आयकर अपीलीय अधिकरण "एफ़" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI

श्री अमित शुक्ला, न्यायिक सदस्य एवं

श्री अशवनी तनेजा, लेखा सदस्य के समक्ष ।

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER

ITA No. : 3189/Mum/2011
(Assessment year: 2005-06)
ITA No. : 3190/Mum/2011
(Assessment year: 2006-07)
ITA No. : 3191/Mum/2011
(Assessment year: 2007-08)
ITA No. : 2546/Mum/2012
(Assessment year: 2008-09)

M/s V Hotels Ltd, Basement, Chandramukhi, Behind Oberoi Hotel, Nariman Point, Mumbai -400 021 PAN:**AABCT 6380 J**	**Vs**	DCIT- Rg -3(3), Aayakar Bhavan, Mumbai -400 020
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)

C.O. No. 25/Mum/2016
Arising out of ITA No. 3189/Mum/2011, AY 2005-06

DCIT- Rg -3(3), Aayakar Bhavan, Mumbai -400 020	**Vs**	M/s V Hotels Ltd, Formerly Tulip Hospitality Services Ltd., Mumbai -400 021
अपीलार्थी (Cross Objector)		प्रत्यर्थी (Respondent)

ITA No. : 4216/Mum/2011
(Assessment year: 2006-07)
ITA No. : 4215/Mum/2011
(Assessment year: 2007-08)
ITA No. : 3732/Mum/2012
(Assessment year: 2008-09)

DCIT- Rg -3(3), Aayakar Bhavan, Mumbai -400 020	**Vs**	M/s V Hotels Ltd, Formerly Tulip Hospitality Services Ltd., Mumbai -400 021
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Assessee by	:	श्री विजय मेहता Shri Vijay Mehta
Revenue by	:	श्री जी एम दास Shri G M Dass

सुनवाई की तारीख /Date of Hearing : 24-07-2016
घोषणा की तारीख /Date of Pronouncement : 26-08-2016

आदेश
ORDER

PER BENCH:

The aforesaid cross appeals has been filed by the assessee as well as by the revenue against separate orders passed by Ld. CIT(Appeals)-7, Mumbai against separate impugned orders for the assessment years 2005-06, 2006-07, 2007-08 and 2008-09. Since common issues are involved arising out of identical set of facts, therefore, same were heard together and are being disposed off by way of this consolidated order.

2. We will first take-up assessee's appeal in ITA No.3189/Mum/2011 for the assessment year 2005-06 and Cross Objection filed by the revenue being CO No.25/Mum/2016 arising out of ITA No. 3189/Mum/2016. In the grounds of appeal, the assessee has raised following grounds:

> ***Ground No. 1:***
> *On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in confirming action of the AO in disallowing depreciation on intangible assets of Rs. 85,20,330 (25% of Rs. 3,40,81,320). The appellant prays that the depreciation on FSI may kindly be allowed @25%.*
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> ***Ground No.2***
> *Without prejudice to ground no. 1, on the facts and circumstances of the case, the learned CIT(A) erred in holding that only Rs. 68,16,264 being amount spent during the year for acquiring rights of FSI is to be*

added to the block of Buildings". The appellant prays that entire consideration towards FSI of Rs.3,40,81,320/- may be added towards the book of building and the depreciation may be accordingly allowed.

The Appellant craves leave to add, alter, amend or withdraw any of the Grounds of appeal herein above and to submit such further arguments, statements, documents and papers as may be considered necessary either at or before the hearing of the appeal.

3. Brief facts and background of the case are that, the assessee company is in the hoteliering business (earlier known as M/s Tulip Star Hotel). It had filed its original return of income for the AY 2005-06 under section 139(1) on 31.10.2005 declaring loss of Rs.61,26,06,726/-. The said return of income was subjected to scrutiny proceedings and assessment was completed under section 143(3) vide order dated 26.12.2007, whereby loss was assessed at Rs.23,23,66,290/-. Later on, the Ld. Commissioner of Income-tax-III, Mumbai, under his revisionary jurisdiction under section 263 called for the assessment records and came to the conclusion that, the assessment order passed was *prima facie* erroneous and pre-judicial to the interest of the revenue, primarily on the ground that assessee has claimed depreciation of 25% on Floor Space Index (FSI) on the addition of Rs.3,40,81,320/- which was debited to the 'Fixed Block of Asset' on which depreciation amounting to Rs.85,20,330/- was claimed. The Assessing Officer had allowed the said claim of depreciation on FSI. The Ld. CIT was

of the view that, with the grant of additional FSI, the assessee only getting permission to increase the total areas of the building to the extent of FSI available. The grant of FSI is not an commercial/ business asset, therefore, AO should have examined the same. After inviting the assessee's objections and submissions, he set aside the assessment order after observing and holding as under:-

> *"The submission of the assessee is perused and considered. The assessee's submission is a matter of details and the AO has not looked into the same at assessment stage as the same was not available to him. The claim of the assessee needs to be examined by the AO with reference to all primary records. However, the claim of the assessee that possession of additional FSI in M/s Tulip Star Hotel is in form of acquisition of business / commercial right is not tenable. Section 32(1)(ii) clearly states that know-how patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998. So, the language "any other business on or after the 1st day of April, 1998. So, the language "any other business or commercial rights" should be of similar nature that of know-how, patents, copy rights trademarks, licenses and franchises. So, the acquisition of FSI by the assessee is no way nearer to the terminology used in section 32(1)(ii) of the Act. In any case, the order of assessment was erroneous and prejudicial to the revenue as it is totally silent about this and therefore there is lapse of omission on the part of the assessing officer*
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> *In the light of above facts, the assessment order u/s 143(3) dated 31.10.2005 passed by Jt. CIT(OSD), Range 3(3), Mumbai is found to be erroneous and prejudicial to the*

interest of revenue and therefore is hereby set aside to be made afresh. While completing the fresh assessment proceedings, the AO will give proper opportunities to the assessee and will also examine and consider all the submissions as well as evidences which the assessee may wish to produce before him and thereafter decide this issue on merits in a speaking order ".

Thus, his directions were, *firstly*, that the claim of the assessee needs to be examined by the AO with reference to all the primary records; *secondly*, possession of additional FSI is not a business / commercial rights and therefore, deprecation cannot be allowed under section 32(1)(ii), that is, @ 25%; and *lastly*, there was omission on the part of the AO to examine this fact and accordingly, he was directed to examine and consider the submissions as well as evidences which assessee may choose to produce for adjudicating for the purpose of the assessment on merits.

4. In pursuance thereof, the AO initiated the reassessment proceedings. In response to the show cause notice, the assessee *firstly*, brought to the notice of the AO that against the original assessment order, assessee had preferred first appeal before the CIT(A) in which substantial relief was granted by the CIT(A) vide his order dated 30th April, 2008. Regarding the issue in hand, that is, the allowability of depreciation on the additional FSI, the assessee stated the entire facts how it received the FSI and tried to substantiate its claim of depreciation @ 25% on such FSI which was added to the building block of asset, in the following manner:-

"During the year under consideration, the assessee

company acquired certain rights in the form of Additional PSI in pursuance of a letter- dated 01. 12.2003 from Urban Development Department, Gout, of Maharashtra granting an additional FSI in Tulip Star Hotel. The letter stated that on the payment of requisite premium to the Government of Maharashtra and Brihanmumbai Municipal Corporation, additional FSI of 10,022.94 sq. meters would be granted to the assessee, which is an additional PSI of 0.476, over and above the existing PSI of 1.5.

Subsequently order from Government of Maharashtra was received by the assessee on 04.08.2004 wherein the assessee had to make the payment of premium to Government of Maharashtra and Brihanmumbai Municipal Corporation that amounted to Rs.3,40,81,320. Under the instructions of the order dated 04.08.2004 issued by Government of Maharashtra assessee made the payment of 1st installment of Rs. 68,16,264. The copy of order from Government of Maharashtra and letter in connection with payment to Brihanmumbai Municipal Corporation has been enclosed as

Annexure A.

In view of the fact that the assessee received rights in the form of additional FSI, the same was capitalized in the books of accounts of the assessee company depreciation @ 25% on the same Le. Rs. 85,20,330 (25% of Rs. 3,40,81,320). The same was disclosed in the return of income, in the tax audit report at Annexure A. The same is also enclosed herewith as

Annexure B.

The A0 while passing the assessment order dated 26.12.2007, after considering all the factual position allowed the said claim of the assessee company.

However, the Hon'ble CIT vide its order passed u/s. 263 dated 23.03.2009 set aside the said assessment order of A. 0. and directed the A.O. to pass the fresh assessment order after considering all the evidences in connection with the said claim, of depreciation @25% on PSI, made by the assessee company.

In this regard, at the outset, we would like to submit before your goodself that the assessee company had submitted all the evidences with regard to claim of depreciation on PSI. It is just a difference of opinion between the two tax authorities. Hence, the assessee company does not have to submit any additional documentary evidences to back up its claim, as the nature of payment is not in dispute.

Now coming to the allowability of depreciation on FSI, we submit as under:

The assessee company is in the hoteliering business. During the year the assessee had acquire an additional FSI amounting to Rs.3,40,81,320. FSI is defined as the ratio of the total floor area of buildings on a certain location to the size of the land of that location. Granting of additional FSI means the right to construct the additional storeys on account of increase in floor space index (FSI) by virtue of regulation 14 of the Development Control Regulation for Greater Bombay, 1991 (DCR). From the above definition it is crystal clear, that the assessee has acquired business rights on which the assessee has claimed depreciation at 25%. The assessee company has acquired such a right on payment of premium.

To substantiate the fact that the acquisition of FSI is a business right, we state that the assessee company is into business of hoteliering. To expand the business operations of the assessee company,

the assessee approached for the acquisition of additional FSI, which would enable the assessee company to construct additional floors and thereby utilizing the same for the business purposes of the assessee company. In view of the same, the acquisition of FSI is nothing but a additional business / commercial right for the assessee company, which would enable the assessee company to expand its business operations.

Here, the assessee would like to invite your goodself's attention to Section 32(1)(ii) of the Income Tax Act, 1961 which is reproduced below for your ready reference:

"32. (1) [In respect of depreciation of

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) ***know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998****,*

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed]"

From the above definition it is crystal clear that business rights fall under the purview of section 32 and the same is eligible for depreciation @ 25%. The assessee company has acquired right to construct additional floors or buildings, with an intention to expand its business operations. Hence, the acquisition of FSI must be considered as acquisition of business/commercial right.

We hope that the explanation given above justifies the claim of depreciation at 25% on Additional Floor space Index

5. However, the Ld. Assessing Officer rejected the assessee's contention on the ground that the grant of additional FSI only got the permission to increase the size of the total building by constructing the additional floors or additional space in the building to the extent of FSI available. The grant of FSI is not in the nature any asset. It is only a payment made to the Government for increasing the building size/ extra floor. It can only be used to construct additional floor on its hotel and such FSI is not in the nature of any right of any type. Hence, assessee cannot claim depreciation of such a FSI because, at the very first instances, it is not a business asset accordingly, he disallowed entire claim of depreciation at Rs.85,20,330/- and was added to the total income of the assessee company and finally, the income was assessed at loss of Rs.38,55,51,470/-.

6. In the first appeal against the said assessment order dated 25.11.2009, assessee preferred first appeal before the CIT(A) and gave detailed submissions as to how FSI is an additional business/ commercial right, which would enable the assessee company to expand its business operations and hence it will falls within the scope and ambit of *'intangible asset'*. The Ld. CIT(A) held that, the assessee was unable to explain as to how and under which item mentioned in section 32(1)(ii) of the Act, the FSI will fall. He observed that, even if it is accepted that FSI is a commercial right which will improve the business interest of the assessee but in no way, it will fall within the nature of knowhow, patent, copyright, trademark, licenses, franchise etc as mentioned in clause(ii) of sub-section (1) of section 32. Accordingly, he upheld the action of

the AO that the claim of depreciation on the entire amount cannot be allowed @ 25%. However, he accepted the assessee's other contention that depreciation should be allowed at @ 10% applicable to building, but he restricted to the amount actually spent for the purpose of business, that is Rs.68,18,265/- paid towards the FSI, which is for enduring nature as it adds to the value of the existing building. The additional FSI will enable the company to add more floors over and above the existing structure. Since it relates to the 'building block of assets', the overall cost of the building block will increase by this amount and accordingly, he directed the AO to allow the depreciation to the 'building block of assets' on the amounts spent, that is, at Rs.68,16,264/- and allow the depreciation as per the law, which is 10% applicable for the building. Against this, the assessee has come in appeal before us on the grounds incorporated above.

7. After the filing of the second appeal against the first appellate order, the Tribunal passed the order dated 01.04.2015 in ITA No.2483/Mum/2009 in the appeal filed by the assessee against the revisionary order dated 23.03.2009, passed under section 263 cancelling the original assessment order under section 143(3). In the said order, the Tribunal has confirmed the action of the Ld.CIT in cancelling the assessment order as well as setting aside the issue before the AO for fresh adjudication. It would be relevant to incorporate certain observations and finding of the Tribunal in this regard:-

> *"9. Therefore, the issue of deprecation on FSI had to be considered as per the provisions of section 32(1) of the Act. We*

find substance in the observation is made, the FSI is not a business asset because prior to the construction of additional space, the FSI itself does not bring any asset into existence to be used for the purpose of business. Further the condition of putting an asset to use for business purpose is also not satisfied. "Moreover, the additional FSI is a permission to construct additional space on a plot of land and, therefore, would add to the value of and by increasing the constructible area/space and has no independent value without underlying land as well as unitl and unless the additional construction is carried out by using the FSI. It is only an addition in the value of land not eligible for depreciation. The decisions relied upon by the Ld. AR are not applicable in the facts of the present case because the Commissioner has not given the finding on a different issue that of the show-cause notice. The observation of the Commissioner that the AO has not looked into the issue if factually correct. Even, otherwise, the main issue is allowability of depreciation on FSI and not conducting the enquiry by the AO is only in respect of the main issue and cannot be treated as a different issue".

10. xxx

11. xxx

12. The subject matter of the revision order is allowability of claim of depreciation on FSI on the ground that it is not a business asset until and unless additional construction is carried out. As we have discussed in the foregoing para of this order that the FSI has not independent existence de hors the land on which it is to be used. It is only an addition in the usable value of the land and, therefore, unless and until it is used for construction of additional space on a particular land no new asset came into existence either tangible or intangible.

Accordingly, we concur with the view of the Commissioner. As regards the objection of giving the finding by the Commissioner that the AO has not looked into the issue and directed the AO to examine the issue afresh, we note that in the show-cause notice the Commissioner has not stated that the AO has conducted an enquiry, therefore, the finding cannot be said to be contrary to the show-cause notice. We have already given our finding that there is a complete lack of enquiry on this issue by the AO, therefore, it makes no difference even if the AO is asked to examine the issue because the jurisdiction of the AO is circumscribed by the finding and observation of the revision order. The AO is not free to take the independent view or has any discretion to take a decision contrary to the revision order. Hence, the directions are not prejudicial to the interest of the assessee"

8. At the outset, it is noticed that the Tribunal has made certain observations, which was neither the issue raised by the CIT in his show cause notice nor there was any finding or observation in the order. It is also completely divorced from the findings given/arrived at in the order by the AO as well as of ld. CIT(Appeals) passed in pursuance of revisionary order under section 263. The Tribunal has observed that, the additional FSI is a permission to construct additional space on a plot of land, therefore, add to the value of the land by increasing the constructible area/ space and has no independent value without underlying land as well as until and unless the additional construction is carried out by using the FSI. It is only an addition in the value of land not eligible for depreciation. Further, the Tribunal has observed that, FSI has no independent existence *de hors* the land it is used. It is

only an addition in the useful value of the land and unless and until it is used for the transfer construction of additional space on a particular land, no new asset can come into existence, either tangible or intangible. These observations by the Tribunal has transgressed the scope and direction of the revisionary order passed by CIT under section 263, because it was not the case of anyone that FSI is available on the land on which no depreciation should be allowed. Be it that as it may be, the Floor Space Index (FSI) is defined as the ratio of the total floor area of buildings on a certain location to the size of the land of that location. Granting of additional FSI means, the right to construct the additional storey/s on account of increase Floor Space Index by virtue of "Regulation for Greater Bombay, 1991 (DCR). Under the section 33 of DCR 1991 pertaining to 'Additional Floor Space Index' which may be allowed in certain categories, sub-section (4) dealing with building of "starred categories" of residential hotels has been defined in the following manner:-

> *(4) Buildings of Starred Category Residential Hotels:—With the previous approval of Government and subject to payment of such premium as may be fixed by Government (out of which 50 percent shall be payable to the Corporation), and subject to such other terms and conditions as it may .specify, the floor space indices in Table 14 may be permitted to be exceeded in the case of buildings of all starred category residential hotels in independent plots and under one establishment as approved by the Department of Tourism, by a maximum of 50 per cent over the normal permissible floor space index in the F and G wards of the Island City and by a maximum of 100 per cent over the normal*

permissible floor space index in wards of the suburbs and extended suburbs-

From this clause, it is quite evident that, FSI is connected with the building alone, that is, right to construct additional floors and such an FSI is never embedded to the land. FSI is the quotient of ratio of the combined gross floor area of all the floors. The assessee got 'additional FSI' of 10022.94 sq. meters which was an additional FSI of 1.5. It is for this additional FSI, the assessee was required to make the payment of premium to Government of Maharashtra and BMC for sums amounting to Rs.3,40,81,830/- against which assessee has paid the first installment of Rs.68,16,864/-. Since it is neither the case of the AO nor the case of the ld. CIT(A) in the appeal impugned before us, that FSI is to be allocated to the land, therefore, we are not entering into the semantics whether the right to additional FSI received by the assessee should be reckoned with the land or is embedded in the land or not. In the wake of the Tribunal order dated 01.04.2015, the revenue has preferred a belated Cross Objection, wherein the following grounds have been raised:-

"1. Whether on the fact and in the circumstances of the case and in law, the learned CIT(A) erred in allowing Rs.68,16,264/- to be added to the block of "Buildings" being amount spent during the year for acquiring rights of FSI, in view of the order of Hon'ble ITAT vide order dated 01.04.2015 in the appeal No.2483/Mum/2009 holding that the additional FSI is only addition in value of land not eligible for depreciation.

2. The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.

3. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary".

9. At the outset, the Cross Objection filed by the revenue is barred by limitation by approximately 5 years, as the receipt of notice of appeal filed by the assessee has been stated to be received by the Department on 21.04.2011 and the Cross Objections have been filed on 09.03.2016. Along with the CO, the reason mentioned by the Department is that the ITAT has decided the issue of 'Additional FSI' vide order dated 01.04.2015 in favour of the Department, therefore, the Department has decided to file the cross objection subsequent to the order of the Tribunal. It is noticed that, there is no affidavit filed by any officer or any *bona fide* reasons have been given for filing of Cross Objection after a lapse of period of 5 years.

10. Before us, the Ld. CIT DR submitted that, there is sufficient cause for condoning the delay, because in assessee's own case the Tribunal has clearly held that the 'additional FSI' is not eligible for depreciation, since it is only addition in the value of land and on land no depreciation is allowable. The subsequent order of the Tribunal in assessee's own case should be considered as a reasonable cause for filing of cross objection belatedly. When it was pointed out to ld. CIT DR that, once the order of the Tribunal is dated 01.04.2015 and admittedly, the order was also received by the Commissioner in month of April, 2015, then why the cross objection has filed on 9th March, 2016 which is after time period of 10 months, Ld. DR in response submitted that, there are various stages of approvals which are required from the concerned hierarchy of authorities before filing of the

appeal, hence, there was further delay in filing of the cross objection.

11. The Ld. Counsel for the assessee, Mr. Vijay Mehta objecting to the filing of the cross objection belatedly, submitted that there is huge delay of 5 years and onus is on the Department to show that, there was a reasonable cause for such a huge delay. In the present case, the Department has taken a conscious decision not to file the appeal before the Tribunal against the decision/order of the CIT(A) which was in pursuance of the proceedings post revisionary order under section 263. Even the contention of the ld. DR that the CO has been filed after the order of the Tribunal, then also there is a huge delay of more than 10 months after the receiving of the Tribunal order for which there is no justification. In support of his argument, he strongly placed reliance on the decision of **Hon'ble Supreme Court** in the case of ***Office of Chief Post Master General and others vs. Living Media Ltd. in Civil Appeal no. 2474 to 2475 of 2012 vide judgment and order dated 24th February, 2012.*** In that case, there was delay of 427 days in filing of the SLP by the office of Chief Post Master General. The Hon'ble Supreme Court after taking note of various decisions of the Hon'ble Supreme Court and analysing the reasons given in the affidavit held that the government officials/department cannot claim that they have a separate period of limitation when they were possessed with the competent persons, who are familiar with the court proceedings. Their Lordships posed the question to themselves as to why the delay has to be condoned mechanically merely because the government or

the wing of the government is perty before us. Their Lordships further observed that, in the matter of condonation of appeal, one has to see whether there was any gross negligence or deliberate inaction or lack of *bona-fide,* a liberal concession has to be adopted to advance substantial justice. However, the claim of the department that the delay is not intentional and is on account of impersonal machinery, departmental/administrative procedures cannot be upheld. Their Lordships held that, the law of limitation undoubtedly binds everybody including the Government. The final observation in this regard was as under:-

> *"13. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay".*

He, further referred and strongly relied upon in the case of Somerset Place CHS Ltd. vs ITO, reported in [2015] 279 ITR (Bom) 146, wherein they have concluded that, if the assessee has initially taken conscious decision not to pursue further proceedings against the adverse order of the Tribunal then, decision rendered by the High Court in favour of the assessee on the same issue in later assessment year cannot be said to be sufficient cause for condoning the delay of 5 years in filing the appeal before the Court. Thus, he submitted that, once the Department has consciously accepted the order of the CIT(A), then merely because a subsequent order of the Tribunal has decided the issue in favour of the Department does not mean, it is a sufficient and reasonable cause.

12. We have considered the rival contentions on the matter of condonation of delay. It is an admitted fact that, the order of the CIT(A) which is impugned before us was accepted by the Department and conscious decision was taken not to file any further second appeal or pursue any remedy. Now, the Department seeks to file the Cross Objection in the wake of oreder of the Tribunal rendered on 1st April, 2015 on the ground that, the subsequent decision has been decided in favour of the Department. At the outset, we are of the opinion that, a new ruling in subsequent proceedings or subsequent judicial decision cannot be the ground alone for condoning the delay. The statutory time limit prescribed for filing of an appeal or law laid down in the Limitation Act cannot be stretched to bring about a situation of unsettling a judicial decision or any order which stood accepted by the parties. The entire mandate of the law would get frustrated if the

litigant who has taken a decision not to pursue any further proceedings is allowed to file an appeal on some new ruling for reviewing the earlier judgment. This will lead to chaos in the attainment of finality of the judicial process. This precise view has been affirmed by the Hon'ble jurisdictional High Court in the case of Somerset Palace CHS Ltd. vs ITO (*supra*). That apart, another very important aspect is that, after receiving the order of the Tribunal in April 2015, the revenue has again taken time of more than 10 months to file the cross objections. The reason for such a delay has been contended to be on account of procedure of approval from various authorities. Such a bureaucratic red tapism has been frowned by Hon'ble apex Court on several occasions and in the case relied upon by the Ld. Counsel in the case of Office of Chief Post Master General vs Living Media Ltd. (*supra*) the Hon'ble Supreme Court has come down very heavily on the Government Department for flouting the law of limitation on the ground that, there is lot of procedures involved in filing of the appeal. Their Lordships have held that, there cannot be a separate period on limitation for the Government Department. Their observations as incorporated above, truly answers the reasons cited by the Department before us. Thus, on the facts and circumstances of the case, we hold that, it is not a fit case for condoning the delay and accordingly, we are dismissing the Cross Objection filed by the revenue on the ground of limitation. Thus, Cross Objection filed by the Department is dismissed.

13. Now, we come to the assessee's appeal, wherein ground no.1, relates to disallowance of deprecation @ 25% by treating

the FSI received as intangible asset. As discussed above, the assessee had contended that it is in the business of hoteliering and acquisition of FSI for building extra floor space is a business right which is useful for expanding the business operation of the assessee company. The acquisition of FSI is nothing but an additional business/commercial right which is to be treated as 'intangible asset' under the meaning and scope of section 32(1)(ii). Such business rights are eligible for depreciation @ 25%.

14. Before us, the Ld. Counsel Mr. Vijay Mehta, after explaining the entire facts and referring to the contention raised by the assessee before the CIT(A), reiterated that, assessee is eligible for depreciation @ 25%, because assessee has received the right to construct additional floors in the form of 'Additional FSI' which is directly related to its business. In any case, alternatively he submitted that, it is a part of block of asset, because the assessee has shown it in the Schedule of 'block of assets' as FSI for the sums amounting to Rs.3,40,81,320/-. Since it is part of the block of asset relating to building, depreciation @ 10% should be allowed to the whole of the amount and not for the part of the amount as held by the Ld CIT(A). This argument has been made with reference to the issue raised in ground no.2. Regarding the decision of the Tribunal in assessee's own case in respect of proceedings under section 263, he submitted that, *firstly*, neither in the show cause notice nor in the order of ld. CIT, there was any such observation or finding that FSI in any manner relates to value of land and it has no independent existence *de hors* the land and, therefore, on this

ground depreciation should not be allowed. Such an observation and finding cannot be held to have persuasive value or binding precedence, as it was neither argued by any parties nor it is borne out of order against which the appeal was preferred. In any case, he submitted that, there are series of decisions of this Tribunal, wherein it has been held that, the Development rights available to the assessee as per DCR 1991 is separate and distinct from the original right in the land and such right cannot be held to be embedded in the land. In support, he strongly relied upon the decision of ITAT Mumbai Bench in the case of Land Breeze CHS Ltd, reported in [2013] 55 SOT 103 and drew our attention to para 15 & 16 of the said order. The relevant observation and finding as pointed out by the Ld. Counsel is reproduced hereunder:-

> *"The contentions and reasoning of the Assessing Officer to the extent that the word 'Property' not only includes tangible asset but' also intangible asset and therefore, additional FSI available to the assessee is view of DCR, 1911 was a right acquired by virtue of being owner of the plot is correct. Thus, such a right is definitely a 'Capital Asset' held by the assessee and assignment of such a right in favour of the developer amounts to transfer of capital asset. It is held that transfer of TDRs amounts to transfer of a 'Capital Asset [Para 15]"*
>
> *"The reasoning and the logic given by the Assessing Officer and the Commissioner (Appeals) that these development rights were embedded with the land and therefore, the sum chargeable to cost has to be ascribed, it l's held, is not tenable for the reason that these development rights have been available to the assessee as per the DCR, 1911 and is separate and distinct from the original right in land*

> *and hence, it cannot be held that such a right was embedded in the land. Therefore, the conclusion drawn by the Assessing Officer and the Commissioner (Appeals) on this score gets failed.*

Mr. Mehta argued that such an observation of the Tribunal *de hors* the issue before it falls within the realm of *obiter dicta* and not a *ratio decidendi* or finding given on the issue involved. In any case, the subject matter of issue arising in assessee's appeal is only whether the 'additional FSI' increases the value of building or not and whether the depreciation should be allowed on the whole of the amount of the FSI, that is, of Rs.3,40,81,320/- or on the amount paid of Rs.68,16,264/-. As regards the ld. CIT(A)'s observation that depreciation should be allowed only on the part payment, he submitted that, once the payment has been made in respect of FSI in the building and the ownership lies with the assessee then depreciation has to be allowed on the full value of the asset. In support, he strongly relied upon the decision of Hon'ble Supreme Court in the case of Mysore Minerals Ltd. vs CIT, reported in 231 ITR 775.

15. On the other hand, Ld. CIT DR submitted that, the FSI can neither be considered under the building block of assets nor it can be taken as block of intangible asset. The value of FSI should be included in the value of the land as held by the Hon'ble Tribunal in the assessee's own case for the same year, wherein it has been held that 'additional FSI' acquired by the assessee is only the addition on the land not eligible for deprecation, as no new asset has come into existence. In any case, he submitted that, assessee's claim of depreciation

on the entire amount of Rs.3,40,81,320/- cannot be allowed, because the assessee has only made the payment of Rs.68,16,264/- and to the extent of the payment made for acquiring the asset can be reckoned as a part of an asset.

16. We have considered the rival submissions and also perused the relevant finding in the impugned orders as well as entire gamut of facts as discussed above. During the year under consideration the assessee company has acquired certain rights in the form of 'additional FSI' from the Urban Development Department; Government of Maharashtra on its Hotel (Tulip Star Hotel), vide letter dated 01.12.2003. The said letter stated that on payment of requisite premium to the Government and the BMC, 'additional FSI' of 10022.94 sq. meters would be granted to the assessee which would be additional FSI of 0.476 over and above the existing FSI of 1.5. Subsequently, order from the Government was received on 04.08.2004 wherein the assessee had to make the payment of the premium to the Government and the BMC amounting to Rs.3,40,81,320/-. Such a payment was to be made under the installment Scheme. In pursuance thereof, the assessee paid its first installment of Rs.68,16,264/-. Thus, the assessee received the rights in the form of 'additional FSI' which has been capitalized in the books of accounts. In the books of account, the assessee company had debited the whole amount of Rs.3,40,81,320/- in the Schedule of 'fixed assets' as "Floor Space Index" and a corresponding credit entry was made as a liability payable to Government/ BMC. In the Balance sheet as on 31st March, 2005, under the Schedule "B" showing 'current liabilities and the provision', the

assessee has shown the liability under the head "premium payable" at Rs.2,72,65,056/- (i.e., Rs.340,81,320 - Rs.68,16,264). The assessee had claimed depreciation @ 25% on the ground that it is a some kind of business or commercial rights, therefore, it falls within the realm and scope of "intangible assets" allowable for depreciation @ 25% under section 32(1)(ii). This has been negated by the Ld. CIT(A) on the ground that the FSI does not fall within the scope and ambit of section 32(1)(ii). However, he accepted the assessee's contention that, the amount spent for the business purpose will go to the add to the value of the existing building as additional FSI, which will enable the assessee company to add more floors to the existing structure and its relates to building complex of assets. Thus, he directed to allow the depreciation applicable to the building, that is, @ 10%. However, he has restricted the said depreciation on the amount paid during the year Rs.68,16,264/- and not to the entire amount as payable to the Government.

17. As observed in the earlier part of our order, the Floor Space Index is the ratio of the total floor of the building on a certain location to the size of the land of that location. In other words, it is quotient of the ratio of the combined gross floor area of all the floors. Granting of 'additional FSI' gives the right to construct the additional floor/s on account of increase in Floor Space Index by virtue of DCR, 1991. Here in this case, it is undisputed fact as discussed above that the assessee received the additional FSI of 10022.94 sq. meters for which premium amount of Rs.340,81,320/- was payable to the Government/ BMC under the "installment scheme".

The assessee did pay the first installment of Rs.68,16,264/-, however, the balance installment/payment has not been paid for many years as brought on record. Once the assessee has received the FSI, it has made the accounting entries in its books by debiting the entire amount of Rs.3,40,81,320/- on the asset side of the Balance sheet by debiting to the details of "Fixed Assets" and the corresponding liability of Rs.2,72,65,056 which remained unpaid (i.e., Rs.3,40,81,320 – Rs.68,16,264= Rs.2,72,65,056) has been shown as premium payable for additional FSI to the Government/ BMC. Once the entire amount has been debited to the fixed assets and has been brought in the Balance sheet in the Schedule of fixed asset, that is, to the block of a building, then depreciation prima facie has to be considered on the full amount debited i.e. Rs.3,40,81,320/-. Before us, the Ld. DR reiterated the finding of CIT(A) that the depreciation cannot be allowed on the whole of the amount, because the assessee had only paid the first installment of Rs.68,16,264/-. However we are unable to accept this contention, because once the assessee receives the rights to construct extra floor/ storey, it enhances the value/cost of the building and assessee under the principle of accounting has debited the entire amount of FSI right to the block of asset of the building by making a corresponding entry as "liability' in the Balance-sheet. This can also be explained by way of an example; suppose, assessee would have taken a bank loan for paying the entire or balance premium (say Rs. 2,72,65,056) on FSI to the Government/ BMC, then assessee would have debited the entire amount to FSI account under the head 'fixed assets' and credited to the bank and disclosed it as its liability in the

Balance sheet. Now, if assessee has paid the premium on installment scheme, then assessee would debit the whole amount on the asset side and make a credit to the vendor account by showing it as liability payable to him for the amount which remains to be paid. It is immaterial whether for many years that liability or installment has been paid subsequently or not. Once the corresponding liability in the accounts has been shown, then depreciation on the asset should be given irrespective of the fact that this year only part payment was made for the acquisition of that asset. Thus, we hold that, assessee would be eligible for depreciation for the entire amount of Rs.3,40,81,320/- debited to the account of asset.

18. Now, coming to the rate of depreciation, whether it has to be allowed @ 10% or 25%, we do not find any merits in the contention of the assessee that the additional FSI is a business or commercial rights falling within the realm and scope of 'intangible asset' within the scope of section 32(1)(ii). The FSI only relates to giving of the right to construct additional floor to the assessee which only goes to enhance the value or cost of the existing asset / building. It strictly pertains to the addition in the building only and, therefore, depreciation allowable would be at the rates applicable to the buildings only and for not some kind of intangible right u/s 32(1)(ii). Accordingly, we uphold the observation and order of the Ld. CIT(A) to the extent that the depreciation allowable would be on rates applicable to the building only that is, @10% and not @ 25% for some kind of intangible right. Thus in our conclusion, the assessee would be entitled to

depreciation @ 10% on the whole of the consideration towards FSI of Rs.3,40,81,320/-. In view of our finding ground no.1 is treated as dismissed and ground No.2 is treated as allowed.

19. In the result, appeal of the assessee is partly allowed.

20. Now, we will take-up cross appeals filed by the assessee in ITA No. 3190/Mum/2011 as well as by the revenue in ITA No. 4216/Mum/2011 for AY 2006-07, which has been filed against impugned order passed by Ld. CIT(Appeals)-7, Mumbai, dated 07.03.2011 for the assessment year 2006-07, The assessee in its appeal has raised following grounds of appeal:-

> *"**Ground No. 1:***
> *On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in confirming action of the AO in disallowing depreciation on intangible assets of Rs.63,90,248 (25% of Rs2,55,60,900). The appellant prays that the depreciation on FSI may kindly be allowed @ 25%.*
>
> ***Ground No.2***
> *Without prejudice to ground no. 1, on the facts and circumstances of the case, the learned CIT(A) erred in holding that only Rs.68,16,264 being amount spent during the year for acquiring rights of FSI is to be added to the block of Buildings". The appellant prays that entire consideration towards FSI of Rs.3,40,81,320/- may be added towards the block of building and the depreciation may be accordingly allowed.*
>
> *The Appellant craves leave to add, alter, amend or withdraw any of the Grounds of appeal herein above and to submit such further arguments, statements, documents and papers as may be considered necessary either at or before the hearing of the appeal".*

21. Since the aforesaid grounds are exactly similar to the grounds raised by in the assessee's appeal for the AY 2005-06 and the issues involved are permeating from identical set of facts, therefore, the finding given above in the appeal for the AY 2005-06 will apply *mutatis mutandis* in this year also. Thus, ground No.1 is treated as dismissed whereas, ground no.2 is allowed.

22. In the result appeal of the assessee stands partly allowed.

23. In the revenue's appeal following grounds have been raised:-

> *"1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing depreciation on intangible assets of Rs.4,88,08,717/-;*
>
> *2. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.*
>
> *3. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary".*

24. Besides this, the revenue has also raised filed an additional ground which reads as under:-

1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the assessing officer to add the amount spent on FSI during the year to the building block of asset and allow depreciation as per law.*
2. *Whether on the facts and in the circumstances of the*

case and in law, the Ld. CIT(A) erred in ignoring the fact that the additional FSI is a permission to construct additional space on plot of and therefore, would add to the value of land by increasing the constructible area/space and has no independent value without underlying land as well until and unless the additional construction is carried out by using the FSI and it is only as addition in the value of land not eligible for depreciation.

3. *The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.*

4. *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary".*

26. So far as the issue relating to depreciation on intangible asset as raised in the original grounds of appeal raised by the revenue, it is seen that, Ld. CIT(A) had followed the order of the CIT(A) for the assessment year 2003-04, 2004-05 and 2005-06. It has been admitted by both the parties that the Tribunal vide order dated 11.03.2015 in ITA nos. 4783 & 5517/Mum/2008 for these assessment years has decided this issue after observing and holding as under:-

> *"The next ground of Revenue relates to allowing depreciation on intangible assets of Rs.8,67,71,053/-. The AO disallowed the depreciation on intangible assets on the plea that the assessee could not establish that the intangible assets on the plea that the assessee could not establish that the intangible assets were used for the purpose of business in the previous year relevant to AY 2004-05 and the assessee did not fulfill the conditions precedent referred to in Section 32 of the Act.*

13.1 By the impugned order, the CIT(A) allowed the depreciation after having the following observations:-

> *2.3 I have considered the assessment order and written submissions and my appellate order No.CIT(A) XXXII/IT-204/06-07 dated 22.10.2008 for AY 2003-04. In my appellate order cited above, of pages 15 to 17, paras 10.4 to 10.10, I have held that depreciation on intangible assets is to be allowed in AY 2003-04. As for AY 2004-05, the appellant has claimed the depreciation on intangible assets at Rs.8,67,71,053/- on account of WDV as on 31.03.2003 (AY 2003-04), and the facts are same. Hence, the depreciation on WDV is therefore, the disallowance of depreciation at Rs.8,67,71,053 is deleted."*

13.2 We have considered rival contentions and perused the record. We found that the CIT(A) in its earlier order for AY 2003-04 has deleted the disallowance of depreciation after having the following observation:-

> *10.4 I have carefully considered the assessment order and the submissions made by the appellant during appellate proceedings. The depreciation on intangible assets of Rs.465,27,78,949/- at Rs.11,50,94,737/- was claimed by the appellant in respect of the running business which was acquired on "slump sale basis". There is no dispute about the computation of depreciation at Rs.11,50,94,737/-. The claim of depreciation for assessment year under consideration is the first year of such a claim. The AO has also accepted that intangible assets were part of slump sale. The AO has, however, relied mainly on three propositions for the purpose of denying the depreciation. Briefly stated, they are:*
>
> *(i) The appellant had not bifurcated the amount to different assets:*
> *(ii) The appellant had not proved that the intangible assets were used for the purposes of its business; and*
> *(iii) The appellant failed to prove that the condition precedent referred to in Section 32 have not been fulfilled.*
>
> *10.5 The AO's contention that the appellant has not bifurcated the amount to different assets is not based on the facts of the case as the appellant had purchased all the intangible assets on "slump sale" basis and had not paid separate price for each of such intangible assets. Further, all the intangible assets fall under block of assets on which depreciation is allowable @ 25%. The AO having accepted*

the fact that intangible assets were acquired by appellant on "slump sale basis", in such a case.. of acquisition of an undertaking as a going concern, the. composite consideration cannot be bifurcated between various assets needs to be accepted. The allocation of cost of acquisition for each of assets in a fair and reasonable manner permitted by law has to be accepted.

10.6 The second proposition that the appellant had not used the intangible assets in their business cannot be accepted as the hotel business could not have been carried out without these license / permits. The AO has also not denied these facts. Therefore, the AO's contention on this proposition that intangible assets were not used for the appellant's business also fails.

10.7 The third proposition of the AO that the condition precedent referred to in Section 32 have not been fulfilled cannot be accepted as the invaluable permits license, approvals for the purpose of operating hospitality business squarely falls within the purview of the definition of intangible assets given in Explanation 3 of Section 32 of the Act.

10.8 In this regard, yet another question which the AO has not considered and which can be raised in the 5th proviso to section 32 of the Act which provides that aggregate depreciation allowable to the predecessor and successor in the case of succession referred to in clauses (xiii) and (xiv) of section 47 or section 170 or to the amalgamating and amalgamated company in the case of amalgamation or to the demerged and resulting company in the case of demerger, as the case may be, shall not exceed, the amount of depreciation as if the succession, amalgamation etc. had not taken place. This question was posed to the appellant's AR who has vide a separate note replied as under:-

Now, a question has arisen, whether in view of the 51th proviso to section 32 of the Income-tax Act, 1961 ("the Act"), whether a part of the depreciation is to be apportioned and to the allowed to predecessor owner. In our considered opinion, we would like to state that the said proviso to section 32 is not applicable to the facts of the assessee's case. The said provisions are applicable to the following cases only:-

(1) Transfer of capital assets by a firm to a company as contemplated in section 47(xiii);
(2) Transfer of capital assets by a sole proprietary concern to a company in terms of section 47(ivx);
(3) Succession of business, referred to, in section 170;
(4) Transfer of assets by a amalgamating company to the amalgamated company and;

(5) Transfer of assets in a demerger by the demerged company to the resulting company.

Firstly, it is submitted that it is not a case of succession. The assessee had purchased the said hotel in an open bid from the Government owned Corporation i.e. Hotel Corporation of India, and by purchasing, the assessee has become owner of the said hotel. The purchase of Hotel by the assessee from Hotel Corporation of India does not amount to succession in as much as that the said company was not only running the said single hotel sold to assessee. Thus, by effecting the sale of single hotel does not tantamount to succession of the while business. In this regard, the reliance is placed on the decision of Gujarat High Court in the case of Premji Khimraj Shah vs ITO (118 ITR 216). The said proviso to section 32 is applicable only in those cases which are covered by sub-clause (xiii) and (xiv) of section 47 or section 170 of the Act. The proviso to sub-section (xiii) & (xiv) of section 47 indicates that sub-section (xiii) is applicable only where any transfer of capital assets or intangible assets has been effected by a firm to a company as a result of succession of the firm by a company. The provisions of sub-section (xiv) is applicable only where a sole proprietary concern is succeeded by company. Thus, it may please be noted that in our case, no transfer has taken place from a firm to a company nor the said business of hotel was a proprietary concern succeeded by a company. Thus the applicability of these said sub-section i.e. (xiii) & (xiv) of section 47 is, therefore, totally ruled out in our case. Another provision i.e. section 170 is also not applicable to the facts of our case as the said provisions are applicable only where a business has been succeeded otherwise then on death. The phenomenon of death in the said provisions clearly shows that the provisions of section 170 are applicable only where business is being run either by individual or Karta of HUF, because the phenomenon of death occurs only in these two types of cases. No death will occur to a company or a firm which could only be either liquidated or dissolved respectively. The 5th proviso to section 32 are also applicable to amalgamating company and demerger company. In our case, neither there is a amalgamation nor there is a demerger at all. Thus, our case is fully outside the purview of 51th proviso to section 32".

From the above submission, it is seen that the appellant's case neither falls in the category of succession (as provided in section 47, clauses (xiii) or (xiv) or section 170), nor amalgamation or demerger. Hence, I agree that 5th proviso to section 32 of the Act would not be attracted to the case of the appellant.

10.10 Taking into consideration, the facts that the AO had

accepted that intangible assets were acquired by way of "slump sale" and for the reasons recorded in earlier paras, I hold that the deprecation on intangible assets at Rs.46,27,78,949/- @ 25% claimed at Rs.11,50,94,737/- is admissible as the same were used for the purpose of appellant's business."

13.3 We found that allocation of cost of acquisition for each block of asses in a fair and reasonable manner as permitted by law had to be accepted. Further, the CIT(A) observed that even the AO had not denied that the hotel business could not be carried out without the said licenses and permits. The CIT(A) further stated that 5th proviso to section 32 of the Act would not be attracted to the case of the assessee. We, therefore, do not find any reason to interfere in the order of CIT(A) in this regard".

27. The assessee in this year also has claimed the depreciation of Rs.4,88,08,717/- on intangible asset and claimed it to be in the nature of licenses, arrangements and other business and commercial rights. The AO has followed the assessment order of the AO for the AYs 2003-04 to 2005-06. The Ld. CIT(A) too has followed the earlier years order for giving relief. Now, that Tribunal has confirmed the order of the CIT(A) deciding the appeal in favour of the assessee, then consistent with the view taken in earlier years, we do not find any merit in the grounds raised by the revenue and same is dismissed.

28. So far as the additional grounds raised on account of amounts spent on FSI during the year to the building block of assets and allowability of depreciation, this issue has already been decided by us in the appellate order for AY 2005-06, wherein, we held that, deprecation has to be

allowed in full, that is, for the entire value of the FSI amount @ 10%. Once, we have directed that the depreciation has to be allowed @ 10%, then in the subsequent years same rate has to be allowed on the w.d.v. value. Thus, additional ground raised by the revenue is dismissed.

29. In the result, appeal of the revenue stands dismissed.

30. Now, we will take-up cross appeals for assessment year 2007-08; assessee's appeal being ITA No. 3191/Mum/2011 and Revenue's appeal being ITA No. 4215/Mum/2011, has been filed against impugned order dated 07.03.2011 passed by CIT(A)-7. In assessee's appeal, following grounds has been raised:

> ***Ground No. 1:***
> *On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in confirming action of the AO in disallowing depreciation on intangible assets of Rs.47,92,686 (25% of Rs 1,91,70,744). The appellant prays that the depreciation on FSI may kindly be allowed @25%.*
>
> ***Ground No.2***
> *Without prejudice to ground no. 1, on the facts and circumstances of the case, the learned CIT(A) erred in holding that only Rs.47,92,686 being amount spent during the AY 2005-06 for acquiring rights of FSI is to be added to the block of "Buildings". The appellant prays that entire consideration towards FSI of Rs.3,40,81,320/- may be added towards the block of building and the depreciation may be accordingly allowed.*
>
> *The Appellant craves leave to add, alter, amend or withdraw any of the Grounds of appeal herein above*

and to submit such further arguments, statements, documents and papers as may be considered necessary either at or before the hearing of the appeal".

31. Since the aforesaid grounds are exactly similar to the grounds raised in the assessee's appeals for AY 2005-06 and 2006-07 and the issues involved are permeating out of identical set of facts, therefore, the finding given above in the assessee's appeal for AYs 2005-06 and 2006-07 will apply *mutatis mutandis* in this year also. Thus, ground No.1 is treated as dismissed and ground No.2 is allowed.

32. In the result appeal of the assessee stands partly allowed.

33. In the revenue's appeal, following grounds have been raised:-

"1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition made by the A.O. on count of Luxury tax payments of Rs.8.00.000/- and interest on Term Loans of Rs 2,00,00,000/- being deduction claimed u/s.43B of the IT Act.

"2. On the facts and in the circumstances of the case and in law, the learned CIT(A) failed to appreciate that such claims of deduction should have been made, if permissible, by filing a revised Return of Income as per law, and if no claim was made in the original/ revised return, the deduction is not allowable in view of the ratio laid down by the Hon'ble Supreme Court in the case of M/s. Goetze India Ltd. reported in 284 ITR 323 (SC)."

"3. On the facts and in the circumstances of the case and in law, the learned CIT(A) failed to appreciate and give a finding on the applicability of ration of the Hon'ble Supreme Court's decision cited supra and relied upon by the A.O., while making disallowances u/s. 43 B of the Act."

"4. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing depreciation on intangible assets of Rs.3,20,51,976/-."

"5. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the Assessing Officer be restored."

"6. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

Besides this, revenue has also raised following as additional grounds:-

"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the assessing officer to add the amount spent on FSI during the year to the building block of asset and allow depreciation as per law"

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the fact that the additional FSI is a permission to contrast additional space on plot of land and therefore, would add to the value of land by increasing the constructible area/space and has no dependent value without underlying land as well until and unless the additional construction is carried out by using the FSI and it is only an

addition in the value of land not eligible for depreciation.

"3. The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored."

"4. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

34. So far as the additional ground is concerned, it is similar to the additional ground raised by the department in AY 2006-07, therefore, in view of our finding and direction given above, additional ground is treated as dismissed.

35. As regards ground No.4, (in the original grounds of appeal) it has been admitted by both the parties that, same is similar to the ground raised by the revenue in AY 2006-07 and, therefore, in view of our finding given therein, which is based on the judicial precedence of the order of the Tribunal of the earlier years, we hold that, assessee is eligible for depreciation on intangible assets and accordingly, ground No.4, as raised by the revenue is dismissed.

36. So far as the issue raised in ground nos. 1, 2 and 3, brief facts are that, during the course of the assessment proceedings, the assessee vide its letter dated 12.10.2009 made an additional claim for the amount of luxury tax payment of Rs.8 lakhs under section 43B and interest on the term loan of Rs. 2 crores under section 43B. The assessee before the AO submitted that, the same should be allowed on payment basis u/s 43B, because due to inadvertent mistake, the same could not be claimed at the time of filing of the return and time for submitting the

revised return has lapsed. The Ld. AO relying upon the decision of Hon'ble Supreme Court in the case of M/s. Goetze India Ltd. reported in 284 ITR 323, disallowed the claim on the ground the same should have been claimed by way of revised return only.

37. The Ld. CIT(A) has allowed the said claim after observing that it is an undisputed fact that such a payment was otherwise allowable under section 43B and, therefore, he directed the AO to allow the said expenditure as deduction.

38. After hearing both the parties and on perusal of the impugned orders, we find that the only reason for disallowing the claim by the AO is that, the assessee has not claimed the said deduction by way of revised return of income, while saying so, he has relied upon the decision of Hon'ble Supreme Court in the case of M/s. Goetze India Ltd. (*supra*). However, there are no fetters on the power of the appellate authorities to entertain such a claim and this has been clarified by the Hon'ble Supreme Court in the said decision itself, wherein, their Lordships have held that, it is only limited to the power of the AO and does not impinge upon the power of the Tribunal under section 254. Thus, we do not find any infirmity in the order of the CIT(A) for allowing the claim of deduction which is otherwise allowable to the assessee as per the law. Thus, ground raised by the revenue is dismissed.

39. In the result, appeal of the revenue is dismissed.

40. Now, coming to the cross appeals filed by the assessee as well as by the revenue for the AY 2008-09, filed against the impugned order dated 17.01.2012 of

CIT(A), Mumbai. In assessee's appeal following grounds have been raised:

> ***Ground No. 1:***
> *On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in confirming action of the AO in disallowing depreciation on intangible assets of Rs.11,50,94,737 (25% of Rs 46,27,949). The appellant prays that the depreciation on FSI may kindly be allowed @25%.*
>
> ***Ground No.2***
> *Without prejudice to ground no. 1, on the facts and circumstances of the case, the learned CIT(A) erred in holding that only Rs.47,92,686 being amount spent during the AY 2005-06 for acquiring rights of FSI is to be added to the block of "Buildings". The appellant prays that entire consideration towards FSI of Rs.3,40,81,320/- may be added towards the block of building and the depreciation may be accordingly allowed.*
>
> *The Appellant craves leave to add, alter, amend or withdraw any of the Grounds of appeal herein above and to submit such further arguments, statements, documents and papers as may be considered necessary either at or before the hearing of the appeal".*

41. Since the aforesaid grounds are exactly similar to the grounds raised by in the assessee's appeal for AYs 2005-06, 2006-07 and 2007-08 and the issues involved are permeating out of identical set of facts, therefore, the finding given above in the assessee's appeal for AYs 2005-06, 2006-07 and 2007-08 will apply *mutatis mutandis* in this year also. Thus, ground No.1 is treated as dismissed and ground No.2 is allowed.

42. In the result appeal of the assessee stands partly allowed.

43. In revenue's appeal following grounds have raised:-

> *"1(i) On the facts and circumstances of the case and in law, the learned CIT(A) erred in deleting addition of Rs.11,54,917/- made u/s. 43B on account of non-payment of service tax liability, holding that service tax charge cannot be disallowed u/s. 436 as it is not debited to the P & L account, without appreciating the fact that the Service Tax is part of trading receipt."*
>
> *1(ii) On the facts and circumstances of the case and in law, the learned CIT(A) has failed to appreciate that Service Tax is a statutory levy and is covered by provisions of section 43B of the I.T. Act, 1961.*
>
> *2 On the facts and in the circumstances of the case and in Jaw, the Ld. CIT(A) erred in allowing depreciation on intangible assets at Rs.2,74,54,904/-.*
>
> *3 The appellant prays that the order of the CIT (A) on the above ground be set aside and that of the Assessing Officer be restored.*
>
> *4. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary".*

44. Besides this, revenue has also raised following as additional grounds:-

> *"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the assessing officer to add the amount spent on FSI during the year to the building block of asset and allow*

depreciation as per law"

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the fact that the additional FSI is a permission to contrast additional space on plot of land and therefore, would add to the value of land by increasing the constructible area/space and has no dependent value without underlying land as well until and unless the additional construction is carried out by using the FSI and it is only an addition in the value of land not eligible for depreciation.

"3. The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored."

"4. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

45. So far as the additional ground is concerned, it is seen that it is similar to the grounds raised in AY 2006-07 and 2007-08, therefore, in view of our finding and direction given therein, additional ground is treated as dismissed.

46. Now, coming to ground No.2, it has been admitted by both the parties that, this issue is similar to the grounds raised for the AY 2006-07 and 2007-08. Thus, on the same reasoning the impugned ground raised by the revenue does not stand and is dismissed as such.

47. So far as issue relating to ground No.1, that is, addition of Rs.11,57,917/- with regard service tax payable under section 43B. At the outset, the Ld. Counsel for the assessee, Mr. Vijay Mehta, submitted that, the assessee has already made the disallowance in the computation of income, therefore, there is no question of claiming of deduction under section 43B. Thus, he submitted that, AO can verify this contention and then there would be no need

for adjudication on this issue. In light of this plea of the ld. Counsel, we do not feel necessary to adjudicate the issue on merits as decided by the Ld. CIT(A) and accordingly, we set aside the matter to the file of the AO to verify the fact, whether assessee has itself disallowed the non-payment of service tax or not and if that is so, then there is no issue of claim of deduction under section 43B. With this direction, ground no.1 is treated as allowed for statistical purposes.

48. In the result, appeal of the revenue is treated as partly allowed for statistical purposes.

To sum-up:

For AY:2005-06:
Appeal of the assessee stands partly allowed
C.O. filed by the revenue stands dismissed.

For AY:2006-07:
Appeal of the assessee stands partly allowed, whereas Revenue's appeal stands dismissed.

For AY:2007-08:
Appeal of the assessee stands partly allowed, whereas Revenue's appeal stands dismissed

For AY:2008-09 Cross appeals:
Appeal of the assessee stands partly allowed, whereas Revenue's appeal stands partly allowed for statistical purposes.

Order pronounced in the open court on 26th August, 2016.

Sd/-	**Sd/-**
(अशवनी तनेजा)	**(अमित शुक्ला)**
लेखा सदस्य	**न्यायिक सदस्य**
(ASHWANI TANEJA)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 26th August, 2016

प्रति/Copy to:-

1) अपीलार्थी /The Appellant.
2) प्रत्यर्थी /The Respondent.
3) The CIT(A) –7/and Concerned___, Mumbai.
4) The CIT Cent-3/ and Concerned___, Mumbai
5) विभागीय प्रतिनिधि "F", आयकर अपीलीय अधिकरण, मुंबई/
   The D.R. "F" Bench, Mumbai.
6) गार्ड फाईल \
   Copy to Guard File.

आदेशानुसार/By Order

/ / True Copy / /

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, मुंबई
Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हान व.नि.स
*Chavan, Sr.PS