आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", 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 Nos. 1158 to 1162/JP/2019
Assessment Years: 2011-12 to 2015-16

Deputy Commissioner of Income Tax, Central Circle-2, Jaipur.	बनाम Vs.	M/s Ksheer Sagar Developers Pvt. Ltd., Hotel Royal Orchid, Opp.- BSNL Office, Near Durgapura Flyover, Tonk Road, Jaipur-302018.
PAN No.: AACCK 3154 G		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by : Shri Rajendra Singh (CIT-DR)
निर्धारिती की ओर से / Assessee by: Shri S.R. Sharma, (CA) &
Shri Rajnikant Bhatra (CA)

सुनवाई की तारीख / Date of Hearing : 06/07/2021
उदघोषणा की तारीख / Date of Pronouncement : 31/08/2021

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

These are the appeals filed by the Revenue against the two separate orders of the ld. CIT(A)-4, Jaipur all dated 31/07/2019 for the A.Y. 2011-12 to 2015-16 respectively.

2. All these five appeals of the Revenue have common issues; therefore, all were heard together and for the sake of convenience, a common order is being passed.

3. The hearing of the appeals was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.

4. Since, common issues have been involved in all these appeals of the revenue, therefore, for deciding the appeal, we take ITA No. 1158/JP/2019 for the A.Y. 2011-12 as a lead case. In this appeal, the Revenue has taken following grounds of appeal:

> *"1. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition without any reference to incriminating material of cash purchase (Annexure-2) seized during the search action u/s 132 of the I.T. Act, 1961?*
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> *2. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in allowing books of accounts in spite of the facts the assessee failed to furnish any evidence of bills of entry to determined whether the plant and machinery and other items for the year under consideration were actually received at any part of India and were being used for business purposes?*
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> *3. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in allowing deduction u/s 35AD of the Act in spite of the fact the assessee has not furnished the report in Form No. 10CCB alongwith return of income which is mandated as per Rule 12(2) of the Income Tax Rules, 1962?*
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> *4. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in allowing deduction u/s 35AD of the Act in spite of the fact the assessee has not got its recognition in two star or above category classified by the Central Government during the year under consideration as mandated u/s 35AD of the Income-tax Act, 1961?*
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> *5. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs. 62,31,856.00 made u/s 43B of the Act, on account of non-payment of interest payment during the financial year since no documentary evidences*

have been produced that payment of the same pertains to A.Y. 2011-12 instead of A.Y. 2012-13?

6. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs. 8,59,200.00 made u/s 69C in spite of the fact the assessee failed to produce any documentary evidences regarding address, PAN and TIN of the suppliers?*

7. *The Appellant crave, leave or reserving the right to amend modify, alter add or forego any grounds of appeal at any time before or during the hearing of this appeal."*

5. The brief facts of the case are that the assessee is a company engaged in business of running of hotel namely Royal Orchid at Tonk Road, Durgapura, Jaipur. The assessee company filed return of income for the year under consideration u/s 139 (1) of the Income Tax Act, 1961 (in short, the Act) declaring loss of Rs. 13,98,55,528/- in which deduction u/s 35AD of the Act amounting to Rs. 13,86,30,120/- was claimed. A search u/s 132 of the Act was carried out and thereafter, the A.O. issued notice u/s 153A of the Act on 27-4-2015 and assessee company complied the same by filing return on 18-5-2015 declaring the loss of Rs. 13,98,55,528/- as was declared in return filed u/s 139 (1) of the Act. Thereafter the A.O. completed assessment u/s 153A / 143 (3) of the Act at an income of Rs. 15,73,020/- by disallowing deduction claimed u/s 35AD amounting to Rs. 13,86,30,120/-, addition u/s 69C at Rs. 8,59,200/- and disallowance u/s 43B of the Act amounting to Rs. 19,39,232/-.

6. Being aggrieved by the order of the A.O., the assessee carried the matter before the ld. CIT(A), who after considering the submissions of both the parties and material placed on record, deleted the additions so made by the A.O. except petty expenses. Against the order of the ld. CIT(A), the Revenue is in appeal before the ITAT on the grounds mentioned above.

7. First ground of appeal raised by the Revenue relates to challenging the order of the ld. CIT(A) in deleting the addition without any reference to incriminating material of cash purchase (Annexure-2) seized during the search action u/s 132 of the Act. In this regard, the ld CIT-DR has vehemently supported the order of the A.O.

8. On the other hand, the ld AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the ld. CIT(A) and also relied on the written submissions filed before the Bench and the submissions made qua this issue are as under:

> *"No incriminating material was found in search. The Ld. A.O. in assessment order gave finding that during the course of search, evidences in respect of 'out-of-books' purchases/expenses, in the form of Annexure-A-2 seized from business premises of the assessee are not verifiable. The assessee has not only failed to justified the expenses recorded in these seized documents but was unable to prove the genuineness of the parties mentioned therein. In this connection it is submitted that papers seized from assessee company being ann. A-2 are only bills of bricks purchased*

from local unregistered dealers for use in construction of hotel and payment therefor was made in cash which too was not in violation of section 40A (3) and those payments for purchase are duly recorded in regular books of accounts which is verifiable therefrom. The Ld. A.O. is thus absolutely wrong in giving finding that evidences in respect of 'out of books' purchases/expenses were found. The Ld. A.O. except giving reference of Ann. A-2 which is already explained mentioned nothing nor brought any instance or evidence in support of said finding and thus the same is without any basis and arbitrary. It is thus clear that in search no incriminating material/documents etc. were found from assessee company.

The soft copy of books of accounts were also available before A.O. in assessment proceedings and copy of books of accounts showing the said entries were filed in paper book in appeal proceedings which was also forwarded to Ld. A.O. in these remand proceedings. The Ld. A.O. has not made any comment therefor and repeated what is stated in assessment order. It is thus evident from record that no incriminating material whatsoever was found in course of search and contention of Ld. A.O. in this respect in remand report is also wrong on facts.

Thus as submitted above no document/loose paper was found / seized during the course of search at the business / residential premises of the assessee indicating any on money receipt/investment/advances made and any unexplained/overstated expenditure etc. in its books of account pertaining to the year under appeal thus the mode and manner of the additions made in the orders passed u/s 153A deserves to be held bad in law.

The reading of provisions of section 153A would reveal that the time limit for issuance of notice u/s 143 (2) stood expired for the year under appeal and therefore, no assessment was pending at the time when search was conducted in this case and therefore additions, if any, to be made via assessment u/s 153A would be restricted to incriminating documents found

during the course of search. In other words, no routine additions would be permitted to be made having no nexus with documents found in search.

This position has been settled by a number of judicial pronouncements, few of which are reproduced herewith:

All Cargo Global Logistic Ltd. Vs. DCIT 137 ITD 287 (Mum)(SB) – Upheld by Bombay High Court.

Relevant extracts:

Para 58 of SB decisions: Thus, question No. 1 before us is answered as under:

(a) In assessments that are abated, the A.O. retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment years separately

(b) In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material, which in the context of relevant provisions means – (i) books of account , other documents, found in the course of search but not produced in the course of original assessment, and (ii) Undisclosed income or property discovered in the course of search.

CIT vs Kabul Chawla Delhi High reported in (2016) 380 ITR 5733 (Delhi) vide ITA Nos. 707/2014 and others, dated 28.8.2015, (SLP dismissed by Hon'ble Supreme Court on 7-12-2015) wherein the Hon'ble Delhi High Court has reiterated the above settled legal proposition that since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed ……..

Rajasthan High Court in the case of Jai Steel (India) vs ACIT reported in 259 CTR (Raj.) 281

"….. The requirement of assessment or reassessment under the said section has to be read in the context of sections 132 or 132A, in as much as, in case nothing incriminating is found on account of such search or requisition, then the question of reassessment of the concluded assessments does not arise, which would require more reiteration and it is

only in the context of the abated assessment under second proviso which is required to be assessed.

…….

…….

Para 26 of the Judgement: The plea raised on behalf of the assessee that as the first proviso provides for assessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess' have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess' has been used in the context of an abated proceedings and word "reasons" has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents.

There are various recent decisions on the issue that there can be no addition in respect to completed assessment if no incriminating material found during the course of search namely : -

Jai Lokenath Oil Extraction P. Ltd. Vs. DCIT (2017) 166 ITD 161 (Kol – ITAT).

CIT Vs. Deepak Kumar Agarwal (2017) 251 Taxman 22 (Bombay H.C.).

Ratan Kumar Sharma Vs. DCIT (ITAT – JPR ITA No. 797/JP/2014 order dated 25-7-1).

9. We have heard the ld. Counsels of both the parties and have perused the material placed on record. We have also deliberated upon the decisions cited in the orders passed by the authorities below as well as

cited before us and we have also gone through the orders passed by the revenue authorities. From perusal of the record, we noticed that the ld. CIT(A) has dealt with the issue in para 7 to 7.5 of his order and for sake of convenience, the said findings are reproduced herein below:-

"7. I have perused the order of the AO and submissions made in this regard. Perusal of assessment order passed u/s 143(3)/153A shows that the additions made by the AO are not relatable to any seized material. I also find that for the A.Yr the assessments stood completed on the date of search. Further there was no time to issue notice u/s 143(2) for the instant A.Yr. Following information are taken from the assessment order u/s 143(3)/153A may be refereed to.

A.Y.	*ROI Filling date*	*143(2) notice time expiry*	*Date of Search*
2010-11	*30-09-2011*	*30-09-2012*	*15-10-2014*
2011-12	*29-09-2012*	*30-09-2013*	*15-10-2014*
2012-13	*30-09-2013*	*30-09-2014*	*15-10-2014*

7.2 It is clear from the table above that assessments stood completed on the date of search and there was no time left to issue the notice u/s 143(2). Careful perusal of the assessment orders indicated that none of the additions/disallowances (except Ground of Appeal 4 in A.Y. 2011-12) made are based on seized material found during the course of search on the appellant premises.

7.3 in the remand report the Ld. AO has reffered to decision of Hon'ble High Court of Rajasthan in the case of CIT Vs Ravi Mathur (citation not provided) to counter the legal grounds taken. In my view the decision cited is a dated decision and the issue is now settled by the decision of Hon'ble Supreme Court (discussed below).

Recently Hon'ble Supreme court vide order dated 02-07-2018 in Meeta Gutgutia Vs. Pr CIT (96 Taxmann.com 468) has held that Invocation of section 153A to re-open concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search qua each such earlier assessment year. The head note of the judgment is as under:

> *Section 153A o] the Income-tax Act, 1961 - Search and seizure (General principles) - Assessment years 2001-02 to 2003-04 and 2004-US - High Court in impugned order held that invocation of section 153A to re-open concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search qua each such earlier assessment year - Whether SIP against said decision was to be dismissed - Held, yes [Para 2] [In favour of assessee]*

7.4 The issue of additions made by the AO in the assessment u/s 143(3)/153A without any reference to incriminating seized material was considered by the Hon'ble Rajasthan High court in the case of Jai Steel limited vs. ACIT (88 DTR 1). The Hon'ble Court was of the view in case of completed assessments no addition can be made if no incriminating seized material is found during the course of search. The relevant observation of the judgment is reproduced below:

> *"In the firm opinion o/ this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:*
>
> *(a) The assessments or reassessments, which stand abated in terms of proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;*
>
> *(b) Regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and*
>
> *(c) In absence of any incriminating material, the completed assessment con be reiterated and the abated assessment or 13 D.B. INCOME TAX APPEAL NO.53/2011 Jai Steel (India), Jodhpur vs. Assistant Commissioner of Income*

Tax, Jodhpur (Along with other 16 similar matters) reassessment can be made."

Similar view point was expressed by the Hon'ble Delhi High Court in the case of Kabul Chawla vs. ACIT 380 ITR 573 (Del HC). The relevant observation of Hon'ble court could be seen in para 37 & 38 of order.

Summary of the legal position

37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light o/ the law exploited in the aforementioned decisions, the legal position that emerges is as under.'

i Once a search takes place under Section 132 o] the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date o/ the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of' the aforementioned six years in separate assessment orders for each of the six years. In other words, there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis o] evidence found in the course of the search, or other post-search material or information available with the AO which con be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment files to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abate" proceedings i.e. those

pending on the date of search and the word 'reassess' to completed assessment proceedings.

vi. *In so far as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*

vii. *Completed assessments can be interfered with by the AO while making the assessment under Section 153A on/y on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.*

Further, similar view is also taken in the following judgments, including by Hon'ble ITAT Jaipur, in many cases:

a) *Continental warehousing Corporation 374 ITR 645*
b) *PCIT Vs Meeta Gutgutia 152 DTR 153*
c) *Vijay Kumar D Agarwal Vs DCIT in IT (SS) A Nos. 153, 154, 155 & 156/Ahd/2012*
d) *Ratan Kumar Sharma Vs DCIT ITA 797 & 798/Jaipur/2014*
e) *Vikram Goyal Vs DCIT ITA 174/Jaipur/2017 etc.*
f) *Jadau Jewellers & Manufacturer PL Vs ACIT (686/Jaipur/2014)*
g) *Prateek Kothari Vs ACIT (312/Jaipur/2015)*

7.5 Considering the above, I am of the view that as the additions made by the A.O. are without any reference to the seized material, they are not legally tenable. The legal ground taken by the appellant is thus allowed."

10. We have observed from perusal of the record that the A.O. passed assessment order u/s 143(3)/153A of the Act shows that the additions made by the AO were not relatable to any seized material. We find that for the A.Yr the assessments stood completed on the date of search. Further there was no time to issue notice u/s 143(2) of the Act for the instant

A.Yr. Following information which came from assessment order is necessary to mention here, which is as under:

A.Y.	ROI Filling date	143(2) notice time expiry	Date of Search
2010-11	30-09-2011	30-09-2012	15-10-2014
2011-12	29-09-2012	30-09-2013	15-10-2014
2012-13	30-09-2013	30-09-2014	15-10-2014

It is clear from the table above that those assessments stood completed on the date of search and there was no time left to issue the notice u/s 143(2) of the Act. Careful perusal of the assessment orders indicated that none of the additions/disallowances (except Ground of Appeal 4 in A.Y. 2011-12) made are based on seized material found during the course of search on the assessee's premises.

11. We also observed that in the remand report, the AO has referred to decision of Hon'ble High Court of Rajasthan in the case of CIT Vs Ravi Mathur (citation not provided) to counter the legal grounds taken, we are of the view the issue is settled by the decision of Hon'ble Supreme Court the case of **Meeta Gutgutia Vs. Pr CIT (6 Taxmann.com 468)** wherein, it was has held that Invocation of section 153A to re-open concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search qua each such earlier assessment year. The head note of the judgment is as under:

Section 153A o] the Income-tax Act, 1961 - Search and seizure (General principles) - Assessment years 2001-02 to 2003-04 and 2004-US - High Court in impugned order held that invocation of section 153A to re-open concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search qua each such earlier assessment year - Whether SIP against said decision was to be dismissed - Held, yes [Para 2] [In favour of assessee]

The issue of additions made by the AO in the assessment u/s 143(3)/153A without any reference to incriminating seized material was considered by the Hon'ble Rajasthan High court in the case of **Jai Steel limited vs. ACIT (88 DTR 1).** The Hon'ble High Court was of the view that in case of completed assessments, no addition can be made if no incriminating seized material is found during the course of search. The relevant observation of the judgment is reproduced below:

"In the firm opinion o/ this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

(a) The assessments or reassessments, which stand abated in terms of proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;

(b) Regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and

(c) In absence of any incriminating material, the completed assessment con be reiterated and the abated assessment or 13 D.B. INCOME TAX APPEAL NO.53/2011 Jai Steel (India), Jodhpur vs. Assistant Commissioner of Income Tax, Jodhpur (Along with other 16 similar matters) reassessment can be made."

12. We also draw strength from the decision of the Hon'ble Delhi High Court as relied by the ld. CIT(A) in his order, in the case of **Kabul Chawla vs. ACIT 380 ITR 573 (Del HC),** wherein it was held as under:

> *37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light o/ the law exploited in the aforementioned decisions, the legal position that emerges is as under.'*
>
> *i Once a search takes place under Section 132 o] the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*
>
> *ii. Assessments and reassessments pending on the date o/ the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*
>
> *iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of' the aforementioned six years in separate assessment orders for each of the six years. In other words, there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".*
>
> *iv. Although Section 153 A does not say that additions should be strictly made on the basis o] evidence found in the course of the search, or other post-search material or information available with the AO which con be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment files to be made under this Section only on the basis of seized material."*
>
> *v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abate" proceedings i.e. those pending on the date of search and the word 'reassess' to completed assessment proceedings.*

vi. *In so far as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*

vii. *Completed assessments can be interfered with by the AO while making the assessment under Section 153A on/y on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.*

We also observed from perusal of the record that papers seized from assessee company being ann. A-2 are only bills of bricks purchased from local unregistered dealers for use in construction of hotel and payment thereof was made in cash which too was not in violation of section 40A(3) of the Act and those payments for purchase are duly recorded in regular books of accounts which is verifiable therefrom. The soft copy of books of accounts were also available before A.O. in assessment proceedings and copy of books of account showing the said entries were filled in paper book in appeal proceedings which was also forwarded to A.O. in the remand proceedings. The A.O. has not made any comment therefor and repeated what is stated in assessment order. No document/loose paper was found/seized during the course of search at the business/residential premises of the assessee indicating any on money receipt/investment/advances made and any unexplained/overstated expenditure etc. in its books of account pertaining to the year under

appeal, therefore, we are of the view that the mode and manner of the additions made in the orders passed u/s 153A deserves to be held bad in law. The ld. CIT(A) has passed a well-reasoned order discussing all material facts and legal position. No new facts or circumstances have been brought before us by the ld AR in order to controvert or rebut the factual findings recorded by the ld. CIT(A), therefore, we see no reason to interfere into or deviate from the findings so recorded by the ld. CIT(A) qua this issue and we uphold the same.

13. Ground No. 2 raised by the Revenue relates to challenging the order of the ld. CIT(A) in allowing books of accounts in spite of the facts the assessee failed to furnish any evidence of bills of entry to determine whether the plant and machinery and other items for the year under consideration were actually received at any part of India and were being used for business purposes. In this regard, the ld CIT-DR has vehemently supported the order of the A.O.

14. On the other hand, the ld AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the ld. CIT(A) and also relied on the written submissions filed before the Bench and the submissions made qua this issue are as under:

> *"The Ld. A.O. in assessment order gave alleged finding that "The assessee company was unable to furnish requisite books of accounts, required bills*

& vouchers in respect to CIF imports and other capital expenses as well as fixed assets."

The Ld. A.O. on the above findings given in assessment order held that it proved that the assessee did not maintain his books as required by law and that his books did not present 'true and fair picture' of his accounts and financial transactions, thereby contravening the provisions of Accounting Standard (AS)-1 issued by the Institute of Chartered Accountants of India (ICAI) as well and relying on certain judgements as discussed in assessment order rejected books of accounts of assessee company by invoking provisions of section 145 (3) this year also.

In this connection it is submitted that –

(a) The assessee company maintains regular books of accounts and a soft copy thereof was filed with the assessing officer vide letter dated 29.12.2016 copy of which is submitted. These accounts are also subject to regular internal audits and statutory audit under Companies Act and the assessee has been complying with all the requirements in maintenance of books of accounts and records which is evident from audit report and audited accounts filed alongwith return which is conclusive that all proper and complete account books and other records were kept/maintained and accounts present a true & fair view of affairs of assessee company.

(b) As regards to claim made u/s 35AD it is supported with fixed asset chart in audited accounts. A few CIF import bills and capital expenses bills were produced before A.O. and it was not practical to produce all voluminous construction bills/vouchers for this year as well as construction bills/vouchers of earlier year within allowed time before Ld. A.O. in its office and so in letter dated 29-12-2016 it made a request to A.O. for verification of bills at business premises of assessee if so required which is not attended to by A.O. The assessee

however, produced bills of CIF imports and other bills before Ld. CIT(A) and Ld. AO in response to remand report.

The Ld. A.O. is thus wrong and has erred in law in invoking provisions of section 145 (3) thereby rejecting audited books of accounts in a very casual manner, on filmsy grounds in an arbitrary manner. The Ld. A.O. having not found any defect or discrepancy in books of accounts is not correct in law to reject books of accounts. The A.O. has not pointed out any specific mistake or deficiency in the books of accounts maintained and produced by the assessee. The correctness of the book results cannot be challenged without pointing out any specific mistake or deficiency in the books of accounts or without giving a firm finding that the method of accounting followed by the assessee was such that profit and gains cannot properly be deduced from such books of accounts. The A.O. is also required to give a finding that the books are incomplete or incorrect in any manner more so when accounts are statutorily audited and audit report has no qualification. Unless such a specific finding is given invoking of section 145 (3) and rejection of books of accounts is wrong and bad in law. The legal position is supported from many judicial decisions such as (2010) 324 ITR 95 Jas Jack Elegance Exports (Delhi HC). The judgements relied by A.O. are not applicable on the facts of the case as they relate to different facts and issue which are quoted without reference or context.

15. We have heard the ld. Counsels of both the parties and have perused the material placed on record. We have also deliberated upon the decisions cited in the orders passed by the authorities below as well as cited before us and we have also gone through the orders passed by the

revenue authorities. The ld. CIT(A) has dealt with the issue in para No. 13 of his order and the same is as under:

> *" I have perused the written submission submitted by the Ld A/R/ and the order of AO. I have also gone through various judgments cited by the Ld. AR and the order of AO. I have also gone through various judgments cited by the Ld. AR and those contained in the order of AO. I find that the Ld. AO has not mentioned the fact that books of accounts were provided to him in the electronic form on 29-12-2016 (letter filed by appellant before Ld. AO filed before me too). More so that audit report with requisite Performa was also provided to him. Ld. AO requisition of all the bills and vouchers was not feasible seeing the qty. of bills and vouchers and also that such requisition was made on the fag end of the time barring date. These books and entire bills etc. were provided in the remand proceedings to the Ld. AO In the remand proceedings the Ld AO has not pointed a single defect in the books bills or vouchers or the audit reports (both internal and external audit). In the remand proceedings the CIF bill, which were not produced before Ld. AO were also produced. Even the allegation of unaccounted cash purchase of bricks of Rs.8,59,200/- (separately adjudicated in ground no.4) is seen to be duly incorporated in the cash book & also not adversely commented by the AO/auditor. The action of Ld. AO is not backed by any factual defect in the books of bills, vouchers or the audit report. The action of Ld. AO in rejecting books is highly arbitrary and same is rejected. The Ld. AO is directed to accept the books of accounts maintained by the appellant for the stated A.Yrs. The ground is allowed."*

16. We also observed from perusal of the record that the A.O. has not mentioned the fact that books of accounts were provided to him in the electronic form on 29-12-2016. More so that audit report with requisite performa was also provided to him. The AO's requisition of all the bills and vouchers was not feasible seeing the qty. of bills and vouchers and also

that such requisition was made on the fag end of the time barring date. These books and entire bills etc. were provided in the remand proceedings to the AO. In the remand proceedings the AO has not pointed a single defect in the books, bills or vouchers or the audit reports (both internal and external audit). In the remand proceedings the CIF bill, which were not produced before the AO were also produced. Even the allegation of unaccounted cash purchase of bricks of Rs.8,59,200/- was seen to be duly incorporated in the cash book & also not adversely commented by the AO/auditor. The action of AO is not backed by any factual defect in the books of bills, vouchers or the audit report. The ld. CIT(A) has passed a well-reasoned order and no new facts or circumstances have been brought before us by the ld AR in order to controvert or rebut the factual findings recorded by the ld. CIT(A), therefore, we see no reason to interfere into or deviate from the findings so recorded by the ld. CIT(A) qua this issue and we uphold the same.

17. Grounds No. 3 and 4 of the appeal raised by the Revenue are interlinked and interrelated and relates to allowing deduction u/s 35AD of the Act in spite of the fact the assessee has not furnished the report in Form No. 10CCB alongwith return of income which is mandated as per Rule 12(2) of the Income Tax Rules, 1962 and allowing deduction u/s 35AD of the Act in spite of the fact the assessee has not got its recognition

in two star or above category classified by the Central Government during the year under consideration as mandated u/s 35AD of the Act. The ld. CIT-DR has vehemently supported the order of the A.O.

18. On the other hand, the ld AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the ld. CIT(A) and also relied on the written submissions filed before the Bench and the submissions made qua these issues are as under:

> *"The assessee company claimed deduction u/s 35AD as it build and operate in India a hotel of two star and above category as classified by Central Govt. as per provisions of section 35AD (8) (c) (iv) r/w Section 35AD (5) (iv) (aa) commenced its operation on or after 1-4-2010. In accordance with section 35AD (1) it was entitled for a deduction in respect of the whole of capital expenditure incurred in the previous year in which it commences operation of hotel. The other conditions of the provisions were also satisfied and, therefore in accordance with provisions of section 35AD it claimed deduction of Rs. 13,86,30,120/- being whole of capital expenditure prior to commencement of its operation which amount it capitalized in the books of accounts on the date of commencement of operations.*
>
> *The Ld. A.O. however in assessment disallowed the said claim of deduction u/s 35AD on following grounds.*
>
> *(a) The assessee company is not an eligible entity as it did not furnish report in prescribed form (i.e. Form 10 CCB) duly signed, verified by the accountant alongwith return of income as required under provisions of section 35AD (7) r/w section 80IA (7) but furnished said report in assessment proceedings.*

(b) That the condition of building operating anywhere in India a Hotel of 2 star or above category as classified by the Central Govt. is not satisfied as it applied for catagorisation of the Hotel in A.Y. 2014-15 and certificate is issued on 31-3-2016 by competent authority showing commencement of operation of Hotel 1-4-2011 while assessee declared it 26-3-2011 in Form 10CCB.

(c) That in the year under consideration it declared nominal income from operation and therefore it seems it is totally an entry to show commencement of operations and further in A.Y. 2011-12 it has capital expenditure/investment at Rs. 13,86,30,120/- while in A.Y. 2012-13 such investment is Rs. 73,22,98,854/- so it is not practical that hotel of 2 star and above can commence in A.Y. 2011-12 when only 16% of capital expenditure was incurred.

(d) The assessee company failed to furnish bills of CIF imports of Rs. 9,18,16,770/- included in total capital expenditure in assessment proceedings before A.O. and as per ledger A/c of CIF imports the total figure is 8,67,71,584/- and as such there is difference.

The Ld. A.O. on these grounds held that assessee failed to fulfill any of the pre-condition to be an eligible entity u/s 35AD and so disallowed deduction of Rs. 13,86,30,120/- claimed by assessee u/s 35AD.

In this connection it is submitted that

(a) *It is submitted that assessee obtained certificate on Form 10CCB on or before the date of filing of return but inadvertently due to oversight it left to be e-filed alongwith return and it was an bonafide inadvertent mistake and thus constitutes a sufficient cause furthur that the requirement of furnishing of audit certificate from an accountant u/s 35AD (7) r/w section 80IA (7) in Form 10CCB alongwith return is not a mandatory provision but only a directory one and the same can be filed*

any time before completion of assessment. The provision is analogous to same provision contained in Section 80HHA, 80HHC, 80IB (10) etc. of the Act. In case of CIT Vs. Berger Paints (No.2) 254 ITR 503, CIT Vs. Krishnan Nair 259 ITR 727, CIT Vs. Godha Chemicals P. Ltd. 353 ITR 679 and Murli Export Vs. CIT 238 ITR 257 while interpreting the analogous provision of section 80HHC (4) the court held that furnishing of audit certificate alongwith return of income is not mandatory provision, but only directory one, and can be filed at any time before the completion of assessment and the deduction under the provision cannot be denid on the ground that certificate not filed with the return. In I.T.O. Vs. Novelty Garments 256 ITR 688 & I.T.O. Vs. VXL India Ltd. 312 ITR 187 it is held that sub section has two part requiring the filing of report is mandatory; the second part relating to the time of filing is only procedural since an appeal to the Tribunal is only a continuation of assessment proceedings, even if audit certificate is submitted before the Tribunal the deduction is allowable. It is evident in the case of assessee that audit certificate of Form 10CCB was filed in assessment proceedings hence provision stand complied and deduction cannot be denied on the ground that certificate on Form 10CCB was not filed alongwith return.

(b) The assessee in order to avail the benefit of section 35AD of the Act has to fulfill the conditions being (i) expenditure incurred prior to commencement of its operation and (ii) the amount is capitalized in the books of accounts of the assessee on the date of its operation. There is no procedure to issue the star rating certificate from the date of application retrospectively and is issued on and from the date of signing of the certificate but it also does not mean that the hotel was operated for lower than two star category from the date of application till the issuance of three-star rated certificate. Naturally, in order to get the certificate, the assessee has designed the hotel rooms and all other amenities according to the terms and conditions specified for three-star hotel.

As per provisions of section 35AD, the expenditure incurred wholly and exclusively for the purpose of any specified business shall be allowed as deduction during the previous year in which he commences operations. The admitted fact is that assessee got the certification of categorization for above 2 star category from competent authority. The commencement of operation of hotel from 26-3-2011 has also been admitted by A.O. as he assessed the income from operation of hotel from 26-3-2011 to 31-3-2011. The deduction u/s 35AD would have been available to assessee even the operation of hotel would have commenced after 31-3-2011 or even thereafter and therefore, no additional benefit was derived so as make it antidate. The findings of A.O. that 'it seems that it is totally an entry to commencement of business is based only on surmises and conjectures. The date of commencement of hotel given in application of catagorisation as 1-4-2011 cannot be equated with date on which operation of hotel commences. The same cannot be a ground for disallowance of deduction u/s 35AD Nowhere in the clause (aa) to sub-section (5) of section 35AD was it mandated that the date of the certificate was to be with effect from a particular date. Therefore, the provision which was to encourage the establishment of hotels of a particular category should be read as a beneficial provision and therefore, the interpretation given by the Ld. A.O. is not valid and justified. The legal position is well supported with the judgement of Hon'ble Madras High Court in case of Ceebros Hotels P. Ltd. (2018) 409 ITR 423 (Mad.) and ITAT Ahmedabad judgement in case of ACIT Vs. River view Hotels (2018) 94 Taxmann.com 433. Thus the Ld. A.O. cannot deny deduction u/s 35AD on this ground also.

(C) The Ld. A.O. is wrong on facts to state that in A.Y. 2011-12 assessee company incurred capital expenditure/investment of Rs. 13,86,30,120/- while in A.Y. 2012-13 such investment is 73,22,98,854/- so it is not practical that hotel of above 2 star category can commence in A.Y. 2011-12 when only 16% of capital expenditure was incurred. The

above facts stated by A.O. are not correct the correct facts are that till 31-3-2011 total capital expenditure/investment was Rs. 54,04,07,631/- other than land of Rs. 10,69,11,042/- on construction of 17650 Sq.ft. area out of which area made operational in A.Y. 2011-12 (on 26-3-2011) was 4328 Sq.ft. Thus on proportionate basis 13,86,30,120/- was capitalized for which deduction u/s 35AD was claimed and after providing depreciation for the year in accounts the balance of Rs. 49,33,88,568/- was c/f to next year as 'Capital Work in Progress to next year which is evident from discussion made by A.O. in para 9.2 of assessment order and from statement prepared from audited accounts submitted herewith.

It is also submitted that in case of deduction u/s 35AD is allowed then on that capital expenditure no deduction of depreciation u/s 32 is admissible and on remaining capital expenditure depreciation at prescribed rates u/s 32 is admissible. In case assessee do not avail or obtain deduction u/s 35AD then assessee is entitled to depreciation on said capital expenditure u/s 32. The assessee thus prays that in case it do not succeed in his claim for allowance of deduction u/s 35AD, the assessee may kindly be held entitled to depreciation on such capital expenditure at prescribed rates and same may kindly be allowed to it."

19. We have considered the rival contentions of both the parties and perused the material placed on record. The ld. CIT(A) has dealt with the issue in para No. 17 & 18 of his order and the same is reproduced below:

"17. I have perused the written submissions submitted by the Ld. A/R and the other of AO. I have also gone through various judgements cited by the Ld. A/R and those contained in the order of AO.

I find the Ld. AO has disallowed claim u/s 35AD citing following reasons:

1. That the appellant company did not file 10CCB report alongwith the return of income.

2. That the approval for star categorization as obtained on 31-3-2016 while the appellant company declared it on 26-03-2011.

3. That the appellant company declared notional income for business operations.

4. That the appellant company fail to furnish CIF import bills of Rs. 9.18 crores while also there is difference of CIF import figure of Rs.8.68 crores in the ledger.

17.2 I have carefully perused the contents of the Ld. AO and the submissions made by the Ld A/R. I have perused all the documents filed in support of the claim u/s 35AD of the Act in the APB from pages 18 to 423. I am of the view that the disallowance of claim u/s 35AD is not legally tenable due to following reasons:

17.3 That the only condition for claim benefit u/s 35AD is that it could be claimed by any person. No approval is required for the same. However, the hotel should be classified as 2-star category or above by the Central Govt. which is precisely the case here. The appellant did construct a hotel which was more than 2-star categories and an application was made on 26-3-2011 to a competent authority. In this application it was well reflected the said hotel is 4-star hotel. Approval of the same was received on 31-3-2016. The receipt of approval of star category later does not imply that from the date of application to the date of receipt of star category the hotel did not have a star category or was functional without a star category. In fact, the appellant made the intention very clear in the application that it would be operational w.e.f. 26-3-2011. The hotel was operational is also evident from the gross receipt received in the relevant period. The logic adopted by the Ld. AO has no factual basis. Further the appellant has claimed Rs.13.86 crores on pro-rata basis. Out of the total capital expenditure only Rs.13.86 crores as claimed u/s 35AD of the Act balance was carried forward as WIP. Same is duly certified by the auditor and is reflected in form 10CCB filed in this regard.

18. I have also examined the specific reliance by the Learned A/R on two judgement namely:

1. *Ceebros Hotels PL (2018) 409 ITR 423 Madras*
2. *ACIT vs. Riverview Hotels (2018) 94 taxmann.com 433*

I find the judgements squarely applied on the appellant. The head note of the first judgement reads as under:

> *Section 35AD of the Income-tax Act, 1961 - Specified business, deduction in respect of expenditure on (Hotels) - Assessment year 2011-12 - For relevant year assessee filed its return claiming deduction under section 35AD(5)(aa) - Assessing Officer, while completing assessment under section 143(3), denied benefit on ground that" assessee had obtained classification as a three star category hotel only during next assessment year - Tribunal noted that revenue had not disputed operation of new hotel from relevant financial year 2010-11, as it had accepted income which was offered to tax - It was also found that assessee had filed application for classification of hotel in three star category in assessment year in question itself and, thereupon, manner in which inspection was conducted and time frame taken by Competent Authority were all beyond control of assessee - Tribunal thus taking a view that holistic interpretation of provisions of section 35AD was to be made, allowed assessee's claim - Whether since revenue failed to controvert aforesaid findings of fact, impugned order passed by Tribunal did not require any interference - Held, yes [Paras 9, 10 and 16] [In favour of assessee]*

18.2 Thus in the present case to the Ld. AO has accepted the part operation of the hotel and the revenue earned also is accepted or is not disputed. It may not be the out of place to extract the para 9, 10 & 16 of the aforesaid judgment;

> *9. The facts noted by the Tribunal clearly show thot the application filed by the assessee for such a classification was made on 19.4.2010 i.e in the assessment year 2010-11. Thereafter, it appears that there are certain procedure to be followed and an inspection requires to be conducted by an Approving Committee constituted for such purpose. The manner, in which, the inspection was conducted and the time frame taken by the Competent Authority are all beyond the control of the assessee. Thus, a holistic interpretation of the provisions has to be made and if the same is done, the attendant circumstances as to how the assessee was treated by the Department assume importance.*

10. *The Revenue has not disputed the operation of the new hotel room the financial year 2010-11, as it had accepted the income, which was offered to tax. Further, the Revenue accepted the income of the assessee from the hotel business, which was newly established and which became fully operational in the year 2010. Therefore, the Tribunal was right in concluding that the Assessing Officer should not have accepted the income of the assessee offered to tax, which was earned in lieu of star category o/ the hotel.*

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16. *However, the case on hand is entirely different." The test would be as to whether the provisions of Section 35AD of the Act would apply to specified business referred to in Sub-Section (2) if it commences operations and in the case of business like that of the assessee, an or after 01.4.2010, where specified filed business is in the nature of building and operating new hotel of two star above Category as classified by the Central Government. We find nowhere in Clause (aa) to Sub-Section (5) of Section 3SAD of the Act mandating that the date of certificate should be with effect from a particular date. Therefore, the provision, which is obviously to encourage establishment of hotels of a particular category, should be read as a beneficial provision and therefore, the interpretation given by the Tribunal considering the facts of the case is perfectly valid and justified. For the above reasons, we find no grounds to interfere with the order passed by the Tribunal.*

In the 2" judgment, ACIT Vs. Riverview Hotels (2018) 94 taxmann.com 433 too the head note may be referred too. Same reads as under:

Section 35AD of the Income-tax Act, 1961 - Specified business, deduction of expenditure in respect of (Hotel) - Assessment year 2012-13 - Whether for avoiding benefit of a three star hotel under section 35AD, what is not relevant is date of certification for classification as two or more star hotel but existence of classification as two or more star hotel; therefore, once assessee engaged in hotel business, was granted certification for categorization of its hotel as three star hotel, entire capital expenditure incurred by assessee in respect of its hotel was to be allowed for deduction under section 35AD - Held, yes [Para 10] [In favour of assessee)

Thus the case of appellant is squarely covered by the aforesaid two judgments.

That the aspect of not furnishing of from 10CCB with the return is a bonafide error, as is submitted by the appellant. In any case it is not mandatory requirement as is duly supported by various case laws furnished by the Ld. A/R. namely;

A *CITVs. Berger paints 254 ITR 503*

Section 32A8, read with section 139, o/the Income-tax Act, J961 - Investment deposit account - Assessment year 1988-89 - Auditing of assessee's claim for investment allowance and ids accounts was duly completed - Whether furnishing of auditor's report on date of filing of return is not mandatory, but only directory in nature, and, therefore, assessee could not be denied investment allowance merely on ground that it failed to tender auditor's report an date of filing of return - Held, yes

B *CIT Vs. Krishan noir 259 ITR 727*

Section 80HHC of the Income-tax Act, 1961 - Deductions - Exporters - Assessment year 1992-93 - Assessing Officer disallowed deduction claimed by assessee under section 80HHC, on ground that certificate as contemplated under sub-section (4A) of section 80HHC was not filed along with return - However, said certificate was filed before final assessment - Whether when exemptions ore made with a beneficent object such as to give incentive to co-operative movement or for encouraging investment in new machinery or plant, such provisions have to be liberally construed - Held, yes Whether, therefore, it can be said that filing of said certificate/declaration to claim benefit is mandatory, but time of filling declaration is directly in nature and it can be filed at any time before completion of assessment- Held,Yes

C *CIT Vs Godha Chemicals 353ITR 679*

Section 80HHC of the I T Act, 1961 – Deductions – Exporter [Filling of audit report] Assessment year 2003-04 -Whether expression 'alongwith return of income' as occurring in sub section (4) of section 80HHC could always be interpreted as directly so far it relates to time of filling of report and, hence, even if report is filed dring assessment proceeding's, assessee cannot be denied claim of deduction- Held Yes – Whether, therefore, where assessee filed audit report during assessment proceedings, assessee

could not be denied benefit of deduction u/s 80HHC- held Yes, {Paras 14 and 16} [In favour of assessee]

18.3 Thus the case laws support the view point that the report in the form 10CCB can be filed even at the stages of assessment before the Ld. AO which was done by the appellant. Other than the technical objection by the Ld. AO there is nothing in the assessment order which would entail the Ld. AO to deny the claim of deduction u/s 35AD. That being so the Ld. AO is directed to allow the claim the deduction u/s 35AD. At the cost of repetition it may be pointed out that this disallowance is NOT based on any incriminating seized material found during the course of search on appellant. Considering the above and on the facts and in the circumstances of the case, the Ld. AO is directed to allow the claim of appellant u/s 35AD of the Act. The ground is allowed."

20. From perusal of the record, we observed that the AO has disallowed claim u/s 35AD of the Act citing following reasons:

1. That the appellant company did not file 10CCB report alongwith the return of income.
2. That the approval for star categorization as obtained on 31-3-2016 while the appellant company declared it on 26-03-2011.
3. That the appellant company declared notional income for business operations.
4. That the appellant company fail to furnish CIF import bills of Rs. 9.18 crores while also there is difference of CIF import figure of Rs.8.68 crores in the ledger.

We observed that the only condition for claim benefit u/s 35AD is that it could be claimed by any person. No approval is required for the same. However, the hotel should be classified as 2-star category or above by the Central Govt. which is precisely the case here. The assessee did construct a hotel which was more than 2-star categories and an application was

made on 26-3-2011 to a competent authority. In this application it was well reflected the said hotel is 4-star hotel. Approval of the same was received on 31-3-2016. The receipt of approval of star category letter does not imply that from the date of application to the date of receipt of star category the hotel did not have a star category or was functional without a star category. In fact, the assessee made the intention very clear in the application that it would be operational w.e.f. 26-3-2011. The hotel was operational is also evident from the gross receipt received in the relevant period. The logic adopted by the AO has no factual basis. Further the assessee has claimed Rs.13.86 crores on pro-rata basis. Out of the total capital expenditure only Rs.13.86 crores as claimed u/s 35AD of the Act balance was carried forward as WIP. Same is duly certified by the auditor and is reflected in form 10CCB filed in this regard. The case laws relied upon by the ld. CIT(A) find support the view point that the report in the form 10CCB can be filed even at the stages of assessment before the AO which was done by the assessee. Other than the technical objection by the AO there is nothing in the assessment order which would entail the AO to deny the claim of deduction u/s 35AD. The ld. CIT(A) has passed a well-reasoned order discussing all material facts and legal position. No new facts or circumstances have been brought before us by the ld AR in order to controvert or rebut the factual findings recorded by the ld. CIT(A),

therefore, we see no reason to interfere into or deviate from the findings so recorded by the ld. CIT(A) qua this issue and we uphold the same.

21. Ground No. 5 raised by the Revenue relates to challenging the order of the ld. CIT(A) in deleting the addition of Rs. 62,31,856/- made U/s 43B of the Act on account of non-payment of interest payment during the financial year since no documentary evidences have been produced. The ld. CIT-DR has relied on the order of the A.O.

22. On the contrary, the ld AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the ld. CIT(A) and also relied on the written submissions filed before the Bench and the contents qua this issue is reproduced as under:

> *"The assessee company has capitalized interest on term loan from Bank of Rs. 4,25,88,123/-. The Ld. A.O. asked to assessee to furnish its details and assessee submitted the copy account of term loan from Bank which stated to show interest detail of Rs. 3,63,51,274/- hence Ld. A.O. disallowed the alleged difference of Rs. 62,31,856/- invoking section 43B. In this connection we submit the detail of interest paid on term loan and copy of A/c of term loan and Bank statement of term loan evidencing payment of interest of Rs. 4,25,88,123/-. The Ld. A.O. is thus wrongly arrived at the difference of Rs. 62,31,856/- and disallowed the same u/s 43B which is wrong in law.*
>
> *Without prejudice the above section 43B can be invoked if expenses for which deduction is claimed under chapter – IV while computation of business income and not otherwise. In the case of assessee the expenses*

have been capitalized and carried forward as capital work in progress to next year and so no deduction therefor in computation of business income is claimed and so section 43B is inapplicable and disallowance made by A.O. for the sum of Rs. 62,31,856/- u/s 43B is wrong and bad in law on this ground also."

23. We have considered the rival contentions of both the parties and perused the material placed on record. The ld. CIT(A) has dealt with the issue in para No. 26.2 of his order and the same is reproduced below:

"26.2 I am in agreement with the contention of Ld. AR that an interest of Rs.6231856/- is not claimed as deduction under the chapter from profit from business and profession. Same is also evident from the audited accounts submitted. Same is evident from the APB pages 01 to 17. Since it is not a business deduction section 43B is not applicable. The Ld. AO is directed to delete the addition of Rs.6231856.00."

24. We observe that Section 43B can be invoked if expenses for which deduction is claimed under chapter – IV while computation of business income and not otherwise. In this case, the expenses have been capitalized and carried forward as capital work in progress to next year and no deduction in computation of business income is claimed and therefore, Section 43B is inapplicable in this case. Since, the ld. CIT(A) has deleted this addition on the basis that it is not a business deduction, therefore, Section 43B is not applicable in the case of the assessee. No new facts or circumstances have been brought before us by the ld AR in order to controvert or rebut the factual findings recorded by the ld. CIT(A),

therefore, we see no reason to interfere into or deviate from the findings so recorded by the ld. CIT(A) qua this issue and we uphold the same.

25. Ground No. 6 raised by the Revenue relates to deleting the addition of Rs. 8,59,200.00 made u/s 69C in spite of the fact the assessee failed to produce any documentary evidences regarding address, PAN and TIN of the suppliers. The ld. CIT-DR has vehemently supported the order of the A.O.

26. On the contrary, the ld AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the ld. CIT(A) and also relied on the written submissions filed before the Bench and the contents qua this issue is reproduced as under:

> *"The Ld. A.O. gave finding that in course of search proceedings certain incriminating documents were found from the business premises (i.e. Hotel Royal Orchid, Durgapura, Jaipur) of the assessee which were inventoried as per Annexure-A2. These papers were regarding purchase of certain material in cash of Rs. 859200/- from M/s Bhagwati Building Material Supplier and Shreeji Hardware Building Material Suppliers without any proper address and Tin. In this regard assessee was show caused to furnish the address and PAN of above parties so that its genuineness can be examined. In the reply furnished by the assessee no required details were provided. Therefore, it is clear that said expenses have been made out of books hence addition of Rs. 859200/- is being made u/s 69C of the I. T. Act, 1961 to the total income of the assessee.*

In this connection it is submitted that the above Ann.A-2 seized in course of search are only bills of brick purchased from unregistered dealers for use in construction of hotels and are recorded in books of accounts of Assessee Company. The books of accounts and copy of relevant A/c of purchases are produced herewith for verification. The full address of those unregistered suppliers are available on seized bills itself but being petty unregistered dealers they have no PAN or TIN but this does not make them unverifiable and as expenses are duly recorded in regular audited books of accounts and cash payment which is not in violation of provision of section 40A (3) and its source is verifiable therefrom and, therefore, Ld. A.O. is wrong on facts as well as in law to hold that these expenses have been made out of books. The Ld. A.O. also wrongly invoked provisions of section 69C which is applicable where assessee incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, any is not satisfactory while in this case expenditure is duly recorded in books of accounts and source of cash payment is clearly depicted in books of accounts being out of withdrawal of cash from Bank A/c(s) of assessee company. The provision of section 69C are inapplicable on facts as well as in law. The addition of Rs. 8,59,200/- is being wrong and bad in law deserves to be deleted."

27. We have considered the rival contentions of both the parties and perused the material placed on record. The ld. CIT(A) has dealt with the issue in para No. 26.2 of his order and the same is reproduced below:

" I have also gone through various judgements cited by the Ld. AR. I find logic of Ld. AO that the expenses were incurred in cash and hence same are unexplained is ludicrous. The expenses are duly recorded in the books of accounts which have been verified by the auditor with no adverse remark in the report by the auditor. There is no adverse verification in the remand

proceedings too by the Ld. AO. Considering these facts the addition of Rs. 859200 is untenable. On the facts and in the circumstances of the case, the same is directed to be deleted. The ground is allowed."

28. We also observed that AnnexureA-2 seized in course of search are only bills of brick purchased from unregistered dealers for use in construction of hotels and are recorded in books of accounts of assessee company. The books of accounts and copy of relevant A/c of purchases are produced for verification. The full address of those unregistered suppliers are available on seized bills itself but being petty unregistered dealers they have no PAN or TIN but this does not make them unverifiable and as expenses are duly recorded in regular audited books of accounts and cash payment which is not in violation of provision of section 40A(3) and its source is verifiable therefrom and in this case expenditure is duly recorded in books of accounts and source of cash payment is clearly depicted in books of accounts being out of withdrawal of cash from Bank A/c(s) of assessee company. Since, the ld. CIT(A) has deleted this addition on the ground that the expenses are duly recorded in the books of accounts which have been verified by the auditor with no adverse remark in the report by the auditor. There is no adverse verification in the remand proceedings too by the AO. No new facts or circumstances have been brought before us by the ld AR in order to controvert or rebut the factual findings recorded by the ld. CIT(A), therefore, we see no reason to

interfere into or deviate from the findings so recorded by the ld. CIT(A) qua this issue and we uphold the same.

29. In the result, this appeal of the Revenue stands dismissed.

30. Now we take ITA No. 1159/JP/2019 for the A.Y. 2012-13, wherein the Revenue has taken following grounds of appeal:

"1. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition without any reference to incriminating material of cash purchase (Annexure-2) seized during the search action u/s 132 of the I.T. Act, 1961?

2. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in allowing books of accounts in spite of the facts the assessee failed to furnish any evidence of bills of entry to determine whether the plant and machinery and other items for the year under consideration were actually received at any part of India and were being used for business purposes?

3. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in allowing deduction u/s 35AD of the Act in spite of the fact the assessee has not furnished the report in Form No. 10CCB alongwith return of income which is mandated as per Rule 12(2) of the Income Tax Rules, 1962?

4. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in allowing deduction u/s 35AD of the Act in spite of the fact the assessee has not got its recognition in two star or above category classified by the Central Government during the year under consideration as mandated u/s 35AD of the Income-tax Act, 1961?

5. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.2,28,96,464.00 made u/s 43B of the Act, on account of non-payment of interest payment during the financial year since no documentary evidences have been produced that payment of the same pertains to A.Y. 2012-13 instead of A.Y. 2013-14?

6. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.5719/- made u/s 36(1)(va) of the Act (i.e. PF/ESI addition) relying on the ratio of CIT Vs

SBBJ 265 CTR 471 which is subjudice as SLP has been admitted by the Hon'ble Apex Court?

7. Whether on the cats and in the circumstances of the case in law the Ld. CIT(A) has erred in deleting the addition of Rs.1,41,26,418/- made under the income from other sources without determining the fact whether the receipt shown in form no. 26AS has been duly accounted for under the head 'revenue from operation'?

The Appellant crave, leave or reserving the right to amend modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."

31. In this appeal, grounds No. 1 to 5 of appeal, facts and submissions of both the parties are identical to the facts and submissions of ITA No. 1158/JP/2019 for the A.Y. 2011-12, therefore, our findings given in ITA No. 1158/JP/2019 for the A.Y. 2011-12 shall apply mutatis mutandis in this appeal also.

32. Ground No. 6 of the appeal raised by the Revenue relates to challenging the order of the ld. CIT(A) in deleting the addition of Rs.5719/- made u/s 36(1)(va) of the Act (i.e. PF/ESI addition) relying on the ratio of CIT Vs SBBJ 265 CTR 471 which is sub judice as SLP has been admitted by the Hon'ble Apex Court. In this regard, the ld CIT-DR has vehemently supported the order of the A.O.

33. The ld. AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the ld. CIT(A) and also relied on the written submissions filed before the Bench and the contents of the same qua the issue under consideration are as under:

"As regards to ESI & PF payment of Rs. 5,719/- the Ld. A.O. with reference to 3CD audit report has stated that the same has been made after due date. However from the said audit report it is also evident that the payment was made before due date of filing of return hence allowable. The complete details thereof was available in Tax Audit Report which A.O. overlooked and made addition. However we submit following information to support our claims.

a. ESI Payment challan

b. Copy of bank statement.

The Ld. A.O. referred SLP filed before Supreme Court. However filing of SLP before Hon'ble Supreme Court do not stay the operation of judgement of Hon'ble jurisdictional High Court. It may be mentioned that the Hon'ble Rajasthan High Court in case of CIT Vs. JVVNL 98 DTR 105 (Raj.) has held that where PF/ESI were paid after due date under respective Act but before due date of filing of return of income u/s 139 (1), these cannot be disallowed under section 43B or under section 36 (1) (va) of the Act, 1961. Recently, the Hon'ble ITAT, Jaipur in the case of M/s K.S. Automobiles Pvt. Ltd. in ITA No. 1184/JP/2018 vide order dated 08.03.2019 has allowed such expenditure following the decision of Hon'ble Apex Court in the case of PCIT vs. Rajasthan State Beverages Corporation Ltd. 250 Taxman 16 wherein SLP filed by the department on this issue was decided in the favour of the assessee and against the revenue. The Hon'ble ITAT has also distinguished the case of PCIT Vs. M/s Rajasthan Renewable Energy Corp. Ltd. in case of Dhabharia Agglomerates P. Ltd. Jaipur ITA No. 10/2018, 11/2018 and 12/2018 dated 20.03.2019 wherein due to typographical error, it was considered in favour of the revenue.

There are various other High Court decisions on the issue. CIT Vs. Sabri Enterprises (2008) 298 ITR 141 (Kar) etc. and recent judgement of Patna

High Court in Bihar State Warehousing Corporation Ltd. Vs CIT (2017) 393 ITR 386."

34. We have considered the rival contentions of both the parties and perused the material available on record. From perusal of the impugned order, we noticed that the ld. CIT(A) has dealt with the issue in para No. 32 to 32.2 of his order and the same is as under:

"32. I have gone through the assessment order as well as submissions made by the appellant including the judicial citations given therein and find that an addition of Rs.5719/- of employees' contribution to ESI and PF has been made by the AO on account of delay in deposition of employees contribution towards ESI and PF u/s 36(1)(va) r.w.s. 2(24)(x) of the Act. AO has noted that payments have been deposited after few days of the due dates of the said act and therefore no deduction could be claimed under the provisions.

32.2 The appellant has stated that all the payments on account of ESI and PF have been made before the due date of filing of return of income and therefore no disallowance could be made on this account. APB pages 18 and 19 can be seen. Further, reliance has been placed on the decisions of the Hon'ble Rajasthan High Court in the case of CIT, Udaipur Vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd (2013) 35 taxmann.com 616 and also in the case of CIT vs. State Bank of Bikaner and Jaipur 265 CTR 471.

32.3 In view of the above discussions, I find that it is not disputed that the payments on account of ESU and PF have not been deposited by the appellant. Further, in view of the above judgments of the Hon'ble Supreme Court which has been subsequently followed by the jurisdictional High Court, I find that there is no justification in the action of the AO in making a disallowance on account of delay in deposition of ESI and PF. On

the facts and in the circumstances of the case, these payments have been made before the due date of filing of return and therefore such addition of Rs. 5719 is directed to be deleted for A.Y. 2012-13 as well as amount of Rs.601811/- for A.Y. 2013-14. On the facts and in the circumstances of the case, appellant's appeal in Ground No.4 is allowed for A.Y. 2012-13 and 2013-14."

35. From the record, we observed that the ld. CIT(A) has given relief to the assessee on the ground that addition of Rs.5719/- of employees' contribution to ESI and PF has been made by the AO on account of delay in deposition of employees contribution towards ESI and PF u/s 36(1)(va) r.w.s. 2(24)(x) of the Act. The AO has noted that payments have been deposited after few days of the due dates of the said act and therefore no deduction could be claimed under the provisions. The assessee has stated that all the payments on account of ESI and PF have been made before the due date of filing of return of income and therefore no disallowance could be made on this account. The ld. CIT(A) has placed reliance on the decisions of the Hon'ble Rajasthan High Court in the case of **CIT, Udaipur Vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd (2013) 35 taxmann.com 616** and also in the case of **CIT vs. State Bank of Bikaner and Jaipur 265 CTR 471**. In view of the above discussions, we are of the view that it is not disputed that the payments on account of ESI and PF have not been deposited by the assessee. Further, in view of the judgments of the Hon'ble Supreme Court which has been subsequently

followed by the jurisdictional High Court, we hold that there is no justification in the action of the AO in making a disallowance on account of delay in deposition of ESI and PF. No new facts or circumstances have been brought before us by the ld AR in order to controvert or rebut the factual findings recorded by the ld. CIT(A), therefore, we see no reason to interfere into or deviate from the findings so recorded by the ld. CIT(A) qua this issue and we uphold the same.

36. Ground No. 7 raised by the Revenue relates to challenging the order of the ld. CIT(A) in deleting the addition of Rs.1,41,26,418/- made under the income from other sources without determining the fact whether the receipt shown in form no. 26AS has been duly accounted for under the head 'revenue from operation'. The ld. CIT-DR has relied on the order of the A.O.

37. The ld. AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the ld. CIT(A) and also relied on the written submissions filed before the Bench and the contents of the same qua the issue under consideration are as under:

> *"The Ld. A.O. held that "the total receipts of the assessee as per 26AS are of Rs. 1,68,51,674/- , for which TDS has been deducted u/s 194A, 194C, 194I and 194J of the Act. Whereas assessee has shown the other source income at Rs. 27,28,256/- only and TDS has been claimed at Rs. 10,48,661/-. In this regard vide show cause notice dated 23.12.2016*

assessee was asked to state its case but no suitable reply was furnished by the assessee as no such reconciliation of TDS claimed and receipts shown was furnished during the course of assessment proceedings.

In view of the above, facts, it is clear that income to the extent of Rs. 1,41,26,418/- (i.e. 1,68,51,674/- minus 27,25,256/-) has not been shown by the assessee in the relevant Return of Income. Therefore, receipts of Rs. 1,41,26,418/- is treated as other source income and added to the total income of the assessee."

In this connection it is submitted that Ld. A.O. has wrongly understood that TDS deducted by persons under the provisions of the Act are from Income from other sources declared by assessee while the same is not correct. The taxes deducted at source under various sections of the Act are against the services rendered by the assessee in the form of sale of room nights, food and beverages and other operating revenues such as laundry services, guest transportation etc. The total revenues generated from operations in the A.Y. 2012-13 is Rs. 9,87,22,256/- against which total receipts of Rs. 1,68,51,674/- were subjected to taxes deducted at source amounting to Rs. 10,48,661/-. The receipts of Rs. 1,68,51,674/- appearing in Form 26AS is towards the revenues from operations and not towards the other income of the assessee. We submit following information to support our claim.

a. *Form 26AS copy alongwith complete reconciliation of TDS vis a vis receipts.*

b. *Ledger extracts of the customers for the transactions from which TDS was deducted by them crediting revenue receipts from operations."*

38. We have considered the rival contentions of both the parties and perused the material available on record. From perusal of the impugned

order, we noticed that the ld. CIT(A) has dealt with the issue in para No. 36 to 36.2 of his order and the same is as under:

> *"36. I have perused the written submissions submitted by the Ld. A/R and the order of AO I have also gone through the written submissions including page 20 to 34 of APB where reconciliation is shown, and the remand report on the issue. I find the Ld AO has misconstrued the revenue receipt as income. The appellant had received Rs.16851674 as gross revenue receipt from various operation. Out of which Rs.2728256 are shown as income from other sources wherein TDS was claimed for Rs. 1048661. The Ld. AO concluded that Rs. 16851674 – Rs.2728256 is the income not disclosed and added the same.*
>
> *36.2 The TDS is for various services rendered to corporate clients for room clients for room service, laundry, guest transportation etc. thus out of the total revenue of Rs.98722256 only Rs.16851674 was subjected to TDS. Thus Rs.16851674 is not income from other sources. Necessary evidence like 26AS forms with TDS reconciliation vis a vis receipt and detailed ledger extracts have been furnished and the same were subjected to remand proceedings too. In absence of any factual rebuttal the stand taken by the Ld. AO does not stand. Similar explanation was offered for AY. 2013-14 too. Since the difference as pointed out by the Ld. AO is duly explained with evidences and no adverse comments in remand report the Ld AO is directed to delete the addition of Rs.14126148 and Rs. 36158358 an income from other sources."*

39. From perusal of the impugned order, we noticed that the ld. CIT(A) had given relief to the assessee on the ground that the AO has misconstrued the revenue receipt as income. The assessee had received Rs.1,68,51,674/- as gross revenue receipt from various operations. Out of

which Rs.27,28,256/- are shown as income from other sources wherein TDS was claimed for Rs. 10,48,661/-. The AO concluded that Rs. 1,68,51,674 – Rs.27,28,256/- is the income not disclosed and added the same. The TDS is for various services rendered to corporate clients for room clients for room service, laundry, guest transportation etc. thus out of the total revenue of Rs.9,87,22,256/- only, Rs.1,68,51,674/- was subjected to TDS. Thus Rs.1,68,51,674/- is not income from other sources. Necessary evidence like 26AS forms with TDS reconciliation vis a vis receipt and detailed ledger extracts have been furnished and the same were subjected to remand proceedings too. No new facts or circumstances have been brought before us by the ld AR in order to controvert or rebut the factual findings recorded by the ld. CIT(A), therefore, we see no reason to interfere into or deviate from the findings so recorded by the ld. CIT(A) qua this issue and we uphold the same.

40. In the result, this appeal of the Revenue stands dismissed.

41. Now we take ITA No. 1160/JP/2019 for the A.Y. 2013-14 wherein the Revenue has taken following grounds of appeal:

> *"1. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition without any reference to incriminating material of cash purchase (Annexure-2) seized during the search action u/s 132 of the I.T. Act, 1961?*
>
> *2. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in allowing books of accounts in spite of the*

facts the assessee failed to furnish any evidence of bills of entry to determined whether the plant and machinery and other items for the year under consideration were actually received at any part of India and were being used for business purposes?

3. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in allowing deduction u/s 35AD of the Act in spite of the fact the assessee has not furnished the report in Form No. 10CCB alongwith return of income which is mandated as per Rule 12(2) of the Income Tax Rules, 1962?*

4. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in allowing deduction u/s 35AD of the Act in spite of the fact the assessee has not got its recognition in two star or above category classified by the Central Government during the year under consideration as mandated u/s 35AD of the Income-tax Act, 1961?*

5. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.2,44,36,100/- made u/s 43B of the Act, on account of non-payment of interest payment during the financial year since no documentary evidences have been produced that payment of the same pertains to A.Y. 2013-14 instead of A.Y. 2014-15?*

6. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.6,01,811/- made u/s 36(1)(va) of the Act (i.e. PF/ESI addition) relying on the ratio of CIT Vs SBBJ 265 CTR 471 which is sub judice as SLP has been admitted by the Hon'ble Apex Court?*

7. *Whether on the cats and in the circumstances of the case in law the Ld. CIT(A) has erred in deleting the addition of Rs.3,61,58,258/- made under the income from other sources without determining the fact whether the receipt shown in form no. 26AS has been duly accounted for under the head 'revenue from operation'?*

8. *The Appellant crave, leave or reserving the right to amend modify, alter add or forego any grounds of appeal at any time before or during the hearing of this appeal.*

42. In this appeal, grounds, facts and submissions of both the parties are identical to the facts and submissions of ITA No. 1158/JP/2019 and 1159/JP/2019 for the A.Y. 2011-12 and 2012-13 respectively, therefore, our findings given in ITA No. 1158/JP/2019 and 1159/JP/2019 for the A.Y. 2011-12 and 2012-13 shall apply mutatis mutandis in this appeal also.

43. Now we take ITA No. 1161/JP/2019 for the A.Y. 2014-15 wherein following grounds have been taken by the Revenue.

"1. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.2,15,56,804/- made u/s 43B of the Act, on account of non-payment of interest payment during the financial year since no documentary evidences have been produced that payment of the same has been made before due date of filling of return?*

2. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.3,59,126/- made u/s 36(1)(va) of the Act (i.e. PF/ESI addition) relying on the ratio of CIT Vs SBBJ 265 CTR 471 which is sub judice as SLP has been admitted by the Hon'ble Apex Court?*

3. *Whether on the facts and in the circumstances of the case in law the Ld. CIT(A) has erred in deleting the addition of Rs.1,48,35,603/- made on account of excess payment of interest @18% on unsecured loan by the assessee company to the related parties ignoring the fact that the interest @ 12.83% was determined after considering SBI's basic rate and risk factor or say on unsecured loan and assessee itself has taken loan from IDBI @ 14% per annum?*

The Appellant crave, leave or reserving the right to amend modify, alter add or forego any grounds of appeal at any time before or during the hearing of this appeal.

44. In this appeal, grounds No. 1 and 2, facts and submissions of both the parties are identical to the facts and submissions of ITA No. 1158/JP/2019 and 1159/JP/2019 for the A.Y. 2011-12 and 2012-13 respectively, therefore, our findings given in ITA No. 1158/JP/2019 and 1159/JP/2019 for the A.Y. 2011-12 and 2012-13 shall apply mutatis mutandis in this appeal also.

45. Ground No. 3 of the appeal raised by the Revenue relates to challenging the order of the ld. CIT(A) in deleting the addition of Rs.1,48,35,603/- made on account of excess payment of interest @18% on unsecured loan by the assessee company to the related parties ignoring the fact that the interest @ 12.83% was determined after considering SBI's basic rate and risk factor or say on unsecured loan and assessee itself has taken loan from IDBI @ 14% per annum. The ld. CIT-DR has vehemently supported the order of the A.O.

46. On the other hand, the ld. AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the ld. CIT(A) and also relied on the written submissions filed before the Bench and the contents of the same qua the issue under consideration are as under:

> *"The Ld. A.O. in assessment order determined the interest paid to associated enterprises at Rs. 3,68,16,604/- instead of total interest paid amounting to Rs. 5,16,52,007/-, hence adding back excess interest of Rs.*

1,48,35,603/- to the total income of the assessee and in not appreciating that the loan taken from associated enterprise cannot be compared with the bank loan as in the case in hand loan given by the associated enterprise are unsecured whereas loans provided by the bank are secured and further in not appreciating that income tax department has allowed the interest payment on unsecured loans at 18 percent per annum to the related parties in earlier year.

In this connection it is submitted that company has set up a Hotel at Durgapura, Jaipur in 2011 with the financial assistance from IDBI Bank Limited. The Company has availed loan for an amount of INR 70 crores in the year 2009 from IDBI Bank Limited, bearing an interest rate of 14%. The said loan was secured by first charge on all the movable and immoveable assets of the Hotel, Corporate Guarantee and personal guarantees of the promoters. The Hotel operations were commenced in the year 2011. However, the business did not progress as envisaged, resulting in liquidity issues. Due to liquidity issues, there were delays in payment of interest, resulting in levy of penal interest/charges from the bank at 2% p.a. This resulted in the effective interest charge of 16% p.a. The promoters had to infuse money into the Company, in order to service the principal repayment of the loan. The promoters infused money in the company in the form of unsecured loans bearing an interest rate of 18% p.a.

The prevailing market rates for unsecured loans from third party ranges between 18%-24% p.a. These loans are provided without any security/guarantee and such facility from a third party comes with higher cost as this is comparatively easier means of raising finance for the company. Further, the unsecured loans from third parties carries an upper limit upto which the loans are provided. However, in this case the support required was high regular and therefore,the promoters who obviously are related persons had to infuse the required amount in the

form of unsecured loans without any stipulation of repayment on interest @ 18%.

The demand loans provided by banks/other financial institutions also bear an interest rate of upto 20% (or more depending on the Company's financial profile) for the period under question i.e. A.Y. 2014-15.

Sample interest rates for demand loans from some of the PSUs are provided below you're your ready reference.

Bank Name	***Interest rates***
IDBI Bank	*Upto 17.75%*
SBH	*Upto 19.50%*
SBI	*Upto 16.45%*

These interest rates are as per the bank-wise lending rates for advances, as published by RBI.

The minimum market rate of interest of unsecured loan through brokers in the year was 14.40% p.a. plus brokerage @ 1.2% and interest payment is to be made bi monthly in advance and loan is to be for stipulated fixed period after which repayment has to be made and such loans are available only to persons having credit in market while the loan taken by assessee from above specified concerns who are promoters of company is @ 18% interest The interest is only credited at year end and not actually paid and loan is unsecured without any stipulation of period in which it is to be paid. Thus on these facts the interest rate of 18% p.a. to specified person is justified and within the market rates of interest on such loans and are at arms length.

According to the audit report of M/s Royal Orchid Hotels Ltd. it is clearly mentioned that the company has obtained short term borrowings @ 18% and loans provided to Ksheer Sagar Developers Pvt. Ltd. also carries an interest rate of 18%. It is also reported that the interest rate on secured loans from different banks/financial institutions ranges from 14.75% to 18.99%. A comparison of the business loans from different banks shows

the rate of interest ranges from 15.50% to 19.99%. In the related party transactions it is also informed by the auditors that there were no transactions of material nature with the promoters, the directors or the management, their subsidiaries or relatives etc. that have potential conflict with the interest of the company.

The various legal decisions on the issue also held that interest on unsecured loans between 18% to 24% cannot be held unreasonable or excessive in terms of section 40A (2) (b) of the Act so they are to be taken at arms length price as section 92BA (i) covers the same field as section 40A (2) (b).

That in the case of Vipul Y Mehta Vs. ACIT (Ahmedabad) ITA No. 869/Ahd/2010, the CIT (A) relied upon the judgement of Omkarmal Gaurishankar Vs. I.T.O. , 92 TTJ (Ahd) 223 where the Tribunal held that the interest paid to relatives @ 24% is reasonable. CIT (A) also considered the fact presented by the assessee that the loan taken from the relatives cannot be compared with the bank loan as loans given by the relatives are unsecured whereas loans provided by the bank are secured.

That in the case of M/s Khandelia Oil & General Mills (P) Ltd. Vs. ACIT, ITA No. 775 and 778/Chd/2012 where facts of the case were, assessee was a private limited company and had claimed interest on unsecured loans amounting to Rs. 1,23,15,529/- covered u/s 40A (2) (b) of the Income Tax Act, A.O. asked the justifiable reasons for payment of interest @ 15% where the borrowings from bank can be obtained at 10.5% against charge, the A.O. did not agree and restricted the interest rate at 12%. The assessee contested the additions before CIT (Appeals) and considering the submissions filed by the assessee, the CIT (A) held that the payment of interest was not unreasonable. The Dept. took case to ITAT who held that in spite of the fact that loan from bank can be

availed at 10.5% but it is also a fact that loan from bank are taken against the charge on the property and there are other opportunity costs involved in raising the loans from the bank which are not there in the case of these unsecured loans. Further, the interest rate charged by the market committee was 18%. Since the rate of interest are always higher when taken from private parties than the banks and with these finding appeal order passed by CIT (A) in this regard has been confirmed by ITAT.

It is further submitted that assessee company in all earlier years and in subsequent years credited interest @ 18% p.a. to those specified persons on loan A/c which was allowed in assessments made by Ld. A.O. u/s 143 (3)/153A. Thus as a rule of consistency the A.O. is to accept the same for this year also. Reliance is placed on the judgement ITAT, Delhi Bench in case of Ajanta Handtex P. Ltd. Vs. I.T.O. (ITA No. 4573/Delhi/2015 order dated 26-11-2015). In the said judgement relying on several judgement of courts the interest rate of 18% paid to related concern has been held reasonable on unsecured loans. Furthur reliance is placed on judgement of ITAT Calcutta Bench in case of I.T.O Vs. Emami Chisel Art Pvt. Ltd. (ITA No. 1702/Kol/2011 decided on 2-12-2013) wherein interest ranging from 15-18% on unsecured and unguaranteed loan has been held unreasonable. The ITAT, Ahmedabad Bench in case of Murardas Shilpa bhai & Co. Vs. I.T.O. (ITA No. 89/And/2017 order dated 30-5-18 copy submitted) has held that taking loans from related persons could avoid a lot of formalities and in this view that payment of interest at a little higher rate to persons covered u/s 40A (2) (b) cannot be termed excessive. The Jaipur Bench of ITAT in case of ACIT Vs. Shiv Agrevo Ltd. (ITA No. 995 & 1055 (JP) of 2007 order dated 13-2-2009) where in Hon'ble Bench relying on several judgements categorically held that prevailing market rate of interest on loans of the permanent nature and long term unsecured loans is between 18% to 24% and so held interest rate of 18% allowed to related persons as reasonable. The above

judgement of Jaipur Bench of ITAT has now been confirmed by Hon'ble Rajasthan High Court reported at CIT Vs. Shiv Agrevo Ltd. (2018) 99 taxman.com 402 (Raj.) wherein Hon'ble High Court held that the market rate of interest for long term loans is between 18% to 24%,. In view of these judicial pronouncements the interest @ 18% paid by assessee company to related persons for loan taken for business purpose was not excessive and is at arm length price.

The TPO has ignored these facts and position of unsecured loans from specified persons and compared the arms length price of such interest with average prime lending rate of SBI for F.Y. 2013-14 which arrived at 9.83% and added 300 basis points therein on account of loan provided to on concern which has low rating and no rating. The Ld. T.P.O. thus has totally failed to take into A/c that Bank loans which are always secured on assets and guaranteed and are repayable as term loan cannot be equated with unsecured loans taken from related parties which has no stipulation of payment at any fixed time."

47. We have considered the rival contentions of both the parties and perused the material available on record. From perusal of the impugned order, we noticed that the ld. CIT(A) has dealt with the issue in para No. 12 & 13 of his order and the same is as under:

"12. I have perused the written submissions submitted by the Ld. A/R and the order of AO. I have also gone through various judgments cited by the Ld. A/R and those contained in the order of TPO order dated 25-10-2017.

12.2 The TPO has not agreed to the interest payment @ 18% to the related party, loan taken from the family member of Tambi Group (detail can be seen on page l and 2 of the TPO order). The learned AO did not agree with the various submissions by the appellant for the reason mentioned in the order in para7.

Briefly the reasons for disallowing are;

1. *That TPO stated that appellant himself has taken loan @ 14% from IDBI and has not conceded for brokerage for unsecure loan if taken from related parties.*

2. *That the TPO stated that in majority of cases the interest charged is 9% to 12%. While stating so the TPO has not denied the payment of interest @15 to 24% on some occasions (refer para 7.2 of TPO order).*

3. *That the TPO has stated that such loan from related party cannot be considered as unsecured and the related parties are known to the appellant.*

4. *That the TPO has rejected the case laws cited by the appellant stating that same do not pertain to current year and interest rate are different for each year.*

12.3 Based on the above the TPO recommended the adjustment of Rs. 1,83,73,764/- which was reiterated by the learned AO in his order for the A Yr.

12.4 After careful consideration f the matter and the written submissions the appellant I am of the view that TPO and the learned AO is not making an addition of Rs. 1,83,73,764/- for the following reasons;

I. That the TPO has not given cognizance of interest payment @ 15 to 24% while explicitly mentioning it in the para 7.2 of his order. It simply implied that interest rate is not static and is dependent on various factors like time, person advancing it etc.

II That the TPO is -not correct in treating loan from related party as in the nature of secured loan. Nature of loan, being secured or unsecured, does not depend relationship with the person. It depend on the fact that whether such loan is backed up with some security or assets mortgaged etc. in simple terms With a secured loan, the lender can take possession of the collateral if you don't repay the loan as you have agreed. A car loan and mortgage are the most common types of secured loan. An unsecured loan is not protected

by any collateral. Thus the loan from related party in undoubtedly unsecured and a slight higher rate of interest payment is justifiable

III That TPO is very succinctly rejected the judgment cited by the appellant violating the principal of judicial discipline. The appellant has cited decision of Hon'b1e ITAT Jaipur namely ACIT Vs. Shiv Agrevo (ITA 995 & 1055 (JP) which is directly on the issue. this decision is affirmed by Hon'ble Rajasthan High Court in 99 taxmann.com 405. The head note of the decision on is as under:

Section 40A(2) of the Income-tax Act, 1961 - Business disallowance - Excessive or unreasonable payment (interest) - Where prevailing market rate of interest for long-term loans was between 18 per cent to 24 per cent, interest paid by assessee to family members at rote of 18 per cent for loans taken for business purpose was allowable [In favour of assessee]

12.5 The relevant para 13 of the Hon'ble High Court is as under:

"13. With regard to issue of loan which was advanced by the family members, the Tribunal has rightly observed in para 13 which reads as under:

"13. We have heard the rival contentions and perused the facts of the case. We are convinced with the arguments of the learned authorised representative as to prevailing market rote for the loans of permanent in nature and long-term loans is between 18 per cent to 24 per cent whereas the cases compared by the Assessing Officer are pertaining to the loans of temporary in nature. Also the assessee has advanced the money for the purpose of business needs, is not under dispute. Therefore, in such circumstances and facts of the case, the Assessing Officer is not justified in considering the said payment of interest as excessive or unreasonable and the same is directed to be deleted. Thus ground No. 1 of the cross-objection of the assessee is allowed."

12.6 The fact that such loans are for business need is not denied nor controverted. Such in interest payments are also for the business need"

13. Considering the above and judgment of Hon'ble ITAT Jaipur and that by Hon'ble High Court of Rajasthan, I am of the view that the adjustment proposed by the TPO is not factually and legally tenable. On the facts and in the circumstances of the case, the ld. AO is directed to delete the addition of Rs. 1,48,35,403/-. The ground is allowed."

48. From perusal of the record, we observed that, as per view of the ld. CIT(A) that the TPO has not agreed to the interest payment @ 18% to the related party, loan taken from the family member of Tambi Group (detail can be seen on page l and 2 of the TPO order). After careful consideration of the matter and the written submissions the assessee we are of the view that TPO and the AO is not making an addition of Rs. 1,83,73,764/- for the following reasons;

I. That the TPO has not given cognizance of interest payment @ 15 to 24% while explicitly mentioning it in the para 7.2 of his order. It simply implied that interest rate is not static and is dependent on various factors like time, person advancing it etc.

II That the TPO is not correct in treating loan from related party as in the nature of secured loan. Nature of loan, being secured or unsecured, does not depend relationship with the person. It depend on the fact that whether such loan is backed up with some security or assets mortgaged etc. in simple terms With a secured loan, the lender can take possession of the collateral if you don't repay the loan as you have agreed. A car loan and mortgage are the most common types of secured loan. An unsecured loan is not protected by any collateral. Thus the loan from related party in undoubtedly unsecured and a slight higher rate of interest payment is justifiable

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49. From perusal of the record, we also observed that the A.O. in assessment order determined the interest paid to associated enterprises at Rs. 3,68,16,604/- instead of total interest paid amounting to Rs. 5,16,52,007/-, hence adding back excess interest of Rs. 1,48,35,603/- to the total income of the assessee and in not appreciating that the loan taken from associated enterprise cannot be compared with the bank loan as in the case in hand loan given by the associated enterprise are unsecured whereas loans provided by the bank are secured and further in not appreciating that income tax department has allowed the interest payment on unsecured loans at 18 percent per annum to the related parties in earlier year. We further observed that the company has set up a Hotel at Durgapura, Jaipur in 2011 with the financial assistance from IDBI Bank Limited. The Company has availed loan for an amount of INR 70 crores in the year 2009 from IDBI Bank Limited bearing an interest rate of 14%. The said loan was secured by first charge on all the movable and immoveable assets of the Hotel, Corporate Guarantee and personal guarantees of the promoters. The Hotel operations were commenced in the year 2011. Due to liquidity issues, there were delays in payment of interest, resulting in levy of penal interest/charges from the bank at 2% p.a. This resulted in the effective interest charge of 16% p.a. The promoters had to infuse money into the Company, in order to service the principal repayment of the loan. The promoters infused money in the

company in the form of unsecured loans bearing an interest rate of 18% p.a. The prevailing market rates for unsecured loans from third party ranges between 18%-24% p.a. These loans are provided without any security/guarantee and such facility from a third party comes with higher cost as this is comparatively easier means of raising finance for the company. Further, the unsecured loans from third parties carries an upper limit up to which the loans are provided. However, in this case the support required was high regular and therefore, the promoters who obviously are related persons had to infuse the required amount in the form of unsecured loans without any stipulation of repayment on interest @ 18%. The minimum market rate of interest of unsecured loan through brokers in the year was 14.40% p.a. plus brokerage @ 1.2% and interest payment is to be made by monthly in advance and loan was to be for stipulated fixed period after which repayment has to be made and such loans are available only to persons having credit in market while the loan taken by assessee from above specified concerns who are promoters of company is @ 18% interest. The interest is only credited at year end and not actually paid and loan is unsecured without any stipulation of period in which it is to be paid. Thus on these facts the interest rate of 18% p.a. to specified person is justified and within the market rates of interest on such loans and are at arm's length. No new facts or circumstances have been brought before us by the ld AR in order to controvert or rebut the factual findings recorded

by the ld. CIT(A), therefore, we see no reason to interfere into or deviate from the findings so recorded by the ld. CIT(A) qua this issue and we uphold the same.

50. This appeal of the Revenue is dismissed.

51. Now we take ITA No. 1162/JP/2019 for the A.Y. 2015-16 wherein the Revenue has taken following grounds of appeal.

"1. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.2,14,61,524/- made u/s 43B of the Act, on account of non-payment of interest payment during the financial year since no documentary evidences have been produced that payment of the same has been made before due date of filling of return.*

2. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.2,76,034/- made u/s 36(1)(va) of the Act (i.e. PF/ESI addition) relying on the ratio of CIT Vs SBBJ 265 CTR 471 which is sub judice as SLP has been admitted by the Hon'ble Apex Court?*

3. *Whether on the facts and in the circumstances of the case in law the Ld. CIT(A) has erred in deleting the addition of Rs.1,83,73,764/- made on account of excess payment of interest @18% on unsecured loan by the assessee company to the related parties ignoring the fact that the interest @ 12.83% was determined after considering SBI's basic rate and risk factor or say on unsecured loan and assessee itself has taken loan from IDBI @ 14% per annum?*

4. *Whether on the facts and in the circumstances of the case in law the Ld. CIT(A) has erred in deleting the addition of Rs.3,99,616/- made on account of excess payment of interest @14% on convertible debentures by the assessee company to the related parties ignoring the fact that the interest @ 13% was determined after considering Arm's Length price of interest on debentures.*

The Appellant crave, leave or reserving the right to amend modify, alter add or forego any grounds of appeal at any time before or during the hearing of this appeal."

52. In this appeal, grounds appeal, facts and submissions of both the parties are identical to the facts and submissions of ITA No. 1161/JP/2019 for the A.Y. 2014-15, therefore, our findings given in ITA No. 1161/JP/2019 for the A.Y. 2014-15 shall apply mutatis mutandis in this appeal also.

53. In the result, all these five appeals of the revenue are dismissed.

Order pronounced in the open court on 31st August, 2021.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(संदीप गोसाईं)
(VIKRAM SINGH YADAV)	(SANDEEP GOSAIN)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 31/08/2021
*Ranjan
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- The DCIT, Central Circle-2, Jaipur.
2. प्रत्यर्थी / The Respondent- M/s Ksheer Sagar Developers Pvt. Ltd., Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 1158 to 1162/JP/2019)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar