

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.3068/Mum/2024
(Assessment Year :2017-18)
ITA No.3063/Mum/2024
(Assessment Year: 2017-18)
ITA No.3061/Mum/2024
(Assessment Year : 2018-19)
&
ITA No.3065/Mum/2024
(Assessment Year : 2018-19)**

Assistant Commissioner of Income Tax (TDS)2(1) / DCIT (CC) 3(4) Mumbai	Vs.	Patel Engineering Limited Patel Estate Off. S.V.Road Jogeshwari West Maharashtra-400 102
PAN/GIR No.AAACP2567L		
(Appellant)	..	(Respondent)

**ITA No.2801/Mum/2024
(Assessment Year :2017-18)
ITA No.2802/Mum/2024
(Assessment Year :2018-19)**

Patel Engineering Limited Patel Estate Off. S.V.Road Jogeshwari West Maharashtra-400102	Vs.	Assistant Commissioner of Income Tax (TDS)2(1) /DCIT (CC)-3(4) Mumbai
PAN/GIR No. AAACP2567L		
(Appellant)	..	(Respondent)

Assessee by	Shri Madhur Agarwal & Shri Mayur Kisnadwala
Revenue by	Shri Amol Kirtane
Date of Hearing	23/10/2024
Date of Pronouncement	31/12/2024

देश / ORDER

PER AMIT SHUKLA (J.M):

ITA NOs. 3068/Mum/2024 & 3065/Mum/2024

The aforesaid appeals have been filed by the Revenue against order dated 18/03/2024 passed by CIT (A)-51 in relation to the order passed u/s.201 / 201A for the A.Y.2017-18 & 2018-19.

2. Since issues involved in both the appeals are common arising out of identical set of facts, therefore, the same are being disposed of together.

3. For the sake of ready reference, the grounds for A.Y. 17-18 raised by the Revenue reproduce hereunder:-

"1. Whether on the facts and circumstances of the case, the order of the Ld. CIT(A) is contrary to law and to the facts and circumstances of the case without appreciating the fact that the JV is separate entity from the assessee and assessee is liable to deduct TDS u/s 194A of the Act, while making payment of interest on 11,55,26,750/- to M/s. AGE Patel JV (AOP)."

2. "Whether on the facts and circumstances of the case, the Ld. CIT(A) erred in holding that assessee was not liable to deduct TDS u/s,194A on the interest paid to M/s. AGE Patel JV (AOP) during F.Y.2016-17 without appreciating the fact that the JV is still intact with object to earn income as a JV receives turnover based fixed fee of 1.5% of each running bill as certified by IRCON. Change in

internal sharing ratio between members does not affect the identity or JV."

3. "Whether on the facts and circumstances of the case, the Ld. CIT(A) erred in not appreciating that the JV is a separate entity (an AOP) as per I. T. Act and this entity is live, liable to be taxes as such. The status of the JV in its return of income filed for A.Y 2017-18 is also an AOP and separate from Assessee."

4. Whether on the facts and circumstances of the case, the ld. CIT(A) erred in not appreciating that the provisions of Chapter XVII-B is applicable in transaction between two separate persons assessable to Income Tax."

5. Similar grounds have been raised in 2018-19 except for variation in figures of payment of interest of Rs. 18,53,35,410/-.

6. The brief facts as culled out from the impugned assessment order are that the assessee is a company and is engaged into the business of execution of civil contracts, construction of roads, toll-ways, bridges, railway tracks, hydroelectric power projects and other infrastructure projects. The assessee is also engaged in the business of real estate development.

7. In the case of the assessee survey was conducted and during the course of a survey, it was seen that the assessee had defaulted in deducting tax at source on interest paid to AGE Patel Joint Venture (JV) in Financial Year (FY) 2016-17. The assessee was a member of the JV namely AGE Patel JV having PAN AAEEAA6695G. AGE Patel JV had entered into two contracts with Ircon International Limited ("IRCON", a GOI undertaking) for the construction of Tunnel T-1 and T-15 in Jammu and

Kashmir respectively ("the Project"). It was decided between the members of the JV that the contract obtained from IRCON would be executed by the assessee. On verification of trial balance and accounts, it was seen that the assessee had not deducted tax at source on interest paid to AGE Patel JV on Mobilisation advance and Machinery advance during FY 2016-17. For the A.Y.1998-99, ld. AO noted that assessee has paid amount of Rs.11,55,26,750/- to M/s. AGE Patel JV on which TDS was required to be deducted @10% alongwith interest on short deduction.

8. In response to show cause notice, assessee had filed its detailed reply which has been incorporated in the order passed by the ld. AO in para 5. However, the ld. AO rejected the assessee's submissions and also distinguished judgments relied upon by the assessee. First of all, AO held that from the reading of the agreement between IRCON and AGE Patel JV and sub-contractual agreement between AGE Patel JV and PEL, it is clear that JV is a separate entity, i.e., it is an AOP under the Act and this entity is liable to be taxed as such. Considering the fact that main contract was awarded to AGE Patel JV and later sub-contract to the assessee and both being separate persons assessable to tax as AOP and again separately as a company in the assessee's case. Both assessee and AGE Patel JV came together for bidding of the work tendered by IRCON and entire work was the joint responsibility of the two members of the JV and therefore, they had a common object of surrendering the contract and verifying the application under the contract. Thus,

he concluded that assessee alongwith other members of the JV constitute AOP which is to be taxed as such and the relationship between the JV and assessee for the work is of contractor and sub-contractor as the ultimate purpose was to complete the project awarded to the JV.

8.1 AO also rejected the assessee's alternate claim that the interest earned from the assessee has been considered in the return of income filed by the JV for the year under consideration and Form 26A was issued by the Chartered Accountant has been given therefore, in view of the second proviso to Section 201(1), assessee should not be treated as 'assessee in default'. He thus, held that assessee has violated the provision of Section 194A and interest paid to AGE Patel JV, TDS was required to be deducted @10%. Thereafter, accordingly, the payment of Rs.1,42,09,790/- was treated in 2017-18 and likewise in A.Y.2018-19 of Rs.2,07,57,565/- including interest u/s.201(1)(A).

9. The ld. CIT (A) allowed assessee's appeal following the CBDT Circular dated 22/09/2017 wherein payments to Corporations like IRCON, no tax is to be deducted at source. He also relied upon the judgment of Jurisdictional High Court in the case of CIT vs. Smsl Uanrcl(JV), reported in 378 ITR 429 and decision of the Hon'ble Gujarat High Court in the case of CIT vs. AGE Patel JV in ITA No.2434-2437 of 2010 to decide this issue in favour.

10. We have heard both the parties at length and also perused the relevant finding given in the impugned order. The main allegation of the ld. AO is that considering the fact that the main

agreement between IRCON and AGE Patel JV and the sub contractual agreement between AGE Patel JV and the assessee, and therefore, it is clear that the JV is a separate entity under the Act and is liable to be taxed as such. The assessee and AGE had jointly prepared a bid for submission to IRCON to execute the project, if allotted and the entire work was the joint responsibility of the two members of the JV with a common purpose to earn income from executing the project. Hence, the two members of the JV formed an association of persons which was liable to be assessed as such. Accordingly, as per the AO the assessee was liable to deduct tax at source on the interest payment made by it to the JV on the mobilisation advance, which it had failed to do. Whereas, the Id. CIT (A) considered the agreement entered into between the AGE Patel JV and IRCON along with the amendment agreements dated 31.03.2016 and 21.04.2016 between the constituent members of the JV. AGE and Patel Engineering Ltd. (assessee), and noted that vide the amendment agreements, it was decided that the entire work will be executed by the assessee in its principal capacity with complete contractual and operational responsibility being experienced in that particular work and the other member of the JV, i.e., AGE, being not interested in the execution of the contract, neither in the JV nor as a constituent member of the JV, would receive only a turnover based fixed fee of 1.5% of each running bill as certified by IRCON from the assessee, i.e., it would not participate in the profit of the said JV project. On this factual matrix, the Ld. CIT (A) held that the Association of

Persons (AOP) of AGE Patel JV ceased to exist with effect from 31.03.2016 and therefore the said JV was no longer an assessable entity during the impugned year. The Ld. CIT (A) also noted that the entire turnover and costs of the IRCON project and consequently the profits have been offered to tax by the assessee and the credit for the TDS in the name and under the PAN of AGE Patel JV has also been claimed by the assessee in its return of income. The assessee has filed evidence in the form of return of income filed, Form 26AS and the assessment order of AGE Patel JV, wherein the assessing officer of the said JV has accepted the contention that the AOP has ceased to exist and therefore, the profits of the AGE Patel JV and its TDS credit belong to the assessee. Simultaneously, the assessing officer of the assessee has assessed such income in the assessment of the assessee and has granted corresponding credit of TDS to the assessee. The assessee has cited a number of decisions, including of the Hon'ble Jurisdictional High Court, in CIT v. SMSL-UANRCL (2015) 372 ITR 429, CIT v. LGE & C Patel JV (ITA No. 2434 to 2437 of 2010) (Gujarat) and ITO v. Shraddha & Prasad Joint Venture (ITA No. 2665 / Pune / 2017), wherein identical/similar contentions as that of the assessee have been upheld.

10.1 The Ld. CIT (A) has also relied on the Circular no. 07/2016 dated 7th March, 2016 of the CBDT, wherein the CBDT itself has accepted the legal position that a consortium, depending on the facts and circumstances of the case, may not be an AOP.

Accordingly, the Ld. CIT(A) held that the assessee had no obligation to deduct tax at source on the interest payment to IRCON routed through AGE Patel JV, as IRCON being one of the notified companies by the Government, the assessee was not liable to deducted tax at source u/s 194A on the interest paid by it to IRCON.

11. In view of the above, the Ld. CIT (A) directed the Ld. AO that the assessee cannot be considered as assessee-in-default u/s 201(1)/ 201(1A) and consequently demand was deleted.

12. In the infrastructure industry, generally, the contract awarded to the JV is executed by the JV itself by pooling of resources and work is executed using one or several third-party contractors by subcontracting the work. However, in the case of AGE Patel JV, where the assessee is a constituent member, it is seen that the members, vide subsequent amendment agreements dated 31.03.2016 and 21.04.2016 decided that the entire work will be executed by the assessee in its principal capacity with complete contractual and operational responsibility and the other member of the JV, i.e., AGE, being not interested in the execution of the contract, neither in the JV nor as a constituent member of the JV and it was entitled to receive only a turnover based fixed fee of 1.5% of each running bill as certified by IRCON from the assessee, i.e., it would not participate in the profit of the said JV project.

13. We have perused the agreement and amendment agreement. By virtue of this agreement dated 31st March, 2016,

it is seen that AGE relinquished its share of profit in the JV and would have no claims on the receipts/payments towards IRCON. It would not be liable for any costs/damages which may be incurred by the JV. The daily administration would be handled by the assessee and all bank accounts of the JV would be solely operated by the assessee. Also, the assessee shall have all the rights to issue standing instructions to the bank for release of any payments related to the JV. In case of need for working capital requirements, AGE would co-operate with the assessee and shall not object to the same, however, its liability or surety towards such loan would be NIL. The assessee would disclose to the banks that the share of AGE in the JV is NIL. Based on the work executed, the running bills would be prepared by the assessee on the JV and the JV would request IRCON to release payments to it based on such bills issued by the assessee. On receipt of payment by the JV, the entire amount would be paid to the assessee towards execution of the entire scope of works out of which the assessee shall pay to AGE only the technical fees as agreed. Any claims or refunds shall be solely belonging to the assessee. Also, all the expenses and costs related to the contract would be borne by the assessee only. Further, the assessee shall be solely responsible for providing bonds/guarantees/indemnities wherever required for which it would also enter into separate agreements with concerned parties. The assessee shall hold AGE harmless and would fully indemnify it from any losses or costs that might have to be incurred in execution of the contract. Further, the assessee shall be responsible for any or all

taxes, duties or penalties including arranging for statutory clearances, permits, documentations, required for completion of the work. Simultaneously, any refund or credit from income tax or other duties which shall accrue to the JV shall also vest with the assessee. Thus, the assessee shall take all responsibilities for the completion of the project such as planning, designing, equipment and manpower deployment, logistics, all site construction related works, permits and liasioning and financing. Effectively, therefore, AGE had no role to play in the JV and the execution of the project.

14. Thus, it is seen that AOP between AGE Patel JV and the assessee had ceased to exist on 31/03/2016 as other member of the JV has no role left to play in the JV. Accordingly, 100% of the revenue/contract receipts/expenses pertaining to the JV, which is a division of the assessee, incurred to execute the contract belongs to and is accounted for by the assessee in its accounts, which is evident from 'Statement containing the salient features of the financial statements of subsidiaries/associates companies/joint ventures' forming part of audited financial accounts.

15. It is important to note here that not only the Ld. AO has accepted this position that the AOP has ceased to exist and assessed the income of AGE Patel JV in the hands of the assessee, but even the Ld. AO of AGE Patel JV has accepted that no income from the contract with IRCON is assessable in the hands of the JV and that even the credit for tax deducted at

source under the PAN of JV would be available to the assessee. The computation of income of the JV for the impugned year shows that the income reflected is Nil and no credit for tax deducted at source under the PAN of JV has been claimed, though Form 26AS of the JV does reflect such TDS. Further, in the ROI of the JV, it is reflected that the share of profit of the assessee is 100% and that of AGE is Nil. Not only the Ld. AO of the assessee has assessed the profit of the IRCON project in the hands of the assessee but has also accepted the position that assessee is eligible for the credit of TDS available under the PAN of the JV. We further, find that the Hon'ble Bombay High Court in the case of **CIT vs. Smsl Uanrcl (JV) (supra)** wherein the facts were identical to that in the assessee's case, i.e. the JV did not execute the contract work and the said work was done by one of its constituent's members, namely SMS Infrastructure Limited (SMS). It was also found that the receipts for the said project work are reflected in the books of account and in the return of income of SMS i.e. the said SMS has disclosed the entire receipts/expenses and consequently the profit/income of the contract and the JV has not shown any contracting activity. The said return was accepted by the AO in the hands of SMS in the assessment made under Section 153A read with section 143(3) of the Act. Against this factual background, the question raised by the Revenue authorities in the assessment of the JV was:

[1] Whether in the facts of the case and in law, the Hon'ble ITAT was correct in holding that the entire income earned by the joint venture company is liable to be taxed in the hand of one of the members of the assessee company without appreciating the

fact that the contract was awarded to the assessee company and not to the individual member of the assessee company?

16. The Hon'ble Bombay High Court held that;

"The Income-tax Appellate Tribunal, Nagpur ("the ITAT"), has as a matter of fact found that the assessee-joint venture did not execute the contract work and the said work was done by one of its constituents, namely, SMS Infrastructure Ltd. It is also found that the receipts for the said project work are reflected in the books of account of SMS Infrastructure Ltd. and in return, the said SMS Infrastructure Ltd. has disclosed that income. The said return was accepted by the Assessing Officer in the assessment made under section 153A read with section 143(3) of the Income-tax Act, 1961. It found that, therefore, the same income could not have been taxed again in the hands of the joint venture-assessee."

17. Before us other various judgments were also stated which are in the favour of the assessee. Lastly, **Circular No.07/2016 dated 07/03/2016 issued by CBDT** wherein it was brought out the features of doing business in the infrastructure industry, the extracts of the same are reproduced hereunder:-

"A consortium of contractors is often formed to implement large infrastructure projects particularly in Engineering Procurement and Construction ("EPC) contracts and Turnkey Projects. The tax authorities, in many cases have taken a position that such a consortium constitutes an Association of Persons (AOP) i.e a separate entity for charging tax The claim of taxpayers, on the other hand, is contrary to this view. This has led to tax disputes particularly in those cases where each member of the

consortium, although jointly and severally liable to the contractee, has a clear distinction and role in scope of work responsibilities and liabilities of the consortium members.

2. The term AOP has not been specifically defined in the income-tax Act, 1961 ("Act"). The issue as to what would constitute an AOP was considered by the Apex Court in some cases. Although certain guidelines were prescribed in this regard, the Court opined that there is no formula of universal application so as to conclusively decide the existence of an AOP and it would rather depend upon the particular facts and circumstances of a case. In the specific context of the EPC contract Turnkey projects, there are several contrary ruling of various Courts on what constitutes an AOP

3. The matter has been examined with a view to avoid tax-disputes and to have consistency in approach while handling these cases, the Board has decided that a consortium arrangement for executing EPC/Turnkey contracts which has the following attributes may not be treated as an AOP:

a. each member is independently responsible for executing its part of work through its own resources and also bears the risk of its scope of work i.e. there is a clear demarcation in the work and costs between the consortium members and each member incurs expenditure only in its specified area of work;

b. each member earns profit or incurs losses based on performance of the contract falling strictly within its scope of work. However, consortium members may share contract price at gross level only to facilitate convenience in billing.

c. the men and materials used for any area of work are under the risk and control of respective consortium members;

d. the control and management of the Consortium is not unified and common management is only for the inter-se coordination

between the consortium members for administrative convenience.

4. There may be other additional factors also which may justify that consortium is not an AOP and the same shall depend upon the specific facts and circumstances of a particular case which need to be taken into consideration while taking a view in the matter.

5. It is further clarified that this Circular shall not be applicable in cases where all or some of the members of the consortium are Associated Enterprises within the meaning of Section 92A of the Act. In such cases the Assessing Officer will decide whether an AOP is formed or not keeping in view the relevant provisions of the Act and judicial jurisprudence on this issue.

6. The above may be brought to the notice of all for necessary compliance" (Emphasis supplied)

18. Thus, in terms of the aforesaid CBDT Circular where consortium arrangement is made for executing the EPC/ Turnkey contracts in which each member is independently responsible for executing its part of work through its own resources and also bears the risk of its scope of work, i.e., there is clear demarcation in the work and costs between the consortium members and each member incurs expenditure only in its specified area of work, such a consortium may not be treated as an AOP. Thus, once in the case of the assessee, no work is performed by the JV or the other constituent member i.e. AGE, but only by the assessee, the AOP does not exist and therefore, we accept the contention of the assessee about non-applicability of Chapter XVII of the Act and no TDS was allowable to be deducted. Accordingly, the order of the ld. CIT

(A) is confirmed and the grounds raised by the Revenue in both the years are dismissed.

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19. These are the cross appeals filed by the assessee as well as by the Revenue against order dated 22/03/2024 passed by Id. CIT(A)-51, Mumbai for the quantum of assessment passed u/s.143(3) for the A.Y.2017-18.

20. In the grounds of appeal, Revenue has raised following grounds:-

1. *"On the facts and circumstances of the case, the Ld CIT(A) erred in deleting the disallowance of the assessee's claim of deduction u/s 80IA of the Act of Rs. 66,35,14,364/-"*

2. *"On the facts and circumstances of the case, the Ld CIT(A) erred in allowing the new claim with regard to rate of tax on capital gain even though such claim was not made in the return of income filed by the assessee."*

3. *"On the facts and circumstances of the case, the Ld CIT(A) erred in deleting the adjustments on account of addition made in computing the Book Profit u/s 115JB of the Act by ignoring the explanation 1 to section 115JB of Income Tax Act."*

21. Whereas assessee has raised following two grounds:-

1. *On the fact and circumstances of the case and in law, the Ld. CIT(A) erred in confirming disallowance of prior period expenses of Rs. 11,98,828 being amount not allowed in subsequent years.*

2. *On the fact and circumstances of the case and in law, the Ld. CIT(A) erred in confirming addition of Rs. 2,17,02,617 on the basis of the AIR Reconciliation.*

22. Assessee had filed its return of income on 30/11/2017 which was revised on 02/02/2018 declaring total income of Rs.122,12,77,610/-. The book profit u/s.115JB was returned at Rs.205,39,00,312/-. The ld. AO has completed the assessment on an income of Rs.192,02,94,830/-. The ld. AO has disallowed the claim of deduction u/s. 80IA(4) which was claimed at Rs.67,44,14,606/- holding that assessee is not eligible because for claiming deduction u/s.80IA(1) infrastructure facility should not only be developed but also operated by the assessee so as to make the profits derived from the infrastructure facility qualify for deduction u/s. 80IA. Unless assessee really develops and begins to operate infrastructure facility, there is no question of granting any deduction for the reason that the period of deduction cannot commence unless the enterprise develops and begins to operate the infrastructure facility. After analysing the Section 80IA in great detail and after considering the assessee's submissions he made following observations:-

- All the technical specifications and drawings of the project have been prepared by the authorities of the Government and the assessee have been assured of the payment as mentioned in respective agreements in the capacity of a contractor as consideration for the execution, completion and maintenance of the project.
- It is also to be mentioned that the Government has retained predetermined part of the payments due to the assessee as per bills passed for payments for part completion of the work as "retention money". This sum was released to the assessee

only on satisfactory performance of the project for a specified period after completion of construction

- The above condition clarifies that the interest of Government in the project was that of an owner and developer and the role of the assessee was only that of contractor who was expected to perform as per specifications provided.
- It is only a small part of the whole project for which the assessee has been engaged
- As regards Turial -II and Turial III, the assessee has entered into an agreement with North Eastern Electric Power Corporation Ltd (NEEPCO). Clause 80 IA(4)(i)(h) requires that the assessee must enter into an agreement with the Central Government or State Government or local authority or any other statutory body for (i) developing (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility; NEEPCO cannot be said to be Central Government or a State Government or a local Authority or a Statutory Body, NEEPCO is registered under the Companies Act 1956 like the assessee company and therefore, in case of these projects, deduction is not allowable.

23. The ld. AO then on perusal of the copies of the agreement filed by the assessee noted that assessee is merely a contractor and therefore, in view of the retrospective amendment in the *Explanation* in the Section 80IA (4) of the Act, to exclude the 'Contractor' but here the underline status of the assessee in each

of the agreement is that a contractor who is engaged in works contract for development of infrastructure facility by other agencies. Accordingly, he made the disallowance in the entire claim of Rs.67,44,14,606/-. Thereafter, he has made further disallowance claimed u/s. 35D of Rs.29,00,000/- and sum of Rs.2,1702,617/- on account of difference in AIR reconciliation.

24. The ld. CIT (A) allowed the claim of deduction u/s.80IA(4) following the earlier decision of the ld. CIT(A) and the Tribunal in assessee's own case right from the A.Y.2005-06 onwards.

25. We have heard both the parties at length and perused the relevant finding given in the impugned orders as well as material referred to before us and so far as first issue raised in the department's appeal regarding claim of deduction u/s.80IA. As noted above, assessee has claimed deduction u/s 801A of the Act with respect to four projects, namely Tural II, Tural III, Teesta Lower Dam and Construction of Road at LEH P-II amounting to Rs. 4,21,96,821/-, Rs 59,88,77,437/-. Rs. 1,09,00,242/- and Rs. 2,24,40,106/-, respectively, aggregating to Rs. 67,44,14,606/-. The case of the ld. AO is that as regards the claim of deduction for Teesta Lower Dam Project at Kameng, the ld. AO acknowledged that the deduction on this project has already been held allowable by the Hon'ble ITAT in AY 2005-06 and for Tural-II and Tural-III Projects in AY 2013-14. However, as the Revenue has filed appeals against such orders of the Hon'ble ITAT before the Hon'ble Bombay High Court, the deduction is not being allowed in this year also.

26. Further, as regards the claim of deduction for Turlial II and Turlial-III project, the AO noted that the assessee has entered into an agreement with Northern Eastern Electric Power Corporation Ltd (NEEPCO) and as per clause 801A(4) (i) (b) requires that the assessee must enter into the agreement with the Central Government, State Government or Local Authority or a Statutory Body NEEPCO is registered under the Companies Act, 1956 like the assessee company and therefore rejected the deduction claimed on these projects on this ground also

27. As regards the allowability of deduction on the Leh road project Package-II being the first year of claim, the AO has canvassed identical arguments as being canvassed by the Revenue for all years from AY 2005-06 and held that the Assessee is not eligible for such deduction.

28. In relation to Teesta Lower Dam Project at Kameng, the Ld CIT (A) has upheld the disallowance made by the AO, since the assessee has withdrawn the claim of deduction on this project.

29. In relation to Turlial II and Turlial III I projects, the Ld. CIT(A) followed the decision of the Hon'ble Mumbai Tribunal in the Assessee's own case for assessment year 2013-14 in I.T.A No.4992/Mum/2017 dated 14 February 2018, wherein, the Hon'ble Tribunal has held that the Assessee is not merely a contractor but a developer, who has assumed risks and rewards under the Agreement.

30. In relation to the road construction project at LEH Package-II, the Ld. CIT(A) followed the decision rendered by the ITAT in ITA No. 6605/Mum/2013 dated 18/11/2015 in the assessee's own case which has considered the issue of deduction claimed u/s 801A of the Act, in respect of projects developed by the assessee in the light of the provisions of section 801A(4) of the Act and *Explanation* inserted by the Finance Act, 2009 and after considering the scope of work and terms and conditions of contract executed by the assessee, in coming to the conclusion that the assessee is a developer of infrastructure facility within the meaning of section 801A(4) of the Act and eligible for deduction towards profits and gains of undertaking. The Ld. CIT (A) further held that the Tribunal in the Assessee's own case has considered the issue of deduction claimed under section 80-IA of the Act post insertion of Explanation by Finance Act, 2009 and has come to the conclusion that Assessee is a developer of infrastructural facilities, as the projects executed by the Assessee were highly technical and specialised and involved a huge risk. Therefore, the Assessee is a Developer and not a contractor.

31. Also as regards the AO's contention that the section requires the assessee to enter into an agreement with Central Government or a State Government or a Local body or a Statutory body and that NPCC is neither of them, the Ld CIT (A), on perusal of the orders of the Hon'ble Tribunal for AYs 2005-06 and 2013-14 held that the NPCC is a Government of India Enterprise and hence have been held to be eligible for deduction u/s 801A(4)

32. In view of the above, the Ld. CIT(A) directed the Ld. AO to allow deduction under section 80-IA(4) of the Act with respect to road construction project at LEH-II as well.

33. It has been stated that the assessee has claimed deduction u/s.80IA with respect to the following projects:-

Name of Project	Amount
Teesta Lower Dam	1,09,00,242
Turial II	4,21,96,821
Turial III	59,88,77,437
Construction of Road at LEH P-II	2,24,40,106
Total	67,44,14,606

34. At the outset, it has been admitted by both the parties that this issue has been concluded and decided in favour of the assessee by the Co-ordinate Benches of the Tribunal in the earlier years and the facts are admittedly similar to the facts of the earlier year. The relevant decisions of the Co-ordinate Bench in the case of the assessee are as under:-

- *ACIT v Patel Engineering Ltd. ITA No. 6605/Mum/2013*
- *DCIT v Patel Engineering Ltd. ITA No. 5317/Mum/2017*
- *Patel Engineering Ltd. v. DCIT ITA No. 4992/Mum/2017*

35. Even though this issue is covered in favour of the assessee still our finding in the facts as discussed in the impugned orders qua each project are discussed hereinafter:-

36. In relation to Teesta Lower Dam at Kameng; As regards the claim of deduction u/s 801A of the Act for Teesta Lower Dam at Kameng, the Assessee has withdrawn the claim of the deduction on this project.

37. In relation to the Turial I and Turial II Proejcts, we find that for these projects in assessee's own case the Tribunal in ITA No. 4992/Mum/2017 dated February 14, 2018 has held that the Assessee is eligible for the deduction u/s 801A(4) of the Act Act. The Assessee further placed reliance upon the decision of the Mumbai Tribunal in the Assessee's own case for Assessment year 2005-06 and 2010-11 in ITA No. 6605/Mum/2013 and ITA No. 5317/Mum/2017 respectively. Further, similar view was taken in A.Y.2005-06 and A.Y. 2010-11 also.

38. In relation to the construction of road at LEH P-II Project. as regards the claim of deduction u/s 801A of the Act for the construction of a road at LEH P-II, wherein the impugned year is the first year of claim, we find that the conditions of section 801A of the Act are satisfied in relation to the aforesaid project as well are in line with the same principle laid down in the earlier decisions of the Tribunal. The first condition is that the Assessee either has to develop or operate and maintain or develop, operate and maintain the infrastructure facility. In the case of the Assessee, it is a Developer of an infrastructure project being High

Altitude Road project (which is covered infrastructure facility under Explanation to section 801A (4)). The scope of work stated in each of the contract documents read with other conditions of various contracts undertaken by the Assessee would show that the Assessee is carrying out development work of the infrastructure facility by committing huge resources in terms of finance, manpower, equipments, know how, etc. and it has also undertaken huge and onerous risk. Moreover, it is not carrying out work which is of incidental or periphery nature. The Assessee, on turnkey basis, is responsible for planning, designing, best modern practices, work method, scheduling and resourcing for the contract, for adequacy and safety of techniques used, obtaining permissions and co-ordinate with various relevant authorities, deciding on machinery, equipment, personnel and services to be installed at the infrastructure facility, conduct geological and geotechnical investigations, undertaking special tests, carrying out a topographical survey of site, establish its own laboratory on site, prepare drawings, install safety procedures, provide as-built drawings, point out defects, if any, in drawings provided by Principal, soil testing, earth filling, civil works, quality assessment and control, make own arrangement for borrow areas, quarries, site offices, casting yard, labour camps, implement a comprehensive safety plan, liable for damages to person, property and environment, etc.

39. It is further seen that the Assessee also undertakes financial exposure / risks, has access to revolving line of credit, gives indemnification, guarantees - financial and technical,

performance security, allows retention of money on work done, risks forfeiture of deposits, receives only interest bearing advance which cannot be diverted for other purposes, takes insurance, receive only interim payments till the development of infrastructure facility is complete and such completed infrastructure facility is handed over/taken over by the authority. It takes full responsibility for the care of the project site while it is under development till the possession handed over Equipment etc. brought on site cannot be removed till the completion of the development of the infrastructure facility is complete, rectify defects in the completed work during the defect liability period, provide experienced personnel for general planning on site, site management, indemnify Government against all losses and claims, to pay liquidated damages for delays and further, the infrastructure facility developed by the Assessee has a long life.

40. Apart from that, the entire work site is in possession of the Assessee throughout the period of development. Hence, the entire onus to develop the infrastructure facility has been shifted on the Assessee by the Government Authority, i.e., the Assessee's involvement in the development of each of specified infrastructure facility is right from the planning stage to handing over the developed infrastructure facility to the Government after the defect liability period is over. Thus, the work so carried out by the Assessee is not of a periphery and incidental nature.

41. The condition prescribed in section 80 I(4) in clause (a) is that the enterprise should be owned by a company registered in India or a consortium of such companies. In case of the Assessee, the enterprise which has entered into an agreement with Government for development of new infrastructure facility is owned by the Assessee. Hence, this condition is fulfilled. Clause (b) prescribes for the condition that the agreement is entered into with Government or Government Authority or other statutory body. In the case of LEH P-II, the agreement is entered into with the National Projects Construction Corporation Limited (NPCC), a Government Corporation having Mini Ratna status. Hence, this condition is also fulfilled.

42. The next condition in clause (c) is that the enterprise starts operating and maintaining the facility on or after 1st April 1995. As regards this condition, it applies to the enterprise operating and maintaining or developing, operating and maintaining the facility. This condition cannot apply to an enterprise which is in the business of developing (only) the infrastructure facility, because, in such a case, after development, as per the agreement, the enterprise is obliged to hand over the developed infrastructure facility to the Government and not operate and maintain it. Hence, the mandate of this condition is merely that the new infrastructure facility developed should begin operation and maintenance on or after 1st April, 1995.

43. The proviso to clause (c) applies only when under a contract for development, operation and maintenance of an

infrastructural facility. After developing the infrastructure facility, the Assessee transfers it to another enterprise for operation and maintenance thereof on its behalf. In the Assessee's case, the proviso does not apply as it is a Developer only and under the contract agreement with the Government, the Assessee has to hand over the developed infrastructure facility to the Government as the Assessee does not have a right to operate and maintain it. Hence, the question of the Assessee transferring it to another enterprise for operating and maintaining the infrastructure facility on its behalf does not arise. Hence, this condition is also satisfied.

44. As regards the contentions of the Ld. AO that the conditions in sub-clause (a), (b) and (c) of clause (i) of section 80IA(4) of the Act have to be cumulatively fulfilled, the same cannot be upheld in view of the decision of the **Hon'ble Bombay High Court in the case of ABG Heavy Industries Ltd.** reported in **323 ITR 322**, wherein in para 23 of the said order held that deduction u/s.80IA(4) is available to three categories of business viz.,

- i) Who merely "develops" the infrastructure facility, or
- (ii) Who merely "operates and maintains" the infrastructure facility, OR
- (iii) Who "develops, operates and maintains" the infrastructure facility.

It was held as under:-

"In the view which we have taken, all the assessment years in question to which this batch of appeals relates would be governed by the same principle. The subsequent amendment of section 80-IA(4A) of the Act to clarify that the provision would

apply to an enterprise engaged in (i) developing: or (ii) operating and maintaining, or (iii) developing. operating and maintaining an infrastructure facility was reflective of a position which was always construed to hold the field. Before the amendment that was brought about by Parliament by the Finance Act of 2001, we have already noted that the consistent line of circulars of the Board postulated the same position. The amendment made by Parliament to section 80-IA(4) of the Act set the matter beyond any controversy by stipulating that the three conditions for development, operation and maintenance were not intended to be cumulative in nature. (Emphasis supplied)

27. As regards the decision in The Indian Hume Pipe Co. Ltd. (ITA 5172/Mum/2008) cited by the AO, based on the facts of that case, the counsel there accepted that the explanation inserted by Finance Act 2009 applies to the Assessee and that decision has relied on the Third Member Larger Bench decision in B.T Patil & Sons Belgaum Pvt. Ltd. (which decision is no longer good law) in deciding that the Assessee is not entitled to deduction u/s 801A(4). As the counsel there accepted that the Assessee therein is not eligible for the deduction, it has also not considered decisions rendered by other Benches of the Hon'ble Tribunal.

28. Further, in Katira Construction Ltd. v. UOI (31 taxmann.com 250) cited by the AO, the Hon'ble Gujarat High Court merely held that the insertion of the Explanation by the Finance Act of 2009 is retrospective in nature; it nowhere held that a developer is not entitled to a deduction u/s 801A(4) of the Act. Hence, the said decision does not address the or"/ controversy of "developer" v. "contractor."

45. Thus, we hold that assessee is a developer of each of the infrastructure facility mentioned hereinabove and considering the scope of work undertaken by the assessee in each of the contracts, the work carried out by the assessee cannot be said to be works simplicitor. Hence, in our view all the conditions required to be claimed and the deduction u/s.80IA for all the

projects are fulfilled. Accordingly, the order of the ld. CIT(A) on this ground is upheld and the appeal of the Revenue is dismissed.

46. In so far as the ground No.2 raised by the Revenue regarding Taxing Capital gain @20% on sale of depreciable long-term capital asset, the facts are that assessee had claimed long term capital gains on the sale of depreciable asset is to be taxed at the rate of 20% instead of at the rate of 30% offered by the assessee in the return of income. However, assessee made a claim before the ld. AO which was rejected by the ld. AO invoking the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. The ld. CIT(A) following the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Prithvi Brokers & Shareholders (349 ITR 336) held that the appellate authorities have jurisdiction to deal with not only additional grounds but also additional claims made before them. Considering the submissions of the Assessee, the ld. CIT (A) proceeded to adjudicate this claim of the assessee. Further, the ld. CIT(A) following the decision of the Hon'ble Jurisdictional High Court in the case of **CIT vs. Ace Builders P. Ltd. (144 Taxman 855)** directed the Ld. AO to tax the gains arising out of sale of depreciation long term asset at the rate prescribed u/s.112 of the Act i.e.20%.

47. Both the parties agreed that this issue now stands covered by the judgment of the **Special Bench in the case of SKF Ltd. vs. DCIT in ITA No.7544/Mum/2011** wherein, Special Bench

has held that in case of long-term capital asset, which are depreciable asset in terms of Section 50, even though are deemed to be taxed as short term capital gain, however, the tax rate u/s.112 would be 20%. Thus, following the decision of the Special Bench, the order of the Id. CIT (A) is upheld and the grounds raised by the Revenue are dismissed.

46. Lastly, with regard to ground No.13 raised by the Revenue that the adjustment of Rs.2,46,02,617/- on account of addition made while computing the Book Profit u/s 115JB of the Act, in the assessment order, the Id.AO made additions of Rs. 29,00,000 u/s 35D of the Act and Rs. 2,17,02,617 on account of AIR reconciliation to the total income computed under the normal provisions of the Act. However, while computing the Book profits u/s 115JB of the Act, without any discussion, the above additions were incorporated therein.

47. The Id. CIT (A) have perused the audited accounts, including the auditor's report of the assessee and found that there is no adverse comment by the Auditor regarding the preparation of the accounts, which have been prepared in accordance with the provisions of Schedule III of the Companies Act, 2013. Also noted that, in absence of any adverse observation by the Ld. AO regarding the preparation of accounts as per said Schedule III, the Ld. AO has no power to rescrutinise the accounts and make the adjustments other than those contemplated in Explanation 1 of section 115JB of the Act. The Ld. CIT(A), following the decision of the Hon'ble Supreme Court

in the case of Apollo Tyres Ltd v CIT (122 Taxman 562), held that the adjustments made by the Ld. AO to the computation of Book Profits are able / not sustainable.

48. We have heard both the parties and also perused the relevant findings given in the impugned orders. It is a well settled proposition that section 115JB regarding computation of Book profits is an independent code in itself and therefore there is no scope or possibility of making any adjustment to the Book profits other than that contemplated in Explanation 1. Explanation 1 defines "Book profits" to mean the profit as shown in the statement of profit and loss for the relevant previous year prepared under subsection 2 of section 115JB i.e. prepared in accordance with the provisions of Schedule III to the Companies Act, 2013.

49. A perusal of the audited accounts would show that there is no adverse comment by the auditor regarding the preparation of accounts in accordance with the provisions of Schedule III to the Companies Act, 2013. Moreover, there is no such allegation by the AO and the hence the audited accounts comply with the requirements of section 115JB(2) of the Act.

50. A perusal of Explanation 1 regarding adjustments to be made in the computation of the Book profits would show that the adjustments made by the AO fall in none of clauses stated therein and since AO has limited power u/s 115JB to make adjustment to book profit only in respect of items provided in Explanation 1 to section 115 JB(1)

51. Accordingly, order of the ld. CIT (A) is upheld and the grounds raised by the Revenue are dismissed.

ITA No.2801/MUM/2024 (Assessee's Appeal)

52. Now coming to the issue raised in assessee's appeal in ground No.1 relating to disallowance of Prior Period Expenses of Rs.11,98,228/-.

53. The brief facts are that in the Tax Audit Report for AY 2018-19, the auditors reported prior period expenses of Rs. 61,17,585, including Rs. 11,98,828 pertaining to AY 2017-18. The said amount of prior period expenses of AY 2018-19 was *suo moto* disallowed by the Assessee in its computation of income for AY 2018-19. During the course of assessment proceedings, vide letter dated 19th December, 2019, a claim of deduction of Rs. 11,98,828 was made before the AO along with documentary evidence that such expenses pertain to the impugned year.

54. The ld. AO did not accept the claim of the assessee for deduction of such expenses even though the genuineness of incurrence of expenses was not doubted after invoking the principle laid down in the case of Goetze (India) Ltd. The ld. CIT (A) dismissed the ground holding that expenses pertaining to earlier year are prior paid expenses which cannot be allowed.

55. Before us, ld. Counsel submitted that it is a fresh claim purely legal in nature which does not require any investigation of

facts, therefore, such claim should have to be entertained and allowed by the appellate authorities.

56. From the perusal of the accounts, it is seen that though the payment of expenses were made during the next assessment year i.e. A.Y.2018-19, the said expenses have been incurred for the period pertaining to impugned assessment year. Since, assessee follows mercantile system of accounting; the said expenses are to be allowed in the year in which they pertained. Accordingly, the said claim of prior period expenses which has been incurred pertain to this year even though the payment has been made in the next assessment year, then also same has to be allowed. Accordingly, grounds raised by the assessee are allowed.

57. Lastly, coming to the issue raised in Ground No.2 with regard to addition on account of difference in reconciliation of Rs.2,16,02,617/- as per 26AS, it is seen that during the course of assessment proceedings assessee was asked to reconcile the AIR transaction with the income of the assessee aggregate value of Rs.2178.43 Crores running into voluminous number of entries. The assessee vide its letter dated 17/12/2019 reconciled all the income stated in the AIR except for a few transactions, the value of which aggregated to Rs. 2,17,02,617/-. Both the authorities have confirmed the said difference.

58. Before us it has been stated that assessee has reconciled almost all the entries in the AIR report and only 0.10% of the total reported entries remain unreconciled due to the fact that the voluminous number of entries and there is also a possibility

that other party may not had returned appropriate amount. It is seen that assessee received income from various authorities out of which, from 11 parties the amount which has been enumerated in page 17 & 18 of the assessment order, there are slight difference in amount. The income returned by the parties and income reflected by the assessee was different except in one case with AGE PATEL Joint Venture (JV) which is for the amount of Rs.1,48,34,838/- rest are all minor accounts. Once the assessee had produced books of accounts which have been accepted, then if there is any reconciliation amount and assessee had claimed that assessee had shown the correct income, then ld. AO should have at least verified from those parties reflecting the payment. Looking to the fact that assessee has already reconciled almost every item except for 0.10% of total reported entries, therefore, we agree with the contention of the assessee that addition should not be made and this view is supported by the decision of the Co-ordinate Bench in the case of TUV India (P) Ltd. v. DCIT 110 taxmann.com 175 (Mum.) wherein it was held as under:-

“Neither AO nor learned CIT (A) had considered it appropriate to conduct enquiries with the parties who had deducted TDS on behalf of the assessee wherein there are differential between information as per Form No. 26AS per income-tax data base and TDS as per books of accounts of the assessee, despite having all information in their possession which was submitted by assessee during appellate/remand proceedings and sufficient time to conduct such enquiries. No notice u/s. 133(6) or summons u/s. 131 of the 1961 Act were issued by both these authorities to various clients of the assessee to whom the assessee has claimed to have invoiced during the year or to those persons whom TDS credit is reflected in 26AS while assessee is denying to have dealt

with these persons. The assessee has done all what best it could do to discharge its onus/burden which lay under provisions of the 1961 Act by submitting reconciliation statements as well explaining the reasons for differential between income as is reported in Form No. 26AS information per data base maintained by income-tax department and income as is reflected in its books of accounts. The assessee has discharged its primary onus/burden and the assessee could not be asked to do impossible. It is well known that there are several reasons for differential in income computed based on TDS as is reflected in Form No. 26AS per data base maintained by income-tax department with income as is reported in the books of accounts.

There could be differences in the accounting policy followed by the tax-payer and its clients who have deducted income-tax at source on behalf of the tax-payer as well wrong mention/punching of the PAN number of the taxpayers by clients while filing TDS returns with the department. One of the reasons for differential could be that clients have deducted TDS on gross amount inclusive of service tax while income is reflected by tax-payers exclusive of service tax. The assessee has no control over the data base of the Income-tax department as is reflected in Form No. 26AS and at best the assessee could do is to offer bonafide explanations for these differential which assessee did in this case during appellate/remand proceedings. On the other hand, the Income-tax department has all the information and data base in its possession and control. The learned CIT (A)/AO ought to have conducted necessary enquiries to unravel the truth but asking assessee to do impossible is not warranted. No defect in the books of accounts are pointed out by the authorities below nor were books of accounts rejected by the authorities below. No cogent incriminating material were brought on record by the authorities below to evidence/prove that the assessee has received/earned any income outside its books of accounts. The authorities below also did not dislodge/rebutted the contentions of the assessee.”

59. Accordingly, the ground raised by the assessee are allowed.

60. In the result, appeal of the Revenue is dismissed and appeal of the assessee is allowed.

ITA No.3061/Mum/2024 & 2802/Mum/2024

61. The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against order dated 26/03/2024 passed by Id. CIT(A)-51, Mumbai for the quantum of assessment passed u/s.143(3) for the A.Y.2018-19.

62. The Revenue in his grounds of appeal has raised the following grounds:-

i. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing payment of interest on delayed payment of TDS ignoring the fact that the amount paid and the expenditure incurred in that connection is in no way connected with persevering or promoting the business of the assessee.

ii. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the disallowance made u/s. 40(a)(in) of the IT Act, 1961 without appreciating the fact that the assessee is liable to deduct tax under 194A while making payment of interest of Rs 18,53,35,410/- to AGE Patel JV.

iii. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing the bad debts amounting to Rs 204,39,50,143/- relating to PERL without appreciating the fact that the assessee company wrote off the loan given to PERL as bad debt during AY 2018-19 and PERL has not offered any such income on account of the same.

iv. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing the write off of interest free loan amounting to Rs. 18,48,99,683/- given to wholly owned step-down subsidiary Dirang Energy P. Ltd (DEPL) without appreciating the fact that DEPL has not offered such income and further the assessee's case is also similar to the fact of Dalmia Jain and Co.

Ltd. us here also a new asset was created and expenditure was in the nature of capital expenditure.

v. On the facts and in the circumstances of the case the Ld. CIT(A) erred in allowing the write off of interest free loan amounting to Rs, 26,30,514/- given to wholly owned step-down subsidiary Bellona Estate Developers Ltd., without appreciating the fact that the assessee's case is similar to the fact of Dalmia Jain and Co. Ltd as here also a new asset was created and expenditure was in the nature of capital expenditure.

vi. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing the written off amount to the extent of Rs 13,12,297/- without fully appreciating the facts of the case.

vii. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing the advance of Rs 14,23,16,905/- to various Piece Rate Workers (PRWs) without appreciating the fact that the assessee has not offered the above as income in the earlier years.

viii. On the facts and circumstances of the case, the Ld CIT(A) erred in deleting the disallowance of the assessee's claim of deduction u/s 80IA of the Act of Rs. 85,06,16,120/-.

ix. On the facts and in the circumstances of the case, the CIT(A) is erred in allowing the taxation of Capital gains @20% on sale of depreciable Long Term Capital Asset of Rs. 1,79,75,000/-by ignoring the decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd 284 ITR 323(SC) wherein the Hon'ble Supreme Court clearly stated that this decision does not in any way relate to the power of assessing officer to entertain claim for deduction otherwise than by filing a revised return.

63. Whereas assessee has raised following grounds of appeal:-

1. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming addition of irrecoverable amounts written off of Rs.8,37,711/-being sundry amounts written off.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming addition of Rs. 3,40,25,640/- being amount advanced to joint venture partner M/s. Sew Infrastructure Ltd through Patel Sew JV.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming addition of Rs. 14,23,405/- being amounts reflected in consolidated accounts of the Assessee.

4. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming addition of Rs. 50,00,000/- being amount advanced to Abhay Singh.

5. On the facts and circumstances of the case and in law, the AO erred in disallowing compensation of Rs. 53,36,42,865 paid by the Assessee to its promoters on account of invocation of the shares held by them and pledged to lenders.

6. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming addition of Rs. 46,20,757/- on the basis of the AIR Reconciliation.

64. We will first take up the appeal of the Revenue. As noted above, the assessee is a company and is engaged into the business of execution of civil contracts, construction of roads, toll-ways, bridges, railway tracks, hydroelectric power projects and other infrastructure projects. The Assessee is also engaged in the business of real estate development. The Assessee filed its return of the income on November 29, 2018; subsequently, the Assessee a revised return of income declaring a total loss of Rs. 101,95,39,352/-. As against the returned income, assessment has been completed at an income of Rs.217,09,44,640/-.

65. Coming to the ground No.1 with regard to allowability of interest on delayed payments of TDS, the brief facts are that assessee has incurred interest expenditure of delayed deposit of TDS amounting to Rs.1,27,52,459/- and the same has been claimed as interest expenditure as an allowable expenditure when computing the total income. The ld. AO held that interest of late payment of TDS is not an allowable expenditure whereas, the ld. CIT (A) has allowed the same after relying upon the decision of the ITAT Mumbai Bench in the case of *Resolve Salvage & Fire India (P) Ltd.*, reported in 139 taxmann.com 196.

66. We have heard both the parties and also perused the relevant finding given in the impugned orders. At the threshold, the claim of the assessee regarding interest expenditure and delayed deposit of TDS, cannot be held to be an allowable expenditure. This issue has been discussed in detail by coordinate bench of ITAT Delhi Bench in the case of **DLF Ltd., vs. The Addl. Commissioner of Income Tax in ITA No.2126/Del/2013** vide order dated 27/05/2019. The tribunal has relied upon the judgment of Hon'ble Madras High Court and held that depositing TDS in time is responsibility of assessee and interest in delay in deposit of TDS cannot be allowed as business expenditure. Accordingly, ground No.1 raised by the Revenue are allowed and the claim of the assessee is rejected.

67. In so far as ground No.2 regarding disallowance made u/s.40 (a) (ia) of the Act, it has been admitted that this issue is similar to the ground raised in the appeal for A.Y.2017-18 and

2018-19 in relation to the order u/s.201(1), 201(1A) wherein, this issue has been discussed in detail. It was held that assessee is not liable to deduct TDS. The facts as discussed earlier, though assessee formed a JV with AGE for bidding of a tender invited by IRCON (Government of India Corporation) for the construction of tunnel including construction of a bridge etc., in the State of Jammu and Kashmir. As per amended judgment dated 31/03/2016 and 21/04/2015, the entire work has to be executed by one member i.e. assessee in his principal capacity and the entire contractual responsibility was transferred to the assessee in relation to the aforesaid project, The other constituent member of AGE would only receive only a turnover-based fixed fee of 1.5% of each running bill certified by IRCON as per the amended agreement. As per the amended agreements, the daily administration of the contract was to be handled by the Assessee and all bank accounts of the JV would be solely operated by the Assessee. The Assessee indemnified the JV and AGE from all contractual responsibilities and liabilities arising out of the contract. The Assessee shall alone be responsible at its own cost to discharge all contractual obligations towards the workforce employed to execute the contract. The salient features of the Amendment Agreements were as under:-

- The JV has entrusted the sole responsibility of the execution of the entire project to the Assessee on a back to back basis along with the responsibilities and obligations associated with it.
- The Assessee indemnifies the JV from all contractual responsibilities and liabilities arising out of the contract.

- The Assessee shall be entitled to the entire gross receipts along with any additional claims/refunds, if received
- Any claims or demands arising out of the contract shall be prepared by the Assessee for further submission to IRCON.
- Any approvals or proceeds against the claims shall be made to the account of the Assessee only.
- The Assessee shall alone be responsible at its own costs to discharge all its contractual obligations towards the man force employed to execute the contract.
- Based on the work executed, the joint measurements would be prepared by the Assessee in direct consultation with IRCON for the bills to be sent, and the JV would request IRCON to release payments to it based on such bills issued by the Assessee
- All taxes and statutory deductions would be borne by the
- The Assessee shall be responsible to furnish bank guarantees towards mobilisation advance or performance.
- The Assessee shall be responsible to procure all related insurance and risk covers and shall be the person entitled to make any claims against such covers taken.
- The Assessee shall be responsible to maintain the projects during the defects liability period and shall rectify all defects at its own cost and risk.
- The Assessee shall be responsible to take necessary measures required for the completion of the project to the satisfaction of IRCON.
- The nominees of the Assessee shall act as the nominees of the JV to represent, negotiate, interact and communicate with IRCON and all other related government agencies in all matters related to the project.

- In case of termination of the project by IRCON for reasons attributable to the Assessee, all the claims/penalties imposed on the JV shall be borne by the Assessee alone.
- The Assessee shall hold the JV and AGE harmless from any claims made by IRCON or any third party in relation to the contract.
- In case of any dispute with IRCON, the expenses for the same shall be borne by the Assessee only.

68. Thus, the JV had ceased to exist as it was merely a pass through entity which shall not be executed any work independently. Apart from that, ld. AO of JV had accepted that entire contract receipts are taxed in the hands of the assessee only and JV is only a pass through entity. The assessee during the year had paid interest on mobilization advances received from IRCON amounting to Rs.18,53,35,410/- wherein ld. AO has held that assessee did not deduct TDS u/s.194A(3)(iii).

69. We have already given a detailed finding after relying upon the judgment of the Hon'ble Bombay High Court and CBDT Circular. Thus, we hold that no TDS is to be deducted, accordingly, disallowance u/s. 40(a)(ia) deleted by the ld. CIT(A) is confirmed.

70. Now coming to the issue of write off of bad debt amounting to Rs.2,04,39,50,143/- relating to Patel Engineering Resources Ltd. (PERL), the brief facts are that the assessee is engaged into the business of the developing infrastructural facilities and real estate projects, which it carries on directly or indirectly through

its subsidiaries. PERL is a wholly owned subsidiary of the Assessee, and Dirang Energy Pvt. Ltd. (DEPL) is a step-down subsidiary of the Assessee. A Memorandum of Agreement was executed between the Assessee and the Government of Arunachal Pradesh on May 18, 2007 for the execution of Gongri Hydro Electric Project by the Assessee or an SPV formed by it on a Build Owned Operate Transfer (BOOT) basis. An Amended MOA was executed on August 5, 2011. As per para 2.24 of MOA, the Assessee formed an SPV in the name of DEPL for implementation of the project, which was approved by the Government of Arunachal Pradesh on September 8, 2008. The Assessee executes certain projects through independent companies as it helps in better financing from lenders, seeking investors who are only interested in specific projects and not in all the projects, etc. After the projects are awarded to subsidiaries, the execution would/is wholly or partly sub-contracted to the Assessee. For the implementation of the project, the Assessee advanced the interest-bearing loans to PERL who in turn advanced the same to DEPL. The Assessee made advances of interest-bearing funds from the year 2011 and the opening balance as of April 1, 2017 of the advances made to PERL stood at Rs.668,90,44,903/-, including interest accrued thereon. Over the period from the assessment year 2011-12 to 2018-19, the Assessee offered interest income from such advances as its business income on an accrual basis aggregating to Rs 367,02,25.240/- During the year under consideration out of the accrued interest already offered for tax in the previous

assessment years, the Assessee wrote off an amount of Rs. 204,39,50,143/- as bad debts under section 36(1)(vii) of the Act.

71. The Id. AO observed that over the years, the Assessee Company has been converting interest receivable from PERL as a loan in its books of accounts. The Assessee company has written off loans given to PERL as bad debt during the assessment year 2018-19 and PERL wrote off loans given to DEPL during assessment year 2019-20. However, DEPL has not offered such write off by PERL as its income during the assessment year 2019-20.

72. The submission of the Assessee before us has been that interest received in the earlier year has been offered as income and, therefore, the write off of bad debt should be allowed as a deduction is not acceptable. Interest income received by the Assessee has again been given as a loan to PERL as evident from the audited financials of the Assessee. Giving of loan is a capital transaction and any loss on this account is a capital loss which cannot be allowed as an expense.

73. The alternative argument of the Assessee that the amount be allowed as a deduction under section 37(1) of the Act is also not acceptable. The provisions of section 37(1) of the Act are applicable for any expenditure not being in the nature of a capital expenditure. Since the amount claimed as a deduction is not expenditure but a loan given to related parties for capital expenditure, the same is not allowable under section 37(1) of the Act.

74. The Id. CIT(A) observed that the submission of the Assessee that the Assessee over assessment year 2011-12 to 2018-19, offered interest income accrued on the advances given to PERL as business income aggregating to Rs. 367,02,25,240/- is found to be correct and the Ld. AO has nowhere in the assessment order or the remand report disputed the said factual position. During the year under consideration, out of the accrued interest already offered to tax in earlier years, the Assessee wrote off the amount of Rs 204,39,50,143/- as a bad debt under section 36(1) (vii) of the Act.

75. We have heard both the parties and perused the relevant finding and the materials referred to before us. From the reading of section 36(2)(i) of the Act, it is clear that income offered to tax under the head "profits and gains of business" in earlier years, written off as bad debts in the current year is an allowable deduction. Based on the details and record furnished by the Assessee, it is evident that the conditions of section 36(2) (i) of the Act are fulfilled in relation to write off of bad debts.

76. Further, the allegations of the Ld. AO that interest accrued on loan given to PERL has been added to the loan itself and, therefore, the writing off of such interest is nothing but writing off of loans has no merit. Just as the amount of sale proceeds would sit in the debtors account and, when written off, cannot be treated as a capital loss, the interest component in the advance account when written off would be a revenue loss in the nature of a bad debt. The only requirement of section 36(1)(vii) read with

section 36(2) (i) of the Act is that the amount written off as bad debt ought to have been offered as income in earlier years. The said requirement has been fulfilled in the facts of the present case.

77. Reference was placed before us on the decision of the Hon'ble Jurisdictional High Court in the case of **PCIT vs. Mahindra Engineering & Chemical Products Ltd. (285 Taxman 699)**, the Hon'ble Court held that wherein interest income on the deposit was offered to tax as business income in the earlier year, subsequent write off of advance of deposit would be eligible for deduction under section 36(1) (vii) of the Act, as conditions of section 36(2)(i) of the Act stood satisfied, i.e., bad debts or part thereof was taken into account in computing income of the Assessee for an earlier assessment year before such debt or part thereof is written off. Reliance was also placed on the decision of the **Hon'ble Jurisdictional High Court in the case of CIT vs. Pudumjee Pulp & Papers Mill Ltd. (63 Taxmann.com 283)**, wherein the Hon'ble Court held that once interest income on the inter-corporate deposit was offered to tax in an earlier year, not only the said interest income would be eligible for a deduction but also the entire inter-corporate deposit would be eligible for a deduction as bad debt.

78. Finally, the Id. CIT (A) relying upon the decision of the Hon'ble Supreme Court in the case of TRF Limited vs. CIT (323 ITR 397) as well as CBDT Circular No. 12/2016 dated May 30, 2016 in support of the proposition that once an amount has

been written off as irrecoverable in the books of the Assessee, it is not necessary for the Assessee to establish that debt has actually become bad.

79. From the perusal of the impugned order it is seen that the ld. CIT(A) has returned a factual finding that interest income offered to tax as business income in earlier assessment years amounting to Rs.204,39,50,143/- has been written off by the Assessee during the year under consideration. It has been submitted that conditions of section 36(1)(vii) read with section 36(2) (i) of the Act stand fulfilled and the Assessee is eligible for a deduction of the amount written off. The Revenue before this Tribunal in its grounds of appeal as well as during the course of the arguments has not disputed the aforesaid factual position.

80. Further, the utilisation of the loan by PERL or treatment given by PERL are not germane for deciding the allowability or otherwise of the bad debts in the hands of the Assessee. The only relevant criteria for deciding the allowability of bad debts written off is governed by the provisions of section 36(1)(vii) read with section 36(2)(i) of the Act, which admittedly stands satisfied in the facts of the present case. In view of the above, the Assessee submits that this ground of appeal of the revenue be dismissed and the reasoned order of the Ld. CIT (A) be upheld.

81. The ld. Counsel further submitted that assuming without accepting, even if the advances made by the Assessee would have resulted in the generation of a capital asset, the same would have been generated in the hands of a third party and not the

Assessee. The owner of such capital asset would be DEPL and not the Assessee. It is a settled position of law that when expenditure results into the creation of a capital asset for a third party and not for the Assessee, the expenditure incurred has to be treated as revenue expenditure in the hands of the Assessee. Reliance in this regard was placed on the decision of the Hon'ble Supreme Court in the case of CIT vs. Associated Cement Companies Limited (172 ITR 257). The aforesaid decision has been followed by the Hon'ble Bombay High Court in the case of National Organic Chemical Industries Ltd. vs. CIT (203 ITR 410).

82. Once there is a categorical finding that interest income has been considered as business income in the earlier years which has been written off by the assessee during the year under consideration, the conditions provided in Section 36(1)(vii) r.w.s. 36(i) stands satisfied and therefore, the finding and observation of the Id. CIT(A) is upheld and the grounds raised by the Revenue are dismissed.

83. Coming to the ground No.4 & 5, Revenue has challenged write off of loan advanced to DEPL amounting to Rs. 18,48,99,683/- and advance amounting to Rs.26.30.514/- to wholly step down subsidiary M/s Bellona Estate Developers Ltd. (BEDL), respectively.

84. Brief facts are that DEPL a step-down subsidiary of the Assessee was formed for setting up a hydropower project under a licensed agreement with the Government of Arunachal Pradesh on a BOOT basis. To raise funds for the execution of the

aforesaid project, various institutional lenders were approached. As per the Underwriting and Facility Agreement dated February 5, 2013. the institutional lenders mandated the Assessee as a sponsor group company to infuse capital for the project either in the form of equity, preference shares, or as an advance for financing the project on an interest free basis. In view of the said mandate, the Assessee advanced a sum of Rs. 18,48,99,683/- over the years.

85. On account of funds constraints and other diverse reasons, the Hydro Electric project got substantially delayed and the license was ultimately terminated by the Government of Arunachal Pradesh In view of the fact that the project was discontinued, the Assessee wrote off the amount of Rs.18,48,99,683/- as a business loss and claimed a deduction under section 28/29 of the Act.

86. As stated above, the Assessee also carried out real estate business directly or through its subsidiaries. BEDL was one of the subsidiaries of the Assessee and the Assessee incurred routine administrative expenses on behalf of BEDL which aggregated to Rs.26,30,514/-. On account of the overall recession and slowdown in the real estate sector, BEDL faced severe liquidity issues and could not service the dues of the banks. Ultimately, the loans advanced to BEDL were classified as non- performing assets (NPA) and the Reserve Bank of India, after invoking the Strategic Debt Restructuring Scheme (SDR), acquired the majority stake in BEDL till the time its sale to a

suitable strategic buyer. Consequently, BEDL ceased to be a subsidiary of the Assessee with effect March 30, 2016. The Assessee considering the precarious financial health of BEDL, wrote off advances given to BEDL and claimed it as a business loss.

87. Ld. AO observed that Assessee has given interest free loan to a step down subsidiary DEPL for capital expenditure, i.e., towards the establishment of a new hydro electric project. Therefore, the loan written off by the Assessee is a capital loss. As per provisions of section 36(1) (vii) read with section 36(2)(i) of the Act, writing off of a loan is not an allowable expense.

88. AO held that the alternative claim of the Assessee of deduction under section 37(1) of the Act also cannot be accepted as the amount claimed is not expenditure but a loan given to related party for incurring capital expenditure. Further, DEPL has not offered the said loan as its income. In relation to advances given to BEDL, the Assessee is not in real estate business and, therefore, the loan that becomes bad cannot be allowed as a business expense, as it is of a capital nature.

89. The ld. CIT (A) held that once it is an admitted fact that is engaged in the business of development of Infrastructural facilities and real estate development, which is in the same line of business as that of its subsidiaries. Therefore, the allegation made by the Ld. AO in relation to advances given to BEDL that the Assessee was not engaged in the business of real estate development is factually incorrect. As evident from the material

on record, the Assessee had made interest free advances to its subsidiaries in the normal course of its business. It is apparent that the Assessee, as a holding company, has deep interest into the business activities of its subsidiaries.

90. Further, during the course of the appellate proceedings, the Assessee has submitted additional evidence in relation to loans advanced to DEPL and its ultimate utilisation by DEPL and demonstrated that the expenses incurred by DEPL were in the nature of revenue field, like professional fees, rent, salaries, electricity, insurance charges, travelling and conveyance and other expenses. Similarly, advances made to BEDL were towards incurring routine administrative expenses and statutory expenses. The additional evidences filed by the Assessee were forwarded to the Ld. AO and the Ld. AO has not made any adverse comments on the same.

91. It was stated that the write off of amounts arose in the course of Assessee's efforts to run its business more smoothly and in a profitable manner. Therefore, the loss arising therefrom is in the revenue field, especially on account of the fact that the expenses incurred by the subsidiaries were inherently revenue in nature and not in the capital field.

92. Reliance was placed by him on the decision of the Hon'ble Jurisdictional High Court in the case of **CIT vs. Colgate Palmolive (India) Ltd. (59 Taxmann.com 139)**, wherein the Hon'ble Court allowed deduction of loss suffered on the sale of shares of a wholly owned subsidiary, which was set up for

manufacturing products traded by the Assessee, as a business loss. The Hon'ble Court held that the purpose of investment was nothing but furtherance of business objectives and the loss suffered was not a capital loss. Reliance was also placed on the decision of the **Hon'ble Jurisdictional High Court in the case of CIT vs. BDA Limited (ITA No. 201 of 2003 dated February 23, 2024)**, wherein the Hon'ble Court on identical facts allowed write off of advances made to a group concern as a business loss even though the advances were made to the group concern for purchase of property. It was further held that it is a settled position of law that accounting and tax treatment in the hands of the receiver of an advance cannot be determined by its allowability or otherwise in the hands of the Assessee.

93. In any case it was submitted that, advances given to the wholly owned subsidiaries have not resulted into the creation of a new asset or granted benefit of an enduring nature. Therefore, write-off of such advances is also revenue in nature.

94. After considering the relevant finding and the material referred to before us we find that Id. CIT (A) has given a finding of fact that advances were given to its subsidiaries in furtherance of the business objects of the Assessee and, therefore, were given in the course of routine business transactions. The revenue has not controverted the said factual finding. Write off of advances made during routine business activity are allowable as a deduction, as the same are incidental to carrying on of business activity.

95. The utilisation of advances by the borrower in no manner dictates the allowability of the loss in the hands of the Assessee. The Assessee, here in this case had advanced the loans in furtherance of its business objective and, therefore, the loss suffered while writing off the advances/loans is a business loss and eligible for a deduction. If the contention of the Ld. AO is accepted it would lead to an absurd result since for instance a sale of machinery by a dealer, which is a capital asset in the hands of the purchaser, would have to be treated as capital receipt in the hands of the seller also.

96. We find that here in this case the principle laid down by the Hon'ble Supreme Court in the case of **Badridas Daga Vs. CIT** (34 ITR 10) has emphatically laid down the principle that losses suffered are incidental to carrying out of business and which are springing from business activities are allowable as a deduction under section 28 of the Act itself. The deductions are not exhaustive and profits are to be determined on the basis of ordinary commercial principles. The aforesaid principle has been followed by the Hon'ble Bombay High Court in the case of **Harshad Choksi vs. CIT (349 ITR 250)**, wherein the Hon'ble Court allowed a deduction of advances made during the course of regular business activity and held that the expression "profits and gains" is to be understood in its ordinary commercial meaning and what has to be brought to tax is the net amount earned by carrying on professional business.

97. Further, in relation to allegation of the Ld. AO that the loans have been utilised by DEPL and BEDL for the acquisition of capital assets and therefore, the loan advanced also would be in the nature of the capital asset. We are of the opinion that the utilisation of the loan by the subsidiary is not determinative of allowability of the expenditure in the hands of the Assessee. Once the loan has been given out of commercial expediency, it is allowable as deductions, this issue is covered by the decisions in CIT vs. Colgate Palmolive (India) Ltd. (59 Taxmann.com 139) and CIT vs. BDA Limited (ITA No. 201 of 2003 dated February 23, 2024). Accordingly this issue is decided in favour of the assessee.

98. Now coming to the ground No.9 raised by the Revenue in relation to taxing capital gain @20% on the sale of depreciable long-term Capital asset, we have already decided in favour of the assessee following the judgment of Special Bench in the case of SKF Ltd. vs. DCIT in ITA No.7544/Mum/2011 wherein, Special Bench has held that in case of long-term capital asset, which are depreciable asset in terms of Section 50, even though are deemed to be taxed as short term capital gain, however, the tax rate u/s.112 would be 20%. Thus, following the decision of the Special Bench, the order of the ld. CIT (A) is upheld and the grounds raised by the Revenue are dismissed.

ITA No.2802/Mum/2024 (Assessee Appeal)

99. The ground Nos. 2 & 4 raised by the assessee are in relation to disallowance of write off of advance made to joint venture partner SEW Infrastructure Ltd. through Patel SEW JV

amounting to Rs.3,40,25,640/- and Rs.50,00,000/- advanced to Mr. Abhay Singh, respectively.

100. The brief facts are that the Assessee in the earlier years had given advances to SEW Infra Ltd. of Rs.3,40,25,640/- for the purpose of initiating an infrastructure project being carried out by Patel SEW JV, wherein the Assessee and SEW were members. The advance was to be adjusted against the work that was to be carried out by the said JV. However, the project suffered delays and the Assessee, even after making repeated attempts for recovery of the said amount, could not recover the advances made. Ultimately, the Assessee considered it appropriate to write off the advance of Rs.3,40,25,640/- as irrecoverable.

101. An Advance of Rs. 50 lakhs was given to Mr. Singh during the course of carrying out routine business activities for undertaking certain work on behalf of the Assessee. However, Mr. Singh could not achieve the desired results and, therefore, the Assessee abandoned the work. Even after repeated attempts, the Assessee was not able to recover the advances given to Mr. Singh and, therefore, wrote off the same.

102. The main allegation of the Ld. AO alleged is that the write off of advance/deposit is not acceptable as bad debt, as a such advance/deposits have not been offered as income in the earlier years. Further, the alternate claim under section 37(1) of the Act also cannot be accepted as the amount claimed is not an expenditure.

103. Ld. CIT (A) held that the Assessee has furnished only the bank statement evidencing the payment of Rs. 3 crores. The Assessee has not furnished the purpose of making such advance and whether it was for the purposes of business. In relation to the balance amount of Rs. 40,25,640/- as well as amount advanced to Mr. Singh, no evidence has been furnished. Therefore, the Assessee has not been able to demonstrate the genuineness of its claim.

104. It is seen that the Ld. AO has nowhere disputed the fact that the advances were given to SEW Infra Ltd. as well as Mr. Singh during routine business operations. The only basis of the Ld. AO to disallow the claim of deduction was that since deposits were not offered to income in earlier years, provisions of section 36(1)(vii) read with section 36(2) of the Act are not satisfied. Therefore, once these facts are not disputed, it is not open to the Ld. CIT (A) to dispute the veracity and the genuineness of the advances made. Here in this case the advances were made to SEW Infra Ltd, in furtherance of its business objectives, as the said JV was also engaged in the business of infrastructure development. Since the project faced delays, the Assessee was forced to write off the advances given.

105. Further, advances were given to Mr. Singh for carrying out certain activities on behalf of the Assessee. However, Mr. Singh was not able to fulfil his obligations and, therefore, the Assessee abandoned the work midway.

106. If the advance has been given during the course of business and if any loss has been suffered on account of writing off of the advance granted during the course of carrying out of business then it is an allowable loss under section 28 read with section 29 of the Act. This fact has not been disputed at all. It is not a case of claim of bad debts albeit claim of loss incurred during the course of business. Accordingly, Ld. AO is directed to allow the deduction of Rs.3,40,25,640/- and Rs. 50,00,000/-. Accordingly, the grounds raised by the assessee are allowed.

107. Now coming to the ground No.3 in relation to write off of amount of Rs.14,23,405/-, it has been stated that the books of accounts of the Assessee are prepared in accordance with IND AS, wherein the accounts of the Joint Ventures are proportionately consolidated with the Assessee. In the said consolidation, income as well as expenses of the said JV is reflected in the accounts of the Assessee. Correspondingly, the profits of the said JVs are also reflected in the accounts of the Assessee. In the computation of the income of the Assessee, an adjustment is made by way of reducing the profits of the JVs to nullify the effect of the consolidation. Therefore, the Assessee does not claim any deduction nor offers any income.

108. The Ld. AO has made similar allegations in ground No.2 & 4 with regard to write off of advances.

109. Before us it has been submitted that the Ld. AO has failed to appreciate that it is only for presentation purposes the results of the JVs consolidated in the accounts of the Assessee.

However, the Assessee is not offering any income nor claiming any corresponding expenditure. In fact, as stated above, the Assessee adjusts the profits of JV in its computation of income to negate the effect of the consolidation.

110. The Ld. CIT (A), after reproducing the submissions of the Assessee, dismissed the ground of the Assessee without giving any specific finding.

111. We have heard both the parties and also perused the relevant material and the finding of the AO. It is not in dispute that the results of JVs of the Assessee are consolidated in its books of accounts only for representation purposes, as the same is mandated by the Companies Act, 2013 and IND AS. No income or expenditure of the JVs has been incorporated in the return of income by the Assessee, as the said entities are separate entities under the Act. It is seen that in the computation of income, the profits that have been included in the financials of the Assessee are, in fact, reduced. Our attention has been drawn to pages 186-187 of the PB, wherein this amount of Rs. 14,23,405/- appears as one of the line items as Bad debts written off. This amount forms part of the total amount of Rs. 39,19,15,906/- being "details of JV adjustment done in COI". The said amount of Rs. 39,19,15,906/- has been adjusted in the Computation of Income under the line item "Share of Profit in Joint Venture & Firms". Therefore, effectively, no deduction of Rs. 14,23,405/- has been claimed by the Assessee and hence, disallowance of such adjustment has resulted in the same income being

assessed twice. Accordingly, the Ld. AO is directed to delete the said disallowance.

112. The ground No.5 is in relation to disallowance of compensation of Rs.53,36,42,865/- paid by the assessee to promoters for invocation of shares pledged by the Promoters to lenders.

113. The brief facts are that during the year under consideration, the financial position of the assessee was not sound, and the lenders were refusing to extend further credit to the Assessee without servicing of the earlier debt obligations. To come out of such a precarious situation, a debt restructuring/ resolution plan called as 'Scheme for Sustainable Structuring for Stressed Assets - termed as S4A) launched by the Reserve bank of India (RBI) was opted by the Assessee. The final S4A scheme approved by all the stake holders provided as under:-

- the existing debts of the Assessee, as on the reference date (of August 8, 2017-falling in the impugned year), was split into Part A Debt serviceable from the reference date and Part-B debt comprising of Working Capital Term Loan (WCTL), Working capital facilities (CC), Non-Convertible Debentures (NCD) and Short term Loans (STL) were converted into various tranches of Optionally Converted Debentures (OCD) of face value of Rs. 1000 each. It is to be noted that the debt obligation was not reduced i.e., the no part of the debt was waived.

- the promoters were required to further infuse Rs. 150 crores, Rs. 75 crores in the relevant year and Rs. 75 crores in AY 2019-20 in the Assessee.
- 63,23,532 shares held by the promoters in the assessee worth Rs.53,99,66,397/- (prevailing market price at the time of invocation) were taken over by the lender banks at a value of Re. 1 per share instead of the then prevailing market price, resulting in a loss of Rs. 53,36,42,865/- to the promoters for the restructuring of the existing debts of the Assessee under the S4A scheme It is reiterated, that the loan amount was not reduced by the amount of loss by the Banks.

114. The said scheme was crucial for the Assessee inasmuch as the financial position of the Assessee was not sound and non-acceptance of this proposal from the lenders would have resulted in various lenders/creditors classifying the company as non-standard and that would have adversely impacted the Assessee for qualifying for various infrastructure development tenders of Government / Government agencies. The restructuring exercise was required as:

- The Assessee did not have enough funds to service interest and principal payments for the entire debt on a monthly basis as and when due. Interest cost pre-S4A was approx. Rs. 30 crores per month; post S4A monthly interest to be serviced reduced to Rs. 17 crores per month on Part A debt.
- If S4A was not completed, the Assessee would have not been able to service its debt obligations and would have turned into a non-standard account with lenders leading to non-availability of

any credit facilities from lenders required to run the business as a going concern.

As part of S4A, the lenders also sanctioned additional non fund-based limits (i.e., Bank guarantees) which is essential for bidding for new projects and basis which company is able to generate revenues every year. At the time of S4A, the Assessee had an order book of approx. Rs. 7,000 crores which has now increased to approx. Rs. 14,000 crores in AY 2021-22.

- Further under S4A, part of the debt was converted into OCDs with coupon rate of 0.01 percent only payable every year and a yield to maturity of 7 percent pa. which is payable at the time of maturity of the said OCDs instead of erstwhile debt being paid on a monthly basis at 11.86 percent p.a. (weighted average interest cost) before S4A.

115. The Board of Directors of the Assessee, including the independent directors and the observer appointed by the lead bank for attending board meeting, took a commercial decision to compensate the promoters for the loss caused to them due to the transfer of their shares for which the benefit was entirely received by the Assessee by restructuring the debt of the assessee leading to saving in interest cost. The said compensation was payable to the promoters as on 31.03.2018 and was debited to the profit and loss account of the assessee for the relevant year. The liability of the assessee to the promoters was discharged by the issue of OCDs to the promoters in the financial year 2019-20 relevant to assessment year 2020-21 in lieu of the compensation payable to them.

116. Thus, it has been contended before us that due to the debt restructuring, the Assessee saved on the interest cost for its debt

and hence, the compensation towards promoter's liability was a revenue expense for the Assessee.

117. The AO contended that the compensation given to promoters for invocation of pledged shares was on loan account and, hence, held to be capital expenditure.

118. After rejecting the Assessee's submissions, the Ld. CIT (A) agreed with the findings of the Ld. AO and held that the expenditure incurred by the Assessee is capital in nature and not allowable. The Ld. CIT (A) held that the Assessee has received an advantage of enduring nature and, consequently, the compensation paid to the Promoters to enable the restructuring of the loan is an expenditure in the capital field

119. We have heard both the parties and perused the relevant finding given in the impugned order as well as material referred to before us. It has been stated before us that the S4A was launched on June 13, 2016, by the Reserve Bank of India as an initiative to address and resolve the debt issues of the corporate sector and strengthen the lender's ability to deal with stressed assets. In view of the above scheme, as on the reference date of 8th August, 2017, the debt of the Assessee was restructured whereby it was split into Part A Debt - serviceable from the reference date and Part-B debt comprising of Working Capital Term Loan (WCTL), Working capital facilities (CC), Non-Convertible Debentures (NCD) and Short term. Loans (STL) that were converted into various tranches of Optionally Converted Debentures (OCD) face value of Rs 1000 each. As a precondition

to availing the Scheme of debt restructuring, the Promoters were required to offer their shareholding in the Assessee Company as a guarantee towards the reconstruction of the debt of the lender banks. The approval granted by the Overseeing Committee of the RBI, which approved the S4A, required the transfer of the said promoters share to the lenders at the rate of Re. 1 per shares. It was only in the interest of the Assessee, the Promoters consented to the said transfer of the shares at a substantial loss to them.

120. As the shares were invoked by the bank at Re.1 instead of the then prevailing market price, the promoters suffered a loss in an amount of Rs. 53,36,42,865/-. To compensate the promoters for such a loss incurred by them, a resolution was passed in the meeting of the Board of Directors (BOD) held on 14.02.2018 to compensate them for this loss. Vide letter dated 08.02.2021, the Assessee furnished the extracts of the board resolution and the resolution passed at the audit committee meeting held on 14.02.2018 approving the compensation to the promoters, along with the journal vouchers to the AO which has not been doubted by him.

121. In addition to the benefits of opting for the Scheme submitted above, it has been submitted that before the implementation of the Scheme, the interest rate on the debt taken by the Assessee was ranging between 10.75% to 13% p.a. on various debts being Working Capital loans, Cash Credits, Non-Convertible Debentures and Short- term loans, averaging to 11.86% (Discounting Rate, which is the weighted average cost of

debt prior to restructuring). By opting for the Scheme, the debts of the Assessee have been so structured, that the interest saving obtained by the Assessee is Rs. 191,20,41,037/- in present value terms as on August 08, 2017. The present value has been arrived at by using the discounting factor at 11.86% (i.e., the rate of borrowing of the Assessee). The Scheme would not have happened if the Promoters had refused the transfer of their shares and, accordingly, the assessee considering the benefit to be received to the Assessee agreed to compensate the promoter to the extent of the loss suffered by them. The Assessee further submitted that the actual benefit derived by the Assessee in terms of reduction in interest obligation is about Rs. 62.86 Crores as on February 10, 2020 (which will only increase with the passage of time upto the year 2027), against which the Assessee has claimed a deduction for compensation of Rs.53.36 crores.

122. In view of the above facts, assessee before us stated that the loss to promoters due to invocation of shares is directly, wholly and exclusively attributable to the benefit gained in the interest cost by the Assessee due to restructuring. It was further stated that the transfer of the shares by the promoters to the lenders was really to compensate the lenders of their loss for reduction in interest rate and change in repayment terms of Part B debt which were converted into OCDs, Looked at differently. If the restructuring had not been undertaken, the Assessee would have been burdened with interest of a much higher amount than the compensation paid by it to the Promoters.

123. We agree with the contention of the assessee that compensation payable by the Assessee to the promoters for securing a beneficial interest rates for the borrowings and repayment terms, is clearly an expenditure which is allowable to the Assessee allowable as deduction u/s 37(1) of the Act, as such an expenditure is not dealt in section 30 to 36 of the Act. We are of the opinion that the said compensation expense, in lieu of savings in interest outgo, is not capital expenditure nor personal expense of the Assessee, and it is incurred or laid out wholly and exclusively for the purpose of business. Further, under the Debt-restructuring scheme as framed by the RBI, the Assessee's Promoters were obliged to surrender their shares to enable the Assessee's existence due to savings in interest and rescheduling repayment of loan and hence, this expenditure in our considered view is allowable as deduction u/s 37 of the Act.

124. As regards the Ld. AO's contention that the compensation payable to the promoters is a capital expenditure, we are in disagreement with such contention of the AO on the facts of the case as discussed above, because, by incurring such expenditure, neither an asset has come into existence nor has a benefit of enduring nature accrued to the Assessee and, hence, the said expenditure cannot be termed as a capital expenditure. In other words, if an expenditure is made not for the purpose of bringing into existence any capital asset or advantage of enduring nature but for running the business smoothly or working it with a view to produce the profits, it is revenue expenditure. To hold so, we are referring to the decision of the

Hon'ble Supreme Court in the case of **Empire Jute Corporation Ltd. vs. CIT (124 ITR 1)**, wherein the Hon'ble Supreme Court has held that:

"What is material to consider is the nature of the advantage in a, commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future."

A similar view has been taken by the Hon'ble Supreme Court in the case of **CIT vs. Associated Cement Corporation Ltd. (172 ITR 257)**.

125. We are of the opinion that, the manner in which the Promoters have been recompensated, i.e., by issuance of further shares, is not a relevant criteria for determining whether the expenditure incurred by the Assessee is revenue in nature or not. If the contention of the Ld. AO is accepted then it leads to an absurd result inasmuch as if a capital asset is acquired out of accumulated/ working profits, then such acquisition would not be treated as capital expenditure but a revenue expenditure since it was incurred out of accumulated profits. The mode of

discharge of consideration is not germane for deciding the nature of expenditure.

126. Before us, the Id. Counsel had also placed reliance upon the decision of the **Special Bench** of ITAT in the case of **Biocon Ltd. vs. Dy CIT (144) ITD 21**), wherein the SB, in relation to claiming a discount offered to employees on the issuance of Employee Stock Option Shares as a deduction, has held that the primary objective of issuance of shares cannot be lost sight of. The shares are issued for securing consistent and concentrated efforts of employees and not to raise capital. The relevant extract is reproduced hereunder:-

"It is quite basic that the object of issuing shares can never be lost sight of. Having seen the rationale and modus operandi of the ESOP, it becomes out-and-out clear that when a company undertakes to issue shares to its employees at a discounted premium on a future date, the primary object of this exercise is not to raise share capital, but to earn profit by securing the consistent and concentrated efforts of its dedicated employees during the vesting period. Such discount is construed, both by the employees and company, as nothing but a part of package of remuneration. In other words, such discounted premium on shares is a substitute to giving direct incentive in cash for availing the services of the employees. There is no difference in two situations viz, one, when the company issues shares to public at market price and a part of the premium is given to the employees in lieu of their services and two, when the shares are directly issued to employees at a reduced rate. In both the situations, the employees stand compensated for their effort. It follows that the discount on premium under ESOP is simply one of the modes of compensating the employees for their services and is a part of their remuneration. Thus, the contention of the revenue that by issuing shares to employees at a discounted premium, the company got a lower capital receipt, is bereft of any force. By no stretch of imagination, such discount can be

described as either a short capital receipt or a capital expenditure. It is nothing but the employees cost incurred by the company."

127. Now the aforesaid decision of the Special Bench has been upheld by the Hon'ble Karnataka High Court in the case of **CIT vs. Biocon Ltd. (430 ITR 151)**. Thus, this judgement also supports our view.

128. Similarly, the Hon'ble Supreme Court in relation to deciding whether a Subsidy granted for setting up of Industries in backward areas is a capital receipt or a revenue receipt, has consistently held that the manner in which the subsidy is disbursed is not the relevant criteria. The intent/object of the Scheme has to be considered. This principle has been laid down in the judgment of the **Hon'ble Supreme Court in the case of CIT vs. Sahney Steel & Press Works Ltd. (228 ITR 253)**, wherein the Hon'ble Supreme Court held that it is not the source from which the amount is paid to the assessee which is determinative of the question whether the subsidy payments are of revenue or capital nature. The source is immaterial. The relevant extract of the decision is reproduced hereunder:-

"It is not the source from which the amount is paid to the assessee which is determinative of the question whether the subsidy payments are of revenue or capital nature. The first proposition stated by Viscount Simon in Ostime's case (supra) is that if payments in the nature of subsidy from public funds are made to the assessee to assist him in carrying on his trade or business, they are trade receipts. The sales tax upon collection forms part of the public funds of State. If any subsidy

is given, the character of the subsidy in the hands of the recipient whether revenue or capital will have to be determined by having regard to the purpose for which the subsidy is given. If it is given by way of assistance to the assessee in carrying on of his trade or business, it has to be treated as trading receipt. The source of the fund is quite immaterial."

129. Before us, the ld. Counsel further placed reliance upon the old decision of English court in the case of Associated Portland Cement Manufacturers Ltd. v. Kerr [1945] 27 TC 103 (CA), wherein it was held that for the purpose of determining whether an expenditure is of a capital or a revenue nature, it is immaterial whether the expenditure is made out of money withdrawn from the capital of the concern or out of its profits. The relevant extract is reproduced here under:-

"It is no sufficient test to say that an asset has been paid for out of revenue, because the consequence does not by way any means necessarily follow that it is an asset of a revenue nature as a distinct from a capital nature".

130. Thus, in view of the above facts and the submissions made before us, we hold that the compensation payable to promoters of Rs.53,36,42,865/- is allowable as a deduction u/s 37(1) of the Act. Accordingly, the ground raised by the assessee is allowed.

131. In relation to Ground No.6: AIR Reconciliation of Rs. 46,20,757/- assessed as business income, the brief facts are that during the course of assessment proceedings, the Assessee was asked to reconcile the AIR transactions with the income of the Assessee of aggregate value of Rs. 1,356.69 crores running

into voluminous number of entries. The Assessee, vide its letter dated 08/02/2021 before the Ld. AO reconciled all the income stated in the AIR except for a few transactions whose value aggregated to Rs. 46,20,757/-. The Ld. AO has considered the irreconciled transaction as the income of the Assessee.

132. The ld. CIT (A) held that the assessee has not been able to reconcile the difference even till date. Therefore, it is apparent that the Assessee is not able to substantiate the amount has already been offered to tax in its return of income. Therefore, the addition made by the learned AO is upheld.

133. Before us the ld. Counsel submitted that the assessee has reconciled almost all entries in the AIR report, unreconciled entries being 0.03% of the total reported entries, which is insignificant differential. Thus, the Assessee has duly discharged its primary onus cast. The ld. Counsel further submitted that no addition can be made merely upon the basis of entries getting reflected in the AIR report. Moreover, the books of accounts of the Assessee have been accepted by the Ld. AO. It is the duty of the Ld. AO to bring evidence on record to substantiate the fact that the Assessee has not offered the corresponding income pertaining to the credits getting reflected in the AIR statement in its return of income. He submitted that the Assessee cannot prove the negative. In support of the above proposition, the ld. Counsel placed reliance upon the following decisions wherein it has been held by the co-ordinate branches of this Hon'ble Tribunal that without bringing on record further corroborative

evidence, addition cannot be made by simply relying upon entries appearing in the AIR statement:

- TUV India (P) Ltd. v. DCIT 110 taxmann.com 175 (Mum.)

Neither AO nor learned CIT (A) had considered it appropriate to conduct enquiries with the parties who had deducted TDS on behalf of the assessee wherein there are differential between information as per Form No. 26AS per income-tax data base and TDS as per books of accounts of the assessee, despite having all information in their possession which was submitted by assessee during appellate/remand proceedings and sufficient time to conduct such enquiries. No notice u/s. 133(6) or summons u/s 131 of the 1961 Act were issued by both these authorities to various clients of the assessee to whom the assessee has claimed to have invoiced during the year or to those persons whom TDS credit is reflected in 26AS while assessee is denying to have dealt with these persons. The assessee has done all what best it could do to discharge its onus/burden which lay under provisions of the 1961 Act by submitting reconciliation statements as well explaining the reasons for differential between income as is reported in Form No. 26AS information per data base maintained by income-tax department and income as is reflected in its books of accounts. The assessee has discharged its primary onus/burden and the assessee could not be asked to do impossible. It is well known that there are several reasons for differential in income computed based on TDS as is reflected in Form No. 26AS per data base maintained by income-tax department with income as is reported in the books of accounts. There could be differences in the accounting policy followed by the tax-payer and its clients who have deducted income-tax at source on behalf of the tax-payer as well wrong mention/punching of the PAN number of the taxpayers by clients while filing TDS returns with the department. One of the reasons for differential could be that clients have deducted TDS on gross amount inclusive of service tax while income is reflected by tax-payers exclusive of service tax. The assessee has no control over the data base of the Income-tax department as is reflected in Form No. 26AS and at best the assessee could do is to offer bonafide explanations for these differential which assessee did in this case during appellate/remand proceedings. On the other hand, the Income-tax department has all the information and data

base in its possession and control. The learned CIT (A)/AO ought to have conducted necessary enquiries to unravel the truth but asking assessee to do impossible is not warranted. No defect in the books of accounts are pointed out by the authorities below nor were books of accounts rejected by the authorities below. No cogent incriminating material were brought on record by the authorities below to evidence/prove that the assessee has received/earned any income outside its books of accounts. The authorities below also did not dislodge/rebutted the contentions of the assessee.

- DM Estates (P.) Ltd. v. DCIT 113 taxmann.com 386 (Bangalore).
- ACIT v. KM Trade Link 147 taxmann.com 227 (Chennai);
- Agilent Technologies (International) (P.) Ltd. v. ACIT 160 taxmann.com 238 (Delhi).

134. After considering the facts and finding of the AO and CIT(A), we find that assessee was able to reconcile the AIR transactions with the income of the Assessee of aggregate value of Rs. 1,356.69 crores running into voluminous number of entries. Only un-reconciled entries were 0.03% of the total reported entries, amounting to Rs. 46,20,757/- which is miniscule difference. If the assessee has shown all the entries in the books of account duly supported by invoices then no addition can be made merely upon the basis of entries getting reflected in the AIR report. Moreover, the books of accounts of the Assessee have been accepted by the Ld. AO. In such a case we agree with the ld. Counsel and the addition of Rs. 46,20,757/- is directed to be deleted. Accordingly, ground No.6 raised by the assessee is allowed.

154. In the result, appeals of the Revenue are dismissed, except for one ground no. 1 in ITA No.3061/Mum/2024 which is allowed; and the appeals of the Assessee are allowed.

Order pronounced on 31st December, 2024.

Sd/-
(GIRISH AGRAWAL)
ACCOUNTANT MEMBER
Mumbai; Dated 31/12/2024
KARUNA, *sr.ps*

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai