IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI G. S. PANNU, VP AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.3072/Mum/2014
(**निर्धारण वर्ष** / Assessment Years: 2010-11)

M/s. Maharashtra Airport Development. Company Ltd., 8th Floor, World Trade Centre Tower No.1, Cuffe Parade, Mumbai-400005.	**बनाम**/ Vs.	DCIT, Range 3(2) Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCM9623M		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by:	Shri Nishant Samaiya (DR)
Assessee by:	Shri Salil Kapoor/ Sumit Lalchandani

सुनवाई की तारीख / Date of Hearing: 17/05/2019
घोषणा की तारीख /Date of Pronouncement: 19/06/2019

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 11.02.2014 passed by the Commissioner of Income Tax (Appeals)-4, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2010-11.

2. The assessee has raised the following grounds of appeal: -

> *"1. Whether on the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) was right in holding that the interest on fixed deposit of Rs. 59,58,791/- is taxable under the head "income from other sources" and that deduction under section 80IAB is not available on the said interest on fixed deposit?*
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> *2. Whether on the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) was right in holding that the interest on contractor advances of Rs,*

1,42,29,269/- is taxable under the head "income from other sources" and that deduction under section 80IAB is not available on the said interest on contractor advances?

3. *Whether on the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) was right in holding that interest expenditure of the Appellant is not allowable as deduction under section 36(1)(iii) of the Act?*
4. *Whether on the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) was right in holding that the processing fees of Rs. 9,066/- and lease premium of Rs. 39 Lakhs is chargeable to tax under the head "income from other sources" and that deduction under section 80IAB is not available on the said receipts?*
5. *Whether on the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) was right in enhancing the income of the Appellant?*
6. *Whether on the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) was right in enhancing the income and holding that the grant of Rs. 1 Crore towards repairs & maintenance of airports received by the Appellant is chargeable to tax under the head "business income"?*
7. *Whether on the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) was right in holding that the rental income of Rs. 1.05 Lakhs is chargeable to tax under the head "Income from House Property" and that deduction under section 80IAB is not available on the said income?*
8. *Whether on the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) was right in enhancing the income and holding that the depreciation of Rs. 2,15,07,392 is not allowable as a deduction as the income from the said property has been assessed to tax as "Income from House Property"?*
9. *Whether on the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) was right in enhancing the income and holding that the expenditure claimed by the Appellant in earning the rental income is not allowable as deduction?*
10. *Whether on the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) was right in holding that on the factual matrix, the Appellant has not objected to the enhancement?*

II . *Whether on the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) was right in confirming the disallowance of Rs.8,09,084/- under section 14A of the Act?*

12. *Whether on the facts and in the circumstances of the case and in law, Commissioner of Income-tax (Appeals) erred in not appreciating that the addition/disallowance made are illegal, unjust and bad in law and are based 0- mere surmises and*

conjunctures and the same cannot be justified by any material on record?

13. Whether on the facts and in the circumstances of the case and in law, Commissioner of Income-tax (Appeals) erred in initiating penalty under section 271(1)(c) of the Act? The Appellant craves leave to add, to alter to amend the above Ground of Appeal at the time of hearing."

3. The assessee has raised the following additional grounds of appeal: -

"Ground 14: That the notice issued by learned CIT (A) for enhancement of additions made by Assessing of and enhancements are made is illegal, had in law, unjust and without jurisdiction.

Ground 15: That without prejudice, the grant of I Crore received from Government of Maharashtra for repair & maintenance of airports in Maharashtra is not the income of the appellant as there is diversion of income by way of overriding title.

Ground 16: That without prejudice, the addition of one crore of grant received is illegal, had in law and highly excessive as the amount debited in the said account during the year is not reduced from the said account.

The relevant facts are already on record and no new fact is required to be investigated. The above noted ground goes to the root of the matter. It is therefore humbly requested that the same may kindly be admitted and adjudicated. Reliance is placed on the decision of Hon'ble Supreme Court in the case NTPC 229 ITR 383 (SC)."

4. The brief facts of the case are that the assessee filed its return of income on 30.09.2010 declaring total loss to the tune of Rs.8,97,42,143/-. The return was processed u/s 143(1) of the Act. Thereafter, the case was selected for scrutiny under CASS. Notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. On verification, it was found that the assessee earned the interest income in sum of Rs.2,01,88,060/- and income from other sources of Rs.40,14,804/- of SEZ Unit.

5. The assessee reduced of Rs.2,01,88,060/- from WIP and the income has been shown on following sources *(i) Interest on fixed deposit Rs.59,58,791/- & (ii) Interest from Contractor Rs.1,42,29,269/-.*

6. Apart from this, assessee has shown following income from other sources in its P & L Account (i) Income from Non SEZ Rs.62,33,635/- (ii) Income from SEZ Rs.40,14,804/-.

7. Income from other sources of SEZ Rs.40,14,804/- (breakup of the same is given below): -

Income	Amount in Rs.
Rent Central Facility Building	1,05,000
Lease Premium	39,00,000
Processing Fees	9,066
Miscellaneous Income	7,38
Total	40,14,804

8. The notice was issued and the assessee also filed the reply and after considering the reply, the claim of the Assessee in connection with the interest earned from fixed deposit in sum of Rs.59,58,791/- and interest from Contractor in sum of Rs.1,42,29,269/- and income from other sources from SEZ Unit in sum of Rs.40,14,804/- was declined and added to the income of the assessee. It was also observed that the assessee company made the investments in sum of Rs.18,73,16,789/- and earned the exempt income in sum of Rs.3,15,345/-, therefore, the AO applied the provisions u/s 14A r.w. Rule 8D of the Act and assessed the expenditure to earn the exempt income in sum of Rs.8,09,084/- and added to the income of the assessee. The total loss of the assessee was assessed to the tune of Rs.6,47,30,195/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who partly allowed the claim of the assessee, therefore, the assessee has filed the present appeal before us.

ISSUE NO. 1

9. Under this issue the assessee has challenged the confirmation of the addition on account of interest income on fixed deposit of Rs.59,58,791/- taxable under the head "Income from other sources". At the very outset, the Ld. Representative of the assessee has argued that the present issue has been decided in favour of the Assessee by Hon'ble ITAT in the assessee's own case for the A.Y.2008-09 in ITA. No.1223/M/2013 dated 27.08.2014,

therefore, in the said circumstances, the interest on fixed deposit in sum of Rs.59,58,791/- is liable to be treated as business income. The copy of order of the Hon'ble ITAT in the assessee's own case for the A.Y.2008-09 in ITA. No. 1223/M/2013 dated 27.08.2014 is on the file in which the relevant para no. 6 is hereby reproduced as under.: -

> *"6. We have carefully perused the orders of the authorities below and also perused the relevant material brought on record before us. The only issue to be decided is whether the FDs was made out of surplus funds of the assessee or out of the borrowings/advances received by the assessee and whether the deposits were made for a short period. We find that this issue has not been considered by the lower authorities on the facts of the case. In our considered opinion, this issue needs to be re-adjudicated by the A.O. We accordingly restore this issue to the file of the A.O. The A.O. is directed to verify whether the FDs have been made out of surplus funds or out of loans and borrowing of the assessee and whether the FDs were for short period of time. The assessee is directed to file necessary details before the A.O. The A.O. is expected to give a fair and reasonable opportunity of being heard to the assessee."*

10. On appraisal of the above mentioned finding, we noticed that the issue has been restored before the AO and the AO passed the order giving effect the order of Hon'ble ITAT by virtue of order dated nil July, 2017 lies at page 38 of the paper book which is hereby reproduced below.: -

Name & Address of the Assesse	*M/s. Maharashtra Airport Development Co. Ltd.* *126 floor. World Trade Centre,* *Cuff e Parade, Mumbai-400005.*
PAN No.	*AADCM9623M*
Status	*Company*
Assessment Year	*2008-09.*
Date of Order	*.07.2017.*

ORDER GIVING EFFECT TO THE ITAT's ORDER.

Consequent upon to the order passed by the Hon'ble ITAT G Bench, Mumbai vide order ITA No.1223/Mum/2013 dated 27.08.2014 on appeal filed by the assessee against order passed by the Ld. CIT(A)-4, Mumbai dated 24.12.2012. the total income of the assessee is recomputed as under:

Business income eligible for deduction u/s. 80IA Rs.32,45,79,566/- (As per the order giving effect to CIT(A) order dated 03.03.2014

Add: Income to be treated as Business income

(I) Interest income of Rs. 3,93,27,585/- Rs.6,86,16,552/-

(6) Interest income from contractors of Rs. 2,92.88,967/-

Revised Business income eligible for deduction u/s.80IA Rs.39,31,96,118/-

Income from Other sources	*Rs. 21,38.34,485/-*
(As per the order giving effect to CIT(A) order dated 03.03.20 14)	
Less: Income treated as Business Income	
(i) Interest income of Rs.3,93,27,585/	*Rs.6,86, 16,552/-*
(ii) Interest income from contractors of Rs. 2,92,88,967/-	
Revised Income from Other sources	*Rs. 14,52,17,933/-*
Total Income	*Rs,53,84, 14,051/-*
Less: Deduction u/s. 80IAB	*Rs.39,31,96,118/-*
Net Taxable Income	*Rs. 14,52,17,933/-*

Revised accordingly, Give credit of pre-paid taxes, TDS and regular taxes after due verification. Charge interest u/s. 234A, 234B, 234C, 234D and 220(2) as applicable and allow interest u/s 244A as per law. Issue revised Demand Notice/Refund accordingly."

11. On appraisal of the above mentioned order giving effect to the order of ITAT, we find that the claim of the assessee has been allowed. Subsequently, the matter of controversy has been further adjudicated by the CIT(A) while deciding the appeal of the assessee for the A.Y. 2011-12 in which the relevant para is 5.2 which is hereby reproduced as under.: -

> *"5.2.1 This ground of appeal relates to treatment of interest on Fixed Deposits amounting to Rs.3,18,52,281/- as "income from other sources" and consequentially rejecting the deduction u/s 80-IAB of the Act. The assessing officer has discussed the issue under para 5 of his order. He has noted that the appellant had received interest on Fixed Deposit which was reduced from the working of WIP and included in profit of SEZ unit for the purpose of deduction u/s 80-AB. The appellant filed a response dated 27.01.2014 which has been extracted under Para 5.3.1. The assessing officer rejected the contention of the appellant that the interest income was derived from business holding that the same was derived from short term deposits made out of funds available for the business and from advances given. In other words, he held that there was no direct nexus with the business of the appellant but is a result of parking of surplus funds and earning interest which had to be treated as 'income from other sources and could not be considered as profit of the undertaking for the purpose of claiming deduction u/s 80-lAB of the Act.*
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> *5.2.2 It is noted that identical issue had come up before Hon'ble ITAT Mumbai in appellant's appeal for AY 2008-09 in ITA no. 1223/Mum/2013 decided by order dated 27/08/2014. On this issue, in Hon'ble [TAT made the following observation at Para 6 of the order:*
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> > *"We have carefully produced the orders of the authorities below and also produce the relevant material brought on record before us. The only issue to be decided is whether the FDs was made out of surplus funds of the assessee or out of the borrowings/advances received by the assessee and whether the deposits were made for a short period. We find that this issue has not been considered by the lower authorities on the facts of the case. in our considered*

opinion, this issue needs to be re-adjudicated by the AG. We accordingly restore this issue to the file of the AG. The AG is directed to verify whether the FOs have been made out of surplus funds or out of loans and borrowings & the assessee and whether the FDs were for short period of time. The assessee is directed to file necessary details before the .40. The AG is expected to give a fair and reasonable opportunity of being heard to the assessee."

5.2.3 A perusal of the accounts of the appellant audited by the Comptroller a Auditor General of India (CAG) shows that during the year, the company has received Interest on Short term Deposits amounting to Rs.3,18,52,281/-. Perusal STATEMENT SHOWING DETAILS OF SOURCE OF FIXED DEPOSITS and interest thereon reveals that out of 17 deposits, deposits were for five months and I remaining 11 deposits were for periods less than three months The sources of the

funds were grant for land acquisition and application money of non-convertible debentures. For example, a sum of Rs. 40 crores was placed in ED in Canara bank on 19/0412010 with maturity date of 12/06/2010 out of grant for land acquisition received on 10/04/2010. This FD earned interest of Rs. 21.36 lakhs. Similarly, FD was made in OBC Bank for Rs. 20 crores on 19/04/2010 with maturity date of 20/07/2010 out of grant for land acquisition of Rs. 46.56 crores received on 10/04/2010. This ED received interest of Rs. 25.19 lakh. FD of Rs. 7 crore was made with ICICI Bank on 07/06/2010 with maturity date of 08/12/2010 out of application money of non-convertible debentures received on 31/05/2010. Further, it is also seen that the appellant had placed Rs. 23 Lacs and Rs.8,26,731/- with Vijaya Bank on 01/04/2010 in lieu of Bank Guarantee, both till 31/03/2011.

5.2.4 Consideration of above details leads to the conclusion that these fixed t deposits were placed by the appellant not out of the surplus funds of the Company but out of grants for land acquisition, non-convertible debentures raised for business or deposits in lieu of Bank Guarantee. The Company has raised funds in June 2010 to the tune of Rs. 150 Crore by issue of Non-convertible debentures to be utilized in infrastructure development of Project MIHAN. It is also to be appreciated that acquisition oi land fora large project is a long and complicated process which may result in several unpredictable reasons for delays. It is the contention of the appellant that amount not immediately required were temporarily parked with Banks with an intention to reduce the interest cost of the Project. Few deposits were placed with Bank towards security for Bank Guarantee.

5.2.5 Consideration of the dates of receipts of grants and non-convertible debentures and the dates of deposits indicates that the same were made within one or 2 weeks of the receipts. In my opinion, this supports the claim of the appellant that the FDs were made out of funds received for the business of the appellant in the form of grants for land acquisition or non-convertible debentures and not out of any surplus funds generated from the business of the appellant. This was the precise finding Hon'ble ITAT Mumbai wanted from lower authorities in its decision in appellant's wanted from lower authorities in its decision in

> *appellant's appeal for AY 2008-09 referred to above. In my view, the ratio of decisions in cases of CIT vs Lok Holdings, 189 Taxman 452 (Born) and CIT vs Paramount Premises (P) Ltd, 190 (TI? 259 (Born) are applicable. Further, in the decision of AC vs. Maxcaro Laboratories Limited (92 lTD 11), it was held that the deposits given the assessee out of business compulsion and interest earned thereon though r derived from Industrial Undertaking but having a direct and proximate connection with the business of industrial undertaking of the assessee was eligible for deduction u 80-IA also supports the appellant. The decision of Hon'ble [TAT Ahmedabad in AC/s vs Mundra Port and Special Economic Zone Ltd., I.T.A. No.1878/Ahd/2011 also supports the appellant's contention.*
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> *5.2.6 In the facts and circumstances of the case, I find that the appellant had temporarily, and for short period parked funds received as grant/non-convertible debentures in FDs to reduce interest burden as a prudenTttii1nIs decision. Hence, the assessing officer is directed to verify the dates of receipts of grants and non- convertible debenture application monies and include the interest for claiming deduction u/s. 80-lAB of the Act. This ground of appeal is allowed."*

12. Subsequently, the CIT(A) has further decided the matter of controversy in favour of the assessee for the A.Y.2012-13 and the relevant finding has been given in para no. 5.2.1. In view of the above said decision, we are of the view that the issue has been squarely covered by the decision of the Hon'ble ITAT and subsequently the issue has been decided by the CIT(A) in favour of the assessee in the Assessment years of 2011-12 & 2012-13 which are not subsequently changed and varied. The facts are not distinguishable at this stage also. No decision the contrary to the said decision has been placed on record, therefore, in the said circumstances, we set aside the finding of the CIT(A) on this issue and decide this issue in favour of the assessee against the revenue.

ISSUE NO. 2

13. Under this issue the assessee has challenged the treatment of interest income arise out of advances to contractor of Rs.1,42,29,269/- under the head "income from other sources". At the very outset, the Ld. Representative of the assessee has argued that the issue has been decided by the Hon'ble ITAT in the assessee's own case in favour of the assessee in

the A.Y. 2008-09 in ITA. No.1223/M/2013 dated 27.08.2014. The copy of order is on the file and the relevant para is 7 which is hereby reproduced as under.: -

> *"7. The second issue relates to the interest received by the assessee on advances made by it to its various contractors who are engaged in infrastructure work. We find that an identical issue has been considered by the Hon'ble Gujarat High Court in the case of Nirma Industries, 283 ITR 402 where the Hon'ble Gujarat High Court has held that the interest received on delayed payment by the debtor is to be included in the profit of the industrial undertaking. In the case in hand, there is no dispute that the assessee has received interest from advances made by it to its contractors engaged in infrastructure work, therefore, the interest received by the assessee has to be considered as interest derived from industrial undertaking eligible for deduction u/s 80-IAB of the Act. To sum up, interest amounting to Rs. 2,92,88,967/- being interest on advances to contractors is to be taxed under the head "business income" and interest of Rs. 3,93,27,585/- being interest on FDR has to be decided afresh as per the directions given hereinabove."*

14. On appraisal of the above mentioned finding, we noticed that the issue has been discussed and decided in favour of the assessee by the Hon'ble ITAT in the assessee's own case for the A.Y.2008-09 in ITA. No.1223/M/2013 dated 27.08.2014. The facts are not distinguishable at this stage also. Subsequently, the issue has been decided by CIT(A) in favour of the assessee in the A.Y.2011-12 & 2012-13. Since the matter of controversy has duly been covered in favour of the assessee by the decision of the Hon'ble ITAT in the assessee's own case for the A.Y.2008-09 in ITA. No.1223/M/2013 dated 27.08.2014, therefore, by honoring the said decision we allowed the claim of the assessee and treated the interest income in sum of Rs. 1,42,29,269/- as business income. Accordingly, this issue is decided in favour of the assessee against the revenue.

ISSUE NO. 3

15. This issue is alternative to the issue no. 1 & 2 whereas we have already treated the interest income as income from business, therefore, this issue is not liable to be adjudicated.

ISSUE NO. 4

16. Under this issue the assessee has challenged the income from processing fees of Rs.9,066/- and lease premium of Rs.39 lakhs respectively as income from other sources. At the very outset, the Ld. Representative of the assessee has argued that the issue has duly been covered by the decision of the Hon'ble ITAT in the assessee's own case for the A.Y.2007-08 in ITA. No.6435/M/2011 dated 15.03.2013. The copy of order is on the file and the relevant paras are bearing no. 23 to 24 which are hereby reproduced as under.:-

> *"45. Ground nos.1, 3 and 4 raised in this appeal relate to the setting up and commencement of the business and treating the receipts as income from other sources instead of business income. This issue is common to the grounds raised in I.T.A. No.127/M/2012 (AY: 2005-2006) and we have adjudicated against the assessee under the factual matrix of the case and based on the activities listed out by Ld counsel for the assessee. Further, the same issue came up for adjudication in the AY 2006-07 too and held that the business must be declared 'set up' under the factual matrix of that year of course, with certain conditions. In the back ground of the above, we proceed to examine the activities under taken by the assessee during the Ay 2007-08 and they are as under:*
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> *"Total land in possession has gone upto 2180.6 hectares… 1) Environmental clearance for the Airport part of MIHAN project excluding SEZ has been obtained by the assessee. 2) Notification for the SEZ is received from Ministry of commerce for 1511.51 hectares. 3) Telecom network is started. 4) The work of internal roads was done to the extent of Rs. 64.5 crores, boundary wall to Rs. 4.7 crores construction of storm water drainage channels in MIHAN area to Rs.1.7 crores and construction of Flyover Interchange at the junction of NH-7 and COB across railway track is done to the extent of Rs. 15.65 crores. 5) Assessee leased out over 1517 acres of land both in processing and non-processing zone."*
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> 46. From the above, it is evident that the assessee not only obtained necessary and mandatory Environmental clearance from the Government and Ministry of Commerce has also issued Notification relating to the SEZ. Assessee also commenced the telecom network, constructed the internal roads, boundary walls, drainage channel systems, construction of flywoverr is also done. Finally, the assessee successfully leased out the land to the customers, which is part of the main business of the assessee. In these circumstances, in our opinion, we have no doubt in adjudicating the issue in its favour that the assessee's business is in place and therefore, the business of the assessee both set up and commenced too. Accordingly, ground 1 and 4 are allowed. 47. Ground no.2 relates to

> treating of certain receipts amounting to Rs. 13,56,67,380/- as 'income from other sources'. In the above paragraphs, with regard to the interest income, we have already adjudicated and given our finding while dealing with the issues in the AY 2005-06. AO is directed to treat the relevant receipts as income from other sources. With regard to the other receipts, we direct the AO to reexamine his conclusions in the light of our findings on the core issue of 'set up' and commencement of the business, which is decided in favour of the assessee. Thus, ground 2 is decided pro-tanto.

17. Thereafter the matter of controversy came before the Commissioner of Income Tax (Appeals) in the A.Y. 2012-13 which has been decided in favour of the assessee treating the said income as income from business. The facts are not changed or varied at this stage. However, in this regard, we also find support of the decision in case of **Shreeji Exhibitors Vs. ACIT (2015) 42 ITR 596, Asiatic Stores & Soda Fountain Vs. ITO, Mumbai (2017) 167 ITD 330.** Taking into account all the facts and circumstances, we are of the view that the income in question is liable to be treated as income from business. Accordingly, we set aside the finding of the CIT(A) on this issue and allowed the claim of the assessee.

ISSUE NO. 5 to 7

18. Issue nos. 5 & 6 are inter connected, therefore, are being taken up together for adjudication. However, the assessee has challenged the order of the CIT(A) in which the CIT(A) has treated the grant of Rs 1 crores of Government of Maharashtra and rental income of Rs.1,05,000/- as income from business of Assessee. The main contention of the assessee is that the CIT(A) was not authorized to decide the issue which was not before him and to raise the addition in question. On appraisal of the order passed by the CIT(A), we noticed that the CIT(A) has treated the grant of Rs.1 crores of Government of Maharashtra on account of repairs and maintenance of airports as income of the assessee and also treated the rental income in sum of Rs.1,05,000/- as income from business. it is to be seen whether the grant in sum of Rs.1 crores released by Government of Maharashtra to the assessee on account of repairs and maintenance of airports is liable to be

treated as income of the assessee or not. So far as the grant of Rs.1 crores released by Government of Maharashtra on account of repairs and maintenance of airports is concerned, the CIT(A) has treated as income of the assessee. The Ld. Representative of the assessee has argued that the Government has given the grant to its 100% undertaking of Government of Maharashtra, therefore, the said grant is not liable to be treated as income of the assessee in view of the decision in the case of **City and Industrial Development Corporation of Maharashtra Ltd. Vs. ACIT (2012) 138 ITD 381 (Mumbai) and in the case of CIT Vs. Karnataka Urban Infrastructure Development & Finance Corpn. (2006) 155 Taxman 228 (Kar.).** However, on the other hand, the Ld. Representative of the Department has refuted the said contention. It is not in dispute that the assessee is 100% subsidiary of the Government of Maharashtra who received the grant in sum of Rs.1 crores on account of repairs and maintenance of airports. The assessee has relied upon the decision Hon'ble ITAT in the case titled as **City and Industrial Development Corporation of Maharashtra Ltd. Vs. ACIT (2012) 138 ITD 381 (Mumbai).** The relevant finding is hereby reproduced as under.: -

> *"37. We have heard the arguments advanced from either side at length and have also perused the material brought and placed before us for consideration.*
> *38. Coming to the arguments of the Senior Counsel that the assessee must be treated as Government or surrogate or an agent, has to be considered and adjudicated at first. To consider the taxation point of view, we have to refer to Article 289 of the Constitution, wherein Article 289(1) says, "The property and income of a State shall be exempt from Union Taxation". Article 289(2) reads, "Nothing in clause (1) shall prevent the Union from imposing or authorizing the imposition of, any tax to such extent, if any, as Parliament by Law provide in respect of a trade or business of any kind carried on by, or on behalf of the Government or State, or any operation connected therewith, or any property used or occupied for the purpose of such trade or business, or any income accruing or arising in connection therewith" and Article 289(3) reads, "Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by Law declare to be incidental the ordinary functions of Government". 39. To our mind, the entire case of the assessee in the instant case, hinges on clause (2) or*

clause (3) of Article 289 of the Constitution of India. The basic purport of Article 289(2) is to neutralize clause (1), but with a rider that, if there is any "trade or business" , done on behalf of the Government or any operations connected therewith or any property issued or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith. To make this clause effective, even for Government / State, conduct of "trade or business" is necessary, which simply means involvement of commercial and profit motive for the vendor. This is in line with the decision of Hon'ble Supreme Court of India in the case of APSRTC (supra), relied upon by the DR, wherein the Hon'ble Supreme Court had observed, "the facts that the trading activity carried on by the appellant may be covered by article 289(2) of the Constitution does not really assist the appellant's case. Even if a trading activity falls under clause (2) of article 289 of the Constitution, it can sustain a claim for exemption from Union taxation only if it is shown that the income derived from the said trading activity is the income of the State". Therefore, whenever, there is an activity in the nature of trade or business, clause (2) shall come to life, which according to clause, shall be applicable towards the State i.e. if an activity which is in the nature of trade or business, conducted by the State itself, the liability for tax shall emerge, a typical example is that of service tax collected by the State on events being conducted by the vendors, have to be deposited by the State, in the Government exchequer, making the State an assessee under service tax as held by the Hon'ble Supreme Court in the case of Rashtriya Ispat Nigam Ltd. vs Dewan Chand Ram Saran (CA No. 3905 of 2012). This is only possible where there is an activity of "trade or business", but, if, confined towards development, either of a new township or betterment of the functions of the local authority, 289(2) shall remain in the oblivion and shall not come into play. In this context when in the case of APRTC, reported in 52 ITR 524 (SC), the Advocate General sought to include activities in clause (2) in clause (1), the Hon'ble Apex Court negated the same by saying "no exception can be taken". Therefore, the functions and / or activity has to be seen primarily. The Hon'ble Supreme Court, thus observes, "Reading the three clauses together, one consideration emerges beyond all doubt and that is that the property as well as the income in respect of which exemption is claimed under clause (1) must be the property and income of the State, and so, the same question faces us again : is the income derived by the appellant from its transport activities the income of the State ? If a trade or business is carried on by the State departmentally and income is derived from it, there would be no difficulty in holding that the said income is the income of the State. It may be that the statute under which a notification has been issued constituting the appellant corporation may provide expressly or by necessary implication that the income derived by the corporation from its trading activity would be the income of the State". This observation read together with section 113(3A) of MR&TP Act, 1966, shall emerge that the activity so performed by the assessee is nothing but an act of State without any profit or commercial motive attached with it. The only clause left for our consideration then would be clause (3), which shall come into play once clause (2) is disbanded and as soon as it become disbanded, clause (3)

come to life, which operates only if, "Parliament may by Law declare to be incidental to the ordinary functions of Government". Here, in the instant case, we have to read "Parliament" as "State Government" because in the instant case, it is the State Government which has authorized the assessee to perform the development projects at Navi Mumbai, VasaiVirar, Waluj and such other places.

40. We cannot agree with the argument of the DR that there is no document which has drawn out the Agent-Principal relationship, because the very first Resolution dated 18th March, 1970 mention in para no. 2 that "…… which would act as an "agent" of Government for the development of the areas with a view to secure the above objective", and in para no. 3 of this Resolution clearly say, "The subsidiary company will work under the control and supervision of the State Government in the General Administrative Department". In our opinion, the first Resolution itself makes it clear that the assessee is to be an agent, but functions as an arm of the State Government, because, if the assessee can only work under the control and supervision of the State Government, meaning thereby that the assessee cannot make / take any decisions suo moto, then, in such a case authority for performance of all activities lie somewhere else. In any case, as per this Resolution, it clearly makes the assessee an "agent" of the State. 41. When we look into the financial functions of the assessee, we find that all dealings have to be routed through authorizations by the Government and all funds receivable shall be in compliance and with intimations to :

> *To The Managing Director, State Industrial and Investment Corporation of Maharashtra Ltd. Bombay. The Industries Commissioner, Bombay The Accountant General, Maharashtra, Bombay The Pay & Accounts Officer, Bombay The Resident Audit Officer, Pay and Accounts Officer, Bombay The Senior Deputy Accountant General, Nagpur All Departments of Secretariat The Divisional Commissioner, Bombay Division, Bombay The Budget Branch, Industries & Labour Department, Bombay The Director of Publicity, Bombay.*

42. We find that according to MR&TP Act, 1966, the machinery sections, i.e. sections 113 & 113A talk of appointment of Development Authority and Local Authority and accordingly, through various Resolutions, in compliance of these sections, MR&TP Act has appointed the assessee as the Development Authority for development to new townships and Local Authorities for streamlining the functions of already existing towns like Aurangabad, Nashik, Nagpur etc. This, itself shows that the assessee is acting totally on behalf of the Government. Another distinguishing feature that can be seen in that as soon as the "Project" is complete, the project gets handed back to the State, i.e. when there is a development project, as per phases, and in the case of local authority, as and when the authorizing committee is satisfied, the reins are transferred to the municipal boards, from whom, the project was taken over, as we have seen from Resolution no. 10375 dated 06/08/2010.

43. In tune with these observations, read with sections 113 & 113A of MR&TP Act along with Articles 289(1) & 289(3) and holding that the assessee corporation is not doing any trade activity on its own accord,

> *we hold, relying on the decision of the Hon'ble Bombay High Court in the assessee's own case, in the Writ Petition, following the decision Percival case (supra), wherein it has been held, that CIDCO, the assessee herein, is an agent of the State Government of Maharashtra. We, therefore, respectfully follow the Hon'ble jurisdictional High Court of Bombay, as held in the case of Percival (supra), and hold, the assessee to be the "agent" of the State Government of Maharashtra, read with the entire overwhelming documents, suggesting that there is no income to the assessee as such, and whatever is, generated, it gets deposited in the Consolidated Fund of the State. We also cannot ignore the fact that the department has been assessing the assessee as a State Government undertaking for the last three years, therefore, even this cannot be called as an afterthought and applying the 'rule of consistency', we hold that the department cannot be allowed to take a distinctive approach in the current year."*

19. On appraisal of the facts and circumstances, we find that the assessee has been treated as agent of Government and the income of the assessee if any was treated as income of the Government which stand deposited in the consolidated fund of the State. The assessee placed reliance upon the decision of Kolkata High Court in case of Prl. CIT Vs. The State Fisheries Development Corporation ITA No. 19 of 2017 with GA 413 of 2017 in which the grant has been treated has capital receipt. The similar view has been taken by the Delhi High Court in case titled as CIT Vs. Handicrafts and Handlooms Exports Corporation of India Limited cited as (2014)360 ITR 130 (Delhi). The instant case also Maharashtra Government release the grant in favour of assessee for the repairs and maintenance of airports . It is if any capital in nature and is not liable to be considered as revenue in nature. Taking into account all the facts and circumstances and by relying upon the above mentioned law, we are of the view that the grant in sum of Rs.1 crores released by Government of Maharashtra on account of repairs and maintenance of airports is not liable to be treated as income of the assessee being in the nature of capital receipt. Coming to the treatment of rental income in sum of Rs.1,05,000/- as business income. We noticed that the main object of the assessee is sale and leasing of land. This issue has

been decided by CIT(A) in favour of the assessee for the A.Y.2011-12 & 2012-13. The CIT(A) has given the finding which is reproduced as under: -

> *"5.5 This ground relates to considering the income from lease rental of appellant as "income from other sources" and denying deduction u/s 80-IAS. The assessing officer has discussed this at para 5.7 of his order. He has held that income from rent of building and lease premium of land located in SEZ has no nexus with the aLe2ants business and hence treated it as "income from other sources".*
> *5.5.2 It is not in dispute that the appellant is a Government company. MADC has been formed to play a lead role in the planning and implementation of the Multi-modal National Hub Airport at Nagpur (MIHAN) project. The main objects of the appellant company as per clause Ill (A) of the Memorandum of Association is to design, plan, construct, erect, build, remodel, repair, execute, develop, operate, sale, lease, rent, improve, administer, manage control, maintain and demolish airport, air-traffic equipment, traffic terminals, roads, railways, highways, expressways, bridges, tunnels, railroads, urban transport systems, alleys, township schemes, industrial, docks, shipyards, canal, wells, ports, reservoirs, embankments, dams, r-cation works, reclamations, improvements, sanitary systems, water works, water gas or any other structural or architectural work and Special Economic Zones. It is the most essential business activity of the appellant to operate the SEZ and income from leasing out parts of it to eligible persons for eligible activities, with It approval of Govt. of India and inconformity with SEZ policy.*
> *5.5.3 The assessing officer has failed to explain why this essential component of appellant's business does not have nexus with its stated business activity as approved by Govt. of India. A considerable amount of public money in form of Government grant has been invested in the company to generate infrastructure to promote eligible industries. If income from this activity is not considered as business income then it is beyond comprehension what other part would constitute its business Therefore, this ground of appeal is allowed. The assessing officer is directed to treat lease/rent of Rs.2,04,90,596/- as business income and eligible for purpose of deduction u/s 80-IAB."*

20. On the basis of the above mentioned finding, the CIT(A) has also decided the issue in favour of assessee. At the time of arguments the Ld. Representative of the assessee has also placed reliance of the case titled as **Shreeji Exhibitors Vs. ACIT (2015) 42 ITR (T) 596 and Chennai Properties & Investment Vs. CIT (2015) 373 ITR 673.** In the said cases it is specifically held that the main business of assessee is commercial exploitation of the properties then the rental income of the assessee is not

liable to be treated as income from house property. Taking into account all the facts and circumstances, we are of the view that the rental income to the tune of Rs.1,05,000/- is liable to be treated as income business. Accordingly, we decide this issue in favour of the assessee against the revenue.

ISSUE NO. 8 to 10

21. Issue nos. 8, 9 & 10 are linked to this issue nos. 5,6 & 7, therefore, there is no need to decide the separately being consequential to the decision of the said issues.

ISSUE NO. 11

22. Under this issue the assessee has challenged the confirmation of the addition raised u/s 14A of the Act in sum of Rs.8,09,084/-. The Ld. Representative of the assessee has argued that the assessee nowhere earned exempt income, therefore, no disallowance required is required u/s 14A of the Act. In support of the in support of the claim, the Ld. Representative of the assessee has relied upon the decision in the case of **Principal CIT Vs. McDonald's India (P.) Ltd. (2019) 101 taxmann.com 86 (Delhi). PCIT Vs. Ballapur Industries ITA No. 51/2015 (BHC)** The factual position is not in dispute as the assessee did not earn any exempt income. The amount in sum of Rs.315345/- has been received on account of Tenements, which has already been taxed in the return of income. In this regard the reference has been given at page 82 of the paper book wherein the amount has been shown under the head details of other income-other income from non-resident as income received from Tenements. In view of the above mentioned law, it is quite clear that the assessee did not earn exempt income in the relevant Assessment Year, therefore, there should not be disallowance in view of the provisions u/s 14A r.w. Rule 8D of the Act. Accordingly, we set aside the finding of the CIT(A) on this issue and hold that the no disallowance is required in view of the provisions u/s 14A r.w.

Rule 8D of the Act. Accordingly, this issue is decided in favour of the assessee against the revenue.

23. In the result, the appeal of the assessee is hereby ordered to be allowed.

Order pronounced in the open court on this 19/06/2019.

Sd/- Sd/-

(G. S. PANNU)
VICE PRESIDENT

(AMARJIT SINGH)
JUDICIAL MEMBER

Mumbai; Dated 19/06/2019
Vijay

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Sr. Private Secretary)
ITAT, Mumbai