land will be kept with respective audhogikkendras for maintenance and further development. The assessee is not a mere custodian. It becomes a lawful owner of the land which has legally been transferred through government of Madhya Pradesh. I have also gone through the memorandum & article of association and observed that the assessee is authorized to purchase/ acquire land on its own also apart from the land earmarked by the government of MP (refer para A-1 of memorandum of association). Therefore, there is no doubt that as far as the management and leasing of the land under consideration is concerned, the assessee has been adequately independent/ equivalent to the owner of the land. This can be seen from clause C(22) of the memorandum wherein it has been clearly brought out that

the object of the Audhyogik Kendra shall be to sell, improve, manage, develop, exchange, lease, mortgage, dispose off, deal with all or any part of property and rights of the company. Moreover there is no denial on the part of the assessee that income has arisen. Once the income has arisen out of any transaction, the same has to be taxed under the income Tax Act, 1961, under the taxation scheme unless the same is exempted by a particular provisions of the Act. I have also noted that till the AY 2003-04, the assessee has been claiming exemptions u/s 10(20A) of the Income Tax Act. However, the same has been omitted with effect from 01-04-2003. Therefore, in my considered view the income arising as a land premium which has duly been accounted for by the assessee is necessary to be taxed under the hand of the assessee. The Government of Madhya Pradesh shall not come into picture for taxation purpose because the assessee is an independent and separate identity who is filing its return of income any paying taxes etc.

2.6 The second limb of argument advanced by the assessee is that the land premium is a capital receipt. This part of argument was mainly advanced before the assessing officer at the time of passing the assessment order. However the same set of arguments have been put forth before me also, the assessee has relied mainly on two decisions of Hon'ble Supreme Court which are as under:-

(i) Ukhara Estate Zamindaries P. Ltd Vs CIT 120 ITR 549 (SC).

(ii) Member for Board of Agricultural Income Tax, Assam Vs. Sindhurani Chaudhurani & Other, 32 ITR 169.

2.7 It is observed that the second issue in this case is whether the receipt under consideration is a capital receipt or revenue receipt. In order to decide and examine this issue, it will be appropriate to go through the memorandum & article of association. A careful perusal of the same makes it crystal clear that the assessee's main

object is to develop, promote, encourage, assist in growth and establishment of industries etc. with ancillary/ incidental objects of carrying out of business. A reference to objects as specified under B9 to B12 makes it clear that the assessee is in the business with a motive to earning the profit. The relevant paras of such objects are reproduced as under:-

Ancillary/ incidental objects of the company shall be:

B(9) To carry on any other trade or business whatsoever which can, in the opinion of the company, be advantageously or conveniently carried on by the company by way of extension of or in connection with any such business as aforesaid or is calculated directly or indirectly to develop any of the company's business or to increase the value of or turn to account any of the company's assets property or rights;

(10) To undertake, manage, control or otherwise deal with the business and undertaking of any person, firm or

corporation when it may be necessary for the purpose of protecting the interests of the company, or for the purpose of protecting securities, realizing upon claims or carrying out any transaction or obligation which the company has entered upon;

(11) To take part in the management, supervision and control of the business or operation of any undertakings, shares or other securities of which are held by the company or in which the company is otherwise interested, any for that purpose to appoint and remunerate any directors or accountants or other experts or agents;

(12) To sell or otherwise dispose of the undertakings of the company or nay part thereof for such consideration as the company may think fit and in particular (but so as not to restrict the generality of the foregoing) for shares, debentures, bonds or securities or obligations of any other company having objects altogether or in part similar to those of the company.

2.8 A careful consideration of above clauses o memorandum reveals that the assessee is in the business. Leasing out of the land and getting rental income as well as the premium is the business of the assessee. Therefore, a land premium is nothing but a revenue receipt in the form of advance rent which has loosely been named as land premium. Since the assessee is showing annual rent on account of leasing of the plots, there is no reason why the advance rent received should not be taxed accordingly. Moreover as brought out clearly in prepares, the assessee itself has offered 1/99th portion of such land premium as revenue receipt to be taxed in the year under consideration which goes to prove that the nature of receipt is revenue. In this regard, it will be appropriate to refer the agreement made by the assessee with the purchaser of the plots. Clause 2 of such agreement makes it abundantly clear that the amount of land premium is nothing, but the rent in advance. The clause 2 reads as under:-

" 2 The lessee having, paid to the lessor for said land the advance rent and premium of Rs..... as security amount before the execution of this deed."

2.9 In view of above discussion, there remains no doubt that the advance rent in the form of land premium is nothing but revenue receipt to be taxed as per Income Tax Act. During the course of appellate proceedings, the counsel of the assessee has further submitted that the decisions relied upon by the assessee in the case of Member of board of agriculture and Ukhara Estate Zamindaries P. Ltd are squarely applicable in the instant case. Although Assessing Officer has briefly distinguished these two cases yet in the interest of natural justice, I have gone through the above two cases to verify the contention of the assessee. In the case of Member of board of agriculture Income Tax, it is seen that the salamis/ premia were not at all dependent on the rate of the rent charged. However, the same varied with the quality of land leased out for the purpose of agriculture. But in the instant case,

as brought out above, the land premium is nothing but advance rent fully dependent on the rate of rent. Further in that case, the salami was defined as lump sum non-recurring receipt of money paid by tenant to land lord before making a settlement of holding. Whereas in the case under reference, where leasing of the plot is for 99 years and there is no provision for conditions in the agreement to suggest the modality of transfers and renewable after 99 years, in other words, after the lease period expires, it is not the case of the assessee that they are not going to charge further premium at the time of renewal of lease. The salami in the referred case has been defined as single payment made for acquisition of right of the lessees to enjoy the benefit granted to them by the lease. In that case it was held as capital asset for the reasons that the right for cultivation of the and being the capital in nature was transferred to the lessee for a consideration called salami. Therefore, the same was treated as capital assets. Hence, in view of the clear-cut difference in the facts and findings of the cases, to that

extent, the case law cited by the assessee is not applicable in the instant case where land premium charged is nothing but the advances rent.

2.10 The another case law, i.e., Ukhara Estate Zamindaries P. Ltd. relied upon by the assessee was also gone through and it was seen that the facts and findings in the said case law are also clearly distinguishable from the facts of the instant case. In that case, the assessee was himself a lessee who took over he zamindari properties of a family for 999 years. The lease items comprised of coal bearing lands/ mines, government promissory notes, jewellery, arrears of rent etc. The assessee granted several sub lease for 900 years to various companies and received salami as well as compensation for compulsory acquisitions. This was single lease by the assessee and receipt of salami by granting of sub lease for management of real property as an owner of lease hold interest was constructed and treated as capital receipt. Whereas in the instant case as brought out above,

the land was given by the state government and the assessee has transferred the same on long term lease and earned rental income as well as the advance rent in the form of land premium. In the case relied upon by the assessee, Hon'ble Supreme Court reversed the decision of High Court saying that the assessee had dealt with its lease hold interest in the zamindari property as a land owner and the receipt of salami, premia and compensation were receipts of capital nature. Therefore, the facts are altogether different. In view of the foregoing discussion, I am of the considered opinion that the AO has correctly assessed the income as revenue receipt. The additions made under this head In the instant assessment year as well as in the AY 2006-07, 2007-08 & 2008-09 are hereby confirmed."

15. The assessee company against the order of the Ld CIT(A) preferred an appeal before this Hon'ble Bench argued its case at length.

16. The Ld. Counsel for the assessee company argued its case mainly on following issues, which are as under:-

1	The assessee company acts as a nodal agencies of the State Government and therefore entire receipt for and on behalf of the State Government is not an income of the assessee company
2	Cost of land was not claimed by the assessee in its books of account as expenses but the same was borne by the State Government. The amount of development expenses were also not charged to the Profit & Loss Account. Hence, following the principle of Matching concept the gross receipt on account of Land Premium and Lease rent is not taxable as income.
3	The different clauses of Memorandum of Association is not a conclusive until the same act actually done by the assessee company. In the present appeal it was claimed that land was not purchased by the assessee in its name and therefore not liable to taxed as income in its own name
4	In any case if it was accepted that the amount of land premium pertains to the assessee company, in that case the said amount of land premium was a capital receipts and not liable to tax as a revenue receipts.

17. The Ld. Counsel for the assessee during the course of hearing argued at length and also filed written synopsis. The written synopsis as filed by the assessee is reproduced as under:-

"Issue:

Whether one time lease premium in addition to lease rent collected by the assessee (engaged in development of industrial area on the land owned by State Government) on behalf of the State Government before commencement of lease is Capital Receipt or Revenue Receipt?

Brief facts

The assessee Madhya Pradesh Audhyogik Kendra Vikas Nigam (Indore) Limited (MPAKVN) was incorporated in the year 1981 by the State Government as wholly owned government company with the main object to develop industrial area for industrial growth in the State of Madhya Pradesh. The State Government had acquired the land from the private landowners and contributed its own land for development of industrial area. The raw land

were handed over to the assessee for development and further management and maintenance of the same. The land remained in the ownership of the State and the assessee was allowed to act as a nodal agency.

The development of industrial area which was commenced in the year 1981 came to at halt around 2000 when most of the land available have been utilized for development.

It is further submitted that in the year 2005 the State Government decided to develop fist Special Economic Zone and therefore established a new entity in the name of SEZ Indore Limited and diverted the development work in that company. Therefore, no major projects remained with the assessee and all the resources and land available with it had been transferred to M/s. SEZ Indore Limited which has developed the first SEZ of the country in India.

The second assessee SEZ Indore Limited(SEZ) is a wholly owned subsidiary of MPAKVN Ltd. and it is a Government Company engaged in the development of Special Economic Zone in the region in terms of provisions of Special Economic Zone Act, 2005. The main object of the

assessee Company is to develop, promote, encourage or to assist in formation of Special Economic Zones and other allied infrastructure development work.

The development of infrastructure is the primarily responsibility of the State Government. However, the State Government may delegate such responsibilities upon its instrumentalities. MPAKVN and the assessee Company are such instrumentalities, which are discharging the responsibility of industrial infrastructure development on behalf of the State Government for promotion of the industrial development in the State.

The assessee allots the developed industrial land to the prospective industrialist to setup industry in the area developed by the assessee in consideration of payment of (i) Land Premium, (ii) advance rent, (iii) security deposit equivalent to one year rent, (iv) other annual charges for maintenance.

The amount of land premium collected by the assessee are credited in the account of State Government as capital receipt and the same are appropriated as per the

standing orders of the State Government for further development.

The Income Tax Authorities have treated the land premium as revenue receipt in the hands of the assessee, which has been agitated by the assessee on the following grounds:

(i) the assessee is not the owner of the land and has acted merely as a nodal agency and instrumentality of the Government hence not liable to tax.

(ii) the amount of land premium (Salami) is capital receipt, hence not taxable under any circumstances.

Ownership: State Govt. v/s. assessee

The State Government had acquired the land under the provisions of the Land Acquisition Act, 1894 for the purpose of development of industrial area in the backward areas or no industry district as per the policy of Government of India to attract industrialization in the State. Thus, the assessee has been entrusted with the responsibilities of the State.

The State Government had acquired the lands in Dhar district from the private landowners, farmers in addition to Govt. land available with the State Government.

That, after acquisition of the land and payment of compensation to the landowners/farmers in terms of the award passed by Land Acquisition Officer and as may be modified by the competent authority or the Courts as the case may be, the land so acquired have been entered in the revenue record in the name of Industries Department, Government of Madhya Pradesh. Therefore the State Government through industries department became the owner of entire land acquired to develop an industrial area/SEZ.

It is made clear that the State Government paid the compensation for acquisition of land from its exchequer. Therefore, the State Government had acquired the land on payment of due consideration/compensation. Thus, the State Government is the owner of the land on which industrial area/SEZ has been developed by the assessee.

The extract of the provisions of MP Land Revenue Code, 1959 which deals the issue of ownership of land are reproduced hereinunder:

> *Sec. 57. State ownership in all lands: (1) All lands belongs to the State Government and it is hereby declared that all such lands, including standing and flowing water, mines, quarries, minerals and forests reserved or not, and all rights in the sub-soil of any land are the property of the State Government.*
>
> *Provides that nothing in this section shall, save as otherwise provided in this Code, be deemed to affect any rights of any person subsisting at the time of coming into force of this Code in any such property.*
>
> *Section 108. Records of rights: (1) A record of rights shall in accordance with rules made in this behalf be*

prepared and maintained for every village and such record shall include the following particulars:

(a) the names of all Bhumiswamis together with survey numbers or plot numbers held by them and their area, irrigated or un-irrigated;

(b) the names of all occupancy tenants and Government lessees together with survey numbers or plot numbers held by them and their area, irrigated or un-irrigated;

(c) the nature and extent of the respective interest of such persons and the conditions or liabilities, if any, attaching thereto;

(d) the rent or land revenue, if any, payable by such persons; and

(e) such other particulars as may be prescribed.

(2) The record of rights mentioned in sub-section (1) shall be prepared during a revenue survey or whenever the State Government my by notification so direct.

Sec. 109. ***Acquisition of rights to be reported****: (1) Any person lawfully acquiring any right or interest in land shall report orally or in writing his acquisition of such right to the patwari within six months from the date of such acquisition, and partwari shall at once give a written acknowledgement*

for such report to the person making it in the prescribed form.

***Sec. 110. Mutation of acquisition of right in Field Book and other relevant land records**: (1) The Patwari shall enter into a register prescribed for the purpose every acquisition of right reported to him under section 109 or which comes to his notice from intimation from Gram Panchayat or any other sources.*

That, after acquisition of lands for the purpose of development of industrial area from private land owners the entire such lands have been recorded in the land records under section 108 of the Code in the name of Industries Department, Government of Madhya Pradesh. Copy of survey reports (land records) is available in paper book.

The State Government instead of undertaking the industrial infrastructure development work on its own

delegated the responsibility up on its instrumentalities in the name of MPAKVN/SEZ and entrusted the task of development of infrastructure on the land owned by the State.

That, the assessee/MPAKVN incurred all cost and expenses for development on behalf of the State Government, however the State Government instead of reimbursement of the same allowed the assessee to adjust the amount of Lease Premium collected/to be collected to meet the cost of development of infrastructure by order dated 14.12.1981 and explanation dated 31.03.2017. Thus, the MPAKVN/Appellant are the nodal agency of State Government engaged in development of infrastructure of industrial area. Copies of order dated 14.12.1981 and explanation dated 31.03.2017 are annexed herewith for ready reference.

That, the lease premium represents the recovery of cost of acquisition of land and since the cost of acquisition has been incurred by the State, therefore the State has right over the lease premium. It is also the duty of the State to

incur the development cost on its land, therefore State has allowed the assessee to adjust such expenses and cost from the amount of lease premium payable to the State by the lessor.

In view of above following facts emerges:

(i) The State Government had acquired the land from the landowners for industrial infrastructure development of area and had paid the compensation from exchequer.

(ii) The name of State Government through industries department has been recorded in the revenue records as owner of land. Thus, State Government is the owner of the land on which industrial area/SEZ has been developed by MPAKVN/the assessee.

(iii) The assessee/MPAKVN were involved in the industrial infrastructure development as an instrumentalities to discharge the responsibility of State Government towards infrastructure development as nodal agency.

(iv) The lease deeds have been executed on behalf of State Government in the name of Governor of Madhya Pradesh. The assessee has no power or right to dispose of any of the

assets without prior consent of the State Government. Therefore, the assessee is under obligation to follow the directions of the State Government in respect of the land.

(v) The lands have not been recorded in the books of A/c of the assessee/MPAKVN as Assets as the assessee is not the owner and have no right over the title of the land.

(vi) Lease Premium collected by the assessee/MPAKVN from the industrial unit have been shown in the books of A/c as liability towards the State Government under the head "Current Liabilities & Provisions" in the Balance Sheet.

(vii) The assessee/MPAKVN are regularly incurring cost and expenses towards infrastructure development of the industrial area and its maintenance on behalf of State Government. Therefore owns such monies from the State Government.

(viii) The State Government instead of reimbursing the cost and expenses of infrastructure development incurred by assessee/MPAKVN allowed the assessee to adjust such cost and expenses from the amount payable to the State

Government towards lease premium as per order dated 14.12.1981 and explanation dated 31.03.2107.

(ix) The object clause of the Memorandum of Association clearly states the main object to develop industrial area and rest of the objects are incidental to main object. The assessee is not in the business of real estate or sale and purchase of land and real estate. The land is not stock in trade in the books of the assessee nor revenue has ever claimed that the land is stock in trade of the assessee.

(x) In case of renting or leasing business only rental income and other recurring charges and fees are revenue receipt but not the lease premium which is received for parting away the rights in capital assets.

The aforesaid facts clearly establish that assessee has no right of ownership on the land and has acted merely as an agent or nodal agency for and on behalf of the State Government to achieve the object of industrialization in the State. Since, the assessee is not the owner of the land, therefore the CIT(A) has erred in confirming the additions

made by the ld. AO by treating the land premium as revenue receipt of the assessee.

Thus, the lease premium received/collected by the assessee is capital receipt for and on behalf of the State Government, hence not taxable in the hands of the assessee.

Response to observation in Appellate Order in ITA No. 402/2009-10 and 882, 883, 884/2011-12 which is relied upon by the CIT(A) in impugned order:

Sr. No.	Observation of CIT	Response
1.	*Para 2.5.* *I have considered .....it is observed that the land under consideration has been given to the assessee by Government of M.P. and through an instruction referred above, any land premium and lease rent received from leased out land will be kept with respective Audhyogik Kendras for maintenance and further developments.*	*First of all it is submitted that the land was not given by the State to the Assessee under ownership. The assessee was allowed by the State to discharge the responsibility of the State towards infrastructure development on the land belonging to State Government as an its instrumentality and in the capacity as nodal agency or executing agency of Govt.* *The lease premium so collected by the Assessee has been shown in the books of A/c of assessee*

		as liability payable towards the State Government. *The lease deed have been executed by the State in the name of the Governor through Managing Director of the assessee company who is a Gazetted Officer of the State Government.* *The State Government instead of reimbursing cost and expenses incurred on development of land to assessee allowed the assessee to adjust the same from the amount payable to State Government towards lease premium collected and shown in liability.*
2.	*Para 2.5 continued ....* *The assessee is not a mere custodian it becomes a lawful owner of land which has legally been transferred through Government of M.P.*	*It is denied that the assessee is the lawful owner. It appears that Ld. AO/CIT(A) did not verify the facts properly. The lands of the industrial area have never been transferred or vested by the State Government in the*

		assessee in any manner. There is no order or conveyance deed to give effect transfer or vesting of the land to the assessee. It is submitted that the land still belongs to and owned by the State Government, which is evident from the fact that revenue record contains the name of the State Government as an owner and also the lease deeds are executed in the name of Governor in compliance of Article 154 of the Constitution of India. Thus this observation of Learned CIT is without any substance and evidence.
3.	*Para 2.5 continued ....* *I have also gone through the Memorandum of Association and Article of Association and observed that the assessee is authorized to purchase/acquire the eland on its own apart from the land*	*There is no dispute about the power and authority of Assessee to purchase and acquire any land. However, it is submitted that the lands on which industrial area/SEZ has been developed are not acquired or purchased by the assessee. The right to purchase given*

	earmarked by the Government of M.P.	*in memorandum does not mean that the land which has been developed by the assessee on behalf of the State has been purchased.*
4	*Para 2.5 continued ....* *Therefore, there is no doubt that as far as the management and leasing of land under the consideration is concerned the assessee has been adequately independent/equivalent to owner of land.*	*This observation of CIT(A) is misconceived and without substance. The Ld. CIT has failed to appreciate that how and under what circumstances the assessee has become the owner of land. This observation shows the whims and fancies of the Ld. CIT to somehow treat the land under the ownership of assessee. Though there is no evidence or document, however only to bring the collection of lease premium on behalf of State Government by the assessee within the ambit of taxable income an attempt has been made in this regard.*
5.	*Para 2.5 continued ....* *This can be seen from*	*It is submitted that such observation are based on the whims as the Ld.*

	the clause C(22) of the Memorandum wherein it has been clearly brought out that the object of the Audhyogik Kendra shall be to sell, improve, manage, develop, exchange, lease, mortgage, dispose off deal with all or any part of property and rights of the company.	*CIT(A) has drawn it merely on the basis of the object incidental to main object given in Memorandum of the company without appreciating the legal rights of ownership over the land.*
6.	*Para 2.5 continued ....* *Moreover there is no denial on the part of the assessee that income has arisen. Once the income has arisen out of any transaction the same has to be taxed.*	*This observation is baseless and contrary to the facts available on the record. The Ld. AO and CIT has observed that the assessee has credited the land premium collected to the State Government account as liability. Therefore it is clear that the assessee had never accepted the collection of lease premium on behalf of State Government as its income. Thus this observation of Ld. CIT is incorrect.*
7.	*Para 2.5 continued ....*	*At the outset it is denied*

	Therefore in my considered view the income arising as a land premium which has duly been accounted for by the assessee is necessarily to be taxed in the hand of the assessee.	*that the assessee has ever considered, the lease premium as its income. The observation of CIT is contrary to the facts recorded by Ld. AO and himself that the lease premium has been credited to the account of State Government as liability. Therefore, the order is not sustainable in the eyes of law.*
8.	*Para 2.6* *The second limb of argument advanced by the assessee is that the land premium is a capital receipt..*	*It is settled legal position that the lease premium in addition to lease rent received for parting away the rights and possession in the party before commencement of the lease is Capital Receipt. The lease rent is payment is for enjoyment of the right uninterruptedly. Various case laws in this regard have been discussed later on.*
9.	*Para 2.7* *It is observed that the second issue in this case is whether the receipt under consideration is a capital receipt or*	*There is no dispute that the main object of the assessee is to develop industrial areas as an instrumentality of the State Government on the*

	revenue receipt. In order to decide and examine this issue, it will be appropriate to go through the memorandum & articles of association. A careful perusal of the same makes it crystal clear that the assessee's main business is to develop, promote encourage, assist in growth and establishment of industries etc. with ancillary/ incidental objects of carrying out of business.	*land owned by the State. It is only a nodal agency. The nature of business of the assessee nowhere affect the nature of receipt. It may be capital or revenue in any business. The capital and revenue receipt depends upon the nature of transaction. In the present case the lease premium has been received for parting away the right and possession over the capital assets and the same is received before parting away, therefore it has cloth of capital receipt as held by Supreme Court and other High Courts as per case law cited below.*
10.	*Para 2.8* *A careful consideration of above clauses of Memorandum reveals that the assessee is in the business of leasing out of land and getting rental income as well as premium is the*	*The Learned CIT has come to the conclusion that since as per Memorandum the assessee is in the business of leasing of land. Therefore land premium is nothing but revenue receipt in the form of advance rent. This observation is totally misconceived and*

	business of the assessee. Therefore land premium is nothing but a revenue receipt is in form of advance rent which has loosely been named as land premium. Since the assessee is showing annual rent on account of such leasing of plots there is no reason why advance rent received should not be taxed accordingly	*under any stretch of imagination it cannot be assumed that lease premium is advance rent. The entire premises of Appellate order considering the lease premium as advance rent is without any substance and the basis. The main object of the assessee is to develop industrial area on the land of the State Govt. and to collect lease premium on its behalf. Thus, it is incorrect to say that the leasing is the business of the assessee. It can be business only if the assessee owns any land. In the present case, the assessee owns no land.* *The Supreme Court has in following cases clarified the Lease Premium and Advance Rent. In the present case the assessee is collecting one time lease premium for parting away the right and*

		possession, advance rent for one year, security deposit in the form of one year advance rent and annual rent for continuation lease. Therefore, lease premium cannot be treated as advance rent in given case.
11.	*Para 2. 9* *In view of above discussion, there remains no doubt that the advance rent in the form of land premium is nothing but revenue receipt to be taxed as per Income Tax Act. .....* *The land premium is nothing but advance rent fully dependent on the rate of rent. Further in that case the salami was defined as lump sum not recurring receipt of money paid by the tenant to landlord before making a settlement of holding. Whereas in the case under reference,*	The contentions of the CIT(A) are misconceived one, on one hand he has stated that "*the land premium is nothing but advance rent fully dependent on the rate of rent. Further in that case the salami was defined as lump sum not recurring receipt of money paid by the tenant to landlord before making a settlement of holding". Whereas all the same ingredients are present in the case under reference as the assessee has received the premium as* *i. non-recurring, one time receipt.* *ii. it has been paid before entering into*

	where leasing of plot is for 99 years and there is no provision for conditions in agreement to suggest the modality of transfer and renewables after 99 years.	*lease agreement* *iii. it has been received for parting away the capital assets (rights and possession in the land)* *iv. lease rent are separately receivable alongwith annual maintenance charges for allowing the lessee to continue to enjoy the benefits of the lease.* The CIT(A) has erred in distinguishing the case law cited before him by the assessee.

Land/lease Premium or Salami – Whether Capital Receipt or Revenue Receipt.

Irrespective of the ownership of the land the major issue is whether the one time lease premium collected by the assessee is capital receipt or revenue receipt:

The assessee collects the lease premium (Salami) for parting of its right and possession over the land, whereas the lease rent is received for continuation of enjoyment of the right of possession.

The Premium is one time non-recurring receipt and is received at the beginning of the lease for transfer of lessors right in the capital assets.

The assessee has not charged the development cost to the profit and loss account as the same has been transferred to the State Government and net balance payable to State Government has been shown under the heard "Current Liabilities & Provisions" in the Balance Sheet.

Therefore, the Revenue has accepted and admitted the infrastructure development cost incurred by the assessee as Capital Expenditure. Therefore, the lease premium shall also be capital revenue extending the same analogy.

CASE LAWS RELIED UPON BY THE assessee IN SUPPORT OF ABOVE CONTENTIONS:

(i) *In case of Dy. Commn. of Income Tax vs. Sudarshan Chemicals Ltd. (22.07.2004 - ITAT Pune) :[2005] 95 ITD 131 (Pune), the Revenue Authorities have supported the case of the assessee herein and had argued that the one time lease premium is capital receipt. The relevant paragraph of the aforesaid order is as under:*

4. The ld. DR has assailed the order of the CIT(A) by contending that the payment made by the assessee was for acquiring the leasehold rights which is an asset and therefore, the payment is in the nature of capital expenditure. It was also pointed out by him that the CIT(A) in AY 1992-93 has taken a different view by referring to the judgment of Madhya Pradesh High Court in the case of Project Automobiles 167 ITR 781 ***wherein it was held that premium payable by the assessee to secure a permanent lease cannot be considered as advance rent and the same as to be held as capital expenditure.*** *Further reliance was placed on the judgment of AP High Court in the case of Aditya Minerals Pvt Ltd. 167 ITR 774 which was relied upon by the ld. CIT(A) in AY 92-93. The reliance was also placed on the Supreme Court judgment in the case of Panbari Tea Co Ltd. 57 ITR 422.*

The ITAT Pune bench after considering the arguments of the revenue and various judgment of the Supreme Court and other High Courts has held:

> *In our opinion, it is the settled legal proposition that where lump-sum money is paid before acquiring leasehold rights then such payment has to be considered as capital expenditure.*
>
> *It is clear beyond doubt that if any consideration is paid for acquiring leasehold rights then such payment would be in the nature of capital expenditure. So, if the interest of the lessor is parted with for a price then the price paid as to be considered as premium/salami which is neither assessable as income in the hands of the recipient nor allowable as deduction in the hands of the payer*

(ii) *The issue has been discussed by the Supreme Court in case of* ***CIT Assam Versus The Panbari tea Company Limited (1965) 57 ITR 422 SC*** *wherein the Apex Court while dealing with the nature of receipt of premium on the*

land leased to lessee has held that it is a payment made for the acquisition of the right of lessor to enjoy benefits granted by the lease the general right may properly be regarded as a capital asset and the money paid to purchase to it may properly be held to payment on capital account. The para 4 to 8 are reproduced herein below:

4. The distinction between premium and rent was brought out by the Judicial Committee in Raja Bahadur Kamakshya Narain Singh of Ramgarh v. Commissioner of Income-tax, Bihar & Orissa[1943] 11 ITR 513 thus :

> *"It (salami) is a single payment made for the acquisition of the right of the lessee to enjoy the benefits granted to them by the lease. That general right may properly be regarded as a capital asset, and the money paid to purchase it may properly be held to be a payment on capital account. But the royalties are on a different footing".*

5. *It is true that in that case the leases were granted for 999 years; but, though it was one of the circumstances, it was not a decisive factor in the Judicial Committee coming to the conclusion that the salami paid under the leases was a capital asset. This Court in Member for the Board of Agriculture Income-tax, Assam v. Sindhurani Chaudhurani [1957] 32 ITR169(SC) defined "salami" as follows :-*

> *"The indicia of salami are (1) its single non-recurring character and (2) payment prior to the creation of the tenancy. It is the consideration paid by the tenant for being let into possession and can be neither rent nor revenue but is a capital receipt in the hands of the landlord."*

6. *It is true that in that case the payments was paid in a single lump sum, but that was not a conclusive test, for salami can be paid in a single payment or by installments. The real*

test is whether the said amount paid in a lump sum or in installments is the consideration paid by the tenant for being let into possession. This Court again in Chintamani Saran Nath Sah Deo v. Commissioner of Income-tax, Bihar & Orissa [1943] 11 ITR 513 considered all the relevant decisions on the subject in the context of licenses granted to the assessee to prospect for bauxite in some cases for 6 months and in others for a year or two and observed :

> *"The definition of salami was a general one, in that it was a consideration paid by a tenant for being let into possession for the purpose of creating a new tenancy."*

7. *Applying that test this Court held in that case that under the said licenses there was a grant of a right to a portion of the capital of the*

licensor in the shape of a general right to the capital asset.

(iii) The Jurisdictional High Court of Madhya Pradesh in case of ***CIT Versus Project Automobiles (1987) 167 ITR 781 M.P.*** *has held that the payment of lease premium even in installment does not change the character and it cannot be treated as advance rent. The Court has in unequivocal words has held that the lease premium or Salami in order to obtain the right of an endeavoring nature in the plot in question is capital expenditure for the lessee. Therefore the same would be capital receipt for the lessor. Para 23 of the order reads as under:*

23. In view of the foregoing discussion, we are of the opinion that the principles laid down in the cases relied on by learned counsel for the Department are applicable to the facts and circumstances of the instant case. From a perusal of the various terms, subject to which the permanent lease was granted by M/s.

Hindustan Steel Company Limited in favour of the assessee, it is apparent that the assessee obtained a right of an enduring nature in the plot in question and in order to obtain this right it had to pay a sum of Rs. 62,500 as premium. On the terms of the contract, it is again apparent that ground rent in the sum of Rs. 3,125 per annum was payable by the assessee in addition to the premium of Rs. 62,500. The amount of premium, in our opinion, could not, on the facts of the instant case, be treated as advance rent. The fact that facility of paying the amount of premium in instalments was provided to the assessee will, in our opinion, in no way derogate from the nature of the amount payable as premium. The payment of the sum of Rs. 62,500 was apparently in the nature of a salami payment in order to obtain the right of an enduring nature in the plot in question. In our opinion,

the clause contemplating resumption of possession by the lessor if the premises were required by it for its own use for a public purpose on the conditions stated in the said clause would also not make much of a difference. Firstly, that is a clause which normally finds place in such leases and, secondly, the contingency contemplated was such which may or may not happen. In the instant case, it is not the case of the assessee that the said contingency has happened and the lessor has resumed possession over the plot in question. In this view of the matter, the amount of premium paid by the assessee was obviously in the nature of capital expenditure and the Tribunal was not right in holding it to be revenue expenditure.

(iv) *The Supreme Court in case of* ***A.R. Krishnamurthy and Anr. vs. Commissioner of Income Tax, Madras (10.02.1989 - SC) :[1989]176 ITR 417 (SC)*** *has held*

that the lease premium is consideration for parting away the right in capital assets, therefore it is capital receipt and cannot be taxed. The head-note reads as under:

> *What is parted with under the terms of the lease deed is the right to exploit the land by extracting clay which right directly flows from the owenership of the land. The said right evaluated in terms of money forms part of the cost of acquiring the land. If transfer of capital asset in s. 45 includes grant of mining lease for any period then obviously the cost of acquisition' of the land would include the 'cost of acquisition' of the mining right under the lease. There is a live nexus between the 'cost of acquisition' of the land and the rights granted under the lease. The amount paid by the assessee was not only the cost of acquiring the land but also of acquiring bundle of rights in the said land including the right to grant lease. There is thus 'cost of acquisition'*

which is attributable to the right of limited enjoyment transferred by the grant of the lease. So far as the apportionment of the cost of acquisition is concerned, it is a question of fact to be determined by the ITO in each case on the basis of evidence.

(v) *The Supreme Court in case of* ***Maharaja Chintamani Saran Nath Sah Deo Versus CIT Bihar and Orissa (1971) 82 ITR 464*** *Hon'ble Supreme Court has held that the principle on which the Courts have acted whether a payment described as Salami or Premium is capital or revenue receipt are well settled. Salami or Premium is a single payment made for the acquisition of right of the lessor by the lessee to enjoy the benefits granted by the lease. That general right may properly be regarded as a capital asset and the money paid to purchase it may properly be held to be a payment on capital account. Para 4 and 6 (relevant portion) are reproduced herein below:*

4. The principles on which the courts have acted whenever a question has arisen whether a

payment described as a salami is capital or revenue receipt are well settled. Salami is a single payment made for the acquisition of the right of the lessor by the lessee to enjoy the benefits granted to him by the lease. That general right may properly be regarded as a capital asset and the money paid to purchase it may properly be held to be a payment on capital account. But merely because a certain amount paid to the lessor is termed as salami it does not follow that no inquiry can be made to determine whether it has or has not an element of revenue receipt in the shape of advance payment of royalty or rent. The onus, however, is upon the income tax authorities to show that there exist facts and circumstances which would make payment of what has been called salami, income. The position may be summed up in this way. When the interest of the lessor is parted for a price the price paid is

premium or salami but the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent; the former is a capital receipt and the latter a revenue receipt. Parties may camouflage the real nature of the transaction by using clever phraseology and, therefore, it is not the form but the circumstances of the transaction that matter. The nomenclature used may not be decisive or conclusive but it helps the courts, having regard to the other circumstances, to ascertain the intention of the parties.

6. The Tribunal proceeded to say:

Here in the present case what we find is that the assessee had chosen to take a large amount by way of premium but a lesser amount by way of royalty. The patent reason for the assessee to take a lesser, amount by way of royalty was that the

amount received by him as salami was not taxable. There is, therefore, no doubt in this case that the sum received by the assessee by way of salami or premium was in substance an advance payment of royalty. We are, therefore, in entire agreement with the Income-tax Officer's order.

We are unable to appreciate how a comparison of the terms of the lease of 1941 which was only for one year and which was for a different purpose, namely, prospecting could afford a reasonable basis for determining whether the terms of the 1944 lease were fixed in such manner that part of the proceeds of royalty were included in the figure of the salami. The object of a prospecting lease is entirely different and since the period was only one year it is quite reasonable to assume that the royalty was fixed at a higher rate because it was not

known how much quantity of mineral would be extracted during that period. The lease of 1944 was for a much longer period i.e. 30 years. When a lessor creates a lease for that period it is legitimate for him to charge more amount by way of salami or premium as he is transferring possession of the demised land for a considerably long period. A lessor may also think that the rate of royalty need not be the same as it was in the case of the prospecting lease and taking an over all business view royalty at a slightly less rate may be charged. The Tribunal's decision based as it was only on a comparison of the terms of the leases of 1941 and 1944 does not appear to take into consideration all these relevant matters. It must not be forgotten that the mere fact that the amount taken on account of salami was substantial and on the face it looked considerably large would not

justify the view that that amount represented capitalized royalty. In the Panbari Tea [1965] 57 ITR 422(SC) case certain tea estates had been leased put for a period of 10 year. The lease was executed on a consideration of a sum of Rs. 2,25,000 as and by way of premium or salami and an annual rent of Rs. 54,000 to be paid by the lessee to the lessor. The payments were to be made by installments. This Court declined to assume that the parties had camouflaged their real intention and fixed a part of the rent in the shape of premium and it was observed that no material had been placed either direct or circumstantial to disbelieve the description given in the lease deed to the amount as premium and to hold that it was not in fact premium but only rent. The position does not seem to be different in the present case.

(vi) The Supreme Court in case of ***Durga Prasad Khanna Versus CIT (1969) 72 ITR 796 (SC)*** *has also held that in para 5 that the departmental authorities as well the High Court were in error in treating the amount of premium of Rs. 55,200/- as advance payment of rent. The Apex Court in para 4 has stated that the payment of Salami (Premium) could not be treated as revenue receipt. The payment of being non-recurring nature.*

4. On behalf of the assessee-assessee it has been urged that the sum of Rs. 55,200/- was paid to the lessor in lump for completing the cinema house without which the lessee could not have used the building for the purpose of exhibiting cinematograph films. According to the recitals in the deed which must be given due effect the lessees agreed to give this amount towards the cost of erection of the cinema house according to their suggestion and for defraying other charges and expenses. The payment of rent was expressly

stipulated at the rate of Rs. 2,100/- per month and there was no indication whatsoever that any different or higher rate of rent was agreed to. It is further submitted that there was no material or evidence on which it could be found that the cinema would have fetched any higher rent, the admitted cost of construction being about Rs. 1,00,000/-. Alternatively the sum of Rs. 55,200/- could be regarded only as payment of salami (premium) and could not be treated as revenue receipt, the payment being of a non-recurring nature.

(vii) A similar question has also been answered by the Calcutta High Court in case of ***Pramode Chandra Roy Choudhary Versus CIT West Bengal 1962 (46) ITR 1064*** *that the premium of salami is capital receipt.*

The Court after considering various judgments of Supreme Court in this regard laid the following principles:

(1) Prima facie premium is no income; *it is for the taxing authorities to prove that the facts exist which would make the same an income, if they seek to tax it.*

(2) Where the premium represents payment of rent in advance it is income. ***But if it represents the whole or part of the price of the land or the sale price of the leasehold interest, it is not income but capital.***

(3) Salami to be income, should be a periodical monetary return coming in with some of sort of regularity or expected regularity from definite sources.

(4) ***Salami or premium paid at the beginning of a mining lease for a long period ordinarily represents the purchase price of an out and out sale of the property and the sum received is capital and not income****, but rent or royalty paid periodically is income. The principle is the same, whether the premium is for a simple lease of mineral rights. But royalty payable under the mining lease stands on a different footing from premium or salami.*

(5) When a premium is received merely as an incident in the possession of property (even if leasehold) and there is no

finding that the letting out of the property is the business of the assessee, the premium receipt is capital.

(6) Salami or premium paid in advance of rent once for all at the outset, the period of tenancy being uncertain and the chances of the resettlement of the same land to some tenant being remote, is capital.

(7) ***Premium (salami) is a single payment made for the acquisition by the lessee of the right to enjoy the benefits granted to him by the lease. Money paid to purchase the said general right is a payment on capital account.***

(8) ***Salami is the amount of money which a landlord insists on receiving as a condition precedent for parting with the land in favour of the lessee and that it was received by the landlord, not because of the use of the land, but before the land was put into use by the assessee****.*

(9) The question of salami should not be decided on the length of the period of the lease, but on the nature of the right

conveyed. The characteristics of the payment should be decided without reference of the nature of the lease including the wasting nature of the assets under the lease.

(10) The smaller the salami the higher the rent and vis-a-vis (Birendra Kishore Manikya v. Secretary of State) is no longer a good law.

Of course it is true, as to whether salami was income or not the same had to be decided on the facts of each case, but on the construction of the terms of the lease in the instant case, we hold that the payment has a close analogy to the payments as in Sindhurani's and Chintamani's cases. We also find that the sum of Rs. 20,000 in the present case is a consideration paid by the tenant at the beginning for being let into possession with the object of obtaining a new tenancy and the covenants of the lease show that there was a transfer or parting with of the landlords right under the instant building lease. The sum of Rs. 20,000 was also paid prior to the creation of the tenancy and not after the relationship of landlord and tenant had come into existence. The payment is also of a single non-recurring character in the

nature of the premium for granting the lease. In view of the absence of any evidence on behalf of the department to show that the rental of Rs. 800 is low and the period of the lease is short and there being no other attending circumstance and in view of assessees proof of another building lease of a contiguous area showing the same state of affairs, we find that the receipt of the said sum of Rs. 20,000 is a capital receipt and not an advance rent.

(viii) The Supreme Court in case of ***Member for the Board of Agriculture Income Versus Sindhu Rani Choudhrani (1957) 32 ITR 0169*** *has defined the Salami (Premium) as follows:*

Salami was described by Lord Wright in Kamakshya Narain Singh v. Commissioner of Income-tax, a case of a grant of a mining lease for a period of 999 years in the following word :

"The salami has been, rightly in their Lordships opinion, treated as a capital receipt. It is a single payment made for the acquisition of the right of the lessees to enjoy the benefits granted to them

by the lease. That general right may properly be regarded as a capital asset, and the money paid to purchase it may properly be held to be a payment on capital account."

The Supreme Court in the said case defined "salami" as follows :

"The characteristics and incidence of salami disclosed from the 'statements of the cases' are that it is a lump sum non-recurring receipt of money by a landlord from a tenant before making a settlement of the holding, waging C.A. No. 162 of 1955 varied from Rs. 7 to Rs. 10 per bigha and was less in other cases. He is also entitled to charge a fixed periodical amount of 11 thousand per bigha per annum. Salami is charged whenever a fresh settlement is made whether it is of a piece of virgin land or of an auction-purchase holding. Thus, salami is payment by a tenant to the landlord antecedent to the constitution of the relationship of landlord

and tenant. It is really a payment by the tenant to the landlord for being allowed to take possession of the land for cultivation under the lease.....salami is not a recurring or periodical payment or a fee or fine levied at fixed intervals from the tenant for the same holding."

(ix) The Bombay High Court in case of Commissioner of Income Tax, Bombay City-III vs. Ratilal Tarachand Mehta (12.11.1976 – BOM HC) [1977] 110 ITR 71(Bom) has also held the lease premium, salami or pagadi as Capital Receipt and rejected the contention of the Income Tax Authorities to consider it as revenue receipt.

7. It is true that in the instant case there were at least more than 12 tenants in respect of which the assessee must have received these amounts by way of premiums from the respective tenants before granting the monthly tenancies to them. But here again, no material has been brought on record to show that the construction of the present building,

from the tenants of which he received premium, was a part of his business as a builder or promoter. Moreover, even the department did not seek to include this item of Rs. 54,000 in the assessee's total income under section 10 of the Indian Income Tax Act, 1922, but the only attempt was to show that it was his income from other sources under section 12 of the Act. As we have said above, considering the case under section 12 of the Act it is difficult to come to the conclusion that the amount of Rs. 54,000 that was received by the assessee from his tenants by way of premium for the grant of monthly tenancies to the tenants would be receipt in the nature of income or revenue.

(x) ITAT Mumbai in case of Joint Commissioner of Income Tax vs. Mukund Ltd. (15.02.2007 - ITAT Mumbai) [2007] 106 ITD 231(Mum) has considered the same issue in favour of the assessee. The headnote reads as under:

Capital or revenue expenditure*--Premium or salami paid for acquisition of land in Industrial area for 99 years Not refundable on termination of agreement before 99 years.--Assessee entered into an agreement with Maharashtra Industrial Development Corporation (MIDC) by writ it was given on land lease for 99 years for its purpose as factory/plant. The assessee paid a huge amount as "premium or salary" and rent was fixed at Rs. 1 per annum. The amount paid as premium or salami was non-refundable on termination of lease before 99 years. The AO treated the amount paid as "premium or salami" as capital expenditure. The assessee contended that it was an advance rent and, therefore, deductible as revenue expenditure. Held: The contention of the assessee was not acceptable. The amount paid as premium or salami was not an advance rent and enduring benefit was to be obtained by the assessee for 99 years and as*

such it was a "premium or salami" and thus to be treated as capital expenditure.

In view of above submission, the appeal may kindly be allowed and the impugned orders of Ld. AO and CIT(A) may kindly be set aside."

18. During the course of hearing it was asked from the Ld. counsel of the assessee to explain the treatment in respect of these receipts prior to the Asst Year 2003-04 where the assessee company eligible to claim exemption U/s 10[20A] of the Act. The Ld. Counsel for the assessee submitted the written submission, which is placed on record. The Ld. Counsel for the assessee reiterated his arguments as per written submission, which is reproduced as under, :-

"*2.1] During the course of hearing an argument was put forth by the Ld. DR stating that in the years prior to 2003-04 the assessee was showing lease premium, lease rent and other revenue as its income and since exemption under section 10(20-A) has been withdrawn, therefore the assessee has changed the*

accounting of the income of lease premium and lease rent. This argument was countered by AR stating that since beginning the assessee has credited the Lease Premium, Lease Rent and other revenues belonging to State Government in the accounts of State Government pursuant to order dated 14.12.1981 by the Industries Department, Government of Madhya Pradesh. In view of above, the Hon'ble Tribunal directed the assessee to produce the audited Balance Sheet and Profit & Loss Accounts of the years prior to 2003-04 to substantiate the arguments. In response to the same the assessee submits the Annual Accounts of following years for kind perusal of the Hon'ble Tribunal:

S. No	Particulars
1	Balance as on 31-03-1986
2	Balance as on 31-03-1991
3	Balance as on 31-03-1999

2.2] That on perusal of the above Balance sheet, following facts emerge :-

[A] ASST YEAR 1986-87 [FOR THE YEAR ENDED ON 31-03-1986]

(i) On page 3 of the Balance Sheet the State Government Account has been shown in the liabilities side and details have been provided in "Schedule – D" at page (7) where State Government Account has been shown and under point no. (2) Direct Collection of Land Premium, Security Deposit, Lease Rent on its behalf for Industrial Area has been shown. Similarly the cost of construction and development has been deducted from the account of State Government under Expenditure on behalf of State Government. Similarly all the deposits in the banks have been shown in "Schedule – G" at page (11) on behalf of State Government and Interest received have been shown under point no. (3) of Schedule "D".

(ii) Profit & Loss Account at page (4) shows Income and details of which has been provided in "Schedule – K" at page (14) where except amount of lease premium, lease

rent which was collected on behalf of State Government, all other revenues have been shown. Similarly in expenses only Personnel Expenditure (Schedule – L) and Administrative Expenditure (Schedule – M) clearly shows that no expenses of development or construction of industrial area has been charged to Profit & Loss Account and the same have been first shown under the head "Capital Work in Progress" and upon completion of the work the same has been debited to the account of State Government in Schedule – D.

Thus, evidently, the entire lease premium, lease rent and security deposit collected on behalf of the State Government have been shown in Schedule – D as liability and the expenses incurred on development has been deducted therefrom. Thus, the assessee was acting as "Nodal Agency" of the State Government.

[B] ASST YEAR 1991-92 [FOR THE YEAR ENDED ON 31-03-1991]

(i) On page 1 of the Balance Sheet the State Government Account has been shown in the liabilities side and details

have been provided in "Schedule – 4" at page (5) where State Government Account has been shown and under point no. (2) Direct Collection of Land Premium, Security Deposit, Lease Rent on its behalf for Industrial Area has been shown. Similarly the cost of construction and development has been deducted from the account of State Government under Expenditure on behalf of State Government. Similarly all the deposits in the banks have been shown in "Schedule – 7" at page (7) on behalf of State Government and Interest received have been shown under point no. (3) of Schedule "4".

(ii) Profit & Loss Account at page (3) shows Income and details of which has been provided in "Schedule – 11" at page (9) where except amount of lease premium, lease rent which was collected on behalf of State Government, all other revenues have been shown. Similarly in expenses only Personnel Expenditure (Schedule – 12) and Administrative Expenditure (Schedule – 13) clearly shows that no expenses of development or construction of industrial area has been charged to Profit & Loss Account

and the same have been first shown under the head "Capital Work in Progress" and upon completion of the work the same has been debited to the account of State Government in Schedule – 4.

Thus, evidently, the entire lease premium, lease rent and security deposit collected on behalf of the State Government have been shown in Schedule – 4 as liability and the expenses incurred on development has been deducted therefrom. Thus, the assessee was acting as "Nodal Agency" of the State Government.

[C] ASST YEAR 1999-00 [FOR THE YEAR ENDED ON 31-03-1999]

(i) On page 11 under the hear Current Liabilities of the Balance Sheet the State Government Account has been shown in the liabilities side in "Schedule – 6" The State Government Account shows the balance payable to the State by the assessee due to collection of Lease Premium, Lease Rent and Security Deposit as shown in previous years as per details given in Annexure – 1 on page no. 18 where under point no. (2) Direct Collection of Land

Premium, Security Deposit, Lease Rent on its behalf for Industrial Area has been shown. Similarly the cost of construction and development has been deducted from the account of State Government under Expenditure on behalf of State Government.

(ii) Profit & Loss Account at page (8) shows Income and details of which has been provided in "Schedule – 8" at page (12) where except amount of lease premium, lease rent which was collected on behalf of State Government, all other revenues have been shown. Similarly in expenses only Personnel Expenditure (Schedule – 9) and Administrative Expenditure (Schedule – 10) clearly shows that no expenses of development or construction of industrial area has been charged to Profit & Loss Account and the same have been first shown under the head "Capital Work in Progress" and upon completion of the work the same has been debited to the account of State Government in Schedule – 6 as per Annexure – 1 on page 18.

Thus, evidently, the entire lease premium, lease rent and security deposit collected on behalf of the State Government have been shown in Schedule – 4 as liability and the expenses incurred on development has been deducted therefrom. Thus, the assessee was acting as "Nodal Agency" of the State Government.

3.1] That from the analysis of the Balance sheet as enclosed for the period prior to 2003-04 it is proved beyond doubt that the assessee company act as a nodal agency for and on behalf of the State Government.

3.2] That it is admitted facts by the assessing officer and also by the Ld CIT[A] that land was acquired by the State Government through collector and handed over the same for development and allotment for installation of the new industries as per order dated 14.12.1981 and clarification dated 31.03.2017.

3.3] The land was allotted by the assessee for and on behalf of the Governor of State Government under Article 299 of the Constitution of India in accordance to the M.P.

Industries (Allotment Shed, Plot & Land) Rule, 1974 and 2008.

3.4] The amount of land premium and Lease rent and other charges have been collected by the assessee company at the rate as prescribed by the State Government in the Rules.

3.5] That as per State Government Order dt 14-12-1981 , land was acquired by the State Government and handed over the same for development to the assessee company, major expenses in excess of Rs 5,00,000/- were also incurred from the Grants as received from the State Government. Thus, development was done by the assessee company for and on behalf of the State Government. Hence, entire amount as received in connection with the allotment of the land pertains to the State Government. The State Government vide his order dt 31-03-2017 further clarified the nature of receipt as received by all the AKVN in the State of Madhya Pradesh. Hence, after clarification from the State Government there was no doubt about the nature of different receipt in

connection with the land. It is also settled position of law that any explanation which has clarificatory in nature having retrospective effect, for this preposition we rely on the following decisions:-

1	*CIT Vs Gold Coins Foods (P)Limited*	*304 ITR 308[SC]*
2	*Allied Motors (P) Ltd etc Vs CIT*	*224 ITR 0677 [SC]*
	Viva Highways Ltd. V MPRDC Ltd.	*AIR2017MP103*

3.6] The assessee company act as a nodal agency of the State Government , there is no business activity of the assessee on its own, assessee does not hold any assets in its own name, all expenses were incurred by the Appellant whether capital or revenue are on behalf of the State Government and therefore the amount as received by the assessee company for and on behalf of the State Government not liable to taxed as income of the assessee but belonging to the State Government. For this preposition we rely on the following direct decisions:-

1	*City and Industrial Development Corporation of Maharashtra Ltd Vs ACIT*	*Appeal Nos ITA No 2985/ Mum/2012 dt 08-08-2012*
2	*CIT and Anr Vs Karnataka*	*284 ITR 0582 [*

	Urban Infrastructure Development and Finance Corporation	*Karnataka]*
3	*Karnataka State Agricultural Produce Processing & Export Corporation Ltd*	*ITA No 1078/ Bang/ 2012 dt 20-12-2013 for the Asst Year 2008-09*
4	*CIT Vs Delhi State Industrial Development*	*295 ITR 0406 [Delhi]*

MATCHING CONCEPT OF ACCOUNTING :

3.7] The assessing officer was also grossly erred in taxing the entire amount as received by the assessee company on account of land premium, lease rent, Transfer Fee and Interest on funds of the State Government as income of the assessee company without following the basic accounting principle of matching concept. Since, cost of land and development expenses have never been charged by the assessee in its books of account as expenses but all such cost have been deducted from the outstanding due of the State Government. Therefore, the Ld. AO has grossly erred in considering the Lease Premium, Lease Rent and other income pursuant to allotment of land to the industries as Income but failed to appreciate that without expenditure how these assets were created.

3.8] The Ld. AO and CIT(A) has heavily relied upon Other Object and Incidental Objects of the Memorandum & Articles of Association of the assessee Company ignoring in totality the MAIN OBJECTS which clearly spell out that the assessee company shall develop the land obtain from the State Government as its instrumentality. The assessee company has not undertaken any of the OTHER OBJECTS as provided under clause (C), however the Ld. AO and CIT(A) merely mention of business activity in the OTHER OBJECT has consider that the assessee company is the OWNER OF THE LAND and is in business of leasing of the land as real estate business. The Ld. AO and CIT(A) failed to appreciate that the LAND OWNER is always the State Government and in all REVENUE RECORS the Industry Department, Government of Madhya Pradesh has been shown as OWNER of the land. The Ld. AO & CIT(A) has also failed to appreciate that the land and cost of development have not been shown in the balance sheet of the assessee company as assets of the assessee company. The land was never transferred and registered

in the name of the assessee. Therefore, the Ld. AO & CIT(A) merely on the basis of collection of lease premium, lease rent by the assessee and its utilization as per the order of State Government, has erred in considering the assessee as OWNER of the land and development.

3.9] The Ld. AO & CIT(A) has also erred in not considering the provisions of section 13 and 149(2-A) of the Companies Act, 1956 which provides that no company can undertake any activity mentioned in clause (C) OTHER OBJECTS of the Company without complying the formalities as provided under section 149(2-A) of the Companies Act and if the company undertakes any such business the same shall be ultra vires to the company.

3.10] LAND PREMIUM IS A CAPITAL RECIEPT

3.10.1] During the course of hearing it was also argued that the amount of land premium for transfer of right to use the land was also capital receipt and not the revenue receipt as taxed by the assessing officer.

3.10.2] In the case of the assessee company, the land as acquired by the State Government was handed over to

the assessee company for development and as per prescribed guideline of the State Government, the assessee company allotted Industrial plot to the eligible industries on the land premium and lease rent as prescribed by the State Government. The right of use was transferred from the land owner to the Industries for 99 years and 30 years as the case may be and the lease rent was payable on annual basis. It is settled position of law that right in land was transferred for longer lease is to be considered as transfer of ownership to the lessee and therefore the amount of land premium as paid for the transfer of right is to be considered as capital receipt in the hand of the assessee company. For this preposition we placed reliance on the following direct decisions: -

1	*Member for the Board of Agricultural Income Tax Vs Sindhurani Chaudharani and Ors*	*32 ITR 0169 [SC]*
2	*Ukhara Estate Zamindaries (P) Ltd vs CIT*	*120 ITR 0549 [SC]*
	The assessee also rely upon all other 11 judgments on this subject which have provided in the Synopsis of Judgments during the course of Arguments.	

3.10.3] The Lease Deed provided in paper book clearly prove the contentions of the assessee as under:

(i) Lease Premium is one time upfront amount received by the assessee on behalf of the State Government for parting away the interest in the property and right to enter in the land, therefore it is capital receipt.

(ii) Lease Rent is periodical payment of continuous enjoyment of the property and in case of failure to pay the lease rent the lessee cannot continue to enjoy the property, therefore it is revenue receipt.

(iii) The Lease Premium is refundable in case of surrender and forfeiture of lease as per the terms of the lease deed. Therefore, it is payment for right in the property but for payment for enjoyment of the property, therefore it is capital receipt.

(iv) The Ld. AO & CIT (A) have erred in considering the lease premium as "Advance Rent" without any reason just on whims and fancies. The assessee is collecting the lease Premium, Lease Rent, Transfer fees, Development Charges etc as per the Rules framed by the State Government. The

assessee is separately collecting 3 years advance rent as "Security Deposit" and one year lease rent in advance in addition to lease premium which is received upfront before entering into an agreement for lease. "

19. The assessee during the course of hearing also placed reliance on the decision of the Hon'ble Mumbai Bench of ITAT in the case of City and Industrial Development Corporation of Maharashtra Limited Vs Assistant Commissioner of Income Tax [Appeal Nos ITA No 2985/ Mum/2012 dt 08-08-2012]has held that [refer paras 37 to 46] :-

***"37**. We have heard the arguments advanced from either side at length and have also perused the material brought and placed before us for consideration.*

***38**. Coming to the arguments of the Senior Counsel that the assessee must be treated as Government or surrogate or an agent, has to be considered and adjudicated at first. To consider the taxation point of view, we have to refer to Article 289 of the Constitution, wherein Article 289(1) says, "The property and income of a State shall be exempt from*

Union Taxation". Article 289(2) reads, "Nothing in clause (1) shall prevent the Union from imposing or authorizing the imposition of, any tax to such extent, if any, as Parliament by Law provide in respect of a trade or business of any kind carried on by, or on behalf of the Government or State, or any operation connected therewith, or any property used or occupied for the purpose of such trade or business, or any income accruing or arising in connection there with" and Article 289(3) reads, "Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by Law declare to be incidental the ordinary functions of Government".

***39**. To our mind, the entire case of the assessee in the instant case, hinges on clause (2) or clause (3) of Article 289 of the Constitution of India. The basic purport of Article 289(2) is to neutralize clause (1), but with a rider that, if there is any "trade or business", done on behalf of the Government or any operations connected therewith or any property issued or occupied for the purposes of such*

trade or business, or any income accruing or arising in connection therewith. To make this clause effective, even for Government / State, conduct of "trade or business" is necessary, which simply means involvement of commercial and profit motive for the vendor. This is in line with the decision of Hon'ble Supreme Court of India in the case of APSRTC (supra), relied upon by the DR, wherein the Hon'ble Supreme Court had observed, "....the facts that the trading activity carried on by the assessee may be covered by article 289 (2) of the Constitution does not really assist the assessee's case. Even if a trading activity falls under clause (2) of article 289 of the Constitution, it can sustain a claim for exemption from Union taxation only if it is shown that the income derived from the said trading activity is the income of the State" Therefore, whenever, there is an activity in the nature of trade or business, clause (2) shall come to life, which according to clause, shall be applicable towards the State i.e. if an activity which is in the nature of trade or business, conducted by the State itself, the liability for tax shall emerge, a typical example is that of

service tax collected by the State on events being conducted by the vendors, have to be deposited by the State, in the Government exchequer, making the State an assessee under service tax as held by the Hon'ble Supreme Court in the case of RashtriyaIspat Nigam Ltd. vs Dewan Chand Ram Saran (CA No. 3905 of 2012). This is only possible where there is an activity of "trade or business", but, if, confined towards development, either of a new township or betterment of the functions of the local authority, 289(2) shall remain in the oblivion and shall not come into play. In this context when in the case of APRTC, reported in 52 ITR 524 (SC), the Advocate General sought to include activities in clause (2) in clause (1), the Hon'ble Apex Court negated the same by saying "no exception can be taken". Therefore, the functions and / or activity has to be seen primarily. The Hon'ble Supreme Court, thus observes, "Reading the three clauses together, one consideration emerges beyond all doubt and that is that the property as well as the income in respect of which exemption is claimed under clause (1) must be the property

and income of the State, and so, the same question faces us again: is the income derived by the assessee from its transport activities the income of the State? If a trade or business is carried on by the State departmentally and income is derived from it, there would be no difficulty in holding that the said income is the income of the State. It may be that the statute under which a notification has been issued constituting the assessee corporation may provide expressly or by necessary implication that the income derived by the corporation from its trading activity would be the income of the State". This observation read together with section 113(3A) of MR&TP Act, 1966, shall emerge that the activity so performed by the assessee is nothing but an act of State without any profit or commercial motive attached with it. The only clause left for our consideration then would be clause (3), which shall come into play once clause (2) is disbanded and as soon as it become disbanded, clause (3) come to life, which operates only if, "Parliament may by Law declare to be incidental to the ordinary functions of Government". Here,

in the instant case, we have to read "Parliament" as "State Government" because in the instant case, it is the State Government which has authorized the assessee to perform the development projects at Navi Mumbai, Vasai- Virar, Waluj and such other places.

***40**. We cannot agree with the argument of the DR that there is no document which has drawn out the Agent-Principal relationship, because the very first Resolution dated 18th March, 1970 mention in para no. 2 that ".... which would act as an "agent" of Government for the development of the areas with a view to secure the above objective", and in para no. 3 of this Resolution clearly say, "The subsidiary company will work under the control and supervision of the State Government in the General Administrative Department". In our opinion, the first Resolution itself makes it clear that the assessee is to be an agent, but functions as an arm of the State Government, because, if the assessee can only work under the control and supervision of the State Government, meaning thereby that the assessee cannot make / take*

any decisions suo motu, then, in such a case authority for performance of all activities lie somewhere else. In any case, as per this Resolution, it clearly makes the assessee an "agent" of the State.

41.XX XX XX

***42**. We find that according to MR&TP Act, 1966, the machinery sections, i.e. sections 113 & 113A talk of appointment of Development Authority and Local Authority and accordingly, through various Resolutions, in compliance of these sections, MR&TP Act has appointed the assessee as the Development Authority for development to new townships and Local Authorities for streamlining the functions of already existing towns like Aurangabad, Nashik, Nagpur etc. This, itself shows that the assessee is acting totally on behalf of the Government. Another distinguishing feature that can be seen in that as soon as the "Project" is complete, the project gets handed back to the State, i.e. when there is a development project, as per phases, and in the case of local authority, as and when the authorizing committee is satisfied, the reins are*

transferred to the municipal boards, from whom, the project was taken over, as we have seen from Resolution no. 10375 dated 06/08/2010.

***43**. In tune with these observations, read with sections 113 & 113A of MR&TP Act along with Articles 289(1) & 289(3) and holding that the assessee corporation is not doing any trade activity on its own accord, we hold, relying on the decision of the Hon'ble Bombay High Court in the assessee's own case, in the Writ Petition, following the decision Percival case (supra), wherein it has been held, that CIDCO, the assessee herein, is an agent of the State Government of Maharashtra. We, therefore, respectfully follow the Hon'ble jurisdictional High Court of Bombay, as held in the case of Percival (supra), and hold, the assessee to be the "agent" of the State Government of Maharashtra, read with the entire overwhelming documents, suggesting that there is no income to the assessee as such, and whatever is, generated, it gets deposited in the Consolidated Fund of the State. We also cannot ignore the fact that the department has been*

assessing the assessee as a State Government undertaking for the last three years, therefore, even this cannot be called as an afterthought and applying the 'rule of consistency' we hold that the department cannot be allowed to take a distinctive approach in the current year.

***44**. The revenue authorities were thus, clearly in error, in assessing the business income in the hands of the assessee at Rs. 63,786.58 lacs. We delete this income, as not belonging to the assessee.*

***45**. Ground no. X to XXIV.*

We have held that there is no business activity of the assessee on its own and the assessee does not hold any assets in its own name, as is evident from the Balance Sheet filed with the revenue authorities, the question of treatment of the same does not arise, besides that all expenses incurred by the assessee whether capital or revenue are on behalf of the State Government of Maharashtra and which are reimbursed to the assessee. In these circumstances, there cannot be any capital expenditure incurred by the assessee on physical and

social infrastructure. In that case, all the impugned grounds become infructuous, hence these are dismissed.

***46**. Ground no. XXV*

The ground is taken on contingency that in case grounds no. 3 to 9 were not allowed. Since we have seen from the records and also held that the assessee did not own any assets, pertaining to the development projects, the ground is rendered infructuous.

20. The Ld. Counsel for the assessee also placed reliance on the decision of the Hon'ble Karnataka High Court in the case of CIT & Anr vs Karnataka Urban Infrastructure Development & finance Corporation as reported in 284 ITR 0582 has held that:-

"*4. The material on record shows that the very purpose of constitution of the assessee was to act as a nodal agency for implementation of mega-city scheme worked out by the Planning Commission. Both the Central and the State Governments are expected to provide requisite finances for implementation of the said project. The funds from the Central and State Governments will flow directly to the specialised institutions/nodal agencies as grant and the*

nodal agency will constitute a revolving fund with the help of Central and State shares out of which finance could be provided to various agencies such as water, sewerage boards, municipal corporations, etc. The objective is to create and maintain a fund for the development of infrastructural assets on a continuing basis and, therefore, the assessee is a nodal agency formed/created by the Government of Karnataka as per the guidelines; there is no profit motive as the entire fund entrusted and the interest accrued therefrom on deposits in bank though in the name of the assessee has to be applied only for the purpose of welfare of the nation/States as provided in the guidelines; the whole of the fund belongs to the State Exchequer and the assessee has to channelise them to the objects of centrally sponsored scheme of infrastructural development for mega-city of Bangalore. Funds of one wing of the Government is distributed to the other wing of the Government for public purpose as per the guidelines issued. The monies so received, till it is utilised, is parked in a bank. The finding recorded by the Tribunal clearly shows that the entire money in question is received

for implementation of the scheme which is for a public purpose and the said scheme is implemented as per the guidelines of the Central Government and, therefore, the assessee is only acting as a nodal agency of Central Government for implementation of these projects. It is not the case of the Revenue that the assessee was carrying on any business or activities of its own while implementing the scheme in question. The unutilised money, during which the project could not be fully implemented, is deposited in a bank to earn interest. That interest earned is also again utilised for the implementation of the mega-city scheme which is also permitted under the scheme. Therefore, in computing the total income of the assessee for any previous year the interest accrued on bank deposits cannot be treated as an income of the assessee as the interest is earned out of the money given by the Government of India for the purpose of implementation of mega-city scheme.

5. Therefore, we do not find any error in the conclusion reached by the Tribunal that there was no income earned by way of interest by the assessee and setting aside the order

of AO which is affirmed by the first appellate authority. The finding given by the Tribunal is purely a question of fact. We do not find any substantial question of law involved in this appeal and therefore, this appeal is liable to be dismissed at the stage of admission itself."

21. The Ld. Departmental Representative has reiterated the submissions before us as made in the written submission, which is reproduced as under :-

"Written submission in the case of M/s Madhya Pradesh Audhyogik Kendra Vikas Nigam Ltd., Indore, ITA No. 347 to 351/Ind/2013, A.Y. 2003-04 to 2008-09-reg.

The above mentioned appeals are fixed for hearing today on 06.03.2018. In this connection we are filing our written submission along with the paper book attached herewith.

1. The original assessment u/s 143(3) read with section 147 in this case was completed on 29.12.2006. The section 147 of Income Tax Act, 1961 was invoked in this case because the appellant was claiming the exemption

u/s 10(20A) of Income Tax Act, 1961 till the financial year 2002-03 which was omitted w.e.f. 01.04.2003. Since the appellant had come under the ambit of taxation from A.Y. 2003-04, necessary action under the Income Tax Act was taken in this case for the A.Y. 2003-04 and A.Y.2004-05. The order of CIT(A) against the order of A.O. dated 29.12.2006 was passed on 15.01.2008 whereby the finding of AO given in the assessment order dated 29.12.2006 were upheld. However, Hon'ble ITAT vide their consolidated order dated 03.02.2009 for the A.Y. 2003-04 & 2004-05 have restored the issue to the file of AO for reconsideration and re-adjudication. The CIT(A) has passed a consolidated order for the A.Y. 2004-05 to 2008-09 and separate order for the A.Y. 2003-04 against the assessment orders passed by the assessing officer in compliance to the direction of Hon'ble ITAT and also the orders on subsequent pending assessments. The CIT(A) in his consolidated order dated 26.02.2013 has dismissed the various grounds of appeal on the issue of Land Premium.

2. The most relevant part of the order of CIT(A) is required to be reproduced hereunder – 2.4 to 2.10.

From careful consideration of written submissions of the assessee, it becomes evident that the arguments of the assessee are basically based on two limbs. Firstly it has been tried to bring out that the land belongs to the government of Madhya Pradesh and the assessee is just an agent engaged in development and distribution of the same. In order to justify this position, the assessee has adduced many arguments for example, (a) the assessee is a subsidiary of MPAVN Ltd., (b) Directors of appellant company are appointed by MPAVN Ltd. and chairman and directors are appointed by governor of MP, (c) the appellant company has not purchased any land on its own for establishment/promotion of industries, (d) Government allocates and disburses the funds for acquisition of land under consideration which reaches to the assessee through DIG, (e) As per instruction 6/3/81/ 11-B, dated

14.12.1981 issued by Commerce and Industry department of MP government, the government is supposed to make available the land to the assessee. Further during the course of appellate proceedings, the assessee has brought to my notice the instance when the MP government has instructed the assessee to spare an amount of Rs. 10 Crores to be given to MP Trade and facilitation corporation to participate in equity of MPAKVN, Ujjain. Through the above mentioned arguments, the assessee has tried to establish that the land belongs to Madhya Pradesh government and the amount of land premium needs to be considered as liability of the appellant towards the government of Madhya Pradesh.

I have considered the submissions of the assessee and noted that the land is provided to the assessee by government of Madhya Pradesh through DIG. It is also noted that the MP government, for development of industries and infrastructure acquires land and

makes payment of compensation through collector of the particular area. This land is subsequently given at the disposal of audhyogik vikas kendras and other agencies engaged in the process of development of industries, housing and infrastructure. It is observed that the land under consideration has been given to the appellant by government of MP and through an instruction as referred above, any land premium and lease rent received from leased out land will be kept with respective audhyogik kendras for maintenance and further development. The assessee is not a mere custodian. It becomes a lawful owner of the land which has legally been transferred through government of Madhya Pradesh. I have also gone through the memorandum & article of association and observed that the assessee is authorized to purchase/acquire land on its own also apart from the land earmarked by the government of MP. (refer para A-l of memorandum of association).

Therefore, there is no doubt that as far as the management and leasing of the land under the consideration is concerned, the assessee has been adequately independent/ equivalent to the owner of the land. This can be seen from clause C(22) of the memorandum wherein it has been clearly brought out that the object of the audhoygik kendra shall be to sell, improve, manage, develop, exchange, lease, mortgage, dispose off, deal with all or any part of property and rights of the company. Moreover there is no denial on the part of the appellant that income has arisen. Once the income has arisen out of any transaction, the same has to be taxed under the Income Tax Act, 1961 under the taxation scheme unless the same is exempted by a particular provisions of the Act. I have also noted that till the AY 2003-04, the assessee had been claiming exemption u/s 10(20A) of the Income Tax Act. However, the same has been omitted with effect from 01.04.2003.

Therefore, in my considered view, the income arising as a land premium which has duly been accounted, for by the appellant is necessarily to be taxed in the hand of assessee. The government of Madhya Pradesh shall not come into picture for taxation purpose because the assessee is an independent and separate identity who is filing its return, of income and paying taxes etc.

The second limb of argument advanced by the assesse is that the land premium is a capital receipt. This part of argument was mainly advanced before the Assessing Officer at the time of passing the assessment order. However the same set of arguments have been put forth before me also. The assessee has relied mainly on decisions of Hon'ble Supreme Court which are as under:-

(i) Ukhara Estate Zamindaries P. Ltd. Vs. CIT 120 1TR 549 (SC)

(ii) Member for the Board of Agricultural Income Tax, Assam Vs. Sindhurani Chaudhurani & Others 32 ITR 169.

It is observed that the second in this case is whether the receipt under consideration is a capital receipt or revenue receipt. In order to decide and examine this issue, it will be appropriate to go through the memorandum & article of the association. A careful perusal of the same makes it crystal clear that the assessee's main object is to develop, promote, encourage, assist in growth and establishment of industries etc. with ancillary/incidental objects of carrying out of businesses, A reference to objects as specified under B9 to B12 makes it clear that the assessee is in the business with a motive of earning the profit. The relevant paras of such objects are reproduced as under :-

"Ancillary/incidental objects of the company shall be:

B (9) To carry on any other trade or business whatsoever which can, in the opinion of the company, be advantageously or conveniently carried on by the company by way of extension of or in connection with any such business as aforesaid or is calculated directly or indirectly to develop any of the company's business or to increase the value of or turn to account any of the company's assets property or rights;

(10) To undertake, manage, control or otherwise deal with the business and undertakings of any person, firm or corporation when it may be necessary for the purpose of protecting the interests of the company, or for the purpose of protecting securities, realizing upon claims or carrying out any transaction or obligation which the company has entered upon;

(11) To take part in the management, supervision and control of the business or operation of any undertakings, shares or other securities of which are held by the company or in which the company is otherwise interested, and for that purpose to appoint and remunerate any directors or accountants or other experts or agents;

(12)To sell or otherwise dispose of the undertaking of the company or any part thereof for such consideration as the company may think fit and in particular (but so as not to restrict the generality of the foregoing) for shares, debentures, bonds or securities or obligations of any other company having objects altogether or in part similar to those of the company."

A careful consideration of above clauses of memorandum reveals that the .assessee is in the business. Leasing out of the land and getting rental income as well as the premium, is the

business of the assessee. Therefore, a land premium is nothing but a revenue receipt in the form of advance rent which has loosely been named as land premium. Since the assessee is showing annual rent on account of such leasing of the plots, there is no reason why the advance rent received should not be taxed accordingly. Moreover as brought out clearly in prepares, the assessee itself has offered I/99th portion of such land premium as revenue receipt to be taxed in the year under consideration which goes to prove that the nature of receipt is revenue. In this regard, it will be appropriate to refer the agreement made by the assessee with the purchaser of the plots. Clause 2 of such agreement makes it abundantly clear that the amount of land premium is nothing but the rent in advance. The clause 2 reads as under :-

"2. The lessee having, paid to the lessor for said land the advance rent and premium of Rs..... .....as security amount before the execution of this deed."

In view of above discussion, there remains no doubt that the advance rent in the form of land premium is nothing but revenue receipt to be taxed as per Income Tax Act. During the course of appellate proceedings, the counsel of the assessee has further submitted that the decisions relied upon by the assessee in the cases of Member for the Board of agriculture income and Ukhara Estate Zamindaries P. Ltd. are squarely applicable in the instant case. Although Assessing Officer has briefly distinguished these two cases yet in the interest of natural justice, I have gone through the above case laws to verify the contention of the assessee. In the case of Member of the Board of Agriculture Income Tax, it is seen that the salamis/premia were not at

all dependent on the rate of the rent charged. However, the same varied with the quality of land leased out for the purpose of agriculture. But in the instant case, as brought out above, the land premium is nothing but advance rent fully dependent on the rate of rent. Further in that case, the salami was defined as lump sum non recurring receipt of money paid by tenant to land lord before making a settlement of holding. Whereas in the case under reference, where leasing of the plot is for 99 years and there is no provision for conditions in the agreement to suggest the modality of transfers and renewable after 99 years. In other words, after the lease period expires, it is not the case of the assessee that they are not going to charge further premium at the time of renewal of lease. The salami in the referred case has been defined as single payment made for acquisition of right of the lessees to enjoy the benefit granted to them by the lease. In that case it was held

as capital asset for the reasons that the right for the cultivation of the land being the capital in nature -was transferred to the lessee for a consideration called salami. Therefore the same was treated as capital asset. Hence, in view of the clear cut difference in the facts and findings of the cases, to that extent, the case law cited by the assessee is not applicable in the instant case where land premium charged is nothing but the advanced rent.

The another case law, i.e., Ukhara Estate Zarnindaries P. Ltd. relied upon by the appellant was also gone through and it was seen that the facts and findings in the said case law are also clearly distinguishable from the facts of the instant case. In that case, the assessee was himself a lessee who took over the zamindari properties of a family for 999 years. The lease items comprised of coal bearing lands/mines, government

promissory note, jewelry, arrears of rent etc. The appellant granted several sub leases for 900 years to various companies and received salami as well as compensation for compulsory acquisitions. This was a single lease by the appellant and receipt of salami by granting of sub leases for management of real property as an owner of lease hold interest was construed and treated as capital asset. Whereas in the instant case as brought out above, the land was given by the state government and the assessee has transferred the same on long term lease and earned rental income as well as the advance rent in the form of land premium. In the case relied upon by the assessee, Hon'ble Supreme Court reversed the decision of High Court saying that the appellant had dealt with its lease hold interest in the zamindari property as a. land owner and the receipt of salami, premia and compensation were receipts of capital nature. Therefore, the facts

are altogether different. In view of the foregoing discussion, I am of the considered opinion that the AO has correctly assessed the income as revenue receipt. The additions made under this head in the instant assessment year as well as in the AY 2006-07, 2007-08 & 2008-09 are hereby confirmed.

3. Special Audit u/s 142(2) of Income Tax Act 1961on land premium-

During the subsequent assessment years i.e.2011-12,2012-13,2013-14 & 2014-15, the assessing officer had got the special audit conducted section under 142(2A) of Income Tax Act 1961. The copies of special audit reports are placed at page no.79 to 137 of paper book. The special auditor has clearly reported that the Land Premium is the revenue income of the appellant. The said conclusion was drawn by the auditor keeping in account various documents like memorandum of association, lease deeds and various facts and circumstances of the case. The

relevant part of notes given by the special auditor in the above mentioned assessment years is reproduced here under-

"Land Premium:-

During our audit we have found that land premium collected by the company amounts to Rs. Xyz. which has been credited to State Government Account and is shown as liability in balance sheet, As explained to us the management of SEZ INDORE Ltd is of the view that the land belongs to state government and land premium so received also belongs to the state government therefore, it is to be credited to State Government account. However, the company retains the whole amount received with it and deploys the said premium amount for industrial and infrastructure development which the main object of the company. The main object of company as per memorandum of association is as reproduced below:-

"To develop, promote encourage or the assist in the formation of Special Economic Zone(s), information

Technology park, software park of any other such zone/ park, in accordance with the policies of the Government of India, Government of Madhya Pradesh or any other Government, or its department(s) of any agency of any regulatory body formed in this regard and to obtain and/or acquire land from Government or private sources and/or arrange, co-ordinate the availability of all essential infrastructural inputs such as water, power, telecommunication facilities and to construct roads, culverts, bridges, industrial sheds, dwelling units, administrative units or any other buildings, multiplex or any other unit which may be considered necessary in this regard, to acquire and provide the telecommunication facilities; and to provide such other infrastructural facilities as may be considered necessary for the establishment of a special economic zone; and to sell, lease or otherwise transfer such properties on such terms and conditions as may be decided from time to time, obtain necessary permission from all concerned Government Departments, Central of State, regulatory bodies such as Reserve Bank

of India or any other competent authorities, and to establish such a special economic zone either on its own or in association/collaboration with any other Government Department or company or institution or individual."

The above object clearly state that the company is to develop or assist in development of industrial area and for the same, take suitable steps to obtain or acquire land from government or private. The company work on model of leasing out land to industries for industrial purpose. On this, they collect upfront land premium and other lease charges.

As stated above company is engaged in the business of industrial and infrastructure development, thus, land premium and other lease charges so received is a part and parcel of its business receipt. Therefore, land premium and lease rent so received is not a liability in the hand of the company.

As in the estate business a builder debit all expenses incurred on construction and credit sale proceeds to profit

and loss account considering them as revenue in nature. The company also debit all expenses incurred on development of plot in profit and loss account. Therefore, the land premium being the consideration of leasing out of plot needs to be given the same treatment i.e. treated as revenue in nature.

Also no capital gain is offered when the lease is cancelled due to surrender of plot or due to any other reason and the said plot is allotted to other lessee on higher premium which shows that the difference of premium received is not a capital receipt, thus, the same stands revenue in nature.

Further in the recent judgment in the case of New Mangalore Port Trust vs Assistant Commissioner of Income Tax, Circle -1(1), Mangalore decided by ITAT Bangalore, it appeal no. 1299(Bang) of 2013 where the upfront premium is treated as income and is charged to tax in the year of the receipt.

Looking to all these facts, land premium is the revenue income of the company and the amount of Rs Xyz- is to be included in the total income"

It becomes evident from the detailed discussion in the order of the CIT(A) as reproduced above and also the finding of the special auditor that the Lumpsum Land Premium charged and collected by the appellant was nothing but revenue receipt earned in the process of business in development and sale of plots. Which has also been found supported by the memorandum of association and the copies of lease deeds wherein nature of receipt has been specified.

4. Memorandum and Articles of association

I may request this Hon'ble Bench to kindly take note of the main objects of the company listed at serial no. 3, 4 & 5 (PARA A) at page no. 1 of the memorandum of association. Similarly we may draw the kind attention of Hon'ble members to incidental/ancillary objects of the company listed at 1,8,9,10,11,12,13,15,17,19,20 (PARA

B), page no. 2 to 4 of the MOA. Further there is a list of other object in the MOA which is listed under (PARA C). Kind attention is invited to serial no. 1,2,3,5,7,21,22 & 23 of other unspecified objects. The above referred objects of the company proves beyond doubt that the company is very much in business of acquiring land, developing plots and selling and leasing out of the same to various industrial houses for a consideration in the form of rent, advance rent and land premium and also for various terms and conditions specified in the lease deeds. Therefore, the learned CIT(A) has rightly reached to the conclusion that land premium is nothing but revenue receipt in the hands of the appellant which view has also been supported by MOA, Sample lease deed and the report of Special auditor filed for various assessment years which are placed on record.

5. Sample lease deed

May I request this Hon'ble bench to take note of a sample lease deed placed in the paper book at page no. 53

to 78. Special attention is drawn to para 1, 2, 3, 4, 5, 6 ,27,28,30 and 33 of sample lease deed wherein various terms and conditions of lease have been specified and the nature and name of consideration in lieu of the lease of the land has been properly specified. It has clearly been brought out that land has been leased out for rent or advance rent or land premium. The appellant has also been reflecting the part of land premium in the return of income for the A.Y. 2003-04 to 2008-09 and subsequent. Therefore, there is no question of considering the land premium as capital receipt. Accordingly it is requested that the action of CIT(A) in confirming the order of AO may kindly be upheld on the issue of taxability of land premium.

6. High Court orders in writ petition

It is not out of place to mention here that the appellant, in the subsequent year i.e. A.Y. 2014-15, soon after the completion of assessment order and raising the demand on the same issue of land premium had preferred

a writ petition in Hon'ble M.P. High Court for stay of the demand. Hon'ble High Court vide it's order dated 13.11.2017 had declined to interfere with the action of assessing officer in perusing the recovery of demand. Rather Hon'ble High Court had opined that the department was justified in issuing demand notice and was also justified in issuing letter dated 04.10.2017 for recovery of 20% of demand in accordance with the circular of CBDT dated 31.07.2017 read with circular dated 29.02.2016.

7. In view of the detailed discussion as above and various relevant documents filed through the paper book, we request this Hon'ble bench to confirm the action of AO and CIT(A) in considering the land premium belonging exclusively to the appellant and treating the same as revenue receipt for the purpose of taxation. "

22. We have carefully considered the rival submissions and have perused the material placed before us and also gone through the case laws cited by the respective Learned Representatives of the parties. The issue requires to be adjudicated is whether the land

premium received by the assessee company is liable to be taxed as an income for the year under consideration. The main thrust of the arguments of the Ld. Counsel for the assessee remain three folds, firstly, the assessee being a Government Company and acting as a nodal agency for the State Government is not liable for the income tax, in terms of Article 289 of the Constitution of India; secondly, the receipt of premium is being accepted and collected by the assessee company on behalf of the State Government, and, thirdly, even if it is assumed that the premium receipt is of the assessee company, even in that event it is not taxable being capital in nature. We have given our careful consideration to the arguments addressed at length by the Ld. Counsel for the assessee that the assessee being a Government Company cannot be taxed under Article 289. Article 289(1), 289(2) and 289(3) read as under :-

Article 289(1) says,-

"The property and income of a State shall be exempt from Union Taxation".

Article 289(2) says -

"Nothing in clause (1) shall prevent the Union from imposing or authorizing the imposition of, any tax to such

extent, if any, as Parliament by Law provide in respect of a trade or business of any kind carried on by, or on behalf of the Government or State, or any operation connected therewith, or any property used or occupied for the purpose of such trade or business, or any income accruing or arising in connection there with".

Article 289(3) says -

"Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by Law declare to be incidental the ordinary functions of Government".

As per Article 289(2) of the Constitution of India, the Union Government is authorized to impose any tax to such extent, being as Parliament by law provides in respect of trade or business of any kind carried on by us on behalf of the Government for State, for any operation connected therewith or any property used or occupied for the purpose of its trade or business or any income accruing or arising in connection therewith. However, as per Article 289(3) nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by Law declare to

be incidental to the ordinary functions of Government. We have perused the objects of the assessee company. A bare perusal of the same, demonstrates that what the assessee company is doing, is purely a work of businessman/contractor. Therefore, the assessee company cannot take shelter under Article 289(1) or 289(3) of the Constitution of India. Hence, this plea of the assessee company is rejected.

Now coming to another plea of the assessee company that whatever is being done is done on behalf of the Government of Madhya Pradesh. In support of this, the Ld. Counsel for the assessee has taken us to various instructions by the Government of Madhya Pradesh. There is no doubt that there has to be a clear distinction between sovereign function and a function carried out as a trader or a businessman. If the function falls under the ambit of sovereign function, certainly any receipt arising therefrom cannot be subject to tax, but where the function is being carried out as a contractor, in that event, in our considered view, such receipt will be taxable. Moreover, as per the directives of the State of M.P., the entire receipt remains with the assessee company.

Now coming to the third arguments of the assessee that even if it is assumed that the receipt is to be taxed as a business receipt, under the facts of the present case, that being a capital receipt cannot be taxed. This plea of the assessee company is contrary to the facts on record. Admittedly, in earlier years, the assessee itself has shown 1/99th of the land premium as a taxable receipt. Thus, such treatment reflects the intention of the assessee company that it was nothing but a business activity. The assessee has relied upon the judgement of the Hon'ble Supreme Court to buttress the arguments if the income is wrongly declared that cannot be taxed. It is not the case where the assessee has wrongly offered the premium for tax. In fact, it was a conscious decision keeping in view the objects of the assessee company and lease deed executed by it.

23. The Ld. Counsel for the assessee strongly urged that the issue may be decided in the light of the various case laws as relied in the written synopsis.

24. We have gone through the decisions relied upon by the Ld. Authorized Representative of the assessee of the Hon’ble Mumbai Bench in the case of M/s City and Industrial Development

Corporation of Maharashtra Limited Vs Assistant Commissioner of Income Tax [Supra] and Hon'ble Karnataka High Court in the case of CIT & Anr vs Karnataka Urban Infrastructure Development & Finance Corporation [supra]**.** We have also considered the case laws cited by the Ld. Counsel for the assessee, but the judgments of Hon'ble Supreme Court in the case of **CIT Assam Versus The Panbari Tea Company Limited (1965) 57 ITR 422 (S.C.),** wherein the Apex Court while dealing with the nature of receipt of premium on the land leased to lessee has held that it is a payment made for the acquisition of the right of lessor to enjoy benefits granted by the lease the general right may properly be regarded as a capital asset and the money paid to purchase to it may properly be held to payment on capital account. and Hon'ble Madhya Pradesh High Court in the case of **Project Automobiles, 167 ITR 781,** wherein it was held that premium payable by the assessee to secure a permanent lease cannot be considered as advance rent and the same has to be held as capital expenditure. Both the above cases are distinguishable on facts. In the present case, the assessee is also empowered to acquire land and deal with the same in the manner it likes. Another distinguishing facts in the present case is

that the assessee itself has treated as taxable in earlier years and in the present case, there was special audit, wherein the auditors have given a finding on facts by observing as under :-

> "*As stated above company is engaged in the business of industrial and infrastructure development, thus, land premium and other lease charges so received is a part and parcel of its business receipt. Therefore, land premium and lease rent so received is not a liability in the hand of the company.*
>
> *As in the estate business a builder debit all expenses incurred on construction and credit sale proceeds to profit and loss account considering them as revenue in nature. The company also debit all expenses incurred on development of plot in profit and loss account. Therefore, the land premium being the consideration of leasing out of plot needs to be given the same treatment i.e. treated as revenue in nature.*
>
> *Also no capital gain is offered when the lease is cancelled due to surrender of plot or due to any other*

reason and the said plot is allotted to other lessee on higher premium which shows that the difference of premium received is not a capital receipt, thus, the same stands revenue in nature."

The case laws as relied upon by the Ld. Counsel for the assessee, Salami or the premium as may be called was not refundable. In our considered view, the fundamental aspect for the treatment of any receipt would certainly depend upon the intention of the assessee. In the case in hand from the Memorandum of Association as well as the Lease Deed as executed, the relevant clauses for the same are reproduced as under :-

Clauses of Memorandum and Articles of Association of MPAKVN:

"***Ancillary/ incidental objects of the company shall be:***

B(9) To carry on any other trade or business whatsoever which can, in the opinion of the company, be advantageously or conveniently carried on by the company by way of extension of or in connection with any such business as aforesaid or is calculated directly or indirectly to develop any of the company's business or to increase the value of or turn to account any of the company's assets property or rights;

(10) To undertake, manage, control or otherwise deal with the business and undertaking of any person, firm or corporation when it may be necessary for the purpose of protecting the interests of the company, or for the purpose of protecting securities, realizing upon claims or carrying out any transaction or obligation which the company has entered upon;

(11) To take part in the management, supervision and control of the business or operation of any undertakings, shares or other securities of which are held by the company or in which the company is otherwise interested,

any for that purpose to appoint and remunerate any directors or accountants or other experts or agents;

(12) To sell or otherwise dispose of the undertakings of the company or nay part thereof for such consideration as the company may think fit and in particular (but so as not to restrict the generality of the foregoing) for shares, debentures, bonds or securities or obligations of any other company having objects altogether or in part similar to those of the company."

Clause 2 of the agreement of Lease Deed :

"2. The lessee having, paid to the lessor for said land the advance rent and premium of Rs. .....as security amount before the execution of this deed."

Moreover, it is contended by the assessee that matching principle is to be applied to give set off of the expenditure incurred in respect of the lease premium. It demonstrates that the assessee is not clear whether this receipt is revenue or capital in nature.

From the above, it is clear that one time premium received by the assessee would be income of the year of the receipt. It can be safely inferred that the land premium is nothing but a kind of rent, which is certainly taxable. Under the identical facts, Coordinate Bench of this Tribunal in I.T.A.No. 1299/Bang/2013, in the case of M/s. New Mangalore Port Trust, Mangalore vs. ACIT, has held as under :-

> "*9.5 Thus it is clear that the Special bench has analyzed the respective obligations of the parties and found that in the said case, the assessee contributed to the accruing or arising of the income by rendering services or otherwise. It was also noted that in case of failure of the assessee to provide the allotted accommodation or the alternative accommodation, the assessee is liable to pay liquid damage to the members. On those peculiar facts of the said case, the Special Bench conducted that there was a continuing liability on the part of the assessee not only to provide the accommodation but also to provide other incidental services attached with the accommodation. Thus, in the said case, when the assessee was under*

obligation to provide accommodation as well as other services incidental to the accommodation to its members, then the amount received in advance was held to be recognized as income over the period during which the assessee remained under obligation to provide the accommodation and other services to the members. By considering the peculiar facts, Special bench held that the entire fee received by the assessee cannot be said to be accrued as income in the year of receipt. In the case in hand, after receiving upfront premium, assessee was no longer required to provide any service or to perform any other act/obligation under the agreement for 30 years. Therefore, we are of the considered ,opinion that the judgment of the Special bench in the case of Mahendra Holidays (supra) cannot be applied in the facts of the present case. In view of the above facts and circumstances of the case, we do, not find any error or illegality in the orders of the authorities below in treating the entire upfront premium received by the assessee as income for the year under consideration."

We, therefore, do not see any reason to take a different view as taken by the Ld. CIT(A). Hence, we hold under the facts of the present case, the Ld. CIT(A) was justified in taxing the land premium. Ground nos. 2 to 8 of the assessee's appeal are dismissed.

Issue regarding exclusion of lease rent, land premium and interest income :

25. The assessee company through the additional grounds of appeal claimed to exclude the amount of lease rent, Land premium and Interest on deposit from its total income in all the appeals. The amount of lease rent as received by the assessee company from different industries to whom land was leased out by it for and on behalf of the State Government. In the ground of Land premium, it was held that the same was received by the assessee company for and on behalf of the State Government. Similarly, 1/99th share of land premium as offered inadvertently also claims to exclude, since the same was also relates to the land leased out by the assessee company to different industries. Similarly, the amount of interest as credited in the books of the assessee on the amount of State Government as received in the form of Land Premium, Lease rent, Transfer fee and development funds which actually pertained to the State Government and as per order of the State

Government dated 31-03-2017 also it was clarified that the amount of lease rent, Interest on State Government, Transfer fee and development funds as received by the assessee actually pertained to the State Government. The assessee before the assessing officer himself vide his letter dated 17-12-2009 has submitted its detailed reply which was also considered in Para 7.6 of the assessment order the same is reproduced as under: -

> *"Further to our earlier submissions on the subject, we may submit that the land premium is being received by the assessee Company for and behalf of the government of M.P. according to the policies as decided by the M.P.Government in this respect. We may invite your honors kind attention on the instructions letter dated 14.12.1981,copy of which is enclosed herewith. On perusal of the said letter your honor will please appreciate that the assessee company, which is fully owned by the government of M.P. and is being functioning under the instructions and polices made and decided by them, was provided with the land by the government and the company is to develop and manage the same for the said purpose. It is very important to note that the assessee company is only an extended and of government of M.P for the leasing out such*

land, that too on the terms and conditions, for and on behalf of government only, which are being laid down by the Government in that respect from time to time.(pl. refer sub clause (c) of clause No. 1 of the said letter.)

It is further submitted that the assessee company is only an agency to collect Land premium and other revenues in respect of such land for and behalf of the government and further that the assessee company is only allowed to retain the land premium and other revenues collected by them in respect of such land and are supposed to utilize the same for the development and maintenance, as per the instructions of the government. Under the circumstance, we are sure that you honor will please agree with us that the land premium is being collected by the assessee Company only for and behalf of the government and as such the same is being rightly shown as liability in balance sheet and accordingly being not offered for taxation.

Without prejudice to whatever is being submitted herein above, even if the land premium so collected, by any stretch of imagination be considered as receipt by the assessee company

, the same cannot be taxed as the same is in the nature of capital receipt. We rely on following"

a. (1957) 32 ITR 169 (SC) Member of the board of agricultural Income-Tax v Sindhurani Chaudhurani.

b.(1979) 120 ITR 549 (SC) Ukhara Estate Zamindaries (P)

Ltd v CIT.

We are sure that in the light of whatever is being submitted herein above, your honor will please agree with us that the land premium so collected is not an income."

26. That from the above, it is clear that the assessee before the Assessing officer himself has stated that Land premium and other receipts were received by it for and on behalf of the State Government and, therefore, entire amount so received was not liable to be taxed in its hand. Thus, entire material and claims was before the assessing officer himself at the time of passing of the assessment order.

27. The Ld. Counsel for the assessee during the course of hearing relied on various decisions and claimed that merely the amount of lease rent, land premium and Interest on State Government Funds inadvertently offered for tax does not deprive the assessee company to lodge its claim before the Hon'ble Bench.

28. The Hon'ble Bombay High Court in the case of Balmukund Acharya Vs DCIT as reported in 310 ITR 310 has held that :-

> *" **31.** Having said so, we must observe that the apex Court and the various High Courts have ruled that 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 any assessee, under a mistake, misconception or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected [see S.R. Koshti vs. CIT (2005) 193 CTR (Guj) 518 : (2005) 276 ITR 165 (Guj), C.P.A. Yoosuf vs. ITO (1970) 77 ITR 237 (Ker), CIT vs. Bharat General Reinsurance Co. Ltd. (1971) 81 ITR 303 (Del), CIT vs. Archana R. Dhanwatey (1981) 24 CTR (Bom) 142 : (1982) 136 ITR 355 (Bom)].*
>
> ***32.** If particular levy is not permitted under the Act, tax cannot be levied applying the doctrine of estoppel [see Dy. CST vs. Sreeni Printers (1987) 67 SCC 279].*
>
> ***33.** This Court in the case of Nirmala L. Mehta vs. A. Balasubramaniam, CIT (2004) 191 CTR (Bom) 8 :*

(2004) 269 ITR 1 (Bom) has held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. In the case on hand, it was obligatory on the part of the AO to apply his mind to the facts disclosed in the return and assess the assessee keeping in mind the law holding the field.

29. That Hon'ble Calcutta High Court in the case of Mayan Poddar (HUF) vs. Wealth Tax Officer as reported in 262 ITR 0633 has held [refer Para 10]:-

" 10. ..... Even if the assessee had included the same in his return, that would not preclude the assessee from claiming the benefit of law. There cannot be any estoppel against statute. A property , which is not otherwise taxable , cannot become taxable because of misunderstanding. If in law an item is not taxable, no amount of admission or misapprehension can make

it taxable. The taxability or the authority to impose tax is independent of admission. Neither there can be any waiver of the right by the assessee. The department cannot rely upon any such admission or misapprehension if it is not otherwise taxable."

30. That it is settled position of law that nothing can be taxable merely if the same was offered by the assessee inadvertently when the same was not taxable as per provision of law. For this proposition the reliance was placed by the Ld. Authorized Representative of the assessee on the following direct decisions:-

1	National Thermal Power Co. ltd. vs. CIT	(1998) 229 ITR 383 (SC)
2	Jute Corporation of India Ltd. vs. CIT	(1991) 187 ITR 688 (SC)
3	Nirmala L. Mehta v. A. Balasubramaniam, Commissioner of Income-tax	269 ITR 1 (Bom)
4	CIT v/s. Mayur Foundation	(2005) 274 ITR 562 (Guj)
5	CIT v/s. Kerala State Co-Operative Marketing Federation Ltd.	(1992) 193 ITR 624 (Ker)
6	Balmukund Acharya Vs DCIT	310 ITR 310 [Bombay]
7	Mayank Poddar [HUF] vs Wealth Tax Officer	262 ITR 0633[Calcutta]

31. The Ld. Departmental Representative vehemently argued supporting the order of both the lower authorities and further added that the assessee has itself offered the income for tax on account of lease premium in the return of income.

31.1 We have heard the rival contentions and perused the records placed before us and gone through the judgments referred and relied by both the parties. We observe that in the preceding para no.22, we have given a categorical finding that the lease premium income offered by the assessee was a conscious decision and further Article 289(1) of Constitution of India is not applicable on the facts of the present case.

Therefore, the grounds raised relating to this issue regarding exclusion of lease rent, land premium and interest income are devoid of merits and therefore, they are rejected.

Issue regarding Under estimation of profit :

32 In the appeal as filed for the Asst Year 2003-04 [Appeal No 347/Ind/2013], the assessee had challenged the addition as made by the assessing officer and as maintained by the Ld CIT[A] in respect of understatement of profit to the tune of Rs.2,18,75,469/-.

33 The assessing officer in the assessment order disallowed the expenses as incurred to the tune of Rs 2,18,75,469/- and added the same to the total income of the assessee. The assessing officer while making the above disallowance stated as under:-

> *"6.8 In the above proposition of law on examination of Note appended to the Schedule (4) of the Balance Sheet it is noticed that the assessee had shown the Capital WIP as on 01.04.2002 at Rs. 23,97,10,477/- after due capitalization of the expenses. Examination of the particulars furnished in the Note further revealed that the assessee had shown the carrying out of the WIP during the previous year under consideration for Rs 6,46,99,371/- From this it follows that the assessee did*

not carry out the capital work during the previous year under consideration, as it was in the earlier previous year. As no other details were furnished by the assessee to establish that the particular expenditure was not incurred for the aforesaid work it is imperative that the method followed by the assessee earlier is invariably required to be adopted in the Previous year under consideration also. Therefore it would rather be incorrect on the part of the assessee to assert that AO had not brought any material evidence to establish that the certain expenditure were required to be capitalized not mentioned in the Guidelines of Chartered Accountant of India. I therefore do not find any merit in assessee's this contention.

6.9 In view of the above it is apparent that by change of method if not capitalization of various expenses to the extent of 75% has resulted in to suppression of profit by Rs 2,18,75,469/-. I therefore make the addition of Rs 2,18,75,469/- to the total income of the assessee. I am satisfied that the assessee had concealed the correct

particular of its income, penalty proceeding u/s 271(1)© of the Act are being initiated separately."

34 The assessee preferred an appeal before the Ld CIT[A] and disputed the additions as made by the assessing officer. The Ld CIT[A] vide his order dated 26-02-2014 has dealt with the said issue in detail but confirmed the action of the Assessing officer. The finding of the Ld CIT[A] is reproduced as under:-

"2.7 After careful perusal of the submissions of the assessee, the main contentions are summarized as under:-

(i) The AO has simply relied on the comments of the Auditor whereas the assessee has accounted for the same as per guidelines of Chartered Accountant.

(ii) The AO has mechanically relied upon the Audiotrs comments without taking into account the notes on accounts from which it emanates that the assessee was considering employee remuneration, administrative and general overheads as capital expenditure only when such expenditures were specifically attributable to the construction of a project. This means such expenditure

were capitalized only till such time, the capital work was in progress and once the capital work has been completed these expenditure have not been capitalized and treated as revenue expenditure, Surprisingly, the facts in the case do not support the statement of the assessee. The assessee's contention that the projects were complete, therefore, the expenses were taken to profit and loss account is absolutely a contradictory statement because records for the year under consideration and subsequent year indicate evidently that the projects/ creation of fixed assets is a continuous process in which the assessee is fully engaged. Even if it is believed that the projects were no more in existence, in that case there is no question of existence of such expenditure under the relevant heads under consideration. Similarly the assessee's objections for referring the Audiotrs comment is not going to help because they are the assessee's auditor not of the Income Tax Department. The assessee has not been in a position to prove anything contrary to the facts brought out by the auditors which in fact is the moral and lawful duty of

Audiotrs. Therefore I do not find an infirmity in the order of AO in referring the comments of the Auditors and taking cognizance of the same.

2.8 Without prejudice to the inference drawn above, during the course of appellate proceedings, in the interest of natural justice, the assessee was requested to file complete details along with supporting documentary evidence relevant to expense of Rs 2,18,75,168/- which are under consideration. The assessee has not filed any such details, further the assessee was required to prove that said expenditure are revenue expenses and not attributable to any work/ project in the nature of capital creation. In other words, the assessee was afforded reasonable opportunity to distinguish the nature of said expenditure from those which were capitalized in earlier assessment years. But the assessee has not been able to avail this opportunity saying that at this stage it shall be cumbersome process. Since the relevant details and explanations have not come forth, the AO is found to be

within his rights to treat the expenditure relying upon the Auditor report being consistent and regular method of accounting followed by the assessee in relation to said expenditure. Therefore, the action of the AO is confirmed. Accordingly, the ground no.2 of the appeal is dismissed."

35 The assessee preferred an appeal before this bench and challenged the assessment order as passed by the assessing officer and order of the Ld CIT[A], the assessee in addition to his verbal arguments filed detailed written synopsis, the same is reproduced as under: -

" The assessee Madhya Pradesh Audhyogik Kendra Vikas Nigam (Indore) Limited was incorporated in the year 1981 by the State Government as wholly owned government company with the main object to develop industrial area for industrial growth in the State of Madhya Pradesh. The State Government had acquired the land from the private landowners and contributed its own land for development of industrial area. The raw land were handed over to the assessee for development and further management and

maintenance of the same. The land remained in the ownership of the State and the assessee was allowed to act as a nodal agency.

The development of industrial area which was commenced in the year 1981 came to at halt around 2000 when most of the land available have been utilized for development.

It is further submitted that in the year 2005 the State Government decided to develop first Special Economic Zone and therefore established a new entity in the name of SEZ Indore Limited and diverted the development work in that company. Therefore, no major projects remained with the assessee and all the resources and land available with it had been transferred to M/s. SEZ Indore Limited which has developed the first SEZ of the country in India.

In the above background, there were need for the assessee to revisit its accounting policy which was continued for many years and as a policy the assessee was allocating 75% of its employees cost and administrative cost to the pending projects. However, since no major projects were in the hands of the assessee, therefore it was imperative for

the assessee to reconsider its policy and charge entire expenditure to Profit and Loss Account.

Ironically, the auditors of the assessee have mechanically given a qualification in their report without appreciating the current status and nature. The Auditor did not apply their mind to the rationality of 75% of expenses to be allocated to the projects when no major projects were in the hands of the assessee. It is further submitted that even in past, the Auditors must have raised an issue on the rationality of allocation of 75% amount of employees cost and other expense to any project without considering the size and work under the project. The Auditors failed to appreciate that the assessee had started development work in the year 1981 and till 2000 it had utilized all the lands available with it and remaining land was earmarked for M/s. SEZ Indore Limited leaving no land for development by the assessee, under such circumstance no amount is required to be allocated to any project.

It is further submitted that, after completion of initial development, the assessee is required to maintain these

infrastructures and facilities and now these employee's cost and other expenses are pertaining to these recurring expenditures.

That, the Ld. AO in the assessment order dated 29th December 2006 has observed referring para 11(c) of Form 3-CD that attribution of expenses incurred on Employees Remuneration and Benefits and Administrative & General Overheads on construction of projects/fixed assets from 75% capitalization to nil percent understatement of profit by Rs. 2,18,75,469/- made the addition.

That, the Ld. AO has relied upon the above note made by the Auditor in their report without ascertaining whether the attribution of expenses to the extent of 75% is required or not under the generally accepted accounting principles and various Accounting Standards & Guidelines issued by The Institute of Chartered Accountants of India from time to time. The ld. AO while relying upon a mechanical note given by the Auditor conveniently ignored the statement of the company on significant Accounting Policies given under

notes to account in Schedule 17 under the head Fixed Asset which reads:

"Previously Expenditure incurred on employees remuneration and benefits and the administrative and general overheads which are specifically attributable to the construction of a project fixed assets are treated as part of the cost of the project/fixed assets. Likewise 75% of employee remuneration, administrative expenses and financial expenses have been charged to capital works in progress. ***Now this year management has changed their policy and it has been decided that major expenditure has been incurred on maintenance activities instead of infrastructure activities hence there is no need to allocate 75% of expenditure to work in progress****"*

36 Thus, it is clear that the assessee was considering employees' remuneration, administrative & general overheads as capital expenditure only when such expenditures were specifically

attributable to the construction of a project. This means such expenditures were capitalized only till such time, the capital work was in progress and once the capital work has been completed these expenditures have not been capitalized and treated as revenue expenditure.

37 Regarding the Accounting Standards-AS 10, the AO stated as under :-

"The Accounting Standards-AS 10

Para 93 of Accounting Standard 10, Accounting for Fixed Assets issued by the Institute of Chartered Accountants of India deal with the subject matter as under:

"Administration and other general overhead expenses are usually excluded from the cost of fixed assets because they do not relate t a specific fixed asset. However, in some circumstances, such expenses as are specifically attributable to construction of a project or to the acquisition of a fixed asset or bringing it to its working condition, may be included as part of the cost of the construction

project or as a part of the cost of the fixed asset."

Thus, the assessee was following the Accounting standard AS 10 while capitalizing 75% of expenses specifically attributable to the construction of the project and when no such expenses were specifically attributable to the construction of project/fixed assets, the assessee rightly debited the same to the profit & loss account.

Copy of Accounting Standard 10 on Accounting for Fixed Assets is annexed as Annexure-C.

***Is there change in accounting policy**:*

Though nothing has been stated by the Ld. AO in regard to the above expenses and has only stated "in view of these circumstances books of accounts are not acceptable as consistency has not been maintained by the assessee."

The ld. AO during the appellate proceeding before CIT(A) in his Remand Report dated 10th September 2007 has stated, "the contention of AR is misplaced because of the reason that auditor of company is

responsible professional man who audits the Books of Accounts on the basis of certain parameters and it is legal requirement under Section 44AB of the IT Act. Moreover, each assessment year is a separate year for tax purposes. Therefore the change of method of accounting has a bearing in the taxability of the therefore to nullify the effect of change the assessee has to pay taxes on income element of Rs. 2,18,75,469/-(sic)."

That the ld. AO even in his Remand Report could not brought any justification for not accepting the employee remuneration benefits, administrative and general overheads as revenue expenditure particularly in light of the Notes to Accounts which says that these expenses, when specifically attributable to the construction of a project/ fixed assets then, 75% of the same were transferred to the capital assets. It is submitted that during the year under consideration, the major project was under progress and the industrial area was fully developed, therefore only routine maintenance expenses

were incurred, which have been correctly charged to profit and loss account.

The Ld. CIT(A) in his appellate order has accepted the contentions of the Ld. AO without going in to the merit and submissions made by the assessee. The Ld. CIT(A) failed to appreciate the notes to the accounts , which categorically mentioned that the assessee was capitalising the revenue expenses only in case these expenses have been specifically attributable to any project or fixed assets, which is as per the accounting standard and GAAP. The Ld. CIT(A) has also erred in considering the above treatment of revenue expenses by the assessee as change in accounting method/policy where there was no change in the accounting method/policies and the assessee continued to follow the same

accounting methods and policies which were regularly employed by the assessee.

When the aforesaid expenses are not directly related to any project nor specifically attributable to construction of a project/fixed assets, the Ld. AO can not impose his decision to transfer 75% of these expenses to a capital assets contrary to the accounting standard AS 10 and GAAP.

It is the brain child of Ld. AO that the assessee by considering the aforesaid expenses as revenue expenses tried to avoid the payment of tax. Before reaching to any such conclusion it is necessary to ascertain whether the aforesaid expenses are capital expenses or revenue expenses in accordance with GAAP.

Employee's cost and Other Expenses are whether revenue or capital

It is undisputed that the expenses disallowed are pure revenue in nature and by stretch of imagination cannot be considered as capital expenses. When it is established that expenses disallowed are pure revenue expenditure then under what circumstances same can be considered as capital expenditure:

(i) When expenses are directly related to the creation of capital assets prior to commencement of business.

(ii) When expenses are incurred on the capital assets after commencement of business.

In the above case, the expenses which are specifically attributable to the construction of project/fixed assets such as project engineer remuneration, interest on loan borrowed for the project, which does not include working capital interest are only to be capitalized and rest of the expenses pertaining to pre-commencement of the business are separately capitalized/deferred under the head pre-operative expenses.

In case when the enterprise has already commenced the business any expenditure, which cannot be attributable to any particular fixed asset, or any revenue expenditure incurred in relation to any long term benefit or capital loss the same is required to be treated as deferred revenue expenditure.

Thus any revenue expenditure which does not fall in any of the above two categories cannot be treated as capital expenditure. Therefore the observation made by the Ld. AO and Ld. CIT(A) are misplaced and wholly influenced by the comments of the Auditor without appreciating the nature and merit.

Comment by Auditor

The Auditor has made the mechanical comment without commenting upon true nature of expenses. The Auditor's comment should not be read in isolation, the same should be read along with the significant accounting policies mentioned in Schedule 17 under the head Notes to Accounts. Secondly, the

assessee should not suffer due to any comment of the Auditor, which is inconsistent to the Accounting Standard and GAAP. The Auditor's comment on change of accounting policy was unwarranted as in fact, there was no change in accounting policy. The assessee still maintains its accounting policy regarding capitalization of revenue expenditure when the same are specifically attributable and when these revenue expenses are not specifically attributable, the assessee is treating the same as revenue expenditure following accounting standards & GAAP.

The assessee rely upon following Judgment in support of his argument:

(i) CIT Vs. Punjab State Industrial Development Corporation Limited (2002) 255 ITR 351 (P&H) *it is undoubtedly correct that the statue stipulates that the income shall be computed on the system of accounting*

"regularly" followed by the assessee. It should mean during the period under consideration. However, the provision cannot be interpreted to mean that once a system of accounting is adopted, it can never be changed. "Regular" cannot in the present context mean permanent. It has not been pointed out with reference to any provision that a change is impermissible or barred even when it is warranted by the existing situation. Where, the assessee a Government Company switched over from mercantile system to hybrid system in respect of its liability on account of interest because "it was not realizing interest in time" and the finding of the Tribunal was that the change over adopted "was a legitimate and bona fide need of accounting" and there was no mala fide

intention". It was held that the procedure adopted by the assessee could not be said to violate Section 145 of Income Tax Act.

The observation of the Ld. AO in para 6.5 to 6.9 of the order has tried to justify the disallowance merely on the ground of change in accounting policy without appreciating the rationality for capitalization of 75% of the employees cost and other expenses whether 75% is commensurate to the pending projects or not. Why only 75% and why not 90% or 100% amount should be capitalized. No justification has been given.

The Ld. AO has also observed that in the year work in progress was Rs. 23.97 crores in 2001-02 which has been reduced to Rs. 6.46 crores in the year 2002-03. Thus, there was substantial reduction (say 75% in the work in progress) whereas the employees cost and other expenses during the same period were Rs. 2.89 crores and Rs. 2.92 crores. Therefore under such circumstances there cannot be straightjacket formula to allocate 75% of the total employee's cost and other expenses irrespective of cost of projects.

The Ld. CIT (A) has failed to appreciate aforesaid submissions of the assessee which were before the Ld. AO as well as before Ld. CIT(A) and have mechanically confirmed the order of Ld. AO.

In view of above submission, the appeal may kindly be allowed and the impugned orders of Ld. AO and CIT(A) may kindly be set aside."

38 On perusal of the order as passed by the assessing officer and by the Ld CIT[A] , written synopsis as filed by the assessee and on perusal of the Balance sheet of the assessee company, we find that major development work has already been completed till the Asst Year 2002-03. The amount of opening Capital WIP and expenses as incurred in this year capitalized in the books of the assessee company and also in the book of M/s SEZ Indore Limited. The assessee further claimed that expenses directly related to the fixed assets have already been capitalized to the cost of assets. On perusal of the Profit & Loss account it seems that against the credit of receipt of Rs 7,02,82,708/- expenses of Rs 5,52,86,310/- only was incurred by the assessee. The expenses as claimed in the Profit & Loss account also having direct nexus of receipt/ income as shown in the Profit & Loss account. Since the expenses as incurred

was not for the purpose of addition to the fixed assets, hence, there was no justification for making the addition merely on the basis of remarks in the clause 11[c] of the Tax audit report. The remarks of the Tax auditor which is important piece of evidence but the same is not considered as conclusive piece of evidence. Considering the written synopsis of the assessee and on perusal of the Profit & Loss account, we are of the view that expenses as claimed by the assessee were incurred for day to day maintenance and also incurred for day to day administrative work which was not in the capital nature. We hereby direct the assessing officer to delete the addition of Rs 2,18,75,469/- as made on account of understatement of profit.

39 In the result, the appeals filed by the assessee company – MPAKVN, Indore, in I.T.A.Nos. 347 to 351/Ind/2013 & 760 & 761/Ind/2014 are partly allowed. Our decision given in I.T.A.Nos. 347 to 351/Ind/2013 & 760 & 761/Ind/2014 in the case of MPAKVN would apply mutatis mutandis to the appeals filed in I.T.A.Nos. 571/Ind/2014, 205 & 206/Ind/2016 in the case of SEZ Indore Limited, Indore.

I.T.A.Nos. 530 to 534/Ind/2016 – Departmental Appeals : A.Ys. 2003-04 & 2004-05 and 2006-07 to 2008-09:

40 The Department through above appeals have come in appeals for the penalty imposed by the AO in all the years and cancelled by the Ld. CIT(A). Admittedly, the assessment proceedings and penalty proceedings are two different and distinct proceedings. The Ld. Departmental Representative supported the order of the CIT(A). In quantum, the appeals of the assessee have been partly allowed except the addition related to land premium. Since the issue relating to land premium is debatable and to be decided on the facts of these cases, we are of the considered view that on this issue as a whole, no interference is called for in the view adopted by the Ld. CIT(A). The same is hereby affirmed. The grounds raised in the Revenue's appeals are dismissed.

41 In the result, all the appeals of the assessees are partly allowed and Departmental appeals are dismissed.

The order pronounced in the open court on 21.03.2018.

Sd/-
(मनीष बोरड)
लेखा सदस्य
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
(कुल भारत)
न्यायिक सदस्य
(KUL BHARAT)
JUDICIAL MEMBER

Indore; दिनांक Dated : 21/03/2018

CPU/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Private Secretary/DDO, Indore