IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

ITA Nos.583/Bang/2019, 299 & 407/Bang/2020
Assessment years : 2015-16, 2016-17 & 2017-18

Indianoil Skytanking Private Ltd., Fuel Farm Facility, Bangalore International Airport, Devanahalli, Bangalore – 560 300. **PAN: AABCI 5709C**	Vs.	The Deputy Commissioner of Income Tax, Circle 3(1)(1), Bengaluru.
ASSESSEE		RESPONDENT

Assessee by	:	Shri Padamchand Khincha, CA
Respondent by	:	Shri Sumer Singh Meena, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	06.05.2022
Date of Pronouncement	:	20.05.2022

O R D E R

Per Padmavathy S., Accountant Member

These appeals by the assessee are filed against the different orders of the CIT(Appeals)-3, Bengaluru, dated 14.03.2019 for AY 2015-16, dated 20.02.2020 for AY 2016-17 and dated 16.03.2020 for AY 2017-18. Certain common issues are involved in these appeals

which were heard together and are disposed by this consolidated order for the sake of convenience and brevity.

2. The common grounds raised in all these appeals, except change in figures. The grounds for the AY 2015-16 are as follows:-

1. The order dated 14 March 2019 passed by the CIT(A) upholding the assessment order dated 04 December 2017 passed by the AO under section 143(3) of the Act is contrary to the facts and circumstances of the present case and is not in accordance with law.

2. Denial of claim of deduction under section 80IA of the Act

3. The CIT(A) erred in law and on facts in confirming the denial of claim of deduction under section 80IA of the Act.

4. The CIT(A) erred in law and on facts in holding that the fuel farm facility provided by the Assessee did not fall within the meaning of 'airport' and as such was not an "infrastructure facility" for the purposes of claiming deduction under section 80IA of the Act.

5. The CIT(A) erred in law and on facts in holding that the Assessee had not entered into an agreement with the Central Government/State Government/Local Authority/ Statutory Body as required under section 80IA(4)(i)(b) of the Act.

6. The CIT(A) erred in law and on facts in not appreciating that the provisions of section 80IA of the Act were introduced to encourage private participation for development of infrastructure and therefore the provisions had to be construed liberally.

7. The CIT(A) erred in law in not following the judicial precedents relied upon by the Assessee thereby not following the judicial discipline.

8. Without prejudice to the above, the deduction under section 80-IA(1) should be allowed on the basis of the profits of the eligible undertaking without setting off the losses of years prior to the initial assessment year aggregating to Rs 4,18,09,098 against the profits of the eligible undertaking.

9. Disallowance of interest on hedge swap

10. The CIT(A) erred in law and on facts in confirming the disallowance of interest on hedge swaps.

11. The CIT(A) erred in law and on facts in not appreciating that the interest on hedge swaps was an allowable expenditure under section 36(1)(iii) of the Act

12. The CIT(A) erred in law and on facts in not appreciating that the aviation fuel facility of the Assessee was completed in April 2008 and was put to use on 24 May 2008 and hence interest on swap paid after the asset was put to use was to be allowed as deduction under section 36(1)(iii) of the Act.

13. The CIT(A) erred in law and on facts in not appreciating that the tax auditor of the Assessee had certified that there were no capital expenditure debited to the profit and loss account during the AY 2015-16.

14. The CIT(A) erred in law and on facts in not appreciating that the treatment provided by the Assessee was consistent with the Accounting Standard (AS) applicable for maintenance of accounts.

15. Without prejudice to the above, alternatively, the CIT(A) erred in not allowing deduction for interest on swap under section 37(1) of the Act."

3. The assessee has also raised an **additional ground**, which is common for all these years, which is as follows:-

16. Additional Ground

> "14. On the facts and circumstances of the case and in law, the assessing officer/Commissioner (Appeals) ought to have restricted the levy of Dividend Distribution Tax (DDT), on the dividend paid to M/s Skytanking Holding Gmbh, Germany, to 10 percent in terms of Article 10 of the Double Taxation Avoidance Agreement (DTAA) between India and Germany, instead of 15 percent charged in terms of section 115-O of the Income-tax Act, 1961."

4. In the petition for admission of the additional ground, it has been stated that Assessee has applied the rate @ 16.995% under section 115-O of the Act while discharging its Dividend Distribution Tax [DDT] liability. As per India – Germany DTAA, the rate of tax that India can charge (irrespective of whether it is tax on the shareholder receiving dividend or tax is payable by the company distributing dividends) cannot exceed 10%, as such, the assessee ought to have been correctly assessed to DDT @ 10%, since the non-resident shareholder is a tax resident of Germany. As per CBDT Circular No.14 (XL-35), the AO cannot take advantage of ignorance of the assessee as to its rights. This claim was not made by the assessee either in the return of income or before the lower authorities and it is raised for the first time before the Tribunal. This additional ground is purely a legal ground on the facts already on record of the department and requires no fresh investigation into facts. Reliance is placed on the following case laws:-

- National Thermal Power Corporation Ltd. v. CIT, 229 ITR 383 (SC)
- Maruti Udyog Ltd. v. CIT, 252 ITR 482 (Del)

5. It is prayed that the additional ground ought to be admitted in light of the precedents cited above.

6. In this additional ground, the assessee has raised a legal issue contending that DDT liability on the dividend amount paid to its AE in Germany should be restricted to the rate prescribed under DTAA. This claim was not made by the assessee either in the return of income or before the lower authorities and it is raised for the first time before the Tribunal.

7. The ld. AR submitted that this issue is covered in favour of the assessee by the decision of the coordinate Bench of this Tribunal in the case of *Gisecke & Devrient (India) P. Ltd. v. ACIT, [2020] 120 taxmann.com 338 (Delhi Trib)* and *Maruti Suzuki India Ltd. in ITA No.961/Del/215 (Delhi Trib.).*, wherein the Delhi Tribunal has expressed the view that DDT is a tax on income and hence additional ground can be raised by the assessee in the appellate proceedings.

8. The ld. DR argued against the admission of the additional ground.

9. We have heard the rival submissions and perused the material on record. We notice that the coordinate Bench of this Tribunal in the case of *Texas Instruments (India) Pvt. Ltd. in ITA Nos.525 & 275/Bang/2019 by order dated 11.03.2022* has dealt with a similar issue of admission of additional ground pertaining to DDT to be

restricted to the rate prescribed under DTAA. The Tribunal has held as follows:-

> "4.3 The present appeal pertains to the assessment order passed u/s 143(3) of the Act and we noticed that, in the impugned assessment order, the AO did not discuss anything about Dividend Distribution Tax either affirming the tax paid by the assessee u/s 115-O of the Act or raising any additional demand. In this context, the bench asked the Ld A.R as to how the issue of DDT can be said to arise out of the impugned assessment order and whether the assessee can raise additional ground relating to the same in the present appeal, when no discussion is there on DDT liability.
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> 4.4 The Ld A.R heavily placed his reliance on the decision rendered by Hon'ble Supreme Court in the case of Genpact India (P) Ltd (2019)(111 taxmann.com402) and submitted that the Hon'ble Supreme Court has held that the additional tax payable u/s 115QA can be challenged u/s 246A under the clause "an order against the assessee where the assessee denies his liability". He submitted that the Hon'ble Supreme Court did not lay down proposition that there has to be a separate appeal filed before Ld CIT(A) for the liability u/s 115QA. He further submitted that the Hon'ble Supreme Court did not advert to the point that the "denial of liability to tax" may not be a subject matter of the assessment proceedings u/s 143(3) and it did not put a bar on raising the said issue as an additional ground in the appeal filed against the assessment order passed u/s 143(3) of the Act.
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> 4.5 The Ld A.R also submitted that the details of DDT are given in the Income tax return filed by the assessee and further there is no separate assessment procedure prescribed for assessing the correct amount of DDT liability u/s 115-O. He submitted that the assessment order did not discuss anything about DDT and hence it should be assumed that this amounts to deemed acceptance of DDT liability by the AO. He submitted that the same amounts to application of mind as held in the case of Kelvinator (2002)(256 ITR 1) by Hon'ble Delhi High Court. Accordingly he submitted that it cannot be said that the DDT

liability is not part of assessment order passed u/s 143(3), if it is not specifically discussed in the assessment order, especially when there is no other section in the Act dealing with the assessment of DDT liability like the case of Fringe Benefit Tax assessment. He further submitted that the Hon'ble Madras High Court in the case of CIT vs. Indian Express (Madurai) (1983)(13 Taxman 441)(Mad) has held that any point which goes into the adjustment of tax liability can be looked into by ITAT.

4.6 He submitted that in the case of Maruti Suzuki vs. DCIT (2019)(ITA No.961/Del/2015), the revenue has stated that the DDT was not part of tax liability of the assessee nor it is part of assessment record and accordingly contended that the ground on DDT cannot be admitted. However, the Delhi Tribunal has admitted additional ground on DDT liability.

4.7 Without prejudice to the above arguments that the Tribunal should admit additional ground, the Ld A.R submitted that if the ITAT were to hold that the appellant had to first file appeal on this ground before Ld CIT(A) u/s 246A, then the ITAT may direct Ld CIT(A) to admit the appeal of the appellant condoning the delay in filing the appeal.

4.8 We heard Ld D.R on this issue and perused the record. The DDT is paid as per the provisions of sec.115-O, which is titled as "Tax on Distributed Profits of Domestic Companies". The assessment order is passed u/s 143(3) of the Act, wherein the assessing officer is required to make assessment of the "total income or loss" of the assessee. The expression "total income" is defined in sec. 2(45) of the Income tax Act to mean the "total amount of income referred to in section 5, computed in the manner laid down in this Act. It can be noticed from section 5, it talks about the income received or deemed to be received or accrued or deemed to accrue or arise. Thus when the assessing officer is determining "total income" of the assessee, he is required to look into the income received or deemed to be received or accrued or deemed to accrue or arise. On the contrary, it can be noticed that the DDT is a "tax payable on the distribution of dividend" and it is in no way connected to the determination of "total income". The appeal filed by the assessee

before us is related to the "determination of total income" u/s 143(3) of the Act.

4.9 Now the question that arises is whether the assessee can raise the issue relating to payment of DDT in an appellate proceeding relating to determination of total income u/s 143(3) of the Act. We notice that the Hon'ble Delhi Court in the case of Genpact India (P) Ltd vs. DCIT (2019)(108 taxmann.com 340) dealt with a writ petition filed before it by the assessee challenging the demand raised u/s 115QA of the Act, which relates to tax on distributed income by way of buy back of shares. The writ petition was filed on the reasoning that the Income tax Act does not provide appeal remedy for the additional tax demanded u/s 115QA of the Act. However, the revenue submitted that the assessee is having alternative remedy for filing appeal before Ld CIT(A) and accordingly prayed for rejection of Writ petition filed by the assessee. It is pertinent to note that the said assessment order passed by the AO included the demand raised u/s 115QA of the Act also besides the demand raised u/s 143(3) of the Act. The Hon'ble Delhi High Court rejected the writ petition and allowed the assessee to file separate appeal before Ld CIT(A) u/s 246A of the Act against the tax liability raised u/s 115QA of the Act. With regard to the contention of the assessee that the additional tax payable u/s 115QA should not be construed as forming part of assessment order, the Hon'ble Delhi High Court answered the same as under:-

> "16. At the outset, the Court would first like to deal with the submissions of Mr Ganesh that the impugned demand raised under Section 115-QA of the Act should not be construed as forming part of the impugned assessment order and that it is something separate from it. While it is true that the demand under Section 115-QA of the Act would be in addition to the total income, the fact of the matter is that in the present case it forms an integral part of the impugned assessment order under Section 143 (3) of the Act. Reading the assessment order as a whole, it is plain to the Court that this demand under Section 115-QA of the Act is in addition to demands under other issues, all of which form part of the impugned assessment order. In fact, Paragraph 11 of the impugned assessment order,

> which gives the computation of the total taxable income, includes the demands raised under all heads and it includes the demand under Section 115-QA of the Act. Therefore, it is not possible for this Court to read this part of the order separate from the rest of the assessment order."

4.10 It is pertinent to note that the M/s Genpact India P Ltd challenged the above said decision rendered by Hon'ble Delhi High Court before Hon'ble Supreme Court and the decision of Hon'ble Supreme Court is reported in (2019)(111 taxmann.com 402). As noticed earlier the Hon'ble Apex Court held that the contention of the assessee that it is not liable to pay tax u/s 115QA would fall under the clause "an order against the assessee where the assessee denies his liability to be assessed under this Act". mentioned in clause (a) of sub. Section (1) of sec. 246A of the Act. Since the DDT payable u/s 115-O of the Act is an additional tax liability akin to the tax payable u/s 115QA of the Act, there should not be any dispute that the assessee can challenge the liability imposed on it u/s 115-O of the Act as held by Hon'ble Supreme Court in the case of Genpact India P Ltd (supra).

4.11 However, the question that arises is whether the assessee can challenged the liability u/s 115-O of the Act by raising an additional ground in the appeal filed against the assessment order passed u/s 143(3) of the Act. It is pertinent to note that clause (a) of sub. Sec. (1) of sec. 246A contains various types of the orders passed by the tax authorities which, inter alia, includes

(a) an order against the assessee where the assessee denies his liability to be assessed under this Act and

(b) any order of assessment under sub-section (3) of section 143.

Thus the grievance of the assessee on DDT liability falls under different class of liabilities mentioned in sec. 246A of the Act. Further, Sec. 246A provides for appellate remedy for different types of tax demands raised upon the assessee and there should not be any dispute that the assessees have been filing separate appeals for the demand raised under different sections of the Act.

4.12 In the case of Genpact India P Ltd, the Hon'ble Delhi High Court noticed that the additional tax liability u/s 115QA was raised in the assessment order itself. Hence the Hon'ble Delhi High Court held that "it is not possible for this Court to read this part of the order separate from the rest of the assessment order". We also notice that M/s Genpact India P Ltd had filed appeal before Ld CIT(A) challenging various additions made by the AO while determining the total income of the assessee and by the time the writ petition was disposed of by Hon'ble Delhi High Court, the Ld CIT(A) had disposed of the appeal filed by the assessee and further the revenue had challenged his order by filing appeal before ITAT. However, the assessee was directed by Hon'ble Delhi High Court to agitate the issue of tax liability u/s 115QA by filing appeal before Ld CIT(A) only.

4.13 In the instant case, first of all, the DDT liability is not forming part of assessment order passed u/s 143(3) of the Act. Further, the liability u/s 115-O can be challenged under the clause "an order against the assessee where the assessee denies his liability to be assessed under this Act" mentioned in sec.246A(1)(a) as held by Hon'ble Supreme Court. The above said clause is a separate clause unconnected with the clause "any order of assessment under sub-section (3) of section 143".

4.14 Accordingly, we are of the view that the assessee cannot raise the additional ground relating to DDT liability in the present appeal. The assessee, if so advised, may prefer appeal in that regard before Ld CIT(A). Since the assessee had entertained bonafide belief that its grievance on DDT liability can be raised as additional ground before ITAT, it did not file appeal before Ld CIT(A). Accordingly, we direct the Ld CIT(A) to take a lenient view on the matter of condonation of delay, if the assessee prefers appeal before him on DDT liability of the year under consideration.

4.15 In view of the foregoing discussions, we reject the additional ground raised by the assessee on DDT liability."

10. Respectfully following the aforesaid decision of the coordinate Bench of the Tribunal, we reject the additional ground raised by the assessee on the DDT liability. However, since it is submitted that the assessee did not file appeal on this issue before the CIT(Appeals) on a bonafide belief that its grievance on the DDT liability can be raised as an additional ground before the ITAT, we also direct the assessee that, if so advised, may prefer appeal before the CIT(Appeals) in this regard. In such an event, the CIT(Appeals) may take a lenient view on the matter of condonation of delay, if any. With these observations, the additional ground by the assessee for all the assessment years is dismissed.

11. The brief facts of the case are that assessee was incorporated on 21.07.2006 under the Companies Act with following JV Companies viz., IndianOil, IOT Infrastructure & Energy Services Limited (IOT I & ESL) and Skytanking, Germany with equal participation of all the three companies. IOT I & ESL made an offer to other two shareholders to sell its entire equity holdings in equal proportion. It was accepted by the other two shareholders and the transfer of shares was approved by the Board of Directors of the assessee on 16th Nov 2015 and from that date i.e. 16.11.2015 the assessee has become a Joint Venture Company with two shareholders Indian Oil Corporation Ltd and Skytanking Holding GmbH Germany with equal equity participation (50:50). The assessee is engaged in the operation of Fuel Farm ownership and operations in Bangalore (Bangalore Fuel Farm

facility) through which the assessee earned a revenue of Rs. 80,25,96,360. Oil Marketing Companies (OMC) store oil in the fuel farm facility operated and maintained by the assessee and bill the airline companies directly for the oil supplied to the aircraft. Assessee charges the OMCs for the fuel farm operation and maintenance fee. The assessee had claimed tax holiday u/s 80-IA for this portion of its revenue for the first time in the year under consideration.

12. The Assessee for AY 2015-16 e-filed its return of income on 25.11.2015 declaring the taxable income of Rs 33,59,53,495 after claiming deduction Rs 2,10,19,853 under section 80-IA of the Act in respect of profits derived from the Bangalore Fuel Farm facility. Case was selected for scrutiny assessment and the assessment order was passed by the AO vide order dated 04.12.2017 assessing total income at Rs.37,22,76,709 under normal provisions of the Act. The AO made the following two disallowances in the assessment order:-

Sl.No.	Particulars	Amount Rs.
1.	Disallowance of deduction claimed under section 80IA of the Act	2,10,19,853
2.	Disallowance of interest (under interest rate swap agreements)	1,62,03,356
Total disallowances		**3,72,23,209**

13. The first common issue in all these appeals for consideration is the **disallowance of deduction claimed u/s. 80IA of the Act.**

14. The Government of India (Ministry of Civil Aviation ('MOCA') and Bangalore International Airport Limited ('BIAL') signed a concession agreement through which BIAL may grant service provider rights to any person for carrying out the activities of the development, design, financing, construction, commissioning, maintenance, operation and management of the Airport. Accordingly, BIAL awarded a contract to design, finance, construct and operate an Aviation Fuel facility at the Bangalore International Airport to the assessee by entering into a Service Provider Right Holder ('SPRH')

15. The assessee company constructed the aviation fuel facility at Bangalore International Airport. The aviation fuel facility as mentioned in SPRH means the fuel farm, the feeder lines and the hydrant system required to be constructed, commissioned, operated and maintained in accordance with the specifications agreed between the assessee and BIAL in its SPRH agreement. The assessee completed the construction of aviation fuel facility in April 2008 and the facility was put to use on 24 May 2008. It is also operating the aviation fuel facility at Bangalore International Airport. Since the assessee is engaged in the business of developing, operating and maintaining "infrastructure facility" as defined in Explanation to section 80-IA(4) of the Act, in the return, it claimed deduction under section 80-IA(1) read with section 80-IA(4).

16. The relevant sub-sections of section 80-IA of the Act, which reads as under:-

"(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(4) This section applies to -

any enterprise carrying on the business of (*i*) developing or (*ii*) operating and maintaining or (*iii*) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely :—

a) it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;

b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (*i*) developing or (*ii*) operating and maintaining or (*iii*) *developing, operating and maintaining a new infrastructure facility;*

c) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995

….

Explanation - For the purposes of this clause, "infrastructure facility" means—

….

(d) a port, *airport*, inland waterway, inland port or navigational channel in the sea"

17. The assessee accordingly made its first effective claim for deduction under section 80-IA for the relevant AY 2015-16 for a sum of Rs. 2,10,19,853 under section 80-IA(1) after setting-off notionally brought forward losses of eligible business of earlier years

18. During the course of assessment proceedings, the AO by notice dated 16/06/ 2017 issued u/s. 142(1) of the Act, requiring the assessee to substantiate the deduction claimed under section 80IA. The assessee made the following submission before the AO:-

(i) The assessee is incorporated with the main object of designing, financing, constructing and operating an aviation fuel facility and providing into-plane refuelling services at the airports.

(ii) The assessee has built aviation fuel facility at the Bangalore Airport. The assessee operates it under an agreement for 20 years under Built Own Operate and Transfer (BOOT) Model. The assessee also handles into plane services at Bangalore Airport for 10 years.

(iii) The assessee is eligible to claim deduction under section 80-IA of the Act for 10 consecutive years out of 15 years from the date of initiation of operations of infrastructure facility.

(iv) The assessee started claiming deduction under section 80IA of the Act from the assessment year 2015-16.

19. The assessee also enclosed Form no. 10CCB certifying deduction claimed under section 80-IA and copy of service provider right holder agreement (SPRH). However, the AO in the assessment order passed under section 143(3) disallowed the deduction claimed u/s. 80-IA. On appeal to the first appellate authority, the CIT(Appeals) upheld the AO's order.

20. The main reasons for not allowing the deduction u/s.80IA to the assessee by the lower authorities are as given below:-

a) Fuel Farm Facility does not fall within the meaning of "Airport" as per clause (d) to explanation to section 80IA(4) and hence a not an "infrastructure facility".

b) The SPRH agreement entered into by the assessee with BIAL is not regarded as an agreement entered into with Central Government or State Government or a local authority or statutory body as in clause (b) of section 80IA(4).

21. The assessee is in appeal before the Tribunal aggrieved by the decision of the lower authorities.

22. Besides the above, the assessee is also contending the quantification of deduction u/s.80IA which the assessee had inadvertently claimed at Rs.2,10,19,853 after setting-off notionally brought forward losses of eligible business of earlier years although the profit eligible for deduction under section 80IA of the Act was Rs.6,28,28,951.The assessee raised this claim before the CIT(A) which was rejected and hence this issue is raised before the Tribunal now for adjudication.

23. We will first consider the issue of whether the fuel farm facility falls within the meaning of 'airport' and is an 'infrastructure facility'. The AO observed that that fuel farm facility established by the assessee in the vicinity of airport to cater to the need of aircrafts for aviation fuel did not come under the definition of 'Airport' as in explanation to section 80IA of the ACT. The AO has referred to the definitions in the

'Airport authority of India Act' and 'Aircraft Act' to conclude that fuel farm does not form part of Airport. The AO also noted that fuel farm facility is located at the vicinity of the Airport only as a cost cutting measure. It is not integral part of the Airport as such facility is not available in few other Airports. The CIT(A) confirmed the disallowance made by the AO stating that Schedule 2 of concession agreement states that farm fuel facility is not located on the airport site but to the west of the airport site and that the fuel farm is located outside the airport and fuel is transported from there to the airport for re-fuelling the aircraft by means of fuel hydrants and fuel tanks. The CIT(A) concluded that the facility provided by the assessee would not get covered under word 'Airport' and hence the assessee is not entitled for deduction u/s.80IA.

24. In connection with whether the fuel farm facility falls within the meaning of airport, the ld.AR drew our attention to the relevant parts of the concession agreement Article 1 of concession agreement defines the term 'airport', 'initial phase' as under:-

> "Airport" means the greenfield international airport comprising of the **Initial Phase** to be constructed and operated by BIAL at Devanahalli, near Bangalore in the State of Karnataka and includes all its buildings, equipment, facilities and systems and including, where the circumstances so require, any Expansion thereof, as per the master plan annexed hereto as Attachment-1."
>
> "Initial phase" means the design, financing, construction, completion and commissioning of the facilities described in Schedule 2.

25. Schedule 2 of the concession agreement provides description of the initial phase of the Airport. Serial no.15 of the Schedule 2 provides construction of fuel farm facility at the Airport as follows:-

> "15. Fuel Farm
>
> It is essential to provide a storage area for the supply of aviation fuel for the refuelling of aircraft that land at Bangalore. The master plan has allocated a space for the fuel farm to the west of the airport site.
>
> Provision of fuel hydrant system to transport fuel from the depot to the aircraft shall be included in the concession agreement with the supplier.
>
> In the initial phase as the rate of aircraft movement is not very high and the fuel requirement not very great, combination of fuel hydrant and fuel tanks for remote stands would be used to refuel the aircraft."

26. From the above, it was submitted that aviation fuel facility is part of the airport and therefore should qualify as infrastructure facility under Explanation to section 80-IA(4) of the Act.

27. Further reference is invited to SPRH agreement. Clause 1.1 defines the term "airport" and "facility" as under:-

> "Airport" means the greenfield international airport to be constructed and operated by BIAL at Devanahalli, near Bangalore in the State of Karnataka and includes all its land, buildings, equipment, facilities and systems."
>
> "Facility" or "Aviation Fuel Facility" means the Fuel Farm, the Feeder Lines and the Hydrant System required to be constructed, commissioned, operated and maintained in accordance with the Specification."

28. According to him, as per SPRH agreement also, the term "airport" includes facility which is nothing but aviation fuel facility constructed by the assessee.

29. The ld AR relied on the following decision to substantiate his contention that the fuel farm facility is part of 'Airport':-

a. **M/s. Menzies Aviation Bobba (Bangalore) Private Ltd. (ITA No.22/Bang/2014) (Bangalore Tribunal)** where the Tribunal has held that construction of cargo terminal for handling of cargo constitutes an integral part of the airport and deduction is admissible on such income u/s 80-IA(4) of the Act

b. **Max Aerospace and Aviation Ltd. (ITA. No. 43/Mum/2014) (Mumbai Tribunal)** where the Tribunal held that hangar constructed by assessee is not a place merely to park the aircraft. It is a full-fledged repair and maintenance centre for aircraft and hence revenue received on account of repairs and maintenance service is by operation of maintenance of hangar which is an infrastructural facility, eligible for deduction under section 80-IA(4) of Act.

30. The ld. AR submitted that in the assessee's case also, aviation fuel facility is an essential part of airport. It performs one of the crucial functions of fuelling of aircrafts without which there will be restriction on the movement & flying of an aircraft from the airport. Therefore, the ld AR submitted that aviation fuel facility operated and maintained by the assessee should be considered as "airport" and consequently covered under the definition of the term "infrastructure facility" as defined in Explanation to section 80-IA(4) of the Act.

31. On the other hand, the ld. DR supported the decision of the lower authorities and submitted that the Fuel farm facility did not fall within the meaning of 'airport' and hence not an 'infrastructure facility'.

32. We heard the rival submissions and perused the materials on record. The word 'Airport' is not defined under the Act and hence there is no direct way to conclude whether the fuel farm facility is part of 'Airport'. A reference in this regard is therefore made to section 2(b) of the Airport Authority of India Act, 1994 wherein, 'airport' means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes 'aerodrome' as defined in clause (2) of section 2 of the Aircraft Act, 1934. Now let us look at the definition of the word 'aerodrome'. 57. As per section 2(2) of the Aircraft Act, 1934, 'aerodrome' means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers and 'other structures' thereon or appertaining thereto. The ld AR submitted that the term "other structures" in the definition of "aerodrome" includes the space or structure built for the purposes of fuel management, cargo, parking or maintenance, loading and unloading, etc. In this connection, reference is invited to "Civil Aviation Requirements" dated 26 August 2015 issued by the Government of India laying down guidelines for design and operation of Aerodrome. "Civil Aviation Requirements" defines the term

"Apron" as "A defined area, on a land aerodrome intended to accommodate aircraft for purposes of loading or unloading passengers, mail or cargo, fueling, parking or maintenance."

33. Though there is no direct definition of 'Airport' to state that it includes the fuel farm facilities, the various interlinked definitions lead to the conclusion that the term "airport" includes "aerodrome" and the term "aerodrome" in turn includes the term "apron" which is nothing but a defined land for fueling of aircraft.

34. Further the relevant clauses of the Article 1 and Schedule 2 of concession agreement includes fuel farm facility as part of the term 'Airport' according to the definition of the said term in the agreement. Reference is also invited to the definition of "airport activities" in Article 1 of the concession agreement (page 3 of the concession agreement), which reads as under:-

> "Airport Activities" means the provision, at or in relation to the airport, of the activities set out at Schedule 3, Part 1 as amended from time to time, pursuant ICAO guidelines, provided that any activities that are not materially similar to those contemplated in Schedule 3, Part 1 shall require the mutual agreement of the Parties." Schedule 3 of the concession agreement list down airport and non-airport activities. Part 1 list down airport activities and Part 2 list down non-airport activities. Part 1 which list down airport activities includes Aircraft fuelling services. **(page 64 of the concession agreement – page 155 of paper book-1).**

35. The relevant clauses of the SPRH agreement also defines the term 'Airport' and 'facility' which includes the fuel farm facility from which it is observes that as per SPRH agreement also the term "airport" includes facility which is nothing but aviation fuel facility constructed by the assessee.

36. We notice that the Karnataka High Court in the case of M/s. *Menzies Aviation Bobba (Bangalore) Private Limited (ITA No.186 of 2016)* with regard to 'cargo handling services' being part of 'Airport' for the purpose claiming deduction u/s.80IA(4) has held that -

> "10. Now, we may deal with the issues whether the activity of the assessee in providing cargo handling services is covered under the expression 'infrastructure development'. The CIT(A) vide order dated 11.06.2012 inter alia has held that from perusal of the layout map of the airport, it is evident that the cargo complex is connected to other infrastructure facilities by airside service road running parallel to the main runway. The aforesaid road serves the isolation bay, fire station, cargo complex, **fuel farm**, and maintenance area as per Clause 4 of the concession agreement between the BIAL and Government of India. It has also been held that the expression "aerodrome" as defined in section 2(2) of the Aircraft Act is an inclusive definition and uses the expression 'includes'. It has been further held that the large amount of non passenger cargo is being uploaded to the commercial aircraft in addition to passengers luggage and therefore, location of cargo handling area is linked with critical airside service road and parking of statutory infrastructure relating to security, customs ,x-rays, etc within its operations, indicates that this service is part of commercial operations undertaken by the air cargo operators and other air transporters whose equipment and machinery are also integrated into the definition of "aerodrome" as per section 2(2) of the Aircraft Act, 1934. Thus it has been held by the CIT(A) that cargo handling services are located within the airport and are critical infrastructure facilities and are deemed to be part of the airport."

37. We have taken into consideration the fact that Part 1 of Schedule 3 of the concession agreement list down airport activities which includes Aircraft fuelling services and Cargo Handling Services. It is also noted that the definition of 'Airport' is an inclusive wide definition and will include within its ambit various structures developed at the airport like aviation fuel facility, cargo facility, hangar etc. Hence we are of the considered view that the ratio laid down by the Hon'ble Karnataka High Court in the case of *Menzies Aviation Bobba (Supra)* is applicable in the present case while analyzing whether fuel farm facility is an integral part of the 'Airport'. One of the key requirements of the airport is that it provides all the necessary facilities for the delivery of fuel to aircrafts at standards compliant with good industry practice. The fuel supply reliability has a major impact on financial and operational viability of flights. Aviation fuel facility forms a vital part of the fuel supply chain. The aviation fuel facility is critical component and inextricably linked to the airport.

38. It is obvious that large planes cannot take off for long distance without the appropriate quantity of fuel and therefore aviation fuel facility is a necessary part of the infrastructure of an airport. . Therefore, fuel farm facility is an integral part of the 'Airport'.

39. The alternate argument of the ld DR was that as per Explanation below section 80 IA(13), section 80-IA(4) does not apply to a business which is in the nature of a "works contract". As assessee got rights under the SPRH from BIAL, assessee has performed a "works

contract" and therefore is not entitled to section 80-IA benefit. Ld. DR cited following judgments for this proposition:-

(i) Judgment of the Karnataka HC in Yojaka Marine Pvt Ltd (ITA 428-429 of 2012 dated April 22, 2013), and

(ii) ITAT LB decision in the case of BT Patil & Sons Belgaum Constructions (P) Ltd (2010) 35 SOT 171 (Mumbai ITAT).

40. As a counter argument, the ld AR submitted that :-

(i) The nature of work done by the assessee in respect of the design, financing and developing the entire fuel farm facility cannot be said to be a works contract.

(ii) As per Para 3 of the SPRH contract (page 201 of the Paper book), the assessee has been granted certain 'service provider rights' which involves the entire gamut of design, construction, testing, financing and commissioning of the fuel farm facility on a Build Own Operate Transfer (BOOT) model.

(iii) Clause 3.2.3 of the SPRH contract (page 202) also recognizes the fact that the assessee is acting as an Independent Contractor and not as an agent or partner of BIAL.

(iv) The aspect of having 'contractual rights' under the SPRH is different from executing a works contract for and on behalf of a principal.

(v) The assessee has made an investment of Rs 125 crores in the Infrastructure pertaining to the Fuel Farm (see page 19 of Paper book - Building and Plant & Machinery under "Fuel farm facility & Hydrant systems). This appears in the Balance Sheet on the assets side. The assessee is the owner of the entire fuel farm facility.

41. The ld AR, therefore, submitted that the assessee cannot be equated with a person who is engaged in a 'works contract', who does not own the asset and merely gets compensation for executing the contract.

42. The ld AR further submitted that the assessee is incorporated with the main object of designing, financing, constructing and operating an aviation fuel facility and providing into-plane refueling services at the airports. He invited our attention to the various clauses of SPRH and Operating agreement viz., Clause 4 (page 15 & 17), Clause 10 (page 26), Clause 19 (page 34&35) which show that the assessee has constructed the aviation fuel facility and is the owner of the aviation fuel facility for the period of 20 years at the end of which period the same is required to be transferred to BIAL. The said facility is under Built Own Operate and Transfer (BOOT) Model and as per **CBDT Circular No.717 dated 14 August 1995** the deduction under section 80-IA is available in case of Built Operate Transfer (BOT) or Built Own Operate & Transfer (BOOT) projects. The ld. AR pointed out to the audited financial statements for the year ended 31 March 2015. Note no.10 of the Audited Financial Statement provides details of the Tangible fixed assets of the assessee wherefrom it may be observed that the assessee has capitalized fuel farm facility and Hydrant system in the books of account since it is the owner of these assets. Therefore, the assessee satisfies the condition of owning the

infrastructure facility as mentioned above and eligible to claim deduction under section 80-IA of the Act.

43. We notice that the decision of jurisdictional high court in the case of *Yojaka Marine Pvt Ltd*. (supra) relied by the revenue is clearly distinguishable as the Hon'ble High Court in that case has decided the issue based on the fact that the assessee therein has not made any investment and the contract entered into was for repairs and maintenance only. However in assessee's case, the Fuel Farm is operated under an agreement for 20 years under BOOT Model.

44. The Hon'ble Karnataka High Court in the case of *Menzies Aviation Bobba (Bangalore) P. Ltd (supra)* has held that :-

> "11. The Appellate Authority has also taken note of the fact that SPRH agreement gives rights for design, construction, financing, testing, commissioning, management and operation of the facility for a total period of 20 years to the assessee and the concession is on built, operate and transfer basis. Therefore, it has been held that every contractor may not be a developer but every developer developing infrastructure facility on behalf of the Government is a contractor. In CHETTINAD LIGNITE TRANSPORT SERVICES P. LTD., supra, it has been held that proviso intends to extend the benefit of deduction under Section 80IA of the Act even to a transferee or a contractor who is approved and recognized by the concerned authority and undertakes the work of development of infrastructure facility or only operates or maintains the same. Thus, in view of aforesaid enunciation of law, it has rightly been concluded by the Appellate Authority that the assessee is engaged in development operation and maintenance of an infrastructure

facility in the light of provisions of SPRH agreement. The aforesaid finding has been affirmed in appeal by the Tribunal. The aforesaid findings are concurrent findings of fact which do not suffer from any perversity. Learned counsel for the revenue was unable to point out any perversity in the findings of fact recorded by the Commissioner of Income Tax (Appeals) as well as by the Tribunal. It is well settled in law that the concurrent findings of fact do not suffer from any perversity warranting interference of this court in exercise of powers under Section 260A of the Act. [SEE: SYEDA RAHIMUNNISA VS. MALAN BI BY L.RS. AND ORS. (2016)10 SCC 315 and PRINCIPAL COMMISSIONER OF INCOME TAX, BANGALORE & ORS. VS. SOFTBRANDS INDIA P. LTD., (2018) 406 ITR 513]."

45. In view of the aforesaid discussion, we are of the considered view that the fuel farm facility built, owned, and operated [BOT] by the assessee falls within the meaning of 'airport' and hence it is an 'infrastructure facility' as per Explanation to section 80IA(4) of the Act.

46. The next issue with regard to the allowability of deduction u/s.80IA of the Act is that the BIAL is not a public/private consortium and is not a statutory body and hence the assessee is not entitled for the deduction as per section 80IA(4).

47. It is the contention of the lower authorities that, the assessee had not entered into an agreement with Central Government/ State Government/Local authority/ Statutory body. BIAL was a public-private consortium and is not a statutory body. BIAL is not a body or

authority established by any Act or law. The assessee submitted that the Bangalore Tribunal in the case of *Menzies Aviation Bobba (Bangalore) P. Ltd. (ITA No. 1160/Bang/2012)* had followed the decision of the Karnataka High Court in the case of *M/s Flemingo Dutyfree Shops P. Ltd (W.P. No. 14215 of 2006 dated 19.12.2008)* and held at paragraph 7 as under:-

> "7. As the very same grounds on which this Tribunal has held that BIAL is not a statutory body, have been considered by the Hon'ble High Court and have been accepted that it is a statutory body. Therefore, respectfully following the Hon'ble jurisdictional High Court Order, we do not see any reason to interfere with the order of the CIT(A)."

48. However the CIT(Appeals) rejected the submissions of the assessee stating that the Bangalore ITAT in *Menzies Aviation Bobba (Bangalore) Private Limited (supra)* did not take note of an earlier decision of in *Central Food Technological Research Institute (ITA No 1607 to 1611/Bang/2013)*, wherein it has been held that corporations or financial corporations which have trappings of Government, but their employees could not be equated with Government employees as they are not holding office in connection with affairs of Union or State. The CIT(A) also relied on *Karnataka Power Transmission Corporation Limited (93 taxmann.com 89), National Diary Research Institute [(2018) 94 taxmann.com 19] and Rejinder Tiku (1996) 59 ITD 410 (Delhi)*.

49. The ld. AR submitted that the Government of India and BIAL signed a concession agreement on 5 July 2004. As per Article 3.1.1 of

the concession agreement (page 103 of the PB), the Government of India has granted BIAL the exclusive right and privilege to carry out the development, design, financing, construction, commissioning, maintenance, operation and management of the airport.

50. As per Article 3.2.1 of the concession agreement (page 12 of the concession agreement and page 103 of the paper book), BIAL may carry out the following activities:-

i. any activity or business related or ancillary to the activities referred to in Article 3.1 or which BIAL considers desirable or appropriate to be carried on or engaged in connection therewith (including any infrastructure service considered by BIAL to be reasonably necessary for the activities referred to in Article 3.1);
ii. …
iii. …

51. As per Article 3.2.2 of the concession agreement (page 12 of the concession agreement and page 103 of the paper book), BIAL to exercise the above functions and activities grant Service Provider Rights (including the right of the Service Provider Right Holders to grant sub-rights) to any person for the purpose of carrying out the activities and businesses described above.

52. The recitals to SPRH agreement are reproduced below:-

A. Pursuant to a Concession Agreement (defined later), the Government of India has granted BIAL the exclusive right

and privilege to carry out the development, design, financing, construction, commissioning, maintenance, operation and management of the Airport, in accordance with the terms contained therein.

B. The Concession Agreement recognizes that BIAL may, subject to the Concession Agreement, grant Service Provider Rights to any person for carrying out the activities mentioned in Recital A above, on such terms and conditions as BIAL may determine are reasonably appropriate.

C. One of the key requirements for the Airport is the provision of cost effective, fit for purpose supply of aviation fuel at the Airport for which BIAL had issued tender documents requesting interested parties to submit their responses for the design, financing, construction testing and commissioning of the Facility (defined later).

D. Pursuant to the aforesaid process, the SPRH comprising the consortium of IOCL, STH and IOTL have been awarded the Service Provider Right for the design, construction, financing testing and commissioning of the Facility pursuant to and in accordance with the terms and conditions set out herein.

53. Accordingly, the ld. AR submitted that BIAL has awarded a contract to design, finance, construct and operate an Aviation Fuel facility at the Bangalore International Airport to the consortium of Indian Oil Corporation Limited, Skytanking Holding GmbH, Germany and Indian Oiltanking Limited by entering into a SPRH and Operating agreement on 1 March 2006. As mentioned above, the Consortium's rights and obligations were novated and transferred to the assessee as if

the assessee had originally been named as a party to the aforesaid agreements instead of consortium.

54. He submitted that GOI cannot enter into agreement with all the parties for the development, operation and maintenance of the airport. Accordingly, it has granted rights to BIAL for development, operation etc. of the airport vide concession agreement. As mentioned above, GOI has granted authority to BIAL to grant such rights to any other person. Accordingly, the GOI has delegated its authority to BIAL for entering into agreements for the operation and maintenance of the airport. In terms of the delegated authority, BIAL has entered into agreement with the assessee company to grant the rights to develop, operate and maintain the aviation fuel facility at the Bangalore International Airport. Therefore, the agreement between BIAL and the assessee satisfies the condition of entering into an agreement with Government or statutory body.

55. Alternatively, the ld AR submitted that in order to support and foster rapid development of Bangalore, Government of Karnataka and the Airports Authority of India (in short referred to as "A.A.I") initiated a Green Field Project for the new BIAL, which is a Public Limited Company. BIAL is a consortium of Karnataka State Industrial Investment Development Corporation, A.A.I, Unique-Zurich Airport, Larsen & Toubro India Ltd. and Siemens Projects Ventures, GmbH.

56. BIAL is operating under the control of the State in particular under the control of A.A.I, the BIAL discharges duties of a public nature. 26% of the share is held by the Governmental Authorities, all important decisions has to be taken only with the approval of the Governmental Bodies and substantial representation on the Board of Directors from the Government nominees are there for effective functioning of BIAL. State Government has got comprehensive control over the functioning of BIAL. The BIAL has got financial aid from the State and its undertaking Companies, functionally and administratively dominated by and controlled by the Union of India. BIAL being the public body discharging duties of a public character. The ld AR argued that BIAL is a "State" within the meaning of Article 12 of the Constitution of India which reads as under:-

> "12. In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

57. The ld. AR therefore submitted that the assessee has entered into agreement with the statutory body and therefore it complies with the above condition.

58. The ld DR supported the decision of the lower authorities.

59. We have heard the rival submissions and perused the material on record. We notice that the Karnataka High Court in the case of *M/s Flemingo Dutyfree Shops P. Ltd (supra)* has held that -

"(xi). With reference to the said rival legal contentions, we have to answer the above point in favour of the petitioner for the reason that as we have already recorded our reasons while answering points 1 to 3 in this judgement with regard to public duties, functions/statutory duties which are required to be carried out by the BIAL pursuant to the statutory provisions of section 12 of A.A.I Act and the functions of second respondent A.A. has been entrusted to the third respondent – BIAL established by members of the consortium of BIAL running of the private international airport at Devanhally, to discharge the statutory functions of the second respondent A.A.I and in view of the various constitutional Bench decisions of the Apex court which are extracted in the preceding paragraphs of the judgement in answer to the contentious points 1 to 3 to hold that discharge of functions by the BIAL pursuant to the shareholder agreement, lease deed and concession agreement referred to supra for establishment of private Airport statutorily permissible after amending to section 12(3)(aa) of the A.A.I.A Act. Nonetheless its functions are that of the Airport Authority and therefore, it has been discharging public duties and functions in providing airport facility to the public at large by establishing BIAL in the vast extent of nearly 4000 and odd acres of land acquired by the Karnataka State Government in exercise of its eminent domain power in favour of K.I.A.D.B and the Government order produced by the BIAL would establish the fact that the said vast extent of land acquired by the State Government for the purpose of formation of an international Airport and the said land has been transferred in favour of K.S.I.I.D.C and in turn it is leased in favour of BIAL and the companion shareholders. The board of management of the BIAL, its administrative functions required to be performed by the board of directors, it decision and their activities are subject to regulations of the statutory provisions of the A.C and A.A.I. Act and Rules framed therein. Therefore, we have already held that BIAL is an Authority and State which comes as defined under Article 12 of the Constitution of India and as interpreted by the Supreme Court in the catena of decisions which are extracted in the preceding paragraphs of this judgement while answering the aforesaid contentious point."

60. Respectfully following the binding decision of the jurisdictional High Court, we hold that BIAL is a State under Article 12 of the Constitution of India carrying out statutory functions/public duties. Accordingly, BIAL is a statutory body and therefore, the above condition is satisfied and the assessee is eligible to claim deduction under section 80IA of the Act.

61. In view of the aforementioned discussion, we hold that the assessee is entitled to deduction u/s.80IA on the income earned from the operation and maintenance fees charged from the OMCs for the fuel farm facility, since the assessee has met with the conditions as specified in section 80IA(4). This ground is allowed in favour of the assessee for all the years under appeal, the facts being identical.

62. Before the CIT(A), the assessee made a claim that the assessee had inadvertently claimed deduction of Rs. 2,10,19,853 under section 80-IA(1) after setting-off notionally brought forward losses of eligible business of earlier years and that the correct profit eligible for deduction under section 80IA of the Act was Rs.6,28,28,951. Since the CIT(A) had confirmed the disallowance of section 80IA, he rejected this claim stating the same to be academic.

63. The ld AR submitted that the past losses have actually been absorbed and there was no brought forward loss and in this regard he drew our attention to the return of income **(page 55 of paperbook)**. The ld AR also submitted that as per the provisions of subsection (5) of

section 80IA, the quantum of deduction be computed as if such eligible business were the only source of income of the assessee and hence even if there had been a carry forward loss the same shall not be setoff for the purpose of claiming the deduction u/s. 80IA.

64. We heard the ld DR also on this issue.

65. The relevant provisions of the subsection (5) of section 80IA reads as follows: –

> "(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."

66. From the reading of the above provision, it is clear that once the assessee starts claiming the deduction u/s.80IA for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility, the quantum of deduction u/s.80IA be computed as if such eligible business were the only source of income of the assessee. We, therefore, direct the AO to re-compute the deduction u/s.80IA in accordance with the directions given in this order, after giving reasonable opportunity of being heard to the assessee. This

ground for all the years under consideration being common on same facts, is allowed for statistical purposes.

67. The next issue for consideration is disallowance of interest on hedge swap.

68. The brief facts on this issue are that the assessee had taken a foreign currency term loan from Punjab National Bank (PNB), for setting up its fuel farm aviation fuel facility at Bangalore International Airport. Since it had foreign currency exposure, to mitigate the risk of foreign exchange fluctuation, it had entered into swap arrangement for principal and interest with ICICI Bank.

69. The assessee has entered into a swap arrangement to pay a fixed interest rate on outstanding principal amount and in consideration will receive floating interest rate as determined the contracts. The objective of entering into swap arrangement was to convert USD floating interest rate liability into INR fixed interest rate liability and mitigate the foreign exchange fluctuation risk. During the assessment year 2015-16, the assessee has debited to Profit and loss account under the head 'finance charges' interest paid to PNB on foreign currency term loan of Rs.89,41,335 and interest on swap paid to ICICI Bank of Rs.1,62,03,356.

70. During the course of assessment proceedings, the AO called for the assessee to clarify on interest paid on swap arrangement to ICICI

Bank. In response, it was replied by letter dated 24.10.2017, the summary of the submissions of the assessee were as under:-

- Foreign currency term loan was availed in the year 2007-08 for the purpose of fuel farm facility and into plane services at Bangalore International Airport.
- To cover the company against foreign exchange fluctuation, assessee hedged its foreign currency exposure by entering into an interest rate swap arrangement with ICICI Bank.
- The swap contract is for a period of ten years and the assessee has been paying compensatory charges at an average rate of 6.82% on the outstanding amount of foreign currency term loan.
- The exchange rate of USD to INR has been pegged at Rs.40.2337, whereas the present exchange rate is around Rs.65. Thus, the assessee is protected against the losses due to foreign currency fluctuations.
- The assessee has been paying interest of LIBOR + 1.90% to the primary lending bank i.e. PNB. Thus, the total finance cost works out to only 9.59%, which is less than the normal lending rates by any bank for any business loan and thus, the assessee stands to gain on account of lower interest payments on the foreign currency loan availed by it.

71. The AO observed that the claim of the assessee that the premium/interest paid on hedge is revenue expenditure is not acceptable. The interest payment on hedge (swap) is compensatory payment for any losses that may arise due to adverse foreign exchange fluctuation and hence disallowed the interest. Reliance is placed on the decision of ITAT Bangalore in the case of *M/s Archidply Industries Ltd. v DCIT in ITA No. 1079(B)/2011 dated 31 July 2012*.

72. The CIT(A) confirmed the disallowance by observing that foreign currency loan was still outstanding and hence held that payment made to hedge against the fluctuation would be capital in nature.

73. The relevant provisions of section 36 of the Act under which the assessee has claimed the deduction reads as follows:-

> "Section 36(1) of the Act specifies certain items in respect of which deduction shall be allowed while computing profits and gains from business or profession. The sub-clause (iii) of section 36(1) and proviso to the sub-clause reads as under:
>
> **'(iii)** the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession'
>
> **Provided** that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset whether capitalised in the books of account or not; for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction."

74. The ld. AR submitted that in respect of capital borrowed for acquisition of capital asset, the proviso to section 36(1)(iii) allows the deduction of such interest from the date on which such asset is put to use. Thus, once the asset is put to use interest will be allowed as deduction as per the provisions of section 36(1)(iii) of the Act. In the facts of the present case, as mentioned above, the assessee completed the construction of aviation fuel facility in April 2008 and facility was put to use on 24 May 2008. Therefore, interest on swap paid in the

previous year relevant to the assessment year 2015-16 i.e. after asset put to use should be allowed as deduction under section 36(1)(iii) of the Act.

75. The ld AR also submitted that the decision of *M/s Archidply Industries Ltd.(supra)* relied by the lower authorities is not applicable in the present case. In case of *M/s Archidply Industries Ltd.(supra)*, the assessee had taken a rupee term loan for capital purpose and the assessee had paid premium for conversion of rupee term loan to foreign currency term loan. In the present case, there is no payment of premium, nor, conversion of loan. The assessee has merely restricted its interest rate liability on foreign currency term loan by entering into a swap contract with ICICI bank in its business interest and the assessee is entitled to deduction under provisions of section 36(1)(iii) or 37(1). The ld AR in this regard placed reliance on the decision of the Supreme Court in the case *Core Healthcare Limited [2008] 167 Taxman 206 (SC)* and for the alternate claim of deduction u/s.37(1), he placed reliance on the decision of Supreme Court in the case of *India Cements Limited. [1966] 60 ITR 52 (SC).*

76. In a rebuttal to the finding of the CIT(A) that the loan is taken for capital purpose and to be treated as capital asset, the ld AR submitted that the assessee completed the construction of aviation fuel facility in April 2008 and facility was put to use on 24 May 2008 and therefore, interest on swap paid in the previous year relevant to the assessment year 2015-16 i.e., after asset put to use should be allowed

as deduction under section 36(1)(iii) of the Act. The ld AR also brought to our attention that no disallowance in this regard was made in the earlier assessment years towards interest expenditure.

77. On the other hand, the ld.DR supported the decision of the lower authorities.

78. We heard the rival submissions and perused the material on record. An interest rate swap contract is typically a contract between the two parties which decide to pay interest on fixed rate, as agreed to between the parties, on a notional principal amount in consideration of receiving a floating rate of interest, or vice versa. In practice, these obligations are settled by making a net payment, i.e. difference between fixed and floating rate of interest. If fixed rate of interest is more than the floating rate of interest, the person under obligation to pay fixed rate of interest only pays the difference between fixed rate and floating rate, and when it is the other way round, the net payment is made by the person under obligation to pay the floating rate of interest. These contracts are entered into to hedge against variations in floating rate of interest from time to time.

79. The swap contract entered into by the assessee is for a period of ten years and the assessee has been paying total finance cost of 9.59%, which according to the ld AR is less than the normal lending rates by any bank for any business loan. The exchange rate of USD to INR for repayment of principal and interest was pegged at Rs.40.2331. Thus,

the assessee is protected against the losses due to foreign currency fluctuations. During the assessment year 2015-16, the assessee has debited to Profit and loss account under the head 'finance charges' interest paid to PNB on foreign currency term loan of Rs.89,41,335 and interest on swap paid to ICICI Bank of Rs.1,62,03,356.

80. We notice that the Apex court in the case of *Core Healthcare Limited(supra)* held that :-

> **"8.** Interest on moneys borrowed for the purposes of business is a necessary item of expenditure in a business. For allowance of a claim for deduction of interest under the said section, all that is necessary is that - firstly, the money, i.e., capital, must have been borrowed by the assessee; secondly, it must have been borrowed for the purpose of business; and, thirdly, the assessee must have paid interest on the borrowed amount [See : Calico Dyeing & Printing Works v. CIT [1958] 34 ITR 265 (Bom.). All that is germane is : whether the borrowing was, or was not, for the purpose of business. The expression "for the purpose of business" occurring in section 36(1)(iii) indicates that once the test of "for the purpose of business" is satisfied in respect of the capital borrowed, the assessee would be entitled to deduction under section 36(1)(iii) of the 1961 Act. This provision makes no distinction between money borrowed to acquire a capital asset or a revenue asset. All that the section requires is that the assessee must borrow capital and the purpose of the borrowing must be for business which is carried on by the assessee in the year of account. What sub-section (iii) emphasizes is the user of the capital and not the user of the asset which comes into existence as a result of the borrowed capital unlike section 37 which expressly excludes an expense of a capital nature. The Legislature has, therefore, made no distinction in section 36(1)(iii) between "capital borrowed for a revenue purpose" and "capital borrowed for a capital purpose". An assessee is entitled to claim interest paid on borrowed capital provided that capital is used for business purpose irrespective of what may be the result of using the capital which the assessee has borrowed. Further, the words "actual cost" do not find place in

> section 36(1)(iii) of the 1961 Act which otherwise find place in sections 32 and 32A, etc., of the 1961 Act. The expression "actual cost" is defined in section 43(1) of the 1961 Act which is essentially a definition section which is subject to the context to the contrary."

81. In assessee's case, the core reason for assessee to enter into the swap agreement is to be protected against the losses due to foreign currency fluctuations. The loan borrowed is for the purpose of business and the this swap arrangement which is entered into for repayment is also therefore for the purpose of business viz., Building the fuel farm facility. Therefore the decision of the Hon'ble Supreme Court in *Core Healthcare Limited(supra)* is clearly applicable in assessee's case. We therefore hold that the interest paid on hedge swap taken for repayment of loan borrowed for the purpose of business is to be allowed as a deduction u/s.36(1)(vii). This ground of the assessee is allowed in favour of the assessee in all the appeals on identical facts.

82. In the result, the appeals are partly allowed.

Pronounced in the open court on this 20th day of May, 2022..

Sd/-	Sd/-
(GEORGE GEORGE K.)	(PADMAVATHY S.)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 20th May, 2022.

/*Desai S Murthy* /

Copy to:

1. Assessee 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.