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

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER

ITA.No. 5986/MUM/2017 (A.Y: 2013-14)

M/s. Housing Development and Infrastructure Limited 9th Floor, HDIL Towers, Anant Kanekar Marg, Bandra (E), Mumbai – 400 051	*v.*	Dy. CIT CC-5(4), Room No. 1927, 19th Floor, Air India Building, Nariman point, Mumbai – 400 021

PAN No: AAACH 5443 F

(Appellant)		**(Respondent)**
Assessee by	**:**	**Shri Dr. K. Shivaram** **Shri Rahul K. Hakani**
Revenue by	**:**	**Shri Anadi Varma**
Date of Hearing	**:**	**13.07.2018**
Date of Pronouncement	**:**	**10.09.2018**

O R D E R

PER RAJESH KUMAR (AM)

1. This appeal is filed by the assessee against the order of the Ld. Commissioner of Income-tax (Appeals)-53 Mumbai dated 30.06.2017 for the Assessment Years 2013-14.

2. The first ground of appeal raised by the assessee is that Ld.CIT(A) erred in upholding the order passed by the Assessing Officer u/s. 143(3) of the Act which is bad in law and against the principles of natural justice.

3. At the time of hearing Learned Counsel for the assessee submitted that Ground No.1 of grounds of appeal is not pressed and accordingly the same may be disposed of. Hence, Ground No.1 is dismissed as not pressed.

4. Ground Nos.2 and 3 of grounds of appeal re ates to disallowance of unabsorbed cost of TDR while computing the Profit on sale of TDR under normal provisions of the Act and while computing the book profits u/s.115JB of the Act.

5. Briefly stated the facts are that, the assessee is engaged in the business of Builder and Property Developers filed its original return of income on 30.09.2013 declaring income of ₹.66,08,53,800/- under normal provisions of the Act and book profits of ₹.20,37,91,742/- u/s.115JB of the Act. Later revised return was filed on 31.10.2013 declaring income of ₹.Nil under normal provisions of Act and book profits of ₹.Nil u/s.115JB of the Act. In the revised return filed, assessee written off unrealized cost of ₹.441.98 Crores as extraordinary/exceptional item and unabsorbed cost of TDR of ₹.104.25 Crores. The Assessing Officer completed the

assessment on 30.03.2016 u/s. 143(3) of the Act determining the income under normal provisions at ₹.647,29,01,700/- and book profits at ₹.612,34,38,349/-. In the course of the Assessment Proceedings the assessee was asked to submit the details of such costs and its allowability in the year under consideration. Assessee by letter dated 04th Jan, 2016 submitted the detailed explanation why the unabsorbed cost of TDR to be allowed as deduction including the break up for the said amount. However, the Assessing Officer, observing that no proper details were furnished by the assessee and the assessee has claimed reduction u/s.80-IA(4) in respect of profit and sale of TDR, denied the claim of the assessee. He also observed that the cost pertained to TDR sold can only be apportioned against the sale of TDR which would result in reduction of profit of sale of TDR and consequent claim of Deduction u/s. 80-IA(4) of the Act.

6. On appeal Ld.CIT(A) sustained the action of the Assessing Officer in not allowing the claim of the assessee. Reiterating the contentions raised by the assessee, Assessing Officer in his Assessment Order observed that the details were not furnished. Ld. CIT(A) also further observed that the Tribunal though passed order on 25.09.2013 in assessee's own case accepting the revised computing cost of sale of TDR in A.Ys: 2009-10 and 2010-11 and 2012-13 and consequential orders

passed giving effect to the Tribunal Order allowing the revised unabsorbed cost of sale of TDR. But, subsequently the Principal CIT, Central – 3, Mumbai in exercising of his revisionary jurisdiction u/sec. 263 of the Act set-aside the aforesaid orders dated 24.06.2014 and 31.03.2015 i.e. giving effect order of Tribunal for the A.Ys. 2009 -10, 2010 - 11 and 2012 -13 directing the Assessing Officer to pass fresh orders after making proper enquiries, verification and bringing on record relevant material regarding unabsorbed cost of TDR

7. Before us, Ld. Counsel for the assessee submitted that Airport Authority of India had entered into a Public Private Partnership joint venture with Mumbai International Airport Pvt, Ltd. (hereinafter in short "MAIL") for expansion, development, improvement, and renovation of International Airport at Mumbai. As a result, AAI and MIAL entered into Operation Management and Development Agreement (OMDA) agreement dated 4.4.2006. Ld. Counsel for the assessee further submitted that Project required clearing 276 acres of land encroached by slums. MIAL entrusted said responsibility upon Assessee. Accordingly, Slum Rehabilitation Agreement (hereinafter in short "SRA") between Mumbai International Airport Ltd and HDIL dated 15th October 2007 was entered into. As per this agreement assessee has to rehabilitate the Slums and accordingly it was to get 65 acres of Airport land to develop

non-aeronautical services as part of development of Airport project. Pursuant to slum rehabilitation agreement Assessee purchased land of Rs. 1900 Crore known as Kurla Premier and conveyed the same to SRA authority as per SRA Scheme. SRA granted land TDR against surrender of land which was sold by assessee in open market.

8. Ld. Counsel for the assessee further submitted that from A.Y: 2009-2010 onwards, assessee started selling the land TDR. Each year the sale was credited to P/L A/C. The expenses were debited to WIP A/C. The cost of sale of TDR was estimated at Rs 650 per sq feet by considering both airport land and SRA TDR. Said cost was transferred from WIP A/C to P/L A/C. On the profit deduction u/s 80IA(4) was claimed. MIAL terminated the contract with HDIL vide its letter dated 6/2/2013 i.e. in this AY 2013-2014. As a result, the assessee was not entitled to get 65 acres of airport land. Hence, entire cost incurred by assesse was only towards the SRA project from where it got TDR.

9. Ld. Counsel for the assessee further submitted that, the claim of Assessee pertaining to s.80-IA(4) for AY 2009-2010 and 2010-2011 was before ITAT and pending adjudication, when the contract was terminated. As a result, assesse submitted revised cost to ITAT and ITAT vide order dated 25/9/2013 directed AO to consider revised TDR cost. Accordingly,

from AY 09-10 onwards, Assessee calculated revised cost for each year and expenses over and above Rs 650 per sq feet were reduced from TDR sales as unabsorbed cost. The revised cost was accepted by AO in AY 2009-10,2010-11 and 2012-13.

10. Ld. Counsel for the assessee further submitted that during this year both A.O. and CIT(A) disallowed the unabsorbed cost of TDR pertaining to AY 2013-2014 of Rs 104 crores. The Ld.CIT(A) also held that orders of AY 2009-10,2010-11 and 2012-13 were revised u/s 263.

11. Ld. Counsel for the assessee referring to Page No. 914 of the Paper Book submitted that the Tribunal by order dated 01.09.2017 in ITA.No. 2780/Mum/2016 to 2782/Mum/2016 quashed the order u/s 263 passed by the Principle CIT, Central-3, Mumbai who directed to revise the order giving effect to the Tribunal order. Therefore, it is submitted since u/s.263 order has been quashed by the Tribunal the revised TDR cost allowed by the Assessing Office consequent to the order passed by the Tribunal stands. Therefore, he submitted that sustaining the order of the Assessing Officer by the Ld. CIT(A) on this ground does not arise.

12. Ld. Counsel for the assessee further referring to Page Nos. 880 to 913 of the Paper Book submitted that in ITAT Order for A.Y. 2009-10 and A.Y. 2010-11 wherein ITAT directed Assessing Officer to consider the

revised cost. Hence order of Assessing Officer and CIT(A) are not in accordance with order of the ITAT. Ld. Counsel for the assessee further referring to Page No. 982-985 submitted that the order of ITAT on this ground has become final. Revenue has not challenged the order of Tribunal on this issue before High Court.

13. Ld. Counsel for the assessee referring to Page Nos. 914 to 932 of the Paper Book submitted that for the A.Y. 2009-10 2010-11 and 2012-13 Assessing Officer has accepted the revised cost of TDR. Said order was revised on the ground that revised cost was not certified/verified and claim can be made in the year of arbitral award and order of revision was challenged before ITAT. ITAT after considering all the details quashed the order of Pr. CIT u/s 263. He placed reliance on the decision of CIT *v.* Excel Industries [358 ITR 295] and Radhasoami Satsand *v.* ACIT [193 ITR 321].

14. The Ld. Counsel for the assessee referring to Page No. 383 and 384 of the Paper book submitted that the assessee worked out the unabsorbed cost for the A.Y. 2013-14 and this working was furnished before the Assessing Officer as well as the Ld. CIT(A). This working was prepared based on the decision of the ITAT for the earlier years and the same method followed in the earlier years and therefore there is no

justification in rejecting the revised cost of unabsorbed TDR stating that details were not furnished. Ld. Counsel for the assessee invited our attention to Page NO. 524 of the Paper book which is the submission made before the Ld.CIT(A). Referring to the said submissions Ld. Counsel submitted that all the contentions raised by the Ld. A.O were rebutted and the Ld. CIT(A) failed to consider these submissions and by simply agreeing with the contentions of the A.O though the details were furnished, claim of the assessee is rejected.

15. Ld. DR vehemently supported the orders of the Authorities below and filed written submissions dated 12 07 2018 supporting the orders of the Authorities below. Ld. DR further referring to the Assessment order as well as the Ld.CIT(A) order submitted that, it is the finding of the Lower Authorities that the assessee has not furnished the requisite details called for and therefore the claim of the assessee was rightly rejected in the absence of the details.

16. We have heard the rival submissions and perused the orders of the authorities below and the case laws relied on and the written submissions filed before us. We notice that in the course of the assessment proceedings the assessee by letter dated 04th Jan, 2016 the detailed

submission was made justifying the deduction of unabsorbed cost of TDR as under:

> *"Justification regarding reducing unabsorbed cost of TDR of ₹.104,25,74,531/- from net Profit for calculating book profit u/s. 115JB: - In this regard we wish to state that. The Airport Authority of India (AAI), had entered into a Public Private Partnership joint venture in the name of Mumbai International Airport Pvt. Ltd. (MIAL) as a part of the expansion, development, improvement and renovation of the CSIL Airport, Mumbai and as a consequence, AAI entered into an Operation, Management, Development Agreement (OMUA) with MIAL on 04.04.2006. The primary necessity for the commencement of the airport modernization project was. the evacuation of approximately 276 acres of airport land, encroached by slums.*
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> *The said responsibility of evacuation and rehabilitation was entrusted by MIAL to the assessee vide Slum Rehabilitation Agreement dated 15.10.2007. In accordance with this agreement for the evacuation of the encroached land, the assessee was to receive a 30-year leasehold right to develop and operate non-aeronautical services on the released airport land of approxima ely 65 acres. In lieu of constructing the rehabilitation buildings, the assessee received TDRs from the Slum Rehabilitation Authority (SRA).*
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> *The entire project of evacuating the encroached land and rehabilitating the slum dwellers was an integral part of developing the new CSIL Airport, Mumbai, with the ultimate goal of obtaining the aforementioned lease of 65 acres of prime airport land, in the form of commercial FSI. The assessee was under the bona fide belief that it was a developer of infrastructure a d thereby eligible for claiming deduction u/s. 80IA(4). Consequently, the entire proje t was accounted accordingly with the entire cost of rehabilitation being expended towards obtaining the expected benefits of the airport land, rather than deferring the income recognition, the assessee company, following the principles of AS - 9 Revenue Recognition, opted for booking the profits accrued from the Sale of TDRs and claiming the matching expenditure. The profit so omputed would reduce the unabsorbed cost of attaining the final goal of commercial FSI available at the airport land on completion of the rehabilitation process.*
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> *Since, both the said benefits and the associated costs were futuristic, without being able to be rystall zed in absolute numbers; the assessee company had no alternative but to make probable estimates, based on acquisition price of land surrendered to SRA, cost of obtaining relevant approvals and expenses to be incurred for construction of rehabilitation buildings, the assessee company determined an estimate cost of Rs, 650/- per sq. ft. The proportionate expenses, corresponding to the sale of TDR was booked and the resultant profit was claimed as deduction u/s. 80IA (4).*
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> *But due to certain unfavorable turn of events, MIAL vide letter dated 06.02.2013, terminated its abovementioned Slum Rehabilitation Agreement dated 15.10.2007 entered into with the assessee company, HDIL. Copy of the same marked as Annexure - IX is. attached herewith is attached herewith for your ready reference.*
>
> *This unprecedented event changed everything. Assessee Company is was then deprived of the very fruit for which it strived laboriously over, the better half of the last decade. Due to the termination of the contract, HDIL was longer entitled to the commercial FSI at the airport land. Consequently, the entire, accounting methodology based on estimates, which was founded on the premise, that at the end there was a tangible commercial outcome, was in need to be revisited.*

At the same lime our client's appeal proceedings was completed before Hon'ble ITAT, Mumbai Wherein, the Hon'ble ITAT, Mumbai, in its immense wisdom, aptly comprehended the dilemma of the assessee company. Due to the frustration of the profit making apparatus in the entire scheme of things, the Hon'ble ITAT, in the interest of justice, has restored the issue back to your precede for his kind consideration of the revised cost of sale of TDR.

The assessee company, complied the instructions of the Hon'ble ITAT, in letter and spirit, submitted the revised cost of TDR per sq. ft., based on actual expenditure incurred from F.Y. 2007-08 to F.Y. 2012-13. Unlike the costs filed in the original return of income, which were based on estimates, the assessee company had then substantiate the working with concrete, tangible costs actually incurred. Copy of detailed calculation of TDR cost per sq. fl. & unabsorbed cost of TDR of Rs. 104,25,74,531/- marked as Annexure-X is attached herewith for your ready reference. Sir, profit on sale of TDR now resulted loss which is nothing but the actual book loss on account of termination of contract of Assessee Company by MIAL of the development of Airport. In other words, the unabsorbed cost of TDR was part of expenses incurred by the Assessee Company in his books of account, not charged to profit & loss account but debited/added to Work-In-Progress account of Airport Project in anticipation of total benefit to be receivable from the MIAL contract. However, on amount of termination of Airport Cont act by the MIAL, the appellant Company had no choice, but revised its cost of sale of TDR which resulted into unabsorbed cost of TDR and accordingly claimed the same in Revised Computation of Income as per normal provisions of the Income Tax Act, 1961 and also while computing book profit u/s 115JB of the Income Tax Act, 1961 for the year under consideration, in other words it can be said that, entire expenditure with respect to Airport project was not charged to profit & loss account and in balance sheet a portion of it was shown as deferred expenditure/ work in progress, assesses could not be denied benefit of actual expenditure while computing profit under section 115JB of the I.T Act, 1961. In this, regard Assessee Company places reliance on the decision of High Court_of Karnataka_ in the. case Commissioner of Income Tax, Central Circle. Bangalore v, Karnataka soaps & Detergents Ltd (2015) 59 taxmann.com 43 (karnaaka) Pg. No 382_- 389). Copy of the same is marked as Annexure – XI is attached herewith for your ready reference.

Sir, as pointed out in the facts, the revised computation of trust of sale of TDR has been accepted by A O presiding your kind selves after due application of mind in earlier Asst Years i e. A.Y. 2009-10 and A Y. 2010-11 and subsequent A,Y. 2012-13. Them is no change in facts and circumstances of the case. Hence, on the principle of consistently the claim of Assessee may be allowed Reliance is placed on the Apex Court decision in Radhasoami Satsand v. CIT (1992) 193 1TR 321 (SC) wherein it is held that:

"We are aware of the fact that strictly speaking res judicata docs no! apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

Sir, based on above contention and factual aspect, your precede after being satisfied with the computational accuracy of our calculation, has allowed the revised Unabsorbed Cost of TDR to the Assessee Company for the A.Y. 2009-10 & A.Y. 2010-11 and accordingly has also given an effect in the Original Assessment Order vide Order Giving Effect to ITAT's order. Therefore, your honour is also kindly requested to allow the same for the year under consideration.

(Reply to Point no. 24 of notice u/s 142(1) of Income tax act, 1961 dated 11.09.2015)."

17. We also observe that the assessee has furnished the breakup of the revised cost of TDR which was arrived at as under: -

Housing Development & Infrastructure			
A.Y. 2013-14			F.Y. 2012-13
Summary			Amount (Actual)
Kurla Premier			--
Bhandari Mill (Fine)			--
Kilburn – Nahur			(74,839,010)
Bombay oxygen – Mulund			(806,586,338)
Popular Car Bazar – Andheri			(23,86,419))
	Net of 5 above		(905,291,767)
Profit /(Loss) as per return filed			137,282,764
Unabsorbed Cost			1,042,574,531
Revised Loss to be claimed			(905,2911767)
Computation of cost of TDR			
Kurla Premier			
	Estimation		F.Y. 201243
Particulars	**Area (sq. ft.)**	**Rate/ sq. ft.**	**Amount (Actual)**
Rehab:			
Cost of land	1,663,162.00		13,382,665,273
Tenancy right			
Cost of Construction	7,787,711.48	1,100	10,267,620,206
Approval& Other Charges			1,272,635,890
Interest cost			6,583,858,540
Total TDR	9,034,779.44		31,506,779,909
Less : Cost of Airport Land			2,405,875,026
Total Cost			29,100,904,883
Less:- Cost of sale of previous year	9,034,779.44		27,420,126,014
Balance area/cost	(0.00)		1,680,778,869
Project			F.Y 2012-13(Actual)
Premier	Area (Sq ft)		
	TDR Sale		
	Cost of Sales		
	Profit/ (Loss)		

	Revised cost		
	Cost recognized in P/L		
	Therefore, Unabsorbed cost		

Bhandari Mill (Fine)				
Project :- Galaxy				
Computation of Cost of TDR				F.Y. 2012-13
	Estimate			
Particulars	Area (sq. ft.)	Rate /sq.ft.		Amount (Actual)
Cost of land	99,170.56			875,766,602
Cost of construction	770,372.70	1,100		735,251,386
Approval & Other Charges				76,229,227
Interest Cost				174,728,037
Total TDK	502,337.04			1,861,975,252
Less : Cost of Airport Land				133,767,532
*T*otal Cost				1,728,207,720
Less:- Cost of sale of previous year	502,337.04			1,668,624,024
balance area/cost	-	-		59,583,695
Project				FY 2012-13(Actual)
Bhandari	Area (Sq ft)			-
	TDR Sale			-
	Cost of Sales			-
	Profit /(Loss)			-
	Revised cost			-
	Cost recognized in P/L			-
	Therefore, Unabsorbed cost			-
Kilburn-Nahur				
Project :- Majestic Tower				F.Y. 2012-13
Computation of Cost of TDR				
	Estimate			
Particulars	Area (sq. ft.)	Rate /sq.ft.		Amount (Actual)
Cost of land	179,399.00			913,449,947
Cost of Construction	887,860.25	1,100		1,311,671,893
Approval & Other Charges				37,884,762
Interest Cost				90,323,541
TDK available	824,863.83			2,353,330,143
Less : Cost cf Airport Land				219,653,320
Total Cost				2,133,676,823
Less:- Cost of sale of previous year	809,271.21			2,030,582,313
Area/cost for the year	15,592.62		6,612	103,094,510
Less:- Cosfy^rea of sale during year	15,592.62			103,094,510
Balance area/cost	(0.00)			(0)
Project				FY 2012-13(Actual)
Cost of Sale Per Unit				6,611.75

Kilburn	Area (Sq ft)			15,592.62
	TDRSale			28,255,500
	Cost of Sales			103,094,510
	Profit/ (Loss)			(74,839,010)
	Revised cost			103,094,510
	Cost recognized in P/L			10,494,900
	Therefore, Unabsorbed cost			92,599,610

18. Further, we also observe that from the paper book filed before us the assessee has given complete details of tenancy / claims / FSI / development rights of the land, details of cost of material consumed etc., before the Assessing Officer. Therefore, the contentions of the Assessing Officer that the assessee has not provided details is contrary to the record. In any case the issue whether the assessee is entitled to claim the revised unabsorbed cost of TDR as expenses and in view of the fact that the contract entered into with Mumbai International Airport Pvt. Limited by the assessee for development of the Airport has been cancelled on 06.02.2013, has been he subject matter of appeal for the A.Y 2009-10 and 2010-11 and the Tribunal by order dated 25.09.2013 directed the Assessing Officer to consider the revised cost of TDR and allow the same observing as under:

> *"37. Ground No. 3. 4 & 5 relate to the income from sale of TDR arising from Slum Rehabilitation activity of airport project. It is the claim of the assesses that the sale of said TDR cannot be assessed in the year under consideration. In so far as Airport project is concerned, the cost of land at Rs, 1.900 crores far exceeds the amount realized from sale of TDR of Rs. 265 crores which has resulted into a loss for the year.*
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> *37.1. Briefly stated the facts of the case are that Mumbai International Airport Limited (MIAL) entered into an agreement with Airport Authority of India for the modernization of Mumbai Airport with world class in Infrastructure facility. This agreement is dt.4.4.2006. Vide agreement dt. 26.4.2006, Government of India agreed to provide support to MIAL in relation to the modernization and restructuring of Mumbai Airport. Govt. of Maharashtra entered into an agreement*

with MIAL on 01.04.2006 in relation to the modernization and restructuring of Mumbai Airport. It was agreed that the State Govt. would provide support to MIAL and AAI in clearing the land required by the MIAL. The State Government also confirmed that it shall undertake best endeavor to identify and reserve such land where the squatters and other individuals who have encroached upon the airport side may be relocated. It was also agreed that the State Government will provide such additional land to the MIAL as required by the MIAL and has identified by the MIAL for such purpose.

37.2. Thereafter, MIAL entered into an agreement with MMRDA on 12.12.2006 to free slum encumbered in Mumbai Airport land because the State Govt. of Maharashtra has appointed MMRDA as nodal agency to handle the airport slum rehabilitation project and therefore MMRDA agreed to assist MIAL to clear the land for MIAL. With these factual background, a Slum Rehabilitation agreement was entered between MIAL and the assessee on 15.10.2007. This agreement contained the entire scope of work to be undertaken for the purpose of modernization and upgradation of the Mumbai Airport and the consideration received by the assessee. Accordingly, the assessee has to rehabilitate the slums in lieu of which it has to get 65 acres of Airport land to develop non-aeronautical services as part of development of Airport project. Pursuant to slum rehabilitation agreement. the assessee purchased land of Rs. 1900 crores known as Kurla Premiere and conveyed The same to SRA authorities as per SRA scheme. SRA granted land TDR against surrender of land which was sold by assessee in open market for Rs. 265 crores and the profit thereon was cla med for deduction u/s.80IA(4) of the Act. Against this sale price of Rs. 265 crores, cost of sales were estimated at Rs. 159.08 crores. The profit of Rs. 105,65 crores was credited to Profit and loss account and accordingly deduction u/s. 80IA(4) was claimed in the computation of total income.

37.3. In alternative, the assessee also claimed that if its claim of deduction u/s. 80IA(4) is not allowed, then the sale value of the TDR should be reduced from WIP as the assessee is following project completion method. The AO denied the claim of deduction u/s. 80IA(4) and also rejected the alternative claim of the assessee as per the findings given at clause-(v) on page 52 of the assessment order. According to the AO, the assessee has failed to comply with the conditions laid down u/s. 80IA(4) of the Act and further the income against which deduction is claimed cannot be said to be derived from the Airport Project.

37.4. Rejecting the alternative contention of the assessee, the AO observed that the assessee itself has credited the P&L account by the amount received by it on account of sale of TDR. By doing this, the assessee itself has considered that the sum relates to the year under consideration and has also claimed u/s. 80IA(4) of the Act. Therefore, now the assessee cannot say that since the project has not been completed and since the assessee is following project completion method, the said amount of sale of TDR should be reduced from the Work-in-Progress.

38. Being aggrieved, assessee carried the matter before the Ld.CIT(A) but without any success. The assessee explained the entire factual aspects relating to the sale of TDR. After considering the entire facts and submissions, the Ld. CIT(A) confirmed the order of the AO.

39. Aggrieved by the order of the Ld. CIT(A) assessee is before us. At the very outset, the Counsel for the assessee submitted that MIAL has terminated the contract with HDIL vide its letter dt. 6.2.2013 and now the dispute is in arbitration. The Ld. Counsel for the assessee requested for admission of Certain additional evidences which relate to the events subsequent, to the assessment and appellate proceedings and which have direct bearing on the project. The additional evidences being termination of contract between the assessee and MIAL, the Ld. Counsel for the assessee argued at length that the very foundation of claiming the deduction u/s, 80IA(4) has been removed by the termination of contract, therefore,

the claim of the assessee has to be considered entirely on new facts which have emerged subsequent to the completion of assessment and appellate proceedings.

40 The Ld. Departmental Representative fairly conceded to these new developments which have emanated alter the conclusion of the assessment proceedings.

41. At this stage, we would like to appreciate Ld. Counsel for assessee, Dr. K. Shivram for bringing to the notice of this Bench the facts which have arisen after the conclusion of the first appellate proceedings. This factual submission by the Ld. Counsel, miscarriage of justice would be prevented. The facts as they are before us today leave us no choice but to restore this issue back to the files of the AO for framing the assessment denovo. Since the very basis of the claim of deduction u/s. 80IA(4)of the Act do not exist, the claim of deduction u/s 80IA(4) cannot be entertained and therefore rejected subject to the out come of the arbitration proceedings and the profit arising out of the sale of TDR has to be recomputed in line with the revised computation of cost of sale of TDR as filed before us by the Ld. Counsel. The AO is directed to consider the revised computation of sale of TDR after giving a reasonable and fair opportunity of being heard to the assessee. The assessee is directed to substantiate its claim by bringing any relevant material which was not submitted in the ear ier proceedings. The AO is also free to collect any relevant information as per the provisions of law and after giving due opportunity of being heard to the assessee. Ground No. 3, 4 & 5 is allowed for statistical purposes."

19. Therefore, as could be seen from the above the Tribunal held that the very basis of the claim of deduction u/s. 80IA(4) of the Act do not exist, the claim of deduction u/s 80IA(4) cannot be entertained and therefore such claim is rejected subject to outcome of arbitration proceedings. It was also held that the profit arising out of the TDR has to be recomputed in line with the revised computation of cost of sale of TDR as filed by the assessee and directed the Assessing Officer to consider the revised computation of cost of sale of TDR after giving a reasonable and fair opportunity of being heard. We also find that the Tribunal by order dated 01.09.2017 in ITA No.2780/Mum/2017 to 2782/Mum/2017 quashed the order passed u/s. 263 of the Act by the Principal CIT, Central-3, Mumbai for the Assessment Years 2009-10, 2010-11 and 2012-13 who directed to

revise the consequential order passed giving effect to the Tribunal order. Further, we also find that for the A.Ys. 2009-10 and 2010-11 the Revenue though filed an appeal before the Hon'ble High Court, the issue of whether the assessee is entitled to claim for revised cost of TDR is not agitated before the Hon'ble High court and the Revenue accepted the decision of the Tribunal in holding that the profit arising out of the sale of TDR has to be recomputed in line with the revised computation of cost of sale of TDR as filed by the assessee. In the circumstances, and respectfully following the same in principle, we hold that the assessee is entitled to revise its cost of TDR and the same has to be recomputed in line with the revised computations of TDR as filed before the lower authorities. Since the revised cost of computation is prepared on same method as adopted in earlier years which was also accepted by Assessing Officer in earlier years while giving effect to ITAT order, we see no reason to accept the same for this Assessment Year. Thus, we direct the Assessing Officer to accept the revised computation of cost of TDR after verification. Subject to verification claim of the assessee is allowed. This ground is allowed.

20. Coming to Ground No. 3 which is in respect of upholding of disallowance of unabsorbed cost of TDR while computing income u/s.115JB of the Act. Ld. Counsel for the assessee submitted that AO and Ld.CIT(A) has not made any discussion in their Orders and A.O. has

not reduced the unabsorbed cost of TDR of ₹.104,25,74,531/- from the book profits. Ld. Counsel for the assessee further submitted that as it was an event subsequent to closing of the accounts, same should be allowed to be reduced from book profits. Ld. Counsel for the assessee relied on the decision of the Hon'ble Jurisdictional High Court in the case of Sushila Shantilal Jhaveri vs. UOI [286 ITR 428] wherein it has been held that Revenue Department must consider subsequent events He also relied on the decision of Karnataka High Court in the case of CIT v Karnataka Soaps & Detergents Ltd [59 taxmann.com 43] wherein it was held that no disallowance of actual expenditure while computing book profits just because it was shown as deferred revenue expenditure for shareholders. Learned Counsel for the assessee submitted that, in the present case also assessee has shown these expenses under WIP/ deferred Revenue and the expenses are actually incurred. Hence, he submitted that assessee had rightly claimed it as reduction from WIP. Thus, Ld. Counsel for the assessee requested to direct Assessing Officer to allow the claim of the assessee.

21. Ld. DR vehemently supported the orders of the authorities below and filed written submissions.

22. We have heard the rival submissions and perused the orders of the authorities below. We find that the Lower Authorities have not examined the claim of the assessee and no findings have been given by the Lower Authorities on this issue. In the circumstances, keeping in view the submissions of the assessee and also our decision in ground No.2 above while computing the income under normal provisions of the Act, we feel it appropriate to restore this issue to the file of the Assessing Officer who shall examine the claim of the assessee and allow in accordance with law. This ground is allowed for statistical purpose.

23. **Ground No. 4 & 5**: The issue in Ground No. 4 & 5 relates to upholding the action of the Assessing Officer in disallowing the deduction of unrealized cost of ₹ 441 98 crores debited to P&L account while computing the income under normal provisions of the Act and also while computing the book profits u/s. 115JB of the Act.

24. Briefly stated the facts are that during this Assessment Year the assessee has written off the unrealized cost of ₹.441.98 crores. This claim was made in view of the cancellation of the contract by MIAL. The A.O however disallowed the claim of the assessee observing that assessee initiated legal remedy against the termination of the contract by challenging the notice. Therefore, the dispute between the assessee and

the MIAL has not attained finality and arbitration is going on. Therefore, Assessing Officer was of the view that loss claimed by the assessee is a contingent loss and liability did not arise during this year. The said expenditure i.e. unrealized cost of ₹.441.98 crores was also added back while computing the book profits u /s. 115JB of the Act under Clause (c) of Explanation (1) being provision made for meeting liability other than ascertain liabilities. According to the Assessing Officer, it is only a provision for meeting the liabilities and is not an ascertained liability. On appeal the Ld. CIT(A) sustained the action of the Assessing Officer in denying the claim of the assessee holding that it is only a contingent liability.

25. Before us, Ld. Counsel for the assessee submitted that till 31.3.2013 assessee had incurred actual cost with reference to rehabilitation of slum dwellers of Airport project at Kurla Premiere land of ₹.2856 crores. Out of the said expense assesse had claimed ₹.611 crores [₹.650 per sq feet] and ₹.1535 crores as unabsorbed cost of TDR leaving a balance of ₹.709 crores. It is submitted that as the contract was terminated, out of balance ₹.709 crores assesse written off ₹.441,98,44,632/- crores by considering the tenements already constructed on which there was not going to be any TDR Income.

26. Ld. Counsel for the assessee referring to the Page Nos.390 to 393 stated that detailed submissions were made before the Assessing Officer regarding the claim for the written off work in progress being unabsorbed cost of TDR and its allowability along with working. Ld. Counsel for the assessee also referring to Page No. 527 to 533 submitted that the detailed submissions were also made before the Ld. CIT(A), however both the Authorities have disallowed the claim under the normal provisions of the Act as well as while computing book profits holding that expenditure is only contingent and liability did not crystalize during this Assessment Year, without appreciating the submissions made before them. Ld. Counsel for the assessee relied on the decision of the Hon'ble Karnataka High Court in the case of Asia Power Projects (P.) Ltd. *v.* DCIT [370 ITR 257].

27. Ld. DR vehemently supported the orders of the Authorities below and filed written submissions.

28. We have heard the rival submissions and perused the orders of the authorities below, the written submissions and the case laws relied on. We observe from the Assessment Order that the Assessing Officer denied the claim of the assessee being write off of unrealized cost of TDR observing that details have not been furnished and the assessee has not

explained why the unabsorbed cost was not claimed in the original return and claimed in the revised return. The Assessing officer was also of the view that since the assessee disputed the termination of the contract by MIAL the expenditure debited to P&L account during this year is only a contingent liability and he was of the view that the expenditure is not allowable in the year under consideration but in the year in which the litigation between the assessee and the MIAL is settled. The Ld.CIT(A) also was of the same view and rejected the claim of the assessee. In the course of the assessment proceedings the assessee by letter dated 27.01.2016 submitted with the detailed explanation justifying the loss on account of unrealized cost debited to P&L account as under:

> *"2.. Complete details/justification of the loss on account of exceptional items amounting to Rs. 441.98 crores claimed in Profit & Loss Account (Reply to point No.7):*
>
> *In this regard we wish to state that, The Airport Authority of India (AAI), had entered into a Public Private Partnership joint venture in the name of Mumbai International Airport Pvt. Ltd. (MIAL) as a part of the expansion, development, improvement and renovation of the CSIL Airport, Mumbai and as a consequence, AAI entered into an Operation, Management, Development Agreement (OMDA) with MIAL on 04.04.2006. The primary necessity for the commencement of the airport modernization project was the evacuation of approximately 276 acres of airport land, encroached by slums.*
>
> *The said responsibility of evacuation and rehabilitation was entrusted by MIAL to the assesses vide Slum Rehabilitation Agreement dated 15.10.2007. In accordance with this agreement for the evacuation of the encroached land, the assessee was to receive a 30-year leasehold right to develop and operate non-aeronautical services on the released airport land of approximately 65 acres, in lieu of constructing the rehabilitation buildings, the assessee received TDRs from the Slum Rehabilitation Authority (SRA).*
>
> *The entire project of evacuating the encroached land and rehabilitating the slum dwellers was an integral part of developing the new CSIL. Airport, Mumbai, with the ultimate goal of obtaining the aforementioned lease of 65 acres of prime airport land, in the form of commercial FSI. The assessee was under the bond fide belief that it was a developer of infrastructure and thereby eligible for claiming deduction u/s.80IA(4).*

Consequently, the entire project was accounted accordingly with the entire cost of rehabilitation being expended towards obtaining the expected benefits of the airport land, rather than deferring the income recognition, the assessee company, following the principles of AS - 9 Revenue Recognition, opted for booking the profits accrued from the Sale of TDRs and claiming the matching expenditure, The profit so computed would reduce the unabsorbed cost of attaining the final goal of commercial FSI available at the airport land on completion of the rehabilitation process.

Since, both the said benefits and the associated costs were futuristic, without being able to be crystallized in absolute numbers, the assessee company had no alternative but to make probable estimates. Based on acquisition price of land surrendered to SRA, cost of obtaining relevant approvals and expenses to be incurred for construction of rehabilitation buildings, the assessee company determined an estimate cost of Rs. 650/- per sq. ft The proportionate expenses, corresponding to the sale of TDR was booked and the resultant profit was claimed as deduction u/s. 80IA(4))

But due to certain unfavorable turn of events, MIAL vide letter dated 06.02.2013. terminated its above mentioned Slum Rehabilitation Agreement dated 15.10.2007 entered into with the assesses company, HDIL. Copy of the same is already submitted before your kind selves vide this office letter dated 04/01/2016 (Point No. 8, Annexure - IX).

This unprecedented event changed everything. Assessee Company is was then deprived of the very fruit for which it strived laboriously over the better half of the last decade. Due to the termination of the contract, HDIL was longer entitled to the commercial FSI at the airport land Consequently, the entire accounting methodology based on estimates, which was founded on the premise, that at the end there was a tangible commercial outcome was in need to be revisited. At the same lime our client's appeal proceedings was completed before Hon'ble 1TAT, Mumbai Wherein, the Hon'ble ITAT, Mumbai, in its immense wisdom, aptly comprehended the dilemma of the assessee company. Due to the frustration of the profit making apparatus in the entire scheme of things, the Hon'ble ITAT, in the interest of justice, has restored the issue back to your predecessor for his kind consideration of the revised cost of sale of TDR. The assesses company, complied the inspections of the Hon ble ITAT, in letter and spirit, submitted the revised cost of TDR per sq. ft, based on actual expenditure incurred from FY. 2007-08 to FY. 2012-13. Unlike the costs filed in the original return of income, which were based on estimates, the assessee company had then substantiated the working with concrete, tangible costs actually incurred. Copy of detailed calculation of TDR cost per sq. ft. & unabsorbed cost of TDR of Rs. 104,25,74,531/- is already submitted before your kind selves vide this office letter dated 04/01/2016 (Point No, 8, Annexure - X). Sir, profit on sale of TDR now resulted loss which is nothing but the actual book loss on account of termination of contract of Assessee Company by MIAL of the development of Airport, In other words, the unabsorbed cost of TDR was part of expenses incurred by the Assessee Company in his books of account, not charged to profit & loss account but debited/added to Work-in-Progress account of Airport Project in anticipation of total benefit to be receivable from, the MIAL contract. However, on account of termination of Airport Contract by the MIAL, the Assessee Company had no choke but revised its cost of sale of TDR which resulted into unabsorbed cost of TDR.

Sir, as pointed out in the facts, the revised computation of cost of sale of TDR has been accepted by A.O. presiding your kind selves after due application of mind in earlier Assessment Years i.e. A.Y. 2009-10 and A.Y. 2010-11 and subsequent A.Y. 2012-13.

Sir, based on above contention and factual aspect, your precede after being satisfied with the computational accuracy of our calculation, has allowed the

revised Unabsorbed Cost of TDR to the Assessee Company for the A.Y. 2009-10 & A.Y. 2010-11 and accordingly has also given an effect in the Original Assessment Order vide order Giving Effect to ITAT's order.

Furthermore, on being served the notice of termination of contract of Mumbai International Airport Ltd, on Assessee Company for Mumbai International Airport project claiming unsubstantiated charges, which was being challenged by Assesses Company. The Assessee Company was being advised by its legal counsel that such notice of termination was not tenable in the court of law and had initiated legal remedies available to it. The board of the Assessee company following its conservative accounting policy had written off unrealized costs in the books of accounts, which is being incurred by the Assessee company during the fulfilment of contract in due faith of completion of contract aggregating to ₹. 441,98,44,632/- as exceptional item by debiting to the profit & loss account and crediting/ reducing the work-in-progress for the year under consideration. Sir, based on the above factual submission, loss on account of exceptional items amounting to Rs. 441.98 crores claimed in Profit & Loss Account may please be allowed.

29. By letter dated 22.03.2014 the assessee once again made a detailed submission justifying the written off of unrealized cost as under:

"Complete details/justification of the loss on account of exceptional items amounting to Rs. 441.98 crores claimed in Profit & Loss:

In this regard we wish to state that, The Ai port Authority of India (AAI), had entered into a Public Private Partnership joint venture in the name of Mumbai International Airport Pvt. Ltd. (MIAL) as a part of the expansion, development, improvement and renovation of the CS1L Airport, Mumbai and as a consequence, AAI entered into an Operation, Management, Development Agreement (OMDA) with MIAL on 04.04.2006. The primary necessity for the commencement of the airport modernization project was the evacuation of approximately 276 acres of airport land, encroached by slums.

The said responsibility o evacuation and rehabilitation was entrusted by MIAL to the assessee vide Slum Rehabilitation Agreement dated 15.10.2007. In accordance with th s agreement for the evacuation of the encroached land, the assessee was to receive a 30-year leasehold right to develop and operate non-aeronautical services on the released airport land of approximately 65 acres. In lieu of constructing the rehabilitation buildings, the assessee received TDRs from the Slum Rehabilitation Authority (SRA).

The entire project of evacuating the encroached land and rehabilitating the slum dwellers was an integral part of developing the new CSIL Airport, Mumbai, with the ultimate goal of obtaining the aforementioned lease of 65 acres of prime airport land, in the form of commercial FSI. The assessee was under the bona fide belief that it was a developer of infrastructure and thereby eligible for claiming deduction u/s. 80IA(4).

Consequently, the entire project was accounted accordingly with the entire cost of rehabilitation being expended towards obtaining the expected benefits of the airport land, rather than deferring the income recognition, the assessee company, following the principles of AS - 9 Revenue Recognition, opted for booking the profits accrued from the Sale of TDRs and claiming the matching expenditure. The profit so computed would reduce the unabsorbed cost of attaining the final goal of commercial FSI available at the airport land on completion of the rehabilitation process.

Since, both the said benefits and the associated costs were futuristic, without being able to be crystallized in absolute numbers; the assesses company had no alternative but to make probable estimates. Based on acquisition price of land surrendered to SRA, cost of obtaining relevant approvals and expenses to be incurred for construction of rehabilitation buildings, the assessee company determined an estimate cost of Rs, 650/- per sq, ft. The proportionate expenses, corresponding to the sale of TDR was booked and the resultant profit was claimed as deduction u/s, 80IA (4) during the A.Y, 2009-10, 2010-11 & 2011-12.

But due to certain unfavorable turn of events, MIAL vide letter dated 06.02.2013, terminated its above mentioned Slum Rehabilitation Agreement dated 15.10.2007 entered into with the assessee company, HDIL.

This unprecedented event changed everything, Assessee Company is was then deprived of the very fruit for which it strived laboriously over the better half of the last decade. Due to the termination of the contract, HDIL was longer entitled to the commercial FSI at the airport land. Consequently, the entire accounting methodology based on estimates, which was founded on the premise, that at the end there was a tangible commercial outcome, was in need to be revisited. At the same time our client's appeal proceedings was completed before Hon'ble ITAT, Mumbai. Wherein, the Hon'ble ITAT, Mumbai, in its immense wisdom, aptly comprehended the dilemma of the assessee company. Due to the frustration of the profit making apparatus in the entire scheme of things, the Hon'ble ITAT, in the interest of justice, has restored the issue back to your predecessor for his kind consideration of the revised cost of sale of TDR.

The assesses company, complied the instructions of the Hon'ble ITAT, in letter and spirit, submitted the revised cost of TDR per sq. ft., based on actual expenditure incurred from RY. 2007-08 t RY. 2012-13. Unlike the costs filed in the original return of income, which were based on estimates, the assessee company had then substantiated the working with concrete, tangible costs actually incurred. Copy of detailed calculation of TDR cost per sq. ft. & unabsorbed cost of TDR of Rs. 104,25,74,531/- is already submitted before your kind selves vide this office letter dated 04/01/2016 (Point No. B, Annexure - X), Sir, profit on sale of TDR now resulted loss which is nothing but the actual book loss on account of termination of contract of A sessee Company by MIAL of the development of Airport. In other words, the unabsorbed cost of TDR was part of expenses incurred by the Assessee Company m his books of account, not charged to profit & loss account but debited/added to Work-in-Progress account of Airport Project in anticipation of total benefit to be receivable from the MIAL contract. However, on account of termination of Airport Contract by the MIAL, the Assessee Company had no choice but revised its cost of sale of TDR which resulted into unabsorbed cost of TDR.

Sir, as pointed out in the facts, the revised computation of cost of sale of TDR has been accepted by A.O, presiding your kind selves after due application of mind in earlier Asst. Years i.e. A,Y. 2009-10 and AX 2010-11 and subsequent A.Y. 2012-13. Sir, based on above contention and factual aspect, your precede after being satisfied with the computational accuracy of our calculation, has allowed the revised Unabsorbed Cost of TDR to the Assessee Company for the A.Y. 2009-10 & A.Y. 2010-11 and accordingly has also given an effect in the Original Assessment Order vide Order Giving Effect to ITAT's order.

Furthermore, on being served the notice of termination of contract of Mumbai International Airport Ltd, on Assessee Company for Mumbai International Airport project claiming unsubstantiated charges, which was being challenged by Assesses Company. The Assessee Company was being advised by its legal counsel that such notice of termination was not tenable in the court of law and had initiated legal remedies available to it. The Board of Directors the Assessee company following its conservative accounting policy had written off unrealized

costs in the books of accounts, which is being incurred by the Assessee company during the fulfillment of contract in due faith of completion of contract aggregating to Rs. 441,98,44,632/- as exceptional item by debiting to the profit & loss account and crediting/reducing the work-in-progress for the year under consideration.

Sir, in this connection we wish to further state that, Assessee Company has undertaken Rehabilitation of Slum Dwellers of Airport Project at one of the purchased land viz. Kurla Premier, wherein, Assessee Company has incurred total cost including land/tenancy, etc to the tune of Rs.2856,63,47,643/ - as on 31-03-2013, out of which cost of TDR sold till 31-03-2012 to the tune of Rs. 611,15,29,770/- (@ Rs.650/-) was charged to Profit & Loss Account during the A.Y. 2009-10, 2010-11, 2011-12 & 2012-13. Thereby resulting Into balance cost of Premier Rehab to the tune of ₹.2245,48,17,873/-. However, since on account of Termination of Contract by the M1AL as mentioned herein above, Assessee Company had reworked cost of TDR sold till 31-03-2012, which came to Rs.2,376/- per sq.ft which resulted into unabsorbed cost of TDR sold till 31-03-2012 amounting to Rs.1535,99,03,749/-(forming part of WIP), In nutshell, Assessee Company has balance cost to the tune of ₹.709,49,14,124/- (Rs. 2245,48,17,873/- MINUS Rs, 1535,99,03,749/-) as on 31-03-2013 in the books of account under Work-in-Progress. Sir, out of the said balance cost, Assessee Company based on the total Number of Rehab Tenements on Kurla Premier Land wo ked the Number of Rehab Tenements completed as on 31-03-2013 based on he fact that out of the Number of Rehab Tenements completed no TDR revenue will accrue to the Assessee Company & arrived at the cost to be written in the books of accounts to the tune of Rs.441.98 Crore In other words, it is neither any provision of expenses nor any assumption of future cost to be incurred,, instead it is purely an actual expenditure incurred by the Assesses Company written off in the books account during the A.Y. 2013-14 on account of Termination of Contract by MIAL. Details of Cost Incurred in the books of account for Premier Rehab from F.Y. 2007-08 to RY. 2012-13 relevant to A.Y. 2008-09 to A.Y 2013-14 along with working of cost of ₹.441.98 crore written off & copy of Work in-Progress as on 31-03-2013 marked as Annexure-II is attached here with for your ready reference.

Sir, based on the above factual submission, loss on account of exceptional items amounting to Rs. 441,98 cro es claimed in Profit & Loss Account may please be allowed."

30. We also observe that a detailed working of the unrealized cost of completed units and uncompleted units was furnished before the Assessing Officer which is at Page Nos.427 and 428 and the assessee has written off the cost in relation to the completed units out of completed units cost of ₹.441.98 crores out of the total cost of 709.49 crores.

31. Therefore, the contentions of the Lower Authorities that the details were not furnished and no explanation has been given appears to be not correct. The reason given by the Assessing Officer for denying the claim

is that the expenditure is contingent. This also appears to be not correct for the reason that the assessee has already incurred the expenses in the books of accounts but only thing is the said expenditure was not charged to P&L account but was debited to work in progress account since the MIAL terminated the contract during this year.

32. We also observe from the Paper Book in Page No. 380 that MIAL issued termination letter dated 06.02.2013 for termination of Slum Rehabilitation Agreement dated 15.10.2007 executed between the MIAL and the assessee. Assessee invoked the arbitration clause and the matter went to the Arbitral Tribunal and the Arbitral Tribunal passed award on 19.09.2016. While the dispute was pending before the Tribunal, parties settled the dispute mutually and Settlement Agreement was entered into on 08.09 2016. Keeping in view the Settlement Agreement, the Arbitral Tribunal passed award settling the dispute between the parties and the terms contained in the settlement agreement observing as under:

> "1. *MIAL entered into a Slum Rehabilitation Contract with HDIL on October 15, 2007. The said contract was terminated on February 6, 2013. HDIL invoked the arbitration clause and after constitution of the Arbitral Tribunal filed the claim. MIAL also filed a Counter Claim. While the dispute was pending before the Tribunal, parties have filed the application, informing that all disputes between the parties have been settled and a prayer has been made that an award be passed in terms of the Settlement Agreement dated September 8, 2016. Justice A. M. Ahmadi, one of the Members could not be physically present on account of illness but attended the meeting through teleconference. The Presiding Arbitrator apprised him of the settlement of the disputes. The Settlement Agreement dated September 8, 2016 has been signed by the parties.*
>
> *2. The Tribunal has perused the Settlement Agreement entered into between the parties. The Tribunal wishes to record that the matter and issues raised in this Arbitration not only concerns the parties to the dispute, but more importantly, impacts the larger public interest, namely airport development and housing of slum*

dwellers in Mumbai. In light of these larger issues, it was both, necessary and desirable that the disputes between the parties be expeditiously resolved. Almost three and a half years have passed since disputes arose between the parties. The entire process of Arbitration would have been time consuming and any outcome would have delayed airport development and rehabilitation of slum' dwellers, which would not be in public interest. In light of this, on the last occasion, it was suggested by this Tribunal that the parties attempt to settle the matter. The parties have taken the Tribunal's suggestion seriously and have entered into a Settlement Agreement. The Tribunal is confident that the Settlement Agreement arrived at is not only in the best interest of the parties but will also serve public interest.

3. Parties as well as their solicitors agree that the award be signed and pronounced here in Kolkata. We accordingly pass this award, on the terms of the Settlement Agreement dated September 8, 2016. The said agreement forms a part of this Award and is annexed to this Award. All the disputes between the parties are thus settled on the terms contained in the Settlement Agreement dated September 8, 2016.

4. This Award is made here in Kolkata on September 19, 2016 and signed by the two Arbitrators of the Tribunal and is being sent to Justice A. M. Ahmadi for obtaining his signature."

33. Further, on a perusal of the Settlement Agreement, we noticed that both the parties agreed for termination of the contract on mutual agreement with effect from the termination letter dated 06.02.2013 and the termination is valid and binding on both the parties from that date. Relevant clauses of the settlement agreement are as under: -

***"Mutual Covenants**:*

1. The Parties hereto accept and agree that the SR Contract is terminated by mutual agreement of the Parties with effect from the Termination Date and further agree that the termination is valid, subsisting and binding on both the Parties.

2. HDIL specifically agrees, acknowledges and undertakes that (a) it shall have no claim, and specifically waives and releases all claims against MIAL in respect of the invocation of the Bank Guarantee dated 30th May 2009 (as extended from time to time) by MIAL, and (b) MIAL has appropriated the amount of Rs. 25 crores towards the amount paid to MMRDA by MIAL under Clause 3.1 (q) (v) of the SR Contract, and HDIL has consented to such appropriation.

3. HDIL and MIAL agree to withdraw, and hereby irrevocably and unconditionally withdraw, all their claims and counter-claims respectively, against each other in the present arbitration proceedings or otherwise in respect of, or arising from, the SR Contract, and further agree that the Parties shall have no claim against each other, whether prior to the Termination Date or in present or in future, under or in respect of (i) the SR Contract, and (ii) any benefits that may have accrued or benefits that may accrue, to each of HDIL and MIAL in respe of, or arising from, the SR Contract.

4. It is hereby agreed that neither Party has any claim or liability against the other Party of any nature whatsoever, including any third party claims, and the Parties further agree, declare and confirm that they will not in any manner make any claim against each other, in present or in future, in respect of, arising out of, or in relation to the SR Contract (including all other agreements or documents entered into, or issued, by the Parties pursuant thereto). All such claims are hereby irrevocably waived.

5. HDIL shall, immediately upon execution of this Agreement, and not later than fifteen (15) days from the date hereof, remove all its servants, agents, employees, contractors, material and equipment of whatsoever nature, if any, from the Mumbai Airport Land. In the event, HDIL fails to do so, MIAL shall on the expiry of the period of fifteen (15) days be at liberty to remove such material and/or equipment at the entire risk and cost of HDIL and prevent entry of such servants, agents, employees and contractors.

6. HDIL shall not act or represent as an agent or representative of MIAL, to any third party including, any government authorities (Central, State and Municipal) in relation to the Project, and shall not rely on, or refer to, the Project in any brochure, memorandum, prospectus or any corporate communication whatsoever. HDIL agrees to indemnify, defend and hold harmless MIAL against all losses, expenses, claims and liabilities incurred or suffered by MIAL due to HDIL acting on behalf of MIAL.

7. HDIL shall not make any claim or interfere or challenge, any scheme or effort of rehabilitation initiated by MIAL or Government of Maharashtra or any statutory authority or body, either directly or through a third party, for removal and rehabilitation of slums/ slum dwellers from the Encroached Airport Land (as defined in the SR Contract). HDIL shall not raise any objection if the rehabilitation units constructed by HDIL pursuant to the Letters of Intent issued by the Slum Rehabilitation Authority on the basis of the SR Contract are used by the Government for rehabilitation of slum dwellers from the Encroached Airport Land (as defined in the SR Contract). HDIL will have no financial liabilities of any nature whatsoever in this respect

8. The Parties, for themselves and on behalf of their respective affiliates, successors and assigns fully and forever release and discharge the other and their respective successors, agents, employees, affiliates, attorneys, accountants, insurers, partners and joint ventures, and each of them, of and from any and all liability, claims, demands, damages, punitive damages, disputes, suits, actions, claims for relief and causes of action, whether known or unknown, arising out of or relating to the SR Contract (since terminated, or any other agreement entered into or document issued by the Parties pursuant thereto) and the Project.

9. The Parties agree that they shall immediately upon execution of this Agreement jointly submit an application to the Arbitral Tribunal, in the format prescribed in Schedule I hereto, for a consent award. Upon receipt of such consent award from the Arbitral Tribunal, the Parties shall jointly write a letter to the Government of Maharashtra and the SRA in the format set out in Schedule II of this Agreement thereby enclosing the consent award received from the Arbitral Tribunal.

10. The Parties shall respectively bear their own costs in respect of the proceedings before the Arbitral Tribunal."

34. As could be seen from the above clauses through the Settlement Agreement both the parties have agreed that there shall not be any

counter claims in respect of the contract entered into by both the parties in terms of the Slum Rehabilitation Agreement dated 15.10.2007 and the contract is terminated with effect from 06.02.2013. Therefore, we find that, though the assessee seems to have initially disputed the termination of contract but ultimately the parties mutually agreed to end the dispute from the date of termination of the letter issued by MIAL and it was also agreed that there shall not be any counter claims. In the circumstances, a question arises whether there is any real dispute between the parties, when both the parties are agreeing for the termination from the date of letter issued by MIAL dated 06.02.2013 without any claims and counter claims. But Lower Authorities have rejected the claim of the assessee on the ground that the liability is only a contingent liability and the liability did not crystalize during the Assessment Year under consideration. Lower Authorities have held that in the case of contractual liability, the liability crystalizes in the year of settlement of dispute between the parties. The above conclusion was drawn based only on the Arbitral Award which was passed on 19.09.2016 without going into the clauses of Award, Settlement Agreement and the termination letter. The question as to whether the liability crystalized, when the termination letter issued on 06.02.2013 in view of the Settlement Agreement and Arbitral award was never examined by Lower Authorities. Lower Authorities have not examined the clauses

of the Settlement Agreement and Award to find out when the liability crystallized i.e., on 06.02.2013 when the termination letter was given or on 19.09.2016 when final Award was passed by the Arbitral Tribunal. In the circumstances, we are of the considered view that the Lower Authorities have to examine all the clauses of the settlement agreement vis-à-vis Arbitral Award and the termination letter before concluding that the liability did not crystallized during this Assessment Year.

35. Further, the Hon'ble Karnataka High Court in the case of Asia Power Projects (P.) Ltd., *v.* DCIT [370 ITR 257] while considering the allowability of expenditure on abandoned projects, it was held that even though the assessee invoked arbitration clause and pending the expenditure on abandoned project should be allowed in the year in which the contract is terminated.

36. In view of above discussion, we feel it appropriate to restore this issue to the file to the Assessing Officer who shall examine the whole issue in the light of the above observations and to decide in accordance with law while computing the income under normal provisions of Act as well as book profits u/s. 115JB of the Act. Needless to say that the Assessing Officer shall provide adequate opportunity of being heard to the assessee. Ground Nos. 4 and 5 are allowed for statistical purposes.

37. **Ground No. 6 & 7**: Ground Nos. 6 & 7 are relating to denial of deduction u/s. 35AD and in the alternative it was claimed that if the same is not allowable under section 35AD the said expenditure be allowed u/s.37(1) of the Act.

38. In the course of the Assessment Proceedings the assessee was asked to submit the details regarding the claim made u/s. 35AD and the assessee furnished the details vide letter dated 12.02.2016. However, the Assessing Officer was of the view that the assessee has not furnished complete details and there was no explanation as to why the claim in the original return u/s. 35AD was made at ₹ 99.50 Crores which was reduced in the revised return to ₹.52.71 Crores and since there was no explanation why the assessee reduced its claim to ₹.52.71 crores and also observing that the assessee did not explain how the conditions u/s. 35AD are fulfilled. The claim of the assess was denied.

39. Before Ld. CIT(A) assessee contended that if deduction u/s. 35AD is not allowable since the expenditure is revenue in nature the same is to be allowed u/s. 37(1) of the Act. However, the alternative claim of the assessee is not entertained by the Ld.CIT(A) and sustained the disallowance made by the Assessing Officer.

40. Ld. Counsel for the assessee further referring to Page No. 385 and 386 submitted that a detailed break up of expenses was submitted before the Assessing Officer. The entire expenses were incurred for creating common infrastructure for airport project. Interest was paid on loan taken for SRA project and was incurred for business.

41. Ld. Counsel for the assessee submitted that Assessing Officer and Ld.CIT(A) disallowed the claim on the ground that the expenses are revenue in nature. Ld. Counsel for the assessee submitted that if the said expenses are not allowable u/s 35AD interest expenses should be allowed u/s. 36(1)(iii) other expenses u/s. 37(1) of the Act, as the contract is terminated and said expenses are allowable as deduction. He placed reliance on the decision of the Hon'ble Bombay High Court in the case of CIBA of India Ltd. *v.* CIT [202 ITR 01] and Khaitan chemicals & Fertilizers Ltd., [326 ITR 114] in support of the above submissions.

42. Ld. DR vehemently supported the orders of the authorities below and filed written submissions.

43. We have heard the rival submissions and perused the orders of the authorities below and the case laws relied on and the written submissions. We find that the alternative contention of the assessee that if deduction u/s 35AD is not allowable the said expenditure is to be allowed u/s 37(1)

of the Act was not considered by the Ld. CIT(A). Ld. Counsel for the assessee fairly submitted that the alternative claim was not made before the Assessing Officer. It is submitted that assessee is only making the alternative claim before the Tribunal. In view of the decisions referred by the Ld. Counsel for the assessee, we are of the view that the alternative claim of the assessee shall be examined by the Lower Authorities. In view of the matter, we restore this issue to the file of the Assessing Officer to examine the alternative claim of the assessee and to decide in accordance with law after providing adequate opportunity of being heard. These grounds are allowed for statistical purpose.

44. Ground No. 8 is in respect of Employees Contribution of ESIC and Provident Fund.

45. Ld. Counsel for the assessee, at the outset submitted that all the payments were made before the due date for filing the return of income and since the payments were made before the due date for filing the return of income provisions of section 43B are not applicable to the contributions made to ESIC and PF beyond prescribed date as was held in the case of CIT *v.* Ghatge patil Transport Ltd [368 ITR 749].

46. Respectfully following the above decision, we direct the Assessing Officer to allow the claim of the assessee to delete the disallowance made

under section 43B in respect of ESIC and PF contribution remitted beyond the due dates by the respective Acts but before the due dates for filing the return of income. This ground is allowed.

47. **Ground No. 9, 11 & 12**: These grounds are relating to Assessing interest income of ₹.63.57 Crores from Non-convertible debentures [in short "NCD"] and interest income of ₹.72.54 Crores from subsidiary under the head "from other sources" instead of income for business and disallowing interest of ₹.89.83 crores under 36(1)(iii) of the Act.

48. Briefly stated the facts are that the, Assessing Officer noticed that the assessee, in the revised return filed, treated interest income from NCD and interest from subsidiary, as business income and consequently assessee claimed interest expenses amounting to ₹.89.83 Crores as business expenses. In the course of the assessment proceedings, it was submitted that since the assessee is engaged in the business of real estate and its subsidiary which is also engaged in the business of real estate, the interest income received shall be considered as business income. However, the Assessing Officer was of the view that assessee is engaged in the business of construction and development of property and therefore making investment and earning interest income cannot be the business of the assessee. He also observed that advance extended by

the assesse to its subsidiary are not related to any business transaction and not in the nature of business advances. Advances were made to subsidiaries not for the purpose of assessee's business. He also observed that, no justification was furnished treating interest income of NCD as business income instead of other sources. It was also observed that assessee has invested ideal funds in NCD and also given interest bearing loans to its subsidiaries and such investments in NCD cannot be considered as normal business of the assessee. Similarly interest bearing loans have been given to the subsidiary and interest income is earned thereon and the transaction with the subsidiary is not in the normal course of business and there is no business arrangement in the form of joint venture or profit sharing with the subsidiary company and therefore the entire interest income received by the assessee from the NCD's are from subsidiary was treated as income under the head of other sources by the Assessing Officer and consequently interest income expenditure to the extent of ₹.89.83 crores claimed by the assessee was disallowed.

49. On appeal the Ld.CIT(A) sustained the action of the Assessing Officer in assessing the interest income from NCD and subsidiary company under the head income from other sources. However, since the assessee company had already credited the interest income of ₹.19.41 crores from Ravijyot Finance and Leasing Pvt. Ltd. subsidiary of the

assesse and forming part of interest income from subsidiary amounting to ₹.72.54 crores shown under the head "income from other sources" directed the Assessing Officer to exclude the same since disallowing the same once again amount to double taxation and consequently disallowing the interest expenditure claimed under 31(1)(iii) by the assessee.

50. Ld. Counsel for the assessee referring to the order of the Ld. CIT(A) at Page No. 33 at Para 8.2.1 submitted that a detailed explanation was given as to why this claim of the assessee is correct and he reiterated these submissions.

51. Ld. DR vehemently supported the orders of the authorities below.

52. This aspect of the matter has been elaborately dealt with by the Ld.CIT(A) with reference to the submission made by the assessee as well as the averments of the Assessing Officer observing as under:

> *"8.3.1 I have considered the submissions of the appellant and perused the materials available in record. The point for adjudication raised vide Ground No.8 is whether the A.O was justified in assessing interest income from NCD of Rs. 63,57,53,42S/-and interest income from subsidiary of Rs.72,54,23,350/- under the head 'income from Other Sources' as against 'Business income' claimed by the appellant in the revised return of Income. It is matter of record that the appellant had on Its own offered the Interest on NCD as well as interest from subsidiary as 'income from Other Sources' In its original return of Income filed for the A-Y- under consideration on 30.09 2013. It is also admitted vide submissions dated 08.03.2017 and 16.03.2017 during appellate proceedings that even in earlier A.Ys.2011-12 and 2012-13, the appellant had declared interest Income from subsidiaries and interest Income on NCD under the head 'Income from Other Sources'. However, it is noticed from the record that the appellant later filed a revised return for the A-Y. under consideration on 31.10.2013 showing the interest Income from NCD as well as Interest from subsidiary as 'business income" Two questions arise for consideration at this stage: first, whether the disclosure of interest income on NCD and interest from subsidiary by the appellant as 'income from Other Sources' in the original return of income represented an "omission or wrong statement" within the meaning of Section 139(5) of the Act which could be*

corrected by filing a revised return declaring the aforesaid Income as 'Business Income and secondly, whether by Its true nature and character, the aforesaid income Is properly assessable as 'Income from Other Sources' or as 'Business Income'.

8.3.2 It Is proposed at the outset to deal with the first question. It Is pertinent to note that the appellant had declared total income of ₹. 66,08,53,800/- under normal provisions of the Act and book profit of ₹.20,37,91,742/-u/s.115JB in the original return of Income filed on 30.09.2013. However, in the revised return of Income filed on 31.10.2013, the appellant declared total income at ₹.-Nil under normal provisions of the Act and book profit of Rs. NIll u/s.115JB of the Act. Thus, the net effect of filing the revised return claiming the aforesaid income as 'Business Income' was that the 'Income from Other Sources' as shown In the original return was reduced from Rs,47,50,38,329/ to Rs, 1,22,31,187/- as brought out above. While filing the revised return of income, The appellant did not explain as to how the disclosure of Interest Income on NCD and Interest from subsidiary under the head 'Income from Other Sources' in the original return of income could be considered an "omission or wrong statement" therein so as to necessitate the filing of a revised return showing the aforesaid Income under the head 'Business Income'. In the course of appellate proceedings, it is claimed that through oversight, the appellant had considered the above interest in ome under the head 'Income from other sources' Instead of considering the same under the head 'Business Income'. The appellant has Invited attention to clause 10 on page 3 of its memorandum of association (MoA) under which one of the objects incidental/ ancillary to the attainment of the main objects of the company Is "to undertake and carry on and execute all kind of financial, commercial and other operations of the company e.g. to draw, make, accept, endorse, discount, execute and Issue bills of exchange, promissory notes, bills of landing, "warrants, debentures and otter negotiable or transferable instruments and se urities". In this connection, it is pertinent to note that the expression "omission or wrong statement" occurring in section 139(5) has been judicially interpreted to mean a clerical or an inadvertent mistake or omission in the originally filed return. It signifies bona fids inadvertence or mistake. In the case of Sunanda Ram Deka v. C1T 210 ITR 988 (Gauh), It has been held That the filing of the revised return after discovery of omission or wrong statement is not by itself suf icient to bring the revised return within the ambit of section 139(5). The further requirement is that this omission or wrong statement in the original return must be due to bona fide inadvertence or mistake on the part of the assessee.

8.3.3 In view of the above legal position, it emerges that in the Instant case, there was no omission or wrong statement In the original return of income because all relevant facts relating to interest income From NCD and interest from subsidiary earned by the appellant had been disclosed Therein. By filing the revised return noting the aforesaid Income as 'business income" the appellant essentially raised a Legal claim in respect of the aforesaid Income which did not envisage either any omission or wrong statement. The act of the appellant in changing the head of income in respect of aforesaid items of interest from "income from other sources' In the original return to "business income " in the revised return was a matter Involving legal interpretation which could not be regarded as an omission or wrong statement so as to be covered within the ambit of section 139(5) of the Act Moreover, the filing of revised return showing the aforesaid Interest income under the head "business income" could not be said to be bona fide In so far as it had the effect of substantially reducing the taxable income of the appellant for the A.Y. under consideration. Reliance Is placed in this regard on the judgment of Hon'ble Delhi High. Court in the case Of Golden Insulation & Engg. Ltd. v. C1T 305 ITR 427 (Del) wherein the assessee changed the method of valuation of closing stock in the revised return because the method adopted did not reflect the correct state of affairs. The result of change in the method of valuation was that the assessee showed a. loss of Rs. 4,01,290/- which was higher than the original loss shown at

₹.3,00,369/-. In these circumstances, it was held that the same was clearly not a legally valid reason nor was it bona fide and that the change was not Justified or legally permissible.

8.3.4 It is now proposed to consider whether the aforesaid interest income earned by the appellant was liable to be assessed under the head "business income" as claimed in the revised return or under the head "income from other sources" as shown In the original return of income. The legal legal position on this Issue is well' established. It is generally recognized that the fact that a person carries on business does not lead to the inference that all income received by such a person is business income. The same assesses can have income which may require to be classified under the different heads as set out in section 14. The mode and manner in which the income is derived Is relevant In determining under which head the income received by the assessee would fall [south India Shipping corporation v. CIT 240 ITR 24 (Mad)], It has to be seen whether the assessee was carrying on the business of money lending in a regular, systematic anti organized manner. In other Words, what is required to be considered is whether the loans are advanced with The Intention to carry on the business of money-lending. The intention has to be gathered with reference to all the activities of advancing money which should be permitted by the objects of the company and also by the resolution of the board of directors to carry on the business of lending of money. The relevant tests to be applied are volume, frequency, continuity .md regularity of the transactions in arriving at the conclusion that the activities of the assessee constituted business.

8.3.5 On application of the aforementioned legal principles to the facts of this case, I am in agreement with the A.O's finding supported by detailed reasoning that the aforesaid Interest income earned by the appellant was rightly chargeable to tax under the head 'income from other sources' rather than 'business Income' as claimed by the appellant. In the first place, it deserves to be noted that the appellant is engaged In the business of real estate and infrastructure development rather than the business of financing or money lending. Merely making mention of an Incidental or ancillary object (clause 10) of its MoA will not by itself lead to the inference that he appellant was engaged in the business of financing or money lending. It is a matter of record that the appellant has not obtained any licence Of permission from the Reserve Bank of India For carrying; on the business of financing: The appellant has not placed on record any resolution of the Board of for carrying on the business of money-lending. The appellant has failed to any material on record to show that it was carrying on the business of financing or money-lending in a systematic and organized manner. The appellant's reliance in this regard on the incidental/ ancillary object clause 10 on page 3 of the memorandum of association is of no avail. Secondly, the appellant company has also not made it known to outsiders that they are in financing business so as to develop the business. There is nothing on record to show that money had been advanced to any outsider. And finally, it is noticed from, the record that debenture Interest income or Rs.63,57,53.425/- was earned by the appellant from one of its subsidiaries, namely. Guruashish Construction pvt. Ltd, whereas the interest Income of Rs.72,54,23,350 /- was also derived from the loans given by the appellant to its six subsidiary companies. The appellant is thus seen to have lent money to its subsidiary companies and derived interest therefrom. The afore mentioned activities of the appellant company Can by no stretch of imagination be said to constitute 'business. As a matter of fact, it is found that the appellant has not done any activity which could be termed as an activity Of business. There Is not even an iota of evidence to demonstrate that the appellant had carried on any financing or money-lending business. 1 am, therefore, of the considered view that the A.O. was Justified in holding that the appellant was not engaged in the business of financing and that the interest Income from NCD as well the interest from subsidiary companies derived by the appellant was appropriately assessable under the head 'Income from other sources'. The action of the A.O, in bringing to tax the aforesaid Items of interest income under this head 'Income from other

sources' Is found to be In accordance with law as well as peculiar facts and circumstances of the case and is, therefore, upheld. Ground No,8 of the present appeal is Thus found to be devoid of merit and is accordingly dismissed.

8.3.6 As far as Ground No.9 is concerned, I find merit in the appellant's claim that the appellant company had already credited the interest income of Rs.19,41,01,237/- from Ravijyot Finance and Leasing Pvt. Ltd, (a Subsidiary of the appellant) which was forming part of interest income from subsidiaries amounting to ₹.72,54,23,350/-/- shown under the head 'Income from Other Sources' In the original return of Income, Therefore, The action of the A.O. In adding back the same once again while computing the total income of the appellant vide impugned assessment order has resulted in double taxation of the said interest Income:. The A.O. is. therefore, directed to verify the facts from the record and delete the said addition of interest of ₹.19,41,01,237/- in case the appellant claim is found to be correct. With this direction, Ground No-9 of the present appeal is treated as allowed for statistical purpose.

8.3.7 The question for adjudication raised vide Ground No.10 is whether the AO. was justified in disallowing the appellant's claim for deduction of interest expenses of Rs.89,83,69,633/- u/s, 57(iii) of the ACT. It is noticed from the record that the aforesaid disallowance of Interest expenses was made by The A.O. as neither details of such Interest expenses were provided nor was th nexus of interest expenses with the earning of interest income estab ished In the course of appellate proceedings, it is submitted that the appellant had furnished details of interest expenses of ₹.567,77,06,676/-before the A.O. vide letter dated 09.10.2015. The appellant has placed the same on record at pages 163 to 165 of the paper book filed before me. However, merely furnishing details of gross finance expenses of Rs.567,77,06,676/- is not sufficient to claim deduction of Interest expenses of ₹.89,83,69,633/- u/s.57(iii) f the Act. In the course of appellate proceedings, the appellant furnished specifi details of interest expenses of Rs.89,83,69,633/- vide submission dated 8.03.2017. A perusal of the details of fiancé/interest expenses aggregating to ₹.89,83,69,633/- reveals that these include interest on overdraft (₹.62.10 Crores), penal interest on debentures (₹.13.14 crores,) penal interes on interest on loan (₹.6.41 cores), interest on late payment of service tax (₹.3 45 crores), interest on bill discounting ₹.2.05 crores, interest on late payment of VAT (₹.2 crores), interest on late payment of works contract tax (₹.0.45 crores), loan processing charges (₹.0.14 cores) and other interest (₹.0.10 crores). bill discounting (₹.2.05 cores) interest. However, no attempt was made by the appellant to establish that the aforesaid interest expenses had been Incurred for the purpose of earning The Interest Income so as to be eligible for deduction u/s-57(iii) of the ACT. It Is well settled That for availing deduction u/s. 57(iii) of the ACT, the onus Is on the assesses to adduce cogent materials to prove that the Interest expenditure in question was not in the nature of capital expenditure and further that such expenditure was laid out or expended wholly and exclusively for the purpose of making or earning the interest Income.

8,3.8 In this connection, It would be pertinent to consider the judicial precedent in the case of Smt Virmati Ramkrishna v. CIT 131 ITR 659 (Guj) wherein the Gujarat High Court has inter allia summed up the fallowing principles or propositions emerging from analysis of the statutory language of section 57(iii) as well as the decided cases: -

- *The expenditure must not be in the nature of capital expenditure or personal expenses of the assesses.*

- *The expenditure must have been laid out or expended wholly and exclusively for the purpose of making or earning "income from other sources "- The purpose of making or earning such Income must be the sole purpose for which the expenditure must have been Incurred, that is to say, expenditure should not have*

been Incurred for such purpose as also for another purpose. or for a mixed purpose.

. The distinction between purpose and motive must always be borne in mind In this connection, for what Is relevant IS the manifest and immediate purpose and not the motive or personal considerations weighing In the mind of the assessee in Incurring the expenditure.

• If the assessee has no option except to incur the expenditure In order To make the earning of the Income possible, then, undoubtedly, such expenditure would be an allowable deduction. However, where the assessee has an option and the option which he exercises has no connection with the making or earning of the income and the option depends upon personal Considerations or motives of the assessee, the expenditure Incurred in consequence of the exercise of such option cannot be treated as an allowable deduction.

• If, therefore, it is found on application of the principles of ordinary commercial trading that there is some connection, direct or indirect, but not remote, between the expenditure incurred and the income earned, the expenditure must be treated as an allowable deduction.

• The question whether the expenditure was laid out or expended for making or earning the Income must be decided on the facts of each case the final conclusion being one of law.

8.3.9 On application of aforesaid legal propositions to the facts of the present case, the inescapable conclusion is that the appellant has failed to discharge the onus u/s.57(iii) to prove with The help of relevant evidences and concrete materials that the aforesaid Interest expenses were laid out wholly and exclusively for the purpose of making or earning the Interest income. It is pertinent to note that the appellant has been providing diffe ent details of interest expenses at different points of time. For example, in its written submissions on this ground before me filed in the course of hearing on 24.02.2017, the appellant has given break up/ working of net other income (after claiming interest expenses of Rs.89,83,69,633/- against interest income o Rs 137,34,07,962/-) to The tune of Rs.47,50,33,829/- as per original return of Inc me Wherein interest expenses of Rs.41,60,32,661/ have been shown against Interest income on NCD (₹.63,57,53,425/-) interest expenses of Rs.47 47,12,042 /- have been shown again interest from subsidiary (Rs,72,54,23,350/-) and interest expenses of Rs. 76,24,930/- have been shown against Other interest Income (Rs.l,16,58,787/-) Strangely enough, the above details of interest expenses are found to be totally at variance with the break-up of Interest expenses submitted by the appellant vide letter dated 08.03.2017 In course of hearing of present appeal as brought out in para 8.3.7 above. No attempt has been made by the appellant to provide any explanation or reconciliation in this regard. Be that as it may, from perusal of details of interest expenses furnished by the appellant vide letter dated 08.03.2017 at the appellate stage, it is noticed that barring Interest on overdraft, none of The other items of Interest expenses viz. penal interest on debentures, penal interest on loan, interest on late payment of service tax/VAT/ works contract tax, Interest on bill discounting, loan processing charges etc. can reasonably be believed to have even the remotest connection with the earning of interest income. Even as regards interest on overdraft, the appellant has not adduced any concrete documentary evidence in order to demonstrate the nexus of utilization of funds in the overdraft account with the earning of interest income. In view of the above discussion, I do not find any error or Infirmity in the action of the A.O in holding that the appellant had failed To establish, the nexus between the interest expenses Incurred and the interest Income earned and consequently disallowing the appellant's claim for deduction of aforesaid expenses aggregating to Rs,89,83,69,633/- u/s, 57(iii)under the head "Income from Other Sources". The disallowance made by the A.O. is, therefore, sustained. Ground No,10 taken up by The appellant is accordingly dismissed."

53. On a perusal of the order of the Ld.CIT(A) and the reasoning given therein, we do not find any infirmity in the order passed by the Ld.CIT(A). Hence ground nos. 9, 11 & 12 are dismissed.

54. Ground No. 10 is relating to the direction given to the Assessing officer to verify the double addition of ₹.19.41 crores being interest received from subsidiary namely Ravijyot Finance and Leasing Pvt. Ltd.

55. At the time of hearing Ld. Counsel for the assessee submitted that this ground is not pressed and the same may be disposed off accordingly, Hence, this ground is dismissed as not pressed.

56. Ground No. 13 is relating to upholding the action of the Assessing Officer to disallow the capitalization of expenses by reducing work in progress on account of compensation paid to MIAL.

57. Briefly stated the facts are that, in the course of the assessment proceedings Assessing Officer noticed that assessee claimed ₹.29.86 crores towards compensation expenses. Assessee was required to explain the same and it was submitted by the assessee that expenses of ₹.25 Crores include compensation paid to MIAL on account of invoking of bank guarantee by MIAL. The Assessing Officer however reducing the said expenditure of ₹.25 Crores from work in progress observing that

assessee had already claimed unrealized costs of ₹.441.98 crores debited to P&L account on account of cancellation of contract by MIAL and there is nothing on record to suggest that ₹.25 Crores forms part of Unrealized expenses or not. He also observed that no proper details were furnished and therefore the said expenditure has to be reduced from work in progress. On appeal the Ld.CIT(A) sustained the disallowance. The Ld.CIT(A) sustained the disallowance observing that it is only a contractual liability.

58. Ld. Counsel for the assessee submitted that the bank guarantee was given to MIAL by the assessee in the course of carrying on its business and the same was encashed by invoking the bank guarantee for not fulfilling the terms of the contract and placing reliance on the decision in the case of CIT *v.* Neo Structo Construction Ltd. [37 taxmann.com 57 (Guj)], CIT *v.* Ragalia Apparels P. Ltd. [352 ITR 71] and Asia Power Project P. Ltd. *v.* Dy. CIT [370 ITR 257]. It is submitted that encashment of bank guarantee is business expenditure.

59. Ld. DR strongly supported the orders of the authorities below.

60. We have heard the rival submissions perused the orders of the authorities below and the case laws relied on. It is not in dispute that MIAL had invoked the bank guarantee forfeiture and encashed the bank

guarantee in the course of business of the assessee to MIAL. In the case of CIT *v.* Ragalia Apparels P. Ltd. (supra) the Hon'ble Bombay High Court considered a situation where the forfeiture of bank guarantee is business expenditure or not and it was held that forfeiture of bank guarantee was compensatory in nature and thus allowable as deduction u/s 37(1) of the Act while holding so it was observed s under: -

> *"2. The respondent assessee is a manufacturer of garments. The Apparel Export Promotion council (APEC) granted to the respondent assessee entitlements for export of garments and knit wares. In consideration for export entitlements the respondent assessee furnished bank guarantee in support of its commitment that it shall abide by the terms and conditions in respect of the export entitlements and commitment and produce proof of shipment. It was also provided that failure to fulfill the obligation to export would render the bank guarantee to being forfeited/encashed. In view of the fact that the respondent was incurring losses, it decided not to utilize the export entitlement which led APEC to encash the bank guarantee. The respondent recorded the said payment as penalty in it Books of Accounts and claimed deduction under Section 37(1) of the Act the Income-tax Act, 1961(the Act"). Before the Assessing Officer, the respondent contended that nomenclature of penalty was erroneous as the payment made to AEPC was compensatory in nature and thus allowable as deduction under Section 37(1) of the Act. However, the Assessing Officer did not accept the same and concluded that the forfeiture was in the nature of penalty and disallowed the expenses under section 37(1) of the Act in view of the explanation thereto. On appeal, the CIT(A) deleted the disallowance and allowed the l. On further appeal by the Revenue, the Tribunal confirmed the order of the CIT(A) and in particular, his findings of facts.*
>
> *3. The contention of the revenue is that forfeiture/encashment of the bank guarantee is penal in nature and therefore, cannot be allowed as expenses under Section 37(1) of the Act in view of the explanation. Consequently, according to the revenue, the expenditure has been correctly disallowed by the Assessing officer.*
>
> *4. We find the finding of fact recorded by the CIT(A) and upheld by the Tribunal was that respondent took a business decision not to honour its commitment of fulfilling the export entitlement in view of loss being suffered by it. The Assessing officer does not dispute this fact nor does he doubt the genuineness of the claim of the expenditure being for business purpose. For these facts the Tribunal held that respondent assessee has not contravened any provisions of law and thus the forfeiture of bank guarantee was compensatory in nature under Section 37(1) of the Act. In view of the above finding of feet, we see no reason to entertain the proposed question of law*."

61. Respectfully following the above decision, we hold that the bank guarantee forfeiture by MIAL is an allowable expenditure. However, we

find in the Assessment Order the Assessing Officer expressed a doubt as to whether this ₹.25 Crores included in the unrealized cost of ₹.441.93 crores or not. Before the Ld. CIT(A) the assessee submitted that the said expenditure of ₹.25 Crores does not form part of write off exceptional loss of ₹.441.98 crores. In view of the above, following the decision of the Jurisdictional High Court, we hold that the bank guarantee forfeited is allowable business expenditure subject to verification of the Assessing Officer. This ground of the appeal is allowed.

62. **Ground No. 14 & 15:** These grounds are relating to upholding the action of the Assessing Officer to disallow the capitalization of expenses by reducing the work in progress on account of payment made to tenants and development expenses.

63. In the course of the assessment, the Assessing Officer noticed that out of ₹.29.86 crores claim towards compensation expenses, ₹.4,86,30,000/- were payments made by the assessee company to tenants. It is contended that the payments were made by the assessee to tenants of Patthar Nagar, Bandra (E) and agreements were submitted. It was contended that since the payment is through account payee cheques the genuineness of the transaction is proved and therefore should be allowed as deduction. However, the Assessing Officer rejected

the claim of the assesse observing that assessee has not submitted any details and the reasons for making said payments to the tenant, the nature of payment is not supported by documentary evidences like proof of payment and agreement, receipts, vouchers etc., On appeal ld. CIT(A) sustained the same.

64. With regard to the development charges, it is the observation of the Ld. Assessing officer that the complete details in respect of development charges incurred by the assessee company were called for and assessee failed to furnish details as called for. It was observed by the Assessing Officer that only at the fag end of the assessment on 22.03.2016 only a part details were submitted. It was observed by the Assessing Officer that the development charges were claimed to be revenue expenditure and it represent reimbursement made from withdrawal from the bank account being pocket expenses incurred at various offices and sites of the assessee company. The Ld.CIT(A) sustained the disallowance of development charges for want of the specific details and nature of expenditure for which the expenditure was incurred.

65. Ld. Counsel for the assessee referring to the Page No 411 of the paper book, reiterated the submission made before the Lower Authorities.

The Ld. Counsel for the assessee further referred to the page book in Page No. 338 of the paper book.

66. Ld. DR supported the orders of the authorities below.

67. On hearing both the parties and perusing orders of the Lower Authorities, we find that the assessee has not substantiated its claim with complete details of expenditure and with supporting evidences. In the circumstances, we are of the view that this issue has to be examined afresh by the Assessing Officer. Thus we set aside this issue to the file of the Assessing Officer for denovo adjudication in accordance with law after providing adequate opportunity of being heard to the assessee. The assessee may produce necessary details to substantiate its claims. This ground is allowed for statistical purposes.

68. **Ground No. 16 & 17:** These grounds are relating to rejecting the claim for set off of brought forward losses and unabsorbed depreciation.

69. It is submitted that these grounds are only consequential in nature and therefore the same may be disposed off accordingly.

70. Set off of brought forward losses and unabsorbed depreciation are only consequential in nature, therefore we restore these grounds to the file of the Assessing Officer who shall examine and allow set off of brought

forward losses and unabsorbed depreciation in accordance with law. This ground is allowed for statistical purpose.

71. **Ground No. 18:** This issue is relating to upholding the action of the Assessing Officer in adding the deemed rental income on the properties which were stock in trade of the assessee.

72. Ld. Counsel for the assessee at the outset submits that the issue in appeal is covered by the decision of the Hon'ble Gujarat High Court in the case of CIT *v.* Neha Builders [296 ITR 661] and the Bombay Bench of the Tribunal in the case of M/s. Mayank Chemiplast Pvt. Ltd. in ITA.No. 4072/Mum/2011 (A.Y. 2007-08), M/s C R. Developers Pvt. Ltd. *v.* JCIT in ITA.No. 4277/Mum/2012 dated 13 05.2015, Runwal Construction *v.* ACIT in ITA.No. No. 5408/Mum/2016 (A.Y. 2012-13) dated 22/02/2018. Ld. Counsel for the assessee further referring to Page No. 15-16 which is Finance Act, 2017 submitted that has w.e.f 01.04.2018 introduced sub-section 5 in section 23 of the Act. Section reads as under:

> "S. 23 (5) Where the property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period upto one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall 78 be taken to be nil. The amendment is prospective and will apply in relation to AY 18-19 and subsequent years. **[**Memorandum explaining provisions (2017) 391 ITR 177 (St).]"

73. Ld. DR strongly placed reliance on the orders of the Authorities below.

74. We have heard the rival submissions and perused the orders of the authorities below and the case laws relied on. We find that the issue is decided by the Coordinate Bench in favour of the assessee in the case of Runwal Construction *v.* ACIT *(*supra*)* following the decision of the Hon'ble Gujarat High court in the cast of CIT *v.* Neha Builders (supra) holding as under: -

3. *"The brief facts of the case are that the assessees, engaged in the business of builders and developers, filed return of income for A.Y. 2012-13. The assessment was completed under Section 143(3) of Income Tax Act, 1961 (hereinafter "the Act") and while completing the assessment the AO computed the annual letti g value in respect of unsold flats held as stock in trade by the assessees. The assessees contended before the AO that they are engaged in the business of builder, developers and construction and the property they purchased is stock in trade and the income from sale of such developed property into flats is assessable as business income. Therefore, the unsold flats which are in the stock in trade cannot be brought to tax under the head 'income from house property' simply because the flats remain unsold at the end of the year. The assessees also placed reliance on the decision of the Hon ble Gujarat High Court in the case of CIT vs. Neha Builders Pvt. Ltd. (296 ITR 661) in suppor of their contentions. However, the AO referring to the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (354 ITR 180) computed the notional annual letting value on the unsold flats and brought to tax under Section 23 of the Act as income from house property.*

4. *On appeal the learned CIT(A) sustained the action of the AO in bringing to tax the notional annual letting value under the head 'income from house property' in respect of the unsold flats. Aggrieved, assessees are in appeal before us.*

5. *The learned A.R. before us strongly placing reliance on the decision of the Hon'ble Gujarat High Court in the case of Neha Builders Pvt. Ltd. (supra) submitted that if the property is used as stock in trade then such property would become or partake the character of stock and any income derived from such stock in trade would be income from business and not income from house property. The learned counsel also placed reliance on the decision of the Coordinate Bench in the case of C.R. Developers Pvt. Ltd. vs. JCIT in ITA No. 4277/Mum/2013 dated 13.05.2015 and submitted that identical issue has been decided by the Coordinate Bench holding that in the case of property held as stock in trade the income should be assessable under the head 'income from business' and no income shall be brought to tax as notional annual letting value under the head 'income from house property'.*

6. *The learned D.R., on the other hand, vehemently supported the orders of Authorities below. He also placed reliance decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra)*

7. *We have heard the rival submissions and perused the orders of the authorities below and the decisions relied upon. It is an undisputed fact that the assessees are in the business of builders, developers and construction. Both the assessees have constructed various projects and the projects were treated as stock in trade in the books of account. Flats sold by the assessees were assessed under the head 'income from business'.*

There were certain unsold flats in stock in trade which the AO treated as property assessable under the head 'income from house property' and computed notional annual letting value on such unsold flats placing reliance on the decision in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra). The action of the AO was upheld by the learned CIT(A).

8. *The Hon'ble Gujarat High Court in the case of Neha Builders Pvt. Ltd. (supra) considered the question whether the rental income received from any property in the construction business can be claimed under the head 'income from property' even though the said property was included in the closing stock. The Hon'ble Gujarat High Court held that if the business of the assessee is to construct the property and sell it or to construct and let out the same, then that would be the business and the business stocks, which may include movable and immovable, would be taken to be stock in trade and any income derived from such stocks cannot be termed as income from house property. While holding so the Hon'ble High Court observed as under: -*

> *"8. True it is, that income derived from the property would always be termed as 'income' from the property, but if the property is used as 'stock-in-trade', then the said property would become or partake the character o the stock, and any income derived from the stock, would be 'income' from the business, and not income from the property. If the business of the assessee is to construct the property and sell it or to construct and let out the same, then that would be the 'business' and the business stocks, which may include movable and immovable, would be taken to be 'stock-in-trade', and any income derived from such stocks cannot be termed as 'income from property'. Even otherwise, it is to be seen that there was distinction between the 'income from business' and 'income from property' on one side, and 'any income from other sources'. The Tribunal, in our considered opinion, was absolutely unjustified in comparing the rental income with the dividend income on the shares or interest income on the deposits. Even otherwise, this question was not raised before the subordinate Tribunals and, all of sudden, the Tribunal started applying the analogy.*
>
> *9. From the statement of the assessee, it would clearly appear that it was treating the property as 'sto k-in-trade'. Not only this, it will also be clear from the records that, except for the ground floor, which has been let out by the assessee, all other portions of the property constructed have been sold out. If that be so, the property right from the beginning was a 'stock-in-trade'."*

9. *Similarly the Coordinate Bench has considered similar issue as to whether the unsold property which is held as stock in trade by the assessee can be assessed under the head 'income from house property' by notionally computing the annual letting value from such property and the Coordinate Bench considering the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra) which the AO relied upon and the decision of the Hon'ble Supreme Court in the case of Chennai Properties & Investments Ltd. vs. CIT reported in 373 ITR 673, held that unsold flats which are in stock in trade should be assessed under the head 'business income' and there is no justification in estimating rental income from those flats and notionally computing annual letting value under Section 23 of the Act. While holding so the Coordinate Bench observed as under: -*

> *"3. The ld. AR placed the order of Bombay Tribunal in the case of M/s Perfect Scale Company Pvt. Ltd., ITA Nos.3228 to 3234/Mum/2013, order dated 6-9-2013, wherein it was held that in respect of assets held as business, income from the same is not assessable u/s.23(1) of the IT Act.*
>
> *4. On the other hand, ld. DR relied on the order of Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd., 354 ITR 180 (Delhi) in*

support of the proposition that even in respect of unsold flats by the developer is liable to be taxed as income from house property.

5. We have considered rival contentions and perused the record. The issue under consideration has been restored by the CIT(A) to the file of AO to compute the annual value. Recently the Hon'ble Supreme Court in the case of M/s Chennai Properties & Investments Ltd. Vs. CIT, reported in (2015) 42 SCD 651, vide judgment dated 9-4-2015 has held that where assessee company engaged in the activity of letting out properties and the rental income received was shown as business income, the action of AO treating the rental income as income from house property in place of income from business shown by the assessee was held to be not justified. The Hon'ble Supreme Court held that since the assessee company's main object, is to acquire and held properties and to let out these properties, the income earned by letting out these properties is main objective of the company, therefore, rent received from the letting out of the properties is assessable as income from business. On the very same analogy in the instant case, assessee is engaged in business of construction and development, which is main object of the assessee company. The three flats which could not be sold at the end of the year was shown as stock-in-trade. Estimating ren al income by the AO for these three flats as income from house property was not justified insofar as these flats were neither given on rent nor the assessee has intention to earn rent by letting out the flats. The flats not sold was its stock-in-trade and income arising on its sale is liable to be taxed as business income. Accordingly, we do not find any justification in the order of AO for estimating rental income from these vacant flats u/s.23 which is assessee's stock in trade as at the end of the year. Accordingly, the AO is directed to delete the addition made by estimating letting value of the flats u/s.23 of the I T.Act."

10. *In the case on hand before us it is an undisputed fact that both assessees have treated the unsold flats as stock in trade in the books of account and the flats sold by them were assessed under the head 'income from business'. Thus, respectfully following the above said decisions we hold that the unsold flats which are stock in trade when they were sold they are assessable under the head 'income from business' when they are sold and therefore the AO is not correct in bringing to tax notional annual letting value in respect of those unsold flats under the head 'income from house property'. Thus, we direct the AO to delete the addition made under Section 23 of the Act as income from house property."*

75. Similarly, the Coordinate Bench in the case of Progressive Homes *v.* ACIT in ITA.No. 5082/Mum/2016 dated 16.05.2018 held as under: -

"7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

The following sub-section (5) has been inserted after sub-section (4) of section 23 by the Finance Act, 2017, w.e.f. 01.04.2018:

> *"(5) Where the property consisting any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to nil."*

Thus, in order to give relief to Real Estate Developers, section 23 has been amended w.e.f. AY 2018-19 (FY 2017-18). By this amendment, it is provided that if the assessee is holding any house property as his stock-in-trade which is not let out for the whole or part of the year, the annual value of such property will be considered as Nil for a period up to one year from the end of the financial year in which a completion certificate is obtained from the competent authority.

In view of the above amendment to section 23, we are not adverting to the case laws relied on by the Ld. counsel and Ld. DR.

In the instant case, the assessee is a builder and developer. The issue of taxability is with regard to 51 unsold flats. The AY is 2012-13. In view of the insertion of sub-section (5) in section 23 by the Finance Act, 2017, w.e.f. 01.04.2018 narrated hereinbefore, we set aside the order of the Ld. CIT(A) and allow the 1st ground of appeal."

76. Respectfully following the said decision, we allow this ground of appeal.

77. In the result, appeal of the assessee is partly allowed as indicated above.

Order pronounced in the open court on the 10th September, 2018.

Sd/-	Sd/-
(C.N. PRASAD)	**(RAJESH KUMAR)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 10/09/2018
Giridhar, Sr.PS

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mum