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

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

ITA No. 977/DEL/2010 [A.Y 2004-05]
ITA No. 2220/DEL/2011 [A.Y 2005-06]

IRCON International Limited, Palika Kendra, R.K. Puram Sector-XIII, New Delhi	Vs.	Dy. C.I.T. Circle 11(1) New Delhi

PAN: AAACI 0684 H

ITA No. 1491/DEL/2010 [A.Y 2004-05]
ITA No. 2449/DEL/2011 [A.Y 2005-06]

Dy. C.I.T. Circle 11(1) New Delhi	Vs.	IRCON International Limited Palika Kendra R.K. Puram Sector-XIII New Delhi PAN: AAACI 0684 H
(Applicant)		(Respondent)

Assessee By	:	Shri Rakesh Gupta. Adv Shri Somil Agarwal, Adv
Department By	:	Shri J.K. Mishra, CIT-DR

Date of Hearing	**:**	**28.01.2020**
Date of Pronouncement	**:**	**30.01.2020**

ORDER

PER BENCH :-

The above captioned set of two cross appeals by the assessee and Revenue are preferred against the very same order of the ld. CIT(A) – V, New Delhi dated 14.01.2010 pertaining to assessment year 2004-05 and against the order of the ld. CIT(A) XIII, New Delhi dated 04-03-2011 for Assessment Year 2005-06. Since all these appeals pertain to same assessee involving common issues and were heard together, these are being disposed of by this common order for the sake of convenience and brevity.

ITA No. 977/DEL/2010 [Assessee's appeal] A.Y. 2004-05

2. Ground No. 1 with sub ground relates to the disallowance of depreciation amounting to Rs. 10,29,903/- on the machinery parts capitalized in the earlier years.

3. Facts on record show that during the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has changed its method of accounting. On perusal of the change, the Assessing Officer found that the assessee company has

added back an amount of Rs. 97.65 lakhs in its computation of income and claimed depreciation @ 25%. The Assessing Officer found that in Assessment Years 2001-02 to 2003-04, a similar issue arose where the claim of depreciation was denied, as the machinery spares which were in stock were not put to use, though capitalised to plant and machinery.

4. The Assessing Officer further observed that inn so far as the alternative claim raised by the assessee on actual consumption basis of machinery spares is concerned, since complete details which show machinery spares of Rs. 3,74,269/- have been consumed during the year, alternative claim of the assessee to the extent of Rs. 3,74,269/- was allowed and balance claim of depreciation was denied as was done in the earlier Assessment Years.

5. The assessee carried the matter before the ld. CIT(A) but the ld. CIT(A) confirmed the findings of the Assessing Officer.

6. Before us, the ld. counsel for the assessee fairly conceded that in earlier years, the Tribunal has decided the issue and the findings may be followed.

7. Per contra, the ld. DR relied upon the findings of the ld. CIT(A).

8. We have given thoughtful consideration to the orders of the authorities below. We find that a similar issue was considered by the co-ordinate bench in assessee's own case in ITA No. 1825/DEL/2005, 705/DEL/2006 and 3804/DEL/2008 for Assessment Years 2001-02 to 2003-04. The relevant findings of the co-ordinate bench read as under:

> "11.9 Before us, the assessee has failed to demonstrate whether the spare parts which are used when a machine malfunctions, has brought into existence a new asset or given enduring benefit to the assessee. In absence of satisfying the requirement for constituting a machinery spare as capital expenditure as laid down in the above decisions of the Hon'ble Supreme Court, expenditure incurred on machinery repairs can not be allowed as capital expenditure and consequent depreciation claimed also cannot be allowed. Thus the ground number 1(a) of the appeal is dismissed.
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> 11.10 The 2nd issue raised is can the depreciation be allowed on machinery in ready to use condition, though actually not put to use.

11.11 On this issue, the Ld. Counsel has referred to the decisions in the case of National Thermal Power Corporation limited versus CIT (supra) and CIT vs Yamaha motor India Private Limited(supra) to support the contention that depreciation is allowable on the asset kept ready for use but not actually used. But in the instant case as we have already held that machinery spares does not constitute capital expenditures and thus the issue of whether the same were ready for use or actually used is not relevant in the facts of the case. This ground of the appeal no 1(b), is accordingly dismissed.

11.12 The 3rd issue which has been raised by the assessee is that in the event deduction towards depreciation on machinery spare is not allowed, deduction may be allowed on the basis of the actual consumption of the Spares. It has been mentioned by the assessee that in assessment year 2002-03 also the assessee has been allowed deduction on the basis of the actual consumption of the machinery spares. In our opinion, this prayer of the assessee is justified as the machinery spares which have been consumed in repair of fixed asset, satisfies the requirement of section 37(1) of the Act and accordingly, ground No.1(c) of the appeal of the assessee is allowed.".

9. As mentioned elsewhere, during the year under consideration, the Assessing Officer himself has allowed the claim in respect of machinery spares consumed during the year. Therefore, we do not find any reason to interfere with the findings of the ld. CIT(A). Ground No. 1 with its sub ground is, accordingly, dismissed.

10. Ground No. 2 relates to the disallowance of Rs. 28,04,000/- made u/s 14A of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'].

11. While scrutinising the return of income, the Assessing Officer noticed that the assessee has earned dividend income of Rs. 7.38 crores, which has been claimed as exempt u/s 10(33) of the Act. The Assessing Officer further noticed that income from tax free bonds of Rs. 51,00,760/- has also been claimed exempt u/s 10(15) of the Act. The Assessing Officer was of the firm belief that provisions of section 14A squarely apply on the facts of the case. The assessee was asked to show cause as to why reasonable disallowance of expenses should not be made for earning exempt income.

12. In its reply, the assessee strongly contended that no disallowance should be made as the assessee has not incurred any expenditure in earning exempt income.

13. Not convinced with the reply of the assessee, the Assessing Officer was of the opinion that certain portion of the administrative expenses should go towards earning of exempt income and, accordingly, attributed the administrative expenses towards earning of dividend income in proportion to tax free income to total receipts and computed the disallowance of Rs. 28.04 lakhs.

14. The assessee carried the matter before the ld. CIT(A) but without any success.

15. Before us, the ld. counsel for the assessee reiterated what has been stated before the lower authorities.

16. Per contra, the ld. DR strongly supported the findings of the Assessing Officer.

17. We have given thoughtful consideration to the orders of the authorities below. At the very outset, we have to state that Rule 8D of the Rules has been held to be applicable from Assessment Year 2008-09. Therefore, for the year under consideration, there is no formula to compute the disallowance. However, at the same time, we are of the view that reasonable expenditure should be disallowed for earning exempt income. Though the Assessing Officer has attributed the administrative expenses on the ratio of the tax free income to total receipts and computed the disallowance at Rs. 28.04 lakhs, but we are of the opinion that such computation is on the higher side. We, therefore, direct the Assessing Officer to restrict the disallowance to Rs. 15 lakhs which should meet the ends of justice. The assessee will get relief of Rs. 13.04 lakhs. Accordingly, Ground No. 2 with sub grounds is partly allowed.

18. Ground No. 3 with sub ground relates to addition made by the Assessing Officer towards interest received on provisional assessment u/s 143(1) of the Act amounting to Rs. 44.90 lakhs.

19. An identical issue was considered by the co-ordinate bench in Assessment Years 2001-02 to 2003-04 [supra]. The relevant findings of the co-ordinate bench read as under:

"18.5 We have heard rival submission of the parties and perused the relevant material on record. The issue in dispute in the case is covered by the decision of the special bench in the case of Avada Trading Company (P) Ltd. (supra). The Tribunal (supra) clearly held that when the assessee received refund under intimation under section 143(1) of the Act, an enforceable debt was created in favour of the assessee in respect of the interest due on such refund and thus income accrued as the right to receive was acquired. The relevant finding of the Tribunal is reproduced as under:

> "9. The main contention of the assessee's counsel is that such right is contingent as the interest so received can be varied or withdrawn after the assessment under s. 143(3'). We are unable to accept such contention of assessee for the reasons given hereafter. According to the dictionary meaning, a right or an obligation can be said to be contingent when such right or obligation is dependent on something not yet certain. According to s. 244A. the only condition for grant of interest is that there must be a refund due to assessee under any provision of the Act. There is no other condition in the said provision affecting such right. Therefore, the moment a refund becomes due to assessee, an enforceable debt is created in favour of assessee and assessee acquires a right to receive the interest. Sub-s. (3) of s. 244A only affects its quantification under certain circumstances and not the right of interest. The Hon'ble Supreme Court in the case of CIT vs. Shri Goverdhan Ltd. (1968) 69 ITR 675 (SC) has observed at p. 681 that once a debt is created, then the liability cannot be said to be contingent merely because it is to be quantified at later date. Under s.

> 244A, even the interest is quantified immediately whenever a refund is issued. In our view, the right to grant interest is absolute since existence of such right is not dependent on any event. For example, assessee is granted interest of Rs. 1,000 on the date of granting refund. Subsequently, under s. 244A(3), it is reduced to Rs. 600 by virtue of assessment under s. 143(3). Can it be said that right to interest did not accrue on the date of refund ? In our opinion, the right of interest came into existence on the date of refund by virtue of s. 244A(1) though its quantification may or may not vary depending upon the outcome of assessment."

18.6 However the Tribunal, further held that in case subsequently, the said interest is withdrawn, the said interest income can be rectified under section 154 of the Act. The relevant finding of the Tribunal is reproduced as under:

14. It has been apprehended by assessee's counsel that assessee would be without remedy if the interest is reduced by virtue of assessment under s. 143(31. This apprehension, in our opinion, is unfounded. If interest is reduced by virtue of sub-s. (3) of s. 244A on account of assessment under s. 143(3), the interest granted in earlier year gets substituted and it is the reduced amount of interest that would form part of income of that year. Thus, it would amount to mistake rectifiable under s. 154 of the Act. In our opinion, if the basis, on which income was assessed is varied or ceases to exist, then such assessment would become erroneous and can be rectified. This can be explained with an

example. For instance, land in a village belonging to various persons is acquired by Government for some development works and the compensation is awarded by the Collector with interest, if any. But one of the land holders challenges the acquisition proceedings in the High Court and later on succeeds as the acquisition is declared illegal. By virtue of such High Court order, such compensation has to be returned and Government will have to restore the land to the villagers. Therefore, if capital gain has been assessed in the hands of some of the persons where lands were acquired, such assessment would become patently erroneous, as the basis itself has ceased to exist. Such assessment would, therefore, amount to mistake, which, in our opinion, can be rectified. Similarly, any income assessed may become non-taxable by virtue of retrospective amendment and consequently, erroneous assessment can be rectified. Therefore, in our humble opinion, if the interest granted under s. 244A(1) is varied under sub-s. (3) of such section, then the interest originally granted would be substituted by the reduced/increased amount as the case may be. Thus, income on account of interest if assessed can be rectified under s. 154."

18.7 In view of the above finding of the Tribunal (supra), we restore the issue in dispute to the file of the Ld. Assessing Officer for verifying that the interest granted under section 143 (1) in relation to assessment year 2000-01 in the previous year corresponding to assessment year under consideration, but same has been subsequently withdrawn under section 143(3) of the Act

> passed in financial year 2003-04 and decide the issue in accordance with law after providing adequate opportunity of being heard to the assessee. In the result, the ground No. 8 of the appeal is allowed for statistical purposes."

20. Respectfully following the findings of the co-ordinate bench, we direct accordingly. Ground No. 3 with sub ground is treated as allowed for statistical purposes.

21. Ground No. 4 relates to disallowance of deduction from income earned from PE in foreign countries and not chargeable to tax under DTAA amounting to Rs. 34.55 crores in computing the book profit for the purpose of section 115JB of the Act.

22. The underlying facts in issue are that the assessee excluded DTAA income earned from its project in Bangladesh, Malaysia and United Kingdom on the ground that the DTAA income is not taxable in India and consequently, the company is not obliged to pay tax under MAT on the said income. The Assessing Officer was of the firm belief that the adjustment required to be done are specified in the provisions of section 115J of the Act and there is no provision under the said clauses to reduce book profit from DTAA. It was further observed that similar

adjustments were made in Assessment Year 2001-02 to 2003-04 which were confirmed by the ld. CIT(A). The Assessing Officer, accordingly, made adjustment of Rs. 34.55 crores.

23. The assessee carried the matter before the ld. CIT(A) but without any success.

24. Before us, the ld. counsel for the assessee fairly conceded that in earlier Assessment Years, the assessee has lost the appeal.

25. Per contra, the ld. DR strongly supported the findings of the ld. CIT(A).

26. We have given thoughtful consideration to the orders of the authorities below. There is no dispute in so far as the facts are concerned, which are mentioned hereinabove. The relevant findings of the ld. CIT(A) read as under:

> "14.3 I have carefully the facts of the case. I find that the appellant has reduced the income of Rs. 21,94,13,814/- earned in Malaysia as per the DTAA while computing its book profit u/s 115JA. I am not convinced by the contention of the appellant

that since the income earned in Malaysia is not taxable in India by virtue of the DTAA between India and Malaysia, it is not required to pay tax even under MAT on such income. The provisions of Section 115JA override all other provisions of the Act, since sub-section (1) thereof begins with the non-obstante clause stating as 'notwithstanding anything contained in any other provisions of this Act ' The reliance by the appellant on the decision of the Hon'ble Madras High Court in the case of CIT Vs. VRSRM Firm and others (1994) 208 ITR 400 (Mad) is rather misplaced; the Hon'ble Court was examining the legal status of the DTAA when it held that Tax treaties have to be considered to be mini legislations containing in themselves all the relevant aspects or features which are at variance with the general taxation laws of the respective countries. The observations of the Hon'ble Court are in relation to the computation of 'total income' under the provisions of the Income Tax Act, taking into consideration the provisions of the relevant DTAA. None of the DTAAs provide for computation of 'Book Profit' under the provisions of Section 115JA of the Act. For this reason alone, as held by the Hon'ble court, the basic tax laws in force in the country (115JA) will get attracted since there is no specific provision in the DTAA as regards the computation of 'Book Profit' for the purpose of levy of Minimum Alternative Tax (MAT). Therefore, there is no merit in the claim of the appellant since section 115JA imposes tax on the Book Profit, which is computed for the purpose of companies Act.

The plain reading of Section 115JA of the Act makes it obvious that none of the clauses (i) to (ix) of the Explanation thereto provide for reduction in respect of the income which may be exempt by virtue of the application of the DTAA. The Hon'ble Supreme Court in the case of Apollo Tyres Limited Vs. CIT (255 ITR 273) have held that the Book Profit as computed from the books of accounts maintained in accordance with the Companies Act is sacrosanct and it can be adjusted only for making increases and reductions as specifically provided in the Explanation to the said section. It has been categorically held that apart from the adjustment as provided in the Explanation, no adjustments can be made to the book profit as per the Companies Act. The exclusion of income under the DTAA is nowhere provided in the said Explanation. If it were the intention of the legislature to provide reduction in respect of the income under the DTAA, it would have been specifically provj^le/j.7b,y-yvay of another clause below the said Explanation to the sectional 115JA. I, therefore, find merit in the view of the AO that the appellant is not entitled to claim reduction in respect of the income covered by DTAA (Rs. 34,55,50,226/-) order of the AO on this ground is accordingly upheld'."

27. On a careful perusal of the findings of the first appellate authority [supra], we do not find any error or infirmity which calls for our interference. Accordingly, Ground No. 4 is dismissed.

28. Ground No. 5 relates to the additions made while computing book profit u/s 115JB of the Act on account of provision for bad and doubtful debts, provision for doubtful advances and provision for loss on account of investment.

29. An identical issue was considered by the co-ordinate bench in Assessment Years 2001-02 to 2003-04 [supra]. The relevant findings of the co-ordinate bench read as under:

> "20.7 We have heard rival submission and perused the relevant material on record. We find that in the case of Philips Carbon Black Ltd (supra) following the decision of the Hon'ble Karnataka High Court in the case of Yokogawa India Ltd (supra),the issue of no addition of the amount of provision for doubtful debt/advances in the event of same is reduced from total debts and only net balances shown in the balance sheet, has been restored back by the Tribunal to the file of the Assessing Officer for verification observing as under:
>
> "9. Vis-a-vis the claim in respect of provision for bad and doubtful debts, relevant Schedule 7 of its Balance-sheet is reproduced hereunder:- Schedule 7 –Sundry debtors (unsecured)

Debts outstanding for a period exceeding six months considered good		4,446.29		4,263.29
Doubtful	1063.70		439.00	
Less : Provision	1063.70		439.00	
		4,446.20		4,263.29
Other debts – Considered good		18,920.26		1 7,948.30
		33,366.55		22,211.59

It is not clear whether the total debts of Rs.23,366.55 lakhs is after deducting the provision of Rs.1,063.70 lakhs. The amount of Rs.624.70 lakhs considered by the Assessing Officer for addition is obviously difference between opening provision of Rs.439 lakhs and closing provision of Rs.1063.70 lakhs, mentioned in the above schedule. If the provision debited by assessee is indeed deducted from the total debts and only the net balance shown in the balance-sheet then by virtue of decision of the Hon'ble Karnataka High Court in the case of Yokogawa India Ltd. (supra) there cannot be any addition of such amount under section 115JB of the Act. However, as mentioned by us, this aspect is not clear. Hence we are of the opinion that the issue regarding provision for doubtful debts requires a fresh look by the Assessing Officer. We, therefore, set aside the order of authorities below in so far as this aspect is concerned, and remit the matter back to the file of Assessing Office for consideration afresh in accordance with law."

> 20.8 The issue in dispute being identical and need verification at the end of the Assessing Officer, we feel it appropriate to restore this issue to the file of the Ld. Assessing Officer for deciding afresh in accordance with law after providing adequate opportunity of being heard to the assessee. In the result, the ground No. 10 of the appeal of the assessee is allowed for statistical purposes."

30. Respectfully following the findings of the co-ordinate bench, we direct accordingly. Ground No. 5 is treated as allowed for statistical purposes.

31. Ground No. 6 relates to disallowance of Rs. 47 lakhs made while computing book profit as per section 115JB of the Act on sale of fixed asset.

32. An identical issue was considered by the co-ordinate bench in Assessment Years 2001-02 to 2003-04 [supra]. The relevant findings of the co-ordinate bench read as under:

> "23.3 We have heard the rival submission and perused the relevant material on record. The hon'ble Bombay High Court in the case of Veekaylal Investment Company Private Limited (supra) held that while computing the book profit under the

companies Act, the assessee has to include capital gains for computing the book profit under section 115J of the Act. The relevant finding of the Hon'ble High Court is reproduced as under :

> "7. We find merit in this appeal. According to s. 1153(1), in the case of an assessee being a company if the total income is less than 30 per cent of its book profits then the total income of such company shall be deemed to be an amount equal to 30 per cent of such book-profit and such income shall be chargeable to tax. That, the assessee has to first compute the total income in accordance with the IT Act and if the total income is less than 30 per cent of the book profit then the assessee has to prepare a P&L a/c for the previous year in accordance with Part II and III of Sch. VI to the Companies Act. In other words, a plain reading of s. 1153 shows that if the assessee is a company and its total income under the IT Act is less than 30 per cent of its book profits then, fictionally, it will be deemed that its total income chargeable to tax would be an amount equal to 30 per cent of such book profits. Hence, in such a case, the total income of the assessee is first required to be computed under the IT Act and if the total income so computed is less than 30 per cent of the book profits then the P&L a/c shall have to be prepared in accordance with Part II and Part III of Sch. VI of the Companies Act. The important thing to be noted is that

while calculating the total income under the IT Act, the assessee is required to take into account income by way of capital gains under s. 45 of the IT Act. In the circumstances, one fails to understand as to how in computing the books profits under the Companies Act, the assessee-company cannot consider capital gains for the purposes of computing book profits under s. 115J of the Act. Further, under cl. (2) of Part II of Sch. VI to the Companies Act where a company receives the amount on account of surrender of leasehold rights, the company is bound to disclose in the P&L a/c the said amount as non-recurring transaction or a transaction of an exceptional nature irrespective of its nature i.e. whether capital or revenue. That, it would be inappropriate to directly transfer such amount to capital reserve [see Companies Act by A. Ramaiya, p. 1669 (Fourteenth Edn.]. Such receipts are also covered by cl. 2(b) of Part II of Sch. VI of the Companies Act which, inter alia, states that P&L a/c shall disclose every material feature, including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of an exceptional nature. Lastly, even under cl. 3(xii)(b) profits or losses in respect of transactions not usually undertaken by the Company or undertaken in circumstances of exceptional or non-recurring nature shows clearly that capital gains should be included for the purposes of computing book profits. That, capital gains would certainly be one of the

> various items whose information is required to be given to the share holders under the said cl. 3 (xii)(b). So also, the disclosure is required to be made in respect of investment in the capital of a partnership firm if the company is a partner on the date of the balance sheet (see p. 1651 of the Companies Act by A. Ramaiya [Fourteenth Edn.]. Similarly, profits or losses on such investments are also required to be disclosed. [See cl. 3(xii)(a) of Part II of Sch. VI of the Companies Act]."

23.4 As the Ld. CIT(A) has followed a binding precedent on the issue in dispute, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground No. 14 of the appeal of the assessee is accordingly dismissed.

33. Respectfully following the findings of the co-ordinate bench, we direct accordingly. Ground No. 6 is dismissed.

34. In the result, the appeal of the assessee is allowed in part for statistical purposes.

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35. Ground No. 1 is general in nature and needs no adjudication.

36. Ground No. 2 relates to the deletion of disallowance of deduction u/s 80IA of the Act amounting to Rs. 26.71 crores made by the Assessing Officer.

37. The claim of deduction came up for adjudication for the first time in Assessment Year 2000-01 and the co-ordinate bench in ITA No. 2596/DEL/2004 held as under:

> "3.5 Considering the arguments advanced by the parties and .after going through the orders and material placed before us, we hold as under"
>
> Regarding the claim of deduction u/s 801A, it is seen that appellant is a company and has entered into contracts with various Central Government, State Government, State Government and Local Authority and other statutory bodies. A close reading of the agreement (for instance agreement with MSRDC enclosed in the paper book) clearly shows that appellant developed the infrastructure facility and has not acted merely as contractor as sought to be made out by Assessing Officer and C1T (Appeals). The Oxford dictionary defines the term developer as a person that designs and crate new products, whereas contractor is a person or a company that has a contract to do work or to provide goods or services. Various clauses of the above referred agreement to which reference has been made by us little below would show that the construction rail over bridge projection (ROB)

awarded by MSRDC to the appellant is nothing but development of infrastructure facility, which was to be legally handed over to the Railways and MSRDC after the payment was received. Various clauses of the agreement would show that the jobs done by the appellant were planning, execution, construction and making the infrastructure facility ready for operations. Ld. Assessing Officer has not pointed out any specific clauses of any agreement, which shows that all attributes of development were not present. Making a bald assertion that assessee was a contractor does not serve any purpose. Merely using the terms contractor in the agreement would not make any difference as what has to be seen is the substance. Anybody who enters into a contract is closely called a contractor but that does not mean that such person entering into the contract Cannot be developer. The other agreement with MSRDC shown to us as one as instance clearly shows mat appellant was engaged in investigation, planning,, organizing and construction of road over bridge within the stipulated time. If the activities undertaken by the appellant can not be termed as development, we are afraid then what can be called development? Therefore, we do not have any hesitation in holding in view of the arguments advanced from the sides of both parties and decisions relied upon that appellant was developing infrastructure facility and claimed deduction u/s 80IA in respect of income derived from the development of infrastructure facilities. Explanation inserted below section 80IA(13) does not prevent developers in claiming deduction u/s 80IA(4). Similarly showing the receipts as work receipts in the books of accounts of the appellant alone cannot determine the character of the appellant which in our opinion was that of development. The argument of revenue that infrastructure facility should be owned by the appellant is also misplaced in view of ITO vs. Cable

Constructions 354 ITR 13 (Guj.) and various decisions relied upon by the Ld. Counsel for the appellant. We also note that the Ld. CIT (DR) tried to raise issues which w?ere not even the case of the assessing officer and this in our considered opinion is clearly impressible. Case laws relied by the revenue are clearly misplaced on facts and are clearly distinguishable. Special bench decision in the case of B. T. Patil (Mum.) 126 TTJ 577 was recalled later on as it did not consider the binding decision of Hon'ble Bombay High Court in the case of ABG 322 ITR 323 (Bom). According to the assessment order, copies of all the agreements were before Assessing Officer yet assessing officer chose to make sweeping observation that the assessee is not developer. Such sweeping and bald assertion cannot be approved by us. Therefore, taking into the facts of the present case., we are the considered view that appellant is entitled to claim deduction 80IA, which was wrongly denied. We set aside the order of the. ld. CIT (Appeals) and direct the Assessing Officer to allow deduction: u/s 801A has claimed by the appellant. Ground No. 1 is allowed."

38. As no new facts have been brought on record for the year under consideration, respectfully following the findings of the co-ordinate bench [supra] we direct the Assessing Officer to allow deduction u/s 80IA of the Act as claimed by the assessee. The findings of the ld. CIT(A) are accordingly confirmed. Ground No. 2 is dismissed.

39. Ground No. 3 relates to the deletion of addition of Rs. 1.56 crores on account of provision for maintenance expenditure.

40. An identical issue was considered by the co-ordinate bench in ITA No. 3805/DEL/2008. The relevant findings of the co-ordinate bench read as under:

> "62. Ground No. 5 the appeal relates to addition of Rs.1,28,77,257/-deleted by the Ld. CIT(A) on account of provision for maintenance expenses. We find that the Ld. CIT(A) has verified that the liability on account of maintenance expenses arisen in the year under consideration. The Ld. DR could not rebut this factual finding of Ld. CIT(A). Accordingly we do not find any error in the order of the Ld. CIT(A) in deleting the disallowance. The ground of the appeal of the Revenue is accordingly dismissed."

41. Respectfully following the findings of the co-ordinate bench, we do not find any error or infirmity in the findings of the ld. CIT(A) Accordingly, Ground No. 3 is dismissed.

42. Ground No. 4 relates to the deletion of disallowance of Rs. 2.79 crores on account of provision of demobilization expenditure, provision for maintenance and provision for other expenses.

43. We find that a similar issue was considered by the co-ordinate bench in assessee's own case in Assessment Year 2001-02. The relevant findings of the co-ordinate bench read as under:

> 16.8 As regard to the relief of Rs.2.67 crores allowed by the Learned CIT(A) , against which Revenue is in appeal in ground No. 7, we find that Learned CIT(A) has verified each and every provision to ascertain whether the liability had crystallised during the year under consideration. This factual finding has not been rebutted by the ld. DR before us. In absence of any such rebuttal to substantiate grounds of appeal by the Revenue, we do not find any error in the order of the Learned CIT(A) in deleting the part of disallowance of provision of mobilisation expenses amounting to Rs. 2.67 crores. The ground No. 7 of the appeal of the Revenue is accordingly dismissed.
>
> 17.6 We have heard rival submission of the parties and perused the relevant material on record. We find that the Ld. CIT(A) has sustained the disallowance due to failure on the part of assessee in substantiating whether the liability arose during the year under consideration and also failure to submit necessary documentary evidence in support of the claim. Before us also, no evidences have been furnished by the assessee to substantiate the claim whether the expenses crystallised during the year. In our opinion, the order of the

> Ld. CIT(A) on the issue in dispute is well reasoned and we do not find any infirmity in the same. Accordingly, the finding of the Ld. CIT(A) on the issue in dispute is upheld. The ground No.7(a) of the appeal of the assessee ground No. 8 of the appeal of the Revenue, are dismissed."

44. Respectfully following the findings of the co-ordinate bench, we decline to interfere with the findings of the ld. CIT(A) Accordingly, Ground No. 4 is dismissed

45. Ground No. 5 relates to deletion of disallowance of Rs. 16.19 crores on account of foreign exchange fluctuation loss.

46. Facts on record show that the Assessing Officer has disallowed loss stating that it is notional in nature. It was strongly agitated before the ld. CIT(A) that the loss arising on account of foreign exchange fluctuation cannot be called notional since the fall in the exchange rate has already taken place in the accounting year. Reference was made to the CBDT Circular 225/161/95/ITA dated 07.05.1996 wherein the Board has stated that foreign exchange fluctuation gain earned by the project exporters has to be considered

as income chargeable to tax in the year in which the said gain accrues/arises.

47. By the same analogy, it was claimed that loss should also be allowed as deductible expenditure in the year in which the same accrues or arises. It was brought to the notice of the ld. CIT(A) that similar forex loss has been allowed in Assessment Year 1998-99 and 2000-01. On the basis of this, the ld. CIT(A) deleted the disallowance made by the Assessing Officer.

48. Before us, the ld. DR could not bring any distinguishing decision in favour of the Revenue.

49. We have given thoughtful consideration to the orders of the authorities below. It is true that in Assessment Year 1998-99 and 2000-01 similar disallowances were deleted by the ld. CIT(A). In fact, in Assessment Year 2000-01, the assessee's appeal travelled upto the Tribunal but the Revenue has accepted the findings of het ld. CIT(A). Therefore, on these facts, we do not find any reason to interfere with the findings of the ld. CIT(A). Accordingly, Ground No. 5 is dismissed.

50. In the result, the appeal of the Revenue is dismissed.

ITA No. 2220/DEL/2011 [Assessee's appeal] A.Y. 2005-06

51. Ground No. 1 relates to disallowance of expenses u/s 14A of the Act amounting to Rs. 2,75,827/-.

52. During the year, the Assessing Officer noticed that the assessee has earned dividend income from tax free bonds amounting to Rs. 7.52 crores which was claimed as exempt u/s 10 of the Act. Invoking the provisions of section 14A of the Act, the Assessing Officer proportionately disallowed the administrative expenses as was done in Assessment Year 2004-05 and made addition of Rs. 53,58,179/-

53. The assessee carried the matter before the ld. CIT(A) and the ld. CIT(A), after analysing the expenditure incurred in meetings of Investment Committee restricted the disallowance to Rs. 2,75,827/-.

54. Before us, the ld. counsel for the assessee could not add anything new to what has been stated before the authorities below.

55. On the other hand, the ld. DR stated that the revenue is also in appeal for relief given by the ld. CIT(A). It is the say of the ld. DR that the entire disallowance of Rs. 53 lakhs should be sustained.

56. We have given thoughtful consideration to the orders of the authorities below. While adjudicating a similar issue in A.Y 2004-05 [supra], we have restricted the disallowance to Rs. 15 lakhs as we considered the same to meet the ends of justice. Considering the facts of the year under consideration, we direct the Assessing Officer to restrict the disallowance to Rs. 12 lakhs which should meet the ends of justice. Ground No. 1 of assessee's appeal is partly allowed.

57. Ground No. 2 relates to the disallowance of prior period expenses of Rs. 38,81,258 lakhs.

58. While scrutinising the return of income, the Assessing Officer noticed that the auditors have mentioned prior period expenses claimed during the year under consideration. The assessee was asked to justify the claim of prior period expenses. The assessee furnished details of prior period expenses.

59. On perusal of the details, the Assessing Officer was convinced with the claim of three expense, namely, leave encashment and bonus, adjustment of exchange fluctuation and payment to M/s Alstom. As regards the claim of other expenses, the Assessing Officer observed that no evidence has been furnished to demonstrate that the liabilities have actually crystallised during the year under consideration. The Assessing Officer, accordingly, made disallowance of prior period expenses amounting to Rs. 66,31,867/-.

60. The assessee carried the matter before the ld. CIT(A) and reiterated its claim and furnished few supporting evidences to demonstrate that the liabilities have been crystallised during the year.

61. After considering the facts and after analysing the details, the ld. CIT(A) was convinced that to the extent of Rs. 27,50,609/-, the assessee has successfully demonstrated that the liabilities have crystallised during the year under consideration and gave relief to that extent and confirmed the disallowance of Rs. 38,81,258/-.

62. Before us, the ld. counsel for the assessee furnished documentary evidences to demonstrate that the liabilities to the extent of Rs. 38.81 lakhs have crystallised during the year under

consideration as no evidences have been furnished. We do not find any reason to remit the matter back to the file of the Assessing Officer.

63. Same view was taken by the co-ordinate bench in A.Y 2001-02 as in that year also the co-ordinate bench declined to send the matter back to the Assessing Officer/ld. CIT(A) for fresh consideration for want of evidences. In the same lines, we decline to interfere with the findings of the ld. CIT(A). Assessee's Ground No. 2 is accordingly dismissed.

64. Ground No. 3 relates to addition of Rs. 5.18 lakhs being interest received on provisional assessment u/s 143(1) of the Act.

65. An identical issue was considered by us in ITA No. 977/DEL/2010 [supra] vide Ground No. 3 of that appeal. For our detailed discussion therein, we direct accordingly. Accordingly, Ground No. 3 is allowed for statistical purpose.

66. Ground No. 4 relates to adjustment made in computation of book profit u/s 115JB of the Act being provision on account of bad and doubtful advances and income earned from PE in foreign countries which is not chargeable to tax under DTAA.

67. In so far as provision on account of bad and doubtful advances is concerned, similar issue was considered by us in ITA No. 977/DEL/2010 [supra] vide Ground No. 5 of that appeal. For our detailed discussion therein, we direct accordingly.

68. In so far as adjustment on account of income earned from PE in foreign countries which is not chargeable to tax under DTAA is concerned, an identical issue was considered by us in ITA No. 977/DEL/2010 [supra] vide Ground No. 4 of that appeal. For our detailed discussion therein, we direct accordingly.

69. In the result, the appeal of the assessee is partly allowed for statistical purposes.

<u>ITA No. 2449/DEL/2011 [Revenue's appeal] A.Y. 2005-06</u>

70. Ground No. 1 relates to the deletion of addition on account of disallowance of depreciation amounting to Rs. 7,72,427/-.

71. An identical issue was considered by us at length in ITA No. 977/DEL/2010 [supra] vide Ground No. 1 of that appeal. For our

detailed discussion therein, we direct accordingly. Accordingly, Ground No. 3 is dismissed.

72. Ground No. 2 relates to the deletion of disallowance of deduction u/s 80IA of the Act amounting to Rs. 39,40,45,216/- made by the Assessing Officer.

73. A similar issue was considered by us in ITA No. 1491/DEL/2010 [supra] vide Ground No. 2 of that appeal. For our detailed discussion therein, we direct accordingly. Accordingly, Ground No. 2 is dismissed.

74. Ground No. 3 relates to the deletion of addition of Rs. 2.44 crores on account of provision for maintenance expenditure.

75. A similar issue was considered by us in ITA No. 1491/DEL/2010 [supra] vide Ground No. 3 of that appeal. For our detailed discussion therein, we direct accordingly. Accordingly, Ground No. 3 is dismissed.

76. Ground No. 4 relates to the restriction of disallowance of Rs. 53.58 lakhs made u/s 14A of the Act.

77. This issue has been considered by us in assessee's appeal [supra] vide Ground No. 1 of that appeal. For the detailed reasoning given therein, this ground is partly allowed.

78. Ground No. 5 relates to deletion of addition of Rs. 2.17 crores on account of proportionate corporate expenses allocated towards DTAA income u/s 14A of the Act.

79. While scrutinising the return of income, the Assessing Officer noticed that the assessee has excluded profits earned in foreign projects undertaken with Malaysia, Bangladesh and United Kingdom amounting to Rs. 29.57 crores. The Assessing Officer was of the opinion that certain portion of corporate office expenses are attributable to PE outside India and accordingly, disallowed a sum of Rs. 2.17 crores on proportionate basis.

80. The assessee carried the matter before the ld. CIT(A) and strongly contended that all the PEs maintain separate books of account and expenses attributable to each PE has been separately accounted for. Therefore, there is no reason why further proportionate disallowance should be made.

81. The ld. CIT(A), after considering the facts and submissions, found that similar allocation of corporate office expenditure in A.Ys 1999-2000 to 2003-04 has been deleted by his predecessor. Therefore, following the findings of the predecessor, he deleted the disallowance.

82. Before us, the ld. DR could not controvert the findings of the ld. CIT(A).

83. We find that appeals for A.Ys 2000-01 to 2003-04 travelled upto the Tribunal and deletion of such disallowances was not challenged before the Tribunal. Therefore, the order of the ld. CIT(A) attained finality on this issue. On these facts, we decline to interfere with the findings of the ld. CIT(A). Ground No. 5 is dismissed.

84. In the result the appeal of the Revenue is dismissed.

86. To sum up, in the result:

ITA No. 977/DEL/2010 - Partly Allowed for Statistical purposes.
ITA No. 2220/DEL/2011 - Partly Allowed for Statistical purposes.
ITA No. 1491/DEL/2010 - Dismissed
ITA No. 2449/DEL/2011 - Dismissed

The order is pronounced in the open court on 30.01.2020.

Sd/-

[KULDIP SINGH]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 30th January, 2020.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	