आयकरअपीलीयअधिकरण,सुरतन्यायपीठ,सुरत

IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT

BEFORE SHRI SANDEEP GOSAIN, Hon'ble JUDICIAL MEMBER
AND SHRI O.P.MEENA, Hon'ble ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.1501/AHD/2014

निर्धारण वर्ष/Assessment Year: 2009-10

M/s.Gujarat Chemical Port Terminal Company Ltd., PO Lakhigam, Via Dahej, Bharuch – 392 130. **[PAN: AAACG 6861 A]**	V s .	The Commissioner of Income Tax, Vadodara.
अपीलार्थी / Appellant		**प्रत्यर्थी/Respondent**

आ.अ.सं./I.T.A No.2998/AHD/2014

निर्धारण वर्ष/Assessment Year: 2010-11

The Deputy Commissioner of Income Tax, Circle-1(1), Baroda.	V s .	M/s.Gujarat Chemical Port Terminal Company Ltd., PO Lakhigam, Via Dahej, Bharuch – 392 130. **[PAN: AAACG 6861 A]**
अपीलार्थी / Appellant		**प्रत्यर्थी/Respondent**

Cross Objection No.30/AHD/2015
(arising out of ITA No.2998/Ahd/2014)

निर्धारण वर्ष/Assessment Year: 2010-11

M/s.Gujarat Chemical Port Terminal Company Ltd., PO Lakhigam, Via Dahej, Bharuch – 392 130. **[PAN: AAACG 6861 A]**	Vs.	The Deputy Commissioner of Income Tax, Circle-1(1), Baroda.
अपीलार्थी / Appellant		**प्रत्यर्थी/Respondent**

Cross Objection No.137/AHD/2016
(arising out of ITA No.2065/Ahd/2016)
निर्धारण वर्ष/Assessment Year: 2009-10

M/s.Gujarat Chemical Port Terminal Company Ltd., PO Lakhigam, Via Dahej, Bharuch – 392 130. **[PAN: AAACG 6861 A]**	Vs.	The Deputy Commissioner of Income Tax, Circle-1(1)(1), Baroda.
अपीलार्थी / Appellant		**प्रत्यर्थी/Respondent**

निर्धारितीकीओरसे **/Assessee by**	Shri Bhavin J. Marfatia – CA
राजस्वकीओरसे **/Revenue by**	Shri O.P.Vaishnav – CIT-DR

सुनवाईकीतारीख/ Date of hearing:	06.02.2020
उद्घोषणाकीतारीख/Pronouncement on:	14.02.2020

आदेश /O R D E R

PER SANDEEP GOSAIN, JM:

1. In the instant case, assessee comprise two cross objections and one appeal and the Revenue filed one cross objection are directed against the separate orders of ld.Commissioner Income Tax-I, Baroda dated 18.03.2014, ld.Commissioner Income Tax(Appeals)-I, Baroda dated 01.08.2014 and ld.Commissioner Income Tax(Appeals)-I, Vadodara dated 31.05.2016 for the assessment years 2009-10, 10-11, 2010-11 and 09-10 respectively.

Assessee's Appeal in ITA No.1501/Ahd/2014 for A.Y. 2009-10:

2. Grounds raised by the Assessee in ITA No.1501/AHD/2014 read as under:

> *"1. The learned Commissioner of the Income Tax-I, Baroda ("the CIT") erred in fact and in law in revising the assessment by invoking powers u/s. 263 of the Income Tax Act, 1961 ("the Act") which was completed by way of assessment made u/s 143(3) despite the fact that the conditions stipulated for invoking such extraordinary jurisdiction were not satisfied.*
>
> *2. The learned CIT erred in fact and in law in setting aside the assessment u/s. 143(3) and directing the Deputy Commissioner of Income Tax Circle-1(1), Baroda ("the AO") to frame fresh assessment on the issues already considered and decided during the proceedings u/s. 143(3) of the Act.*
>
> *3. The learned CIT erred in fact and in law in observing that the assessment u/s. 143(3) was framed without proper enquiry and verification despite the fact that the AO had examined the issue at length and had called for various details during the course of assessment.*
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> *4. The learned CIT erred in fact and in law in directing the AO to verify the claim of interest of Rs. 1,69,83,390/- despite the fact that the said interest was not debited to P&L account and therefore the question of claiming the same u/s. 36(l)(iii) does not arise.*
>
> *5. The learned CIT erred in fact and in law in directing the AO to verify the claim of depreciation on electrical fitting forming integral part of Jetty & Trestle and thereby holding that depreciation @ 10% is allowable on the same.*
>
> *6. The learned CIT erred in fact and in law in exercising the jurisdiction u/s. 263 on the issue of depreciation on Jetty & Trestle despite the fact that the same was already considered by the CIT(A) in appeal for the year under consideration.*
>
> *7. The learned CIT erred in fact and in law in directing the AO to verify the claim of depreciation on an amount of Rs. 3,85,00,000/- being Foreign Exchange Fluctuation u/s. 43A despite the fact that the said issue never formed part of show-cause notice u/s. 263(1) and therefore direction on this issue is beyond the preview of section 263."*
>
> *8. Your Appellant craves the right to add to or alter, amend, substitute, delete or modify all or any of the above grounds of appeal."*

3. The brief facts of the case are that the assessee is a Public Related Company and filed its Return of Income on 20.09.2009 declaring total loss at (-) Rs.8,73,41,740/-, accordingly an assessment order u/s.143(3) was passed on 20.12.2012

determining loss at (-)Rs.3,37,75,020/-. Subsequently, the records of the assessee were called-for for an examination and after serving show-cause notice and seeking the reply of the assessee under u/s.263 of the Income Tax Act was passed by the ld.CIT.

4. The assessee, being aggrieved with the order of the ld.CIT, preferred an appeal before this Tribunal on the grounds mentioned hereinabove. First of all, the ld.Authorised Representative(AR) pressed ground 7 of the appeal to be decided at the very first instance as the same goes to the roots of the case, therefore, while considering the request of the AR of the assessee, we also feel that ground no.7 of the appeal goes to the routs of the case and is legal in nature, therefore, we decided to adjudicate this ground firstly.

5. Ground No.7 : This ground raised by the assessee relates to challenging the order of ld.CIT in directing the ld.Assessing Officer (AO) to verify the claim of depreciation on an amount of Rs.3,85,00,000/- being Foreign Exchange Fluctuation u/s.43A. Despite the fact that the said issue never formed part of show-cause notice u/s.263(1) of the Act, and therefore direction on this issue is beyond the purview of section 263 of the Act. The

ld.Authorised Representative(AR) in this respect relied upon the decision of Co-o0rdinate Bench of ITAT Ahmedabad in the case of Arsh Industrials & Investments Pvt. Ltd., vs ITO [1988] 32 TTJ 402 (Ahmedabad), Ultramarine & Pigments Limited Vs. ACIT, Range-7(3), Mumbai in ITA No.2844/Mum/2013 for A.Y. 2009-10, CIT, Patiala Vs. Roadmaster Industries Lt.d, [2013] 40 taxmann.com 298 (Punjab & Haryana) and Damodar Velley Corporation Vs. DCIT [2016] 72 taxmann.com 127 (Kolkata – Tribunal). It was further submitted by the assessee that showcase notice issued u/s.263(1) of the Act is at page no.148 & 149 of the paper book and the said show-cause notice is restricted only to on account of two heads i.e. (i) Interest Payable on the loan received from Reliance Industries Limited, it was capitalized and was added to loan amount (ii) In respect of claim of depreciation @15% on WDB of Electrical Installations / Fittings. However, the ld.CIT while passing the impugned order has also noticed that assessee had claimed depreciation on account of Foreign Exchange Fluctuation, therefore the ld.Assessing Officer(AO) was directed to pass a fresh order *denovo*.

6. On the other hand, the ld.Departmental Representative(DR) relied upon the order passed by the ld.CIT.

7. We have heard both the Counsels and perused the material placed on record, judgements cited by the parties as well as orders passed by the Revenue Authorities. In order to decide the controversy in question, it is necessary to first of all evaluate the show-cause notice issued by the ld.CIT u/s.263 (1) of the Act which is at page no.148 / 149 of the paper book and same reproduced below:

Office of the
Commissioner of Income-tax-I,
Aayakar Bhavan, 2nd floor, Annexe Building,
Race Course, Baroda.

No. BRD/CIT-I/HQ/263/GCPTCL/2013-14 *Dated: 09.12.2013*

To,
The Principal Officer,
M/s Gujarat Chemical Port Terminal company Limited,
Po.; Lakhigam, Tal. Vagree
Dahej,
Bharuch-392130

Sir,

Sub: Proceedings u/s 263 of the I.T. Act, 196i- A.Y.2009-10-

Notice u/s 263(1) of the Act. - regarding- PAN: AAACG 6861A

It was found that the assessment order passed u/s 143(3) of the Act dated 20.12.2011 by the Assessing Officer, Dy. Commissioner of Income Tax, Circle-l(l), Baroda for A.Y. 2009-10 was erroneous in so far as it was prejudicial to the interest of the revenue on account of the following:

"1. Whereas it is seen that for A.Y. 2009-10 that interest amount of Rs.1,31,34,954/- Interest: Rs.1,69,83,390/- less TDS Rs.38,48,436/-/-) payable on the loan received from Reliance Industries Limited. (RXL) was capatilized and was added to loan amount. Since the amount of interest was not actually paid and the loan amount to that extent increased, the interest amount so claimed u/s 36(l)(iii) was required to be disallowed. Not doing this resulted into underassessment of Rs. 1,31,34,954/-.

2. It was noticed from the depreciation chart that the assessee had claimed depreciation @ 15% on WDV amount Rs.5,60,65,380/- of electrical installation / fittings. The eligible rate of depreciation on electric installation / fittings as per Appendix-I was 10%. Thus there was an excess claim of depreciation @ 5% on electrical fittings as shown below;

Depreciation claimed by the assessee @ 15% (including half the rate for period less than 180 days)	*84,09,807*
Depreciation eligible to the assessee @ 10% (including half the rate for period less than 180 days)	*56,06,538*
Excess depreciation allowed	*28,03,269*

The excess depreciation of Rs.28,03,269/- claimed by the assessee was required to be disallowed. This being not done resulted in under assessment of income of Rs.28,03,269/-.

In view of the above, I am directed to give an opportunity of being heard and to show cause as to why the aforesaid assessment made by the Assessing Officer for the A.Y.2009-10, should not be enhanced or cancelled with a direction to make fresh assessment in accordance with the provisions of section 263 of the Act. For this purpose, you may appear before the Commissioner of Income Tax-I, Baroda in person or through your authorized representative on 19.12.2013 at 04.00 P.M. In case of non-compliance, the matter will be decided on merits.

Soft copy of all submissions may also please be given in CD.

Yours faithfully,

Sd/-
(Nagarajan S.)
For Commissioner of Income Tax-I,
Baroda.

8. After having gone through the aforementioned show-cause notice, we find that CIT has issued the show-cause notice u/s.263(1) of the Act, primarily on accounts of two grounds. However, the ld.CIT while passing the impugned order has held that assessee had claimed depreciation on account of Foreign Exchange Fluctuation it has been allowed in total disregard of section 43A of the Income Tax Act, therefore, the ld.AO was directed to pass a fresh order *denovo*.

9. At this stage, we relied upon the decision of the Co-ordinate Bench of ITAT Ahmedabad in the case of Arsh Industrials & Investment Pvt. Ltd., vs. ITO (supra) wherein it is held as *"Where the show-cause notice mentioned only the propriety of allowing relief under section 80J when the unit had made a loss. The Commissioner could not give directions to re-compute the 'capital employed' also which was not mentioned in the notice."* and in Ultramarine & Pigments Limited vs. ACIT it is held as below:

> *"7. We have considered the rival submissions and perused the record. At the very outset we have anyaliscd the show-cause noticed issued by learned CIT and subsequently order passed by learned CIT which reads as under :-*
>
> > *"In view of the above, it is clear that the AO's order allowing for such depreciation without enquiry has resulted in error within the meaning of Section 263 of the IT. Act, 1961; this error has differently caused prejudice to the revenue because of allowance of excess depreciation to the extent of Rs. 1,65,04,000/-. Accordingly, it is held, that order of the AO in this regard is erroneous insofar as it is prejudicial to the interest of revenue within the meaning of section 263 of IT. Act, 1961.*
> > *7. In respect of other items viz. profit of Rs. 1,15,91,571/-, the AO has allowed deduction u/s 10A without conducting any enquiry. The assessee's reply in this regard as contained in the written reply dated 12.2.2013 is carefully considered. However, it is a fact thai the AO has not conducted any enquiry in respect of these items before allowing deduction u/s 10A. In view of this, after having considered the material on record and assessee's submissions, I am of the considered view that these items have been considered for exemption u/s 10A by the A.O. without conducting the enquiries which are prima-facie warranted on the facts and circumstances of this case. It is trite law that lack*

of enquiry results in error within the meaning of Sec.263 of the I.T. Act, 1961. It is a fact that considering profit of Rs. 1,15,91,571/ for computation of income u/s.10A without enquiries has resulted in error within, the meaning of section 263 of the I.T. Act, 1961. This has also caused prejudice to the revenue inasmuchas it has resulted in granting exemption without enquiries warranted, on facts and circumstances of the case. Accordingly, the order the AO in respect of profit of Rs.1,15,91,571 / - is also set aside to the file of the AO.

8. The AO is directed to examine issues which are subject matter of notice u/s.263 and conduct enquiries required on facts and circumstances of the case. Thereafter, the AO is directed to take the decision as per law. In nutshell, the order passed, by the AO is set aside to the file of the AO for considering the issues which are subject matter of notice u/s.263 afresh and take decision as per law."

From the perusal of both show-cause notice as well as findings recorded by learned CIT while passing the order u/s. 263, we have noticed that the grounds taken by learned CIT while issuing show-cause notice is with regard to the disallowance but in the final order passed u/s. 263, the learned CIT has categorically mentioned that the Assessing Officer has not carried out any inquiry therefore direction was given to carry out necessary inquiry in this regard. We first of all referred to the judgment passed by the IT AT, Mumbai Bench in the case of Star India Ltd. (supra), wherein it has been categorically held that when the show-cause notice is issued on the ground that the computation is incorrect but the revision is exercised on the ground that the matter was not examined on the merits. The reason which can be inferred from the revision order u/s 263 is different from the reason set out in the show cause notice and therefore in that case from the reason set out in the show cause notice and therefore in that case it was held that if a ground of revision is not mentioned in the show-cause notice, then it cannot be made the basis of the order for the reason that assessee would have had no opportunity to meet the point.

Hon'ble 1TAT Delhi Bench in the case of B.S. Sangwan vs. ITO (supra) has also categorically held that the commissioner started by pointing out, that he saw as, glaring illegalities in the assessment order, which was subjected to revision proceedings, but what he concluded was that the said assessment order was passed without making 'proper requisite and desired inquiries'. Therefore, the Hon'ble ITAT has held in the above cited case that a revision order can only be passed on the ground on which the assessee has been given a reasonable opportunity of being heard, and it is not open to the Commissioner to set out one reason ground for revision the order but actually revise the order on some other ground.

8. Considering the other judgments relied upon by learned AR, we find- that 'the grounds mentioned by learned CIT in show-cause notice fire different arid the order passed by learned CIT u/s. 263 is based on another ground and therefore the assessee could not get opportunity to explain the point recorded at the time of passing the final order. Therefore, respectfully following the judgments which are based on the facts which are similar to the facts of the present case, we hold that the order passed by learned CIT u/s. 263 is bad in law and not sustainable in law. Therefore the same is quashed.

9. Even, otherwise on the merits of the case, the ld. CIT(A) has held that this "windmill" was not used in any manufacturing activity. Therefore as per CIT this does not qualify for additional depreciation. In this respect we are of the considered view that as per provision of section 32(l)(iia) which reads as under:

"in the case of any new machinery or plant (other than ships an aircraft), which has been acquired and installed after 31st day of

March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing..".

From the afore mentioned reading we find that the only requirement of section is that the assessee should be engaged in the business of manufacture or production of any article or thing. This condition is clearly satisfied by the assessee who is engaged in the manufacture of pigments, HDPE etc. A close reading of the provision brings out that there is no requirement that the windmill should be used in any manufacturing activity. However, a windmill which generates power is itself engaged in the manufacturing of production of an article or thing. We found support from the judgement rendered by Hon'ble Bombay High Court in the case of Associated Bearing Co. Ltd. vs. Commissioner of Income-lax 286 ITR 341 (Bom) and from the judgement of Hon'ble Madras High Court in the case of Commissioner of Income Tax vs. Atlas Export. Enterprise 373 ITR 4 14 (Mad). Therefore, while relying upon the judgement, we hold that the assessee clearly satisfied the conditions of section 31(I)(iia) and is entitled to the claim of additional depreciation in respect of wind mills. Since we have decided the ground No. 1 which was on the point, of jurisdiction regarding passing the order u/s. 263 and given detailed findings that the order u/s. 263 itself is not maintainable, therefore there is no need to deal with the other issues.

10. In the result net result, appeal is allowed."

10. And also in CIT vs. Roadmaster Industries of India Ltd., it is held as *"A revisional order can be passed only after giving an opportunity of hearing to assessee.*

11. After appreciating the facts of the present case, we are of the view that the reasons, which can be inferred from the revisional order u/s.263 is different from the reasons set-out in the show-cause notice and therefore, we are of the considered view that when a ground of revision is not mentioned in the show-cause, then it cannot be made the basis of the order for the reason that assessee would have had no opportunity to meet the point. Considering the judgements relied upon by the ld.AR, we find that the ground mentioned by the ld.CIT, while passing the order u/s.263 with regard to claiming of depreciation on account of Foreign Exchange Fluctuation was not

mentioned in the show-cause notice u/s.263(1) of the Income Tax Act. Therefore, the assessee could not get opportunity to explain the point recorded at the time of passing final order.

12. Therefore, respectfully following the judgments which are based on the facts which are similar to the facts of the present case, we hold that the order of ld.CIT u/s.263 qua directing the ld.AO to pass a fresh order *denovo* on account of claim of depreciation on account of Foreign Exchange Fluctuation is bad in law and is thus not sustainable in Law. Therefore, that portion of the order is quashed, and this ground no.7 raised by the assessee is allowed.

13. Since we have allowed Ground No.7 of this appeal filed by the assessee, therefore other grounds raised by the assessee become infructuous in view of our findings on ground no.7 as subsequently to the passing of order u/s.263 of the Act, the ld.AO had made additions which have already been deleted by the ld.CIT(A).

14. In the result, appeal of the assessee is allowed.

Revenue Appeal in ITA No.2998/Ahd/2014 for A.Y. 2010-11:

15. Ground raised by Revenue read as under:

> *(i) On the facts and in the circumstances of the case, the ld.CIT(Appeals) erred in deleting the addition/disallowance of Rs. 56/74,523/- out of total addition/disallowance made by the AO of Rs7~59,65,871/- on account of repairs to Plant & Machinery, being capital in nature, without appreciating the fact that the expenditure incurred had an enduring benefit.*
>
> ***(ii)*** *On the facts and in the circumstances of the case and in law, the ld.CIT (Appeals) erred in directing the Assessing Officer to allow depreciation on Jetty & Trestle @ 15%, as claimed by the assessee, treating the same as plant and machinery, instead of allowing 10%*

applicable to buildings, thereby deleting the addition of ' 4,05,58,751/- made on account of disallowance of excess claim of depreciation.

(iii) On the facts and in the circumstances of the case and in law, the ld.CIT(Appeals) erred in deleting the addition on account of disallowance of diminution in value of spares of Rs. '19,10,788/- following the decision of his predecessor on the same issue in A.Y. '2007-08, wherein it was held that the method of accounting consistently followed by the assessee and diminution claimed by the assessee for the assessment year 2006-07 was accepted by the department. The ld.CIT(Appeals) erred in not appreciating the fact that the department had not considered the issue in the assessment year 2006-07 as was done in the year under consideration, and that though the spares are not usable, such spares forms part of the stock of the company and the loss is notional loss, which was never incurred by the assessee.

16. Ground No.1 and 2 relates to repair of machinery.

Ground No.1: At the very outset, it was submitted by ld.AR that this is covered in ground in ITA No.3080/Ahd/2011 for A.Y. 2007-08 and 2008-09 at para 3 to 7 reproduced as below:

"3. The assessee has challenged the action of the CIT(A) on confirming the action of the AO in making disallowance of Rs.73,42,870/- stated to be expenditure incurred on repair to plant & machinery.

4. When the matter was called for hearing, the Ld.AR for the assessee referred to the details of repairs to plant & machinery incurred as placed at page No.69 of the paper-book and relevant invoices thereto and submitted that the expenditure incurred is in the routine course of business to maintain the existing plant & machinery. The Ld.AR submitted that no new asset has come into existence and no capacity expansion has occurred due to repairs activity undertaken by the assessee. The Ld.AR once again submitted that the details of expenditure incurred would make it manifest that such expenditure incurred are routine maintenance expenditure. It was further submitted that the Gross Block of assessee is about Rs.85,918.32 lakhs as against the repair expenditure to plant and machinery of Rs.73.42 lakhs which is quite miniscule. The Ld.AR thereafter submitted that similar disallowances were made by the Revenue in AY 2004-05 and 2006-07 which were reversed by the Tribunal in ITA Nos.3077 & 3079/Ahd/2011 for AYs 2004-05 & 2006-07 order dated 13/11/2017.

5. The Ld.DR relied upon the order of the AO and submitted that the expenses incurred has increased the endurance value of the plant & machinery.

6. We have carefully considered the rival submissions together with the orders of the authorities below. We notice that the repair expenditure of the aforesaid amount have been treated as capital expenditure by the CIT(A) on the ground that such expenditure includes mainly expenses on fabrication/erection/dismantling. The AO had on the other hand held that such expenditure carries endurance value and therefore capital expenditure. We do not find any reason to agree with either of the contentions of the Revenue authorities. Having regard to the nature of work that the assessee is engaged in and having regard to the staggering value of plant & machinery held by the assessee, such expenses of fabrication of structures, erection and dismantling expenses for insulation on ground piping etc. is a normal incidence of business expenditure. The test of enduring benefit flowing from expenditure of any, in is of no avail and is a not conducive test for the purposes of determination of character of expenditure. Having regard to the nature and ordinary course of business and the object for which such repair expenditure have been incurred and

having regard to the Revenue character of the expenditure, we have no hesitation to accept the plea of the assesse for its allowability as revenue expenditure.

7. In the result, appeal of the assessee in ITA No.3080/Ahd/2011 for AY 2007-08 is allowed."

17. Ground No.2 is also covered in para 9 of assessee's own case in ITA No.3077 to 3.79/Ahd/2011 for A.Y. 2004-05 & 2006-07 in which relevant para reproduced below:

"9. Learned Departmental Representative fails to dispute the crucial fact that the assessee had in fact disclosed all its depreciation details in Form 3CD Annexure 1A. Her case however is that Section 149(1)(b) envisages time limit for issuing Section 148 notice to be between four years to six years squarely appli9es in facts of the instant case. We find no merit in the instant argument as the above statutory provision does not operate as an exception to Section 147 (first proviso). It is not a proviso to proviso in other words. Learned Departmental Representative further fails to dispute that the question whether or not a port terminals Jetty / Trestle is to be treated as plant and machinery is no more res integra since this tribunal's co-ordinate bench decision in Kandla Port Trust case (2007) 1041 ITD 1 (Rjt) has held such assets to be plant and machinery entitled for 25% rate of depreciation. Hon'ble jurisdictional high court has upheld the said view in Revenue's tax appeal no. 1942 of 2006 decided on 05.07.2016. We therefore find no reason to accept in Revenue's arguments seeking to treat assessee's Jetty & Trestle as building block of assets instead of plant and machinery in all cases on merits as well. Its appeal ITA No.3115, 3116, 3117, 3118 & 3119/Ahd/2011 are accordingly declined."

18. Therefore, respectfully following the above decision, we order accordingly.

19. Ground No.3 also covered in ITA No's.3121/Ahd/2011 and 3122/Ahd/2011 for A.Y's 2004-08 and 2008-09 respectively in which para no.19 reproduced as below:

"19. With the assistance of the Ld.DR for the Revenue and ld.AR for the assessee, we observe that the claim of the assessee which in essence represents write off of unusable stores and spares deserves to be allowed on first principle. However, in the same vain, we do not find any reference to the details filed before the AO in this regard towards mythology of identifying unusable stores and spares and segregating them for write off purposes. The AO not given any finding on the bonafides and correctness of such treatment. Thus, while the loss if any arising on write off of stores and spares in the given set of circumstances ordinarily are admissible expenditure, the factual aspects requires to be examined. Therefore, we consider it expedient to restore the issue back to the file of the AO for examination of the issue de novo in accordance with law. The AO, while doing so, shall be entitled to verify the process for identification of the source and spares which are subjected to write off/diminution. Needless to say, a reasonable opportunity shall be granted to the assessee while determining the issue. The issue is thus set aside to the file of AO."

20. Therefore, respectfully following the above decision, we order accordingly.

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

Cross Objection No.30/Ahd/2015 (arising out of ITA No.2988/Ahd/2014 for A.Y. 2010-11):

22. Grounds raised by the Assessee in Cross Objection read as under:

> *"1. The learned Commissioner of Income-tax (Appeals) – 1 ["the CIT(A)"], Baroda erred in fact and in law in confirming the action of the Deputy Commissioner of Income-Tax Circle – 1(1), Baroda ("the AO") in making a addition of Repairs & Maintenance expenditure to the extent of Rs. 9,05,748/- treating as capital expenditure.*
>
> *2. The learned CIT(A) erred in fact and in law in confirming the action of the AO in charging interest u/s 234D of the Income Tax Act, 1961.*
>
> *3. Your respondent craves a right to add to or amend, alter, substitute, delete or withdraw all or any of the grounds of cross objections."*

Condonation of Delay:

23. We have gone through the contents of the application for condonation of delay in filing the Cross Objection. Keeping in view of the contents of the application as well as considering the fact that Cross Objection were fined during the pendency of appeal filed by the Revenue. We are of the view that the delay in filing the C.O. can very well be condoned, therefore, we condone the delay.

24. Keeping in view in our decision in Ground No.1 of the appeal filed by the Revenue in ITA No.2998/Ahd/2014, we allow this Cross Objection in view of the fact that identical ground has already been decided in favour of the assessee in assessee's own case for A.Y. 2007-08 in ITA No.3080/Ahd/2011. Therefore, while following the findings

given by the Hon'ble ITAT in assessee's own case, the grounds of appeal by the assessee in this Cross Objection is allowed.

25. In the result, Cross Objection appeal filed by the assessee is allowed.

Cross Objection No.137/Ahd/2016 (arising out of ITA No.2065/Ahd/2016 for A.Y. 2009-10):

26. Grounds raised by the Assessee in Cross Objection read as under:

> *"1. The learned Commissioner of Income-Tax (Appeals) - 1, Vadodara ["the CIT(A)"] erred in fact and in law in conforming the action of the Income Tax Officer, Ward-I(I)(I), Vadodara ["the AO"] in restricting depreciation on electric installation to 10% instead of 15% as claimed by the respondent and thereby confirming the addition of Rs.28,03,269/- to the income of the respondent.*
>
> *2. The learned CIT(A) erred in fact and in law in conforming the action of the AO in restricting the depreciation on electrical installation to 10% instead of 15% despite the fact that the electrical installation is an integral part of plant and machinery.*
>
> *3. The learned CIT(A) erred in fact and in law in confirming the action of AO in disallowing depreciation of Rs.28,94,339 on foreign exchange loss arising from reinstatement of creditors for fixed assets.*
>
> *4. Without prejudice to the above, the learned CIT(A) erred in fact and in law in not allowing the foreign exchange loss as revenue expenditure despite holding that the same does not form part of the cost of the fixed asset.*
>
> *5. The learned CIT(A) erred in fact and in law in confirming the action of the AO in charging interest u/s. 234B of the act.*
>
> *6. The learned CIT(A) erred in fact and in law in confirming the action of the AO in charging interest u/s.234C of the act.*
>
> *7. The learned CIT(A) erred in fact and in law in confirming the action of the AO in initiating penalty proceedings u/s.271(1)(c) of the Act.*
>
> *8. Your respondent craves a right to add to or amend, alter, substitute, delete or withdraw all or any of the grounds of cross objections."*

27. At the time hearing, the ld.Counsel for the assessee submitted that the issue is squarely covered by the Tribunal decision in assessee's own case of M/s.Gujarat Chemical Port Terminal Co.Ltd., Vs. DCIT, Circle-1(1)(1), Surat in I.T.A.No.1888/AHD/2016 for the

assessment year 2012-13 dated 13.12.2019 (copy filed) passed by Surat Bench of ITAT.

28. On the other hand, the ld.CIT-D.R. relied on the orders of Lower Authorities.

29. We have heard the Counsels of both the parties and we also perused the material placed on record and orders passed by the Revenue Authority as well as the judgments cited by the parties. From the records, we find that the issue is squarely covered by the decision Co-ordinate Bench of ITAT in M/s.Gujarat Chemical Port Terminal Co.Ltd., Vs. DCIT, Circle-1(1)(1), Surat in I.T.A.No.1888/AHD/2016 (supra) in which para 7 & 8 held as under:

> *"7. We have heard the Counsels of both the parties and we also perused the material placed on record and orders passed by the Revenue Authority as well as the judgments cited by the parties. From the records, we find that the issue is squarely covered by the decision Co-ordinate Bench of ITAT Surat in assessee's own case in I.T.A.No.2414/Ahd/2015/SRT A.Y. 2013-14(supra).*
>
> *8. Since the facts are identical, we are of the considered opinion that the assessee is eligible for depreciation @15% instead of 10% allowed by the ld.Assessing Officer(AO), accordingly the AO is directed to allow deduction of depreciation as mentioned above, accordingly ground of appeal is allowed."*

30. Therefore, keeping in view the decision of the Co-ordinate Bench in assessee's own case the Hon'ble ITAT Surat Bench in the case of I.T.A.No.1888/AHD/2016 for the assessment year 2012-13 has allowed the appeal under the same set of facts and grounds. Therefore, in order to maintain judicial consistency and judicial discipline, we are also of the opinion that assessee is eligible for depreciation @ 15% instead of 10% allowed by the ld.AO, accordingly

we also give the same directions as given by the Co-ordinate Bench in the assessee's own case.

31. In the result, Cross Objection appeal of the assessee is allowed.

32. To sum up, appeal of the assessee in ITA No.1501/AHD/2014, C.O.No.30/AHD/2015 and C.O.No.137/AHD/2016 are allowed and Revenue appeal in ITA No.298/AHD/2014 is dismissed.

33. Order pronounced in the open court on 14-02-2020.

Sd/-	**Sd/-**
(O.P.MEENA)	**(SANDEEP GOSAIN)**
(लेखा सदस्यतथा/ACCOUNTANT MEMBER)	**(न्यायिक सदस्यकेसमक्ष /JUDICIAL MEMBER)**

सुरत/ **Surat,** दिनांक **Dated:** 14th February, 2020/*S.Gangadhara Rao, Sr.PS*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / **TRUE COPY** / /

Assistant Registrar, Surat