IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SMT BEENA A. PILLAI, JUDICIAL MEMBER

ITA No. 357/DEL/2005 (A.Y. 2000-01)
ITA No. 358/DEL/2005 (A.Y. 2001-02)

Oil and Natural Gas Corporation Ltd Corporate Tax Division Room No. 442, Institute of Drilling Technology, Kaulagarh Road Dehradun	Vs.	Addl. CIT Range - I Dehradun

PAN : AAACO 1598 A

ITA No. 374/DEL/2005 (A.Y. 2000-01)
ITA No. 375/DEL/2005 (A.Y. 2001-02)

Addl. CIT Range – 1 **Dehradun**	Vs.	Oil and Natural Gas Corporation Ltd **Room No. 442, Institute of Drilling** Technology, Kaulagarh Road Dehradun PAN : AAACO 1598 A
[Appellant]		[Respondent]

Date of Hearing : 08.08.2018

Date of Pronouncement : 17.08.2018

Assessee by : Shri Ajay Vohra, Sr. Adv
Shri Gaurav Jain, Adv
Ms. Manisha Sharma, Adv

Revenue by : Shri Shefali Swaroop, CIT- DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

These cross appeals filed by the assessee and revenue are preferred against the separate orders of the Commissioner of Income Tax(A)-I, Dehradun dated 17.09.2004 pertaining to assessment year 200-01 and dated 28.09.2004 pertaining to A.Y 2001-02. All these appeals pertaining to same assessee were heard together and are disposed off by this common order for the sake of convenience and brevity.

2. Before proceeding further, we find that the assessee, vide an application dated 25.06.2011, has craved leave to raise the following additional ground of appeal:

> *"The appellant submits that it is entitled to a deduction of prior period expenditure of Rs. 7,76,23,975/- in the same way as claimed for the A.Y 2001-02."*

3. The ld. DR strongly objected to the admission of this additional ground stating that no point of law is involved and the assessee is raising the additional ground purely on facts and, therefore, as per the

ratio laid down by the Hon'ble Supreme Court in the case of NTPC 229 ITR 383, such ground cannot be allowed to be raised at this stage.

4. Per contra, the ld. Counsel for the assessee stated that all the relevant details are very much on record and as per the judgment of the Hon'ble High Court of Delhi in the case of DCM Benetton India Limited 173 Taxmann 283, the assessee is eligible to raise such additional ground.

5. We have carefully considered the orders of the authorities below qua the additional ground raised by the assessee. It is true that by raising this additional ground, the assessee is trying to claim deduction of prior period expenses and no point of law is involved. However, we find that the Hon'ble High Court of Delhi in the case of DCM [Supra] was seized with the following substantial question of law:

> *"Whether on the facts and circumstances of the case, the ITAT erred in law in not admitting the additional ground raised by the assessee in respect of expenditure incurred to the extent of Rs. 13,10,566/- shown in the balance sheet for the A.Y 2003-04 as prior period expenses."*

6. And the relevant findings of the Hon'ble High Court of Delhi read as under:

> "7. Before the Income-tax Appellate Tribunal ('the Tribunal'), the assessee sought to raise an addition ground in this regard but this was declined by the Tribunal on the ground that the accounts of the assessee were audited and finalized on 5-8-2003 whereas the order was passed by the CIT(A) on 30-9-2/ Consequently,-according to the Tribunal, the assessee could have raised this ground before the CIT(A : did not do so. Under the circumstances, the Tribunal declined to permit the assessee to raise the addition ground by relying upon the decision of the Supreme Court in *National Thermal Power Co. Ltd.* [1998] 229 ITR 383 as well as the decision of the Andhra Pradesh High Court in *CIT v. Gangappa Cables Ltd.* [1979] 116 ITR 778. It was further held by the Tribunal that since the facts were not before : Tribunal, it could not adjudicate the claim.
>
> 8. Learned counsel for the assessee submits that under these circumstances, even though the expenditure incurred by the assessee is a genuine expenditure, it cannot get the benefit thereof either for : assessment year 2003-04 or for the assessment year 2001-02.

9. Learned counsel for the assessee relied upon *CIT* v. *Kerala State Co-operative Marketing Federate / Ltd.* [1992] 193 ITR 624 (Ker.) wherein it has been held by the Kerala High Court that in the ever; relevant facts are not on record, the Tribunal can always remand the matter to the file of the Assessing Officer to investigate and determine the facts. It is submitted that the Tribunal ought to have remanded the matter to the file of the Assessing Officer rather than decline to permit the assessee to raise the additional ground.

10. Following the view expressed by the Kerala High Court, with which we have no reason to disagree, particularly since it relies upon a decision of the Madras High Court in *CED* v. *P. Brahadeeswaran* ' 163 ITR 680, which in turn relies upon three decisions of the Supreme Court in *CIT* v. *McMHan & (*[1958] 33 ITR 182 ; *Hukumchand Mills Ltd.* v. *CIT* [1967] 63 ITR 232 and *CIT* v. *Mahalakshmi Text:. Mills Ltd.* [1967] 66 ITR 710. we answer the question of law in the affirmative, in favour of the assessee and against the revenue and remand the matter to the file of the Assessing Officer to determine the claim of the assessee on merits."

7. We find that the Hon'ble High Court of Delhi has considered the judgment of the Hon'ble Supreme Court in the case of NTPC. Respectfully following the judgment of the Hon'ble Delhi High Court [supra], we admit the additional ground of appeal and remit the matter back to the file of the AO to determine the claim of the assessee on merits. Additional ground of appeal is allowed for statistical purposes.

8. We will now first take up assessee's appeal in ITA No. 357/DEL/2005.

9. Ground No. 1 reads as under:

> *"The ld. Commissioner of Income Tax (Appeals)-I, Dehra Dun [CIT(A)] erred in reeling the Assessing Officer to work out the disallowance of the interest paid on borrowings on the basis of the difference between the rate of interest on the borrowings and the rate of interest of the tax free bonds. The CIT(A) failed to appreciate that as the Appellant had sufficient interest-free funds and as there was no nexus whatsoever between the borrowed funds and the investments in the tax-free bonds, there was no scope for any disallowance."*

10. Facts on record show that during the year under consideration, the assessee has earned interest income of Rs. 29,57,93,547/- on tax free PSU bonds carrying interest rate of 9% per annum which was claimed as exempt u/s 10(15)(iv)(h) of the Act. During the course of assessment proceedings, the AO noticed that the assessee company has borrowed money from financial institutions, World Bank and other agencies. The AO was of the firm belief that since there were borrowings on the one hand and on the other hand there were investments in tax free PSU Bonds and in the preceding A.Y., the then AO has disallowed interest claim of borrowed funds in Indian currency to the extent it was attributed to investments in tax free bonds. Invoking the provisions of section 14A of the Act, the AO disallowed the entire interest expenditure of Rs. 20,62,37,789/- on the ground that interest bearing borrowed funds had been invested in tax free PSU bonds giving rise to exempt interest income and further disallowed Rs. 89,55,575/- being 10% of the balance exempt interest income of Rs. 8,95,55,758/- on adhoc basis towards administrative expenses. Accordingly, the AO made total disallowance of Rs. 21,51,93,365/- u/s 14A of the Act.

11. The assessee carried the matter before the CIT(A) who gave partial relief by deleting the adhoc disallowance of Rs. 89,55,575/- by following the appellate order for A.Y 1994-95 and holding that the AO failed to point out any specific expenditure incurred for earning exempt income from tax free bonds.

12. In so far as disallowance of interest expenditure is concerned, the CIT(A) drew support from the findings given by his predecessor for A.Y 1999-2000 and restricted the disallowance of interest expenditure to the difference between rate of interest paid on the borrowing and rate of interest received on investment in tax considering the bonds relatable to the amount of investment in tax free bonds. In other words, the CIT(A) restricted the disallowance to the differential interest expenditure incurred on borrowed funds equivalent to the amount of investment in tax free bonds.

13. After considering the rival contentions, we find that the investments in PSU Bonds were made in earlier years. This fact has also been admitted by the AO and is apparent from the chart exhibited at page 2 of the assessment order. Therefore, it can be safely

concluded that no sufficient investment was made during the year under consideration.

14. In the earlier years when the investments were made, in those years also the AO had made adhoc disallowance of 10% of exempt income in the original assessment order and subsequently, by reopening the assessment, disallowance of interest expenditure was also made. We find that the reopening was quashed by the Hon'ble Uttaranchal High Court. We find that the Hon'ble High Court has also accepted that the assessee had sufficient cash profits and reserves for making investment in PSU Bonds not warranting any further disallowance u/s 14A of the Act. We find that the Revenue approached the Hon'ble Supreme Court but the SLP filed was dismissed by the Hon'ble Supreme Court vide order dated 15.03.2004.

15. The adhoc disallowance of 10% which was made in the original assessment order was deleted by the Tribunal in A.Y 1991-92 and in A.Ys 1992-93 to 1994-95. Similar disallowance was deleted by the CIT(A) for which no permission was granted by the COD for further appeal before the ITAT. Similar was the case in A.Y 1995-96, in A.Y 1996-97 and 1997-98. Similar disallowances were deleted by Tribunal

by holding that there is no nexus between borrowed funds and investments made in PSU Bonds. Similar disallowances were made in A.Ys 2002-03 to 2007-08 and in those years, the CIT(A) deleted the disallowances and COD denied permission to agitate in appeal before the Tribunal.

16. Considering the past history of the assessee vis a vis the issue, in our considered opinion, since no fresh investment was made during the year under consideration and no nexus has been proved between the borrowed funds and the investment in tax free PDU Bonds, we do not find any justification in the disallowance made u/s 14A of the Act. Ground No. 1 is allowed.

17. Ground No. 2 reads as under:

> "The CIT(A) erred in confirming the disallowance of Rs. 17,27,225/- representing (payments made by the Appellant to various clubs. The CIT(A) failed to appreciate that as the said expenditure was incurred for business purposes, the deduction was admissible".

18. During the course of scrutiny assessment proceedings and on perusal of Annexure of the audited report in Form No. 3CD, the AO noticed that the assessee has made payments to the club amounting to Rs. 17,27,225/-. Though the assessee has placed reliance on the decision of the Hon'ble Madras High Court in the case of Sundaram Industries Ltd 243 ITR 335 and the decision of the Hon'ble Bombay High Court in the case of OTIS Elevators 195 ITR 682, the AO was of the opinion that the liability of these expenses have to be decided with regard to the business expediency. The AO was of the firm belief that the assessee, during the year under consideration, has not be able to state even a single occasion where the expenditure on clubs was made towards business purposes and to promote their business prospects. The AO disallowed Rs. 17,27,225/-. The AO further observed that similar disallowance was made in A.Y 1998-99 also.

19. The CIT(A) carried the matter before the CIT(A) but without any success.

20. Before us, the ld. AR straightaway pointed out that the disallowance made in A.Y 1998-99 has been deleted by the Tribunal relying upon the decision of the Hon'ble Madras High Court in the case

of Sundaram Industries [supra] and the Hon'ble Bombay High Court in the case of OTIS Elevators [supra].

21. The ld. DR relied upon the findings of the AO.

22. We have carefully considered the orders of the authorities below qua the issue. We find force in the contention of the ld. AR. The coordinate bench in ITA No. 2753/DEL/2002 and 2832/DEL/2002 in A.Y 1998-99 had considered a similar disallowance vide Ground No. 2 and following the judgment mentioned hereinabove, the disallowances were deleted. We further find that in A.Y 2002-03 to 2005-06, the first appellate authority himself has deleted the disallowances made on account of club expenses and the COD denied permission to the department to agitate this issue in further appeal before the Tribunal. We further find that no such disallowances have been made in A.Ys 2006-07 to 2009-10

23. Respectfully following the findings of the coordinate bench and considering the history of the assessee as mentioned above, we set aside the findings of the CIT(A) and direct the AO to delete the addition of Rs. 17,27,225/-. Ground No. 2 is allowed.

24. Ground No. 3 reads as under:

> *"The CIT (A) erred in taking the view that the interest received by the Appellant on refunds of income tax paid by it was chargeable to tax at rates applicable to the nonresident companies. He failed to appreciate that as the said refunds were received by the Appellant on its own account and not on behalf, or as a representative of, any nonresident, the said interest was chargeable to tax in the hands of the Appellant at the rates applicable to it. Without prejudice, the CIT (A) ought to have held that even if the interest was chargeable to tax at rates applicable to a non-resident; the same could not exceed the rates prescribed in the respective Double Tax Avoidance Agreements."*

25. While scrutinising the return of income, the AO noticed that Rs. 7,13,702/- was granted to the assessee as interest pertaining to various non resident companies for the reason that the tax liability of these companies was upon the assessee company. Since these non-resident companies were assessable on separate rates other than applicable to the assessee and income of these non resident companies was assessable in the hands of the assessee in its representative capacity, the applicable rate of tax on such interest income of Rs. 7,13,702/- in the opinion of the AO, was assessable at a tax rate of 48% and added the same to the income of the assessee. In further appeal,

the CIT(A) confirmed the action of the AO by following his own order passed for preceding A.Y i.e., 1999-2000.

26. Before us, the ld. AR pointed out that in A.Y 1999-2000, order framed u/s 143(3) of the Act and revised by the Commissioner u/s 263 of the Act was set aside by the Tribunal and the assessment order was restored. Therefore, the findings of the CIT(A) based upon his findings given in A.Y. 1999-2000 become otiose.

27. Per contra, the ld. DR relied upon the findings of the AO.

28. We have carefully considered the underlying facts in issue. We find that under the agreement, the assessee was supposed to pay tax liability of non resident companies and has accordingly paid the same. Subsequently, refund was granted by the department and tax paid by the assessee for non resident companies was refunded. On such refund, interest was granted to the assessee to the tune of Rs. 7,13,702/-. We fail to understand how the tax rate of non resident companies in their respective countries will be applied on this interest income earned by the assessee on the refund of Income tax when the rate of interest is determined by the Income tax Act. The action of

the AO is uncalled for and deserves to be set aside. We direct the AO to delete the impugned addition and allow Ground No. 3.

29. Before closing, we find that from A.Y 2002-03 to A.Y 2007-08, the CIT(A) himself had deleted the additions on account of interest on I.T. refunds on similar facts and the COD denied permission to the department to agitate this issue in further appeal before the Tribunal.

30. Ground Nos. 4 and 5 read as under:

> *4. The CIT (A) erred in confirming the addition in respect of oil bonds worth Rs. 850.63 crore and Rs.447.40 crores. He failed to appreciate that as the said bonds had been assessed by the AO in the assessment year 1998-99 and as the AO had not accepted the decision of the CIT (A) for that year, he was not entitled to assess the said bonds in the current assessment year.*
>
> 2. *The CIT(A) erred in not upholding the change in accounting method-(for project (overheads) adopted by the Appellant. He failed to appreciate that as the said project overheads had no direct connection with the drilling operations carried on by the Appellant, the Appellant was justified in changing its method of accounting and debiting the entire expenditure*

to the profit and loss account in the year of incurring the expenditure."

31. Ground Nos 4 and 5 have not been pressed by the ld. AR and therefore, the same are dismissed as not pressed.

32. In the result, the appeal of the assessee is partly allowed for statistical purposes.

ITA No. 374/DEL/2005 [Revenue's appeal]

33. Ground No. 1 reads as under:

"The CIT(A) has erred in law and on facts in allowing foreign currency loss on capital account on accrual basis as well as revenue account."

34. While scrutinising the return of income, the AO noticed that the assessee company is claiming Foreign Currency Exchange Fluctuation Loss, both on capital as well as on Revenue account transactions, on accrual basis. The AO found that the department has been allowing this loss only to the extent of allowability discharged by actual payment. The AO further found that the department has been taking

support from the judgment of Tribunal passed in A.Y 1994-95 wherein the Revenue component was held by the Tribunal to have been correctly computed by the AO and as regards capital component, the Tribunal did not accept the case of the department which was held allowable on the basis of accrual method of accounting. The Revenue had challenged the findings of the Tribunal before the Hon'ble High Court and the assessee also challenged the findings of the Tribunal. The AO further observed that the Special Bench of the Tribunal in ITA No. 2472/DEL/1996 for A.Y 1991-92, Foreign Exchange Fluctuation Loss, even on revenue account, has been decided in favour of the assessee. The AO further observed that the department has not accepted the order of the Tribunal for A.Y 1991-92 allowing Foreign Exchange Fluctuation Loss to the assessee on accrual basis. The AO proceeded by computing Foreign Exchange Fluctuation Loss on account of capital component and revenue component as under:

Capital Account

WDV of capital component of exchange loss c/f from A.Y.99-00	Rs.4363087396
Add: Additions during the P.Y.99-2000	Rs. 1051830980
	Rs. 5414918376
Allowable depreciation @25%	Rs.1353729594

(However as per accrual basis, the claim of depreciation of ONGC on capital account is Rs.860039754)

Revenue Account

The total loss on revenue account on cash basis is Rs.2060611933/-. However, after adjusting the same in accordance with claim u/s 42 the loss on cash basis works out to Rs. 222,88,30,694/- as follows:

I) Related to producing properties

2060611933 x 2215884144 = Rs. 231389624

19733284607

Allowable in current year - 1/3 of the above: Rs. 77129875

II) Remaining allowable full on a/c of abandoned Areas, development, drilling and survey) Rs.1829222309

III) IIIrd installment from A.Y.1998-99 Rs.123769211

III) IInd installment from A.Y.1999-2000 Rs.198709299

Rs.2228830694

(However, as per accrual basis, the claim of ONGC on revenue account is Rs.3582669239).

35. The assessee carried the matter before the CIT(A) and drew his attention to the order of the Tribunal in assessee's own case for earlier year. The CIT(A), following the order of the Tribunal, deleted the disallowance made by the AO.

36. Before us, the ld. DR strongly supported the findings of the AO.

37. Per contra, the ld. A.R. pointed out that the issue now stands decided in favour of the assessee and against the Revenue by the decision of the Hon'ble Supreme Court in assessee's own case for A.Ys 1991-92 to 1994-95 and 1997-98.

38. We have considered the orders of the authorities below. We find that the amendment in section 43A of the Act is applicable only from A.Y 2003-04 and prior to that the assessee is entitled to deduction on Foreign Exchange Fluctuation loss arising for both Revenue and on capital account. For this proposition, we draw support from the judgment of the Hon'ble Supreme Court in the case of Woodward Governor India Pvt Ltd 312 ITR 254. Further, the Hon'ble Supreme Court in assessee's own case has settled this issue in favour of the assessee and against the Revenue in A.Ys 1991-92 to 1994-95 and 1997-98. Respectfully following the same, we decline to interfere. Ground No. 1, accordingly, stands dismissed.

39. Ground No. 2 reads as under:

> *"That the ld. CIT(A) erred in law and on facts in directing that difference in the rate of interest paid on borrowings and interest received on investments in tax free PSU Bonds should only be disallowed out of interest liability of Rs. 20,62,37,789/."*

40. The underlying facts are identical to the facts considered by us in assessee's appeal in ITA No. 357/DEL/2005 [supra] vide Ground No. 1 of that appeal, wherein we had directed the AO to delete the entire disallowance. For our detailed findings given therein, this ground is dismissed.

41. Ground No. 3 reads as under:

> ""*That the ld. CIT(A) erred in law and on facts in deleting the disallowance of Rs. 24,09,24,000/- being 60% of the royalty and cess paid in respect of PY-3 production sharing contract.*"

42. While scrutinising the return of income and on perusal of notes to the account of Schedule 28, the AO found that the expenditure on joint venture project towards cess and royalty has been claimed at 100%. The AO further noticed that the assessee has participating interest only at 40%. The AO was of the firm belief that on the total payment of Rs. 40,15,40,000/-, the assessee's share was only to the extent of 40% and accordingly disallowed the balance 60% and made addition of Rs. 24,09,24,000/-. When the matter was agitated before the CIT(A), he following his own order passed for the preceding A.Y i.e. 1999-2000 and deleted the disallowance made by the AO.

43. Before us, the ld. DR strongly supported the findings of the AO.

44. Per contra, the ld. A.R. pointed out that a similar issue arose in A.Y 1999-2000 and the CIT(A) has deleted the addition and the appeal of the department was dismissed for want of COD approval. The ld. AR further pointed out that similar disallowance made in A.Y 2002-03 to 2007-08 were deleted by the CIT(A) and the COD denied permission to the department to agitate the issue further in appeal before the Tribunal.

45. We have considered the orders of the authorities below. The underlying facts to this issue show that the aforesaid royalty and cess payments were governed by the terms of the PSC entered into between Government of India and contracting parties i.e. joint venture parties. As per the terms of PSC, the assessee was obliged to pay 100% of cess & royalty to the relevant Government. The relevant extracts of PSC are exhibited at pages 409 to 412 of the paper book wherein it has been specifically mentioned that royalty and cess shall be paid by the assessee. In our considered opinion, once the bonafides of the expenditure have been accepted by the Assessing Officer and the genuineness has not been doubted, the Assessing Officer cannot

question the commercial expediency of the expenditure. It is trite law that the Revenue cannot justifiably put itself in the arm chair of the business man and decide how much expenditure is reasonable having regard to the circumstances of the case. For this proposition, we draw support from the judgments of the Hon'ble Supreme Court in the following cases :

1. CIT vs. Walchand & Co.: 65 ITR 381 (SC)
2. J.K. Woollen Manufacturers vs. CIT: 72 ITR 612 (SC)
3. Hero Cycles Ltd. vs. CIT (2015) 379 ITR 347 (SC)

46. As mentioned elsewhere, similar additions were deleted by the first appellate authority in earlier A.Y and also in subsequent A.Y. Considering the facts in totality, we do not find any error or infirmity in the findings of the CIT(A). Ground No. 3 stands dismissed.

47. In the result, the appeal of the Revenue is dismissed.

ITA No. 358/DEL/2005 [Assessee's appeal]

48. Ground No. 1 reads as under:

"The Ld. Commissioner of Income Tax (Appeals)-I, Dehra Dun [CIT(A)] erred in directing the Assessing Officer to work out the disallowance of the interest paid on borrowings on the basis of the difference between the rate of interest on the borrowings and the rate of interest of the tax free bonds. The CIT(A) failed to appreciate that as the Appellant had sufficient interest-free funds and as there was no nexus whatsoever between the borrowed funds and the investments in the tax-free bonds, there was no scope for any disallowance."

49. The underlying facts are identical to the facts considered by us in assessee's appeal in ITA No. 357/DEL/2005 [supra] vide Ground No. 1 of that appeal, wherein we had directed the AO to delete the entire disallowance. For our detailed findings given therein, ground No. 1 is allowed.

50. Ground No. 2 reads as under:

"The CIT(A) erred in confirming the disallowance of Rs.2,11,369/- representing payments made by the Appellant to

various clubs. The CIT(A) failed to appreciate that as the said expenditure was incurred for business purposes, the deduction was admissible."

51. An identical issue was considered and decided by us hereinabove in ITA No. 357/DEL/2005 [supra] vide Ground No. 2 of that appeal. For our detailed findings given therein, ground No. 2 is allowed.

52. Ground No. 3 reads as under:

"The CIT (A) erred in taking the view that the interest received by the Appellant on refunds of income tax paid by it was chargeable to tax at rates applicable to the non-resident companies. He failed to appreciate that as the said refunds were received by the Appellant on its own account and not on behalf, or as a representative of, any non-resident, the said interest was chargeable to tax in the hands of the Appellant at the rates applicable to it. Without prejudice, the CIT (A) ought to have held that even if the interest was chargeable to tax at rates applicable to a non-resident; the same could not exceed the rates prescribed in the respective Double Tax Avoidance Agreements."

53. The underlying facts are identical to the facts considered by us in assessee's appeal in ITA No. 357/DEL/2005 [supra] vide Ground No. 3 of that appeal, wherein we had directed the AO to delete the entire disallowance. For our detailed findings given therein, this ground is allowed.

54. Ground No. 4 reads as under:

"The CIT(A) erred in confirming the disallowance of Rs. 124,90,85,698/-, Rs.80,79,008 & Rs. 1,56,73,180 towards Dry Docking Expenses, Furnishing of Hired Accommodation & Construction of Boundary wall on the land belonging to Bombay Port Trust. The CIT(A) failed to appreciate that these are normal repair & maintenance and the other expenditure has been incurred on the assets which it did not own but were incurred for smooth functioning of its business."

55. While scrutinizing the return of income for the year under consideration, the Assessing Officer found that the assessee has claimed deduction of Rs. 1,24,90,85,698/- as dry docking expenses and Rs. 80,79,008/- towards furnishing of hired accommodation and Rs. 1,56,73,180/- on construction of boundary wall. The Assessing Officer noticed that these expenses were not claimed as they were not

debited to the profit and loss account. When the assessee was asked to explain the liability of these expenses, the assessee stated that it incurred expenses on dry docking and furnishing of hired accommodation in connection with its business purposes. It was explained that the same are amortized and charged to profit and loss account in installments. It was further pointed out that since these expenses are of revenue nature, the same are claimed as allowable expenses for tax purpose in the year of incurrence.

56. The assessee furnished the following details in respect of the aforesaid claim:

> "Offshore Rigs are basically offshore based. These Drilling Rigs are divided into three categories:
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> 1) FLOATERS : The Rigs which keep floating while drilling and have got self propulsion system
>
> 2) JACK UP RIGS : Jack up rigs are of two categories:
>
> i) Sagar Samrat which is a Ship as it has self-propulsion machinery which can be Jacked up.
>
> ii) Jack up Barges: These arc non propelled and are towed from one location to another with the help of OSVs and Jacked up at the location for drilling purposes. As per

Marine Act, these vessels are required to be classified under Society of Surveyors which is internationally accepted. In our case, the Rigs are classified with American Bureau of Shipping (ABS)

It is obligatory on the part of ONGC to carry out surveys as per ABS for insurance and other purposes like requirements of mandatory authorities. The periodicity of these surveys is as follows:

Annual Load Line	: Yearly
Annual Cargo Gear	: Yearly
Annual 1 lull	: Yearly
Dry dock surveys	: 2'A yearly
Special Surveys	: 5 yearly
Safety construction	: 5yearly
Tail Shaft	: 5 yearly
Intl. Load Line	: 5 yearly
10PP	: 5 yearly

During dry dock survey of a periodicity of 2 A year the hull bottom and other structures which remain under water have to be taken out of water and inspected. Since the Floater rigs remain floating all the time it becomes mandatory to go to the dry dock and get the under water inspection done to the satisfaction of ABS and other mandatory authorities. This is in

addition to other surveys which can be carried out even during operations.

In 5 yearly periodic survey, non destructive testing of all structures and visual inspection and NDT on the hull structure which is under water has to be done to the satisfaction of ABS. Hence dry docking becomes necessary for both these periodicities.

For jack up Rigs the under water inspection can be done during floating and during jack up sequencely; hence it is not very necessary to go into a dry dock for these surveys.

However, all these rigs need repairs by shutting down operations for structure, system and equipment repairs like plating, pipings for the engine room and other critical places, painting and drilling equipments and engines etc. which cannot be shut down during operations.

In view of this, all these repairs are planned in such a way that a planned action can be taken up to take the rig out of operation for some period every 5 yearly (for Jack up rigs) and 2'A Yearly for Floater rigs to carry out surveys, repairs.

Your goodself would appreciate that dry docking expenses are basically revenue expenses and therefore, fully allowable in computing the taxable income.

ONGC also incurs expenditure on furnishing of accommodation which is not owned by it but is rather hired. Since no capital asset of ONGC comes into existence by incurring this expenditure, the same is revenue expenditure for ONGC and fully allowable in the year of incurrence.

In light of the above your goodself is requested to allow deduction for the full amount of dry docking expenses and expenditure on furnishing of hired accommodation as claimed in the return of income. In the alternative and without prejudice to our claim of allowability of the said expenses in the year of incurrence, if your goodself is still of the view that the same are capital expenses, we place on record our claim for allowing depreciation on the alleged capital expenses."

57. Explanation of the assessee and details submitted by it did not find favour with the Assessing Officer who was of the firm belief that these expenses are clearly capital in nature and, accordingly, disallowed the same.

58. When the matter was agitated before the ld. CIT(A), the ld. CIT(A) confirmed the disallowance.

59. Before us, the ld. counsel for the assessee stated that dry docking expenses are statutorily required to be incurred by the assessee and such expenditure has been incurred to preserve and maintain an already existing asset and even after incurrence of such expenses, the vessel continues to operate in the same normal manner and no new asset comes into existence. The ld. counsel for the assessee further stated that dry docking expenses was in litigation in the earlier years also and the Hon'ble Uttarakhand High Court vide its judgment dated 14.05.2015 in Tax Appeal Nos 19 to 22 of 2010 has allowed the claim of such expenditure. The ld. counsel for the assessee further pointed out that the Hon'ble Uttarakhand High Court in assessment year 2006-07 vide its judgment dated 21.05.2015 in Tax Appeal No. 18 & 23/2010 has again decided this issue in favour of the assessee and the SLP preferred by the Revenue was dismissed by the Hon'ble Supreme Court vide order dated 28.11.2016 in SLP(C) No. 147/2016. It is the say of the ld. counsel for the assessee that following the judgments of the Hon'ble jurisdictional High Court for

assessment years 2004-05 to 2006-07, the Assessing Officer did not make any disallowance on this issue in assessment year 2013-14.

60. Per contra, the ld. DR could not bring any distinguishing decision in favour of the Revenue.

61. We have given careful consideration to the orders of the authorities below and carefully gone through the decisions relied upon by the ld. counsel for the assessee, exhibited at pages 890 to 895 of the paper book. We find force in the contention of the ld. counsel for the assessee. This issue has been settled in favour of the assessee and against the Revenue by the aforementioned judgment of the Hon'ble Uttarakhand High Court. Respectfully following the same, we direct the Assessing Officer to delete the dry docking expenses of Rs. 1,24,,90,85,698/-. Thus, ground No. 4 is allowed.

62. In so far as the expenditure incurred on furnishing of hired accommodation is concerned, we find that the assessee had entered into a MOU with Bengal Chemicals & Pharmaceuticals Ltd. [BCPL] on 18.12.1999 to take premises on lease for a period of 36 months. In the agreement it is provided that the expenditure on interior decoration of

premises would be incurred by the assessee and BCPL would be required to only reimburse 40% of the cost thereof to the assessee on termination of the agreement. Pursuant to this agreement, the assessee incurred expenditure of Rs. 1,34,65,011/- on account of repair/interior decoration of the lease premises to renovate the same to be used in accordance with the business purpose of the assessee. Since 40% of the expenditure was to be subsequently reimbursed by BCPL on termination of such agreement, the assessee capitalised 40% of the total expenditure and accordingly claimed deduction of the balance amounting to Rs. 80,79,008/-.

63. Before us, the ld. counsel for the assessee vehemently stated that 60% of the total expenditure incurred on renovation of the premises was in the nature of repair and maintenance and did not result in acquisition of any capital asset in the hands of the assessee and, therefore, the same should be allowed as revenue expenditure.

64. Per contra, the ld. DR strongly relied upon the findings of the AO and reiterated that such expenditure is of capital in nature.

65. It is not in dispute that as per the MOU with BCPL all the expenditure incurred by the assessee towards renovation/furnishing /repairs of the leased premises was to be reimbursed by BCPL. It is

also not in dispute that 40% of the total expenditure incurred was capitalised by the assessee. In our considered opinion, the amount spent on furnishing of such leased premises to make the premises workable has to be considered as revenue expenditure. It is for the business man to see as to in what manner the leased premises is to be maintained and what are the necessary repairs which are required to be done. For this proposition, we draw support from the decision of the Hon'ble Delhi High Court in the case of Escorts Finance Ltd 205 CTR 574. In our considered opinion, the expenditure incurred by the assessee do not result in acquisition of capital asset and have to be considered as revenue expenditure incurred on such premises and such revenue expenditure has to be allowed u/s 30(a)(1) of the Act. In the case of Hi Line Pens [P] Ltd, 306 ITR 182, the Hon'ble Delhi High Court while following the decision of Escorts Finance Ltd [supra] observed that where expenses have been incurred by the assessee towards repairing premises taken on lease so as to make it more conducive to its business activity, such expenses would clearly fall within the expression “repairs to the premises as appearing in section 30(a)(i) of the Act and the same were allowable as revenue expenditure.” Considering the facts of the case, in line of judicial decisions discussed hereinabove, we direct the Assessing Officer to delete the

disallowance of expenses incurred on furnishing of hired accommodation.

66. Expenses incurred on construction of boundary wall amounting to Rs. 1,56,73,180/- was incurred on construction of protective wall for helipad by the assessee at its existing processing facility at Uran, near Mumbai.

67. Before us, the ld. counsel for the assessee stated that this expenditure was incurred due to frequent high tide and over flow of water because of which there was substantial threat to the operation of processing facility as well as helipad. In order to protect them from water flow, boundary wall was constructed on the sea shore land belonging to the Government after taking necessary permissions from the authorities. The ld. counsel for the assessee concluded by saying that since no new asset was created nor there was any acquisition/construction of any new asset, the expenditure so incurred should be allowed as revenue expenditure. In support of his contention, reliance was placed on the decisions in the following cases:

a) CIT Vs. Madras Auto Services [P] Ltd 233 ITR 468 [SC]
b) Lakshmiji Sugar Mills Co Pvt Ltd Vs. CIT 82 ITR 376 [SC]
c) L.H. Sugar Factory and Oil Mills Pvt Ltd Vs. CIT 125 ITR 293 [SC]
d) CIT Vs. Associated Cement Companies ltd 172 ITR 257 [SC]
e) CIT Vs. DTTDC Ltd 350 ITR 1 [DEL]

68. Per contra, the ld. DR strongly submitted that the decisions relied upon by the ld. counsel for the assessee are misplaced. It is the say of the ld. DR that the helipad belongs to the assessee and to protect the same from overflow of water, the assessee has constructed boundary wall. The ld. DR vehemently stated that the boundary wall was constructed by the assessee to protect its own asset and, therefore, the same is capital expenditure.

69. We have given careful consideration to the rival contentions. There is no dispute that the boundary wall was constructed to protect helipad and processing facility at Uran near Mumbai which asset belongs to the assessee. We find force in the contention of the ld. DR. The expenditure has been incurred to protect its own assts thereby adding value to its existing asset. In our understanding of the facts, such expenditure is of capital in nature and has been rightly treated as such. However, having said that the assessee is entitled for deprecation as per applicable rate of depreciation on such asset, we

accordingly direct the Assessing Officer to allow deprecation as per the provisions of law.

70. Before closing, all the decisions relied upon by the ld. counsel for the assessee are misplaced in as much as in all the cited cases, expenditure was incurred where the general public was also benefitted whereas in the case in hand, only the assessee was benefited and only the asset of the assessee was protected. Ground No. 4 is partly allowed.

71. Ground Nos. 5 and 6 were not pressed by the ld. counsel for the assessee. The same are dismissed as not pressed.

72. Ground No 7 reads as under:

> "The CIT (A) erred in confirming the disallowance of Rs. 10,18,84,612 debited to the Profit and Loss account as prior period expenses. He failed to appreciate that as per the Minutes of the Meeting between the Appellant and the Commissioner of Income-tax, which was binding on the department, the AO was not entitled to make any disallowance. Without prejudice, the CIT (A) failed to appreciate that even on merits the Appellant was entitled to a deduction in respect of the said expenses."

73. While going through the audited statement of account of the assessee, the Assessing Officer noticed that the assessee has also claimed prior period expenses amounting to Rs. 10,18,84,612/-. Since the expenses pertained to prior period, the Assessing Officer disallowed the same. When the matter was agitated before the ld. CIT(A), addition was confirmed.

74. While dismissing the appeal of the assessee, the ld. CIT(A) followed his own order passed for preceding assessment year i.e. 1999-2000 in revisional proceedings.

75. Before us, the ld. counsel for the assessee pointed out that the order framed u/s 263 of the Act was quashed by the Tribunal and, therefore, the order of the first appellate authority became otiose.

76. Per contra, the ld. DR supported the findings of the lower authorities.

77. In our considered opinion, the under lying facts are identical to the facts of additional ground raised by the assessee in ITA No. 357/DEL/2005 [supra] wherein we have remanded the matter to the

file of the Assessing Officer to decide the issue on merits. For similar reasons, we remand the matter to the file of the Assessing Officer to be considered on merits. Ground No. 7 is set aside and treated as allowed for statistical purposes.

78. Ground No. 8 reads as under:

> "The CIT (A) erred in not allowing the Appellant's claim for deduction under section 80- IA of the Act. He failed to appreciate that as the Appellant had set up an undertaking for the generation of power and had satisfied all the conditions of the section, it was eligible for a deduction in respect of the profits derived from such undertaking."

79. During the course of scrutiny assessment proceedings, the assessee claimed deduction u/s 80IA amounting to Rs. 26,69,25,281/-. Audited report in Form No. 10CCB was filed. The Assessing Officer denied the claim by stating "*However, since I do not find any force in the same, this claim is rejected*".

80. When the matter was agitated before the ld. CIT(A), he called for remand report from the Assessing Officer who, in his remand report, contended that deduction u/s 80IA of the Act would not be

available to the assessee since the power generating undertaking were producing power for “captive consumption”, and, therefore did not qualify as an eligible ‘undertaking’. Considering the remand report, the ld. CIT(A) upheld the disallowance.

81. Before us, the ld. counsel for the assessee drew our attention to the relevant provisions of the Act and pointed out that various courts have repeatedly held that deduction u/s 80IA of the Act cannot be denied in respect of profits derived by undertaking from production of power from captive consumption. It is the say of the ld. counsel for the assessee that from assessment years 2002-03 to 2005-06, the ld. CIT(A) himself deleted the disallowance and COD denied permission to the department to agitate the issue further in appeal before the Tribunal. The ld. counsel for the assessee further pointed out that from assessment years 2008-09 to 2010-11, the Assessing Officer himself has allowed the claim of deduction.

82. Per contra, the ld. DR supported the findings of the lower authorities and in support, preferred to file a written submission.

83. We have given thoughtful consideration to the orders of the authorities below. We have also considered the rival submissions. Section 80IA(1) reads as under:

> "Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years."

84. The above sections have to be read with clause (4) to Section 80IA of the Act which reads as under:

> "This section applies to—
>
> (*i*) any enterprise carrying on the business of (*i*) developing or (*ii*) operating and maintaining or (*iii*) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely :—
>
> (*a*) it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;

(*b*) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (*i*) developing or (*ii*) operating and maintaining or (*iii*) developing, operating and maintaining a new infrastructure facility;
(*c*) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995:"

85. The afore mentioned sections of the Act now have to be read with clause (8) to Section 80IA of the Act which reads as under:

86. Along with section 80IA(8)

"*Where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date.*"

87. A conjoint reading of the aforesaid provisions clearly shows that the assessee is very much entitled for claim of deduction u/s 80IA of the Act. Our view is fortified by the judgment of the Hon'ble Delhi High Court in the case of DCM Sriram Consolidated Ltd 322 ITR 486. The relevant findings read as under:

" In view of the ratio of the judgments of the Supreme Court referred to above, i.e., Tata Iron & Steel Ltd (supra), Textile Machinery Corporation Ltd (supra), as well as, that of the Division Bench of this Court in Orissa Cement (supra) it is quite evident that assessee's CPPs can as a matter of principle derive profits which is in point of fact embedded in the ultimate profit earned on the sale of the final product.

13. This brings us to the second contention as to whether the assessee is in the business of generation of power. Based on the findings returned both by the CIT(A), as well as, the Tribunal, it cannot be said that the assessee is not engaged in the business. As rightly held by the Tribunal, the assessee had been authorised by the State Electricity Boards to generate electricity. The generation of electricity has been undertaken by the assessee by setting up a fully independent and identifiable industrial undertaking. These undertakings have separate and independent infrastructures, which are, managed independently and whose

accounts are prepared and maintained separately and subjected to audit. The term —business‖ which prefixes generation of power in Clause (iv) of the Explanation to Section 115JA is not limited to one which is prosecuted only by engaging with an outside third party. The meaning of the word ‗business' as defined in Section 2(b) of the Act includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The definition of ‗business', which is inclusive, clearly brings within its ambit the activity undertaken by the assessee, which is, captive generation of power for its own purposes. The approach of the CIT(A) and, consequently the Tribunal, both in law and on facts cannot be faulted with. We are of the opinion that the Assessing Officer clearly erred in holding that, since the main business of assessee is of manufacture and sale of urea it could not be said to be in the business of generation of power in terms of Explanation (iv) to Section 115JA of the Act.

14. In view of the discussion above, we hold that the assessee is entitled to reduce from its book profits, the profits derived from its CPPs, in determining tax payable for the purposes of Section 115JAof the Act."

88. Though the aforestated judgment is in context to section 115JA of the Act, but the underlying principles clearly apply on the facts of the case in hand.

88. Considering the facts in totality in the light of relevant provisions of law and the decision of the Hon'ble Delhi High Court, we direct the Assessing Officer to allow the claim of deduction u/s 80IA of the Act. Ground No. 8 is accordingly allowed.

89. In the result, the appeal of the assessee is partly allowed for statistical purpose.

90. ITA No. 375/DEL/2005 [Revenue's appeal]

91. Ground No. 1 reads as under:

> *"The ld. Commissioner of Income Tax (Appeals)-I, Dehra Dun [CIT(A)] erred in reeling the Assessing Officer to work out the disallowance of the interest paid on borrowings on the basis of the difference between the rate of interest on the borrowings and the rate of interest of the tax free bonds. The CIT(A) failed to appreciate that as the Appellant had sufficient interest-free funds and as there was no nexus*

whatsoever between the borrowed funds and the investments in the tax-free bonds, there was no scope for any disallowance."

92. An identical issue was considered and decided by us hereinabove in ITA No. 357/DEL/2005 [supra] vide Ground No. 1 of that appeal. For our detailed findings given therein, ground No. 1 is dismissed.

93. Ground No. 2 reads as under:

"The CIT(A) erred in confirming the disallowance of Rs. 2,11,369/- representing (payments made by the Appellant to various clubs. The CIT(A) failed to appreciate that as the said expenditure was incurred for business purposes, the deduction was admissible".

94. An identical issue was considered and decided by us hereinabove in ITA No. 357/DEL/2005 [supra] vide Ground No. 2 of that appeal. For our detailed findings given therein, ground No. 2 is dismissed. Reference is also made to department's appeal in ITA No. 374/DEL/2005 vide ground No. 2 of that appeal.

95. Ground No. 3 reads as under:

> *"The CIT (A) erred in taking the view that the interest received by the Appellant on refunds of income tax paid by it was chargeable to tax at rates applicable to the nonresident companies. He failed to appreciate that as the said refunds were received by the Appellant on its own account and not on behalf, or as a representative of, any nonresident, the said interest was chargeable to tax in the hands of the Appellant at the rates applicable to it. Without prejudice, the CIT (A) ought to have held that even if the interest was chargeable to tax at rates applicable to a non-resident; the same could not exceed the rates prescribed in the respective Double Tax Avoidance Agreements."*

96. An identical issue was considered and decided by us hereinabove in ITA No. 357/DEL/2005 [supra] vide Ground No. 3 of that appeal. For our detailed findings given therein, ground No. 3 is dismissed.

97. In the result, appeal filed by the Revenue is dismissed.

98. To sum up, in the result,

ITA No. 357/DEL/2005	-	Partly allowed for statistical purposes
ITA No. 374/DEL/2005	-	Dismissed
ITA No. 358/DEL/2005	-	Partly allowed for statistical purposes
ITA No. 375/DEL/2005	-	Dismissed

The order is pronounced in the open court on 17.08.2018.

Sd/-	**Sd/-**
[BEENA PILLAI**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 17th August, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
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Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	