

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I" MUMBAI**

**BEFORE SHRI PAWAN SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 2901/MUM/2008
Assessment Year: 2003-04
&
ITA No. 2902/MUM/2008
Assessment Year: 2004-05**

L&T Hochtief Seabird Joint
Venture
Taxation Department, L&T
House, N.M. Marg, Ballard
Estate, Mumbai-400001
PAN No. AAAAL0284E
Appellant

Vs.

Dy. Commissioner of
Income Tax Range 12(2),
Room No. 114, 1st floor,
Aayakar Bhavan, M.K.
Marg, Mumbai-400020.
Respondent

Assessee by : Mr. J.D. Mistry, AR
Revenue by : Mr. Nishant Samaiya, DR

Last Date of Hearing : 05/07/2019
Date of pronouncement: 30/09/2019

ORDER

PER N.K. PRADHAN, AM

The captioned appeals filed by the assessee are directed against the order of the Commissioner of Income Tax (Appeals)-XIII, Mumbai [in short 'CIT(A)'] and arise out of the assessment completed u/s 143 r.w.s. 142(2A) of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to dispose them off through a consolidated order for the sake of convenience.

ITA No. 2901/MUM/2008
Assessment Year: 2003-04

2. The 1st ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the Assessing Officer(AO) of Rs.20,40,10,166/- being a deduction of 5% while valuing work-in-progress. The appellant submits that the said deduction is for future unforeseeable factors to recognize the profit as per Accounting Standard - 7 (AS-7).

3. Briefly stated, the facts are that the Ministry of Defense, Government of India (the Employer) awarded a contract for construction of Breakwater, Dredging and Land Reclamation work to a consortium comprising of :

- (i) Ballast Nedam Baggeren, a company based in Netherlands (BND)
- (ii) Hochtief Aktiengesellschaft, a company based in Germany (Hochtief)
- (iii) Larsen & Toubro Limited, an Indian company (L&T)

The above three parties, to whom the contract was awarded, have been prequalified as distinct entities in respect of identifiable scope of work viz.:

- (i) Dredging and Land Reclamation work to be undertaken by BND
- (ii) Construction of Breakwaters to be undertaken by Hochtief
- (iii) Quarrying to be undertaken by L&T

The Employer requested all the three parties, even though the specific work to be executed by each one is separately identified, to come together as a consortium so as to provide a single point interface. A consortium

agreement is executed between all the three parties dated 5/6/1997. L&T and Hochtief agreed amongst themselves to jointly execute their scope of work and have entered into a joint venture named L&T Hochtief Seabird Joint Venture (UJV) as per Agreement dated 16.08.1999. As per the said agreement L&T's share in UJV is determined at 90% whereas Hochtief's share in UJV is 10%. Based on the scope of work to be executed by the parties the share of profit in the ratio of 90% and 10% is decided. The UJV has independently maintained books of accounts and has recorded the transactions relating to the joint execution of contract entered with the Employer. The UJV has followed a particular method of accounting for recognizing revenue and after debiting the cost for execution the contract the net income is distributed between L&T and Hochtief in the ratio of 90:10.

3.1 The UJV filed its return of income for the assessment year (AY) 2003-04 declaring an income of Rs.36.61 crores. It claimed that it is following percentage completion method of construction accounting. The income was offered for the first time in the AY 2003-04, as the work completed exceeded 50% of the works. In AY 2003-04 for the purpose of recognizing profit, the work-in-progress (WIP) is valued at market value/realizable value and the difference between the closing stock of WIP (determined at realizable value) and the opening stock of WIP (determined at cost) is the revenue recognized by the UJV. The market value/realizable value of closing stock of WIP is equal to the cumulative value of total bills raised on the Employer (Government of India) as on 31.03.2003 subject to certain adjustments. The cumulative value of billing

as on 31.03.2003 was Rs.4,12,23,71,211/-. The UJV reduced Rs.20,40,10,166/- as other allowances which is 5% of gross bills realized and arrived at the net market value/realizable value of WIP at Rs.391.84 crores. This figure was further reduced by opening WIP and the net figure of Rs.189.99 crores was credited to P&L account of the UJV.

The AO observed that there is no dispute that accounting standard provide for creation of provision for future losses, but it speaks of creation of provision only if circumstances and facts so demand. The AO further noted that there is nothing in the accounting standard which says that such provision can be made even when circumstances for such future losses are not there.

During the course of assessment proceedings, the assessee explained to the AO that the reduction of Rs.20.40 crores was based on method prescribed in accounting standard-7 and the 5% contingency is supported by the fact that the contract envisages retention of 5% of total value. It was stated before the AO that any dispute or conflict with the client could have an immediate effect on the recoverability or retention at least in relation to any further exposure or liability.

However, the AO was not convinced with the above explanation of the assessee for the reason that AS-7 gives only guidelines and does not say that contingent liabilities can be taken into account to compute profit. As per the AO the claim of the assessee is merely contingent. Therefore, he disallowed the claim of deduction of Rs.20,40,10,166/-.

In appeal, the Ld. CIT(A) agreed with the reasons given by the AO with the observation that the assessee failed to furnish details regarding where such non-recovery took place or where recovery was stuck because of various factors narrated by it. As the assessee failed to provide any instance where there was non-recovery of dues during the project completion, the Ld. CIT(A) confirmed the disallowance of deduction of Rs.20,40,10,166/- made by the AO.

4. Before us, the Ld. counsel for the assessee submits that the issue has been decided in favour of the assessee by the Tribunal in the case of L&T for AYs 1988-89, 1990-91 to 1997-98. Also reference was made to the decision of the Hon'ble Bombay High Court in the case of L&T for AYs 1995-96, 1996-97 and 1997-98. It is further explained that in any event, all amounts were assessed in the year of completion i.e. AY 2006-07.

5. On the other hand, the Ld. Departmental Representative (DR) relies on the order passed by the CIT(A). Further, it is submitted by him that (i) AS-7 applies for accounting and not for computation of income, (ii) the assessee has not explained the plausible reason of provision for contingencies, (iii) the explanation furnished by the assessee is general in its nature, (iv) the judgment relied by appellant in the case of L&T Ltd ITA No 698/631/886 of 2014 for A.Y. 1995-96, A.Y. 1996-97 & AY 1997-98 was on the issue of scientific working out for anticipated liabilities and the issue to be judged based on past experience. In the instant case neither there was scientific working out based on past experience nor any factual supplementation done by the appellant. Therefore the ratio of the

case does not applicable to the facts of this case, (v) on the basis of the findings of the AO/Special Auditor appointed us 142(2A) and of Ld CIT(A), it clearly emerges that the provision for contingencies is made on ad-hoc basis and not on scientific method or experience, (vi) also to be noted that, the deduction/contingent provision by appellant is against the retention money by the contracting party (Ministry of Defence) which is not the mandate of AS-7.

6. We have heard the rival submissions and perused the relevant materials on record. We find that similar issue arose before the ITAT 'G' Bench, Mumbai in the case of *Larsen & Toubro Ltd. v. DCIT* (ITA No. 2423/Mum/1992 for AY 1988-89). In the said case one of the issues was provision of Rs.32,90,525/- in the accounts in respect of liability towards future costs relating to incomplete or then lately completed projects. The Tribunal vide order dated 27.07.2004 held at para 42 as under :

"42. We have considered the rival submissions and perused the materials on record. We find that the practice followed by the assessee is as per the accounting standard issued by the Institute of Chartered Accountant of India i.e. Accounting for construction contract, AS-7. This system of accounting is being consistently followed by the assessee and because of these two reasons, similar disallowance was deleted by the learned CIT(A) in the case of the assessee for A.Y. 1995-96 & 1996-97 and it seems that these orders of the learned CIT(A) have been accepted by the department because learned DR of the revenue has not pointed out that the revenue is in appeal against the order CIT(A) on this ground in A.Y. 1995-96 & 1996-97. We also find that the other judicial pronouncements relied upon by the learned Counsel of the assessee also support the case of the assessee. In the case of *Voltas Ltd.* (supra), it was

held that the provision for trade guarantees during warranty period is allowable when the assessee has been scientifically working out the anticipated liabilities to be provided under, mercantile system of accounting based on past experience and no ad-hocism is involved. Under these facts/and circumstances, we are of the considered opinion that the disallowance of Rs.32,90,525/- is not justified and we delete the same. The assessee succeeds on ground.”

6.1 In *CIT v. M/s Larsen & Turbo Infotech Ltd.* (ITA No. 698 of 2014) one of the questions of law raised by the Revenue before the Hon’ble Bombay High Court was the following :

“3. Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in deleting the disallowance of Rs.9.60 crore, being the amount provided for un-foreseeable losses in valuing work-in-progress of the construction contract.”

The Tribunal had dismissed the appeal of the Revenue on the above issue by following its order in the case of the same assessee for AYs 1990-91 and 1994-95.

The Hon’ble High Court held that the above question, as proposed, does not give rise to any substantial question of law, as the Revenue has accepted the issue arising herein as decided by the Tribunal for earlier assessment years.

7. Facts being identical, we follow the order of the Co-ordinate Bench in the case of *L&T* (supra) and delete the disallowance of

Rs.20,40,10,166/- made by the AO. Thus the 1st ground of appeal is allowed.

8. We now deal with the 2nd, 4th, 6th, 8th, 10th, 12th ground of appeal together as they deal with a common theme :

The 2nd ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the AO of Rs.2,03,13,027/- being construction management fees paid to M/s Hochtief, Germany for the year.

The 4th ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the AO of Rs.2,03,13,027/- being technical management fees paid to M/s Hochtief, Germany for the year.

The 6th ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the AO of Rs.1,01,56,514/- being consortium leadership fees paid to M/s. Hochtief, Germany for the year.

The 8th ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the AO of Rs.2,03,13,027/- being commercial management fees paid to M/s. Larsen S Toubro Ltd. for the year.

The 10th ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the AO of Rs.9,14,08,622/- being H O expenses reimbursed to M/s Larsen & Toubro Ltd for the year.

The 12th ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the AO of Rs.1,01,56,514/- being H O expenses reimbursed to M/s. Hochtief, Germany for the year.

9. We may illustrate here the 2nd ground of appeal. The AO observed that the payments have been made to the parties who are members of UJV. As per the agreements of UJV, the commercial leadership is with L&T having 90% share whereas technical leadership rests with Hochtief having 10% share. The AO held that after forming UJV and after deciding allocation of profit, there was no justification for such ad-hoc payments. Therefore, the AO concluded that the fees are not allowable in view of provisions of section 40(ba) of the Act.

10. In appeal, before the Ld. CIT(A), the assessee referred to the clauses in the UJV agreement and contended that the fees were payable for services rendered. It also referred to the order of the Transfer Pricing Officer (TPO) on arm's length price (ALP). The assessee contended that the expenses were exclusively for the purpose of business and thus allowable u/s 37(1) of the Act. It also contended that the provisions of section 40(ba) of the Act cannot be applied to commercial leadership fees as that section applies to payments by way of interest, salary, bonus or remuneration and commercial leadership fees cannot fall in any of specific categories of the payments.

However, the Ld. CIT(A) was not convinced with the above explanation of the assessee for the reason that since the assessee is

assessed as an Association Of Persons (AOP), it cannot escape the provisions of section 40(ba) of the Act. The said section speaks of any payment of interest, salary, bonus, commission or remuneration by whatever name called. As per him, the word “any” is a word of wide importance and has to be given its full meaning in the context of provisions of the Act. Observing that there is no indication whatsoever to differentiate between the nature of remuneration or between the purpose for which the remuneration was given to the partners, the Ld. CIT(A) observed that the provisions of section 40(ba) impose an absolute embargo against deduction in respect of any payment made by the AOP of the nature enumerated to any partners of the AOP/UJV. Thus the Ld. CIT(A) held :

“In the present case, technical fees and commercial fees are payable to the partners as per agreement. The fees were supposed to be for various services rendered stated in the agreement. Remuneration as defined in any dictionary is payment for services rendered. Hence, the fees received by partners are nothing but remuneration. The section speaks of “any” payment of whatever name called. Hence nomenclature given by the appellant has no relevance to facts of the case. Further, the agreement of UJV cannot override provisions of section 40(ba). A perusal of duties assigned to get the fees shows that they are general in nature and basically speaks of divisions of work between two partners. The appellant could not provide any details to show that these fees are reimbursement of money paid by them. Hence, the fees paid by the UJV to partners attract the mischief of section 40(ba) of the IT. Act. The appellant has also referred to the order of TPO in case of payment to Hochtief. The order of TPO has no relevance to the issue here. The issue is whether they fall within the ambit of section 40(ba) of the IT Act or not. The issue is not whether they

are within arm's length or not. Even, if they are still, they cannot escape the mischief of section 40(ba) of the IT. Act. In view of this, the decision of Delhi ITAT cited by the appellant has no relevance to the facts of the case. In view of this, I hold that various fees paid to partners, they being nothing but remuneration, fall within the ambit of section 40(ba) of the IT. Act and are liable to be disallowed."

11. Before us, the Ld. counsel of the assessee submits the abovementioned payments were made to them not in the capacity as the members of the AOP but for separate and distinct services rendered by them in different capacities. Referring to page 16 and 17 of the Paper Book (P/B) it is stated by him that this is evident from the roles and responsibilities listed in detail therein. It is explained that the payments received by L&T and Hochtief were not in the capacity as the members of AOP but in various other capacities as technical leader, commercial leader, construction manager and commercial manager and therefore, the said payments are not covered within the ambit of section 40(ba) of the Act.

In this regard, reliance is placed by the Ld. counsel on the decisions of the Hon'ble Bombay High Court in *CIT v. Trade Wings* (241 ITR 198), *Hindustan Cocoa Products Ltd. v. CIT* (120 Taxman 457), *Pai Paper and Allied Industries Pvt. Ltd. v. CIT* (207 ITR 410), *Filmyug Pvt. Ltd. v. CIT* (261 ITR 263) and *Nav Ketan International Films Pvt. Ltd. v. CIT* (209 ITR 976).

It is also pointed out that the said payments were already offered to tax by the respective parties viz. L&T and Hochtief and the same has been

accepted by the Department by virtue of the provision of distinct independent services by the respective parties. Referring to the submission made before the CIT(A), it is stated that the amount offered by the respective parties were tabulated therein and therefore, again taxing the same in the hands of the assessee is not justified as it would amount to double taxation.

The Ld. counsel further submits that the payments made to Hochtief were a subject matter of reference to the Transfer Pricing Officer (TPO) and in the order passed u/s 92CA(3) dated 31.01.2006, the TPO has accepted that the payments made were at ALP and this proves that the payments made were for the specific services rendered and not as the Member of the AOP and the same was found to be at ALP.

Therefore, it is submitted by him that the disallowance made in respect of the abovementioned payments cannot be upheld and therefore, liable to be deleted.

12. On the other hand, the Ld. DR submits that the case laws relied on by the assessee are with respect to old and omitted section 40(c) of the Act and the said section was applicable in the case of a Company and its Director. It is further remarked by him that the submission of the assessee that section 40(c) and section 40(ba) are *pari materia* is misplaced because the very basis of omission of section 40(c) is that the legislature in its wisdom opined that the funds/assets/benefits/remuneration etc. of the company shall not be misutilized by the persons having substantial interest in the company. Thus

the Ld. DR concludes that the ratio laid down in various cases referred by the assessee cannot be applied to the present case as this is a case of an AOP and one cannot give monetary benefit to oneself.

13. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

At this moment we discuss the case-laws relied on by the Ld. counsel. In the case of *Trade Wings Ltd.* (supra) the assessee is a limited company. The AY is 1978-79. During the relevant previous year, the assessee-company paid guarantee commission of Rs.91,194/- to its managing director for giving personal guarantee to various banks and insurance companies for the loans advanced by them to the assessee-company. The ITO included the above amount in the remuneration paid to the managing director for the purpose of working out the ceiling u/s 40(c) of the Act. In appeal, the CIT(A) held that the guarantee commission paid the managing director could not be regarded as remuneration or perquisite within the meaning of section 40(c) of the Act for the purpose of the ceiling prescribed therein. In further appeal by the revenue, the Tribunal held that the guarantee commission paid to the managing director of the Company was outside the purview of section 40A(5) of the Act. In appeal by the revenue, the Hon'ble High Court held that:

“the guarantee commission paid to a Director for standing guarantee for the loans obtained by the assessee-company cannot be held to be remuneration or benefit or amenity to a Director qua-Director. It is paid for the personal guarantee furnished by him which he is under no obligation to furnish as a

Director or a Managing Director. The guarantee commission paid to the Managing Director is not a remuneration etc. to the Managing Director within the meaning of section 40(c) of the Act.”

In *Pai Paper & Allied Industries Pvt. Ltd.* (supra), the Hon’ble High Court held as under :

“10. We are of the clear opinion that the above decision of the Supreme Court is a clear answer to the controversy sought to be raised in regard to the scope and ambit of section 40(c) of the Act. It stands concluded now that only payments made to directors as directors (qua director) fall within section 40(c). Payments made in consideration of a valuable right parted with by the directors of the assessee-company in favour of the assessee-company are outside the scope of the said section.

11. Turning to the facts of the present case, it is pertinent to note that in the case before us, there is no controversy in regard to the factum of genuineness of the payment or the reasonableness thereof having regard to the legitimate business needs of the assessee. The only dispute is in regard to the scope and ambit of section 40(c), which as stated by us, stands concluded by the above decision of the Supreme Court. We, therefore, hold that the payments in question did not fall within section 40(c) of the Act. In that view of the matter, we answer the first question referred to us in the affirmative, i.e., in favour of the assessee and against the Revenue.”

In *Nav Ketan International Films Pvt. Ltd.* (supra), the assessee-company carried on the business of production of motion pictures. The assessee, in its account for the AY 1974-75 debited amounts of Rs.7,77,604/- and Rs.6,33,281/- totaling Rs.14,10,885/- against the cost of production of two motion pictures and claimed them as deduction in

determining the taxable income of the assessee on the basis of the profit/loss shown as per the books of accounts. The ITO, however, did not accept this deduction. He held that in view of the restrictions placed u/s 40(c)(i) of the Act, only a sum of Rs.72,000/- could be allowed as a deduction. He, therefore, disallowed the deduction of Rs.13,38,885/- in the computation of total income for the said assessment year. The Tribunal by its order held that the restrictions placed with regard to the admissibility of expenditure u/s 40(c)(i) apply to the payments made for the purchase of the annuity in question. In respect of the said order of the Tribunal, the following question was referred to the High Court u/s 256(1) of the Act :

“Whether on the facts and in the circumstances of the case, the provisions of section 40(c)(i) are applicable in respect of the liability of the assessee to make the payment of Rs.14,10,885/- to its Director?”

The Hon’ble High Court held that the payments which have been made by the assessee-company for the purchase of annuities in favour of Dev Anand, who also happens to be one of the Directors of the assessee-company, are not covered by section 40(c) and the restrictions placed under clause (A) of that sub-clause would not apply.

In *Hindustan Cocoa Products Ltd.*, (supra), the assessee paid an amount of Rs. 14,600 to each of its directors. The Assessing Officer disallowed the aforesaid amount under Section 40(c) of the Act on the ground that the two directors were in receipt of salary of Rs. 97,900 and in addition to the said salary each of the two directors received

commission payment of Rs. 14,600. The Assessing Officer disallowed the aforestated amount in view of the decision of the Tribunal in the case of *Sapt Textiles Products (India) Ltd.* Being aggrieved, the assessee went in appeal. The Commissioner of Income-tax (Appeals) took the view that the commission of Rs. 14,600 paid to the two directors was a part of remuneration. The Commissioner of Income-tax (Appeals) came to the conclusion that in view of the decision of the Tribunal in *Nav Ketan International Films Pvt. Ltd.* and in view of the decision of the Tribunal in the case of *Pai Paper and Allied Industries Pvt. Ltd.*, the commission of Rs. 14,600 paid to the directors constituted part of the remuneration and, accordingly, applied Section 40(c) of the Act. Being aggrieved by the decision of the first appellate authority, the matter was carried in appeal to the Tribunal which followed the decision in *Pai Paper and Allied Industries Pvt. Ltd.* and *Nav Ketan International Films Pvt. Ltd.* Accordingly, the Tribunal dismissed the appeal preferred by the assessee. Being aggrieved, the matter came to the High Court under Section 256(1) of the Income-tax Act. The Hon'ble High Court held:

“At the outset, it may be mentioned that the decision of the Tribunal in *Pai Paper and Allied industries Pvt. Ltd.* and *Nav Ketan International Films Pvt. Ltd.* came to be reversed by the judgments of the Bombay High Court in the case of *Pai Paper and Allied Industries Pvt. Ltd, v. CIT* [1994] 207 ITR 410 and in the case of *Nav Ketan International Films Pvt. Ltd. v. CIT* [1994] 209 ITR 976. In the aforestated two judgments, this court has ruled that Section 40(c) of the Income-tax Act would be attracted only to those cases where the director of a company is paid remuneration or where an expenditure is incurred to provide benefits or amenities to him in his position as a director. In *Nav Ketan*

International Films Pvt. Ltd. v. CIT [1994] 209 ITR 976 (Bom), the assessee carried on business of producing motion pictures. Mr. Dev Anand, the famous film actor, was a permanent director of a company. The assessee-company produced two motion pictures. In the said two pictures, Mr. Dev Anand was the writer, director and the leading man. He was paid remuneration of Rs. 50,000 which was payable in annuity instalments from 1974 up to 2003 for which the assessee-company undertook to purchase a single premium policy for Rs. 7.77 lakhs from the LIC. Similarly, for the second picture, the assessee paid Rs. 33 lakhs for purchase of the policy from the LIC. Thereafter, the assessee debited a total amount of Rs. 14 lakhs against the cost of production of the above two pictures. The Assessing Officer did not accept the deduction in view of Section 40(c). He, therefore, disallowed the deduction to the extent of Rs. 13 lakhs in the computation of the total income. It was held by the Bombay High Court that the payments which have been made by the assessee-company for the purchase of annuities in favour of Dev Anand who was one of the directors of the company was not covered by Section 40(c) because Section 40(c) applies only to cases where the director is paid remuneration or where any expenditure is incurred to provide benefits to him in his position as a director. Since the expenditure was incurred to provide him with benefits in his position as an actor and as a writer, Section 40(c) was held to be not applicable. The ratio of the judgment of this court in *Pai Paper and Allied Industries Pvt. Ltd.* [1994] 207 ITR 410, is also to the same effect. In view of the a fore stated two judgments of the Bombay High Court in the cases of *Pai Paper and Allied Industries Pvt. Ltd.* [1994] 207 ITR 410 and *Nav Ketan International Films Pvt. Ltd.* [1994] 209 ITR 976, there is no dispute regarding the legal position. However, in ihe present case, it is not clear from the decision of the Tribunal as to on what account the commission was paid. It is not clear as to whether the commission was paid to the director as part of his remuneration or whether it was paid for some other services rendered by him. It is not clear whether the

expenditure incurred by the assessee-company was to provide any benefit to the two directors as directors or whether the payment was made by the assessee-company for some other services rendered by the two directors. In this reference, we are concerned with the assessment year 1976-77. In the circumstances, we answer question No. 3 in the negative, i.e., in favour of the assessee and against the Department, on the footing that the decisions of the Tribunal in *Pai Paper and Allied Industries Pvt. Ltd.* and *Nav Ketan International Films Pvt. Ltd.* delivered earlier have been rightly overruled by the Bombay High Court in the aforesaid cases reported in *Pai Paper and Allied Industries Pvt. Ltd. v. CIT* [1994] 207 ITR 410 and *Nav Ketan International Films Pvt. Ltd. v. CIT* [1994] 209 ITR 976.”

In *Filmyug Pvt. Ltd.* (supra), the Hon’ble Bombay High Court held that the Tribunal was right in holding that for computing the disallowance u/s 40(c) of the Act, in respect of expenditure which resulted in remuneration, benefit or amenities to the managing director the sum of Rs.3,50,000/- paid in the accounting year relating to the assessment year 1979-80 and Rs.5,00,000/- paid in the accounting year relating to the assessment year 1981-82 for the professional work of directing motion pictures under productions should not be taken into account.

13.1 We find that the case-laws relied on by the Ld. counsel relate to Section 40(c) and it had application to assessments of companies and of no other taxable entity. It cast a duty, and conferred the power on the AO not to allow deduction in respect of excessive remuneration or benefit or amenity etc. This power could be exercised by the AO, in the matter of computation of taxable profits and gains of the company, notwithstanding the provisions of sections 30 to 37.

Section 40(c) has been amended by the Finance Act, 1984 w.e.f. 01.04.1985 i.e. for and from AY 1985-86. Under section 40(c) of the Act, expenditure incurred by a company on the provision of any remuneration or benefit or amenity to a Director or person who has a substantial interest in the company or to a relative of the director or of such person, and expenditure or allowance in respect of any assets of the company which are used by such person for his own purposes or benefit, is not allowable as a deduction in computing the taxable profits of the company, to the extent such expenditure or allowance is, in the opinion of the ITO, excessive or reasonable. The aggregate of such expenditure and allowance is further subject to an overall ceiling limit of Rs.72,000/- in a year, in respect of anyone director or person who has a substantial interest in the company or a relative of the director or of such person. Where such expenditure or allowance relates to only a part of a year, the monetary ceiling is the amount calculated @ Rs.6,000/- p.m. or part of a month comprised in the period to which the expenditure or allowance relates.

Having regard to the guidelines issued by the Company Law Board in regard to managerial remuneration, the Finance Act, 1984, has raised the aforesaid monetary limit u/s 40(c) of the Act as under :

- (i) the monthly ceiling limit of Rs.6,000/- has been raised to Rs.8,500/-;
- (ii) the overall ceiling limit in respect of the aggregate expenditure and allowance during the year has been raised from Rs.72,000/- to Rs.1,02,000/-.

Section 40(c) was omitted w.e.f. 01.04.1989.

13.2 Now we turn to Section 40(ba), inserted by the Direct Tax Laws (Amendment) Act, 1989, w.e.f. 01.04.1989, i.e. for and from AY 1989-90, and it provides that in computing the income chargeable under the head “Profits & Gains of business or profession”

– in the case of an association of persons or body of individuals (other than a company or a co-operative society or a society registered under the Societies Registration Act, 1860, or under any law corresponding to that Act in force in any part of India.

- any payment of interest, salary, bonus, commission or remuneration, by whatever name called, made by such association or body to a member of such association or body shall not be allowed as a deduction.

These provisions of Section 40(ba) are on the lines of those of section 40(b). Further, Explanation 1, 2, and 3 to Section 40(ba) are on the lines of Explanations 1, 2, and 3 of section 40(b).

We find that the clause (ba) of Section 40 provides that any payment of interest, salary, bonus, commission or remuneration by whatever name called, made by an association of persons or body of individuals to a member of such association or body shall not be allowed as a deduction while computing the total income of such association or body. These provisions are on the same lines as of clause (b), which disallows such payments made by a firm to its partners. Explanations 1 to 3 in the new clause (ba) deal with the treatment of interest paid by an

association or body to its members or *vice versa*. These Explanations are also exactly on the same lines as Explanations 1 to 3 in clause (b), which deal with the treatment of interest paid by a firm to its partners and *vice versa*. It may be noted that even before the insertion of this clause, such payments made by an association of persons or body of individuals to its members were not being allowed as a deduction in the hands of the association or body, as they were regarded as payments to self. This has now been given a statutory recognition.

Section 67A, which has sub-sections (1) to (3) and an Explanation, provides for the method of computing a member's share in the income of an association of persons or body of individuals wherein the shares of the member are determinate, in the same manner as provided for in Section 67 for computing a partner's share in the income of the firm.

13.3 To summarize : (i) Under section 40(c) of the Act, expenditure incurred by a company on the provision of any remuneration or benefit or amenity to a Director or person who has a substantial interest in the company or to a relative of the director or of such person, and expenditure or allowance in respect of any assets of the company which are used by such person for his own purposes or benefit, is not allowable as a deduction in computing the taxable profits of the company, to the extent such expenditure or allowance is, in the opinion of the ITO, excessive or reasonable, (ii) Clause (ba) of Section 40 provides that any payment of interest, salary, bonus, commission or remuneration by whatever name called, made by an association of persons or body of

individuals to a member of such association or body shall not be allowed as a deduction while computing the total income of such association or body, (iii) We find that the case-laws relied on by the Ld. counsel relate to Section 40(c) and not applicable at all to Section 40(ba) of the Act, (iv) Section 67A, which has sub-sections (1) to (3) and an *Explanation*, provides for the method of computing a member's share in the income of an association of persons or body of individuals wherein the shares of the members are determinate, in the same manner as provided for in section 67 for computing a partner's share in the income of the firm; therefore, there is no merit in the contentions of the assessee that again taxing the same in the hands of the assessee would amount to double taxation, (v) in order to compute the share of a member of AOP/BOI, in which the shares of the members are determinate and known, from the total income of AOP/BOI, any interest, salary, bonus, commission or remuneration by whatever name called, is to be deducted and the balance is to be apportioned among the members in proportions in which they are entitled to share in the income of the AOP/BOI, (vi) the order of the TPO in the case of payments made to Hochtief and the contentions that the payments made were at ALP has no relevance to the instant case because the issue herein is not whether they are within ALP or not ; the issue herein is whether the payments fall within the ambit of Section 40(ba) of the Act and (vii) the agreement between the parties cannot override the provisions of the Act.

It is well-settled that the cardinal rule of interpretation is that the statute must be construed according to its plain language and neither

should anything be added nor subtracted therefrom unless there are adequate grounds to justify the inference that the Legislature clearly so intended. It is also well-settled that in a taxing statute one has to look merely at what is clearly stated. The meaning and extent of the statute must be collected from the plain and unambiguous expression used therein.

Examined on the above factual scenario and position of law, we are of the considered view that provisions of Section 40(ba) are applicable to the present case. Thus we uphold the order of the Ld. CIT(A) on the above issue and dismiss the appeal in respect of the 2nd, 4th, 6th, 8th, 10th and 12th ground of appeal.

14. Next to deal with the 3rd, 5th, 7th, 9th, 11th and 13th ground of appeal together as they address another common theme :

The 3rd ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the AO of Rs.2,00,25,714/- being construction management fees paid to Hochtief, Germany upto 31-3-2002.

The 5th ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the AO of Rs.2,00,25,714/- being technical management fees paid to Hochtief, Germany upto 31-3-2002.

The 7th ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the AO of Rs.1,00,12,857/- being consortium leadership fees paid to M/s.Hochtief, Germany upto 31-3-2002

The 9th ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the AO of Rs.2,00,25,715/- being commercial management fees paid to M/s. Larsen & Toubro Ltd upto 31-3-2002.

The 11th ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the AO of Rs.9,01,15,715/- being H O expenses reimbursed to M/s. Larsen & Toubro Ltd. upto 31-3-2002.

The 13th ground of appeal

The Ld. CIT(A) was not justified in confirming the disallowance made by the AO of Rs.1,00,12,857/- being H O expenses reimbursed to M/s. Hochtief, Germany upto 31-3-2002.

15. In a nutshell, the facts are that the fees were for the period ending on 31.03.2002 i.e. the earlier year. The reasons given by the AO for disallowing the same is same as that for disallowance of fees for AY 2003-04 discussed hereinabove. The AO also held that the assessee follows percentage completion method and the earlier year's expenditure is to be considered in the year as the income is offered during the year. On this

reasoning, the AO disallowed the technical leadership fees, commercial leadership fees and construction management fees paid upto 31.03.2002.

16. In appeal before the Ld. CIT(A), the assessee contended that payments made in earlier years become part of the closing stock and is carried forward to this year as opening stock and hence the income incurred in earlier year cannot be considered for disallowance in the present year. However, the Ld. CIT(A) was not convinced with the above explanation of the assessee for the reason that the assessee follows percentage completion method and till AY 2002-03 i.e. the period ending on 31.03.2002, it did not disclose any income in respect of the project undertaken by the employer; the assessee's policy was to show income when the work completed exceeds 50% ; the present year is the first year in which the assessee offered income; since the assessee follows percentage completion method, the major factors determining the profit will be opening and closing WIP and hence if the opening WIP is exaggerated and not proper, the AO is within his rights to correct the same.

Further the Ld. CIT(A) observed that various fees paid to partners are not allowable expenditure in view of provision of section 40(b) of the Act and hence, if any such fees is part of opening WIP, the same is required to be reduced from WIP and added to the total income and such method will be applied while computing closing WIP as on 31.03.2003.

With the above reasons, the Ld. CIT(A) confirmed the disallowance made by the AO.

17. Before us, the Ld. counsel submits that similar payments as above were made to both L&T and Hochtief by the assessee herein even prior to the assessment year under consideration i.e. upto 31/03/2002. The said amounts were again disallowed by the Assessing Officer in the year under consideration and has been upheld by the CIT(A). It is not known as to how the disallowance could have been made in the year under consideration as no claim for the same has been made in the year under consideration. The payments were made prior to AY 2003-04 and the claim for the same formed part of work- in- progress for those years. In the year under consideration, they were a part of the opening WIP and the closing WIP and therefore, no claim on the same was made in the year under consideration. It is not known as to how a disallowance can be made when neither the expenditure was incurred in the year under consideration nor a claim was made on the same. The disallowance made is wholly without any basis. The issue, if at all, could have been raised in the AYs prior to the instant year under consideration or in the final year in which the contract was completed (AY 2006-07) and not in the year under consideration. Therefore, it is submitted the addition cannot be sustained and is liable to be deleted. In any event, the same is also covered by the arguments pertaining to grounds 2, 4, 6, 8, 10 and 12 and therefore, the disallowance cannot be sustained.

The Ld. counsel further relies on the case laws mentioned at para 11 hereinbefore.

18. On the other hand, the Ld. DR submits that AY 2003-04 is the first year when the assessee has offered income and since it follows percentage completion method, the major factor determining the profit will be opening and closing WIP. Thus it is argued by him that if the opening WIP is exaggerated and gives a distorted picture, the AO is within his right to correct the same.

19. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the instant case, the AO has relied on the following observations of the Special Auditor :

“UJV is paying to Hochtief Construction Management Fees from AY 2001-02. The total fees paid under this heading from the beginning of the project till 31.03.2002 is Rs.2,00,25,714/- which is over & above the fees of Rs.2,03,13,027/- paid for AY 2003-04. The total fees of Rs.4,03,38,741/- is claimed as deduction in AY 2003-04.”

“UJV is paying to Hochtief Technical Management Fees from AY 2001-02. The total fees paid under this heading from the beginning of the project till 31.03.2002 is Rs.2,00,25,714/- which is over & above the fees of Rs.2,03,13,027/- paid for AY 2003-04. The total fees of Rs.4,03,38,741/- is claimed as deduction in AY 2003-04.”

“UJV is paying to Hochtief Consortium Leadership Fees from AY 2001-02. The total fees paid under this heading from the beginning of the project till 31.03.2002 is Rs.1,00,12,857/- which is over & above the fees of Rs.1,01,56,514/- paid for AY 2003-04. The total fees of Rs.2,01,69,371/- is claimed as deduction in AY 2003-04.”

“UJV is paying to L&T Commercial Leadership Fees from AY 2001-02. The total fees paid under this heading from the beginning of the project till 31.03.2002 is Rs.2,00,25,715/- which is over & above the fees of Rs.2,03,13,027/- paid for AY 2003-04. The total fees of Rs.4,03,38,742/- is claimed as deduction in AY 2003-04.”

UJV has paid L&T by way of Head Office expenses from the AY 2001-02 till 31.03.2002 is Rs.9,01,15,715/- which is over & above the amount of Head Officer expenses of Rs.9,14,08,622/- paid for AY 2003-04. The total claim of Head Office expenses of UJV in respect of payments to L & T is Rs.18,15,24,337/-.

UJV has paid to Hochtief by way of Head Office expenses from the AY 2001-02 till 31.03.2002 is Rs.1,00,12,857/- which is over & above the amount of Head Officer expenses of Rs.1,01,56,514/- paid for AY 2003-04. The total claim of Head Office expenses of UJV in respect of payments to Hochtief is Rs.2,01,69,371/-.”

19.1 Before us, the Ld. counsel submits that the expenditure in the form of construction management fee upto 31st March, 2002 were incurred in the relevant years and carried forward as part of work-in-progress at the end of those years. The assessment of the appellant for those years have been completed and the results of those years have been accepted. Hence, the contention of the AO that the said fees are claimed in the year under appeal is not correct. The situation in this regard is similar to the claim for costs and expenditure relating to goods which remain in stock at the end of the year and get carried forward as part of closing stock which becomes the opening stock of the next year. In that situation, the costs incurred in the earlier year which form part of the opening stock cannot

be considered for disallowance in the year when the opening stock is disposed off. Since the management fees upto 31st March, 2002 have not been incurred and/ or claimed during the year under appeal, the same cannot be considered for disallowance during the year under appeal.

Similar arguments have been made in respect of the other grounds of appeal.

19.2 We are of the considered view that because of contrary claims on facts, the above issue needs to be re-examined. Therefore, we set aside the order of the Ld. CIT(A) on the above grounds of appeal and restore the matter to the file of the AO to make an order afresh as per the provisions of the Act, after examining the accounts and facts. We direct the assessee to file the relevant documents/evidence before the AO. Needless to say, the AO would give reasonable opportunity of being heard to the assessee before finalizing the order. In the result, the 3rd, 5th, 7th, 9th, 11th and 13th ground of appeal are allowed for statistical purposes.

20. The 14th ground of appeal

The Ld. CIT(A) was not justified in confirming the addition made by the AO of Rs.97,74,485/- on account of alleged undervaluation of closing stock of heavy tools, etc.

21. In the instant case, the special auditor pointed out that the UJV had a stock of Rs.97,74,485/- in respect of various items classified as heavy tools, small tools, consumable, construction materials etc. Though, these items have been debited to the P&L account, they did not find place any

closing stock. The auditor reported that these items have been used in subsequent years. Thus the auditor observed that the closing stock was undervalued to the extent of Rs.97,74,485/-. During the course of assessment proceedings, the assessee contended before the AO that it follows the policy of charging the cost of all consumables, small tools etc. which are specifically acquired for the purpose of project in the years of purchase and since these specific items cannot be used anywhere else, the entire amount is shown as cost of the project. However, the AO was not convinced with the above explanation of the assessee and observed that as the entire purchase is debited to the P&L account, the unused amount should be shown as closing stock. Thus the AO made an addition of Rs.94,74,485/-.

22. In appeal, the Ld. CIT(A) observed that all the tools, implements purchased by the assessee and not used in the project cannot be used to increase the cost of the project. Observing that the assessee did not provide any proof that tools worth Rs.97,74,485/- have become unusable and liable for write off, and also the finding of the special auditor that some of these tools were used in subsequent year, the Ld. CIT(A) confirmed the addition of Rs.97,74,485/- made by the AO.

23. Before us, the Ld. counsel for the assessee submits that the method of accounting regularly employed by the assessee cannot be disturbed and in this regard reliance is placed by him on the decision in *Tata Iron & Steel Co. Ltd.* (106 ITR 363), *Realest Builders & Services Ltd.* (307 ITR 202), *Bilahari Investments (P.) Ltd.* (299 ITR 1), *Excel Industries Ltd.* (358 ITR

295), *Snow White Food Products Co. Ltd.* (141 ITR 861), *Nagri Mills Co. Ltd.* (33 ITR 681), *Balapur Vibhag Jungle Kamdar Mandal Ltd.* (135 ITR 91), *Alfa Laval India Ltd.* (113 Taxman 740) and *India Motor Parts & Accessories (P.) Ltd.* (60 ITR 531).

24. On the other hand, the Ld. DR submits that these heavy tools, small tools, consumables have been used in subsequent years as reported by the special auditor in his report and therefore, the policy of the assessee-UJV to show them as cost of the project is factually incorrect. Thus it is argued by him that these stocks are not the dead stocks and carries value, therefore, these cannot be written off for the sake of following company's policy.

25. We have heard the rival submissions and perused the relevant materials on record. We discuss below the case-laws relied on by the Ld. counsel.

In *Alfa Laval India Ltd.*(supra), in A.Y. 1989-90 the assessee-company had written off an amount on account of obsolete items which were not moving for last three years . The assessee valued closing stock of obsolete items at 10 per cent of cost . The AO, however, holding that assessee failed to furnish list of obsolete items, added back certain amount by taking realisable value of obsolete items at 50 per cent of cost . The Tribunal also confirmed view taken by the AO. It was found from records that assessee had placed auditor's report before AO which justified valuation of obsolete items at 10 per cent of cost ; such obsolete items were, in fact, sold in subsequent year at a price less than 10 per cent

of cost , moreover, AO had also not doubted correctness of auditor's report regarding valuation of obsolete items . The Hon'ble High Court held that in view of circumstances, it could not be concluded that assessee failed to furnish list of obsolete items or had made valuation arbitrarily and, therefore, amount added back by AO was without any basis and was liable to be set aside.

In *Bilahari Investment (P.) Ltd.* (supra), it is held that every assessee is entitled to arrange its affairs and follow method of accounting, which department has earlier accepted, and it is only in those cases where department records a finding that method adopted by assessee results in distortion of profits, that it can insist on substitution of existing method.

In *Excel Industries Ltd* (supra), it is held that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year, therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect.

In *India Motor Parts and Accessories (P.) Ltd.* (supra), assessee-company took over spare part of cars of a foreign company which was giving up its Indian business . It found a part of its stock as obsolete and a part as slow-moving because of ban on import and assembly of these cars in India . Assessee, therefore, valued them notionally at lower value which was less than cost price . The AO made addition on ground that assessee, while applying for an overdraft, declared value of these spare parts at higher price and also insured those stocks for such higher value .Though AAC deleted addition Tribunal held that slow moving parts were later sold on profit . The issue was whether cause for obsolescence or inactivity

of said spare parts besides being ban on import and assembly of those cars, there was a market for spares, and as such it was difficult to postulate that value put by assessee on this stock was arbitrary or that it could be regarded as an under-valuation . The Hon'ble High Court held that the mere fact that occasionally a solitary item was sold for a price higher than cost price would not detract from nature of system of accounting adopted year after year ; mere because different method of valuation of stocks was adopted for obtaining overdraft facility, would not justify rejection of method followed by assessee for ascertainment of his income under the Act.

In *Nagri Mills Co. Ltd.* (supra), it is held that the question as to the year in which a deduction is allowable may be material when the rate of tax chargeable on the assessee in two different years is different; but in the case of income of a company, tax is attracted at a uniform rate, and whether the deduction in respect of bonus was granted in the assessment year 1952-53 or in the assessment year corresponding to the accounting year 1952, that is in the assessment year 1953-54, should be a matter of no consequence to the Department; and one should have thought that the Department would not fritter away its energies in fighting matters of this kind.

In *Realest Builders & Services Ltd.* (supra), it is held that in cases where department wants to tax an assessee on ground of liability arising in a particular year, it should always ascertain method of accounting followed by assessee in past and whether change in method of accounting was warranted on ground that profits are being underestimated under

impugned method of accounting and if Assessing Officer comes to conclusion that there is underestimation of profits, he must give facts and figures in that regard .

In *Shri Balapur Vibhag Jungle* (supra), assessee-corporative society took forests on contract from government for exploitation. Cutting work to be finished and material to be removed to government approved sale depot by 15-3-1969. Eighty per cent share of sale proceeds, calculated on net realisation, was payable to government. Part of timber remained unsold at the close of accounting period. Closing stock valued by assessee at market rate and government's share estimated and shown in profit and loss account at Rs. 7,47,183 and provisional profit worked out, said timber subsequently sold at higher price and actual amount paid to government was Rs. 10,21,849. It is held that before finalization of assessment said amount actually paid could be substituted for Rs. 7,47,183 and, thereby, assessee's net profit could be reduced by additional share paid to government.

In *Snow White Food Products Co. Ltd.* (supra), assessee was following mercantile system of accounting . For relevant assessment year it claimed that its interest income should be assessed on cash basis. Assessee conceded that there was no resolution by board of directors or its shareholders supporting change except for a statement in annual report that management had decided to account for same on cash basis; said statement indicated that change was suggested only for relevant year and there was nothing else on record to indicate that change was intended to be followed regularly in future by assessee. It is held that it

was not duty of revenue to probe further into matter and establish regularity of change; assessee could not be allowed to adduce further evidence at reference stage to enable it to prove regularity of change and therefore, Tribunal was justified in holding that assessee was not entitled to change its method of accounting in respect of its interest income .

In *Tata Iron & Steel Co. Ltd.*(supra), the method of accounting regularly followed by assessee company was to claim obsolescence allowance in respect of discarded plants under section 10(2)(vii) of 1922 Act, retaining, however, in book, 1 per cent of value of such discarded plants which was adjusted when discarded plants were actually sold and any profit on such sale over and above it was brought to account . Over a period of years debit raised in respect of 1 per cent value of discarded plants got accumulated and could not be directly connected with sales thereof made from time to time . Assessee made claim for deduction of certain amount as representing value of discarded plant which had been retained in books, but which on physical verification was found to be non-existent . Tribunal held that method adopted by assessee could not be said to be unreasonable even if better method could be visualized and allowed assessee's claim under section 10(1) of 1922 Act . The Hon'ble High Court held that the Tribunal was justified in allowing said deduction.

25.1 We find that in the instant case, the assessee has charged the cost of all consumables, small tools etc. purchased during the year to the cost of the project. This method has been consistently followed by the assessee.

We also find that the assessee has been consistently following the method of accounting of charging the cost of consumables to the cost of the project in the year of purchase as the same cannot be used or applied to any other business nor for any other purpose. Therefore, the contentions of the AO that the same should have been part of the closing stock is not correct. As the assessee has adopted this method of accounting consistently, by following the ratio laid down in the cases discussed at length at para 25 above, we delete the addition of Rs.97,74,485/- made by the AO. Thus the 14th ground of appeal is allowed.

26. The 15th ground of appeal

The Ld. CIT(A) was not justified in confirming the addition made by the AO of Rs.2,05,47,323/- on account of alleged undervaluation of closing stock of spares.

27. The assessee has valued the closing stock of spares at Rs.1,58,25,052/-. The special auditor reported that the actual cost of these spares are Rs.3,63,66,376/-. Thus it is observed by him that the reduction in valuation of these spares done by UJV is arbitrary. Further, the special auditor observed that the UJV was unable to provide any documentary evidence to prove that these spares were unserviceable or unsalable or are in the nature of scrap. Further, it is reported by him that these spares were consumed in later years. Thus the undervaluation was to the extent of Rs.2,05,47,323/-.

During the course of assessment proceedings, the assessee argued before the AO that once the spares are purchased, they lose substantial

value as there cannot be any resale value of the spares in the market and hence they were valued at a lower amount taking into consideration the age of the spares. The assessee also contended before the AO that the valuation was done on the basis of its vast experience in this field.

However, the AO was not convinced with the above explanation of the assessee and made an addition of Rs.2,05,47,323/-.

28. In appeal, the Ld. CIT(A) observed that the contention of the assessee before him was same as before the AO. Further observing that the explanation of the assessee is general in nature, not backed by evidence and having no scientific basis nor based on any accounting standard, the Ld. CIT(A) confirmed the addition of Rs.2,05,47,323/- made by the AO.

29. Before us, the Ld. counsel for the assessee relies on the case laws as mentioned at para 23 hereinabove.

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

30. We have heard the rival submissions and perused the relevant materials on record. We find that in respect of stock of spares lying with the assessee, it valued the stock which were about one to two years old at 50% and the stock which were more than two years old at 5%. This method has been consistently followed by the assessee. We further find that the assessee has been consistently following the method of accounting of valuing the stock of spares at cost or net realizable value

whichever is lower. Stocks which are more than one year old would not fetch the same value as its original cost. This method of accounting is also recognized by AS-2 (valuation of inventories).

Considering the above and following the ratio laid down in cases narrated at para 25 above, we delete the addition of Rs.2,05,47,323/- made by the AO. Thus the 15th ground of appeal is allowed.

31. The 16th ground of appeal

The Ld. CIT(A) was not justified in confirming the addition made by the AO of Rs.96,00,953/- on account of temporary structures. Without prejudice, even the quantification of the depreciation allowed is incorrect.

32. The assessee has debited Rs.3,59,43,793/- to the P&L account being value of temporary structure for AYs 2000-01 to 2003-04. These structures include structures constructed for various purposes. The assessee took the value of these structures at Rs.2,63,42,840/- in its closing stock. In respect of these structures, the special auditor observed that they are in use since 1999 and hence cannot be categorized as temporary structures. It is further observed by the special auditors that the cost of temporary structures cannot be treated as cost of the projects and the UJV is entitled to claim depreciation only. Before the AO the assessee submitted that these structures are constructed or acquired for limited use on the project only and these structures are at the work site and have to be demolished after completion of the project and hence and the entire cost of these structures should be charged to the cost of the project only. Further, it was explained to the AO that purely temporary

erections such as wooden structures are subject to 100% depreciation as these are in the nature of providing site facilities like office sheds, toilet facility, canteen structure etc. However, the AO was not convinced with the above explanation of the assessee for the reason that those were in use for more than 5 years and therefore cannot be treated as purely temporary structures and hence not eligible for 100% depreciation. Therefore, the AO disallowed Rs.96,00,953/- being the difference of opening and closing value of these structures.

33. In appeal, the Ld. CIT(A) observed that these structures were in use for more than 5 years and just because they will be demolished or dismantled, after the project is over will not entitle the assessee to claim the entire cost of structure as revenue expenditure. Regarding the claim of 100% depreciation on temporary structures, the Ld. CIT(A) held that the depreciation schedule speaks of purely temporary structure like wooden structures and hence 100% depreciation on them is not allowable. However, he held that since the AO has himself treated the structure as non-temporary, he should have allowed appropriate depreciation on it. Holding that the assessee is eligible for depreciation @ 10% of cost of structures, he directed the AO to allow depreciation of Rs.35,94,380/-.

34. Before us, the Ld. counsel for the assessee submits that the nature of structure is purely temporary in nature and there is no enduring benefit obtained by the assessee for the same to be treated as capital in nature. It is argued that by no stretch of imagination can temporary

structures like sheds of office, canteen etc. be treated as permanent in nature and the expenditure as capital in nature. Further, the site on which the project was carried out does not belong to the assessee and the same is to be handed over after completion of the project. Finally it is explained that there is no asset of enduring benefit which is obtained by the assessee and therefore, the same is to be treated as revenue expenditure.

35. On the other hand, the Ld. DR submits that vide para no. 11.2 in his order dated 29.02.2008, the Ld. CIT(A) has given elaborate finding and the same may be confirmed.

36. We have heard the rival submissions and perused the relevant materials on record. In the instant case, the assessee has erected temporary structures and these structures were constructed for the limited purpose of project and were constructed at the site of work which were to be demolished on the completion of the project. These were purely temporary erections such as wooden structures and are to be used for providing site facilities like office sheds, wash and toilet facilities, canteen structures etc.

We are of the considered view that as these structures were temporary in nature, the assessee has rightly charged them to the cost of the project and claimed as deduction. Therefore, we delete the addition of Rs.96,00,953/- and allow the 16th ground of appeal.

37. The assessee has not pressed the 17th ground of appeal and also ground No. II & III.

The 18th ground of appeal regarding levy of interest u/s 234B is consequential.

38. It is relevant to mention here that for AY 2004-05, the 1st ground of appeal is same as the 1st ground for AY 2003-04; the 2nd, 3rd, 4th, 5th, 6th and 7th ground for AY 2004-05 are same as the 2nd, 4th, 6th, 8th, 10th and 12th in AY 2003-04; the 8th ground for AY 2004-05 is same as the 16th ground of appeal for AY 2003-04.

Facts being identical, arguments being same, our decision for AY 2003-04 applies *mutatis mutandis* to AY 2004-05.

39. In the result, the appeals filed by the assessee are partly allowed.

Order pronounced in the open Court on 30/09/2019.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 30/09/2019

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai