

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI
BEFORE SH. PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SH. K. NARASHIMHA CHARY, JUDICIAL MEMBER
(Through Video Conferencing)

ITA No.4061/DEL/2013
Assessment Year: 2009-10

DLF Limited DLF Centre, (9 th Floor) Sansad Marg, New Delhi-110001 PAN No.AAACD3494N	Vs	Addl. CIT Range-10 404, C. R. Building New Delhi
(APPELLANT)		(RESPONDENT)

ITA No. 4436/DEL/2013
(Assessment Year: 2009-10)

DCIT Circle -7 (1) New Delhi	Vs.	DLF Ltd. Sansad Marg New Delhi PAN No. AAACD3494N
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. R. S. Singhvi, CA Sh. Satyajeet, CA
Respondent by	Ms. Nidhi Srivastava, CIT DR

Last Date of hearing:	14/08/2020
Date of Pronouncement:	10/09/2020

ORDER

PER PRASHANT MAHARISHI, AM:

1. These are the cross appeals filed by the assessee and the Deputy Commissioner Of Income Tax, Circle – 10 (1), New Delhi (The Learned AO) against the order of the learned Commissioner Of Income Tax (Appeals) –XIII, New Delhi [the Id CIT (A)] dated 1st May 2013 for assessment year 2009 – 10.
2. ITA No.4061/DEL/2013 is filed by the assessee raising following grounds of appeal:-
 - 1.1 *That learned CIT(A) has grossly erred in law and on the facts and in the circumstances of the appellant's case in confirming the disallowance of Rs.83,02,737/- made by the Assessing Officer on account of brokerage and commission expenses relating to leased out properties. [Page 129- 142: of CIT(A)'s*

Order]

- 1.2 *That in the alternative, if same is attributable to lease income, adjustment is required to be made while working out rental income as per provisions of section 23(1) of the Income Tax Act, 1961.*
- 2.1 *That the learned CIT(A) has grossly erred in law and on the facts and in the circumstances of the appellant's case in confirming the disallowance made by AO u/s 14A of the Income-tax Act, 1961, to the extent of Rs.10,01,00,000/- . [Page 189-205 of CIT(A)'s Order]*
- 2.2 *That the learned CIT(A) has failed to appreciate that no interest, administrative or any other expenditure was incurred by the appellant in relation to investments during the assessment year 2009-10. That the learned CIT(A) ought to have held that no amount of interest, administrative or other expenditure was disallowable u/s 14A of the I Income-tax Act, 1961.*
- 2.3 *That the learned CIT(A) has grossly erred in applying section 14A of the Act without appreciating that this section has no application to the present case.*
- 2.4 *Without prejudice to above, the learned CIT(A) has erred in law, on facts and in circumstance of the case in not appreciating that for the purpose of making disallowance u/s 14A of the Act the assessing officer, having regard to accounts of the assessee for previous year, has to be not satisfied with - (a) the correctness of the claim of the expenditure made by the assessee or (b) the claim made by the assessee that no expenditure has been incurred in relation to income which does not form part of the total income under the Act, for such previous year, as mandated by section 14A of the Act.*
- 2.5 *That the learned CIT(A) has not appreciated that no such finding on satisfaction, as amended by law, has been recorded by the Assessing Officer and as such provisions of section 14A of the Act cannot be invoked.*
- 3.1 *That learned CIT(A) has grossly erred in law and on the facts and in the circumstances of the appellant's case in confirming the net addition of Rs. 11,55,271/- [i.e. after allowing standard deduction @ 30% on gross addition of Rs. 16,50,387/- which works out to Rs.4,95,116/-] made by the Assessing Officer on account of notional rent where security deposits were received from the tenants but no rental income has been shown by the appellant, whereas in fact the appellant has not received any*

rental income from these tenants. [Page 228-231 of C IT(A)'s Order]

- 3.2 *That learned CIT(A) has grossly erred in law arid on the facts and in the circumstances of the appellant's case in appreciating the fact that the taxable income means real income and not a fictional income.*
- 3.3 *That in the alternative, claim of maintenance expenses may be considered and allowed as permissible deduction.*
- 4.1 *That learned CIT(A) has grossly erred in law and on the facts and in the circumstances of the appellant's case in confirming the disallowance of Rs. 1,16,935/- on account of interest on late deposit of TDS. [Page 253- 259 of CIT(A)'s Order]*
- 4.2 *That claim of interest is permissible deduction under law and Assessing Officer may be directed to accept the same.*
- 4.1 *That learned CIT (A) has grossly erred in law and on the facts and in the circumstances of the appellant's case in confirming the addition of Rs.4,61,57,388/- on account of short deposit of Dividend Distribution Tax. [Page 259-264 of CIT (A)'s Order]*
- 5.2 *That impugned order is without proper appreciation of facts and /application of mind.*
6. *That the order passed by the learned CIT(Appeals) is bad in law as well as wrong on facts and erroneous in points of law and right is reserved to assail the same on such other ground or grounds as may be advanced at the time of hearing for which the appellant craves leave to amend, vary or add to the grounds hereinbefore appearing.*

3. ITA No.4436/DEL/2013 is filed by the learned assessing officer raising following grounds of appeal:-

1. *Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs.3,09,16,658/- made by the AO on account of disallowance of prior period expenses ?*
2. *Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs.7,72,65,10,922/- made on account of disallowance of deduction u/s. 80 IAB of the IT Act, 1961?*

- 2A Whether the CIT(A) under the facts and circumstances of the case and in law was correct in allowing deduction of Rs.772,62k,10,922/- u/s. 80 IAB of the Act, without deducting the short allocation of overheads of Rs.15,48,61,000/- to the SEZ division as worked out by the Special Auditor?
3. Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the disallowance of Rs.77,83,55,804/- on account of artificially estimated IDC charges, and pre-ponement of construction cost?
4. Whether the CIT(A) under the facts and circumstances of the case and in law was justified in restricting the disallowance to Rs.83,02,737/- as against Rs.4,00,44,936/- as made by the AO on account of Brokerage & Commission ?
5. Whether the CIT (A) under the facts and circumstances of the case and in law was justified in deleting the disallowance of Rs.5,46,83,000/- on account of interest capitalization ?
6. Whether the CIT(A) under the facts and circumstances of the in law was justified in deleting the addition of Rs.1,66,71,710/- on account of late construction charge?
7. Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs.28,837/- on account of contingency deposits received during the year ?
8. Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs.63,159/- on account interest free security deposit?
9. Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs.25,37,61,992/- on account of registration charges?
10. Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs.25,37,81,038/- on account of non allocation of overheads to group companies ?
11. Whether the CIT(A) under the facts and circumstances of the case and in law was justified in restricting the disallowance u/s. 14A of the IT Act, 1961 read with Rule 8 D of the Income Tax Rule, 1962 to lRs.10,01,00,000/- as against the disallowance of Rs.71,02,72,000/- made by the Assessing Officer ?
12. Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs.1,05,19,606/- on account of capitalization of expenses on commercial project not commended?
13. Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs.13,82,35,746/- on account of reclassification of income from house property to income from business or profession ?
14. Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of

Rs.15,41,010/- on account of notional rental income on vacant / leased properties ?

15. *Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs.6,36,614/- on account of recalculation of depreciation in respect of earlier let out DLF Centre Building, now converted to self occupied property ?*
 16. *Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs.30,12,202/- on a/c of disallowance of expenses where bills were not in the name of the company ?*
 17. *Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs.3,48,396/- on a/c of disallowance of excess payment of rent?*
 18. *The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of hearing.*
4. Facts show that Assesse Company is engaged in the business of real estate development. It filed its return of income on 29 September 2009 declaring an income of ₹ 6,912,407,270. The above return was further revised on 30 June 2010 wherein the total income declared was ₹ 6,604,096,800/-. It further revised its return of income on 31st of March 2011 declaring the income that was declared in a revised return; however, certain tax deduction at source claims was made.
 5. The case of the assessee was selected for scrutiny and therefore the learned assessing officer as per order dated 22 December 2011 directed the assessee to get its account audited for the financial year 2008 – 09 relevant to the assessment year 2009 – 10 u/s 142 (2A) of the act. Such accounts audited by the special auditor on 9 March 2012 and submitted before the assessing officer on the same date. On the basis of the audit report and after considering the reply filed by the assessee the learned assessing officer framed assessment order u/s 143 (3) read with Section 142 (2A) of the act on 30 April 2012 making total addition/disallowance of ₹ 9,948,413,224/-. Assessee challenged the same before the learned Commissioner of Income Tax (Appeals), New Delhi. The assessee submitted before him that large numbers of issues are covered by the grounds of appeal, which have been decided in favour of the assessee by the order of the Commissioner of Income Tax (A) for assessment year 2006 – 07, 2007 – 08, and 2008 – 09, which has been subsequently upheld by the coordinate bench. Therefore, out of the

total addition, the learned Commissioner of income tax tabulated such 20 issues at page number 16 – 18 of his order. He passed an order on 1 May 2013 partly allowing the appeal of the assessee. Therefore, both the parties are aggrieved with the order of the learned Commissioner of income tax A and have preferred appeal before us.

6. Now we first come to the appeal of the learned assessing officer.
7. 1 st ground of appeal is with respect to the deletion of the addition of ₹ 30,916,658/- on account of disallowance of prior period expenses. The learned CIT A dealt with this issue at paragraph number seven of his order. The learned authorized representative submitted that this issue is covered in favour of the assessee as per the order of the coordinate bench for assessment year 2006 – 07 as well as in ITA number 2749/del/2013 for assessment year 2008 – 09 dated 27/05/2019. He referred to paragraph number 42 – 45 at page number 35 – 38 of that decision.
8. The learned departmental representative also stated that the coordinate bench has considered identical issue. However, he relied upon the order of the learned assessing officer.
9. We have carefully considered the rival contentions and perused the orders of the learned lower authorities. The coordinate bench in assessee's own case for assessment year 2008 – 09 in ITA number 2749/Del/2013 has dealt with this issue as Under:-

“42. In so far as the first issue is concerned, the facts in brief are that the Special Auditors have pointed out that assessee has claimed prior period expenses amounting to ₹ 70,12,062/- on the basis of which, ld. Assessing Officer issued a show cause notice to the assessee. In response, the assessee submitted that first of all, an amount of ₹ 14,63,017/- was on account of purchase of assets being the cost of office equipment and computers and was never claimed as admissible expenses but have been capitalized as fixed assets. The balance amount was stated to be on account of reimbursement to their employees on account of telephone expenses, travelling, printing, and stationary and these are reimbursed if the employees submit the claims after proper verification. The claim though relates to earlier years, but bills were presented and settled during the year under reference, therefore, the same is allowable in this year. Similarly, with regard to legal and professional charges which was paid to various consultants, these payments were made after due verification of the services rendered and the claim was finally settled during the year, hence, allowable in this year only. Likewise, repair and maintenance expenses, the same was on account of annual maintenance, contract overlapping in the

subsequent year or miscellaneous repair maintenance for which bills were received after the closing of the year, therefore, all these expenses were crystallized during the year. Ld. Assessing Officer, however, disallowed the amount of ₹ 55,36,471/- which was on account reimbursement relating to employees; and legal and professional expenses.

43. Ld. CIT(A) relying upon the judgment of Hon'ble Delhi High Court in the case of CIT vs. Modipon Ltd., 334 ITR 102 (Del) has allowed the appeal.

44. After considering the rival submissions, we find that precisely similar issue has arisen in assessee's own case for assessment year 2006-07 wherein the Tribunal has allowed the same nature of expenditures, after observing and holding as under:

"231. We have carefully considered the rival contentions. ₹ 18.51 lakhs were regarding to the leave travel assistance claims of the assessee and ₹ 63 lakhs were on account of reimbursement and telephone and conveyance expenses of the assessee. These expenses were disallowed by the AO. The details of these expenses are enclosed as per Annexure 'A' at page 101 along with explanatory statement. These bills are pertaining to the regular staff of the employees and are payable and paid at the time of settlement of their entitlement. It is irrespective of the time when employee has actual travelled. In same way, the telephone and conveyance expenses are also reimbursement of the expenditure which would be determining the claim of the employees and admitted by the employer. The special auditor has held so because of the reason that the actual travelling has taken in the previous year. Naturally, it is a matter of common sense for the purpose of LTA claim, the travelling of the employees is prior to the claims submitted by the employees. The CIT (A) has specifically dealt with one instance in para 27.3 of his order. After verification of the details, it was received by the assessee from its employees during this period and after following the decision of Hon'ble jurisdictional High Court in the case of CIT vs. Shriram Piston - 174 taxman 147, the disallowance is deleted. The reliance of the ld. AR on the decision of Hon'ble Delhi High Court in CIT vs. Modipon Ltd. - 334 ITR 102 is also apt as the expenditure are settled during the year. Further genuineness of these expenditure is not in doubt and allowability of these expenditure is also not in question except classifying them as prior period expenses and there is no difference in rate of taxes for respective years. In the result, we confirm the order of the CIT (A) in deleting the addition of ₹ 22,98,510/- on account of prior period expenditure. In the result, ground no.26 of the revenue's appeal is dismissed."

45. Since, similar issue has been allowed by the Tribunal following the ratio and principle laid down by the Hon'ble Jurisdictional High Court in the case of CIT vs. Modipon Ltd. (supra), therefore, following the same precedence, we allow the

claim of the assessee and consequently the Revenue's ground is dismissed."

10. In view of the above finding of the coordinate bench in assessee's own case, we respectfully following the same dismiss ground number 1 of the appeal.
11. Ground number 2 is with respect to the deletion of addition on account of deduction u/s 80 IA B of the income tax act. The learned authorised representative also stated that issue is squarely covered by the order of the coordinate bench in assessee's own case for assessment year 2008 – 09 in ITA number 2714/del/2013. He also referred paragraph number 125 at page number 138 of the order.
12. The learned departmental representative also stated that issue is already been decided by the coordinate bench however he relied upon the order of the learned assessing officer.
13. We have carefully considered the rival contention and orders of the learned that lower authorities stopped be find that issue is squarely covered for assessment year 2008 – 09 is per order dated 27 May 2019 as under:-

"125. In ground no.12, the Revenue has challenged the deletion of addition ₹ 15,02,99,365/- on account of disallowance of expenses towards non allocation of overheads.

126. Ld. Assessing Officer based on Special auditor's observation noted that there were certain discrepancies with regard to apportionment of common overhead expenses incurred by the assessee company but attributable to group concern were benefitting from such expenditure. Based on the observations of the Special Auditors, the Assessing Officer required the assessee as to why the expenditure of ₹ 15,02,99,365/- benefit of which has accrued to the group entities like, DLF Infocity developers (Chennai Limited) and DLF Cyber City Developers Ltd. be apportioned to them and correspondingly the same should be disallowed in the hands of the assessee. In response, the assessee has submitted the detail reply and submitted that if income expenditure has been incurred on behalf of company, the same have been duly recovered from those companies specifically and assessee has not debited to the P&L account. For the specific expenses which were debited to the concern group companies there is no expenditure which pertains to other group companies and all the expenses debited in the P&L account are related to the business of the assessee. Even the Special auditors have not been pointed out even a single voucher pertaining to other group company which has been wrongly debited to the P & L account of the assessee. Regarding overhead allocation the assessee has submitted as under:

a. That the assessee company has not developed the SEZ rather only constructed the buildings. The deduction u/s 80-IAB is available only in the case of development of SEZ. Mere construction of Bare shell buildings will allow the assessee the deduction u/s 80-IAB. Section 80-IAB states that profit and gains derived from business of developing SEZ. Thus, the deduction is only available once the SEZ is developed and it cannot be allowed before the stage of development of SEZ.

b. Sale of buildings to the co-developer is neither an activity of development of SEZ nor one of the authorized operations for SEZ notified by the competent authority. It is an isolated transaction giving one time income from transfer of capital assets. It is very clear from the Co- Developer agreement and lease deed that the intention on the part of the assessee company, from the very beginning was to construct and sale the buildings as a onetime activity. Such isolated transaction can never be termed as business activity. Co-developer agreement and lease deed very clearly shows that the developer has sold the land and building and loses all rights over these transferred capital assets and the relinquishment of right is irrevocable.

c. Though SEZ Act prohibits for sale of land thereby implicitly denying any benefit to a developer who is basically interested in deriving income by transfer of assets, the assessee has found a way to overcome this prohibition by creating 49 years lease in favour of co-developer. It is pertinent to note that the lease deed is renewable further and thus effectively transferring the land also. Para 2.3 and 5.1 of the Lease Deed clearly allows the parties to renew the lease deed. Thus, the assessee company has transferred the land in actual sense and substance of this present transaction means sale of land. In most of the cases, substance of the transaction and its form are one and the same. However, the substance can be different from the form of the transaction in many cases. In the present case, the assessing officer has rightly gone for the substance of the transaction and disallowed the deduction u/s 80-IAB claimed by the assessee company as the lease deed is mere eye wash and actual transaction was sale of land which is clearly not permissible under SEZ Act. Relevant paras of Lease deed are at page 135 & 136 of the Paper Book II filed by the Counsel of the assessee.

d. The transfer of building is absolute and as per the amended agreement and lease deed, Co-developer shall be treated as owner of the bare shell building and the warm shell building after additions etc and will have exclusive rights to let, mortgage, or allow use of all or any part of buildings.

e. That if the deduction u/s 80-IAB is allowed to the assessee company in this case and the Co-developer does not develop the SEZ later on , how can we say that the SEZ has been developed and why should the deduction be allowed to the assessee company at this stage where the development of SEZ has not been done . Allowing the deduction at the stage of construction

of bare shell building would be against the provisions of SEZ and Income Tax Act.

127. Ld. Assessing Officer after considering the assessee's reply had observed as under:

"12.5 The reply of the assessee has been considered and from the reply it emerges that the assessee has stated that it is a listed company and not incurred any expenditure on behalf of its associated companies. The assessee company has argued that in case of both the companies to which the expenses have been allocated the main project undertaken by the two companies is development of SEZ and hence administrative activities in these companies are minimal and there is no need for allocation of further overheads. Both these companies have incurred overhead expenditure which formed part of development cost considered in POCM. This argument of the company is not tenable as the two companies DLF Info City Developers (Chennai) Ltd and DLF Cyber City Developer Ltd. during the Asstt. year 2008-09 had earned development income of ₹ 1,68,686.15 lacs and ₹ 1,63,049.03 lacs respectively and against the same the overhead expenditure shown by these companies is ₹ 71.58 lacs and ₹ 1,194.51 lacs respectively. In fact, in case of DLF Cyber City Developers, the expenditure of ₹ 1194.51 lacs includes commission and brokerage expenditure of ₹ 1155.79 Lacs and if this is reduced then the overhead expenditure incurred would be just ₹ 38.72 Lacs. It is difficult to imagine that the two companies earning development income of ₹ 168686 lacs and ₹ 163049 lacs would have incurred overhead expenditure of ₹ 71.58 lac and 38.72 lacs only. This clearly points to the fact that these two companies must have benefitted from the overhead expenditure incurred by DLF Ltd. In the previous year's also DLF Ltd has itself allocated overhead expenditure to its associated concerns.

12.6 The assessee has contended that revenue impact of whole of this exercise is revenue neutral since if certain amount of expenses is held to be allocable to group entities, the same will have to be allowed in the hands of those entities. In this respect the point to be observed is that the two companies identified by the Special Auditors which had incurred negligible overheads have earned income from development of SEZ and claimed deduction equal to 100% of profit earned on SEZ development u/s 801AB, hence the argument of the assessee that this exercise would be revenue neutral is incorrect.

12.7 The assessee has stated in the reply that in these two companies even though construction activities were going on, there was no marketing, planning or any other HO level administrative work involved during the year. The assessee has not been able to substantiate this argument with any documentary evidence.

12.8 The assessee has relied on certain citations wherein it has been held that expenses incurred for business requirement are allowable and any incidental benefit arising to a third party out of such expenditure cannot be made basis for disallowing the same. These citations are not relevant in the present case since the

expenses incurred by the assessee have benefitted the associated companies of the assessee who are in similar line of business as that of the assessee and in the past also the assessee itself had allocated certain expenditure to its associated companies. The assessee has also mentioned certain citations regarding business expediency and stated that the expenses must be incidental to the business of the assessee. The question here is that the expenses incurred by the assessee have benefitted the associated concerns and therefore the same are to be apportioned to the associated concerns. The associated concerns during the year have developed SEZ and the assessee company during the year had also earned income from development of SEZ but there is substantial variance in the level of expenses incurred and accordingly some expenses are to be attributable for the benefit of associated concerns since there is similar line of business. The associated concerns has claimed 100% deduction u/s 80IAB and therefore by transferring the expenses of associated concerns to the assessee company some portion of such expenses are to be allocated to the associated companies.

12.9The assessee has also cited judgement in the case of Nestle India Limited Vs DCIT (2009) 27 SOT 9(Delhi). In this case it was held that the assessee company had incurred expenditure on account of advertisement and sales promotion in respect of only those products in which the Indian company dealing in. Thus, the expenditure had been incurred to promote sales in India. Therefore, those expenses were incurred wholly and exclusively for the purpose of business of the assessee. In this case the associated concerns of Nestle India are situated outside India and it was easily established by Nestle that the advertisement expenses were incurred in respect of products dealt by the Indian company. However, in the case of the assessee the line of business of the assessee company and its associated concerns is identical and therefore the percentage of overhead expenditure incurred by the assessee and its associated concerns would be similar. The Special Auditor in their report have reported that DLF Ltd have incurred administrative overheads of 3.18% of the total turnover but in the case of DLF Info City Developers (Chennai) Ltd. the company has incurred administrative overheads of ₹ 71.58 Lacs against development income of ₹ 168686 Lacs which is just 0.042% of total turnover and DLF Cyber City Developers Ltd have incurred administrative overheads of ₹ 38.72 Lacs (after reducing brokerage and commission) against development income of ₹ 163049 Lacs which is just 0.023% of total turnover. The line of business of the assessee company and associated concern being identical, the proportion of overhead expenditure to the level of business should also be similar but as mentioned above there is substantial variance in the proportion of overhead expenditure incurred by the assessee company vis-a-vis the two associated concerns. The judgment of Nestle quoted by the assessee is not at all relevant in the present case since the assessee has not been able to prove that the overhead expenses incurred were wholly and exclusively for its benefit and had not benefitted the associated concerns. The assessee has not been able to

convincingly explain the extremely low level of administrative overhead expenditure incurred by the two associated concerns as compared to the assessee company considering the similar line of business.

12.10 In view of the same it can be inferred that a part of overhead expenses relatable to the two entities stand in the books of the assessee. Since the benefit of such expenditure does not accrue to the assessee but to the two group entities also, the expenditure of ₹ 15,02,99,365/- as worked out by the special auditors is disallowed.”

128. Ld. CIT(A) has deleted the addition in the following manner:

“19.22 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, order of the CIT (A)-XVIII for the A.Y. 2006-07 and my own order for A.Y. 2007-08 wherein this issue has been decided in favour of the appellant, and various case laws relied upon by the appellant on this issue. It is seen that appellant company was allocating over head expenses to its associate companies till October 2006. However, after October 2006, the appellant company stopped allocating overhead expenses to its group companies and transferred the concerned staff, who were previously looking after the affairs of group entities, to the respective entities. After October 2006, the group entities started incurring their own expenses themselves and this fact has been verified by the Special Auditors during the course of Special Audit. It is seen that there are certain heads of expenses which were exclusively pertaining to the appellant company and could not have been allocated to the other group entities. It is also seen from the Special Audit report that the Special Auditors have not brought out any instance of expenditure specifically pertaining to other group companies but has been claimed in the profit and loss account of appellant company during the year. The allocation made out by the Special Auditors was based on the presumption without bringing any material on record. No allocation of overheads is needed in the case of M/s. DLF Info City Developers (Chennai) Ltd. and DLF Cyber City Developers Ltd. because these subsidiaries have their own resources and are meeting out their expenses own their own. In the case of M/s DLF Info City Developers (Chennai) Ltd. it is seen that this company has only one project that is the development of SEZ at Chennai. The only activity in this company is the development of SEZ building and the administrative activity is bare minimum and hence there was no requirement of the allocation of further expenses. Apart from the above the company had incurred overhead expenditure which formed part of the development cost which has been considered for POCM. The details of such expenditure was furnished to the Assessing Officer at page No.1 of appellant’s letter dated 31.3.2011. The amount of overhead expenditure forming part of development cost comes to ₹ 13,12,65,162/-. This expenditure includes the overhead expenses incurred by the DLF Infocity Developer (Chennai) Ltd.

In the case of M/s. DLF Cyber City Developers Ltd, it is noted that the main project was only development of SEZ project at Sector 25 Gurgaon. Besides, the above project this company has only rental income. The administrative activity in this company is also minimal and hence there is no need of allocation of any further overheads. This Company is again self sufficient and has its own resources to carry out the activity and hence no further allocation is required. Apart from the above, the company had incurred overhead expenditure which formed part of the development cost which has been considered for POCM. The details of such expenditure was furnished to the Assessing Officer at page No.2 of appellant's letter dated 31.3.2011. The total cost of the overhead expenditure forming part of development cost is ₹ 9,73,06,213/-. This expenditure includes the overhead expenses incurred by the DLF Cybercity Developer Ltd.

19.23 Hence, it is clear that no benefit has accrued to group companies namely DLF Info City Developers (Chennai) Ltd. and DLF Cyber City Developers Ltd from the expenses of ₹ 150,299,365/-, as these expenses were exclusively for the business of the appellant company. There was no justification for disallowing these expenses. The ASSESSING OFFICER as well as Special Auditors have not brought any material on record which can prove that expenditure debited in the P&L account of the appellant company was not incurred for the bonafide business needs of the appellant company. The appellant company is main group company and expenditure incurred in this company are bound to be higher and in the process of incurring such expenditure if other group companies derived some benefit from such expenses, the expenditure cannot be allocated to the companies who have also derived some benefit. The genuineness of the impugned expenditure for the purpose of business has not been disputed by the AO. Further, under the facts and circumstances as discussed above, it cannot be denied that the said expenditure was not incurred wholly and exclusively for the purpose of the appellant's business. Further, as argued by the learned AR that all the above group companies of the appellant are subject to tax at the same rate and hence shifting of such expenditure from appellant company to other group companies would be futile and revenue neutral exercise. Considering the above, the impugned disallowance of ₹ 15,02,99,365/- made by the Assessing Officer cannot be sustained. The same is, therefore, deleted.”

129. The Tribunal in Assessment Year 2006-07 has dismissed the Revenue's appeal on this issue after observing and holding as under:

“121. We have carefully considered the rival contentions. The brief fact is that certain overhead expenses incurred by the assessee have been apportioned to the other group companies for the reason that by incurring those expenses, the assessee has passed on some benefit to those companies. The amount of 75% of that expenditure has been transferred to the group companies and 30% of that expenditure is borne by the assessee company. During the

course of assessment proceedings, the AO found that an amount of ₹ 20,79,10,574/- expenditure pertaining to payment to Directors, advertisements, printing and stationery, security charges, leave encashment and salary and wages are not apportioned to group companies and, therefore, AO disallowed 70% of those expenditure amounting to ₹ 14,55,37,401/-. It is not the case of the AO that these amount of expenditure are not incurred by the assessee and further veracity of those expenditure have also not been doubted. The only reason for disallowance is that assessee has not allocated this expenditure to its various group companies and, therefore, AO was of the view that this expenditure has not been incurred wholly and exclusively for the business purpose of the company. On perusal of the expenditure and the orders of the lower authorities, it is apparent that the director's salary is being paid to the directors of the company including a commission thereof is for the purpose of managing the business of the DLF – assessee. Further, for the protection of the interest of the company even if the directors have given their time for looking after other group activities it is merely a shareholders' activity. Furthermore, the advertisements, salary and wages, leave encashment expenditure and printing expenses etc. are all pertaining to the business of the company. No evidence / instances have been cited by AO that any of this expenditure has not been incurred by the company and they are not related to the business of the assessee. It may happen that by incurring certain expenditure by the assessee for the purpose of his business may result into some indirect benefit to the group companies but that cannot be the ground for disallowance of that expenditure in the hands of the assessee. The CIT (A) relying upon the decision of ITAT, Delhi Bench in the case of Nestle India Ltd. vs. DICT – 27 SOT 9 has deleted the addition. We do not find any infirmity in the order of the CIT (A) and revenue could not controvert the fact of any expenditure with instances that these are not incurred by the assessee wholly and exclusively for the purposes of the business of the assessee. Hence, we confirm the order of the CIT (A) deleting the addition of ₹ 14,55,37,400/-. Ground No.4 of the revenue's appeal is dismissed.”

130. In view of the aforesaid observation and the finding of the Tribunal which is applicable in this year also, therefore, respectfully following the same, the Revenue's ground is dismissed.”

14. Therefore, respectfully following the decision of the coordinate bench in assessee's own case, ground number 2 and 2A of the appeal of the learned assessing officer are dismissed.
15. Ground number 3 is with respect to the deletion of addition on account of estimated IDC charges and revenue recognition as per percentage completion method cost of the construction. The learned authorised representative submitted that this issue is covered in favour of the assessee by the order of

the coordinate bench in assessee's own case for assessment year 2006 – 07 as per paragraph number 35 – 42 at page number 58 – 62 and further in assessment year 2008 – 09 also the coordinate bench following the order of the coordinate bench for assessment year 2006 – 07 has allowed the claim of the assessee. He further referred to paragraph number 81 – 87 of the order of the coordinate bench for assessment year 2008 – 09.

16. The learned departmental representative vehemently supported the order of the learned assessing officer. However, he could not distinguish the facts of the present appeal with the facts before the coordinate benches in earlier years in assessee's own case.
17. We have carefully considered the rival contention and perused the orders of the lower authorities. This issue is squarely covered in favour of the assessee by the decision of the coordinate bench in assessee's own case for earlier years. The latest order with respect to the above issue is covered in the decision of the coordinate bench for assessment year 2008 – 09 as Under:-

“81. The next issue relates to deletion of addition on account of disallowance of Revenue recognition as per percentage of completion method (POCM) of ₹ 42,92,17,872/-.

82. At the outset, learned counsel informed that this issue stands covered in favour of the assessee by the Tribunal in assessee's own case for the Assessment Year 2006-07 and drew our attention to paragraphs 35 and 42 of the said order.

83. Ld. Special counsel also admitted that this issue now stands covered in favour of the assessee.

84. Ld. Assessing Officer on the basis of remarks made by the Special Auditors held that Revenue to be recognized from various projects as per the POCM method have to be worked out in the following manner: -

Name of the Project	Revenue recognition as per POCM for F.Y.07-08	Gross Margin recognised as per our working during F.Y.07-08	Difference	Additional Revenue recognized as per Assessment Order for A.Y.2007-08	Additional revenue recognised as per Assessment Order for AY 2006-07
Trinity	(11,58,438)	1,30,93,649	1,42,52,087	2,25,90,443	12,70,13,958
Aralias	(34,15,34,045)	(29,50,49,819)	4,64,84,226	10,49,09,048	37,50,19,955
Westend Heights	81,42,828	3,74,00,432	2,92,57,604	6,34,73,181	38,56,76,277

Royalton	7,15,12,958	7,97,19,390	82,06,432	1,43,28,160	4,88,79,491
Pinnacle	45,32,46,474	49,38,96,094	4,06,49,620	4,39,97,615	28,41,42,051
Icon	38,56,98,510	41,54,67,530	2,97,69,020	4,05,73,424	93,46,81,602
Summit	67,87,31,045	69,82,35,605	1,95,04,559	1,28,23,779	-
Magnolias	526,66,86,898	5,36,95,65,201	10,28,78,303	2,17,22,670	-
The Belaire	322,94,28,422	3,29,92,89,020	6,98,60,598	1,55,03,253	-
The Park Place	250,38,47,408	2,570,346,411	66,499,003	-	-
Wellington	(49,17,634)	(4,917,634)	-	-	-
Princeton	(59,02,013)	(5,902,013)	-	-	-
Carlton	(38,99,436)	(3,899,436)	-	-	-
Total Phase-V (A)	1223,98,82,978	12,66,72,44,430	42,73,61,452	33,99,21,573	2,15,54,13,334
DLF City Court	9,33,58,702	94,652,773	1,294,071	-	-
CourtYard Office	6,37,92,669	6,38,23,974	31,305	65,641	-
Rajarhat Kolkata	59,75,03,936	597,503,936	-	-	-
Jalandhar Mall	23,83,66,943	238,366,943	-	-	-
Ludhiana Mall	28,96,61,350	289,661,350	-	-	-
Star Tower –	5,11,80,289		18,450	-	-
Silokhera		51,198,739			
Cross Point	6,58,07,790	66,245,928	512,594	-	-
Corporate Park	33,75,82,954	337,582,954	-	-	-

Grand Mall	-	-	-	-	-
Exclusive Floors	-	-	-	-	6,95,96,807
Moulsary Arcade	-	-	-	-	6,76,915
Total (B)	173,72,54,633	1,73,90,55,150	18,56,420	65,641	7,02,73,722
Net Total (A+B)	13,97,71,37,609	14,40,62,99,580	42,92,17,872	33,99,87,214	2,22,56,87,056

Accordingly, AO made the addition of ₹ 42,92,17,872/-.

85. Ld. CIT(A) after detailed finding has deleted the said addition after observing and holding as under:

“9.8 I have considered the submission of appellant, observation of the ASSESSING OFFICER & Special Auditors comments, decision of Hon’ble ITAT in appellant’s own case in A.Y. 1994-95 and treatment given to this issue in earlier assessment years by ASSESSING OFFICER as well as appellate authorities. It is also noticed that this issue has been decided in favour of the appellant vide order dated 25.03.2011 passed by CIT(A)-XVIII, New Delhi, for A.Y. 2006-07 (page Nos.122-153 of the said order) and in my own order in appellant’s own case for the immediately preceding year relevant to assessment year 2007-08 (page Nos.108-139 of the said order). It is seen that whenever appellant company starts a new building/ project, it prepares a budgeted statement of total cost to be incurred for completing the building or Project and the total revenue which can be derived from sale of such building or project. The budgeted statement of Revenue and cost gives the budgeted margin on such building or project. When the actual construction of building or project starts, the actual cost incurred at the end of financial year is compared with total budgeted cost to determine the percentage of completion of building or project.

The appellant has following components of cost to be included in the budgeted cost:-

- *cost of land (including Land under agreements to purchase)*
- *estimated internal development cost (IDC),*
- *external development charges,*
- *construction costs and development/ construction materials,*

Internal Development Charges are incurred towards amount spent on roads, parks, water supply, electricity and other facilities required for habitation inside the peripheral of a colony. Since the expenditure is common for total colony and cannot be directly correlated with the particular project or Building, the total internal development charges (IDC) are required to be apportioned on some scientific basis over the

projects. The availability of approach road, sewage and other infrastructure facilities are an essential part of sale transaction and therefore, it is a liability committed by the appellant at the very initial stage of sale of property itself. Without the provision of these infrastructure facilities, the constructed building cannot be habitable and no customer may even buy the property of the appellant without these essential facilities. Thus, there is a direct nexus between the sale price and the expenditure to be incurred on these infrastructure facilities by the appellant. The sale revenue as well as expenditure on internal development works is inextricably linked with each other and, since the estimated revenue includes charges for internal development work, the corresponding estimated expenditure on internal development work also has to be taken into consideration in the total cost to be incurred. In other words, internal Development Work is inbuilt in the total estimated revenue; the corresponding expenditure has to be necessarily included in the total cost to be incurred. The appellant is bound to apply the matching principles i.e. matching revenue with cost to be incurred to earn the revenue. On this principle alone and by itself the inclusion of IDC in the total cost to be incurred is reasonable and justified, as without applying the principle of matching revenue with cost there would be distortion in the matter of arriving at income. This distortion needs to be avoided for the purpose of ascertaining the true profit/loss of the appellant.

As per the initial estimate prepared by the appellant the cost on internal development charges was estimated at ₹ 230 crores for its phase V projects. The same has been prepared by Shri Sunil Arora having diploma in civil engineering with an experience of 16 years and Sh. Devender Singh, B.E. (Civil) having an experience of 24 years. The cost estimate of ₹ 230 crores is further backed by individual items of cost, such as earth work, road work, storm water drainage work, horticulture work, water supply work, sewerage work, boundary wall, electrical work etc. In turn, there is a cost break down of all these broad heads.

9.9 In view of the detailed facts discussed above, the IDC is a part of budgeted cost prepared by the appellant. The budgeted IDC is prepared on scientific basis. The appellant has an experience of more than 30 years in this line of business and over the years the budgeted IDC estimated by the appellant company has been accepted as part of budgeted cost by the department. In between there was a difference between the budgeted cost and the cost estimated by the department which was finally settled before the ITAT in A.Y. 1994-95 wherein the budgeted cost of IDC as estimated by the appellant was accepted as part of the budgeted cost and issue was settled in favour of the appellant. It is also seen that the budgeted IDC has been accepted by the department from A.Y. 1988-89 to 1994-95. For A.Y. 1995-96 to 2000-01, the department has made certain additions which have been deleted by CIT (A) as well as ITAT and no further appeal has been filed by the department. From A.Y. 2001-02 to 2005-06, no additions have also been made on this issue except in A.Y. 2002-03 wherein an addition of ₹ 4,43,994/- was made, which was deleted by CIT(A). It is also seen that Hon'ble ITAT in the appellant's own case has held that appellant can claim upto 30% as IDC cost of the budgeted sales. It may be seen that revised IDC of ₹ 236.05 crore

claimed by the appellant for Phase-V project is less than the 30% of budgeted sales as stated supra. It is also seen that budgeted cost of the IDC has been accepted in A.Y. 2004-05 and 2005-06 in the appellant's case.

It may be seen that IDC is an integral part of the cost of the project and based on these estimates, the project has been approved by the Director Town and Country Planning, Govt. of Haryana. If there is no provision for IDC in the project then, appellant's project may not be approved by the Director Town and Country Planning, Haryana. It is also an accepted fact that whenever project is taken for development, initially flats are constructed and thereafter the basic infrastructure facilities like roads, sewage, lightning, park, water supply line etc. are developed. Therefore, the observation of the ASSESSING OFFICER that only ₹ 60.39 (36.07 + 24.32) crore have been spent on IDC till 31.03.2008 cannot be given much weightage and provision of such facilities has to be taken into account as part of budgeted cost. Merely because the contract for internal development work has not been awarded in the current assessment year or in the absence of actual payment of IDC, cannot lead the revision of the IDC cost from its budgeted level to actual cost incurred. In my considered view, whether one follow project completion method or percentage of completion method, the element of cost cannot change. Once IDC is accepted to be an element of cost, then whichever method one apply, it has to be allowed as a cost of the project for working out the true profit and loss account in respect thereof.

9.10 I am therefore, of the considered view that ASSESSING OFFICER was not justified in replacing budgeted IDC with actual IDC cost incurred for recognizing revenue as per POCM Method. The Budgeted IDC is a part of cost and same has to be accepted for recognizing revenue as per POCM which is being consistently accepted by the department. Hence, the addition of ₹ 39,52,39,897/- made by the ASSESSING OFFICER on this issue is uncalled for and the same is, therefore, deleted.

(II) Labour Cost:

9.11 Special Auditors have increased cost of construction actually incurred by ₹ 3,39,77,973/- on the ground that expenditure in relation to contract work performed during FY 2007-08 has been booked in subsequent financial year i.e F.Y. 2008-09. They have based their findings on the period of measurement as given by contractors.

9.12 The AR submitted that the balance addition of ₹ 3,39,77,973/- is on account of increase in labour cost / material cost by shifting this cost from F.Y. 2008-09 to current financial year i.e. F.Y. 2007-08 based on the observation of the Special Auditors. The Submissions filed by the appellant on this point is as under:-

“Summary of all the bills, made by the special auditors in Volume IVA to IVD of Special Audit Report was furnished before the Assessing Officer at page Nos. 67 of our letter dated 24.03.2011 and all the bills mentioned therein were produced in original before the Assessing Officer. A copy of the same was furnished before me by the appellant vide its submission dated 29.11.2012 at page No.91 of Paper Book

(Volume II). It was submitted that no liability has been accrued or arisen upto 31.3.2008. On perusal of this summary, it will be appreciated that all these bills were for over lapped period beginning in the previous year and continuing in the subsequent year. Obviously, the bills were received after the close of the year and after receipt of such bills due verification of the work was done. After verification and measurement of the work done, bills were approved. Till that date no expenditure accrues or arises and that date falls in the subsequent financial year. The company consistently follows the policy of accruing and booking costs on the basis of the date on which bills were approved and verified which can only be after the date of receipt of the bill. In the opening balance also, similar policy has been adopted. This is the only possible way for accounting. The law does not require the assessee to do the impossible. The Hon'ble Chhattisgarh High Court in the latest judgment reported in 323 ITR 252 (Chhattisgarh) in the case of Beekay Engineering Corporation has decided the similar issue. Head Note of the said judgment is reproduced for your ready reference as under:-

“The assessee entered into a contract for doing job works and made a payment of ₹ 1,36,767 to B in respect of certain jobs done by it from December 1988 to June 1989. The bills were raised by the party in the month of August 1989. According to the assessee, as it was not aware of the actual liability on the last date of the accounting period, it claimed this deduction only when the bills were submitted by the corporation. The Assessing Officer however, held that as the assessee was following mercantile system of accounting, the expenditure should have been claimed as deduction in the earlier year and not in the subsequent year and accordingly, disallowed the claim. The Commissioner (Appeals) confirmed the order but the Tribunal held that the liability could be ascertained only in the accounting year relevant to the assessment year 1990- 91. On a reference:

Held, that the expenditure was deductible in the assessment year 1990-91.”

Thus, by applying the same principles it is requested that the allocation of expenses by the Special Auditors, against the bills which were received subsequently, was not justified.

Reliance is placed on the decision in the case of CIT vs. Modipon Ltd. [2011] 334 ITR 0102 wherein the similar issue was decided in the favour of assessee.

9.13 The AR further submitted that the facts of Saurashtra Cement and Chemical Industries Ltd. Vs. CIT (1995) 213 ITR 523 (Guj.) were similar to the facts of the instant case, in which it was held that earlier years expenses could be allowed in the year in which the liability is accepted and paid. Hon'ble Gujarat High Court in the case of Saurashtra Cement and Chemicals Industries Ltd. vs. CIT (1995) 213 ITR 523 (Guj.), has held as follows:

“ . . . Merely because an expense relates to a transaction of an earlier year it does not become a liability payable in the earlier year unless it can be said that the liability was determined and crystallized in the year in question on the basis of maintaining accounts on the

mercantile basis. In each case where the accounts are maintained on the mercantile basis it has to be found in respect of any claim, whether such liability was crystallized and quantified during the previous year so as to be required to be adjusted in the books of account of that previous year. If any liability, though relating to the earlier year, depends upon making a demand and its acceptance by the assessee and such liability has been actually claimed and paid in the later previous years it cannot be disallowed as deduction merely on the basis the accounts are maintained on mercantile basis and that it related to a transaction of the previous year. . . .” (p. 531)

Further reliance was placed on the judgment in the case of National Agricultural Co-operative Federation of India Ltd. vs. Jt. CIT (2008) 304 ITR (AT) 303 (Delhi) wherein it has been held that the liability is deductible only when it crystallizes into an ascertained liability. In this case as per an arbitration award interest was payable by the assessee on the sum awarded only up to the date of award of the arbitrator. Thereafter, a decree was passed by the High Court, for further interest on amount of award from the date of the award by the arbitrator till the date of payment, after the end of the accounting year. In the circumstances of the case it was held by the Hon'ble jurisdictional Tribunal that there was no liability to pay interest after the award of the arbitrator and such liability arose only after the decree of the High Court. Thus, the liability to pay future interest had crystallized in the next assessment year and not in the assessment year in question and hence the deduction was not allowable in the current assessment year.

Reliance was also placed on the judgment in the case of CIT v Shri Ram Pistons & Rings Ltd (2008) 174 Taxman 147 (Del), wherein it was held that:

“4. In terms of the scheme, as extended, the assessee incurred a liability of ₹ 1,40,541 and according to the assessee this amount was liable to be adjusted in the assessment year 1983-84. The basis on which the assessee had claimed this deduction for that year was that the liability had accrued and crystallized only on 30-6-1981 when the assessee came to know the actual sales made by its dealers.”

As far as the purchase of material is concerned the entry of purchases and stocks is made only after receipt of material, inspection of material and Material Receipt Note (MRN). It is, therefore, submitted that liability accrued only when material is accepted and MRN is made.

Therefore, the appellant submitted that the effect of this proposed addition of ₹ 3,39,77,973/- recommended by the special auditors may please be deleted.”

9.14 I have carefully considered submission of the appellant, observation of Assessing Officer and various judicial pronouncements relied upon by the appellant. It is also noticed that this issue has been decided in favour of the appellant vide order dated 25.03.2011 passed by learned CIT(A)-XVIII, New Delhi, for A.Y. 2006-07 (page Nos.122-153 of the said order) and my own order in appellant's own case for the immediately preceding year relevant to assessment year

2007-08 (page Nos.108-139 of the said order). As discussed above, in large construction contracts, it is natural that contractors submit running bills which may sometime overlap the accounting year. These bills per se did not accrue and become payable merely on their raising. The measurements etc done by the inspection staff have to be checked and verified by the concerned person and only after due verification and examination of the measurements and quality of the work done, the contract bills are approved and liability of such work is crystallized. The appellant has accounted for the bills of contract work, material and labour work only after proper verification of receipt of material, work done by the labours and measurement of the work done by the concerned person. Once it is certified of having material received upto the desired standard and quantity, and work done by the labour and contractor upto proper satisfaction, then only the liability is crystallized and entered into the books of account. The various bills of material, labour and contract mentioned by the Special Auditors and ASSESSING OFFICER, as pertaining to the F.Y. 2007-08 were, in fact, crystallized during the F.Y. 2008-09 and on the basis of same rightly accounted for in F.Y. 2008-09. The cost of ₹ 3,39,77,973/- pertaining to labour charges, contract and material which was accounted for in F.Y. 2008-09 on the basis of crystallization of liability cannot be preponed from assessment year 2009-10 to the current Assessment Year 2008-09. Again, this attempt and exercise made by the Special Auditors and the ASSESSING OFFICER is revenue neutral and it would make no difference to the Revenue except resulting in increased administrative work load of shifting expenses from one year to another. In my view, it is only a futile exercise and consequently, the addition based on the said increase of cost of construction is deleted.

In this regard, reliance is placed on the judgment of Hon'ble Chattisgarh High Court in the case of Beekay Engineering Corporation India 323 ITR 252 (Chattisgarh). The head note of the same is reproduced as under:-

“BUSINESS EXPENDITURE--YEAR IN WHICH DEDUCTIBLE--ASSEESSEE DOING JOB WORK FOR ENGINEERING CORPORATION FROM DECEMBER 1988 TO JUNE 1989--BILLS SUBMITTED BY CORPORATION IN AUGUST 1989-- EXPENDITURE DEDUCTIBLE IN ASSESSMENT YEAR 1990-91-- INCOME-TAX ACT, 1961, S. 37.

The assessee entered into a contract for doing job works and made a payment of ₹ 1,36,767/- to B in respect of certain jobs done by it from December 1988 to June 1989. The bills were raised by the party in the month of August 1989. According to the assessee, as it was not aware of the actual liability on the last date of the accounting period, it claimed this deduction only when the bills were submitted by the corporation. The Assessing Officer however, held that as the assessee was following mercantile system of accounting, the expenditure should have been claimed as deduction in the earlier year and not in the subsequent year and accordingly, disallowed the claim. The Commissioner (Appeals) confirmed the order but the Tribunal held that the liability could be ascertained only in the accounting year relevant to the assessment year 1990- 91. On a reference

Held, that the expenditure was deductible in the assessment year 1990-91.

COMMISSIONER OF INCOME-TAX V. MODIPON LTD. (No. 1) [2011] 334 ITR 0102-

BUSINESS EXPENDITURE--DEDUCTION ONLY ON ACTUAL PAYMENT--DISALLOWANCE ON GROUND THAT EXPENSES RELATED TO PRIOR PERIOD AND NOT PRESENT ASSESSMENT YEAR--TRIBUNAL FINDING ALL EXPENSES SETTLED IN CURRENT YEAR AND COVERED UNDER SECTION 43B(D)-- JUSTIFIED--INCOME-TAX ACT, 1961, S. 43B(D).

The assessee for the assessment year 2004-05 filed the return claiming certain expenses allowable as business expenditure. The Assessing Officer was of the view that out of those, expenses to the tune of ₹ 41,95,719 related to the prior period and did not pertain to the financial year 2003-04 relevant to the assessment year 2004-05, as the assessee-company was following the mercantile system of accounting and therefore, these expenses should have been claimed in the previous year. The Commissioner (Appeals) confirmed this view whereas the Tribunal reversed the order and allowed those expenses. On appeal :

Held, dismissing the appeal, that even when the assessee was following the mercantile system of accounting, the explanation furnished by the assessee was that the expenses were not booked due to non-receipt of details, information thereof on time, which was beyond the control of the assessee. It was also explained that these expenses to the tune of ₹ 41.95 lakhs were marginal as compared to the enormous size of the assessee-company. It was also explained that as per the accounting policy followed by the assessee, such expenses were booked in the year in which they were settled for payment. The Tribunal went into the details of each and every such expense and recorded the finding of fact that all these expenses were settled during this year. It was also recorded that more than 50 per cent. of expenses could be claimed only on actual payment, as they were covered under section 43B(d) of the Income-tax Act, 1961. The assessee also informed that even in the earlier year, the assessee had shown positive income and paid tax thereon. Therefore there was no loss of revenue. Had this expense been allowed in the previous year, the assessee would have paid less tax. There was no necessity to interfere with the order of the Tribunal.”

The Facts of the above cited judicial pronouncement are identical with the facts of appellant’s case. Therefore, ratio of the said judgments is squarely applicable to the appellant’s case. Hence, the addition of ₹ 3,39,77,973/- based on pre-ponement of certain expenses is deleted.

As a result, the appellant gets a relief of ₹ 42,92,17,870/ (₹ 39,52,39,897/- + ₹ 3,39,77,973/-)”

86. We find that the similar issue was also involved before this Tribunal in the appeal for the Assessment Year 2006-07, wherein the Tribunal has decided this issue in favour the assessee in the following manner:

“42. We have carefully considered the rival contentions and also given a careful thought to the offer of Id. DR for setting aside this ground of appeal to the file of the AO for determination of threshold limit of 30% of the total project cost incurred up to this year or not. Before that we would like to address the issue of threshold percentages determined by the assessee of 30% instead of 25 % provided in the guidance note on accounting for real estate transactions issued by ICAI in 2012. Firstly assessee has submitted the instances where in the identical facts and circumstances there is trade practice of adopting threshold of 30 % of the achievement of total project cost for commencement of recognising of revenue. According to that guidance note it is provided that “5.3 Further to the conditions in paragraph 5.2 there is a rebuttable presumption that the outcome of a real estate project can be estimated reliably and that revenue should be recognised under the percentage completion method only when the events in (a) to (d) below are completed.

(a) All critical approvals necessary for commencement of the project have been obtained. These include, wherever applicable:

(i) Environmental and other clearances.

(ii) Approval of plans, designs, etc.

(iii) Title to land or other rights to development/ construction.

(iv) Change in land use

(b) When the stage of completion of the project reaches a reasonable level of development. A reasonable level of development is not achieved if the expenditure incurred on construction and development costs is less than 25 % of the construction and development costs as defined in paragraph 2.2 (c) read with paragraphs 2.3 to 2.5.

(c) At least 25% of the saleable project area is secured by contracts or agreements with buyers.

(d) At least 10 % of the total revenue as per the agreements of sale or any other legally enforceable documents are realised at the reporting date in respect of each of the contracts and it is reasonable to expect that the parties to such contracts will comply with the payment terms as defined in the contracts. To illustrate - If there are 10 Agreements of sale and 10 % of gross amount is realised in case of 8 agreements, revenue can be recognised with respect to these 8 agreements.”

According to the above guidance note the revenue of the project can be recognised only when the above conditions specified therein. According to one of the conditions specified there in is reasonable level of development is not achieved if the expenditure incurred on construction and development costs is less than 25 % of the construction and development costs as defined in paragraph 2.2 (c) read with paragraphs 2.3 to 2.5. Therefore the threshold suggested by ICAI is the minimum threshold and it is not prohibited that looking to the business conditions assessee cannot fix up higher threshold. More so when the assessee has stated that many identical companies are also following similar threshold of 30 % of the total project cost, no fault can be found with the estimate made by the assessee. It is also undisputed that in subsequent years the special auditor appointed by

revenue has accepted the threshold of 30 % adopted by assessee and AO has accepted the same. In view of above we are of the opinion that assessee has rightly accepted the threshold of 30 % of achievement of total project cost for commencement of revenue recognition. Further the working of the total project should also include all types of development charges required to be included in the same. Ld. AR has stated that the details of percentage of completion of project are available in the assessment order itself. However after careful consideration and agreed by both the parties, we set aside this issue to the file of the AO to determine with respect to Magnolia Project and Summit Project following :-

(i) To determine the total project cost of both these projects including the cost of internal and external development charges of the project

(ii) To determine whether the actual cost of expenditure incurred up to 31.03.2006 is less than 30% of the total project cost estimated by the assessee;

(iii) If the threshold limit of 30% is crossed then to determine the income of both these projects on percentage completion method in this year;

(iv) To give appropriate relief in subsequent years, if any income is taxed on these projects in those years;

(v) If the project cost incurred up to this year has not crossed threshold of 30% limit of the total project cost estimated then to delete the addition of ₹ 1,02,84,93,509/-.

While deciding this issue AO may however keep in mind the principle laid down by honorable Supreme court in case of CIT v. Excel Industries Ltd. [2013] 358 ITR 295, if AO is satisfied that issue is revenue neutral the matter may be set at rest.

Therefore, ground no.8 of the appeal is allowed with above direction.”

87. Thus, following the earlier year precedence, we decide the issue in favour of the assessee and revenue’s appeal is consequently, dismissed.”

18. Therefore, respectfully following the decision of the coordinate bench in assessee’s own case for earlier years, we dismiss ground number 3 of the appeal of the learned assessing officer and confirm the order of the learned CIT – A in deleting the disallowance on account of estimated IDC charges and commencement of construction cost.
19. Ground number 4 is on account of disallowance of brokerage and commission expenditure of ₹ 40,044,936/-. The learned authorised representative submitted that this issue is covered in favour of the assessee company by the order of the coordinate bench for assessment year 2006 – 07. Further it was also stated that the revenue has not preferring the appeal

before the honourable High Court on this issue and in subsequent year i.e. in assessment year 2016 – 17 the learned assessing officer himself has not made any addition/disallowance on this issue. It was further stated that in assessment year 2008 – 09 also this issue was considered and the order of the learned CIT – A was upheld. Therefore it was submitted that the issue is squarely covered in favour of the assessee.

20. The learned departmental representative vehemently supported the order of the learned assessing officer however, he could not distinguish that facts of the case before us.
21. We have carefully considered the rival contention and perused the orders of the lower authorities. The issue is squarely covered in favour of the assessee by the decision of the coordinate bench in assessment year 2006 – 07 and assessment year 2008 – 09 in favour of the assessee. The coordinate bench in its order for assessment year 2008 – 09 has dealt with this issue as Under:-

“99. In ground no.6, the Revenue has challenged the deletion of addition on account of disallowance of brokerage and commission of ₹ 2,99,74,610/-.

100. Ld. Assessing Officer on the basis of comments of Special Auditors observed that certain expenses such as brokerage and commission are being claimed in the P&L account while the matching revenues are not credited to the P&L account. He has discussed in detail various observations and note of the Special Auditors and observed that assessee's reliance on accounting standard-7 is not misplaced as it applies to construction contract and not to development project undertaken by the assessee himself. Further, the reliance placed by the assessee upon the order of the Id. CIT(A) for the Assessment Year 1983-84 is also misplaced as accounting policy is followed for recognition of revenue in Assessment Year 1983-84 is to be from the accounting policy followed for the year under assessment. The assessee has not paid this brokerage as a selling cost for procuring any construction contract. He has paid this money for selling of this various project even before the construction project was started. He further held liability of expenditure for the purpose of determining the taxable income is determined by the Income Tax Act and not by the accounting standard. He also made reference to the judgment of Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. vs. CIT, (1997) 225 ITR 0802 (SC) and out of total claim of ₹ 10,63,46,742/-, he made disallowance of ₹ 3,64,25,771/-.

101. Ld. CIT(A) has discussed the issue in detail and has allowed part relief after observing and holding as under:

“13.20 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, accounting standard AS-2 & AS-7 and judgment of ITAT in earlier years and CIT (Appeals) in appellant’s own case for A.Y. 2006-07 and 2007-08. It is seen that as per para-19 of AS-7, it is mentioned that the selling cost cannot be attributed to contract activity or cannot be allocated to a contract under construction. Even as per AS-2 “Valuation of Inventory” issued by ICAI, it is seen that selling and distribution cost cannot be considered as part of the cost of inventory and such expense has to be recognized in the period in which they are incurred. The cost which can be attributed /allocated over the inventory should comprise all the cost of purchase, cost of conversion and other cost incurred in bringing the inventory to their present location and condition. In the case of construction activities the cost of purchase of land and construction cost can only be attributed over the project. The brokerage expenses are purely a selling cost and cannot form a part of inventory. In view of the accounting standard, the brokerage expenses being a selling cost cannot be capitalized with the cost of inventory and cannot be allocated to the construction activity. During the year the appellant has paid brokerage of ₹ 10,63,46,742/- for selling of the flats and other properties and properties given on lease to various brokers. The brokerage expenses to the extent of ₹ 9,98,95,581/- pertains to selling of flats and other property. Therefore, such expenses has to be allowed as selling cost in the year in which such expenditure is incurred. The selling cost cannot be capitalized with the inventory as per AS-2 and AS-7 issued by ICAI. Hence, the brokerage paid for selling of flats and property to the extent of ₹ 9,98,95,581/- is an allowable expenditure during the year and disallowance to that extent of ₹ 2,99,74,644/- is deleted.

It is also seen that this issue has been decided in favour of the appellant by Hon’ble ITAT in its order for A.Y. 1984-85. However, the ASSESSING OFFICER has observed that the accounting policy followed by the appellant company for recognition of revenue in the A.Y. 1983-84 were different from the accounting policy followed during the year under consideration. It is seen that in A.Y. 1983-84 also the selling cost i.e. brokerage and commission were claimed in the year in which they are incurred and same were not recognized on the basis of revenue recognition. Therefore, the ratio of the said judgment is still applicable in the case of appellant and the brokerage and commission has to be allowed in the year in which they are incurred and cannot be associated with construction cost. The contention of the ASSESSING OFFICER that the brokerage expenditure to be postponed to subsequent year as per AS-9 cannot be accepted, as brokerage and commission are related to the sale of flats and properties. By incurring the same the appellant has not derived any enduring advantage in subsequent years.

The ASSESSING OFFICER has relied upon the Supreme Court judgment in the case of Madras Industrial Investment Corp. 225 ITR 802. (SC), and has held that the expenses have to be spread

over in several years if the benefit of such expenditure is continued in the ensuing years. The facts of this judgment cannot be applied to the appellant's case as Brokerage and Commission linked with the services rendered by the brokers to the appellant for selling the flats and other properties. There is a nexus between the expenses and services rendered which cannot be spread to several years. The benefit of the brokerage and commission is related to a particular property or flat sold and it cannot be extended to other properties. Therefore, brokerage expenses cannot be postponed for the future years. Therefore, ratio of the said judgment is not applicable in the case of appellant.

13.21 The appellant has placed reliance on the decision of the jurisdictional High Court in the case of Nokia Corporation vs. DIT, Delhi, 2007, 162 Taxman 369 (Delhi), wherein it is held that even if the Department has filed further appeal against the last order, which is in favour of the appellant, the last order is judicially binding on the subordinate authority. Hence, respectfully following the order of the Hon'ble Income Tax appellate Tribunal for AY 1984-85 and the order of CIT(Appeals) for the immediately preceding years relevant to the Assessment Year 2006-07 and 2007-08 in appellant's own case. In view of the above, the addition to the extent of ₹ 2,99,74,600/- (₹ 2,82,93,983 + ₹ 16,80,717) pertaining to payment of brokerage and commission is deleted.

13.22 However, expenses of ₹ 64,51,161/- pertains to brokerage paid for giving property on lease. These brokerage expenses have been incurred for giving the Grand Mall and Town Square Mall on rent. This expenditure does not pertain to selling of the inventory or stock in trade, therefore, such expenses cannot be covered under AS-2 and AS-7. This brokerage expenditure of ₹ 64,51,161/- is inextricably linked with the giving Grand Mall and Town Square Mall on rent. The income of the Grand Mall and Town Square Mall received or receivable from rent is assessable under the head "house property". As per the provisions of IT Act no expenditure is allowable against the income from house property except deduction @30% and interest payment on the loan for construction of house u/s 24 of the IT Act. There is no provision of deduction of brokerage paid for giving the property on rent, therefore, the expenditure incurred by the appellant of ₹ 64,51,161/- (for Grand Mall ₹ 3,65,378/- + town square mall ₹ 60,85,783/-) is not an allowable expenditure.

In the result, this ground of appeal is partly allowed and appellant gets a relief of ₹ 2,99,74,600/-."

102. Again, this issue has been decided in favour of the assessee by the Tribunal in assessee's own case for Assessment Year 2006-07 in the following manner:

"69. We have carefully considered the rival contentions. We have also perused the order of ITAT in assessee's own case for AY 1984-85 submitted before us by the Id. AR. This decision has also been considered by the AO at page 188 of the assessment order. The AO

has not followed this decision as it could not be verified whether the issue has been taken up by the department before the Hon'ble Delhi High Court or not. Before us, ld. DR also could not point out that why this decision cannot be followed nor we could find any reason for not following the same by AO except that whether it is accepted by the department or not is not verified. Ld. CIT (A) has also deleted the addition following the order of coordinate Bench of ITAT for AY 1984- 85 in the case of the assessee. Merely because the decision is not accepted by revenue disallowance has been made. As observed by the CIT (A), these expenses related to brokerage of flats as part of selling expenses and, therefore, cannot be included in the cost of construction for the purpose of value of closing stock of WIP and in view of Accounting Standards issued by the ICAI. Respectfully following the decision of Honourable high court in case of CIT V DLF universal Limited in ITA no 1136/2009 dated 16.04.2015 while deciding ground no 4 of the appeal of the revenue honourable high court has held that expenditure towards brokerage and commission paid to brokers for booking and sale of certain properties is allowable firstly in view of the facts that assessee's treatment of such expenditure has been decided in favour of the assessee and revenue has not challenged it and secondly such expenditure are allowable. In view of the above facts and following the decision of coordinate Bench as facts are not distinguished by revenue, we confirm the order of CIT (A) in deleting the addition of ₹ 20,87,70,567/- on account of brokerage expenses for sale of various properties. Therefore, ground no.14 is dismissed."

103. Thus, in view of the aforesaid precedence of the earlier year this issue is decided in favour of the assessee."

22. Therefore, respectfully following the decision of the coordinate benches we confirm the order of the learned CIT – A and deleting the disallowance of brokerage and commission expenditure, thus, ground number 4 is dismissed.
23. Ground number 5 of the appeal is against the deletion of addition on account of capitalisation of the interest expenditure of ₹ 54,683,000/-.
24. The learned authorised representative submitted that the issue is issue is covered in favour of the assessee by the decision of the coordinate bench in assessee's own case for assessment year 2006 – 07 and he referred paragraph number 43 – 50 at page number 63 – 70 of that order. He further referred to the decision of the coordinate bench in assessee's own case for assessment year 2008 – 09 dated 27/5/2019 at paragraph number 94 – 98 at page number 111 – 118 of the order.
25. The learned departmental representative vehemently supported the order of the assessing officer. However, he could not distinguish the facts of the case

in this year compared to the facts in the case for assessment year 2006 – 07 as well as assessment year 2008 – 09.

26. We have carefully considered the rival contention and perused the orders of the lower authorities. On perusal of the order of the coordinate benches in assessee's own case for earlier years it is apparent that the issue is squarely covered in favour of the assessee. By the latest decision of the coordinate benches for assessment year 2008 – 09 which dealt with this issue at paragraph number 94 – 98 of this issue as Under:-

“94. The next issue pertains to deletion of addition on account of disallowance of capitalization of interest of ₹ 7,93,00,000/-. Ld. Assessing Officer on the basis of Special Auditor's comment observed that interest capitalization is also required on interest paid on loan taken for M/s. Edward Keventer Project, and therefore, net interest eligible for capitalization is to be bifurcated into interest capitalization on Keventer loan and interest capitalization on project under execution. The Special Auditor has recommended that out of net interest of ₹ 34.86 crore requiring capitalization, ₹ 1.10 crore is to be capitalized towards interest paid on loan taken for M/s. Edward Keventer project and ₹ 33.76 crore of interest is eligible for capitalization on account of projects under execution on the level of completion achieved till 31st March, 2008 and accordingly, the interest to be capitalized on projects under execution is to be completed in the following manner:

Particulars	Cost of Total Project as on 31.03.2008	% value of projects	Net Interest Expenditure	% of Revenue recognised for A.Y. 0809	Interest Expenditure allowable in the proportion of revenue recognised	Interest expenditure to be capitalized towards non-recognition of proportionate revenue from projects
Phase - V Gurgaon Project	1,529.55	100.00	33.76	76.50	25.83	7.93

95. After detailed discussion, AO held that the interest to the extent of ₹ 7.39 crore is in the nature of borrowing cost attributable to the acquisition or construction of qualifying assets and hence these expenses needs to be capitalized and is not allowable as revenue expenditure.

96. Ld. CIT(A) has deleted the addition after observing as under:

“11.12 I have considered the submission of the appellant and observation of the Special Auditors as well as ASSESSING OFFICER and order of CIT (A)-XVIII for AY 2006-07 and my own order for AY 2007-08 in appellant's own case wherein this issue was decided in favour of appellant. It is seen that ASSESSING OFFICER has further capitalized an amount of ₹ 7,93,00,000/- towards ongoing projects. This capitalization is over and above the

amount already capitalized by the appellant to the extent of ₹ 354.43 crores which relates to the loan taken for fixed period term loan. It is seen that appellant has claimed total interest expenditure of ₹ 604.43 crores on fixed period term loan, out of which it has capitalized ₹ 354.43 crores over the ongoing projects and has claimed interest of ₹ 249.54 crores on fixed period term loan. The appellant has also claimed ₹ 176.06 crores as interest on bank overdraft. Thus, the total interest payment claimed in the P&L A/c comes to ₹ 425.60 crores. As against this appellant has offered interest received from banks, customers, loans to subsidiaries and associates to the tune of ₹ 411.99 crore in the profit and loss account. If the interest pertaining to bank overdraft and interest paid to others is excluded from the total interest charged to the profit and loss account, then the remaining interest debited to P&L A/c comes to ₹ 249.54 crores, which is less than the interest income of ₹ 411.99 crores as offered in the P&L A/c. Since, the interest payable is less than the interest received from different sources. No further notional interest can be capitalized over the projects. The interest pertaining to projects has already been capitalized by the appellant to the extent to ₹ 354.89 crores, which is specific to the projects under execution. The further capitalization of ₹ 7.93 crores is based on presumptions, there is no scientific method worked out by the ASSESSING OFFICER for capitalizing the further interest of ₹ 7.93 crores. The net impact of the interest in Profit & Loss A/c is positive income after excluding the overdraft interest expenses. Once the interest income is positive in the P&L a/c, the further capitalization of interest cannot be estimated on presumption basis as done by the ASSESSING OFFICER. It is also seen that ASSESSING OFFICER has not pointed out any diversion of funds which was not utilized for business purposes. The funds taken by the appellant from banks or otherwise generated from own sources have either been utilized in construction business or advanced to the subsidiaries and associate companies at an appropriate interest rates. It is also observed that:-

- There is no diversion of money for non-business purpose.
- Loans to subsidiaries are on interest at rates more than the rate of interest paid on borrowings.
- The proviso to section 36(1)(iii) is not applicable as:
 1. The building under construction are not capital asset
 2. These are stock in trade
 3. Any borrowing for stock in trade can never be capitalized.
- Accounting standard AS-(16) has no application.
- Accounting Standards cannot override the provisions of Income Tax Act.

In view of the above, it is held that capitalization of interest of ₹ 7,93,00,000/- on notional basis done by the assessing officer based on various permutation and computation was not justified and same is deleted.”

97. This issue too has been decided in favour of the assessee after detailed discussion by the Tribunal and the relevant observation of the Tribunal reads as under:

“49. We have carefully considered the rival contentions. It appears that the AO has made this addition mainly because of note mentioned by assessee in its accounting policies with respect to borrowing costs according to Accounting Standard 16 issues by ICAI. We have perused notes attached to financial statements and we are of opinion that these notes have arisen in the financial statement of the assessee because of the issue of applicability of Accounting Standard 16 issued by the ICAI. According to Accounting Standard 1 i.e. disclosure of accounting policies, each and every company is required to disclose the accounting policy with respect to various significant income, expenditure and assets and liabilities etc. applicable to it. Borrowing cost is also one of them. ICAI has issued Accounting Standard 16 Accounting for Borrowing Cost wherein it is provided that in case of interest expenditure incurred by the company, it is required to be capitalized if the borrowing is related to the qualifying assets. In this case the inventory is a qualifying assets as it is held for more than 12 months and therefore interest attributable to it is required to be capitalized in the books of accounts as per AS -16. Therefore we do not agree with the arguments of AR that AS -16 does not apply to inventory. However, those are the provisions which are applicable for the maintenance of the accounts of the company and interest is allowable according to provisions of section 36(1) (iii) of the act. Further according to us, the provisions of Accounting Standards and provisions of the Act are two different set of regulations and while deciding this issue, it is well settled judicial precedent that is if there is a contradiction between the two, the provisions of the Act shall prevail. Provisions of section 36(1)(iii) provides that the amount of interest paid in respect of capital borrowed for the purposes of the business or profession deduction is required to be allowed. Proviso inserted w.e.f. 01.04.2004 is the only restriction if condition laid down u/s 36(1) (iii) are satisfied by the assessee. The proviso says that any amount of the interest paid in respect of capital borrowed for acquisition of an asset whether capitalized in books of accounts or not for any period beginning from the date on which the capital asset was borrowed for acquisition of the asset till the date on which such asset was put to use shall not be allowed as deduction. The deduction is to be disallowed even if the interest is capitalized in the books of accounts or not. Hon’ble Supreme Court in the case of Core Healthcare [298 ITR 194] has held that provisions of section 36(1)(iii) is a code in itself. In the present case, the interest paid by the assessee is not for the purpose of acquisition of any capital asset but for its inventory. We do not find any restriction in provisions contained u/s 36(1)(iii) which provides that the interest can be disallowed if incurred for the purpose of inventory as provided under Accounting Standard 16. Apparently, in this case, there is no allegation that interest is not paid on capital borrowed for the purpose of the business. Hon’ble Mumbai High Court in the

case of CIT vs. Lokhandwala Constructions Industries Ltd. [131 taxman 810] has held as under :-

“4. From the facts found by the Tribunal on record, it is clear that assessee undertook two-fold activities. It bought and sold flats. Secondly, the assessee was also engaged in the business of construction of buildings. The profits from both the activities were assessed under section 28 of the Income-tax Act. In this case, we are concerned with the second activity (hereinafter referred to, for the sake of brevity, as “Kandivali Project”). According to the Commissioner, loan was raised for securing land/development rights from the Mandal. That, the loan was utilised for purchasing the development rights, which, according to the Commissioner, constituted a capital asset. According to the Commissioner, since the loan was raised for securing capital asset, the interest incurred thereon constituted part of capital expenditure. This finding of the Commissioner was erroneous. In the case of India Cements Ltd. v. CIT [1966] 60 ITR 52 , it was held by the Supreme Court that in cases where the act of borrowing was incidental to carrying on of business, the loan obtained was not an asset. That, for the purposes of deciding the claim of deduction under section 10(2)(iii) of the Income-tax Act, 1922 [section 36(1)(iii) of the present Income-tax Act], it was irrelevant to consider the purpose for which the loan was obtained. In the present case, the assessee was a builder. In the present case, the assessee had undertaken the Project of construction of flats under the Kandivali Project. Therefore, the loan was for obtaining stock-in-trade. That, the Kandivali Project constituted the stock-in-trade of the assessee. That, the Project did not constitute a fixed asset of the assessee. In this case, we are concerned with deduction under section 36(1)(iii). Since the assessee had received loan for obtaining stock-in-trade (Kandivali Project), the assessee was entitled to deduction under section 36(1)(iii) of the Act. That, while adjudicating the claim for deduction under section 36(1)(iii) of the Act, the nature of the expense - whether the expense was on capital account or revenue account - was irrelevant as the section itself says that interest paid by the assessee on the capital borrowed by the assessee was an item of deduction. That, the utilization of the capital was irrelevant for the purposes of adjudicating the claim for deduction under section 36(1)(iii) of the Act - Calico Dyeing & Printing Works v. CIT [1958] 34 ITR 265 (Bom.). In that judgment, it has been laid down that where an assessee claims deduction of interest paid on capital borrowed, all that the assessee had to show was that the capital which was borrowed was used for business purpose in the relevant year of account and it did not matter whether the capital was borrowed in order to acquire a revenue asset or a capital asset. The said judgment of the Bombay High Court applies to the facts of this case.”

Further, in the following decisions of various coordinate Benches, the deduction of interest has been allowed u/s 36(1)(iii) even where the assessee has followed the projection completion method :-

(i) ACIT vs. Tata Housing Development Company Ltd. – 45 SOT 9 (Bom.);

- (ii) DCIT vs. Thakar Developers – 115 TTJ 841 (Pune);
- (iii) DCIT vs. K. Raheja Pvt. Ltd. – (2006) TIOL 220 ITAT-MUM.;
- (iv) K. Raheja Development Corporation vs. DCIT in ITA No.240/Bang./97 dated 22.09.1997 - In this case, reference application filed by the Department has also been rejected by the Hon'ble Karnataka High Court vide its order dated 08.11.2000 in Civil Petition No.832/2000 (IT).

Before us, Id. DR could not cite any decision against the claim of the assessee, therefore, respectfully following the decision of Hon'ble Bombay High Court and as well as various coordinate Benches, cited above, we do not concur with the view of CIT (A) on disallowance of interest of ₹ 24.75 crores u/s 36(1) (iii) of the Act. The alternative argument of the assessee regarding adoption of any artificial formula for the purpose of computing interest disallowance. Id. CIT (A) has presumed proportion of utilisation of funds in absence of the nexus holding that assessee has used mixed funds. Honourable Bombay High court in case of CIT V Reliance Utilities & Power limited 313 ITR 340 has held that

“The principle therefore would be that if there are funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available with the company, if the interest-free funds were sufficient to meet the investments.”

Therefore we are of the view that presumption is to be assumed in favour of the assessee and not against assessee. Hence, we reject the formulae adopted by CIT (A) of working out proportionate disallowance by adopting artificial formulae. Therefore respectfully following decisions of Honourable Bombay High court in CIT vs. Lokhandwala Constructions Industries Ltd. [131 taxman 810] and CIT V Reliance Utilities & Power limited [313 ITR 340] We reverse the order of the CIT (A) confirming the disallowance of expenditure of ₹ 27.40 crores and direct the AO to allow this interest expenditure u/s 36(1) (iii) of the Act.”

98. Accordingly, respectfully following the aforesaid precedence which is applicable on the facts of the present year also, we decide this issue in favour of the assessee.”

27. Therefore respectfully following the decision of the coordinate bench in assessee's own case as there is no change in the facts and circumstances of the case, we dismiss ground number 5 of the appeal of the learned assessing officer confirming the order of the learned CIT – A. To the deletion of addition on account of interest expenditure of ₹ 54,683,000/-.
28. Ground number 6 is with respect to the deletion of addition on account of disallowance of late construction charges received from the customers of Rs. 166,71,710/-.

29. Both the parties confirmed that the facts in the case of the assessee for this year are identical to the facts in the case of the assessment year 2006 – 07 as well as 2008 – 09. The learned authorised representative submitted that this issue is covered by the decision of the coordinate bench in assessee's own case for assessment year 2006 – 07 and the revenue has not preferred appeal before the honourable High Court on this issue as well as the learned assessing officer has also not made any addition on this issue from assessment year 2012 – 13 onwards. It was further stated that this issue is also covered by the decision of the coordinate bench in assessee's own case for assessment year 2008 – 09.
30. The learned departmental representative vehemently supported the order of the learned assessing officer. However, he did not distinguish the facts of the impugned appeal with the facts of the issues decided by the coordinate bench in earlier years.
31. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also perused the orders of coordinate benches in assessee's own case for earlier years. It is apparent that this issue first arose in the appeal of the assessee for assessment year 2006 – 07. The coordinate bench wide decision dated 11th of March 2016 decided the issue in favour of the assessee however the revenue did not prefer any further appeal before the honourable High Court on this issue. For assessment year 2008 – 09 the coordinate bench followed the decision of the coordinate bench in assessee's own case for assessment year 2006 – 07. The latest decision for assessment year 2008 – 09 which dealt with this issue as Under:-

“104. In ground no.7, the Revenue has challenged the deletion of addition on account of late construction charges of ₹ 1,88,81,388/- Ld. Assessing Officer following the assessment order for Assessment Year 2006-07 and 2007-08 held that receipt of late construction charges is income on the basis of such late construction charges were collected during the year. Though, he observed that assessee has claimed that it has recognized all the credit balance lying in the construction charges till 31st March, 2010 as income in its books of account yet in view of the judgment of Hon'ble Supreme Court in the case of DLF Universal and others Ltd. Vs. Town Country Planning, the late construction charges received by the assessee-company is to be taxed in the year of receipt.

105. Ld. CIT(A) has deleted the said company in the following manner:

“14.9 I have considered the submission of the appellant, observation of the ASSESSING OFFICER and judgment of Hon’ble Supreme Court in this regard. It is seen that Hon’ble Supreme Court has set aside the judgment of Hon’ble Punjab & Haryana High Court and has accepted the appellant’s right to collect the late construction charges from customers, if they fail to commence the construction activities within stipulated time. It may be seen that Hon’ble Punjab & Haryana High Court had declared such levy as illegal, therefore, appellant was showing such charges as its liability instead of showing such late construction charges as its income. Because of that judgment these charges were not treated as appellant’s income and the amount of late construction charges cannot be said to have accrued to appellant unless the appellant acquires a right to receive it. Had the Hon’ble Supreme Court would have approved the judgment of Punjab & Haryana High Court, the appellant would have refunded such late construction charges to the respective parties. Therefore, such amount was kept in a liability account. After the Supreme Court judgment which has set aside the Punjab & Haryana high Court judgment a right to receive has been created in favour of appellant on 19.11.2010. Therefore, the entire amount has been offered as income in F.Y. 2010-11 relevant to A.Y. 2011-12. In view of the above, the appellant has rightly not offered the late construction charges as its income in the relevant year. It has further been noticed that this issue of treatment of late construction charges has been decided in favour of the appellant vide order dated 25.03.2011 passed by learned CIT(A)- XVIII, New Delhi, in appeal No.35/2010-11 for A.Y. 2006-07 (page Nos. 204-218 of the said order) and by me vide order dated 29.05.2012, in appeal No.66/2010-11 for A.Y. 2007-08 (page Nos. 146-149 of the said order) respectively in appellant’s own case.

Accordingly, the addition of ₹ 1,88,81,388/- made by the AO is not sustainable. The same is, therefore, deleted.”

106. This issue has been dealt in detail by the Tribunal in assessee’s own case for Assessment Year 2006-07 wherein this issue has been decided in favour of the assessee in the following manner:

“225. We have carefully considered the rival contentions. It is an admitted fact that the assessee is receiving late construction charges from customers which is under dispute before the Hon’ble Punjab & Haryana High Court and that litigation was settled vide order dated 19.11.2000 of Hon’ble Supreme Court. The ld. CIT (A) has decided this issue after considering the judgment of Hon’ble Supreme Court in the case of E.D. Sassoon & Co. Ltd. v. CIT [1954] 26 ITR 27 wherein it is held that if the assessee acquires a right to receive the income the said income has accrued to him. As till the decision of Hon’ble Supreme Court assessee did not have right to receive that income and even though that amount was collected, it becomes a liability on the assessee towards the customers. The CIT (A) has further considered this issue in entirety as under:-

“26.10 It is observed that up to September 2002, the appellant has treated collection of late construction charges as its income and from

October 2002 onward, the appellant has not been treated the receipts of late construction charges as its income, in view of the matter being under litigation. The assessee himself has stated that if the Hon'ble Supreme Court decides that the assessee cannot collect late construction charges then only charges will be returned to concerned customers. It is noted that as per the High Court order, the assessee company had no right to collect late construction charges from its customers. However, the Supreme Court by its order dated 19.11.2010 has set aside the order of the High Court and therefore, it cannot be said that receipts in question are not accrued income. As the order of the Hon'ble Supreme Court is dated 19.11.2010 the amount collected is the income for financial year 2010-11.

26.11 An amount cannot be said to accrue unless enforceable debt is created in favour of assessee. Reference can be made to the judgment of Hon'ble Supreme Court in the case of *E.D. Sassoon & Co. Ltd. v. CIT* [1954] 26 ITR 27. Their Lordships at page 51 observed as under :

“That the words ‘arising or accruing’ are general words descriptive of a right to receive profits... If the assessee acquires a right to receive the income, the income can be said to have accrued to him. Though it may be received later on it being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody... Unless and until there is created in favour of assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him.”

26.12 In view of the above binding principle, it has to be held that the amount of late construction charges cannot be said to have accrued to assessee unless the assessee acquires a right to receive it. A right to receive can be said to be created in favour of assessee on 19.11.2010 when the order of the Hon'ble Supreme Court is passed and till that date revenue cannot be legally recognized. During the hearing, I was informed by the ld. AR that this income has been recognized in the current financial year (F.Y. 2010-11) after receiving the judgement of the Supreme Court.

26.13 Accordingly, the addition of ₹ 1,88,81,388/- made by the AO is not sustainable. The same is, therefore, deleted.”

226. We have noted that identical issue has been decided by the coordinate bench of ITAT in case of *Nilgiri Cultivations Pvt Ltd V ACIT* for AY 2006-07 in ITA no 4634 & 4635/Del/2011 dated 30.4.2012 where in while deciding the issue in ground no 1 of the appeal addition of late construction charges received from customers shown under the head sundry creditors is income which has accrued to the assessee or not, It is held that

“7.1 Assessee as following a prudent and consistent accounting policy which was necessitated by the order of Honourable Punjab And Haryana High court. The assessee offered the entire amount as its income on settlement of disputes by the Honourable Supreme Court. Therefore, we hold that the assessee was acting on prudent and consistent accounting policy. Going by this accounting policy, the

income cannot be recognised unless it is free from impending and binding litigation which in this case was clarified in A.Y. 2011- 12 only”

Accounting standard 9 issued by ICAI on revenue Recognition also satisfies the accounting policy of the company that when the revenue is saddled with uncertainties same should not be recognised till the uncertainties are resolved. Therefore following the decision of coordinate bench as well as the accounting standard 9 of ICAI we are of the view that assessee has correctly recognised revenue in the year the issue attained certainty. Therefore on perusal of the decision of CIT (A) we are of the view that there is no infirmity in the order. Hence we confirm the order of CIT (A) and dismiss ground no 25 of the appeal.”

107. Accordingly, following the aforesaid order of the Tribunal in assessee’s own case, this issue is decided in favour of the assessee.”

32. Therefore respectfully following the decision of the coordinate bench, ground number 6 of the appeal of the learned assessing officer is dismissed.
33. Ground number 7 is with respect to the deletion of addition on account of the contingency deposit of ₹ 28,837/-.
34. Both the parties confirm that this issue is squarely covered in favour of the assessee by the decision of the coordinate bench in assessee’s own case for assessment year 2006 – 07 and further it was also confirmed that the revenue has not preferred appeal before the higher forum. The learned authorised representative that in the subsequent years that is in assessment year 2016 – 17 no such disallowance has been made also stated it. The learned departmental representative however supported the order of the learned assessing officer.
35. We have carefully considered the rival contention and perused the orders of the lower authorities. The coordinate bench in assessee’s own case has decided this issue for assessment year 2006 – 07 at paragraph number 232 – 236 of that order which has not been challenged by the revenue before the honourable High Court. There is no change in the facts and circumstances of the case. Therefore respectfully following the decision of the coordinate benches in assessee’s own case which is not been disputed by the learned departmental representative be dismiss ground number seven of the appeal of the assessing officer.
36. Ground number 8 of the appeal is with respect to the deletion of addition on account of net interest free security deposit of ₹ 63,159/-.

37. Both the parties confirm that this issue is squarely covered in favour of the assessee by the decision of the coordinate bench in assessee's own case for assessment year 2006 – 07 and 2008 – 09. However it was also stated that revenue has not preferred any appeal before the honourable High Court on this issue and the learned assessing officer has also not made any addition on this issue in assessment year 2016 – 17 onwards.
38. We have carefully considered the rival contention and perused the orders of the lower authorities. This issue has been considered by the coordinate bench in assessee's own case for assessment year 2008 – 09 dated 27 May 2019 in paragraph number 112 – 115 as Under:-

'112. In ground no.9, the Revenue has challenged the deletion of addition on account of net interest fee security deposits receipt of ₹ 3,30,893/-. This amount has been added by the Assessing Officer on the ground that maintenance charges collected by the assessee are the same as has been collected by the maintenance agencies. There was no liability of the assessee to pay back this amount to the buyers, and therefore, this amount is income generated by the assessee which should be liable to be taxed.

113. Ld. CIT(A) has deleted the addition made by the Assessing Officer in the following manner:

"16.9 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, decision of CIT (Appeals) for A.Y. 2006-07 and A.Y. 2007-08 which have decided this issue in favour of the appellant company and various judicial pronouncements available on the issue. It is seen that that these deposits were received in terms of sale agreement from customers as interest free security deposits on account of buyers obligation to regularly pay to the appellant or any other agency appointed by the appellant in respect of insurance premium, maintenance etc. These amounts are refundable to customers/ resident associations, once a society or association is formed. In the agreement to sell, it is specifically mentioned that these interest free deposits were taken from the customers to meet certain future liabilities like insurance premium and maintenance charges of the building. For these receipts, a separate account is maintained and as and when the buildings or the complex is handed over to the resident association or condominium association such deposits are handed over to them for maintaining the building and payment of insurance premium of building out of interest received from such deposits. Such deposits are not forming part of sale proceeds, therefore, the same cannot be treated as trading receipts in the hands of the appellant. There is a regular movement of funds for utilization of the same for maintenance and payment of insurance premium from this account. Hence, the addition made by the ASSESSING OFFICER on account of

interest free deposits is deleted. The reliance in this regard is placed to the decision of jurisdictional high court in the case of CIT vs. Goyal Gases Pvt. Ltd. (Supra), wherein security deposits received by the said company were not held as revenue receipt.”

114. The Tribunal also in Assessment Year 2006-07 has dismissed the Revenue’s appeal after observing and holding as under:

“240. We have carefully considered the rival contentions. It is a fact that these deposits are received in terms of sale agreement for customers as security deposit till the formation of condominium and society. These deposits are taken as a safeguard to defray the maintenance expenditure of the society and to keep these deposits for insurance premium and maintenance. They are refundable to resident welfare associations. CIT (A) relying on the decision of Hon’ble jurisdictional High Court in the case of CIT vs. Goel Gases Pvt. Ltd. – 188 ITR 216 (Del.) held that security deposit cannot be charged to tax as an income. In view of this, we do not find any infirmity in the order of the CIT (A) when deposits are with a purpose, the depositors are identified, there is a regular method of accounting adopted in past for treatment of this income which is accepted by the revenue and there is an obligation cast upon the assessee. Hence, ground no.28 of the revenue’s appeal is dismissed.”

115. Accordingly, following the aforesaid order, this issue is decided in favour of the assessee and revenue’s ground is dismissed.’

39. In absence of any change in the facts and circumstances of the case, respectfully following the decision of the coordinate bench in assessee’s own case for earlier years, we confirm the order of the learned CIT – A and dismiss ground number 8 of the appeal of the assessing officer.
40. Ground number 9 of the appeal is with respect to the deletion of disallowance on account of net registration charges of ₹ 253,761,992/-.
41. Both the parties confirmed that this issue is identical to the issue decided by the coordinate bench in assessment year 2006 – 07 and 2008 – 09 in assessee’s own case. It was further stated by the learned authorised representative that the revenue has not preferred any appeal before the higher forum on this issue and further the learned assessing officer has not made such disallowance from assessment year 2012 – 13 onwards. The learned authorised representative therefore submitted that this issue is squarely covered in favour of the assessee.

42. The learned departmental representative supported the order of the learned assessing officer however stated that issue is already been decided in favour of the assessee.
43. We have carefully considered the rival contention and perused the orders of the lower authorities. The coordinate benches in assessee's own case have considered this issue for assessment year 2006 – 07 and 2008 – 09. Further the revenue has accepted the order of the coordinate bench and has not preferred any appeal before the honourable High Court. The coordinate bench for assessment year 2008 – 09 has decided this issue as Under:-

“116. The next issue relates to deletion of addition on account of net registration charges received at ₹ 8,49,20,884/-.

117. Ld. Assessing Officer noted that as per clause 13 of the 'Buyers' agreement', it is mentioned that the company along with subsidiary company will prepare and execute Conveyance Deed in favour of the buyer only after receiving the full payment of the total price of the property, parking space, all security deposits, registration charges etc. If the buyer is in default of any of the payment, then the company can withhold the registration of the Conveyance Deed in favour of the buyer till the full payment is made by the buyer. This clause means an obligation on the buyer to undertake the Conveyance Deed within the time stipulated by the company, failing which, in terms of clause 12 of the Agreement, the company can cancel the allotment and forfeit the amount received from the buyer. The assessee's contention before the Assessing Officer was that real nature of the balance is that buyers have paid advance bills to the assessee and accordingly this has been shown as liability in the balance-sheet and this method has been consistently followed by the assessee in the earlier assessment years. However, the ld. Assessing Officer held that these are not correct fact because similarly additions have been made in the Assessment Year 2006-07 and 2007-08 by the Assessing Officer. The Assessing Officer has also accompanied the assessee company has furnished company-wise, propertywise of the persons from whom registration charges were received during the financial year 2007-08 which cannot contains the subsequent dates of payment of registration charges till 31.12.2010. From these details, Assessing Officer held that it is difficult to assessed the amount spent up to the period ending 31.02.2010 which corresponding to the amount received in the financial year 2007-08 and whether the amount of ₹ 8,49,20,884/- received in the year was actually spend till 31.12.12010 assessee has also not given proof of deposit of registration charges and has only enclosed the list. He thus concluded assessee has not utilized the amount received in account for more than two years, and therefore, it is in the nature of income and assessee may claim the expenditure against such income in the year when the registration charges are paid to the concern parties in these manner he has made the addition.

118. Ld. CIT (A) has deleted the addition after observing as under:

17.15 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, decision of CIT (Appeals) for Assessment Year 2006-07 and 2007-08 in appellant's own case wherein this issue has been decided in favour of the appellant and various judicial pronouncements on the issue. It is seen that registration charges are received from the buyers of the plots/flats alongwith other charges to get the flats/plots registered in the name of buyer. There is time gap between the receipt of such charges and actual registration of the flat/plot. Before actual registration takes place, the appellant has to pay stamp charges or it has to get the documents franking for the stamp charges. Therefore, after payment of franking/stamp charges a date is fixed for registration of the property. This procedure takes time, therefore, the amount received on account of registration charges are credited in the account maintained under the head 'registration charges'. These registration charges have been shown as liability in the balance sheet of the appellant. It is also seen that some time registration charges are received from the customers but actual registration could not take place due to non availability of person concerned or for want of other formalities or documents. Therefore, the money received in this account is kept in a separate account under the head 'Current Liability' as the same does not belong to the appellant. The appellant is a custodian of this amount which ultimately is to be paid to the Government. As observed by the Special Auditors that out of an amount of ₹ 24.76 crore received during the year, an amount of ₹ 16.29 crore has been spent on registration charges. This shows that there is a regular movement of funds by way of credit or debit in this account which has been utilized for registration of conveyance deed in favour of the customers. Hence, the assessing officer was not justified in treating the registration charges as appellant's income. Hence, the addition of ₹ 8,49,20,884/- made by the ASSESSING OFFICER is deleted."

119. We find that similar issue was decided by the Tribunal in assessee's own case in Assessment Year 2007-08 has dismissed the Revenue's appeal after observing and holding as under:

"244. We have carefully considered the rival contentions. It is noted that this is the amount which is collected by the buyers with specific object of getting exclusion of conveyance deed in favour of the buyer. In fact, it is an advance collected by the assessee from the buyer towards registration charges with the office of the Registrar for conveyance deed registration. At the time of registration, assessee incurs this expenditure by debiting to this account of that particular customer. The total receipt of registration charges is identified with respect to each of the buyer and there are movement in respective accounts. In fact, it is a past through cost collected by the assessee from the buyer to be incurred by assessee on behalf of the buyer. In view of these facts, these receipts cannot partake character of the revenue in the hands of the assessee. It is also not the case of the AO that the depositors are not identified and despite the conveyance deed executed by the assessee, the amount has not been incurred. In absence of this finding, it is not possible to confirm

the disallowance. Therefore, we confirm the order of the CIT (A) in deleting the addition of ₹ 18,66,82,603/- being credit balance of registration charges received from the customers. Ground No.29 of the revenue's appeal is dismissed."

2. Further, the department has accepted this issue as the above finding of Hon'ble ITAT in AY 2006-07 has not been challenged before High Court. Also, the assessing officer himself has accepted this claim from AY 2012-13 onwards and no addition has been made in this regard."

120. Further, learned counsel has informed that this issue is decided in favour of the assessee by Id. CIT (A) in assessee's own case for Assessment Year 2007-08 and the Department has not preferred any second appeal and further, no addition has been made from Assessment Year 2012-13 onwards. In view of the Tribunal order and as a matter of consistency, in this year also we delete the said addition."

44. In view of the facts stated above, respectfully following the decision of the coordinate bench, we dismiss ground number 9 of the appeal of the AO.
45. Ground number 10 of the appeal is with respect to deletion of addition on account of expenses towards non allocation of overheads to group companies amounting to ₹ 135,381,038/-.
46. Both the parties confirm that this issue is identical to the facts of the case for assessment year 2006 – 07 and 2008 – 09 wherein the coordinate bench deletes the identical disallowance made by the learned assessing officer. The learned authorised representative further submitted that the revenue has not challenged the same before the honourable High Court and further the learned assessing officer himself has not made these additions from assessment year 2012 – 13 onwards.
47. The learned departmental representative vehemently supported the order of the learned assessing officer however did not controvert the fact that this issue has been covered in favour of the assessee by the decision of the coordinate bench in earlier years.
48. On careful consideration of the orders of the lower authorities and the decision of the coordinate benches in earlier years in case of the assessee it is found that the issue is squarely covered in favour of the assessee by the decision of the coordinate bench for assessment year 2008 – 09 as Under:-

“125. In ground no.12, the Revenue has challenged the deletion of addition ₹ 15,02,99,365/- on account of disallowance of expenses towards non allocation of overheads.

126. Ld. Assessing Officer based on Special auditor's observation noted that there were certain discrepancies with regard to apportionment of common overhead expenses incurred by the assessee company but attributable to group concern were benefitting from such expenditure. Based on the observations of the Special Auditors, the Assessing Officer required the assessee as to why the expenditure of ₹ 15,02,99,365/- benefit of which has accrued to the group entities like, DLF Infocity developers (Chennai Limited) and DLF Cyber City Developers Ltd. be apportioned to them and correspondingly the same should be disallowed in the hands of the assessee. In response, the assessee has submitted the detail reply and submitted that if income expenditure has been incurred on behalf of company, the same have been duly recovered from those companies specifically and assessee has not debited to the P&L account. For the specific expenses which were debited to the concern group companies there is no expenditure which pertains to other group companies and all the expenses debited in the P&L account are related to the business of the assessee. Even the Special auditors have not been pointed out even a single voucher pertaining to other group company which has been wrongly debited to the P & L account of the assessee. Regarding overhead allocation the assessee has submitted as under:

a. That the assessee company has not developed the SEZ rather only constructed the buildings. The deduction u/s 80-IAB is available only in the case of development of SEZ. Mere construction of Bare shell buildings will allow the assessee the deduction u/s 80-IAB. Section 80-IAB states that profit and gains derived from business of developing SEZ. Thus, the deduction is only available once the SEZ is developed and it cannot be allowed before the stage of development of SEZ.

b. Sale of buildings to the co-developer is neither an activity of development of SEZ nor one of the authorized operations for SEZ notified by the competent authority. It is an isolated transaction giving one time income from transfer of capital assets. It is very clear from the Co- Developer agreement and lease deed that the intention on the part of the assessee company, from the very beginning was to construct and sale the buildings as a onetime activity. Such isolated transaction can never be termed as business activity. Co-developer agreement and lease deed very clearly shows that the developer has sold the land and building and loses all rights over these transferred capital assets and the relinquishment of right is irrevocable.

c. Though SEZ Act prohibits for sale of land thereby implicitly denying any benefit to a developer who is basically interested in deriving income by transfer of assets, the assessee has found a way to overcome this prohibition by creating 49 years lease in favour of co-developer. It is pertinent to note that the lease deed is renewable further and thus effectively transferring the land also. Para 2.3 and 5.1 of the Lease Deed clearly allows the parties to renew the lease deed. Thus, the assessee company has transferred the land in actual sense and substance of this present transaction

means sale of land. In most of the cases, substance of the transaction and its form are one and the same. However, the substance can be different from the form of the transaction in many cases. In the present case, the assessing officer has rightly gone for the substance of the transaction and disallowed the deduction u/s 80-IAB claimed by the assessee company as the lease deed is mere eye wash and actual transaction was sale of land which is clearly not permissible under SEZ Act. Relevant paras of Lease deed are at page 135 & 136 of the Paper Book II filed by the Counsel of the assessee.

d. The transfer of building is absolute and as per the amended agreement and lease deed, Co-developer shall be treated as owner of the bare shell building and the warm shell building after additions etc and will have exclusive rights to let, mortgage, or allow use of all or any part of buildings.

e. That if the deduction u/s 80-IAB is allowed to the assessee company in this case and the Co-developer does not develop the SEZ later on , how can we say that the SEZ has been developed and why should the deduction be allowed to the assessee company at this stage where the development of SEZ has not been done . Allowing the deduction at the stage of construction of bare shell building would be against the provisions of SEZ and Income Tax Act.

127. Ld. Assessing Officer after considering the assessee's reply had observed as under:

"12.5 The reply of the assessee has been considered and from the reply it emerges that the assessee has stated that it is a listed company and not incurred any expenditure on behalf of its associated companies. The assessee company has argued that in case of both the companies to which the expenses have been allocated the main project undertaken by the two companies is development of SEZ and hence administrative activities in these companies are minimal and there is no need for allocation of further overheads. Both these companies have incurred overhead expenditure which formed part of development cost considered in POCM. This argument of the company is not tenable as the two companies DLF Info City Developers (Chennai) Ltd and DLF Cyber City Developer Ltd. during the Asstt. year 2008-09 had earned development income of ₹ 1,68,686.15 lacs and ₹ 1,63,049.03 lacs respectively and against the same the overhead expenditure shown by these companies is ₹ 71.58 lacs and ₹ 1,194.51 lacs respectively. In fact, in case of DLF Cyber City Developers, the expenditure of ₹ 1194.51 lacs includes commission and brokerage expenditure of ₹ 1155.79 Lacs and if this is reduced then the overhead expenditure incurred would be just ₹ 38.72 Lacs. It is difficult to imagine that the two companies earning development income of ₹ 168686 lacs and ₹ 163049 lacs would have incurred overhead expenditure of ₹ 71.58 lac and 38.72 lacs only. This clearly points to the fact that these two companies must have benefitted from the overhead expenditure incurred by DLF Ltd. In

the previous year's also DLF Ltd has itself allocated overhead expenditure to its associated concerns.

12.6 The assessee has contended that revenue impact of whole of this exercise is revenue neutral since if certain amount of expenses is held to be allocable to group entities, the same will have to be allowed in the hands of those entities. In this respect the point to be observed is that the two companies identified by the Special Auditors which had incurred negligible overheads have earned income from development of SEZ and claimed deduction equal to 100% of profit earned on SEZ development u/s 80IAB, hence the argument of the assessee that this exercise would be revenue neutral is incorrect.

12.7 The assessee has stated in the reply that in these two companies even though construction activities were going on, there was no marketing, planning or any other HO level administrative work involved during the year. The assessee has not been able to substantiate this argument with any documentary evidence.

12.8 The assessee has relied on certain citations wherein it has been held that expenses incurred for business requirement are allowable and any incidental benefit arising to a third party out of such expenditure cannot be made basis for disallowing the same. These citations are not relevant in the present case since the expenses incurred by the assessee have benefitted the associated companies of the assessee who are in similar line of business as that of the assessee and in the past also the assessee itself had allocated certain expenditure to its associated companies. The assessee has also mentioned certain citations regarding business expediency and stated that the expenses must be incidental to the business of the assessee. The question here is that the expenses incurred by the assessee have benefitted the associated concerns and therefore the same are to be apportioned to the associated concerns. The associated concerns during the year have developed SEZ and the assessee company during the year had also earned income from development of SEZ but there is substantial variance in the level of expenses incurred and accordingly some expenses are to be attributable for the benefit of associated concerns since there is similar line of business. The associated concerns has claimed 100% deduction u/s 80IAB and therefore by transferring the expenses of associated concerns to the assessee company some portion of such expenses are to be allocated to the associated companies.

12.9 The assessee has also cited judgement in the case of Nestle India Limited Vs DCIT (2009) 27 SOT 9(Delhi). In this case it was held that the assessee company had incurred expenditure on account of advertisement and sales promotion in respect of only those products in which the Indian company dealing in. Thus, the expenditure had been incurred to promote sales in India. Therefore, those expenses were incurred wholly and exclusively for the purpose of business of the assessee. In this case the associated concerns of Nestle India are situated outside India and it was easily established by Nestle that the advertisement expenses were incurred in respect of products dealt by the Indian company.

However, in the case of the assessee the line of business of the assessee company and its associated concerns is identical and therefore the percentage of overhead expenditure incurred by the assessee and its associated concerns would be similar. The Special Auditor in their report have reported that DLF Ltd have incurred administrative overheads of 3.18% of the total turnover but in the case of DLF Info City Developers (Chennai) Ltd. the company has incurred administrative overheads of ₹ 71.58 Lacs against development income of ₹ 168686 Lacs which is just 0.042% of total turnover and DLF Cyber City Developers Ltd have incurred administrative overheads of ₹ 38.72 Lacs (after reducing brokerage and commission) against development income of ₹ 163049 Lacs which is just 0.023% of total turnover. The line of business of the assessee company and associated concern being identical, the proportion of overhead expenditure to the level of business should also be similar but as mentioned above there is substantial variance in the proportion of overhead expenditure incurred by the assessee company vis-a-vis the two associated concerns. The judgment of Nestle quoted by the assessee is not at all relevant in the present case since the assessee has not been able to prove that the overhead expenses incurred were wholly and exclusively for its benefit and had not benefitted the associated concerns. The assessee has not been able to convincingly explain the extremely low level of administrative overhead expenditure incurred by the two associated concerns as compared to the assessee company considering the similar line of business.

12.10 In view of the same it can be inferred that a part of overhead expenses relatable to the two entities stand in the books of the assessee. Since the benefit of such expenditure does not accrue to the assessee but to the two group entities also, the expenditure of ₹ 15,02,99,365/- as worked out by the special auditors is disallowed.”

128. Ld. CIT(A) has deleted the addition in the following manner:

“19.22 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, order of the CIT (A)-XVIII for the A.Y. 2006-07 and my own order for A.Y. 2007-08 wherein this issue has been decided in favour of the appellant, and various case laws relied upon by the appellant on this issue. It is seen that appellant company was allocating over head expenses to its associate companies till October 2006. However, after October 2006, the appellant company stopped allocating overhead expenses to its group companies and transferred the concerned staff, who were previously looking after the affairs of group entities, to the respective entities. After October 2006, the group entities started incurring their own expenses themselves and this fact has been verified by the Special Auditors during the course of Special Audit. It is seen that there are certain heads of expenses which were exclusively pertaining to the appellant company and could not have been allocated to the other group entities. It is also seen from the Special Audit report that the Special Auditors have not brought out any instance of expenditure specifically pertaining to other group companies but has been claimed in the profit and loss account of

appellant company during the year. The allocation made out by the Special Auditors was based on the presumption without bringing any material on record. No allocation of overheads is needed in the case of M/s. DLF Info City Developers (Chennai) Ltd. and DLF Cyber City Developers Ltd. because these subsidiaries have their own resources and are meeting out their expenses own their own. In the case of M/s DLF Info City Developers (Chennai) Ltd. it is seen that this company has only one project that is the development of SEZ at Chennai. The only activity in this company is the development of SEZ building and the administrative activity is bare minimum and hence there was no requirement of the allocation of further expenses. Apart from the above the company had incurred overhead expenditure which formed part of the development cost which has been considered for POCM. The details of such expenditure was furnished to the Assessing Officer at page No.1 of appellant's letter dated 31.3.2011. The amount of overhead expenditure forming part of development cost comes to ₹ 13,12,65,162/-. This expenditure includes the overhead expenses incurred by the DLF Infocity Developer (Chennai) Ltd.

In the case of M/s. DLF Cyber City Developers Ltd, it is noted that the main project was only development of SEZ project at Sector 25 Gurgaon. Besides, the above project this company has only rental income. The administrative activity in this company is also minimal and hence there is no need of allocation of any further overheads. This Company is again self sufficient and has its own resources to carry out the activity and hence no further allocation is required. Apart from the above, the company had incurred overhead expenditure which formed part of the development cost which has been considered for POCM. The details of such expenditure was furnished to the Assessing Officer at page No.2 of appellant's letter dated 31.3.2011. The total cost of the overhead expenditure forming part of development cost is ₹ 9,73,06,213/-. This expenditure includes the overhead expenses incurred by the DLF Cybercity Developer Ltd.

19.23 Hence, it is clear that no benefit has accrued to group companies namely DLF Info City Developers (Chennai) Ltd. and DLF Cyber City Developers Ltd from the expenses of ₹ 150,299,365/-, as these expenses were exclusively for the business of the appellant company. There was no justification for disallowing these expenses. The ASSESSING OFFICER as well as Special Auditors have not brought any material on record which can prove that expenditure debited in the P&L account of the appellant company was not incurred for the bonafide business needs of the appellant company. The appellant company is main group company and expenditure incurred in this company are bound to be higher and in the process of incurring such expenditure if other group companies derived some benefit from such expenses, the expenditure cannot be allocated to the companies who have also derived some benefit. The genuineness of the impugned expenditure for the purpose of business has not been disputed by the AO. Further, under the facts and circumstances as discussed above, it cannot be denied that the said expenditure was not incurred wholly and exclusively for the purpose of the appellant's business. Further, as argued by the

learned AR that all the above group companies of the appellant are subject to tax at the same rate and hence shifting of such expenditure from appellant company to other group companies would be futile and revenue neutral exercise. Considering the above, the impugned disallowance of ₹ 15,02,99,365/- made by the Assessing Officer cannot be sustained. The same is, therefore, deleted.”

129. The Tribunal in Assessment Year 2006-07 has dismissed the Revenue's appeal on this issue after observing and holding as under:

“121. We have carefully considered the rival contentions. The brief fact is that certain overhead expenses incurred by the assessee have been apportioned to the other group companies for the reason that by incurring those expenses, the assessee has passed on some benefit to those companies. The amount of 75% of that expenditure has been transferred to the group companies and 30% of that expenditure is borne by the assessee company. During the course of assessment proceedings, the AO found that an amount of ₹ 20,79,10,574/- expenditure pertaining to payment to Directors, advertisements, printing and stationery, security charges, leave encashment and salary and wages are not apportioned to group companies and, therefore, AO disallowed 70% of those expenditure amounting to ₹ 14,55,37,401/-. It is not the case of the AO that these amount of expenditure are not incurred by the assessee and further veracity of those expenditure have also not been doubted. The only reason for disallowance is that assessee has not allocated this expenditure to its various group companies and, therefore, AO was of the view that this expenditure has not been incurred wholly and exclusively for the business purpose of the company. On perusal of the expenditure and the orders of the lower authorities, it is apparent that the director's salary is being paid to the directors of the company including a commission thereof is for the purpose of managing the business of the DLF – assessee. Further, for the protection of the interest of the company even if the directors have given their time for looking after other group activities it is merely a shareholders' activity. Furthermore, the advertisements, salary and wages, leave encashment expenditure and printing expenses etc. are all pertaining to the business of the company. No evidence / instances have been cited by AO that any of this expenditure has not been incurred by the company and they are not related to the business of the assessee. It may happen that by incurring certain expenditure by the assessee for the purpose of his business may result into some indirect benefit to the group companies but that cannot be the ground for disallowance of that expenditure in the hands of the assessee. The CIT (A) relying upon the decision of ITAT, Delhi Bench in the case of Nestle India Ltd. vs. DICT – 27 SOT 9 has deleted the addition. We do not find any infirmity in the order of the CIT (A) and revenue could not controvert the fact of any expenditure with instances that these are not incurred by the assessee wholly and exclusively for the purposes of the business of the assessee. Hence, we confirm the order of the CIT (A) deleting the addition of ₹ 14,55,37,400/-. Ground No.4 of the revenue's appeal is dismissed.”

130. In view of the aforesaid observation and the finding of the Tribunal which is applicable in this year also, therefore, respectfully following the same, the Revenue's ground is dismissed."

49. In view of above facts, respectfully following the decision of the coordinate bench in assessee's own case for earlier years and also for the reason that this decision has been accepted by the revenue by not preferring an appeal on this issue before the honourable High Court and also for the reason that the learned assessing officer himself has not made these additions from assessment year 2012 - 13 onwards, we dismiss ground number 10 of the appeal.
50. Ground number 11 of the appeal is with respect to the deletion of addition on account of disallowance of expenses u/s 14 A of the income tax act. The brief facts of the case show that the assessee has earned dividend from mutual fund amounting to ₹ 79,276,451/-. Before the assessing officer assessee submitted that it has not incurred any expenditure in the nature of administrative expenditure or interest expenditure which is related to the earning of tax free income as it had enough resources of its own to make the investment for earning the tax free income. However the learned assessing officer applied the provisions of rule 8D of the income tax rules 1962 and disallowed a sum of ₹ 710,272,000/- u/s 14 A of the income tax act. On appeal before the learned CIT - A wherein he held that assessee has not incurred any interest expenditure for earning exempt income. However he upheld the application of rule 8D (2) (iii) and confirmed the disallowance to the extent of ₹ 10.01 crore. Therefore, the assessee was granted a relief of ₹ 610,172,000/- therefore revenue is in appeal before us. On this issue the assessee has also preferred an appeal before us as per ground number two wherein it is challenging the confirmation of the disallowance of ₹ 10.01 crores.
51. The learned authorised representative vehemently submitted that this issue has been considered by the coordinate bench in assessee's own case for assessment year 2008 - 09 so far as the issue is with respect to deletion of disallowance of the interest expenditure u/s 14 A of the act. He referred to paragraph number 131 - 132 of that order. It was submitted that issue is squarely covered in favour of the assessee.

52. Pressing ground no 2 of the appeal of the assessee, ld AR submitted that even other amount of disallowance u/s 14A cannot be Rs 10.01 Crs. He submitted a chart of investments which yielded tax free income. He also submitted revised working of disallowance of Rs 15 lakhs as under .

Average investment in Partnership Firms and Mutual Funds

Opening as on 01/04/2008	=	Rs. 31cr
Closing as on 31/03/2009	=	Rs. 31cr
	Total	Rs. 62cr
Average investment	=	Rs. 31cr
Disallowance being 0.5% of Rs. 31cr=		Rs.15.50 lakhs

53. The learned departmental representative vehemently supported the order of AO.
54. We have carefully considered the rival contention and perused the orders of the lower authorities. Identical issue has been considered by the decision of the coordinate bench in assessee's own case for assessment year 2008 – 09 is per paragraph number 131 – 132 of the order as Under:-

“131. In ground no.13, the Revenue has challenged the deletion of addition on account of disallowance of expenses u/s.14A r.w. Rule 8D.

132. Admittedly, this issue is similar and linked with the grounds no. 2 and 3 of appeal and in view of our finding given therein, the grounds raised by the Revenue is dismissed”.

55. On careful consideration of the order of the coordinate bench for assessment year 2008 – 09, where the issue with respect to the disallowance u/s 14 A of the income tax act was considered as Under:-

3. Coming to the issue of disallowance u/s.14A, the facts in brief are that the Assessing Officer has made disallowance u/s.14A to the extent of ₹ 35,40,91,000/- in accordance with Rule 8D. The Assessing Officer noted that the special auditors to whom matter was referred u/s.142A have pointed out that assessee-company has made investment for an amount aggregating to ₹ 89.97 crore as on 31st March, 2008 in 12 partnership firms as its capital contribution. These investments have been made out of interest bearing funds having direct nexus between the funds borrowed and capital contribution made in the partnership firm, since share of profits earned by the assessee company aggregates to ₹ 87.20 lac which is exempt

u/s. 10(2A). Apart from that, assessee has also made investment in various private limited companies. The closing balance as on 31st March, 2008 was ₹ 1,63,342.19 lacs. The assessee has paid over all interest of ₹ 425.61 crore. The Assessing Officer rejected the assessee's contention that no interest bearing funds were utilized for making the investment for earning the exempt income on the ground that the same has not been substantiated by the assessee for documentary evidences. He further rejected the assessee's contention that it has received interest at ₹ 426.08 crores against the interest expenditure claimed of ₹ 425.61 crores and the borrowed funds were used for giving loan to other subsidiary companies at a higher interest rate, therefore, the interest on which sums have been borrowed and assessee has not made any expenditure on earning interest free income or exempt income to warrant any disallowance, on the ground that same also remained unsubstantiated. AO further observed that assessee-company has not been able to establish flow of funds or any nexus. The assessee's contention is based on the presumption that entire investments have been made from the interest free funds available in the balance sheet as the assessee has not establish only flow of funds from its bank account into investment and establish that same is from interest free funds available only. He accordingly worked out the disallowance of 29.42 crore on account of interest expenditure under Rule 8D(2) and further made disallowance of administrative expenditure of ₹ 5.98 crore under Rule 8D(2)(3) after following decision of ITAT Special Bench in the case of Chem Invest Ltd., 121 ITD 318. He proceeded to make the disallowance of ₹ 35,40,91,000/- u/s. 14A r.w. Rule 8D(ii).

4. Ld. CIT (A) after analyzing the investment made interest income on an interest expenditure incurred and the position of availability of surplus funds with assessee held that no disallowance of interest can be made. However, he has confirmed the part of the disallowance after observing and holding as under:

20.10 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, orders of CIT (A)-XVIII for AY 2006-07 and my own order for AY 2007-08 in appellant's own case and various judicial pronouncements relied upon by the appellant on this issue. It is seen that during the year, the appellant has earned exempt income of ₹ 87,20,11,847/- as share of profit from partnership firms and dividend income on mutual funds. It is also seen that appellant has made average investment of ₹ 1197.30 crore in various partnership firms and in the shares of various group companies and mutual funds. The appellant has shown total average assets during the year of 17319.40 crore in the balance sheet. Vide my decision on ground No. 6 and 7,1 have held that appellant has shown interest incurred on fixed period loan of ₹ 604.43 crore. Out of this, an amount of ₹ 354.89 crore has been capitalized over the project. The appellant has also paid interest on over draft etc. to the tune of ₹ 176.06 crore. As such the total interest payment during the

year comes to ₹ 425.60 crore. As against this, the appellant has shown interest receipts of ₹ 411.99 crore in the P&L account. If the interest paid on bank overdraft facilities of ₹ 176.06 crore is reduced then balance interest paid comes to ₹ 249.54 crore which is less than the interest receipt from subsidiary companies and banks. On the basis of above working it can be said that investment made by the appellant company was interest neutral. Therefore, on this basis the disallowance of interest for earning exempt income will be nominal or nil. At the same time the appellant has been sanctioned loan of ₹ 370 crores by ICICI Bank and has invested in the shares of M/s Edward Keventor (Successors) Pvt. Ltd. for acquiring shares of said company. The appellant had paid ₹ 7.93 crore as interest on the loan taken from ICICI Bank which has been specifically taken for making investment in shares of M/s Edward Keventor (Successors) Pvt. Ltd. (page 203 of AO's Order). The other loans taken by the appellant company on which interest is paid were related to the construction projects being undertaken by the appellant company and advanced to other group, entities. Therefore, interest on such loan cannot be considered for disallowance u/s 14A. The loan taken in making investments in the shares of M/s Edward Keventor (Successor) Pvt. Ltd can be considered for making disallowance u/s 14A of the IT Act which worked out as under:-

Amount

1	Expenditure directly relating to the exempted income	-
2	Amount of expenditure by way of interest other than the amount of interest included in point No.1. (directly related to exempted income) (A x B / C)	0.54
	Disallowance u/s 14A (1 + 2)	0.54
A	Amount of expenditure	7.93

	by way of interest other than the amount of interest included in point No. 1. (directly related to exempt income)	
B	Average of value of investment, income from which does not form part of total income.	1197.30
C	The average of total assets as appearing in the balance sheet	17,419.40

5. Before us, the learned counsel for the assessee, Mr. R.S. Singhvi submitted that, the Id. CIT (A) has allowed the relief to the extent of ₹ 28,87,91,000/- by observing that the entire investment is out of assessee's own fund, however has confirmed the disallowance of ₹ 6.53 crore consisting of proportionate interest of ₹ 54 lac on loan taken for purchase of shares of M/s. Edward Keventor Pvt. Ltd. and ₹ 5.99 crores under Rule 8D(2)(iii). He submitted that investment in the share of M/s. Edward Keventor Pvt. Ltd. was purely a strategic investment, and therefore, no disallowance can be made u/s.14A. Apart from that, he submitted that assessee has substantial amount of own funds in the form of share capital and reserves and entire investments are fully made out of non interest bearing free funds. The details of share capital and reserves as on 31.03.2008 and corresponding investment appearing in the balance sheet were as under:

	Amount (Rs. in Lacs)
a.	Share Capital 34,095.95
b.	Reserve and Surplus 1,092,818.68
Own funds	1,126,914.63

Total investment in shares/partnership firms	
As per Balance sheet	175,349.69

6. He further provided us the details of investment and the details of exempt income in the following manner:

(a) Details of investment are given hereunder:

(Rs. in crores)

	31.03.08	31.03.07	31.03.06	31.03.05	31.03.04
- Quoted Mutual Funds	31	10	-	-	-
- Quoted Shares					
- Unquoted Shares	1633	588	565	133	133
- Partnership Firm	90	84	49	41	45

(b) Details of exempt income: Particulars

Assessment Year

	2008-09	2007-08	2006-07
Share of Profit from Partnership Firms (net)	1,87,02,005	5,66,24,572	4,88,69,429
Exempt income from subsidiary Companies			
Other Exempt Income (Dividend)	85,33,09,842 (Mutual funds)		
Total 87,20,11,847	87,20,11,847	5,66,24,572	4,88,69,429

7. He further submitted that the same was also come up for consideration before this Tribunal for the Assessment Year 2006-07 and 2007-08, wherein the Tribunal after detailed discussion has deleted the disallowance on the grounds.

- firstly, there is no satisfaction recorded by the Assessing Officer u/s. 14A(2).
- secondly, interest free funds available in excess of investments in earning tax free securities,
- thirdly, investments in partnership firms and companies are for the business purposes of the assessee and;
- lastly, no dividend was earned by the assessee on investments in unquoted share of the private limited companies.

8. He further strongly relied upon the judgment of Hon'ble Delhi High Court in the case of ACB India Ltd. vs. ACIT reported in (2015) 374 ITR 108, wherein it has been upheld that while calculating the disallowance under Rule 8D(2)(ii) Assessing Officer has to adopt average value of the investment the income from which does not form part of the total income and disallowance can only be computed in respect to investment which has yielded exempt income during the year. The assessee has earned exempt income from the investments made in partnership firm and mutual fund and not from other investments, and therefore, disallowance if any should be restricted to the extent of ₹ 53.75 lac, the working of which was given in the following manner:

Average investment in Partnership Firms and Mutual Funds		
Opening as on 01/04/2007	=	₹ 84+10 cr.
Closing as on 31/03/2008	=	₹ 90+31 cr
Total		₹ 215 cr
Average investment	=	₹ 107.50 cr.
Disallowance being 0.5% of ₹ 107.50 cr.	=	53.75 lakhs.

9. Before us, Id. Special Counsel appearing on behalf of the Revenue strongly relied upon the order of the Assessing Officer and further submitted that in so far as strategic investments are concerned, the same cannot be removed for the purpose of calculating the disallowance in view of the judgment of Hon'ble Supreme Court in the case of Maxopp Investment Ltd v/s CIT, 402 ITR 640 (SC). He further submitted that the assessee has to establish the nexus and the link between the borrowed funds and its utilization so as to prove that all the investments yielding investment income has been made out of surplus funds and interest bearing fund has been used purely for the business purposes.

10. We have heard the rival submissions and also perused the relevant findings given in the impugned orders as well as material referred to before us. The undisputed fact is that assessee has earned exempt income of ₹ 87,20,11,847/- as share of profit from partnership firm and dividend income on mutual funds. The average investment as on 31st March, 2008 stood at ₹ 1197.30 crore in various partnership firm and the shares of various group and mutual funds. The total average assets during the year in the balance-sheet were ₹ 1,754 crores. The assessee's case has been

that it has huge surplus fund in the form of reserves and surplus and share capital at ₹ 1126.91 crore out of which investments in shares and in partnership firm was only 175.30 crore. From a perusal of the impugned appellate order which is based on perusal of material placed on record, it is seen that Id. CIT (A) has taken note to the fact that assessee has paid ₹ 176.06 crores interest on bank overdraft facilities and the balance interest of ₹ 249.5 crore is much less than total interest received from subsidiary companies and banks which was more than 411.99 crore. On these facts, he has held that on investment made by the assessee-company no disallowance of interest can be made. Apart from that, he has noted that assessee has been sanctioned loan of ₹ 370 crores by ICICI bank which was invested in shares of M/s. Edward Keventor P. Ltd. for acquiring the shares of a said company for which assessee has paid ₹ 7.39 crore interest. The other loans taken from the assessee-company on which interest has been paid, purely related to business undertaken by the assessee and business advance to the group companies. Based on such findings he has held that interest of such loan cannot be considered for disallowance u/s.14A. However, he has confirmed the disallowance of ₹ 653 lacs mostly arising out of disallowance of administrative expenditure under Rule 8D(2)(iii) and disallowance of interest on the investment made in the shares of M/s. Edward Keventor P. Ltd. which has been stated to be strategic investment.

11. In so far as disallowance of interest is concerned, we find that, not only the Id. CIT (A) has properly examined the utilization of interest bearing funds for the assessee which was purely for the purpose of business but also from the bare perusal of the balance sheet, it is seen that the interest free funds available with the assessee in the form of reserves and surplus far exceeds the total investment made in shares/partnership firms including the investment made in the shares of M/s. Edward Keventor P. Ltd. which has been stated to be strategic investment. If that is so, then no disallowance u/s.14A can be made. This proposition has now been confirmed by the Hon'ble Supreme Court in the case of CIT vs. Reliance Industries Ltd. in civil appeal no.10 to 13 of 2019 judgment and order dated 23rd March, 2019, wherein the Hon'ble Supreme Court has upheld the proposition that if assessee has interest free funds available sufficient to meet its investment, then it can be presumed that the investment have been made from interest free fund available with the assessee and not from the borrowed funds. Thus, no disallowance of interest can be made.

11.1 In so far as disallowance made under Rule 8D2(iii), one of the plea raised by the learned counsel before us is that, for the computation of average investment which had not yielded exempt income should be removed for which, reliance has been placed in the judgment of Hon'ble Delhi Court in the case of ACB India Ltd vs. ACIT (supra). In view of such a binding precedent, we direct the Assessing Officer only to include those investments while computing the average investments which have yielded exempt income, i.e., investment made in the partnership firm and mutual

fund only, because investment made on unquoted shares have not yielded any exempt income. The calculation of average investment in partnership firm and mutual fund has been given by the learned counsel as has been incorporated above and accordingly we direct the Assessing Officer to verify the same and work out the disallowance of 0.5%. Accordingly, appeal of the assessee is partly allowed.”

56. Therefore, respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2008 – 09 we confirm the order of the learned CIT – A to the extent of deletion of the disallowance of interest expenditure u/s 14 A read with rule 8D (2) of the act. Further coming to the ground number 2 of the appeal of the assessee wherein the confirmation of disallowance of administrative expenditure is challenged, respectfully following paragraph number 11.1 of the order of the coordinate bench for assessment year 2008 – 09, we set aside the whole issue of administrative expenses with similar direction back to the file of the learned assessing officer. Assessee may raise any ground with respect to above disallowance. In view of this ground number 11 of the appeal of the AO is dismissed and ground number two of the appeal of the assessee is set aside to the file of the learned assessing officer with above direction.
57. The next ground of appeal of the learned assessing officer i.e. ground number 12 of the appeal is with respect to the deletion of addition/disallowance on account of expenses on commercial projects which are not commenced amounting to Rs.1 05,19,606/-.
58. The parties confirm that this issue is identical to the issue decided by the coordinate bench in assessee's own case for assessment year 2006 – 07 and 2008 – 09. It was further submitted that this issue has not been preferred by the revenue before the honourable High Court in appeal of the revenue. Therefore the learned authorized representative price to that this issue is now concluded in favour of the assessee by the decision of the coordinate bench. The learned departmental representative vehemently supported the order of the learned assessing officer.
59. We have carefully considered rival contention and perused the orders of the lower authorities as well as the orders of the coordinate bench. The issue has already been decided by the coordinate bench in assessee's favour by the decision dated 27 May 2019 for assessment year 2008 – 09 is per paragraph number 139 – 143 of that order as Under:-

139. In ground no.15, the Revenue has challenged the deletion of addition of ₹ 1,30,38,853/- on account of disallowance of expenses on projects not commenced.

140. Ld. Assessing Officer has treated various expenses to be capitalized as per the noting of the Special Auditor in their report which were as under:-

A/c Head	Amount	Narration
Legal & Professional Expenses	2,791,433.00	LANGHAM CAPITAL LTD. - PROF. / TRANSACTIONS FEE FOR JOINT VENTURE WITH WSP GROUP PLC
Legal & Professional Expenses	522,474.00	50% FEES ON SUBMISSION OF DRAFT REPORT FOR GUJRAL DESIGN PLUS VALUATION
Legal & Professional Expenses	5,000,000.00	PROF FEE FOR SR IN CONNECTION OF PUR. OF CONV. PREF. SHARES BY DAL SINGAPORE FROM LEHMAN BR. & D.E. SHAW
Legal & Professional Expenses	229,500.00	Amount paid to amar chand mangaldas towards drafting of Memorandum of Corporation with Fraport AG Frankfurt Airport services worldwide for joint coloboration relating to Airport projects.
Legal & Professional Expenses	289,250.00	Amount paid to amar chand mangaldas towards drafting of Memorandum

		of Corporation with Fraport AG Frankfurt Airport services worldwide for joint collaboration relating to Airport projects.
Legal & Professional	505,620.00	FEEES FOR VALUATION OF GUJRAL DESIGN PLUS OVERSEAS PVT LTD. For buying stake in company.
Legal & Professional	1,966,300.00	PROF. FEES IN CONNECTION WITH IMPLEMENTATION AND ACQUISITION OF CYPRUS HOLDING COMPANY, INCLUDING ASSISTANCE IN ACQUISITION & IMPLEMENTATION OF CYPRUS HOLDING COMPANY.
Legal & Professional	161,236.60	OUT OF POCKET EXPENSES FOR TRAVEL TO CYPRUS
Legal & Professional	1,067,420.00	PROF. FEES IN RESPECT OF CROSS BORDER INVESTMENT STRUCTURING FOR HOSPITALITY BUSINESS EVALUATION FOR SETTING UP AN OFFSHORE COMPANY FOR

		ACQUIRING
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141. Ld. CIT (A) has deleted the addition in the following manner:

“23.11 I have considered the submission of the appellant, observation of the ASSESSING OFFICER, and various judicial pronouncements relied upon by the appellant and my own order for AY 2007-08 in the case of the appellant company wherein the issue was decided in favour of the appellant. It is seen that the appellant is engaged in the business of developing real estate like development of plots, multi storey buildings, commercial complexes etc. During the year, the appellant has incurred certain expenditure on legal and professional fees paid for drafting the joint venture agreements, preparing draft report for Gujral Design Plus Valuation, Purchase of preferential shares by DAL Singapore from Lehmen Brothers, drafting of memorandum corporation with Fraport AG for joint venture and airport projects, acquisition of companies, advice taken for cross border investments etc and other expenses on feasibility and viability of the various projects. It is seen that the appellant has paid these expenses for taking legal and professional advice on the issues mentioned above and have paid ₹ 1,30,38,853/- to the various parties for services rendered by them. In the assessment proceedings these expenses have been treated as capital expenditure by the ASSESSING OFFICER. It is claimed by the appellant that expenses incurred on legal and professional fees paid for drafting the joint venture agreements, preparing draft report for Gujral Design Plus Valuation, Purchase of preferential shares by DAL Singapore from Lehmen Brothers, drafting of memorandum corporation with Fraport AG for joint venture in airport projects, acquisition of companies, advice taken for cross border investments etc was not new line of business but it was incurred to expand the business in same line. Out of the above proposals most of the study or legal advice or joint venture agreements did not fructified, therefore, the same were abandoned. Most of these projects were only with consultancy stage, therefore, treating such expenses as capital nature cannot be justified. The expansion of the appellant’s business by entering into joint ventures and acquisition of shares and company which are engaged in the business of real estate was in the same line of business and such expenses are in the revenue field. The expenses like planning, identification of sites, consultation charges, lay out etc. and other expenses on feasibility and viability of the commercial projects etc, are the expenses incurred for bonafide business requirement of the appellant and such expenses falls within the objectives of the MOA of the appellant company. Any expenditure incurred for the projects to be undertaken in future and viability of such projects are business expenditure and same has to be allowed as revenue expenditure. The question of capitalization of such expenses arises only when such projects actually commence & are in existence, but there are certain projects for which various expenses were incurred before their intended commencement but due to some reasons, such projects could not be commenced. Therefore, expenses relating to such projects cannot be capitalized and has to be allowed as revenue expenditure as these expenses have been incurred wholly and exclusively for the business

requirement of the appellant company. The Assessing Officer was not justified in treating these expenses as pre-operative expenses and same is to be capitalized. The question of capitalization does not arise as these expenses were incurred on legal and professional advice and preparing joint venture agreements. However, after the feasibility and viability study these proposed joint ventures or valuation reports were not found suitable for carrying out further investments and same were abandoned. The expenses were incurred for extension of same line business and such expenses has to be allowed as revenue expenditure. In view of the above, the disallowance made by the ASSESSING OFFICER on account of capitalisation of such expenses cannot be sustained. Therefore, respectfully following the decisions of jurisdictional High Court and my own order for AY 2007-08 in appellant's case (Page 229-237), the disallowance of ₹ 1,30,38,853/- made by the Assessing Officer on this account is deleted."

142. We find that the Tribunal also in Assessment Year 2006-07 has dismissed the Revenue's appeal after observing and holding as under:

"216. We have carefully considered the rival contentions. The assessee has incurred this expenditure on proportionate and feasibility of various construction projects in which business the assessee is engaged into. Before embarking on to any of the projects, it is a common practice to obtain a feasibility and economic viability of construction projects at different geographical location. These expenses are for facilitating the existing business of the assessee. It is not the case of the revenue that it is altogether a new line of the business or unrelated to the business of the assessee. Therefore, in our view, this expenditure are wholly and exclusively incurred for the purposes of the business of the assessee. Hence, we confirm the order of CIT (A) and delete this ground of revenue's appeal."

143. Thus, when similar nature of expenditure has been incurred for the purpose of business then in this year also we do not find any reason to deviate from such a finding and accordingly ground of the Revenue on this score is dismissed."

60. In view of the decision of the coordinate bench in assessee's own case for earlier year, respectfully following the same, we dismiss ground number 12 of the appeal of AO.
61. Ground number 13 is with respect to the disallowance deleted by the learned CIT – A on account of the classification of income from income from house property to income from business or profession. The learned assessing officer has reclassified a sum of ₹ 138,235,746 as income from house property to income from business or profession such classification is deleted by the learned CIT – A.

62. The learned authorised representative submitted that the coordinate bench in assessee's own case has decided identical issue for assessment year 2006 – 07 and 2008 – 09. Thus the issue is squarely covered in favour of the assessee.
63. The learned departmental representative supported the order of the learned assessing officer.
64. We have carefully considered the rival contention and find that the issue is squarely covered in favour of the assessee by the decision of the coordinate bench for assessment year 2008 – 09 wherein paragraph number 155 - 160 deals with the issue and decide the same in favour of the assessee as Under:-

“155. In ground no.18, the Revenue has challenged the deletion of addition of ₹ 9,4,52,455/- on account of reclassification of income from house property to income from business and profession.

156. Ld. Assessing Officer had noted the following observation of the Special Auditor that following properties have been reflected as fixed assets in the balance sheet as on 31st March, 2008 and also noted their comments in the following manner: Properties reflected as Fixed Assets in the Balance Sheet:-

S. No.	Name of the property
1.	DLF, Centre, Sansad Marg, New Delhi (Partly held as office).
.	40F Cannaught Place New Delhi.
.	Shops at Belvedere Park, Gurgaon (CWIP)
.	Shops at Belvedere Tower, Gurgaon (CWIP)
.	Shops at Grand Mall, Gurgaon (CWIP) Copy of fixed assets register in substantiation of the above is enclosed as Annexure “A” (Page 15).

b) Properties shown as current assets:-

S. No.	Name of the property
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1.	Corporate Park.
2.	Shops at Centre Point Faridabad.
3.	Le Millennia Supermart, Windsor Court, Phase -V, Gurgaon.
4.	Le Millennia Supermart, Carlton Estate, Phase -V, Gurgaon.
5.	Apartments at DLF City, Gurgaon.
6.	Shop at DLF City Centre, Gurgaon.
7.	Shops at Ridgewood Estate.
8.	DLF Centre, Sansad Marg, New Delhi (Partly held as SIT).
9.	American Express bank Ltd. Phase - V, DLF City, Gurgaon.
10.	Felicite Builders & Constructions Pvt. Ltd., I-E, Jhandewalan

Copy of the finalization schedule of Balance Sheet in substantiation of the above is enclosed as Annexure "B" (page No. 16).

Out of the properties mentioned in (b) above the property mentioned at S1. No.8 is not treated as owned by the Company.

In the case of property at DLF Centre Sansad Marg, in the assessment order for A.Y.2007-08 & A.Y. 2006-07 and earlier years, it has been held that the said property is not owned by the assessee company. However, it is explained that as per ITAT order for the A. Y. 1996-97, the said property is considered as owned by the Company.

In view of the above stated findings, the computation of income from house property needs to be recalculated according to the nature of income from all the 15 different properties. We have therefore restated the Income from House Property under the various heads of income which is tabulated as under:-

Reclassification of income declared under the head income from house property:-

		Amount (Rs.)
1.	INCOME FROM HOUSE PROPERTY	

a) 40 - F Connaught Place, New Delhi	8,56,693.00	
Less:- House Tax paid	1,07,720.00	
	7,48,973.00	
b) Shops at Bevvedre Park, Gurgaon	1,63,200.00	
c) Shops at Bevvedre Park, Tower	3,29,040.00	
d) Shops at Grand Mall, Gurgaon	1,30,32,412.0 0	
e) Other rent	1 9,18,123.00	1,61,91,748.0 0
Less: Statutory Deduction @ 30 % 1,13,34,224.0 0		48,57,524.00

2. INCOME FROM BUSINESS & PROFESSION

a)	Corporate Park	8,46,69,205.0 0
b)	Shops at Centre Point, Faridabad	7,15,586.00
c)	Le Millennia Supermart, Windsor Court, Ph-IV, Gurgaon	7,17,876.00
d)	Le Millennia Supermart, Carlton Estate, Ph-	1,02,600.00

	IV, Gurgaon	
e)	Rent / License Fee for Appartments at DLF City, Gurgaon	16,63,333.00
f)	Shops at DLF City Centre, Gurgaon	9,49,912.00
g)	Shops at Ridgewood Estate	7,50,000.00
h)	American Express Bank Ltd., Phase-V, DLF City Gurgaon	5,89,25,991.00
i)	Felicite Builders & Construction Pvt. Ltd., I-E, Jhandewala n	88,000.00
j)	DLF Centre, Sansad Marg, New Delhi	19,39,85,629.00
Less: Expenses- House Tax Paid	2,90,59,948.00	16,49,25,681.00
31,35,08,184.00		
TOTAL INCOME		
a)	Income from House Property Shown in Computation	32,48,42,408.00

	of Income	
b)	Income under stated by the Company	23,07,89,953.00
(a)	- (b)	9,40,52,455

In view of the above a sum of ₹ 9,40,52,455/- has been under stated by the company by including it as income from House Property instead of Business Income/Income from other Sources.”

157. Ld. Assessing Officer based on similar observation and following the judgment of Hon'ble Gujarat High Court in the case of CIT vs. Neha Builders, 296 ITR 661, reiterated the addition and computation made by the Special Auditor.

158. Ld. CIT (A) has deleted the addition in the following manner:

“27.13 I have considered the submission of the appellant and observation of the ASSESSING OFFICER and decision of Hon'ble ITAT for A.Y. 1996-97 in appellant's own case and decision of the Hon'ble CIT(A)-XVIII for A.Y. 2006-07 and my own decision in appellant's own case for A.Y. 2007-08. It is seen that the issue in this ground is covered in favour of the appellant by the order of Hon'ble ITAT in appellant's own case for AY 1996-97. The appellant has received income from the properties owned by it and such properties are reflecting in balance sheet as stock in trade. The appellant has furnished the receipt of house tax payment with respect to above said properties during the course of assessment proceedings which establish that said properties belong to appellant and owned by it. It is noticed that the Assessing Officer has made the addition by reclassifying the income by relying upon the judgment of Hon'ble Gujarat High Court in the case of CIT vs. Neha Builders Pvt. Ltd. (supra). However, there is no dispute on the facts noted above. Taking into consideration the order of Hon'ble ITAT in the appellant's own case for earlier years and the decision in CIT vs. National & Grindlays Bank Limited (supra) and CIT (A)'s order for the immediately preceding years relevant to AY 2006-07 & 2007-08 in appellant's own case, the income received from the properties owned by the appellant and shown in the balance sheet has to be assessed as income from house property. Therefore, the ASSESSING OFFICER is directed to treat the income from such properties as income from “house property” and allow deduction u/s 24(a) of the IT Act. Hence, the addition made by the ASSESSING OFFICER of ₹ 9,40,52,455/- is deleted.”

159. The Tribunal in assessee's own case for Assessment Year 2006-07 has dismissed the Revenue's appeal after observing and holding as under:

“184. Further, Ld. DR has relied upon the decision of Hon'ble Supreme Court in the case of Chennai Properties and Investment Ltd. vs. CIT in Civil Appeal No.4494/2004 wherein Hon'ble Supreme Court has held that letting out of the properties is in fact the business of the assessee. We have gone through the decision of Hon'ble Supreme Court and we

are of the view that this decision favours the argument of the assessee. At page 4 of the decision, the Hon'ble Supreme Court has considered the judgement of that court in East India Housing and Land Trust Ltd. The court has considered that decision that where the main objection the company is buying and developing land and properties and promoting and developing markets and some rent is turned out of that, the character of that income shall be income from house property. Therefore, in this case too, the assessee company is a developer and hence, the decision of Hon'ble Supreme Court in the case of Chennai Properties is rendered in the context of the company which is formed with the main object of renting up of the properties. In view of the above, respectfully following the decision of coordinate Bench of the ITAT in the case of assessee for AY 2005-06, we confirm the order of CIT(A) in taxing the rental income as income from house property. In the result the ground no.17 of the revenue's appeal is dismissed."

160. Since this issue has been dealt by the Tribunal in various years, therefore, consistent with the view taken, the order of the Id. CIT (A) has confirmed and consequently the Revenue's ground is dismissed."

65. Therefore, respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2008 – 09 is above we dismiss ground number 13 of the appeal of the learned assessing officer.
66. Ground number 14 is against the deletion of addition on account of notional rent, additional annual letting value in respect of the vacant and lease of properties amounting to ₹ 1,541,010/-.
67. Both the parties confirm that this issue is identical to the issue decided by the coordinate bench in assessee's own case for assessment year 2006 – 07 and 2008 – 09. It was further stated that AO has not further agitated this issue before the honourable High Court and has also not made any such addition with respect to assessment year 2016 – 17 onwards. The learned departmental representative vehemently supported the order of the learned assessing officer.
68. We have carefully considered the rival contention and perused the orders of the lower authorities as well as the orders of the coordinate bench in assessee's own case for assessment year 2008 – 09 wherein we find that this issue is covered in favour of the assessee at paragraph number 161 onwards as Under:-

"161. In ground no.19, the Revenue has challenged the deletion of addition of ₹ 12,28,340/- on account of disallowance of notional

rent/additional annual letting value in respect of the vacant property.

162. Ld. Assessing Officer noted that Special Auditor has pointed out that number of immovable property owned by the assessee were lying vacant and notional rent in respect of such properties has been worked out at ₹ 12,28,340/-.

163. Ld. CIT (A) has deleted the addition in the following manner:

“28.13 I have considered the submission of the appellant, observation of the ASSESSING OFFICER and various judicial pronouncements available on the issue and order of Commissioner of Income Tax (Appeals)- XVIII for AY 2006-07 and my own order for AY 2007-08 in the case of appellant wherein this issue was decided in favour of appellant. It is seen that impugned addition made on account of notional rent on properties that remained vacant for part of the previous year, the AR reiterated submissions made before the AO and emphasized that the matter is covered in favour of the appellant by judgment in the case of one of the appellant’s group concerns M/s DLF Office Developers Vs. ACIT reported in 23 SOT 19 (Del) and orders of CIT (Appeals) in appellant’s own case for the Assessment year 2006-07 and 2007- 08. It is observed that” where there was an intention to let out the house property and assessee took steps to let it but could not get suitable tenant, in such cases the annual value will have to be worked out under section 23(1)(c) of the IT Act and according to this clause, if the actual rent received /receivable during the year is Nil then that has to be taken as annual value of the property in order to compute the income from property.”

In the case of appellant, the appellant had intention to let such properties but could not get suitable tenant. In such a situation, the ALV will be Nil as per provision of section 23(1)(c) of the IT Act. Section 23(1)(a) r.w.s 23(1)(c) clearly provides that if the property remain vacant wholly or partly during the party, then actual rent received or receivable will be taken as the ALV of such properties. In the case of appellant the property is remained vacant, therefore, the ALV of such properties will be Nil. Hence, no notional rent can be estimated in the case of vacant properties. The decision of the ASSESSING OFFICER was not justified.”

164. The Tribunal also in assessee’s own case for Assessment Year 2006-07 has dismissed the Revenue’s appeal after observing and holding as under:

“196. We have carefully considered the rival contentions. We have also perused the order of the coordinate Bench of the ITAT in ITA No.3561/Del/2013 wherein ground no.3 have considered the identical issue where in para no 16 to 23 addition is deleted by ITAT as under :-

“16. The Assessing Officer made an addition of ₹ 3,02,61,251/- on account of notional rent/ additional annual letting value (ALB) u/s 23(1) (a) of the Income tax Act,1961, in respect of vacant properties.

The details of the addition as per the assessment order is as under:

- DLF City Centre	₹ 2,36,01,310/-
- DLF Commercial Shopping Complex	₹ 27,21,360/-
DLF Corporate Park	₹ 1,69,07,688/-
	₹ 4,32,30,358/-
Less: Standard Deduction u/s 24(1)	₹ 1,29,69,107/-
	₹ 3,02,61,250/-

17. The Ld. CIT (A) has deleted the addition after discussing the case of the assessee in detail and following the decision cited before him in this regard including decision of 'D' Bench of the Tribunal on an identical issue in the assessee's group concern M/s DLF Office Developers vs. ACIT reported in 23 SOT 19 (Del) and first appellate orders in the assessee's own case for the assessment year 2006-07, 2007-08 and 2008-09.

18. In support of the ground the Ld. Departmental Representative has basically placed reliance on the assessment order.

19. The Ld. AR on the other hand reiterated the submissions made before the Ld. CIT (A) and the decisions cited and relied upon before him.

20. Considering the above submission, we find that the Ld. CIT (A) has decided the issue in favour of the assessee narrating the observation made in the cited decisions in case of M/s DLF Office Developers vs. ACIT (Supra) and other that where there was an intention to let out the house property and assessee took steps to let it but could not get suitable tenant, in such cases the annual value have to be worked out u/s 23(1) (c) of the IT Act and according to this clause if the actual rent received/ receivable during the year is Nil then that has to be taken as annual value of the property in order to compute the income from property. He has accordingly held that in case of the assessee where the property remained vacant then the ALV of such property will be Nil. Hence, no notional rent can be estimated in the case of vacant properties.

21. In absence of rebuttal of above aspect of the facts in the case of present assessee, we are of the view, that the Ld. CIT (A) has rightly decided the issue in favour of the assessee taking assistance of the cited decisions before him. We find that the Ld. CIT (A) has discussed the issue in appeal and has passed a speaking order, which is being reproduced hereunder:

7.15 I have considered the submission of the appellant, observation of the ASSESSING OFFICER and various judicial pronouncements available on the issue and order of Commissioner of Income Tax (Appeals)-XVIII for AY 2006-07 and my own orders for A Y 2007-08 & 2008-09 in the case of appellant wherein this issue was decided

in favour of appellant. It is seen that impugned addition made on account of notional rent on properties that remained vacant for part of the previous year, the AR reiterated submissions made before the AO and emphasized that the matter is covered in favour of the appellant by judgment in the case of one of the appellant's group concerns M/s DLF Office Developers Vs. ACIT reported in 23 SOT 19 (Del) and orders of CIT(Appeals) in appellant's own case for the Assessment year 2006-07, 2007-08 & 2008-09. It is observed that "where there was an intention to let out the house property and assessee took steps to let it but could not get suitable tenant, in such cases the annual value will have to be worked out under section 23(l)(c) of the IT Act and according to this clause, if the actual rent received / receivable during the year is Nil then that has to be taken as annual value of the property in order to compute the income from property. "

In the case of appellant, the appellant had intention to let such properties but could not get suitable tenant. In such a situation, the ALV will be Nil as per provision of section 23(1)(c) of the IT Act. Section 23(1)(a) r.w.s 23(1)(c) clearly provides that if the property remain vacant wholly or partly during the year, then actual rent received or receivable will be taken as the ALV of such properties. In the case of appellant the property is remained vacant, therefore, the ALV of such properties will be Nil. Hence, no notional rent can be estimated in the case of vacant properties. The decision of the Assessing Officer was not justified.

As regards, the Assessing Officer's decision of computing the notional rent based on highest rent in respect of each building, it is seen that the properties have been given to various parties which are not related to the appellant and some of them are of International repute like GE Capital, KPMG. The rent has been charged based on the location of the property, area of lease property and timing of lease agreement. It is seen that appellant has filed copies of the all lease agreement before Assessing Officer for verification and no discrepancy in the rental income in the books of accounts, as compared to the lease agreement was pointed out by the Assessing Officer. It is not the case that appellant has received some under hand rent from the tenants. In this regard the Assessing Officer has not brought any evidence on record and no enquiry in this direction was conducted by him. Therefore, assuming the rent for all properties based on the highest lease agreement was not justifiable. As regards Assessing Officer's reliance on various judgments in the assessment order, it is seen that the facts of the said judgments are squarely different with that of the appellant's case. In the case of appellant, none of the properties have been rented out/leased to the related parties. Therefore, the ratio of the said judgment cannot be applied in the appellant case. In view of the above, the bonafide lease agreement between the appellant and third parties cannot be disregarded without having any adverse information in this regard and based on conjectures and surmises. Hence, the addition made by the Assessing Officer on this issued is deleted.

Facts of the above cited judicial pronouncements are identical with the facts of the appellant's case. Therefore, ratio of the said

judgment is squarely applicable to the facts of the appellant's case. Hence, the notional addition made by the Assessing Officer of ₹ 3,02,61,251/- under the head "income from house property" on account of notional income u/s 23(1) (a) of the Income Tax Act is deleted."

22. We find that the first appellate order on the issue as discussed above is reasonable and view supported with this decision. Hence, we are not inclined to interfere with the order, the same is upheld. Ground no.3 is accordingly rejected."

197. Therefore, following the decision of the coordinate Bench of the ITAT in the case of the assessee for AY 2005-06 , the addition of ₹ 3,27,52,542/- is deleted. In the result, ground no.19 is dismissed."

165. Once this issue has been consistently decided in favour of the assessee, then in this year, without any change in material facts no different view can be taken. Respectfully following the aforesaid decision of the Tribunal, we dismiss the ground raised by the Revenue."

69. Therefore, respectfully following the decision of the coordinate bench we dismiss ground number 14 of the appeal of the AO.
70. Ground number 15 of the appeal is with respect to the deletion of the addition on account of disallowance of depreciation claimed on DLF Centre building amounting to ₹ 636,614/-.
71. Both the parties submitted that in assessment year 2006 – 07 the CIT – A deleted the above addition however the same was not challenged before the coordinate bench. The learned assessing officer himself has not made this disallowance of depreciation for assessment year 2016 – 17 onwards. The learned authorised representative further submitted that this issue arose in assessment year 2008 – 09 in assessee's own case wherein the coordinate bench as per order dated 27 May 2019 has deleted the above disallowance confirming the order of the learned CIT – A therefore the issue is squarely covered in favour of the assessee.
72. The learned departmental representative vehemently supported the order of the learned assessing officer
73. We have carefully considered the issue , orders of lower authorities, orders of coordinate bench in assessee's own case for assessment year 2008 – 09 wherein at paragraph number 166 to 170 the coordinate bench decided this issue in favour of the assessee as Under

“166. In ground no.20, the Revenue has challenged the deletion of addition ₹ 7,17,794/- on account of depreciation claimed on DLF Centre Building.

167. The Assessing Officer on the basis of Special Audit Report observed that assessee company has charged excess depreciation of ₹ 914277/- on certain portion in respect of building on DLF Center which was earlier let out but during the Assessment Year the same has been converted into self occupied already therefore excess depreciation has been charged since the assessee has claimed depreciation existing on 01.04.1999 whereas depreciation is allowable on WVS on 01.04.2005 the Assessing Officer worked out the excess depreciation of ₹ 8,03,807/-.

168. Ld. CIT(A) has deleted the addition in the following manner:

“30.7 I have considered the submission of the appellant and observation of the ASSESSING OFFICER and order of CIT (A) XVIII for AY 2006-07 and my own order for AY 2007-08 in appellant’s case, where this issue was decided in favour of the appellant company. It is seen that the AO has recalculated written down value as on 01.04.2005 by notionally deducting depreciation from the WDV as on 01.04.1999. The amount of notional depreciation for the period 01.04.1999 01.04.2005 during which period the property had been leased and the income taxed under the head “Income from House Property” after allowing deductions permissible under Section 24 of the Income Tax Act. Deductions by way of depreciation allowance are dealt in section 32 of the Income Tax Act which provides for allowing depreciation on the basis of Written Down Value of the assets under section 32(1)(ii). The definition of the word written down value is in section 43(6)(b) of the Income Tax Act which provides that in the case of assets acquired before the previous year written down value means the actual cost to the appellant less all depreciation actually allowed under the Act. From the facts and the judgment of Hon’ble Supreme Court in the case of CIT vs. Doomdooma India Limited (2009) 178 Taxman 261 (SC), it is clear that the depreciation is to be allowed on the basis of actual WDV and same cannot be reduced on notional basis for the period for which property was not used for business purposes and no depreciation was claimed on such part of the property. From the facts as narrated above and respectfully following the judgment of Hon’ble Supreme Court in the case of CIT vs. Doomdooma India Limited (2009) 178 Taxman 261 (SC) and the judgment of the CIT (Appeals) in the case of the appellant for A.Y. 2006-07 and 2007-08 (supra), the disallowance of depreciation of ₹ 7,17,794/- made by the ASSESSING OFFICER is deleted.”

169. The Tribunal also in assessee’s own case for Assessment Year 2007-08 has dismissed the Revenue’s appeal after observing and holding as under:

“151. We have gone through the submission of the parties. The CIT(A) has observed that this very issue arose in the preceding

year and relief allowed at the first appellate stage was accepted by the revenue as no appeal was filed against the same before ITAT. In the light of above position and as per the decision of Hon'ble Supreme Court in the case of CIT v. J K Charitable Trust [2008] 308 ITR 161 (SC), the revenue could not be permitted to agitate the very same issue in the year under reference. Accordingly, the order of CIT(A) is confirmed."

170. In view of the above, this issue is decided against the Revenue."

74. Therefore, respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2008 – 09 we dismiss ground number 15 of the appeal of the learned assessing officer.
75. Ground number 16 relates to the disallowance on account of expenses were bills are not in the name of the company which is deleted by the learned CIT – A amounting to ₹ 30,12,202.
76. Both the parties confirmed that identical issue arose in case of the assessee for assessment year 2006-07 and 2008 – 09 wherein the issue is decided in favour of the assessee.
77. The learned authorised representative further stated that revenue has not preferred any appeal before the honourable High Court on this issue.
78. The learned departmental representative vehemently supported the order of the learned assessing officer.
79. We have carefully considered the rival contention and perused the orders of the lower authorities as well as the orders of the coordinate bench for assessment year 2006 – 07 and 2007 – 08 in assessee's own case wherein the issue is decided in favour of the assessee. The latest order with respect to the assessment year 2008 – 09 paragraph number 171 to 175 considered this issue and decides in favour of the assessee as Under

"171. In ground no.21, the Revenue has challenged the deletion of addition of ₹ 58,50,162/-on account of disallowance of expenses where bills are not in the name of the company.

172. The Assessing Officer has made the disallowance on the ground that no documentary evidences have been filed in respect to certain expenses as bills does not contain the name of the assessee company.

173. Ld. CIT(A) has deleted the addition in the following manner:

"32.7 I have considered the facts available on records and the contention of the appellant and order of CIT (A) XVIII for AY 2006-07 and my own order for AY 2007-08 in appellant's own case where

this issue was decided in favour of the appellant company. It is observed that the impugned disallowance of expenditure of ₹ 58,50,162/- have been made on the ground that the bills are not in the name of appellant. It is observed from pages 403 to 406 of the assessment order that the appellant has explained each and every item of expenditure in detail. It is seen that these expenses are in the nature of electricity bill and water charges pertaining to Jhandewalan Office of the appellant, reimbursement made to the employees and other group companies. As explained by the appellant that Jhandewalan Property belongs to the appellant since so many years but the same was given on rent to M/s DCM Ltd. When the said property was given on rent those companies took electricity connection and water connection on their name. Though the property has been vacated by those tenants and being used by the appellant but the electricity and water connection is still running in their name. These expenses have been incurred wholly and exclusively for the business purposes of the appellant as these premises are being used by the appellant for its office purposes. Merely because the water and electricity bills are in the name of earlier tenants, the same cannot be disallowed. It is also submitted by the appellant that water and electricity bill pertaining to Raisina Cold Storage are also being utilized by the appellant as property in the name of said company is in the possession of the appellant. This company has been merged with the appellant, therefore, these expenses also pertain to the appellant's and therefore, incurred only for the business purposes of the appellant. The reimbursement made to the group companies and employees of the appellant company for the expenses incurred by them on behalf of the appellant also pertains to the appellant as these expenses were incurred on behalf of the appellant for its business purposes. Considering the facts it is established that these expenses were pertaining to appellant company and services or utilization thereof were for the purposes of the business of appellant company. Hence, the same are allowable. In view of the above discussions the disallowance of ₹ 58,50,162/- made by the Assessing Officer is deleted."

174. We find that the Tribunal also in assessee's own case for Assessment Year 2006-07 has dismissed the Revenue's appeal after observing and holding as under:-

"276. We have noted that most of these expenses are in the nature of electricity expenses of the property taken on rent by the assessee that was explained to the AO by assessee however same were disallowed. Naturally the electricity bill would be in the name of owner of the property and not tenant in case the property is rented. Therefore we do not find any infirmity in the order of CIT (A) in deleting disallowance. In the result ground no 38 of the appeal is dismissed."

175. Here, in this case also, the bulk of expenses are in the nature of electricity and water expenses for which the name of erstwhile tenant has been mentioned. Similar issue was involved in the earlier year also, therefore, respectfully following the precedence

this issue is decided in favour of the assessee and against the Revenue. Accordingly, the Revenue's grounds are dismissed.”

80. In view of the decision of the coordinate bench in assessee's own case for assessment year 2008 – 09 ground number 16 of the appeal of the learned assessing officer is dismissed.
81. Ground number 17 of the appeal is with respect to the deletion of disallowance on account of excess payment of rent of ₹ 348,396/-. The fact shows that that appellant has paid rent of ₹21,62,796/- to Ms veena Swarup . The special auditor reported that the learned assessing officer may examine the reasonableness of these expenditure u/s 40 A (2) (a) of the act. The AO noted that rent cannot be increased on annual basis in the proportion basis and by ignoring the fact that during the year Under appeal the rent was increased by 19% as compared to increment in rent by 50% in previous year. The AO noted that assessee has failed to furnish any supportive evidence with respect to the instance of rent paid of other similar flat in the same area as asked by the appellant. Therefore, considering the reasonableness according to AO the rent cannot be allowed in current year more than what has been allowed in the previous year. Therefore as in previous year the rent allowed was ₹ 1,814,400, whereas same is paid in this year of 21,62,796/- AO disallowed ₹ 348,396. On appeal before the learned CIT – A he deleted the above disallowance on the basis of details filed by the assessee in the form of lease deed and Yearwise chart of rent paid. He noted that it is an admitted fact that the rent has been paid for the accommodation of director of the appellant company. The same rent has been considered as a perquisite in the hence of the director and tax at source has been deducted thereon. The payment has been made by cheque. The recipient offers the income. During the year the increase in the rent is only 19% whereas in earlier years it was more than 50%. He further noted that in assessment year 2008 – 09 the learned AO did not make any disallowance when increase in the rent was more than 50%. He noted that during the year the increase in rent is just 19% which is in line with the current market trend. Therefore he deleted the disallowance.
82. The learned departmental representative submitted that the reasons given by the learned and CIT – A in para number 26.9 of his order are not in conformity with the provisions of Section 40 A (2) (a) of the act. He submitted

that the consideration that payment is made by cheque, tax deduction at source is made, recipient offered the same in its return of income are all irrelevant. Therefore he submitted that the addition may be upheld.

83. The learned authorised representative submitted that there is any increase in the rent which is less than increase in the rent in earlier years. It was further stated that learned assessing officer has not shown what is the market rate of rent of the flat. Unless that is shown by the AO, no disallowance can be made.
84. We have carefully considered the rival contention and perused the orders of the learned lower authorities.
85. It is undisputed that the assessee and Veena Swarup are persons referred to in clause (b) of sub-section (2) of section 40A. However, in order to invoke sub-section (2) of section 40A, the Assessing Officer has to come to the conclusion that such expenditure incurred by the assessee being a payment to a person referred to in clause (b), the expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities, for which the payment is made or the legitimate needs of business or profession of the assessee or the benefit delivered by or accruing to him. In the present case the learned assessing officer has disallowed the sum merely on the basis of increase in the earlier year compared to the increase in the current year. Increase in the earlier year was more than 50% whereas increase in the current year is merely 19%. The learned assessing officer has not brought on record any material to show that what was the market rate of the rent of the flat. In absence of such information it cannot be said that what is paid by the assessee to a related party is excessive. All these exercised by the learned assessing officer are missing in this case. In view of this we do not find any infirmity in the order of the learned CIT – A in deleting the addition of ₹ 348,396/-. Accordingly, ground number 17 of the appeal is dismissed.
86. Ground number 18 of the appeal is general in nature, no arguments advanced by either of the parties. Therefore, it is dismissed.
87. In the result appeal number ITA 4436/del/2013 filed by the learned assessing officer for assessment year 2009 – 10 is dismissed.
88. Now we come to the appeal of assessee for the same year.
89. Ground number 1 is with respect to the confirmation of the addition on account of brokerage and commission expenses related to the lease out

property is amounting to ₹ 8,302,737 confirmed by the learned Commissioner of income tax (A) of the act. In the chart submitted before us the assessee stated that above ground was not pressed before the coordinate bench when the identical issue arose in case of assessee for assessment year 2006 – 07 and 2008 – 09. In view of this the addition/disallowance made by the learned CIT – A for those years were confirmed. Therefore, this issue is already decided against the assessee in that year hence ground number 1 of the appeal is dismissed.

90. Ground number 2 related to the disallowance u/s 14 A of the income tax act confirmed by the learned CIT – A to the extent of ₹ 10.01 crores, has already been dealt with while dealing with the ground number 11 of the appeal of the learned assessing officer wherein the issue to the extent of computation of the disallowance of administrative expenses is set-aside to the file of the learned assessing officer with certain directions. Therefore, ground number two is allowed accordingly.
91. Ground number 3 of the appeal is against the confirmation of the addition of ₹ 1,155,271 on account of notional rent where security deposit received but no rental income have been shown. Learned authorised representative submitted that this issue is covered by the decision of coordinate bench in case of assessee for assessment year 2007 – 08 and for assessment year 2008 – 09 in favour of the assessee. The learned departmental representative supported the orders of the lower authorities.
92. We have carefully considered the rival contention and perused the orders of the lower authority as well as the orders of the coordinate bench. While deciding the appeal of the assessee for assessment year 2008 – 09 the coordinate bench has decided this issue in favour of the assessee as Under:-

“21. Coming to the issue of addition on account on notional rent where security deposits were received but no rental was shown, amounting to ₹ 10,91,270/-. It has been pointed out by both the parties that this issue now stands covered in favour of the assessee by the Tribunal in assessee’s own case for the Assessment Year 2007-08 vide order dated 01.11.2017 in ITA No.3846/D/2012.

22. The addition has been made on the ground that assessee despite being owner of the Kiosks has not disclosed rental income in its books and the same has been transferred to M/s. DLF Services Ltd. by over riding title. M/s. DLF Services Ltd is providing maintenance and upkeep services of the mall including Kiosks. In return for consideration for these services, the appellant vide authority letter dated 12/12/2005 has granted M/s DLF

Services Ltd., right to recover the rental receipts from the third parties using said Kiosks. Assessee has not claimed any expenditure in the name of M/s DLF Services Ltd. in connection with maintenance services of the mall. In view of above arrangement, M/s. DLF Services Ltd. is showing the receipts from the Kiosk as a part of its income which is duly subjected to tax in its hands and accordingly there is no loss to the revenue.

23. This precise issue had come up for consideration before the Tribunal in assessee's own case in the earlier year, wherein it has been observed and held as under:

'42. We have heard the rival submissions and perused the material on record. The ground is regarding addition of ₹ 12,60,000/- as rental income. The Assessing Officer observed that the assessee was owner of Kiosks installed at Malls which were leased to various parties at the lease rent of ₹ 18,00,000/- per annum. The Assessing Officer after accepting statutory deduction of 30%, considered the net rental income at ₹ 12,60,000/-. The CIT(A) confirmed the finding of the Assessing Officer.

43. The appellant contended that M/s. DLF Services Ltd. was appointed as maintenance agency for upkeep and maintenance of Mall, owned and run by appellant. For maintenance services being rendered by DLF Services Ltd., the appellant assigned the lease rental to DLF Services Ltd. as part of maintenance cost. The appellant contended that the diversion of lease rent was towards reimbursement of maintenance services rendered by M/s. DLF Services Ltd. and as such diversion was towards provisions of maintenance services. It was further contended that the rental income as diverted to DLF Services Ltd. has being subjected to tax in the case of M/s. DLF Services Ltd. and there is no case of subjecting the same income again in the case of appellant. In this connection, the appellant made reference to decision of Supreme Court in the case of M/s. Ashish Plastic Industries Vs. ACIT 373 ITR 45, as per which same income cannot be subjected to tax again in the case of the appellant.

44. The Ld. CIT DR supported the order of the Assessing Officer and CIT(A).

45. After hearing both the parties, we are of the view that the appellant assigned DLF Services Ltd. right to recover lease rent for maintenance and upkeep services of Mall and as such there was a genuine business arrangement between the parties. If the lease income is considered as chargeable to tax in the case of appellant, the appellant may be eligible for claim of expenses on account of maintenance of Mall which was owned and run by the appellant and as such appellant has not derived any tax benefit on the basis of such arrangement and for diversion of lease rent. It is further relevant to take note of the fact that such lease rent has been subjected to tax in case of M/s. DLF Services Ltd.

46. After considering the facts of the case, we are of the view that there is no justification for addition of ₹ 12,60,000/- as same was towards business obligation and for specific services rendered by

M/s. DLF Services Ltd. and accordingly the impugned disallowance is directed to be deleted.”

24. Thus, following the aforesaid precedence in assessee's own case, we decide this issue in favour of the assessee and the impugned addition is directed to be deleted.”

93. Therefore, respectfully following the decision of the coordinate bench we allow ground number three of the appeal.
94. Ground number 4 of the appeal is regarding the disallowance on account of interest on late deposit of tax deduction at source of ₹ 116,935/- the learned authorised representative submitted that this issue is covered against the assessee by the order of the coordinate bench in assessee's own case for assessment year 2008 – 09 is per paragraph number 32 of that decision. The learned DR also confirmed the same.
95. On careful consideration of the orders of the lower authorities and the order of the coordinate bench it is found that for assessment year 2008 – 09 the identical issue arose in the case of the assessee which has been decided against the assessee by the coordinate bench as Under:=-

“32. The next issue relates to addition on account of interest on late deposit of TDS.

33. The facts in brief are that the Id. Assessing Officer on the basis of comments made by the Special Auditor observed that interest of ₹ 28,79,372/- paid on late deposit of TDS has been claimed against interest received on income tax refund and the interest payment on late deposit of TDS is not allowable expenditure. In response to the show cause notice, the assessee relied upon the judgment of Hon'ble Karnataka High Court in the case of CIT vs. Oriental Insurance Company Ltd., (2009) 183 Taxman 186 (Kar.). However, the Id. Assessing Officer held that the assessee has not furnished any statement regarding late deposit of TDS.

34. Ld. CIT(A) has confirmed the said addition after observing and holding as under:

“33.10 I have considered the observations of Special Auditors as well as of the Assessing Officer and submission of the appellant. It is seen that the appellant company has received interest on income tax refund of ₹ 30,31,199/-. This interest was credited in the account “interest paid others - Income Tax” and this interest on refund was adjusted against the interest paid on late payment of TDS of ₹ 28,79,372/-. Thus, an amount of ₹ 28,79,372/- was adjusted against the interest received on income-tax refund and balance amount was offered as interest income. The interest paid on late payment of TDS is not an allowable expenditure u/s 37 of the IT Act. This is not an expenditure wholly and exclusively for the

purposes of the business of the appellant company, therefore same is not an allowable expenditure. Hence, the disallowance of set off of interest payment on late deposit of TDS against the interest received on income tax refund was justified and same is confirmed.”

35. Before us the learned counsel submitted that in an identical issue, ITAT Kolkata Bench in the case of DCIT vs. M/s. Narayani Ispat Pvt. Ltd., ITA No.2127/Kol/2014, order dated 30.08.2017 wherein it was held that TDS amount is in the nature of tax of the deductee, i.e., other party and not that of the assessee and as such the interest on late deposit of TDS is allowable expenses u/s.37 of the Act. In support, following observations and findings of the Tribunal in para 7 was referred: -

“...in the case before us the interest was paid for delayed payment of service tax & TDS. The interest for the delay in making the payment of service tax & TDS is compensatory in nature. As such the interest on delayed payment is not in the nature of penalty in the instant case on hand.

The issue of delay in the payment of service tax is directly covered by the judgment of Hon’ble Apex Court in the case of Lachmandas Mathura Vs. CIT reported in 254 ITR 799 in favour of assessee. The relevant extract of the judgment is reproduced below :

“The High Court has proceeded on the basis that the interest on arrears of sales tax is penal in nature and has rejected the contention of the assessee that it is compensatory in nature. In taking the said view the High Court has placed reliance on its Full Bench's decision in Saraya Sugar Mills (P.) Ltd. v. CIT [1979] 116 ITR 387 (All.) The learned counsel appearing for the appellantassessee states that the said judgment of the Full Bench has been reversed by the larger Bench of the High Court in Triveni Engg. Works Ltd. v. CIT [1983] 144 ITR 732 (All.) (FB), wherein it has been held that interest on arrears of tax is compensatory in nature and not penal. This question has also been considered by this Court in Civil Appeal No. 830 of 1979 titled Saraya Sugar Mills (P.) Ltd. v. CIT decided on 29-2-1996. In that view of the matter, the appeal is allowed and question Nos. 1 and 2 are answered in favour of the assessee and against the revenue.”

In view of the above judgment, there remains no doubt that the interest expense on the delayed payment of service tax is allowable deduction.

The above principles can be applied to the interest expenses levied on account of delayed payment of TDS as it relates to the expenses claimed by the assessee which are subject to the TDS provisions. The assessee claims the specified expenses of certain amount in its profit & loss account and thereafter the assessee from the payment to the party deducts certain percentage as specified under the Act as TDS and pays to the Government Exchequer. The amount of TDS represents the amount of income tax of the party on whose behalf the payment was deducted & paid to the Government Exchequer. Thus the TDS amount does not represent the tax of the assessee

but it is the tax of the party which has been paid by the assessee. Thus any delay in the payment of TDS by the assessee cannot be linked to the income tax of the assessee and consequently the principles laid down by the Hon'ble Apex Court in the case of Bharat Commerce Industries Ltd. Vs. CIT (1998) reported in 230 ITR 733 cannot be applied to the case on hand.

Thus, in our considered view, the principle laid down by the Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd. (supra) is not applicable in the instant facts of the case. Thus, we hold that the Assessing Officer in the instant case has wrongly applied the principle laid down by the Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd.(supra). We also find that the Hon'ble Supreme Court in the case of Lachmandas Mathura (Supra) has allowed the deduction on account of interest on late deposit of sales tax u/s 37(1) of the Act. In view of the above, we conclude that the interest expenses claimed by the assessee on account of delayed deposit of service tax as well as TDS liability are allowable expenses u/s.37(1) of the Act. In this view of the matter, we find no reason to interfere in the order of the ld. CIT(A) and we uphold the same. Hence, this ground of Revenue is dismissed.”

36. Before us, the ld. Special Counsel for the revenue submitted that there is one direct judgment of Hon'ble Madras High Court in the case of Chennai Properties and Investment Ltd., 239 ITR 435 (Mad) and submitted that now in view of this only judgment of Hon'ble High Court, in this issue, the matter should be decided against the assessee.

37. After considering the rival submissions, we find that the assessee-company has received an interest on income tax refund of ₹ 30,31,199/- and such an interest was credited in the account of “interest paid others – Income Tax” and such an interest of refund was adjusted against the interest paid on late payment of TDS of ₹ 28,79,372/- and only the balance amount has been offered as interest income. Thus, in this manner, interest paid on late payment of TDS has been claimed as expenditure u/s.37 of the Act.

38. Learned counsel for the assessee had contended that the TDS amount is in the nature of tax for the deductee and not that of the assessee and such interest on late deposit of TDS is allowable expenses u/s. 37 because it has been incurred during the course of business. Under the provision of the Act, levy of interest for delay in remittance of the TDS has been envisaged u/s. 201(1A) which is not in the nature of penalty albeit it is more on account of delayed tax, deposited by the assessee on behalf of the deductee, i.e., other party for which the interest is charged. The amount of TDS represents the amount of income tax which is payable by the party on whose behalf the deductor has deducted the tax and pays to the Government Exchequer. The TDS amount does not represent tax liability of the assessee albeit it is the tax of the other party, but it has to be paid by the assessee. In case there is any delay in payment of tax deducted by the assessee on

behalf of the deductee, then it cannot be linked or reckoned as income tax of the assessee payable by the assessee, and moreover the interest herein is more of compensatory in nature. Though, Co-ordinate Bench of ITAT Kolkata in the case of DCIT vs. M/s. Narayani Ispat Pvt. Ltd. (supra) has allowed the said expenditure. Even though, we may be persuaded by such a reasoning, however, we find that Hon'ble Madras High Court as pointed out by the Id. Special Counsel for the revenue, in the context of interest u/s. 201(1A) only, has held that the TDS partakes the character of income tax and is not allowable as business expenditure. The relevant observation of the Hon'ble Court reads as under:

“The liability for deduction of tax arises by reason of the provisions of the Act. Under s. 201, the consequence of failure to comply with the same renders that person liable to be deemed as an assessee in default with all the consequences attached thereto. The liability to pay interest on the amount not deducted or deducted but not paid is directly related to the failure to deduct or remit the amount. The amount required to be deducted is the amount payable as income-tax. The interest paid for the period of delay takes colour from the nature of the principal amount required to be paid, but not paid within time. The principal amount here would be the income-tax and the interest payable for delayed payment is the consequence of failure to pay the tax and in the circumstances, in the nature of a penalty though not described as such in sub-s. (1A) of s. 201 of the Act. The fact that the income-tax required to be remitted was not income-tax payable by the assessee, but is ultimately for the benefit of and to the credit of the recipient of the income on whose behalf that tax is payable does not in any manner alter the character of the payment, namely, its character as income tax.

6. *Learned counsel for the Revenue submitted placing strong reliance on the recent decision of the Supreme Court in the case of Bharat Commerce & Industries Ltd. vs. CIT (1998) 145 CTR (SC) 340 : (1998) 230 ITR 733 (SC) : TC S17.1878 that payments required to be made by way of income-tax under the IT Act are not deductible as expenditure and the further amounts which a person may be required to pay by a reason of failure to comply with the provisions requiring the payments of the tax are also amounts which cannot be regarded as deductible expenditure under s. 37 of the Act.*

In that case the question considered was as to whether interest paid on delayed payment of income-tax and surtax by way of instalments, on income voluntarily disclosed under the Voluntary Disclosure of Income and Wealth Act, 1976, is not in any way an expense incurred wholly or exclusively for the purpose of the assessee's business. The Court held that (headnote) : “When interest is paid for committing a default in respect of the statutory liability to pay advance tax, the amount paid and the expenditure incurred in that connection is not in any way connected with preserving or promoting the business of the assessee. The liability in the case of payment of income-tax and interest for delayed

payment of income-tax or advance tax arises in the computation of the profits and gains of business". The Court further held that: "Under the IT Act, the payment of such interest is inextricably connected with the assessee's tax liability. If income-tax itself is not a permissible deduction under s. 37, any interest payable for default committed by the assessee in discharging his statutory obligation under the IT Act, which is calculated with reference to the tax on income, cannot be allowed as deduction".

Before holding so, the Court considered the decision of the apex Court in the case of Mahalakshmi Sugar Mills Co. vs. CIT (1980) 16 CTR (SC) 198: (1980) 123 ITR 429 (SC): TC 17R.877 a decision rendered by three learned Judges of the apex Court and held that the ratio of that judgment had no application to the case before it in the case of Bharat Commerce & Industries Ltd. vs. CIT (supra). The assessee in the case of Mahalakshmi Sugar Mills Co. (supra), had claimed deduction of interest paid on arrears of sugarcane cess. The payment of sugarcane cess, as it was observed by the Court in the case of Bharat Commerce & Industries (supra), is very much a part of the assessee's business expense and any interest on arrears of cess would, therefore, take colour from the cess which is payable, that it was an indirect tax which had to be paid in the course of carrying on business.

7. Learned counsel for the assessee placed reliance on the judgment of the apex Court in the case Mahalakshmi Sugar Mills Co. (supra). As pointed out by the apex Court in its later judgment in the case of Bharat Commerce & Industries (supra), the cess which was considered in the case of Mahalakshmi Sugar Mills Co. (supra) was an indirect tax payable in the course of the business of the assessee and the interest paid on the arrears of the cess took colour from the cess which was paid.

8. Learned counsel for the Revenue also referred to the decisions of the Bombay High Court in the case of Ferro Alloys Corpn. Ltd. vs. CIT (1992) 196 ITR 406 (Bom) : TC 17R.817 and the decision of the Calcutta High Court in the case of Martin & Harris (P) Ltd. vs. CIT (1994) 73 Taxman 555 (Cal). It was held in those cases that the interest paid under s. 201(1A) of the Act was not deductible as business expenditure under s. 37 of the Act.

9. As already noticed the payment of interest takes colour from the nature of the levy with reference to which such interest is paid and the tax required to be but not paid in time, which rendered the assessee liable for payment of interest was in the nature of a direct tax and similar to the income-tax payable under the IT Act. The interest paid under s. 201(1A) of the Act, therefore, would not assume the character of business expenditure and cannot be regarded as a compensatory payment as contended by learned counsel for the assessee.

10. Counsel for the assessee in support of his submission that the interest paid by the assessee was merely compensatory in character besides relying on the case of Mahalakshmi Sugar Mills Co. (supra) also relied on the decision of the apex Court in the cases of Prakash Cotton Mills (P) Ltd. vs. CIT (1993) 111 CTR (SC)

389 : (1993) 201 ITR 684 (SC) : TC 17R.746, *Malwa Vanaspati & Chemical Co. vs. CIT* (1997) 42 CTR (SC) 137 : (1997) 225 ITR 383 (SC) : S17.1860 and *CIT vs. Ahmedabad Cotton Manufacturing Co. Ltd.* (1993) 115 CTR (SC) 401 (1994) 205 ITR 163 (SC) : TC 17R.848. In all these cases, the Court was concerned with an indirect tax payable by the assessee in the course of its business and admissible as business expenditure. Further liability for interest which had been incurred by the assessee therein was regarded as compensatory in nature and allowable as business expenditure.

11. The ratio of those cases is not applicable here. Income-tax is not allowable as business expenditure. The amount deducted as tax is not an item of expenditure. The amount not deducted and remitted has the character of tax and has to be remitted to the State and cannot be utilised by the assessee for its own business. The Supreme Court in the case of *Bharat Commerce & Industries (supra)*, rejected the argument advanced by the assessee that retention of money payable to the State as tax or income-tax would augment the capital of the assessee and the expenditure incurred, namely, interest- paid for the period of such retention would assume character of business expenditure. The Court held that an assessee could not possibly claim that it was borrowing from the State, the amounts payable by it as income-tax, and utilising the same as capital in its business, to contend that the interest paid for the period of delay in payment of tax amounted to a business expenditure.”

39. Since, this is the only judgment of the Hon'ble High Court brought to our notice and no contrary decision of any High Court has been cited by from the side of the assessee, therefore, as judicial precedence we are persuaded to follow the same and accordingly, we hold that such an interest on late payment of deposit of TDS cannot be allowed as expenditure u/s.37. Consequently, this issue is decided against the assessee.”

96. Therefore respectfully following the decision of the coordinate bench, we dismiss ground number four of the appeal.
97. Ground number 5 of the appeal is against the confirming the addition on account of short deposit of Dividend Distribution Tax of Rs. 4,61,57,388/-. Brief facts shows that in tax audit report assessee has shown final dividend paid of ₹340,96,65,361 on 1 October 2008 and on the same sum Dividend Distribution Tax of ₹ 281,418,489/- was deposited on 13/10/2008. In the profit and loss account the assessee has shown proposed dividend of ₹ 33,94,388 lakhs. On the same amount the provision for tax on dividend is shown at ₹ 289,121 lakhs. In the return of income the assessee has shown dividend distribution tax payable at Rs. nil. Therefore, the learned assessing officer asked the assessee to explain the same. The assessee submitted a

detailed reply on 12 September 2011 and submitted that assessee has special economic zone undertaking [SEZ] and profit of that undertaking, if distributed as dividend, is not subjected to dividend distribution tax in terms of the provisions of Section 115O(6) prevailing at that time. Therefore, assessee submitted that on that sum assessee has not paid dividend distribution tax. For working out that amount on which dividend distribution tax is not payable, assessee submitted working, which was disputed by the AO. According to the AO the computation given by the assessee is not correct, therefore, he held that assessee has short paid dividend distribution tax by ₹ 46,157,388/-. This amount was added as income of the assessee in the assessment order. Even the learned Commissioner of income tax appeals, this addition was confirmed.

98. Learned AR has submitted before us that the assessee has not paid dividend distribution tax on the amount of profit derived by the assessee from a special economic zone unit. He also submitted that there is no provision in the act that if the dividend distribution tax paid is short it can be taxed as an income of the assessee. He extensively referred the provisions of Section 115 O, 115 P and Section 115 Q. He therefore submitted that the addition made by the learned assessing officer and confirmed by the learned CIT – A is devoid of any merit and is not in accordance with the law.
99. The learned departmental representative vehemently supported the orders of the lower authorities.
100. We have carefully considered the rival contentions and perused the orders of the lower authorities. In fact, without going into the merits of the case whether the assessee has short paid dividend distribution tax or has properly discharged its duty, the moot question is whether shorter payment of dividend distribution tax can be considered as income of the assessee or not. According to the provisions of Section 115O of the act any amount declared, distributed or paid by a specified company by way of dividends on or after 1 April 2003 shall be subject to additional income tax in the form of dividend distribution tax at the specified rate. According to subsection (6) dividend distribution tax is not payable on distributed profit in respect of total income of an undertaking engaged in developing or developing and operating order blocking operating and maintaining a special economic zone. This provision is inserted by the special economic zones act, 2005 with effect from 10 February 2006. According to Section 115 P where the company fails

to pay the whole or any part of the tax on such distributed profits within a time allowed, then it shall carry interest at the specified rate up to the date on which tax is actually paid. The provisions of Section 115 Q provides that if the dividend distribution tax is not paid in accordance with the provisions of Section 115 O then the principal officer or the domestic company shall be deemed to be an assessee in default in respect of the payment of tax payable and all the provisions of this act for the collection and recovery of income tax shall apply. Chapter XV II of the income tax act deals with the collection and recovery. Part D of that chapter deals with collection and recovery of taxes. According to Section 220 when assessee is deemed in default, an amount of such tax in default can be determined, the notice of demand u/s 156 can be issued, and such tax shall be paid within 30 days of service of the notice. The consequence of such non-payment of tax may result into, recovery of tax, penalty payable on such tax and also prosecution u/s 276B of the income tax act. However on reading of the order of the lower authorities we do not find mention of any of the provisions of the income tax act which provides that short payment of dividend distribution tax may be added to the income of the assessee and assessee can further be saddled with payment of tax on such short payment of dividend distribution tax. The learned departmental representative also could not show us any such provision in the income tax act. Therefore, we are unable to uphold such an addition made by the lower authorities. Accordingly we allow ground number 5 of the appeal of the assessee where the addition of Rs 4, 61,57,388/- is made in the hands of the assessee on account of shorter payment of dividend distribution tax as determined by the learned assessing officer.

101. In the result, appeal number ITA 4061/del/2013 filed by the assessee is partly allowed.
102. Accordingly, for assessment year 2009 – 10, ITA number 4436/del/2013 filed by the learned assessing officer is dismissed and appeal filed by the assessee in ITA number 4061/del/2013 is partly allowed.

Order pronounced in the open court on 10/09/2020.

-Sd/-
(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Date:10/09/2020
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI