IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER & SHRI AMARJIT SINGH, ACCOUNTANT MEMBER)

ITA. Nos: 3144, 3145 & 3146/AHD/2016
(Assessment Years: 2010-11, 2012-13 & 2013-14)

Dholu Construction & Prodjects Ltd. 401, GalaArgos, B/h, Harikrupa Tower, Gujarat College Road, Ellisbridge, Ahmedbad-380006	**V/S**	**DCIT, Circle-1(1)(2), Ahmedabad**
(Appellant)		**(Respondent)**

ITA. Nos: 566 & 874/AHD/2017
(Assessment Year: 2011-12)

Dholu Construction & Prodjects Ltd. 401, GalaArgos, B/h, Harikrupa Tower, Gujarat College Road, Ellisbridge, Ahmedbad-380006	**V/S**	**ACIT(OSD), Range-1, Ahmedabad**
DCIT, Circle-1(1)(2), Ahmedabad	V/S	**Dholu Construction & Prodjects Ltd. 401, GalaArgos, B/h, Harikrupa Tower, Gujarat College Road, Ellisbridge, Ahmedbad-380006**
(Appellant)		**(Respondent)**

PAN: AABCD5760E

Appellant by	**: Shri Bandish Soparkar, AR**
Respondent by	**: Shri Mudit Nagpal, Sr. D.R.**

(आदेश)/ORDER

Date of hearing : 31 -07-2019
Date of Pronouncement : 26 -09-2019

PER MAHAVIR PRASAD, JUDICIAL MEMBER

1. These four appeals filed by the Assessee for A.Ys. 2010-11, 2011-12, 2012-13 & 2013-14 and one appeal filed by the Revenue for A.Y. 2011-12 are directed against the order of the Ld. CIT(A). In ITA No. 3144/Ahd/2016, assessee has passed solely ground that no notice u/s. 143(2) was issued to the assessee. The assessee has taken several grounds but pressed only one ground i.e. with regard to that ld. CIT(A) erred in law and on facts in dismissing the grounds. The challenging the validity of re-assessment order made by A.O. without there being "reason to believe" as required by the provision of Section 147 of the Act. Ld. CIT(A) ought to have quashed order being invalid bad in law.

2. Facts of the case are in this matter, proceedings were re-opened u/s. 147 of the Act and notice u/s. 148 of the Act was issued on 02.06.2014 which was served upon the assessee. However, assessee did not file return of income in response to the notice u/s. 148 of the Income Tax Act. The assessee vide letter dated 20.08.2014 submitted that the return of income filed on 30.09.2011 declaring income of Rs. 25975061/- may be treated as return of income filed in response to notice u/s. 148 of the Income Tax Act. And also sought for reason recorded

for re-opening of the assessment. The reason recorded for reopening of assessment was provided to the assessee vide letter dated 03.06.2015. Thereafter notice u/s. 142(1) of the Act was issued and duly served upon the assessee. The assessee did not comply with the notice issued. The assessee filed objection against the re-opening of assessment proceedings vide its letter dated 18.06.2015. Before the lower authorities, assessee took plea that no notice u/s. 143(2) was issued within time.

3. In order to ascertain the facts of the case, we summoned original re-assessment record from the office of the Assessing Officer and checked and verified and found that no mandatory notice u/s. 143(2) was served upon the assessee.

4. The Hon'ble Jurisdictional High Court has held in the matter of CIT vs. Sukhini P. Modi (2014) 52 taxmann.com 15 (Guj.) wherein it is held that "where procedure prescribed of issuance of notice u/s. 143(2) had not been followed at all, assumption of jurisdiction of issuance of notice of re-opening itself would not sustainable and matter was decided in favour of the assessee.".

5. Since no notice was served upon the assessee u/s. 143(2) and in the absence of same reassessment would not survive.

6. In the result, appeal filed by the Assessee is allowed and for rest of the ground, we do not want to go into the merit of the case, since we have allowed the appeal of the Assessee on technical ground.

7. Now we come to ITA No. 3145/Ahd/2016. The assessee has taken following grounds of appeal:

1 Ld. CIT (A) erred in law and on facts in confirming disallowance of Rs. 3,21, 238/- made by AO allocating common expenses to wind mill project to restrict deduction claimed u/s 801A(4) of the Act. Ld. CIT (A) ought to have deleted disallowance of expenses having absolutely no concern with the wind mill project than following appellate order of A Y 2009/10.

2 Ld. CIT (A) further erred in law and on facts in confirming disallowance of Rs. 8, 661/- depreciation made by AO from deduction u/s 801A of the Act. Ld. CIT (A) ought to have deleted disallowance of depreciation already reduced and deducted by the appellant.

3 Ld. CIT (A) erred in law and on facts in confirming disallowance made by AO of Rs. 33, 375/- employees' contribution to PF u/s 2(24)(x) of the Act. Ld. CIT (A) ought to have deleted disallowance of contribution to PF for the month of March which was paid before the due date of filing of return.

4 Ld. CIT (A) erred in law and on facts confirming action of AO restricting depreciation on hire of heavy goods vehicles from 30% to 15% on the ground of not used for transportation of passengers or goods. Ld. CIT (A) ought to have deleted disallowance of depreciation correctly claimed under clause - III(3)(ii) of New Appendix I of Income Tax Rules.

5 Ld. CIT (A) erred in law and on facts confirming action of AO restricting depreciation from 50% to 15% on commercial vehicles. Ld. CIT (A) ought to have deleted disallowance when depreciation at 50% is allowable on commercial vehicles as defined in the Act and vehicles are registered as under RTO as heavy goods vehicle and commercial vehicles.

6 Without prejudice to the above contentions Id. CIT (A) failed to appreciate that depreciation is allowable on block of assets and is allowed on block which is brought forward at the rate of 30% allowed in the past by the appellant. Ld. CIT (A) ought to have allowed at the rate claimed.

7 Levy of interest u/s 234A/B/C & D of the Act is unjustified.

8 Initiation of penalty proceedings u/s 271 (l)(c) of the Act is unjustified.

8. The assessee is engaged in the business of mining services. During the year under consideration, following disallowances were made by the A.O.:

9. Against the said order, assessee preferred first statutory appeal before the ld. CIT(A) who partly allowed the appeal of the assessee.

10. Now assessee has come before us against the order of the ld. CIT(A). So far ground no. 1 is concerned regarding confirming of disallowance of Rs. 321238/- allocating common expenses to wind project to restrict deduction claimed u/s. 80IA(4) of the Act. Ld. CIT(A) followed 2009-10 and ITAT in ITA No. 551/Ahd/2014 on similar disallowance, ITAT granted relief to the assessee in assessee's own case for assessment years 2009-10 & 2010-11 at relevant para of the order is reproduced:

> *8. We now advert to assessee's latter substantive ground challenging adhoc allocation of expenses between windmill and mining business resulting in disallowance of Rs.47,17,803/-. There is no dispute that this assessee has installed a windmill units in Tirunalveli (Tamilnadu) for generating wind power. Its income derived therefrom is admittedly entitled for Section 80IA deduction. The relevant figure pertaining to this deduction in the impugned assessment year reads a figure of Rs.59.76lacs. The Assessing Officer sought to allocate its expenses between the two businesses. These expenses are in the nature of audit fee, bank commission, books, internet, stationary and printing, travelling, professional fee, telephone expenses, Director's remuneration, depreciation and interest etc. The Assessing Officer went by prorate figures of the two businesses turnover to allocate its above direct/indirect expenditure resulting in addition of Rs.47.70lacs in question to be pertaining to the wind power business hereiabove.*
>
> *9. The CIT(A) upholds Assessing Officer's findings as under:*
>
> > *4.2. In the assessment order A.O. observed that appellant had claimed deduction u/s.80IA on the income from the wind mill. As seen from the profit & loss account the profit from the activity was only Rs.24,04,044/-; whereas as per Form 10CCB the deduction claimed was Rs,59,76,775/-; as per Section 80IA the profits and gains derived were to be computed as if the eligible business was only source of income of the assessee during the year; therefore the, depreciation and proportionate interest and common administration expenses were to be reduced from the income; appellant had reduced only AMC charges of Rs.12,30,966/- while computing the deduction; however, the depreciation as per I.T. Act, interest and common*

expenses were not deducted; the expenses narrated at para-4.4 of the assessment order were common expenses not attributable fully to any particular activity of the assessee; the turnover of the appellant from mining contracts was Rs.4283.10 lacs and the turnover of the wind mill was Rs.72.08 lacs accordingly 1.655% of the common expenses of Rs.78,28,687/- which worked out to Rs. 1,29,565/- was being allocated to the wind mill; similarly appellant had paid interest of Rs.1,07,53,349/- on the amounts borrowed for the wind mills and for other business activities; since the appellant failed to give necessary particulars, the loan taken for the wind mill was taken at Rs.5 crores (out of the total secured loans of Rs.15,31,33,038/- as on 31.03.2009); accordingly, 32.6% of the interest paid which worked out to Rs.35,05,591/- was being allocated to the wind mill activity and A the sum of Rs.47,17,803/- being depreciation (Rs.10,82,646/-), common expenses (Rs.1,29,565/-) and interest expenditure (Rs.35,05,591/-) was being reduced from the deduction claimed u/s.80IA.

4.3. The contentions of the ld. A.R. are that the secured loans were availed towards purchase of plant and machinery not pertaining to the activity of the wind mills and therefore no proportionate allocation of the interest expenses was called for; as regards the common expenses the bank commission, books and travelling could not be treated as common since they had no nexus with the wind mill project and therefore reduction of proportionate interest and common expenses was not warranted.

4.4. I have considered the facts of the matter. As seen from the written submission reproduced above, appellant had not contested the reduction of depreciation of Rs. 10,82,646/- while computing the deduction claimed u/s.80IA. Further as seen from appellant's reply reproduced at para-4.3 of the assessment order, appellant stated that the depreciation as per the I.T. Act may be reduced. Therefore, disallowance of the said sum is upheld. Out of the reduction of common expenditure, in the written submission proportionate reduction of only the bank commission (Rs.1,81,210/-), books (Rs. 12,630/-) and travelling (Rs.7,63,676/-) out of the total common expenditure enumerated by the A.O. at para.4.4 of the assessment order of Rs.78,28,687/- was contested. Even these items were summarily stated not to have had any nexus with the wind mill projects. No evidence in support of this contention was furnished. Therefore, the reduction of proportionate common expenditure of Rs. 1,29,565/- while

computing the deduction u/s.80IA is upheld. Coming to the proportionate allocation of the interest expenses, it is seen that the A.O. had assumed the loan taken for wind mill to be at Rs.5 crores (by observing at para 4.6 of the assessment order that 'The loan relating to WEG as on 31.03.2011 is taken at Rs.5.00 crore as the assessee has not given any details, then the percentage of WEG loan works out to 32.6%). The contention of the ld. A.R. is that as may be seen from the invoices, bank advice etc. furnished to the A.O. none of the secured loans was utilized for purchase of plant and machinery pertaining to the wind mills. A.O. is directed to verify the contention and modify the disallowance of proportionate interest expenditure accordingly.

4.5. To sum-up, disallowance of Rs.10,82,646/- and Rs.1,29,565/- are upheld. Disallowance of Rs.35,05,591/- is directed to be re-worked after verification. These grounds of appeal are treated as; partly allowed.

10. We have heard rival submissions. Shri Soparkar states at the outset that the assessee in any case is not raising the issues of interest and depreciation (supra). We proceed in this backdrop to notice that the assessee has been maintaining separate books of its two businesses throughout as duly audited as per this statutory provisions. It has further entered into annual maintenance contract with the windmill installment companies so far as its former business is concerned. There is no evidence in the case file indicating that the assessee has either way diverted expenditure of one business towards the other one i.e. from windmill to mining and vice versa. The Assessing Officer rather appears to have adopted prorate turnover figures to arrive at the impugned allocation. We notice that such a course of action already stands reversed by various tribunal's decisions. For instance, [2012] 23 taxmann.com 301 (Jodhpur-tribunal) ACIT vs. P I Industries deleting similar allocation / apportionment of expenses made by the Assessing Officer in case of an entity having two businesses and one of them eligible for Section 80IA deduction. We adopt the same reasoning herein as well to reverse the impugned allocation in absence of any specific material. The impugned disallowance/addition of Rs.47,70,803/- is partly deleted. It is made clear that we have not dealt with the two issues of depreciation and interest expenditure (supra). Assessee's former appeal ITA No.551/Ahd/2014 is partly accepted.

11. In parity with the above said ITAT order, we allow this ground of appeal of the assessee.

12. Now we come to next ground relating to confirming disallowance of depreciation of Rs. 8,661/- on account of smallness of amount, assessee does not wish to press the same. Thus, the same is dismissed as not pressed.

13. Now we come to next ground relating to confirming disallowance of Rs. 33,375/- u/s. 2(24)(x) of the Act.

14. On perusal of Clause 16(b) of the 3CD Report read with Annexure-III thereto it is seen that the following payments of Employees Contribution for Provident fund has been paid beyond the due date prescribed under the relevant Act. An amount of Rs. 33,375/- paid towards Provident Fund from the Employees Contribution on 30.04.2014 wherein due date was 15.04.2014. In view of the GSRTC 366 ITR 170 (supra) wherein it is held as under:

> *"Section 438, read with section 36(1)(va) of the Income-tax Act, 1961 - Business disallowance - Certain deductions to be allowed on actual payment (Employees contribution) - Whether where an employer has not credited sum received by it as employees' contribution to employees' account in relevant fund on or before due date as prescribed in Explanation to section 36(1)(va), assesses shall not be entitled to deduction of such amount though he deposits same before due date prescribed under section 43B i.e., prior to filing of return under section 139(1) -Held, yes - Assessee State transport corporation collected a sum being provident fund contribution from its employees - However, it had deposited lesser sum in provident fund account - Assessing Officer disallowed same under section 43B -However, Commissioner (Appeals) deleted disallowance on ground that employees contribution was deposited before filing return - Whether since assesses had not deposited said contribution in respective fund account on date as prescribed in Explanation to section 36(1)(va),*

disallowance made by Assessing Officer was just and proper - Held, yes [Para 8] [In favour of revenue]

15. In view of the above said Jurisdictional High Court, this ground of appeal is dismissed.

16. Now we come to ground relating to restricting depreciation on hire of heavy goods vehicles from 30% to 15%.

17. On verification of the depreciation chart, it is noticed that the assessee has claimed deprecation of Rs. 28,05,595/- at 50% on loader vehicles as against allowable depreciation at 15%. As such, vide Point No. 1 of notice u/s, 142(1) dated 03/02/2015, the assessee was requested to justify its claim of depreciation at 50% on loader vehicles. In response thereto, the assessee vide letter dated 16/02/2015 stated that the heavy goods vehicle owned by us are used on hire a/id, as such the depreciation at 50% is allowable. In support of the same, the assessee furnished copy of New Appendix-l in item No. 3(via) of machinery and plant. The submission made by the assessee has been gone through carefully but the same is found to be not acceptable. The 50% depreciation is allowable as per New Appendix-l in item No. 3(via) new commercial vehicle which is acquired on or after the 1st day of January, 2009 but before the 1st day of ^[October], 2009 and is put to use before the 1st day of ^[October], 2009 for the purposes of business or profession [See paragraph 6 of the Notes below this Table]. A careful perusal of the above, it can be seen that the condition for 50% depreciation is only that the assets should be covered in the note-6 of table defines "Commercial vehicle" means "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle" and "medium passenger motor vehicle" but does not

include "maxi-cab", "motor-cab", "tractor" and "road-roller". The expressions "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle", "medium passenger motor vehicle", "maxi-cab", "motor-cab", "tractor" and "road-roller" shall have the meanings respectively assigned to them in section 2 of the Motor Vehicles Act, 1988 (59 of 1988).

18. As per Wikipedia dictionary, a loader vehicle means a backhoe loader, also called a loader backhoe, digger in layman's terms, or colloquially shortened to backhoe within the industry, is a heavy equipment vehicle that consists of a tractor like unit fitted with a shovel/bucket on the front and a small backhoe on the back. The assessee claimed of depreciation at 50% on loader vehicle does not cover any of the vehicles defined in Note-6 of New Appendix-1 of I. T. Rules. In view of the above, the assessee's claim for depreciation at 50% on loader vehicle is restricted to 15% and excess claim of depreciation of Rs. 8,41,678/- on loader vehicle is disallowed and added to the total income.

19. We have heard both the parties and gone through the material available on record. And in support of its contention, ld. A.R. cited an order of Jurisdictional High Court in the matter of Pr. CIT vs. Durga Construction Co. [2018] 93 taxmann.com 436 (Guj.) wherein in similar circumstances, claim of the assessee was allowed and relevant para is reproduced:

> *5. The assessee has been awarded contract for providing equipments on hire with manpower to execute the work of excavation, loading and removal of minerals from one place to another. The entire operation is scheduled and controlled by the principal. The assessee is required to provide stipulated equipments and vehicles on hire. The assessee would not be allowed to remove any equipments or vehicles provided under the contract without prior permission of the principal. The business of the assessee-firm itself was providing equipments and motor vehicles on hire.*

6. CIT [A] accepted the assessee's contention and reversed the decision of Assessing Officer, relying on the earlier decision. The Appellate Commissioner has also relied on CBDT Circular No. 652 which provides that under sub-item 2[ii] of Item III of Appendix I to the Rules, higher rate of depreciation would be admissible on motor buses, motor lorries and motor taxis used in the business of running them on hire. It was clarified that higher depreciation will also be admissible on motor lorries used in the assessee's business of transportation of goods on hire.

7. The revenue carried the matter in appeal before the Tribunal. The Tribunal confirmed the view of the CIT [A] taking note of the scope of work awarded to the assessee under the tender terms as also placing reliance on the CBDT Circular No. 652 dated 14th June 1993.

8. Against such judgment, the Revenue has filed the present appeal.

9. Facts in all other appeals are substantially similar and are therefore not separately recorded.

10. Section 32 [1] of the Income-tax Act, 1961 ["the Act" for brevity] provides for depreciation in respect of buildings, machinery, plant or furniture, being tangible assets as well as certain intangible assets owned wholly or partly by the assessee and used for the purpose of the business or profession, at the prescribed rates. New Appendix I, which is applicable for AY 2006-2007 and onwards, in Part-A contends specific rate of depreciation for "tangible assets". Capital-Ill thereof pertains to "machinery and plant". Under sub-item [2] of Item [3] (iii), the rate of depreciation on "motor buses, motor lorries and motor taxis used in the business of running them on hire" is prescribed @ 30%. It is in this context, we have to test the correctness of the view taken by CIT [A] and the Tribunal. Revenue's main contention appears to be that the assessee had not given the said machinery on hire since the assessee was awarded the contract for mining. However, we have noticed some of the leading terms of the tender. These terms inter alia required the assessee to provide machinery for hire for excavation of overburden; transportation of such excavated overburden minerals; transportation of minerals from mines to pit-head, stock piles or at any other place, and the transportation of overburden of minerals and excavated minerals to be done by running motor vehicles such as tippers, dumpers, etc. Essentially, therefore, the assessee was awarded contract for providing such equipments on hire. It was in this context, the assessee has highlighted that the assessee has no control over the equipments so hired and it was the principal which would decide to deploy the equipments at the appropriate place.

11. From the material available on record though the assessee essentially was awarded contract for providing specialized equipments and trained manpower for mining and transportation of excavated minerals on hire, the terms of the tender and the eventual contract awarded would suggest that the assessee was given the work of mining. The assessee was essentially required to provide equipments and manpower on hire. In view of such discussion, we find no error in the view taken by the Tribunal. Even if the assessee had used such equipments and manpower for its direct mining operations for the contract, if it was so awarded, we wonder whether that would make any difference particularly in view of CBDT Circulars No. 609 and 652 and the decision of the Supreme Court in case of I.C.D.S. Ltd. v. CIT [2013] 350 ITR 527/212 Taxman 550/29 taxmann.com 129. However, when this issue does not arise for direct consideration, we need not conclude the same.

12. All in all, we see no error in the view taken by the Tribunal. No question of law arises. Tax Appeals are dismissed.

20. Respectfully following the aforesaid Jurisdictional High Court order, we allow the claim of the depreciation on commercial vehicle retained by the assessee to 15% to 50%. Therefore, we allow this ground of appeal.

21. Now we come to next ground relating that ld. CIT(A) erred in appreciating depreciation is allowable on block of assets and is allowed on block which is brought forward in the past.

22. Since in above said ground, we have granted relief to the assessee, therefore, this ground has become infructuous and same is dismissed as infructuous.

23. In the result, appeal filed by the Assessee is partly allowed in the terms mentioned therein.

24. Now we come to ITA No. 566/Ahd/2017 for A.Y. 2011-12. The assessee has taken following grounds of appeal:

1 Ld. CIT (A) erred in law and on facts in confirming allocation of common expenses totally unconnected in the nature of bank commission, interest, stationary/ printing, traveling, professional fees & oil / lubricant expenses to wind mill project thereby restricting deduction u/s 80IA(4) of the Act.

2 Ld. CIT (A) erred in law and on facts in directing AO to verify the claim that depreciation of Rs. 43, 350/- is already reduced in the calculation in form no. 10CCB placed on record.

3 Ld. CIT (A) erred in law and on facts in confirming disallowance made by AO of Rs. 97, 175/- employees' contribution to PF u/s 2(24)(x) of the Act.

4 Ld. CIT (A) erred in law and on facts confirming disallowance of business loss of Rs. 27, 70, 229/- suffered due to write off of performance securities given in furtherance of business contract and not as loan or advances.

5 Ld. CIT (A) erred in law and on facts confirming restriction of depreciation on heavy goods vehicle from 30% to 15% in absence of income on hiring of vehicles & also for not falling in the category of commercial vehicles.

6 Ld. CIT (A) erred in law and on facts confirming action of AO restricting depreciation to 15% on Mercedez Benz Tractor though a heavy goods vehicle duly registered as such with RTO.

7 Without prejudice to the above contentions Id. CIT (A) failed to appreciate that depreciation is allowable on block of assets and is allowed in the past on the block of assets at the rate of 30 % which is brought forward.

8. Levy of interest u/s 234A/B/C &D of the Act is unjustified.

9. Initiation of penalty proceedings u/s 271(1)© of the Act is unjustified.

25. Now we come to ground no. 1 regarding that ld. CIT(A) erred in law and on facts in confirming allocation of common expenses totaling unconnected in the nature of bank commission, interest, stationary/printing, travelling professional fees & oil/lubricant expenses to wind mill project thereby restricting deduction u/s. 80IA(4) of the Act.

26. It is observed that an identical issue arose in the appellant's own case in A.Y. 2009-10 and 2010-11. In appeal under consideration spare parts and repairs of Rs. 3,67,73,505/- was also include in the common expenditure for working out

the exempt income u/s. 80IA on wind mill and other income. The AO has noted that the warrant period of the Annual Maintenance Contract was only for one year and Annual Maintenance Contract was further extended for four years however annexure "h" of the said AMC clearly mentioned that in the additional warranty period and post warranty period, spare parts of the plant are not included in the service contract. Therefore, the A.O. has included expenditure of spare parts for pro rata allocation in common expenditures as spare parts and repair cannot be connected/ related to wind mill. And apart from that AMC appellant has also claimed following expenditure:

Audit Fees	*29,781*
Books & Periodicals	*8,637*
Directors remuneration	*73,62,600*
Electricity expenses	*1,68,304*
Festival Expenses	*46,426*
Miscellaneous Expenses	*66,647*
Municipality Tax expenses	*14,972*
Postage Telegram & courier	*20,358*
Professional Tax	*2,920*
Office Expenses	*19,772*
Petrol Expenses	*44,630*
Tea Coffee expenses	*22,684*
Telephone Expenses	*3,47,479*
Total expenses	*81,55,210*

27. Similar issue also came before the ITAT in assessee's own case for A.Ys. 2009-10 & 2010-11 wherein relief was granted by the ITAT in ITA No. 551 & 552/Ahd/2014 and relevant para of the ITAT order is reproduced:

> *10. We have heard rival submissions. Shri Soparkar states at the outset that the assessee in any case is not raising the issues of interest and depreciation (supra). We proceed in this backdrop to notice that the assessee has been maintaining separate books of its two businesses throughout as duly audited as per this statutory provisions. It has further entered into annual maintenance contract with the windmill installment companies so far as its former business is concerned. There is no evidence in the case file indicating that the assessee has either way diverted expenditure of one business towards the other one i.e. from windmill to mining and vice versa. The Assessing Officer rather appears to have adopted prorate turnover figures to arrive at the impugned allocation. We notice that such a course of action already stands reversed by various tribunal's decisions. For instance, [2012] 23 taxmann.com 301 (Jodhpur-tribunal) ACIT vs. P I Industries deleting similar allocation / apportionment of expenses made by the Assessing Officer in case of an entity having two businesses and one of them eligible for Section 80IA deduction. We adopt the same reasoning herein as well to reverse the impugned allocation in absence of any specific material. The impugned disallowance/addition of Rs.47,70,803/- is partly deleted. It is made clear that we have not dealt with the two issues of depreciation and interest expenditure (supra). Assessee's former appeal ITA No.551/Ahd/2014 is partly accepted.*
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> *11. This leaves us with assessee's latter appeal ITA No.552/Ahd/2014 seeking to raise a similar sole substantive ground challenging correctness of allocation of expenses resulting in disallowance/addition of Rs.60,05,017/-. Both the learned representatives state very fairly that our findings in preceding paragraph dealing with the very issue in former assessment year apply mutatis muntandis herein as well. We accept this substantive ground in same terms. This appeal partly succeeds.*
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> *12. These two assessee's appeals are partly allowed.*

28. Since relief was granted by the ITAT in preceding year to the assessee on similar facts and circumstances. Thus, in parity with the said order, we allow claim of the assessee.

29. Now we come to next ground relating to depreciation of Rs. 43,350/- is not pressed by the assessee and same is dismissed as not pressed.

30. Now we come to ground relating to disallowance of Rs. 97,175/- Employees Contribution to PF u/s. 2(24)(x) of the Act.

31. In view of the Jurisdictional High Court judgment in the matter of GSRTC 366 ITR 170 (supra) wherein it is held as under:

> *"Section 438, read with section 36(1)(va) of the Income-tax Act, 1961 - Business disallowance - Certain deductions to be allowed on actual payment (Employees contribution) - Whether where an employer has not credited sum received by it as employees' contribution to employees' account in relevant fund on or before due date as prescribed in Explanation to section 36(1)(va), assesses shall not be entitled to deduction of such amount though he deposits same before due date prescribed under section 43B i.e., prior to filing of return under section 139(1) -Held, yes - Assessee State transport corporation collected a sum being provident fund contribution from its employees - However, it had deposited lesser sum in provident fund account - Assessing Officer disallowed same under section 43B -However, Commissioner (Appeals) deleted disallowance on ground that employees contribution was deposited before filing return - Whether since assesses had not deposited said contribution in respective fund account on date as prescribed in Explanation to section 36(1)(va), disallowance made by Assessing Officer was just and proper - Held, yes [Para 8] [In favour of revenue]*

32. Thus this ground of appeal is dismissed.

33. Now we come next ground relating to confirming disallowance of business loss of Rs. 27, 70,229/- suffered due to write off of performance securities given furtherance of business contract and not as loan or advances.

34. The AO in the assessment order has noted as under :

"5.1 On verification of P & L account it is seen that the assessee has debited an amount of Rs.3047225/-as bad debts. The assessee vide point no. 28 of letter dated 10/09/2013, was requested to furnish details of such debts. The assessee vide reply dated 16/10/2013 furnish its reply giving therein details of such bad claimed. The same is as under:

"Furnish details of bad debts of Rs. 30,47,225/- and also their copies of accounts with name and address:

Rs.2607795/- Security deposit given as BG Margin for GIPCL work

Rs. 432430/- Balance receivable from Dholu KCL JPF Joint Ventures written off

Rs. 7000/- Balance to be received from Balvant Bapuso Medsinge on A/c of scrape sale writtenoffRs.3047225/-

5.2 On verification of the assessee's submission it is clear that the transactions in which the

assessee has Claimed bad debts are capital in nature, therefore, the assessee vide order sheet

entry dated 04/02/2014 was requested to justify its claim for bad debts. The assessee vide reply

dated 07/01/2014 furnish breakup of said debts which is as under:

1) Details of bad debts: Baa^debts expenses is only Rs.30,47,725/-, and details of this bad debts is as under.

(Amount	*Nome of party*	*Nature*
Rs.26,07,79 5/-	*Ketan Construction Limited KCL Amin Marg, 150ft Ring Road, Rajkot*	*Performance security given, in due course of contract not refunded by the party. Amount written of as bad debts in this year.*
Rs.7,000/-	*Balvant Bapuso Medshing Giral - Banner, Rajasthan*	*Amount not paid by the party amount due on sale of scrap and other waste*
Rs.2,69,995/	*Dholu KCL JPF Joint Venture Co, KCL Amin Marg, 150ft Ring Road, Rajkot*	*Amount not paid by the party amount due on earth work services provided.*

Rs. l,62,434/-	*Dholu KCL JPF Joint Venture Co, As above*	*Performance security given, in due course of contract not refunded by the party. Amount written of as bad debts in this year. "*

5.3 From the above, it can be seen that the assessee has made deposit one kind or the other with the mentioned two parties viz. Ketan Construction Ltd. and Dholu KCL JPF Joint Venture Co. which were not receivable from the above parties. The assessee wrote off such deposit as bad debts and debited in P & L A/c. As per the provision of clause (vii) of sub section (1) of section 36, the amount of any bad debts or pan there of which is written off as irrecoverable in the accounts will be allowable subject to the provision sub-section (2). Sub-Section (2) of 36 of the Act provides that no such deduction shall be allowed unless such debts or part there of has been taken in to account in computing income of the assessee previous year in which the amount of such debts or part thereof is written off or any earlier previous There is no denying the fact that, the amount written off by the assessee is loans advanced. It is thereof quite clear that such loans are not taken into account in computing the income of the assessee for as or any of the earlier years. As such, the assessee is not fulfilled the conditions laid down in Sub- Section(2) of Section 36 of the Act for claiming bad debts. The assessee also failed to produce any evidence to prove that the amount written off as bad debts has been considered in computing the income of any of the or in the previous year. In view of the discussion made above, the claim of the assessee for bad debts of Rs.27,70,229/- is disallowed and added back to the income of the assessee. Penalty U/s. 271(l)(c) is separately initiated for furnishing inaccurate particulars of income. (Addition Rs. 27,70,229/-)"

35. The appellant submitted written submission as under :

"The Id AO further erred in law and on facts in disallowing Rs. 27,70,229/- written off as bad debt or as trading loss.

The appellant furnished the details in its letter dated 16.10.2013 (EXHIBIT-B page No, 10} stating the nature of amounts written off. This was again explained by letter dated 24.02.2014 (EXHIBIT-C page No. 23-24). It was explained that the

amount was towards performance security which is given in terms of business contract. It was very categorically explained that without performance security, which is a business transaction, no work can be given to the appellant and in case of failure to give performance security, the earnest money of the tender will be lost and also no work order shall be obtained. Since the debtors failed to refund the amount of this business transaction, the same was written off and has resulted in to trading loss.

It is submitted that instead of commenting on the above factual aspects, the Id AO erroneously held that the amount written off was loans and advance. In fact as stated in Statement of facts, this is fundamental misconception of the AO. As held by the Apex Court in the case of Badridas daga vs CIT 34 ITR 10 (SC) and in CIT vs Nainital Bank 55 ITR 707 (SC) any loss incidental to carrying on of the business is allowable deduction in computing business profit under section 28 of the Income tax Act. This is also the view taken by Bombay High Court in G.G.Dandekar Machine Works vs CIT202 ITR 161 (Bom).

The jurisdictional Gujarat High Court in the case of CIT vs Abdul Razak & Co has also held that any 'loss of advance money which sprang from the business of the assessee is deductible as trading loss u/s28.

36. Lower authorities disallowed the claim on the ground that conditions of Section 36(2) are not fulfilled as the amount of security deposit was not taken in to account as income of the assessee that loss should be allowed as business loss. In this case, appellant has claimed expenses under the head " bad debts" only and it was not the claim of the appellant before the lower authorities that it should be considered business loss. The above said loss has not incurred from the revenue and same are not part of the computation of income. Business loss is allowable if it is of a non-capital nature and if the same is not only connected with trade but is identical to trade itself. The loss for which a deduction is claimed must be one that springs directly from the carrying on of the business and is incidental to it, and not any loss sustained by the assessee even if it has some connection with the business of assessee.

37. We have gone through the impugned order as we can see above land loss on account of business only. Because performance security was given for a contract by the assessee and non receipt of amount from sale of scrap and without security deposit assessee could not carry on the business. Therefore, we accept alternative plea of the assessee of Rs. 3047275/- is a business loss.

38. In the result, this ground of appeal is allowed.

39. Now we come to next ground relating to that ld. CIT(A) erred in law and on facts confirming restricting of disallowance on heavy goods vehicle from 30% to 15% in absence of income on hiring of vehicles and also for not falling in the category of commercial vehicles.

40. It is claimed by the appellant that Mercedes-Benz tractors is a heavy duty truck introduced by Mercedes-Benz in 1995. It is normally used for long-distance haulage, heavy duty distribution haulage and construction haulage. It is available in weights starting at 18 tonnes and is powered by a V6 or V8 cylinder diesel engine with turbocharger and intercooler.

41. As we can see above referred vehicle in question do not fall in the category of commercial vehicles as per new Appendix-I, table of rates at which depreciation is admissible is prescribed. Since assessee in the mining business and using for for long-distance haulage, heavy duty distribution haulage and construction haulage. It is available in weights starting at 18 tonnes and is powered by a V6 or V8 cylinder diesel engine and using for its commercial activities and claim of the appellant is duly certified by the auditor. In the case of Bulldozer used for mining purpose are eligible to get 30% depreciation and

above machines in questions are also used in mining for excavation work of mining. In our considered opinion assessee claim is allowable for depreciation @ 30%. Thus we allow this ground of appeal.

42. Now we come to next ground relating to depreciation on Mercedez Benz Tractor @ 15% by the lower authorities. Since Mercedez Benz Tractor are registered with RTO as heavy goods vehicle. Thus, same would be entitled to get @ 30% depreciation.

43. In the result, this ground of appeal is allowed.

44. Now we come to ground no. 7 that ld. CIT(A) failed to appreciate that depreciation is allowable on block of assets and is allowed in the past on the block of assets @ 30% which is brought forward. Since relief has already been granted by the ld. CIT(A) at para 36 page 22. Thus same is dismiss as in fructuous .

45. The assessee has taken additional ground of appeal:

> *Both the lower authorities erred in law and on facts in adding disallowance u/s. 14A of the Act of Rs. 3,12,631/- while determining book profit u/s. 115JB of the Act.*

46. Since ld. CIT(A) has already granted relief to the appellant and directed A.O. to delete the same disallowance u/s. 14A of Rs. 3,12,631/-same has become infructuous and dismissed as infructuous.

47. Now we come to ITA No. 874/Ahd/2016. The revenue has taken following grounds of appeal:

> *(a) That the ld.CIT(A) erred in law and on facts in deleting the addition of Rs.9,22,842/- made u/s 80IA of the I.T. Act and disallowance of depreciation of Rs.43,305/- on windmill.*
> *(b) That the ld.CIT(A) erred in law and on facts in deleting the disallowance of additional depreciation of Rs.90,66,784/-.*
> *(c) That the ld.CIT(A) erred in law and on facts in deleting the addition of Rs.3,12,631/- made u/s 14A of the I.T. Act.*

48. Since ld. CIT(A) followed assessment years 2009-10 & 2010-11 and granted relief in assessee's own case, we do not want to interfere in the order passed by the ld. CIT(A).

49. Now we come next ground relating to deleting the disallowance of additional depreciation of Rs. 90,66,784/-.

50. The A.O. has disallowed additional depreciation on the ground that the various equipments used for mining activity and its transportation are not plant and machinery and activities cannot be said to be production activity. Thus, he disallowed the claim of the assessee.

51. The Hon'ble Bombay High Court in the matter CIT vs. Sesa Goa Ltd. [2004] 266 ITR 126/137 taxmann 267 wherein it is held that operations of mining amounting to production and decided the matter in favour of the assessee.

52. Respectfully following the above said order, we dismiss this ground of appeal of the Revenue.

53. Now we come to next ground relating to that ld. CIT(A) erred in law and on facts in deleting the addition of Rs. 3,12,631/- made u/s. 14A of the Act.

54. Since there is not exempt income. In our considered opinion, ld. CIT(A) has rightly granted relief to the appellant citing order of Hon'ble Gujarat High Court in the matter of CIT vs. Corretech Energy Pvt. Ltd. (supra). We think that same does not require any kind of interference at our end. Thus, this ground is also dismissed.

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

Order pronounced in Open Court on 26 - 09- 2019

Sd/- Sd/-

(AMARJIT SINGH) **(MAHAVIR PRASAD)**
ACCOUNTANT MEMBER **True Copy** **JUDICIAL MEMBER**

Ahmedabad: Dated 26/09/2019

Rajesh

Copy of the Order forwarded to:-
1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad