

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
Shri AMARJIT SINGH, ACCOUNTANT MEMBER

ITA Nos. 166, 167, 193 & 304/Coch/2017

Assessment Years: 2010-11 to 20120-13 & 2007-08

DCIT, Circle 1(1), Range 1 Kochi	vs.	Cochin International Airport Ltd. GCDA Commercial Complex Marine Drive, Kochi. PIN - 682031 PAN: AAACC9658B
(Appellant)		(Respondent)

For Revenue :	22.08.2024
Date of Pronouncement :	23.10.2024

ORDER

PER BENCH :

The instant batch of four Revenue's appeals pertains to a single assessee herein, i.e. Cochin Interntional Airport Ltd. All other related details stand tabulated hereunder: -

Sr. No.	ITA No.	AY	Appeal Reference No.	Order date
1	166/Coch/2017	2010-11	ITA No. 33/R-1/EKM/ CIT(A)-II/2013-14	07.02.2017
2	167/Coch/2017	2011-12	ITA No. 51/R-1/ CIT(A)- II/2014-15	27.02.2017
3	193/Coch/2017	2012-13	ITA No. 76/R-1/EKM/ CIT(A)-I/2015-16	28.02.2017
4	304/Coch/2017	2007-08	ITA No. 25/R- 1/E/CIT(A)-II/2012-13	31.03.2017

We proceed assessment year-wise for the sake of convenience and brevity.

ASSESSMENT YEAR 2007-08 :

2. The Revenue's appeal ITA.No.304/Coch./2017 raises the following substantive grounds : -

- "1. The orders of the Commissioner of Income Tax (Appeals)-1, Kochi opposed to the facts and circumstances of the case.*
- 2. In the facts the circumstances of the case, the learned Commissioner of Income Tax(Appeals) is not justified in directing the AO to delete the addition of Rs.71,07,988/- being the bad debt which are not actually written off in books. 36(1*
- 3 The learned CIT(Appeals) is not justified to deleting the addition of Rs.17,70,00,000/- made on account of royalty and other charges receivable from Air India*
- 4 The conclusion of the learned CIT(Appeals) in this regard not being just and proper deserves to be vacated.*

5. *It is prayed that the orders of the learned Commissioner of Income Tax(Appeals)-1, Kochi be reversed and that of the Assessing Officer restored.*
6. *For these and other grounds that may be urged at the time of hearing, it is requested that the order of the Commissioner of Income Tax(Appeals) may be set aside and that of the Assessing Officer restored."*

3. Learned CIT-DR vehemently submitted during the course of hearing that the CIT(A) herein is erred in law and on facts in deleting the bad debt disallowance of Rs.71,07,988/- which is only in the nature of a provision. He could hardly dispute the clinching fact that even the learned Assessing Officer's corresponding assessment in para 2 nowhere raised such an issue of capital write off. We make it clear that we are dealing with an assessment framed u/s. 143(3) r.w.s. 263 of the Income Tax Act, 1961 (the Act) wherein the learned revisionary authority had extracted its jurisdiction only for the purpose of computation of net profit so as to finalise the book profit u/s. 115JB(2) of the Act. We conclude that within the given facts, there is no issue of actual write-off in principle. Rejected accordingly.

4. Lastly comes the Revenue's latter substantive ground seeking to add an amount of Rs.17.70 crores representing royalty and other charges receivable from M/s. Air India Ltd..

5. Learned A.R. refers to the findings of the CIT(A) and the facts on record that the assessee had already added the same in it's computation [para-ii at page-13 of the lower appellate discussion]. That being the case we see no substance in Revenue's instant latter substantive ground. This appeal ITA No.304/Coch/2017 is dismissed.

6. We now proceed to deal with Revenue's remaining latter three appeals ITA No. 166, 167 and 193/Coch/2017 for assessment years 2010-11 to 2012-13 respectively. Its identical first and foremost substantive ground herein challenges the assessee's eligibility for raising section 80IA deduction claim. We find during the course of hearing the instant issue of the assessee section 80IA deduction claim is no more *res integra* as the tribunal's order dated 21.11,.2019 for preceding AY 2005-06 onwards has rejected the very contentions. We wish to clarify that there is distinction pinpointed in the pleadings of the Revenue so far as the relevant facts in these assessment years

stand on identical footing. We accordingly find no substance in Revenue's instant first and foremost substantive ground. Rejected accordingly.

7. Learned CIT-DR next seeks to revive the assessing authority's action excluding various items of receipts, i.e. surcharge from prepaid taxi, sale of scrap, notice pay, interest on delayed payment bond from staff as business income eligible for deduction u/s. 80IA(4) claims, involving varying sums, in all these three assessment years. We find that the earlier coordinate bench's order has already dealt with the same as while accepting the assessee's contentions. Rejected accordingly.

8. The Revenue pleads next identical issue in its ground Nos. 2,3,7 and 8; assessment year-wise, respectively that the CIT(A) has erred in law and on facts in treating the assessee eligible for claiming section 80IA(4) regarding income *qua* "Passenger service fee-security component". We note that the CBDT has also issued a circular dated 30.06.2008 that such an income indeed forms regular business income "derived" from the eligible activity(ies) only. That being the case, and in light of the fact that there is a "revenue" item in

assessee's books to this effect we feel the same indeed qualifies section 80IA deduction. Rejected accordingly.

9. The Revenue's ground Nos. 3, 4, 7, 10 & 6 substantive grounds; assessment year-wise, respectively seeks to treat the interest on passenger service fee deposit as assessee's taxable income in the corresponding assessment years. We do not see any material in the case which could indicate that the impugned interest income have been accrued or received in assessee's book so as to treated as taxable. We accordingly see no merit in Revenue's instant substantive ground.

10. The Revenue's third ground in AY 2011-12 appeal raises the issue of section 36(1)(va) disallowance on the ground that the assessee ought to have credited the employees' contribution to PF & ESI within the specified due date under the corresponding statute than going by the "due" date of filing the return u/s. 139(1) of the Act. Suffice to say, case law Checkmate Services (P) Ltd., vs. CIT [2022] 143 taxmann.com 178 (SC) has already decided the instant issue in department's favour and against the assessee. Allowed accordingly.

11. Learned CIT-DR further submits that the learned CIT(A) has erred in law and on facts in AY 2011-12 and AY 2012-13 in reversing the disallowance made u/s. 14A of the Act in relation to the assessee's exempt income; vide following detailed discussion :-

“vv) The next dispute (Ground Numbered 5) relates to the (notional expenditure) amount of Rs.75,70,210/- computed under Rule 8D that was assessed by the AO as the Appellant's taxable income. On facts, the interest cost of Rs.3,65,54,015/- debited and claimed by the Appellant in its Profit and Loss Account are determined to be towards: a) Land Acquisition compensation amounts, b) short term working capital loans; and b) paid to KSIDC on Term loan taken for setting up of Golf Course and Country Club, which are specific items and have no bearing on the investments made by the Appellant in its sister concerns being Cochin International Aviation Services Limited and Air Kerala International Services Limited totaling Rs.35,31,34,000/- and Rs.1,06,40,000/- respectively. Also, all the investments being made in earlier financial years, there were no fresh

investments during the year. The Appellant also had enough interest free surplus funds available for making the investments and no borrowed funds have been utilized for the purpose of investments in subsidiary companies. The interest free surplus/capital funds stood at Rs 399.92 crores as at 31.03.2010 whereas the value of investments made were only Rs 35.31 crores, viz, less than 10% of the former amount.

ww) It cannot therefore prima facie be held that the Appellant had been making investments that took and kept away large portions of its business funds towards earning tax-exempt incomes. A separate discussion is that of whether the investments have been made with strategic as against narrow business intent/purpose. A strategic investment is a transaction that is closely related to joint ventures and in which one company makes an investment in another after the two companies enter into agreements that are designed to serve shared business goals. The planners of such transactions decide on a strategic investment when they

believe that the investment is not merely directed towards financial goals, but also broader business or strategic goals. There is nothing preventing the Appellant from taking a business decision of parking some of its interest-free and after-tax funds in making investments or lending interest-free advances to its sister concerns, when these funds are not required to meet working capital needs or immediate business/financial goals or exigencies. In any event, there is nothing shown by the AO that the investments made in earlier financial years are non-business in nature. The Memorandums of Association (MOA) of most companies allow satellite objects of dealing with tax-free funds in manners considered desirable by the management, which may include financial and tax-planning devices like short-term parking of funds in dividends-earning investments.

xx) In the case of CIT v. Walchand and Co. (R) Ltd. (1967) 65 ITR 381 (SC), the Hon'ble Supreme Court held that if the expenditure is wholly incurred for the purpose of business of the assessee, there was no reason to disallow any portion of

the interest expenditure on imaginary reasons. The judgment dated 08.08.2011 of the Hon'ble Bombay High Court in K. Raheja Corporation Pvt. Ltd. in Income Tax Appeal No. 1260 of 2009, held that when investments are made out of the assessee's own funds and not out of borrowed funds, no disallowance can be made on account of interest expenditure under section 14A. From these and a conspectus of several other judicial ratios held by the Hon'ble Courts and Tribunals, it is clear that the Appellant cannot be prevented, u/s 14A or u/s 2(22)(c) or u/s 36(1) (iii) r.w.s 37 of the Act, from making interest-free advances from out of interest- free funds, if such payments are made towards business purposes and if such payments have been made towards specified intents.

yy) The following represent the statutory positions for the impugned A.Y. 2011-12 :

- (i) Section 14A of the Act provides for the disallowance of expenditure incurred in relation to the earning of exempt incomes. Where the Tax Officer is not satisfied*

with the taxpayer's claim with respect to determination of amount liable for disallowance under section 144, Rule 8D of the Income-tax Rules provides for the mechanism to determine the quantum of such disallowance.

- (ii) In terms of the provisions of Rule 8D, the amount to be disallowed shall be the aggregate of (i) expenses directly incurred to earn exempt income, (ii) interest expense (not directly attributable to any exempt income) worked out on the basis of a prescribed formula; and (iii) 0.5% of the average value of investments yielding exempt income.*
- (iii) Rule 8D was introduced by the Income Tax (Fifth Amendment) Rules 2008 with prospective effect from 24th March 2008 vide Notification No. 45/2008 for computation of disallowance u/s 14A of the Act by the AO subject to his/her satisfaction with the correctness of the claim (or no claim) by an assessee.*

[NB: It may be noted that the Central Board of Direct Taxes (CBDT) vide notification no. 43/2016 dated 2 June, 2016, has amended Rule 8D. In the same, the formula specified in relation to indirect interest expenditure has been deleted. Accordingly, indirect interest expenses will not be disallowed in future Assessment Years. The amendment has been brought about based on the recommendations of the R. V. Easwar Committee (constituted vide CBDT's Notification No. A. 50050/112/ 2015-Ad.I dated 27 October 2015) in that the second limb of method of computation and the resultant figure of disallowance that deals with the interest expenditure in certain cases are unfair to the assessee as the resulting disallowance of interest exceeds the actual unallocated interest expenditure and allocated interest expenditure towards the income not forming part of total income. Although not directly retrospectively applicable here, this recent change is supportive of the position of the Appellant].

zz) *From the facts, figures and averments provided by the Appellant, there is no incontrovertibly proven nexus between the interest-bearing funds borrowed by the Appellant and the impugned investments. The ratio of the Hon'ble Supreme Court in the case of CIT vs. Walfort Share & Stock Brokers: [2010] 326 ITR 1 (SC), wherein it was held by the Apex Court that there must be a proximate relationship of expenditure with exempt income for the purposes of making disallowance of same u/s 14A of the Act is relevant and applicable. The AO's arguments (if they may be considered to amount to such) amount to that Section 14A of the Act disallowed all expenditure related to the investments which generated tax-exempt incomes. The AO ought to have considered the position that before applying Rule 8D in computing the disallowance, the basic provisions of Section 14A were be considered (viz. substantive law ahead of procedural law). Rule 8D is only an instrument to apply Section 14A Substantive law precedes and overrides*

procedural law. If an amount is not to be disallowed and taxed u/s 14A of the Act then Rule 8D cannot be invoked.

aaa) The AO's approach in making the disallowances is mechanical and superficial and appear to be based on nothing but surmise and conjecture. There is on the facts of the instant case nothing to show that any interest-bearing loans have been employed to earn the exempt dividends or to make investments that generated such dividends. The loans obtained by the Appellant are seen to be towards other specific purposes which are directly attributable to its taxable profits-generating business operations. There is no material on record or link to show that the tax-exempt-dividends-earning investments were made out of any borrowed funds. The Appellant has been able to show that the investments were made from tax free funds owing to surplus capital that needed to be parked in productive assets (the mutual funds). Moreover, the parking is seen to be not with any long-term strategic intent that deviates from the business objectives or purposes of the Appellant. No

expenses have been shown by the AO to be incurred, towards the earning of the dividend incomes.

bbb) If the AO wished to make a disallowance u/s 14A of the Act, a detailed comparison on a day-to-day basis needed to be made between the entering interest-bearing funds and the outgoing tax-exempt- earning investments, to show that any item or installment of loans obtained had been invested in dividend-earning destinations owing singularly because of the lack of tax-free funds being reserves and surpluses. Besides the fact that the AO has not carried out such an exercise to establish the due and legally vital nexus, there is little likelihood in the instant case, owing to the magnitude of the resources being the tax-free funds at the Appellant's command and the demonstrated sources of the funds flow into the impugned investments being the proceeds from allotment of Equity Shares, that such an effort would unearth anything adverse against the Appellant. The tax-free reserves available to the Appellant on 31.03.2010 are sufficient to cover the investments. The AO appears to have

made little effort to consider or counter or disprove any of facts available on record. There hence appear to be no facts unearthed by the AO to show that the interest amounts expended by the Appellant have been employed even through the remotest of relationships or connecting umbilicus towards earning/receiving tax exempt dividend incomes.

ccc) Section 14A is a "negative" "disallowance' provision and not a positive, charging, "addition' provision. Before invoking it, the AO needed to confirm that the impugned expenditure must have been claimed as a deduction in the first place, because what has not been claimed as deduction cannot be disallowed. There also needed to exist a proximate relationship between the expenditure and the exempt income. The ratio of the Hon'ble Punjab and Haryana High Court in the case of CIT v. Hero Cycles Ltd [2010] 323 ITR 518 (P&H) (HC) is applicable.

ddd) The decision of the Division Bench of the Hon'ble Delhi High Court in the case of Maxopp Investments vs. Commissioner of Income-tax on 8.11.2011 in ITA 687/2009 too is

applicable, wherein the Hon'ble High Court, while approving the contention raised by the assessee that the term "expenditure incurred" appearing in section 14A(1) of the Act would mean "actual expenditure incurred, held that no disallowance could be made under the said Section when no expenditure had 'actually' been incurred by the assessee in relation to the earning of the exempt income. Attention is also invited to the decision of the Hon'ble Punjab & Haryana High Court in the case of CIT v. Metalman Auto P. Ltd.: [2011] 336 ITR 434 (P & H). The relevant observations are in favour of the Appellant's contentions.

eee) The decision of the Delhi Bench of the Income Tax Appellate Tribunal in the case of ACIT v. HCL A Comnet Ltd.: ITA No. 322 and 2583/Del/2012 [Assessment Years 2007-08 and 2008-09], wherein the ITAT, following the decision of the Hon'ble Punjab and Haryana High Court in the case of Hero Cycles (supra), held that interest paid in connection with loans having no nexus with investments giving rise to exempt income cannot be disallowed under Section 14A

read with Rule Rule 8D. The decisions of the Kolkata and Chennai Benches of the ITAT in the cases of ITO vs. Narain Prasad Dalmia: ITA No. 1180/K/2011 for the AY 2008-09 and ACIT v. Best & Crompton Engg Ltd. ITA No.1603/Mds/2012 for the AY 2009-10 too are applicable.

fff) On the debate that no disallowance on account of interest is called for when the Appellant was having its own sufficient funds to make investments, it may be noted that it becomes necessary for an assessee to prove on facts that investments have been made out of his own funds. In case an assessee is able to prove on the basis of his facts that investments have undoubtedly been made out of own funds and no borrowed funds have been utilized, there would no case of disallowance. In the instant case, such evidence is on record, which the AO has failed to gauge, analyze appreciate and/or accept. A controversy, however, arises in those circumstances involving the presence of mixed funds. The following decisions of the Hon'ble Supreme Court and High Courts hold that in the context of Interest free loans

given to sister concerns, where an assessee has owned funds that exceed interest free loans it should be presumed that interest free loans have been given out of own funds and no disallowance of interest is called for :

- i. Munjal Sales Corpn. Vs. CIF [2008] 168 Taxman 43 (5C)*
- ii. CIT vs. Reliance Utilities & Power Ltd. [2009] 178 Taxman 135 (Bom.);*
- iii. CIT vs. Tin Box Co. [2004] 135 Taxman 145 (Delhi)*
- iv. CIT vs. Motor Sales Ltd. [2008] 304 ITR 123 (All)*
- v. CIT vs. Bharti Televenture Ltd. [2011] 200 Taxman 39 (Mag)/11 taxmann.com 356 (Delhi)*
- vi. K. Industries Ltd. v. CIT [2011] 11 taxmann.com 72 (Cal.) (vi);*
- vii. CIT vs. Indian Sugar Exim Corpn. Ltd. [2012] 206 Taxman 242/19 taxmann.com 158 (Delhi).*

In the light of the aforesaid legal position the Appellant can well argue that since it had sufficient owned and interest-free funds to make investments during the impugned F.Y. 2008-09, even if he is not able to match entries of investments to interest free funds, no disallowances on account of interest are called for.

ggg) In several cases, the view has been taken by the Hon'ble High Courts and the Tribunals that no disallowance is called for where the assessee has made investments out of his own funds or the own funds available with the assessee are quite sufficient to make investments which have given rise to exempt income. In this regard following decisions can be referred to:

- i. CIT v. Winsome Textile Industries Ltd. [2009] 319 ITR 204 (Punj. & Har.).*
- ii. CIT v. Suzion Energy Ltd. [Tax Appeal No. 223 of 2013, dated 3-4-2013] (Guj.)*
- iii. CIT v. K. Raheja Corpn. (P.) Ltd. [IT Appeal No. 1260 of 2009, dated 8-8-2011] (Bom.)*
- iv. Yatish Trading Co. (P.) Ltd. v. Asstt. CIT [2011] 129 ITD 237/9 taxmann.com 164 (Trib.)(Mum.)*
- v. Maruti Udyog Ltd. v. Dy. CIT [2005] 92 ITD 119 (Trib.) (Delhi.)*
- vi. Paranjape Autocast (P) Ltd. v. Dy. CIT [IT Appeal Nos. 1090 & 1091 (Trib) (Pune) of 2010, dated 25-6-2012]*
- vii. ITO v. Strides Arcolab Ltd. [2012] 138 (TD 323/24 taxmann.com 89 (Trib.)(Mum.)*
- viii. Yamuna Prasad Peshwa v. Dy. CIT [IT Appeal No. 416 (Trib.) (Jodh.) of 2009, dated 9-12-2011]*

- ix. *Dy. CIT v. Maharashtra Seamless Ltd. [2011] 48 SOT 160 (URO)/16 taxmann.com 97 (Trib.) (Delhi)*
- x. *Balarampur Chini Mills Lad v. Dy. CIT [2012] 20 taxmann.com 117 (Trib.) (Kol.)*

hhh) The Bombay High Court in the case of HDFC Bank Lid vs. DCIT 2(3), Mumbai & Ors (in its decision dated 25.02.2016) observed that the presumption that the investment in tax-free securities is made from the taxpayers own funds if the funds are in excess of the securities applies to section 14A of the Act. Such a presumption would apply notwithstanding the fact that the tax payer concerned may also have taken some funds on interest. The same decisions were held by the Hon'ble Bombay High Court in the case of CIT vs Reliance Utilities and Power Ltd (2009) 313 ITR 340 (Bom.) and by the Hon'ble Karnataka High Court in the case of CIT v Microlabs Ltd (2016) 383 ITR 490 (Kar.).

iii) The decision of the Hon'ble Bombay High Court in the case of Godrej & Boyce M. Co, Lil Ya DCIT (2010) 328 ITR 81 (Bom.) held that Rule 8D r.w.s S. 14A (2) is not arbitrary or unreasonable but can be applied only if the assessee's

method was found to be not satisfactory, is considered. In the said decision, the Hon'ble Court in the said case also observed that in the light of the decision of the Hon'ble Apex Court in the case of Walfort Shares & Stock Brokers (supra), the disallowance under section 14A could be effected only when a proximate cause for disallowance was established. In the instant case, the relationship of the disputed expenditure with the tax exempt income remains to be proved. The AO appears to have acted on presumptions, conjectures and surmises, and wrongly interpreted in the impugned assessment order the said decision in support of his position. The decision of the Hon'ble Bombay High above also held that expenditure incurred in relation to exempt income can be disallowed under section 14A of the Act only if the AO is not satisfied with the correctness of the expenditure claimed by the assessee. The Hon'ble Court further also went on to hold that if the assessee claimed that no expenditure has been incurred to earn the exempt income, no disallowance under that section could be made

unless the AO, on the basis of cogent material on record, records a satisfaction that the submissions made by the assessee were not correct. No disallowance under that section could be made by the AO in the absence of such recording of satisfaction. The decision in the case of REI Agro v. DCIT; ITA No. 1331/Kol/2011 for the A.Y. 2008-09 of the Kolkata Bench of the ITAT too is seen to be on similar lines.

jjj) The ratios offered by the Appellant in support of its position are along the same lines as above and supplement the Appellant's case and cause in the instant Appeal. From a consistent reading of all these judicial ratios, what emerges is that for making a disallowance u/s 14A r.w.r 8D:

- (i) A clear, actual proximate cause for disallowance, which is the relationship of the expenditure with the tax exempt income needs to be proved or established;*
- (ii) Actual expenditure towards the earning of the tax-exempt Dividend incomes must have been incurred;*

- (iii) The AO, on the basis of cogent material on record, needs to record his satisfaction that the submissions made by the assessee are not correct;*
- (iv) The interest-free owned funds of the Appellant are not in excess of the tax-exempt-income- generating investments made, which exception would hold even if the funds of the Appellant consisted of mixed (interest-bearing and interest-free) funds;*
- (v) Positive (actual) Dividend incomes must have been earned;*

kkk) It is seen that the intersection of all of the above established judicial positions that prevent any disallowance u/s 14A r.w.r 8D apply in favour of the Appellant in the instant case. In respect of judicial position (iii), it can be noted that the AO's comments are generic in that he has recorded his surmise/conjecture that the Appellant may have incurred expenses attributable to the earning of exempt incomes being dividends (which do not exist) from investments (that have not been made during the impugned financial year)

and that such imagined expenses have not been attributed and/or disallowed by it. He has not specifically shown with the support of evidences that any such incurrence or consequent non-attribution has taken place. There is hence no cogent material on record to draw the inferences and conclusions the AO has drawn. The AO's action is mechanical and without proper reason or responsibility in that she has ignored and/or failed to consider salient and important facts. Section 14A(3) which mandates such satisfaction to be recorded in a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act has thus not been correctly understood or applied by the AO. All of these overwhelm any possible argument in favour of disallowance u/s 14A.

- II) *All of the above submissions of the Appellant and judicial pronouncements along the factual matrix and legal provisions clearly show that no disallowance of the impugned amount of Rs.75,70,210/- being interest*

expenditure relating to exempt income was called for, for any reason. In spirit and fairness, the CBDT's recent Notification No. A.50050/112/2015-Ad.I dated 27 October 2015 too can be considered as indicative. The AO, by mechanically applying Rule 8D, has acted on unstated and as yet unfathomed presumptions, conjectures and surmises. This action is unsustainable in law and the enhancement made is hereby directed to be deleted. Ground Numbered 5 is allowed in favour of the Appellant."

12. Suffice to say, it is very much evident that the Revenue's endeavour herein is to revive the proportionate interest expenditure disallowance in assessee's case relating to its exempt income. As against this, learned CIT(A) has recorded a categorical finding that the assessee had nowhere utilized its interest bearing funds in making exempt income yielding actual exempt income in the relevant previous year(s) which is nowhere disputed in the corresponding substantive grounds. We conclude in these facts that once the assessee had already proved to have utilized its interest free funds,

no proportionate interest could be disallowed in sec.14A read with Rule-8D as per above judicial precedents. Rejected accordingly.

13. The Revenue's fifth substantive ground in AY 2011-12 and AY 2012-13 seeks to reverse the CIT(A)'s identical, action deleting the assessee's depreciation disallowance claim *qua* its golf course under the head "plant and machinery". Learned A.R. not only drew strong support from the CIT(A)'s detailed discussion but also produced this tribunal's coordinate bench's order in Landbase India Ltd. vs. ACIT [2020] 185 ITD 40 (Delhi) (Tribu.). Mr. Gopi takes as to para 6 therein that the hon'ble Gujarat high court had also accepted similar issue therein rejecting the department's submission and hold that such plant and machinery is indeed entitled for depreciation. We find that their lordships had come across the corresponding depreciation claim relating to an oil rig, which was treated as a "well" i.e., only a building, than "plant and machinery", up-to the tribunal in Niko Oil Resources vs. ACIT [2017] 395 ITR 301 (Guj.) as under :

"2. While admitting the matter on 11.01.2010, the following substantial question of law was framed by the Court for consideration :—

"(i) Whether, in the facts and under the circumstances of the case the Income Tax Appellate Tribunal was right in law in treating the mineral oil wells as Buildings for the purpose of applying rate of depreciation under Section 32 of the Income Tax Act?"

3. *Learned Senior Counsel for the appellant - assessee Mr. S.N. Soparkar has submitted that the Tribunal has erred in restricting the alternate claim of depreciation made by the assessee without prejudice to its principal claim under Section 42 of the Act. It is further submitted that the Tribunal has erred in restricting the claim of depreciation only @ 10% against 100% allowed by CIT(Appeals) by treating the oil wells as buildings. It is next contended that the Tribunal has erred in not appreciating that the mineral oil wells can never be equated with the buildings and therefore its action of applying the rate of depreciation of buildings to the mineral oil wells is illegal and cannot be sustained in law.*

3.1. *Learned Senior Counsel Mr. S.N. Soparkar has taken us to the orders of the Assessing Officer, CIT (Appeals) and the*

Tribunal and has contended that building a well forms a mandatory part for drilling of the oil and therefore, the same was constructed and this aspect has not been considered.

3.2. *Learned Senior Counsel for the appellant has relied on the decision of the Hon'ble Supreme Court in the case of Scientific Engg. House (P.) Ltd. v. CIT [1986] 157 ITR 86/[1985] 23 Taxman 66 (SC) and more particularly on paragraphs 10, 11 and 12 which reads as under :—*

'10. The next question is whether the acquisition of such a capital asset is depreciable asset or not? Under section 32 depreciation allowance is, subject to the provisions of section 34, permissible only in respect of certain assets specified therein, namely, buildings, machinery, plant and furniture owned by the assessee and used for the purpose of business while section 43(3) defines 'plant' in very wide terms saying "plant includes ships, vehicles, books, scientific apparatus and surgical equipments used for the purpose of the business". The question is whether technical know-how in the shape of

drawings, designs, charts, plans, processing data and other literature falls within the definition of 'plant'.

11. *The Counsel for the assessee urged that the expression 'plant' should be given a very wide meaning and reference was made to a number of decisions for the purpose of showing how quite a variety of articles, objects or things have been held to be 'plant'. But it is unnecessary to deal with all those cases and a reference to three or four decisions, in our view, would suffice. The classic definition of 'plant' was given by Lindley, L.J. in Yarmouth v. France, [1887] 19 Q.B.D. 647, a case in which it was decided that a cart-horse was plant within the meaning of section 1(1) of Employers' Liability Act, 1880. The relevant passage occurring at page 658 of the Report runs thus :-*

"There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business - not his stock-in-trade which he buys or makes for sale; but

all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business"

In other words, plant would include any article or object fixed or movable, live or dead, used by businessman for carrying on his business and it is not necessarily confined to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business. In order to qualify as plant the article must have some degree of durability, as for instance, in Hinton v. Maden & Ireland Ltd., 39 I.T.R. 357, knives and lasts having an average life of three years used in manufacturing shoes were held to be plant. In C.I.T. Andhra Pradesh v. Taj Mahal Hotel, 82 I.T.R. 44, the respondent, which ran a hotel installed sanitary and pipeline fittings in one of its branches in respect whereof it claimed development rebate and the question was whether the sanitary and pipe line fittings installed fell within the definition of

plant given in sec. 10(5) of the 1922 Act which was similar to the definition given in Sec. 43(3) of the 1961 Act and this Court after approving the definition of plant given by Lindley L.J. in Yarmouth v. France as expounded in Jarrold v. John Good and sons Limited, 1962, 40 T.C. 681 C.A., held that sanitary and pipe-line fittings fell within the definition of plant.

12. *In Inland Revenue Commissioner v. Barly Curle & Co. Ltd., 76 I.T.R. 62, the House of Lords held that a dry dock since it fulfilled the function of a plant must be held to be a plant. Lord Reid considered the part which a dry dock played in the assessee company's operations and observed :*

"It seems to me that every part of this dry dock plays an essential part....The whole of the dock is I think, the means by which, or plant with which, the operation is performed."

Lord Guest indicated a functional test in these words :

"In order to decide whether a particular subject is an 'apparatus' it seems obvious that an enquiry has to be made as to what operation it performs. The functional test is, therefore, essential at any rate as a preliminary..."-

"In other words the test would be: Does the article fulfil the function of a plant in the assessee's trading activity Is it a tool of his trade with which he carries on his business? If the answer is in the affirmative it will be a plant."

3.3. *Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of CIT v. Dr. B. Venkata Rao [2000] 243 ITR 81/111 Taxman 635 and paragraphs 2 and 3 of this decision reads as under :—*

"2. The assessee is a medical practitioner. The assessee is a medical practitioner. He runs a nursing home. In respect of the building in which the nursing home is run, the assessee claimed, for the asst. yr. 1983-84, that it was a "plant". His contention was

rejected by the ITO and by the CIT(A). The Tribunal found to the contrary. Applying the functional test, it held that the nursing home was a plant. The High Court affirmed that view. It said that a building used as a nursing home is not comparable with an ordinary building having regard to the number of persons using it, the manner of its use and the purpose for which it is used. The building was used not only to house patients and nurse them, but also to treat them, for which various kinds of equipment and instruments were installed.

3. *The most apposite decision in this context is that delivered by the Allahabad High Court in S.K. Tulsi & Sons v. CIT (1990) 90 CTR (All) 99 : (1991) 187 ITR 685 (All) : TC 29R.638. Reference was made to an earlier judgment, where also the functional test approved by this Court in several decisions was applied. It was held that if it was found that the building or structure constituted an apparatus or a tool of the taxpayer by*

means of which business activities were carried on, it amounted to a "plant"; but where the structure played no part in the carrying on of these activities but merely constituted a place wherein they were carried on, the building could not be regarded as a plant."

3.4. *In addition, learned Senior Counsel for the appellant has referred to the decision of the Hon'ble Supreme Court in the case of Asstt. CIT v. Victory Aqua Farm Ltd. [2015] 379 ITR 335/234 Taxman 598/61 taxmann.com 166 wherein Paragraphs 4 and 6 are reproduced hereunder :—*

'4. *It is not in dispute that if these ponds are 'plants', then they are eligible for depreciation at the rates applicable to plant and machinery and case would be covered by the provisions of Section 32 of the Act. It is not even necessary to deal with this aspect in detail with reference to the various judgments, inasmuch as judgment of this Court in Commissioner of Income Tax, Karnataka v. Karnataka Power Corporation [2002(9) SCC 571] clinches the issue.*

Therein the Court has taken into consideration the earlier judgments on which some reliance was placed by the learned counsel for the Revenue and are suitably dealt with. The relevant portion of the said judgment reads as under:

"5. It was the case of the assessee that it was entitled to investment allowance as applicable to a plant in respect of its power generating station building. In a note filed before the Commissioner (Appeals) it stated that it had included for the purpose the value of its Potential Transformer Foundation. Cable Duct System, Outdoor Yard Structures and Tail Race Channel. It explained that the process of generation started from letting in water from the reservoir into the pen-stocks and ducts which were the water conductor system into the turbines. Once electricity had been produced by generation, it had to be conducted, as it was not possible to store the

same, and the process of generation continued until the electricity was led to the transmission tower. The water that was used for rotation of the turbines had to be removed and this was done through the Tail Race Channel. For stepping up the electricity, transformers were used in the outdoor yard. The conduction of the electricity was through conductors held in ducts, called the Cable Duct System, which were specifically designed for the purpose. The case of the assessee, therefore, was that all these were part of the special engineering works that were an essential part of a generating plant and, therefore, it was entitled to have the same treated as a plant for the purposes of investment allowance. The Commissioner accepted the correctness of the assessee's case. He held that it was clear that the generating station buildings had to be treated as a plant for the purposes of investment allowance.

These buildings could not be separated from the machinery and the machinery could not be worked without such special construction. He, therefore, allowed investment, allowance on the generating station, building, as claimed. The Tribunal affirmed this finding, as, as, indeed did the High Court.

6. We, therefore, have before us a finding of fact recorded by the fact finding authority that the generating station building is an integral part of the assessee's generating system."

14. Learned counsel fails to rebut the clinching facts emerging from the CIT(A)'s order that he has not examined the instant issue in detail as to whether the assessee's golf course, forms part of its airport business or not, which in turn, could be treated as part of "plant and machinery". We thus deem it as a fit case to be restored to the learned CIT(A) for his afresh appropriate adjudication. We make it clear that it shall be assessee's risk and responsibility only to plead and prove all relevant issues on facts as well as law in

consequential proceedings. This Revenue's ground in both later assessment years 2011-12 and 2012-13 succeeds for statistical purposes.

15. Revenue's 6th and 7th substantive ground(s) in assessment years 2011-12 and 2012-13 herein plead that the CIT(A) has erred in law and on facts in granting higher depreciation to the assessee @ 50% involving maxi cab, motor cab, etc. We note in this factual backdrop that the CIT(A) has not followed his order in AY 2010-11 and the Revenue appears to have accepted the same which has not raised its corresponding substantive ground in its foregoing appeal ITA No. 166/Coch/2017. Rejected accordingly.

16. Revenue lastly contends that in AY 2012-13 the learned CIT(A) ought to have upheld the Assessing Officer's section 115JB computation involving the passenger security fee and interest thereon. We are of the considered view that once the assessee has succeeded on the corresponding issue itself, the instant last substantial ground raised at the Revenue's behest stands rendered academic. Rejected therefore.

17. To sum-up, the Revenue's instant first and foremost appeal ITA.No.166/Coch./2017 is dismissed. It's latter three appeals ITA.Nos.167, 193 & 304/Coch./2017 *inter alia* are partly allowed/ partly allowed/partly allowed for statistical purposes in above terms. copy of this common order be placed in the respective case files.

Order pronounced in the open court on 23rd October, 2024.

Sd/-
(Amarjit Singh)
Accountant Member

Sd/-
(Satbeer Singh Godara)
Judicial Member

Cochin, Dated: 23rd October, 2024

VBP/-

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin