IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD "D" BENCH

(Conducted Through Virtual Court)

Before: Ms. Annapurna Gupta, Accountant Member
And Ms. Madhumita Roy, Judicial Member

ITA No. 1607 & 1533/Ahd/2016
Assessment Year 2010-11

Sabarmati Gas Limited Plot No. 907, Sector-21, Gandhinagar-382021 PAN No: AAKCS0110N	Vs	ACIT Gandhinagar Circle, Gandhinagar (Respondent)
Joint Commissioner of Income Tax(OSD), Gandhinagar (Appellant)	Vs	Sabarmati Gas Limited Plot No. 907, Sector-21, Gandhinagar-382021 PAN No: AAKCS0110N

ITA No. 1886/Ahd/2016
Assessment Year 2012-13
& ITA No. 2002/Ahd/2017
Assessment Year 2013-14

Sabarmati Gas Limited Plot No. 907, Sector-21, Gandhinagar-382021 PAN No: AAKCS0110N (Appellant)	Vs	ITO, Ward-2, Gandhinagar & DCIT, Gandhinagar Circle, Gandhinagar (Respondent)

ITA No. 173 & 423/Ahd/2019
Assessment Year 2014-15

Sabarmati Gas Limited Plot No. 907, Sector-21, Gandhinagar-382021 PAN No: AAKCS0110N	Vs	DCIT Gandhinagar Circle, Gandhinagar
DCIT Gandhinagar Circle, Gandhinagar (Appellant)	V/s	Sabarmati Gas Limited Plot No. 907, Sector-21, Gandhinagar-382021 PAN No: AAKCS0110N (Respondent)

Assessee by : Shri S. N. Soparkar, Sr. Advocate & Shri Parin Shah, A.R.
Revenue by : Shri Mohd Usman, CIT DR & Shri Purushottam Kumar, Sr. D.R.

Date of hearing : 12-01-2022
Date of pronouncement : 28-02-2022

आदेश/ORDER

PER : ANNAPURNA GUPTA, ACCOUNTANT MEMBER:-

The present appeals relate to the same assessee and are against separate orders passed by the Commissioner of Income Tax (Appeals) (in short referred to as CIT(A)) u/s. 250(6) of the Income Tax Act, 1961(hereinafter referred to as the "Act") for different assessment years(AY) .While for AY 2010-11 & 2014-15 there are cross appeals filed by the Assessee and the Revenue , in AY 2012-13 & 2013-14 the assessee has filed appeal.

2. At the outset, it was pointed out that all the above appeals involved certain common issues, therefore they were heard together and are being disposed of by this common and consolidated order.

2.1 The issues which are common and repetitive in the appeals shall, for the sake of convenience , be dealt with by us issue wise and our decision will accordingly then

be applied to the respective grounds raised vis a vis the said issues in the different appeals before us.

3. Before taking up the common issues it is relevant to bring out a brief description of the assessee's business so as to provide a proper perspective in which the issues have arisen in the present appeals and thus facilitate in adjudicating them. Para 3 of the Assessment order, relating to assessment year 2010-11, bringing out the said facts is being reproduced hereunder:

> *The assessee, a joint venture company of Gujarat State Petroleum Corporation Ltd. and Bharat Petroleum Corporation Ltd., was incorporated on 06/06/2006 pursuant to the Agreernent entered into between GSPCL and BPCL, to procure, purchase and sell Natural Gas, Compressed Natural Gas (CNG), Piped Natural, Gas (PNG) or any other gaseous fuel and to sell and distribute the same in specified locations of Gujarat namely; Gandhinagar, Mehsana and Sabarkantha. This involves supply of gas to industrial, domestic and commercial establishments and to automobile and other industrial sectors through City Gas Distribution Network Systems.*

4. Thus the assessee is in the business of selling Gas through Gas Distribution Networks.

5. Having said so, we shall now first take up the common issues arising in the assessee's appeal.

1. **<u>The first issue relates to disallowance of claim of depreciation on fixed assets.</u>**

(Arising in all the appeals of the assessee before us in ITA No. 1607/A/16 AY 2010-11, ITA No.1886/A/16 AY 2012-13,ITA No.2002/Ahd/17 AY 2013-14& ITA No.173/A/19 AY 2014-15, Raised in Ground No. 1-1.7/8)

6. Briefly stated the Assessing Officer(AO) denied the claim of depreciation on fixed assets which were shown by the assessee to have been put to use on the last day of the previous year i.e. 30th /31st March of the respective previous years ending and all

these assets were in the nature of pipeline sections for the purpose of transporting gases to its various customers. While the assessee claimed that it was entitled to depreciation on the same since they were ready for use on the said date, as evidenced by the fact of the said pipelines being commissioned by technical officers and third parties, the Revenue denied the same stating that the assessee had neither demonstrated that the pipeline systems were connected to the entire grid of pipelines of the assessee, from the source to the ultimate consumer, and also not demonstrated gases being transported through it. On account of failure of the assessee to establish the aforesaid facts, it was held that the assessee was not eligible to claim depreciation on these assets as per the provisions of Section 32 of the Act.

7. For the sake of convenience, we are mentioning the facts relating to assessment year 2010-11 and referring to the findings of the A.O. and CIT(A) for the said year which finding of the Ld. CIT(A) has been followed in the other years also while upholding the order of the A.O. disallowing the claim of the depreciation.

8. The assets put to use on the 31st March 2010 in relation to which depreciation was denied to the assessee are as under:

Sr. No.	*Assets Description*	*Capitalization Date*	*Value*
1	*4" Steel Pipeline-P&M Gandhinagar-BSF*	*31-03-2010*	*12,907,799*
2	*4" Steel Pipeline-P&M North Balal*	*31-03-2010*	*24,235,899*
3	*4" Steel Pipeline-P&M Unjha*	*31-03-2010*	*27,143,914*

9. The finding of the A.O. denying depreciation on the same claimed by the assessee amounting to Rs. 2,13,31,985/- are at page 15 to 17 of the assessment order as under:

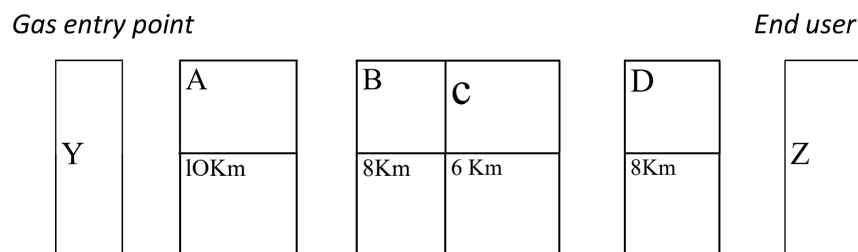
> *The reply filed by assessee is not found acceptable. The assessee has not produced any bills of Gas supplied through the new pipeline which is claimed to have been installed on 30/03/2010 & 31/03/2010. The assessee was also asked to justify from where the Gas was transmitted in and from where Gas was transmitted out but no details could be produced by the assessee.*

The assessee itself has submitted in its above reply that assessee awards separate contract for lying of different tranches of pipeline to different contractors for setting up connection at various places.

Thus the assets claimed to have been put to use is only a trench which has been completed. But it is clear that when all such tranches joined together from initial point to end point are not ready to transport, Gas cannot be supplied through only one part which is kept ready. For asset to be effectively used it is required that they are connected with each of her and are made operative. If only part is ready it cannot be said that it is put to use unless GAS is transported through it which is not possible in the case, of assessee as entire network is not ready but only a part is ready. The assessee failed to, produce any bills of Gas supplied through pipeline which is claimed to have been put to use on 30/03/2010 and 31/03/2010 only because it has not supplied any Gas through this new asset. The assessee has also failed to provide details of entry point and exit point of transportation of Gas because no Gas was transported at all as only a part was ready and entire network was not ready. Therefore asset cannot be considered as put to use and therefore depreciation claimed there on is also not allowable.

The following diagram explains the facts of the case very convincingly.

Gas entry point *End user*



It is clear from the above graph that if part A and Part C are ready Gas can not be supplied to destination Z from entry point Y unless all four parts are joined to gether and are become fuly operative. Till all ABCD parts are fully operative depreciation on only part A can not be allowed even if it is ready as it can not be put to use till all four parts are completed and become fully operative.

In view of the above discussion the depreciation of Rs. 2,13,31,98s/-being 7.5% (50% of 15%) of Rs. 28,44,26,468/- claimed by the assessee is not found allowable and therefore the same is disallowed.

(Disallowance Rs. 2,13,31,985/-)

9. And the findings of the Ld. CIT(A) upholding the assessment order are at para 6.2 of his order as under:

> *6.2 I have considered the assessment order and the submissions made by the appellant. The AO made the disallowance on asset's that were claimed to be put to use by the appellant on 30.03.210 and 31.03.2010. The AO after a detailed discussion, held that these assets had not been put to use on. 30.03.210 and 31.03.2010'and: hence depreciation was not allowable. The appellant, on the other hand, submitted that it was settled law that if an asset was ready to use, depreciation could be claimed on the same even it was not put to use. Therefore what is to be seen in this case is whether the assets commissioned on 30.03.2010 and 31.03.2010 were actually ready to use or not. The appellant is in the business of procurement and purchase of natural gas, CNG, PNG, etc. and supply and distribution of the same to industrial, domestic and commercial establishments through city gas distribution network systems. It has been claimed by the appellant that the pipeline system is an integrated network and the company keeps adding sections to it every year. These sections become an integral part of the grid. It is seen from the submission made by the appellant that the appellant company awards separate targets for laying pipelines to different contractors who set up connections at various places. The same are verified and certified thereafter by an independent agency. Based on this certificate, the commissioning report is received which, as per the appellant, is evidence of the asset being put to use, However, the argument of the appellant cannot be accepted for the following reasons:*
>
> > *(i) There is an inherent contradiction in the Submission made by the appellant. While on the one hand, the appellant is claiming that a commissioning report signifies that the assets have been put to use, on 1fhe other hand, it is also claiming that once a pipeline has been added to the grid, the same is ready to use even though it may not have been put to use.*
> >
> > *(ii) If indeed the assets have been put to| use, the appellant should have been in a position to submit documentary evidence in respect of the same by way of details of customers, bills of gas supplied, details of where the gas was supplied from and where it was supplied to, etc. None of these details however have been furnished by the appellant either during assessment or appellate proceedings.*
> >
> > *(iii) The only submission made by the appellant in respect of the addition of fixed assets to the grid is that once a tranche is added to the network, it is ready to transport gas to the customer. However, the appellant has stated that it employs different contractors for adding different parts of pipeline in different places. While the appellant, has shown evidence that this work has been completed by the individual contractors, no evidence or Explanation has been has been given to substantiate or explain that these independent sections added to the grid were in fact ready to supply gas to customers. Nowhere has the starting point and ending point of these pipelines been explained by the appellant.*
> >
> > *6.2.1. Considering the above facts, I am of the view that while sections of pipeline amy have been added to the main grid on 30th and 31st March 2010, the*

> *same were not ready to use and certainly were not put to use. Thus, I am inclined to agree with the view taken by the Assessing Officer and the disallowance of depreciation amounting to Rs. 2,13,31,985/- is confirmed. Ground of appeal no. 3 is dismissed.*

11. We have heard the contentions of both the parties. As is evident from the orders of the authorities below, the assessee's claim to depreciation on assets in the nature of pipeline systems for transmission of gases was denied for the reason that the pipeline systems were constructed in tranches which could effectively be used only when connected to the grid of the assessee and gas transported through it, which the assessee was allegedly unable to establish.

12. The contention of the Ld.Counsel for the assessee, while reiterating his submissions made before the lower authorities, was to the effect that the pipeline system was one integrated network whereby the company kept adding sections to the grid every year. That once the pipeline system was ready, it was tested and certified both by an independent technical agency as well the technical head of the company and a commissioning report issued thereafter. That this commissioning report was the fundamental evidence of the asset being ready to use and accordingly depreciation is claimed thereon .In this regard, our attention was invited to the submissions made before the A.O. as reproduced at page 15 of his order as under:

> *Reply: There are mainly four types of customers of the company, i.e. Domestic customer, Commercial Customer, Industrial Customer and CNG for automobiles and transport sector.*
>
> *It is pertinent to note that pipeline system is one integrated network (Pipeline Grid), whereby the company keeps commissioning and adding sections every year. Accordingly, such sections of pipeline, becomes integral part of the grid. The Gas to the customer can be supplied, only after pipeline is tested, commissioned and added to the pipeline network. It is a settled position of law that once asset is commissioned & put to use in business, depreciation is admissible...*
>
> *Assessee company awards separate contract for laying of different tranches of pipeline to different contractor for setting up connections at various places. Contractor executes the pipeline related work according to the work order and as per the specification provided by the company. After completion of the laying of the specified trench of*

pipeline, the same is tested, inspected and certified by the independent technical agency (Third Party Inspection) as required under Petroleum and Natural Gas Regulatory Board (PNGRB) as well as technical Head of the company.

Based on the certificate of the technical person the commissioning report is jointly issued by the technical person of the company as well as by the contractor. Such commissioning report is submitted to the finance department by the project department. After verification by the project department, entry for capitalization of assets under the head plant & machinery from capital work in progress - CWIP is passed at the end of the month. The Commissioning Report is fundamental documentary evidence of the asset being put to use.

We are attaching herewith copy of commissioning reports in respect of assets put to use on 30-03-10 (exceeding Rs. 1 crore) which is issued by M/s. Aneri Constructions Pvt. Ltd. (being pipeline construction contractor), M/s. Wood Group Engineering India Pvt. Ltd, (being Project Management Consultant) & M/s. SGS India Pvt. Ltd. (being Third Party Inspection Agency) appointed by SGL.

1. *P&MGandhinagar-BSF (Annexure-1)*
2. *P&MNorth Balol (Annexure-2)* *i*
3. *P & M Unjha (Annexure - 3)*

13. He also drew our attention to the various commissioning reports of the Technical Officers of the company and the third party contractors as referred to above at P.B 130-133 for A.Y 2010-11, P.B 294-304 for A.Y 2012-13, P.B 74-76 for A.Y 2013-14, P.B 197-200 for A.Y 2014-15.

14. He further contended that the Revenues contention that the pipelines were constructed in tranches and therefore it was necessary for the assessee to establish connection of the newly added tranches with the Grid for the purposes of demonstrating user of the asset for claiming depreciation, was not based on correct appreciation of facts since the pipeline systems were added to the grid ,tested and thereafter commissioned and the commissioning report itself established fulfillment of the criteria pointed out by the Revenue. The contention of the Revenue that the asseessee also needed to demonstrate transportation of gas through the pipeline systems for claiming depreciation was countered by the Ld.Counsel for the assessee

by contending that for the purposes of claiming depreciation under the Act passive user was sufficient and if it was established that the assets were ready to use, the assessee was eligible for depreciation. Our attention was drawn to the submissions made before the Ld. CIT(A) to this effect at page no. 17 as under:

> *3.5 The learned A.O. has mentioned that "Thus the assets claimed to have been put to use is only a tranch which has been completed. But it is clear that when all such tranches joined together/rom initial point to end point are not ready to transport, Gas cannot be supplied through only one part which is kept ready." The learned A.O has failed to take a note of the submission made by the appellant. Appellant has already mentioned vide letter dated 19-02-13 that*
>
> *"It is pertinent to note that pipeline system is one integrated network (Pipeline Grid), whereby the company keeps commissioning and adding sections every year. Accordingly, such sections of pipeline, becomes integral part of the grid." Thus, learned A.O. has not considered this fact and wrongly stated that "assets claimed to have been put to use is only a trench". The learned A.O. has not appreciated that pipeline system is one integrated network (Pipeline Grid), whereby the appellant company keeps commissioning and adding sections every year. Accordingly such sections of pipeline become integral part of the Grid. Hence, as and when one tranch commissioned it is added to the existing network and gas can be transported to the customer once the pipeline is tested, commissioned and added to the pipeline network. Thus, the learned A.O. has wrongly concluded at page no. 17 that "Till all ABCD parts are fully operative depreciation on only part A cannot be allowed even if it is ready as it cannot be put to use till all four parts are completed and become fully operative"*
>
> *3.6 The learned A.O. has not.considered the commissioning report submitted by the appellant which is fundamental documentary evidence of the asset being put to use and which has been jointly issued by the technical person of the company as well as by the contractor (Third Party)(Copy Enclosed – Annexure 11) .*
>
> *3.7 Without prejudice to our claim and contention, Appellant humbly submits that to claim depreciation it is not necessary that assets which were ready to use must have been used during the year. Your honour will appreciate that appellant can claim depreciation if the assets i.e. pipelines were ready to use but were not used during the year i.e. it is not compulsory that the gas has to be supplied through pipeline once the pipeline is ready to use. As in the case of appellant company, sometimes, the pipelines systems are built according to the requirement of customer and once the pipelines systems are ready to use, as per the instruction and requirement of the customer, gas is supplied through pipeline. Hence your honour will appreciate that contention of the learned A.O. that claim of depreciation is not allowable as the gas is not supplied through the pipeline is not acceptable.*
>
> *3.8 The appellant humbly draws the attention of your honour to the following decisions*
>
> *a. Decision of Commissioner of Income tax Vs. Geo Tech Construction Corporation (2000) 244 ITR 452 where in it was held that*

"Depreciation — User for business — There is no requirement in s. 32 that the assets should be owned and used for the whole of previous year in question—Wider meaning of the word "used" will include cases where an asset is kept ready for use—Tribunal, on a consideration of factual aspects, has recorded a finding about passive user'of tippers purchased by assesses just before the end of relevant1 previous-year—Said conclusion essentially is factual and it cannot be termed to be onewithout any basis or illogical—Assessee entitled to depreciation on .tippers (Asset)

Conclusion:

Tribunal having recorded a finding about passive user of tippers purchased by assesseejust before the end of relevant previous year, assessee was entitled to depreciation on tippers (Asset)."

b. CITvs. Refrigeration & Allied industries Ltd. (2000) 163 CTR (Del) 498 : (2001) 247 ITR 12 (Del) : (2000) 113 TAXMAN103 (Del)

"Depreciation—User for business—Active vis-a-vis passive use—There is no requirement in s. 32 that the assets should be used for whole of previous year—An asset can be said to be in use even when it is kept ready for use—Assessee had no business from cold storage during the year in question due to poor crop of potatoes— However, the plant was kept in operational condition— Expenses relating to cold storage plant allowed by AO—Depreciation could not be disallowed"

c. Capital Bus Service (p) Ltd vs. CIT, High Court of Delhi (1980) 17 CTR (DEL) 155 : (1980) 123 ITR 404 (DEL) : (1980) 4 TAXMAN 309

Depreciation—Allowability—Buses used for not more than 30 days—Buses kept ready by the owner for use in the business though the same could not be put to use for more than 30 days due to reason beyond assessee's control—Buses can be said to have been used throughout the year for the purposes of allowing depreciation I

d. CIT vs. Panacea Biotech ltd. High court of. Delhi (2009) 29 DTR (del) 110 : (2010) 324 ITR 311 : (2009) 183 taxman 212

Depreciation—User for business—Flat purchased and used as office—Assessee obtained possession of the flat on 21st March,i2000 and got the deed registered on 29th March, 2000 after paying the charges to the concerned society—Flat was fitted with requisite amenities for using it as an office and one consignment was sent to this office—Thus, the office was functional and was actually used for the purpose of business—User of office need not be full-fledged—Therefore, assessee is entitled to depreciation on the flat in the relevant assessment year—CIT vs. Refrigeration & Allied Industries Ltd. (2000) 163 CTR (Del) 498 : (2001) 247 ITR 12 (Del) and Capital Bus Service (P) Ltd. vs. CIT (1980) 17 CTR (Del) 155: (1980) 123 ITR 404 (Del) followed

The above case laws are squarely applicable to the case of appellant from which your honour can appreciate that once the assets are ready to use, depreciation is allowable irrespective of the fact that the assets are actually used or not.

3.9 The appellant further pray to your honour that the impugned disallowance on account of depreciation of Rs. 2,13,31,985/- on addition made to plant and machinery as made by the learned A.O. may kindly be deleted."

15. The Ld. D.R. however relied on the order of the A.O./CIT(A) stating that mere commissioning did not establish the fact of the pipelines being ready for use till they were shown to be connected from the initial point to the end point and it was shown that gas had been transported through it.

16. It is in this backdrop that the issue of claim of depreciation is to be adjudicated by us. Since the entire controversy rest and turns around the fact whether the assessee has been able to establish that the assets, in the form of pipeline systems were put to use,an essential prerequisite for claiming depreciation u/s 32 of the Act, it is important to understand the meaning of the said term as interpreted by various courts. Undoubtedly courts have held in various decisions that the assessee need not establish actual user of asset for the purpose of claiming depreciation and is entitled to claim the same even on demonstrating that is ready to use. Depending on the facts in each case,it has been held that assets ready to use were entitled to depreciation .

17. There is no dispute vis-a vis this proposition of law.

18. That the asset is ready to use is based on the facts of each case but the underlying import and meaning of the term no doubt is that the asset is in such a condition that it can be put to use without any further addition or exercise. That is the basic minimum requirement for claiming depreciation for user of assets.

19. In the facts of the present case since the fixed assets involved are pipelines in the gas distribution system there can be no iota of doubt that pipelines system which the assessee keeps building and getting constructed as part of its entire grid/network of pipelines are capable of being put to use only when they are connected to the original gird and are in a condition of transporting gases to the concerned destination/ customers safely. It is only when the assets are in such a situation that the pipelines can be said to be ready to use. As for establishing the fact of transportation of gases through it, it transpired during the course of hearing before us that the Audited Financial Statements of the assessee for assessment year 2010-11 , placed before us at paper book page no. 235 to 272, included Schedule 18 mentioning significant

accounting policies followed by the assessee in the preparation of its final accounts and which stated that the gas distribution system was treated as commissioned only when supply of gas commenced through. The relevant portion of Schedule 18 is reproduced for clarity as under:

SCHEDULE-18

Significant Accounting Policies and Notes to Financial Statements

A. Significant Accounting Policies

1…………………………….

2……………………………

3. Fixed Assets

Fixed assets are stated are stated at their original cost of acquisition / construction less depreciation. Cost includes freight, duties, taxes and other incidental expenses relating to acquisition and installation of the asset and is net of that portion of cost that has been met directly or indirectly by any other person. Accordingly, the cost of meters and instruments is net of initial connection charges levied on the consumers being part recovery of the costs.

In case of industrial and domestic contract connections, gas distribution systems are treated as commissioned when supply of gas commences to the individual customers.

(emphasis provided by us)

20. This fact was confronted to the Ld.Counsel for the assessee during the course of hearing itself, who responded by stating that the fact of supply of gas was evidenced to the Revenue authorities in A.Y 2013-14 & 2014-15 and could be established in the other years if given an opportunity.

21. In view of the above, there is no iota of doubt that in the facts of the present case, the assets by way of pipeline systems can be said to be ready for use only when it is established that the system is connected to the pipeline Grid of the assessee ,the origin/source of supply of gas being connected to the ultimate customers,and gas is also supplied through the same, which is the accounting policy followed by the assessee itself in this regard.

22. The assessee has relied only upon commissioning reports of the pipeline systems constructed during the year, and on going through the same we are unable to understand how it establishes the aforestated facts. Even the Ld.Counsel was unable to bring out the above . This surely does not suffice to establish the criteria held above by us for being eligible to claim depreciation .The Ld.Counsel for the assessee has pointed out that the fact of transporting gases through the pipelines was established on record in A.Y 2013-14 and 2014-15 . Our attention was drawn to P.B page No 74 pointing out therefrom that it related to commissioning of CNG Equipments of station of M/s Vinod Petroleum, and thereafter to P.B 77 which was bill of transporting gas from M/s Vinod Petroleum to Essar Oil Ltd. for the period 30-31st March 2013.Identical evidence for A.Y 2014-15 was shown placed at P.B page No 200 for the said year. He further stated that this fact could be established in the other years also.

23. In the interest of justice therefore we deem it fit to restore the issue back to the AO, in all the impugned assessment years, to verify whether the pipeline systems added during the year were connected to the grid and gas supplied through them. And only on establishing the aforesaid, depreciation be granted to them. Needless to add due opportunity for adducing the evidences in this regard be granted to the assessee.

24. We shall now deal with the issues arising in the Revenues appeal

Issue No.2 Treatment of initial connection charges received by the assessee whether revenue or capital in nature.

(Arising in Revenues appeals in ITA No. 1533/A/16 for AY 2010-11, ITA No.423/A/19 for AY 2014-15)

25. Brief facts relating to the issue are that the initial connection charges being collected by the assessee from its consumers was being reduced by the assessee from the cost of assets by way of meters and line connection and depreciation being claimed at the reduced value of these assets. In assessment year 2010-11 and

assessment year 2014-15, the A.O. held that these charges had nothing to do with the meters purchased by the assessee or pipelines connection given to the assessee but were in lieu of services rendered to the consumers and received by way of one time charge. He held that the same was in the nature of income of the assessee and accordingly added the same to the income of the assessee. The relevant findings of the A.O. in Assesment year 2010-11 at para 7 of the order is as under:

> ***7. Initial Connection Charges:-***
>
> *The assessee was asked vide show cause dated 28/01/2013 to explain why Initial Connection Charges may not be added in the income.*
> *The assessee filed its reply vide submission dated 05/02/2013 which is considered. The assessee has not submitted any reason for not treating it an income but has reproduced finding of CIT(A) given in earlier years. It has not at all tried to explain why it may not be treated as income in year under consideration.*
> *The assessee has claimed depreciation on meters as per the provisions of act but it has also reduced the cost by reducing amount of initial connection charges from that. Thus as against depreciation allowable only @15% the assessee has reduced its income by 100%. The assessee is not charging initial connection charges only to the extent of cost of meter. Numbers of other administrative charges, labour & several other charges are incurred for providing connection to the customers. Thus, it is a composite service and not only reimbursement of cost of meters. Further, this is a service, which is provided by assessee to its customers for which it is collecting connection charges. The charges received are non-refundable and therefore there is no contingency that in future it will have to be reversed, amount collected from customers is also not in form of deposit which is to be returned back. It is a one time charge collected by the assessee from its custmers against providing Gas connection. It is not amount collected for installing meter. The custmer accepts services of the assessee of suppling gas. The custmer shall not accept- only a meter if no Gas is to be supplied to it. Thus assessee is not collecting cost of meter but it is charging custmer for providing Gas cormection which is a composite service. This is a clear income of the assessee, which is taxable in the hands of the assessee, and it cannot be treated as capital receipt. In view of the above income of the assessee is added to the extend it has collected initial connection charges of Rs.4,60,31,594/-. Since depreciation has been reduced to the extent of 15% net addition is worked out at Rs.3,91,26,854/- (Rs.4,60,31,594 -Rs.69,04,739/-).*

26. For identical reasons addition was made in assessment year 2014-15 also. The Ld. CIT(A) deleted the addition in both the years noting the fact that identical addition made in the case of the assessee right from assessment year 2007-08 onwards stood deleted by the ITAT. The relevant findings of the Ld. CIT(A) is as under:

5.2 I have considered the assessment order and the submissions made by the appellant, The AO after discussing the matter in the assessment order held that while the appellant had claimed depreciation on gas meters, it had also reduced the cost by reducing the amount of initial connection charges from the same, The AO held that these charges were income in the hands of the appellant and taxable as such and could not be treated as capital receipt The appellant submitted that as per the accounting policy regularly followed by the company, these charges were treated as recovery of the cost of the meters and were thus reduced from the cost of plant and machinery, Hence, these were shown as capital receipt.

5.2.1 A perusal of the submissions made by the appellant shows that the identical issue was before the Hon'ble CIT[A], Gandhlnagar for Asst. Years 2007-08 & 2008-09. The Hon'ble CIT[A), Gandhinagesr has held as under;

> *"6,2 I have carefully gone through the facts of the case, the assessment order, the appellant contentions and. the decided law on the issue, I find that the very issue was decided by my predecessor in the assessee's case for AY 2007-08 vide order dated 30/08/2010 as follows:*
>
> *"3,3.1 have considered the assessment order as well as assessee's contentions. It is seen that total amount of Rs. 5,28,72,901/- was collected as initial connection charges from customers towards cost of the meters and instruments. Out of this amount Rs. 4,76,62,071/- have been collected on behalf 'of BPCL for the meters and instruments to be supplied by them and shown as current liabilities by the appellant. Balance amount of Rs. 52JSOJ830/- has been netted out of off from the value of cost of plant and machineries. A.O. has held this amount of Rs, S,28,72,901/- as the taxable income holding that these are non-refundable initial connection charges for meters and equipment's installed which remains properly of the seller. The above conclusion of A.O. is not based on the facts of the case because out of Rs, 5,28,72,901/-, Rs. 4,76,22,071/~ are initial connection charges collected on behalf of BPCL for the equipments to be installed and they have been rightly shown as the current liability in the assessee's case. This cannot be treated as income of the assessee in any case. As regarding the amount ofRs. 52,50,830/-assesse has treated it as the capital receipt and has reduced the value of plant and machinery by this amount This is appropriate as the said amount has been received towards the installation of pipeline, meters and equipment's Le. Capital assets for supplying gas to the clients. This amount is on account of bringing into place the plant & machinery and appellant has already claimed the reduced depreciation to this extent. Such conclusion is duly supported by decision of Hon 'hie Supreme Court in the case of Hoshiarpur Electric Supply Co Vs. CIT 41 ITR 608 (SC) where the recoupment of expenditure for bringing into existence a capital asset has been held as capital in nature. This is further supported by the decisions in the cases ofCIT Vs. Poona Electric Supply Co. Ltd, 14ITR 622 (Bom) and Monghyr Electric Supply Co, Ltd. Vs. CIT26ITR IS (Patna).*
>
> *Accordingly, this ground of appeal is allowed and the addition ofRs. 5,28,72,901/- is deletecl."*

I do not find any reason to disagree with the decision of my predecessor, where the facts of the case, the arguments of the AO and the contentions of the appellant are essentially the same. Accordingly, the ground of appeal is allowed and the addition ofRs. 9,32,12,5BS/- is deleted."

5.2.2 In view of the- decision of my Id, predecessor and the fact that initial connection charges have been treated as capital receipt by the appellant regularly over the years, the addition of Rs.3,91,26,854/- is deleted, Ground of appeal N0.2 is allowed.

27 Before us by the Ld. D.R. relied on the order of the Ld. A.O. Ld. Counsel for the assessee reiterated the contentions made before the Ld. CIT(A) and as a corollary relied on the findings and the order of the Ld. CIT(A) in this regard.

28. We have gone through the contentions made by the Ld. Counsel for the assessee before the Ld. CIT(A) which is reproduced at para 5.1 of the order is as under:

5.1 During the course of appellate proceedings, the appellant has made the following submissions:
2.1 "The learned A.O. asked the appellant vide notice dated 04-10-12 & 28-01-13 as under: Notice dated 04-10-12
"Q.I Please described nature of initial connection charge of Rs. 4,60,31,594/- and liquidated damages of Rs. 2,43,401/- which are shown as capital receipt in audit report.
"Q.3 Please explain why initial connection ch\arges may not be treated as your income for current year. Please also explain against which block of asset this income is adjusted and what is the rate of depreciation of this block. •
2.2 The appellant replied the same vide letter dated 19-10-12 & 05-02-13 (Copy enclosed - Annexure - 5 & 6) as under.
Reply: "The company has installed certain meters and instruments at the sites of the customers to provide the last point connectivity and for that the company has collected Rs. 4,60,31,594/- which has been shown as initial connection charges and has been treated as capital receipt, I We are enclosing herewith copy of ledger account of Initial Connection Charges - ICC for your ready reference. (Annexure-1)
We now draw your attention to Note No. 3 - Fixed Assets of Schedule 18 of Significant Accounting Policies, which is reproduced below for your ready reference.
"3. Fixed Assets
Fixed Assets are stated at their original cost of acquisition / construction less depreciation. Cost includes freight, duties, taxes and other incidental expenses relating to acquisition and installation of the asset and is net of that portion of cost that has beer\ met directly or indirectly by any other person. Accordingly, the cost of meters and instruments is net of initial connection charges levied on the consumers being part recovery of the costs."
Thus, as per the accounting policy regularly followed by the company, initial connection charges are treated as recovery of cost of meters and .instruments and thus are reduced

from the cost of plant & machinery and hence the same has been shown as capital receipt in Point No. 13(e) of Form No. 3CD.

We also draw your attention to the order of Hon'ble CIT (A) Gandhinagar dated 30-08-10 for A. Y. 07-08 where in Hon'ble CIT (A) has confirmed the accounting treatment followed by the company.

We also draw your attention to the point no. 6.2 at page no.23 of the order dated 17-03-12 for A.Y 2008-09 passed by Hon'ble CIT(A) Gandhinagar, which is reproduced hereunder. [

"6.2 I have carefully gone through the facts of the case, the assessment order, the appellant contentions and the decided law on the issue. I find that the very issue was decided by my predecessor in the assessee's case for AY 2007-08 vide order dated 30/08/2010 as follows:

"3.31 have considered the assessment order as well as assessee's contentions. It is seen that total amount of Rs. 5,28,72,901/- was collected as initial connection charges from customers towards cost of the meters and instruments. Out of this amount Rs. 4,76,62,071/- have been collected on behalf of BPCL for the meters and instruments to be supplied by them and shown as current liabilities by the appellant. Balance amount of Rs. 52,50,830/- has been netted out of off from the value of cost of plant and machineries. A.O. has held this amount of Rs. 5,28,72,901/- as the taxable income holding that these are non-refundable initial connection charges for meters and equipment's installed which remains property of the seller. The above conclusion of A.O. is not based on the facts of the case because out of Rs. 5,28,72,901/-, Rs. 4,76,22,071/- are initial connection charges collected on behalf of BPCL for the equipment's to be installed and they have been rightly shown as the current liability in the assessee's case. This cannot be treated as income of the assesses, in any case. As regarding the amount ofRs. 52,50,830/- assesses has treated it as the capital receipt and has reduced the value of plant and machinery by this amount This is appropriate as the said amount has been received towards the installation of pipeline, meters and equipment's i.e. capital assets for supplying gas to the clients. This amount is on account of bringing into place the plant & machinery and appellant has already claimed the reduced depreciation to this extent Such conclusion, is duly supported by decision of Hon'ble Supreme Court in the case of Hoshiarpur Electric Supply Co Vs. CIT 41 ITR 608 (SC) where the recotipment of expenditure for bringing into existence a capital asset has been held as capital in nature. This is further supported by the decisions in the cases ofCIT Vs. Poona Electric Supply Co. Ltd. 14ITR 622 (Bom) and Monghyr Electric Supply Co. Ltd. Vs. ClT 26 ITR 15(Patna).

Accordingly, this ground of appeal is allowed and the addition ofRs.5,28,72,901/- is deleted."

*I do not find any reason to disagree with the decision of my predecessor, where the facts of the case, the arguments of the AO and the contentions of the appellant are essentially the same. Accordingly, the ground of appeal is allowed and the addition of Rs.9,32,12,585/-is deleted." *

From the above you will appreciate that Hon'ble CIT (A) has confirmed the accounting treatment followed by the company."

As mentioned above, Initial connection charges - ICC are treated as recovery of cost of meters and instruments from the customers and the same are reduced from the block of plant & machinery on which depreciation has been claimed at l5%".

I :

2.3 The appellant humbly submits that appellant has been treating the Initial connection charges as Capital Receipt and the same is accepted by the Internal Auditors, Statutory Auditors and also Tax Auditors, Even Hon'bleClT(A) has accepted the methodology adopted by the appellant company for A. Y. 2007-08 &A.Y. 2008-09 which is reproduced at point no.2.3.

2.4 The learned A.O. has not considered the fact that by reducing the block of assets the appellant has already claimed reduced depreciation and therefore over a period of time the revenue effect of the same will be nil.

2.5 The appellant further draws the attention of your honour to the decision of Cyanamid Agro Ltd. Vs. Addl. CIT (2009) 121 TTJ [Mumbai) 606 : (2009), wherein it was held as under(Copy enclosed -Annexure - 7)

"Accounts - Valuation of stock - Outward freight on goods - Assessee having valued the closing stock as per method of accounting Regularly followed, AO was not justified in adding the cost of outward freight on manufactured goods from the factory premises to the depots - what could be included under s. 145A was only the amount of any tax, duty, cess or fee, by whatever name called, actually paid or incurred by'the assessee to bring the goods to the place of its location and condition as on date of valuation - Addition made bytheAO is neither permissible under s. 145 nor under s. 145 A."

2.6 The appellant further draws the attention of your honour to the decision of Hoshiarpur Electric Supply Co. Vs. CIT (1961) 41 ITR 608 (SC), wherein ;f was held as under. (Copy enclosed - Annexure 8)

Business income - Trading receipt - Assessee - Complany engaged in distributing electricity - receiving contributions from customers for installing service lines - such contributions are in direct recoupment of the expenditure for bringing into existence a capital asset of lasting value, and hence capital in nature -surplus in the hands of the assessee after installing service lines - such surplus not of profit in the nature of trading receipt -hence not taxable as business income.,

2.7 The appellant further draws the attention of your honour to the decision of CIT Vs. Poona Electric Supply Co. Ltd. (1946) 14 ITR 622 (Bom), wherein it was held as under. (Copy enclosed - Annexure 9)

Business income - Trading receipts - contribution received by electricity co. from government towards construction of new supply lines - not in the nature of recurring income or receipts - not an extra charge for supplying electricity to government - not, therefore, trading receipts.

2.8 The appellant further draws the attention of your honour to the decision of Monghyr Electric Supply co. Ltd. Vs. CIT (1954) 26 ITR 15 (Pat), wherein it was held as under.(Copy enclosed - Annexure 10)

Reference - Mixed question of fact and law - Payment'received on account of cost of'service connection whether a capital receipt in the hands of electric supply company is not a pure question of fact but is a mixeti question of fact and law - If the tribunal has

> *applied a wrong legal principle in determining this question the matter passes from the realm of fact in to the realm of law and the High Court is entitled to interfere with the finding of the Tribunal.*
>
> *Business income - Trading receipts - electric supply co: received a sum as cost of service connection from consumers - shown as revenue receipt in books of account merely in view of statutory regulations -contribution made by consumers is a contribution compelled by statute for installation of service lines - it, bears the character of capital receipt and is not includible in business income - question is to nature of such receipt is a mixed question of fact and law, *
>
> *From the above, your honour will appreciate that contribution made by consumers is a contribution compelled by statute for installation of services lines and it bears the character of capital receipt and is not includible in business income.*
>
> *Similarly in the case of appellant, as per the accounting policy followed by it has reduced the amount of ICC from the block of Plant & machinery. So the addition made by the learned A.O. is not justified.*
>
> *2.9 The appellant humbly pray to your honour that the impugned additions of Initial Connection Charges - ICC Rs. 3,91,26,854/- as made by the learned A.O. may kindly be deleted.*
>
> *ALTERNATE CLAIN:*
>
> *The appellant humbly submits that if the disallowance is confirmed, then the amount of lCC be treated as additions towards block of plant & machinery and 'depreciation u/s, 32 be allowed to the appellant as an alternate claim."*

29 From the above it emerges that the contentions taken up by the Ld. Counsel for the assesee before the Ld. CIT(A) were to the effect that

(a) the initial connection charges were reduced from the cost of meters and instruments as per the accounting policy followed by it as noted in the notes to the accounts forming part of the audited balance sheet of the assessee for the year.

(b) That identical issue had been dealt with by the ITAT in the case of the assessee for assessment year 2007-08 and 2008-09 accepting the plea of the assesee and treating the connection charges as capital receipt. The emphasis of the assessee which found favour with the ITAT in the earlier years was that these contributions were for the purpose of installation of service line and meters being recovery of the cost of meters and instruments and therefore bore character of capital which accounting policy had been consistently followed by the assessee in all the years.

30 Before us also, ld. Counsel for the assessee reiterated these contentions and also drew our attention to the order of the ITAT in assessment year 2007-08 & 2008-09 placed before at paper book page no. 1 to 21 of the compilation of orders. Our attention was also drawn to the Annual Accounts along with the auditor's report for assessment year 2010-11 placed at paper book page no. 235 to 272 more particularly to page no. 261 being Schedule 18 containing significant accounting policies and notes to financial statements at point no. 3 thereof relating to fixed assets and dealing with the initial connection charges as under:

SCHEDULE-18

Significant Accounting Policies and Notes to Financial Statements

A. Significant Accounting Policies

1.......

2............

3. Fixed Assets

Fixed assets are stated are stated at their original cost of acquisition / construction less depreciation. Cost includes freight, duties, taxes and other incidental expenses relating to acquisition and installation of the asset and is net of that portion of cost that has been met directly or indirectly by any other person. Accordingly, the cost of meters and instruments is net of initial connection charges levied on the consumers being part recovery of the costs.

In case of industrial and domestic contract connections, gas distribution systems are treated as commissioned when supply of gas commences to the individual customers.

31. Thus the assessee, accounting for the initial connection charges as recovery of cost of meters and instruments , which has found favour with the ITAT also in preceding years in the case of the assessee, the Ld.CIT(A) was justified in allowing the assesses treatment of initial connection charges as being capital in nature in A.Y 2010-11.

But having said so we find that for A.Y 2014-15, the circumstances were not the same as in A.Y 2010-11. The submissions of the Ld.Counsel for the asseesee before the ld. CIT(A) in assessment year 2014-15 reveal that the assessee had changed its method of accounting for initial connection charges ,accepting it to be in the nature of its

income, having nothing to do with recovery of cost of meters and instruments, on the advice of a senior counsel. That having changed its treatment of initial connection charges as Revenue receipts in its books of account, the same was however continued to be treated as capital receipt for income tax purposes. The contentions to this effect reproduced at para 4.1 of the order as under:

> *4.1 .*
>
> *.*
>
> *.*
>
> *.*
>
> *1.2 During the course of assessment proceedings, the learned A.O. asked the appellant that why the similar disallowance should not be made for A. Y. 2014-15 as it was made in A. Y. 2013-14 and asked to provide details of Initial Connection Charges. The appellant vide letter dated 14-12-17 submitted as under:*
>
> *"The company has installed certain meters and instruments at the sites of the customers to provide the last point connectivity and for that the company has collected Rs.2,84,76,945/- which has been shown as initial connection charges and has been treated as Revenue receipt. We are enclosing herewith copy of ledger account of Initial Connection Charges - ICC for your ready reference. (Annexure - 2A)*
>
> *We now draw your attention to relevant notes forming part of accounts which is reproduced below for your ready reference*
>
> *sub .note (c) - Tangible Assets of Note No. 2 - Significant Accounting Policies,*
>
> *C. Tangible Assets:*
>
> *Fixed Assets are stated at their original cost of acquisition / construction less accumulated depreciation and impairment losses, if any. Borrowing costs directly attributable to qualifying assets / capital projects are capitalized and included in the cost of fixed assets. Cost includes freight, duties, taxes and other incidental expenses relating to acquisition and installation of the asset and is net of that portion of cost that has been met directly, or indirectly by any other person.*
>
> *sub note (h) - Revenue Recognition of Note No. 2 - Significant Accounting Policies.*
>
> *" (a} Sale of Natural Gas*
>
> *i) Sale of Natural Gas is recognized on supply of gas to customers by metered/assessed measurements and when no significant uncertainty exists regarding the measurability or collectability of the sale consideration.*

ii) Revenue on sale of Compressed Natural Gas (CNG) is recognized, on sale of gas to consumers from retail outlets.

iii)) Gas Transmission income is recognized in the same period in which the related volumes of gas are delivered to the consumers, I

(b) Other operating income

i) Initial Connection Charges : Based on the Management view and opinion taken by group City Gas Distribution (CGD) Company from Senior Counsel on Identical facts, since the company does not pass on any ownership or other right in the pipeline and equipments in favour of the customer, the amounts collected towards initial connection charges from industrial customers and commercial - non commercial customers are in the nature of installation fees for providing the infrastructure to facilitate the supply of gas and are recognized as revenue.

(iii) Security Deposits : The amounts collected towards "Security Deposit" from industrial customers, Commercial, Non-commercial customers and domestic customers are in the nature of refundable to secure the gas usage bills. Accordingly, the same are recognized as liability under head "Deposit from Customers" in the balance sheet as and when recovered," Hi) The amounts collected towards extra charges, modification charges and alteration charges from domestic customers are in the nature of non-refundable charges to avail the extra facility for gas connection. Accordingly, the same are recognized as revenue as and when the Company completes such installations and the customers accept such installations.

iv) Revenue in respect of Interest/ late payment charges on delayed realizations from customers, If any, is recognized on accrual basis.

Further, we have to state that till F. Y. 2011-12 (A. Y. 2012-13), as per the accounting policy regularly followed by the company, initial connection charges were treated as capital receipt i.e. recovery of cost of meters and instruments and thus were reduced from the cost of plant & machinery. From F. Y. 2012-•13 (A. Y. 2013-14) initial connection charges are treated as revenue receipt and offered as income under the head Gas Transmission & Other Operating Income. However, for the purpose of arriving at taxable income under the provisions of Income tax, Company has treated the initial connection charges as capital receipt and accordingly company has reduced the amount of initial connection charges from the value of plant & machinery and in turn claimed reduced depreciation.

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1.6 The Ld. A.O. has failed to appreciate that the appellant has changed its accounting treatment from A.Y. 2013-14 and treated the initial connection. charges as revenue receipt in the books of account. However, the appellant has treated the same as capital receipt for the purpose of calculating income under the normal provision of the act and claimed reduced depreciation.

32. This change in accounting policy was verified from the copy of Audited financial statements for the A.Y 2014-15 placed before us at paper book page no. 226-259.

33. The assessee clearly cannot treat a transaction in two different manners, one in its books of accounts and another under the Income Tax Act, unless allowed by statute. There is clearly no reference made to any provision of law while treating the initial connection charges as capital receipt for Income Tax purposes having admitted to the position that it was its income/a revenue receipt in its books of accounts.

34. Considering this change in position of the assessee admitting and accepting the treatment of initial connection charges as its income from assessment year 2013-14 onwards the Ld. CIT(A), we find, has grossly erred in applying the decision of the ITAT in the case of the assessee for earlier years when the position was reverse and the assessee had been treating the initial connection charges as capital receipt both in its books of account and Income Tax purposes also. Clearly the ratio laid down in the said decision turned on the fact of the ITAT accepting that the connection charges were reimbursement or recovery of the cost of meters and instruments supplied to the customers. But with the assessee having accepted the fact that these charges had nothing to do with the meters and instruments, the said proposition could not have been applied in the present case. But since the Ld. CIT(A) failed to take note of this change in position despite having been pointed out by the ld. Counsel for the assessee, We are of the view that the issue needs reconsideration and is therefore

restored to the AO to decide the same afresh in the light of the changed facts and circumstances and after giving due opportunity of hearing to the assessee.

35. Since the change was adopted from assessment year 2013-14 onwards, the issue arising in assessment year 2014-15 before us is restored back to the A.O. with the direction to consider the changed facts and circumstances relating to the nature of the initial connection charges as noted by the assessee in its accounting policies as per the notes of accounts forming part of the balance sheet and taking into consideration all other aspect relating to the issue which he considers necessary and thereafter to adjudicate the issue in accordance with law. Needless to add, the assessee be granted due opportunity of hearing.

36. As for the issue relating to assessment year 2010-11 is concerned, though admittedly the assessee has accepted the fact of these charges being revenue in nature, in assessment year 2013-14 onwards but till the said assessment year, the assessee was consistently treating it as a capital receipt being related to recovery of cost of meters and instruments and which had also found approval with the ITAT. Therefore, we are of the view that the position up to assessment year 2012-13,i.e prior to the year in which the assessee itself admitted to the real nature of the charges being revenue ,cannot be disturbed. Therefore for assessment year 2010-11 the order of the Ld. CIT(A) allowing assessee's claim of treating the initial connection charges as capital in nature is upheld.

ISSUE No.3.R<u>elating to disallowance of interest expenditure</u>.
(Arising in Revenues appeals in ITA No. 1533/A/16 for AY 2010-11, ITA No.423/A/19 for AY 2014-15)

37. This issue arises in revenue's appeal for assessment year 2010-11 and 2014-15 wherein the A.O. had disallowed interest expenses holding the same to be pertaining to work-in-progress and thus capitalizing it. The relevant portion of the order of the A.O. holding so at para 11 in assessment year 2010-11 is as under:

7. Capitalization of Interest

On perusal of P&L A/c audit report and details filed by the assessee it is found that during the year under consideration the assessee has made addition to its assets as under:-

Before 6 months	*Rs.*	*27,95,76,794/-*
After 6 months	*Rs.*	*49,90,75,142/-*
Total	*Rs.*	*77,86,51,936/-*

In addition to this there is work in progress of Rs. '36,57,87,872/- at the end of the year. Which was also Rs. 39, 07,41, 151/- at the end of immediately proceeding year i.e. work in progress was almost, same through out the year even if assets worth Rs. 77,86,51,936/- is put to use.
As against this the assessee has incurred total financial expenses of Rs. 10,35,26,414/- out of which only Rs. 2,57,13,407/- has been treated as borrowing cost capitalized.
The assessee was asked to explain how interest was capitalised by quoting specific transaction vide notice issued u/s. 142(1) on 12/02/2013. The assessee could not offer any specific answer in response to the specific quarry raised and preferred to answer in general terms. On perusal of details of assets put to use submitted vide submission dated 19/10/2012 it is found that assessee has capitalized Rs. 1,31,34,859/- on assets put to use during the year. Out of total amount of Rs. 2,57,13,407/- capitalised during the year.
Thus only Rs. 11,25,78,548/- (2,57,13,407 - 1,31,34,859) has been capitalised on WIP. If average WIP of the year is taken at Rs. 37,82,64,511/-then also interest cost of Rs. 3,02,61,160/- @ 8% approx can be attributable to WIP. As against which assessee has only capitalised Rs, 1,25,78,548/-. Therefore remaining amount of Rs. 1,76,82,6127- is required to be capitalised.
In view of the above discussion interest of Rs. 1,76,82,612/- is disallowed. However it is allowed to be added in the cost of WIP.

38 Identical disallowance was made in assessment year 2014-15 also amounting to Rs. 2,21,03,942/-.

39. The Ld. CIT(A) deleted the same noting that the A.O. has given no reason for making the disallowance on interest taking only an average figure and calculating attributable interest only while the assessee had demonstrated the fact of having capitalized the interest expenditure attributable to each project. The relevant findings of the Ld. CIT(A) at para 7.2 of his order for assessment year 2010-11 is as under:

7.2 I have considered the assessment order and the submissions made by the appellant. The AO held that the appellant had claimed excessive interest expenses and working out the average WIP of the year, disallowed interest of Rs.1,76,82,612/- and capitalized the

same. The appellant stated that the disallowance of interest attributable to WIP had been -an arbitrary manner by taking an average figure

7.2.1. A perusal of the relevant part of the assessment order shows, that the AO has not given any reasons for making the disallowance on account of interest, but has merely taken an average figure and calculated the attributable interest accordingly. The appellant has made detailed submission to show that the capitalization of interest expenditure has been done on actual basis as per its method of accounting over the years and has capitalized expenditure attributable to each of the projects separately and on a day-today basis. Considering these facts, I am of the view that the AO was not justified in making the disallowance without any concrete basis and therefore the disallowance of Rs.1,76,82,612/- is deleted. The ground of appeal No. 4 is allowed.

40. Before us, Ld. Counsel for the assessee pointed out that besides the fact that the assessee had demonstrated the capitalization of all interest pertaining to interest bearing funds utilized for CWIP and the Ld. A.O. without giving any reasons has adopted an arbitrary method for calculating the interest pertaining to CWIP, the ld. Counsel contended that the Co-ordinate Bench of the ITAT have repeatedly been deleting identical disallowance of interest on finding that sufficient interest free funds were available with the assessee. Our attention in this regard was drawn to the order of the ITAT Ahmedabad Benches in the case of Nova Petrochemicals Ltd. for assessment years 2009-10 & 2010-11 in ITA No. 2876/Ahd/2014 dated 10.07.2018 placed at paper book page no. 22 to 32 and to the decision of the ITAT benches against in the case of Nova Petrochemecials Ltd. for assessment year 2012-13 in ITA NO. 388/Ahd/2016 placed at paper book page no. 33 to 35.

41. Ld. D.R. per contra relied on the order of the A.O.

42. We have heard contentions of both the parties. We have also gone through the order of the Ld. CIT(A), and we do not find any infirmity in the same. The ld. CIT(A) we find has given a categorical finding of fact that the assessee had demonstrated having capitalized all interest pertaining to funds utilized in capital CWIP. The Ld. CIT(A) has also pointed out the fact that the A.O. has failed to controvert this fact and has gone on to make the disallowance arbitrarily without any

basis. These facts have remained uncontroverted before us. Therefore, there is no reason to interfere in the order of the Ld. CIT(A) deleting the disallowance of interest after appreciating the facts before him. Moreover, we are also in agreement with the contention of the Ld. Counsel for the assessee that no disallowance of interest is warranted where sufficiency of own interest free funds is demonstrated by the assessee. It is a settled position of law that where own interest free funds are available, the presumption is that the said funds were used for the purpose of making investments in CWIP or otherwise. The Hon'ble Apex Court has settled this position of law in the case of CIT(Large Taxpayers Unit) vs Reliance Industries Ltd(2019)307 CTR 121(SC).

43. Before us, the availability of sufficient own interest free funds for making investments in CWIP during the year has been demonstrated by the Ld. Counsel for the asessee. He has pointed out that own funds by way of share capital and reserves were to the following extent in assessment year 2010-11 and 2014-15 as under:

Assessment year	2010-11	2014-15
Share capital & Reserves	162 crores	182 crores

44. The CWIP reflected in the balance sheet of these years amounted to

Assessment year	2010-11	2014-15
CWIP	36.58 crores	16.98 crores

45. Thus, in view of the above facts also, there was no reason for making any further disallowance of interest. The order of the Ld. CIT(A) therefore deleting the disallowance of interest in assessment year 2010-11 and 2014-15 is upheld.

46. Having dealt with the repetitive issues arising in the appeals before us, we shall now proceed to deal with the appeals ground wise

47. We shall first deal with the cross appeals pertaining to **A.Y 2010-11** in **ITA No. 1607/Ahd/2016 & ITA No. 1553/Ahd/2016**

Taking up first the appeal of the assessee,in **ITA No. 1607/Ahd/2016 for A.Y. 2010-11 (Assessee's appeal)**

Ground No. 1-1.7 pertain to the same issue of disallowance of depreciation and reads as under:

ITEM NO. I : DISALLOWANCE ON ACCOUNT OF CLAIM OF DEPRECIATION FOR RS. 2.13,31,985/-

1.1 The learned CIT(A) has grossly erred on the facts and circumstances of the case and in the law in upholding the decision of the learned A.O. by confirming the disallowance Rs. 2,13,31,9857- towards depreciation claimed on Plant & Machinery.

1.2 The learned CIT(A) has grossly erred in disallowing the claim of depreciation on the ground that appellant has not submitted documentary evidence like details of customers, bills of gas supplied, details of where the gas was supplied from and where it was supplied to, details of independent sections added to the grid were in fact ready to supply gas to customers, starting point and ending point of these pipelines has not been explained.

1.3 The learned CIT(A) has failed to appreciate that pipeline system is one integrated network (Pipeline Grid), whereby the appellant keeps commissioning and adding sections every year. Accordingly, such sections of pipelines, becomes integral part of Grid. The learned CIT(A) has further failed to appreciate that the Gas to the customer can be supplied only after pipeline is tested, commissioned and added to the pipeline network. It is a settled position of law that once asset is commissioned & put to use in business, depreciation is admissible.

1.4 The learned CIT(A) has also failed to consider the commissioning report submitted by the appellant as a proof of commissioning of pipeline. The learned CIT(A) has failed to appreciate that it is fundamental documentary evidence of the asset being put to use which is jointly issued by the technical-person of the appellant company as well as by the contractor (Third Party).

1.5 The learned CIT(A) has grossly erred in appreciating that to claim depreciation it is not necessary that assets which were ready to use must have been used during the year. The learned CIT(A) has further failed to appreciate that appellant can claim depreciation if the assets i.e. pipelines were ready to use but were not used during the year. i.e. it is not compulsory that the gas has to be supplied through pipeline once the pipeline is ready to use. As in the case of appellant company, sometimes, the pipelines systems are built according to the requirement of customer and once the pipelines systems are ready to use, as per the instruction and requirement of the customer, gas is supplied through pipeline. Hence your honour will appreciate that contention of the learned CIT(A) that claim of depreciation is not allowable as the gas is not supplied through the pipeline is not acceptable.

1.6 The appellant has relied on the decision of

a. CIT Vs. Geo Tech Construction Corporation (2000) 244 ITR 452

b. CIT Vs. Refrigeration & Allied Industries Ltd (2001) 247 ITR 12

c. CIT Vs. Panacea Biotech Ltd (2010) 324 ITR 311
Wherein it was held that the appellant can claim depreciation once the assets is ready to use.

1.7 The appellant further respectfully submits that the impugned disallowance on account of depreciation of Rs. 2,13,31,9857- as confirmed by the learned CIT(A) may kindly be deleted.

48. The above issue Relates to disallowance of depreciation on assets being pipeline systems which stands dealt with by us above as ISSUE No.1 at para 6-23 of our order above. Applying our findings at para 11-23 of the order therefore this issue stands restored to the AO to be decided afresh in accordance with our directions contained therein. Ground of appeal No.1-1.7 is therefore allowed for statistical purposes.

ITEM NO. II: LEVY OF INTEREST U/S. 234B. 234C & 234D OF THE ACT:

2.1 The learned CIT (A) has grossly erred in law and on facts in upholding the decision of the learned A.O. for levy interest U/s. 234B, 234C & 234D of the Act.
2.2 The appellant states that levy of interest is wholly unjustified and the same may kindly be deleted.

The above grounds relating to levy of interest u/s 234B/C/D of the Act ,being consequential in nature,need no adjudication.

ITEM No. Ill : INITIATION OF PENALTY PROCEEDINGS U/S 271(1)(c) OF THE ACT:

3.1 The Learned CIT(A) has grossly erred in law and on facts in not deciding the issue by stating that the "No appeal lies against the mere initiation of penalty under section 271(1)(c).

The learned CIT(A) ought to have appreciated that the appellant has not furnished any inaccurate particulars either with the return of income or during assessment proceedings and also appellant has not concealed any particulars of income. The Learned CIT(A) ought to have appreciated that the additions are made on account of difference of opinion in interpretation of the provisions of law and therefore question of initiation of penalty proceeding does not arise.

IV. The appellant reserves its right to add, amend, alter, substitute or modify all or any of the grounds stated hereinabove as the facts and circumstances of the case may justify.

49. The above ground relating to the initiation of penalty proceedings being premature is not being dealt with by us.

50. In effect appeal of the assessee is allowed for statistical purposes.

<u>ITA No. 1553/Ahd/2016 for A.Y. 2010-11 (Revenue's appeal)</u>

51. Ground No .(i) raised by the Revenue reads as under:

> *(i) On the facts and circumstances of the case, the Ld. Commissioner of Income-Tax(appeals) has erred in law and on facts in deleting initial connection charges of Rs. 3,91,26,854/- treating is as capital receipt.*

51.1 The above ground relating to the issue of treatment of initial connection charges has been dealt with by us at Issue No.2 at para 25-36 of our order above wherein we have up held the treatment of the said charges as capital by the Ld.CIT(A) for the impugned year at para 31 & 36. Ground of appeal No(i) is accordingly dismissed.

> *(ii) On the facts and circumstances of the case, the Ld. Commissioner of Income-Tax(appeals) has erred in law and on facts in deleting interest expenditure of Rs. 1,76,82,612/-.*

51.2 The above ground relates to the issue of disallowance of interest u/s 36(1)(iii) of the Act which has been dealt with by us at ISSUE No.3 at para 37-45 of our order above wherein we have upheld the order of the Ld.CIT(A) deleting the disallowance at para 42-45.

51.3 In view of the same Ground of appeal No(ii) is dismissed.

52. In effect appeal of the Revenue is dismissed.

53. We shall now take up the appeals for **<u>A.Y 2012-13 ITA No. 1886/Ahd/2016 for A.Y. 2012-13 (Assessee's appeal)</u>**

53.1 Grounds No.1-1.7 raised by the Assessee reads as under:

> ***ITEM NO. I: <u>DISALLOWANCE ON ACCOUNT OF CLAIM OF DEPRECIATION FOR RS. 76.58.045/-</u>***

1.1 The learned CIT (A) has grossly erred on the facts and circumstances of the case and in the law in upholding the decision of the learned A.O. by confirming the disallowance Rs. 76,58,045/- towards depreciation claimed on Plant & Machinery.

1.2 The learned CIT (A) has grossly erred in disallowing the claim of depreciation on the ground that appellant has not submitted documentary evidence like details of customers, bills of gas supplied, details of where the gas was supplied from and where it was supplied to, details of independent sections added to the grid were in fact ready to supply gas to customers, starting point and ending point of these pipelines has not been explained.

1.3 The learned CIT (A) has failed to appreciate that pipeline system is one integrated network (Pipeline Grid), whereby the appellant keeps commissioning and adding sections every year. Accordingly, such sections of pipelines, becomes integral part of Grid. The learned CIT(A) has further failed to appreciate that the Gas to the customer can be supplied only after pipeline is tested, commissioned and added to the pipeline network. It is a settled position of law that once asset is commissioned & put to use in business, depreciation is admissible.

1.4 The learned CIT(A) has also failed to consider the commissioning report submitted by the appellant as a proof of commissioning of pipeline. The learned CIT(A) has failed to appreciate that it is fundamental documentary evidence of the asset being put to use which is jointly issued by the technical person of the appellant company as well as by the contractor (Third Party).

1.5 The learned CIT(A) has grossly erred in appreciating that to claim depreciation it is not necessary that assets which were ready to use must have been used during the year. The learned CIT(A) has further failed to appreciate that appellant can claim depreciation if the assets i.e. pipelines were ready to use but were not used during the year. i.e. it is not compulsory that the gas has to be supplied through pipeline once the pipeline is ready to use. As in the case of appellant company, sometimes, the pipelines systems are built according to the requirement of customer and once the pipelines systems are ready to use, as per the instruction and requirement of the customer, gas is supplied through pipeline. Hence your honour will appreciate that contention of the learned CIT(A) that claim of depreciation is not allowable as the gas is not supplied through the pipeline is not acceptable.

1.6 The appellant has relied on the decision of

a. CIT Vs. Geo Tech Construction Corporation (2000) 244 ITR 452

b. CIT Vs. Refrigeration & Allied Industries Ltd (2001) 247 ITR 12

c. Capital Bus Service (p) Ltd Vs. CIT, High Court of Delhi (1980) 123 ITR 404

d. CIT Vs. Panacea Biotech Ltd (2010) 324 ITR 311

Wherein it was held that the appellant can claim depreciation once the assets is ready to use.

1.7 The appellant further respectfully submits that the impugned disallowance on account of depreciation of Rs. 76,58,045/- as confirmed by the learned CIT(A) may kindly be deleted.

53.2 The above issue Relates to disallowance of depreciation on assets being pipeline systems which stands dealt with by us above as ISSUE No.1 at para 6-23 of our order above. Applying our findings at para 11-23 of the order therefore this issue stands restored to the AO to be decided afresh in accordance with our directions contained therein. Ground of appeal No.1-1.7 is therefore allowed for statistical purposes.

ITEM NO. II**: **LEVY OF INTEREST U/S. 234C OF THE ACT:

2.1 The learned CIT (A) has grossly erred in law and on facts in upholding the decision of the learned A.O. for levy interest U/s. 234C of the Act.
2.2 The appellant states that levy of interest is wholly unjustified and the same may kindly be deleted.

The above ground relating to levy of interest being consequential in nature is not being dealt with by us.

ITEM NO. III: INITIATION OF PENALTY PROCEEDINGS U/S 271(1)(c) OF THE ACT.

3.1 The Learned CIT (A) has grossly erred in law and on facts in not deciding the issue by stating that the "Initiation of penalty proceedings U/s. 271(1) (c) of the Act being premature is not entertained."
The learned CIT(A) ought to have appreciated that the appellant has not furnished any inaccurate particulars either with the return of income or during assessment proceedings and also appellant has not concealed any particulars of income. The Learned CIT(A) ought to have appreciated that the additions are made on account of difference of opinion in interpretation of the provisions of law and therefore question of initiation of penalty proceeding does not arise.

The above ground relating to initiation of penalty proceedings being premature is not being dealt with by us.

In effect appeal of the assessee is allowed for statistical purposes.

54. ITA No. 2002/Ahd/2017 for A.Y. 2013-14 (Assessee's appeal)

GROUND No.1-1.8 reads as under

ITEM NO. I: DISALLOWANCE ON ACCOUNT OF CLAIM OF DEPRECIATION FOR RS. 85,11.818/-

1.1 The learned CIT (A) has grossly erred on the facts and circumstances of the case and in the law in upholding the decision of the learned A.O. by confirming the disallowance Rs. 85,11,818/- towards depreciation claimed on Plant & Machinery.
1.2 The learned CIT (A) has grossly erred in disallowing the claim of depreciation on the same ground on which depreciation was disallowed for A.Y. 2010-11 by stating that appellant has not submitted documentary evidence like details of customers, bills of gas supplied, details of where the gas was supplied from and where it was supplied to, details of independent sections added to the grid were in fact ready to supply gas to customers, starting point and ending point of these pipelines has not been explained.
1.3 The learned CIT (A) has failed to appreciate that pipeline system is one integrated network (Pipeline Grid), whereby the appellant keeps commissioning and adding sections every year. Accordingly, such sections of pipelines, becomes integral part of Grid. The learned CIT(A) has further failed to appreciate that the Gas to the customer can be supplied only after pipeline is tested, commissioned and added to the pipeline network. It is a settled position of law that once asset is commissioned & put to use in business, depreciation is admissible.

1.4 The learned CIT(A) has also failed to consider the commissioning report submitted by the appellant as a proof of commissioning of pipeline. The learned CIT(A) has failed to appreciate that it is fundamental documentary evidence of the asset being put to use which is jointly issued by the technical person of the appellant company as well as by the contractor (Third Party).

1.5 The learned CIT(A) has also failed to consider the copy of invoice for supply of CNG made on 31-03-13 submitted by the appellant as a proof of supply of CNG in respect of Pipleline which has been commissioned on 30-03-13. The learned CIT(A) has failed to appreciate that invoice for supply of CNG made on 31-03-13 is a basic evidence of the asset being put to use.

1.6 The learned CIT(A) has grossly erred in appreciating that to claim depreciation it is not necessary that assets which were ready to use must have been used during the year. The learned CIT(A) has further failed to appreciate that appellant can claim depreciation if the assets i.e. pipelines were ready to use but were not used during the year. i.e. it is not compulsory that the gas has to be supplied through pipeline once the pipeline is ready to use. As in the case of appellant company, sometimes, the pipelines systems are built according to the requirement of customer and once the pipelines systems are ready to use, as per the instruction and requirement of the customer, gas is supplied through pipeline. Hence your honour will appreciate that contention of the learned CIT(A) that claim of depreciation is not allowable as the gas is not supplied through the pipeline is not acceptable.

1.7 The appellant has relied on the decision of

a. CIT Vs. Geo Tech Construction Corporation (2000) 244 ITR 452
b. CIT Vs. Refrigeration & Allied Industries Ltd (2001) 247 ITR 12
c. Capital Bus Service (p) Ltd Vs. CIT, High Court of Delhi (1980) 123 ITR 404
d. CIT Vs. Panacea Biotech Ltd (2010) 324 ITR 311

Wherein it was held that the appellant can claim depreciation once the assets is ready to use.

1.8 The appellant further respectfully submits that the impugned disallowance on account of depreciation of Rs. 85,11,818/- as confirmed by the learned CIT(A) may kindly be deleted.

55. The above issue relates to disallowance of depreciation on assets being pipeline systems which stands dealt with by us above as ISSUE No.1 at para 6-23 of our order above. Applying our findings at para 11-23 of the order therefore this issue stands restored to the AO to be decided afresh in accordance with our directions contained therein. Ground of appeal No.1-1.8 is therefore allowed for statistical purposes.

ITEM NO. II: <u>ADDITION ON ACCOUNT OF INTEREST U/S. 244A OF THE ACT FOR A.Y. 2008-09 WHILE CALCULATING INCOME UNDER NORMAL PROVISION OF THE ACT RS. 31,54,290/-</u>

2.1 The learned CIT(A) has grossly erred in law and on facts in confirming the addition made on account of Interest U/s. 244A amounting to Rs. 31,54,290/- for A.Y. 2008-09 while calculating income under the normal provision of the Act.

2.2 The learned CIT(A) has failed to appreciate that Appellant has received only refund order cheque and Appellant has not received any Order Giving Effect to CIT(A)'s order showing breakup of refund and interest. The learned CIT(A) has further failed to

appreciate that even break up of Interest and Refund was not reflected in Form No. 26AS.

2.3 The learned CIT(A) has failed to appreciate that only at the time of receipt of AIR details, appellant came to know the breakup of refund and interest and hence appellant has not offered the interest income.

2.4 The appellant humbly request that addition on account of Interest U/s. 244A amounting to Rs. 31,54,290/- for A.Y. 2008-09 while calculating income under the normal provision of the Act may kindly be deleted.

ITEM NO. Ill: ADDITION ON ACCOUNT OF INTEREST U/S. 244A OF THE ACT FOR A.Y. 2008-09 WHILE CALCULATING INCOME UNDER PROVISION OF THE MAT I.E. U/S. 115JBRS. 31.54.290/-

3.1 The learned CIT(A) has grossly erred in law and on facts in confirming the addition made on account of Interest U/s. 244A amounting to Rs. 31,54,290/- for A.Y. 2008-09 while calculating income under the provision of MAT i.e. U/s. 115JB.

3.2 The learned CIT(A) has failed to appreciate that Appellant has received only refund order cheque and Appellant has not received any Order Giving Effect to CIT(A)'s order showing breakup of refund and interest. The learned CIT(A) has further failed to appreciate that even break up of Interest and Refund was not reflected in Form No. 26AS.

3.3 The learned CIT(A) has failed to appreciate that only at the time of receipt of AIR details, appellant came to know the breakup of refund and interest and hence appellant has not offered the interest income.

3.4 The appellant humbly request that addition on account of Interest U/s. 244A amounting to Rs. 31,54,290/- for A.Y. 2008-09 while calculating income under the provision of MAT i.e. U/s. 115JB of the Act may kindly be deleted.

56. Ground No 2- 2.4 and 3-3.4, it was stated before us, relate to the same issue of treatment of interest on income tax refund to tax. While Ground No.2-2.4 challenge the order of the Ld.CIT(A) holding it taxable in the impugned year under the normal provisions of computation of Business Profits, ground No.3-3.4 challenge its inclusion in the Book Profits for taxability as per section 115JB of the Act on the Book Profits.

57. Brief facts are that in the assessment framed relating to assessment year 2013-14, the A.O. on noting that the assessee had received refund during the year pertaining to assessment year 2008-09, which included interest u/s. 244A amounting to Rs. 31,54,290/- which he noted the assessee had neither reflected in his profit and loss account nor included in his income computed for the purposes of taxation, added the same to the income of the assessee. This interest was also added to the book profits of the assessee u/s. 115JB of the Act.

58. The Ld. CIT(A) upheld the said addition holding that as per the provisions of Section 56(2) any interest received from the Income Tax Department on delayed refund is to be treated as income of the year in which the refund is allowed.

59. Before us, Ld. Counsel for the assessee relied on the decision of the ITAT Ahmedabad Bench in the case of Fag Bearings India Ltd. Vs. DCIT reported in [2011] 12 ITR (T) 395 Ahmedabad Tribunal, in support of this contention that the impugned interest was not to be included for the purposes of computation of income under the normal provisions. As for the inclusion of the interest in the book profits u/s. 115JB of the Act , he relied on the decision of the Hon'ble Apex Court in the case of Apollo Tyres Ltd. vs. CIT [2002] 255 ITR 273

60. The Ld. D.R. relied on the order of the Ld. CIT(A).

61. We have heard both the parties. The issue is to be adjudicated is the taxability of interest on Income Tax Refund. The facts which are not disputed are that during the previous year 2012-13 relating to assessment year 2013-14 which is the impugned AY, the assessee had received Income Tax refund of Rs. 2,74,89,180/- which included interest u/s. 244A amounting to Rs. 31,54,290/-. The refund pertained to assessment year 2008-09 and was received by the assesee on 27.07.2012. All these facts emanate from the order of the Ld. CIT(A) and have not been disputed/controverted before us. That interest Income Tax refund is taxable is not in dispute. The only issue is whether it is taxable in the impugned year.

62. We have gone through the order of the ITAT Ahmedabad Bench in the case of Fag Bearings India Ltd. (supra) relied upon by the ld. Counsel for the assessee and we have noted there from that the proposition laid down therein was to the effect that interest on Income Tax refund was taxable in the year of receipt of refund. That the finality of the assessment thereof was not a determinative factor for the taxability of the said income which was to be held as accrued in the year of receipt/grant of refund. The Co-ordinate Bench had followed the decision of the Special Bench of the ITAT in the case of Avada Trading Company (P.) Ltd. vs. ACIT [2006] 100 ITD

131 (Mum) in this regard. It had further accepted the plea of the ld. Counsel for the assessee that since the assessment had attained finality at the time of hearing of the appeal by the ITAT, the finally determined amount of refund be subjected to tax.

63.. Applying the aforesaid proposition, to the facts of the present case wherein the Income Tax refund has been received during the impugned year itself i.e. assessment year 2013-14, the interest on Income Tax refund is held to have accrued in the impugned year and has therefore been rightly subjected to tax in the said year. Further if the assssessment of the assessment year to which the refund relates,i.e A.Y 2008-09, has attained finality, the A.O is directed to tax only that component of the interest which is ultimately found due to the assessee.

63.1 As for inclusion of interest on Income Tax refund in the book profits of the assessee for the purposes of Minimum Alternate Tax (MAT) to be paid thereon as per the provisions of Section 115JB of the Act, we are in agreement with the Revenue on the same. Section 115JB of the Act requires taxes to be paid on the book profits of the assesee, where the tax as per the normal computation is less than the rate specified for taxes to be paid on the book profits. As per the said section the book profits mean the profits as shown in the statement of Profit and Loss account for the relevant year prepared in accordance with Schedule III of the Companies Act, 2013 (18 Of 2013)(earlier Part II and III of Schedule VI of the companies Act ,1956). Schedule III requires all incomes to be disclosed therein.

63.2 In the present case the interest on Income Tax refund having been received during the year and being in the nature of income of the assessee, there is no doubt that the same ought to have been disclosed in the profit and loss account of the assessee as per the Standard Accounting Practices. The same having not been disclosed by the assessee, the A.O. was entitled to make adjustment of the same to the profit and loss account so as to ensure that it is in accordance which Schedule III of the Companies Act. The Hon'ble High Court of Bombay in the case of Commissioner of Income Tax vs Veekaylal Investment Co.(P)(Ltd.(2001) 249 ITR 0597 ,while seized with the issue of inclusion of capital gains in book profits as per section 115J held that there is no question why the same should not be included being clearly in the nature of profits which are to be disclosed as per Schedule VI part II & III of the Companies Act. The relevant findings of the Hon'ble High Court in the said case are as under.

> *"We find merit in this appeal. According to s. 115J(1), in the case of an assessee being a company if the total income is less than 30 per cent of its book profits then the total income of such company shall be deemed to be an amount equal to 30 per cent of such book-profit and such income shall be chargeable to tax. That, the assessee has to first compute the total income in accordance with the IT Act and if the total income is less than 30 per cent of the book profit then the assessee has to prepare a P&L a/c for the previous year in accordance with Part II and III of Sch. VI to the Companies Act. In other words, a plain reading of s. 115J shows that if the assessee is a company and its total income under the IT Act is less than 30 per cent of its book profits then, fictionally, it will be deemed that its total income chargeable to tax would be an amount equal to 30 per cent of such book profits. Hence, in such a case, the total income of the assessee is first required to be computed under the IT Act and if the total income so computed is less than 30 per cent of the book profits then the P&L a/c shall have to be prepared in accordance with Part II and Part III of Sch. VI of the Companies Act. The important thing to be noted is that while calculating the total income under the IT Act, the assessee is required to take into account income by way of capital gains under s. 45 of the IT Act. In the circumstances, one fails to understand as to how in computing the books profits under the Companies Act, the assessee-company cannot consider capital gains for the purposes of computing book profits under s. 115J of the Act. Further, under cl. (2) of Part II of Sch. VI to the Companies Act where a company receives the amount on account of surrender of leasehold rights, the company is bound to disclose in the P&L a/c the said amount as non-recurring transaction or a transaction of an exceptional nature irrespective of its nature i.e. whether capital or revenue. That, it would be inappropriate to directly transfer such amount to capital reserve [see Companies Act by A. Ramaiya, p. 1669 (Fourteenth Edn.]. Such receipts are also covered by cl. 2(b) of Part II of Sch. VI of the Companies Act which, inter alia, states that P&L a/c shall disclose every material feature, including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of an exceptional nature. Lastly, even under cl. 3(xii)(b) profits or losses in respect of transactions not usually undertaken by the Company or undertaken in circumstances of exceptional or non-recurring nature shows clearly that capital gains should be included for the purposes of computing book profits. That, capital gains would certainly be one of the various items whose information is required to be given to the share holders under the said cl. 3(xii)(b). So also, the disclosure is required to be made in respect of investment in the capital of a partnership firm if the company is a partner on the date of the balance sheet (see p. 1651 of the Companies Act by A. Ramaiya [Fourteenth Edn.]. Similarly, profits or losses on such investments are also required to be disclosed. [See cl. 3(xii)(a) of Part II of Sch. VI of the Companies Act]."*

63.3 Identical view was taken by the Mumbai Bench of the ITAT in the case of DCIT vs Bombay Diamond Company (2010) 33 DTR 0059(Mum) on the identical aspect of inclusion of capital gains in the book profits ,its findinds being as under:

"We have considered the rival submissions made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. There is no dispute to the fact that the assessee in the impugned assessment year has earned gross profit of Rs. 10,38,13,765 on account of sale of its rights in an immovable property. There is also no dispute to the fact that this income has not been passed through the P&L a/c but has directly been taken to the balance sheet as capital reserve. According to the AO since the assessee has not prepared its accounts in the manner provided in Part II and Part III of Sch. VI to the Companies Act, therefore, the amount of Rs. 10,38,13,765 having not routed through the P&L a/c has to be added to the book profit for the purpose of provisions of s. 115JB. It is the submission of the learned counsel for the assessee that in view of the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra), the decision of the Hon'ble Bombay High Court in the case of Kinetic Motor Co. Ltd. (supra) and the decision of the Co-ordinate Bench of the Tribunal in the case of Orson Trading (P) Ltd. (supra) the AO has no power to go beyond the accounts adopted in the AGM.

17. *We find Part II and Part III of Sch. VI to the Companies Act read as under :*

"PART II

Requirements as to P&L a/c

1. The provisions of this part shall apply to the income and expenditure account referred to in sub-s. (2) of s. 210 of the Act, in like manner as they apply to a P&L a/c, but subject to the modification of references as specified in that sub-section.

2. The P&L a/c—

(a) shall be so made out as clearly to disclose the result of the working of the company during the period covered by the account; and

(b) shall disclose every material feature, including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of an exceptional nature.

3. The P&L a/c shall set out the various items relating to the income and expenditure of the company arranged under the most convenient heads; and in particular, shall disclose the following information in respect of the period covered by the account :

(i) ..

(ii) ..

(xi) (a) The amount of income from investments, distinguishing between trade investments and other investments.

(b) Other income by way of interest, specifying the nature of the income.

(c) The amount of income-tax deducted if the gross income is stated under sub-paras (a) and (b) above.

(xii) (a) Profits or losses on investments showing distinctly the extent of the profits or losses earned or incurred on account of membership of a partnership firm to the extent not adjusted from any previous provision or reserve.

Note : Information in respect of this item should also be given in the balance sheet under the relevant provision or reserve account.

(b) Profits or losses in respect of transactions of a kind, not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, if material in amount.

(c) Miscellaneous income.

(xiii) (a) ..

(b) ..

(xiv) ..

(xv) .."

***18.** From a bare reading of the above it is clear that the P&L a/c of a company shall disclose every material feature including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of exceptional nature also. Further the company is also required to set out the various items relating to the income and expenditure of the company arranged under most convenient heads and disclosing profit or loss in respect of transactions of a kind not usually undertaken by the company or undertaken in circumstances of exceptional or non-recurring nature if material in amount.*

***19.** However, in the instant case we find although the assessee has earned a profit of Rs. 10,38,13,765 from the sale of rights in an immovable property the same has not been routed through the P&L a/c and has directly been credited to the balance sheet. Therefore, in our opinion, the accounts are not prepared in accordance with the manner provided in Part II and Part III of Sch. VI to the Companies Act.*

***20.** The various decisions relied on by the learned counsel for the assessee are not applicable to the facts of the present case. In the case of Apollo Tyres Ltd. (supra) the question No. (i) before the Hon'ble Supreme Court was as under :*

"(i) Can an AO while assessing a company for income-tax under s. 115J of the IT Act question the correctness of the P&L a/c prepared by the assessee company and certified by the statutory auditors of the company as having been prepared in accordance with the requirements of Parts II and III of Sch. VI to the Companies Act ?"

***21.** From the above it is clear that the issue before the Hon'ble Supreme Court was under the provisions of s. 115J and when the accounts of the*

company are prepared in accordance with the requirements of Part II and Part III of Sch. VI to the Companies Act. However, in the instant case the issue is relating to the provisions of s. 115JB and the accounts are not prepared in accordance with the provisions of Part II and Part III of Sch. VI to the Companies Act. Merely because the auditors have certified the accounts which apparently are not prepared in accordance with Part II and Part III of Sch. VI to the Companies Act, therefore, the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra), in our opinion is not applicable to the facts of the present case.

***22.** Similarly in the case of Kinetic Motor Co. Ltd. (supra) the assessee had debited an amount of Rs. 6,32,65,430 on account of depreciation on the basis of WDV which is one of the permissible methods under the Companies Act although the assessee used to provide the depreciation on the straight-line method in its corporate accounts. The above resulted in a book loss of Rs. 1,64,49,937. These accounts were certified to be true and fair by the auditors. The AO took the view that there was no justification for the assessee to change the basis of providing depreciation and reworked the depreciation and arrived at a book profit of Rs. 2,22,10,525 as against the book loss of Rs. 1,64,49,937 which was confirmed by the Tribunal. On further appeal to the High Court, the Hon'ble High Court had held that under the Companies Act both straight-line method and written down method are recognised, therefore, once the amount of depreciation actually debited to the P&L a/c and was certified by the auditors it was not permissible for the AO to make book adjustments.*

***23.** Thus from the above it is clear that the assessee has debited the depreciation in the P&L a/c as per one of the recognised methods. Further the issue before the Hon'ble High Court was under the provisions of s. 115J of the Act. However, in the instant case the assessee has bypassed the provisions of Part II and Part III of Sch. VI of the Companies Act and directly credited the profit to the reserve account. Therefore, the decision of the jurisdictional High Court is also not applicable to the facts of the present case. Similarly the decision of the Co-ordinate Bench of the Tribunal in the case of Orson Trading (P) Ltd. (supra) is also distinguishable and not applicable to the facts of the present case since it relates to the provisions of s. 115JA and it has not been held that even if the accounts are not prepared in the manner prescribed as per Part II and Part III of Sch. VI of the Companies Act, 1956, the AO has no power to disturb the book profit declared by the assessee.*

***24.** The various other decisions relied on by the learned CIT(A) in his order are also not applicable. In none of the case it has been held that even where the accounts are not prepared in the manner provided as per Part II and Part III of Sch. VI to the Companies Act, 1956 the AO has no power to go beyond the book profit as per the audited accounts. In our opinion, the AO cannot go beyond the book profits as per the audited accounts provided they are prepared as per the manner provided in Part II and Part III of Sch. VI to the Companies Act, 1956 and are adopted in the AGM. However, in the instant case, admittedly the accounts are not prepared in the manner provided in Part II and Part III of Sch. VI to the Companies Act, 1956 since the profit on sale of investments amounting to Rs. 10,38,13,765 which is a material amount, has not been routed through the P&L a/c. Therefore, the AO, in our opinion has the power to re-work the book profit by recasting the accounts in the manner provided as per Part II and Part III of Sch. VI to the Companies Act, 1956. In this view of the matter, the order of the CIT(A) on this issue is set aside and that of the AO is restored.*

63.4 And while rendering the said decision ,the ITAT has dealt with and the ratio laid down by the apex court in the case of Appollo Tyres (supra) , relied upon by the Ld. Counsel for the assessee, pointing out that the Hon'ble court had held that where Profit & Loss account is prepared in accordance with Schedule VI Part II & III of Companies Act the AO cannot make any adjustments except those specified in section 115J and therefore where the accounts are not so prepared the AO can go beyond the same

63.5 In view of the same, the adjustment to the book profits of the assesse by the A.O. by adding interest on Income Tax refund received during the year amounting to Rs. . 31,54,290/- is upheld.

63.6 Ground No 2-2.4 and 3-3.4 are accordingly dismissed

> ***ITEM NO. IV**: **<u>INITIATION OF PENALTY PROCEEDINGS U/S 271(1)(c) OF THE ACT:</u>***
> *4.1 The Learned CIT (A) has grossly erred in law and on facts in not deciding the issue by stating that the "Initiation of penalty proceedings U/s. 271(1) (c) of the Act being premature is not entertained and is hereby rejected."*
> *The learned CIT(A) ought to have appreciated that the appellant has not furnished any inaccurate particulars either with the return of income or during assessment proceedings and also appellant has not concealed any particulars of income. The Learned CIT(A) ought to have appreciated that the additions are made on account of difference of opinion in interpretation of the provisions of law and therefore question of initiation of penalty proceeding does not arise.*

64.The above ground relating to initiation of penalty proceedings, being premature are not being dealt with by us.

65. In effect appeal of the assessee is partly allowed for statistical purposes.

<u>66. ITA No. 173/Ahd/2019 for A.Y. 2014-15 (Assessee's appeal)</u>

Ground No.1-1.8 read as under:

> ***<u>Item No. I: Disallowance of Claim of Depreciation For Rs. 1,30.38,69s/-</u>***

1.1 The learned CIT (A) has grossly erred on the facts and circumstances of the case and in the law in upholding the decision of the learned A.O. by confirming the disallowance of Rs. 1,30,38,698/- towards depreciation claimed on addition made to Plant & Machinery. The learned CIT (A) has grossly erred in disallowing the claim of depreciation on the same ground on which depreciation was disallowed for A.Y. 2010-11 by stating that appellant has not submitted documentary evidence like details of customers, bills of gas supplied, details of where the gas was supplied from and where it was supplied to, details of independent sections added to the grid were in fact ready to supply gas to customers, starting point and ending point of these pipelines has not been explained.

The learned CIT (A) has failed to appreciate that pipeline system is one integrated network (Pipeline Grid), whereby the appellant keeps commissioning and adding sections every year. Accordingly, such sections of pipelines, becomes integral part of Grid. The learned CIT(A) has further failed to appreciate that the Gas to the customer can be supplied only after pipeline is tested, commissioned and added to the pipeline network. It is a settled position of law that once asset is commissioned & put to use in business, depreciation is admissible.

The learned CIT(A) has also failed to consider the commissioning report submitted by the appellant as a proof of commissioning of pipeline. The learned CIT(A) has failed to appreciate that it is fundamental documentary evidence of the asset being put to use which is jointly issued by the technical person of the appellant company as well as by the contractor (Third Party).

1.5. The learned CIT(A) has also failed to consider the copy of invoice for supply of CNG made on 31-03-14 submitted by the appellant as a proof of supply of CNG in respect of Pipeline which has been commissioned on 31-03-14. The learned CIT(A) has failed to appreciate that invoice for supply of CNG made on 31-03-14 is a basic evidence of the asset being put to use.

1.6 The learned CIT(A) has grossly erred in not appreciating that to claim depreciation it is not necessary that assets which were ready to use must have been used during the year. The learned CIT(A) has further failed to appreciate that appellant can claim depreciation if the assets i.e. pipelines were ready to use but were not used during the year. i.e. it is not compulsory that the gas has to be supplied through pipeline once the pipeline is ready to use. As in the case of appellant company, sometimes, the pipelines systems are built according to the requirement of customer and once the pipelines systems are ready to use, as per the instruction and requirement of the customer, gas is supplied through pipeline. Hence your honour will appreciate that contention of the learned CIT(A) that claim of depreciation is not allowable as the gas is not supplied through the pipeline is not acceptable.

1.7 The appellant has relied on the following decision wherein it was held that the appellant can claim depreciation once the assets is ready to use.

a. CIT Vs. Geo Tech Construction Corporation (2000) 244 ITR 452
b. CIT Vs. Refrigeration & Allied Industries Ltd (2001) 247 ITR 12
c. Capital Bus Service (P) Ltd Vs. CIT, High Court of Delhi (1980) 123 ITR 404
d. CIT Vs. Panacea Biotech Ltd (2010) 324 ITR 311

1.8 The appellant further respectfully submits that the impugned disallowance of Rs. 1,30,38,698/ - towards depreciation claimed on addition made to Plant & Machinery as confirmed by the learned CIT(A) may kindly be deleted.

67. The above issue relates to disallowance of depreciation on assets being pipeline systems which stands dealt with by us above as ISSUE No.1 at para 6-23 of our order above. Applying our findings at para 11-23 of the order therefore this issue stands restored to the AO to be decided afresh in accordance with our directions contained therein. Ground of appeal No.1-1.7 is therefore allowed for statistical purposes.

67.1 Ground No 2-2.5 read as under:

Item No. II: Disallowance of Employee Contribution To EPF Rs. 1,75,904/*-*

2.1 The learned CIT (A) has grossly erred on the facts and circumstances of the case & in law in upholding the decision of the learned A.O. by confirming disallowance of Rs. 1,75,9047-towards employee's provident fund u/s. 36(1)(va) r.w.s. 2(24)(x) of the act.

2.2 The learned CIT(A) has grossly erred in law and on facts in not appreciating that though appellant has paid employee's provident fund after due date prescribed under relevant act, the same is considered as allowable if the same has paid been paid before due date of filing of Return under income tax act.

2.3 The learned CIT(A) has grossly erred in fact and in law by relying on the decision of Gujarat High Court in the case of CIT vs. Gujarat State Road Transport Corporation for the purpose of making disallowance.

2.4 The learned CIT(A) has failed to appreciate the fact the appellant has rightly considered the late deposit of employee's provident fund as allowable by relying on following decisions

a. CIT Vs. Alom Extrusions Ltd. (2009) 319 ITR 306 (SC)

b. CIT vs. Aimil Limited - (2010) 321 ITR 508 (Delhi)

c. Parry Agro Industries Vs. ACIT (2009) 314 ITR (AT) 181

d. CIT Vs. Nipso Polyfabriks Ltd. (2013) 350 ITR 327 (HP)

2.5 The Appellant humbly submits that disallowance of Rs. 1,75,9047- towards employee's provident fund contribution u/s. 36(1)(va) r.w.s 2(24)(x) of the act as confirmed by the learned CIT(A) may kindly be deleted as the appellant has deposited employee's provident fund and on or before due date of filing of return.

68. Ld. Counsel for the assessee contended fairly admitted that this issue stood decided against the assessee by the Jurisdictional High Court in the case of CIT vs. Gujarat State Road Transport Corporation.(2014) 41 taxmann.com 100(Guj). In view of the above, the disallowance of employees' contribution to EPF is upheld.

69. Ground No.2-.25 is dismissed

Item No. Ill: Initiation of Penalty Proceedings U/s. 271(1)(c) of the Act:

3.1 The Learned CIT (A) has grossly erred in law and on facts in not deciding the issue by stating that the "Initiation of penalty proceedings U/s. 271(1) (c) of the Act being premature is not entertained and is hereby rejected."

The learned CIT(A) ought to have appreciated that the appellant has not furnished any inaccurate particulars either with the return of income or during assessment proceedings and also appellant has not concealed any particulars of income. The Learned CIT(A) ought to have appreciated that the additions are made on account of difference of opinion in interpretation of the provisions of law and therefore question of initiation of penalty proceeding does not arise.

4. The appellant reserves its right to add, amend, alter, substitute or modify all or any of the grounds stated hereinabove as the facts and circumstances of the case may justify.

69.1 The above ground relating to initiation of penalty proceedings being premature is not being dealt with by us.

70. In effect appeal of the assessee is partly allowed for statistical purposes.

71. ITA No. 423/Ahd/2019 for A.Y. 2014-15 (Revenue's appeal)

Ground No.(i) raised by the Revenue reads as under:

i*). On the facts and circumstances of the case, the Ld. Commissioner of Income-Tax(appeals) has erred in law and on facts in deleting initial connection charges of Rs.2,42,05,403/- treating it as capital receipt.*

71.1 The above ground relating to the issue of treatment of initial connection charges has been dealt with by us at Issue No.2 at para 25-36 of our order above wherein we have ,for the impugned year restored the issue back to the AO at para 34-35 to be decided in accordance with our directions contained therein.

71.2. Ground of appeal No(i) is accordingly allowed for statistical purposes.

71.3. Ground No ii reads as under:

ii) On the facts and circumstances of the case, the Ld. Commissioner of Income-Tax(appeals) has erred in law and on facts in deleting interest expense of Rs.2,21,03,942/-.

71.4 The above ground relates to the issue of disallowance of interest u/s 36(1)(iii) of the Act which has been dealt with by us at ISSUE No.3 at para 37-45 of our order above wherein we have upheld the order of the Ld.CIT(A) deleting the disallowance at para 42-45 .

71.5 In view of the same Ground of appeal No(ii) is dismissed.

75. In effect appeal of the Revenue is partly allowed for statistical purposes.

77. In effect appeal of the Assessee and Revenue in:

a) ITA No.1607/Ahd/2016 for A Y 2010-11 (Assessee's appeal) is allowed for statistical purposes.

b) ITA No.1533/Ahd/2016 for A.Y. 2010-11 (Revenue's appeal) is dismissed.

(c) ITA No. 1886/Ahd/2016 for A.Y. 2012-13 (Assessee's appeal) is allowed for statistical purposes.

(d) ITA No. 2002/Ahd/2017 for A.Y. 2013-14 (Assessee's appeal) is partly allowed for statistical purposes.

(e) ITA No. 173/Ahd/2019 for A.Y. 2014-15 (Assessee's appeal) is partly allowed for statistical purposes.

(f) ITA No. 423/Ahd/2019 for A.Y. 2014-15 (Revenue's appeal) is partly allowed for statistical purposes.

Order pronounced in the open court on 28 -02-2022

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

True Copy

Ahmedabad : Dated 28 /02/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद