

आयकर अपीलीय अधिकरण, पुणे न्यायपीठ “ए” पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “A”, PUNE**

श्री आर. के. पांडा, लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

**BEFORE SHRI R.K. PANDA, AM
AND SHRI VIKAS AWASTHY, JM**

आयकर अपील सं. / ITA Nos.377 to 383/PN/2013
निर्धारण वर्ष / Assessment Years : 2004-05 to 2010-11

ACIT, Central Circle,
Kolhapur

..... अपीलार्थी /
Appellant

बनाम v/s

RDS Construction Pvt. Ltd.,
S-1, Malati Towers,
223/3, 2nd Floor,
E-Ward, Tarabai Park,
Kolhapur
PAN No.AABFR4457M

..... प्रत्यर्थी /
Respondent

आयकर अपील सं. / ITA Nos.2578 to 2581/PN/2012
निर्धारण वर्ष / Assessment Years : 2007-08 to 2010-11

RDS Construction Pvt. Ltd.,
S-1, Malati Towers,
223/3, 2nd Floor,
E-Ward, Tarabai Park,
Kolhapur
PAN No.AABFR4457M

..... अपीलार्थी /
Appellant

बनाम v/s

DCIT, Central Circle,
Kolhapur

..... प्रत्यर्थी /
Respondent

निर्धारिती की ओर से / Assessee by : Shri Nikhil Pathak
प्रत्यर्थी की ओर से / Department by : Mrs. M.S. Verma, CIT

सुनवाई की तारीख / Date of Hearing :11.09.2015	घोषणा की तारीख / Date of Pronouncement:06.11.2015
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आदेश / ORDER

PER R.K. PANDA, AM :

ITA Nos. 377 to 383/PN/2013 filed by the Revenue are directed against the common order dated 01-11-2012 of the CIT(A), Kolhapur relating to Assessment Years 2004-05 to 2010-11 respectively. The assessee has also filed appeals for A.Yrs. 2007-08 to 2010-11 vide ITA Nos. 2578 to 2581/PN/2012 against the said order of the CIT(A). For the sake of convenience, all these appeals were heard together and are being disposed of by this common order.

ITA No.377/PN/2013 (By Revenue) (A.Y. 2004-05) :

2. Facts of the case, in brief, are that the assessee is a company engaged in the business of Civil construction. It filed its original return of income for the year under consideration on 01-11-2004 declaring total income of Rs.72,07,240/-. A search u/s.132 of the I.T. Act was carried out on 23-09-2009 in the group of cases. In response to notice u/s.153A the assessee filed its return of income on 20-07-2010 declaring total income of Rs.78,14,980/-. The AO completed the assessment u/s.153A r.w.s. 143(3) for the impugned assessment year on a total income of Rs.80,54,157/- by making the following additions :

a. Disallowance u/s.40A(3)	Rs.4,060/-
b. Addition on account of bogus claim of expenses in the name of labour contractors	Rs.2,35,117/-

3. So far as addition made u/s.40A(3) is concerned the AO noted that during test check of certain expenses, certain cash payments exceeding Rs.20,000/- were found. Accordingly, the AO

disallowed an amount of Rs.4,060/- being 20% of such cash payment of Rs.20,300/- made in A.Y. 2004-05.

4. Similar additions have been made for other assessment years, the details of which are as under :

A.Y.	Amount of Expenses Spent in excess of Rs.20,000/- in cash	Disallowance u/s.40A(3) of the I.T. Act
2005-06	213941	42788
2006-07	361069	72214
2007-08	317566	63513
2008-09	609305	609305
2009-10	184068	69384
2010-11	80499	NIL

5. So far as addition of Rs.2,35,117/- is concerned the AO noted during the course of assessment proceedings that the assessee company has shown huge amount outstanding in the names of sub-contractors and labour contractors. From the various details furnished by the assessee the AO noted that certain creditors are outstanding for more than 3 years and certain creditors are even outstanding for more than 10 years. He, therefore, asked the assessee to shortlist the names of creditors who are outstanding for more than 3 years and since when they have remained unpaid. The AO noted that investigation during the course of search and assessment proceedings revealed that assessee is generating unaccounted income by inflating its expenditure. Since assessee is doing Government contract work it cannot suppress the receipts. When an expenditure is debited in the books, the payment is made through cash from its unaccounted income. However, the liability is continued till such time the cash book has sufficient cash balance. Whenever there is sufficient cash balance the payments is

shown in the books and liability is liquidated. According to the AO since the labourers are poor and they lead hand to mouth existence, therefore, it is very unlikely that they will wait for such a long time for the labour work done by them. The other method is that the bogus expenditure is debited in the books of account. Since the expenditure is bogus no payment is made and the liability is continued for a long time. In view of the above, the AO disallowed the outstanding liability for more than 3 years amounting to Rs.2,35,117/- for A.Y. 2004-05.

6. Similar additions have been made for other assessment years, the details of which are as under :

A.Y.	Amount
2005-06	1,03,230/-
2006-07	1,94,223/-
2007-08	3,12,525/-
2008-09	25,23,585/-

7. Before CIT(A) it was submitted that original assessments were completed u/s.143(3) for the A.Y. 2004-05 to 2006-07 and various additions were made after verifying the books of account and other details furnished by the assessee. It was submitted that these additions could not have been made in the order passed u/s.143(3) r.w.s. 153A as no incriminating material or documents were found in the course of search. It was pointed out that the additions made in respect of the above items were as a result of change of opinion on the same set of facts considered in the original assessments. Relying on the decision of the Special Bench of the Tribunal in the case of All Cargo Global Logistics Ltd. Vs. DCIT vide ITA No.5018 to 5022 & 5059/Mum/2010 for A.Yrs. 2004-05 to 2009-10 it was submitted that the Tribunal in the said decision has held that in

cases where assessment orders have already been passed, assessment u/s.153A will be made on the basis of incriminating material, i.e. the books of account and other documents found during the search but not produced during the course of original assessment and undisclosed income or property discovered in the course of search. It was accordingly argued that no addition is warranted either u/s.40A(3) or u/s.41(1) of the I.T. Act, 1961.

8. So far as disallowance u/s.40A(3) is concerned the Ld.CIT(A) confirmed the addition for all the years in absence of any examination by the AO during the first round of assessment proceedings and in absence of the assessee to show that the expenses made in excess of Rs.20,000/- were incorrect due to circumstances beyond the control of the assessee.

9. So far as disallowance u/s.41(1) is concerned the Ld.CIT(A) deleted the addition holding that the AO in the order passed u.s,143(3) which was completed prior to the search, had verified the issue of outstanding creditors and no incriminating documents were found as a result of search. He accordingly deleted the addition.

10. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us with the following grounds :

“1. Whether on the facts and in the circumstances of the case the CIT(A) is justified in deleting the addition of Rs.2,35,117/- made on account of creditors outstanding stating that the issue of outstanding creditors was already subject to scrutiny during original assessment and the Assessing Officer cannot re-assess the income u/s.153A?

2. On the facts and in the circumstances of the case and in law, whether the Ld.CIT(A) is justified in holding that the original assessment made u/s.143(3) had reached finality and the same could not be agitated during the course of assessment proceedings

u/s.143(3) r.w.s.153A of the Act in the absence of incriminating material found during the search.

3. The Appellant prays that the order of the Ld.CIT(A) be vacated and that of the Assessing Officer's order may be restored.

4. The appellant craves leave to add, alter, amend, modify any of the above grounds raised, any other grounds at the time of proceedings before the Hon'ble Tribunal which may please be granted."

11. The Ld. Departmental Representative strongly opposed the order of the CIT(A). She submitted that the Ld.CIT(A) was not justified in deleting the addition made by the AO amounting to Rs.2,35,117/- made on account of sundry creditors outstanding for more than 3 years. She also relied on the decision of Hon'ble Karnataka High Court in the case of Canara Housing Development Company Vs. DCIT vide ITA No.38/2014 order dated 25-07-2014 to the proposition that the AO has power to re-assess the income u/s.153A even in case of a completed assessment, the order of which was passed u/s.143(3).

12. The Ld. Counsel for the assessee on the other hand submitted that no incriminating evidence was found as a result of search u/s.132 or during the assessment proceedings u/s.153A. Therefore, no addition could have been made. Referring to the decision of the Special Bench of the Tribunal in the case of All Cargo Global Logistics Ltd.(Supra) he submitted that the Tribunal in the said decision has already considered this issue. Further, the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation vide ITA No.523 of 2013 and 1969 of 2013 order dated 21-04-2015 after considering the decision of Hon'ble Karnataka High Court in the case of Canara Housing (Supra) has held that the scope of enquiry u/s.153A is to be

confined only to the undisclosed income unearthed during the search or proceedings u/s.153A. He submitted that merely because creditors were outstanding for some years it did not mean that the liability has ceased in the hands of the assessee. Referring to the decision of Hon'ble Supreme Court in the case of CIT Vs. Sugauli Sugar Works Pvt. Ltd. reported in 236 ITR 518 he submitted that the Hon'ble Supreme Court in the said decision has held that the mere fact that the assessee has made an entry of transfer in his accounts unilaterally will not enable the department to say that section 41(1) is applied and the amount should be included in the total income of the assessee. Thus, even when the assessee has credited such amount to its profit and loss account still provisions of section 41(1) are not applicable in view of the above decision. Therefore, when the assessee in the instant case is still showing the creditors in its balance sheet, therefore, there is no question of making the addition u/s.41(1). Referring to the decision of the Pune Bench of the Tribunal in the case of Hrishikesh L. Joshi vide ITA No.702/PN/2007 he submitted that the Tribunal in the said decision has held that simply because the liability is unpaid for more than 3 years it cannot be taxed as cessation of liability u/s.41(1). He accordingly submitted that no addition could have been made.

13. We have considered the rival arguments made by both the sides, perused the orders of the AO and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO made addition of Rs.2,35,117/- u/s.41(1) of the I.T. Act on the ground that the liability appearing in the balance sheet on account of creditors has

ceased to exist. We find the Ld.CIT(A) deleted the addition on the ground that the assessment for the impugned assessment year was completed u/s.143(3) prior to the date of search and no incriminating material/evidence was unearthed during the course of search and therefore no addition u/s.41(1) could have been made. It is the submission of the Ld. Departmental Representative that in view of the decision of Hon'ble Karnataka High Court in the case of Canara Housing Development Company (Supra) the AO can make addition in an assessment u/s.153A even though the assessment has been completed u/s.143(3) prior to the date of search.

13.1 We find the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Supra) after considering the decision of Hon'ble Karnatak High Court in the case of Canara Housing Development Company (Supra) has held that the AO while passing the independent assessment order u/s.153A r.w.s. 143(3) of the Act could not have disturbed the assessment/re-assessment order which has attained finality unless the materials gathered in the course of search or the proceedings u/s.153A of the I.T. Act establish that the reliefs granted in the finalized assessment/re-assessment were contrary to the facts unearthed during the course of 153A proceedings. Since in the instant case, there is nothing on record to suggest that any material was unearthed during the search or in 153A proceeding which would show that non-disallowance u/s.41(1) was erroneous, therefore, we do not find any infirmity in the order of the CIT(A) deleting the addition made by the AO.

13.2 Even on merit also, we find the issue stands covered in faovur of the assessee by the decision of the Hon'ble Supreme Court in the case of Sugauli Sugar Works Pvt. Ltd. (Supra). We find the Hon'ble Supreme Court in the said decision while deciding on the issue of cessation of liability u/s.41(1) of the I.T. Act has observed as under:

"The respondent-assessee is a private limited company. In the proceedings for assessment of tax for the year ending 30.6.1964 relevant to the Assessment year 1965-66, the assessee transferred a sum of Rs. 3,45,000 out of the suspense account running from 1946-47 to 1948-49 to the capital reserve account. The Income Tax Officer found that an amount of Rs. 1,29,000 was with reference to the deposits and advances which had been paid back and he included a sum of Rs. 2,56,529 under Section 41 of the Income Tax Act in the total income of the assessee. The assessee went on appeal before the Appellate Assistant Commissioner and the order of the I.T.O. was confirmed. The assessee carried the matter to the Tribunal. The Tribunal accepted the contention of the assessee and held that its unilateral entry in the accounts transferring the amount to the capital reserve account would not bring the matter within the scope of Section 41 of the Income Tax Act and consequently held in favour of the assessee. The decision of the Tribunal was challenged before the High Court. The High Court observed :

"The transfer of an entry is a unilateral act of the assessee, who is a debtor to its employees. We fail to see how a debtor, by his own unilateral act, can bring about the cessation or remission of his liability. Revision has to be granted by the creditor. It is not in dispute and it indeed cannot be disputed that it is not a case of remission of liability. Similarly a unilateral act on the part of the debtor cannot bring about a cessation of his liability. The cessation of the liability may occur either by reason of the operation of law, that is, on the liability becoming unenforceable at law by the creditor and the debtor declaring unequivocally his intention not to honour his liability when payment is demanded by the creditor or a contract between the parties, or by discharge of the debt the debtor making payment thereof to his creditor. Transfer of an entry is neither an agreement between the parties nor payment of the liability."

On that reasoning, the High Court answered the question in refer-ence in favour of the assessee. Aggrieved thereby, the Commissioner of Income Tax has preferred this appeal.

2. Learned counsel for the appellant contends that in the facts of the present case, the liability has come to an end as a period of more than 20 years had elapsed and the creditor had not taken any step to recover the amount. Consequently, according to him, there is a cessation of the debt and the matter would fall within the scope of Section 41 of the Act. Section 41 reads as follows :

"Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee and subsequently during any previous year, the assessee has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by him, shall be deemed to be profits and gain of business or profession and accordingly chargeable to income tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made in existence in that year or not."

3. It will be seen that the following words in the Section are important: "the assessee had obtained, whether in cash or in any other manner whatsoever any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by him". Thus, the section Contemplates the obtaining by the assessee of an amount either in cash or in any other manner whatsoever or a benefit by way of remission or cessation and it should be of a particular amount obtained by him. Thus, the obtaining by the assessee of a benefit by virtue of remission or cessation is sine qua non for the application of this Section. The mere fact that the assess has made an entry of transfer in his accounts unilaterally will not enable the Department to say that Section 41 would apply and the amount should be included in the total income of the assessee. The reasoning of the High Court is correct and we are in agreement with the same.

4. Learned counsel for the appellant draws our attention to the judgment of the Calcutta High Court in *Commissioner of Income Tax v. General Industrial Society Ltd.*, (1994) 207 ITR 169. The Division Bench of the Calcutta High Court has taken care to set out the two important factors in that case which weighed with them to come to the particular conclusion. The Bench said :

"It appears from the assessment order that there is one peculiar aspect in the present case. It is the practice of the assessee to write back such unclaimed and unspent liabilities from year to year on grounds of bar limitation of the liability and to get away without paying tax on such amount written back to profit on the same plea. This has been happening since the assessment year 1977-78. This fact, to our mind, is very significant. One more notable feature is that the assessee never divulged to the Assessing Officer the details and particulars of the claims dequite specific enquiry. These two factors combine to lend to the case a colour different from the case relied upon on behalf of the assessee." (at pages 172-73) The Bench distinguished the other decisions referred to before it by pointing out that the facts were entirely different in those cases. Hence, the ruling of the Calcutta High Court in the case cited will not help the appellant as it turned on the peculiar facts of the case as stated in the passage extracted.

5. Learned counsel submits that the said judgment has been followed by the Calcutta High Court in *Commissioner of Income-Tax, v. Jiajee Rao Cotton Mills Ltd.*, (1997) 227 ITR 860. There is no separate reasoning in the said judgment and does not take the matter any further.

6. Learned counsel also referred to the judgment of the Bombay High Court in Commissioner of Income-Tax v. Bennett Coleman and Co. Ltd., (1993) 201 ITR 1021. The Bench held that it was difficult to accept the contention of the assessee that cessation of liability can take place only as a result of a bilateral act, but it will depend upon the facts of each case. The Bench pointed out that there may be cases where the liability is not barred by operation of law, but in such cases bilateral act of the parties will be necessary to bring about cessation of liability. According to the Bench, if the recovery had become barred by limitation by operation of law, unilateral expression of intention of the debtor not to treat the amount any more as liability might be sufficient to bring about a cessation of the liability. The Bench also accepted the alternative argument that where an assessee had written off his time barred liability from his accounts and transferred the amount to his profit and loss account thereby treating it as his income, he could not be permitted to turn round when the question of inclusion of such amount in his income under Section 41(1) of the Act arose. The Bench distinguished the judgment in Kohinoor Mills Co. Ltd. v. CIT, (1963) 49 ITR 578, by observing that there was no cessation of liability in that case despite the expiry of period of limitation to enforce the same. The Bench said that the assessee could not get rid of his liability when called upon to meet either by the employees under the Industrial Disputes Act or by the Government under the Bombay Welfare Fund Act on account of the special provisions of those Acts. We are unable to accept the reasoning of the Bombay High Court in that case. Just because an assessee makes an entry in his books of accounts unilaterally, he cannot get rid of his liability. The question whether the liability is actually barred by limitation is not a matter which can be decided by considering the assessee's case alone but it is a matter which has to be decided only if the creditor is before the concerned authority. In the absence of the creditor, it is not possible for the authority to come to a conclusion that the debt is barred and has become unenforceable. There may be circumstances which may enable the creditor to come with a proceeding for enforcement of the debt even after expiry of the normal period of limitation as provided in the Limitation Act.

7. One aspect of the matter has been completely ignored by the judgment of the Division Bench of the Bombay High Court. As pointed out already, the crucial words in the Section require that the assessee has to obtain in cash or in any other manner some benefit. That part of the Section has been omitted to be considered by the Division Bench of the Bombay High Court. The said words have been considered by a Full Bench of Gujarat High Court in detail in The Commissioner of Income-tax, Gujarat-II, Ahmedabad v. M/s. Bharat Iron & Steel Industries, Bhavnagar, (1993) Tax L R 188. The following passages in the judgment brings out of the reasoning of the Full Bench succinctly :

"11. In our opinion, for considering the taxability of amount coming within the mischief of S. 41(1) of the Act, the system of accounting followed by the assessee is of no relevance or consequence. We have to go by the language used in s. 41(1) to find out whether or not the amount was obtained by the assessee or whether or not some benefit in respect of trading liability by way of remission or cessation thereof was obtained by the assessee and it is in the previous year in which the amount or benefit, as the case may be, has been obtained that the

amount or the value of the benefit would become chargeable to income tax as income of that previous year.

12. We fully agree with the view taken by the Division Bench in *C.I.T. v. Rashmi Trading* (1977) Tax LR 520 Gujarat (Supra) that the only meaning that can be attached to the words "obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure" incurred in any previous year clearly refer to the actual receiving of the cash of that amount. The amount may be actually received or it may be adjusted by way of an adjustment entry or a credit note or in any other form when the cash or the equivalent of the cash can be said to have been received by the assessee. But it must be the obtaining of the actual amount which is contemplated by the Legislature when it used the words "has obtained; whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure in the past". As rightly observed by the Division Bench in the context in which these words occur, no other meaning is possible." we are in agreement with the said reasoning.

8. There is another judgment of the Bombay High Court which was rendered much earlier in *J.K. Chemicals Ltd. v. Commissioner of Income-Tax, Bombay City II*, (1966) 62 ITR 34. The Bench observed :

".....The transfer of an entry is a unilateral act of the assessee, who is a debtor to its employees. We fail to see how a debtor, by his own unilateral act, can bring about the cessation or remission of his liability. Remission has to be granted by the creditor. It is not in dispute, and it indeed cannot be disputed, that it is not a case or remission of liability. Similarly, a unilateral act on the part of the debtor cannot bring about a cessation of his liability. The cessation of the liability may occur either by reason of the operation of law, i.e., on the liability becoming unenforceable at law by the creditor and the debtor declaring unequivocally his intention not to honour his liability when payment is demanded by the creditor, or a contract between the parties or by discharge of the debt - the debtor making payment thereof to his creditor. Transfer of an entry is neither an agreement between the parties nor payment of the liability....."(at page 41)

9. This judgment has been quoted by the High Court in the present case and followed. We have no hesitation to say that the reasoning is correct and we agree with the same.

10. The principle that expiry of period of limitation prescribed under the Limitation Act could not extinguish the debt but it would only prevent the creditor from enforcing the debt, has been well settled. It is enough to refer to the decision of Court in *Bombay Dyeing & Manufacturing Co. Ltd. v. The State of Bombay and Others*, [1958] SCR 1122, If that principle is applied, it is clear that mere entry in the books of accounts of the debtor made unilaterally without any act on the part of the creditor will not enable the debtor to say that the liability has come to an end. Apart from that, that will not by itself confer any benefit on the debtor as contemplated by the Section.

11. In the circumstances, we find no merit in this appeal and it is dismissed. There will be no order as to costs."

13.3 We find the Pune Bench of the Tribunal in the case of Hrishikesh L. Joshi (Supra) while deleting the addition u/s.41(1) of the Act, following the above decision and various other decisions has observed as under :

“12. Aggrieved with the above decision of the CIT(A), the assessee filed ground 3 of the appeal before us. Further, aggrieved with the relief given to the assessee the revenue is in appeal vide the ground 7 of the appeal. During the proceedings, the assessee filed a written note stating that the AO invoked the provisions of section 41(1) of the Act and according to the said provisions, the AO cannot treat the said amounts as income of the assessee or deem them as case of remission or cessation of liabilities, where the said amounts were not written off by the assessee in the books of the assessee. During the proceedings before us, the assessee filed case laws to support view including the Pune bench decision in the case of M/s Atidab Concrete Pipes and Products Pune vide ITA no 1017/PN/2002 to support the above. Further, counsel stated that the said amounts were written off as the income of the assessee in the year relevant to the AY 2006-07 and therefore, there is no need for any addition during the year under consideration. Further, we find the judgments in the cases of DSE Engineers (30 SOT 31) (Mum), Sugaoli Sugar Works P Ltd (236 ITR 518) holds that the liabilities do not cease to exist merely by efflux of time. Considering the above settled principles on the issue, we find that the finding of the CIT(A) has to be reversed on this issue. Accordingly, the relevant ground of the assessee are allowed. Further, the grounds of the revenue are dismissed.

13.4 Following the above precedents we hold that the CIT(A) was fully justified in deleting the addition of Rs.2,35,117/-. Accordingly, the grounds raised by the Revenue are dismissed.

ITA No.378/PN/2013 (By Revenue) (A.Y. 2005-06) :

14. Grounds of appeal No.1 and 2 by the Revenue read as under:

“1. Whether on the facts and in the circumstances of the case the CIT(A) is justified in deleting the addition of Rs.1,03,230/- made on account of creditors outstanding stating that the issue of outstanding creditors was already subject to scrutiny during original assessment and the Assessing Officer cannot re-assess the income u/s.153A?

2. On the facts and in the circumstances of the case and in law, whether the Ld.CIT(A) is justified in holding that the original assessment made u/s.143(3) had reached finality and the same could not be agitated during the course of assessment proceedings

u/s.143(3) r.w.s. 153A of the Act in the absence of incriminating material found during the search.”

15. After hearing both the sides, we find the above grounds are identical to grounds of appeal No.1 and 2 in ITA No.377/PN/2013. We have already decided the issue and the grounds raised by the Revenue have been dismissed. Following the same reasoning, the above grounds by the Revenue are dismissed.

16. Ground of appeal No.3 by the Revenue reads as under :

“3. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting addition of Rs.22,04,250/- u/s.69B of the Act stating that the Assessing Officer has incorrectly assumed jurisdiction over this item when assessment proceedings were completed u/s.143 of the Act and by holding that the land was not undervalued as DVO has taken comparable sales instance of the year 2005, whereas the Assessing Officer was supposed to take comparable instance of 1996 and 2002. However, there is nothing in the purchase deed to suggest that the assessee had made payment in the year 1996 and 2002?”

17. Facts of the case, in brief, are that the AO during the course of assessment proceedings noted that the assessee has acquired the following properties during A.Y. 2005-06 :

1	Land at S.No.22/1 (Part) Bavdhan (Budruk), Tal Mulshi, Dist. Pune
2	Land at S.No.22/1 (Part) Bavdhan (Budruk), Tal Mulshi, Dist. Pune
3	Land at S.No.22/1 (Part) Bavdhan (Budruk), Tal Mulshi, Dist. Pune
4	Land at S.No.22/1 (Part) Bavdhan (Budruk), Tal Mulshi, Dist. Pune

The total value of the above properties acquired are Rs.41,95,750/-. To know the investment in the said properties the AO made a reference to the DVO u/s.142A of the I.T. Act to determine the cost of the properties in the hands of the assessee as on the date of acquisition.

18. The DVO valued the properties at Rs.64,00,000/-. The AO, therefore, asked the assessee to explain as to why the difference of Rs.22,04,250/- shall not be added u/s.69B of the I.T. Act. It was submitted by the assessee that the difference between the investment shown by the assessee and the value determined by the DVO is due to the sudden increase in price by more than 60% to 70%. Further, the DVO has not considered the fact that one of the properties, i.e. Plot No.22/1 at Bavdhan was agreed to be purchased in 2002 and Plot No.21/1 at Bavdhan was agreed to be purchased in 1996. The DVO has not considered the above fact and has considered the fair market value of properties on the date of purchase. The fair market value on the date of first payment, i.e. 2002 and 1996 should have been considered by the AO. However, the AO did not accept the arguments advanced by the assessee and made the addition of Rs.22,04,250/- being the difference between the cost arrived at by the DVO and shown by the assessee u/s.69B of the I.T. Act.

19. Before CIT(A) it was submitted that the stamp duty registration charges are accounted for in its books at the time of purchase deed. Relying on the decision of Hon'ble Delhi High Court in the case of CIT Vs. Puneet Sabharwal reported in 338 ITR 485 it was submitted that the Hon'ble High Court in the said decision has held that addition cannot be made only on the basis of report of the DVO and that the primary burden to prove understatement or concealment of income is on the revenue.

20. Based on the arguments advanced by the assessee the Ld.CIT(A) deleted the addition by observing as under :

“20. I have considered the submissions of the appellant with reference to the facts on record. I find that for assessment year 2006-07, the assessing officer had issued a questionnaire on 10/12/2007 whereby vide item no. 13 the appellant was required to give the details of land purchased at Bavdhan and Dharmbe. The appellant had, vide letter dated 11/01/2008 at item no. 13 provided the purchase deed and details of payments made by providing the extract of land account. These details comprised of both lands purchased at Bavdhan i.e. details were given in respect of survey no. 22/1 and 21/1. During the course of appellate proceedings, the appellant has pointed out that possession of both the pieces of land was taken in earlier years. For this purpose, it has provided with the account extract of construction and material purchased account from 01/04/2003 to 31/03/2004. These account extracts show that construction was undertaken even prior to 01/04/2003 because the opening balance of Bavdhan building is shown at Rs.6,72,951/-. During the financial year 2003-04, further construction worth Rs.16,91,602/- was also undertaken. This goes to prove that the possession of land was taken prior to 2004-05. The appellant had also made payment in respect of survey No.21/1 as early as 1996 (Rs.7.20 lakhs) and in respect of Survey No.22/1, the payments were made in the financial year 2002-03 itself. These facts indicate that the transaction for transfer and purchase of land was completed before the date of registry for sale, which were executed in the financial year 2004-05. The transfer of land was completed in accordance with section 53A of the Transfer of Property Act. Now, these facts were already before the assessing officer during the course of assessment proceedings for assessment year 2006-07. Hence, in accordance with the principles for examination of items of addition in a reassessment proceeding under section 153A (*supra*), I hold that the assessing officer was not entitled to revisit the same issues which were already concluded in an assessment proceeding completed under section 143(3). It is also not the case of the assessing officer that incriminating documents indicating cash dealing in land purchase were discovered during the course of search and seizure. Under these circumstances, the assessing officer has incorrectly assumed jurisdiction over this item and made the addition of Rs.15.90 lakhs in assessment year 2006-07 and Rs.22.40 lakhs in assessment year 2005-06.

21. Even on merits, there is no case for an addition because the DVO has taken comparable sales instance of the year 2005 whereas he was supposed to take the comparable sales instance of the year 1996 and 2002. There is nothing on record to indicate that land was undervalued while making the purchases in these two years. Therefore, the additions made are deleted.

21. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

22. The Ld. Departmental Representative heavily relied on the order of the AO.

23. Ld. Counsel for the assessee on the other hand while supporting the order of the CIT(A) submitted that no incriminating evidence whatsoever was found during the course of search that the assessee has made any unaccounted investment or unaccounted payment. The assessments were completed u/s.143(3) prior to the date of search. The agreements for purchases were entered into in the year 1996 and 2002 and the possession of the said lands were also taken prior to 2004-05. The DVO instead of taking comparable sale instances in the year 1996 to 2002 when the agreements were made had taken comparable sale instances of 2005. Therefore, the Ld.CIT(A) was fully justified in deleting the addition.

24. We have considered the rival arguments made by both the sides, perused the orders of the AO and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. There is no dispute to the fact that the assessment in the instant case was completed u/s.143(3) prior to the date of search and the investment in purchase of lands were already declared in such return. No incriminating material whatsoever was found during the course of search to substantiate that unaccounted investment has been made by the assessee towards purchase of the lands. The addition was mainly based on the valuation report of the DVO. The Hon'ble Delhi High Court in the case of Puneet Sabharwal (Supra) has held that addition to income based solely on report of DVO is not valid in absence of any evidence of understatement of consideration. Further, the

contention of the assessee before the AO as well as the CIT(A) that the agreements for purchase of lands were entered in the year 1996 and 2002 and the possession was also taken prior to 2004-05 could not be controverted by the Ld. Departmental Representative. Under these circumstances, we find merit in the submission of the Ld. Counsel for the assessee that the DVO has erred in taking the sale instances of the year 2005 instead of taking comparable sale instances of 1996 and 2002. There is also nothing on record to indicate that land was undervalued. Under these circumstances we do not find any infirmity in the order of the CIT(A) deleting the addition made by the AO u/s.69B of the I.T. Act. Ground raised by the Revenue is accordingly dismissed.

25. Grounds of appeal No.4 and 5 being general in nature are dismissed.

ITA No.379/PN/2013 (By Revenue) (A.Y. 2006-07)

26. Grounds of appeal No.1 and 2 by the Revenue read as under:

“1. Whether on the facts and in the circumstances of the case the CIT(A) is justified in deleting the addition of Rs.1,94,223/- made on account of creditors outstanding stating that the issue of outstanding creditors was already subject to scrutiny during original assessment and the Assessing Officer cannot re-assess the income u/s.153A?

2. On the facts and in the circumstances of the case and in law, whether the Ld.CIT(A) is justified in holding that the original assessment made u/s.143(3) had reached finality and the same could not be agitated during the course of assessment proceedings u/s.143(3) r.w.s. 153A of the Act in the absence of incriminating material found during the search.”

27. After hearing both the sides, we find the above grounds are identical to grounds of appeal No.1 and 2 in ITA No.377/PN/2013. We have already decided the issue and the grounds raised by the

Revenue have been dismissed. Following the same reasoning, the above grounds by the Revenue are dismissed.

28. Ground of appeal No.3 by the Revenue reads as under :

“3. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting addition of Rs.15,90,000/- u/s.69B of the Act stating that the Assessing Officer has incorrectly assumed jurisdiction over this item when assessment proceedings were completed u/s.143 of the Act and by holding that the land was not undervalued as DVO has taken comparable sales instance of the year 2005, whereas the Assessing Officer was supposed to take comparable instance of 1996 and 2002. However, there is nothing in the purchase deed to suggest that the assessee had made payment in the year 1996 and 2002?”

29. Facts of the case, in brief, are that the AO during the course of assessment proceedings noted that the assessee has acquired land at Sy.No.21/1 (Part) Bavdhan (Budruk), Tal Mulshi, Dist. Pune for Rs.22,50,000/- as per purchase deed as on 12-04-2005. He made a reference to the DVO u/s.142A to determine the cost of the property in the hands of the assessee as on the date of acquisition. The DVO valued the value of the property at Rs.38,40,000/-. Rejecting the various explanations given by the assessee the AO made addition of Rs.15,90,000/- u/s.69B of the I.T. Act.

30. In appeal the Ld.CIT(A) deleted the addition. The relevant observation of Ld.CIT(A) has already been reproduced at Para 20 of this order while adjudicating Ground of appeal No.3 in ITA No.378/PN/2013.

31. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

32. After hearing both the sides, we find the above ground is identical to ground of appeal No.3 in ITA No.378/PN/2013. We

have already decided the issue and the ground raised by the Revenue has been dismissed. Since in the instant case also, the assessment was completed prior to the date of search and no incriminating material whatsoever was found to substantiated that any unaccounted investment has been made, therefore, we find no infirmity in the order of the CIT(A). The decision of Hon'ble Delhi High Court in the case of Puneet Sabharwal (Supra) is squarely applicable to the facts of the case according to which addition cannot be made solely on the basis of the report of the DVO in absence of any evidence of understatement of consideration. We therefore uphold the order of Ld.CIT(A) on this issue. Ground raised by the Revenue is accordingly dismissed.

33. Ground of appeal No.4 by the Revenue reads as under :

“4. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing the depreciation on windmill of Rs.17,50,000/- and MEDA charges holding that this issue is already been looked into during the course of original assessment u/s.143(3) and an opinion was formed that depreciation is allowable on foundation of windmill at the rates applicable to WTGS and MEDA charges were an allowable business expenditures. Hence, it is not possible for the Assessing Officer in the absence of any material found during the course of search to make the disallowance as the same tantamount to a change of opinion which is not permitted in the course of assessment u/s.153A.”

34. Facts of the case, in brief, are that the AO during the course of assessment proceedings noted that the assessee during the impugned assessment year has installed new windmills. From the various details furnished by the assessee the AO noted that the assessee had claimed depreciation on the entire expenditure including purchase and installation of the windmill. He, therefore, asked the assessee to substantiate its claim made on the assets other than windmill.

35. The assessee submitted that there was no civil work involved for erection of the wind turbine as parts like control panels and display meters were housed within the tower itself. It was submitted that the civil work done in the form of foundation work could not be separated from the wind turbine and therefore it was entitled for depreciation on the entire cost of the wind turbine. However, the AO was not satisfied with the explanation given by the assessee. After perusing various bills in connection with expenses incurred on wind turbine, the AO held that the assessee was not entitled for depreciation on civil work and payment towards MEDA charges. For the above proposition, he relied on the decision of the Pune Bench of the Tribunal in the case of Poonawala Finwest & Agro Pvt. Ltd. Vs. ACIT reported in 118 TTJ 68 (Pune). The AO has also referred to Rule 32(1) of the I.T. Act Rules, 1962, Appendix-I, part A, item III(3) (xiii)(i). Based on the above, additions on this count were made to the total income of the assessee by reworking depreciation on windmills.

36. Before CIT(A) it was submitted that in the original assessment proceedings during A.Y. 2006-07 the AO had allowed depreciation @80% on the entire cost of windmill which included expenses for civil work, foundation, erection and commissioning and testing. It was argued that addition could not have been made in the order passed u/s.143(3) r.w.s. 153A for the reason that the issue of depreciation for A.Y. 2006-07 was already concluded in the original assessment passed u/s.143(3) and also no incriminating documents in this respect were found during the course of the search. The assessee without prejudice to the above contentions further submitted that the windmill requires specific type of civil

foundation and was not in the nature of general civil construction. Referring to various decisions it was submitted that foundation expenses of plant and machinery/windmill is part of cost of plant and machinery/windmill and therefore depreciation @80% has to be allowed to it on civil work and also MEDA Charges.

37. Based on the arguments advanced by the assessee the Ld.CIT(A) allowed the claim of excess depreciation on windmill by observing as under :

“33. In respect of assessment year 2006-07, the assessing officer had, vide questionnaire dated 10/12/2007 issued along with notice under section 142(1), had sought the details of an addition of fixed assets vide item no. 14 of the questionnaire and specifically asked for the details pertaining to windmill i.e. purchase details etc., vide item no. 21. The appellant had provided details vide letter dated 11/01/2008 vide item no. 17 of the answer and had provided the bills etc. showing the addition of fixed assets. This bill given by M/s Enercon Ltd. clearly shows that an amount of Rs.25 lakhs was billed towards earth work and foundation, including approach and internal roads and construction of the DP structure post. The details also show that further sum of Rs.10 lakhs was charged towards erection and commissioning of the windmill. Applying the principles for assessment as above in the foregoing paragraphs, I hold that these issues were already looked into during the course of original assessment and an opinion was formed that depreciation is allowable on foundation of the windmill at the rates applicable to WTGS and that MEDA charges were an allowable business expense. Hence, it was not possible for the assessing officer, in the absence of any material found during the course of search to make the aforesaid disallowance as the same tantamount to a change of opinion which is not permitted in the course of reassessment u/s.153A. The appeal on this ground is allowed for A.Y. 2006-07.”

38. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

39. After hearing both the sides, we find there is no discussion on this issue by the AO in the original assessment order, a copy of which is placed at paper book pages 78 to 80. We find the issue stands decided against the assessee by the decision of the Tribunal in the case of J-Sons Foundry Pvt. Ltd. vide ITA No.2349/PN/2012.

In subsequent years also the Ld. Counsel for the assessee has conceded on this issue. Accordingly, the order of Ld.CIT(A) on this issue is reversed and the ground raised by the Revenue is allowed.

40. Ground of appeal No. 5 and 6 being general nature are dismissed.

ITA No.2578/PN/2012 (By Assessee) (A.Y. 2007-08) :

41. Grounds of appeal No.1 and 7 by the assessee being general in nature are dismissed.

42. The Ld. Counsel for the assessee did not press ground of appeal No.4 for which the Ld. Departmental Representative has no objection. Accordingly, the same is dismissed.

43. Grounds of appeal No. 2 to 2.2 by the assessee read as under:

“2. The learned CIT(A) erred in confirming the addition of Rs.3,12,525/- made by the learned A.O. on account of cessation of liability u/s. 41(1) in respect of creditors outstanding for a period of more than three years without appreciating that as per law, the addition is not justified.

2.1 The learned CIT(A) erred in holding that the creditors had abandoned their right to enforce recovery as no action was taken by them and hence, the liability had ceased to exist once the recovery became legally time barred and therefore, the addition was rightly made by the learned A.O. u/s. 41(1).

2.2 The learned CIT(A) failed to appreciate that-

a. There was no evidence that the liability in respect of the creditors had ceased during this year and hence, the income u/s 41 (1) could not be assessed in this year.

b. Just because, the period of three years was over, it did not mean that the liability had ceased in this year as per the ratio of Supreme Court decision in the case of Sugauli Sugar Works [236 ITR 518] and thus, there was no reason warranting the addition u/s 41 (1) in this year.”

44. After hearing both the sides we find the AO made addition of Rs.3,12,515/- from the outstanding sundry creditors on the ground that the some of the trade creditors are outstanding for few year and the liability has ceased to exist. The Ld.CIT(A) confirmed the addition following the decision of Hon'ble Supreme Court in the case of CIT Vs. T.V. Sundaram Iyenger and Sons Ltd. reported in 222 ITR 344.

45. Aggrieved with such order of CIT(A) the assessee is in appeal before us.

46. The Ld. Counsel for the assessee submitted that merely because the creditors were outstanding for a period of 3 years it does not mean that the liability has ceased in the hands of the assessee. He referred to the decision of Hon'ble Supreme Court in the case of Sugauli Sugar Works Pvt. Ltd. (Supra) and the decision of the Pune Bench of the Tribunal in the case of Hrishikesh L. Joshi vide ITA No.702/PN/2007 order dated 13-08-2010 for A.Y. 2003-04 and submitted that the Tribunal following various other decisions has deleted similar addition made by the AO and upheld by the CIT(A). He accordingly submitted that the addition made by the AO and upheld by the CIT(A) should be deleted.

47. The Ld. Departmental Representative on the other hand heavily relied on the order of the CIT(A).

48. We have considered the rival arguments made by both the sides, perused the orders of the AO and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO in the instant

case made addition of Rs.3,12,525/- on account of outstanding sundry creditors holding that these trade creditors are outstanding for a few years and the liability of the assessee has ceased. We find in appeal the Ld. CIT(A) following the decision of the Hon'ble Supreme Court in the case of CIT Vs. T.V. Sundaram Iyenger & Song Ltd. (Supra) held that the provisions of section 41(1) has been correctly invoked and the amounts of outstanding creditors have rightly been brought to tax u/s.41(1) as cessation of liability. According to him, the principle is particularly applicable in case of sub-contractors and labour suppliers since it is well known that these categories of service providers do not work if payment is not made to them immediately on performance of their part of contracted work. Therefore, the probability that the amounts should be outstanding against sub-contractors and labourers is contrary to normal human and business conduct. He accordingly upheld the addition made by the AO. It is the submission of the Ld. Counsel for the assessee that in view of the subsequent decision of Hon'ble Supreme Court in the case of Sugali Sugar Works Pvt. Ltd. (Supra) there is no reason to hold that the liability has ceased in the hands of the assessee and such amount of old creditors constitute income u/s.41(1).

49. We find the Hon'ble Supreme Court in the case of Sugali Sugar Works Pvt. Ltd. (Supra) has decided the issue of cessation of liability u/s.41(1) of the I.T. Act. The relevant observations of Hon'ble Supreme Court are already reproduced at para 13.2 of this order. The decision of the Pune Bench of the Tribunal in the case of Hrishikesh L. Joshi has also been reproduced while deciding the

grounds of appeal No.1 to 3 in ITA No.377/PN/2013 for A.Y. 2004-

05. Since facts are identical, therefore, following the same reasonings, the grounds raised by the assessee are allowed.

50. Grounds of appeal No.3 to 3.1 by the assessee read as under:

“3. The learned CIT(A) erred in holding that the compensation received of Rs.40 lakhs from Suzlon Energy Ltd. was taxable as a revenue receipt in the hands of the assessee.

3.1 The learned CIT(A) failed to appreciate that the compensation received from Suzlon Energy Ltd. was before the windmill was put to use and hence, the said compensation was a capital receipt which was to be reduced from the cost of the asset.”

51. Facts of the case, in brief, are that the AO during the course of assessment proceedings noted that the assessee has received 2 credit notes aggregating Rs. 40 lakhs given by M/s. Suzlon Energy Ltd. It was explained before the AO that the credit notes in respect of compensation were received from M/s. Suzlon Energy Ltd. for delay in completion of windmill project within the stipulated time limit. It was further explained that these credit notes were received for the period before the asset was put to use and was treated as capital receipts and deducted from the invoice of the value of the windmill purchased. However, the AO rejected the above contention of the assessee that these were capital receipts and accordingly brought to tax the sum of Rs. 40 lakhs as income from other sources.

52. Before CIT(A) the assessee reiterated the same submissions as made before the AO. It was submitted that the compensation receipt of Rs.40 lakhs was taxed as revenue receipt in A.Y. 2006-07

and while working out depreciation in A.Y. 2007-08, the cost of the windmill was increased to that extent. It was urged that since the above sum was received before the asset was put to use, the same should be treated as capital receipt and accordingly be reduced from the cost of windmill.

53. However, the Ld.CIT(A) was not satisfied with the above explanation given by the assessee and held that the same is revenue in nature. Aggrieved with such order of CIT(A) the assessee is in appeal before us.

54. The Ld. Counsel for the assessee referring to Page 120 of the paper book drew the attention of the Bench to the letter addressed by M/s. Suzlon Energy Ltd. to the assessee according to which an amount of Rs.22.54 lakhs has been offered by them as compensation for delay caused in completion of 600 KW project at Dhalgaon. Referring to page 121 of the paper book he drew the attention of the Bench to the letter written by M/s. Suzlon Energy Ltd. according to which an amount of Rs.17.5 lakhs has been given as compensation towards delay in completion of the project. Referring to the decision of Hon'ble Supreme Court in the case of CIT Vs. Saurashtra Cement Ltd. reported in 325 ITR 422 he submitted that such compensation is capital in nature.

55. The Ld. Departmental Representative on the other hand heavily relied on the order of the CIT(A).

56. We have considered the rival arguments made by both the sides, perused the orders of the AO and CIT(A) and the paper book filed on behalf of the assessee. We find the AO made an addition of

Rs.40 lakhs being compensation received from M/s. Suzlon Energy Ltd. as revenue receipt in the hands of the assessee. We find the Ld.CIT(A) upheld the same. It is the submission of the Ld. Counsel for the assessee that since the amount was received as compensation for delay in executing the project, therefore, the same is capital in nature. From page 120 of the paper book, we find M/s. Suzlon Energy Ltd. vide letter dated 03-08-2006 to the assessee has written as under :

“Ref : SEL/MKTG/MS/06-07/43

Date August 3, 2006

To

R.D.S. Construction Company,
363/11, Balaji Niwas, Deep Bunglow Chowk,
Shivaji Nagar, Pune – 411016.

Kind Attn : Mr. M.S. Dandavate

Subject : Your proposed wind power project of 600 KW at Dhalgaon

Dear Sir,

With reference to the above subject and your letter dated 14th march 06, we sincerely regret the delay caused in completion of your proposed wind power of 600 KW project to be installed in Dhalgaon, Maharashtra. As discussed we would like to offer following :

Enclosed drafts of revised purchase orders to be placed on us along with detailed working. We also request you to complete the advance payment as per PO drafts.

The proposed project will be completed on or before 30th September 2006 at Dhule/Nandurbar, Maharashtra.

Rs.22.5 Lacs as compensation for delay caused in completion of project payable on receipt of revised purchased order and completion of advance.

We request for your kind acceptance of the above and would like to assure you of your best endeavours to strengthen business relations with your group.

Thanking you,

With best regards,

Sd/-

Anjali Lothe

(Sr. Manager-Marketing)”

57. Similarly, vide letter dated 02-11-2006 another letter has been addressed by M/s. Suzlon Energy Ltd. to the assessee agreeing to pay another Rs.17.50 lakhs as compensation towards the said delay.

58. We find the Hon'ble Supreme Court in the case of Saurashtra Cement Ltd. (Supra) while deciding an identical issue had an occasion to consider the nature of such receipt and held such type of receipt as capital in nature. The relevant observation of Hon'ble Supreme Court reads as under :

"10.Thus, the short question for determination is whether the liquidated damages received by the assessee from the supplier of the plant and machinery on account of delay in the supply of plant is a capital or a revenue receipt?

11.The question whether a particular receipt is capital or revenue has frequently engaged the attention of the Courts but it has not been possible to lay down any single criterion as decisive in the determination of the question. Time and again, it has been reiterated that answer to the question must ultimately depend on the facts of a particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a conclusion. In Rai Bahadur Jairam Valji (supra), it was observed thus:

"The question whether a receipt is capital or income has frequently come up for determination before the courts. Various rules have been enunciated as furnishing a key to the solution of the question, but as often observed by the highest authorities, it is not possible to lay down any single test as infallible or any single criterion as decisive in the determination of the question, which must ultimately depend on the facts of the particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a decision. Vide Van Den Berghs Ltd. v. Clark⁵. That, however, is not to say that the question is one of fact, for, as observed in Davies (H.M. Inspector of Taxes) v. Shell Company of China Ltd.⁶, "these questions between capital and income, trading profit or no trading profit, are questions which, though they may depend no doubt to a very great extent on the particular facts of each case, do involve a conclusion of law to be drawn from those facts."

12.In Kettlewell Bullen and Co. Ltd. (supra), dealing with the question whether compensation received by an agent for premature determination of the contract of agency is a capital or a revenue receipt, echoing the views expressed in Rai Bahadur Jairam Valji

(supra) and analysing numerous judgments on the point, this Court laid down the following broad principle, which may be taken into account in reaching a decision on the issue :

"Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue : Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt."

13. We have considered the matter in the light of the afore- noted broad principle. It is clear from clause No.6 of the agreement dated 1st September 1967, extracted above, that the liquidated damages were to be calculated at 0.5% of the price of the respective machinery and equipment to which the items were delivered late, for each month of delay in delivery completion, without proof of the actual damages the assessee would have suffered on account of the delay. The delay in supply could be of the whole plant or a part thereof but the determination of damages was not based upon the calculation made in respect of loss of profit on account of supply of a particular part of the plant. It is evident that the damages to the assessee was directly and intimately linked with the procurement of a capital asset i.e. the cement plant, which would obviously lead to delay in coming into existence of the profit making apparatus, rather than a receipt in the course of profit earning process. Compensation paid for the delay in procurement of capital asset amounted to sterilization of the capital asset of the assessee as supplier had failed to supply the plant within time as stipulated in the agreement and clause No.6 thereof came into play. The afore-stated amount received by the assessee towards compensation for sterilization of the profit earning source, not in the ordinary course of their business, in our opinion, was a capital receipt in the hands of the assessee. We are, therefore, in agreement with the opinion recorded by the High Court on question Nos. (i) and (ii) extracted in Para 1 (supra) and hold that the amount of Rs.8,50,000/- received by the assessee from the suppliers of the plant was in the nature of a capital receipt.

14. We, therefore, dismiss the appeal with no order as to costs."

59. Since the compensation of Rs.40 lakhs received by the assessee from M/s. Suzlon Energy Ltd. was for delay in executing the project, therefore, respectfully following the decision of Hon'ble Supreme Court cited (Supra), we hold that the amount of Rs. 40 lakhs received by the assessee is capital in nature. We accordingly

set aside the order of the CIT(A) and direct the AO to delete the addition.

60. Grounds of appeal No. 5 to 7 read as under :

“5. The learned CIT(A) erred in holding that 60% of the cost of Power Evacuation facility and infrastructure cost would be entitled to depreciation at the rate applicable to building and not at the rate applicable to windmill.

5.1 The learned CIT(A) failed to appreciate that the expenditure on Power Evacuation facility and infrastructure cost was part and parcel of windmill and hence, the entire expenditure was entitled to depreciation at a higher rate which was available to windmill.

6. The learned CIT(A) erred in directing to apportion the other misc. expenses between windmill cost and infrastructure cost without appreciating that all the expenses incurred by the assessee were relating to windmill and therefore, all such misc. expenses should have been allowed depreciation at the rate applicable to windmill.

7. The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.”

61. The Ld. Counsel for the assessee at the outset submitted that the above grounds are decided against the assessee by various decisions of the Tribunal. In view of the same, the grounds raised by the assessee are dismissed.

ITA No.380/PN/2013 (By Revenue) (A.Y. 2007-08) :

62. The only effective ground raised by the Revenue reads as under :

“1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing additional depreciation of Rs.92,32,906/- at higher rate of 80% for civil work foundation and related labour cost of the windmill.”

63. Facts of the case, in brief, are that the AO in the assessment order has noted that the assessee has invested in windmills at

Rs.3,80,00,000/- which includes investment of Rs.25 lakhs towards Earth Work Foundation, i.e. civil works and internal road etc. which is not entitled for higher rate of depreciation. He observed that though the foundation is part of windmill eligible for higher rate of depreciation in view of the decision of Madras Cement Company, however from the total bill raised towards civil construction including roads etc. cannot be separated. He noted that the depreciation has been claimed on entire expenditure of Rs.3,80,00,000/- at the higher rate, i.e. 80% of the above assets excluding the land. He noted that the depreciation on the civil work, payment towards MEDA charges etc. does not constitute windmill. Therefore, the claim of depreciation at higher rate to that extent is wrong. He accordingly disallowed Rs.92,32,906/- being excess depreciation claimed by the assessee.

64. In appeal the Ld.CIT(A) following his decision in the case of Chappalkar Brothers for A.Y. 2008-09 directed the AO to re-compute the depreciation on the basis of the guidelines given therein. According to Ld.CIT(A) the various components which go on to make up the case of the windmill are as under :

Sr.No.	Particulars
1.	Cost of wind turbine generator
2. a)	Cost of component & accessory (copper wound with accessories)
b)	Cost of component for generation of electricity supply of rotor blades
c)	Electrical items, components of RE device
3.	Cost of tubular tower
4.	Cost of work including foundation work
5.	Labour related cost
a)	Installation of windmill
b)	Installation of electrical line for power transmission and meter
c)	Final testing and commissioning
6.	Reimbursement of power evacuation facility and creation of infrastructure

7.	Miscellaneous
a)	Processing charges
b)	Interest of loan capitalized upto 17/01/2008
c)	Professional fees
d)	Registration fees
e)	Substation charges
f)	Franking charges
g)	MEDA or equivalent charges

65. He had accordingly directed the AO to re-compute the depreciation allowance according to the following :

- i) Cost of new windmill will be inclusive of all items mentioned at 1 to 5 above.
- ii) Cost of power evacuation facility and infrastructure will be apportioned between the rates applicable to building/roads and windmill in 60 : 40 ratio.
- iii) Cost of other miscellaneous expenses will be apportioned on prorata basis between windmill and infrastructure facilities.

66. The following observation of Ld.CIT(A) is also relevant :

“43. It was submitted by the appellant that the details of separate cost of foundation were not available with them in respect of WTGS supplied by Enercon. They have provided me with copies of tax invoices for supply of tower including wind turbine generating system, component and accessories, civil work for foundation and allied work, electrical items, installation and commission charges, labour charges etc. provided by Suzlon. The assessing officer is directed to find out the cost of items at Sr.Nos. 4, 5, 6 and 7 of the above table in respect of WTGS supplied by Enercon. The appellant is directed to provide the cost attributable to these items for the purpose of allocation. In case the appellant is unable to provide these details in respect of supply of windmill by Enercon, the assessing officer will apply the same ratio as these items bear to total cost of a Suzlon windmill. The appeal on this ground is partially allowed”.

67. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

68. The Ld. Departmental Representative strongly supported the order of the AO.

69. The Ld. Counsel for the assessee on the other hand referring to the decision of the Tribunal in the case of DCIT Vs. J-Sons

Foundry Pvt. Ltd. vide ITA No.2349/PN/2012 order dated 28-01-2014 submitted that under identical facts and circumstances the directions given by the CIT(A) for computing the depreciation on windmill has been upheld and the grounds raised by the Revenue have been dismissed. He accordingly submitted that the grounds raised by the Revenue should be dismissed.

70. We have considered the rival arguments made by both the sides. We find in the case of J-Sons Foundry Pvt. Ltd. (Supra) the CIT(A) following his decision in the case of M/s. Chaphalkar Brothers had given identical direction to the AO for computation of depreciation of various components of windmill wherein higher rate of depreciation at 80% was allowed on the cost of foundation as well as cost incurred on erection of the windmill. The relevant observation of the Tribunal at para 5 of the order reads as under :

“5. In sum and substance the Tribunal upheld the action of the Assessing Officer to restrict the depreciation @ 10% on some items but allowed the depreciation @ 80% on the cost of foundation as well as cost incurred on erection and commissioning of the Wind Mill. The Tribunal also held that cost incurred on installation of Wind Mill is an integral part of the Wind Mill and the assessee should be allowed depreciation @ 80% on the cost of foundation as well as on erection and commissioning. As the issue is consequential in this year vis-à-vis the allocation made by the Ld. CIT(A), we find no reason to take different view. Accordingly, confirm the order of the Ld. CIT(A) to the extent of allocation of the expenditure and rate of depreciation on foundation, erection and commissioning expenditure. Ground Nos. 1 & 2 are dismissed.”

71. In view of the decision of the Tribunal in the case of J-Sons Foundry Pvt. Ltd. (Supra) we find no infirmity in the order of the CIT(A) allowing higher depreciation @80% on civil work foundation and related labour cost of windmill. Ground raised by the Revenue is accordingly dismissed.

ITA No.2579/PN/2012 (By Assessee) (A.Y. 2008-09) :

72. Ground of appeal No.1 by the assessee reads as under :

“1. The learned CIT(A) erred in confirming the various additions made by the learned A.O. without appreciating that the various additions made were not based on any incriminating material and hence, such additions were not warranted in the assts. completed u/s 153A. “

73. The Ld. Counsel for the assessee at the outset submitted that this ground is against the assessee by various decisions of the Tribunal. The Ld. Departmental Representative has no objection. Accordingly, this ground by the assessee is dismissed.

74. Ground of appeal No.2 was not pressed by the Ld. Counsel for the assessee for which the Ld. Departmental Representative has no objection. Accordingly, the said ground is dismissed as not pressed.

75. Grounds of appeal No. 3 and 4 by the assessee read as under:

“3. The learned CIT(A) erred in holding that 60% of the cost of Power Evacuation facility and infrastructure cost would be entitled to depreciation at the rate applicable to building and not at the rate applicable to windmill.

3.1 The learned CIT(A) failed to appreciate that the expenditure on Power Evacuation facility and infrastructure cost was part and parcel of windmill and hence, the entire expenditure was entitled to depreciation at a higher rate which was available to windmill.

4. The learned CIT(A) erred in directing to apportion the other misc. expenses between windmill cost and infrastructure cost without appreciating that all the expenses incurred by the assessee were relating to windmill and therefore, all such misc. expenses should have been allowed depreciation at the rate applicable to windmill.”

76. The Ld. Counsel for the assessee fairly submitted that the above grounds are decided against the assessee by various

decisions of the Tribunal. In view of the above, the above grounds are dismissed.

ITA No.381/PN/2013 (By Revenue) (A.Y. 2008-09) :

77. The only effective ground raised by the Revenue reads as under :

“1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing additional depreciation of Rs.1,10,70,063/- at higher rate of 80% for civil work foundation and related labour cost of the windmill.”

78. After hearing both the sides, we find the above ground is identical to ground of appeal No.1 in ITA No.380/PN/2013 filed by the Revenue for A.Y. 2007-08. We have already decided the issue and the ground raised by the Revenue has been dismissed. Following the same reasoning, this ground by the Revenue is dismissed.

ITA No.2580/PN/2012 (By Assessee) (A.Y. 2009-10) :

79. Grounds of appeal No.1 and 7 by the assessee being general in nature are dismissed. Ground of appeal No.2 by the assessee was not pressed by the Ld. Authorised Representative for which Ld. Departmental Representative has no objection. Accordingly, this ground by the assessee is dismissed as ‘not pressed’.

80. Grounds of appeal No.3 and 4 by the assessee read as under:

“3. The learned CIT(A) erred in holding that 60% of the cost of Power Evacuation facility and infrastructure cost would be entitled to depreciation at the rate applicable to building and not at the rate applicable to windmill.

3.1 The learned CIT(A) failed to appreciate that the expenditure on Power Evacuation facility and infrastructure cost was part and parcel of windmill and hence, the entire expenditure was entitled to

depreciation at a higher rate which was available to windmill.

4. The learned CIT(A) erred in directing to apportion the other misc. expenses between windmill cost and infrastructure cost without appreciating that all the expenses incurred by the assessee were relating to windmill and therefore, all such misc. expenses should have been allowed depreciation at the rate applicable to windmill.”

81. The Ld. Counsel for the assessee at the outset submitted that the above grounds are decided against the assessee by various decision of the Coordinate Benches of the Tribunal. In view of the above, the above grounds by the assessee are dismissed.

82. Ground of appeal No.5 by the assessee reads as under :

“5. The learned CIT(A) erred in holding that the interest u/s 234A was leviable for the period from 31.10.2009 to 20.07.2010 without appreciating that as per law, no interest was leviable for that period.”

83. Facts of the case, in brief, are that the assessee during appeal proceedings before the CIT(A) challenged levy of interest u/s.234A for the period from 31-10-2009 on 20-07-2010. It was submitted that the search action was conducted on 23-09-2009 and as on the date of search, the due date for filing the return for A.Y. 2009-10 u/s.139(1) did not expire. Further, the assessee had filed its return of income in response to notice u/s.153A on 20-07-2010. It was argued that as per provisions of section 153A(1)(a) a return filed in response to notice u/s.153A is to be treated as return filed u/s.139(1) and that the due date of filing return u/s.139(1) gets shifted to the date prescribed in the notice u/s.153A.

84. However, the CIT(A) was not convinced with the arguments advanced by the assessee. He observed that there is nothing in section 153A or 139 which allows the AO to extend the time limit

for filing of income-tax returns during the regular course. According to the CIT(A), if the contention of the assessee is accepted, then even if the assessee did not file the return of income for any of the 6 years contemplated u/s.153A or 153C, the time limit for filing of return of income for all those years would be automatically extended and the same would have to be considered as return filed u/s.139 and therefore all natural consequences under the act including the provisions of carry forward and set off of various types of losses and computation of interest payable u/s.234A, 234B, 234C and 234D would become applicable. It would leave no distinction between the non-filer and a regular filer of return and would result in allowing prescribed benefits to a delinquent assessee. He accordingly held that in respect of the A.Y. 2009-10 the assessee should have filed the return of income on or before 31-10-2009. Since this was not done the assessee was liable to pay interest u/s.234A. He accordingly dismissed the grounds raised by the assessee.

85. Aggrieved with such order of the CIT(A) the assessee is in appeal before us.

86. The Ld. Counsel for the assessee submitted that when the search took place on 23-09-2009 the due date for filing of the return u/s.139(1) had not expired. The assessee in response to notice u/s.153A filed his return of income on 21-07-2010. He submitted that after the search the assessee is required to file return u/s.153A only. Hence, there is no question of filing any return u/s.139(1). Therefore, there is no delay in filing the return and therefore levy of interest u/s.234A is not justified at all. He

submitted that as per the provisions of sub-section (3) of section 234A the interest can be levied for the default in not filing the return u/s.153A within the time limit prescribed in the section. Therefore, when the notice u/s.153A was served on the assessee on 24-06-2010 asking the assessee to furnish the return of income within 30 days from the receipt of notice and when the assessee has filed its return of income on 21-07-2010, i.e. within the prescribed period of 30 days, therefore, there is no justification for levy of interest u/s.234A.

87. The Ld. Departmental Representative on the other hand heavily relied on the order of the AO and CIT(A).

88. We have considered the rival arguments made by both the sides, perused the orders of the AO and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. The only dispute in the instant case is levy of interest u/s.234A of the I.T. Act for the period from 31-10-2009 to 20-07-2010 by the AO which has been upheld by the CIT(A). It is the submission of the Ld. Counsel for the assessee that on the date of the search on 23-09-2009 the due date for filing of the return u/s.139(1) has not expired. Since the search has taken place the assessee was precluded from filing return u/s.139(1). The assessee in response to notice u/s.153A served on him on 24-06-2010 has filed the return on 21-07-2010 which is within the period of 30 days which is granted by the AO. Therefore, there is no question of levy of any interest u/s.234A.

89. We find the provisions of section 153A read as under :

“153A. [(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made.

.....
.....”

90. We find the provisions of section 234A (3) read as under :

“(3) Where the return of income for any assessment year, required by a notice under section 148 [or section 153A] issued [after the determination of income under sub-section (1) of section 143 or] after the completion of an assessment under sub- section (3) of section 143 or section 144 or section 147, is furnished after the expiry of the time allowed under such notice, or is not furnished, the assessee shall be liable to pay simple interest at the rate of [one] per cent, for every month or part of a month comprised in the period commencing on the day immediately following the expiry of the time allowed as aforesaid, and,-

(a) where the return is furnished after the expiry of the time aforesaid, ending on the date of furnishing the return; or

(b) where no return has been furnished, ending on the date of completion of the re-assessment or re- computation under section 147[or reassessment under section 153A],

on the amount by which the tax on the total income determined on the basis of such re-assessment or re-computation exceeds the tax on the total income determined [under sub- section (1) of section 143 or] on the basis of the earlier assessment aforesaid.

91. We further find the Hon’ble Bombay High Court in the case of CIT Vs. Continental Warehousing Corporation reported in (2015) 93

CCH 0048 (Mumbai HC) at para 22 of the order has observed as under :

“22. A bare perusal thereof would indicate as to how a non obstante clause has been inserted and with a defined intent. One would find that in section 139 of the IT Act, the return of income is contemplated. These provisions fall in Chapter XIV entitled "Procedure For Assessment". Section 139 deals with return of income whereas section 140 states that such return has to be verified. Section 147 which also falls within this Chapter deals with income escaping assessment and section 148 provides for issuance of notice where income has escaped assessment. Section 149 sets out a time limit for notice. Then, appear sections 149, 151 and 153 which, inter-alia, deal with time limit, sanction for issue and time limit for completion of assessments and reassessments. All these are brought in section 153A and specifically mentioned with an intent to bring them within the non obstante clause. Notwithstanding anything contained in these provisions where search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31st day of May, 2003, that the Assessing Officer is in a position to and mandated to issue notice within the meaning of sub-section (1) of section 153A. That is because the preceding Chapter, namely, Chapter XIII within which the powers of search and seizure and powers to requisition books of account are spelt out enable the Revenue to take care of cases where it effects a search and seizure. That search and seizure is effected and after the same is effected books of account, other documents, money, bullion, jewellery or other valuable article or thing is found as a result thereof that notwithstanding anything and within the meaning of the above provisions having been concluded, it is open for the Revenue to make an assessment. It is also open to the Revenue to make a reassessment in cases where it exercises the powers to requisition books of account etc. This is because it is of the view that the books of account are required to be summoned or taken into custody. It, therefore, issues a summons in that regard. It may also requisition the books of account or other documents for that might be useful and or any assets representing withholding or part income or property which has not been or would not have been disclosed for the purpose of the Indian Income Tax Act, 1922 or the Income Tax Act of 1961 by any person from whose possession or control they have been taken into custody. This is when the authorities have reason to believe that such powers need to be exercised. Therefore, the fetters and which are to be found in other provisions are removed and a notice of assessment in such cases is then issued. That is mandated by sub-section (1) of section 153A. It is not only the issuance of the notice but assessment or reassessment of total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition has to be made.”

92. A combined reading of the above provisions as well as the decision cited (Supra) indicates that a non-obstante clause has

been inserted and with a defined intent. In our opinion, once the search takes place on a person and the due date for filing of the return u/s.139(1) has not expired he can file the return only after the issue of notice u/s.153A. He is not required to file the return u/s.139(1). Therefore, the authorities below are not justified in levying interest u/s.234A of the I.T. Act for a period from 31-10-2009 to 20-07-2010. The ground raised by the assessee is accordingly allowed.

93. Ground of appeal No.6 by the assessee reads as under :

“6. The learned CIT(A) erred in holding that the cash seized of Rs.1,14,60,500/- should be appropriated towards the tax liability of the assessee from 30.03.2010, i.e. the date of letter submitted by the assessee for adjusting the seized cash and not from the date of seizure of cash, i.e. 12-10-2009 for the purposes of determining the interest payable u/s.234B.”

94. Facts of the case, in brief, are that the assessee during the course of appeal proceedings before the CIT(A) raised a ground disputing the charging of interest u/s.234B and 234C on cash seized on Rs.1,14,60,500/- from the residence of Shri R.D. Shinde. It was submitted that the AO had not taken cognizance of the assessee's letter dated 30-03-2010 requesting to adjust the seized cash against self-assessment tax for the year under consideration. The cash so seized was adjusted against tax liability in the month of March and interest u/s.234B was charged from the date of seizure of cash to March 2011.

95. However, the CIT(A) was not impressed by the arguments advanced by the assessee. According to him the AO has charged interest u/s.234B correctly. As regards the contention of the

assessee that the seized cash would have been considered as self-assessment tax for the year under consideration since the same was seized on 13-10-2009 he held that credit cannot be given from the date of seizure of the cash. According to the CIT(A) until and unless the quantum of tax payable is determined and the assessee specifically requests the department to appropriate the cash seized towards meeting of such income tax liability it cannot be said that the cash was available with the department for appropriation towards taxes due.

96. As regards the letter dated 30-03-2010 addressed to the ACIT, Central Circle, Kolhapur wherein it was specifically requested that the cash seized from the office and residence of Shri R.D. Shinde be utilised for paying taxes in respect of A.Y. 2007-08 and 2009-10 is concerned he noted that the AO has appropriated the seized cash from adjusting against the tax liability in the month of March 2011. However, since the assessee vide letter dated 30-03-2010 had specifically requested to appropriate cash seized towards self assessment tax, he directed the AO to rework the interest chargeable u/s.234B and 234C on the balance tax liability.

97. Aggrieved with such order of the CIT(A) the assessee is in appeal before us.

98. The Ld. Counsel for the assessee referring to the decision of the Pune Bench of the Tribunal in the case of Pushphendra Subash Chandra Vs. ACIT reported in (2013) 37 CCH 127 submitted that the Tribunal in the said decision has held that section 132B(1)(i) does not prohibit utilization of the amount seized during the course of search towards advance tax payable on the amount of

undisclosed income declared during the course of search. Referring to page 169 of the paper book the Ld. Counsel for the assessee drew the attention of the Bench to the letter addressed on 30-03-2010 to the AO requesting the adjustment of seized cash against the assessment of tax for A.Y. 2009-10. He accordingly requested that appropriate direction may be given.

99. The Ld. Departmental Representative on the other hand heavily relied on the order of the CIT(A).

100. We have considered the rival arguments made by both the sides, perused the orders of the AO and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find in the instant case cash amounting to Rs.1,14,00,000/- was seized from the residence and office premises of the director of the assessee company. We find the assessee vide letter dated 30-03-2010 addressed to the AO had requested to adjust such cash seized during the course of search as self-assessment tax for A.Y. 2009-10. We find the AO appropriated the seized cash for adjustment against tax liability in the month of March 2011. We find the CIT(A) directed the AO to give credit for such cash seized w.e.f. 30-03-2010. We find no infirmity in the order of the CIT(A) since the assessee vide letter dated 30-03-2010 had requested the AO adjust such seized cash as self assessment tax. Until and unless the assessee makes a specific request, the AO is not duty bound to appropriate such tax either towards advance tax or towards self assessment tax. He can only adjust such seized cash from the tax determined after completion of assessment. Since in the instant case, the assessee

vide letter dated 30-03-2010 only has requested the AO to adjust such seized cash towards self assessment tax for A.Y. 2009-10 and since the CIT(A) has accepted this plea of the assessee, therefore, we find there should not be any grievance on the part of the assessee. Accordingly, this ground by the assessee is dismissed.

ITA No.382/PN/2013 (By Revenue) (A.Y. 2009-10) :

101. Ground of appeal No.1 by the Revenue reads as under :

“1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing additional depreciation of Rs.27,08,083/- at higher rate of 80% for civil work foundation and related labour cost of the windmill.”

102. After hearing both the sides, we find the above ground by the Revenue is identical to Ground of appeal No.1 in ITA No.380/PN/2013 for A.Y. 2007-08. We have already decided the issue and the ground raised by the Revenue has been dismissed. Following the same reasoning this ground by the Revenue is dismissed.

103. Ground of appeal No.2 by the Revenue reads as under :

“2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the unexplained business expenses of Rs.1,50,00,000/- in respect of Ghodzari Project.”

104. Facts of the case, in brief, are that the AO during the course of assessment proceedings noted that the assessee has declared an amount of Rs.5,83,00,000/- as its undisclosed income which includes Rs.1.50 crores on account of unexplained business expenses in respect of Ghodzari project, which are claimed against the sources in the hands of the assessee. The AO noted that the

application of undisclosed expenses of Ghodzari Project pertains to the sister concerns M/s. Mahalaxmi Infraprojects Ltd. Thus, the unaccounted expenditure pertains to the sister concerns M/s. Mahalaxmi Infraprojects Ltd. and it does not belong to the assessee. He therefore held that telescoping adjustment against declaration made on the basis of sources in the hands of the assessee cannot be given for the unaccounted expenses of the sister concerns. He noted that in the case of M/s. Mahalaxmi Infraprojects Ltd. declaration has been made on account of application basis whereas in the case of the assessee declaration has been made on source basis. He therefore held that shifting of application on undisclosed fund pertaining to the sister concern M/s. Mahalaxmi Infraprojects Ltd. does not have any impact on the undisclosed income of the assessee.

105 Before CIT(A) the assessee challenged the action of the AO in rejecting the claim made for reducing Rs.1.50 crores surrendered as income on account of unexplained business expenses in respect of Ghodzari Project stating it to be on source basis. It was submitted that the source based income as per SMS cash receipts is Rs.4,35,65,000/- as against undisclosed income declared of Rs.5.83 crores and the balance of Rs.1,47,35,000/- was application based income. It was pointed out that the said amount was subject to tax twice, i.e. in the hands of the assessee as well as in the case of M/s. Mahalaxmi Infraprojects Ltd. It was accordingly argued to reduce the income to this extent as it amounts double taxation.

106. Based on the arguments advanced by the assessee the Ld.CIT(A) allowed the claim of the assessee by observing as under :

“46. I have carefully considered the submission of the appellant. The appellant is a sister concern of Mahalaxmi Infraprojects Ltd. Shri R D Shinde, Director in Mahalaxmi Infraprojects Ltd. had made a total declaration of Rs. 31 crores out of which Rs.24.71 crores pertained to Mahalaxmi Infraprojects and Rs. 6.29 crores pertained to the appellant firm. Out of the total declaration of Rs.31 crores, Rs.21.91 crores pertained to Ghodzhari project. Although the year wise breakup of declaration on account of Ghodzhari project is not given in the statement made under section 132(4) on 12/10/2009, it is evident that the amount of Rs. 21.9182 crores was made by the appellant for the previous year 2007-08, 2008-09 and 2009-10. Perusal of assessment orders in the case of Mahalaxmi Infraprojects Ltd. shows that the entire amount of Rs.21.9182 crores was considered as unexplained business expenses, on account of Ghodzhari project, of Mahalaxmi Infraprojects Ltd. itself. Now, the bifurcation of this Rs. 21.9182 crores in the hands of Mahalaxmi Infraprojects Ltd. and the appellant was done in the course of filing of returns under section 153A. The comparative position of the declaration and its treatment by the Department in various assessment years in respect of Ghodzhari project is given in the table below:

Previous years relevant to Asst. year	Assessee	Department
2007-08	--	MIL 2,75,17,500
2008-09	35,63,000	MIL 14,90,67,500
2009-10	MIL 7,46,12,030	MIL 4,25,97,000
	RDS 1,50,00,000	
2010-11	10,55,06,970	--
	(Cash) 2,05,00,000	--
Total	21,91,82,000	21,91,82,000

47. In assessment proceedings, it was noted that the appellant had declared an amount of Rs.5.83 crores as undisclosed income of assessment year 2009-10 which included Rs.1.50 crores on account of unexplained business expense in respect of Ghodzari project. The assessing officer noted that the declaration is made on application basis in the case of Mahalaxmi Infraprojects Ltd. and on source basis in the case of the appellant. Hence, he did not allow the shifting of Rs.1.50 crores on application basis to Mahalaxmi Infraprojects Ltd. There is no confusion in respect of the amount of Rs.5.83 crores made in the hands of the appellant by Shri R D Shinde in the statement made under section 132(4). It is the appellant's contention that out of this Rs. 5.83 crores, a sum of Rs.4.3665 crores was on account of kickback from contractors i.e. on source basis. The balance amount of Rs.1.4735 crores was on account of expenses incurred by the appellant. The appellant has provided a copy of the details of cash receipts and payments to sub-contractors as per SMSs retrieved from the mobile belonging to Shri R D Shinde, which is reproduced below:

Date of SMS	Received Amt.	Paid Amount
22/09/2009	1,32,00,000	-
19/09/2009	74,00,000	-
15/09/2009	13,00,000	-
10/09/2009	27,00,000	-
08/09/2009	18,00,000	-
07/09/2009	20,00,000	-
05/09/2009	-	85,00,000
03/09/2009	35,00,000	-
29/08/2009	-	31,00,000
29/08/2009	23,00,000	-
27/08/2009	31,00,000	-
27/08/2009	6,65,000	-
18/08/2009	56,00,000	-
14/08/2009	-	-
30/07/2009	-	-
03/07/2009	-	34,00,000
24/06/2009	-	6,50,000
23/06/2009	-	15,00,000
01/06/2009	-	-
Total	4,35,65,000	1,71,50,000

A tabulation of the various amounts as per the SMSs shows that Rs.4.3565 crores was received from the sub-contractors and an amount of Rs.1.7510 crores was bifurcated into sums of Rs.86.50 lakhs and Rs.85 lakhs which were declared on application basis in the hands of Mahalaxmi Infraprojects Ltd. and the appellant, respectively (refer to question No.17) of the statement u/s.132(4) dated 12/10/2009). It is apparent therefore, that the entire declaration of Rs.5.83 crores was not made on source basis. It is evident from the replies given during the course of statement made u/s.132(4) that a sum of Rs. 4.3565 crores was declared on source basis and at least Rs.85 lakhs was declared on application basis. This leaves only a balance of Rs. 62 lakhs to be explained. In order to explain this amount, the appellant has given a source and application statement of additional income for the financial years 2008-09 and 2009-10. This statement clearly shows that as against application of Rs.2,96,38,338/-, the appellant had a surplus of Rs.77,20,872/- which was sufficient to cover the balance of Rs.62 lakhs. The appellant has also demonstrated that this amount will be available with it even if the amount of Rs. 1.4735 crores is reduced from the declaration of Rs.5.83 crores.

48. In my opinion, given the facts in paragraph 46 (supra) the contention of the appellant deserves to be accepted. There is no doubt about the fact that the total quantum of declaration on account of unexplained expenses on Ghodzhari project cannot exceed Rs.21.9182 crores. The appellant had declared it as income in the hands of Mahalaxmi Infraprojects Ltd. and the appellant in the previous year relevant to assessment years 2008-09 to 2010-11. While making the assessment of Mahalaxmi Infraprojects Ltd., the assessing officer has treated the entire sum of Rs. 21.9182 crores being the amount of unexplained expenses Ghodzhari project in the case of Mahalaxmi Infraprojects Ltd. during the previous year relevant to assessment years 2007-08 to 2009-10. The assessing officer also admits that the

amount of Rs.1.50 crores (it should be Rs.1.4735 crores) pertains to Ghodzhari project declared in the hands of the appellant. Now, if the entire amount of Rs.21.9182 crores is considered in the hands of Mahalaxmi Infraprojects Ltd. then, there is no scope for treating any amount over and above this amount as unexplained expenses in the hands of the appellant. It is also clear that the entire declaration of Rs.5.83 crores was not on account of source only. A part of it pertained to application as well. Finally, there were sufficient funds available in the hands of the appellant to cover up for any eventual discrepancies such as this. Hence, credit for Rs.1.4735 crores has to be given to the appellant and the assessing officer is directed to do so accordingly. The appellant succeeds on this ground.”

107. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

108. The Ld. Departmental Representative strongly opposed the order of the CIT(A). She submitted that the statement given u/s.132(4) legally stands and it was never retracted. Nothing prevented the assessee not to present the above table before the AO. Only after the assessment was completed it was brought before the CIT(A). If the orders passed by the CIT(A) giving telescoping benefit is accepted, then the assessed income becomes below the returned income.

109. Relying on various decisions she submitted that the assessed income cannot go below the returned income. For the above proposition, she relied on the following decisions :

1. CIT Vs. Shelly Products reported in 129 taxmann 271
2. Saurashtra Cement And Chemical Industries Limited. Vs. ITO reported in 194 ITR 659
3. Philip Joseph (E.) Vs. ITO reported in 234 ITR 846
4. Chandra Mohan vs. UOI reported in 241 ITR 434

110. The Ld. Counsel for the assessee on the other hand heavily relied on the order of the CIT(A). He submitted that the CIT(A) at para 46 of the order had given a categorical finding that the director of the assessee company Shri R.D. Shinde, who is also the director

of another sister concern M/s. Mahalaxmi Infraprojects Ltd. had made a total declaration of Rs.31 crores out of which Rs.24.71 crores pertain to M/s. Mahalaxmi Infraprojects Ltd. and Rs.6.29 crores pertains to the assessee firm. Similarly out of total declaration of Rs.31 crores Rs.21.91 crores pertain to Ghodzari Project. The break-up of Rs.21.91 crores in different assessment years both by the assessee as well as by the Department was also considered by the CIT(A). He submitted that the AO has made addition of Rs.21.92 crores in M/s. Mahalaxmi Infraprojects Ltd. and M/s. Mahalaxmi Infraprojects Ltd. has not disputed the same. Referring to the assessment order of M/s. Mahalaxmi Infraprojects Ltd. for A.Y. 2009-10 at para 28 page 9 he drew the attention of the Bench to the following observation :

“9. Evidences of kick backs from sub-contractors :

Bundle No.1 seized from the residence of Shri R.D. Shinde, Managing Director of assessee company contains details of receipt of kick back from various sub-contractors. The seized documents are SMS's of amounts received from sub-contractors by Shri R.D. Shinde from his accountant. Amount is paid through cheque to the sub-contractors and same is received back in cash. Evidences are found for Rs.4,35,65,000/-. This amount was admitted by the assessee group as additional income in the hands of RDS Construction Company, sister concern of assessee company.”

Therefore, when the AO is same for the assessee as well as M/s. Mahalaxmi Infraprojects Ltd., therefore, there is no additional evidence filed by the assessee before the CIT(A). However, the AO did not choose to discuss the same in the assessment order of RDS Construction Pvt. Ltd. for reasons best known to him. He submitted that an amount of 4.35 crores is source based and Rs.1.48 crores is expenses based. He submitted that in the hands of M/s. Mahalaxmi Infraprojects Ltd. an amount of Rs.21.90 crores has been accepted. Referring to the decision of the Pune Bench of

the Tribunal in the case of Jyotichand Bhaichand Saraf and Sons reported in 139 ITD 10 he submitted that addition has to be made on the basis of evidence and not on the basis of any statement.

111. As regards the various case decisions relied on by the Ld. Departmental Representation to the proposition that assessed income cannot go below the returned income are concerned, he submitted that the same can go below the returned income. Referring to the decision of Hon'ble Gujarat High Court in the case of Gujarat Gas Company Vs. JCIT reported in 245 ITR 84 he submitted that the Hon'ble Gujarat High Court in the said decision has held that the direction of the CBDT to issue instructions to subordinate authorities directing that scrutiny assessments not to be made at figure lower than that returned is ultra vires. The Ld. Counsel for the assessee drew the attention of the Bench to the Held portion of the order which reads as under :

“Held, that the circular in question refers to assessments which are to be made u/s.143(3) of the Act. The circular directs that in a particular type of cases, i.e. in scrutiny cases u/s.14(3) of the Act, the income can neither be assessed at a figure lower than the returned income nor the loss assessed at a figure higher than the loss nor further refund given except what was due on the basis of the returned income. Thus, by issuance of the circular, the quasi-judicial officer is directed to assess cases of particular nature in a particular manner. The Assessing Officer being bound by it had abdicated his function and did not Act independently and, therefore, there was no question of alternative remedy which was a futile remedy. In fact, the jurisdiction had been exercised by the Central Board of Direct Taxes by issuing the circular and, therefore, the order of the Assessing Officer was without jurisdiction. The court had to exercise its jurisdiction under article 226. The order of the Assessing Officer to the extent it stated that the total income would be the returned income, was to be set aside, with a direction to the Assessing Officer to make assessment without keeping in mind the Central Board of Direct Taxes circular dated October 31, 1989.”

112. Referring to the decision of Hon'ble Bombay High Court in the case of CIT Vs. Pruthvi Brokers and Shareholders Pvt. Ltd.

reported in 349 ITR 336 he submitted that the CIT(A) has power to consider the claim not made in the return.

113. As regards the decision relied on by the Ld. Departmental Representative in the case of Shelly Products (Supra) is concerned he submitted that the said decision is distinguishable and not applicable to the facts of the present case. In that case the respondent assessee after having paid the advance tax and self assessment tax filed his return for the relevant assessment year. The AO framed assessment u/s.143(3) r.w.s. 144B. CIT(A) partly allowed the appeal and rejected assessee's contention that the AO was acting without jurisdiction. On further appeal, the Tribunal held that the assessment orders were void ab-initio as the AO lacked jurisdiction. Reference against the said order of the Tribunal was pending before the High Court and the assessee in the meantime, pursuant to order of the Tribunal, applied to the AO for refund of the tax paid by them. Since the taxes were not refunded, a director preferred an appeal before the AAC which was allowed and the AO was directed to refund the assessee the advance tax and self assessment tax. The Tribunal affirmed the order of the AAC and on a reference the High Court also affirmed the order of the Tribunal. Under these circumstances the Hon'ble Supreme Court set aside the order of the High Court and held that if an assessing authority cannot make a fresh assessment in accordance with provisions of the Act, it amounts to deemed acceptance of the return of income furnished by the assessee. It cannot raise a demand for further payment of taxes and the tax paid by the assessee must be accepted as it is. In the event of the tax paid being in excess of the tax liability duly computed on the

basis of return furnished and the rates applicable, the excess shall be refunded to the assessee since its retention may offend Article 265 of the constitution. However, if the tax paid is found to be less than that payable no further demand can be made for recovery of the balance amount since a fresh assessment is barred. Therefore, the said decision is not applicable to the facts of the present case.

114. As regards the objection of the Ld. Departmental Representative that why the assessee did not make any submission before the AO the Ld. Counsel for the assessee submitted that the assessee came to know only after the assessment was completed since in the case of Mahalaxmi Infraprojects Ltd. the said income has been added. Therefore, it has to be reduced from the income of RDS Construction Company.

115. We have considered the rival arguments made by both the sides, perused the orders of the AO and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Revenue has challenged the order of the CIT(A) in deleting the unexplained business expenses of Rs.1.50 crores in respect of Ghodzari Project. We find the AO during the course of assessment proceedings rejected the claim of the assessee to reduce Rs.1.50 crores by giving telescoping effect which was surrendered as income on account of unexplained business expenses in respect of Ghodzari Project source basis. The relevant observation of the AO at para 9 of the order read as under :

“9. The assessee has declared an amount of Rs.5,83,00,000/- as its undisclosed income, which includes Rs.1.50 crores on account of unexplained business expenses in respect of Ghodzari Project, which are claimed against the sources in the hands of assessee. It is seen that the application of undisclosed expenses of Ghodzari Project is pertains to the sister concerns M/s. Mahalaxmi Infraproject Ltd. Thus, the unaccounted expenditure pertains to the sister concerns M/s. Mahalaxmi Infraproject Ltd. and not belongs to the assessee. A Telescopic adjustment against declaration made on the basis of source in the hands of the assessee cannot be given for the unaccounted expenses of the sister concerns.

In the case of M/s. Malaxaxmi Infraproject Ltd. declaration is made on account of application basis, whereas, in the case of assessee declaration is made on source basis. Therefore, shifting of application of undisclosed fund pertains to the sister concerns. M/s. Mahalaxmi Infraproject Ltd. does not have any impact on undisclosed income of the assessee.”

116. We find before CIT(A) it was submitted that the source based income as per SMS cash receipt is of Rs.4,35,65,000/- as against undisclosed income declared of Rs.5,83,00,000/- and the balance of Rs.1,47,35,000/- was application based income. The assessee also provided a copy of the details of cash receipts and payments of sub-contractors as per SMS retrieved from the mobile belonging to Shri R.D. Shinde, the director of the firm. We find the CIT(A) allowed the claim of the assessee on the ground that an amount of Rs.21.92 crores has already been considered in the hands of Mahalaxmi Infraprojects Ltd. on account of Ghodzari project which includes the amount of Rs.1.4735 crores (Not Rs.1.50 crores). Therefore, making addition of this amount in the hands of the assessee will amount to double taxation. We do not find any infirmity in the order of the CIT(A). The finding of the Ld.CIT(A) that while making the assessment of Mahalaxmi Infraprojects Ltd. the AO treated the entire sum of Rs.21.9182 crores being the amount of unexplained expenses of Ghodzari Project in the case of Mahalaxmi Infraprojects Ltd. itself during the previous year

relevant to assessment years 2007-08 and 2009-10 could not be controverted by the Ld. Departmental Representative. Therefore, we find merit in the observation given by the CIT(A) that if the entire amount of Rs.21.9182 crores is considered in the hands of Mahalaxmi Infraprojects Ltd., then there is no scope of treating any amount over and above this amount as unexplained expenses in the hands of the assessee. Further, the entire declaration of Rs.5.83 crores was both on account of source based and application based. Since Mahalaxmi Infraprojects Ltd. has already admitted the amount of Rs.21.90 crores in their hands which includes Rs.1.4735 crores (Not Rs.1.50 crores), therefore, the addition of the same in the hands of the assessee will amount to double taxation. Therefore, in view of the above and in view of the detailed reasoning given by the CIT(A) we do not find any infirmity in his order. Accordingly, the same is upheld.

117. So far as objection of the Ld. Departmental Representative that CIT(A) has admitted additional evidence, we find the same is without any basis. The AO has discussed the evidence seized from the residence of the director of RDS Construction Company in the hands of Mahalaxmi Infraprojects Ltd. at para 28 of page 9. However, the AO chose not to discuss the same in the body of the assessment order of the assessee. Therefore, we find no force in the submission of the Ld. Departmental Representative that the Ld. CIT(A) has accepted any additional evidence.

118. As regards the objection of the Ld. Departmental Representative that the assessee did not make any submission before the AO on this issue, we find force in the argument of the

Ld. Counsel for the assessee that the assessee came to know only after the assessment was completed in the case of Mahalaxmi Infraprojects Ltd. Since it has been added in the hands of Mahalaxmi Infraprojects Ltd., therefore, addition of the amount in the hands of the assessee will amount to double taxation.

119. As regards the objection of the Ld. Departmental Representative that the assessed income cannot go below the returned income if the contention of the assessee is accepted, we find the Hon'ble Bombay High Court in the case of Pruthvi Brokers and Shareholders Pvt. Ltd. (Supra) has held as under (Short notes):

“An assessee is entitled to raise not merely additional legal submissions before the appellate authorities but is also entitled to raise additional claims before them. The appellate authorities have the discretion to permit such additional claims to be raised. The appellate authorities have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The words “could not have been raised” must be construed liberally and not strictly. There may be several factors justifying the raising of a new plea in an appeal and each case must be considered as its own facts.”

120. As regards reliance on the decision of Hon'ble Supreme Court in the case of Shelly Products (Supra) by Ld. Departmental Representative is concerned, we find the facts of that case are different from the facts of the present case. In that case, the assessee after having paid the advance tax and self assessment tax filed its return of income for the relevant assessment year. The AO framed the assessment u/s.143(3) r.w.s. 144B. CIT(A) partly allowed the appeal and rejected the contention of the assessee that the AO was acting without jurisdiction. On further appeal, the Tribunal held that the assessment order was void ab-initio as the

AO lacked jurisdiction. While the appeal was pending before the Hon'ble High Court the assessee applied to the AO for refund of the tax paid by them. Since the taxes were not refunded, the assessee preferred an appeal before the AAC who allowed the appeal filed by the assessee and directed the AO to refund the amount paid by the assessee towards advance tax and self assessment tax. The Tribunal affirmed the order of the AAC and the High Court upheld the order of the Tribunal. Under these circumstances the Hon'ble Supreme Court set aside the order of the High Court holding that if the assessing authority cannot make the assessment in accordance with provisions of the Act, it amounts to deemed acceptance of the return of income filed by the assessee. In such case the assessing authority is denuded of its authority to verify the correctness and completeness of the return, which authority it has while framing a regular assessment. It must accept the return as furnished and shall not in any event raise a demand for payment of further taxes. Accepting the income as disclosed in the return of income furnished by the assessee, it must refund to the assessee any tax paid in excess of the liability incurred by him on the basis of income disclosed. Even if the tax paid is found to be less than that payable, no further demand can be made for recovery of the balance amount since a fresh assessment is barred. However, if the assessee has paid more tax than the income that was returned then the excess tax to be refunded. We therefore, are of the considered opinion that the said decision is distinguishable and not applicable to the facts of the present case. The various other decisions relied on by the Ld. Departmental Representative are also not applicable to the facts of the present case. Therefore, this

argument of the Ld. Departmental Representative is also without any force. In this view of the matter the ground raised by the Revenue is dismissed.

121. Grounds of appeal No.3 & 4 by the Revenue being general in nature are dismissed.

ITA No.2581/PN/2012 (By Assessee) (A.Y. 2010-11) :

122. Ground of appeal No.1 was not pressed by the Ld. Counsel for the assessee for which the Ld. Departmental Representative has not objection. Accordingly, ground of appeal No.1 is dismissed.

123. Grounds of appeal No.2 to 2.2 by the assessee read as under:

“2. The learned CIT(A) erred in confirming the addition of Rs.25,23,585/- made by the learned A.O. on account of cessation of liability u/s 41(1) in respect of creditors outstanding for a period of more than three years without appreciating that as per law, the addition is not justified.

2.1 The learned CIT(A) erred in holding that the creditors had abandoned their right to enforce recovery as no action was taken by them and hence, the liability had ceased to exist once the recovery became legally time barred and therefore, the addition was rightly made by the learned A.O. u/s 41(1).

2.2 The Ld.CIT(A) failed to appreciate that :

a. There was no evidence that the liability in respect of the creditors had ceased during this year and hence, the income u/s 41 (1) could not be assessed in this year.

b. Just because, the period of three years was over, it did not mean that the liability had ceased in this year as per the ratio of Supreme Court decision in the case of Sugauli Sugar Works [236 ITR 518] and thus, there was no reason warranting the addition u/s. 41 (1) in this year.”

124. After hearing both the sides we find the above grounds are identical to grounds of appeal No. 2 to 2.2 in ITA No.2578/PN/2012 for A.Y. 2007-08 filed by the assessee. We have already decided the

issue and the grounds raised by the assessee have been allowed. Following the same ratio, the above grounds raised by the assessee are allowed.

125. Grounds of appeal No. 3 and 4 by the assessee read as under:

“3. The learned CIT(A) erred in holding that 60% of the cost of Power Evacuation facility and infrastructure cost would be entitled to depreciation at the rate applicable to building and not at the rate applicable to windmill.

3.1 The learned CIT(A) failed to appreciate that the expenditure on Power Evacuation facility and infrastructure cost was part and parcel of windmill and hence, the entire expenditure was entitled to depreciation at a higher rate which was available to windmill.

4. The learned CIT(A) erred in directing to apportion the other misc. expenses between windmill cost and infrastructure cost without appreciating that all the expenses incurred by the assessee were relating to windmill and therefore, all such misc. expenses should have been allowed depreciation at the rate applicable to windmill.

126. The Ld. Counsel for the assessee fairly conceded that the above grounds are decided against the assessee by various decisions of the Tribunal. In view of the above, the above grounds are dismissed.

127. Ground of appeal No.5 being general in nature is dismissed.

ITA No.383/PN/2013 (By Revenue) (A.Y. 2010-11) :

128. Ground of appeal No.1 by the Revenue reads as under :

“1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing additional depreciation of Rs.8,14,920/- at higher rate of 80% for civil work foundation and related labour cost of the windmill.

129. After hearing both the sides, we find the above ground is identical to ground of appeal in ITA No.380/PN/2013. We have

already decided the issue and the ground raised by the Revenue has been dismissed. Following the same ratio, this ground by the Revenue is dismissed.

130. Ground of appeal No.2 by the Revenue reads as under :

“2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing deduction u/s.80IA(4)(iv) of Rs.74,26,459/-.”

131. Facts of the case, in brief, are that the AO in his order rejected the claim of deduction u/s.80IA(4)(iv). While doing so the AO observed that while making the claim of deduction under section 80IA(4)(iv), the assessee had ignored the provisions of 80IA(5) which provided that the profit and gain of eligible business should be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year upto and including the assessment year for which the determination is to be made. The AO observed that the assessee is in the business of civil construction and in the year of installation of wind mill the unabsorbed depreciation of windmill was claimed and allowed against profit of such other business. Further the assessee had shown profit from windmill for subsequent years. The assessing officer reworked the manufacturing and profit and loss account in respect of windmill as per provisions of section 80IA(5). He observed that as per this working even at the end of the assessment year under consideration, there was unabsorbed depreciation of Rs.4,64,79,412/-. Based on the above observation, the claim of deduction u/a. 80IA(4) was rejected and the sum of Rs. 74,26,459/- was brought to tax.

132. Before CIT(A) the assessee submitted that it had installed two windmills in A.Y. 2006-07 and one in A.Y. 2007-08 which was entitled for deduction u/s.80IA(4)(iv) from A.Y. 2006-07, which was the first year of generation of power. It had set off loss from windmill against the profit of construction activity for four years till assessment year 2009-10. When the operation of windmill activity resulted in profit of Rs.1,07,72,594/- for the first time, it had claimed deduction u/s.80IA(4) in assessment year 2010-11. It was submitted that the year-wise details of profit / loss from windmill activity produced during assessment proceedings were not considered by the assessing officer. The initial assessment year in the case of eligible undertaking is the first year of claim of deduction and not the first year of operation of the undertaking. The fiction of notional carry forward of losses under section 80IA(5) does exist but operates only from initial assessment year i.e. the first year of claim and thereafter and is not applicable from earlier years. The decision of Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills Pvt. Ltd. Vs. ACIT reported in 38 DTR 57 and the decision of the Pune Bench of the Tribunal in the case of Poonawalla Estate Stud & Agro Farm Pvt. Ltd. Vs. ACIT reported in 136 TTJ 236 were brought to the notice of the CIT(A).

133. Based on the arguments advanced by the assessee the Ld.CIT(A) allowed the claim of the assessee by observing as under :

“52. I have given careful consideration to the contentions of the appellant. A similar issue had come up in appeal before me in the case of M/s Preetam Enterprises wherein the decision of the Honourable ITAT, Pune Bench 'A', Pune in ITA No. 544, 545 and 613/PN/2009 dated 29/04/2011 in its case for assessment years 2004-05, 2005-06 and 2006-07, allowing the claim of deduction under section 80IA(4)(iv)(a) was considered. The relevant portion of the ITAT's order is reproduced below-

2.1 We also find that in the case of Velayudhaswamy Spinning Mills (P) Ltd., Vs ACIT (2010) 231 CTR (Mad) 368 Hon'ble Madras High Court has held that losses and depreciation of the years earlier to the initial assessment year which have already been absorbed against the profits of other business cannot be notionally brought forward and set off against the profits of the eligible business for computing the deduction under section 80 IA. Following this judgment of Honble Madras High Court, this issue is decided in favour of the assessee. The assessee is entitled to claim for deduction u/s 80IA(4)(iv)(a) of the Act.

53. Thus, in view of the identical facts and circumstances, decision of the Honourable ITAT reproduced above is applicable to the instant case also. The disallowances made for the assessment years under appeal are therefore, deleted. This ground of appeal is allowed."

134. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

135. After hearing both the sides, we find the issue as to whether initial assessment year u/s.80IA(5) means year of installation of windmill or year in which the claim of deduction u/s.80IA is first made has been decided in favour of the assessee by the decision of the Pune Bench of the Tribunal in the case of Poonawalla Estate Stud & Agro Farm Pvt. Ltd.(Supra) wherein it has been held as under :

"13. We have heard both the parties and perused the factual matrix of the case and orders of the Revenue and the paper book. We have also examined the legal position on the matter. Before adjudicating the issue in question, it is necessary to examine the scope of the provisions relating to the initial assessment year :

"80-IA. Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.—(1) Where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or an enterprise referred to in sub-s. (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to hundred per cent of profits and gains derived from such business for the first five assessment years commencing at any time during the periods as specified in sub-s. (2) and thereafter, twenty-five per cent of the profits and gains for further five assessment years :

Provided that where the assessee is a company, the provisions of this sub-section shall have effect as if for the words 'twenty-five per cent'; the words 'thirty per cent' had been substituted.

(2) The deduction specified in sub-s. (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park or generates power or commences transmission or distribution of power :

Provided that where the assessee begins operating and maintaining any infrastructure facility referred to in cl. (b) of Explanation to cl. (i) of sub-s. (4), the provisions of this sub-section shall have effect as if for the words 'fifteen years', the words 'twenty years' had been substituted....."

14. From the above provisions of sub-s. (2) of s. 80-IA of the Act, it is evident that the assessee is granted the option to select 'initial assessment year' i.e., first assessment year of the 'any ten consecutive assessment years out of fifteen years'. Starting assessment year for counting the duration of fifteen years is also provided in the said sub-section. As per these provisions, the assessee is not allowed to jump the assessment year once an initial assessment year is opted. Therefore, we find no fault with the assessee in selecting the asst. yr. 2004-05 as the 'initial assessment year'. In this regard i.e., on the issue of assessee's option to select the 'initial assessment year', we have perused the citations relied upon by the assessee's counsel. The conclusion by the Tribunal Mumbai Bench decision in ITA No. 4620/Mum/2007 (asst. yr. 2004-05) in the case of Dy. CIT vs. Ushdev International Ltd., is straight on this issue of initial assessment year and the option to the assessee and the held portion of the decision reads as under :

"In view of the above learned CIT(A)'s order to the extent of holding that initial assessment year and subsequent succeeding assessment years can only be considered for the purpose of computing deduction under s. 80-IA. Coming to the facts of the case, however, as seen from the schedule of details available in the learned CIT(A)'s order the assessee has incurred losses in the asst. yrs. 1997-98 and 1998-99 only. Subsequently in all the years there were profits till asst. yr. 2004-05. It is not clear whether the assessee has claimed any deduction in earlier years under s. 80-IA. This being the 8th year of starting the project, assessee would be left with only another 7 years of claim out of the 10 years available to the assessee. Considering this we are of the opinion that the initial assessment year is to be determined on the basis of the year the assessee choose to claim the deduction for the first time....."

15. When the statute have granted the option to choose the initial assessment year and when the assessee has so chosen the current assessment year as the initial assessment year and when the assessee accordingly paid the taxes on the profits of the windmill activity in the earlier years as per the statute, the AO's decision to thrust the initial

assessment year on the assessee is not in tune with the provisions of s. 80-IA(2) of the Act. Accordingly, we are of the opinion, the learned CIT(A) erred in holding that the initial assessment year for the purposes of s. 80-IA(2) r/w s. 80-IA(5) was the year in which the assessee started generating the electricity. Therefore, the order of the CIT(A) has to be reversed on this issue. It is clear that the 'initial assessment year' for the above purposes was the first year in which the assessee claimed the deduction under s. 80-IA(1) after exercising his option as per the provisions of s. 80-IA(2) of the Act. Consequently, the assessee is entitled to claim the deduction of Rs. 25,44,326 under s. 80-IA in respect of the profits from the windmill activity. Accordingly, the clarificatory ground raised is allowed. In the result, adjudication of the grounds 3 and 4 raised in the appeal is mere academic and hence they are dismissed as infructuous.

16. In the result, the appeal of the assessee is allowed."

136. Respectfully following the decision of the Coordinate Bench of the Tribunal cited (Supra) and in absence of any contrary material brought to our notice we hold that the provisions of section 80IA(5) are applicable only from the initial assessment year, i.e. the assessment year in which deduction u/s.80IA(4) was first claimed by the assessee after exercising its option as per the provisions of section 80IA(2) of the Act. The order of Ld.CIT(A) is accordingly upheld and the ground raised by the Revenue is accordingly dismissed.

137. Grounds of appeal No. 3 and 4 by the Revenue being general in nature are dismissed.

138 In the result, all the appeals filed by the assessee are partly allowed and all the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 06-11-2015.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 06th November, 2015.
सतीश

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CITA), Kolhapur
4. CIT, Kolhapur
विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए", पुणे
5. DR, ITAT, "A" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune