आयकरअपीलीयअधिकरण, अहमदाबादन्यायपीठ 'बी' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD

BEFOREMRS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND MS. SUCHITRA R. KAMBLE, JUDICIAL MEMBER

ITA No. 830/Ahd/2011
निर्धारणवर्ष/**Assessment Year: 2006-07**

Gujarat Mineral Development Corporation Ltd. (GMDC), Khanij Bhavan, 132 Ft. Ring Road, University Ground, Vastrapur, Ahmedabad-380052 PAN : AAACG 7987 P	Vs.	Asst. Commissioner of Income-tax, Circle-4, Ahmedabad

ITA No. 2817/Ahd/2013
निर्धारणवर्ष/**Assessment Year: 2006-07**

Gujarat Mineral Development Corporation Ltd. (GMDC), Khanij Bhavan, 132 Ft. Ring Road, University Ground, Vastrapur, Ahmedabad-380052 PAN : AAACG 7987 P	Vs.	Asst. Commissioner of Income-tax, Circle-4, Ahmedabad

ITA No. 1133/Ahd/2014
निर्धारणवर्ष/**Assessment Year: 2007-08**

Gujarat Mineral Development Corporation Ltd. (GMDC), Khanij Bhavan, 132 Ft. Ring Road, University Ground, Vastrapur, Ahmedabad-380052 PAN : AAACG 7987 P	Vs.	Asst. Commissioner of Income-tax, Circle-4, Ahmedabad

अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Shri S.N. Soparkar, Sr. Advocate & Shri Bandish Soparkar, AR
Revenue by :	Shri Sudhendu Das, CIT-DR

सुनवाई की तारीख/**Date of Hearing : 30.10.2023**
घोषणा की तारीख /**Date of Pronouncement: 31.10.2023**

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER:

These three appeals filed by the assessee are directed against separate orders of learned Commissioner of Income-tax (Appeals), Ahmedabad ("CIT(A)" in short) dated 08.11.2010, 12.08.2013 and 24.01.2014for Assessment Years (AY)2006-07, 2006-07 and 2007-08 respectively. The two appeals pertaining to A.Y 2006-07 areagainst orders of the Ld.CIT(A) in relation to separate proceedings, one against orders passed u/s 143(3) of the Act and the other against order passed u/s 147 of the Act .

2. It was common ground that the issues involved in these appeals are identical.All the appeals were therefore taken up for hearing together and are being disposed off by a single consolidated order for the sake of convenience.

3. At the outset itself it was pointed out by the ld. Counsel for the assessee that the majority of the issues raised in all appeals before us have already been adjudicated by the ITAT in the case of the assessee in the immediately preceding year, i.e. AY 2005-06, in its order passed in ITA Nos.1747/Ahd/2009 and 1657/Ahd/2015 dated 30.11.2022. Copy of the order was placed before us. A tabular detail was also filed before us pointing out the relevant paragraphs of the ITAT order of the immediately preceding year where the different issues raisedwere dealt with by the ITAT.

Appeal pertaining to Assessment Year 2006-07 was first taken up for hearing.

ITA No. 830/Ahd/2011 for AY 2006-07

4. Ground No.1 - 1.2 raised by the assessee, it was pointed out, related to the disallowance of project expenses treating them as capital expenditure. The said grounds raised in Ground Nos. 1 to 1.2 read as under:-

> *"1. The Learned C.I.T. (A) has grossly erred in law and on facts in confirming disallowance of revenue Expenditure incurred on Lignite project at Bhavnagar of Rs.3131748 on Lignite project at Tadkeshwar of Rs.66091456/-, treating them as Capital Expenditure.*
>
> *1.1 That the Learned C.I.T.(A) has further erred in Law and on facts in not appreciating the facts that the expenditure incurred were only in connection with the expansion & extension of the existing business of Lignite. The expenditure incurred were for salary, wages of the workers, power consumable and Transportation only and that no Capital Assets were created.*
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> *1.2 That both the lower Authorities have further erred in law and on facts in not appreciating the contention that the commercial production have commenced at Tadkeshwar Mining project and that there have been sales worth Rs.97.10 lacs at Lignite Project at Tadkeshwar, and have wrongly held that the projects under Reference were entirely a new project, and have further failed to follow the ratio laid down in*
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> *(i) Kedarnath Jute Mfg. Corpn. Ltd. Vs.C.I.T. (82 ITR 363)*
> *(ii) United Phosphorus Ltd. Vs. C.I.T. (73 TIJ 404)*
> *(iii) C.I.T. Vs. Alembic Glass Industries Ltd. (103 ITR 715)"*

5. It was pointed out that disallowance was made of the various project expenses as mentioned in the grounds above for the reason that these projects were found not to have commenced during the year and were noted to be new projects and, therefore, held to be capital in nature. Thereafter, ld. Counsel for the assessee drew our attention to the order passed by the ITAT in the immediately preceding year, i.e. AY 2005-06 pointing out therefrom that identical issue was dealt with by the ITAT in the said year at paragraph Nos. 11 to 20 of the order, wherein the ITAT had allowed the claim of the assessee treating the project expenses as incurred for the continuation of the existing business of the assessee only, and therefore, revenue in nature. The relevant findings of the ITAT in this regard are as under:-

"11. We have gone through order of authorities below, and we have noted that with respect to AkriMota power project, which was dealt at para-5 of the CIT(A)'s order, the entire project expenses of Rs.33,60,51,123/- were disallowed for the reason that it was entirely new project set up by the assessee; process of construction was going on, and had not commenced production or generation of electricity. Further it was held not to be an expansion of the existing business of the assessee, but an entirely new project totally different and distinct from the existing industrial undertaking. The ld.CIT(A), we have noted, has confirmed, disallowance of project expense, as made by the AO in this regard, rejecting the assessee's contentions that it was a vertical integration of the existing business of the assessee, stating that generation of electricity requires various other machineries and equipments which are admittedly not manufactured by the assessee, and therefore, the power project cannot be said to be expansion of the assessee's existing business. The relevant findings of the Ld.CIT(A) at para 5.2 of his order is as under:

> *"5.2 I have considered the facts of the case and the submissions of the Ld.A.R. carefully. It is seen that the Akrimota Power Project is entirely a new project which is being set up by the appellant. During the relevant period it was in the process of construction and had not started the generation of electricity. The Ld.A.R's claim that the project is an expansion of appellant's existing business is breft of reasoning. The appellant is engaged in excavation of Lignite which is one of the various inputs used for generation of electricity. Further, the generation of electricity requires various other machineries and equipments and admittedly these are not manufactured by the appellant. Therefore, the project under reference cannot be held as expansion of appellant's existing business. As already held that this project has not started functioning during the relevant period, therefore, the claim of interest on borrowed funds cannot be allowed under the provisions of sec.36(1)(iii) of the Act. Besides, the other expenses incurred on this project are also not deductible from the income of the appellant. In this regard reliance is placed on the decision of Hon'ble Supreme Court in the case of Chellapalli Sugar Ltd 98 ITR 167 and Bokaro Steel Ltd 236 ITR 315. In view of the above, the ground taken by the appellant against the same are hereby dismissed."*

12. With regard to the lignite project at Bhavnagar, which has been dealt with by the ld.CIT(A) at para-6 of his order, the same was disallowed and upheld as capital expenditure, since the AO noted that the project had not commenced its production during the relevant year, and it was entirely new

project set up by the assessee, different and distinct from the existing industrial undertaking. The finding of the AO was upheld by the ld.CIT(A) at para 6.4 of his order as under:

> *"6.4 I have considered the facts of the case and the submissions of the Ld.A.R. carefully. The LdAR. has not contradicted the findings of the A.O. that the project under reference was entirely a new project the construction thereof was not completed during the relevant period. Further the Ld.A.R. has not brought on record supporting facts to show that the project was an expansion of appellant's existing business. It is a well settled position of law that the expenditure incurred on interest for the money borrowed for setting up a new industrial undertaking is not deductible before its completion. In these circumstances, the A.O. has rightly rejected the appellant's claim for deduction under the provisions of sec.36(1)(iii) of the Act"*

13. With respect to Tadkeshwar project, for the same reason, as in the case of Bhavnagar project, the claim of project expenses was disallowed. The findings of the Ld.CIT(A) upholding the order of the AO at para 7.2 of his order is as under:

> *"7.2 I have considered the facts of the case and the submissions of the Ld.A.R. carefully. The Ld.A.R. has not contradicted the findings of the A.O. that the project under reference was entirely a new project and the construction thereof was not completed during the relevant period. Further the Ld.A.R. has not brought on record supporting facts to show that the project was an expansion of appellant's existing business. It is a well settled position of law that the expenditure incurred on interest for the money borrowed for setting up a new industrial undertaking is not deductible before its completion. In these circumstances, the A.O. has rightly rejected the appellant's claim for deduction under the provisions of sec.36(1)(iii) of the Act."*

The claim of depreciation was also disallowed with respect to machineries employed in setting up these projects for identical reason.

14. We shall first deal with the project expenses disallowed vis-àvis power projects and two lignite projects and also claim of depreciation on assets vis-à-vis these projects, all of which are disallowed for the same reasons, that were all treated as new undertaking of the assessee and not an expansion of existing business, since these projects had not commenced operations.

15. The proposition of law with regard to identifying whether the business set up by an assessee is an expansion of its existing business or totally new business undertaken, has been laid down by the Hon'ble Apex Court in the

case of Monnet Industries Ltd. (supra) wherein order of the Hon'ble High Court in this regard was upheld by the Hon'ble Supreme Court. Hon'ble High Court while dealing with the issue had held that the decisive test for determining whether two lines of business constitute the same business, is the unity of control and not nature of two businesses. As long as there is a unity of control and management in respect of two business, and there is intermingling of funds and dove tailing of the business, it cannot be said that a new business had been commenced by the assessee. But on the contrary, only conclusion that can be drawn was that it was extension of the existing business of the assessee only. The Hon'ble Court confirmed the findings of the Tribunal in this regard while holding so at para 7-9 of its order as under:

"7. The upshot of the aforesaid decisions as applied by the Tribunal in instant case is that:-

(i) a loan taken or capital borrowed is, by itself, not a capital asset, nor does it give an advantage of an enduring nature;

(ii) as long as a loan was taken or capital was borrowed for the purposes of business, the assessee is entitled to claim interest paid thereon as deduction under Section 36(1)(iii) of the Act;

(iii) interest may have to be capitalized after the borrowed capital or loan taken is utilized in bringing into existence an asset at the stage of commencement of business. In other words, after the assessee's business had already commenced then the interest paid on capital borrowed or loan taken can be claimed as deduction under Section 36 (1)(iii) of the Act.

(iv) in coming to the conclusion whether the interest paid on capital borrowed or loan taken in setting up a new line of business ought to be capitalized or treated as revenue expenditure, the test as laid down by the Supreme Court in the case of Produce Exchange Corporation (supra) and Prithvi Insurance Company (supra) would be relevant and;

(v) lastly, as long as interest is paid on capital borrowed or loan taken in respect of new line of business which is in the same business fold for the purposes of ascertaining income under Section 28 of the Act, it can be claimed as a deduction under Section 36(1)(iii) of the Act.

8. In the instant case, the Tribunal has returned the finding that there is a unity of control and management, in respect of the ferro alloys plant as well as the sugar plant and there is also intermingling of funds and dove-

tailing of businesses. In these circumstances it cannot be said that the respondent/assessee had not commenced its business and hence, interest would have to be capitalized in terms of the ratio of the judgment in the case of Challapalli Sugars Ltd (supra). If that is not so then, the only other conclusion that is possible on these facts, is that, the interest was paid by the respondent/assessee on borrowed capital for the purposes of business. That being the case, in our view, the Tribunal correctly allowed the financial charges i.e., interest paid to the extent of Rs 3,50,83,472/- as deduction under Section 36(1)(iii) of the Act.

9. These being the findings of fact, we do not consider it fit to interfere with the impugned judgment of the Tribunal. Accordingly, we hold that there is no question of law, much less a substantial question, which arises for consideration. In the result, the appeal is dismissed."

16. Now, having said so, we find in the facts of the present, the issue has been decided against the assessee not based on these parameters, but on parameters which have been categorically rejected by the Hon'ble Supreme Court for determining, whether business is new venture or continuation of existing business of the assessee only, as noted above. The only reason for holding AkriMota Power project and lignite project as new undertaking is the fact that in the case of lignite projects they were being undertaken in new geographical area and in that case of the power project because it has no link with the existing projects of the assessee. It is clear from the proposition of law laid down by the Hon'ble Apex Court that merely because new projects are in different geographical area it necessarily does not make it a new business of the assessee and that cannot be criterion for holding so.

17. As for power project is concerned, we agree with the ld.counsel for the assessee that it could be said to be a vertical integration of the existing business of mining of the assessee, since it was lignite based project, where lignite is a major material for the projects for the purpose of generation of power. The Ld.CIT(A) does not dispute this fact. On the contrary he relies on the fact that machineries also were required for producing power which has not been manufactured by the assessee and therefore the power project could not be said to be vertical integration of the business of the assessee. This we find is of no consequence. As long as it is not disputed that lignite is the major raw material from which power is been generated and lignite being extracted by the assessee itself in its mining business, setting up power project is nothing but a vertical integration of the business of the assessee only. For this reason alone, setting up of the power project cannot be said to be a new business of the assessee. Even otherwise, based on the parameter laid down by the Hon'ble Apex Court in Monnet Industries (supra) also it cannot be said to be new business undertaking merely because it is a completely

different project which has been set up by the assessee. In the case of Monnet Industries Ltd. (supra) the facts of the case was that the assessee was in the business of ferro-alloys and had set up sugar manufacturing plants at different places which were treated as new business of the assessee and all expenditure incurred prior to the commencement of the business were treated as not allowable. In these facts and circumstances, the decision was rendered by the Hon'ble Apex Court holding that the different nature of the business was not a determinative factor for the purpose of deriving whether it is a new business or expansion of exiting business only. On the contrary, it is the unity of management and control and handling of funds which would determine the same. In the case of these projects, the issue has certainly not been examined from this angle.

18. We have also noted that the impugned appeal before us relates to Asst.Year 2005-06 which is more than 17 years old. No purpose, we find, will be achieved by restoring back to the file of the Revenue authorities for deciding this issue on this parameter. On the contrary, interest of justice could be well served by examining the facts from audited annual accounts of the impugned year, which have been placed before us in the paper book which clearly reveal the fact that all these projects were being undertaken under the same management with common control and funds, and there is nothing in the audited balance sheet disclosing any fact to the effect that they were different undertakings with separate funds for each projects.

19. In view of the above, we hold that all three projects i.e. Akrimota Power Projects, Lignite projects at Bhavnagar and Tadkeshwar are nothing but the continuation of existing projects of the assessee only, and all its expenses incurred therefore in the setting up of these, prior to the commencement of the business in these projects, are to be treated as revenue expenses. Accordingly, the claim of project expenses vis-à-vis all three projects along with claim of depreciation on assets in the Tadkeshwar and Bhavnagar lignite projects are directed to be allowed.

20. Having held so, we find that the Revenue authorities have also treated the income generated from these projects as income from other sources. Since, we have held these projects to be continuation of existing projects only, therefore income generated from these projects are to be considered as business income of the assessee."

6. The ld. DR was unable to distinguish the issue in the present case before us, either on facts or on law. The issue, therefore, admittedly stands covered in favour of the assessee by the order of the ITAT in the

immediately preceding year i.e. AY 2005-06, following which we direct the Assessing Officer to allow the entire project expenses incurred by the assessee relating to the project at Bhavnagar and Tadkeshwar.

Grounds of appeal Nos.1-1.2 are accordingly allowed.

7. Ground Nos. 2 to 2.1 raised by the assessee relates to disallowance of interest of Rs.35,85,354/- paid to Sales Tax Authorities treating it as penalty. The said grounds read as under:-

> *"2. The Learned C.I.T.(A) has further erred in Confirming the disallowance of Rs.3585354/- paid to Sales Tax Authorities treating them as penalty through paid as Interest on Completion of Assessment U/s.47(4) of the G.S.T. Act.*
>
> *2.1 He has further failed to appreciate that the amount of Rs3585354/- was calculated at certain percentage and for certain period for Short payment or delay in payment of S.T. Amount and hence was for compensatory nature for withholding sales tax, and thus ignored the ratio laid down by Supreme Court in the matter of Mahalaxmi Sugar Mills Co. Ltd. (123 ITR 429). He has further erred in relying upon a High court decision and ignoring the Supreme Court's decision when the facts of both the cases are similar."*

8. The learned Counsel for the assessee pointed out that the amount paid to the Sales Tax Authority had consistently been stated to be in the nature of interest for late payment of sales tax as per Section 47(4)(a) of the Gujarat Sales Tax Act. This was stated before the Assessing Officer which finds mention at paragraph no. 5 of the Assessment Order and was reiterated before the learned CIT(A), which finds mention at paragraph No. 5.2 of the order of the ld. CIT(A). He pointed out that the Hon'ble Apex Court in the case of LachmandasMathuradas Vs. CIT, reported in [2002] 122 Taxman 828 (SC), had held interest on arrears of sales tax to be compensatory in nature and allowable as deduction in computing profits of the business.

9. The ld. DR, however, relied on the order of the ld. CIT(A) drawing our attention to his findings to the effect that "*after insertion of the Explanation to Section 37 of the Act ,which was inserted by Finance Act, 1998, the payment of interest due to late payment of taxes cannot be allowed as a deduction because by any stretch of imagination it cannot be said that it is a public policy of the Government to encourage delayed payment of taxes*".

10. We have heard both the parties and have gone through the orders of the authorities below, as also the case laws relied upon before us. We have notedthat the Hon'ble Apex Court in the case of LachmandasMathuradas(supra) has categorically held that interest on outstanding balance of sales tax was compensatory in nature and hence allowable under Section 37(1) of the Act. In view of the proposition of law as above, we find merit in the contention of the ld. Counsel for the assessee that the amount of Rs.35,85,354/- paid to the Sales Tax Authorities for late payment of sales tax is to be allowed under Section 37(1) of the Act. The ground of appeal so raised by the assessee is, therefore, allowed.

Grounds of appeal Nos.2 & 2.1 are accordingly allowed.

11. Ground No.3& 3.1 , it was pointed out, pertained to disallowance of prior period expenses as reported in the Tax Audit Report and the said grounds read as under:-

> *3. On Facts and circumstances of the case, the Learned Assessing officer and the Learned C.I.T.(A) both have erred in rejecting the claim of Rs.13500855 (Gross) being the amount of prior period Expenses as reported in Tax Audit Report eventhough the expenditure in question was materialized and crystalised during the year under appeal and eventhough the details are filed before the AO and learned CIT(A).*
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> *3.1 Your appellant further submits that CIT(A) has further erred in not following judgment of Hon. ITAT in appellants own case in ITA No.3483/Ahd/1998 for AY 1989-90. Your appellant further relies on Hon.*

ITAT's judgement in appellants own case in ITA No.159/Ahd/2003 for Asst. Year 1995-96."

12. The background leading to the disallowance was that the AO noted prior period expenses reported in the tax audit report amounting to Rs.1,35,00,855/-. Since the assessee was unable to substantiate its claim to the said expenses in the said year on the reasoning that the expenses crystallized in the impugned year, the AO disallowed these expenses treating them as prior period expenses. Ld.CIT(A) confirmed the same.

13. With regard to the above issue, the ld. Counsel for the assessee pointed out that identical issue was adjudicated by the ITAT in the Assessment Year 2005-06 at paragraph Nos. 26 to 29 of the order, wherein the order of the Ld.CIT(A) restoring the issue back to the file of the Assessing Officer for verifying which prior period expenses crystalized during the year and directing him to allow all such prior period expenses, was upheld by the ITAT. Our attention was drawn to paragraph Nos. 26 to 29 of the order as under:-

"26. Ground No.4 raised by the assessee is against order of the ld.CIT(A) upholding rejection of claim of prior period expenses amounting to Rs.67,37,949/-. The ground reads as under:

> *4. In facts and circumstances of the case, Your Appellant most respectfully submits that the Ld. A.O. erred in rejecting claim of Rs. 67,37,9497- being the amount of prior period expenses even through the said expenditure had, materialized and Crestaiised during this Financial Year and Ld. CIT (A) further erred in rejecting the claim by sending / restoring the matter back on the file of Id. A.O. Your Appellant further submits that both the authorities have failed to follow Hon. ITAT's Judgment in appellant's own case in prior years, in appeals for A.Y. 1989-90 & A. Y. 1995-96.*

27. As transpires from orders of authorities below the assessee's claim of prior period expenses had been disallowed by the Assessing Officer (AO) since the assessee could not justify his claim to the said expenses during the impugned

year by demonstrating with necessary evidences that the liability relating to the prior period expenses had crystalised during the relevant period. The ld.CIT(A), however noted that the assessee had produced vouchers relating to these expenses before the AO but the AO had failed to analyse the claim of the assessee that the expenditure had crystalised during the year. He therefore restored the issue back to the AO allow all the prior period expenses which crystalised during the relevant year. His findings at page no. 27 para 13.2 of the order are as under:

> *"13.2 I have considered the facts of the case and the submissions of the ld.AR carefully. It is seen that the AO without analyzing the same of the appellant in detail has made the disallowance under reference. I have gone through the submissions made by the ld.AR before the AO during the assessment proceedings wherein he has provided all the vouchers pertaining to such expenses in the form of a paper book. Therefore, under these circumstances, it would be appropriate that the AO allow those expenses under this head which crystallized during the relevant period. The AO while giving effect to this order will pass the speaking order on this issue while allowing or otherwise the appellant's claim and the nature of expenses since the details thereof are with him. The ground therefore stands disposed of accordingly.*

28. The ld.counsel for the assessee fairly admitted that for the Asst.Year 2003-04 also, the ITAT had restored this issue of claim of prior period expenses back to the AO with identical direction to examine which expenses had crystalised during the year and allow claim of the expenses accordingly. He drew our attention to the order passed in the Asst.Year 2003-04 in the case of the assessee in ITA No.1185 and 1246/Ahd/2007 dated 29.1.2015, copy of which placed before us at page no.1 to 36. Our attention was drawn to para-4 to 4.3 of the order containing the said directions of the ITAT. In view of this, the ld.counsel for the assessee fairly admitted that he had no grievance against the direction of the ld.CIT(A) on the impugned issue.

29. In view of the above, We see no reason to interfere in the order of the ld.CIT(A) in this regard. This ground of appeal raised by the assessee is therefore dismissed."

14. The ld. DR was unable to distinguish the issue in the present case before us, either on facts or on law. In view of the same, we restore this issue back to the Assessing Officer to adjudicate the same afresh in accordance with the direction of the ITAT in its order passed for AY 2005-06 (supra).

Grounds of appeal Nos. 3-3.1 are allowed for statistical purposes.

15. Ground No.4-4.2, it was pointed out, related to the issue of disallowance made of expenses relating to the earning of exempt income, as per the provisions of Section 14A of the Act. The said grounds read as under:-

> *"4. That the Learned A.O. has erred in making an addition of Rs.5929382/- U/s.14A of the Act, and Learned C.I.T.(A) has further erred in directing the Learned A.O. to make the disallowance U/s.14A as per Rule 8D, eventhough the Rule 8D becomes effective from 24.03.2008.*
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> *4.1 That both the lower authorities have failed to appreciate the facts that Investment in Tax Free Bonds, Equity Shares & Mutual Funds when made were out of own Capital and free Reserves, as there was no borrowed funds when Investments were made, and that the nexus betweenthe Investments & borrowed funds was not established, and thus has erred in applying Rule 8D, even when the Rule 8D is applicable w.e.f. 24.03.2008.*
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> *4.2 That the Learned C.I.T.(A) has failed to follow the ratio laid down by Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. Vs.C.I.T. in which Supreme Courts decision in Wellford's case (192 Taxmann 211) relied, that an expenditure can not be disallowed unless there is a proximate cause for disallowance, Ahmedabad I.T.A.T. "B", Bench decision in the matter of C.I.T. Vs. M/s. Aguagel Chemicals, Bhavnagar is also replied upon."*

16. The facts relating to the issue is that during assessment proceedings the assessee was noted to have earned exempt income of Rs.2,40,54,256/- ,but no disallowance of expenses relating to the earning of such income was made by the assessee , in terms of the provisions of section 14A of the Act.Rejecting the assesses plea of no disallowance being warranted on account of the availability of sufficient own funds, the AO invoked Rule 8D of the Rules and computed disallowance u/s 14A of the Act amounting to Rs.59,29,382/-. The Ld.CIT(A) upheld the disallowance holding the invocation of Rule 8D of the Rules by the AO justified.

17. The ld. Counsel for the assessee pointed out that identical issue was adjudicated by the ITAT in the Assessment Year 2005-06 at paragraph Nos. 56 to 61 of the order, wherein noting the decision of the Hon'ble Bombay High court in the case of Godrej & Boyce Mfg. CO. Vs. CIT, 328 ITR 81 holding that Rule 8D of the Rules was applicable only from A.Y 2007-08, the invocation of the said Rule in A.Y 2005-06 was held to be not inaccordance with law.He pointed out that the entire disallowance was deleted by the ITAT thereafter noting sufficiency of own funds, following order of the ITAT in the case of the assessee in A.Y 2003-04.Paragraph Nos. 56-61 of the order deals with the issue reads as under:

> *56. Ground No.9 raised by the assessee relates to disallowance of interest incurred for the purpose of earning exempt income, amounting to Rs.23,50,047/-,as per the provisions of section 14A of the Act, which was confirmed by the ld.CIT(A). The said ground reads as under:*
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> > *"9. In facts and circumstances of the case, Your Appellant most respectfully submits that Ld, A.O, has erred in making an addition of Rs. 23,50,047/- u/s 14A of the Act and Ld. CIT (A) further erred in directing the Ld. A.O. to make the disallowance u/s 14A as per rule 8D, and Particularly when the Rule 8D has come into existence by IT Rules 2008 Dated 24/03/2008. Your Appellant further submits that both the lower authorities have failed to appreciate the facts that investments made in Tax Free Bonds, Equity Shares or Mutual Funds were out of own Capital & free .reserves and not out of borrowed funds."*
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> *57. As transpires from orders of the authorities below, the assessee during the impugned year had earned dividend income to the tune of Rs.65,35,060/- and interest on tax free bonds of Ahmedabad Municipal Corporation of Rs.1,26,20,421/-. The assessee had shown investment of Rs.71,71,47,000/- as on 31.3.2005. In response to the query raised by the AO asking details of interest bearing funds utilized for investment in exempt income, the assessee filed reply stating that the investments were out of own interest free funds of the assessee. The AO however worked out disallowance of interest at Rs.77,487/- and administrative expenses of Rs.22,72,560/-accordingly disallowing of a sum of Rs.23,50,047/- under section 14A of the Act.*

58. Before the ld.CIT(A), the assessee contended that it had deployed its own interest free funds for the purpose of making impugned investment which were more than sufficient for the said purpose, and further had incurred no administrative expenses to earn and collect impugned exempt income. He further pointed out that no such disallowance had been made in the preceding assessment year i.e. Asst.Year 2002-03. The ld.CIT(A) however held that since the assessee had not come forward with complete details to establish that it did not incur any expenditure to earn exempt income, it could not be held that nothing is attributable out of interest to the income from dividend income. Further reliance on the decision of Special Bench of the ITAT, Mumbai Bench in the case of ITO Vs. Daga Capital Management P.Ltd. which laid down that provision of Rule 8D inserted Income Tax Rules, 1962 is clarificatory for the purpose of computing disallowance under section 14A of the Act. The ld.CIT(A), accordingly, directed that disallowance be computed following the procedure laid down in Rule 8D of the Rules.

59. Before us, the ld.counsel for the assessee contended that the assessee had sufficient interest free funds for the purpose of making investment. He drew our attention to the audited financial accounts of the assessee before us placed at page no.1 to 105. He pointed out that the assessee had owned interest free funds of Rs.767.00 Crs while investment for earning exempt income amounted to only Rs.71 crores. He stated therefore that no disallowance under section 14A was warranted and relied upon the decision of Hon'ble Apex Court in the case of CIT(LTU) vs Reliance Industries Ltd. CA No. 37 of 2019 & others dated 23-03-2019. He further contended that direction of the ld.CIT(A) to follow Rule 8D for the purpose of computing disallowable expenses in the impugned year i.e. Asst.Year 2005-06 when such rules were not even notified was not in accordance with judgment of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. CO. Vs. CIT, 328 ITR 81wherein it had been categorically held that these rules were to be applied prospectively only w.e.f. Asst.Year 2007-08 onwards. He further pointed out that in the preceding year i.e. Asst.Year 2003-04, this issue had been decided by the ITAT in favour of the assessee. Our attention as drawn to page no.15 of the compilation of the orders wherein at para 6.3 the issue was dealt with by the ITAT deleting disallowance of interest expenses holding that in the case of CIT Vs. Gujarat Industrial Development Corpn 37 taxmann.com 254, the Hon'ble Gujarat High Court has held that department is expected to establish a nexus between interest bearing funds borrowed and those invested by the assessee respondent and only when it was shown that interest free funds were not available with the assessee, that question would arise of fastening tax liability on assessee.

60. The ld.DR, on the other hand, relied on the order of the ld.CIT(A).

61. We have heard both the sides. Vis-à-vis the issue of disallowance of expenses under section 14A of the Act, we agree with the ld.counsel for the assessee that invocation of Rule 8D is applicable for the purpose of computing the amount of expenditure to be disallowed only w.e.f. Asst.Year 2007-08, when said Rule were brought into force and section 14A of the Act also specifies the invocation of the said rules. This proposition was laid down by the Hon'ble High Court in the case of Godrej Boycee (supra) also. Further it is a settled law that where sufficient interest free funds are available the presumption is that the investments have been made out of such funds calling for no disallowance of interest under section 14A of the Act. Hon'ble Supreme Court in the case of Reliance Industries Ltd. (supra) has laid down the above law. In the present case, therefore, invocation of Rule 8D by the ld.CIT(A), we hold is not in accordance with law. Further, noting that the assessee had sufficient owned interest free funds for the purpose of making the impugned investment, as demonstrated both to the Ld.CIT(A) and also before us and which fact has remained uncontroverted by the Revenue, we hold no disallowance of interest under section 14A of the Act is warranted. Further noting that in identical facts and circumstances the ITAT in the case of the assessee in A.Y 2003-04 had deleted entire disallowance made u/s 14A of the Act, we hold that the disallowance of Rs.23,50,047/- under section 14A is unwarranted, not in accordance with law and direct the same to be deleted in entirety."

18. The ld. DR was unable to distinguish the issue in the present case before us, either on facts or on law. The issue, therefore, admittedly stands covered in favour of the assessee by the order of the ITAT in the immediately preceding year i.e. AY 2005-06, following which we direct the Assessing Officer to delete the disallowance made under Section 14A of the Act.

Grounds of appeal Nos.4-4.2 are allowed.

19. Ground Nos.5– 5.1, it was pointed out, related to the issue of disallowance of contribution made to Index-B & Govt. of Gujarat for celebrating Gaurav Day &Shardotsav. The said ground read as under:-

"5. That the Learned A.O. & C.I.T. (A) both further erred in making addition of Rs.6575989/- consisting of Contribution made to Index-B, Rs.4000000/-, Rs.16.5 lacs as Contribution to Govt. of Gujarat for

celebrating Gaurav Day & Rs.10 lacs for celebrating Shardotsav. The Learned C.I.T. has erred in confirming these disallowance and thus has failed to appreciate that by making such contribution the activities of GMDC are being advertised through Index-B, by banners and announcement of sponsorship by GMDC at Celebration Time.

He has thus failed to appreciate that the Expenditure was not Capital Exp. or not of personal nature and were incurred for the purpose of business.

5.1 It is also not open to the I.T. Authorities to substitute their own standards of reasonableness of any expenditure for the Assessee unless the transaction is not a genuine or straight forward one or is either colorable or illusory or fraudulent or there was a consideration other than business or is of a personal nature, the expenditure cannot be disallowed. Asian Tools & Plastics Co. Ltd. Vs. C.I.T. (551 ITR 392) not followed. The mere fact that it is also for instance motivated by Charity would not justify disallowance. Godavari Sugar Mills Vs. CIT (191 ITR 311) is also not followed."

20. The facts relating to the issue are that contributions made by the assessee to Index B and to Govt. of Gujarat for- celebrating Gujarat Gaurav Day and Sharad Utsav were disallowed by the AO treating them to be non-business in nature, rejecting assesses contention that these expenses were meant for advertisement of the assesses business. Ld.CIT(A) confirmed the disallowance finding that the assessee was unable to substantiate its explanation that these expenses were by way of advertisement expenses.He further noted that these expenses had been incurred on the specific request of the concerned authorities of Government of Gujarat and/ or were in the nature of donations. Therefore he held that they were not incurred for the business of the assessee and rightly disallowed by the AO.

21. The ld. Counsel for the assessee pointed out that identical issue was dealt with by the ITAT in its order dated 30.11.2022 for the Assessment Year 2005-06 at paragraph Nos. 43 to 47 of the order holding that the said expenses were for the purposes of business of the assessee and, therefore,

were allowable as expenditure under Section 37(1) of the Act. Our attention was drawn to paragraph Nos. 43 to 47of the order which reads as under:-

> *"43. In Ground No.7, the assessee has challenged the order of the ld.CIT(A) in confirming the disallowance by the AO of the claim of contribution made by the assessee to the Office of Commissioner of Geology & Mining, Gandhinagar amounting to Rs.53,84,000/-. Ground No.7 reads as under:*
>
> > *"7. Your Appellant further submits that the Ld, A.O. has erred in making addition of Rs.53,84,000/- in respect of contribution made to the Office of Commissioner of Geology & Mining, Gandhinagar on the plea that there was no legal or statutory obligation or liability of the Appellant to make such payment. Your Appellant further submits that for the purpose of allowance of any expenditure incurred by the Appellant as per the provisions of sect 37 of the IT Act, the expenditure should be for the purpose of business, and Ld. CIT (A) has further erred in confirming such addition."*
>
> *44. As transpires from orders of the authorities below, the AO has disallowed the contribution made by the assessee to the Office of Commissioner of Geology & Mining, Gandhinagar amounting to Rs.53,84,000/-holding that there was no legal and statutory liability for the assessee to make such expenditure, and he further observed that the assessee did not bring on record the benefit derived from it during the relevant period out of such expenses.*
>
> *45. Before the ld.CIT(A), the assessee contended that this contribution of Rs.53,84,000/- to the Office of Geology & Mining, Gandhinagar was made for the purpose of upgradation of their laboratory at Gandhinagar, which was set up for research and testing in the field of mining. It was contended by the assessee, that the laboratory being involved in the business of mining research and testing its activities were very useful to the assessee which was in the business of mining and the expenditure therefore was purely on the principle of commercial expediency. The ld.CIT(A) however rejected the claim of the assessee holding that the assessee had not established what benefit it had derived from the such expenditure. The relevant findings of the Ld.CIT(A) at page 38-39 para 20.2 of his order is as under:*
>
> > *"20.2 I have considered the facts of the case and the submissions of the Ld.A.R. carefully. It is seen that the Ld.A.R. neither during the assessment proceedings nor during the appellate proceedings filed any details to establish that the impugned expenses were incurred for the*

purposes of the business of the appellant. It is also clear from the submissions that how such expenses have helped the appellant in its business of mining during the relevant period. Further it is also not clear the laboratory stated to be set up from the funds provided by the appellant were used by it for its business. If the said laboratory was used during the relevant period, then what kind of reports were obtained therefrom by the appellant. It has not come out in the submissions of the Ld.A.R, therefore, under these circumstances the A.O. has rightly disallowed the claim of the appellant for expenses amounting to Rs.53,84,000/-. In view of this I do not find any justification to interfere in the findings of the A.O. accordingly. As a result, the ground taken by the appellant is hereby rejected."

46. The ld.counsel for the assessee reiterated submissions made before the ld.CIT(A), while ld.DR relied on the order of the ld.CIT(A). He further relied on the decision of Hon'ble Apex Court in the case of Venkata Satyanarayana Rice Mill Contractors Co., (1996) 89 taxman 92 (SC) for the proposition that any contribution made by an assessee with a view to secure benefit to the assessee's business, whether voluntary or at the instance of the authorities concerned, were to be allowed.

47. We have heard contentions of both the parties. We find merit in the contentions of the ld.counsel for the assessee that the contribution made by the assessee to the Office of Commissioner of Geology & Mining, Gandhinagar was in furtherance of the business of the assessee only. The fact that the contribution made to the Office of Commissioner of Geology & Mining, Gandhinagar was given for setting up of laboratory for research and testing in the field of mining, has not been controverted by the Revenue. It is also fact on record that the assessee is in the business of mining of minerals. Therefore the research carried out in the laboratory would benefit the assessee is a foregone conclusion. There is no doubt that the contribution made by the assessee to the Office of Commissioner of Geology & Mining, Gandhinagar was to assist and for the benefit of the business of mining only. The assessee need not demonstrate derivation of any direct/actual benefit on account of any expenditure claimed as long as intention for deriving benefit from the said expenditure is there. Intention to derive benefit is sufficient to treat the claim as allowable revenue expenditure on commercial principle itself. As rightly pointed out by the Ld.Counsel for the assessee, the Hon'ble apex court ,in the case of Sri Venkata Satyanarayana Rice Mill Contractors Co.(supra) settled the proposition with regard to claim of expenses for business, holding that the correct test for such claims is that of commercial expediency alone . That as long as payment is made for the purpose of business and not for infraction of any law ,the same would be allowed as deduction.

In view of the above, we hold that the assessee's claim of contribution to the Office of Commissioner of Geology & Mining, Gandhinagar amounting to Rs.53,84,000/-, being for the purpose of business, is allowable as expenditure under section 37(1) of the Act."

22. The Ld.DR however relied on the order of the Ld.CIT(A) and pointed out that the facts in the present case were different from that in A.Y 2005-06 and the decision of the ITAT in that year could not be followed therefore for deciding the present issue.

23. We have heard both the parties, have gone through the order of the authorities below. We are not impressed with the contention of the Ld.Counsel for the assessee that the issue of allowability of payments made by the assessee to Index B and govt. Of Gujarat for celebrating Gujarat Gaurav Day and Sharad Utsav is squarely covered by the order of the ITAT in the A.Y 2005-06. As rightly pointed out by the Ld.DR,the facts in A.Y 2005-06 were completely different . The assessee in the said case was found to have made payment to Office of Commissioner of Geology & Mining, Gandhinagarfor setting up of laboratory for research and testing in the field of mining, which was found to be for the benefit of assesses business of mining minerals.In this backdrop of facts the payment made to the Office of Commissioner of Geology & Mining, Gandhinagarwas held allowable as incurred for the business of the assessee. In the present case the payments relate to Index B and Govt of Gujarat for celebrations of Gujarat Day and Sharad Utsav. Index B has been explained as a Govt. Body established for providing various information & services to various entrepreneur regarding availability of loans, sheds, raw material etc. The contention of the assessee is that Index B provides information relating to the assessee also and therefore payment made to it is for advertisement of its business. Similarly payment made to Govt . of Gujarat has been explained for putting up

banners of assessee during celebrations and thus advertisement expenses. The Ld.CIT(A), we find, has noted that no details were filed by the assessee to establish these were advertisement expenses. Also he noted that the payment for events was made on the specific request of authorities of Govt. of Gujarat. His findings in this regard at para 8.3 of the order is as under:-

> *"8.3 I have gone through the assessment order and the submissions of the AR carefully. It is seen that the AR of the appellant has not come forward with the complete details of the expenses to establish that the payments made were towards advertisements. The details of such advertisements has also not been produced. From a perusal of the contributions made for the events it becomes apparent that the payments were not made for the purposes of advertisement only. It is also clear that the payments were made on specific requests of the concerned authorities from the government of Gujarat who happens to be the major shareholder in the appellant. Such payments are therefore not for the purposes of business of the appellant. In fact such contributions are not diversion of income but application of income of the appellant and hence cannot be allowed as a deduction from the income of the appellant.*
>
> *It is seen that the contribution of the appellant to Index B, Gujarat Gaurav Day and Shardotsav are in the nature of donations.*
>
> *In the case of MalayalaManorma Co. Ltd. Reported in (2006) 150 Taxman505(Ker) the hon'ble Kerala High Court has held that contribution made to the trust for rehabilitation of earth quake victims was not expenditure laid out wholly, necessarily and exclusively for the purpose of business and was not allowable as deduction.*
>
> *In view of the above, the disallowance by the AO is justified. The same is confirmed."*

24. We are in complete agreement with the Ld.CIT(A) that these expenses are nothing but donations made by the assessee. These expenses have not been incurred for the purpose of business of the assessee. They are merely contributions made to these entities. That some benefit would accrue to the assessee is only incidental. The purpose of incurring the expenditure is definitely not for the business of the assessee. The same have therefore, we hold, rightly been disallowed by the Ld.CIT(A). the facts being found to be

different from A.Y 2005-06, the contention of the assessee that the issue is covered by the order of the ITAT in A.Y 2005-06 is rejected.

Grounds of appeal Nos.5 & 5.1 are accordingly dismissed.

25. Ground Nos. 6 & 6.1 relates to disallowance of expenses for non-deduction of tax at source in terms of Section 40(a)(ia) of the Act . The said grounds read as under:-

> *"6. That the Learned C.I.T. (A) has erred in confirming the addition of Rs.156036/-being the amount paid to ATIRA U/s.40(a)(ia) as Tax was not deducted and has failed to appreciate that ATIRA is an Approved Scientific Research Association wholly exempt from Income Tax under section 10(21) read with section 24(1) under Income Tax act, 1961, vide notification No.1325 DG/IT/E/CAL/G-33-35(1)(ii) dt. 25.01.1995.*
>
> *6.1 That the C.I.T. (A) has failed to follow the I.T.A.T's direction in appellants own case where in the I.T.A.T. has directed that if ATIRA has paid Tax on such Income, GMDC should not deduct Tax on the said Income."*

26. The facts of the case being that the assessee had paid an amount of Rs.1,56,036/- to ATIRA, an approved Scientific Research Association, and since the taxes were not deducted at source on the same, the entire amount paid was disallowed by invoking Section 40(a)(ia) of the Act. The contention of the ld. Counsel for the assessee before us was that the entire income of ATIRA was exempt from tax under Section 10(21) r.w.s. 24(1)of the Income Tax Act, 1961, vide notification No.1325/DG/IT/E/CAL/G-33-35(1)(ii) dated25.01.1995 of the Ministry of Finance, Government of India. That this fact had been pointed out to the authorities below which finds mention at paragraph No.10.2 of the ld. CIT(A)'s order. He further contended that the ITAT, Mumbai Bench in the case of DCIT vs. Essar Steel Ltd., reported in [2013] 40 taxmann.com 537 (Mumbai-Trib.), had held that the amounts which are exempted by CBDT, no TDS liability arises on the same; and, therefore, the assessee could not be defaulted and penalized for having not

deducted TDS on the same. Our attention was drawn to paragraph No. 14 of the order holding so as under:-

> *"14. In the present order, the learned Commissioner of Income-tax (Appeals) without elaborate discussion has allowed the assessee's claim on the same reason as that of the assessment year 2000-01. Therefore, in order to examine the issue, we had to extract the above order of the Commissioner of Income-tax (Appeals) for considering this ground. As can be seen from the above, the learned Commissioner of Income-tax (Appeals) discussed the issue both on facts as well as on law. It is a fact that the Central Board of Direct Taxes has examined the receipt of interest as per the provisions of section 10(15)(iv)(c) of the Act. Therefore, where the utilisation is for purchase outside India of raw material, components or plant and machinery, so long as exemption granted is valid, the interest received by the other party is not covered by the Income-tax Act and by virtue of exemption granted by the Central Government, the question of TDS on the above amount does not arise at all. Since there is no requirement of TDS, question of disallowance under section 40(a)(ia) for non deduction of tax also does not arise. Moreover, as seen from the correspondence with the Ministry of Finance by the assessee-company way back in December, 1996 and February, 1997 it can be noticed that the Central Board of Direct Taxes also insisted on verifying the deployment of funds and the assessee vide the letter dated February 7, 1997 enclosed the auditor's certificate certifying the attached statement showing the deployment of funds equivalent to US$ 40.22 million and corresponding invoices for import of capital goods for the hot rolled coils project of the company out of euro convertible bonds issue of US$ 75.00 million. They also placed on record the approval of the Reserve bank of India for the purpose of financing the put option under euro convertible bonds issue of USD 75 million. After examining the relevant certificates the Central Board of Direct Taxes Foreign Tax Division vide letter dated March 12, 1997 granted the approval under section 10(15)(iv)(c). Therefore, the contention of the assessee now made at the time of payment of interest does not survive as the issue of utilisation of the funds was already examined by the Central Board of Direct Taxes at the time of granting exemption. As already stated once the interest income is not taxable in the hands of the recipient and was exempted by the Government of India, question of TDS on the interest paid by the assessee does not arise. Therefore, the ground has no merit and is accordingly rejected."*

27. The ld. DR, however, relied on the order of the ld. CIT(A) pointing out that he had upheld the disallowance holding that the fact that the recipient is

a person liable to pay tax or not is not the concern of the person making the payment and, therefore, the disallowance made under Section 40(a)(ia) of the Act for non-deduction of tax at source was justified.

28. We have heard the rival contentions and gone through the judgments cited before us. The fact that ATIRA to whom payment of Rs.1,56,036/- was made by the assessee without deduction of tax at source is exempt from tax by virtue of CBDT Notification No.1325/DG/IT/E/CAL/G-33-35(1)(ii) dated25.01.1995 has not been controverted by the Revenue. We have also noted that the ITAT, Mumbai Bench in the case of Essar Steel Ltd. (Supra) has held that where the recipient is exempt from tax, there is no TDS liability on the payer and, therefore, no disallowance is warranted in such circumstances for non-deduction of tax at source. Ld. DR was unable to controvert either on the facts of the case before us or the legal proposition as laid down by the ITAT, Mumbai Bench in the case of Essar Steel Ltd. (supra). In view of the same, we find merit in the contention of the ld. Counsel for the assessee that there being no TDS liability on the assessee vis-à-vis ATIRA, non-deduction to tax at source on the payment made to the assessee amounting to Rs.1,56,036/- would not attract the provisions of Section 40(a)(ia) of the Act. The disallowance made by the Assessing Officer under the said section is, therefore, directed to be deleted. This ground of appeal of the assessee is accordingly allowed.

Ground of appeal Nos. 6 & 6.1 are accordingly allowed.

29. Ground No.7, it was pointed out by the ld. Counsel for the assessee, related to the issue of treating the income earned by the assessee from projects which was still under construction, as income from other sources. The ld. Counsel for the assessee has pointed out that this issue was linked to the issue in Ground No.1 raised by the assessee wherein the expenses

incurred in these projects were treated as capital in nature and disallowed. He pointed out that the income earned accordingly was treated as income from other sources since the projects were yet to commence operation.

30. The ld. Counsel for the assessee pointed out that this issue was dealt with by the ITAT in the immediately preceding year, i.e. AY 2005-06 vide order dated 30.11.2022, cited by the ld. Counsel for the assessee, in paragraph nos. 19 & 20 of the order holding the income to be in the nature of income from business. The relevant findings of the Tribunal for AY 2005-06 in ITA No. 1747/Ahd/2009 read as under:-

> *"19. In view of the above, we hold that all three projects i.e. Akrimota Power Projects, Lignite projects at Bhavnagar and Tadkeshwar are nothing but the continuation of existing projects of the assessee only, and all its expenses incurred therefore in the setting up of these, prior to the commencement of the business in these projects, are to be treated as revenue expenses. Accordingly, the claim of project expenses vis-à-vis all three projects along with claim of depreciation on assets in the Tadkeshwar and Bhavnagar lignite projects are directed to be allowed.*
>
> *20. Having held so, we find that the Revenue authorities have also treated the income generated from these projects as income from other sources. Since, we have held these projects to be continuation of existing projects only, therefore income generated from these projects are to be considered as business income of the assessee."*

31. The ld. DR was unable to distinguish the issue in the present case before us, either on facts or on law. The issue, therefore, admittedly stands covered in favour of the assessee by the order of the ITAT in the immediately preceding year i.e. AY 2005-06, following which we direct the Assessing Officer to treat the income from projects as Business income.

32. We may add that in view of our findings in Ground No.1 and Ground No.7 of the assessee's appeal, the gross expenditure incurred on projects is to be allowed to the assessee and the income earned from these projects is to be treated as income from business and profession.

Ground of appeal No.7 is allowed.

33. Ground No.8, it was stated, related to the rejection of claim of depreciation in respect of leased buses to GSRTC.The said ground reads as under:-

> *"8. In facts and circumstances of the case, the Ld AO has erred in rejecting the claim of depreciation of Rs.6958066/- in respect of Leased Buses to GSRTC and Ld. CIT(A) has further erred in confirming the action of Ld AO of rejecting such claim of depreciation.*
>
> *Your Appellant further submits that Ld CIT(A) has further erred in not considering the following 3 Judgments cited before him while rejecting the claim of depreciation on Leased Buses to GSRTC.*
>
> *a) Orissa Mineral Development Corpn. Ltd. 268 ITR 130(Orissa High Court) b) Zuari Finance Ltd. 271 ITR 538 (Bombay High Court)*
> *c) Gujarat Lease Finance Corpn. Ltd. ITa No.1427/Ahd/2003 decided on17/11/08 by Hon. ITAT, Ahmedabad "A" Bench.*
>
> *In view of the facts of the case and Judicial Pronouncement in the matter, Your Appellant most respectfully submits that claim of depreciation of Rs.6958066/- in respect of Leased Buses to GSRTC may be allowed."*

34. The issue relates to claim of depreciation on buses purchased from and thereafter leased to GSRTC.The transaction was held to be ingenuine and colorable device intended to avoid taxation by claiming depreciation.

35. The ld. Counsel for the assessee submitted that identical issue was dealt with by the ITAT in assessee's own case for the Assessment Year 2005-06 vide order dated 30.11.2022 at paragraph Nos. 36-38 of the order holding thatthe assessee was entitled to claim depreciation on leased assets. Our attention was drawn to paragraph Nos. 36 to 38 of the order which reads as under:-

> *"36. We have heard the rival contentions and gone through the orders of the authorities below as also the case laws referred to before us.*

After considering the entire facts relating to the issue, we are perplexed with the apparently contradictory stand taken by the Revenue on the impugned issue before us. As is evident,the Revenue had held the lease and buy back arrangement of the assessee with GSRTC to be ingenuine and colorable device while denying claiming of depreciation thereon of the assessee holding that the assessee was not the owner of buses allegedly leased to GSRTC.Having so found the lease and buy back arrangement to be ingenuine the Revenue has thereafter subjected to tax lease rent from the same arrangement on accrual basis as opposed to the assessee adopting the cash basis and has also denied write off of lease rentals of earlier years as bad debts holding that the assessee failed to establish that they had become bad. This tanatamounts to the Revenue accepting the genuineness of the arrangement which is in stark contrast to its findings of the same being ingenuine while denying claim of depreciation.

37.Be that so we find that the denial of depreciation on leased assets was based on the decision of the ITAT Special Bench in the case of IndusInd Bank(supra),which the Ld.Counsel has pointed out has since then been reversed by the Hon'ble apex court in the case of ICDS Ltd(supra) .In the case of Indus Ind Bank the lease and buy back arrangements were found to be colorable device and it was held that the assesses were merely financing purchase of vehicles by this arrangement, i.e it was a mere financing arrangement . That as a result the ownership of assets so allegedly leased out by virtue of these arrangements was not of the alleged lessor and thus claim of depreciation thereon by the lessor was held not allowable. The Hon'ble Apex court recognized the genuineness of such arrangements and held that by virtue of various clauses in the agreement the ownership of the asses leased was that of the lessor. Claim of depreciation thereon by the lessors was accordingly held allowable by the Hon'ble apex court.

38. Since in the present case the assesees lease and buy back arrangement has been held to be a colorable device on the basis of the special bench decision of the ITAT in IndusInd Bank (supra) which blanket proposition vis a vis lease and buy back arrangements has since been reversed by the Hon'ble apex court and the Ld.DR has not distinguished the said case before us, applying the decision of the Hon'ble apex court ,we hold that the assesses is entitled to claim depreciation on leased assets.The order of the Ld.CIT(A) upholding the disallowance of depreciation amounting to Rs.72,30,369/- is set aside and the AO is directed to allow the same."

36. The ld. DR was unable to distinguish the issue in the present case before us, either on facts or on law. The issue, therefore, admittedly stands covered in favour of the assessee by the order of the ITAT in assessee's own

case in the immediately preceding year i.e. AY 2005-06, following which we direct the Assessing Officer to delete the disallowance made on account of depreciation of leased assets of Rs.69,58,066/-.

Ground of appeal No.8 is allowed.

37. Ground No. 9 pertains to disallowance of claim of expenditure incurred for excavation of river diversion amounting to Rs.3,28,32,791/- treating it to be capital in nature,which in turn was upheld to the extent of 80% by the ld.CIT(A). The said ground reads as under:

> *"9. In Facts and circumstance of the case, Your Appellant respectfully submits that LD AO has further erred in disallowing claim of Rs.32832791/- in respect of expenses incurred for excavation of River Diversion holding that the Expenditure was incurred giving benefit of enduring nature and hence treated as Capital Expenditure and rejected the claim and Hon. CIT(A) further erred in holding that the said expenditure was for a continuous benefit and thereby directing Ld. AO to allow only 20% of such expenditure in each of the five consecutive years.*
>
> *Your Appellant most respectfully submits that the Ld. AO and also Hon. CIT(A) have failed to appreciate the fact that the said expenditure was incurred for removal of disadvantage or obstacle in its regular, mining business and therefore it was, wholly allowable as revenue expenditure.*
>
> *Your Appellant further submits that his claim was base on decision of Hon. Supreme Court in case of Bikaner Gypsum Ltd. V/s. CIT 187, ITR 39 and CIT Vs. Ashok Leyland Ltd. Your Appellant further submits that the lower Authorities have also failed to appreciate Hon. Gujarat High Court decision in appellant's own case as reported in 132 ITR 377 (Gujarat High Court) which is dully affirmed by Hon. Supreme Court as reported in 249 ITR 787 (SC)."*

38. At the time of hearing, the ld. Counsel for the assessee submitted that an identical issue was dealt with by the ITAT in assessee's own case for the immediately preceding assessment year, i.e. Assessment Year 2005-06, videparagraph Nos. 52-55of the order dated 30.11.2022 wherein the ITAT held as under:-

"52. We have heard both the parties and have gone through the orders of the authorities below. We find merit in the contentions of the ld.counsel for the assessee that the expenses incurred for diverting the course of the river for enabling business of mining activities carried out by the assessee is allowable as revenue expenditure. The Hon'ble apex court in the case of Empire Jute Co. Ltd v CIT 124 ITR 1(SC) has settled the principle for determining capital expenditure holding that only when the advantage on account of the expenditure is in capital field ,it would be treated as capital expenditure. That if the advantage consists merely in facilitating the assesses trading operations or enabling management and conduct of assesses business to be carried out more efficiently or more profitably, while having the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for indefinite future.

53. In the present case the sole reason for treating the expense incurred on diversion of a river as capital was that it gave rise to enduring benefit. The Ld.CIT(A) has given a finding of fact that the said expenditure has not resulted in any asset coming into existence. And as contended by the assessee and not controverted by the Revenue, the purpose of incurring the expenditure was to remove obstacle/ hindrance so as to enable carrying out its activity of mining smoothly.

54. It is amply clear therefore that the expense was incurred only for enabling conduct of the business of the assessee, admittedly without any expenditure being incurred on capital account. The ratio settled by the Hon'ble apex court in the case of Empire Jute(supra) will therefore squarely apply in the facts of the present case. Accordingly therefore, we hold, that the impugned expenditure is to be treated as revenue in nature.

55. The decision of the Hon'ble Bombay High court in the case of Taparia Tools (supra) relied upon by the Ld.CIT(A) while holding the claim of expenditure to be on capital account ,has been pointed out by the Ld.Counsel to have been reversed by the Hon'ble Supreme Court. The Ld.DR did not controvert the same. The Decision of the Hon'ble apex court in the case of Madras Industrial Investment Corp.(supra) also relied upon by the Ld.CIT(A) is we find distinguishable on facts where the issue before the Hon'ble Apex Court was allowability of discount on issue of debentures, which it was held was to be allowed proportionately over the period of holding of the debentures. The issue therefore did not relate to capital/revenue expenditure. This issue was also there in Taparia Tools(supra) where the Hon'ble Bombay High Court held likewise but the said decision was reversed by the Hon'ble apex court subsequently .

In view of the above we hold, the assessee's claim of expenses incurred for excavation of river diversion amounting to Rs.3,4,80,929/- as allowable revenue expense."

39. The ld. DR was unable to distinguish the issue in the present case before us, either on facts or on law. The issue, therefore, admittedly stands covered in favour of the assessee by the order of the ITAT in assessee's own case in the immediately preceding year i.e. AY 2005-06. We see no reasons to take any other view than the view taken by us in the immediately preceding year.Following the same we direct the AO to delete the impugned disallowance of excavation of river diversion expenses amounting to Rs.3,28,32,791/-.

Ground of appeal No.9 is allowed.

In effect appeal of the assessee is partly allowed for statistical purposes.

ITA No. 2817/Ahd/2013 for AY 2006-07

40. We now take up the appeal bearing ITA No.2817/Ahd/2013.

41. Ground No.1 of the assessee's appeal was not pressed at the time of hearing; accordingly the same is dismissed.

42. Ground Nos.2& 3 raised by the assessee relate to the disallowance of depreciation and additional depreciation of Akrimotaproject. The said grounds read as under:

> *"2.In facts & Circumstances of the case, Your Appellant, most respectfully submits that the Ld. Assessing officer has erred by disallowing the depreciation of Rs.66,53,47,522/- of Akrimota Power Project by holding that commercial production has started in October 2005 instead of March 2005. The Ld Assessing Officer has further erred by not accepting the date of production done during the trial run as date of commencement of commercial production and not following the ratio as specified by Hon'ble Gujarat High Court in 251 ITR 133 and Learned CIT(A) has further erred by not following ratio as specified by Hon'ble Gujarat High Court in 251 ITR 133 and trating date of trial run as date of commencement of commercial production.*

3. In facts & Circumstances of the case, Your Appellant, most respectfully submits that the Ld. Assessing officer has erred by disallowing the additional depreciation of Rs.67,24,96,232/- towards Plant & Machinery & Boiler in respect of Akrimota power project holding that generation of power is not an article or a thing manufactured by appellant company and the Ld. CIT(A) has further erred by accepting above addition."

43. The depreciation pertaining to Akrimota project of Rs. 66,53,47,522/- was denied on the ground that the project commenced operations in October 2005, though assesse claimed commencement in March 2005 when trial runs were done which contention was rejected by the authorities below.

44. The claim to additional depreciation of Rs.67,24,96,232/- on Plant and Machinery deployed in the said Akrimota project was denied holding that Power did not qualify as article or thing manufactured by the assessee to make it eligible for additional depreciation.

45. At the time of hearing, the ld. Counsel for the assessee submitted that this issue was dealt with by the ITAT in assessee's own case for the immediately preceding assessment year, i.e. Assessment Year 2005-06, vide paragraph Nos.21-25 of the order dated 30.11.2022 wherein the ITAT held as under:-

"21. Now we take up the issue denial of claim of depreciation in all the projects.

Depreciation on assets used in implementation of the project of Lignite extraction at Bhavnagar and Tadkeshwar, having also been denied finding the projects to be new and in which business activity was yet to commence, we delete the disallowance of depreciation with respect to these projects since we have held these projects to be in continuation of the business of the assessee and not new undertakings set up,above in our order.

22. As for denial of depreciation of machinery used in AKRI MOTA Project,it transpires from order of the authorities below that claim was denied for the reasons that the assets were not shown to have been used as at the end of the year. The assessee's claim of having conducted trial production or trial run was rejected by the Revenue. The reasons for rejecting the claim, as

emanates from orders of the ld.CIT(A), is that apparently after conducting the trial run the assessee had actually put to use its machinery after seven months and gave no explanation for this long gap between conducting trial run and commencing actual user of the assets, from which the Revenue concluded that trial run conducted by the assessee was a mere sham and only for the purpose of claiming huge depreciation.

23. Before us, the ld.counsel for the assessee contended that the fact that it had conducted trial run had been evidenced by the fact that the power generated by virtue of trial run was to GEB; copy of the invoice raised on GEB was submitted to the Revenue authorities, report of meter reading duly signed by GEB Officials, confirmation of generation of power was also provided to the Revenue officers, as also newspaper cuttings covering the news on synchronization of power project with GEB Grid was also submitted to the Revenue officers. It was also pointed out that the reasons for non-commencement of actual production, thereafter was pointed out to be due to technical reasons, and since the assessee has demonstrated the fact of actual production of power in the trial run conducted, this explanation of the assessee could not have been simply brushed aside, that too, ignoring all the evidences filed by the assessee and making adverse observation solely for the reasons that there was huge time gap between the trial run and actual production trial which were also duly explained by the assessee. The ld.counsel for the assessee further relied on the decision of Hon'ble Madras High Court in the case of Lakshmi General Finance Ltd., [433 ITR 94 (Madras)] for the proposition that where even on trial production, machineries can be said to be ready for use and depreciation thereon allowed.

24. The ld.DR relied on the order of the authorities below.

25. We have beard both the parties and we find that the assessee's case for claiming depreciation rests entirely on the fact that it had conducted trial run of its machinery during the impugned year. The Revenue does not dispute the allowability of claim of depreciation on the machinery on the basis of trial run conducted. The contention/basis for denying depreciation is refuting the claim of any trial run conducted by the assessee.

We have noted from the arguments and submissions made before us, and even from the order of the ld.CIT(A) that the assessee had substantiated carrying on trial run, by pointing out that the power generated during the trial run had been sold to GEB which was evidenced by copy of invoices issued by the GEB, meter reading confirmed by the GEB and fact that power generation from the plant being reported in the newspaper. All these evidences filed by the assessee having been dealt with by the authorities below,

they have clearly chosen to ignore all these very valid evidences. On the contrary, they have arrived at a finding of no trial run for generation of power according to their own whims and fancies ,that there is a huge gap between trial run and production of power, being seven months, for which no reasonable explanation was apparently given by the assessee. Considering the fact that the assessee had demonstrated carrying on trial runs with valid evidences, which have not been controverted by the Revenue despite being placed before both the authorities below, we cannot agree with the finding of the Revenue authorities that no trial run was conducted by the assessee. In view of the same, we hold that the assessee had rightly claimed deprecation at Rs122,67,81,665 & Rs 38,26,54,024/-. Assessee's claim of depreciation is accordingly allowed."

46. The Ld.DR fairly agreed that the issue was covered in favour of the assessee by the order of the ITAT in the preceding year.

47. In view of the above, and following the decision of the Co-ordinate Bench in assessee's own case for the immediately preceding year, we allow the ground raised by the assessee and direct the Assessing Officer to delete the disallowance of depreciation of Rs.66,53,47,522/- and additional depreciation of Rs.67,24,96,232/- of Akrimota Power Project.

Grounds of appeal Nos. 2 & 3 are accordingly allowed.

48. Ground No. 4raised by the assessee is against confirmation of addition pertaining to accrued interest amounting to Rs.27,94,000/-,on doubtful advance made to GIIC. The ground reads as under:-

"4. In facts & circumstances of the case, Your Appellant, most respectfully submits that the Ld. Assessing Officer has erred by making addition in respect of accrued interest of Rs.27,94,000/- pertaining to doubtful deposits with G.I.I.C. and the ld. CIT(A) has further erred by confirming addition pertaining to accrued interest on doubtful deposit."

49. The facts relating to the issue being that the assessee had made advances to GIIC but not accounted for interest on the same. The reason advanced by the assessee was that the advance itself was irrecoverable since

GIIC was at the stage of closure , therefore interest on the same being doubtful for recovery, it had not been accounted for as income. The AO/CIT(A) however rejected the assesses contention holding that the interest income was due on mercantile basis and therefore interest of Rs.27.94 lacs, being due on advances made to GIIC, was added to the income of the assessee .

50. The issue raised by the assessee, Ld.Counsel for the assessee pointed out, had been dealt with by the ITAT in the immediately preceding year in ITA No. 1747/A/2009 A.Y 2005-06, at para 35 of the order, ruling in favour of the assessee as under:-

> *"35. He also drawn to para 15-15.5 of the order taxing lease rental and interest on delayed rentals on accrual basis rejecting assesses claim of accounting for on receipt basis as under:*
>
> > *"15. The ground No.8 of appeal is regarding taxing of interest and lease rent receivable amounting to Rs.8,93,10,033/-. The A.O. from the perusal of Directors report found that the statutory auditors of the appellant had observed that "certain items of income are accounted on cash basis as stated in accounting policy No.1(A) in Schedule XVI which is not in accordance with Accounting Standard AS 9 "Revenue Recognition" ". In continuation of such note the A.O. found that the appellant had not accounted for lease rental amounting to Rs.5,37,26,160/- and delayed interest thereon amounting to Rs.3,27,89,873/- receivable from G.S.R.T.C. during the relevant period. He further found the appellant did not account for the interest accrued on loan to GIIC amounting to Rs.27,94,000/-. In response to queries raised by the A.O. in this regard, it was explained on behalf of the appellant that due to stringent financial position of G.S.R.T.C. and GIIC the appellant had not received lease rentals, interest on delayed payments during the relevant period. Therefore, under these circumstances these income were not accounted for and consequently not offered for tax.*
> >
> > *15.1 The A.O. however, rejected the appellant's contention in this regard and held that it was following the mercantile system of accounting wherein accrued income on account of lease rental and interest thereon for delayed payment from G.S.R.T.C. was required to*

be accounted for by the appellant. Similarly, the appellant was required to show interest income from GIIC on accrual basis. In view of this, he made the addition of Rs.8,93,10,0337- in the income of the appellant.

15.2 During the appellate proceedings, the Ld.A.R. of the appellant objected to the said disallowance and submitted as under:

> *11.6 Your appellant had given Buses on Lease to GSRTC. The said lease agreement was in force till September 2004 only. The same was not renewed upon its expiry. Because of Stringent financial position, GSRTC was not in position to pay installments of lease rentals and therefore the corporation did not account for lease rentals due from GSRTC. On the contrary, it had written off the amount of Rs. 11.75 crores which was already accounted and was due from GSRTC. Your appellant had also put a clear note in the statement of total income disclosing these facts. Your appellant relied on the decisions of Hon'ble Supreme Court in the case of Godhra Electricity Co Ltd. V CIT 225 ITR 546 and Uco Bank v CIT 237 ITR 889 in this regard. The Learned assessing officer has not accepted the contention of the appellant has made the addition of Rs. 5,37,26,160/-. The addition made by the Learned Assessing officer also includes a sum of Rs. 2,68,63,0807- which pertains to the period beyond the period covered by the lease agreement.*
>
> *11.7 The said lease agreement provided for interest on delayed lease rentals. Since, the lease rentals itself were not recoverable, interest on delayed lease rental was also not provided for. The Learned assessing officer has made addition of Rs. 3,27,89,8737- being interest on delayed payment of lease rentals by GSRTC.*
>
> *11.8 Your appellant had advanced certain sum to GIIC. Since the said sum itself was doubtful, interest in respect of the same was also not provided relying on the on the decision of Hon'ble Supreme Court in the case of Uco Bank v CIT 237 ITR 889 . The Learned assessing officer has not accepted the contention of your appellant and has made the addition of Rs. 27,94,000/-."*

15.3 I have considered the facts of the case and the submissions of the Ld.A.R. carefully. It is an admitted fact that the appellant is following

mercantile system of accounting. The provisions of sec. 145 of the Act are very clear in this regard after its amendment w.e.f. 1.4.1997, that an assessee has to follow either cash system of accounting or the mercantile system of accounting. The hybrid system of accounting is not permissible now. Under the mercantile system of accounting the income has to be recognized on accrual basis only. It may be pointed out that the appellant's main plea regarding non inclusion of impugned income is that M/s.G.S.R.T.C. was not in a position to pay its due. However, such plea is against the facts which emerged after close analysis of the affairs of the appellant company made by the A.O. The appellant in the F.Y.2005-06 itself debited the accounts of G.S.R.T.C. on 31.3.2006 with a amount of Rs.11.83 crore on account of lease rent receivable. It is an admitted fact that the appellant renewed the lease agreement with G.S.R.T.C. in the month of July, 2006. The appellant's claim that the earlier lease agreement became ineffective after September, 2004 breft of reasoning in sense the assets which were given by it to the G.S.R.T.C. remained with that company. Therefore, the lease agreement which was renewed by the appellant in the month of July, 2006 shall be seen in continuation of earlier lease agreement only. Therefore, under these circumstances, there was accrual of income to the appellant on account of lease rentals and the interest thereon due to late payments thereof.

15.4 It will not out of place to mention here that the auditors of the appellant in note No. 10 to the notes forming part of statement of total income have observed as under:

> *"As per the consistent policy followed by the Corporation - interest on delayed lease rentals accounted on cash basis. The same will be offered for taxation as and when received by the Corporation".*

15.4.1 This note itself shows that the appellant recognizes the delayed interest as its income. Therefore, under these circumstances, the impugned income is required to be taxed in the hands of the appellant for the relevant period. In this regard reliance is placed on the decision of Hon'ble Delhi High Court in the case of Saraswati Insurance Company Ltd Vs. CIT reported in 252 ITR 430. The relevant extracts of the decision are as under:

"The assessee-company had advanced certain loans to its subsidiary company on interest at the rate of 12 per cent, per annum. Interest income was included in the total income of the assessee. For the

assessment years 1977-78 and 1978-79, the assessee claimed that it had not charged interest from the subsidiary company due to its financial condition. The Income-tax Officer found on verification that interest had actually accrued for both the assessment years on the basis of the method of accounting followed by the assessee and the interest was waived only after the accrual. The Commissioner of Income-tax (Appeals) affirmed the views of the Assessing Officer. The resolution forgoing interest was passed a few days before the close of the accounting year in respect of the assessment year 1977-78 and another resolution was passed after the close of the accounting year in respect of the assessment year 1978-79. The Tribunal held that what was waived by the assessee was income which had already accrued to it according to the method of accounting regularly employed by it. On a reference:

Held, that the taxability is attracted not only when income was actually received but also when it accrued. Income accrues when it falls due, that is to say when it becomes legally recoverable, irrespective of whether it is actually received or not and accrued income is that income which the assessee has a legal right to receive. Therefore, the income by way of interest, waived by the assessee, was includible in its total income for the assessment years 1977-78 and 1978-79."

15.5 The reliance placed by the Ld.A.R. on the decision of Hon'ble Supreme Court in the case of UCO Bank Ltd 237 ITR 887 is of no help to the appellant as same has been rendered in respect of the sticky advances in the banking business. Therefore, in view of the above, the ground taken by the appellant is hereby dismissed."

He further drew our attention to para 18-18.3 of the order denying claim of bad debts on account of unrecoverable lease rentals as under:

"18. The 11th ground of appeal is directed against disallowance of bad debt claimed at Rs.11,75,96,456/-. The A.O. disallowed the appellant's claim for writing off of bad debt amounting to Rs.11,75,96,456/- in respect of G.S.R.T.C. The A.O. found that though the appellant had written off the amount in its books of account during the relevant period, the G.S.R.T.C. had not given consequential effect to same in their books of account. He further found that in the subsequent year the appellant itself reversed the entries in its books of account and the impugned debts were again appearing in the appellants books of the

subsequent years. The A.O. has discussed this issue in para -11 of the assessment order.

18.1 During the appellate proceedings, the Ld.A.R. of the appellant objected to the said addition and submitted as under:

> *"11.12 Your appellant had leased the Buses to GSRTC. The Lease rentals were accounted for on accrual basis till 31/03/2004. The Income from lease was credited to the Profit & Loss account and was offered for taxation under the head Profits and Gain from Business or Profession*
>
> *11.13 Lease Installments due from GSRTC amounting to Rs. 11,75,96,456/-were written off by your appellant in the Profit and Loss account as the same were considered to be Bad looking at the financial position of GSRTC.*
>
> *11.14 Necessary resolution was passed at the meeting of the Board of Directors and the copy of the same was submitted during the course of assessment proceedings. Your appellant has failed all the requirements and law for allowing the claim of Bad Debts.*
>
> *11.15 The Learned assessing officer has disallowed the claim of Bad Debt amounting to Rs. 11,75,96,456/- ignoring the provisions of law."*

18.2 I have considered the facts of the case and the submissions of the Ld.A.R. carefully. The close analysis of the submissions made by the appellant before the A.O. clearly reveal that he did not take legal action for recovery of impugned debt on his own volition. In other words, the effective steps were not taken by the appellant to recover the outstanding debt. There is no evidence of any correspondence which were made by the appellant with the defaulting party. The appellant reversed the entries in its books of accounts of subsequent year. Therefore, under these circumstances it can not be held that the debt under reference became bad during the relevant period. In this regard reliance is also placed on the decision of the Hon'ble Gujarat High Court in the case of Dhall Enterprise and Engineers Pvt. Ltd Vs. CIT 295 ITR 481 has held that "under clause (vii) of section 36(1) of the Income-tax Act, 1961, the requirement for allowing deduction on account of bad debt is that the bad debt should be written off as irrecoverable. Merely debiting the amount is not sufficient. The requirement is that the assesses should also prove that the debt has become bad in that particular year."(emphasis supplied).

> *18.3 Therefore, the appellant has to prove two vital points for claiming a deduction u/s.36(1)(vii) with regard to bad debt namely the debt has become bad, and it became bad during the relevant period. The debt claimed by the appellant in respect of G.S.R.T.C does not fulfill the conditions as laid down by the Hon'ble Gujarat High Court in the case of Dhall Enterprise and Engineers Pvt. Ltd. In view of this the appellant's claim of bad debt amounting to Rs.11,75,96,456/- is hereby Rejected. The disallowance made by the A.O. is therefore, hereby confirmed."*

51. Ld.DR fairly agreed that the issue was decided in favour of the assesse in the immediately preceding year. In view of the same the decision of the ITAT in the immediately preceding year will squarely apply to the present case following which, we hold,that no addition on account of interest on advances made to GIIC is tenable in the present year on mercantile basis. The addition therefore made of Rs.27.94 lacs is directed to be deleted.

Ground of appeal No.4 is allowed.

52. Ground of appeal No. 5 relates to addition made of lease rental charges and accrued interest on lease rental charges to be recovered from GSRTC.The said ground reads as under:-

> *"5. In facts & Circumstances of the case, Your Appellant, most respectfully submits that the Ld. Assessing officer has erred by making addition of Rs.5,38,32,916/- as accrued Lease rental Charges to be recovered from GSRTC and Rs.3,27,89,873/- as accrued interest on the delayed payment of above lease rental by the GSRTC, even though lease rental agreement has ended on 30/09/2004 and Ld CIT(A) has further erred by confirming the addition in respect of accrued Lease rental and accrued interest thereon."*

53. The addition made relates to lease rental income and interest accrued on delayed payment of lease rental by GSRTC on buses leased to it by the assesse.The assessee had not accounted for the same stating that GSRTC had

defaulted in payment of huge amount of lease rent of the past period and the assessee, therefore, had discontinued its lease agreement with it.

54. The Ld.Counsel for the assessee stated that the issue raised isidentical to that raised in assessee'scase for the immediately preceding year, i.e. AY 2005-06 dealt with by the ITAT at para 39-41 of its order as under:

> *"39. Having held so, we now proceed to deal with the issue of taxing the lease rentals; on accrual basis as held by the Revenue or on cash basis as claimed by the assessee.*
>
> *40. We find that the solitary basis with the Revenue for taxing lease rentals on accrual basis is that the assessee was following mercantile system of accounting and even section 145 of the Act directs following of either cash or mercantile system and not hybrid system. But as rightly pointed out by the Ld.Counsel for the assessee, even as per the accrual basis only those amounts certain for recovery are to be accounted for. In the present case the contention of the assessee was that GSRTC being in stringent financial position was not paying lease rentals .This is evident from the fact that the assessee had written off lease rentals of earlier years unrecovered of Rs. 11.75 Crs. Therefore even as per the accrual system of accounting the assessee was not required to account for lease rentals which were not certain of recovery and the method therefore adopted by the assessee of accounting for such income on cash basis was, we hold, justified .*
>
> *The addition made of Rs. 8,93,10,033/- on account of lease rental income and interest on delayed rentals accordingly is directed to be deleted.*
>
> *41. Taking up now the last aspect of claim of bad debts with respect to lease rentals written off amounting to Rs.11,75,96,450/-, we find that the same was denied for the reason that the assessee had failed to establish that the debts had become bad. The facts on record however we find are to the contrary. As discussed above the assessee in the impugned year had not accounted for lease rental income of approx. 5.36 Crs for the reason that its recovery was not possible as GSRTC was not paying up the said amount. Along with the same there was interest accrued on delayed lease rentals totaling 3.28 crs which again the assessee had not accounted for ,for the same reason. That these amounts pertaining to the impugned year were unrecovered is an admitted fact. Thus what derives from the same is that GSRTC was not paying up the amounts due from it to the assessee. And for this reason the assessee had resorted to accounting for lease rental income from GSRTC on cash basis which aspect we have dealt with above. Besides,*

the assessee had filed resolution of Board of directors approving the write off of debts. The facts on record themselves establish the fact of debts from GSRTC becoming bad. The assessee therefore, we hold, is entitled to claim bad debts of Rs.11,75,96,456/-.The finding of the Revenue that the assessee had renewed lease agreement with GSRTC which proved that the debts were capable of recovery, has been duly explained by the assessee as being on account of expiry of earlier agreement which in no way effected the recovery of earlier lease rentals."

55. Ld.DR fairly agreed with the same.

56. In view of the above, and respectfully following the decision of the Co-ordinate Bench in assessee's own case for the immediately preceding year, we uphold the grievance of the assessee and direct the Assessing Officer to delete the addition made of lease rent and accrued interest on lease rent of Rs.5,38,32,916/- and Rs.3,27,89,873/- respectively.

Ground of appeal No.5 is thus allowed.

57. Ground No. 6 relates to the addition made to the book profits of the assessee for the purposes of paying tax thereon in terms of Section 115JB of the Act. The said ground reads as under:-

"6. In facts & Circumstances of the case Your Appellant, most respectfully submits that the Ld. Assessing officer has erred by making addition of Rs.59,29,382/-made in the original assessment order pertaining to the exempt income calculated u/s 14A of the Income Tax Act, 1961 and Rs.60,00,000/- pertaining to the provision for the FBT in order to calculate book profit for the purpose of levy of tax w/s 115JB of the IT act and Ld. CIT(A) has further erred by confirming the addition of Rs 59,29,382/- of expenditure pertaining to exempt income in calculating book profit u/s 115JB of the Income Tax Act, 1961"

58. The addition in challenge before us being that relating to disallowance of expenses made under normal provisions of the Act in terms of Section 14A of the Act and the amount of Fringe Benefit Tax (FBT) paid by the assessee amounting to Rs.60,00,000/-. The ld. Counsel for the assessee, at

the outset itself, pointed out that the Hon'ble Karnataka High Court in the case of PCIT Vs. J.J. Glastronics (P.) Ltd., reported in [2022] 139 taxmann.com 375 (Karnataka), has held that the amounts disallowed under Section 14A of the Act could not be added to net profit while computing book profit under Section 115JB of the Act. He further pointed out that ITAT, Mumbai Bench in the case of Rashtriya Chemicals & Fertilizers Ltd. Vs. CIT, reported in [2018] 91 taxmann.com 104 (Mumbai-Trib.), has held that Fringe Benefit Tax not being part of income-tax cannot be added back for arriving at Book Profits under Section 115JB of the Act. He, therefore, stated that both the amounts added back by the Assessing Officer to the Book Profits, i.e. relating to disallowance of expenses made under Section 14A of the Act and FBT paid by the assessee stand covered in favour of the assessee by the judicial decisions.

59. The ld. DR was unable to bring to our notice any contrary decision on the issue.

60. In view of the same, we hold that the disallowance made under Section 14A of the Act amounting to Rs.59,29,382/- is not required to be added back to the Book Profits of the assessee, nor the FBT paid of Rs.60,00,000/- to be added back to the Book Profits of the assessee under Section 115JB of the Act. The additions so made by the Assessing Officer is, therefore, directed to be deleted. This ground of appeal raised by the assessee is thus allowed.

Ground of appeal No.6 is thus allowed.

61. Ground No. 7 raised by the assessee relates to addition made by the Assessing Officer of all disallowance made ,which are under challenge before us in the appeal ,to the book profits of the assessee, amounting in all to Rs.145,22,56,170/-. The said ground reads as under:-

"7. In facts and circumstances of the case, Your Appellant, most respectfully submits that the ld. Assessing Officer has erred by making adding amount of Rs.145,25,56,170/- pertaining to additions made in assessment order in computing profit u/s 115JB of the IT Act and Ld. CIT(A) has further erred by confirming the addition of Rs.142,72,60,543/- pertaining to additions made in assessment order in computing profit u/s 115JB of the IT Act."

62. Since we have deleted all the disallowance made by the Assessing Officer in ground raised before us, i.e. in Ground No.2 to 5, there remains no basis for the Assessing Officer to make any addition to the book profits of the assessee under Section 115JB of the Act. This ground of appeal of the assessee is accordingly allowed.

Ground of appeal No.7 is thus allowed.

In effect, this appeal of the assessee is partly allowed.

ITA No. 1133/Ahd/2014 for AY 2007-08

63. We shall now take up assessee's appeal for AY 2007-08.

Ground No.1 reads as under:

"1. In facts & Circumstances of the case, Your Appellant, most respectfully submits that the Ld. Assessing officer has erred by disallowing expenditure of Rs. 35,74,535/- incurred on lignite Project at Bhavnagar for Carbshal project by holding it as new project, since the no commercial production have been commenced instead of treating the same as extension of existing business as appellant is already engaged in the business of Mining activities of Lignite since last several years. The Ld. CIT(A) has further erred by upholding such addition and not following the ratio as specified by Gujarat High Court in the case of CIT vs. Alembic Glass India Ltd. (103 ITR 715) (Guj. HC) and CIT vs. Core Health Ltd, (251 ITR 61) (Guj.)."

64. Ground no.1 raised therein relates to the disallowance of expenditure incurred on lignite project, holding it as new project treating it as capital expenditure. The issue raised by the assessee, it was common ground,isidentical to the issue raised by the assessee in its appeal bearing

No.830/Ahd/2011, Ground No.1 (supra), which has allowed in favour of the assessee, following the decision of ITAT in assessee's own case for the immediately preceding year, i.e. AY 2005-06.Our findings in this regard are at para 4-6 of the order.In view of the same, and respectfully following the decision of the Co-ordinate Bench in assessee's own case for the immediately preceding year, we uphold the grievance of the assessee and direct the Assessing Officer to delete the impugned disallowance relating to the project expenses at Bhavnagar.

Ground of appeal No.1 is thus allowed.

65. Ground No.2 reads as under:

> *"2. In facts & Circumstances of the case. Your Appellant, most respectfully submits that the Ld. Assessing officer has erred by disallowing the net expense of Rs. 1,07,06,250/- as Prior Period expense, holding that same cannot be allowed as the expenditure as it pertains to earlier year instead of verifying the date of crystallization of liability. The Ld. CIT(A) has further erred by upholding such addition and not considering the date of crystallization of liability."*

66. Ground No. 2 raised by the assessee pertains to the confirmation of disallowance of prior period expenses. It was common ground that the issue raised was identical to that raised in Ground No.3 of the assesses appeal in ITA No.830/Ahd/2011 dealt with us above.Since we have restored the issue back to the AO at para 12-14 of our order above, following the same, we restore this issue back to the Assessing Officer to adjudicate the same afresh in accordance with the direction of the ITAT in its order passed for AY 2005-06 (supra).

Ground of appeal No.2 is allowed for statistical purposes.

67. Ground No.3 reads as under:

"3. In facts & Circumstances of the case, Your Appellant, most respectfully submits that the Ld. Assessing officer has erred by making addition of Rs.167,67,909/- u/s 14A r.w.r.8D out of Interest Expense & other administrative expense even though such provision is made effective from 24/03/2008. The Ld. CIT(A) has further erred by Confirming such addition and not following the ratio as set by Punjab & Haryana High Court in the matter of CIT vs. Hero Cycles."

68. Ground no.3 raised by the assessee relates to the disallowance of expenses relating to the earning of exempt income as per the provisions of Section 14A of the Act. This issue raised by the assessee,it was common ground, is similar to the issue raised by the assessee in its appeal bearing No.830/Ahd/2011, Ground No.4 (supra). We have dealt with issue deleting the disallowance made,at para16-18 of our order above. Following the same, we uphold the grievance of the assessee and direct the Assessing Officer to delete the impugned disallowancemade under Section 14A of the Act.

Ground of appeal No.3 is thus allowed.

69. Ground No.4 reads as under:

"4. In facts & Circumstances of the case, Your Appellant, most respectfully submits that the Ld. Assessing officer has erred by making addition of Rs.76,63,967/- in respect of advertisement expense by treating the same as contribution to Government and not eligible as business expense instead of appreciating the fact that by mistake it has been debited as contribution to government but actually it is in nature of Advertisement Expense. The Ld. CIT(A) has further erred by Confirming such addition & not treating such as Advertisement Expense. The Ld. CIT(A) has further erred by not following the ratio as specified by the High Court in the case of Asian Tools & Plastic Co. vs. CIT 53 ITR 392 and Godavari Sugar Mills vs. CIT 191 ITR 311."

70. Ground no.4 raised by the assessee relates to the disallowance of expenditure being advertisement expenditure by treating it as contribution to Government and not eligible business expenses. The aforesaid issue raised by the assessee , it was contended,was similar to the issue raised by

the assessee in its appeal bearing No.830/Ahd/2011, Ground No.5 (supra), and also in assessee's appeal for AY 2005-06 in ITA No. 1747/A/2009 which stands adjudicated vide order dated 30/11/22.

71. We have noted from the facts of the case before us that the contributions made by the assessee to the commissioner, Geology and Mining,Index B and to various advertisement agencies like The Hindu,The Pioneer,The Statesmanetc. for information to all factories in respect of Product and services of GMDC. This fact finds mention at para 7 of the assessment order as under:-

> *"7. Contribution to Government Bodies:- Rs.76,63,967/-. The Assessee Company has claimed an amount of Rs.76,53,967/- being contribution made to Government bodies as business expenditures. The Assessee Company was requested to justify the expenditure as the 74% of the holding is held by Government of Gujarat and the contribution is made to the Government bodies. In view of above position they are the persons specified u/s 40A(2)(b) of the Act.*
>
> *In response to the same the Assessee Company vide Annexure 5 to letter dated 24/07/2009 submitted that it has paid Rs. 53 thousand to Commissioner of Geology & Mining to their consultants, Rs.40 Lakhs to IndextB, and balance Rs. 33.11 lakhs to various advertisement agencies like the Hindu The pioneer, The Statesman etc. for information to all factories in respect of product and activities of GMDC.*
>
> *The assessee has submitted that due to wrong codification, these expenses were wrongly debited to Contribution to Govt. bodies account. The assessee has further submitted that Rs. 53000.00 were paid toconsultants for prospecting of minerals in new lease areas Rs. 40.00 lacs is paid to a Govt. body Indext B for publicity of its products and to attract new entrepreneurs for business enhancement. Balance amount is also spent on corporate advertisement campaigning.*
>
> *The reply submitted by the Assessee Company is considered but not found acceptable. The Assessee Company is not dealing in any branded product and it is also not facing any competition. Hence the question of advertisement of making its name, activity or product familiar among users does not rise.*

Considering above facts the expenses of Rs.76,63,967 being payment to Government bodies i e. persons specified u/s 40A(2)(b) of the Act is disallowed treating it as non business expenditure."

72. We have noted that in for A.Y 2005-06 the ITAT has allowed assesses claim for deduction of amounts paid to commissioner, geology and Mining finding it to be incurred for the purpose of business of the assessee. At the same time in A.Y 06-07, we have denied this claim with respect to contribution made to Index B Fund at para 23-24of our order.The issue of allowability of above two payments therefore are covered by the orders of ITAT following which we allow the payment made to commissioner, geology and Mining and disallow that made to Index B Fund. As for payments made to advertisement agencies, we see no justification in the orders of the authorities below denying it for the reason that assessee not dealing it branded products it was not required to advertise its products. As long as the incurrence of the expenditure is not in dispute and there is also no dispute that it is for the purpose of business of the assessee, the claim cannot be denied by the Revenue gauging its necessity.The claim to expenses for advertisement in dailies is therefore allowed.

Ground of appeal No. 4 is partly allowed.

73. Ground No.5 reads as under:

"5. In facts & Circumstances of the case, Your Appellant, most respectfully submits that the Ld. Assessing officer has erred by making addition of Rs.85,75,046/- by rejecting the claim of depreciation on leased assets to G.S.R.T.C by observing that the appellant has no ownership right on assets leased to G.S.R.T.C. The Ld. Assessing Officer on the other side has further erred by taxing entire lease rental and not restricting the taxability to the extent of Interest amount of the lease rentals. The Ld. CIT(A) has further erred by confirming such additions and not restricting the taxability to the extent of Interest amount of the lease rentals."

74. Ground no.5 raised by the assessee relates to the disallowance being depreciation on leased assets to GSRTC. The aforesaid issue raised by the assessee, it was common ground,was identical to the issue raised by the assessee in its appeal bearing No.830/Ahd/2011, Ground No.8 (supra), which was allowed in favour of the assessee, following the decision of ITAT in assessee's own case for AY 2005-06. (Para 34-36 of our order above). In view of the above, and respectfully following the decision of the Co-ordinate Bench in assessee's own case for the AY 2005-06, we direct the Assessing Officer to allow the claim of depreciation in respect of leased buses to GSRTC.

Ground of appeal No.5 is thus allowed.

75. Ground No. 6 raised by the assessee relates to the disallowance of claim made by the assessee on account of additional depreciation on Plant & Machinery amounting to Rs.592,11,502/-. The said ground reads as under:-

> *"6. In facts & Circumstances of the case, Your Appellant, most respectfully submits that the Ld. Assessing officer has failed to appreciate facts that in order to claim additional depreciation on Plant & Machinery the appellant should be engaged in the manufacturing of Article or thing. Since assessee is engaged in the Mining activity it amount to manufacturing activity and since generation of power is incidental to related to its main activity it also qualifies for additional depreciation. However without appreciating such fact the Ld. Assessing Officer has disallowed the claim of additional depreciation of Rs.592,11,502/-. The Ld. Assessing Officer has further erred in appreciating the fact that as per Section 80-IC(2) generation of Power is treated as manufacturing of Article or thing & eligible for deduction @100% of the profit of manufacturing activity. The Ld. CIT(A) has further erred by confirming such additions & not appreciating the facts of the case."*

76. The issue raised in the aforesaid ground is similar to the issue raised by the assessee in its appeal bearing No.2817/Ahd/2013 for AY 2006-07, in Ground Nos. 2 & 3 (supra), which was allowed in favour of the assessee, following the decision of ITAT in assessee's own case for AY 2005-06, at para

44-47. In view of the above, and respectfully following the decision of the Co-ordinate Bench in assessee's own case for the AY 2005-06, we uphold the grievance of the assessee and direct the Assessing Officerto allow the claim of additional depreciation on Plant & Machinery.

Grounds of appeal No. 6 is accordingly allowed.

77. Ground No. 7 relates to the addition made to the book profits of the assessee for the purposes of paying tax thereon in terms of Section 115JB of the Act. The said ground reads as under:-

> *"6. In facts & Circumstances of the case Your Appellant, most respectfully submits that the Ld. Assessing officer has erred by making addition of Rs.59,29,382/-made in the original assessment order pertaining to the exempt income calculated u/s 14A of the Income Tax Act, 1961 and Rs.60,00,000/- pertaining to the provision for the FBT in order to calculate book profit for the purpose of levy of tax w/s 115J8 of the IT act and Ld. CIT(A) has further erred by confirming the addition of Rs 59,29,382/- of expenditure pertaining to exempt income in calculating book profit u/s 115JB of the Income Tax Act, 1961"*

78. The issue pertained to the aforesaid ground is similar to the issue raised by the assessee in Ground No. 6 of its appeal bearing ITA No. 2817/Ahd/2013 for AY 2006-07 (surpa), which was allowed in favour of the assessee for reason mentioned in paragraph Nos. 57-60 as above. We see no reasons to take any other view of the matter than the view taken by us while deciding Ground No.6 vide ITA No. 2817/Ahd/2013 for AY 2006.07.Accordingly, the addition so made by the Assessing Officer is, therefore, directed to be deleted. This ground of appeal raised by the assessee is thus allowed.

Grounds of appeal No. 7 is thus allowed.

In effect, this appeal of the assessee is partly allowed for statistical purposes.

79. In the combined result, ITA Nos. 2817/Ahd/2013 is partly allowed, whereas ITA No. 830/Ahd/2011& 1133/Ahd/2014 are partly allowed for statistical purposes.

Order pronounced in the open Court on31/10/2023 at Ahmedabad.

Sd/-	**Sd/-**
(SUCHITRA R. KAMBLE)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad;Dated 31/10/2023

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