

Shri Rama Multi Tech Ltd. Vs. Assistant Commissioner of Income

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Court : Income Tax Appellate Tribunal ITAT Ahmedabad

Decided On : Dec-03-2004

Reported in : (2005)92TTJ(Ahd.)568

Judge : S Yadav, A Gehlot

Appellant : Shri Rama Multi Tech Ltd.

Respondent : Assistant Commissioner of Income

Judgement :

1. These two cross-appeals-6ne by the assessee and the other by the Revenue are directed against the order of CIT(A), dt. 5th March, 2004, for asst. yr. 2000-01. Since the assessee is the same and some of the issues involved in these appeals are interlinked, these appeals were heard together and are being disposed of by this common order for the sake of convenience.

1. The learned CIT(A) has erred in law and on facts in confirming the addition of interest of Rs. 3,27,90,125 and further erred in not allowing the set off of the said interest income from the pre-operative expenses capitalized.

2. The learned CIT(A) has erred in law and on facts in confirming the disallowance of purchase expenses of Rs. 83,90,690 out of total purchases have been alleged bogus purchases.

3. The learned CIT(A) has erred in law and on facts in confirming the disallowance of Rs. 44,52,805 of provisions for bad debts.

4. The learned CIT(A) has erred in law and on facts in confirming the disallowance of Rs. 32,02,200 out of the interest expenses on the ground that loans and advances have been given for alleged non-business purpose without charging any interest.
5. The learned CIT(A) has erred in law and on facts in confirming the disallowance of Rs. 9,94,421 claimed under Section 35D of the Act.
6. The learned CIT(A) has erred in law and on facts in not considering the additional ground of Rs. 45,38,678 being financial charges and the same has been not allowed as revenue expenditure.
7. The learned CIT(A) has erred in law and on facts in not considering the additional ground of Rs. 64,75,000 being professional charges and the same has been not allowed as revenue expenditure.
8. The learned CIT(A) has erred in law and on facts in not considering the additional ground of Rs. 80,34,352 being upfront fees and the same has been not been allowed as revenue expenditure.
9. The learned CIT(A) has erred in law and on facts in confirming the action of AO in not properly calculating deduction under Section 80-IA of the Act.
10. The learned CIT(A) has erred in law and on facts in confirming the exclusion of other income of Rs. 6,86,96,685 from the business profit for the purpose of calculating deduction under Section 80-IA of the Act.
11. The learned CIT(A) has erred in law and on facts in confirming the action of AO in not properly calculating deduction under Section 80HHC of the Act.
12. The learned CIT(A) has erred in law and on facts in confirming the action of AO in excluding 90 per cent of the gross interest income amounting to Rs. 5,91,30,485 from the profits for the purpose of calculating deduction under Section 80HHC of the Act.
13. Alternatively, and without prejudice, if the interest income is required to be excluded from the profit of the business, then only the net interest income, i.e.,

gross interest receipt less interest expenditure, can be reduced from the profit of the business. Learned CIT(A) has thus erred in not allowing the netting off of the interest receipt against interest expenditure.

14. The learned CIT(A) has erred in law and on facts in confirming the levy of interest under Sections 234B and 234C of the Act.

3. The first ground of assessee's appeal is regarding confirmation of addition of interest of Rs. 3,27,90,125 and in not allowing the set off of the said interest income from the pre-operative expenses capitalized. The facts of the case are that the assessee-company is engaged in manufacturing of flexible packaging products, viz., plastic laminated tubes (PLT), multi-layered blown films, labels/stickers, plastic coated papers, etc. at village Motibhoyan, district Mehsana, Gujarat. The assessee-company was asked to give details of preoperative income and expenditure. As per details submitted along with letter dt.

11th March, 2003, it has been observed by the AO that the total interest income amounting to Rs. 4,99,20,337 has been reduced from the pre-operative expenses account. Out of this, income of Rs. 1,71,30,212 has been shown as "other income", but the balance sum of Rs. 3,27,90,125 has not been shown as income. The same issue was involved in asst. yr. 1998-99, wherein it had been held that the interest earned by the assessee is taxable under the head 'Income from other sources', even if it is earned during the pre-operative period and is required to be added to the total income of the assessee-company. The AO relied on the decision of the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT (1997) 227 JTR 172 (SC), wherein the Supreme Court held that interest so earned is income from other sources and is, therefore, liable to be taxed. Following the same, the AO held that the pre-operative income of Rs. 3,27,90,125 is income from other sources and addition is accordingly made to the total income of the assessee-company. Matter was carried in appeal before the first appellate authority wherein the learned counsel for the assessee submitted that the AO has confused the two issues, namely, interest income simpliciter and income alleged as interest which is, in fact, in the nature of liquidated damages recovered or recoverable from the parties to whom advances were made for

carrying out construction work and/or supply of machinery. Hence, they were in the nature of liquidated damages and the entire issue is covered in favour of assessee. The learned counsel for the assessee relied on the decision of Supreme Court in the case of CIT v. Bokaro Steel Ltd. (1999) 236 ITR 315 (SC). Further, the learned counsel for the assessee submitted that the assessee had entered into supplementary agreements with its contractors under which the assessee had made certain advances to the contractors on interest to enable them to execute the large-scale construction work smoothly and this arrangement primarily meant payment in advance for which the assessee had charged interest and this interest was later adjusted against the dues of the contractors. It was further submitted by the assessee that the advances were made to facilitate the construction activity of putting together a very large project and to ensure that the work of contractors proceeded without any financial hitches and the arrangements which were made between the assessee and the contractors pertaining to these three receipts were arrangements which were intrinsically connected with the construction of its steel plant, the receipts had been adjusted against the charges payable to the contractors and had gone to reduce the cost of construction and, therefore, it is capital receipt and not income of the assessee from any independent source. In case of money borrowed by a newly started company which is in the process of constructing and erecting its plant, the interest incurred before the commencement of production on such borrowed money can be capitalized and added to the cost of the fixed asset created as a result of such expenditure, and by the same reasoning, if the assessee received any amounts which were inextricably linked with the process of setting up its plant and machinery, such receipts would go to reduce the cost of its assets and these were receipts of a capital nature and could not be taxed as income. In the case cited above, it was held by the Supreme Court that interest earned by the assessee on advance given by it for the purpose as discussed, does not represent the independent source nor an investment made for earning income but was charged by way of damages which is clearly adjusted against final bill of each of the parties.

The CIT(A) considered the facts of the case and submissions made by the learned counsel for the assessee. The CIT(A) observed that the interest earned by the

assessee on advances given by it for the purpose as discussed does not represent the independent source nor an investment made for earning income, but was charged by way of damages which is clearly adjusted against final bill of each of the parties. At the same time, the decision as relied on by the AO in the assessment order in the case of Tuticorin Alkali Chemicals & Fertilizers (supra) cannot be applied to the instant case, because the interest earned in that case was income from other sources and before the commencement of its business. The decision as relied on by the assessee in the case of Bokaro Steel Ltd. (supra) is also not relevant in the assessee's case, as the facts are quite distinguishable. In that case, the work of construction of the company's factory and installation of plant was in the process of completion and the company has not started any business, whereas the fact remains that the business of the assessee is a running one. In the light of above discussion, the CIT(A) treated the amount of Rs. 3,27,90,125 as income from other sources and upheld the action of the AO.3.1 Before us the learned counsel for the assessee submitted that the decision of the Hon'ble Supreme Court in the case of Bokaro Steel Ltd. (supra) is still applicable as the assessee had commenced expansion of its business by setting up two new projects at Ambaliyara in Gujarat and Pondicherry. The said two new projects were planned for setting up and to manufacture the same items which the assessee was carrying on at Motibhoyan and at Kadi. The learned counsel for the assessee drew our attention to pp. 227 and 227A of the paper book and pointed out that a sum of Rs. 3,27,90,125 was recovered from eleven parties to whom advances were made for carrying out construction work or supply of machinery as listed out at these pages, wherein for each party details have been given. It was submitted that said interest was nothing but in the nature of liquidated damages received from the parties to whom advances were made for supplying the capital goods or carrying out construction work which were delayed. Hence, these are liquidated damages and entire issue is covered in favour of the assessee in view of Hon'ble Gujarat High Court decision in the case of CIT v. Saurashtra Cements & Chemicals Industries Ltd. (2002) 253 ITR 373 (Guj). As regards the first party, i.e., Bhagwati Consultancy, interest income is amounting to Rs. 2,11,511 @ 14 per cent against advances given for purchase of dyes and moulds. Similarly, interest of Rs. 3,99,562 was charged from JB Machinery for not supplying the goods to the

assessee-company as per the terms of contract. From Monita Containers (P) Ltd., Rs. 7,32,935 were charged and recovered interest on capital advances, the assessee-company has purchased the paper cup machines from the party. The assessee had given advances for purchase of 6 paper cup machines. The assessee had taken delivery of 3 paper cup machines in the month of March, 2000, and remaining 3 machines in the month of June, 2000. The party has not delivered machines in time, hence, the assessee had charged interest to the said party. So far as Vimpsan Precision Private Ltd., the assessee had ordered to the party for various capital goods like dyes and moulds of various dia, captooling and utilities for various machineries. The assessee-company had also granted advances to the party for the same purpose. Due to several reasons, the company had not taken delivery of goods as party is not able to deliver it in time, hence, the assessee has charged interest to the party. The assessee has taken delivery of goods in the years 2000-01 and 2001-02. The assessee has also adjusted these interests in balance amount payable to the party after advances. As regards Suraksha Petrochemicals (P) Ltd., the assessee-company had given capital contract to the party for supply of various capital goods, the party could not respond in time and hence the assessee had charged interest of Rs. 65,02,500. Similar is the position in respect of other advances given to the parties for supply of capital goods. The last two parties mentioned at p. 227A of the paper book were entrusted the work of construction of factory building and development of the land of two new projects which were to be set up at Ambaliyara in Gujarat and at Pondicherry. Therefore, such interest recovered from these parties for liquidated damages cannot be added to the total income of the assessee.

The issue is covered in favour of the assessee by the decision of Hon'ble Gujarat High Court in the case of CIT v. Saurashtra Cements & Chemicals Industries Ltd. (supra).

3.2 The stand of Revenue is that assessee has not submitted any evidence before the AO but fresh evidence has been placed before the CIT(A) for the first time and no opportunity was given to the AO. Hence, the disallowance be confirmed. Reliance placed in the case of Saurashtra Cement & Chemicals Industries Ltd. (supra) is now given different colour. Such arguments were not before the AO and

hence the orders of authorities below be upheld. The reliance placed on the decision of Supreme Court in the case of Bokaro Steel Ltd. (supra) is not applicable to the facts of the case of assessee. In the case of Bokaro Steel Ltd. (supra), the business had not started whereas in the case of assessee, the assessee is already having existing business. So, the decision of Hon'ble Supreme Court in the case of Bokaro Steel Ltd. (supra), cannot be made applicable to assessee's case. Section 43(1) does not entitle deduction of interest income. Even if it does, then also it is not in the nature of income. In fact, assessment of the year of the project completion work has not been finalised. The ratio laid down in the decision of Hon'ble Gujarat High Court in the case of Saurashtra Cements & Chemicals Industries Ltd. (supra), relied on by the assessee cannot be applied to the facts of the assessee's case because the assessee has not brought the material on record as to how the assessee received interest for damages or so. The explanation given at pp. 227 and 227A in respect of various parties is given for the first time before CIT(A). AO was not provided any opportunity of hearing. So, the disallowance made by the AO and confirmed by the CIT(A) be upheld, or this issue be restored to the file of AO.

3.3 The learned counsel for the assessee, in rejoinder submitted that informations regarding advances given for capital work were furnished by the assessee to AO vide its letter dt. 11th March, 2003, compiled at p. 263, which is almost the same as appearing at pp. 227 and 227A of the paper book. The AO neither disputed the information furnished above nor called for any further information. Therefore, the basic information of the said claim was before AO. However, the assessee had not again given elaborate explanation before AO as the AO did not raise any query, presumably because he accepted the correctness put up before him. Arguments before the CIT(A) put forward by assessee are only the arguments to elaborate the basis of assessee's claim and no fresh evidence before CIT(A) was given for the first time. In the present case, the assessee was concerned about expansion of the existing business and no new business was to be set up at Ambaliyara in Gujarat and at Pondicherry. The two projects at these places were set up for manufacturing the same items which were produced at the units at Kadi and Motibhoyan. Therefore, the ratio laid down in the decision of the Hon'ble Supreme Court in the case of Bokaro Steel Ltd. (supra) is squarely applicable. The Supreme

Court has further considered this issue in the case of CIT v. Karnataka Power Corporation (2001) 247 TTR 268 (SC) which was considered in the context of existing business. The learned counsel for the assessee also submitted that the case (2001) 247 ITR 268 (SC) (supra) has arisen from the case CIT v. Karnataka Power Corpn. Ltd (1994) 205 ITR 511 (Kar), wherein it was held that the High Court has given specific finding in regard to question No. 3 for expansion of running business and in that case also it was held as capital receipt. So, the case of assessee is squarely covered by the decision of Hon'ble Gujarat High Court reported in (2002) 253 ITR 373 (Guj) (supra) and as such the damage recovery in the form of interest is related to executing contract, and as such the said receipts are capital and it cannot be taxed as revenue receipt. The learned counsel for the assessee further submitted that in the course of assessment proceedings, the prospectus for issuing fresh share capital was for the purpose of setting up of two new units and expansion of existing business at Kadi and Motibhoyan which were given to AO and after going through the same, it was reported by AO that he did not require the same. At this point of time, the Bench asked to give the copy of prospectus in this regard. Under Section 43(1), interest paid is to be capitalized other than in form of interest receipt from the parties.

3.4 After considering the rival submissions and going through the material on record, we are of the view that the basic facts necessary for considering the claim of assessee were available on record before AO and the arguments given by the assessee before the CIT(A) were not fresh evidence taken up before CIT(A) but they were only arguments taken up by the assessee to elaborate this aspect because information regarding advances given for capital goods was furnished to the AO vide assessee's letter dt. 11th March, 2003, compiled at p. 263, which is almost the same as appearing at pp. 227 and 227A of the paper book. The AO has neither disputed the information furnished above nor called for any further information. Therefore, the basic information of said claim was before the AO. Thus, the arguments before the CIT(A) put forward by the assessee are arguments to elaborate the basis of assessee's claim and no fresh evidence before the CIT(A) was given. On merit, the AO has relied on the decision of Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra) and the assessee has relied on the decision of Hon'ble Supreme Court in

the case of Bokaro Steel Ltd. (supra). Actually, both the decisions were for the period prior to commencement of the business. In assessee's case it is actually expansion of business. The assessee was concerned with expansion of existing business and no new business was to be set up at Ambaliyara in Gujarat and Pondicherry. These two projects at these two places were to be set up for manufacturing the same items which were produced at the units at Kadi and Motibhoyan in Gujarat. The Hon'ble Supreme Court in the case of Bokaro Steel Ltd. (supra) has held that where money was borrowed by company which was in process of construction and erecting its plant, the interest incurred before the commencement of production on such borrowed money can be capitalized and added to the cost of the fixed assets created, as a result of such expenditure. By same reasoning, if the assessee receives any amounts which are intricately linked with the process of setting up its plant and machinery, such receipts will go to reduce the cost of its assets.

These are receipts of capital nature and cannot be taxed. Hon'ble Supreme Court in the case of CIT v. Carnal Co-operative Sugar Mills Ltd. (2000) 243 ITR 2 (SC) has held that the deposit of money in present case for opening credit for purchase of machinery was directly linked with purchase of plant and machinery. Accordingly, interest was held as capital receipt which would go to reduce cost of asset. It is pertinent to mention here that in Kamal Co-op. Sugar Mills Ltd, (supra), both the decisions in the cases of Tuticorin Alkali Chemicals & Fertilizers Ltd. (supra) and Bokaro Steel Ltd. (supra) have been considered. A similar decision has been rendered by Hon'ble Gujarat High Court in the case of Saurashtra Cements and Chemicals Industries Ltd. (supra), wherein the assessee had entered into an agreement with the supplier to purchase certain machinery; under the agreement, in the event of delay caused in delivery to supply the machinery it had to pay by way of liquidated damages @ 0.5 per cent of the purchase price of machinery which has not been delivered in time without any proof of damages actually suffered by the assessee. There was delay in supply of machinery and the assessee received compensation on the basis of agreement. It was held that amount of damages received by the assessee had direct nexus to the delay caused in delivery of capital assets.

Hence, the damages received by the assessee were capital receipt. It is settled legal position that agreement can be oral as well as written.

If the facts brought on record show that there was certain contract between the parties, the absence of written contract will not affect the damages payable for breach thereof. Moreover, the AO did not dispute the information furnished through letter dt. 11th March, 2003.

So, it is not correct to suggest that this issue has been taken by assessee for the first time before the CIT(A). The assessee has all options to elaborate the basis of its claim taken before the AO. A similar view has been taken by Hon'ble Madras High Court in P.L.M. Firm v. CIT (1968) 68 ITR 856 (Mad). As far as the issue of expansion is concerned, the prospectus shows that issuing fresh share capital was for the purpose of setting up of two new units and expansion of existing business at Kadi and Motibhoyan, which was given to the AO. In the facts and circumstances of the case, we are of the view that amount received by the assessee had relation with delay caused in execution of contract of construction and supply of plant and machinery as discussed above and is capital receipt. Accordingly, this ground is allowed.

4. The second ground of the appeal is regarding confirmation of disallowance of purchase expenses of Rs. 83,90,690 out of total purchases. This issue has been discussed vide paras 6 to 11 at pp. 2 and 3 of the assessment order and the CIT(A) has dealt this issue vide paras 5.1 to 5.4 at pp. 6 to 9 of the appellate order. Before the AO, the assessee submitted that total purchases from M/s Sai Baba Sales Corporation have been made of Rs. 1,16,20,690 against which there were purchase and return bogus purchase returns of Rs. 32,30,000, thereby net purchase debited in the account amounts to Rs. 83,90,690. Further, it was submitted that the payments were made by account payee cheques and truck numbers have been mentioned. Therefore, the purchases themselves suggest that these cannot be said bogus purchases. The AO, considering the submissions of assessee, observed that as per specific information received vide letter dt. 28th March, 2003, from the Dy.

Commr. of Sales-tax (Enforcement), the Sai Baba Sales Corporation is a bogus entity, which was only supplying bills and just by giving truck numbers and payments by account payee cheque do not in any way controvert the findings of the ST authorities. During the course of search by ST authorities at the residence of Mr. Deepak K. Gujjar, blank printed bills of M/s Sai Baba Sales Corporation were seized. The AO treated the purchases as bogus and made an addition of Rs. 83,90,690. Matter was carried in appeal before the CIT(A) wherein the learned Authorised Representative for assessee raised various contentions and also relied on the decisions of Hon'ble Gujarat High Court in the case of CTT v. M.K. Bros. (1987) 163 ITR 249 (Guj) together with other case law, which have been discussed by CIT(A) in paras 5.2 and 5.3 of the appellate order. Considering the facts of the case and submissions of the learned Authorised Representative, the CIT(A) confirmed the finding of AO. Aggrieved, the assessee has come in appeal before the Tribunal.

4.1 Before us, the learned counsel for the assessee submitted that the accounts of assessee have been audited-under Section 44AB of the IT Act, 1961, and the auditors have certified that proper books of account have been maintained giving quantitative details of purchases, etc.

Copy of tax audit report of the assessee for asst. yr. 2000-01 along with its enclosures in Form 3CB has been placed at pp. 13 to 69 of the paper book of assessee, wherein vide Annex. A at p. 40, els. 9(b) and (c) indicate list of books of account maintained and generated by computer system and examined. The learned counsel for the assessee submitted that item No. 7 is stock registers, which have been duly audited and no discrepancy was found. Similarly, the tax audit report of auditors certified the raw material, stock purchases during the previous year, consumption, sales and closing stock, yield of finished goods and percentage of yield, shortage, etc. Therefore, in view of the above submissions, the learned counsel for the assessee contended that the authorities below were not justified in making and sustaining the addition of Rs. 83,90,690, treating the same as bogus purchases. It is required to be deleted.

4.2 The learned Departmental Representative opposed the submissions of the learned counsel and submitted that the supplier of goods, i.e., M/s Sai Baba Corporation is not genuine and not in existence. Mere cheque payment is not sufficient. Assessee never demanded examination or cross-examination of any party. No evidence for supply of material and consumption of material was given. Quantity tally is not available.

Therefore, consumption of bogus purchase cannot be presumed. There should be 100 per cent disallowance in view of Tribunal, Ahmedabad, decision in the case of Swetamber Steel Ltd. The decision of Gujarat High Court in the case reported at (1987) 163 ITR 249 (Guj) (supra) is distinguishable and it does not help the assessee. Quantitative details of raw material and finished goods, i.e., input and output do not tally. Hence, the disallowance towards bogus purchases is required to be continued.

4.3 After considering the rival submissions and going through the material on record, we find that the AO has mainly relied upon the letter dt. 28th March, 2003, received from the ST authorities. The AO has not examined Mr. Deepak K. Gujar nor the assessee was given any opportunity of cross-examination of Shri Deepak K. Gujar. The tax audit report filed in the paper book, particularly p. 33 at Item 9(c), wherein auditors have certified that list of books of account examined as per Annex. A at p. 40 of the compilation wherein cls. 9(b) and (c) at Sl. 7 show stock registers at pp. 38 and 39 of the paper book.

Further, at item No. 28 regarding raw material particulars of which were given in Annex. P appearing at p. 65 of the paper book, wherein the auditors have clarified the quantitative details of raw material.

It is not possible to work out the yield in relation to raw material because raw material used is in kilograms and finished products produced are in metres and as such it is impossible to reconcile any production ultimately. Therefore, the Department's argument is not tenable that the assessee had not given all quantitative details.

Revenue has not been able to dispute the fact that GP of last year and yield have been shown. In this regard, he referred to pp. 265 to 269 of the compilation, wherein calculations for asst. yrs. 1998-99, 1999-2000 and 2000-01 have been shown. Revenue has not disputed item No. 4 at p.

267, wherein last year's yield has been shown at 70.33 per cent and at page No. 269, item No. 4 shows the yield at 74.88 per cent. The facts of the case of Swetamber Steel Ltd. v. ITO are not applicable to the facts of the case of assessee. In the present case the assessee has made payment by account payee cheques against each bill. Revenue has brought nothing on record to suggest that payment made to the suppliers has come back to the assessee. We find that Hon'ble Gujarat High Court in CIT v. M.K. Bros., (supra) has decided a similar issue, wherein similar additions were made which were confirmed by the CIT(A). Matter was carried in appeal before the Tribunal, wherein on behalf of the assessee it was submitted that the transactions in question were normal business transactions and the assessee had made payments by cheques.

The parties did not come forward and if they did not come, the assessee should not suffer. However, on behalf of the Revenue, it was urged that detailed enquiries were made and thereafter conclusion was reached.

Tribunal found that there was no evidence that these concerns gave bogus vouchers to the assessee. No doubt, there were certain doubtful features, but the evidence was not adequate to conclude that purchases made by assessee from the said parties were bogus. The Tribunal did not sustain the addition retained by the AAC. Matter was further referred to the Hon'ble High Court, wherein the issue was decided in favour of assessee. It is pertinent to mention here that in case of M.K. Bros, (supra) also investigation was initiated on the basis of action of the ST authorities. Apart from this, assessee (sic-AO) has not taken into consideration the returned goods because purchase from M/s Sai Baba Sales Corporation has been made of Rs. 1,16,20,690, while only purchase of Rs. 83,90,690 was debited. The AO has not taken into consideration the return purchases. So, the Revenue has not justified its stand to falsify the transactions. Taking all the facts of the case including the case law relied on by the parties into consideration, and in view of

the above discussion, we do not concur with the findings of CIT(A) and the addition in question is directed to be deleted.

5. Ground No. 3 is in regard to disallowance against provisions for bad debt of Rs. 44,52,805. The learned counsel for the assessee fairly conceded that this being provision made, is not pressed. Accordingly, ground No. 3 of assessee's appeal is dismissed as not pressed.

6. Ground No. 4 is regarding confirmation of disallowance of Rs. 32,02,200 out of interest expenses on the ground that loans and advances have been given for alleged non-business purpose without charging any interest. This issue has been discussed vide paras 13 to 15 of the assessment order and the CIT(A) has dealt the same vide para 7 of his appellate order. The learned counsel for the assessee drew our attention to pp. 133 to 138 of the paper book wherein the assessee has made written submission and the AO made notional addition of Rs. 32,02,200 on the ground that the assessee has not charged interest, which according to the AO, were advances to the sister concerns free of interest. The learned counsel for the assessee submitted that Shree Ram Association was given advance of Rs. 1,77,90,000 to construct corporate house - Shree Rama Centre-to a non-trading organization. Due to several specifications laid down by Ahmedabad Municipal Corporation regarding fire safety, B.U. permission, etc., the construction work has not been completed and hence the party has not given the possession to the assessee. So, there is no justification in charging notional interest by AO. For proposition that total interest-free funds available with the assessee, alleged notional addition cannot be made, assessee relied on the decision of the Tribunal, Ahmedabad Bench, in the case of *Torrent Financiers v. Asstt. CIT* (2001) 73 TTJ (Ahd) 624.

6.1 The learned Departmental Representative submitted in this regard that nexus between the advances and construction of corporate house has not been established by the assessee, This submission, i.e., construction of office premises has been made for the first time.

6.2 After considering the rival submissions and going through the material on record, we find that stand of assessee is that funds were not given free of interest

to the sister concern but for business consideration, i.e., for construction of building as stated above. The said building could not be constructed because of violation of concerned building bye-laws. Without being prejudiced to the above, it was submitted that Revenue has not been able to prove nexus between the funds and advance. It was also submitted that notional interest is not justified. Having gone through the alternative submissions, we are of the view that this issue needs deep probe as per alternative submission made by the assessee. So, in the interest of justice, we restore this issue to the file of AO with direction to decide the same as per law after providing reasonable opportunity of hearing to the assessee.

7. Ground No. 5 is regarding confirmation of disallowance of Rs. 9,94,421 claimed under Section 35D of the Act. The AO observed that the expenditure which could be claimed under Section 35D of the Act has been specifically listed out in Section 35D(2)(c)(iii) of the Act and hence the impugned expenditure was not allowable as deduction. Matter was carried in appeal before appellate authority wherein the learned counsel for assessee submitted that total expenses incurred for public issue under Section 35D of the Act expenditure incurred was amounting to Rs. 10,63,81,582. The assessee gave break-up of the public issue expenses. The assessee also submitted that the allowability of expenditure has to be considered with reference to the provisions of Section 37 of the Act first and thereafter if the expenditure is found to be in nature of capital expenditure, it should be required to be amortised under Section 35D of the Act. The CIT(A) confirmed the disallowance in question.

7.1 Before us, the learned counsel for the assessee reiterated the submissions made before the authorities below and opposed their orders.

The learned counsel for the assessee submitted that total expenses incurred for public issue under Section 35D of the Act was to the tune of Rs. 10,63,81,582 and the assessee had claimed 1/5th of the total amount which amounts to Rs. 2,12,76,316. On examination of the break-up of the public issue expenses furnished by the . assessee, AO found that the assessee had claimed the following expenses : (i) Conference and seminar expenses 26,82,919 (ii) Guest

entertainment expenses 43.419(iii) Travelling expenses 5,68,012 (iv) Postage and courier charges 16,77,756 ----- Therefore, 1/5th of the said expenditure of Rs. 49,72,106 came to Rs. 9,94,421 and the same was disallowed by AO. It was argued by the learned counsel for the assessee that all these expenses are of revenue nature and allowable under Section 35D because the same were incurred on public issue. The learned counsel for the assessee contended that guests were also entertained and the expenses towards guest entertainment are an allowable expenditure. In a nutshell, all the above expenditure is of revenue nature and as claimed by assessee, 1/5th of the same should be allowed. The learned counsel for the assessee relied on a series of case law in support of its contentions.

The learned counsel for the assessee drew our attention to pp. 139 to 149 of the paper book wherein detailed submissions have been made and the case law have been discussed. According to the learned counsel for the assessee, the AO was not justified in disallowing the above expenses and the CIT(A) has wrongly upheld the action of AO. So, the orders of the authorities below be set aside and the claim of assessee be allowed.

7.2 On the other hand, the learned Departmental Representative supported the orders of authorities below and opposed the submissions of learned Authorised Representative. The learned Departmental Representative submitted that these expenses are for shares and, therefore, question of allowing the expenditure under Section 35D does not arise. The nature of expenditure as mentioned in the paper book has not been explained as such travelling expenses, conference and seminar are not covered as advertisement expenses as prescribed under Section 35D.7.3 After considering the rival submissions and going through the material on record including the case law relied on by the parties, we are of the view that allowability of expenses has to be considered with reference to the provisions of Section 37 of the Act first and thereafter if expenditure is found to be capital expenditure, it should be required to be amortised under Section 35D of the Act. This issue needs deep probe in the light of above legal discussion. So, in the interest of justice, we. restore this issue also to the file of AO with the direction to decide same as per law after providing reasonable opportunity of hearing to the assessee.

8. Ground Nos. 6, 7 and 8 are regarding additional ground being financial charges, professional charges and upfront fees, and the same have not been allowed as revenue expenditure. During the appellate proceedings, the assessee has raised the additional grounds vide its submission dt. 17th July, 2003, which are as under : "The learned AO grossly erred in law in accepting the appellant's claim relating to capitalization of interest and incidental charges as per the details set out hereinafter, contrary to Expln. 8 to Section 43(1) of the Act, as also in the binding decision of the Hon'ble Gujarat High Court in the case of Dy. CIT v. Core Healthcare Ltd. (2001) 251 ITR 61 (Guj). He ought not to have accepted the claim for capitalization as made by the appellant but ought to have treated the impugned expenditure exigible to deduction in computing the total income of the appellant under Section 36(1)(iii) of the Act.

Copy of additional grounds along with submissions in this regard were forwarded to the AO for his comments vide letter No.CIT(A)-XIV/Report/2003-04, dt. 19th Aug., 2003. The comments of the AO have been received in CIT(A)'s office vide AO's letter dt. 3rd Nov., 2003, and the copy of the same was given to the assessee as well to get his comments/rejoinder. In response thereto, the assessee filed its reply on 12th Nov., 2003. The main issue raised by the assessee in the additional grounds is regarding the claim of interest and financial charges, legal and professional expenses and upfront fees as revenue expenses, in view of the jurisdictional High Court's judgment in the case of Dy. CIT v. Core Healthcare Ltd. (2001) 251 ITR 61 (Guj). The assessee has also submitted that its claim for admission of additional ground is supported by the following decisions of the Hon'ble Supreme Court: Jute Corpn. of India Ltd. v. CIT and Anr. (1990) 187 JTR 688 (SC) The assessee also relied upon the judgment of Hon'ble Gujarat High Court in the case of CIT v. Alembic Glass Industries Ltd., (1976) 103 ITR 715 (Guj) for allowing the interest on borrowed capital as revenue expenses. The AO relied upon the judgment of Hon'ble Supreme Court in the case of Challapalli Sugars Ltd. v. CIT (1975) 98 ITR 167 (SC), as also the case of CIT v. Tensile Steel Ltd. (1976) 104 ITR 581 (Guj).

There is a reference of Allahabad High Court in the case of CIT v. J.K.Cotton Spinning & Weaving Mills Ltd. (1975) 98 ITR 153 (All) by the AO. The stand of

assessee was that in its case Section 36(1), Clause (iii), is clearly applicable, because the matter is covered by the jurisdictional High Court's decision in the case of Core Healthcare Ltd. (supra). The assessee-company had an existing unit manufacturing glass at Baroda. For establishing a new glass manufacturing unit at Bangalore, the company incurred certain expenditure in the relevant year and the production of the new unit did not take place. The assessee has also relied on the judgment of Hon'ble Supreme Court in the case of India Cement Ltd. v. CIT (1966) 60 ITR 52 (SC), wherein the issue of allowing interest as revenue expenditure is decided. It had further relied on the judgment of Bombay High Court in the case of Calico Dyeing & Printing Works v. CIT (1958) 34 ITR 265 (Bom). Apart from this, the assessee also relied on various other decisions. The CIT(A) vide paras 13.2 and 13.3 at pp. 16 to 18 of his appellate order has observed as under: "13.2 I have carefully analysed all the decisions of various High Courts and Hon'ble Supreme Court as relied upon by the AO as well as the appellant. First of all, I take up the issue of admitting the additional ground raised by the appellant. The appellant has relied upon the three judgments of the Supreme Court, viz., Jute Corpn. of India Ltd. v. CIT and Anr., (1990) 187 ITR 688 (SC), National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC) and CIT v. Kanpur Coal Syndicate (1964) 53 ITR 225 (SC). In the case of Kanpur Coal Syndicate (supra), three Judge Bench of the Supreme Court held as under : The AAC has plenary powers in disposing of an appeal. The scope of his power is co terminus of that of ITO. He can do all what the ITO can do and also direct him to do what he has failed to do.'Jute Corpn. of India Ltd. v. CIT and Anr., (1990) 187 ITR 688 (SC) has held that additional ground could be raised before the appellate authority if the same could not have been raised before the ITO when the return was filed or when the assessment was made. There may be factors justifying the raising of additional ground in appeal and if the same could not have been raised before the AO on account of some bona fide reasons, the same could be raised before the appellate authority. The latest judgment of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. (supra) states that the Tribunal has the discretion to allow or not to allow a new ground to be raised, but where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be

raised, when it is necessary to consider the question involved, to correctly assess the liability of the assesses. The Hon'ble Supreme Court in the case of National Thermal Power Co. (supra), applied the ratio of Jute Corpn. of India (supra).

In view of the above cited judgments of the Supreme Court, I admit the additional ground raised by the appellant regarding the allowance of interest as revenue expenditure as against the treatment made in the return of the same as capital expenditure.

13.3 Now, I deal with the issue of allowing interest as claimed by the appellant in its additional ground. There is enough material available on the assessment record regarding details of interest charges of Rs. 2,92,45,670, financial charges of Rs. 45,38,678, legal and professional charges of Rs. 64,75,000 and upfront fees of Rs. 80,84,352. All these details regarding the above expenses were submitted to the AO vide letter dt. 27th March, 2003, during the course of assessment proceedings and these details are containing Annexs. 5, 6 and 7. Out of the above, I intend to allow only interest expenses of Rs. 2,92,45,670 in view of the Gujarat High Court's decision in the case of Core Healthcare (supra). The balance charges of Rs. 45,38,678, being financial charges, legal and professional charges of Rs. 64,75,000 and upfront fees of Rs. 80,84,352 are not considered as revenue expenses.

In this regard, the AO is directed to look into the correctness of the interest charges from the Annex. 5 as given by the appellant and accordingly if it is found arithmetically correct, allow the same as revenue expenses in view of the decision of Hon'ble High Court mentioned supra. I agree with the contention of the appellant that the amendment to Section 36(1)(iii) is w.e.f. 1st April, 2004, which has been introduced by the Finance Act, 2003, which is reproduced as under : 'Provided that any amount of the interest paid in respect of capital borrowed for acquisition of an asset for extension of existing business or profession (whether capitalized in the books or account or not) for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use shall not be allowed as deduction.' The facts of the appellant's case are identical the facts of the case of Core Health (supra) and the

business is already going on and the money borrowed is for its business only, though meant for expansion of its existing business. The appellant, no doubt, claimed the interest expenses as capital in the return, but on account of judgment of the jurisdictional High Court the same is being claimed as revenue and the law position in the State of Gujarat is very clear on this point, that for the running business, interest on the borrowed capital for the business is to be allowed as revenue.

Therefore, I do not see any hesitation in holding that interest expenses as claimed by the appellant in its additional ground of appeal are revenue expenses and the appellant deserves to be allowed the same. The decision of the Supreme Court in the case of *Challapalli Sugars Ltd. v. CIT* (1975) 98 ITR 167 (SC) is not applicable to the facts of the appellant, as in that particular case, the production of the sugar mills was yet to commence. Here, the business is already going on and capital is borrowed for its business. Insofar as the expenses of financial charges, legal and professional expenses and upfront fees, I hold that these expenses have been rightly claimed by the appellant as capital expenses and the Hon'ble High Court has not mentioned anything regarding such expenses. Therefore, I restrict the relief in this regard to the extent of Rs. 2,92,45,670 being the interest expenses. The other expenses in the form of financial charges, stamp duty and stamp paper expenses are primarily of capital nature because stamp duty for land and stamp paper, which are of capital nature and inevitably to be capitalized. Similarly upfront fees paid to various banks and stamp duty charges thereon are capital in matter and this expenditure will go to increase the cost of the project and depreciation accordingly will be given as and when these assets are put to use." 8.1 Before us, the learned counsel for the assessee submitted that assessee's claim in these grounds, i.e., ground Nos. 6, 7 and 8, being financial charges, legal and professional charges and upfront fees, are allowable under Section 36(1)(lii). In this regard, he relied on the decisions *Dy. CIT v. Core Healthcare Ltd.* (supra), *Challapalli Sugars Ltd. v. CIT* (supra), *CIT v. Alembic Glass Industries Ltd.* (supra), *Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT* (supra), *National Organic Chemical Industries Ltd. v. CIT*, (1993) 203 ITR 410 (Bom), *Sutlej Cotton Mills Ltd. v. CIT* (1979) 116 ITR 1 (SC), *CIT v. India Discount Co. Ltd.* (1970) 75 ITR 191 (SC), *CIT v. Chunilal V. Mehta & Sons (P) Ltd.* (1971) 82 ITR 54 (SC), *CIT v.*

Associated Fibre & Rubber Industries (P) Ltd. (1999) 236 ITR 471 (SC) and State of Madras v. G.J.Coelho (1964) 53 ITR 186 (SC). The learned counsel for the assessee contended that these are allowable expenditures as these expenses are incurred on borrowings made for the existing business and assessee had borrowed money for expansion of existing units, and hence these are covered by the decision of Hon'ble Supreme Court in the case of India Cements Ltd. v. CIT (supra). Those expenses were incurred towards the fund borrowed for the purposes of business. Upfront, but one-time processing loss @ 1.5 per cent, so these amounts being revenue in nature are covered in favour of assessee by the decision of Hon'ble Supreme Court in the case of India Cements Ltd. (supra).

8.2 On the other hand, the learned Departmental Representative opposed the submissions of the learned counsel for the assessee and advanced his arguments that the Department has raised two-fold arguments that the assessee has raised additional ground for the first time and the CIT(A) should have admitted the same on merits. It was contended that in view of the finding these are legal and professional charges and upfront expenses which are not allowable as revenue expenditure under Section 37(1) of the Act. The learned Departmental Representative relied on the following decisions : (vii) Rallis India Ltd. v. ITO, (1987) 29 TTJ (Cal) 366 : (1987) 23 ITD 1 (Cal).

According to the learned Departmental Representative, all these expenses are of capital nature and not allowable since these are for the purposes of upfront fees, etc. The Hon'ble Gujarat High Court in the case of Gujarat Alkalies (supra) has laid down thoroughly regarding allowability of new projects in relation to law wherein the assessee is not entitled to claim under Section 36(1)(iii). Interest on financial charges cannot be charged as interest on upfront expenses cannot be allowed under Section 36(1)(iii).

8.3 The learned counsel for the assessee, in rejoinder, submitted that CIT(A) can entertain the additional ground raised by the assessee and he stated that Department's challenge for admitting additional ground is not tenable. He relied on various decisions including the decision reported at 202 ITR 264 (sic). The assessee had given letter dt. 27th March, 2003, wherein legal and professional

expenses have been explained. Copy of the letter is placed at page No. 264 and relevant working of the expenses have been shown in Annexs. 1 to 7, at pp. 265 to 274 of the paper book. Details of interest and financial charges legal and professional fees and upfront fees have been furnished in Annex. 4 at p. 271 of the paper book. LC commission charges towards import of 3 layer film plant from Relfenhauser from Germany, LC commission charges for import of Tube Machine from AISA Automation from Switzerland have been shown in Annex. 5 at p. 272 of the paper book.

Stamp paper and other charges for purchase of land at Ambaliyara, from Vivro Financial Services (P) Ltd., for project report for Ambaliyara, stamp papers, other charges for purchase of land at Pondicherry, and stamp duty for land at Ambaliyara have been shown at Annex. 6 at p. 273 of the paper book. The learned counsel for the assessee submitted that all these charges/fees are eligible deduction under Section 37(1) of the Act. The learned counsel for the assessee submitted that CIT(A) has called for report from AO on additional ground regarding deduction of interest. All these details have been shown at pp. 228 to 231 of the paper book. It would be seen that all these details are regarding new business and as such the said payments are not supported by any evidence. On the contrary, as mentioned earlier, the payment is pertaining to expansion of existing business and as such the same is eligible for deduction. The principle laid down by Hon'ble Gujarat High Court in CIT v. Alembic Glass Industries Ltd. (supra) and Bansidhar (P) Ltd. v. CIT (1981) 127 ITR 65 (Guj) that where there is same management, same company, it is always in case of expansion and hence it is for the purpose of existing business and not for new business.

Therefore, the deduction is eligible under Section 36(1) or 37(1). It was also submitted that copy of prospectus from where these facts are mentioned was also given to the AO. 8.4 After considering the rival submissions and going through the material on record, we find that the assessee has raised certain additional grounds which have rightly been admitted by the CIT(A) by relying upon various decisions as mentioned above: As far as allowability of interest and financial charges of Rs. 3,37,84,348 is concerned, it has two components. First of these two components is Rs. 2,92,45,670 pertaining to interest charged. The issue of interest expenses

has rightly been allowed by CIT(A). All details regarding above expenses including interest charged were submitted before the AO vide letter dt. 27th March, 2003, during the course of assessment proceedings. The Hon'ble Gujarat High Court in CIT v. Core Healthcare (supra) has observed that there is inherent indication in the Act that any expenditure which is in the nature of capital nature would not be allowable as deduction while computing the income chargeable under the head 'Profits and gains of business or profession' as laid down in Section 37 of the Act. There is specific provision dealing with interest paid/payable in respect of borrowings incurred for the purpose of business and hence general provisions, viz., Section 37 of the Act cannot come into play. Therefore, where interest is paid for borrowings which is utilized for acquisition of capital asset or which is utilized for revenue purposes loses its distinction. In view of the above, the CIT(A) has rightly held that interest charges is allowable expenditure.

As far as financial charges, legal and professional charges and upfront fees are concerned, assessee has mainly relied on the decision in India Cement (supra). In determining the nature of expenditure (revenue or capital) incurred for obtaining loan, it is irrelevant to consider the purpose of loan. The amount spent - stamp duty, lawyer fee, etc., for obtaining loan secured by charge on its fixed assets is as revenue expenditure, because the transaction was entered into directly to facilitate the business of the company and was made on ground of commercial expediency. Upfront fee is also related to loan for expansion of the business. In the facts and circumstances of the case, financial charges, legal and professional charges and upfront fees are allowable expenditure. AO is directed accordingly.

9. Ground Nos. 9 and 10 are in regard to confirmation of action of AO in not properly calculating deduction under Section 80-IA of the Act.

On verification of P&L a/c, the AO found that the profit of the Motibhoyan unit includes income under the head 'Other income' amounting to Rs. 6,86,96,685 and, therefore, he observed that deduction under Section 80-IA is only admissible on the profit derived from the industrial undertaking. By relying upon the decision of Hon'ble Supreme Court in the case of Sterling Foods v. CIT (1991) 190 ITR 275 (Kar), wherein it has been held that the import of word "derived" is much smaller

than the phrase "attributable to", as also the case of Madras High Court in the case of CIT v. Pandian Chemicals Ltd. (1998) 233 ITR 497 (Mad), wherein it has been held that "a mere connection between an income and an industrial undertaking would not be sufficient", the AO has observed that the other income amounting to Rs. 6,86,96,685 from Motibhoyan unit is not eligible for deduction under Section 80-1, as the same is not derived from the industrial undertaking and accordingly recalculated the same. The CIT(A) confirmed the same.

9.1 Before us, the learned counsel for the assessee submitted that the AO has not properly computed the deduction under Section 80-IA of the Act. For that purpose the learned counsel for the assessee drew our attention to p. 11 of the paper book wherein the working of Section 80-IA is given. Over and above, the learned counsel for the assessee relied on the note which has been submitted during the course of hearing that working of Section 80-IA should be worked out correctly on the basis mentioned in the said note, i.e., provision for doubtful debt which is clearly disallowable under the provisions of the IT Act, but for the purpose of calculating eligible profit, same is required to be added back and ultimately he requested that the AO may be directed to rework the deduction under Section 80-IA on the basis of submissions made by the assessee and note submitted at the time of hearing.

9.2 After considering the rival submissions and going through the material on record, we are of the view that Hon'ble Supreme Court in the case Pandian Chemicals Ltd. v. CIT (2003) 262 ITR 278 (SC) has observed that interest on deposit made with Electricity Board for electricity was not income derived from business of undertaking.

Similar view has been taken in other cases. So, the stand of assessee on merits is not tenable. However, we find that the AO has not taken proper note of the note which is in paper book, which has been explained in detail during course of hearing. Accordingly, we are of the view that it will be just and proper in the interest of justice to restore the matter to the AO with direction to recalculate the deduction as per law available at relevant point of time after providing opportunity of hearing to the assessee.

10. Ground Nos. 11, 12 and 13 relate to deduction under Section 80HHC of the Act. While calculating the deduction under Section 80HHC, the AO has reduced the business profit by an amount of Rs. 5,32,17,435 being 90 per cent of interest income. Matter was carried in appeal before the first appellate authority wherein it was submitted that the entire income in respect of interest earned amounting to Rs. 5,91,30,485 has clear nexus with interest paid by the assessee and, therefore, benefit of netting off must be granted. The CIT(A) observed that computation made by AO is in order and the stand of assessee is not acceptable since it has been held by many Benches of the Tribunal that 90 per cent interest is to be excluded from the income from business or profession for computation of deduction under Section 80HHC. The CIT(A) did not accept the contentions of the assessee.

10.1 After considering the rival submissions and going through the material on record, we are not inclined to interfere with the findings of CIT(A) who has observed as under : "After carefully considering the observation of the AO as well as the submissions by the appellant along with the judicial decisions, I am of the view that the computation made by the AO under Section 80HHC is in order and the stand of the appellant is not acceptable, since it has been held by many benches of the Tribunal that 90 per cent of the interest is to be excluded from the income from business or profession for computation of deduction under Section 80HHC. Further, the contention of the appellant regarding benefit of netting off cannot be accepted, in view of the decision of the Madras High Court in the case of K.S. Subbiah Pillai & Co. (India) (P) Ltd. v. CIT (2004) 134 Taxman 735 (Mad), wherein it has been held that there is no scope for setting off the interest income against the expenditure by way of interest before applying Clause (baa). Since the controversy regarding this issue has been settled by the above decision, the action of AO is quite justified in reducing the business profit by 90 per cent of interest income earned and no interference whatsoever is called for on this count." However, the issue for netting off the interest earned is restored to the AO with the direction to recalculate the same as per law available at relevant point of time.

11. Ground No. 14 is regarding levy of interest under Sections 234B and 234G of the Act, which is consequential to the above grounds. So, the AO is directed

accordingly.

12. The assessee has raised two additional grounds before us which are as under:

1. On the facts and circumstances of the case and in law, the sum of Rs. 1,71,30,212 being the interest earned on fixed deposit created out of share application money, inadvertently offered by the assessee as its income from other sources, requires to be excluded from total income as the same is to be set off against the share issue expenses of Rs. 10,63,81,580 and out of the balance amount of said share issue expenses of Rs. 8,92,51,368, 1/5th amounting to Rs. 1,78,50,723 is required to be allowed by way of deduction under Section 35D as against 1/5th of the total share issue expenses amounting to Rs. 2,12,76,316 claimed in the return of income.

2. On the facts and circumstances of the case and in law, the sum of Rs. 82,54,455 being the amount of customs duty paid and included in the value of closing stock of imported raw material and imported spares valued at Rs. 2,92,50,813 requires to be reduced from the value of closing stock in view of Section 43B, for which the appellant relies on the Supreme Court decision in the case of Berger Paints India Ltd. v. CIT (2004) 266 ITR 99 (SC).

12.1 So far as additional ground No. 1 is concerned, the learned counsel for the assessee pleaded before the Tribunal for the additional ground but the learned Departmental Representative opposed the submissions of the learned counsel for the assessee. Both the learned Representatives relied on various case law in support of their contentions. After going through the rival submissions and on perusal of the material on record, we find that at pp. 4 and 5 of the paper book, copy of the return filed for assessment year in question has been placed. As per page No. 5, the assessee has clearly offered the interest on share application money of Rs. 1,71,30,212 as income from other sources. At p. 34 of the paper book which is part of tax audit report, wherein it has been stated in reply to question No. 13D that Rs. 1,71,30,212 was interest on F.D. created out of share application money. As per p. 6 of the compilation No. 2 which is reply dt. 11th March, 2003, to query by AO in course of assessment proceedings whereby break-up of interest received on F.D. created out of share application money was

given to AO. Thus, assessee has made out a case that all relevant material was on record and, therefore, in view of various decisions, the additional ground may be admitted. Regarding legal position, we find that Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963, is relevant on the issue, which reads as under : "Rule 11 : The appellant shall not except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule : Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground." The Hon'ble Supreme Court in National Thermal Power Co. Ltd. v. CIT (supra) has held that the Tribunal is only required to consider a question of law arising from the facts which are on record in assessment proceedings. Such question should be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of assessee. This decision has been followed by Hon'ble Madras High Court in CIT v. Dhanalakshmi Mills Ltd. (1999) 238 ITR 766 (Mad), wherein the case was decided straightway. Hon'ble Supreme Court in Hukumchand Mills Ltd. CIT (1967) 63 ITR 232 (SC) has held that Section 254(1) of the Act empowers the Tribunal to pass such order as the Tribunal thinks it fit. This implies that powers of Tribunal are very wide, including power to permit raising new contention and power to remand the case. We find that applying the ratio of the decision of Hon'ble Supreme Court in the case of CIT v. Mahalakshmi Textile Mills Ltd. (supra) Hon'ble Allahabad High Court in L.H. Sugar Factories & Oil Mills (P) Ltd. v. Addl CIT (1979) 116 ITR 937 (All) has held that all questions whether of law or of facts which relate to assessment of assessee may be raised before the Tribunal.

There is nothing in the IT Act which restricts the Tribunal to determine all questions raised by the Departmental authorities. If for reasons recorded by Departmental authorities in respect of contention raised by the assessee, grant of relief to the assessee on another ground is justified, it will be open to the Departmental authorities and Tribunal to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him and he is entitled to change his grant before the Tribunal. Similarly, Hon'ble Bombay High Court in CIT v.

Govindram Bros. (P) Ltd. (1983) 141 ITR 626 (Bom) has held that additional ground could be allowed to be raised before the Tribunal and the Tribunal is competent to give necessary direction to carry forward of losses. Hon'ble Madras High Court in CWT v. S.S.Sankaralingam (2000) 245 ITR 640 (Mad) has decided a similar issue wherein claim was not made before ITO and AAC. The, question was raised for the first time before the Tribunal wherein it was held that Tribunal had jurisdiction to entertain claim for exemption under Section 5(1)(xxxi) made by assessee for the first time before it and decide such issue. In view of above discussion, we are of the view that additional ground may be admitted. We direct accordingly.

12.2 On merit, the stand of assessee was that keeping the share money in F.D. in bank pending allocation is statutory requirement and has to be complied. The assessee relied on the decisions of the Tribunal in the cases of Neha Proteins Ltd. v. Asstt. CIT (2004) 83 ITJ (Jd) 236 and J.M. Shares & Stock Brokers Ltd. v. Dy. CIT (2004) 83 TTJ (Mumbai) 1052, wherein on identical facts the Tribunal has held that such interest should have been reduced from share issue expenses and cannot be treated as income from other sources. It was pointed out that the decision of Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT (supra) has been considered in the case of Neha Proteins (supra). On the other hand, the learned Departmental Representative opposed the submissions of assessee on facts and law. It was specifically submitted by the learned Departmental Representative that it was not clear what portion of the interest on F.D. created out of share application money relates to period after allotment and what portion was prior to allotment. He further submitted that this interest is not linked specifically or intricately in that item of share issue expenses. The learned Departmental Representative also pointed out that in the case of Brooke Bond India Ltd. v. CIT (1997) 225 ITR 798 (SC), additional issue was not considered in the Tribunal decision relied by the assessee.

12.3 After considering the rival submissions and going through the material on record, we are of the view that we have already observed that additional ground No. 1 raised by the assessee is purely a question of law and hence the assessee is justified in raising this ground before us, which has been admitted by us as

mentioned above. But on perusal of the record, we agree with the contention of learned Departmental Representative that what portion of the F.D. created out of share application money relates to period after allotment and what portion was prior to allotment. So, in the facts and circumstances of the case and in the interest of justice, we restore this issue on merit to the file of AO to decide the same as per law after providing opportunity of hearing to the assessee.

12.4 Regarding ground No. 2, which is relating to a sum of Rs. 82,54,455 being amount being the amount of customs duty paid and included in the value of closing stock of imported raw material and imported spares valued at Rs. 2,92,50,813, which according to the learned Authorised Representative requires to be reduced from the value of closing stock in view of Section 43B for which the assessee relied on the decision of Hon'ble Supreme Court in the case of Berger Paints India Ltd. v. CIT (supra), the learned Departmental Representative opposed the same. The contention of learned Departmental Representative is that the above decision was rendered in context of pre-amended law as legal position changed after 1st April, 1999, with introduction of Section 145(1) and according to the Revenue, the closing stock has to be valued inclusive of customs duty. In rebuttal, the stand of assessee is that the assessee has included the value of customs duty as provided under Section 145A in the value of closing stock. But in the additional ground raised, the assessee wants relief on account of applicability of Section 43B. In the facts and circumstances of the case, we are of the considered opinion that in view of the decision in Berger Paints (supra), the entire amount of excise duty/customs duty paid by the assessee in particular accounting year is allowable under Section 43B of the Act as deduction in respect of that year, irrespective of the amount of excise duty/customs duty included in value of assessee's closing stock at the end of accounting year as related thereto. So, in the interest of Justice, we restore this issue to the file of AO for deciding the same as per law available at relevant point of time on the issue relevant to the assessment year under consideration after providing reasonable opportunity of hearing to the assessee.

1. The learned CIT(A) has erred in law and on facts in deleting the disallowance of Rs. 14,90,243 being debenture issue expenses.

2. The learned CIT(A) has also erred in law and on facts in deleting the addition amounting to Rs. 14,00,000 made in respect of stamp duty for term loan and professional fees for term loan.

3. The learned CIT(A) has also erred in law and on facts in directing the AO to allow Rs. 20,65,537 being 1/5th disallowed on account of deferred revenue expenses.

4. The learned CIT(A) has also erred in law and on facts in deleting the disallowance of interest expenses to the extent of Rs. 14,48,879 being 2 per cent of interest income charged less by the assessee.

5. The learned CIT(A) has also erred in law and on facts in deleting the interest disallowance to the extent of Rs. 2,92,45,670 being revenue expenses.

13.1 The first ground of Revenue's appeal is regarding deletion of disallowance of Rs. 14,90,243 being debenture issue expenses. The AO made this disallowance of Rs. 14,90,243 being debenture issue expenses.

Matter was carried in appeal before the first appellate authority wherein the learned counsel for the assessee submitted that identical disallowance has been deleted for asst. yrs. 1996-97 and 1997-98. After examining the details furnished by the assessee, the CIT(A) noticed that the issue regarding disallowance of debenture issue expenses amounting to Rs. 14,90,243 has been decided in assessee's favour while passing appellate orders for asst. yrs. 1996-97 and 1997-98. Following the observations made therein, the CIT(A) directed the AO to delete the disallowance to the extent of Rs. 14,90,243 being debenture issue expenses. The Revenue being aggrieved with the order of CIT(A), is in appeal before the Tribunal. At the time of hearing before us the learned senior Departmental Representative pointed out that the debenture issue expenses are for the new project and hence the CIT(A) has wrongly deleted the disallowance made by the AO. On the other hand, the learned counsel for the assessee contended that the CIT(A) has rightly deleted the impugned disallowance by following his earlier order. The issue is covered by the decision of Hon'ble Supreme Court in the case of India Cement Ltd. (supra). The learned counsel for the assessee has also relied

on the following decisions : So, according to the learned counsel for the assessee, there is no need to interfere.

13.2 We have considered the rival submissions and gone through the material on record. We find that in CIT v. East India Hotel Ltd. (2001) 252 ITR 860 (Cal), issue of debenture expenses was involved and the loan was repayable within eleven years of allotment of debenture. The expenditure was held to be revenue in nature. The Board has clarified that provisions of amortization are not intended to supersede any other provisions of IT Act under which it is admissible as deduction or deduction allowable by virtue of the decision of Hon'ble Supreme Court in India Cement Ltd. (supra). In view of this discussion, we are not inclined to interfere with the findings of CIT(A) and the same are upheld.¹⁴ The second ground of Revenue's appeal is regarding deletion of addition of Rs. 14,00,000 made in respect of stamp duty for term loan and professional fees for term loan. The learned Departmental Representative submitted that as submitted in ground No. 1 above, the debenture issue expenses is for the new project and as such it is of capital nature and the AO has rightly disallowed the same. The CIT(A) has wrongly deleted the same without appreciating the facts of the case. It may be confirmed. On the other hand, the learned counsel for the assessee has submitted that for the new project all these expenses were incurred and hence the same has to be capitalized. The learned counsel for the assessee has submitted that the CIT(A) has rightly appreciated the facts of the case and deleted the impugned addition.

This issue is also covered in favour of assessee by the decision of Hon'ble Supreme Court in India Cement Ltd. (supra).

14.1 We have considered the rival submissions and gone through the material on record. We agree with the findings of CIT(A) on the issue who has held that the issue is covered by the ratio laid down in the case of Indian Cement (supra). Stamp duty for term loan and professional fee for term loan is not capital in nature and is not allowable for amortization and the entire expenditure incurred by the assessee on this account is allowable in view of judicial pronouncement by Hon'ble Supreme Court in the abovesaid case. So, the order of CIT(A) on the

issue is upheld.¹⁵ The third ground of Revenue's appeal is regarding direction to allow Rs. 20,65,537 being 1/5th disallowed on account of deferred revenue expenses. Before the first appellate authority, the learned counsel for the assessee submitted that this issue is covered by the decision of CIT(A) vide his appellate orders for asst. yrs. 1995-97 and 1997-98. The CIT(A) considered the facts of the case and submissions of the learned counsel for the assessee, and he directed the AO to allow Rs. 20,65,537 being 1/5th disallowed on this count. The learned Departmental Representative supported the order of AO while the learned counsel for the assessee relied on the order of CIT(A). The learned counsel for the assessee submitted that this issue is also covered by the decision of Hon'ble Supreme Court in the case of India Cement Ltd. (supra) and contended that the CIT(A) has rightly deleted the impugned addition. So, there is no need to interfere.

15.1 We have considered the rival submissions and gone through the material on record. We are of the view that this issue is also covered by the ratio laid down in the decision of Hon'ble Supreme Court in the case of India Cement (supra). The finding of CIT(A) on the issue is also upheld.¹⁶ The fourth ground of the Revenue's appeal is regarding deletion of disallowance of interest expenses to the extent of Rs. 14,48,879 being 2 per cent of interest income charged less by the assessee. The learned Departmental Representative supported the findings of AO in the assessment order on this issue. On the other hand, the learned counsel for the assessee asserted that the assessee has rightly recovered the interest @ 16 per cent from Babubhai Patel & Co., as against the interest charged by AO @ 18 per cent. The AO is not justified in charging 2 per cent interest more. The CIT(A) has discussed this issue vide para 7 of his appellate order, relevant portion of which is as under : "7. The sixth ground of appeal relates to disallowance of Rs. 1,17,97,468 out of interest expenses. The interest expenses of Rs. 1,17,97,468 consist of two parts, first, interest charged from Babubhai Patel & Co. on advance on running account of Babubhai Patel & Co. The AO has computed interest on running account of this party at Rs. 85,95,268 which includes an amount of Rs. 1,37,897 being interest due on short-term deposit and in the case of Shri Rama Association, on an advance of Rs. 1,77,90,000 the AO has computed Rs. 32,02,000, the total of which comes to Rs. 1,17,97,468.

On a perusal of assessment order, it is noticed that the AO has charged interest on these two accounts by holding that these advances are for non-business purposes. However, during the course of appellate proceedings the appellant has submitted that Babubhai Patel & Co. has been given an advance for construction of factory premises and Shri Ram Association for the construction of office premises and both these advances are given for the purposes of business. It was further submitted that in the case of Babubhai Patel & Co., the interest already stands charged @ 16 per cent amounting to Rs. 71,46,389 and this is included in the interest of Rs. 3,27,90,125. This issue has already been covered while, disposing of ground No. 3. The only difference is the rate of interest. The appellate has charged @ 16 per cent whereas the AO has charged (r) 18 per cent and according to the calculation of the AO the interest is computed at Rs. 85,95,268. The AO is directed to delete the disallowance in respect of interest of Babubhai Patel & Co. as this has already been charged and it is included in the interest of Rs. 3,27,90,125 as discussed while disposing of ground No. 3. So far as the interest in respect of Shri Rama Association is concerned, the interest on this advance is not charged and it is not included in the figure of Rs. 3,27,90,125. However, the appellant has stated that Shri Rama Association is an NTC and advance has been given to this party for the construction of office premises known as Shree Rama House and the appellant is having share premium, share capital to the extent of over Rs. 200 crores. The appellant has not established that the funds to Shri Rama Association have been given out of its interest-free funds. There is no nexus between the deployment of funds as advance to this entity and availability of non-interest bearing funds. Further, it is seen that from other parties who are engaged in the construction of factory premises interest is charged by the appellant, then how the NTC, i.e., Shri Rama Association is left out without charging the interest. The appellant could not adopt different yardsticks for different parties. I, therefore, confirm the stand taken by the AO and the disallowance of interest expenses to the extent of Rs. 32,02,200 is confirmed." The learned counsel for the assessee submitted that there is no reason to interfere with the findings of learned CIT(A). The same be upheld.16.1 After considering the rival submissions and going through the material on record, we find force in the submissions of the learned Authorised Representative. We find that the GIT(A)

has observed-This issue has already been covered while disposing of ground No. 3. The only difference is of rate of interest. The appellant has charged @ 16 per cent whereas the AO has charged @ 18 per cent and according to the calculation of the AO the interest is computed at Rs. 85,95,268. The AO is directed to delete the disallowance in respect of interest of Babubhai Patel & Co., as this has already been charged and it is included in the interest of Rs. 3,27,90,125 as discussed while disposing of ground No. 3." In our opinion, there is no infirmity in the order of CIT(A) and, therefore, the same is upheld.¹⁷ The fifth ground of Revenue's appeal is regarding deletion of interest disallowance to the extent of Rs. 2,92,45,670 being revenue expenses. We find that this issue has been discussed and decided in para No. 8.4 of this order in assessee's appeal wherein we have upheld the deletion of interest disallowance to the extent of Rs. 2,90,45,670 being revenue expenses by detailed reasoning. Same is not repeated here. Accordingly, the order of CIT(A) on the issue is upheld as indicated above.

18. Regarding admissibility of additional ground, we are not inclined to interfere with the findings of CIT(A), who has rightly admitted the additional grounds as indicated in para 8 of this order.

19. In the result, both the appeals are partly allowed for statistical purposes.

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