IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.764/Del./2011
(ASSESSMENT YEAR : 2006-07)

Kribhco Shyam Fertilizers Ltd., C – 165, 1st Floor, Naraina Industrial Area, Phase-1, New Delhi – 110 028.	vs.	ITO (OSD), Range – 5, New Delhi.

(PAN : AACCK6999B)

ITA No.765/Del./2011
(ASSESSMENT YEAR : 2007-08)

Kribhco Shyam Fertilizers Ltd., C – 165, 1st Floor, Naraina Industrial Area, Phase-1, New Delhi – 110 028.	vs.	ACIT, Circle – 5 (1), New Delhi.

(PAN : AACCK6999B)

ITA No.3508/Del./2011
(ASSESSMENT YEAR : 2008-09)

ITA No.5696/Del./2015
(ASSESSMENT YEAR : 2009-10)

ITA No.4622/Del./2014
(ASSESSMENT YEAR : 2010-11)

Kribhco Shyam Fertilizers Ltd., A – 60, Kailash Colony, New Delhi – 110 048.	vs.	ACIT, Circle – 5 (1), New Delhi.

(PAN : AACCK6999B)

ITA No.851/Del./2011
(ASSESSMENT YEAR : 2006-07)

ITA No.852/Del./2011
(ASSESSMENT YEAR : 2007-08)

ITA No.3569/Del./2011
(ASSESSMENT YEAR : 2008-09)

ITA No.248/Del./2014
(ASSESSMENT YEAR : 2009-10)

ITA No.5616/Del./2014
(ASSESSMENT YEAR : 2010-11)

ITA No.4963/Del./2015
(ASSESSMENT YEAR : 2011-12)

ACIT, Circle – 5 (1), New Delhi.	vs.	Kribhco Shyam Fertilizers Ltd., C – 165, 1st Floor, Naraina Industrial Area, Phase-1, New Delhi – 110 028. **(PAN : AACCK6999B)**

ITA No.247/Del./2014
(ASSESSMENT YEAR : 2008-09)

ACIT, Circle – 5 (1), New Delhi.	vs.	Kribhco Shyam Fertilizers Ltd., C – 165, 1st Floor, Naraina Industrial Area, Phase-1, New Delhi – 110 028. **(PAN : AACCK6999B)**

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri Vijay Ranjan, Advocate
Ms. Ira Kapoor, CA
REVENUE BY : Shri J.K. Mishra, CIT DR
Smt. Naina Soin Kapil, Senior DR

Date of Hearing : 04.12.2018
Date of Order : 17.12.2018

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

The aforesaid cross appeals filed by the assessee and the Revenue are being disposed off by way of consolidated order to avoid repetition of discussion.

2. The appellant, M/s. Kribhco Shyam Fertilizers Ltd. (hereinafter referred to as 'the assessee') by filing the present appeals, sought to set aside the impugned orders dated 02.12.2010, 02.12.2010, 10.05.2011, 28.07.2015 & 14.07.2014 passed by Ld. CIT (Appeals)-VIII, New Delhi/ CIT (Appeals)-5, Delhi qua the Assessment Years 2006-07, 2007-08, 2008-09, 2009-10 & 2010-11 respectively on the following grounds inter alia that:-

> ***"ASSESSEE'S APPEALS***
>
> ***ITA NO.764/DEL/2011 (AY 2006-07)***
>
> ***1. On the facts and in the circumstances of the appellant's case, the learned CIT(A) has erred in rejecting the ground of appeal raised by the appellant-company before him challenging the validity of the assessment order on the ground that the said order is bad in law.***
>
> ***2. On the facts and in the circumstances of the appellant's case, the learned CIT(A) has erred in confirming disallowance of Rs.90,204 made by the Assessing Officer from out of repairs and maintenance expenditure, which is a legitimate business expenditure.***
>
> ***3. On the facts and in the circumstances of the appellant's case, the learned CIT(A) has erred in confirming disallowance of***

deduction claimed by the assessee of Rs.29,68,000 being business expenditure incurred by the appellant company in respect of professional fees.

4. On the facts and in the circumstances of the appellant's case, the learned CIT(A) has erred in confirming disallowance of Rs.29,62,500 made by the Assessing Officer being depreciation claimed by the appellant company on capital spares."

"ITA NO.765/DEL/2011 (AY 2007-08)

1. On the facts and in the circumstances of the appellant's case, the learned CIT(A) has erred in rejecting the ground of appeal raised by the appellant-company before him challenging the validity of the assessment order on the ground that the said order is bad in law.

2. On the facts and in the circumstances of the appellant's case, the learned CIT(A) has erred in confirming disallowance of depreciation of Rs.1,17,81,748 made by the Assessing Officer being depreciation claimed by the appellant company on capital spares."

"ITA NO.3508/DEL/2011 (AY 2008-09)

1. In law and in the facts and circumstances of the appellant's case, the Departmental Authorities have erred in rejecting the Assessee's claim for depreciation of Rs.1,00,14,486 on critical parts of plant and machinery kept as standby."

"ITA NO.5696/DEL/2015 (AY 2009-10)

1. On the facts and circumstances of the case the impugned order passed by Id. (IT (A) is bad in law.

2. On the facts and circumstances of the case and in law the Ld. CIT (A) erred in confirming the disallowance of Rs.5429632/- as prior period income, made by the Ld. AO through an order passed u/s 154.

3. On the facts and circumstances of the case and in law the Ld. CIT (A) erred in confirming the rectification ignoring the fact that higher income had already been assessed in earlier years by way of reduction of depreciation on the basis of letter

filled by the assessee and once an income is already assessed in earlier year the same cannot be again assessed in a current year as it will amount to double taxation.

4. On the facts and circumstances of the case and in law the Ld. CIT (A) erred in confirming the rectification on an issue which is highly debatable."

"ITA NO.4622/DEL/2014 (AY 2010-11)

1. On the facts and circumstances of the case and in law the Ld. CIT (A) erred in confirming the addition of Rs.1,25,000/- under section 14A of the Act without appreciating the fact that Ld. A.O. had not recorded any satisfaction about the correctness of the claim of the Assessee that no expenditure has been incurred on earning dividend income by the Assessee.

2. On the facts and circumstances of the case and in law, Ld. CIT (A) erred in sustaining addition u/s 43B of the Act in respect of sales tax liability of Rs.104,39,210/-"

3. The appellant, ACIT, Circle 5 (1), New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeals, sought to set aside the impugned orders dated 02.12.2010, 02.12.2010, 10.05.2011, 15.10.2013, 14.07.2014 & 07.05.2015 passed by Ld. CIT (Appeals)-VIII, New Delhi/ CIT (Appeals)-V, Delhi qua the Assessment Years 2006-07, 2007-08, 2008-09, 2009-10, 2010-11 & 2011-12 respectively on the following grounds inter alia that:-

"REVENUE'S APPEALS

ITA NO.851/DEL/2011 (AY 2006-07)

1. The order of the learned CIT (Appeals) is erroneous & contrary to facts & law.

2. On the facts and in the circumstance or the case and in law the learned CIT (Appeals) has erred in deleting the addition of Rs.17,12,93,314/- and Rs.4,87,50,000/- made by the A.O. by disallowing the depreciation intangible assets intangible benefits.

2.1 The ld. CIT (A) ignored the finding recorded by the A.O and the fact that the items in question are not listed in Part B of I.T Rules 1962.

3. On the facts and in the circumstances of the case and in law. the learned CIT(Appeals) has erred in deleting the addition of Rs.85,14,636/- u/s 35D of the I.T Act on account of preliminary expenses.

3.1 The Ld. CIT (A) ignored the facts recorded by A.O and the fact that the expenses in question were made for acquiring new assets .

<u>ITA NO.852/DEL/2011 (AY 2007-08)</u>

1. The order of the learned CIT (Appeals) is erroneous & contrary to facts & law.

2. On the facts and in the circumstances of the case and in law, the learned CIT(Appeals) has erred in deleting the addition of Rs.29,97,63,300/- and Rs.9.01,87,000/- made by the A.O. by disallowing the depreciation intangible assets intangible benefit respectively.

2.1 The Ld. CIT (A) ignored the finding recorded by the A.O and the fact that the items in question are not listed in Part B of I.T Rules 1962.

3. On the facts and in the circumstances of the case and in law, the learned CIT(Appeals) has erred in deleting the addition of Rs.85,14,636/- u/s 35D of the I.T Act on account of preliminary expenses.

3.1 The Ld. CIT (A) ignored the facts recorded by AO and the fact that the expenses in question were made for acquiring new assets.

4. On the facts and in the circumstances of the case and in law, the learned CIT(Appeals) has erred in deleting the addition of Rs.94,141/- being the prior period expenses.

4.1 The Ld. CIT (A) ignored the facts recorded by A.O and the fact that the assessee is maintaining the mercantile system of accounting.

4. On the facts and in the circumstances of the case and in law. the learned CIT(Appeals) has erred in deleting the addition of Rs.18,40,403/- being the difference in the balance of creditors.

4.1 The Ld. CIT (A) ignored the facts recorded by A.O and the fact that the assessee did not account for the credit notes received from the clients."

<u>ITA NO.3569/DEL/2011 (AY 2008-09)</u>

1. The order of the learned CIT (Appeals) is erroneous & contrary to facts & law.

2. On the facts and in the circumstances of the case and in law, the learned CIT(Appeals) has erred in deleting the addition of Rs.22,46,82,475/- being the depreciation on intangible assets.

2.1 The Ld. CIT (A) ignored the finding recorded by the A.O and the fact that no depreciation is allowable on intangible assets as per I.T. Act.

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in deleting the addition of Rs.7,66,59,375/- being the disallowance of 15% of the WVD of intangible assets.

3.1 The Ld. CIT (A) ignored the finding recorded by the AO and the fact that the assessee did not file necessary documents to substantiate its claim.

4. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in deleting the addition of Rs.85,14,636/- u/s 35D of the Act being the disallowance on account of preliminary expenses.

4.1 The Ld. CIT (A) ignored the finding recorded by A.O and the fact that the assessee did not file necessary documents to substantiate its claim."

ITA NO.248/DEL/2014 (AY 2009-10)

1. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) is justified in deleting the depreciation of Rs.16,86,16,856/- on intangible assets ignoring the findings recorded by the A.O. that same being not allowable?

2. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) is justified in allowing 1/5th of the preliminary expenses of Rs.85,14,636/-?

3. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) is justified in allowing depreciation on intangible assets out of plant & machinery of Rs.6,51,60,469/- without proper verification?

4. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) is justified in allowing depreciation in respect of capital spares and parts of the plant & machinery to the amount of Rs.85,12,313/- only on purchase basis u/s 32 of the LT. Act, 1961?"

ITA NO.5616/DEL/2014 (AY 2010-11)

1. That on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in deleting the depreciation of Rs.12,64,62,643/-.

2. That on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in allowing 1/5th of the preliminary expenses of Rs.85,14,636/-.

3. That on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in allowing depreciation on intangible assets out of plant & machinery of Rs.5,53,86,398/- without proper verification.

4. That on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in allowing depreciation in respect of

capital spares and part of the plant & machinery to the amount of Rs.72,35,466/- only on purchase basis u/s 32 of the LT. Act, 1961.

5. That on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in allowing prior period expenses of Rs.15,13,126/-."

ITA NO.4963/DEL/2015 (AY 2011-12)

1. That on the facts & in the circumstances of the case & in law, the Ld. CIT(A) has erred in deleting the addition on account of disallowance of depreciation on intangible assets of Rs.9,48,46,982/-.

2. That on the facts & in the circumstances of the case & in law, the Ld. CIT(A) has erred in deleting the addition on account of disallowance of depreciation on estimated assets of Rs.4,70,78,439/.

3. That on the facts & in the circumstances of the case & in law, the Ld. CIT(A) has erred in deleting the addition on account of disallowance of depreciation on spare machinery parts of Rs.61,50,146/-.

4. That on the facts & in the circumstances of the case & in law, the Ld. CIT(A) has erred in deleting the addition on account of disallowance of expenses on vehicle Repair & Maintenance of Rs.7,96,706/-."

4. Appellant, ACIT, Circle 5 (1), New Delhi (hereinafter referred to as 'the Revenue'), by filing the present appeal sought to set aside the impugned order dated 30.10.2013 passed by the Commissioner of Income-tax (Appeals)-VIII, New Delhi qua the assessment year 2008-09 deleting the penalty levied u/s 271(1)(c) on the grounds inter alia that :-

ITA NO.247/DEL/2014 (AY 2008-09)

1. Whether on the facts and circumstances of the case & in law, the Ld. CIT (A) is justified in deleting the penalty u/s 271(1)(c) for concealment of the particulars of its income or furnishing inaccurate particulars of its income of Rs.79,45,080/-

2. That the order of the Ld. CIT (A) is erroneous and is not tenable on facts and in law."

5. Briefly stated the facts necessary for adjudication of the identical controversy in all the aforesaid cross appeals filed by the assessee as well as Revenue at hand are : Assessee company is into the business of manufacturing and sale of urea and ammonia. In AY 2006-07, Assessing Officer made disallowance of Rs.29,62,500/- claimed by the assessee as depreciation on spare parts of Rs.3.95 crores by treating the explanation submitted by the assessee as not satisfactory, the ld. CIT (A) also confirmed the addition made by the AO on account of depreciation on capital spares on RS.3.95 crores by observing that the assessee has failed to substantiate its claim. AO made disallowance of Rs.17,12,93,314/- being the depreciation claimed by the assessee on intangibles by declining the contention of the assessee that the value of intangible benefits can also be assigned to the cost of ammonia plant as purge gas is a product from ammonia plant. However, ld. CIT (A) deleted the disallowance of depreciation made by the AO.

6. AO also made addition of Rs.4,87,50,000/- on assumed intangibles by declining the contentions raised by the assessee on the ground that the stated expenses are either capital in nature or can be categorized as pre-operative expenses.

7. AO also disallowed an amount of Rs.85,14,636/- claimed by the assessee on account of preliminary expenses on the ground that payment to Registrar of Companies (ROC) of authorized capital is not admissible u/s 35D of the Act and also that the assessee has failed to substantiate under which clause of section 35D the claim of preliminary expenses is covered.

8. AO also disallowed an amount of Rs.5,00,000/- being claimed by the assessee on account of professional/fees paid on sales-tax matter. AO also disallowed an amount of Rs.3,00,000/-, Rs.15,000/-, Rs.16,53,000/- and Rs.5,00,000/- claimed by the assessee on account of payment for legal fees on exemption, consultation fee for transfer of employees, fee paid to PDIL and on account of purchase of stamp papers respectively.

9. In AYs 2007-08 & 2008-09, AO also disallowed an amount of Rs.1,17,81,748/- and Rs.1,00,14,486/- claimed by the assessee on account of capital spares respectively on the same ground.

10. In AYs 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11, AO disallowed an amount of Rs.17,12,93,314/-, Rs.29,97,63,300/-,

Rs.22,48,22,475/-, Rs.16,86,16,856/- and Rs.12,64,62,643/- respectively on account of depreciation on intangibles and AO also disallowed depreciation on assumed intangibles of Rs.4,87,50,000/-, Rs.9,01,87,500/-, Rs.7,66,59,375/-, Rs.6,51,60,469/- and Rs.5,53,86,398/- in AYs 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11 respectively. Similarly, AO also disallowed amount of Rs.85,14,636/- each in AYs 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11 claimed by the assessee on account of preliminary expenses u/s 35D. In AY 2007-08, AO also disallowed an amount of Rs.18,40,403/- on account of difference in balance of creditors and Rs.94,141/- on account of travelling expenses. In AY 2010-11, AO also disallowed an amount of Rs.15,13,126/- claimed by the assessee on account of prior period expenses.

11. The assessee carried the matter before the ld. CIT (A) by way of filing appeals who has partly allowed the appeals. Feeling aggrieved, the assessee as well as Revenue have come up before the Tribunal by way of filing the present cross appeals.

12. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

ASSESSEE'S APPEAL

GROUND NO.1 OF
ITA NO.764/DEL/2011 (AY 2006-07),
ITA NO.765/DEL/2011 (AY 2007-08) &
ITA NO. 5696/DEL/2015 (AY 2009-10)

13. Ground No.1 of assessee's appeal in ITA Nos. 764/Del/2011, 765/Del/2011 & 5696/Del/2015 for AYs 2006-07, 2007-08, 2009-10 is general in nature, hence needs no specific adjudication.

ASSESSEE'S APPEAL

GROUND NO.4 OF
ITA NO.764/DEL/2011 (AY 2006-07)

GROUND NO.2 OF
ITA NO.765/DEL/2011 (AY 2007-08)

GROUND NO.1 OF
ITA NO. 3508/DEL/2011 (AY 2008-09)

REVENUE'S APPEAL

GROUND NO.4 OF
ITA NO.248/DEL/2014 (AY 2009-10)
ITA NO.5616/DEL/2014 (AY 2010-11)

GROUND NO.3 OF
ITA NO. 4963/DEL/2015 (AY 2011-12)

14. Assessee claimed depreciation of Rs.29,62,500/- on capital spare parts of Rs.3.95 crores on the ground that the same are critical

spares to be kept ready for manufacturing process. AO/CIT(A) have disallowed this depreciation on the ground that assessee has failed to spell out as to which of the critical spare part was ready and also no evidence to substantiate its claim has been brought on record.

15. AO disallowed an amount of Rs.85,12,313/ and Rs.72,35,466/- for AYs 2009-10 & 2010-11 respectively claimed by the assessee as depreciation on capital spares. However, the ld. CIT (A) has allowed the same which is now under challenged before the Tribunal by way of filing the appeals by the Revenue.

16. Undisputedly, the ld. CIT (A) has allowed the identical claim of depreciation on claim of spare parts in case of assessee for AY 2009-10 and 2010-11 by following the decision rendered by Hon'ble Delhi High Court in case cited as ***CIT vs. Insilco Limited*** (supra) as well as by following the decision rendered by the coordinate Bench of the Tribunal in ***Continental Carbon India Ltd. vs. ITO – 2012 (7) TMI 34***.

17. Hon'ble Delhi High Court in case cited as ***CIT vs. Insilco Limited*** (supra) dealt with the identical issue and has decided in favour of the assessee. The ratio of the judgment is *"under section 32 of the Act expression "used for the purpose of business" also includes emergency spares which even though ready for use are not*

as a matter of fact used during relevant period as the same are kept as spare parts to a fixed asset and in all probability be useless once the asset is discarded." So, the deprecation u/s 32 of the Act on capital spares is allowable expenses even though they have not been put to use during the relevant period. In the instant case, it is not in dispute that the capital spares were purchased and kept ready for use in case of emergency by the assessee and as such allowable expenses on account of depreciation claimed by the assessee on capital spares.

18. So, following the decision rendered by Hon'ble Delhi High Court in ***CIT vs. Insilco Limited*** (supra), we are of the considered view that the ld. CIT (A) has erred in disallowing the claim of the assessee on account of deprecation on capital spares during AYs 2006-07, 2007-08 & 2008-09, hence AO is directed to allow the same after due verification of capital spares purchased during the year under assessment. So, Ground No.4 in ITA No.764/Del/2011 (AY 2006-07), Ground No.2 in ITA No.765/Del/2011 (AY 2007-08) and Ground No.1 in ITA No. 3508/Del/2011 (AY 2008-09) in assessee's appeals are determined in favour of the assessee.

19. In view of what has been discussed above, we are also of the considered view that ld. CIT (A) has rightly allowed the claim of the assessee for depreciation of capital spares in AYs 2009-10,

2010-11 and 2011-12. Accordingly, Ground No.4 in ITA No.248/DEL/2014 (AY 2009-10) & ITA No.5616/DEL/2014 (AY 2010-11) and Ground No.3 in ITA No. 4963/DEL/2015 (AY 2011-12) of the Revenue's appeals are determined against the Revenue.

ASSESSEE'S APEAL

GROUND NO.2 OF
ITA NO.764/DEL/2011 (AY 2006-07)

20. Ground No.2 in ITA No.764/Del/2011 for AY 2006-07 in assessee's appeal is not pressed due to smallness of the amount.

ASSESSEE'S APEAL

GROUND NO.3 OF
ITA NO.764/DEL/2011 (AY 2006-07)

21. AO as well as ld. CIT (A) have disallowed an amount of Rs.29,68,000/- claimed by the assessee (on account of professional legal fee on sales-tax matter of Rs.5,00,000/-, for taking legal opinion on exemptions and concessions of Rs.3,00,000/-, paying consultation fee for transfer of employees of Rs.15,000/-, on account of fee paid to PDIL of Rs.16,53,000/- and amount for purchase of stamp papers of Rs.5,00,000) on the ground that all aforesaid payments claimed by the assessee pertain to the acquisition of urea fertilizer plant at Shahjahanpur and as such

formed the part of the acquisition cost itself and cannot be treated as revenue expenses. It is the case of the assessee that the entire aforesaid payment of Rs.29,68,000/- was made for business purposes and as such, all the expenses are in the nature of sustainable business expenditure and allowable u/s 37(1) of the Act. Undisputedly, the assessee company was incorporated on 08.12.2005 and the fertilizer plant at Shahjahanpur was handed over to it on 18.01.2006. AO as well as CIT (A) have disallowed the aforesaid expenses claimed by the assessee on the sole ground that since the promoters of the assessee company are already in the line of fertilizer industry, the said promoters have managed the affairs of this company from their own resources and even otherwise till 1.01.2006, it cannot be said that the assessee company has set up their business.

22. We are of the considered view that to decide the controversy at hand, the date of setting up of the business is a relevant date to allow or disallow the expenses claimed by the assessee u/s 37(1) of the Act. To understand the controversy at hand, the assessee has brought on record the chronology of events as to purchase of the business of the assessee company which is extracted for ready perusal as under:-

SR.NO.	*DATE OF EVENT*	*EVENT*	*REMARKS*
1.	*03.11.2005*	*Agreement to Sell between Shyam Basic Infrastructure Projects Pvt. Ltd.(SBIP) & Oswal Chemicals & Fertilizers Ltd.(OCFL)*	*Consideration = 1900 crore + Book value on 13/01/2006 of current assets (excl. Machinery & Elec. Spares) as per Sch. "D" of this agreement (REF: AY 06-07/ Vol.2/ P- 129, 142)*
2.	*05.11.2005*	*Joint Venture Agreement between SBIP & KRIBHCO*	*Agreement to Form Special purpose Vehicle (SPV) named as "KRIBHCO Shyam Fertilizers Ltd." to acquire & run the fertilizer plant.*
3.	*08.12.2005*	*Incorporation of KSFL*	*(REF: AY 06-07/Vol.2/ P-155)*
4.	*23.12.2005*	*Addendum no.1 to "Agreement to Sell dated 03.11.2005" was made between SBIP & OCFL*	*By this addendum, right to purchase factory & other assets was transferred to newly formed company "KRIBHCO Shyam Fertilizers Ltd.". KSFL had 60% shareholding of KRIBHCO & 40% shareholding of STL Fertilizers Pvt. Ltd.- a wholly owned subsidiary of SBIP. (REF: AY 06-07/Vol.2/ P-143)*
5.	*13.01.2006*	*Addendum no.2 to "Agreement to Sell dated 03.11.2005" was made between SBIP & OCFL*	*NOT important for the issues before ITAT (REF: AY 06-07/Vol.2/ P-144)*
6.	*16.01.2006*	*Addendum no.3 to "Agreement to Sell dated*	*OCFL agreed to hand over management control to KSFL w.e.f.*

		03.11.2005" was made between SBIP & OCFL	***18.01.2006 (REF: AY 06-07/Vol.2/ P-147)***
7.	***18.01.2006***	***Management was taken over by KSFL***	***(REF: AY 06-07/Vol.l/ P-3(Bk), 163 (BK)***
8.	***31.03.2006***	***Sale Agreement between OCFL & KSFL***	***Total final consideration Rs.1908 crore (REF: AY 06-07/Vol.l/ P-160)***
9.	***06.04.2006***	***PDIL -Value Assessment Report submission by PDIL***	***Value 1902.5 crore incl. spares but excl. value of other current assets & current liabilities (REF: AY 06-07/Vol.l/ P-123)***
10.	***05.05.2006***	***Addendum to Value Assessment Report by PDIL***	***It provided break up of spares into revenue spares & capital spares besides other things. (REF: AY 06-07/Vol.l/ P-126(Bk)***
11.	***31.10.2006***	***Sale Deed execution between OCFL & KSFL***	***(REF: AY 06-07/Vol.l/ P-188)***

23. Perusal of the chronology of events extracted above apparently shows that the business activities were started by the assessee company w.e.f. 03.11.2005 when Agreement to Sell between Shyam Basic Infrastructure Projects Pvt. Ltd. and Oswal Chemicals & Fertilizers Ltd. (OCFL) was entered into and thereafter assessee company was incorporated on 08.12.2005.

24. Now, the question arises for determination is :-

> ***"as to whether the assessee company is entitled for claiming business expenditure from the date of commencement of its business i.e. 18.01.2006 or from the date of setting up of the business?"***

25. We are of the considered view that when the assessee company has incurred expenses for making professional fee for taking legal opinion on sales-tax matter; paid legal fee for taking legal opinion on exemptions and concessions and then consultation for transfer of employees on take over and then paid fee to PDIL and then for purchase of stamp papers; it certainly amounts to business expenses for setting up the business though incurred prior to commencement of the business. Because without any of the aforesaid legal and professional opinions, the business would never have been set up.

26. Identical issue has come up before the Hon'ble High Court of Bombay in case cited as ***Western India Vegetable Products Ltd. vs. CIT – (1954) 26 ITR 151 (Bom.)*** wherein identical issue as to whether business expenditures are to be allowed from the date of setting up of the business or from the commencement of the business.

27. Hon'ble Bombay High Court in case cited as ***Western India Vegetable Products Ltd. vs. CIT*** (supra) decided the controversy in

favour of the assessee by holding that all expenses incurred after the setting up of the business and before the commencement of the business are permissible deductions by returning following findings:-

> ***"For the purpose of a business the previous year begins from the date of the setting up of the business. Therefore it is only after the business is set up that the previous year of that business commences and in that previous year the expenses incurred in the business can be claimed as permissible deductions. Any expenses incurred prior to the setting up of a business would obviously not be permissible deductions because those expenses would be incurred at a point of time when the previous year of the business would not have commenced. There is difference between the two expressions "setting up" and "commenced". The expression "setting up" means, as is defined in Oxford English Diction "to place on foot" or "to establish", and in contradiction to "commence". The I . a w en a business is established and is ready to commence business then it can be said of that business that it is set up. But before it is ready to commence business it is not set up. But there may be an interregnum, there may be an interval between a business which is set up and a business which is commenced and all expenses incurred after the setting up of the business and before the commencement of the business, all expenses during interregnum, would be permissible deductions under section 10(2).***
>
> ***In the instant case, the assessee-company actually commenced business only on 1-11-1946, when it purchased a groundnut oil mill and was in a position to crush groundnut and produce oil. But prior to this there was a period when the business could be said to have been set up and the company was ready to commence business, and in the view of the Tribunal one of the main factors was the purchase of raw materials from which an inference could be drawn that the company had set up its business; but that was not the only factor that the Tribunal had taken into consideration. The Tribunal had, on scrutinising the various details of the expenses, came to the conclusion that these expenses did not show that the business was set up prior to 1-9-1946. Thus, it could not be said that the decision***

> ***of the Tribunal was based upon a total absence of any evidence. Therefore, there was evidence before the Tribunal to hold that the assessee-company set up its business as from 1.9.1946."***

28. The decision rendered by Hon'ble High Court of Bombay in ***Western India Vegetable Products Ltd. vs. CIT*** (supra) is squarely applicable to the facts and circumstances of the case because, in the instant case, business of the assessee was set up from the date of entering into agreement for acquisition of the fertilizer plant and without expert legal and financial opinion the entire deal would not have been through. The moment the assessee has taken first step for setting up the business, it is established that the business has been set up and the assessee became entitled for expenses of the previous year.

29. Moreover incurrence of the expenses have not been disputed by the Revenue. The Revenue has only disallowed the expenses on the ground that the business has not been commenced during the previous year and as such not allowable whereas such expenses are to be treated as business expenses from the date of setting up of the business which is certainly 03.11.2005. Moreover, finance of the assessee company are audited one and no mistake has been pointed out. So, we are of the considered view that the AO as well as CIT (A) have erred in disallowing the expenses, hence expenses of

Rs.29,68,000/- are ordered to be allowed as business expenses incurred for setting up the business of the assessee company during the previous year. So, ground no. Ground No.3 in ITA No.764/Del/2011 (AY 2006-07) of assessee's appeal is allowed.

ASSESSEE'S APPEAL

GROUNDS NO.2, 3 & 4 OF
ITA NO.5696/DEL/2015 (AY 2009-10)

30. AO by invoking the provisions contained u/s 154 of the Act disallowed an amount of Rs.54,29,632/- on account of prior period income on the ground that from the perusal of assessment record, he has noticed that in the computation of income, assessee has reduced the prior period income of Rs.54,42,139/- from the total income during the year under assessment. We are of the considered view that this addition made by the AO is not sustainable for two reasons : one, that when the computation of income was there before the AO at the time of completion of assessment u/s 143 (3) of the Act, the same cannot be treated as a mistake apparent on record as it needs detailed investigation by providing an opportunity of being heard to the assessee; and two, that it is still a debatable issue if the prior period income can be added as income u/s 154 of the Act. Moreover, it is revenue neutral because the assessee company is running into loss. So, in these circumstances, the

addition made by the AO is not sustainable, hence grounds no.2, 3 & 4 in ITA No.5696/Del/2015 (AY 2009-10) in assessee's appeal is determined in favour of the assessee.

ASSESSEE'S APPEAL

GROUND NO.1 OF
ITA NO.4622/DEL/2014 (AY 2010-11)

31. AO by invoking the provisions contained u/s 14A read with Rule 8D (iii) made disallowance of Rs.1,25,000/-. CIT (A) confirmed the addition.

32. Undisputedly, assessee has earned dividend income of Rs.5,403/- during the year under assessment. It is the case of the assessee that no expenses have been incurred by the assessee during the year under assessment and contended that at the most, disallowance cannot be more than the exempt income.

33. First of all, AO has not recorded dis-satisfaction as to the working out made by the assessee that no expenses have been incurred to earn the meager dividend income rather proceeded to invoke the provisions contained u/s 14A read with Rule 8D in a mechanical manner which is not permissible.

34. Hon'ble Delhi High Court in judgment cited as ***Maxopp Investment Ltd.*** (supra) while deciding the identical issue held as under :-

> ***"Section 14A even prior to the introduction of sub-sections (2) and (3) would require the Assessing Officer to first reject the claim of the assessee with regard to the extent of such expenditure and such rejection must be for disclosed cogent reasons. It is then that the question of determination of such expenditure by the Assessing Officer would arise. The requirement of adopting a specific method of determining such expenditure has been introduced by virtue of .sub-section (2) of section 14A . Prior to that, the assessee was free to adopt any reasonable and acceptable method. So, even for the pre-rule 80 period, whenever the issue of section 14A arises before an Assessing Officer, he has, first of all, to ascertain the correctness of the claim of the assessee in respect of the expenditure incurred in relation to income which does not form part of the total income under the Act. Even where the assessee claims that no expenditure has been incurred in' relation to income which does not form part of the total income, the Assessing Officer will have to verify the correctness of such claim. In case, the Assessing Officer is satisfied with the claim of the assessee with regard to the expenditure or no expenditure, as the case may be, the Assessing Officer is to accept the claim of the assessee in so far as the quantum of disallowance under section 14A is concerned. In such eventuality, the Assessing Officer cannot embark upon a determination of the amount of expenditure for the purposes of section 14A(1). In case, the Assessing Officer is not, on the basis of the objective criteria and after giving the assessee a reasonable opportunity, satisfied with the correctness of the claim of the assessee, he shall have to reject the claim and state the reasons for doing so. Having done so, the Assessing Officer will have to determine the amount of expenditure incurred in relation to income which does not form part of the total income under the Act. He is required to do so on the basis of a reasonable and acceptable method of apportionment."***

35. Similarly, Hon'ble Apex Court in ***Godrej & Boyce Manufacturing Company Ltd. vs. DCIT – 394 ITR 449 (SC)*** thrashed the issue in controversy as to invoking of the provisions contained under Rule 8D of the Rules by observing as under :-

> ***"37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income***

which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable."

36. Moreover, assessee was in possession of sufficient interest free funds at its disposal to make investment. In these circumstances, we are of the considered view that disallowance u/s 14A in this case cannot be more than Rs.5,403, the exempt income earned during the year under assessment. So, AO is directed to disallow the amount of Rs.5,403/- only instead of Rs.1,25,000/-. Consequently, ground no.1in ITA No.4622/Del/2014 (AY 2010-11) in assessee's appeal is partly determined partly in favour of the assessee.

ASSESSEE'S APPEAL

GROUND NO.2 OF
ITA NO.4622/DEL/2014 (AY 2010-11)

37. AO by invoking the provisions contained u/s 43B of the Act made addition of Rs.1,04,39,210/- on account of non-payment of statutory dues of outstanding sales-tax pertaining to the month of March, 2010 before the due date of filing the return of income. It

was the defence of the assessee that the amount of sales-tax has been converted into a loan by the Government of Uttar Pradesh through PICUP but AO noticed that the sales-tax dues upto 28.02.2010 amounting to Rs.32,76,18,868/- were converted into loan and the balance outstanding of Rs.1,04,39,210/- for the month of March, 2010 was converted into loan vide letter dated 08.04.2011 i.e. after the due date of filing the return of income.

38. The issue in controversy has been decided by the Hon'ble Delhi High Court in case cited as ***CIT vs. Minda Wirelinks (P.) Ltd. – (2013) 40 taxmann.com 111 (Delhi)*** in the light of the CBDT circular by holding that in case the sales-tax liability of an assessee was converted into a loan within relevant previous year, assessee was entitled to claim deduction for the same. This is also mandate of the Circular No.674 dated 29.12.1993 issued by the CBDT.

39. Coordinate Bench of the Tribunal while deciding the identical issue in case cited as ***Teesta Agro Industries Ltd. vs. DCIT – 2018 (5) TMI 1019 – ITAT Kolkata*** also allowed the deduction of unpaid sales-tax converted into loan. In the instant case, since assessee has got outstanding dues on account of sales-tax converted into loan by the Government of UP (through PICUP), the assessee is held to have complied with the provisions contained

u/s 43B of the Act. So, we are of the considered view that the assessee is entitled for deduction thereof and as such, ground no.2 in ITA No.4622/Del/2014 (AY 2010-11) in assessee's appeal is determined in favour of the assessee.

REVENUE'S APPEAL

GROUND NO.1 OF
ITA NO.851/DEL/2011 (AY 2006-07)
ITA NO.852/DEL/2011 (AY 2007-08)
ITA NO.3569/DEL/2011 (AY 2008-09)

40. Ground No.1 in ITA No.851/Del/2011 (AY 2006-07), ITA No.852/Del/2011 (AY 2007-08) and ITA No.3569/Del/2011 (AY 2008-09) is general in nature, hence does not require any specific adjudication.

REVENUE'S APPEAL

GROUND NO.2 OF
ITA NO.851/DEL/2011 (AY 2006-07)
ITA NO.852/DEL/2011 (AY 2007-08)

GROUNDS NO.2 & 3 OF
ITA NO.3569/DEL/2011 (AY 2008-09)

GROUNDS NO.1 & 3 OF
ITA NO.248/DEL/2014 (AY 2009-10)
ITA NO.5616/DEL/2014 (AY 2010-11)

GROUNDS NO.1 & 2 OF
ITA NO.4963/DEL/2015 (AY 2011-12)

41. Aforesaid grounds raised by the Revenue are qua deleting the addition made by the AO on account of depreciation on intangibles

as well as depreciation on assumed intangibles. Except for difference in amounts, the facts are identical in all the appeals. So, aforementioned grounds in appeals filed by the Revenue for AYs 2006-07, 2007-08, 2008-09, 2009-10, 2010-11 and 2011-12 are being disposed off in one-go to avoid repetition of discussion.

42. Undisputedly, purchase consideration of Rs.1,908 crores qua fertilizer plant has been allocated towards different heads of fixed assets and other assets on the basis of report and valuation made by Project & Development India Ltd. (PDIL), a Government of India Undertaking. Assessee claimed depreciation on intangibles @ 25%. AO, by declining the contentions raised by the assessee, disallowed the depreciation claimed by the assessee on intangibles being the value assigned to potential surplus power generation from gas turbines and from sale of argon gas being the same not covered by Part-B of the Income-tax Rules.

43. However, the ld. CIT (A) allowed the same and ordered the AO to delete the addition. Similarly, AO also made addition claimed by the assessee on account of depreciation on assumed intangibles to the extent of 50% of 15% of Rs.65 crores as claimed by the assessee. The ld. CIT (A) deleted the addition made by the AO on account of depreciation of assumed intangibles which order is now under challenge before the Tribunal.

44. It is the case of the assessee that the valuation of intangible benefits can also be assigned towards ammonia plant as purged gas is a product from ammonia plant and similarly intangible benefits from power sale can be attributed to the cost of turbines. Assessee also claimed that other intangible benefits like right to produce urea using natural gas, APM Contract and PMT Contract etc.

45. Undisputedly, assessee has paid an amount of Rs.125 crores for purchase of approvals, licenses, permits, registration, etc. to run its business, over and above the purchase price of Rs.1,777 crores, for intangibles. The ld. CIT (A) deleted the addition on account of disallowance of depreciation claimed on intangible assets by following the decision rendered by Hon'ble Supreme Court in case cited as ***CIT vs. Techno Shares & Stocks Ltd. – (2010) 327 ITR 323 (SC)***.

46. Undisputedly, the assessee claimed depreciation on intangibles on the basis of valuation made by PDIL, a Government of India Undertaking which has specifically made valuation of tangibles and intangible assets. The valuation report given by PDIL is available at pages 355 to 391 of the paper book. When we examine para 8 at pages 355 & 356 of the valuation report, it shows that a valuation of assets i.e. land and land development, plant & machinery, plant and non-plant building, office equipments,

vehicles, furniture, spares, etc., has been made. In para 8.1.7 of the valuation report, a note has been given that, *"intangible assets and their value has been discussed in detail in Chapter VII of this report, which are presented in Annexure VII"*. Perusal of Annexure VII, available at page 359 of the paper book, has categorically made the valuation of intangible assets, which is extracted as under for ready perusal :-

"***INTANGIBLE ASSETS***

(Rs. Lakhs)

Sl. No.	***Particulars***	***Current Value***	***Value Adjustment for Operating Period***	***Asset Value as on 18.01.2006***
1.0	***Due to Power Generation***	***7700***	***0***	***7700***
2.0	***Due to Argon Recovery Plant***	***4800***	***0***	***4800***
	Total	***12500***	***0***	***12500***

Note –
In addition to above, there are number of other intangible assets as detailed in the report. Though direct and indirect benefits of these assets are substantial, it is not possible to quantify the same. Hence, values against these items have not been shown."

47. When we further examine Chapter VII at pages 370 to 372 of the paper book, benefits of intangibles have been given in detail before evaluating the same at Rs.125 crores. Broadly, benefits of intangibles specifically purchased by the assessee inter alia that right of urea production in the fertilizer plant, gas supplied for Shahjahanpur fertilizer plant, locational advantage as Shahjahanpur is located in a highly agriculture intensified area, trained manpower,

sale of surplus power, production and sale of argon, sale and surplus of ammonia, and thereby valued the total intangible benefits to the tune of Rs.125 crores.

48. A detail of approvals/licences/permits/registration for business, which are intangible assets, is given by the PDIL in valuation report at pages 497 & 498 of the paper book.

49. AO disallowed the depreciation on the sole ground that when depreciation on the tangible assets has already been availed of by the assessee, no depreciation on intangible is allowable.

50. Now, the question arises for determination on this issue is :-

> ***"as to whether in case of a slump sale of a fertilizer plant, depreciation of intangibles viz. approvals, licences, permits, registration, etc. to run the business is allowable?"***

51. Hon'ble Supreme Court in ***Techno Shares & Stocks Ltd. v. CIT [2010] 327 ITR 323 (SC)*** held that a membership card of Bombay Stock Exchange (BSE) is an intangible asset, which included right of nomination was a licence or akin to licence on which depreciation is allowable u/s 32(1)(ii) of the Act. However, Hon'ble Supreme Court indicated that this decision was strictly confined to right of membership conferred by BSE membership card.

52. Hon'ble Delhi High Court in ***Areva T & D India Ltd. vs. DCIT – – 345 ITR 421 (Delhi)*** decided the identical issue regarding sale of intangible assets in case of slump sale in favour of the assessee by returning following findings :-

> "***Applying the principle of ejusdem generis, which provides that where there are general words following particular and specific words, the meaning of the latter words shall be confined to things of the same kind, as. specified for interpreting the expression 'business or commercial rights of similar nature' specified in section 32(1)(ii), it is seen that such rights need not answer the description of 'know-how, patents, trademarks, licenses or franchises' but must be of similar nature as the specified assets. On a perusal of the meaning of the categories of specific intangible assets referred in section 32(1)(ii) preceding the term 'business or commercial rights of similar nature', it is seen that the aforesaid intangible assets are not of the same kind and are clearly distinct from one another. The fact that after the specified intangible assets the words 'business or commercial rights of similar nature' have been additionally used, clearly demonstrates that the legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. In the circumstances, the nature of 'business or commercial rights' cannot be restricted to only six categories of assets, viz., know-how, patents, trademarks, copyrights, licenses or franchises. The nature of 'business or commercial rights' can be of the same genus in which all the aforesaid six assets fall. All the above fall in the genus of intangible assets that form part of the tool of trade of an assessee facilitating smooth carrying on of the business. In the circumstances, it is observed that in case of the assessee, intangible assets, viz., business claims; business information; business records; contracts; employees and know-how, were all assets, which were invaluable and result in carrying on the transmission and distribution business by the assessee, which was hitherto being carried out by the transferor, without any interruption. The aforesaid intangible assets were, therefore, comparable to a license to carry out the existing transmission and distribution business of the transferor; in the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business. [Para 13]***

> ***In view of the above discussion, it is held that the specified intangible assets acquired under slump sale agreement were in the nature of 'business or commercial rights of similar nature' specified in section 32(1)(ii) and were accordingly eligible for depreciation under that section. [Para 14]"***

53. Coordinate Bench of the Tribunal in case cited as ***M/s. Controls & Switchgear Contractors Ltd. vs. DCIT (ITA No.511/Del/2011 order dated 22.06.2016)*** by following the decision rendered by Hon'ble Delhi High Court in case of ***Areva T & D India Ltd. vs. DCIT*** (supra) held as under :-

> ***"10…….we are of the considered view that 'Type Test Certification Fees' and 'Customer Approval Fees' are certainly intangible assets being business claims, business information, contracts and know-how etc., which were intangible and without which the assessee would have no business to start with. Thus, rights of the similar nature specified in section 32(1)(ii) of the Act are eligible for depreciation."***

54. Similarly, coordinate Bench of the Tribunal in ***ThyssenKrupp Elevator (India) (P.) Ltd. vs. ACIT – (2014) 50 taxmann.com 279 (Delhi – Trib)*** also decided the identical issue in favour of the assessee by holding that, *"where the assessee acquired elevated division business of another company on slump basis, excess consideration paid by assessee over and above the value of net assets was to be considered as goodwill u/s 32(1)(ii), as such eligible for depreciation."* So, the answer to the question framed is in affirmative.

55. So far as issue of deletion of disallowance of assumed intangibles made by the AO is concerned, ld. CIT (A) has rightly held that there is no basis for the AO to assume that further 10% of the total consideration of Rs.1,908 crores is to be treated as intangibles *"not eligible for depreciation u/s 32(1)(ii) of the Act"* as the total sale consideration of Rs.1,908 crores has been paid in terms of the Agreement to Sell between assessee and Oswal Chemical & Fertilizers Limited. When the value of specific items has been put by PDIL under different heads, as discussed in the preceding paras, there is no scope for guesswork or assumption for such disallowance of depreciation of assumed intangibles. Moreover, this issue is consequential because when the assessee is otherwise found to be entitled for depreciation on intangibles, further depreciation on assumed intangibles is not sustainable.

56. Following the decision rendered by Hon'ble High Court and coordinate Bench of the Tribunal discussed in the preceding paras, which are squarely applicable to the facts and circumstances of the case, we are of the considered view that when in the valuation report, which is given by PDIL, a Government of India Undertaking, intangibles assets and their benefits have been specifically valued and the assessee had paid a sum of Rs.125 crores in a slump sale agreement for approvals, licences, permits,

registration to run the business over and above the total price of fertilizer plant i.e. Rs.1,444 crores, the same are intangibles and deprecation thereon is allowable u/s 32(1)(ii) of the Act apart from the depreciation claimed by the assessee on tangible assets. So, finding no illegality or perversity in the findings returned by ld. CIT (A), Ground No.2 of ITA No.851/Del/2011 (AY 2006-07) & ITA No.852/Del/2011 (AY 2007-08); Grounds No.2 & 3 of ITA No.3569/Del/2011 (AY 2008-09), Grounds No.1 & 3 of ITA No.248/Del/2014 (AY 2009-10) & ITA No.5616/Del/2014 (AY 2010-11) and Grounds No.1 & 2 of ITA No.4963/Del/2015 (AY 2011-12) of Revenue's appeals are determined against the Revenue.

REVENUE'S APPEAL

GROUND NO.3 OF
ITA NO.851/DEL/2011 (AY 2006-07)
ITA NO.852/DEL/2011 (AY 2007-08)

GROUND NO.4 OF
ITA NO.3569/DEL/2011 (AY 2008-09)

GROUND NO.2 OF
ITA NO.248/DEL/2014 (AY 2009-10)
ITA NO.5616/DEL/2014 (AY 2010-11)

57. AO disallowed an amount of Rs.85,14,636/- being 1/5th of expenses of Rs.2,25,07,200/- claimed by the assessee on account of preliminary expenses being paid to ROC and Rs.2 crores being

incurred by Shyam Basic Infrastructure Projects Pvt. Ltd. for due diligence report, drafting agreements, etc., preparation of Memorandum of Association and Rs.65,980/- being paid to S.S. Kothari Mehta & Company with regard to incorporation of Kribhco Shyam Fertilizers Ltd. u/s 35D by relying upon the decision of Hon'ble Delhi High Court in case cited as ***CIT vs. Hindustan Insecticides Ltd. (2001) 250 ITR 338 (Delhi)*** on the ground that payment to ROC for increased authorized share capital is not admissible u/s 35D.

58. Undisputedly, at the time of registration of the assessee company, its authorized share capital of Rs.750 crores under the provisions of Companies Act, 1956 and payment of Rs.2 crores was made to ROC by Kribhco. It is also not in dispute that this amount has been claimed by the assessee as preliminary expenses u/s 35D(2)(c)(iii) of the Act. Assessee has placed on record the documentary evidence qua amount of expenses claimed as preliminary expenses, available at pages 96 to 115, particularly page 107, which is proposal put up by Chief Manager, F&A for approving the object required for incorporation of the company for acquisition of assets of OCFL located at Shahjahanpur, UP.

59. When we examine the facts there is no ambiguity that the amount claimed by the assessee u/s 35D(2)(c)(iii) was incurred

towards registration of the company as a new concern and not for increasing authorized share capital. So, in these circumstances, the decision rendered by the Hon'ble Delhi High Court in ***CIT vs. Hindustan Insecticides Ltd.*** (supra), relied upon by the AO, is not applicable to the facts and circumstances of the case. So, ld. CIT (A) has rightly deleted the addition made by the AO qua claim of preliminary expenses made u/s 35D and as such, there is no scope to interfere into the findings returned by the ld. CIT (A). Consequently, Ground No.3 of ITA No.851/DEL/2011 (AY 2006-07) & ITA No.852/Del/2011 (AY 2007-08); Ground No.4 of ITA No.3569/Del/2011 (AY 2008-09) and Ground No.2 of ITA No.248/Del/2014 (AY 2009-10) & ITA No.5616/Del/2014 (AY 2010-11) of Revenue's appeals are determined against the Revenue.

REVENUE'S APPEAL

GROUND NO.4 OF
ITA NO.852/DEL/2011 (AY 2007-08)

60. Ground No.4 of ITA No.852/Del/2011 (AY 2007-08) is not pressed because of smallness of amount involved.

REVENUE'S APPEAL

GROUND NO.4 (RENUMBERED OTHERWISE GROUND NO.5) OF ITA NO.852/DEL/2011 (AY 2007-08)

61. AO made addition of Rs.18,40,403/- after going through the confirmation of the creditors, namely, Indian Oil Corporation (IOC) on the ground that the same has not been accounted for credit note dated 31.1.2007 till 31.03.2007. However, ld. CIT (A) deleted the addition on the ground that when the same amount of Rs.18,40,403/- has been accounted for in the subsequent years and in both the assessment years, the net result is loss then there is no justification in disallowing the amount in question in assessment year in question. This is a factual issue decided by the ld. CIT (A) and there is no need to interfere into the findings returned by the ld. CIT (A), hence Ground No.4 (renumbered otherwise Ground No.5) of ITA No.852/Del/2011 (AY 2007-08) of Revenue's appeal is determined against the Revenue.

REVENUE'S APPEAL

GROUND NO.5 OF ITA NO.5616/DEL/2014 (AY 2010-11)

62. Ld. CIT (A) has apparently erred in allowing the prior period expenses of Rs.15,13,126/- because assessee itself has admitted before AO when confronted that the amount of Rs.15,13,126/- was

erroneously netted and offered to be added for computation of taxpayer's income. For ready perusal, para 8 of the assessment order is extracted as under :-

> ***"8. Perusal of Tax Audit Report shows that there was prior period expenses of Rs.90,47,81,124/-. However, in the computation of income, assessee added the amount of Rs.90,32,67,998/- after netting the prior period income of Rs.15,13,126/-. During the assessment proceedings, the assessee was asked to explain why the amount was added after netting off. In response, the assessee company filed a letter dated 15/01/2013 in which it is submitted that the amount of Rs.15,13,126/- was erroneously netted and the same is being offered to be added for the computation of taxable income. Hence, the amount of Rs.15,13,126/- is hereby disallowed on account of prior period expenses and added to the total income of the assessee for the year under consideration."***

63. In view of the findings returned by the AO, the ld. AR for the assessee conceded that the ld. CIT (A) has erred in deleting the addition of Rs.15,13,126/-. In these circumstances, when the assessee has erroneously netted the amount of Rs.15,13,126/-, the question of allowing the same as prior period expense does not arise. So, Ground No.5 of ITA No.5616/Del/2014 (AY 2010-11) of Revenue's appeal is determined in favour of the Revenue.

REVENUE'S APPEAL

GROUND NO.4 OF
ITA NO.4963/DEL/2015 (AY 2011-12)

64. AO disallowed an amount of Rs.7,96,706/- being 10% of Rs.79,67,061/- claimed by the assessee as expenses under the head 'vehicle repair and maintenance' in order to exclude personnel

expenses booked under it. Perusal of the impugned order passed by the ld. CIT (A) deleting the addition of Rs.7,96,706/- shows that the ld. CIT (A) after appreciating the fact that the assessee company is situated at Shahjahanpur and its headquarter is at Noida and assessments are made at Bareilly and its appellate jurisdiction is at Delhi and Lucknow and it is having large work force, the travelling is commercial necessity. Moreover, the ld. CIT (A) has rightly observed that there is no evidence or material available with the AO to work out personnel use of vehicle rather he has proceeded to estimate the same which is not permissible when accounts of the assessee are audited one and has been duly accepted by the Revenue. So, there is no illegality or perversity in the findings returned by the ld. CIT (A), hence Ground No.4 of ITA No.4963/Del/2015 (AY 2011-12) of Revenue's appeal is determined against the Revenue.

65. Resultantly, the appeals filed by the assessee being ITA Nos.764/Del/2011 (AY 2006-07), 765/Del/2011 (AY 2007-08), 3508/Del/2011 (AY 2008-09) & 5696/Del/2015 (AY 2009-10) are allowed and ITA No.4622/Del/2014 (AY 2010-11) is partly allowed; and the appeals filed by the Revenue being ITA Nos.851/Del/2011 (AY 2006-07), 852/Del/2011 (AY 2007-08), 3569/Del/2011 (AY 2008-09), 248/Del/2014 (AY 2009-10) &

4963/Del/2015 (AY 2012) are dismissed and ITA No.5616/Del/2014 (AY 2010-11) is partly allowed.

REVENUE'S APPEAL (U/S 271(1)(c) of the Act)

ITA NO.247/Del/2014 (AY 2008-09)

66. On the basis of completed assessment u/s 143 (3) of the Act, penalty proceedings u/s 271(1)(c) of the Act are initiated against the assessee by way of issuance of notice by making numerous additions, out of which, addition of Rs.1,33,60,273/- and addition of Rs.1,00,14,486/- on account of sales-tax not paid & disallowed u/s 43B and disallowance of depreciation on spare parts respectively was confirmed and remaining addition was deleted by the ld. CIT (A). Declining the contentions raised by the assessee, AO proceeded to levy the penalty of Rs.79,45,080/- @ 100% for furnishing inaccurate particulars by the assessee to the extent of income of Rs.2,33,74,759/-.

67. Assessee carried the matter by way of an appeal before the ld. CIT (A) who has deleted the penalty by allowing the appeal. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

68. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and

orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

69. Undisputedly, penalty has been levied for disallowance of claim of the assessee on account of sales-tax not paid and for disallowance of depreciation claimed by the assessee on spare parts. Perusal of para 9 of the penalty order goes to show that the penalty has been levied by the AO for concealment of particulars of its income and furnishing of inaccurate particulars of income. It is settled principle of law that in order to initiate the penalty proceedings, a valid show-cause notice as required u/s 271(1)(c) read with section 274 is required to be issued to the assessee so as to make him aware as to under which limb of section 271(1)(c) of the Act, the penalty is going to be levied.

70. But, in the instant case, AO even at the time of passing the penalty order was not aware *"if the assessee has concealed the income or has furnished inaccurate particulars of its income rather preferred to levy the penalty on both the accounts"*. Reliance in this regard is placed on the decision of Hon'ble Karnataka High Court in case of ***CIT vs. Manjunatha Cotton and Ginning Factory & Ors. 359 ITR 565 (Karn.)***, affirmed by Hon'ble Supreme Court.

71. So, the ld. CIT (A) has rightly deleted the penalty on this account. Furthermore, when as per our findings returned in the

preceding paras while deciding the grounds in the respective appeal filed by the assessee, the addition on the basis of which penalty has been levied, has been deleted, penalty cannot survive and as such, has to be deleted. In nutshell, when there is no addition, there cannot be any penalty. Reliance in this regard is placed on decision rendered by Hon'ble Supreme Court in case cited as ***K.C. Builders v. Assistant Commissioner of Income-tax [2004] 265 ITR 562 (SC)***.

72. In view of what has been discussed above, there is no scope for interference into the impugned order passed by ld. CIT (A), hence appeal being ITA No.247/Del/2014 (AY 2008-09) filed by the Revenue is dismissed.

Order pronounced in open court on this 17th day of December, 2018.

Sd/-	**sd/-**
(N.K. BILLAIYA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 17th day of December, 2018
TS

Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A)
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.