

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "B" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 886 to 888/JP/2019
निर्धारण वर्ष / Assessment Years : 2012-13 to 2014-15

M/s Sumeru Enterprises H-1-29, Old Tourist Hotel Building, Subhash Marg, C-Scheme, Jaipur.	बनाम Vs.	The ITO, Ward-6(4), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAEFS 3266 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agrarwal (C.A.)
राजस्व की ओर से / Revenue by : Shri B.K. Gupta (CIT)

सुनवाई की तारीख / Date of Hearing : 19/10/2020
उदघोषणा की तारीख / Date of Pronouncement : 20/01/2021

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

These are three appeals filed by the assessee against the orders of the Id. CIT(A), Ajmer dated 25.02.2019 for the assessment years 2012-13 to 2014-15 respectively. Since common issues are involved, all these appeals were heard together and disposed off by this consolidated order.

2. In ITA No. 886/JP/2019 for A.Y 2012-13, the assessee has taken the following grounds of appeal:-

"1. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in confirming the disallowance of the expenditure of Rs. 4,77,36,535/- claimed on account of interest paid on borrowed funds, arbitrarily by solely relying upon observations of Id. AO, thus the disallowance so made deserves to be deleted.

1.1 That the Ld. CIT(A) has further erred in upholding the observation of Ld. AO that the interest paid is not a business expenditure by ignoring the fact that assessee has proved direct nexus between the borrowed funds and its utilization in business of assessee thus the observations deserves to be ignored and excluded.

1.2 That the Ld. CIT(A) has further erred in misinterpreting the provisions of section 37(1) and thereby considering the interest paid on fresh loan taken to repay the old loan as not for business purpose, thus the said observation being based on no logic deserves to be ignored.

1.3 On the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in not following the order of the Hon'ble ITAT, Jaipur Bench, Jaipur wherein addition of similar nature and in identical circumstances were deleted, therefore, following the principle of consistency addition confirmed by Ld. CIT(A) deserves to be deleted.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in confirming the disallowance of an expenditure of Rs. 25,282/-, claimed on account of depreciation charged during the relevant year, arbitrarily. Appellant prays

depreciation is a statutory allowance and deserves to be allowed.

3. On the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in confirming the disallowance of the expenditure of Rs. 11,59,34,654/- claimed by assessee u/s 36(1)(vii) on account of exceptional items during the relevant year by ignoring the submissions made and evidences adduced, thus disallowance so made deserves to be deleted.

3.1 That the Ld. CIT(A) has further erred in ignoring the fact these exceptional charges stood declared in the return income of the assessee filed in the preceding assessment years and have already suffered tax in preceding assessment years and if the same is not allowed it would tantamount to double taxation, thus the disallowance so made deserves to be deleted.

3.2 That the Ld. CIT(A) has further erred in ignoring the fact that assessee has duly complied with all the conditions as enumerated in section 36(1)(vii) thus the resultant addition deserves to be deleted.

4. On the facts and in the circumstances of the case Ld. CIT(A) has grossly erred in not allowing set off of the brought forward unabsorbed business loss and unabsorbed depreciation arbitrarily without any cogent reasons, thus the same deserves to be allowed.”

3. Briefly the facts of the case are that the assessee has filed its return of income on 31.07.2012 declaring a loss of Rs.16,48,87,898/-. The matter was taken up for scrutiny assessment whereby the

Assessing Officer assessed the loss at Rs.11,89,097/- vide order passed u/s 143(3) dated 28.03.2015 by making disallowances of interest paid on borrowed funds of Rs.4,77,36,535/-, depreciation of Rs.25,282/- and disallowance of Rs.11,59,34,654/- being "Exceptional Items" claimed in Profit & Loss Account. On appeal, the findings of the AO have been confirmed by the Id CIT(A) and aggrieved by the order of the Id. CIT(A), the assessee is in appeal before us.

4. Regarding ground Nos. 1 to 1.3, the Id. AR submitted that in these grounds of appeal, the assessee has challenged the action of the Id. CIT(A) of upholding the disallowance of Rs.4,77,36,535/- made in respect of interest expenditure claimed by the assessee by misinterpreting the provisions of section 37(1) of the Act and by solely relying on the observations of the AO. At the outset, it was submitted that the issue under consideration has been adjudicated by the Tribunal in assessee's own case for AY 2008-09, 2009-10 and 2011-12 vide common order dated 22.08.2016 in ITA Nos. 446/JP/2012, 764/JP/2013 & 158/JP/2015. Also in earlier years, i.e. AY 2004-05 to 2007-08 disallowance of similar nature was made, which has been deleted by the Tribunal. For AY 2004-05, i.e. first year of disallowance, the Tribunal has deleted the disallowance vide its order dated 10.12.2010 in ITA No. 282/JP/2010 by observing as under:

"7. We have heard rival submissions and considered them carefully. After considering the submissions and perusing the material on record, we find no infirmity in the finding of Ld. CIT(A). The Ld. CIT(A) has ascertained the factual aspect that this is not a closure of business but temporary discontinuance of

business. We further noted that in earlier years the interest expenditure claimed by assessee were allowed by the department itself. However, in the year under consideration the same was not allowed for the reason that during the year under consideration fresh loans have been taken by the assessee for repayment of old loans taken for the purpose of business. Fresh loans taken during the year under consideration for the purpose of repaying the loans taken in past for the purpose of business, in our considered view does not change the character of the loan taken during the year under consideration. The loan taken for the year under consideration has to be treated as taken for business purposes for the simple reason that this loan was substituted with the loans taken in past after repaying the old loans. There is a direct nexus between the fresh loans and old loans because the fresh loans have been utilized for the purpose of repaying the old loan. Now fresh loans partakes the character of loans taken for business purposes. Interest paid on old loans was held as allowable, therefore, interest paid on fresh loans has to be allowed as the character of loan remains the same but only change of the name of the person / institution from whom the fresh loans are taken. Therefore, the decision of Hon'ble Allahabad High Court considered by Ld. CIT(A) in case of Raj Kumar Singh & Co. (supra) is directly on the issue. Therefore, we see no reason to interfere with the finding of Ld. CIT(A). Accordingly, we confirm the findings of the Ld. CIT(A) in respect to both the disallowances deleted by him."

5. Further, the Tribunal has also dismissed the appeals of the department for the Assessment Year 2005-06 & 2007-08 vide order dated 13.01.2011 passed in ITA No.416 & 417/JP/2010 by observing that the issue is squarely covered by the decision of Tribunal for the assessment year 2004-2005 and confirmed the order of Ld. CIT(A) deleting the disallowances. It was accordingly submitted that the disallowance of Rs.4,77,36,535/- on account of interest expenditure claimed by the assessee may be deleted.

6. Per contra, the Id. CIT/DR relied on the finding of the lower authorities and our reference was drawn to the findings of the Id. CIT(A) which are contained at para 4.3 which read as under:-

"4.3 I have gone through the assessment order, statement of facts, grounds of appeal and written submission carefully. It is seen that the AO has discussed in detail at Para 4 (Page No. 5 to 8), as to why the interest of Rs. 4,77,36,535/- debited by the appellant in the books of accounts was not having any nexus with the business of the appellant. Even during the course of appellate proceedings, the appellant has failed to show that the interest of Rs. 4,77,36,535/- debited by the appellant was incurred in investment of the business carried on by the appellant. Therefore, in view of the facts discussed by the AO in the assessment order in detail, I am of the considered view that the AO has rightly disallowed the interest of Rs. 4,77,36,535/-. Accordingly, the

disallowance of Rs. 4,77,36,535/- made by the AO is hereby confirmed."

7. Further, our reference was drawn to the findings of the AO which read as under:

"Disallowance on A/c of Financial Charges & Depreciation :

1.1 The assessee is a partnership firm came into existence in terms of partnership deed dated 31.01.1987 and constructed a commercial complex namely Laxmi Complex at Subhash Marg, M.I.Road, Jaipur. During the course of construction of the complex a dispute arose between the partners and therefore, one of the partner Smt. Sudha Yadav filed a suit in the year 1995 for rendition of accounts and dissolution of the firm and accordingly, the Hon'ble Rajasthan High Court had granted the stay in the month of March, 1996, on further sale of the offices/ shops constructed in the commercial complex, therefore, after March, 1996 neither any sale was taken place nor any construction activity was carried out and the portion left undeveloped as on the date of stay remained in its original position.

1.2 During the year under consideration, two partners namely Smt. Sudha Yadav and Shri Prashant Kumar Yadav retired and remaining partners i.e. Smt. Kalpana Kothari and M/s.Padmini Enterprises Pvt. Ltd., has decided to continue the firm in partnership and give effect these changes Deed of Retirement and Reconstitution of Partnership is entered into between the parties on 17.02.2012.

1.3 During the year under consideration the long pending litigation between partners settled through a settlement agreement dated 17.02.2012 and Hon'ble Arbitrator Justice N.M. Kasliwal has accordingly passed an Arbitration award dated 20.03.2012, according to which two partners Smt. Sudha Yadav and Shri Prashant Kumar Yadav retired from the firm. As per settlement agreement both the partners Smt. Sudha Yadav and Shri Prashant Yadav received built up area 5686 Sq.Ft. and 11,837 Sq.Ft respectively out of total built up area. Further, the continuing partners also made payment of Rs.61,50,000/- to each of them.

2. The assessee firm constructed a commercial complex name "Laxmi Complex" in F.Y. 1995-96 relevant to A.Y. 1996-97 thereafter due to dispute amongst the partners/owners of land some shops offices were sold but title could not be transferred through registered deed. Simultaneously, advances were taken against some office/shops but sale transactions could not be finalized. There were some creditors also. Since, then the assessee working out interest on balance amount receivable from the person to whom possession have been transferred in lieu of part sale consideration and interest is worked out on the on the outstanding liabilities (loan taken). During the year interest paid on loans including financial brokerage and bank commission is Rs.4,77,36,535/-.

3. As per point No.28(b) of form No.3CD reflecting finished and work in progress the opening stock in respect of 'commercial complex was shown at 21,503 sq. feet and closing stock was also

shown at an even figure. This reflected that no construction work was carried out in commercial complex project during the year under consideration. There being no business activity in the A.Y. 2011-12 in the assessee firm in so far as real estates was concern neither any shops nor offices were constructed nor sold. The assessee was asked to furnish an explanation as to why interest expenses and depreciation thereof should not be disallowed. The reply of the assessee justifying his claim submitted vide letter dated 24.10.2014

Justification of payment made to person specified u/s.40A(2)(b) :

During the year under consideration assessee firm has made interest payment Rs.71,47,640/- to the relatives which are covered u/ s.40A(2)(b) Details of the same are as under :

<i>S. N</i>	<i>Name of Person</i>	<i>Amount Paid</i>	<i>Rate of Interest</i>
1.	<i>Smt. Amarao Devi Sethi</i>	<i>10,29,292.00</i>	<i>13.20%</i>
2.	<i>Shri Nihar Kothari</i>	<i>6,05,552.00</i>	<i>13.20%</i>
3.	<i>Shri Sanchai Sethi</i>	<i>8,18,169.00</i>	<i>13.20%</i>
4.	<i>Smt. Sangeeta Sethi</i>	<i>10,93,075.00</i>	<i>13.20%</i>
5.	<i>Sh. Sohan Lal Sethi</i>	<i>19,18,610.00</i>	<i>13.20%</i>
6.	<i>Sh. Sidharth Kothari</i>	<i>10,91,101.00</i>	<i>13.20%</i>
7.	<i>Sh. Gulab Kothari</i>	<i>5,91,841.00</i>	<i>13.20%</i>
	<i>Total</i>	<i>71,47,640.00</i>	

During the year under consideration assessee firm has paid interest to various parties ranging between 13 to 15 percent which depends upon the interest rate prevailing in the market. On the perusal of the aforesaid chart, it is crystal clear that he assessee firm has made interest payment to the related parties @

13.20% which is within the range of prevalent market rate at which interest was paid to unrelated parties. Further all the aforesaid sum as paid by the assessee firm has been duly shown by the relevant persons in their return of income filed for the A.Y. 2012-13. It is thus requested that the amount so paid deserves to be allowed being quite reasonable looking to the market. "

Reply of the assessee has been examined but not found acceptable due to the following reasons:

(i) Ld. A/R has contended that the interest expenditure is admissible U/s.36(1)(iii) and 37(1). In this regard it is stated that Section 36(1)(iii) categorically spells that only that interest paid is an allowable expenditure if it is in respect of capital borrowed for the purpose of business.

(ii) The above expenditure cannot be construed as for the purpose of business or profession because there is ^y no nexus at all between the income earned and the expenditure incurred and this the precise reason that disallowance is proposed U/s.37(1). In view of the above also sec. 36(1)(iii) is any ways not applicable because of introduction of the proviso to sec. 36(1)(iii).

(iii) With regard to interest expenditure, the assessee could not furnish any document/evidence so as to claim that there is nexus between the interest income and interest expenditure. In fact, interest income was earned by the assessee from Sundry Debtors who had not made complete payments for purchase of said shops and offices. So, as per the agreement, the buyers were supposed

to pay certain amount of interest as per the terms and conditions of the agreement. So, interest income was consequential to the agreement between the assessee and the buyers.

(iv) As regards the interest payment, it deserves a mention here that the assessee had taken loans from various parties in the F.Y. 1995-96 for tire purpose of business of Real Estate i.e. for constructing shops and offices in a commercial complex. Every year the assessee take up fresh loans but not for the purpose of business of Real Estate and sale of Shops and offices, but to repay the old loans. These loans are taken up just to repay the old loans. So, the expenditure has been incurred not for the purpose of business. Sec. 37(1) categorically states that only that expenditure should be allowed which has been incurred wholly and exclusively for the purpose of business. Any distant or remote connection between the two is not sufficient. In this case, it is very clear that nexus of interest paid is with stock in trade and not with Sundry Debtors. Therefore, it is not to be allowed against interest income.

(v) It has been held in various judicial pronouncements that the expenditure should be for the purpose of business and connection between expenditure and object must be real and not remote or illusory as held in the cases of CIT vs. Vazir sulaton Tobacco Co. Ltd (1978) 114 ITR 605 (Col.)- Co.

(vi) The undersigned wishes to place reliance on the decision of (A) Hon'ble Kerala High Court in the case of T.M. Chacko and Partners vs. CIT (1978) 195 ITR 905 (Ker.) Business Expenditure

Condition Precedent Business must be in existence- Assessee carrying on business from 1971-72 to 1978-79 due to a legal bar interest on kist arrears not deductible in assessment year 1976-77 Income Tax Act, 1961.

The authorities as well as the Tribunal came to the conclusion that, on account of the prohibition in law, the assessee could not carry on the abkari business and during the previous year the assessee obtained remuneration as an employee from M/s CT. Thereafter, it was not open to the tribunal to come to the conclusion that the assessee " must be considered to have carried on its business in a passive sense during the previous year" for the assessment year. Therefore, the Tribunal erred in law in holding that during the previous year the absence of active trade amounted to lull in the business activity & not a discontinuance in the business section.

The facts of the instant case are very similar to those cited in the above case. In both the cases there was a legal bar on the operation of business. As discussed above Hon'ble Kerala High Court held that the expenditure incurred during the period of legal bar should be disallowed holding that there was no business and bar should be disallowed holding that there was no business and so no expenditure shall be allowed.

(B) Haji Aziz and Abdul Shakoob Bros. vs. CIT (41) ITR 350 (SC)-- It is held that - " Expenses which are permitted as deductions are such as are made for the purpose of carrying on the business, i.e., to enable a person to carry on and earn profit in the business. It is

not enough that the disbursements are made in the course of or arise out of or are concerned with or made out of the profits of the business but they must also be for the purpose of earning the profits of the business. They cannot be deducted if they fall on the assessee in some character other than that of a trader."

(c) CIT vs. Shahibag Entrepreneurs (P) Ltd. (1995) 215 ITR 810 Guj.)- Purpose must be to keep the trade going - The true test of an expenditure laid out wholly and exclusively fo the purposes of trade or business is that it is incurred by the assessee as incidental to his trade for the purpose of keeping the trade going and of making it pay and not in any other capacity that of a trader. Deduction is limited to interest on the part of capital which is used for the purpose of business- Interest paid on borrowed capital will be allowed as deduction only if the capital was borrowed and used for the purpose of business and that if it is used for a purpose other than that of business, then interest to the extent to which the capital was so used, will not be allwoed P.R.M.S. Ramanathan Chettiar vs.CIT(1969) 72ITR 534 (Mad.) /M.S.P. Rajav CIT (1976)105 ITR 295 (Mad.)

It is a settled state of affairs that expenditure should be incurred for the purpose of business which is carried on in the accounting year and the profits of which are under assessment. Decution can be permitted in respect of only those expenses and losses which are incurred in the relevant accounting year. Though the assessee has been stating that there is no discontinuance of the business but there is only a stay of the court, yet it is worth considering

that the Period of stay has been substantial and there is no chance of its vacation considering the fact that there is dispute between the partners of the concern. Accordingly, deduction cannot be allowed for payment of interest on loans taken for paying off earlier loans & not for the purpose of the business of the assessee.

Viii. It is important to mention that assessee has taken advance of Rs.16,12,270/- in F.Y. 1995-96 since then cost of shop/offices has increased many times. Now in the perspective of increase in cost of project many times (as claimed by assessee due to outstanding liability of loans) corresponding interest on amount of advance is not taken to evaluate the sale price of shops/office at the market rate whenever the dispute is resolved. But assessee has not made any such entries. It does not reflect the correct corresponding value of stock against which advances have been taken. It also does not give the true value of work in progress.

*5. From the above facts it is concluded that the payment of interest has no nexus with the business purposes of the assessee. Therefore, it is not admissible against interest declared on accrual basis on amount of outstanding debtors. **Though the issue has been decided by the Hon'ble ITAT, Jaipur Bench, Jaipur for A.Y. 2004-05, 2005-06 and 2007-08 but the department has not accepted the decision of the Hon'ble ITAT and further appeal before the Hon'ble High Court is still pending. This issue has not attained finality***

yet. Thus, payment of interest of interest of Rs.4,77,36,535/- and depreciation of Rs.25,282/- totaling to Rs.4,77,64,147/- are not considered as business expenditure and hereby added to the income of the assessee."

8. We have heard the rival contentions and perused the material available on record. The **Coordinate Bench** in **assessee's own case** in ITA No. 446/JP/2012, 764/JP2013 & 158/JP/2015 pertaining to **assessment years 2008-09, 2009-10 & 2011 -12** in para 5.2 of its order has decided the issue and relevant findings read as under :-

"5.2. We have heard rival contentions, perused the material available on record and gone through the orders of authorities below. In the written submission the assessee has submitted as under :-

" At the outset, it is submitted that the disallowance of identical nature by making similar allegation under similar circumstance were also made in case of the assessee for Assessment Years 2004-05 which stood deleted by the Ld. CIT (A) and such orders were uphold by this Hon'ble Tribunal by dismissing the appeal of the department vide order dated 10-12-2010 in ITA No.282/JP/2010 (APB 39-41). The relevant observation of Hon'ble Bench in order for A.Y.2004-05 at page 5 in para 7 are reproduced herein below for ready reference (APB 41).

"7. We have heard rival submissions and considered them carefully. After considering the submissions and perusing the material on record, we find no infirmity in the finding of Ld. CIT(A). The Ld. CIT(A) has ascertained the factual aspect that this is not a closure of business but temporary discontinuance of business. We further noted that in earlier years the interest expenditure claimed by assessee were allowed by the department itself. However, in the year under consideration the same was not allowed for the

reason that during the year under consideration fresh loans have been taken by the assessee for repayment of old loans taken for the purpose of business. Fresh loans taken during the year under consideration for the purpose of repaying the loans taken in past for the purpose of business, in considered view does not change the character of the loan taken during the year under consideration. The loan taken for the year under consideration has to be treated as taken for business purposes for the simple reason that this loan was substituted with the loans taken in past after repaying the old loans. There is a direct nexus between the fresh loans and old loans because the fresh loans have been utilized for the purpose of repaying the old loan. Now fresh loans partakes the character of loans taken for business purposes. Interest paid on old loans was held as allowable, therefore, interest paid on fresh loans has to be allowed as the character of loan remains the same but only change of the name of the person / institution from whom the fresh loans are taken. Therefore, the decision of Hon'ble Allahabad High Court considered by Ld. CIT(A) in case of Raj Kumar Singh & Co. (supra) is directly on the issue. Therefore, we see no reason to interfere with the finding of Ld. CIT(A). Accordingly, we confirm the findings of the Ld. CIT(A) in respect to both the disallowances deleted by him."

Further this Hon'ble Tribunal has also dismissed the appeals of the department for the Assessment Year 2005-06 & 2007-08 vide order dated 13.01.2011 passed in ITA Nos. 416 & 417/JP/2010 (APB 42-45) by observing that the issue is squarely covered by the decision of Hon'ble ITAT for the assessment year 2004-05 and confirmed the order of Ld. CIT(A), deleting the disallowances. In the year under appeal Ld. CIT(A) confirmed the disallowance by alleging that there were certain facts which were not brought on record in preceding assessment years therefore,

the judicial proprietary could not be followed. Such conclusion of Ld. CIT(A) is based on mis-appreciation of the facts solely relying upon the remand report given by the AO (APB 8-11) wherein the Ld. AO had exceeded his jurisdiction and tried to comment upon the matters which have already been settled by the Hon'ble ITAT in the case of the appellant company itself specially with reference to the cost of work in progress carried over from A.Y. 1995-96 which order traveled up to the Hon'ble ITAT and the closing work in progress as claimed by the appellant was confirmed by the Hon'ble Bench however merely for a typographical error such cost which has been made basis for disbelieving the submissions made. Such an error was considered and decided in favour of appellant by the Hon'ble ITAT in respect to the assessee's appeal for A.Y. 1996-97 in ITA No. 392/JP/2003 dated 07.11.2006 while disposing ground of appeal no.4 and relevant observations are at page 16 & 17 at para 4.7 of the order.

In the aforesaid context, it is submitted that the Ld. AO had disallowed the interest expenses of Rs. 2,51,64,779/- paid on borrowed funds, on the ground that no business activity was carried on during the assessment year under appeal and there is no direct nexus of interest expenses with the business of the appellant which finding is based totally on assumptions and presumptions.

Facts of the case are that appellant had taken unsecured loans from various parties in F.Y. 1995-96 for its real estate business i.e. for construction of commercial complex having shops and offices. Upto A.Y. 2000-01, the interest paid on such borrowed funds was added to the cost of work in progress, however, from A.Y. 2001-02 and onwards it was decided to claim the same separately in the Profit & Loss Account as normal business expenditure and the returns filed by claiming such expenses were never doubted and processed u/s 143(1) by the department. For the first time in A.Y. 2004-05, the department has changed its

stand by alleging that the assessee has taken fresh loans therefore, they loose their character of business expediency and accordingly disallowance of interest was made. While doing so, the fact that in the A.Y. 2004-05 fresh loans have been taken by the assessee firm for the purpose of repayment of old loans and the interest payment was made during the year on the said loans which were obtained and utilized wholly and exclusively for the purpose of business of the appellant and are admissible expenditure u/s 36(1)(iii) or 37(1) of the Income Tax Act, 1961 was ignored by the department. There is direct nexus and live link between the interest expenditure and the business of the appellant but the Ld. AO alleged that there is no such direct nexus by stating that fresh loans raised are not for the purpose of business but to pay off the old loans and since the old loans were exclusively used for the purpose of business only thus the expenditure in shape of interest on such loans is an allowable expenditure u/s 36(1)(iii) or 37(1) of the Income Tax Act, 1961. Reliance is placed on the case of Kalpana Trading Corporation Vs. ITO, 156 Taxman 78, ITAT, Mumbai Bench, Mumbai. Based on these facts, the Ld. CIT(A) as well as the Hon'ble Bench had allowed the expenses claimed by the assessee on account of interest paid on such borrowed funds.

In the year under appeal while disallowing the expenditure, the observations of Ld. Assessing Officer himself are self contradictory as:

In Page 3 point 2 (first para) of assessment order the Ld. AO observed that: ".....section 36(1)(iii) categorically spells that only that interest paid is an allowable expenditure if it is in respect of capital borrowed for the purpose of business

In Page 3 point 4 (fourth para) of assessment order he further observed that:

"As regards the interest payment, it deserves a mention here that the assessee had taken loans from various parties in the F.Y. 1995-96 for the purpose of business of Real Estate i.e. for constructing shops and offices in a commercial complex. In the instant year i.e. A.Y. 2007-08 fresh loans have been taken by assessee not for the purpose of business of real estate and sale of shops and offices, but to repay old loans....."

From the perusal of the aforesaid observation of Ld. AO, the fact that the loans taken during the year under appeal were in fact for the repayment of old loans taken for business purposes is not in dispute rather the AO himself has accepted the same as stated above.

Further while making disallowance of the expenditure claimed u/s 36(1)(iii) on account of interest on borrowed funds by the appellant, the Ld. AO alleged that the business of the assessee company was discontinued which was further mentioned in the remand report which had been relied upon by the Ld. CIT(A) who at para 3.2 in page 9 of the appellate order has observed that any temporary suspension in the business cannot last for 15 years. While observing so the Ld. AO as well as Ld. CIT(A) has failed to appreciate the fact that the business of the appellant was in temporary suspension due to the stay order on its real estate activity by the Hon'ble Rajasthan High Court vide its order dated 26.03.1996 as such the appellant was following the directions of the Hon'ble Jurisdictional High Court during the suspension of its real estate activity.

In this regard, it is further submitted that there was no total discontinuance of business of the appellant as presumed by the AO and Ld. CIT(A). The appellant had earned income from "Complex maintenance charges" and interest income from sundry debtors. On the basis of same and unchanged figure of opening and closing stock, the Ld. AO concluded that during the year

under consideration there was no business activity carried out and accordingly held that the interest claimed u/s 36(1)(iii) was not admissible. Further the Ld. AO alleged that the nexus of payment with stock in trade and not with sundry debtors. The allegation of the Ld. AO with regard to nexus are incorrect as the nexus of payment of interest is fully justified which is on account of borrowed loans which were utilized for purpose of real estate business. It is pertinent to note here that the business of construction had remained in abeyance due to orders of stay passed by Hon'ble Rajasthan High Court dated 24-03-1996 due to ongoing dispute between partners of the assessee firm. Thus construction activity was put at halt which was beyond the control of the assessee and also further considering the market conditions it was a prudent business decision that there should be a limbo in construction operations though the rest of the activities related to the business continued in its routine manner during the entire year under consideration, which is a part and parcel of the main business activity from which the total receipts is duly forming part of the income declared. In this regard, kind attention of Hon'ble bench is invited to profit & loss a/c for the year ended 31-03-2008 (APB 70), on perusal of which, it is evident that apart from interest expenses (including Finance cost) disallowed by Ld. AO, Administrative & Other expenses to the tune of Rs.13,03,479/- (APB 74) have also been debited to P & L A/c, which inter alia include Complex Maintenance expenses Rs.7,71,290/-, Salary Rs.1,43,567/- and electric charges of Rs.2,92,211/-. It is pertinent to note here that neither Ld. AO nor Ld. CIT (A) has raised any objection in respect of allowability of these expenses. In other words, by allowing these expenses, lower authorities have conceded the fact that business of the assessee was very much in existence and it was merely temporary suspension of real estate business activities. Basic difference between discontinuation of business and temporary suspension is that in the former situation assets are sold to pay off the liabilities, as business activities are not resumed ever,

whereas in the latter, assets have to be maintained and liabilities have to be discharged separately, for which funds are required, for which certain minimum expenses, mostly in the nature of administrative expenses have to be incurred. In the instant case also, business of the assessee remained suspended due to stay order of court and funds were borrowed to discharge loans already taken for the purpose of business, which were not doubted. Further, as stated above there was no objection with respect to administrative expenses, which means that Ld. AO has impliedly accepted that the business was very much in existence and in this scenario, there was no reason, for which interest expenses should be disallowed.

Apart from this, logically, the Ld. AO has accepted that the loans old or new have been taken for the purpose of business. This fact has neither been denied nor contradicted anywhere in the assessment order. Since this is an established fact that the real estate business is always carried out on the basis of loans from various agencies and their utilization is exclusively to expand the business without in any way leading to the fact that any stoppage or a lull period would hamper the construction work. Even if, for argument sake, the findings of the Ld. AO are considered that there was no business due to stay order of the court, thus it cannot be said that the repair works, construction of passage and other allied and facility items did not continue during this period also as the stay order was purely for constructing new units and extension of the existing units. The Ld. CIT(A) at page 7 of its impugned order firstly tried to disbelieve the value of closing work in progress claimed by the appellant in A.Y. 1996-97 which as submitted above is due to typographical error and deserves to be ignored. Further Ld. CIT(A) has also doubted the total area available with the appellant as work in progress by alleging that the assessee received advances for 8549 sq. ft. area by wrongly appreciating the fact that the amount was received against the booking of such area however due to stay by the High Court

neither the sales were made nor the possession were handed over. The Ld. CIT(A) further alleged the interest income declared by the assessee regularly in its Profit & Loss Account as a make believe story since the assessee has received loans from the same persons who are the debtors and the interest receivable was never received but a debit entry to this effect was made in the debtors account by grossly ignoring the fact that the same was accepted by the department since beginning and even in the year under appeal where the assessments were also completed u/s 143(3). It is further submitted that an application under Rule 29 (for filing of additional evidences) the Income Tax Rules has been filed before Hon'ble Jaipur Bench on 27- 05-2015 stating that the suit filed by Smt. Sudha Yadav, erstwhile partner of the assessee firm, in the District Court was dismissed and direction was given to resolve the dispute through arbitration (APB 96-104). The said order of District Court was challenged in appeal before the Hon'ble Rajasthan High Court wherein, vide order dated 18.07.2005 passed in S.B. Civil First Appeal No. 76/2003 the Hon'ble Court referred the matter to arbitration appointing Mr. Justice N.M. Kasliwal, former judge Supreme Court of India as the sole arbitrator to decide the dispute, who vide passed an interim award on 01.05.2007 which was challenged before the District Court and the High Court.

However, before conclusion of the said proceedings, the parties reached an amicable settlement vide settlement deed dated 17.02.2012 (APB 125) and with effect of which, the ongoing dispute came to an end. Subsequently, the sole arbitrator passed an award in accordance with the terms of the settlement deed and the proceedings pending before the District Court as well as the High Court were sought to be withdrawn which were allowed so by the respective Courts.

Thus, after having reached settlement as stated above, the stay order stood vacated automatically and the business of assessee

firm resumed after executing a deed of retirement & reconstitution of partnership dated 17.02.2012 (APB 105-114) in terms of the settlement deed and arbitration award as mentioned above.

In view of above, it is proved that business of the assessee was not discontinued rather temporarily stayed under the order of the Hon'ble Court which has been revived now by vacation of stay with effect from settlement reached between parties.

It is further submitted that the suspension or discontinuation of one of the activities of business out of several such activities does not disentitle the taxpayer from deduction of interest or other expenditure incidental to the business. All the business activities taken together constitutes the business undertaking as one and so long the same remains under the common management with common resource employment and common establishment and control it cannot be said that the business activity is separate and distinct. The appellant continued its business in the relevant assessment year and the business was neither closed nor discontinued nor it had ever ceased to be functional during the previous year relevant to the assessment year under appeal.

It is further submitted that u/s 36(1)(iii) of the Income Tax Act, 1961 it is categorically spelled out that the interest paid is an allowable expenditure if it is paid in respect of capital borrowed for the purpose of business. From the perusal of section 36(1)(iii) it is submitted that the interest paid on borrowed capital and used for the purpose of business of the appellant only and not for personal or other purposes, is fully allowable expenditure.

Where the assessee company had no intention to close down its business activity and also kept its business assets ready for use its claim of business expenditure incurred on minimum electricity charges and other office establishment expenses alongwith depreciation could not be disallowed because of temporary

suspension of manufacturing activity. It has been so held in the case of Shingar Lamps Ltd. Vs. Addl. CIT (2006) 150 Taxman 17 (Asr.) (Mag.). Thus although there was a stay by court on the appellant do deal with certain specific properties but there was no suspension, cessation, closing down and discontinuous of business activity of the appellant.

In view of above submissions, facts and circumstances it is humbly prayed that since the issue under the year consideration is squarely covered by the decision of Hon'ble ITAT passed in earlier years thus the disallowance of Rs. 2,51,64,779/- deserves to be deleted.

Reliance is also placed on the following case laws:

Commissioner of Income Tax vs. Raj Kumar Singh and Co. (No. 2) 295 ITR 81 (All)

KNP Securities (P) Ltd. vs. Assistant Commissioner of Income Tax 33 DTR 210 (Mumbai) (Trib)

Dy. CIT Vs. Sarabai Pitamal Pharmaceuticals Ltd. 8 SOT 815 (Mum.)

CIT Vs. Gom Industries Ltd. & 299 ITR 42 (MP)

DCIT Vs. Core Health Care Ltd. reported in 215 CTR 1 (SC) "

We find that the Tribunal in assessee's own case in ITA No. 392/JP/2003 pertaining to assessment year 1996-97 decided the issue of Work-in-Progress in favour of the assessee. Further, the Coordinate Bench of the Tribunal in assessee's own case in ITA No. 282/JP/2010 pertaining to assessment year 2004-05, in para 7 of its order has decided the issue which is also subject matter of this appeal, as under :-

"7. We have heard rival submissions and considered them carefully. After considering the submissions and perusing the material on record, we find no infirmity in the finding of Id. CIT (A). The Id. CIT (A) has ascertained the factual aspect that this is

not a closure of business but temporary discontinuance of business. We further noted that in earlier year the interest expenditure claimed by assessee were allowed by the department itself. However, in the year under consideration the same was not allowed for the reason that during the year under consideration fresh loans have been taken by the assessee for repayment of old loans taken for the purpose of business. Fresh loans taken during the year under consideration for the purpose of repaying the loans taken in past for the purpose of business, in our considered view does not change the character of the loan taken during the year under consideration. The loan taken for the year under consideration has to be treated as taken for business purposes for the simple reason that this loan was substituted with the loans taken in past after repaying the old loans. There is a direct nexus between the fresh loans and old loans because the fresh loans have been utilized for the purpose of repaying the old loan. Now fresh loans partakes the character of loans taken for business purposes. Interest paid on old loans was held as allowable, therefore, interest paid on fresh loans has to be allowed as the character of loan remains the same but only change of the name of the person/institution from whom the fresh loans are taken. Therefore, the decision of Hon'ble Allahabad High Court considered by Id. CIT (A) in case of Raj Kumar Singh & Co. (supra) is directly on the issue. Therefore, we see no reason to interfere with the finding of Id. CIT (A). Accordingly, we confirm the findings of the Id. CIT (A) in respect to both the disallowances deleted by him."

Further, the Tribunal in ITA No. 416 & 417/JP/2010 pertaining to assessment years 2005-06 and 2007-08 confirmed the deletion of addition by Id. CIT (A) by holding as under :-

"7. We have heard rival submissions and considered them carefully. After considering the submissions and perusing the material on record, we find no infirmity in the finding of Id. CIT

(A). The Id. CIT (A) has ascertained the factual aspect that this is not a closure of business but temporary discontinuance of business. We further noted that in earlier year the interest expenditure claimed by assessee were allowed by the department itself. However, in the year under consideration the same was not allowed for the reason that during the year under consideration fresh loans have been taken by the assessee for repayment of old loans taken for the purpose of business. Fresh loans taken during the year under consideration for the purpose of repaying the loans taken in past for the purpose of business, in our considered view does not change the character of the loan taken during the year under consideration. The loan taken for the year under consideration has to be treated as taken for business purposes for the simple reason that this loan was substituted with the loans taken in past after repaying the old loans. There is a direct nexus between the fresh loans and old loans because the fresh loans have been utilized for the purpose of repaying the old loan. Now fresh loans partakes the character of loans taken for business purposes. Interest paid on old loans was held as allowable, therefore, interest paid on fresh loans has to be allowed as the character of loan remains the same but only change of the name of the person/institution from whom the fresh loans are taken. Therefore, the decision of Hon'ble Allahabad High Court considered by Id. CIT (A) in case of Raj Kumar Singh & Co. (supra) is directly on the issue. Therefore, we see no reason to interfere with the finding of Id. CIT (A). Accordingly, we confirm the findings of the Id. CIT (A) in respect to both the disallowances deleted by him."

The facts in the year under appeal are identical as were before the Tribunal in the earlier assessment years. The revenue has not placed any contrary material on record suggesting that there is change in facts and circumstances of the case. Therefore, we are unable to sustain the finding of Id. CIT (A). Respectfully, following the decision of Coordinate Bench in assessee's own case in earlier

assessment years, we direct the AO to delete the disallowance of interest expenditure. Thus the appeal of the assessee is allowed."

9. The AO in the assessment order has also stated that the issue has been decided by the Tribunal for A.Y. 2004-05, 2005-06 and 2007-08 and the reason why the same is not followed is that the department is in further appeal before the Hon'ble High Court and the matter has not attained finality. There is thus no dispute that the matter is squarely covered by earlier decisions of the Tribunal and therefore, following the principle of consistency, the matter is decided in favour of the assessee and against the Revenue. The grounds of appeal are thus allowed.

10. Regarding Ground No. 2, the Id. AR submitted that the assessee has challenged the action of the Id. CIT(A) of upholding the disallowance of Rs.25,282/- made the AO claimed on account of depreciation charged for the year under appeal. In this regard, it was submitted that disallowance of depreciation has been made without providing any cogent reason for making such disallowance by the Id. AO. Further, such disallowance has been upheld by the Id. CIT(A) by observing the following vide para 5.3 on page no. 10 of the appellate order:

"I have gone through the assessment order, statement of facts, grounds of appeal and written submission carefully. In view of the facts discussed by the AO in the assessment order I am of the considered view that the disallowance made by the AO is quite reasonable and fair. Accordingly, the disallowance made by the AO is confirmed. This ground of appeal is dismissed"

11. On perusal of the observation of the Id. CIT(A), it is clearly evident that such observation has been made by the Id. CIT(A) without referring to the submissions made by the assessee and the documents placed on record. The disallowance has been mechanically upheld without considering the issue on merits. Moreover, the sustenance of disallowance by the Id. CIT(A) on the basis of observation of the AO where the AO had himself failed to bring any cogent reason on record for disallowing the statutory claim of depreciation available to the assessee, is against the principles of law and that of natural justice.

12. It was further submitted that claim of depreciation being statutory claim deserves to be allowed so far as assets have been used for the purposes of business. In the instant, no adverse remarks have been made by either AO in assessment order or by the Id. CIT(A) in the appellate order. Under the circumstances it was submitted that expenditure claimed by the assessee on account of depreciation may be allowed

13. Per contra, the Id. CIT/DR relied on the finding of the lower authorities.

14. We have heard the rival contentions and perused the material available on record. There is no finding of the AO for disallowance of depreciation and similarly, the order of the Id CIT(A) doesn't bring out the reasoning for sustenance of claim of depreciation. There is no dispute that there are assets which were acquired in the earlier years

and forms part of the opening block of assets and there are fresh assets in the nature of air conditioner and open well (pump) to the tune of Rs 62,455 which have been acquired by the assessee during the year under consideration and used for the purposes of business. Therefore, in absence of any adverse finding by the AO, the disallowance of claim of depreciation is hereby set-aside and the ground of appeal so taken by the assessee is allowed.

15. Regarding ground Nos. 3. to 3.2, the Id. AR submitted that the assessee has challenged the action of the Id. CIT(A) of arbitrarily upholding the disallowance of Rs.11,59,34,654/- made by the Id. AO on account of expenditure in nature of exceptional items claimed u/s 36(1)(vii) of the Act by ignoring the submissions made by the assessee and the materials placed on record.

16. It was submitted that during the year under consideration, assessee debited a total sum of Rs.11,59,34,654/- to profit & loss a/c as 'Exceptional Items', which consisted of following items:

S.No.	Particulars	Amount
1	Interest recoverable from debtors reversed	11,16,01,886.00
2	Complex Maintenance Charges Reversed	35,74,268.00
3	Electric Installation Charges	7,58,500.00
	Total	11,59,34,654.00

17. During the course of assessment proceedings, AO issued show cause notice dated 12.02.2015 directing assessee to furnish details of

expenses to the tune of Rs.11,59,34,654/- claimed in profit & loss account, which were claimed as "Exceptional items". In response to show cause notice, detailed submission were made by the assessee vide letter dated 17.03.2015, whereby it was explained that during the year under consideration certain flats previously allotted were cancelled. As the flats were allotted long back and only part payment of sale consideration was made by them, assessee was charging interest on outstanding balance receivable from such debtors (allottees) on year to year basis and accruing complex maintenance charges and electric installation charges as well, which was offered for taxation in return of Income. During the year under consideration, allotment of some of the flats was cancelled, pursuant to which interest already charged on such debtors and offered for taxation on yearly basis was reversed, alongwith Complex maintenance charges and Electric Installation charges. However, AO, disregarded submission of assessee and disallowed the claim of the assessee on the basis of observations that are summarized as under:-

- (1) That the genuineness of the expense claimed as bad debts could not be verified in absence of complete details of parties/ persons in whose case the bad debts of Rs.11,59,34,654/- were claimed by the assessee;
- (2) That there was nothing on record to show that the amount claimed as bad debts was taken into consideration in computing the income of previous years and that the assessee failed to form a firm opinion that the debts had in fact become bad;
- (3) That there was no documentary proof that the assessee had proceeded against such debtors;

(4) That the auditor in the audit report had only categorized the amount of Rs.11,59,34,654/- as exceptional and not considered the same as bad debts.

The above observations of the AO were affirmed by the Id. CIT(A) without independent application of mind on the facts of the case.

18. It was submitted that in respect of the expenses so claimed by the assessee as exceptional items, the attention is invited to the facts of the case that have also been stated in the foregoing paras of this written submission, that during the financial year under consideration, the long pending litigation between partners stood settled through a settlement agreement dated 17.02.2012, according to which outgoing partners i.e. Smt. Sudha Yadav and Shri Prashant Kumar Yadav would be given certain built up area 5686 Ft. and 11,837 Ft. respectively on the corresponding market value. Assessee requested the Sundry Debtors to repay the outstanding due including interest accrued and debited to their accounting year to year basis and get the documents registered. However, they refused to make the payment of outstanding dues and under these circumstances, only option left with appellant was to cancel their allotment and forfeit the flats already sold to them. Accordingly assessee cancelled the earlier allotments and written off the outstanding amounts and claimed the same in Profit & Loss account as "Exceptional Items". Since, assessee had cancelled the allotments against which interest was charged, income already booked in respect of such allottees got irrecoverable and assessee was left with no other option but to write it off. Accordingly, amount so charged in their

respective ledger on account of interest, complex maintenance charges, and electric installation charges are reversed and credited to their respective account in the year under consideration.

19. It was further submitted that in respect of the observations of the AO, it is submitted that the details in form of journal voucher (reflecting the reversal of interest, electric and complex maintenance charges) in respect of the parties from whom the amount of Rs.11,59,34,654/- has been claimed to be irrecoverable (stating the fact that the same have already been offered to tax in earlier years) were filed during the course of assessment proceedings. In absence of any further query/requirement being raised by the AO in respect of the year-wise details of parties whose flats were cancelled as stated above, the same were not submitted during the course of assessment proceedings. However, during the course of first appeal proceedings, the chart showing the year-wise details of income credited to the P/L a/c in respect of all such parties (allotments to whom had been cancelled and sums due from them were considered irrecoverable) was filed before the Id. CIT(A), who conveniently ignored the additional details filed before him and sustained the disallowance solely on the basis of observation of the AO that were based on incomplete facts.

20. It was submitted that AO himself while deciding on the issue of allowability of interest expenses (challenged in ground no. 1) has observed that assessee was charging interest on outstanding debtors, whereas while deciding the issue of allowability of irrecoverable

outstanding balance of debtors has conveniently ignored such fact. Such self contradictory observations of AO are reproduced hereunder:

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(iii)With regards to interest expenditure, the assessee could not furnish any document/evidence so as to claim that there is nexus between the interest income and interest expenditure. In fact, interest income was earned by the assessee from Sundry Debtors who had not made complete payments for purchase of said shops and offices. So, as per the agreement, the buyers were supposed to pay certain amount of interest as per the terms and conditions of the agreement. So, interest income was consequential to the agreement between the assessee and the buyers.”

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(2) The assessee has also failed to produce details with regard to accrued interest declared and charged to Income Tax in the earlier years.

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.....

(5)There is nothing on record to show that amount written off was taken into account in computing Income of the assessee”

In view of above, it is evident that when Id. AO admits that assessee was charging interest in respect of outstanding debtors. In fact, income for earlier Assessment Years has been assessed by Id. AO u/s 143(3), after duly including such interest income offered by assessee. Details of such interest income offered are furnished as under:

A.Y.	Total Income declared in Return	Interest income included in Total income	APB	Disallowance made by AO		Assessed Income	APB
				Depreciation	Interest		
2004-05	(76,57,476)	61,95,251/-	90 & 93	9,011/-	1,39,87,305/-	63,38,840/-	6
2005-06	(69,29,882)	72,84,362/-	97 & 102	26,887/-	1,43,33,911/-	74,30,916/-	14
2006-07	(72,95,095)	83,55,823/-	106 & 109	11,247/-	1,53,94,387/-	68,90,955/-	18
2007-08	(1,10,85,390)	96,08,164/-	113 & 117	6,000/-	2,06,57,878/-	95,72,490/-	22
2008-09	(1,36,88,648)	1,09,52,068/-	121&126	9,738/-	2,51,64,779/-	1,14,76,130/-	27
2009-10	(1,66,00,101)	1,25,77,776/-	129&133	13,479/-	2,92,49,133/-	1,26,75,990/-	32
2011-12	(2,31,28,905)	1,66,22,102/-	148&155	20,740/-	3,95,30,668/-	1,64,22,500/-	35

From perusal of above, it is evident that interest income as declared by assessee has not been disturbed by Id.AO in any of the preceding Assessment years and only interest expenses have been disallowed. Furthermore, had assessee not charged interest on debtors, total income declared would have been lower to this extent. In this scenario, when interest income on outstanding debtors has already been taxed by Id. AO, same deserves to be allowed in the captioned Assessment Year on being irrecoverable.

21. Further, in respect of the observation of Id.AO that the auditor had merely classified the expense as an exceptional item in the audit report and not explicitly considered the same as bad debts it is submitted that such nomenclature was used by auditor for the presentation of financial statements. Since, the quantum of bad debt is quite high, had the same been merged with other expenses of routine nature, the same would have resulted into reduction in profits from ordinary activities substantially, which is not true in the present case. Further, the nomenclature of expense does not decide the allowability or otherwise of a particular expenses, rather it is the substance of the transaction that matters.

22. In this regard, the attention is invited to the provisions of section 36(1)(vii) which is reproduced as under for ready reference:

"36. (1)The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in [section 28](#)—

(vii) subject to the provisions of sub-section (2), the amount of [any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year]:

[Provided that in the case of [an assessee] to which clause (vii) applies, the amount of the deduction relating to any such debt or part thereof shall be limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account made under that clause.]

[Explanation.—For the purposes of this clause, any bad debt or part thereof written off as irrecoverable in the accounts of the assessee shall not include any provision for bad and doubtful debts made in the accounts of the assessee;]”

Further, section 36 (2) reads as under:

"(2) In making any deduction for a bad debt or part thereof, the following provisions shall apply-

- (i) no such deduction shall be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year, or represents money lent in the ordinary course of the business of banking or money-lending which is carried on by the assessee;]*
- (ii) if the amount ultimately recovered on any such debt or part of debt is less than the difference between the debt or part and the amount so deducted, the deficiency shall be deductible in the previous year in which the ultimate recovery is made;*
- (iii) any such debt or part of debt may be deducted if it has already been written off as irrecoverable^{5a} in the accounts of an earlier previous year⁶ [(being a previous year relevant to the assessment year commencing on the 1st day of April,*

1988, or any earlier assessment year)], but the²[Assessing] Officer had not allowed it to be deducted on the ground that it had not been established to have become a bad debt in that year;

- (iv) where any such debt or part of debt is written off as irrecoverable in the accounts of the previous year⁸[(being a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year)] and the²[Assessing] Officer is satisfied that such debt or part became a bad debt in any earlier previous year not falling beyond a period of four previous years immediately preceding the previous year in which such debt or part is written off, the provisions of sub-section (6) of [section 155](#) shall apply;*
- (v) where such debt or part of debt relates to advances made by an assessee to which clause (vii) of sub-section (1) applies, no such deduction shall be allowed unless the assessee has debited the amount of such debt or part of debt in that previous year to the provision for bad and doubtful debts account made under that clause.]”*

23. On perusal of the provisions reproduced above, it is evident that the deduction u/s 36(1)(vii) is available on fulfillment of the conditions prescribed under sub section (2) to section 36 which are:

- (i) amount is actually written off in the books of accounts and

(ii) such amount was offered for taxation in current or any earlier years.

24. In the assessee's case, the interest, complex maintenance charges and electric installation charges were offered for taxation in all the preceding assessment years and stood declared in the returns of income of the assessee filed in all the preceding assessment years and also assessed in the assessment completed u/s 143(3) on substantive basis as income of the assessee firm. Now since assessee has lost all rights of recovery in respect of such debts due to cancellation, such income offered in earlier years is claimed in the Profit & Loss as "Exceptional items". Therefore, it is evident that the assessee has duly fulfilled both the conditions prescribed in the statute for allow ability of the expense. Under the circumstances the expense so claimed by the assessee deserves to be allowed.

25. Reliance in this regard is placed on the following judicial pronouncements:

1) 323 ITR 397 (SC) T.R.F. Ltd. vs Commissioner of Income Tax:
Bad Debt- Law after April 1,1989- Assessee only to establish that debt was written off- Not necessary to establish that debt in fact had become irrecoverable to establish that debt in fact had become irrecoverable-
Income Tax Act,1961, s.36(1)(vii).

2) 53 DTR 120 CIT &Anr. vs. Krone Communication Ltd. (Kar):

Business Expenditure – Bad Debt – Debt Written off in the books – Assessee having written off certain debt, it is entitled to deduction thereof as a bad debt – There is no further requirement to prove that the debt was a trade debt or that it is in fact irrecoverable.

26. In view of above judgment of the Hon'ble Apex Court, CBDT passed circular no.12/2016 dated 30.05.2016 which categorically holds that-

"3. The legislative intention behind the amendment was to eliminate litigation on the issue of the allowability of the bad debt by doing away with the requirement for the assessee to establish that the debt, has in fact, become irrecoverable. However, despite the amendment, disputes on the issue of allowability continue, mostly for the reason that the debt has not been established to be irrecoverable. The Hon'ble Supreme Court in the case of TRF Ltd. In CA Nos. 5292 to 5294 of 2003 vide judgment dated 9.2.2010 (available in NJRS 2010-LL-0209-8), has stated that the position of law is well settled. "After 1.4.1989, for allowing deduction for the amount of any bad debt or part thereof under section 36(1) (vii) of the Act, it is not necessary for assessee to establish that the debt, in fact has become irrecoverable; it is enough if bad debt is written off as irrecoverable in the books of accounts of assessee. "

"5. In view of the above, claim for any debt or part thereof in any previous year, shall be admissible under section 36(1)(vii) of the Act, if it is written off as irrecoverable in the books of

accounts of the assessee for that previous year and it fulfills the conditions stipulated in sub section (2) of sub-section 36(2) of the Act.

6. Accordingly, no appeals may henceforth be filed on this ground and appeals already filed, if any, on this issue before various Courts/Tribunals may be withdrawn/not pressed upon.”

27. The assessee further submits that the observation of the AO that assessee had failed to form a firm opinion upon whether the debts had become bad it is submitted that the submissions made by assessee are very clear about its claim of bad debts and such observations of AO are completely baseless. It is also submitted that the assessee had submitted all primary details called for by the AO during the assessment proceedings thereby discharging its onus. In absence of any specific query being raised by the AO, submission of details sought for by him was not possible by the assessee at any stretch of imagination.

28. Further, the AO has placed reliance on few judgments, which were passed before Apex Court judgment cited above and consequently have no relevance now more particularly when the Income Tax Act specifically provides allowability of Bad debts U/s 36(2) on fulfilling certain conditions.

29. It was further submitted that the facts and the circumstances narrated in the foregoing paras of this written submission clearly depict the wrong approach followed by the Id. CIT(A) while disposing off the

appeal of the assessee without considering the submissions and the material placed before him. The appellant therefore, submit that in light of the fact that the assessee has fulfilled the conditions laid down by the statute for claiming the aforesaid expense the claim of Rs.11,59,34,654/- may be allowed.

30. Per contra, the Id. CIT/DR relied on the finding of the lower authorities and our reference was drawn to the findings of the Id. CIT(A) which are contained at para 6.3 which read as under:-

"6.3 I have gone through the assessment order, statement of facts, grounds of appeal and written submission carefully. It is seen that the AO has discussed in detail at Para 4 of the assessment order has given the details reason why the deduction of Rs. 11,59,34,645/- claimed by the appellant u/s 36(1)(vii) is not admissible. In view of the facts discussed by the AO in the assessment order, I am fully in agreement with the finding of the AO that the amount of Rs. 11,59,34,654/- was not admissible as deduction u/s 36(1)(vii). Accordingly, the disallowance of Rs. 11,59,34,654/- made by the AO is hereby confirmed."

31. Further, our reference was drawn to the findings of the AO which read as under:

"4.5 The written submission filed by the A/R of the assessee has been considered carefully, however, the same has not been found convincing. As per provisions of section 36(1)(vii) the amount of debt or part thereof which is written off as

irrecoverable in the accounts of the assessee can be considered as expenditure of the relevant year. However, in the case of the assessee the amount of Rs.11,59,34,654/- cannot be considered as written off as irrecoverable due to the following reasons:

(1) The assessee has failed to furnish details of the parties in whose cases the amount of Rs.11,59,34,654/- has been considered as bad debts.

(2) The assessee has also failed to produce details with regard to accrued interest declared and charged to Income-tax in the earlier years.

(3) In absence of complete details of the parties/persons in whose cases, a huge amount of Rs.11,59,34,654/- has been shown as bad debts, it is not possible to verify its genuineness.

(4) The Auditor. in his Audit Report has categorized the amount of Rs.11,59,34,654/- as "Exceptional Items" and has not considered it as bad debts.

(5) There is nothing on record to show that amount written off was taken into account in computing Income of the assessee.

(6) The assessee failed to file any documentary evidence which prove, that the assessee proceeded further against such debtors.

(7) In fact, the assessee has failed to form its firm opinion that the debt has become bad debts.

(8) It is also of relevant to mention here that under section 101, 102, and 106, of the Evidence Act, the onus lies upon the

assessee to prove all the expenses to the satisfaction of the Assessing Officer, which was not discharged by the assessee as it failed to produce the list of parties from whom accrued interest has been shown as bad debt.

In this regard reliance is also placed on the following Judicial Pronouncements:

- 1. CIT Vs. Coates of India Ltd., (Cal.) 232 ITR 324*
- 2. Industrial Cables (I) Ltd., Vs. ACIT (ITAT, Chd) 97 ITD 267*
- 3. Indian Express (Madurai) (P) Ltd., Vs. DCIT (ITAT, Mad) 68 ITD 374*
- 4. Rallis India Ltd., Vs. CIT (Cal) 246 ITR 170*
- 5. City Financial Retail Services India Ltd., Vs. ACIT 2008-TIOL-05-ITAT-MAD*

In view of the above discussion, the amount of Rs.11,59,34,654/- shown under the Head "Exceptional Items" and as claimed by the assessee U/s.36(1)(vii) of the I.T. Act, 1961 are disallowed and added back to the total income of the assessee."

32. We have heard the rival contentions and perused the material available on record. It is the case of the assessee that it had cancelled the allotment of certain flats in its commercial complex as the allottees/debtors refused to pay the outstanding amount towards the interest, complex maintenance charges and electric installation charges and the same were reversed and written off in respective ledger

accounts of the parties and claimed in its profit/loss account for the previous year relevant to impugned assessment year. It has been further submitted that such interest, complex maintenance charges and electric installation charges were duly offered to tax in previous assessment years and the return for those years have been assessed u/s 143(3) wherein such charges have been brought to tax and accepted by the Assessing officer. We find force in the contentions so advanced on behalf of the assessee and agree with the same. It is a settled legal position as laid down by the Hon'ble Supreme Court in case of TRF Ltd (supra) and also accepted by the CBDT as communicated vide circular no. 12/2016 dated 30.05.2016 that claim for any debt or part thereof in any previous year, shall be admissible under section 36(1)(vii) of the Act, if it is written off as irrecoverable in the books of accounts of the assessee for that previous year and it fulfills the conditions stipulated in sub section (2) of section 36 of the Act i.e, such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year.

33. It has been further submitted by the Id AR that such contentions of the assessee are duly supported by the journal entries in respective ledger account of the parties reflecting the reversal of these outstanding charges during the previous year relevant to impugned assessment year, and such charges have been duly offered in the earlier years and all these details in terms of journal vouchers, ledgers and entries in the books of accounts, copies of returns of income for past assessment years were duly submitted before the AO as well as the Id CIT(A). The

AO has however disputed the same holding that the claim of the assessee couldn't be examined in absence of complete details. To our mind, all the AO has to examine is whether the amount of aforesaid charges so recoverable have been actually reversed in respective ledger accounts of individual allottees/debtors and written off in the books of accounts of the assessee during the previous year relevant to impugned assessment year or not. Further, the AO has to examine whether such charges which have not been claimed as irrecoverable and written off were forming part of income and offered to tax in the previous assessment years or not. Given that these details have been claimed to be on record and in absence of findings of the AO, we are constrained to remand the matter to the file of the AO. Therefore, for the limited purposes of verifying these two aspects, the matter is set-aside to the file of the AO and where the same is found to be in order, the AO is directed to allow the necessary relief to the assessee. In the result, the ground of appeal is partly allowed for statistical purposes.

34. In ITA Nos. 887 & 888/JP/2019 pertaining to A.Y 2012-13 & 2013-14, both the parties fairly submitted that the facts and circumstances of the case are exactly identical to the facts and circumstances of the case in ITA No. 886/JP/2019, therefore, our findings and directions contained therein shall apply *mutatis mutandis* to these appeals.

In the result, all the three appeals of the assessee are disposed off in light of aforesaid directions.

Order pronounced in the open Court on 20/01/2021.

Sd/-

(संदीप गोसाई)
(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 20/01/2021.

***Santosh**

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

1. अपीलार्थी / The Appellant- M/s Sumeru Enterprises, Jaipur.
2. प्रत्यर्थी / The Respondent- ITO, Ward-6(4), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 886 to 888/JP/2019 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar