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आयकर अपीलीय अधिकरण "जी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

श्री मनोज कुमारअग्रवाल, लेखा सदस्य **एवं**
सुश्री मधुमिता राय, न्यायिक सदस्य के समक्ष।
BEFORE SHRI MANOJ KUMAR AGGARWAL, AM
AND MS. MADHUMITA ROY, JM

आयकरअपील सं./ I.T.A. No.300/Mum/2018
(**निर्धारण वर्ष /** Assessment Year: 2012-13)

M/s. Gateway Terminals Pvt. Ltd. GTI House, Jawaharlal Nehru Port Sheva, District-Uran Navi Mumbai-400 707.	**बनाम**/ Vs.	**DCIT-Panvel Circle** Ashar I.T. Park, Road No.16Z Wagle Estate Thane (W)-400 604.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AACCG-1899-E**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Shri Porus Kaka- Ld. Sr. Counsel
Revenue by	:	Shri N. Padmanabhan- Ld. DR

सुनवाईकीतारीख/ **Date of Hearing**	:	07/01/2020
घोषणाकीतारीख / **Date of Pronouncement**	:	28/05/2020

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member):-

1.1 Aforesaid appeal by assessee for Assessment Year [in short referred to as 'AY'] 2012-13 contest the order of Ld. Commissioner of Income-Tax (Appeals)-2, Thane, [in short referred to as 'CIT(A)'], *Appeal No.ITA No./10109/16-17* dated 31/10/2017 on certain grounds of appeal.

1.2 The learned Sr. Counsel, during the course of hearing, submitted that

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only ground nos. 1 to 3 are being pressed in the appeal. The same read as under: -

> **Ground I: Denial of deduction u/s. 80IA for interest on income tax refund: Rs.2,35,18,687**
> 1.1 The learned Commissioner of Income-tax (Appeals) - 2, Thane ['CIT(A)'] has erred in law and on facts in confirming the action of the Assessing Officer ('AO') in denying deduction u/s. 80IA for interest on income tax refund.
> **Ground II: Denial of deduction u/s. 80IA for interest on Fixed Deposit with bank: Rs.8,67,66,538**
> 2.1 The learned CIT(A) has erred in law and facts of the case in enhancing the assessment by denying the deduction u/s. 80IA for interest income from FDs with bank which was allowed by the AO.
> 2.2 The learned CIT(A) failed to appreciate that the monies were kept in FDs with bank for the business reason and hence such interest income should be considered as profits derived from the eligible business for calculating deduction u/s. 80IA.
> **Ground III: Amortization / Depreciation claimed on Terminal Rights: Rs. 76,12,752**
> 3.1 The learned CIT(A) has erred in law and facts of the case, in confirming the action of the AO, by upholding that the terminal right (which is accepted as an intangible assets) should be amortized over a period of thirty years even though the rate of depreciation prescribed under the Income tax Rule is 25%."

2. We have carefully heard the rival submissions, perused relevant material on record including judicial pronouncements as cited before us. Our adjudication to the grounds of appeal would be as given in succeeding paragraphs. It is admitted position before us that Ground-3 of the appeal is covered by the decision of this Tribunal in assessee's own case for AY 2010 -11, ITA No.3594/Mum/2016 order dated 16/03/2018 (which has been authored by one of us). A copy of the order has been placed on record.

3. Facts on record would reveal that assessee being resident corporate assessee stated to be engaged as *port terminal operator* was assessed for year under consideration u/s. 143(3) on 29/02/2016 wherein the income of the assessee was determined at Rs.244.03 Lacs under normal provisions

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after certain additions / disallowances / adjustments as against returned income of Rs.8.59 Lacs e-filed by the assessee on 30/11/2012. The *Book Profit* u/s.115JB were determined at Rs.2499.16 Lacs after sole adjustment of provision for slow-moving stock.

4.1 For determination of issues, the interpretation of the provisions of Sec. 80-IA shall fall for our consideration. Section 80-IA provides for deduction in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development etc. Sub-section (1) of Sec.80-IA read as under: -

> 80-1 A. (l) Where the gross total income of an assesses includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

As per Explanation, infrastructure facility would *inter-alia,* mean a port, airport, inland waterway, inland port or navigational channel in the sea.

4.2 The Hon'ble Apex Court in **Liberty India V/s CIT (317 ITR 218 31/08/2009),** in the context of Sec.80-IB read with Sections 80-I and 80-IA, interpreting the expression 'derived from an industrial undertaking' as occurring in section 80-IB of the Income-tax Act, 1961 held as under:-

> **14.** Analysing Chapter VI-A, we find that section 80-IB/80-IA are the Code by themselves as they contain both substantive as well as procedural provisions. Therefore, we need to examine what these provisions prescribe for "computation of profits of the eligible business". It is evident that section 80-IB provides for allowing of deduction in respect of profits and gains derived from the eligible business. The words "derived from" is narrower in connotation as compared to the words "attributable to". In other words, by using the expression "derived from", Parliament intended to cover sources not beyond

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the first degree. In the present batch of cases, the controversy which arises for determination is: whether the DEPB credit/Duty drawback receipt comes within the first degree sources? According to the assessee(s), DEPB credit/duty drawback receipt reduces the value of purchases (cost neutralization), hence, it comes within first degree source as it increases the net profit proportionately. On the other hand, according to the Department, DEPB credit/duty drawback receipt do not come within first degree source as the said incentives flow from Incentive Schemes enacted by the Government of india or from section 75 of the Customs Act, 1962. Hence, according to the Department, in the present cases, the first degree source is the incentive scheme/provisions of the Customs Act. In this connection, Department places heavy reliance on the judgment of this Court in *Sterling Food's* case (*supra*). Therefore, in the present cases, in which we are required to examine the eligible business of an industrial undertaking, we need to trace the source of the profits to manufacture. (*see CIT* v. *Kirloskar Oil Engines Ltd.* [1986] 157 ITR 762(Bom.).

15. Continuing our analysis of sections 80-IA/80-IB it may be mentioned that sub-section (13) of section 80-IB provides for applicability of the provisions of sub-section (5) and sub-sections (7) to (12) of section 80-IA, so far as may be, applicable to the eligible business under section 80-IB. Therefore, at the outset, we stated that one needs to read sections 80-I, 80-IA and 80-IB as having a common Scheme. On perusal of sub-section(5) of section 80-IA, it is noticed that it provides for manner of computation of profits of an eligible business. Accordingly, such profits are to be computed as if such eligible business is the only source of income of the assessee. Therefore, the devices adopted to reduce or inflate the profits of eligible business has got to be rejected in view of the overriding provisions of sub-section (5) of section 80-IA, which are also required to be read into section 80-IB [*see* section 80-IB(13)]. We may reiterate that sections 80-I, 80-IA and 80-IB have a common scheme and if so read it is clear that the said sections provide for incentives in the form of deduction(s) which are linked to profits and not to investment. On analysis of sections 80-IA and 80-IB it becomes clear that any industrial undertaking, which becomes eligible on satisfying sub-section(2), would be entitled to deduction under sub-section (1) only to the extent of profits derived from such industrial undertaking after specified date(s). Hence, apart from eligibility, sub-section (1) purports to restrict the quantum of deduction to a specified percentage of profits. This is the importance of the words "derived from industrial undertaking" as against "profits attributable to industrial undertaking".

The Hon'ble Court has observed that the words "derived from" is narrower in connotation as compared to the words "attributable to". In other words, by using the expression "derived from", Parliament intended to cover sources not beyond the first degree.

4.3 The Hon'ble Delhi High Court in **CIT V/s Eltek SGS (P) Ltd. (169**

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Taxman 283 19/02/2008), rendered in the context of deduction of duty drawback u/s 80-IB, noted the distinction between the expression *profits and gains derived from an industrial undertaking* and *profits and gains derived from any business* and held that in the case of latter, there need not necessarily be a direct nexus between the activity of an industrial undertaking and profits and gains. It was also found that duty drawback was in the nature of reimbursement of custom duty that an exporter has paid on imported goods, which are subject to a manufacturing process and then exported. In that sense, the export has direct nexus with the industrial undertaking itself. In the above background, the substantial ground raised by the revenue was not admitted.

4.4 The Hon'ble Bombay High Court in **CIT V/s Jagdishprasad M. Joshi (318 ITR 420 25/11/2008),** rendered in the context of deduction of interest income on fixed deposits and other interest income u/s 80-IA, relying upon the aforesaid decision of Hon'ble Delhi High Court in **CIT V/s Eltek SGS (P) Ltd. (supra)**, refused to admit the substantial question of law raised by the revenue. This decision of **CIT V/s Jagdishprasad M. Joshi (supra)** has subsequently been followed by Hon'ble Court in **Tema Exchangers Manufacturers Pvt. Ltd. V/s ACIT (ITA No. 415 of 2004 dated 18/07/2018)** while dismissing revenue's appeal.

4.5 The decision of Hon'ble Bombay High Court in **CIT V/s Punit Commercial Ltd. (116 Taxman 191 08/08/2000)** has been rendered in the context of Sec.80HHC which altogether employ different expression and provide for deduction of profits derived from export of goods or

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merchandise.

4.6 We find that the decision of Hon'ble Delhi High Court in **CIT V/s Eltek SGS (P) Ltd. (169 Taxman 283 19/02/2008)** was rendered prior to the decision of Hon'ble Apex Court in **Liberty India V/s CIT (317 ITR 218 31/08/2009).** The revenue preferred special leave petition against the aforesaid decision of Hon'ble Delhi High Court which was admitted as civil appeal no. 2817 of 2010 (Arising out of SLP (C) No. 851/2009) which was disposed-off on 26/03/2010. The Hon'ble Apex Court, following the ratio of **Liberty India V/s CIT (317 ITR 218)** reversed the decision of Hon'ble Delhi High Court by observing as under: -

> O R D E R
>
> Leave granted.
> By consent, the matter is taken up for final hearing.
> The issue is squarely covered in favour of the Department vide our judgment in the case of M/s. Liberty India vs. C.I.T., Karnal, reported in 317 ITR 218.
> Accordingly, Civil Appeal stands allowed.
> No order as to costs.

It is evident that the above said decision of Hon'ble Delhi High Court has been reversed by Hon'ble Apex Court in view of the decision in **Liberty India (supra).**

4.7 In sum and substance, as held by Hon'ble Apex Court in **Liberty India,** the words "derived from" is narrower in connotation as compared to the words "attributable to". By using the expression "derived from", Parliament intended to cover sources not beyond the first degree. To answer the same, one need to trace the source of profit and until that source is first degree

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source, the deduction u/s 80-IA would not be allowable to the assessee.

4.8 The decision of Mumbai Tribunal in **ITO V/s Hiranandani Builders (83 Taxmann.com 65 28/10/2015)** has been rendered in the case of an assessee which did not operate any industrial undertaking. It developed IT parks and SEZ and derived lease income upon leasing out the properties. The lease income was, undisputedly, eligible for deduction u/s 80-IA. The primary income of the assessee consisted only of leased income. The lease deposits received from tenants were parked as fixed deposits which generated interest income. It was noted that the assessee was required to keep part of lease deposits in fixed deposits out of business compulsion. Since the lease rental income was primary source for the assessee, the keeping of fixed deposits shall from integral part of the business of operations of IT parks and SEZ. Therefore, the action of Ld. CIT(A) in directing Ld. AO to net-off the same from interest expenditure was upheld. Further, the assessee's customers deducted TDS on leased rental which was stated to be beyond assessee's control and due to delay in getting non-deduction certificate from AO. Therefore, TDS deduction was held to be integral part connected with the receipt of lease income which could not be separated from assessee's activity. The coordinate bench equated the interest on TDS refund with delayed payment of business receipts and directed Ld. AO to net-off the same against interest expenditure for the purpose of computing profits and gains derived from the undertaking.

5. Keeping in mind the above settled legal position, our adjudication to the issue would be as follows: -

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Ground-1: Denial of Deduction u/s 80-IA on Income Tax Refund for Rs.235.18 Lacs

5.1 During assessment proceedings, it transpired that the assessee earned interest of Rs.235.18 Lacs on Income Tax refund. The assessee treated the interest income as income derived from the undertaking and accordingly claimed deduction u/s 80-IA against the same. Since this amount was not derived from profits and gains of business, the same was not considered for deduction u/s 80-IA by Ld. AO and brought to tax as *Income from Other Sources.*

5.2 Before Ld. CIT(A), it was pleaded that refund arose to the assessee due to excess TDS made by the customers against payment to be made to the assessee and therefore, the TDS was part and parcel of the business receipts. It was submitted that had the customers not deducted the excess amount of TDS, the assessee would have received the surplus funds which could have been used for business purposes / repayment of loans etc. Accordingly, the interest liability would have been less and profits would have been more and therefore, the assessee would be eligible to claim deduction u/s 80-IA. Reliance was placed on the decision of Mumbai Tribunal in **ITO V/s M/s Hiranandani Builders (ITA No.463/Mum/2013).**

Gr.2 Denial of Deduction u/s 80-IA on Interest on Fixed Deposits with Bank for Rs.867.66 Lacs

5.3 This issue arises out of impugned order since no such adjustment

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was proposed by Ld. AO. In the background of appellate proceedings *qua* assessee's claim of deduction u/s 80-IA on interest on Income Tax Refund, it was observed by Ld. CIT(A) that the assessee earned interest on fixed deposits with bank for Rs.867.66 Lacs, which was included in eligible profits for the purpose of computing deduction u/s 80-IA. In other words, similar deduction u/s 80-IA was claimed on this interest income. Accordingly, an enhancement notice was issued to the assessee on 15/02/2017 requiring assessee to explain as to why the said income was not to be excluded from the eligible profits.

5.4 The assessee, in defense, submitted that its only business was operating and maintaining the container terminal at Jawaharlal Nehru Port Trust (JNPT) which was eligible for deduction u/s 80-IA. Interest was earned out of monies accruing from the eligible business of the assessee and the same was also utilized for the purpose of its eligible business. It was further submitted that interest arose due to parking of funds in compliance of the orders of Hon'ble Bombay High Court in a tariff dispute between the assessee and the Tariff authorities of major port.

5.5 However assessee's submissions could not find favor with Ld. CIT(A) who opined that interest income derived / generated from surplus funds, parked with the bank, could not be considered as an income derived from the industrial undertaking as there was no direct nexus between income earned and the industrial undertaking. The relevant observations were as under: -

> 8.6 The above contention of the appellant has been considered and noticed that the

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case law relied upon by the assessee is not applicable to the facts of the appellant, hence not tenable. In the case of the appellant the issue is to be considered whether interest received from surplus fund parked with the bank can be constitute as income derived from industrial undertaking to make it eligible for deduction u/s 80IA of the Act or not?. From the facts of the case it is noticed that the appellant had claimed deduction u/s 80IA of the Act in respect of income of Rs 2,35,18,687/- received from I T refund and Rs.8,67,66,538/- interest received against deposit / surplus fund parked with the bank. In my considered view the interest income derived /generated from surplus fund, parked with the bank, cannot be considered as income derived from the industrial undertaking, as there was no direct nexus between income earned and the industrial undertaking, The interest income cannot be considered to be derived from the activity merely be reason of the fact that the activity may be resulting in earning the said income in indirect, incidental or remote manner. In my view the commercial connection is irrelevant and it is also not sufficient even if such income is assessable as business income.

8,9 As regard the appellant's claim that he had parked certain surplus funds with the bank to cover up the future liability, if at all arose in view of the court's order is also not tenable as the interest income derived from such deposits itself cannot be held as income derived from the undertaking because the effective source of interest is from deposit and not from business, as the industrial undertaking was moved by one step from the source of income for interest. In other words the immediate and effective source of deposit was the deposit and not the industrial undertaking. The Hon'ble Supreme Court in the case of Cambay Electric Supply Industrial Co Ltd. Vs CIT 1978 113 ITR 84 inter-alia held that the profits or gains eligible for deduction under section 80HH must be derived from the actual conduct of the business and unless the profits or gains are derived from the actual conduct of the business, it cannot be stated that the interest is derived from the industrial undertaking. From these facts it is crystal clear that the industrial undertaking must directly **yield the profit** to be eligible for deduction and it cannot be means to **yield the income.** As per various prevailing case laws, it is clearly held that the interest income might be assessable as business income, but the same itself would not be sufficient to hold that the interest income was derived from the actual conduct of business of the industrial undertaking, hence will not be eligible for deduction u/s 801A of the Act. The perusal of the provision of the Section of the Act clearly reveal the fact that it was not all business receipts that would qualify for deduction **and the Legislature has apparently not intended to give the benefit of deduction to all business income.** In the case of Liberty India (317 ITR 218) the Hon'ble Supreme Court had clearly held that one may find that sections 80-IB and 80-IA arc the codes by themselves as they contain both substantive as well as procedural provisions. It is further held that it is evident that section 80-IB provides for allowing of deduction in respect of profits and gains derived from the eligible **business and accordingly it is held that the words 'derived from' are narrower in connotation to the words 'attributable to[1].**
In this regard, I would like to quote the relevant part of the provision of Section 80IA of the Act which inter-alia read as under:

"80-1 A. (l) Where the gross total income of an assesses ***includes any profits and gains***

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derived by an undertaking or an enterprise from any business referred to in sub-section (4) *(such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section,* ***be allowed, in computing the total income of the assese, a deduction*** *of an amount equal to hundred per cent of the profits and gains derived from such business far ten consecutive assessment years. "*

8.10 The above provision of section clearly speaks about the fact that income which has been derived from the industrial undertaking is only eligible for deduction u/s 80IA of the Act. The interest income derived from the bank against parking of surplus fund cannot be considered to be derived from industrial undertaking, as the appellant has not carried out any activities to earn such interest income. Accordingly, in my considered view, the same cannot be linked as income derived from the Industrial undertaking. In the case of Rajkumar Impex Pvt Ltd Vs DCIT 15 DTK 118, it is held that the interest received on margin money deposits for opening letter of credit is not entitled for deduction u/s 80IA of the Act. Likewise in the case of Sudhir Engineering Co Vs ACIT, 2007, 108 TTJ 933, it is held that the interest earned on Vikas cash certificates cannot be considered as profit and gains of business derived from industrial undertaking, hence not eligible for deduction u/s 80IB of the Act. Similar view has been taken by the Hon'ble Chandigarh ITAT in the case of Varindra Agrochem Ltd Vs DCIT 2006, 100 TTJ 1114. Likewise the Hon'ble Rajasthan High Court in the case of Mukesh Oil Mill Pvt Ltd in 1TA NO. 1/2008 dated 12.04,2017, dismissed the appeal by holding inter-alia, that "the FDR interest and Interest on IT refund are not eligible for deduction u/s 801A of the Act, by placing he reliance on the decision of the Hon'ble S. C. in the case of Liberty India Vs CIT (2009) 317 ITR 218 (SC).

8.11 From the above discussion it is inferred that the deduction is to be strictly construed and language of enactment prevent the extension of the benefits to income, which is merely incidental or ancillary to the industrial undertaking, but which does not arise from and out of it, as has been held in the case of CIT Vs Standard Motor Products of India Ltd (1962) 46 ITR 814 (Mad). Taking into account the facts as discussed above, in my considered view the interest income of Rs 2,35,18,687/- received from I T refund as well as interest of Rs 8,67,66,538/~ received from bank against surplus fund parked as deposit is not eligible for deduction u/s 80IA of the Act and accordingly the addition of Rs 2,35,18,687/- made by the AO is sustained. **It is further held that income of the appellant is also enhanced by Rs.8,67,66,538/-, in respect of interest income received from bank, which is not eligible for deduction u/s 801A of the Act. The penalty u/s 271(1)(c) of the Act is initiated for filing of inaccurate particulars in respect of this enhanced income. This ground of appeal is decided accordingly.**

It is evident that Ld. CIT(A) noted the ratio of decision in **Liberty India (317**

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ITR 218) and took a view that the words 'derived from' are narrower in connotation to the words 'attributable to' and therefore upheld the stand of Ld. AO *qua* interest on Income Tax Refund as well as enhancement on account of interest on FDRs with Bank.

Aggrieved as aforesaid, the assessee is under further appeal before us.

6. The perusal of documents on record would reveal that the assessee is joint venture between APM Terminals Mauritius Ltd., Mauritius and Container Corporation of India Ltd. It entered into a comprehensive License Agreement dated 10/08/2004 with Jawaharlal Nehru Port Trust (JNPT) to build as well as operate a container terminal at JNPT on Build, Operate and Transfer (BOT) basis. The business activities of the company have stated to have commenced from 14/03/2006 and it is eligible to claim deduction u/s 80-IA from AY 2006-07 onwards. However, AY 2012-13 is the first year where there are taxable profits and therefore, it has claimed deduction for the first-time u/s 80-IA. Admittedly, it fulfils the conditions laid down in Sec.80-IA to claim deduction therein.

7. The Ld. Sr. Counsel has submitted that tariff charged by the assessee from its customers was governed by the Tariff Authority for Major Ports (TAMP). TAMP notified a reduction in tariff with effect from 23/02/2012 which was challenged by the assessee before Hon'ble Bombay High Court. The Hon'ble Court, vide interim decision dated 02/07/2012, directed the assessee to set aside the differential tariff amount in its bank account. The fixed deposits were placed to comply with the aforesaid interim order of the court and therefore, the FDR would have direct nexus with assessee's

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business activities and therefore, the same should be treated as part and parcel of the business activities. Similarly, arguments have been made to submit that the refund of Income Tax arose to the assessee due to excess deduction of TDS by the customers. Had there been less / no TDS, excess money would be placed at the disposal of the assessee which would ultimately reduce interest cost meaning thereby higher eligible profits. *Au Contraire,* Ld. CIT-DR supported the stand of Ld. CIT(A) in the impugned order. Our adjudication, in the light of settled legal position as enumerated by us in para 4.7 would be as given in succeeding paragraphs.

8. We are of the considered opinion that interest on Income Tax arises to the assessee as per the statutory provisions of Income Tax. The law mandate provision of interest to the assessee for deprivation of use of money due to excess payment of tax. This interest accrues to the assessee as per statutory mandate only and it accrues to every assessee under certain conditions irrespective of manner of earning of the income. The source of the interest was necessarily to be traced to the fact that the assessee was deprived of use of money due to excess payment of taxes and the same would bear no nexus with the business activities being carried out by the assessee. The argument that lower TDS would have meant lower interest expenditure is misplaced. The deduction of interest is allowed to the assessee as per the mandate of Sec. 36(1)(iii) only. The TDS is also deducted as per statutory mandate only and the same is applicable to each type of assessee under certain conditions. Therefore, the said argument, in our opinion, would not materially alter the basic fact that

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interest on Income Tax refund would bear no nexus with the eligible activities being carried out by the assessee. Going by the ratio of **Liberty India (supra),** we confirm the stand of Ld. CIT(A) in the impugned order. This ground stand dismissed.

9. Similar analogy would apply to interest on fixed deposits since the accrual / source of interest would be traced to investment made by the assessee with the Banks in the shape of FDRs notwithstanding the motive which led to make those investments. The assessee's only source of income may be the earnings from eligible business but the accrual of interest could not be said to have any nexus with the eligible business rather the same would be traced to investments made by the assessee with the Bank. The words *derived from* would not cover sources of income beyond first degree. Therefore, the action of Ld. CIT(A) in bringing to tax the same, is upheld. Consequently, ground No. II stands dismissed.

<u>Gr.3 Depreciation on Terminal Rights Rs.76.12 Lacs.</u>

10. Upon perusal of financial statements, it transpired that assessee entered into 30 years license agreement with an authority i.e. Jawaharlal Nehru Port Trust (JNPT). The assessee paid sum of Rs.15 crores as upfront fee and Rs.25.97 crores as stamp duty for registration of agreement. These amounts were disclosed as *terminal rights* and have been amortized over a period of 10 years effective from AY 2006-07. However, the depreciation, while computing taxable income, was claimed @25% of written down value of these assets. The Ld. AO, forming a belief that since the asset acquired by the assessee would generate income for

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the whole of contract period, the same should be amortized over 30 years. Accordingly, Ld. AO reworked depreciation in the aforesaid manner and disallowed depreciation to the extent of Rs.76.12 Lacs. The same, upon confirmation by learned first appellate authority, is under challenge before us.

11. As stated earlier, this issue is covered in assessee's favor by the cited decision of the Tribunal for AY 2010-11 (which has been authored by one of us) wherein it was held that since prescribed rate of depreciation as per Rule is 25%, the assessee would be entitled for the same. Facts are pari-materia the same in this year. Therefore, taking the same view, we direct Ld. AO to allow depreciation at prescribed rate of 25%. This ground stand allowed.

Reasons for delay in pronouncement of order

12.1 Before parting, we would like to enumerate the circumstances which have led to delay in pronouncement of this order. The hearing of the matter was concluded on 07/01/2020 and in terms of Rule 34(5) of Income Tax (Appellate Tribunal) Rules, 1963, the matter was required to be pronounced within a total period of 90 days. As per sub-clause (c) of Rule 34(5), every endeavor was to be made to pronounce the order within 60 days after conclusion of hearing. However, where it is not practicable to do so on the ground of exceptional and extraordinary circumstances, the bench could fix a future date of pronouncement of the order which shall not ordinarily be a day beyond a further period of 30 days. Thus, a period of 60 days has been provided under the extant rule for pronouncement of the

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order. This period could be extended by the bench on the ground of exceptional and extraordinary circumstances. However, the extended period shall not ***ordinarily*** exceed a period of 30 days.

12.2 The record would show that a draft of the present order was prepared and sent through postal authorities vide receipt no. EM045083040IN dated 20/03/2020 for approval of Hon'ble Judicial Member at Ahmedabad. The package containing the draft orders was delivered at destination on 23/03/2020. It is quite evident that the order was well drafted before the expiry of 90 days and sent for approval of the other member immediately. However, unfortunately, on 24/03/2020, a nationwide lockdown was imposed by the Government of India in view of adverse circumstances created by pandemic covid-19 in the country. The lockdown was extended from time to time which crippled the functioning of most the government departments including Income Tax Appellate Tribunal (ITAT). The situation led to unprecedented disruption of judicial work all over the country and the draft order could not reach Hon'ble Judicial Member for approval despite lapse of considerable period of time. The situation created by pandemic covid-19 could be termed as unprecedented and beyond the control of any human being. The situation, thus created by this pandemic, could never be termed as ordinary circumstances and would warrant exclusion of lockdown period for the purpose of aforesaid rule governing the pronouncement of the order. The draft order was subsequently been received at the first available opportunity and approved by the bench and accordingly, the same is being pronounced now.

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12.3 Faced with similar facts and circumstances, the co-ordinate bench of this Tribunal comprising-off of Hon'ble President and Hon'ble Vice President, in its recent decision titled as **DCIT V/s JSW Limited (ITA Nos. 6264 & 6103/Mum/2018)** order dated 14/05/2020 held as under: -

> 7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 7th January 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:
> (5) The pronouncement may be in any of the following manners: —
> (a) The Bench may pronounce the order immediately upon the conclusion of the hearing.
> (b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.
> (c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.
>
> 8. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of **Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]** wherein Their Lordships had, inter alia, directed that **"We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile** (emphasis, by underlining, supplied by us now), **all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment".** In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.

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9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that **"In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown".** Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, **"It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly"**, and also observed that **"arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020".** It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. **force majeure** clause) maybe invoked, wherever considered appropriate, following the due procedure…". The term **'force majeure'** has been defined in Black's Law Dictionary, as **'an event or effect that can be neither anticipated nor controlled'** When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the

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Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)],** Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed **"while calculating the time for disposal of matters made timebound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly".** The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

Driving strength from the ratio of aforesaid decision, we exclude the period of lockdown while computing the limitation provided under Rule 34(5) and proceed with pronouncement of the order.

Conclusion

13. Finally, the appeal stands partly allowed in terms of our above order. This order is pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details of the same on the notice board.

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Sd/-	Sd/-
(Madhumita Roy)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य **/ Judicial Member**	लेखा सदस्य **/ Accountant Member**

मुंबई Mumbai; दिनांकDated : 28/05/2020
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT
   – concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

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उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई **/ ITAT, Mumbai**