IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C', NEW DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.1346/Del/2018
Assessment Year: 1996-97

M/s. Delhi Metro Rail Corporation Ltd., 3rd Floor, Metro Bhawan, Fire Brigade Lane, Barakhamba Road, New Delhi	**Vs.**	JCIT, Circel-10(1), New Delhi
PAN :AAACD3254A		
(Appellant)		**(Respondent)**

And
ITA No.2398/Del/2001
Assessment year: 1997-98

M/s. Delhi Metro Rail Corporation Ltd., N.B.C.C. Place, Bhishma Pitamaha Marg, Pragati Vihar, New Delhi	**Vs.**	JCIT, Special Range-24, New Delhi
PAN :AAACD3254A		
(Appellant)		**(Respondent)**

And
ITA No.1144/Del/2002
Assessment year :1998-99

M/s. Delhi Metro Rail Corporation Ltd., N.B.C.C. Place, Bhishma Pitamaha Marg, Pragati Vihar, New Delhi	**Vs.**	Addl. CIT, Special Range-24, New Delhi
PAN :AAACD3254A		
(Appellant)		**(Respondent)**

And

ITA No. 3356/Del/2002
Assessment year: 1999-2000

M/s. Delhi Metro Rail Corporation Ltd., N.B.C.C. Place, Bhishma Pitamaha Marg, Pragati Vihar, New Delhi	**Vs.**	DCIT, Special 10(1), New Delhi
PAN :AAACD3254A		
(Appellant)		**(Respondent)**

And

ITA No.1874/Del/2004
Assessment year: 2000-01

M/s. Delhi Metro Rail Corporation Ltd., N.B.C.C. Place, Bhishma Pitamaha Marg, Pragati Vihar, New Delhi	**Vs.**	Dy. CIT, Circle-10(1), New Delhi
PAN :AAACD3254A		
(Appellant)		**(Respondent)**

And

ITA No.4553/Del/2003
Assessment year: 2001-02

M/s. Delhi Metro Rail Corporation Ltd., N.B.C.C. Place, Bhishma Pitamaha Marg, Pragati Vihar, New Delhi	**Vs.**	Dy. CIT, Circle-10(1), New Delhi
PAN :AAACD3254A		
(Appellant)		**(Respondent)**

And

ITA No.5095/Del/2004
Assessment year: 2002-03

M/s. Delhi Metro Rail Corporation Ltd., N.B.C.C. Place, Bhishma Pitamaha Marg, Pragati Vihar, New Delhi	**Vs.**	Addl.CIT, Range-10, New Delhi
PAN :AAACD3254A		
(Appellant)		**(Respondent)**

And

ITA No.2081/Del/2003
Assessment year: 1998-99

M/s. Delhi Metro Rail Corporation Ltd., N.B.C.C. Place, Bhishma Pitamaha Marg, Pragati Vihar, New Delhi	**Vs.**	Commissioner of Income Tax, Delhi-IV, C.R. Building, New Delhi
PAN :AAACD3254A		
(Appellant)		**(Respondent)**

And

ITA No.2082/Del/2003
Assessment year: 1999-2000

M/s. Delhi Metro Rail Corporation Ltd., Metro Bhawan, 13, Fire Brigade Lane, Barakhambha Road, New Delhi	**Vs.**	Commissioner of Income Tax, Delhi-IV, C.R. Building, New Delhi
PAN :AAACD3254A		
(Appellant)		**(Respondent)**

Assessee by	Shri C.S. Aggarwal, Sr. Adv.; Shri Gautam Jain, Adv.; Shri Lalit Mohan, CA & Ms. Deepa Sharma, CA
Department by	Shri S.S. Rana, CIT(DR)

Date of hearing	09.05.2019
Date of pronouncement	28.06.2019

ORDER

PER O.P. KANT, A.M.:

The captioned appeals filed by the assessee are related to assessment years 1996-97, 1997-98, 1998-99, 1999-2000, 2000-2001, 2001-02 and 2002-03. Out of the aforesaid nine appeals filed by the assessee, two appeals for assessment year 1998-99 and 1999-2000 (ITA No.2081/Del/2003 and 2082/Del/2003) are against the order(s) dated 18/03/2003 under section 263 of the Income-tax Act, 1961 (in short 'the Act'). The remaining seven appeals of the assessee are against respective orders of the Ld. Commissioner of Income-tax (Appeals) confirming the orders of the assessment framed under section 143(3) of the Act for each of the assessment years. As the grounds raised in various appeals and issues involved are common, these appeals were heard together and disposed off by way of this consolidated order for the sake of convenience and to avoid repetition of facts.

2. First, we take up the seven appeals arising from order of the Ld. Commissioner of Income-tax (Appeals) for assessment years from 1996-97 to assessment year 2002-03. The grounds raised in these appeals are reproduced as under:

A. Grounds of appeal for assessment year 1996-97

1. That the learned Commissioner of Income Tax (Appeals) has erred both on facts in law in upholding the findings of learned AO, who had held that, the assessee is not an 'authority' within the meaning

of section 10(20A) of the Act and thus was not eligible to the claim of exemption u/s 10(20A) of the I.T. Act.

2. That the learned Commissioner of Income Tax (Appeals) has further erred in failing to appreciate that Rs. 2,39,452/- was not an income earned from other sources and was not assessable to tax and had to be set off from work in progress.

3. That the learned Commissioner of Income Tax (Appeals) has further erred in failing to appreciate that the income computed at Rs. 2,39,452/- has incorrectly been computed as against the returned loss of Rs. 5,67,775/-.

4. That the appellant craves leave, to add, to amend, modify, rescind, Supplement, or after any of the Grounds stated here-in-above, either before or at the time of hearing of this appeal.

B. Grounds of appeal for assessment year 1997-98

1. That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and rather grossly erred in confirming the action of the A.O. by holding that the provision of Section 10(20A) of the Income Tax Act, 1961 are not applicable in the case of the appellant and thereby confirming the disallowance of the appellant's claim for exemption of its income under the said section.

2. That on the facts and in the circumstances of the case, the Learned CIT(Appeals) was not justified in confirming the action of the A.O. by holding that the appellant had not commenced its business activity, and thereby confirming the disallowance of the expenditure incurred on professional and consultancy charges amounting to Rs.65.40 lacs.

3. That on the facts and in the circumstances of the case, the Learned CIT(Appeals) was not justified in confirming the action of the A.O. in not allowing the deduction u/s 35D of the Act, amounting to Rs.8,07,227/- as claimed by the appellant.

4. That the appellant craves leave, to add, to amend, modify, rescind, supplement, or alter any of the grounds stated here-in-above, either before or at the time of hearing of this appeal.

C. Grounds of appeal for assessment year 1998-99

1. On the facts and in the circumstances of the case the learned Commissioner of Income-tax (Appeals) has erred in law in holding that the provisions of section 10(20A) are not applicable in the case of the appellant. Exemption under section 10-(20A) being available to the appellant under the law the same deserves to be allowed.

2. In the facts and circumstances of the case the learned Commissioner of Income tax (Appeal) has erred in not allowing deduction of Rs.3,44,23,404/- on account of professional and consultancy charges. The expenses incurred under this head being of allowable nature, deduction for the same deserves to be fully allowed.

3. In the facts and in the circumstances of the case, the Commissioner of Income-tax (Appeal) has erred in not allowing deduction of Rs.8,07,227/- under section 35-D of the Income-tax Act. This deduction being admissible deserves to be fully allowed.

4. In the facts and in the circumstances of the case, the Commissioner of Income-tax(Appea1) has erred in not allowing deduction of Rs.1,75,49,218/- on account of the claim for depreciation. The claim for depreciation being admissible deserves to be fully allowed.

5. The appellant craves leave to add, amend, modify or alter any of the grounds of appeal stated above either before or at the time of hearing of this appeal.

D. Grounds of appeal for assessment year 1999-2000

1. On the facts and circumstances of the case the learned Commissioner of Income tax (Appeals) has erred in law in holding that the provisions of section 10C20A) are not applicable in the case of the appe11ant. Exempt ion under section 10(20A) being available to the appellant under the law the same deserves to be allowed.

2. In the facts and circumstances of the case the learned Commissioner of Income-tax (Appeals) has erred in not allowing deduction of Rs.1,01,96,865/- on account of professional and consultancy charges. The expenses incurred under this head being of allowable nature, deduction for the same deserves to be fully allowed.

3. In the facts and circumstances of the case, the Commissioner of Income-tax (appeals) has erred in not allowing deduction of

Rs.8,07,227/-, under section 35-D of the Income-tax Act. This deduction being admissible deserves to be fully allowed.

4. In the facts and circumstances of the case, the Commissioner of Income-tax (Appeals) has erred in not allowing deduction of Rs.2,13,84,915/— on account of claim for depreciation. The claim for depreciation being admissible deserves to be fully allowed.

5.The appellant craves leave to add, amend, modify or alter any of the grounds of appeal stated above either before or at time of hearing of this appeal.

E. Grounds of appeal for assessment year 2000-01

1. On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals) has erred in law in holding that the provisions of Section 10(20A) of the Income Tax Act are not applicable in the case of the appellant and thereby disallowing the appellant's claim for exemption of its income under the said section. The appellant's claim for exemption U/s U/s 10(20A) being legally admissible deserves to be allowed.

2. On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals) has erred in law in holding that the appellant had not commenced its business activity and thereby disallowing the claim for deduction of business expenses of Rs. 14,67,87,754/- as per revised Return filed on 27.3.2002. The business activity of the appellant company having commenced, the claim for deduction of business expenses of Rs. 14,67,87,754 deserves to be fully allowed.

3. The commencement of business of the appellant has taken place. The Ld. CIT (Appeals) has erred in holding that commencement of business is not as yet started. This finding is against facts of the case. In fact, business has commenced. Hence, expenses of Rs. 14,67,87,754/- are liable to be fully allowed.

4. The deduction of expenses is liable to be allowed U/s 37 of the Income Tax Act, 1961 fully to the appellant. The claim of expenses has been illegally disallowed to the appellant and the same is liable to be fully allowed at Rs. 14,67,87,754.

5(a) Without prejudice to the above the Ld. CIT (Appeals) has erred in reducing the claim of deduction of expenses for earning of interest income from Rs.56,21,803/- to Rs. 37,94,354.00. The claim for

deduction of expenses at Rs. 56,21,803/- for earning of interest income being based on the formula evolved by the CIT, Delhi IV, New Delhi during the proceedings U/s 263 of the I.T. Act for Assessment Years 1998-99 and 1999-2000 deserves to be fully allowed. This claim for deduction of expenses for earning of interest income being in accordance with the provisions of law contained in Section 57 of the I.T. Act deserves to be fully allowed.

5(b) Deduction of expenses of Rs. 56,21,803/- claimed by the appellant as deduction for earning of interest income deserves to be fully allowed to the appellant.

6. The appellant craves leave to add alter or modify any ground of appeal either before or at the time of hearing of appeal.

F. Grounds of appeal for assessment year 2001-02

1. On the facts and in the circumstances of the case, the Ld. Commissioner of Income-tax (Appeals) has erred in law in holding that the provisions of Section 10(20A) are not applicable in the case of the appellant. Exemption U/s 10(20A) being available to the appellant under the law, the same deserves to be allowed.

2. On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals) has erred in law in holding that the business of the appellant did not commence during the period under Assessment. The business of the Appellant company as per its Memorandum and Articles of Association having commenced during the period under assessment, the finding of the learned CIT(Appeals) on this point deserves to be cancelled.

3. On the facts and in the circumstances of the case, the Ld. Commissioner of Income-tax (Appeals) has erred in not allowing deduction of Rs.52,81,704/- on account of professional and consultancy charges. These expenses having been incurred wholly and exclusively for the purpose of business, deserve to be fully allowed.

4. On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals) has erred in not allowing deduction of Rs.1,53,66,018/- on account of claim for depreciation. The claim for depreciation being admissible deserves to be fully allowed.

5. On the facts and in the circumstances of the case, the Ld. CIT(Appeals) has erred in law in not allowing deduction for expenses of Rs.19,41,39,559/- as claimed. The business of the appellant Company having commenced during the period under assessment claim for deduction of Rs.19,41,39,559/- [Rs.21,47,87,281 – (52,81,704 + 1,53,66,018) =Rs.19,41,39,559/-] being business expenses deserves to be fully allowed.

6. On the facts and in the circumstances of the case, the learned CIT(Appeals) has erred in law in limiting the deduction of expenses for earning of interest income to Rs.7,76,600/-. Deduction of expenses incurred for earning of interest income deserves to be allowed at Rs.83,08,123/- on the basis of finding given by CIT (Delhi-IV) in proceedings U/s 263 for assessment year 1998-99 & 1999-2000, as claimed during the appellant proceedings.

7. The appellant craves leave to amend, modify or alter any of the grounds of the appeal stated above either before or at the time of the hearing of this appeal.

G. Grounds of appeal for assessment year 2002-03

1. On the facts and in the circumstances of the case, the Ld. CIT (Appeals) has erred in law in holding that the provisions of Section 10(20A) are not applicable in the case of the appellant. Exemption U/s 10(20A) being available to the appellant under the law the same deserves to be allowed.

2. On the facts and in the circumstances of the case, the Ld. CIT (Appeals) has erred in law in holding that the business of the appellant did not commence during the period under assessment. The business of the appellant company as per its Memorandum & Articles of Association having commenced during the period under assessment, the finding of the Ld. CIT (Appeals) on this point deserves to be cancelled.

3. On the facts and in the circumstances of the case, the Ld. CIT(Appeals) has erred in not allowing deduction of Rs. 31,84,59,233/- as deduction of business expenses. The business of the appellant company having been commenced, the claim for deduction of business expenses of Rs. 31,84,59,233/- being in accordance with the provisions of law deserves to be fully allowed.

4. On the facts and in the circumstances of the case, the Ld. CIT(Appeals) has erred in disallowing claim for deduction of business expenses of Rs. 31,84,59,233/-. These expenses having

been incurred wholly and exclusively for the purpose of business deserve to be fully allowed as deduction.

5 facts and in the circumstances of the case, the Ld. CIT(Appeals) has 'V/ erred in allowing deduction of only Rs. 41,73,789/- against earning of interest income of Rs. 71,94,57,145/- as against the claim for deduction of Rs. 28,80,19,287/- by the appellant company. The claim for deduction of expenses of Rs. 28,80,19,287/- for earning of interest income of Rs. 71,94,57,145/- being in accordance with the provisions of law deserves to be fully allowed.

6. On the facts and in the circumstances of the case the CIT (Appeals) has erred in reducing the claim for deduction of expenses for earning of interest income from Rs. 28,80,19,287/- to Rs. 41,73,789/-. Expenses of Rs. 28,80,19,287/- having been incurred wholly and exclusively for the purpose of earning of interest income of Rs. 71,94,57,145/- deserves to be fully allowed as deduction U/s 57 of the I.T. Act.

7. The appellant craves leave to amend, alter or modify any of the grounds of appeals stated above either before or at the time of hearing of appeal.

3. The assessee also filed applications dated 28/03/2007 for admitting additional grounds for assessment years 1997-98, 1998-99, 1999-00, 2000-01 and 2001-02. The additional grounds filed in these assessment years involved are identical and thus, the additional grounds sought to be admitted for assessment year 1997-98 only are reproduced as under:

Additional Grounds for assessment year 1997-98

……
2. It is submitted that these alternative grounds arises as a result of findings recorded in the respective orders (which have been disputed in theses appeals) that the business of the appellant had not commenced. It is submitted such findings have been disputed on the ground that the findings so reached is on mis-appreciation of settled legal provisions.

a) That in the alternative and without prejudice the interest earned on the fact and circumstances of the case and offered

as business income in any case ought to have been reduced from the cost of project and thus was required to be reduced from the computation of total income.

b) That the expenditure claimed and disallowed in the alternative and without prejudice ought to have been capitalized and added to the cost of project.

……

4. It was contended on behalf of the assessee that above additional grounds arises from the order of the assessment and goes to the very root of the matter. It was further submitted that all the facts relating to determination of the above grounds are on record and no fresh evidence are required for determination of the aforesaid legal grounds. The assessee in its application for admission of the additional ground relied on the decision of the Hon'ble Supreme Court in the case of NTPC Vs. CIT reported in 229 ITR 383.

5. The Learned DR, on the other hand, opposed admission of the additional ground.

6. We have heard the parties on the admissibility of the additional ground. We find that the issues raised in the additional ground are legal in nature and all the facts in relation to the issues raised are available on record and no investigation of the fresh facts is required. In view of these facts and circumstances and respectfully following the finding of the Hon'ble Supreme Court in the case of NTPC Vs CIT (supra), we admit the additional ground.

7. A summary of the grounds and additional grounds raised in various appeals by the assessee is reproduced as under for convenience:

Sr. No	Issue Involved	**1346/D/18**	**2398/D/01**	**1144/D/02 u/s 143(3) & 2081/D/03 u/s 263**	**3356/D/02 u/s 143(3) & 2082/D/03 u/s 263**	**1874/D/04**	**4553/D/05**	**5095/D/04**
		1996-97 (Ground No.)	**1997-98 (Ground No.)**	**1998-99 (Ground No.)**	**1999-2000 (Ground No.)**	**2000-2001 (Ground No.)**	**2001-02 (Ground No.)**	**2002-03 (Ground No.)**
1	Whether the assessee is entitled to the claim of exemption u/s 10(20A) of the Act?	(1)	(1)	(l)	(1)	(1)	(1)	(1)
2	What is the date when the business had been setup?	(3)	(2)	(2.3 and 4)	(2,3 and 4)	(2 and 3)	(2)	(2)
3	Whether disallowance of following expenses is justified:							
a)	Disallowance of deduction claimed u/s 35 D of the Act	8,07,227/- (3)	8,07,227/- (3)	8,07,227/- (3)	8,07,227/- (3)	8,07,227/-		
b)	Disallowance of claim of depreciation			1,75.49,218/- (4)	2,13,84,915/- (4)	3,20,72,656/-	1,53,66,018/- (4)	
c)	Disallowance of Consultancy Expenses		65,40,000 (2)	3,44,23,404/- (2)	1,01,96,865/- (2)	53,62,872/-	52,81,704/- (3)	
d)	Disallowance of other expenses	----	-----	----		10,85,44,999/-	19,41,39,559/-	Rs.318459233/-
	Total		73,47,227/-	5,27,79,849/-	3,23,89,007/-	14,67,87,754 (2.3 4)	21,47,87,281/-	
4.	Deduction of expenses for earning interest income					18,27,449/-	83,08,123/-	
	Additional Ground							
5.	The interest income derived from the funds contributed by the shareholders could not assessed as ñincome from other sourcesò and should be reduced from the cost of the project and, furthermore, the expenses incurred, claimed and, disallowed be added to the coast of project.							

8. The assessee has filed paper-books for all the years involved containing the Annual Reports, return of income etc. Briefly stated facts of the case as culled out from the order of the lower

authorities and paper-book(s) of the assessee company for assessment year involved are summarized as under:

(i) On the recommendation of M/s. Rail India Technical and Economic Services Ltd ('RITES') for the financing of the Mass Rapid Transit System (MRTS) project for NCR Region as a joint venture of Government of India and Government of National Capital Territory (NCT) of Delhi, through a corporate structure, namely, the Delhi Metro Rail Corporation (DMRC) Limited, i.e., the assessee, was incorporated as a company under the Companies Act, 1956 and accordingly was registered as a company on 03/05/1995. The main objective of the "MRTS" project was stated to be providing for non-polluting, efficient and affordable rail-based Mass Rapid Transit System for the National Capital Territory of Delhi, duly integrated with other modes of transport. The assessee company claimed that it was constituted for the purpose of planning, designing, development, construction, maintenance, operation and financing of Mass Rapid Transit System and other transport etc.

Assessment year 1996-97

(ii) During the financial year 1995-96 corresponding to assessment year 1996-97, the assessee shown receipts of Rs.2,80,52,272/- and expenditure of Rs.80,52,272/-. The un-used funds remained with the assessee company were deposited in various banks. The receipts of the company came in the form of equity

contribution released by the Government of NCT of Delhi and Government of India. The expenditure reported during the period consists mainly of statutory fees paid for registration of the company with the registrar of companies. In the Balance sheet as on 31/03/1996, the 16,104 equity shares amounting to Rs.1,61,04,000/- have been shown as allotted to the Government of India and contribution from the Delhi government of Rs.1,19,48,000/- has been shown under share application money pending allotment. Out of the expenses reported/incurred of Rs.80,72,272/-, 1/10th of the expenses were written off and claimed as miscellaneous expenditure during the assessment year 1996-97. During the assessment year 1996-97 the assessee earned interest of Rs.2,39,452/-from funds deposited in banks. In the profit and loss account the assessee adjusted preliminary expenses written off of Rs.8,07,227/- against the interest income of Rs.2,39,452/-, and calculated net loss of Rs.5,67,775/-.

(iii) For assessment year 1996-97, the assessee filed return of income on 28/11/1996 declaring a loss of Rs.5,67,775/-. In the profit and loss account for the year ended on 31/03/1996, interest accrued on fixed deposit with banks was shown at Rs.2,39,452/-. Apart from interest income, there was no income or expenditure. The assessee claimed to have incurred

preliminary expenses of Rs.80,72,270/-which were amortized and 1/10th of the same i.e. 8,07,227 /- were claimed as " preliminary expenditure written off". The assessee sought deduction of preliminary expenses written off amounting to Rs.8,07,227/- under section 35D of the Act and claimed set off of the same against interest income of Rs.2,39,452/- and arrived at loss of Rs.5,67,775/-which was shown in the return of income.

(iv) According to the Assessing Officer, since there was no loss computed from business or profession during the year, the interest income could not be set off against the amount worked out for the purpose of section 35D of the Act and therefore, he assessed the income shown from interest at Rs.2,39,452/- under the head "Income from other sources" in the assessment order passed u/s 143(3) of the Act on 29.11.1999, as against returned loss of Rs. 5,67,775/-.

(v) The ld. CIT(A)-6, Delhi vide his appellate order dated 12.10.1999, in appeal no. 9/1999-2000 decided the appeal of the assessee. According to the Ld. CIT(A), since there was no income or expenditure other than interest on funds lying with the bank, it cannot be said that the business of the assessee had commenced and thus the claim of the assessee under section 35D of the Act cannot be accepted in the year under consideration. The Ld. CIT(A), thus upheld the action of

the Assessing Officer of assessing the amount of Rs.2,39,452/- under the head "Income from other sources" rejecting the claim of set off of preliminary expenses of Rs.8,07,227/- under section 35D of the Act

(vi) Against the order passed by the ld. CIT(A) dated 12.10.1999, the assessee preferred appeal before the Income-tax Appellate Tribunal (ITAT) . The ITAT in an order dated 18.7.2006 passed in ITA No. 1481/Del/2000 restored the appeal of the assessee to the learned CIT(A), with the direction to record his findings on the issue whether the assessee is entitled to claim exemption u/s 10(20A) of the Act for the year under consideration. The relevant findings are as under:

> *"5. After going through the order of ld. CIT(A) both the parties agreed that ld. CIT(A) has not given any finding on the issue of applicability of the provisions of section 10(20A) of the Income Tax Act, 1961 to the assessee although this ground was taken as ground no. 3 in the appeal filed before him. It was also agreed that decision of CIT(A) on the issue of applicability of the provisions of section 10(20A) will have direct bearing on the other grounds in this appeal. The parties have no objection to the matter being restored to ld. CIT(A) for recording his findings on the issue.*

6. We accordingly restore the matter to the file of ld. CIT(A) with a direction to record his findings on the issue whether the assessee is entitled to claim exemption u/s 10(20A) of the Income Tax Act for the A.Y. under consideration. In case the assessee is found entitled to the benefit of section 10(20A)? Ld. CIT(A) may record his findings on the other issues also arising in the said appeal. Before passing the orders, ld. CIT(A) may afford opportunities of hearing to the assessee.

7. In the result the appeal is treated as allowed for statistical purposes."

9. Pursuant to the aforesaid direction of the ITAT, the learned CIT(A) vide his order dated 19.2.2018, rejected the claim of exemption u/s 10(20A) of the Act.

10. Brief facts in respect of other assessment years are also summarized as under:

For assessment year 1997-98

(i) In the assessment year concerned, the share capital allotted stands at Rs.1,61,05,000/-, alongwith share application money of Rs.57,94,99,000/- , which was pending for allotment. During the year, the assessee had shown the only activity of Land and Building acquisition of Rs.16,73,23,400/- (for purchase of office space at

NBCC Place, Bhishma Pitamaha Marg , New Delhi) under the fixed assets. The balance funds available were invested with Banks and earned interest thereon. In profit and loss account, the assessee shown interest received of Rs.31,09,770/- and interest accrued but not due of Rs.6,93,151/-. Against income, the assessee claimed expenses of Rs.74,19,134/- and reported net loss of Rs.36,02,450/-. The expenses debited included consultancy expenses of Rs.65,40,000/- (Rs.65,00,000/- to M/s. RITES for technical consultancy & Rs. 40,000/- to Jain Kapila & Associates for Internal Audit Fee), Advertisement (Rs.33,338/-), Honorarium charges (Rs.15,000/-), Printing and Stationary (Rs.2,235/-), Preliminary expenses written off of Rs.8,07,227/-, Staff Welfare (Rs.2296/-) etc.

(ii) The assessee filed return of income on 28.11.1997 declaring loss of Rs.36,02,450/-. In the return of income, the assessee claimed exemption u/s 10(20A) of the Act and mentioned that business of the assessee commenced in terms of the main object as specified in Memorandum and Articles of Associations for which it has been set up. The Assessing Officer in order passed u/s 143(3) of the Act on 08.11.1999 rejected the claim of exemption of income u/s 10(20A) of the Act. The Assessing Officer also held that the business of the assessee was not commenced and disallowed the claim of preliminary expenses written off of Rs.8,07,227/- u/s 35D of the Act

and consultancy expenses of Rs.65,40,000/-. The Assessing Officer assessed the total income at Rs.37,44,777/-.

(iii) On further appeal by the assessee, the Ld. CIT(A) upheld the rejection of exemption u/s 10(20A) of the Act ,disallowance of preliminary expenses written off of Rs.8,07,227/- u/s 35D of the Act and consultancy expenses of Rs.65.40 lakhs.

For assessment year 1998-99

(i) In the concerned year, the issued and subscribed share capital stands at Rs.2,05,61,04,000/-. During the year, the assessee purchased various item under fixed assets like computer, telephone equipment, car, furniture & fixture etc., amounting to Rs.79,84,243/- and claimed depreciation on the same alongwith depreciation on land and building. The capital work-in-progress was computed at Rs.10,80,65,862/- , which represented advances paid for capital expenditure. In Profit & Loss account , the assessee shown interest income of Rs.15,26,70,209/- and sale of tender documents at Rs.17,95,243/-. On expenses side, total expenses of Rs.04,11,99,255/ were shown - and after reducing depreciation of Rs.18,51,811/- & preliminary expenses written off of Rs.8,07,227/- net profit of Rs.11,06,07,159/- was reported. The expenses incurred comprised of consultancy charges (Rs.3,44,23,404/-); Advertisement (Rs.14,01,669/-), business promotion (Rs.1,71,300/-),

Conveyance (Rs.33,552/-), Ground rent (Rs.15,75,000/-), Salary Expenses (Rs.15,32,687/-) and other expenses on maintenance of car, office etc.

(ii) The assessee filed return of income on 30.11.1998, declaring total income of Rs.11,06,07,159/-. The Assessing Officer in assessment order u/s 143(3) of the Act dated 30.11.2000 rejected the claim of exemption of income u/s 10(20A) of the Act and disallowed the preliminary expenses written off of Rs.8,07,227/- & consultancy charges of Rs.3,44,23,404/-, holding that the business of the assessee was not commenced during the year. The AO also disallowed the claim of depreciation of Rs.18,51,811/- made. The interest income was assessed under the head "income from other sources" and remaining expenses in profit & loss account other then disallowed by the AO, were allowed as expense against income from other sources u/s 57 of the Act.

(iii) The learned CIT(A) upheld the finding of the Assessing Officer.

(iv) The Ld Comisioner of income-tax (CIT) having administrative jurisdiction over the Assessing Officer ,called for the records of the Assessing Officer and after examination of the record, issued show cause notice to the assessee under section 263 of the Act. According to the Ld. CIT, the Assessing Officer had erroneously allowed expenses against interest income and thus after taking into consideration submission of the assessee, he,

in order dated 18/03/2003 u/s 263 of the Act, held the order of the Assessing Officer as erroneous and prejudicial to the interest of Revenue and computed the expenses , to be allowed against interest income under section 57 of the Act. In compliance, the Assessing Officer passed consequential order.

For assessment year 1999-2000

(i) As per the balance-sheet as on 31.03.199, the subscribed share capital of Rs.40,46,10,400/- and share application money of Rs.40,00,00,000/- is appearing in balance sheet. During the year, the assessee purchased fixed assets items like computer, air conditioning, electrical equipments, furniture & fixture etc. and claimed depreciation on the same. During the year capital work-in-progress was valued at Rs.57,59,14,052/- and advance for capital expenditure was shown at Rs.23,89,19,303/-. In profit and loss account, interest income of Rs.36,58,38,183/- and misc. income of Rs.26,15,340/- has been shown. On expense side, expenditure of Rs.825,48,214/- was debited which included employees remuneration and benefit of Rs.2,06,21,133/-, Administrative & other expenses of Rs.4,90,38,445/-, depreciation of Rs.1,12,46,873/-, preliminary expenses written off of Rs.8,07,227/-. The assessee transferred incidental expenses during the construction of Rs.7,56,54,241/- to Capital work-in-progress leaving expenses of Rs. 68,93,973/- under the

profit and loss account and computed net profit of Rs.36,15,59,550/-.

(ii) The assessee filed return of income on 28.12.1999 declaring total income of Rs.36,20,49,611/-. In assessment order dated 26.02.2002, the Assessing Officer rejected the claim of income exempted u/s 10(20A) of the Act. The Assessing Officer also held that business of the assessee was not commenced during the year and hence, he disallowed preliminary expenses written off of Rs.8,07,227/-, consultancy charges of Rs.1,01,26,865/- (which were debited in Administrative expenses) and depreciation of Rs.2,13,84,915/-. The interest income was assessed under the head "Income from other sources" and remaining expenses in profit & loss account other then disallowed by the AO, were allowed as expense against income from other sources u/s 57 of the Act.

(iii) The learned CIT(A) dismissed the appeal of the assessee upholding the order of the Assessing Officer.

(iv) In this year also , the Ld. CIT passed order under section 263 of the Act on lines identical to the order u/s 263 passed in AY 1998-99 and the Assessing officer passed consequential order.

For assessment year 2000-01

(i) As per balance sheet for the year ending on 31.03.2000, the subscribed share capital stands at Rs.58,56,10,400/- .The assessee purchased item of fixed assets including

computer, furniture & fixtures, vehicles, other equipments etc. and claimed depreciation on the block of assets . The capital work-in-progress was valued at Rs.83,58,66,730/- and advance for capital expenditure was shown at Rs.31,58,26,373/-. The balance ideal funds remain invested in fixed deposit with Bank. As per profit and loss account, the assessee earned interest on Bank deposits of Rs.59,67,94,426/-; interest on advances to contractor of Rs.85,80,848/- and misc income of Rs.1,49,66,897/-. Against the receipts, the assessee reported expenditure of Rs.13,50,92,518/- which comprised of employees remuneration and benefits (Rs.4,71,67,078/-), Administrative & other expenses (Rs.7,15,89,352/-); depreciation (Rs.1,49,06,402/-) etc. The assessee added provision written back of Rs.44,403/- and expenditure not related to construction of Rs.94,07,630/- to the gross receipt Rs.62,03,42,171/-. The assessee adjusted entire income against the expenditure and balance profit of Rs.49,47,01,686/- was transferred towards capital work-in-progress. In Schedule 12 of the Annual Report, the assessee has reported that expenses during the year are booked to incidental expenditure during construction and transferred to capital work-in-progress and incidental expenditure not related to construction have been transferred to deferred revenue expenditure. The assessee further noted that deferred revenue expenditure would be proportionally

charged off over a period of five years stating from the year in which the assets are first put to use.

(ii) The assessee filed return of income on 31.01.2000 declaring total income of Rs.59,57,94,426/- under business head. The assessee later on revised the return on 27.03.2002 , computing the income at NIL as under:

Revised Computation of Total Income and Tax Payable

Particulars	*Amount (in Rs.)*	
Profit and Gains from Business or Profession		*59,67,94,426*
Less: *(a) Deprecation allowable as per Income Tax (As per Annexure/Attached)*	*3,20,72,656*	
(b) Expenses allowable as revenue expenditure in accordance with the assessments of earlier years as per details enclosed.	*11,29,07,871*	
(c) Deduction allowable u/s 35D (1/10th of Preliminary Expenses -4th year)	*8,07,227*	
(d) Donation	*10,00,000*	*14,67,87,754*
Gross Total Income		***45,20,06,672***
Less: *Deduction under Chapter VIA Donation paid to National Defence Fund*		*10,00,000*
Total Income		***45,10,06,672***
Less: Exempt under Section 10(20A) of the I.T. Act.		*45,10,06,672*
Total		***Nil***
Taxes Paid:		
Tax deducted at sources as per original return		*17,66,94,569*
Advance tax paid as per original return		*4,13,00,000*
Tax and interest paid u/s 140A as per original return		*1,29,64,586*
Total tax paid		*23,09,59,155*
Refund due		***23,09,59,155***

(iii) The Assessing Officer in assessment order dated 31.03.2003 rejected the claim of exemption of income u/s 10(20A) of the Act. The AO held that business of the assessee was not commenced and he assessed the interest income from fixed deposits with Banks under the head " Income from other sources" as against claim of the assessee as income under the head "profit and gains of the business and profession". The Assessing Officer also rejected claim of the assessee to allow expenses of Rs.14,67,87,754/- against the income from other sources holding that those expenses were not related to the activity of the earning interest.

(iv) On further appeal, the learned CIT(A) in order dated 19.02.2004 upheld the rejection of exemption of income u/s 10(20A) of the Act. The learned CIT(A) also upheld that business of the assessee was not commenced and hence confirmed, the finding of the AO on expenditure on constancy & preliminary expenses written off.

(v) As far as interest income is concerned, the Ld. CIT(A) upheld the action of assessing the same under the head "Income from other sources", but allowed the expenditure of Rs.37,94,354/- under Section 57 of the Act for earning interest income following the finding of the Ld. CIT in order(s) under section 263 passed for Assessment year 1998-99 & 1999-2000.

For assessment year 2001-02

(i) As per balance sheet for the year ending on 31.03.2001, the subscribed share capital stands at Rs.9,05,61,04,000/- alongwith share application money of Rs.83,00,00,000/-. During the year, the assessee made addition of Rs.85,77,24,851/- to the fixed assets including lease hold land & building, computer, plant & machinery, furniture & fixtures vehicles, other equipments etc. and claimed depreciation there on. The capital work-in-progress was valued at Rs.1,99,80,95,099/- and construction stores & advance were reported at figure of Rs.2,14,96,89,581/-. The ideal or un-used fund remained invested in Bank fixed deposits, on which the assessee earned interest income. In the Profit & Loss account, the assessee shown total receipts of Rs.91,96,95,370/- including interest on FDR of Rs.88,11,43,805/- and against which claimed expenditure of Rs.21,53,28,615/-. After making small adjustments to income of Rs.66,11,719/- for revenue expenditure, the balance profit of Rs.71,09,78,474/- was adjusted against the capital work-in-progress.

(ii) The assessee filed return of income on 30.10.2001 declaring business income of Rs.8,80,367,205/- after claiming expenses of Rs.776,600/- against interest receipts of Rs.8,81,713,805/-. This income was claimed as exempt u/s 10(20A) and thus filed NIL income for the purpose of Income-tax.

(iii) The Assessing Officer in assessment order dated 21.03.2003 rejected the claim of exemption of income u/s 10(20A) of the Act. The AO held that business of the assessee was not commenced and thus he disallowed the claimed of set off of preliminary expenses written off u/s 35D of the Act, and deduction of expenses against the interest on fixed deposits. He also disallowed the claim of expenses of Rs.7,76,000/- against income from other sources for earning the interest income.

(iv) On further appeal, the learned CIT(A) rejected the claim of exemption of income u/s 10(20A) of the Act. He also upheld that business of the assessee was not commenced during the year and hence justified the action of the AO of holding the consultancy charges paid on preoperative expenses eligible for amortization u/s 35D(2)(a) of the Act. On the issue of allowing expenses against interest income, he accepted the claim of the assessee and allowed expenses of Rs.7,76,600/- against the interest income.

For assessment year 2002-03

(v) The assessee filed return of income on 31.10.2002 declaring total income of Rs.40,03,08,800/-, which was computed as under:

Income from Business/Profession:			
Interest Income on Bank Deposits	Rs.71,94,57,145		
Consultancy Fees Received	Rs.	3,10,837	Rs. 71,97,67,982

Less : Expenses incurred for earning of (a) Interest income as per statement enclosed	Rs.28,80,19,287	
(b) Depreciation allowable as Revenue Expenditure in accordance with the assessment of earlier years	Rs.3,04,39,946	Rs.31,84,59,233
Gross Total Income		Rs. 40,13,08,749
Less :Deduction u/s 80-G		Rs. 10,00,000
Total Income		Rs. 40,03,08,749
Gross Total Income rounded off		Rs. 40,03,08,800
Tax on Total Income		Rs. 14,01,08,080
Add: Surcharge @ 2%		Rs. 28,02,162
Tax payable		Rs. 14,29,10,242
Less: Tax Deducted at sources		Rs. 14,97,05,171
Less: Advance Tax Paid on 15.06.2001		Rs. 1,36,00,000
ñ ñ on 15.09.2001		Rs. 1,78,00,000
ñ ñ on 15.12.2001		Rs. 5,04,00,000
ñ ñ on 15.03.2002		Rs. 2,37,00,000
Refund Due		Rs. 11,22,94,929

(ii) The Assessing Officer in assessment order dated 30.01.2004 disallowed the claim of exemption of income u/s 10(20A) of the Act. The Assessing Officer further held that business of the assessee was not commenced hence, he disallowed the claim of expenses of Rs.31,84,59,233/- against the interest income. Against the claim of the

assessee for allowing expenses of Rs.28,80,19,287/- against income from other sources, the Assessing Officer estimated expense for earning interest income of Rs.9,12,000/- and allowed accordingly. The learned CIT(A) upheld the finding of the Assessing Officer on the issue of rejection of 10(20A) exemption and commencement of business and consequential denial of Rs.31,84,59,233/- as business expenses. But under the head "Income from other source", he allowed expenses of Rs.41,73,789/- out of expense of Rs.28,80,19,287/- claimed and disallowed the balance.

11. In background of above facts, now, we take up the various issues involved in the grounds raised in all the appeals.

12. The first issue raised in the grounds is **whether the assessee is entitled to the claim of exemption u/s 10(20A) of the Act**.

13. Before us, the learned Senior Advocate, Shri C.S. Aggarwal filed a paper-book (combined for all years) containing pages 1 to 76 and a separate paper book for assessment year 1997-98 containing pages 1 to 432 in addition to the year wise paper-book filed earlier by the assessee. The Ld. Senior Counsel contended that assessee is an 'authority' eligible for claim of exemption u/s 10(20A) of the Act. It was submitted that assessee came to be constituted on 3.5.1995 as a joint venture company between the 'Government of India' and 'Government of Delhi'. It was

submitted that assessee was incorporated with the objective of planning, development, construction, maintenance, operation and financing of mass transit and urban transport system in the National Capital Territory for the purpose of development and improvement of the city of Delhi. It was submitted that section 10(20A) of the Act *exempts any income of any authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both.* It was submitted that in order to claim exemption under this section, the assessee must satisfy following two conditions:

i) It must be an "Authority" constituted in India by or under any 'law'; and

ii) The law must be enacted for the purpose specified in this sub-section

13.1 It was submitted that assessee is a joint venture company formed by two governments, i.e. Government of India and Government of Delhi, who themselves are authorities. It was submitted that 'authority' has not been defined under the Act. It was submitted that as per Black's Law Dictionary, "an authority is a body having jurisdiction in certain matters of a public nature". It was submitted that statutory corporations, who are the "voice and hands" of Central Government, are 'authorities' under Article 12 of the Constitution and will be considered as a 'State'. It was submitted that a public authority is a body, which

has public or statutory duties to perform and which performs these duties and carries out its transactions for the benefit of the public and not for the private profit. It was submitted that State is an abstract entity and it can only act through the instrumentality or agency of natural or juridical persons. It was submitted that merely because it is a company incorporated under the Companies Act, 1956, it does not cease to be an authority. Reliance was placed on the judgment of Ajay Hasia v. Khalid Mujib AIR 1981 SC 487 wherein it has been held that a society registered under the Societies Registration Act, 1898, is an agency of "instrumentality of the State" and hence a "State" within the ambit of Article 12. Reliance was also placed on the judgment of Supreme Court in the case of Ramana Dayaram Shetty v. International Airport Authority of India 1979 AIR (SC) 1628, wherein it has been held that the Government which represents the executive authority of the State, may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency or juridical persons to carry out its functions. Thereafter reference was made to chronological sequence of events to support that the claim of exemption that it is an authority having its own right and powers and enacted under law for the purpose of dealing with and satisfying the needs of transportation and for the purpose of planning, development or improvement of cities, towns and villages or both:

"DATE	*EVENT/ITEM*	*OUTCOME*
13.1.1994	*First Cabinet note by MOUD was*	*Union Cabinet decided to meet on 27.1.1994.*

	sent to Cabinet for seeking in principle approval of Delhi MRTS Project.	
27.1.1994	*Union Cabinet met.*	*Decided that a presentation on Delhi MRTS be made to Group of Ministers.*
25.4.1994	*Presentation to Group of Ministers was made.*	*The Group of Ministers recommended to the Cabinet for in principle approval for the preparation of DPR subject to certain conditions such as pricing of Govt. land at market value, no change in FSI, conducting environment impact assessment study etc.*
23.5.1994	*Supplementary note was sent by MOUD to the Cabinet.*	*Referring to the outcome of the presentation made to Group of Ministers on 25.4.1994, approval of the Cabinet was sought for:* *i. to go ahead in principle for Delhi MRTS Project;* *ii. to take up the preparation of DPR;* *iii. To take up environment assessment study;* *iv. To approve financing pattern;* *v. For railway land;* *vi. Allowing participation of private sector;* *vii. Posing the project for assitance to international aid agencies;* *viii. Constitution of GOM;* *ix. Constitution of Empowered Committee;*

		x. Setting up of DMRC Ltd.; *xi. Constitution of a Cell in Ministry;*
19.7.1994	*The meeting of Cabinet took place.*	*The Cabinet approved the proposal of MOUD with the stipulation that the total cost of Phase-I of the Project as well as the sources of financing indicated in the note of MOUD will be considered as indicative.*
3 .5.1995	*Company was incorporated*	
17.10.1995	*The first meeting of Empowered Committee took place wherein a presentation of Delhi MRTS was made by RITES.*	*It was decided:* *i. A small group of MOUD and MOR be constituted to examine the extent of railway land which can be spared for MRT Project;* *ii. MOUD to consult Planning Commission for the accuracy of the estimated cost;* *iii. MOUD to send a copy of environment impact study to MOEF;* *iv. A proposal be submitted to Cabinet for seeking investment approval to the projects asking for exemption from PIB procedure;*
9.9.1996	*The project was submitted to PIB for its consideration and approval.*	*PIB felt that the project is not ripe for clearance unless certain basic issues are resolved such as true and full cost of the project, availability of the Railway land at market price or inter-departmental Government price, bearing exchange fluctuation risk for OECF loan, etc.*
9.12.1996	*Cabinet note from MOUD to Cabinet wherein approval of the Cabinet was sought for the modified Phase I of the*	*The Cabinet considered this note in the meeting held on 14.9.196.*

	Delhi MRTS. Vide this note executive summary of DPR was also submitted to the Cabinet.	
14.9.1996	*Cabinet meeting held to discuss the MRTS Project.*	*Certain issues relating to true and correct cost of Delhi MRTS Project, interest during construction, land at market rates, etc., were discussed and it was decided that these figures may be worked out of MOUD and submitted to Empowered Committee which may discuss these at its special meeting. It was further decided that the matter may be referred again to the Cabinet in its next meeting to be held on 17.9.1996.*
16.9.1996	*Empowered Committee met and discussed the comments of MOUD and Minutes of PIB.*	*It was decided that a supplementary note for the Cabinet would be prepared by MOUD wherein land cost should be recalculated on the basis that it will be taken on lease both from Railways and GNCTD and IDC will be included in the capital cost of the Project.*
16.9.1996	*Supplementary note from MOUD incorporating therein the suggestions from Empowered Committee was circulated to the Cabinet members.*	*Final approval was sought from Cabinet.*
17.9.1996	*Cabinet meeting took place.*	*Cabinet considered the note dated 9-12.9.1996 and supplementary note dated 16.9.1996 and approved the following proposals:* *i. Alignment-Approval of 55.3 kms.*

		long alignment; *ii. Capital cost- 4860 Crores at April'96 prices;* *iii. Land;* *iv. Implementation of Project by GOI and GNCTD in equal proportion;* *v. Financing Plan;* *vi. Provision of planned funds towards equity capital, land acquisition cost, etc.;* *vii. Approval to Delhi Govt. to nominate equal number of Directors on the DMRC Board;* *viii. Chairman and MD to be appointed by GOI and GNCTD respectively;* *ix. Authorising the Empowered Committee to grant all necessary Govt. sanctions to avoid cost escalation due to delays";*

13.2 It was submitted by referring to supplementary note for the Cabinet dated 16.9.1996 that the Government of India had sought to implement the project through DMRC Ltd. which had come into existence on 3.5.1995. Reliance was also placed on the cabinet note dated 19.7.1994, which, inter-alia, provided as under:

> *"x) Setting up of a company under the Companies Act for implementation of Delhi MRTS project with participation by Govt. Of India, Govt. Of NCt of Delhi and others."*

13.3 It was submitted that having regard to the substance of the formation of the company since the implementation of the project have to be done by the company, it cannot be stated that the implementation of the project is not by an authority. It was submitted that Hon'ble High Court of Delhi in its judgment in the case of assessee has held that the tax levied by Delhi Municipal Corporation Tax Act 1957 on the assessee i.e. M/s Delhi Metro Rail Corporation Ltd. was not leviable in view of section 184 of the India Railway Act' 1989. It was held that DMRC is, in fact a 'railway' and, can be regarded as within the expression "railway administration". It was contended that aforesaid judgment establishes beyond doubt that assessee has been constituted in India under any law enacted though in the form of a company and is an authority. It was also submitted that assessee cannot be subjected to tax because one cannot tax itself. It was also submitted that company is a compendious name of its shareholders, and is a creature of Central Government. To support, following illustrations were provided:

a) Clause (k) to sub-section (1) of section 2 of Delhi Metro Railway Act provides that metro railway official means any person employed by the Central Government or by a metro railway administration in connection with the services of a metro railway.

b) The notifications under the Delhi Metro Railway Act means a notification published in the Official Gazettee.

c) Section 4 of DMR Act provides that the general superintendence and control of a Government metro railway is to vest in the General Manager to be appointed by the Central Government. Further, section 14 of DMR Act provides that the metro railway in the metropolitan city of Delhi shall not be opened for the public carriage of passengers except with the previous sanction of the Central Government. The power u/s 18 of DMR Act for closing of metro railway and reopening of closed metro railway u/s 19 of DMR Act also vests with the Central Government.

d) Section 86 of DMR Act provides that the metro railway administration shall, in the discharge of its duties and functions under this Act, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time.

e) Section 88 provides protection of action taken in good faith by any metro railway administration official or against any other person, for anything is in good faith done or intended to be done in pursuance of this Act or any rules, regulations or orders made thereunder.

f) Section 89 of DMR Act provides that no rolling stock, metro railway tracks, machinery, plant, tools, fittings, material or effects used or provided by a metro railway administration for the purposes of traffic on its railway, or its stations or workshops, or offices shall be liable to

be taken in execution of any decree or order of any court or of any local authority or person having by law the power to attach or distrain property or otherwise to cause the property to be taken in execution, without the previous sanction of the Central Government.

g) Section 90 of DMR Act further provides that all persons in the employment of the metro railway administration shall when acting or purporting to act in pursuance of the provisions of this Act, be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

h) The members of the Committee for fixation of fare for carriage of passengers u/s 33 of DMR Act is to be nominated by the Central Government and the Government of the National Capital Territory of Delhi respectively.

i) The period for making fare fixation u/s 36 of DMR Act is required to be specify by the Central Government.

13.4 The assessee also sought to place reliance on the judgment of Supreme Court in the case of **Gujarat Industrial Development Corporation v. CIT 227 ITR 414** wherein it has been held that a corporation is an authority under the Act and the provisions of section 10(20A) will apply to a corporation in the same manner as it applies to an authority. Reliance was also placed on the decision of Mumbai Bench in the case of Vidarbha Irrigation

Development Corporation v. JCIT 102 ITD 1 to contend that assessee is eligible for exemption u/s 10(20A) of the Act. Further reliance was placed on the following judgments:

a) U.P. State Warehousing Corporation v. ITO 94 ITR 129, 132 (All) affirmed by Apex Court in the case of UOI v. U.P. State Warehousing Corporation 187 ITR 54
b) M.D. U.P. State Wareshousing Corporation v. Vijay Narayan Vajpayee 1980 AIR (SC) 840
c) Shri Anandi Mukta Sadguru v. Rudani 1989 AIR SC 1607 at page 1612
d) AISSE ASSCOCN v. Defence Minister 1989 AIR (SC) 88-91

13.5 The appellant further submitted that Delhi Metro Rail is a "Railway" taking reference from section 184 of the Indian Railway Act which defines railway to mean a railway, or any portion of a railway for the public carriage of passengers or goods. It was also submitted that Delhi Metro Railway is a railway as is evident from The Delhi Metro Railway (Operation and Maintenance) Act, 2002. It was submitted that Hon'ble Supreme Court in the case reported in 1981 AIR (SC) 487-503 Ramana Shetty Vs. International Airport Authority has held that power/authority to issue directions, disobedience of which would be punishable as a criminal offence, constitutes an "authority". It was submitted that section 62(3) of Delhi Metro Railway (Operation and Maintenance) Act, 2002 contemplates that if a DMRC official directs any person to leave any compartment, carriage or premises and he refuses to

go he shall be punishable with imprisonment for a term which may extent to six months or with a fine which may extend to one thousand rupees or with both. Similarly section 36 of Metro Railway (Construction of Works) Act, 1978 applicable to DMRC also envisages penalty for failure to comply with directions issued u/s 21 of Metro (Construction of Works) Act, 1978. It was also submitted that section 82 of Delhi Metro Railway (Operation and Maintenance) Act, 2002 empowers to punish a person who commits any offence mentioned in sections 59, 61, 65 to 79 of Delhi Metro Railway (Operation and Maintenance) Act, 2002 and to arrest without warrant or other written authority by any metro railway official or by a police officer not below the rank of a head constable or by any other person whom such metro railway official or police may call to his aid.

13.6 It was submitted that there is no requirement under section 10(20A) of the Act to be mandatorily constituted by an Act of Parliament or State Legislature. The incorporation of company under the Companies Act' 1956 also meets the conditions prescribed in section 10(20A) of the Act, since it is a company constituted under any law. It was submitted that, there is a mandatory precondition in section 10(23BB) and, 10(23BBA) of the Act that, an authority should be either established or constituted or appointed by Central, State or Provincial Act and, not simply constituted by or under any law in India; whereas for the purposes of section 10(20A) of the Act, there is no such requirement that, the authority must be established by an Act of Parliament placed before both the Houses or even by the State

Legislature, as is the requirement in the aforesaid provisions. It was thus submitted that, under section 10(20A) of the Act even a company incorporated under the Companies Act' 1956 can be an "authority" for the purpose of section 10(20A) of the Act, of course it has to be an authority. It was also submitted that where the two Governments are the shareholders and, assessee is discharging quasi Governmental function and is authorized to administer revenue producing public enterprise, hence the assessee is an authority. The assessee has desired support from the following sub-sections of section 10 of the Act:

Sr No	*Section*	*To whom exemption is available under the relevant section.*	*Established Under*
i)	*10(26AAB)*	*an agricultural produce market committee or board*	*Constituted under any law for the time being in force.*
ii)	*10(26B)*	*a corporation*	*Established by a Central, State or Provincial Act or of any other body, institution or association (being a body, institution or association wholly financed by Government).*
iii)	*10(26BB)*	*a corporation*	*Established by the Central Government or any State Government.*
iv)	*10(26BBB)*	*a corporation*	*Established by a Central, State or Provincial Act.*

13.7 It was, therefore, submitted that, language employed in section 10(20A) of the Act is wider and, no where envisages that, authority must necessarily be creature of the Central on Statue

Act. All what it provides that, it must be constituted in India by or under any law, which in the case of the appellant is duly satisfied.

13.8 The appellant also relied on notes on clauses of the Finance Bill to insertion of section 10(20A) of the Act which states as under:

> *"Sub-clause (a) seeks to insert a new clause (20A) in section 10 of the Income Tax Act retrospectively from the 1st April, 1962, i.e., the date of commencement of the Income tax Act. The effect of the proposed amendment is that income of the Housing Boards or other statutory authorities set up for the purpose of dealing with or satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages will be exempt from income tax"*

13.9 It was submitted that Central Board of Direct Taxes after the insertion of the aforesaid provisions issued a circular. In the Circular No. 45 issued by CBDT dated 02.09.1970 wherein it is provided as under:

> *"State housing boards, development boards, etc.*
> *41. Several States have set up statutory Housing Boards for the framing and execution of housing and other development schemes. These Boards are autonomous organizations and they play an important role in implementing the housing programmes of Government for the common good. As these Boards are serving an important public purpose and do not exist for private profit, the Finance Act, 1970 has made a specific provision in a new clause (20A) of section 10 exempting the income of such Boards from tax altogether. This provision exempts from tax any income of an authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing*

accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both. This provision has been made with effect from 1-4-1962 that being the date of commencement of the Income-tax Act.
[Section 10(20A) inserted by section 4(a) of the Finance

13.10 It was also submitted that the aforesaid sub-section was omitted by the Finance Act 2002, when a Circular No. 8/2002 dated 27.08.2002 had been issued by the CBDT wherein it was stated as under:

"Income of certain Housing Boards etc. to become taxable.
13.1 Under the existing provisions contained in clause (20A) of section 10, income of the Housing Boards or other statutory authorities set up for the purpose of dealing with or satisfying the need for housing accommodations or for the purpose of planning, development or improvement of cities, towns and villages is exempt from payment of income tax.
13.2 Through Finance Act, 2002 clause (20A) of section 10 has been deleted so as to withdraw exemption available to the abovementioned bodies. The income of Housing Boards of the States and of Development Authorities would, therefore, also become taxable."

13.11 In light of the above, it was submitted that DMRC has been constituted under a legislative enactment i.e. Companies Act' 1956 for the purpose of planning, designing, development, construction, maintenance, operation and financing of Mass Transit and other Urban Transport and People Mover systems of all types and description in the National Capital Territory of Delhi and other areas of the National Capital Region; and is eligible for exemption u/s 10(20A) of the Act.

14. On the contrary, the Ld. DR submitted that the assessee does not fulfill eligibility of claim of exemption under section 10(20A) of the act due to following reasons:

(i) For claiming the exemption the assessee must be an "authority" but the assessee is simply a joint-venture registered under section 617 of the Companies Act and it is not an authority.

(ii) For claiming the exemption, the authority must be constituted in India by or under any law but the assessee has not been constituted by under any law and it is only registered under the Companies Act.

(iii) For claiming the exemption, the authority must be constituted for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages or for both. If argument of the Ld. Counsel of the assessee is accepted, then any company registered under the Companies Act would be eligible for exemption under section 10(20A) of the Act, but the same is not true.

(iv) Merely obtaining of necessary approvals for its Constitution, funding and functioning from the Central Government, do not prove that, the assessee has been constituted by or under any law. The Operation and Maintenance Act (2002) as well as Metro Railway (

Construction of Works) Act as such are Acts by the government to regulate its funding and operation.

14.1 The Ld. DR distinguished the decision in the case of Gujarat Industrial Development Corporation Vs. CIT (supra) stating that sad Corporation was constituted under an Act of the state government of Gujarat and thus, a statutory body, whereas the assessee has been incorporated as a company under the companies act, 1956 and registered as a Government company as defined in section 617 of the Companies Act.

14.2 The Ld. DR relied on the decision of the coordinate bench of the Tribunal in the case of **Uttarakhand Purv Sainik Kalyan Nigam Ltd. Vs ACIT (2019) 102 taxmann.com 227 (Delhi – Trib)/ 175 ITD 107** wherein the exemption sought under section 10(26BBB) of the Act claiming to be a Corporation established by Central, State or provincial Act was denied for the assessee being merely registered under the Companies Act.

14.3 The Ld. DR also referred to the decision of the Hon'ble Supreme Court in the case of **CIT Vs. Canara Bank (2018) 406 ITR 161 (SC).** The Ld. DR also relied on following decisions:

1. *Agricultural Produce Market Committee Vs. CIT [2008] 173 Taxman 115 (SC)/[2008] 305 ITR 1 (SC)/[2008] CTR 433 (SC)*
2. *New Okhla Industrial Development Authority (NOIDA) Vs. CCIT [20018] 95 taxmann.com 58 (SC)/[2018] 256 Taxman 296 (SC)/[2019] 406 ITR 178 (SC)/[2018] 303 CTR 448 (SC);*

3. *Income Tax Officer Vs. Urban Improvement Trust [2018] 98 taxmann.com 237 (SC)/[2018] 259 Taxman 61 (SC)/[2018] 409 ITR 1 (SC)*
5. *Adityapur Industrial Area Development Authority Vs. Union of India [2006] 153 Taxman 107 (SC)/[2016] 283 ITR 97 (SC)/[2006] 202 CTR 464 (SC),*
6. *Sharda Sahayak Samadesh Kshettra Vikas Nigam Ltd. Vs. CIT [2000] 109 Taxman 24 (Allahabad)/[2000] 244 ITR 264 (Allahabad)/[2000] 162 CTR 220 (Allahabad)*
7. *Karnataka State Small Industries Development Corpn. Ltd. Vs. Asstt. Commissioner of Income Tax [2013] 40 taxmann.com 212 (Karnataka)/[2014] 220 Taxman 4 (Karnataka) (MAG.)*
8. *M.P. Audyogik Kendra Vikas Nigam (Indore)Ltd. Vs. Asstt. Commissioner of Income Tax [2018] 98 taxmann.com 191 (Madhya Pradesh)/[2018] 258 Taxman 273 (MP)*
9. *Sone Command Aread Development Agency Vs. Union of India [2011] 16 taxmann.com 179 (Patna)/[2011] 203 Taxman 96 (Patna) (MAG.)/[2011] 333 ITR 102 (Patna).*
10. *CIT Vs. State of Industries Promotion Corpn. Of Tamil Nadu Ltd. [2008] 167 Taxman 36 (Madras)/[2009] 311 ITR 197 (Madras)/[2007] 212 CTR 334 (Madras.)*

15. We have heard the rival submissions and perused the relevant material on record. The issue before us is whether the assessee is entitled to benefit of section 10(20A) of the Act or not. The section 10(20A) of the Act has been omitted by the Finance Act, 2002, w.e.f., 01/04/2003. To decide the controversy, it is relevant to reproduce the provisions of section 10(20A) of the Act, prior to the omission, inserted by the Finance Act, 1970 w.e.f. 01/04/1990, as under:

> *"Section 10(20A) any income of an authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of*

planning, development or improvement of cities, towns and villages, or for both;"

15.1 The plain reading of the above section makes it clear that for eligibility of the exemption under the section, following requirements must be satisfied:

(i) The entity claiming the exemption must be an authority.

(ii) The said authority must be constituted in India by or under any law enacted.

(iii) The said authority must be constituted for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, developing a improvement of cities, towns and villages or for both.

15.2 Before us, the Ld. Sr. counsel referred to the Memorandum and Article of Association of the assessee company available on pages 38 to 133 of the paper-book for assessment year 1997-98. The main objects of the company as per Clause IIIA of the Memorandum of Association, available on page 42 of the said paper book reads as under:

A: Main Objects of the Company to be pursued by the Company on its incorporation:

(a) Planning, designing, development, construction, maintenance, operation and financing of Mass Transit and other Urban Transport and People Mover Systems of all types and description in the National Capital Territory of Delhi and other areas of the National Capital Region (NCR), either individually of In

association with other Undertakings or Companies in India and/or abroad, including but not limited to :

(i) Feasibility Reports, Detailed Project Reports, Techno-Economic investigations, site selection, supply of basic engineering and detailed designs and working drawings for construction of the system, equipment selection therein and manufacture of rolling stock and equipment, including their components, spares, assemblies and sub-assemblies of all kinds and disciplines, material handling, preparation of specification and tender documents, tender evaluation and purchase assistance of all materials and goods pertaining to such projects, expediting inspection and testing, construction supervision, project management, commissioning, operation and maintenance, training of personnel and any such other services.

(ii) Provision of Engineering, technical and management services including but not limited to engineering, commercial and operational management, market research and personnel management, organizational structure, improvement in the system of administration, traffic forecasts, transport planning, investment planning, modernization of existing systems and facilities, modernization of motive power and rolling stock, improvement in operational and maintenance practices towards optimum utilization of the assets, inter-modal relationship of various forms of transport and engaged in research of all problems relating to mass transit, urban transport and other people mover Systems and promotion or proposition of such methods, studies and measures as may be considered desirable by or beneficial to the interest of the company.

15.3 According to the main object clause the assessee company has been constituted for planning, designing and development of Metro-Rail for national Capital Territory of Delhi and other areas of national capital region. Thus, in view of the learned Counsel, the assessee fulfils the third condition of the section 10(20A) of the Act as mentioned above. The Revenue has also not seriously objected on this eligibility condition.

15.4 As far as the remaining two eligibility conditions of section 10(20A) i.e. “the assessee should be an authority” and “the

authority should be constituted in India by or under any law enacted", is concerned, the Ld. Senior Counsel has submitted that the assessee fulfils both the conditions.

15.5 Let us, first examine the second condition first i.e. whether the assessee was constituted in India by or under any law enacted. In this reference, we may like to refer to the decision of the coordinate bench of the Tribunal in the case of **M/s Uttarakhand Purv Sainik Kalyan Nigam Limited** (supra) cited by the Ld. DR. In this case, the assessee was incorporated on 01/03/2004 under the provisions of the Companies Act, 1956. It was claimed that it was established for the welfare and economic upliftment of ex-servicemen, being citizens of the India and the assessee claimed benefit of exemption under section 10(26BBB) of the Act. The relevant section prescribed that any income of a Corporation established by Central, State or Provincial Act for the welfare and economic upliftment of the ex-servicemen being the citizens of India is exempted from the Income-tax. Before the Tribunal, the assessee contended that the assessee has been established under the Companies Act, and thus, it should be treated as an established under Central Act. The Tribunal after considering submission of the parties , held that the assessee is merely registered under the Companies Act and not established by or under a Central Act. The relevant finding of the Tribunal is reproduced as under:

> *"5. We have considered the rival submissions and perused the material available on record. Section 10(26BBB) of the I.T. Act provides that the income which do not form part of total income -*

"any income of a Corporation established by Central, State or Provincial Act for the welfare and economic upliftment of ex-servicemen being the citizen of India". The Explanation to this Section provides the definition of "Ex-servicemen". According to the above provisions, when assessee seeks exemption of income under the above Section, the assessee shall have to prove that the Corporation have been established by Central, State or Provincial Act. In the present case, the assessee has been registered under the Companies Act only. No Corporation have been established by any such Act in the case of the assessee. It was incorporated as any other Company under the provisions of Companies Act and its name was later on changed to Uttarakhand Purv Sainik Kalyan Nigam Limited. However, by mere mention of Corporation in the name of the assessee would not serve any purpose unless the assessee is incorporated as a Corporation as is required by Section 10(26BBB) of the I.T. Act. It may be a State Government owned Company but it would not serve the purpose of claiming exemption under section 10(26BBB) of the I.T. Act. Since the assessee has admittedly not been established by Central, State or Provincial Act, it is disqualified on this point itself for exemption under the above provision. We may also note that the word 'Corporation' established by Central, State or Provincial Act, is a standard term used in several enactments to denote statutory Corporation established or brought into existence by or under same statute. On the other hand, a Company is not established under the Companies Act. A registered Company, does not owe its existence to the Companies Act. An incorporated Company is formed by the act of required persons associated for any lawful purposes subscribing their name to the Memorandum of Association and by complying with the requirements of the Companies Act in respect of registration. A Company is incorporated and registered under the Companies Act and not established under the Companies Act. Thus, the A.O. miserably failed to enquire and investigate into the substantive provisions of Law - whether assessee is entitled for exemption under section 10(26BBB) of the I.T. Act. The impugned assessment order shows that A.O. asked for the explanation of assessee and the entire reply of the assessee has been reproduced in the assessment order and the A.O. without examining and without verifying the contents of the reply of the assessee has partly disallowed the exemption under section 10(26BBB) of the I.T. Act in a sum of Rs.52,23,503/-. The A.O. in the assessment order has nowhere mentioned or concluded that assessee has satisfied the conditions of Section 10(26BBB) of the I.T. Act. Therefore, it is a case where A.O. did not make any enquiry with regard to applicability of substantive provisions of Section 10(26BBB) of the I.T. Act. The A.O. has failed to apply his mind to the facts and circumstances of the case. The A.O. did not make any

enquiry into the issue involved in the present appeal. The A.O. merely reproduced the reply of the assessee and accepted the claim of assessee partly. Therefore, there is no question of taking any possible view into the matter as is contended by Learned Counsel for the Assessee. During the course of arguments, the Learned Counsel for the Assessee was not able to satisfy as to how the assessee satisfied the requirements of Section 10(26BBB) of the I.T. Act and how the Judgments, relied upon by him are applicable to the facts and circumstances of the case. The Ld. D.R. on the other hand has suggested that both the decisions relied upon by the Learned Counsel for the Assessee support the case of the Revenue. On this reason itself, the assessment order was correctly found to be erroneous in so far as it is prejudicial to the interests of the Revenue. On this reason itself, the appeal of assessee is liable to be dismissed. We may also note briefly that Learned CIT has noted that even the case of the assessee would not fit within the definition of the term "Ex-servicemen" appearing in Section 10(26BBB) of the I.T. Act, on which, no arguments have been made during the course of hearing of the appeal. Since the assessee failed to satisfy the conditions of Section 10(26BBB) of the I.T. Act and A.O. did not examine this issue at all, therefore, learned CIT, Delhi was justified in setting aside the assessment order and to enhance the income of assessee by holding that assessee is not entitled for exemption under the provisions of Section 10(26BBB) of the I.T. Act. No infirmity have been pointed out in the Order of the learned CIT. We, accordingly, do not find any error in the Order for interference. The appeal of assessee have no merit and the same is accordingly dismissed.

15.6 In the instant case before us also, the assessee-company has been constituted under the provisions of the Companies Act, 1956. A copy of certificate of incorporation issued by the Additional Registrar of Companies is available on page 40 of the paper book for assessment year 1997-98 which reads as under:

"I hereby certify that Delhi Metro Rail Corporation limited is this day incorporated under the Companies Act, 1956 (No. 1 of 1956) and the companies limited.

Given under my hand at New Delhi this 3rd day of May 1995."

15.7 The Ld. counsel has referred to various correspondence among the Ministry of Urban Development and other stakeholders, which have been enclosed with the synopsis and filed along with the paper book. A summary of chronological event resulting into formation of the assessee company and associated Cabinet Committee meeting notes submitted by the learned Senior counsel before us have been reproduced above. We find that though formation of the assessee has been discussed in this cabinet note, however, the assessee has been incorporated under the Companies Act, 1956 only, though Metro Railways (Construction of Works) Act, 1978 and Delhi Metro Rail (Operation and Maintenance) Act, 2002 have been legislated by the Parliament, but these Acts do not contain any section or law related to constituting or establishing of the assessee company. The Learned Senior Counsel was asked to produce a copy of any Notification issued under the Metro Railways (Construction of Works) Act, 1978 or Delhi Metro Rail (Operation and Maintenance) Act, 2002, in relation to constitution of the assessee company however, he failed to produce any such Notification issued under those Acts for constitution of the assessee company. Thus, it is evident that the assessee company is merely registered under the Companies Act.

15.8 The Hon'ble Supreme Court in the case of Canara Bank (supra) has discussed in detail as what is a Corporation, under the Companies Act and an authority established by or under the

Central, State or Provincial act. In the said case, New Okhla Industrial Development Authority (NOIDA) which has been constituted by notification dated 17/04/1996 issued under section 3 of the Uttar Pradesh Industrial Area Development Act, 1976, was held to be a Corporation established by a State Act and, therefore, entitled to exemption from payment of tax at source under section 194A(1) of the Act.

15.9 The relevant part of the decision of the Hon'ble Supreme Court in the case of **CIT Vs Canara Bank** (supra), is reproduced as under:

> *"17. One more principle which was reiterated by this Court in above Constitution Bench judgment is that Corporations which are instrumentalities of the Government are subject to the limitation as contained in the Constitution. The Corporations which were under consideration in the above case, namely, Life Insurance Corporation of India, Oil and Natural Gas Commission, Industrial Finance Corporation were held to be constituted within the meaning of Article 12 of the Constitution. Two categories of Corporations have been noticed i.e. statutory corporations and non-statutory corporations. Whereas, the statutory corporations owe their existence from "by or under" statute, non-statutory bodies and corporations are not created by or under statute rather are governed by a statute.*
>
> *"ESTABLISHED BY A CENTRAL, STATE OR PROVINCIAL ACT"*
>
> *18. The appellant on the one hand submits that the Authority has not been established by 1976 Act rather it has been established under the 1976 Act, hence it is not covered by Notification dated 22.10.1970 whereas the respondent submits that Authority has been established by the 1976 Act hence, it fulfills the condition as enumerated under Notification dated 2.10.1970. Alternatively, it is submitted that words "by and under" have been interchangeably used in the IT Act, 1961 and there is no difference, even if, the Authority is established under the 1976 Act.*
>
> *19. Section 194A(3)(iii) clauses (b), (c) and (d) refer to expression "established". In sub clause (b) expression used is "established by*

or under a Central, State or Provincial Act", in sub clause (c) the expression used is "established under the Life Insurance Corporation Act" and in sub clause (d) expression used is "established under the Unit Trust of India Act". The Section thus uses both the expressions "by or under". The expression established by or under an Act have come for consideration before this Court on several occasions.

In this context, it shall be useful to refer to few judgments of this Court. In Sukhdev Singh (supra), the Court had occasion to consider the status of company incorporated under the Companies Act. The Court held that Company incorporated is not a Company created by the Companies Act. In paragraph No. 25 following was held:

> *"25 A company incorporated under the Companies Act is not created by the Companies Act but comes into existence in accordance with the provisions of the Act. It is not a statutory body because it is not created by the statute. It is a body created in accordance with the provisions of the statute."*

20. Mathew J., writing concurrent opinion while discussing the public corporation held that such corporations are created by State. In Executive Committee of Vaish Degree College, Shamli and Others vs. Lakshmi Narain and Others, (1976) 2 SCC 58, the question for consideration fell as to whether the Executive Committee of a degree college is a statutory body. Contention before the Court was that the Executive Committee was the statutory body since it was affiliated to the Agra University which was established by the statute. The Executive Committee was further covered by the statute framed by the Agra University. In the above context, this Court held that there is a clear distinction between a body which is created by the Statute and a body which having been come into existence is governed in accordance with the provisions of the statute. In paragraph No. 10 following was held:

> *"10 It is, therefore, clear that there is a well marked distinction between a body which is created by the statute and a body which after having come into existence is governed in accordance with the provisions of the statute. In other words the position seems to be that the institution concerned must owe its very existence to a statute which would be the fountainhead of its powers. The question in such cases to be asked is, if there is no statute would the institution have any legal existence. If the answer is in the negative, then undoubtedly it is a statutory body, but if the institution has a separate existence of its own without any reference to the*

statute concerned but is merely governed by the statutory provisions it cannot be said to be a statutory body

21. Again in S.S.Dhanoa (supra), this Court had occasion to consider a Registered Society which was a body/corporate. The question was as to whether the State Body /corporate is a Corporation within the meaning of Clause Twelfth of Section 21 of the IPC (Indian Penal Code). This Court again held that expression Corporation means a Corporation created by the legislature. In paragraph No. 7 following was held:

"7 In our opinion, the expression 'corporation' must, in the context, mean a corporation created by the legislature and not a body or society brought into existence by an act of a group of individuals. A cooperative society is, therefore, not a corporation established by or under an Act of the Central or State Legislature."

22. Further noticing the distinction between Corporation established by or under Act or body created by or under Act, following was held in paragraph No. 10:

"10. There is a distinction between a corporation established by or under an Act and a body incorporated under an Act. The distinction was brought out by this Court in Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi. It was observed: [SCC p. 435: SCC (L&S) p. 115, para 25]

"A company incorporated under the Companies Act is not created by the Companies Act but comes into existence in accordance with the provisions of the Act."

There is thus a well-marked distinction between a body created by a statute and a body which, after coming into existence, is governed in accordance with the provisions of a statute……"

23. Another judgment which had occasion to consider the expression established by or under the Act is a judgment of this Court in Dalco Engineering Private Limited vs. Satish Prabhakar Padhye and Others (2010) 4 SCC 378. The Court had occasion to examine the provision of Section 2k, of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, specifically expression "establishment" means a Corporation established by or under Central, Provincial or State Act. This Court held that the phrase established by or under the Act is a standard

term used in several enactments to denote a statutory corporation established or brought into existence by or under the statute. On Company it was held that the company is not established under the Companies Act and an incorporated company does not "owe" its existence to the Companies Act. In paragraph No. 20 following has been laid down:

> *"20. A "company" is not "established" under the Companies Act. An incorporated company does not "owe" its existence to the Companies Act. An incorporated company is formed by the act of any seven or more persons (or two or more persons for a private company) associated for any lawful purpose subscribing their names to a memorandum of association and by complying with the requirements of the Companies Act in respect of registration. Therefore, a "company" is incorporated and registered under the Companies Act and not established under the Companies Act. Per contra, the Companies Act itself establishes the National Company Law Tribunal and the National Company Law Appellate Tribunal, and these two statutory authorities owe their existence to the Companies Act."*

24. This Court further elaborating the expression held that when the expression used is "established by or under the Act", the emphasize should be on the word "established" in addition to the words "by or under". It is useful to refer to what has been said in paragraph Nos. 21 and 22 of the judgment which is to the following effect:

> *"21. Where the definition of "establishment" uses the term "a corporation established by or under an Act", the emphasis should be on the word "established" in addition to the words "by or under". The word "established" refers to coming into existence by virtue of an enactment. It does not refer to a company, which, when it comes into governed in accordance with the the Companies Act. But then, difference between "established existence, is provisions of what is the by a Central Act" and "established under a Central Act"*
>
> *22. The difference is best explained by some illustrations. A corporation is established by an Act, where the Act itself establishes the corporation. For example, Section 3 of the State Bank of India Act, 1955 provides that a bank to be called State Bank of India shall be constituted to carry on the business of banking. Section 3 of the Life Insurance Corporation Act, 1956 provides that*

> *3. Establishment and incorporation of Life Insurance Corporation of India.—(1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be established a Corporation called the Life Insurance Corporation of India.*
>
> *State Bank of India and Life Insurance Corporation of India are two examples of corporations established by "a Central Act"."*

25. This Court has also referred to provisions of The State Financial Corporations Act, 1951 which provides for establishment of various financial corporations under the Act. It is useful to refer to definition of financial corporation as contained in Section 2(b) which is to the following effect:

> *"2(b) Financial Corporation means a Financial Corporation established under Section 3 and includes a Joint Financial Corporation established under Section 3A;"*

26. Section 3 deals with establishment of State Financial Corporation which provides as follows:

> *"3. Establishment of State Financial Corporations.: (1) The State Government may, by notification in the Official Gazette, establish a Financial Corporation for the State under such name as may be specified in the notification.*
>
> *(2) The Financial Corporation shall be a body corporate by the name notified under sub-section (1), having perpetual succession and a common seal, with power, subject to the provisions of this Act, to [acquire, hold and dispose of] property and shall by the said name sue and be sued."*

27. This Court clearly in above case, Dalco Engineering (supra) has held that such Financial Corporations are established by an Act or under an Act. In paragraph No. 23 of the judgment following has been held:

> *"23. We may next refer to The State Financial Corporations Act, 1951 which provides for establishment of various financial corporations under that Act. Section 3 of that Act relates to establishment of State Financial Corporations and provides that "the State Government may, by notification in the Official Gazette, establish a financial corporation for the State under such name as may be specified in the notification" and such financial corporation shall be a body corporate by the name*

notified. Thus, a State Financial Corporation is established under a Central Act. Therefore, when the words "by and under an Act" are preceded by the words "established", it is clear that the reference is to a corporation established, that it is brought into existence, by an Act or under an Act. In short, the term refers to a statutory corporation as contrasted from a non-statutory corporation incorporated or registered under the Companies Act."

28. Now, we revert back to the provisions of 1976, Act. The very preamble of that Act reads "an Act to provide for the Constitution of an Authority for the development of certain areas in the State into industrial and urban township and for masses connected through with".

29. Thus, the Act itself provides for constitution of an authority. Section 2(b) of the 1976 Act defines Authority as authority constituted under Section 3 of the Act. Section 3 which is very relevant for the present case is as follows:

"3. (1) The State Government may, by notification, constitute for the purposes of this Act, An authority to be called (Name of the area) Industrial Development Authority, for any industrial development area.

(2) The Authority shall be a body corporate.

(3) The Authority shall consist of the following :-

(a) The Secretary to the Government, Uttar Pradesh, Industries Department or his Nominee not below the rank of Joint Secretary-ex-official.	*Member Chairman*
(b) The Secretary to the Member Government, Uttar Pradesh, Public works Department or his nominee not below the rank of Joint Secretary ex-official.	*Member*
(c) The Secretary to the Government, Uttar Pradesh, Local Self-Government or his nominee not below the rank of joint Secretary-ex official.	*Member*
(d) The Secretary to the Government, Uttar Pradesh,	*Member*

Finance Member Department or his nominee not below the rank of Joint Secretary-ex official.	
(e) The Managing Director, U.P. State Industrial Development Corporation-ex official.	*Member*
(f) Five members to be nominated Member by the State Government by notification.	
(g) Chief Executive Officer.	*Member Secretary*

(4) The headquarters of the Authority shall be at such place as may be notified by the State Government.

(5) The procedure for the conduct of the meetings for the Authority shall be such as may be prescribed.

(6) No act or proceedings of the Authority shall be invalid by reason of the existence of any vacancy in or defect in the constitution of the Authority."

30. When we compare the provisions of Section 3 of 1976 Act with those of The State Financial Corporations Act, 1951, it is clear that the establishment of Corporation in both the enactments is by a notification by State Government. In the present case, notification has been issued in exercise of power of Section 3, the Authority has been constituted. It is useful to extract paragraph No. 2 of the Notification dated 12.04.1976:

"2. The Governor is hereby further pleased, in exercise of the powers under Section 3 of the said Act, to constitute, in respect of the above-mentioned Industrial Development Area, for the purposes of the said Act, an Authority to be called the 'New Okhla Industrial Development Authority', consisting of the following, namely,

(i) Secretary to the Government, Uttar Pradesh, Industries Department, Member Chairman Ex officio	*Member Chairman (Under Clause(a))*
(ii) Secretary to the Government, Uttar Pradesh, Public Works Department, Ex Officio	*Member (Under Clause(b))*
(iii) Secretary to the Government, Uttar Pradesh,	*Member (Under Clause (c))*

Local self-Government, Department Ex officio	
(iv) Secretary to the Government, Uttar Pradesh, Finance Department, Ex officio	*Member (Under Clause (d))*
(v) Managing Director, UP State Industrial Development Corporation Ltd. Ex. Officio	*Member (Under Clause (e))*
(vi) Chairman, UP State Electricity Board, Ex-officio	*Member (Nominated under Clause (f))*
(vii) Chief Engineer, UP Jal Nigam Board, Ex-officio	*Member (Nominated under Clause (f))*
(viii) Chief Engineer, Irrigation Department UP, Ex-officio	*Member (Nominated under(f))*
(ix) Chief Town and Country Planner, UP, Ex-officio	*Member (Nominated under Clause(f))*
(x) District Magistrate, Bulandshahr, Ex-officio	*Member (Nominated under Clause(f))*
(xi) Chief Executive Officer	*Member Secretary (Under Clause (g))"*

31. This Court having already laid down in Dalco Engineering (supra) that establishment of various financial corporations under State Financial Corporation Act, 1951 is establishment of a Corporation by an Act or under an Act. We are of the view that the above ratio fully covers the present case and we have no doubt that the Authority have been established by the 1976 Act and it is clearly covered by the Notification dated 22.10.1970. It is further relevant to note that composition of the Authority is statutorily provided by Section 3 of 1976 Act itself, hence, there is no denying that Authority has been constituted by Act itself.

15.10 In the instant case before us the assessee has not produced before us any notification issued by or under any Central, State or Provincial Act for constitution of the assessee. In our considered view, the assessee-company has been merely

registered or incorporated under the Companies Act, 1956 and not created as a consequence of the Companies Act,1956.

15.11 In the case of **Sharda Sahayak Samdesh Kshettra Vikas Nigam Ltd** (supra) the Hon'ble Allahabad High Court held as under:

> *"3. The assessee-company was registered as a Government public company, as defined in s. 617 of the Companies Act, 1956 for a large number of objects which are mentioned in cls. (1) to (42) of the memorandum of association, which includes the objects like (a) modernization, maintenance and operation of the irrigation system, (b) development of field channels and field drains within the command of each outlet, (c) consolidation of holdings and re-drawing of field boundary, (d) development of ground water to supplement surface irrigation, (e) development of marketing and processing and communication, (f) town planning, etc., etc. During the two years under consideration, no activity of any sort mentioned in its objects was taken up and the only income derived was from interest earned on fixed deposit, etc. It claimed its income to be exempt under s. 10(20A) of the Act. This claim has been negatived throughout, and in our view rightly, because the assessee was not an authority constituted by or under any law enacted either for the purposes of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages. It was a company registered under the general law relating to companies as contained in the Companies Act, 1956 and,* ***therefore, it could not be treated as authority as contemplated by s. 10(20A) of the Act.*** *Therefore, we answer question No. 1, as reproduced above, in the affirmative, i.e., in favour of the CIT and against the assessee."*
>
> ***(emphasis supplied externally)***

15.12 Similarly in the case of **CIT Vs. State Industries Promotion Corporation of the Tamil Nadu Limited** (supra), the Hon'ble High Court rejected the claim of benefit under section 10(20A) observing as under:

> *"8. It is an admitted case that the assessee is not an authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing*

accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both. It is also an admitted case that the assessee has been incorporated under the provisions of the Companies Act, 1956. Hence, the assessee cannot claim the benefit under s. 10(20A) of the IT Act, 1961, though it might come with the later part of the provisions of s. 10(20A) of the IT Act, 1961.

9. For arriving at the opinion, we can take the support of similar view taken by the Allahabad High Court in the case of Sharda Sahayak Samadesh Kshettra Vikas Nigam Ltd. vs. CIT (2000) 162 CTR (All) 220 : (2000) 244 ITR 364 (All), in which, while answering the question as to whether the Tribunal was justified in holding that the assessee company was not an authority as envisaged in s. 10(20A) of the IT Act, 1961 has held that the assessee company was not entitled to exemption under cl. (20A) of s. 10 of the IT Act, inasmuch as it was registered as a Government public company as defined in s. 617 of the Companies Act, 1956 and not an authority constituted by or under any law enacted either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages.

10. Mr. Ramachandran, learned senior counsel appearing for the assessee submits that in CIT vs. U.P. Forest Corporation (1998) 145 CTR (SC) 402 : (1998) 230 ITR 945 (SC), the Supreme Court while rejecting the finding of the High Court that the U.P. Forest Corporation is a local authority, however remitted back the matter to the authorities concerned to consider whether the U.P. Forest Corporation is entitled to take advantage of the provisions of s. 11 of the IT Act. The same treatment may be given to the assessee herein by relegating them to go before the authorities to advance their case that they are entitled to the advantage of the provisions of s. 11 of the Act.

11. Here again, we are not able to accept the suggestion made by the learned senior counsel for the reason that in that case during the course of assessment proceedings for 1977-78, 1980-81 and 1984-85, the Forest Corporation claimed its status to be that of a local authority entitled to exemption under s. 10(20). The AO rejected the claim and in respect of asst. yrs. 1977-78 and 1980-81, he taxed it in the status of artificial juridical person and in respect of the asst. yr. 1984-85 as a company. The assessee then filed an appeal in respect of the asst. yrs. 1977-78 and 1980-81 and the CIT(A) came to the conclusion that the respondent was a local authority and as such its income was exempted from tax. That order was challenged

in appeal by Revenue before the Tribunal, which set aside the order of the CIT(A). Instead of following the procedure prescribed by the Act by way of reference under s. 256 of the IT Act, the assessee filed three writ petitions in the Allahabad High Court challenging the orders of High Court in respect of the asst. yrs. 1977-78 and 1980-81 and the order of the assessing authority for the asst. yr. 1984-85. The writ petitions were allowed by coming to the conclusion that the Forest Corporation was a local authority and therefore its income was exempt from tax. Before the High Court, it was contended that the assessee was a charitable institution and therefore its income was in any case entitled to be exempted under s. 11(1) of the Act. That contention was found favoured by the High Court. On appeal by Revenue to the Supreme Court, the Supreme Court has held that the High Court was not correct in coming to the conclusion that the respondent was a local authority and entitled to exemption under s. 10(20) of the Act, however relegated the assessees before the authorities to seek the claim under s. 11 of the Act. The facts of the present case are not comparable to that of the decision of the Supreme Court so as to grant the relief by way of relegation to the authorities. In that case, the Supreme Court has also given a cautionary note that the High Court would not have entertained the writ petitions and granted the relief. Hence, we are not able to accept the contention and the contention is rejected.

12. The reliance made in Gujarat Industrial Development Corporation & Ors. vs. CIT (1997) 142 CTR (SC) 181 : (1997) 227 ITR 414 (SC) by the assessee does not also advance the case of the assessee in view of the fact that the assessee in the cited case was an authority created under the provisions of Gujarat Industry Development Act, 1962 which satisfied the requirement of s. 10(20A) of the Act. But the assessee in this case was incorporated under the Companies Act.

13. In the light of the above discussions, the question of law Nos. 1 and 2 in Tax Case Nos. 112 to 114 of 2004 and question of law Nos. 1 to 4 in Tax Case No. 205 of 2004 are answered against the assessee. The question of law No. 3 in Tax Case Nos. 112 to 114 of 2004 does not arise for consideration in the facts and circumstances of the case and hence the same is not answered. Thus Tax Case Nos. 112 to 114 of 2004 are allowed and Tax Case No. 205 of 2004 is dismissed."

15.13 The Ld. Senior counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of Gujarat Industrial Development Corporation Vs. CIT (supra) to support the

contention that assessee is an authority constituted by or under Central Act i.e. the Companies Act, 1956. But in the said case the Hon'ble Supreme Court has observed that said assessee-company was created under the Gujarat Industrial Development Act, 1962, whereas in the instant case, the assessee has been registered with the Companies Act only and not created under the Companies Act or any other Central or State Act and thus the ratio of the said decision cannot be imported over to the fact of the instant case. In the case of **Vidarbha Irrigation Development Corporation** (supra) also, the issue whether the assessee was constituted by under Central or State Act was not in dispute and thus, the ratio of the said decision cannot be applied over the facts of the instant case.

15.14 Similarly, the ratio of the other decisions relied upon by the assessee are not applicable over the facts of the instant case. The Ld. Senior counsel also placed reliance on the decision of the Hon'ble Delhi High Court wherein the tax levied by the Delhi Municipal Corporation Tax Act, 1957 on the assessee was held to be not leviable in view of the section 184 of the Indian Railway Act, 1989. The Ld. counsel submitted that the Hon'ble Court held that the assessee is, in fact a "Railway" and, can be regarded as within the expression "Railway Administration". In view of the above observation of the Hon'ble Delhi High Court, the Ld. counsel submitted that it establishes and beyond doubt that the assessee has been constituted in India under any law enacted though in the form of a company and is an authority. We do not agree with the above argument of the Ld. counsel because the

said decision was in relation to levy of municipal taxes and not in relation to the Income-tax provisions of particularly section 10(20A) of the Act, where it has been specified that the assessee should be an authority constituted in India by or under Central, State or Provincial Act.

15.15 The reliance placed by the Ld. counsel on the CBDT circular (supra) is also of no assistance to the assessee as the said circular was in relation to income of the housing boards or other statutory authorities set up by the state government for the purpose of dealing with or satisfying the need for housing accommodation or for the purpose of planning development or improvement of the cities, towns and villages.

15.16 In view of the decisions discussed above and keeping in view the facts & circumstances of the case, we reject the contention of the Ld. counsel of the assessee that the language employed in section 10(20A) of the Act is wider and it is not necessary that the assessee be creature of Central or State Act, as provided in section 10(23BB) and section 10(23BBA) of the Act.

15.17 Thus, the assessee failed to satisfy the condition of "authority constituted by under any Central, State of Provincial Act". In view of the failure to satisfy this condition, the assessee cannot be granted benefit of exemption under section 10(20A) of the Act. Since we have held the assessee not eligible for exemption under section 10(20A) of the Act as the assessee has not been constituted by or under any Central Act, thus, we are not adjudicating on the arguments of the parties as to whether the

assessee is an authority or not as same are rendered only academic.

15.18 In view of the above, the ground No. 1 raised in all the respective appeals is dismissed.

16. In other grounds raised in appeals before us, the issues of assessing interest income from fixed deposits with bank by the Assessing Officer, non-allowance of expenditure including professional and consultancy expenses claimed in the profit and loss account, non-allowance of deduction under section 35D of the Act etc. have been raised. In assessment year 2002-03, the assessee has also raised the issue of quantum of expenditure allowed against interest income assessed under "Income from other sources". In the additional grounds raised in all the respective appeals, the assessee has requested for adjustment of interest earned on fixed deposit against the cost of the project and in alternative claimed for capitalization of the entire expenditure claimed in the profit and loss account for adding to the cost of the project. In these issues, the main issue of contention is whether the business of the assessee was set up or not.

16.1 The Ld. Senior Counsel of the assessee contended that the respective lower authorities have denied the claim of adjustment of interest income earned on fixed deposit against the cost of the project, allowance of expenses claimed in profit and loss account including consultancy and professional expenses, claim of deduction under section 35D of the Act in appeals of respective assessment years, on the ground that business of the assessee has been commenced only on 25/12/2002, when the Delhi Metro

train was run commercially. The Ld. Senior counsel submitted that it is settled law that, when a business is established and is ready to commence then it can be said that business is set up; but however, before it is ready to commence business, it is not set up. It was submitted that it is only the expenditure that are incurred after the setting up of the business are liable to be allowed a deduction and not the expenditure incurred prior to the setting up of the business; and there will be some time gap between the setting up and the commencement of business. Reliance was placed on the following judgments:

a) *Western India Vegetable Products v. CIT 26 ITR 151, 158-9 (Bom)*
b) *Sarabhai Management Corp. Ltd. v. CIT 102 ITR 25 (Guj) affirmed by Apex Court in the case of CIT v. Sarabhai Management Corp. Ltd. 192 ITR 151*

16.2 The assessee specifically relied on the judgment of Hon'ble Delhi High Court in the case of CIT v. Jubilant Offshore Drilling (P) Ltd. ITA No. 694/2014 dated 24.11.2014 wherein the Hon'ble Court has held as under:

> *"8. Noticeably, the respondent assessee had themselves added back the Registrar of Companies' filing fee of Rs.20,80,000/- and had applied/claimed the said expense under Section 35D of the Act. The depreciation of Rs.26,65,819/- had also been added back by the respondent assessee. This factual position was ignored in the assessment order, without any explanation. Other expenditure was not directly relatable and having nexus with the oil exploration costs. This is not the finding of the assessing officer or an issue raised before us. They are clearly business expense.*
>
> *9. The Assessing Officer had also disallowed Rs.2,90,854/- under Section 35D of the Act being expenses relating to increase in the authorised capital. Once we hold that the business had been set up or rather the business had commenced, the said addition made by the Assessing Officer disallowing the claim under Section 35D of the Act has to be rejected."*

16.3 It was submitted that the assessee is engaged, in planning, designing, construction, etc., of the Mass Rapid Transit System in the city of Delhi. It was submitted that as per its memorandum the main objectives to be pursued by the assessee includes, inter alia, planning, designing, development, construction, maintenance, operation, and financing of the Mass Transit and other Urban Transport and People Mover Systems of all types and description, in the National Capital Territory of Delhi and other areas of the National Capital Region. A copy of the Memorandum of Association is placed on record. It was submitted that during the assessment year 1997-98, the assessee had undertaken, inter alia, planning, designing and financing activities in respect of its Mass Rapid Transit System Project. The major steps taken during the year as a part of implementing the project includes:

(a) Signing of the Loan Agreement by GOI with OEC (Japan) on 25th February 1997;

(b) Finalisation of the work for appointment of General Consultants i.e. inviting expressions of interest from reputed General Consultancy Firms, Preparation of Bid Documents, etc;

(c) Purchase of Office building at NBCC place on Bhishma Pitamaha Marg at a cost of Rs. 16.73 crores from the Ministry of Urban Affairs and Employment, Government of India, New Delhi;

(d) Various steps undertaken as part of planning and designing of the project;

16.4 The assessee submitted that the business activities of it can be classified under the following three broad stages:

Stage 1 Planning, Designing and Financing of the Mass Rapid Transit System (MRTS) Project;

Stage 2 *Construction and Development of the Mass Rapid Transit System (MRTS) Project;*

Stage 3 *Operation and maintenance of the Mass Rapid Transit System (MRTS) Project.*

16.5 It was submitted that the above broad stages of the project are inter related and one must necessarily precede the other. Stage–1 of the project being Planning, Designing and financing of the project needs to be completed before Stage–2 being construction and development of the project is taken up. Similarly Stage-3 being operation and maintenance of the project can commence only after Stage –2 of the project is completed. It was further submitted that during the previous year relevant for the assessment year 1997-98 first stage of the project comprising of planning, designing and financing activities of the project were initiated by the assessee, hence it could certainly be concluded that the business activity of the assessee had commenced in assessment year1997-98. Reference was made to the judgment of Hon'ble Gujarat High Court in the case of **CIT V. Saurashtra Cement and Chemical Industries Limited (1973) 91 ITR 170 (Guj).** In the said case the company was formed for the manufacture and sale of cement. The activities, which constitute business of the assessee, could be divided into three categories, first category being extraction of Limestone, second category being manufacture of cement and third category being sale of cement. The Hon'ble High Court in the said case has held that, business connotes a continuous course of activities. All the

activities, which go to make up the business, need not be started simultaneously in order that the business may be said to have commenced. The business would commence when the activity which is first in point of time and which must necessarily precede all other activities is started. Applying the same, it was submitted that in the case of assesse, business has to be considered to have commenced when the activity, which is first in point of time and which necessarily precedes all other activities is started or commenced. It was submitted that during the assessment year 1997-98, the assessee had commenced the planning, designing and financing activities in respect of its Mass Rapid Transit System Project, activities, which must necessarily precede all other activities and hence, business activity of the assessee is to be considered as commenced. On the adverse finding by the lower authorities to the effect that the stage-1 has not commenced, the assessee submitted that on setting up of office and appointment of key executives and consultants, the DMRC i.e. assessee started the work of planning and designing of the MRTS project. The DMRC appointed M/s. Rail India Technical & Economic Services Ltd. (RITES) as consultants, who did substantial planning work for the Metro and who were paid on progressive completion of their work. It was submitted that an amount of Rs.3,42,00,000/- was paid/payable for the work done during the assessment year 1998-99. It was submitted that details of consultancy fee paid during the various assessment years are on record. Copies of letter of appointment of "RITES" as Standing Technical Consultants were also placed on record. It was

submitted that in succeeding assessment years, the assessee company even received consultancy income, details of which are also placed on record. It was submitted that in para 4.5 for the Assessment Year 1999-2000, the DCIT has observed as under:

> *"Business can be considered to have commenced only when actual planning and designing of Metro system starts, leading to construction activities. This would indicate completion of first stage of activity as per Memorandum of Association."*

16.6 It was submitted that the learned DCIT has admitted that, business can be said to have commenced, when actual planning and, designing of Metro System starts, which leads to construction activities. It was submitted that in the instant case, thus, planning and, designing of MRTS in Financial Year 1996-97 itself led to commencement of business and, even if it is held the same was only leading to construction activities, the business can be said to have commenced, though the submission of assessee is that, assessee was independently engaged is business of actual planning and designing of Metro systems. It was submitted that, the moment, the assessee started incurring of expenses on planning and designing, which was F.Y. 1996-97 itself, business had commenced. The aforesaid conclusion further show that, the learned AO admits that, planning and, designing is the business of the appellant but however unless such planning and, designing is of Metro System, the business cannot be said to have commenced. It was submitted that, perusal of the consultancy services obtained by the assessee would show that, such reports from "RITES" were in respect of only planning and, designing of Metro Systems and, accordingly it has to be held that, assessee

has commenced business in assessment year 1997-98 which subsequently undisputedly led to construction activities.

16.7 In view of the above arguments, we can summaries that according to the Ld. Sr. Counsel of the assessee , business of the assessee was set up in assessment year 1997-98 corresponding to the financial year 1996-97 with initiation of planning, designing and financing of the MRTS project.

17. The Ld. DR, on the other hand, submitted that business of the assessee was commenced only from 24/12/2002 and prior to that it was in the process of setting up the metro network in national capital region. According to the Ld. DR the total revenue shown in the profit and loss account for the assessment year 1997-98 to AY 2001-02 was consist mainly of the interest income earned on the fixed deposit and there was no revenue from the operational activity. Regarding the consultancy expenses claimed to have been incurred by the assessee, the Ld. DR submitted that those consultancy charges were paid mainly for setting up the business of Metro rail network and not for earning income from consultancy. According to him, no income from consultancy has been shown by the assessee upto assessment year 2001-02. He submitted that providing consultancy is not the objective of the company and any small amount of income of approx. Rs 3.00 lakhs shown to have earned by way consultancy, can not lead to result that business of the assess was set up.

18. We have heard the rival submission of the parties and relevant judicial decisions on the issue as when the business of

an assessee could be called as set up. To decide the present controversy, we need to refer to section 3 of the Income-tax Act, which states that the "financial year" immediately preceding the "assessment year", would be the previous year, but for **newly set up business or profession** , or **source of income newly coming into existence**, the previous year would begins with the setting up of business or profession or the date on which the source of income newly coming into existence.

18.1 Further, as per the provisions of section 4 of the Act, which is charging section, Income-tax is charged in respect of the total income of the previous year of every person. Thus in other words we may say that income under the head "Profit and Gains of the Business or Profession" can arises to an assessee from the date of setting up the business, which is chargeable to tax depending on whether it is in nature of capital or revenue. The section 28 is the charging section for "profit and gains of business and profession" which prescribes that profit and gains of business and profession which was carried on by the assessee any time during the previous year, is chargeable to tax. For any income to be classified as income under the head "profit and gains of the business of profession "it must be an activity which is connected in some manner or form with the business of the assessee . The term "business" has been defined in section 2(13) as including any trade, commerce or manufacture or any adventure or concern in the nature of the trade, commerce or manufacture. .

18.2 We find that In the case of **CIT Vs Hughes Escorts Communication [2009] 311 ITR 253**, it has been held that *"the*

expenses incurred in the previous year, prior to the commencement of the business but after the setting up of its business, which two dates need not be the same, would be deductible as revenue expenses". In the said case, while making distinction between the setting up and commencement of a business the Hon'ble Court has relied upon the **Bombay High Court in Western India Vegetables Products Ltd**. (supra) In this case, the Bombay High Court, which was in this case dealing with the corresponding provision of the Indian Income-tax Act, 1922, then explained the distinction between the concepts of 'commencement' and 'setting up' of a business :

> "……*It seems to us, that the expression 'setting up' means, as is defined in the Oxford English Dictionary, 'to place on foot' or 'to establish', and in contradistinction to 'commence'. The distinction is that when 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 the interregnum would be permissible deductions under section 10(2).*** *. . .*"

18.3 In the case of **Sarabhai Management Corpn. Ltd. [1976] 102 ITR 25 (Guj.),** the Hon'ble Gujarat High Court has held that the business commences with the first activity for acquiring by purchase or otherwise immovable property. There may be an interval between the setting up of the business and the commencement of the business. All expenses incurred during that interval are also permissible for deduction.

18.4 The decision of Hon'ble Gujarat High Court in the case of Sarabhai Management Corpn. Ltd. (supra) has been affirmed by the Hon'ble Supreme Court in the case of **CIT v. Sarabhai Management Corpn. Ltd. [1991] 192 ITR 151**, where the Hon'ble Supreme Court went a step ahead that even the activities at a preparatory stage are also admissible. It is well settled that all the expenses incurred after the business had been set up are allowable as business deduction under section 37 of the Act. There may be interval between the setting up of the business and the actual commencement of the business but all the expenses incurred during the interval of setting up of the business and the commencement of the business are also permissible for deduction as so held in the above referred decisions.

18.5 The Ld. CIT(A) in assessment year 1998-99 also referred to various decisions on the issue of setting up of the business. Those decisions have been followed by the Ld. CIT(A)s in other years before us. The relevant decisions are also reproduced as under:

> *"6. In appeal it was submitted that the Assessing officer had erred in holding that the appellant had not commenced its business. I have considered the facts of the case including the objects of the company and the directors report extract of which has been reproduced above. On the facts and in the circumstances of the case, the conclusion is inescapable that till 31.3.1998 the business of the appellant had not been set up. In this connection, the following decisions are relevant:-*
>
> *The mere purchase and erection of machinery will not amount to starting of the business, though they may be essential preliminary steps for starting the business. The assessee can be taken to have started the business only when his plant and machinery go into products.*

K. Sampath Kisser V. CIT,(1986) 158 ITR 25(Mad.)

A manufacturing concern cannot be sold to have set up its business simply by installing the machinery and giving it a trial with a hire generator set.

CIT Vs. Forging & Stamping (P.) Ltd. (1979) 119 ITR 616 (Bomb.)

A business is set up only when it is ready to commences mere obtaining a land on lease and placing of orders of raw materials and machinery will not mean that business has been set up.

CIT V. Sarabhai Sons (P) Ltd. (1973) 90 ITR 318 (Guj.)

Where during the relevant previous year assessee had procured orders but neither its plant or machinery had been installed nor any manufacturing activity commenced in previous year, it could not be said that assessee's business had been set up in the previous year.

CIT V. L & T Mcnell Ltd. (1993) 202 ITR 662 (Bom.)

Where works relating to construction of plant and installation of machinery for establishing factory for sponge iron, were in progress during relevant years and machinery was awaited and production work had not commenced. It could not be said that business of assessee

CIT Vs. Sponge Iron India Ltd.(1993) 201 ITR 770(AP)

Where hotel building of assesses was not complete, merely because banquet hall is incomplete hotel building was let out by assessee, it would not follow that hotel business as such was set up by assesses by the date of letting out banquet hall.

CIT V. Plem Hotel (P) Ltd. (1994) 209 ITR 616(Bom.)

(Emphasis supplied externally)

18.6 In view of the above judicial pronouncement, we can conclude that when a business is ready to commence, that means

business has been set up though it may not have been actually commenced. The businesses mentioned in the above judicial pronouncement are of or engaged either in the trading or manufacturing or service of the products, In case of trading concern, when an assessee is ready with his set up of shops etc and the moment he buys or purchases goods of stock-in-trade, he is ready to commence his business of trading and his business can be called as set up. In case of manufacturing, when an assessee set up his manufacturing apparatus like factory etc alongwith plant and machinery and all power or water connection required and thereafter moment he buys raw material for the manufacturing of products , he is ready to commence the business of manufacturing, though finished goods might be produced or sold after a interval of the period , and business of manufacturing would be called as set up. Wherever, the manufacturing involves multiple steps, where the finished goods of one step may be used as raw material for other step, in such cases, set up of first step of manufacturing will suffice to hold that the business of manufacturing is set up. In case of service industries, when the apparatus or instrument for providing service is ready, then business can be called as set up. In the case of Plem Hotel Private Limited (supra), the Hon'ble Bombay High Court has held that by merely letting out of banquet Hall without completing the hotel building, it cannot be said that hotel business was set up by the assessee by the date of letting out banquet Hall. In the instant case before us, also the assessee is

engaged in providing services of rail transport by way of construction of Metro railway network in Delhi NCR region.

18.7 The claim of the assessee that business of the assessee consist of 3 stages i.e. stage I : planning, designing and financing of the MRTS project stage II; construction and development of the MRTS project and stage III; operation and maintenance of the MRTS project. According to the assessee , above broader stages of the project are interrelated and commencement of the one must necessarily precede that of the other . Stage one of the project being planning, designing and financing of the project needs to be commenced before a stage - 2, being construction and development of the project is taken up. Similarly, stage III , being operation and maintenance of the project can commenced only after Stage II of the project.

18.8 We are of the opinion that project of the assessee of Metro railway network for NCR region, must be seen as project as a whole of providing services of Metro Rail facility to people and cannot be seen in stages created by the assessee for the purpose of commencement of the business. The ultimate revenue generating activity is from operation and maintenance of the project and no revenue could be earned at the stage of planning/designing and construction of the Metro rail network. In such circumstances, the business of the assessee could be called as setup only when the entire construction work related to infrastructure including construction of Metro Station was completed and the assessee company was ready to operate the Metro rail. Since, the assessee was not ready to commence or

operate the railway network till assessment year 2002-03 , which was the source of revenue generation of the assessee , , business of the assessee was not set up till that period. In the case of the Saurashtra Cement and Chemical Industries Limited (supra) relied upon by the assessee, company was engaged in manufacturing and sale of cement and thus in that case extraction of limestone was one of the step of manufacturing activity, which was ready to commence and hence the business of manufacturing of assessee was held to be setup. The limestone itself was a saleable commodity, though might not have been sold. But in the instant case the assessee is not engaged in manufacturing and it is engaged in providing services of rail transport and the said service cannot be provided until and unless the entire infrastructure for running Metro rail, is established. The claim of the assessee that it was also engaged in providing consultancy services during the period is not supported by the evidences. During the period involved in appeal before for us, the assessee has availed consultancy services in relation to establishment of Metro railway network and other related infrastructure. Thus, in our opinion, there was no separate business of providing consultancy by the assessee, at least in the period involved in appeals before us except small amount of consultancy income shown in AY 2002-03. The providing consultancy is not the main object of the assessee company and by earning small amount of consultancy, the business of assessee of providing metro rail transport facility cannot be called as set up.

18.9 In the instant case before us, during assessment year 1996-97, the company had no person under its employment which is evident from page -4 of the Annual Report as under:

> *"EMPLOYEES:*
>
> *In the Financial Year 1995-96, there was no employee in the Company and the work relating to the company was mainly performed by the employees of Ministry of Urban Affairs and Employment. The Board Places on record its appreciation of the services rendered by the employees of Ministry of Urban Affairs and Employment."*

18.10 The assessee did not incur any expenses on capital work-in-progress for the project of Metro railway network. On page 2 of the Annual Report under the heading "Present Activities", it is reported that during the period under AY 1996-97, the company was registered though it could not be made functional immediately and effective steps were taken to set the final investment approval from the cabinet for the implementation of Delhi MRTS project. In view of the circumstances, we hold that the business of the assessee cannot be treated as setup as far as assessment year 1996-97 is concerned.

18.11 In the remaining assessment years before us, i.e., assessment years 1997-98 to 2002-03, the assessee has incurred capital work-in-progress and the assessee has claimed that its business was set up in assessment year 1997-98. In the Annual Report for the financial 1996-97, corresponding to assessment year 1997-98, the Director's report mentioned on the status of the project as under:

"I. STATUS OF THE PROJECT

The Union Cabinet accorded investment approval to the Delhi Metro Rail Project at a cost of Rs. 4860 crores (at April, 1996 prices) on 17th September, 1996. Phase I of the Delhi MRTS Project as approved by the cabinet would consist of a 55.3 K.M. railway network, of which 11 K.M. will be an underground Metro Corridor (Central Secretariat-Connaught Circus-New Delhi Railway Station-Chawri Bazar-Delhi Junction-ISBT-Old Secretariat-Delhi University) and 44.3 K.M. will be "at grade''/"elevated" rail corridors (Shahdara-ISBT-Nangloi and Pul Bangash-Holambi Kalan). The formal commencement date for the project has been decided as 1st April, 1997 and the stipulated completion period as agreed to with the OECF (Japan) will be eight years.

Pending appointment of the General Consultant, RITES have been providing interim consultancy to DMRC w.e.f. LI.97. The following major steps have been taken towards implementation of the project during the of the year:

(i) Signing of loan agreement by GOI with OECF (Japan) on 25th February, 1997;

(ii) Nation of preliminary work for appointment of General Consultant i.e. inviting expressions of interest from reputed general consultancy firms, preparation of bid documents, etc.

(iii) Purchase of office building at NBCC place on Bhishma Pitamaha Marg (Opp. Lodhi Road) at a cost of Rs.16.73 crores from the the Ministry of Urban Affairs & Employment,Government of India, New Delhi on 31st March, 1997

II. FINANCIAL RESULTS

(Rs. in lakhs)

		1995-96	*1996-97*
(i)	*Sales (Income from Operations)*	*Nil*	*Nil*
(ii)	*Other Income*	*2.39*	*38.12*
	Totak Income	*2.39*	*38.12*
(i)	*Expenditure*	*Nil*	*66.07*
(ii)	*Preliminary expenditure written off*	*8.07*	*8.07*
	Total Expenditure		
(iii)	*Gross Profit/Loss after interest , depreciation & tax interest*	*(-)5.68*	*(-)36.02*
(iv)	*Gross profit/loss after interest but before depreciation & tax*	*(-)5.68*	*(-)36.02*
(v)	*Depreciation*	*Nil*	*Nil*

(vi)	*Provision of taxation*	*Nil*	*Nil*
(vii)	*Net profit/ loss*	*(-)5.68*	*(-)36.02*
	(i) Paid up equity share capital	*161.04*	*161.05*
	(ii) Share application money pending allotment	*119.52*	*5794.99*
	Toal	*280.52*	*5956.04*
	Reserves	*Nil*	*Nil*
	Dividend (Proposed)	*Nil*	*Nil*

During the financial year, total receipts of the company, mainly from the contribution towards equity from Govt. of India and GNCTD were Rs.56,75,20,000/-, the break-up of which is as under:

GOI – Rs.52,00,00,000/-
GNCTD –Rs.4,75,52,000/-

The total expenditure during the year was Rs.17,39,30,992/-, the break-up of which is as under:

Revenue Expenditure – Rs. 66,07,592/-
Capital Expenditure – Rs.16,73,23,400/-

The capital expenditure during the year was mainly due to the purchase of building and revenue expenditure was mainly due to the payment of consultancy fees to RITES.

III. EMPLOYEES

During the year under review, steps have been initiated to employ key functionaries in the company. However, no regular employee was on the rolls of the company during the year. The work of the company during the year was, therefore, carried out mainly by the employees of the Ministry of Urban Affairs & Employment and the services of RITES were utilized for technical consultancy and other work. The Board places on record its appreciation of the services rendered by RITES and the employees of the Ministry of Urban Affairs & Employment.

There was no employee in the employment of the company who was drawing salary of more than Rs.25,000/- p.m., if employed for the part of the year and Rs.3,00,000/- per annum if employed for the full year, in whose respect information under Section 217(2A) of the Companies Act, 1956, read with Companies (Particulars of Employees) Rules, 1975 is required to be given.

IV. ENERGY CONSERVATION, TECHNOLOGY ABSORPTION AND FOREIGN EXCHANGE EARNINGS AND OUTGO (PURSUANT TO SECTION 217(1)(E) OF THE COMPANIES ACT, 1956)

Since the implementation of the project on the ground has not yet been started, no steps have been taken for conservation of energy and technology absorption.

The company has bad no foreign exchange earnings and outgoes during the year.

V. ACKNOWLEDGEMENTS

Your Directors place on record their appreciation for the Co-operation & assistance received from the MOUAE, OECF, RITES, NBCC and Railway Board.

For & on behalf of Board of Directors
Sd/-
(N.P. Singh)
Chairman."

18.12 It is evident from the admission of the directors that there were no regular employees on the rolls of the assessee company during the year and no work for implementation of the project of Delhi MRTS consisting of 55.3 kms. railway network. Thus, business of the assessee cannot be called as set up.

18.13 According to the Ld. CIT(A) also in assessment year 1997-98, the business of the assessee was not set up. The relevant finding of the Ld. CIT(A) is reproduced as under:

"6.2 The submissions of the AR were sent to the AO vide report dated 04.12.2000, the AO has stated that this issue was examined in detail in AY 1998-99. In para 2.2 of her report the AO has stated : "An analysis of the activities earned out during the year indicate that these activities were aimed towards operationalsing the organization and not towards commencement of business. These activities are obviously pre-operative before commencement of business". In this regard to the reliance placed by the appellant on the decision of Saurashtra Cement and Chemicals (supra) the AO has stated : "But the facts of the case of the assessee company for this year are different. Details filed during the course of assessment proceedings and as discussed in para 2.2 above show that a few

steps were taken during the year by the company to set in motion the process of commencement of business. A reliance on Gujarat High Court decision is not correct for in the said decision the High Court made a distinction between commencement of business and setting up of business. Setting up of business has been considered at the stage of commercial operation whereas commencement of business has been considered at the stage when preparations for setting up business were under way. In Saurashtra Chemicals the High Court held that limestone extraction prior to manufacture of cement can be considered as commencement of business and this lead to setting up of production of cement. Going by the same logic the moment assessee undertakes planning, designing, development, financing activities as a pre-requisite to consideration and running of Metro i.e. State -1 activities as per Memorandum of Association it can be said to have commenced business. Going by this yardstick for this year it is seen that the assessee has sold lender documents only. Other activities include payments for financing, interior designing of offices, acquisition of land for project, appointment of key functionaries, appointment of consultants etc. i.e. basically activities through which assessee was getting ready to commence business. It cannot be said to have commenced business in this year.

6.3……

6.4 I am in agreement with the AO that the above activities can in no way amount to commencement of business by the appellant and accordingly the AO's action in denying the appellant's claim of expenditure incurred on professional and consultancy charges amounting to Rs.65.40 Lakhs is held to be justified and is confirmed."

18.14 In view of the above observation of the Ld. CIT(A), as well as our finding in above Paras, we hold that business of the assessee was not set up in assessment year 1997-98.

18.15 In AY 1998-99 to AY 2002-03 the respective the Ld. CIT(A) has followed the same finding and held that business of the assessee was not set up. The relevant finding of the Ld. CIT(A) in AY 1998-99 is reproduced as under:

"5. The next ground of appeal relates to addition of consultancy charges amounting to to,Rs.3,44,23,404/-. The claim represented to Rs.48,000/-, internal audit fee paid to M/s Jain Kapila Associates, Chartered Accountants and the balance amount

due for technical consultancy and other work-relating Delhi Metro Rail Project paid/payable to Rail India Technical & Economic Services Ltd. (RITES). The Assessing Officer held that the appellant had not commenced business this year and, therefore, the aforementioned expenses were in the nature pre-operatives expenses. In arriving at this conclusion the Assessing Officer started in para 4,2 of the assessment order as under:-

> *"The directors' report for the financial year ending 31.3.1998 while reviewing the status of the project status that during the year efforts were made to build up and strengthen the organization. Towards this end, key functionaries including Managing Director was appointed corporate office of the company became functional, general consultants were appointed who started mobilization and started review of technical parameters of the project. Action relating to acquisition of land and rehabilitation of project affected persons have been undertaken. Four tender packages for civil work were considered and contract for the first two packages were under finalization during the year. The report further states under the head conservation of energy that the company did not commence any-ground operation. An analysis of the activities carried out during the year indicate that these "Activities were preponderantly aimed towards operationalising the organization and not towards commencement of business. These activities are obviously pre-operative before commencement of business.*

6. In appeal it was submitted that the Assessing Officer had erred in holding that the appellant had not commenced its business. I have considered the facts of the case including the objects of the company end the directors' report extract of which has been reproduced above. On the facts and in the circumstances of the case, the conclusion is inescapable that till 31.3.1998 the business of the appellant had not been set up. In this connection, the following decisions are relevant:-

……

Considering the facts of the case and in the light of the decision cited above, it is clear that the appellant company was engaged during the year ended 31.3.1998 in the process of setting up the business. Therefore, the Assessing Officer was justified in holding that the consultancy charges paid were pre-operative expenses eligible for amortisation under section 35D(2)(a) of the Income-tax Act, 1961."

18.16 The Assessing Officer for AY 1998-99 has extensively quoted the director's report which has mentioned that the assessee company had not commenced any ground operation for implementation of the MRTS project. The only activity related to acquisition of land and rehabilitation of the affected person and inviting tender for civil work was undertaken during the year. In the annexure to revised audit report, which is part of Annual Report, the Auditor in clause -3 has also mentioned that the company has not started construction activity during the year. In view of the above factual observations, we are of the view that business of the assessee was not set up. We concur with the finding of the Ld. CIT(A) in AY 1998-99 and accordingly uphold the same.

18.17 In AY 1999-2000, we find that the assessee started construction activity for implementation of project through outsourcing of work. The assessee shown capital work-in-progress of Rs.57,59,14,052/- at the end of the financial year relevant to AY 1999-2000. The capital work-in-progress include project & plan report (Rs.46,95,000/-), Grade level work (Rs.91,34,595/-), earth work for rail corridor (Rs.74,388,119/-); Elevated Portion Rail Corridor (Rs.3,415,495/-), Yamuna Bridge Works (Rs.71,471,264/-) etc. From the capital work-in-progress shown by the assessee, it is evident that construction work of Delhi MRTS was not completed during the year. This fact has been admitted by the Auditor in annexure to the Audit Report, which is part of the Annual Report. In view of the above

observation, we are opinion that business of the assessee was not ready for commencement and thus, it was not set up during the assessment year 1999-2000.

18.18 In assessment year 2000-01 also as evident from details of capital work-in-progress (Schedule -5 of Annual Report), the work of MRTS project which included Earth Work for Rail Corridor, Elevated portion of Rail Corridor, Yamuna Bridge Words, Station & Building etc. continued during the year. Again in this year also the Auditor, in clause-3 of annexure to the Audit Report has reported that work of the project was not completed. In view of the construction work of the project not completed, the business of the assessee cannot be said as ready for commencement.

18.19 Facts & circumstances in assessment year 2001-02 & 2002-03 are similar. The Auditor in annexure to the Audit Report for assessment year 2001-02 has mentioned that work of the project was not completed.

18.20 In view of our observation above, we hold that business of the assessee was set up only in the period immediately before the date when the assessee carried on commercial run of the Metro rail. The Ld. Assessing Officer has reported this date of running the Metro train as 25/12/2002 on page 8 of the assessment order for assessment year 2002-3. This factual information has not been disputed by the assessee before us. The date of setting up of business can only be in period immediately prior to commencement of business. That date may be the date of announcement of inauguration of the Metro Rail network or may

be any days slightly before that. Since the business was commenced in 25.12.2002 , the business can be treated as set up in any date in FY 2002-03 corresponding to AY 2003-04 and not in AY 2002-03 or any assessment year prior to that. Accordingly, we hold that the business of the assessee was not set up in any of the assessment years of appeals before us. The ground No. 2 of ITA No. 4553 for assessment year 2001-02 and ground No. 2 of ITA No. 5095/del/2004 for assessment year 2002-03 raises specifically on this issue are accordingly dismissed.

19. Now, the remaining issues raised in the appeals before us are being adjudicated in view of the date of setup of the business held by us above.

20. On the issue of taxability of interest income under the head "Income from other sources" or not, the Ld. counsel of the assessee contended that in the assessment year 1996-97, the assessee declared interest income of Rs.2,39,452/-. It was submitted that this interest income was fixed deposits placed with banks on funds raised by way of share capital/share application money from the Union Government and Government of NCT of Delhi for the purpose of the project. It was contended that the aforesaid income is merely incidental and therefore such interest income is not eligible to tax. Reliance was placed on the judgment of Hon'ble Jurisdictional High Court in the case of **Indian Oil Panipat Power Consortium Ltd. v. ITO 315 ITR 255**. It was contended that the aforesaid judgment has further

been followed by the Hon'ble High Court of Delhi in the following cases:

a) ***CIT vs. Panem Coal Mines Ltd ITA No 639/2008 dated 17.09.2009;***

b) CIT vs. Petronet LNG Ltd ITA No. 290/2011 & 292/2011 dated 17.02.2011;

c) CIT vs. Jaypee DSC Ventures Ltd. ITA 357/2010 dated 11.03.2011;

d) Petronet LNG Ltd. v. CIT ITA No. 4191/D/2003 and 4371/D/2009 dated 17.2.2011

20.1 The assessee also placed reliance on the judgment of Supreme Court in the case of **CIT v. Shree Rama Multi Tech Ltd. 165 DTR 137** to contend that interest income is not assessable to tax.

20.2 Similarly, interest was earned on fixed deposits with banks in assessment year 1997-98 to 2002-03. It was submitted that it is undisputed that interest has been earned on the fixed deposits from the amount contributed by the shareholders as is evident from the chart enclosed with submissions as was in the case of CIT vs. Petronet LNG Ltd (supra), wherein their lordships has held that if the interest is earned on the funds which are to be utilized for purchase of capital asset/ setting up of the business and that is inextricably linked with the setting up of the business, said interest will not be treated as income under the head "income from other sources" and therefore submitted that such an amount of interest cannot be included in the income of the assessee, and same should be capitalized towards the cost of the project. Reliance was also placed on the following judgments:

a) *CIT v. Bokaro Steel Ltd. 236 ITR 315 (SC)*
b) CIT v. U.P. State Industrial Development Corporatiion 225 ITR 703 (SC)
c) karnal Cooperative Sugar Mills Ltd. v. CIT 233 ITD 531 (P&H)
d) CIT v. Karnataka Power Corporatioin 247 ITR 268 (SC)
e) Bongaigon Refinery Petrochemicals Ltd. v. CIT 251 ITR 329 (SC)
f) CIT v. Vidyut Steel Ltd. 82 Taxman 94 (AP)

20.3 It was further submitted on behalf of the assessee that assessee company had commenced business from A.Y. 1997-98 onwards and, as such consequentially it be held that, interest income is business income, as the learned AO has merely held in the order of assessment that, business has not commenced in the years under consideration. The assessee submitted that, since the business of the assessee has commenced, it ought to have been held that, interest income is business income. In fact, the Hon'ble Delhi High Court in the case of **Snam Progetti S.P.A. V. Addl. CIT 132 ITR 70** has also held that interest earned on surplus funds by a businessman is to be assessed as income from business. It was submitted that the assessee company had not come into existence to earn income only from interest and as such all the activities carried in the course of business ought to have been held as relatable to business activities. Hence, the interest income declared by the assessee has to be assessed as business income, and is eligible for set off against the business expenses incurred and claimed by the appellant or alternatively adjusted against the cost of the project.

21. The Ld. DR, on the other hand, submitted that from the chart of total receipt as well as receipt earned from interest during the assessment year 1996-97 to 2001-02, as follows, it

appears that there was hardly any business receipt apart from the interest and thus business had neither been set up nor commenced:

AY.	*Total Receipts*	*Receipts from Interest Earned*	*Expenses*
1997-98	*38,16,684*	*38,02,921*	*74,19,134*
1998-99	*15,44,65,452*	*15,26,70,209*	*5,95,61,700*
1999-2000	*36,58,38,682*	*36,58,38,183*	*9,18,25,170*
2000-2001	*59,67,94,426*	*59,67,94,426*	*14,67,87,754*
2001-02	*88,11,43,805*	*88,11,43,805*	*21,47,87,281*

21.1 The Ld. DR submitted that business of the assessee commenced on 24/12/2002 and prior to that it was in the process of setting up the Metro network in National Capital Region. The Ld. DR submitted that during those years, the assessee had claimed expenses on account of consultancy charges paid for setting up the business and the assessee invested in FDR out of its own funds. According to the Ld. DR the interest income earned on fixed deposit is chargeable as "income from other sources" and against which the assessee can claim only expenses incurred for earning that income. In support of his claim that interest income earned on FDR is chargeable under the head "Income from other sources", the Ld. DR relied on the following decisions:

1. Tuticorin Alkali Chemicals & Fertilizers Ltd. Vs CIT T19971 93 Taxman 502 (SC)/[1997] 227 ITR 172 (SC)/[1997] 141 CTR 387 (SC)

where Hon'ble Supreme Court held that interest income earned on short-term deposit of funds before commencement of business during setting-up of factory could not be set off against loss of the company

2. CIT Vs Coromandal Cements Ltd [998] 234 ITR 412 (SC)/[1999] 153 CTR 209 (SC)

where Hon'ble Supreme Court held as follows:
The point in dispute has now been concluded by a decision of this court in Tuticorin Alkali Chemicals and Fertilizers Ltd. v. CIT [1997] 227 ITR 172. In view of that the appeal is allowed. The judgment under appeal is set aside.

3. CIT Vs Indian Vaccines Corporation Ltd [2014] 44 taxmann.com 130 (Delhi)/[2014] 222 Taxman 207 (Delhi)(MAG)/[2014] 363 ITR 295 (Delhi)

Where Delhi High Court held that Where there was no inextricable link between investment and project, interest income on said investment could not be permitted to be adjusted against pre-operative expenses in respect of said project.

4. Bharat Oman Refineries Ltd. Vs [2013] 35 taxmann.com 187 (Madhya Pradesh)/[2013] 218 Taxman 282 (Madhya Pradesh)/[2013] 356 ITR 399 (Madhya Pradesh)

It was held that where a company had introduced in assessee company a sum of Rs. 900 crores in form of zero coupon convertible debenture to be converted into equity shares within a span of 36 months and out of which a sum of Rs. 500 crores was invested by assessee in short-term deposits with banks, interest earned on these deposits was an income chargeable under head 'income from other sources.

5. GIT Vs Bhawal Synthetics (India), Udaipur [2017] 81 taxmann.com 478 (Rajasthany) [2017] 248 Taxman 127 (Rajasthan)/[2017] 297 CTR 104 (Rajasthan)

where Hon'ble Rajasthan High Court held that Interest earned on FDR kept with bank as margin money for obtaining letter of credit to purchase machinery was taxable as income from other sources

6. Thermal Powertech Corporation India Ltd. Vs DCIT [2017] 81 taxmann.com 168 (Hyderabad - Trib.)/[2017] 164 ITD 449 (Hyderabad - Trib.) (Copy Enclosed)
where Hon'ble ITAT held that where assessee-company formed to build, own and operate a power plant, deposited unutilized borrowed funds in short term fixed deposits during construction of power plant, interest earned on those deposits was to be taxed as income from other sources

7. Shree Maheshwar Hydel Power Corporation Ltd. Vs CIT 120181 96 taxmann.com 167 (Bombay) (Copy Enclosed)

where Hon'ble Bombay High Court held that where assessee raised amounts from Debentures and deposited same with bank and, interest earned by assessee from said deppsits, was not inextricably linked with setting up of capital assets, said interest tficome could not be capitalized

8. Kakinada SEZ (P.) Ltd. T20131 31 taxmann.com 165 (Hyderabad - Trib.)/[2013] 141 ITD 635 (Hyderabad - Trib.) (Copy Enclosed)

where Hon'ble ITAT Hyderabad held that where loans taken for business purposes was invested in fixed deposits, interest paid or borrowed funds cannot be deducted while computing interest income from those fixed deposits under section 57.

9. Hotel Queen Road (P.) Ltd. VS ITO T20121 25 taxmann.com 425 (Delhi - Trib.)/[2012] 14 ITR(T) 124 (Delhi - Trib.) (Copy Enclosed)

where Hon'ble ITAT Delhi held that in absence of any material to show that amount invested in fixed deposit was actually out of amount borrowed by assessee for acquiring capital asset, interest earned on fixed deposit would be assessed as income from other sources.

10. MKR Frozen Food Exports Ltd. VS ITO r20101 126 ITD 1 (Delhi) (Copy Enclosed)

Assessee was engaged in business of export of frozen foods and meals - For this purpose, overdraft facilities were taken from bank to meet liquidity requirements - Subsequently, when assessee earned profit, money so generated was placed in fixed deposits with a bank - Assessee contended that deposits were placed with a view to reduce interest liability, and, therefore, interest income would partake character of profits and gains of business and became eligible for deduction under section 10B - Whether since interest earned from bank deposits did not have direct or proximate connection with business of export of EOU, same would be taxable under residuary head, i.e., 'Income from other sources' and was not eligible for deduction under section 10B - Held, yes.

11. Conventional Fastners Vs CIT 2018-TIQL-202-SC-IT (Copy Enclosed)

SLP dismissed. Since interest income earned from fixed deposits reserves kept as security and as a business pre-requisite had nothing to do with carrying on assessee's business of manufacture and sale of electric meters, same would not be entitled to benefit of deduction under section 80-IC

12. CIT Vs Jyoti Apparels [2008] 166 Taxman 343 (Delhi)/[2007] 209 CTR 288 (Delhi) (Copy enclosed)

where Hon'ble Delhi High Court held that interest earned by an exporter on fixed deposits kept by it with bank as margin money or security for bank guarantee in order to avail of credit facility for its export business has to be treated as 'income from other sources' and not as 'business income', inasmuch as it does not have an immediate nexus with export business. Therefore, such interest income cannot be considered for computing deduction under section 80HHC.

13. CIT v. Mereena Creations [2010] [2010] 189 Taxman 71 (Delhi)/[2011] 330 ITR 199 (Delhi) .

where Hon'ble Delhi High Court held that the interest earned by an exporter on fixed deposits kept by it with bank as margin money or security for bank guarantee in order to avail of credit facility for its export business has to be treated as 'income from other sources.

14. CIT Vs Rassi Cement Ltd H9981 100 Taxman 568 (Andhra Pradesh)/f1998l 232 ITR 554 (Andhra Pradesh)/[1999] 153 CTR 140 (Andhra Pradesh) (copy enclosed)

where Hon'ble AP High Court held that interest earned by assessee on surplus funds deposited in banks during installation of assessee-company had to be taken as income from other sources and could not be treated as a part of capital structure'

22. We have heard the rival submissions and perused the relevant mental on record including the case laws relied upon by both the parties. The assessee has made alternative claims on this issue. The first claim is that the interest income earned on fixed deposit with banks should not be taxable under the head "income from other sources" and it should be treated as part of "business income" and adjusted against business expenditure. The second claim is that the interest income should be adjusted against the cost of project or capital work in progress. In few assessment years, the Assessing Officer has allowed expenditure against earning the interest income under the head "Income from other sources". In those assessment years, the assessee has

disputed the quantum of expenses allowed against the interest income under the head "Income from other sources".

22.1 The Ld. counsel has submitted that funds deposited in the banks were inextricably connected to the setting up of the business of the assessee and therefore interest income earned on the fixed deposits with bank is eligible for setting off against project expenses. According to the Revenue Authorities, the business of the assessee was not set up during the period under consideration i.e. AY 1996-97 to AY 2002-03 and no income was shown during the period under the head "profit and gains of the business "and thus the interest income earned should be taxed under the head "Income from other sources" and the expenditure claimed under section 35D should also be allowed in the year of setting up the business.

22.2 In our opinion, for any income to be classified as income under the head "profit and gains of the business of profession " it must be an activity which is connected in some manner or form with the business of the assessee .

22.3 In the instant case, funds were gathered by way of share capital from both the Union Government of India and the Government of Delhi and other loan funds, which were lying ideal in the hands of the company during the process of setting up of infrastructure for Metro Rail Network and invested in fixed deposits solely for the purpose of earning interest. During the year prior to assessment year 1996-97, the Ministry of urban development incurred the preliminary expenses of Rs.80,72,272/- on behalf of the assessee, which consist of fee paid off

Rs.80,00,400/-; court fee of Rs.1,872; preparation of memorandum of Association and article of Association Rs.50,000/- and printing of Memorandum of Association and Article of Association Rs.20,000/-. In the year AY 1996-97 , the assessee claimed 1/10th of the preliminary expenses of Rs.80,00,272/- as deduction under section 35D of the Act

22.4 In forthcoming paras, we have already held that business of the assessee was commenced only on 25/12/2002 and thus prior to that business of the assessee was not set up. On the issue as how the interest income prior to commencement of the business has to be taxed, the Hon'ble Supreme Court in the case of **Tuticorin Alkali Chemicals and Fertilizers Ltd** (supra) has held *"interest income earned on fixed deposits, before commencement of the business is taxable as income under the head "income from other sources".* In that case the assessee company during construction and establishment of its factory, before commencement of the manufacturing activities, invested funds borrowed for the purpose of setting up factories in short-term deposits with banks and earned interest thereon. In its return, it disclosed the interest earned as income from other sources and after setting off same against business loss claimed carry forward of remaining loss. Later on, it filed revised return claiming that interest and finance charges along with the other production expenses will have to be capitalized and therefore, the interest income should go to reduce the preproduction expenses, which would ultimately be capitalized and as such, the interest income was not accessible to tax. The Assessing Officer as well as the

Tribunal rejected the claim of the assessee. In view of the conflicting decision of the various High Courts on the issue in dispute, the Tribunal made reference to the Hon'ble Supreme Court under section 257 of the Act. The Hon'ble Supreme Court observed in para 12 that "*if a company has not commenced business, there cannot be any question of assessment of its profit and gain of the business*". On the issue as under which head the income earned by the company would be taxed before it commences a business, the Hon'ble Supreme Court described with three examples that (a) if company invests the surplus fund in its hand for purchase of land or house property and later sale, then the profit or gains made by the company, would be assessable under the head "capital gains" (b) if a company purchases a rented house and gets rent, which will be assessable to tax under section 22 of the Act as Income from House Property and (c) if a company (also as in the case before the Lordship), keep the surplus fund in short-term deposit in order to earn the interest, then such interest would be chargeable under the head "Income from other sources". The Hon'ble Supreme Court further held that the interest earned would be in the nature of revenue, observing as under:

> *"13. The company has chosen not to keep its surplus capital idle, but has decided to invest it fruitfully. The fruits of such investment will clearly be of revenue nature. This position in law was explained by Sir George Lowndes in the oft-quoted passage in the case of CAT v. Shaw Wallace A Co. [1932] [59 LA. 206]:*
>
> > *"Income, their Lordships think, in this Act connotes a periodical monetary return 'corning in' with some sort of regularity or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously*

productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. This income has been linked pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something, which is often loosely spoken of as 'capital'."

14. In other words, if the capital of a company is fruitfully utilized instead of keeping it idle, the income, thus, generated will be of the revenue nature and not accretion of capital. Whether the company raised the capital by issue of shares or debentures or by borrowing will not make any difference to this principle. If borrowed capital is used for the purpose of earning income that income will have to be taxed in accordance with law. Income is something which flows from the property. Something received in place of the property will be capital receipt. The amount of interest received by the company flows from its investments and is its income and is clearly taxable even though the interest amount is earned by utilizing borrowed capital."

22.5 Thus, Hon'ble Supreme Court has laid down the principal that irrespective whether the funds used for the purpose of earning interest income is owned or borrowed, if it is lying ideal and invested, then the interest income which flows from those investments would be clearly revenue in nature and taxable. But, if something is received in place of the property (investment) that will be in the nature of capital receipt.

22.6 The facts of the instant case are exactly identical to the case of Tuticorin Aalkali Chemicals and Fertilizers Ltd. (supra).

22.7 In the case of **Indian Oil Panipat Power Consortium Limited** (supra) relied upon by the Ld. Counsel of the assessee, the title of the land which was to be purchased was in question and under litigation. The Ld. first appellate authority observed that the funds were placed in fixed deposit so that liquidity was insured and money would remain available when required for

purchase of land and infrastructure development. The Ld. first apellate authority observed that the interest earned was "inextricably" linked with the setting up of the power plant. Based on the reasoning, the first appellate authority applied the judgment of the Hon'ble Supreme Court in "Bokaro Steel Ltd." (supra) and allowed the claim of the assessee directing the Assessing Officer to consider the interest income for capitalization and adjusting against the preoperative expenses. In view of the finding of the fact by the first appellate authority, the Hon'ble Delhi High Court concluded that the assessee's income was an income connected with business and thus it cannot be held that income derived from parking the funds temporarily with bank would result in the character of the funds being changed and brought to tax under the head "Income from other sources". The Hon'ble High Court in para 5.2 has observed as under:

> *"5.2 It is clear upon a perusal of the facts as found by the authorities below that the funds in the form of share capital were infused for a specific purpose of acquiring land and the development of infrastructure. Therefore, the interest earned on funds primarily brought for infusion in the business could not have been classified as income from other sources. Since the income was earned in a period prior to commencement of business it was in the nature of capital receipt and hence was required to be set off against pre-operative expenses. In the case of Tuticorin Alkali Chemicals (supra) it was found by the authorities that the funds available with the assessee in that case were 'surplus' and, therefore, the Supreme Court held that the interest earned on surplus funds would have to be treated as 'income from other sources'. On the other hand in Bokaro Steel Ltd (supra) where the assessee had earned interest on advance paid to contractors during pre-commencement period was found to be 'inextricably linked' to the setting up of the plant of the assessee and hence was held to be a capital receipt which was permitted to be set off against pre-operative expenses."*

22.8 In the above case we find that funds which were deposited in banks were infused by way of share capital for a specific purpose of acquiring land and the development of the infrastructure but due to litigation on the title of the properties, same were parked with the bank for ready access of the funds and therefore the Hon'ble High Court held that the interest earned on such fund was capital receipt. Thus in the above case prime purpose of investing fund in banks was easy access for purchase of land, but in the instant case before us, the construction work of the infrastructure for Metro rail network was in progress and there was no litigation as to the title of the land and the ideal funds available with the assessee were deposited with banks with the objective of earning interest. Before us, the Ld. senior counsel of the assessee has filed a copy of various guidelines issued for investment of surplus funds by Central public sector enterprises. In compliance to the guidance, the assessee has made investment in fixed deposits from time to time. The Ld. Council has also filed copies of minuts of the meeting of various dates on the investment made by the assessee. On perusal of those minutes of meeting, it is evident that the assessee is made investment of the surplus fund available with the objective of earning highest interest. The assessee has explored relative schemes of interest of the various banks and thereafter only investment has been made after selection of the appropriate bank. Minutes of one of such meetings, available on page 46 of the paper book filed, combined for all the years of the appeal is reproduced as under:

Minutes of the meetings on investment held on 12.10.99.

Present: -

Shri C.B.K. Rao - Director (P&P)
Shri Satish Kumar - Director (RSE)
Smt. Saroj Rajware - FA&CAO"

An amount of Rs.44 crores are maturing in the following manner:-

1. Rs.22 crores including interest of approximately Rs.2 crores with Canara Bank on 14.10.99.

2. Rs.22 crores including interest of approximately Rs.2 crores with Oriental Bank of Commerce on 13.10.99.

Accordingly quotations were invited from the 15 banks on our panel. 9 Banks have responded in writing whereas SBI have telephonically conveyed their rates for a period of one year for deposits in excess of Rs.10 crores at 10% p.a. The best rates have been quoted by Oriental Bank of Commerce at 11.1 p.a. On an earlier occasion on 7.9.99, the Committee had decided to place Rs. 60 crores with SBI and Rs. 30 crores with Oriental Bank of Commerce for a period of one year each seeing the substantial pre mature withdrawals from the LTDRs with SB! despite interest rate differential. At that point of time the approximate outgo of funds till 31.3.00 was estimated to be nearly Rs.90 crores. In a subsequent decisions sum of Rs. 58 crores were placed with Oriental Bank of Commerce for a period of one year on 15.9.99 increasing the total exposure of DMRC on Oriental Bank of Commerce to Rs.183 crores.

Seeing that the trend of expenditure entails further drawing down of almost Rs.75 crores till 31st March and all of it is likely to be met by withdrawals from LTDRs with SBI due to the benefit of waiver of penalty of 1% on premature withdrawals, the Committee recommends:-

1. To reinvest Rs. 22 crores maturing with Oriental Bank of Commerce on 13.10.99 at 11.1% p.a.

2. To invest Rs.22 crores maturing with Canara Bank in LTDRs with SBI at 10% p.a. for a period of one year.

The balance proceeds of about Rs. 22 lakhs from both the maturities be taken into the current account with SBI, Nirman Bhawan for routine expenditure.

Minutes of the meetings on investment held on 27.10.99.

Present: -

Shri C.B.K. Rao - Director (P&P)
Shri Satish Kumar - Director (RSE)
Smt. Saroj Rajware - FA&CAO

An amount of Rs.67 Crores has been received from GNCTD towards equity. Quotations were invited from the banks on our panel and 14 banks have responded. The highest rates received for different periods are tabulated. Best rates for one year have been quoted by Vijaya Bank at 11.15% followed by Oriental Bank of Commerce at 11.05% State Bank of India has quoted 10.25%.

Keeping in view the next maturity coming up end of December, 1999. It is proposed to invest Rs. 67 crores with Vijaya Bank for one year and one day at the rate of 11.15%.

22.9 In view of the facts that investment in fixed deposit has been made with the purpose of earning interest, the ratio of the decision in the case of Indian oil Panipat Power construction Ltd(supra) cannot be applied over the facts of the instant case.

22.10 In the case of Jaypee DSC ventures Ltd (supra), the assessee furnished performance guarantee in favour of the NHAI to get the contract awarded in its favour and to procure the said bank guarantee, the assessee kept the amount in the fixed deposit in the bank. The Hon'ble Delhi High Court in the said case observed that investment in fixed deposit had an inexplicable nexus with the securing the contract and therefore it could not be taxed under the head "Income from other sources".

The facts of the above case being different from the instant case where funds have been invested in fixed deposit for earning interest as against the fixed deposit made for the business purpose in said case, the ratio of the above decision cannot be applied over the facts of the instant case. In other cases relied upon by the Ld. Counsel of the assessee, the decision in the case of Indian oil Panipat Power Consortium Limited (supra), has been followed, which we have already distinguished.

22.11 In view of the above discussion, respectfully following the ratio in the case of Tuticorin Alkali Chemical and Fertilizers Ltd(supra), we reject the contentions made while arguing the grounds as well as additional grounds related to the issue in dispute claiming the interest income as part of business income and also that adjustment of interest on fixed deposits against the capital work in progress and uphold the finding of the Ld. CIT(A) on the issue in dispute for assessing the interest income from funds invested in bank deposits during the assessment years from AY 1996-97 to 2002-03 as income taxable under the head "Income from other sources". The ground No. 2 of ITA No. 1346/del/2018 for assessment year 1996-97 and additional ground (a), raised in all the respective appeals are dismissed.

23. In assessment years 2000-2001; 2001-02 and 2002-03, the assessee has also raised the issue of allowing expenses for earning interest income on fixed deposits with banks , taxed under the head "Income from other sources". In assessment year 2000-01, the claim of the assessee for allowing expenses of Rs.56,21,803/- against the interest income was rejected by the

Assessing Officer on the ground that the assessee may be entitled to capitalize the interest payable by it. The Assessing Officer held that the assessee cannot claim adjustment of this expenditure against interest assessable under section 56 of the Act ,because section 57 of the Act has set out in its clause (i) to (iii) the expenditure which are allowable and deductible from income assessable under section 56 of the Act . According to the Assessing Officer there was no expenditure being incurred for earning the interest income on fixed deposits and thus claim of the expenditure was denied by the Assessing Officer. The Ld. CIT(A), however, following the finding of the CIT in order passed under section 263 of the Act for assessment year 1998-1999 and 1999-2000, allowed Rs.37,94,354/-. The relevant finding of the Ld. CIT(A) is reproduced as under:

> *"Ground No. 3 relates to the non-allowance of deduction of Rs.56,21,803/- claimed as deduction in the return for earning of interest income. As per formula of CIT, Delh- IV, Now Delhi during the course of proceedings under section 263 of the income-tax Act, 1961 for the assessment years 98-99 and 99 00. The Assessing Officer lias not allowed the expenses on the ground that the appellant company has not filed the details of expenses incurred for earning the interest before tier. The expenses claimed by the appellant company at Rs.14,67,67,754/- for earning interest income were not allowed by tire Assessing Officer in view of the decision of the Hon'ble S.C in the case of M/s Tuticorin Alkali Chemicals A. Fertilizers Ltd. Vs. CIT 227 ITR Page 172 Interest, earned on deposits made by any assessee prior to commencement of its business is chargeable to tax.*
>
> *The authorized representative of the appellant company lias submitted that Commissioner of Income-tax, Delhi-IV, Now Delhi has allowed the expenses in the order under section 263 as under:*
>
> | *Asstt. Year* | *Interest Income* | *Deduction of expenses allow3d in order u/s 263 by CIT, Delhi –IV, New* |
> |---|---|---|

		Delhi
1998-99	*Rs.15,44,65,452/-*	*Rs.31,35,830/-*
1999-2000	*Rs.36,58,38,183/-*	*Rs.34,49,413/-*

The submissions of the appellant company filed on were forwarded to the Assessing Officer for her comments. The reply of the Assessing Officer was received vide letter dated 10.2.2004 wherein it is specifically mentioned that since the assessee has not furnished any details of expenses the claim of the assessee remained unverifiable whether the expenses were incurred wholly and exclusively for earning the interest income. Therefore, no expenses were allowed in this year. It is further stated that the only FDR made in the bank for the surplus funds lying in the bank, there would actually be no expenses that assessee would need to incur for earning this income.

The authorized representative of the appellant company has filed rejoinder on 20.4.2004 where it is stated that:-

"The main contention of the Assessing Officer is that no separate accounts are maintained for incurring of expenses or earning of interest income and therefore no expenses were allowed by the Assessing Officer for earning of interest. The Ld. A.O. has failed to appreciate that earning of interest income is not one of the main objects of the assessee company and therefore no separate account for expenses incurred is maintained. Interest income is earned for financing the project by placing surplus available funds in F.Ds with bank in such a way that funds are available as and when required for the project and instead of allowing the funds to lay idle, best use is made by putting the surplus funds in F.Ds with bank. In this way not only the optimum use of surplus funds is ensured but it is also ensured that finance to the extent possible is generate for financing the project. This situation was examined in Detail by the Ld. CIT, Delhi IV, New Delhi in the proceedings u/s 263 of the I.T. Act for A.Ys 1998-99 and 1999-2000. It has already been mentioned in our letter dated 20.11.2003 that after going through the relevant records and examining the matter in greater detail in the proceedings u/s 2.63 the id. CIT, Delhi-IV, allowed deduction of expenses for earning of interest income as follows:-

Asstt. Year	*Interest Income*	*Deduction of expenses allowed in order u/s 263 by CIT, Delhi-IV, New Delhi*
1998-99	*Rs.15,44,65,452/-*	*Rs.31,35,830/-*
1999-2000	*Rs.36,58,38,183/-*	*Rs.34,49,413/-*

It has been further stated that

"in para IV on page of the order u/s 263 for A.Y. 1999-2000 tire Ld. CIT Delhi-IV, New Delhi has observed as under:-

The assessee was allowed specific opportunities to provide separate breakup of expenses relating for interest income & other expenses related to business which had not as yet commenced. However, assessee has expressed its inability to provide such break-up. Under such circumstances & by keeping in view the reasons given under order u/s 263 of even date for asstt. year 1998-99 an expenditure of Rs. 34,49,413/- is held as Incurred wholly and exclusively for earning Interest Income and the balance amount of Rs. 5,20,70,154/-(Rs. 5,55,19k,567/- - Rs. 34,49,413/-) is not relatable to interest Income and is, therefore, being disallowed.

I have gone through the findings of the Assessing Officer and the submissions made by the appellant company. I he argument taken by the appellant company has substantial force because the Hon'ble Commissioner of Income-tax. Delhi-IV, New Delhi has allowed the expenses relatable to interest in the assessment years 1998-99 and 1999-2000 in the order passed under section 203 of the Income-tax Act, 1961. The relevant para is reproduced as under:-

"that a fraction of those expenses incurred was relatable to earning interest income. In order under section 263 of the Income tax Act. 1961 for the assessment year 98-99 it has been held that "expenses of Rs.31,35,830/- were relatable to interest income. It is observed that the interest income has increased from Rs.15,44,65,452 in the assessment year 1998-99 to Rs. 36,58,38,183/- in assessment year 1999-2000, since not much extra expenses were required to earn the additional interest income in asstt. year 99-2000, it will be fair, if we increase the expenses held to be incurred to earn interest income in asstt. year 1998-99 by 10%. The figures comes to Rs. 34.49.413/- (Rs. 31,35,830 + Rs. 3,13,583/-). Against "interest of Rs. 15.26 crores for asstt. year 1998-99 the total deduction claimed for expenses was Rs. 67,75,852/- where as against interest income of Rs. 36.58 crores for asstt. year 1999-2000 deduction on account of expenses allowed is of Rs. 5,55,10,567. The details are enclosed as Annexure 'A ' As is clear from Annual Report for F.Y. 1998-99(asstt. year 1999-2000, the company had incurred major expenses on appointment of consultants for Metro Rail Project, payment of consultancy fees arid salary, inviting for tenders for civil works, acquiring the land and rehabilitation of about 500 juggi dwellers falling within the project align/pent. Thus almost entire increase over expenses inclined during preceding year is not related to

earning of interest income e.g. consultancy fees, salaries to staff other than that engaged for earning interest income, foreign tours & travels of consultants & engineers, wage electricity expenses etc".

It is further stated that:-

"The assessee was allowed specific opportunities to provide separate breakup of expenses relating for interest income & other expenses related to business which had not as yet commenced. However the assessee has expressed its inability to provide such breakup. Under such circumstances <& by keeping in C.. 'lew the reasons given under order u/s 263 of even date for asstt. year 1998-99, an expenditure of Rs. 34,49.4 13/- is held as incurred wholly and exclusively for earning interest income and the balance amount of Rs. 5,20,70,154 (Rs 5,55,19,567 - Rs. 34,49,413/-i's not relatable to interest income and is, therefore, being disallowed."

The appellant company has shown interest income of Rs. 59,67,94,426/- against which claimed expenses of Rs. 56,21,803/- in the year under consideration on proportionate basis as allowed by the CIT, Delhi-IV, New Delhi in the order passed under section 263 of the Income-tax Act, 1961 for the assessment year 1999-00. The interest income was earned at Rs. 15.47 crores in the asstt. year 98-99 and Rs. 36.58 crores in the asstt. year 99-00. Against these interest income the relatable expenses were allowed at Rs. 31,35,830/- and Rs. 34,49,413/- respectively. It means that the relatable expenses allowed in the asstt. year 99-00 comes Rs. 34,49,413/-i.e. 10% more than the expenses claimed in the asstt. year 98-99 of Rs. 31,35,830/- In spite of this fact that interest income had been increased from Rs. 15.44 to 36.59 crores in (- .comparison to asstt. year 98-99. The Hon'ble CIT, Delhi-IV, New Delhi has categorically given the finding that since no much extra expenses were required to earn additional interest income for asstt. year 99-00, it will be fair that if we increase the relatable expenses held to be inclined to earn interest income for the asstt. year 98-99 by 10% only.

I do not intend to the differ with the findings of the CIT, Delhi-IV, New Delhi and accordingly I hereby direct the Assessing Officer to allow the relatable expenses amounting to Rs. 37,94,354 (Rs.34,49,413/- + 10% Rs.3,44,941) i.e 10% more than of expenses allowed in the asstt. year 1999-00 for earning the interest income. The balance amount is disallowed."

24. Similarly in assessment year 2001-02 and 2002-03, the assessee claimed expenses of Rs.7,76,600/- and Rs.28,80,19,287/-. The Assessing Officer disallowed the entire claim of Rs.7,76,600/- in assessment year 2001-2002, whereas in the assessment year 2002-03, the Assessing Officer estimated five employees as engaged in the work relating to maintenance of the fixed deposit and allowed the expenses on salary, conveyance, telephone etc which was estimated by him at Rs.9,12,000/-. The Ld. CIT(A) allowed expenses of Rs.7,76,600/- and Rs.41,73,789/- in assessment year 2001-02 and 2002-03 respectively, following his finding in assessment year 2000-01.

25. We have considered rival submission of the parties on the issue in dispute and perused the material on record.

25.1 We are of the considered view that under the provisions of section 57(iii) of the Act, any expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income is deductible against the said income assessed under section 56 of the Act i.e under the head "Income from other sources". The Assessing Officer estimated the expenditure incurred on the basis of number of employees. The Ld. CIT(A) however has followed the estimation made by the Ld. CIT while passing order under section 263 for assessment year 1998-99 and 99-2000. The assessee is claiming that the entire expenditure debited in profit and loss account might be allowed against the interest income earned from fixed deposit, which according to the assessee is in the nature of the business income. We do not agree with the contention of the

assessee. It is for the assessee to demonstrate as how the expenditure incurred is wholly and exclusively for the purpose of earning interest income on fixed deposit. Before the Ld. CIT during proceeding under section 263 of the Act for assessment year 1998-99 and 99-2000 also the assessee expressed its inability to provide break-up of the expenses relating to the interest income and under those circumstances the Ld. CIT estimated expenditure of Rs.34,49,413/- for assessment year 1998-99. The Ld. CIT(A) has further progressively increased the expenses which could be allowable, by 10% for the year 2000-01, 2001-02 and 2002-03. In the assessment year 2001-02 , the claim of the assessee was only of Rs.7,76,600/- and therefore he restricted the claim of expenses to that extent. In absence of a specific demonstration by the assessee that particular expenses relates to the interest income and in absence of any documentary evidence in support of such a claim, we may not like to disturb the expenses already allowed by the Ld. CIT(A), in view of the fact that there is no appeal of the Revenue before us in which the quantum of expenses allowed under the head "Income from other sources" has been contested by the Revenue. In view of the above discussion, the relevant ground number 5(a) and 5(b) of ITA No. 1874/del/2004 for assessment year 2000-01, ground No. 5 and 6 of ITA No. 4553/del/2003 for assessment year 2001-02 and grounds No. 5 and 6 of ITA No. 5095/del/2004 for assessment year 2002-03 are accordingly dismissed.

25.2 The next issue raised in the grounds for AY 1996-97 to 1999-2000 is regarding not allowing claim of deduction of 1/10th

of preliminary expenses under section 35D of the Act. Referring to the issue of deductibility of preliminary expenses written off under section 35D of the Act in the AY 1996-97, the learned counsel of the assessee contended that the assessee had earned an income of Rs.2,39,452/- which was set off against preliminary expenditure written off Rs.8,07,227/- so as to declared a loss of Rs.5,67,775/-. It was further submitted that aggregate preliminary expenditure incurred was Rs.80,72,227/- and out of which 1/10th of Rs.8,07,227/- was written off in the instant year. It was thus contended that entire expenditure incurred on account of preliminary expenses is eligible for deduction u/s 35D of the Act. In other assessment years also the claim of deduction was contended as justified.

26. The learned DR, on the other hand, submitted that the business of the assessee was not set up and therefore claim of deduction under section 35D of the Act could be entertained only after commencement of the business.

27. We have heard the arguments of the both the parties on this issue in dispute and perused the relevant material on record. The issue of deduction under section 35D of the Act is also connected with the setting up of the business, because previous year in case of newly setup business starts from the setting up of the business and business income under the head profit in gains of the business is computed thereon as per the provisions of section 28 to 44 of the Act. As we have already held that business of the assessee was not set up during the period assessment years 1996-97 to 2002-03 and thus the assessee was not entitled to

claim the deduction under section 35D of the Act in the these relevant assessment years, however the assessee is eligible to claim such deduction under section 35D of the Act after setting up of the business.

27.1 The Ld. CIT(A) in assessment year 1998-99 has confirmed the disallowance on similar grounds. Accordingly, we uphold the finding of the Ld. CIT(A) on the issue in dispute and the ground No.3 of ITA No. 1346/del/2018 for assessment year 1996-97, ground No. 3 of ITA No. 2398/del/2001 for assessment year 1997-98 , ground No. 3 of ITA No. 1144/del/2002 for assessment year 1998-99 and ground No. 3 of ITA No. 3356/del/2002 for AY 1999-2000 raised on this issue are accordingly dismissed.

28. The next issue raised various appeals before us is related to not allowing deduction in respect of expenses claimed in the profit and loss account including professional and consultancy charges incurred by the assessee. The Ld. CIT(A) in relevant years has held that company was in the process of setting up the business and therefore the Assessing Officer were justified in holding that professional or consultancy charges paid were preoperative expenses eligible for amortisation under section 35D(2)(a) of the Act. It is now well settled law that, once business is set up , then only expenditure is allowable as business expenditure, as has also been held the judgment of Jurisdictional High Court in the case of **CIT vs. Dhoomketu Builders & Development Pvt. Ltd. 216 Taxmann 76**. As we have already held that business of the assessee was not set up during the period from assessment year 1996-97 to assessment year 2002-03, the assessee is not eligible

for claiming any business expenditure as previous year has not began. In the additional ground (b), the assessee has requested that in case the expenditure incurred in the profit and loss account including professional and consultancy expenses, if not allowed in the respective year of incurring, then might be allowed to be capitalized and added to the cost of the project. We find that in assessment year 1998-99, the Ld. CIT(A) held that consultancy charges paid are eligible for amortization under section 35D of the Act. We are of the view that if those consultancy and professional expenses falls under the provisions of section 35D of the Act , then the AO may consider allowability of the same in accordance to law in the year of setting up of the business. Further, we are of the view that the other expenses which have been debited in the profit and loss account and are related directly or indirectly to the plant and machinery or other capital assets constructed or built or purchased by the assessee, then those expenses are eligible for capitalization and eligible for inclusion in written down value of those fixed asset. We hold accordingly. The ground No. 2 of ITA No. 2398/del/2001 for assessment year 1997-98, ground No. 2 of ITA No. 1144/del/2002 for assessment year 1998-99, ground No. 2 of ITA No. 3356/del/2002 for assessment year 1999-2000, ground No. 2, 3 and 4 of ITA No. 1874/del/2004 for assessment years 2000-01, ground No. 3 of ITA No. 4553/del/2003 for assessment year 2001-02 and ground No. 3 of ITA No. 5095/del/2004 for assessment year 2002-03 are accordingly dismissed. The additional ground No. (b) raised in all the respective appeals before us is allowed partly.

29. The next issue is regarding the deduction of depreciation claimed on office equipments etc. During AY 1997-98 to AY 2002-03. In assessment year 1998-99, the Ld. CIT(A) denied the claim of the depreciation observing as under:

> *"8. The last ground of appeal relates to non-allowance of depreciation of Rs.1,75,49,49,218/-. Depreciation under section 32 of the Income-tax Act, 1961 is admissible only in a case where the assets in question "are used for the purposes of the business." The provisions of section 32 are applicable only in cases where the business is carried on. Where the business has not yet been set up there is no question of allowing depreciation.*
>
> *The primary condition for application of Part D of Chapter –IV of the Income Act …….to computation of profits and gains of business or profession is that the business is carried on. When an assessee does not carry on business at all these computation provisions have no application and the income that he receives cannot bear the character of profits of business.*
>
> *New Savan Sugar & Gur Refining Co. Ltd. Vs. CIT (1969) 74 ITR 7(SC).*
>
> *Senairam Doongarmall Vs. CIT (1961) 42 ITR 392 (SC)."*

30. The Ld. Sr. Counsel of the assessee relied on the decision of Hon'ble Delhi high Court in the case of CIT Vs Oswal Agro Mill Ltd. reported in 341 ITR 467 (Delhi) and decision in the case of National Thermal Power Corporation Vs. CIT, reported in 357 ITR 253. The Ld. DR, on the other hand, relied on the finding of the lower authorities.

31. We have heard both the parties on the issue on dispute. In the case of Oswal Agro Mills Ltd (supra), issue in dispute was in respect of depreciation on passive use of the assets. The Assessing Officer denied depreciation in respect of the Bhopal unit of assessee on assets forming part of a block of assets on the ground that the unit was closed throughout the years. The

Hon'ble Delhi High Court held that depreciation had to be allowed an entire block of the assets irrespective of the individual asset was in use or not. In the instant case before us , issue involves different, and therefore issue of the said decision cannot be applied out the facts of the instant case. In the case of National Thermal power Corporation (supra) issue involved whether as an asset though ready to use but not put to use , can depreciation be allowed on such asset. The Hon'ble High Court held that the expression "used for the purposes of the business" in section 32 of the Act has been judicially interpreted to include a case where the asset is kept ready for use, but is not actually put to use.

31.1 But in the instant case before us as we have already held that business of the assessee was not set up in AY 1996-97 to AY 2002-03, the question of carrying of the business does not arise and in such circumstances the assessee is not eligible for deduction of depreciation under section 32 of the Act. We concur with the finding of the Ld. CIT(A) on the issue in dispute and accordingly depreciation claimed from AY 1997-98 to 2002-03 is denied. The ground No.4 of ITA No.1144/del/2002 for assessment year 1998-99, ground No.4 of ITA No. 3356/Del/2002 for assessment year 1999-2000, ground No. 4 of ITA No. 4553/del/2003 for assessment year 2001-02 , raised on the issue of claim of depreciation are accordingly dismissed.

32. Now, we take up the appeal of the assessee in ITA No. 2081/del/2003 and ITA No. 2082/del/2003 for assessment years

1998-99 and 1999-2000 respectively against the order(s) under section 263 of the Act passed by the Ld. Commissioner of income tax, Delhi. The grounds raised in the appeals are reproduced as under:

Grounds of appeal for assessment year 1998-99

1. *The Assessing Officer having adjudicated upon the question of allowability of expenses against earning of interest income, in the facts and circumstances of the case, the CTT, Delhi-IV, has erred in law and on facts in sitting over the judgment of the question of allowability of expenses for earning of interest income and holding that out of expenses of Rs. 67,75,851 allowed by the Assessing Officer for earning of interest income, expenses amounting to Rs.20,90,552 did not relate to earning of interest income. The exercise of jurisdiction u/s 263 being not in accordance with the provisions of law, the order dated 18.3.2003 u/s 263 passed by the CIT, Delhi-IV deserves to be cancelled.*
2. *The Assessing Officer having come to the conclusion that expenses of Rs. 67,75,851 were allowable as deduction under section 57 of the Income-tax Act for earning of interest income, in the facts and circumstances of the case the CIT, Delhi-IV has erred in law and on facts in holding that expenses of Fes. 20,90,552 out of expenses of Rs.67,75,851 allowed as deduction by the Assessing Officer were disallowable being not relatable to interest income. Such change of opinion being not permissible under the provisions of section 263 of the Income-tax Act, 1961, the order of the C.I.T., Delhi-IV being illegal deserves to be cancelled.*
3. *On the facts and in the circumstances of the case the Commissioner of Income-tax, Delhi-IV has erred in law in exercising jurisdiction under section 263 of the Income-tax Act,1996 and holding that out of expenses of Rs.67,75,851 allowed by the Assessing Officer expenses of Rs.20,90,552 were disallowable being not relatable to interest income. The assessment order dated 30.11.2000 of the Addl. CIT Spl. Range-24, New Delhi being not erroneous in so far as it was not prejudicial to the interest of revenue, the order u/s 263 dated 18.3.2003 passed by the CIT, Delhi-IV being illegal deserves to be cancelled.*
4. *The Assessing Officer having held that interest income of the appellant was to be taxed under the head "Income from other sources" and that expenses of Rs. 67,75,851 were allowable as deduction against interest; income of Rs. 15,26,70,209 under section 57 of the Income-tax Act, 1961,the CIT, Delhi-IV in the facts and*

circumstances of the case has erred in law in invoking the provisions of section 263 to hold that expenses of Rs.20,90,552 were disallowable being not relatable to interest income. The order of the Assessing Officer being not erroneous in so far as it was not prejudicial to the interests of revenue, the order passed by the CIT, Delhi-IV, New Delhi deserves to be cancelled being not in accordance with the provisions of law.

5. *The Assessing Officer having allowed deduction of expenses amounting to Rs.67,75,851 against interest income of Rs. 15,26.70,209 in the facts and circumstances of the case the CIT, Delhi-IV has erred in law and on facts in invoking jurisdiction u/s 263 of the Income-tax Act,1961 to hold that out of expenses of Rs. 67,75,851 allowed by the Assessing Officer, the expenses amounting to Rs.20,90,552 were disallowable being not relatable to interest income. The order of the Assessing Officer being not erroneous in so far as it was not prejudicial to the interest of revenue, the order passed by the CIT, Delhi- IV under section 263 of the Income-tax Act, 1961 being illegal deserves to be cancelled.*
6. *In the facts and circumstances of the case the CIT, Delhi-IV has erred in law and on facts in invoking jurisdiction under section 263 of the Income-tax Act, 1961.The Assessing Officer after having disallowed the business expenses amounting to Rs.3,70,82,442 and having allowed expenses of Rs. 67,75,85 as expenses against earning of interest income of Rs. 15,26,70,209 the order of the CIT, Delhi-IV holding that expenses of Rs.20,90,552 were disallowable being not relatable to interest income, being illegal deserves to be cancelled.*
7. *On the facts and in the circumstances of the case the CIT, Delhi-IV has erred in law and on facts in holding that expenses amounting to Rs.20,90,552 did not relate to earning of interest income. The figure of expenses of Rs.20,90,552 being based on estimate and not on any material on record, the order of the CIT, Delhi-IV is bade in law. Such estimation being not permissible under the proceedings under section 263, the order of the CIT, Delhi-IV is bad in law and therefore the same deserves to be cancelled.*
8. *On the facts and in the circumstances of the case the CIT, Delhi-IV erred in calling upon the appellant for production of books and other records to come to a conclusion that out of expenses of Rs. 67,75,851 already allowed by the Assessing Officer for earning of interest income, some expenses were disallowable. The CIT being required to have such details ready before him before issue of notice under section 263, the order passed is bad in law and, therefore, the same deserves to be cancelled.*
9. *On the facts and in the circumstances of the case the CIT, Delhi-IV has erred in law in not justifying the disallowance of expenses on*

facts. The total expenses having been incurred for the purpose of business are liable to be fully allowed.

10. *In the facts and circumstances of the case the CIT, Delhi-IV has erred in law in invoking the provisions of section 263 of the Income-tax Act, 1961.The assessment order dated 30.11.2000 passed by the Assessing Officer having been the subject matter of appeal before the CIT(Appeals)-XIII, New Delhi, the order passed by the CIT, Delhi-IV is without jurisdiction and, therefore, the same is liable to be cancelled.*
11. *The learned CTT, Delhi-IV has illegally invoked section 263 of the Income-tax Act, 1961. As such, the proceedings u/s 263 of the Income-tax Act deserve to be cancelled.*
12. *The appellant craves leave to add, alter or modify any ground of appeal either before or at the time of hearing of the appeal.*

Grounds of appeal for assessment year 1999-2000.

1. *The Assessing Officer having adjudicated upon the question of allowability of expenses against earning of interest income, in the facts and circumstances of the case, the CIT, Delhi-IV, has erred in law and on facts in sitting over the judgement of the question of allowability of expenses for earning of interest income and holding that out of expenses of Rs.5,55,19,567/- allowed by the Assessing Officer for earning of interest income, expenses amounting to Rs.5,20,70,154/- did not relate to earning of interest income. The exercise of jurisdiction u/s 263 being not in accordance with the provisions of law, the order dated 18.3.2003 u/s 263 passed by the CIT, Delhi-IV deserves to be cancelled.*
2. *The Assessing Officer having come to the conclusion that expenses of Rs.5,55,19,567./- were allowable as deduction under section 57 of the Income-tax Act for earning of interest income, in the facts and circumstances of the case the CIT, Delhi-IV has erred in law and on facts in holding that expenses of Rs.5,20,70,154/- out of expenses of Rs.5,55,19,567/- allowed as deduction by the Assessing Officer were disallowable being not relatable to interest income. Such change of opinion being not permissible under the provisions of section 263 of the Income-tax Act, 1961, the order of the C.I.T., Delhi-IV being illegal deserves to be cancelled.*
3. *On the facts and in the circumstances of the case the Commissioner of Income-tax, Delhi-IV has erred in law in exercising jurisdiction under section 263 of the Income-tax Act,1961 and holding that out of expenses of Rs.5,55,19,567/- allowed by expenses of by the DOT,Circle-10(1),New Delhi expenses of Rs.5,20,70,154/- were disallowable being not relatable to interest income. The assessment order dated*

26.2,2002 of the DOT, Circle 10(1), New Delhi being not erroneous in so far as it was not prejudicial to the interest of revenue, the order u/s 263 dated 18.3.2003 passed by the CIT, Delhi-IV being illegal deserves to be cancelled.

4. *The Assessing Officer having held that interest income of the appellant was to be taxed under the head "Income from other sources" and that expenses of Rs.5,55,19,567/- were allowable as deduction against inte/est income of Rs.36,58,38,183/- under section 57 of the Income-tax Act,1961,the CIT, Delhi-IV in the facts and circumstances of the case has erred in law in invoking the provisions of section 263 to hold that expenses of Rs.5,20,70,154,/- were disallowable being not relatable to interest income. The order of the Assessing Officer being not erroneous in so far as it was not prejudicial to the interests of revenue, the order passed by the CIT, Delhi-IV, New Delhi deserves to be cancelled being not in accordance with the provisions of law.*
5. *The Assessing Officer having allowed deduction of expenses amounting to Rs.5,55,19,567/- against interest income of Rs.36,58.38.1837-. in the facts and circumstances of the case the CIT, Delhi-IV has erred in law and on facts in invoking jurisdiction u/s 263 of the Income-tax Act,1961 to hold that out of expenses of Rs.5,55,19,567,/- allowed by the Assessing Officer, the expenses amounting to Rs.5,20,70,154/- were disallowable being not relatable to interest income. The order of the Assessing Officer being not erroneous in so far as it was not prejudicial to the interest of revenue, the order passed by the CIT, Delhi-IV under section 263 of the Income-tax Act, 1961 being illegal deserves to be cancelled.*
6. *In the facts and circumstances of the case the CIT, Delhi-IV has erred in law and on facts in invoking jurisdiction under section 263 of the Income-tax Act, 1961.The Assessing Officer after having disallowed the business expenses amounting to Rs.3,23,89,007/- and having allowed expenses of Rs.5,55,19,567./- as expenses against earning of interest income of Rs.36,58,38 183/- the order of the CIT, Delhi-IV holding that expenses of RS.5,20,70,154/- were disallowable being not relatable to interest income, being illegal deserves to be cancelled.*
7. *On the facts and in the circumstances of the case the CIT, Delhi-IV has erred in law and on facts in holding that expenses amounting to Rs.5,20,70,154/- did not relate to earning of interest income. The figure of expenses of Rs.5,20,70,154/- being based on estimate and not on any material on record, the order of the CIT, Delhi-IV is bade in law. Such estimation being not permissible under the proceedings under section 263, the*

order of the CIT, Delhi-IV is bad in law and therefore the same deserves to be cancelled.

8. *On the facts and in the circumstances of the case the CIT, Delhi-IV erred in calling upon the appellant for production of books and other records to come to a conclusion that out of expenses of Rs. 5,55,567,/- already allowed by the Assessing Officer for earning of interest income, some expenses were disallowable. The CIT being required to have such details ready before him before issue of notice under section 263, the order passed is bad in law and, therefore, the same deserves to be cancelled.*
9. *On the facts and in the circumstances of the case the CIT, Delhi-IV has erred in law in not justifying the disallowance of expenses on facts. The total expenses having been incurred for the purpose of business are liable to be fully allowed.*
10. *In the facts and circumstances of the case the CIT, Delhi-IV has erred in law in invoking the provisions of section 263 of the Income-tax Act,1961.The assessment order dated 26.2.2002 passed by the Assessing Officer having been the subject matter of appeal before the CIT(Appea!s)-XIlI, New Delhi, the order passed by the CIT, Delhi-IV is without jurisdiction and, therefore, the same is liable to be cancelled.*
11. *The learned CIT, Delhi-IV has illegally invoked section 263 of the Income-tax Act,1961. As such, the proceedings u/s 263 of the Income-tax Act deserve to be cancelled.*
12. *The appellant craves leave to add, alter or modify any ground of appeal either before or at the time of hearing of the appeal*

33. So far as orders u/s 263 of the Act are concerned for A.Y. 1998-99 and A.Y. 1999-2000, it was submitted by the Ld. Senior counsel that, the same are firstly without jurisdiction and, even otherwise, the conclusion of the learned CIT to restrict the expenditure allowable and, duly allowed by AO is wholly arbitrary and, untenable. The learned CIT has restricted the expenditure allowed by AO of Rs. 67,75,851/- in A.Y. 1998-99 to Rs. 46,85,299/- and, disallowed Rs. 20,90,552/-; whereas in A.Y. 1999-2000, she has restricted the expenditure allowed of Rs. 5,55,19,567/- to Rs. 34,49,412/- and, disallowed Rs.

5,20,70,154/-. The basis of disallowance for A.Y. 1998-99 is as under:

A.	Total Expenditure Allowed by AO	Rs. 67,75,851/-
B.	Out of the aforesaid, expenditure pertaining Income from sale of tenders	Rs. 15,49,470/-
C.	Balance (A-B)	Rs. 52,26,381/-
D.	Out of the aforesaid only 60% is allowable	Rs. 31,35,829/-
E.	Balance is not allowable (C-D)	Rs. 20,90,552/-
F.	Expenditure allowable (A-E)	Rs. 46,85,299/-

34. So far as A.Y. 1999-2000 is concerned, the learned CIT, enhanced the figure of expenditure allowed in A.Y. 1998-99 of Rs. 31,35,829/- by 10% and, held that, expenditure allowable is Rs. 34,49,413/- and, balance is Rs. 5,20,70,154/- is disallowed.

35. The assessee submitted that, while making the aforesaid disallowance, the learned Commissioner of Income Tax has exceeded in his jurisdiction in disregard of the fact that, it is not a case where conditions for exercise of powers to act under section 263 of the Act existed. In order to assume jurisdiction under section 263, the pre-requisites are that the order passed by the Assessing Officer should be erroneous and it should be prejudicial to the interests of Revenue. The Commissioner has to satisfy the twin conditions, namely, (i) the order of the Assessing Officer sought to be revised should be erroneous (ii) it should be prejudicial to the interests of the revenue. Both the conditions must be satisfied. It was submitted that if either of the two conditions does not exist or are found not satisfied, the learned

CIT cannot initiate proceedings to set aside otherwise an unfavourable order, as has been held by the Hon'ble Madras High Court in the case of Venkat Krishna Rice Company v. CIT 163 ITR 129 and, noted by their Lordships of Apex Court in the case of Malabar Industrial Co. Ltd. v. CIT 243 ITR 83.

36. It was submitted that, the learned CIT has erred in assuming jurisdiction by making an order by invoking the provision of section 263 of the income Tax Act as in doing so the learned CIT failed to appreciate that the orders of assessment for both assessment year 1998-99 and, 1999-00, were neither erroneous nor was prejudicial to the interest of revenue. In fact, the perusal of the order of assessment for AY 1998-99 would show that, the learned AO had duly considered the claim of expenses and, held as under:

> *"The remaining expenses except depreciation are allowed as expenses against income from other sources u/s 57"*

36. In fact, before coming to the aforesaid conclusion, the learned AO had called for all the necessary details,

35 It was therefore submitted that, the conclusion of learned CIT to hold that the learned A.O has not applied his mind to the claim of deduction is factually misplaced. It was submitted that the ld AO passed the assessment order after thoroughly investigating the matter and not only after taking into account all the necessary records and information, copies of which are placed in the PB for 1998-99. It was also

submitted that likewise details had been called for and, the same were duly furnished for A.Y. 1999-2000.

36 It was submitted that the CIT failed to appreciate that there could be no valid justification to hold that the amount of Rs 20,90,552/- and, Rs. 5,20,70,154/- claimed as deduction were not allowable. It was submitted that there is no basis to adopt the percentages of 40% and, 10%. The estimate is purely arbitrary. Reliance was placed on the judgement of SC in the case of **Maharaja B.P. Singh Deo v State of Orissa 76 ITR 690.**

37 It was submitted that the learned CIT failed to appreciate that such expenditure allowed was otherwise an allowable expenditure u/s 57 of the Act. It was submitted that, that the assumption that the expenditure claimed by the assessee is an expenditure, which has not incurred wholly and exclusively for the purpose of earning income is also based on no material and evidence, and is highly conjectural and, theoretical. It was settled law that, if an expenditure in held allowable u/s 37(1) of the Act, there can be no partial disallowance made of such expenditure. Reliance is placed on the following judicial pronouncements:

a) CIT v Dhanrajgirji Raja Narsingirji 91 ITR 544 (SC)
b) Sassoon J David and Co. (P) Ltd v CIT 118 ITR 261 (SC)
c) CIT v Dalmia Cement (P) Ltd 254 ITR 377 (Del)
d) Abbas Wazir (P) Ltd v CIT 265 ITR 77 (All)

38 It was submitted that the learned CIT failed to appreciate the settled position of law that merely because the A.O adopted one view which was not in consonance with the commissioner's view, the order passed by the A.O can not be said to be erroneous.

39 It was submitted that the learned CIT also failed to appreciate the settled position of law that the Commissioner cannot substitute his opinion in place of that of A.O. particularly when views taken by the A.O is also one of the legally possible views. The scope of the powers vested u/s 263 of the Act is not so wide as to pass any order in the garb of revising an order of assessment but is circumscribed with certain limitations as has been held by the Hon'ble Supreme Court in the case of Malabar Industrial Company Ltd. v CIT 243 ITR 83. Reliance was also placed on the judgment of the Gujarat High Court in the case of Arvind Jewellers reported in 259 ITR 502 and Nabha Investments Ltd. V UOI 246 ITR 41 (Del). It was also submitted that even otherwise, section 263 cannot be invoked in view of the judgement of the Apex Court in the case of CIT v G.M. Mittal Stainless Steel Ltd reported in 263 ITR 255.

40 It was submitted that since the orders of assessment were neither erroneous and, nor prejudicial to the interest of revenue, therefore in the absence of the satisfaction of both the preconditions, it was respectfully submitted that the

provisions u/s 263 of the Act could not have validly been invoked.

41 The assessee also submitted that, the scope of appellate powers of the Hon'ble Income Tax Appellate Tribunal are confined to such issues and, grounds, which have been stated by the learned CIT in his notice and, no more. Reliance was placed on the following judgments

i) Jagadhri Electric and Supply Co. v CIT 140 ITR 490 (P&H)

ii) L.F.D. Silva v. CIT 92 ITR 547 (Kar) 2: clear view on the wall and nice is in a will of a will nearly and easier usually a visit and 11, he will to the Ministry of Hilo maximally

iii) CIT V. Late .T.S. Srinivasa Iyer 192 ITR 50 (Mad)

iv) Jagjit Industries Ltd v ACIT 60 ITD 295 (Del)

v)) Satishbhai Jayantilal Shah v. Asstt. CIT 61 ITD 307 (Ahd-)

37. The Ld. DR, on the other hand, submitted that no enquiries were done by the Assessing Officer on the issue of quantum of expenditure allowable against the interest income as per the provisions of section 57 of the Act. According to him in view of the lack of Inquiry, the order passed by the Assessing Officer in both the assessment years, i.e., assessment years 1998-99 and 1999-2000 are erroneous. He further submitted that in view of the revenue loss on account of the action of the Assessing Officer, the

orders are also prejudicial to the interest of the Revenue. In view of the contentions, he submitted that orders passed by the Assessing Officer being erroneous insofar as prejudicial to the interest of the Revenue, the Ld. CIT was justified in invoking provisions of section 263 of the Act. On the contention of the Ld. Senior Counsel of the assessee that the order under section 263 of the Act are based on change of opinion, the Ld. DR submitted that no opinion was framed by the Assessing Officer on the issue and therefore there cannot be any change of the opinion by the Ld. CIT. In support of the contention, he relied on the following judicial pronouncement:

> ***"1. Hon'ble Supreme Court in the case of Deniel Merchants Pvt. Ltd. vs. Income Tax Officer (Appeal No. 2396/2017) dated 29.11.2017. (copy enclosed).***
> *In this group of cases, Hon'ble Supreme Court has dismissed SLPs in cases where AO did not make any proper inquiry while making the assessment and accepting the explanation of the assessee(s) insofar as receipt of share application money is concerned. On that basis the Commissioner of Income Tax had, after setting aside the order of the Assessing Officer, simply directed the Assessing Officer to carry thorough and detailed inquiry*
> *The relevant judgement of Hon'ble Calcutta High Court in this case is also enclosed.*
> ***2. BSES Raidhani Power Ltd. Vs PCIT [2017] 88 taxmann.com 25 (Delhi)/[2017] 399 ITR 228 (Delhi) (copy enclosed)***
> *Hon'ble Delhi High Court held that non-consideration of larger claim for Rs. 298.93 crores as depreciation and consideration of only a part of it being Rs. 6.45 crore by Assessing Officer, who did not go into issue with respect to whole amount, was an error, that could be corrected under section 263. Commissioner has power to consider all aspects which were subject matter of Assessing Officer's order, if in his opinion, they were erroneous, despite assessee's appeal on that or some other aspect*
> ***3. Malabar Industrial Co. Ltd. Vs CIT r20001 109 Taxman 66 (SC)/[2000] 243 ITR 83 (SC)/[2000] 159 CTR 1 (SC) (Copy Enclosed)***

Where Hon'ble Supreme Court held that where Assessing Officer had accepted entry in statement of account filed by assessee, in absence of any supporting material without making any enquiry, exercise of jurisdiction by Commissioner under section 263(1) was justified

4. Raimandir Estates (P.) Ltd. Vs PCIT [70 taxmann.com 124 (Calcutta)/[2016] 240 Taxman 306 (Calcutta)/[2016] 386 ITR 162 (Calcutta)/[2016] 287 CTR 512] (Copy enclosed)

Where Hon'ble Calcutta High Court held that where assessee with a small amount of authorised share capital, raised a huge sum on account of premium and chose not to go in for increase of authorised share capital merely to avoid payment of statutory fees and Assessing Officer passed assessment order without carrying out requisite enquiry into increase of share capital including premium received by assessee, Commissioner was justified in treating assessment order as erroneous and prejudicial to interest of revenue

5. Raimandir Estates (P.) Ltd. Vs PCIT [2017] 77 taxmann.com 285 (SC)/[2017] 245 Taxman 127 (SC)

Hon'ble Supreme Court has dismissed SLP against High Court's ruling that where assessee with a small amount of authorised share capital, raised huge sum on account of premium, exercise of revisionary powers by Commissioner opining that this could be a case of money laundering was justified

6. Swarup Vegetable Products Vs CIT H9911 54 Taxman 175 (Allahabad)/[1991] 187 ITR 412 (Allahabad)/[1990] 90 CTR 113 (Allahabad) (copy enclosed)

Assessee received certain amount by way of refund of excise duty and claimed that he had placed this amount in suspense account as a large part of this amount was claimed by one G and a suit and also a writ petition filed by G in this regard were pending before Courts and, thus, this amount did not constitute his income. ITO accepted assessee's claim without making proper enquiries. Commissioner acting under section 263, set aside assessment order on ground that it was clearly erroneous and also prejudicial to revenue inasmuch as claim of assessee was accepted without proper enquiries and directed ITO to make fresh assessment after making proper enquiries and recording a finding. Order upheld

6. CIT Vs Amitabh Bachhan (69 taxmann.com 170. 240 Taxman 221, 384 ITR 200, 286 CTR 113) (copy enclosed)

Hon'ble Supreme Court held that Section 263 does not require any specific show cause notice detailing specific grounds on which revision of assessment order is tentatively being proposed affecting initiation of exercise in absence thereof or to require commissioner to confine himself to terms of notice and foreclosing consideration of any other issue or question of fact; Commissioner is free to exercise his jurisdiction on consideration of all relevant facts, provided an

opportunity of hearing is afforded to assessee to contest facts on basis of which he had exercised revisional jurisdiction

7. Shree Maniunathesware Packing Products & Camphor Works Vs CIT [1998] 96 Taxman 1 (SO/[1998] 231 ITR 53 (SO/[1997] 143 CTR 406 (SC)

Hon'ble Supreme Court held that word 'record' used in section 263(1) would mean records as it stands at time of examination by Commissioner but not as it stands at time of order passed by Assessing Officer. Material which had already come on record though subsequently to making of assessment could be taken into consideration by Commissioner. Commissioner was justified in invoking section 263 on basis of valuation report submitted by DVO subsequent to assessment order.

8. CIT Vs Ballarpur Industries Ltd. [2017] 85 taxmann.com 10 (Bombay)

Hon'ble Bombay High Court held that where Assessing Officer allowed claim of deduction under section 80HHC without examining said claim with reference to unabsorbed depreciation and investment allowance as referred to in sections 32 and 32A respectively, Commissioner was justified in invoking revision under section 263."

38. We have heard the rival submissions and perused the relevant material on record. In the instant case, the Assessing Officer in order u/s 143(3) of the Act for assessment year 1998-99, had allowed the expenditure claimed in the profit and loss account, other than the additions made , as the expenditure against the interest income as per the provisions of section 57 of the Act. The detail of expenditure allowed by the Assessing Officer against interest income in assessment year 1998-99 is as under:

(Figures in Rupess)

		1997-98
Expenditure		
Advertisement A/c		*1,401,669*
AGM/ Board Meeting Expenses		*29,431*
Audit Fees		*3,000*
Bank Charges		*3,621*

Books and Periodicals		*105,749*
Brokerage		*6,000*
Business Promotion A/c		*171,3000*
Car Maintenance		*30,907*
Conveyance Expenses		*33,552*
Electricity Expenses		*61,816*
Entertainment Expenses		*7,754*
Ground Rent		*1,575,000*
Honorarium		*147,300*
Insurance A/c		*26,066*
Membership A/c		*14,673*
Miscellaneous expenses		*111,679*
Office Maintenance Expenses		*41,787*
Postage and telegraph		*14,115*
Printing and Stationary		*149,737*
Processing charges		*95,000*
Rent for Conference Hall		*25,900*
Rent/Lease rent A/c		*119,500*
Repair and Maintenance A/c		*5,874*
Salary A/c		*1,532,687*
Security Expenses		*98,620*
Staff Welfare Expenses		*40,088*
Telephone Expenses		*363,326*
Travelling Expenses		*173,414*
Vehicle hiring expenses		*315,641*
Vehicle Running expenses		*104,906*
Water Charges		*25,740*
Total Expenditure		***67,75,851***

38.2 The Ld. CIT called for and examined the record and issued notice that expenditure of Rs.67,75,851 (Rs.4,11,99,225 - Rs.3,44,23,404) was allowed erroneously by the Assessing Officer against the interest income credited in the profit and loss account. According to the Ld. CIT, the business of the assessee had yet not commenced and said expenditure of Rs.67,75,851/- was not entirely related to earning of interest income and thus, cannot be allowed entirely against interest income.

38.3 The Ld. CIT, after considering the submission of the assessee held that the Assessing Officer did not apply mind to the nature and details of the other expenses claimed and allowed as deduction against the interest income. The Ld. CIT observed that all the expenses of Rs.67,75,851, were clearly not relatable to the earning of the interest income as those expenses mainly include advertisement, business promotion, ground rent etc, vehicle and salary to technical staff etc. The Ld. CIT held that income from investment in short-term deposit with banks would be chargeable to tax under the head "Income from other sources" during the pre-commencement period of the business and against the said interest income expenses for earning of such interest income was only allowable. The Ld. CIT asked the assessee to segregate the expenses relatable to the interest income, however in view of the failure on the part of the assessee, the Ld. CIT estimated such expenditure for assessment year 1998-99 as under:

> *"iii) However, a fraction or these expenses incurred was reliable to earning interest income During the course of proceedings u/s 263, the counsel of the assessee was asked to segregate expenses which*

were relatable to interest income and which were not relatable to interest income. The assessee's counsel submitted that it was not possible to segregate expenses ort the above said lines as no such record was maintained. However, she pointed out that besides interest income of Rs.15,44,65,452/- there was income of Rs. 17,95,243 from sale of tender documents. She further pointed out that expenses on advertisement etc. amounting to Rs.15,49,470/- (Rs.14,01,669 + Rs.29,431 + Rs.3000 + Rs.3,621 + Rs.1,05,749 + Rs.6,000) v/ere relatable to income from sale of tender documents and should therefore, not be disallowed. This argument of the assessee's counsel is acceptable. After excluding these expenses from the expenses in question of Rs.67,75,852/-, the balance figure comes to Rs.52,26,382 (Rs.67,75,852 - Rs.15,43,470) which consists mainly of salary, business promotion electricity and ground rent and out of which segregation of the above said lines is required to be made."

38.4 Similarly, in assessment year 1999-2000, also the Assessing Officer passed the assessment order in identical manner, making additions to the income filed by the assessee in revised return of income. In the assessment year 1999-2000 the Assessing Officer allowed deduction of Rs.6,57,16,432/- against the interest income which was considered by the assessee as business income. The Ld. CIT held the order passed by the Assessing Officer as erroneous insofar as prejudicial to the interest of the Revenue in manner identical to the order passed under section 263 for assessment year 1998-99. For the year under consideration, the Ld. CIT estimated the amount of Rs.34,49,413 as allowable against the interest income under section 57 of the Act and disallowed the balance amount of Rs.5,20,70,154 (Rs.5,55,19,167 - Rs.34,49,413) as under:

"iii) However, a fraction of these expenses incurred was relatable to earning interest income. In my order u/s 263 of the I T. Act for Assessment year 1998-99, it has been held that expenses of

Rs.31,35,830/- were relatable to interest income, it is observed that the interest income has increased from Rs. 15,44,65,452 in assessment year 1998-99 to Rs.36,58,38,183/- in assessment year 1999-2000 Since not much extra expenses were required to earn the additional interest income in asstt. year 99-2000, it will be fair, if we increase the expenses held to be incurred to earn Interest income In asst year 1995-99 by 10%. This figures comes to Rs.34,49,413/- (Rs.31,35,830 + Rs.3,13,583). Against interest of Rs. 15.26 Crores for Asstt. Year 1998-99, the total deduction claimed for expenses was Rs.67,75,852/- where as against interest income of Rs. 36.58 Crores for Asstt. year 1999-2000, deduction on account of expenses allowed is of Rs. 5,55,19,567/-. The details are enclosed as Annexure 'A'. As is clear from Annual Report for A.Y 1998-99 (Asst. Yr. 1993-2000), the company had incurred major expenses or appointment of consultants for Metro Rail Project, payment of consultancy fees and salary, inviting for tenders for civil works, acquiring the land and rehabilitation of about 500 jhuggi dwellers falling within the project alignment. Thus almost entire Increase over expenses Incurred during preceding year is not related to earning of interest income, e.g., consultancy fees, salaries to staff other than that engaged relearning interest income, foreign tours & travels of consultants & engineers, wage electricity expenses etc.*

IV. The assessee was allowed specific opportunities to provide separate breakup of expenses relating for interest income & other expenses related to business which had not as yet commenced. However the assessee has expressed its inability to provide such breakup. Under such circumstances & by keeping in view the reasons given under order u/s 263 of even date for asstt. year 1998-99, an expenditure of Rs. 34,49,413/- is held as Incurred wholly & exclusively for earning Interest income and the balance amount of Rs.5,20,70,154 (Rs.5,55,19,567 - Rs.34,49,413) is not relatable to interest income and is, therefore, being disallowed."

38.5 After going through the order under section 263 and the records before us particularly the paper book filed in ITA No. 1144/Del/2002 for assessment year 1998-99 which contains query letter issued by the Assessing Officer and replies filed by the assessee in the course of the assessment proceedings, we find that the Assessing Officer has not raised a single query on the issue of the allowability of quantum of expenditure against earning of interest income. Similar facts have been observed in AY

1999-2000. Though in the assessment order, the Assessing Officer had mentioned that in respect of the remaining expenses, except depreciation, same were allowed as expenses against income from other sources under section 57 of the Act. In our opinion, the Assessing Officer has arrived at the said finding without making either an enquiry or examination of the expenses claimed by the assessee. The Assessing Officer has not given any reasoning for arriving at this conclusion. The Hon'ble Delhi HC in the case of CIT Vs. Toyota Motor Corporation (2008) 174 Taxman 395 (Del.) held that when the Assessing Officer did not give any reasoning in the order passed by him, the order of Assessing Officer is liable to action u/s 263 of the Act. In the case of BSES Rajdhani Power Ltd. (supra), the Hon'ble Delhi High Court upheld the order u/s 263 because of non-consideration of claim of depreciation by the Assessing Officer. In the case of Rajmandir Estate (P) Ltd. (supra) also the Hon'ble Calcutta High Court upheld the 263 proceedings for not carrying out enquiry by the AO into increase of share capital. The Hon'ble Delhi High Court in the case of GeeVee Enterprises Vs. Add. CIT (1975) 99 ITR 375 has observed that the word *'erroneous'* in section 263 includes the failure to make any inquiry when the circumstances could make such an inquiry prudent. In view of the above, we are of the view that the Ld. CIT is justified in holding the order of the Assessing Officer as erroneous insofar as prejudicial to the interest of the revenue.

38.6 On behalf of the assessee it was submitted before us that the commissioner cannot substitute his opinion in place of the

Assessing Officer particularly when view taken by the Assessing Officer is one of the legally possible views. But in the instant case, we find that the Assessing Officer has not examined whether the expenses incurred were in relation to earning of the interest income. At least from the record, it is apparent that the Assessing Officer has not carried out an enquiry on this issue. The expenses claimed include all sorts of expenses including bank charges, brokerage, Honorarium, ground rent, insurance, membership, security expenses, vehicle hiring and running expenses etc. From a prima-facie perusal of these expenses, one can infer that all those expenses are not related to earning of the interest income on fixed deposits made with banks. In such circumstances, it cannot be said that the commissioner has substituted his opinion in place of that of the Assessing Officer but the commissioner has found that those expenses cannot be allowed without an enquiry.

38.7 Further, the assessee has challenged the estimating of quantum of expenses allowable deduction by the Ld. CIT. But we find that, the Ld. CIT asked specifically to the assessee for submitting the expenses related to the interest income, however no such details were furnished by the assessee before the Ld. CIT. Even such detail has not been furnished before us also. In such circumstances, we are of the opinion that the Ld. CIT is justified in estimating the expenditure relatable to the interest income, which could be allowed under section 57 of the Act. The Hon'ble Supreme Court in the case of Maharaja BP Singh Deo (supra) held that assessment must be based on some relevant material and it is not a power that can be exercised under the sweet will

and pleasure of the concerned authorities. We find that in the instant case before us the Ld. CIT has identified the advertisement expenses as not related to the earning of interest income and in respect of the balance expenses also, he identified the employees engaged in looking after the project work of the assessee and made estimate of the expenses allowable against interest income on rational basis. Thus the ratio of the said decision of the Hon'ble Supreme Court cannot be applied over the facts of the instant case.

38.8 As far as the decisions relied upon by the Ld. counsel of the assessee on the issue of allowability of the expenditure under section 37(1) of the Act is concerned, we are of the opinion that the Ld. CIT has considered the expenses relatable to the earning of the interest income as per the provisions of section 57 of the Act, thus, the decisions relied upon by the assessee cannot be applied in the instant case.

39. In view of the above, we uphold the order of the Ld. CIT passed under section 263 of the Act for AY 1998-99 and 1999-2000. We order accordingly. The grounds of the appeal raised by the assessee in ITA No. 2081/Del/2003 for assessment year 1998-99 and ITA No. 2082/del/2003 for assessment year 1999-2000 are accordingly dismissed.

40. In the result, the appeals bearing ITA No. 1346/Del/2018 for assessment year 1996-97 is dismissed, and other appeals having ITA No. 2398/del/2001 for assessment year 1997-98, ITA No. 1144/Del/2002 for assessment year 1998-99; ITA No. 3356/Del/2002 for assessment year 1999-2000; ITA No.

1874/Del/2004 for assessment year 2000-01; ITA No. 4553/Del/2003 for assessment year 2001-02 and ITA No. 5095/Del/2004 for assessment year 2002-03 are partly allowed. The appeals bearing ITA No. 2081/Del/2003 for assessment year 1998-99 and ITA No. 2082/12/2003 for assessment year 99-2000 are dismissed.

Order is pronounced in the open court on 28th June, 2019.

Sd/-	Sd/-
[BHAVNESH SAINI]	**[O.P. KANT]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 28th June, 2019.
RK/-[d.t.d.s]
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi