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

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

ITA.NOs. 3785 & 3786/MUM/2013
(A.Ys: 2008-09 & 2009-10)

M/s. Infrastructure Leasing & Financial Services Ltd., The IL & FS Financial Centre Plot No. C-22, G Block Bandra Kurla Complex Bandra (E), Mumbai – 400 051 **PAN: AAACI0989F**	*v.*	Addl. Commissioner of Income Tax Range – 10(1) Room No. 455, 4th Floor Aayakar Bhavan M.K. Road, Mumbai – 400 020
(Appellant)		**(Respondent)**

ITA.NOs. 3699 & 3700/MUM/2013
(A.Ys: 2009-10 & 2008-09)

Dy. Commissioner of Income Tax Range – 10(1) Room No. 455, 4th Floor Aayakar Bhavan M.K. Road, Mumbai – 400 020	*v.*	M/s. Infrastructure Leasing & Financial Services Ltd., The IL & FS Financial Centre Plot No. C-22, G Block Bandra Kurla Complex Bandra (E), Mumbai – 400 051 **PAN: AAACI0989F**
(Appellant)		**(Respondent)**

Assessee by	**:**	**Shri Sandeep Bhalla & Shri Prashant Bhojwani**
Department by	**:**	**Shri Awangshi Gimson**
Date of Hearing	**:**	**19.11.2019**
Date of Pronouncement	**:**	**28.11.2019**

O R D E R

PER C.N. PRASAD (JM)

1. These cross appeals are filed by the assessee and revenue for the A.Y. 2008-09 and A.Y. 2009-10 against different orders of the Ld. CIT(A) dated 06.03.2013 for the A.Y. 2008-09 and 2009-10 respectively.

2. First we take up the appeal of the assessee for the A.Y. 2008-09

3. The assessee in its appeal raised the following grounds: -

> *"1. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in confirming the disallowance of the claim of the depreciation of Rs.11,31,212/- in respect of residential properties. On the facts and circumstances of the case the appellant submits that the disallowance of depreciation of Rs.11,31,212/- is not justified and the said disallowance may be deleted.*
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> *2. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in confirming the disallowance of the amortization of the premium paid on leasehold land on which the commercial complex has been constructed by the appellant amounting to Rs.22,32,084/-. On the facts & circumstances of the case the appellant submit that the disallowance of the claim of amortisation of land premium amounting to Rs.22,32,084/- is not justified and the said disallowance may be deleted.*
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> *3. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in confirming the disallowance u/s 14A amounting to Rs.24.37 crores attributing the interest relating to the exempt income earned by appellant. On the facts & circumstances of the case the appellant submit that the determination of interest attributable to earning interest income which is exempt u/s 10 is not justified and the said disallowance may be deleted.*
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> *4. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in confirming the disallowance of Rs.28,48,716/- being the lease equalisation charge debited to Profit and Loss account. The appellant submits that the said amount is allowable deduction u/s 37(1) of the Income Tax Act, 1961. The disallowance confirmed by the Learned Commr. of Income Tax (A) is not justified and be deleted.*

5. On the facts and circumstances of the case the Learned Commr. of Income Tax (Appeals) has erred in confirming the disallowance of depreciation on the Toll Road amounting to Rs.3,16,705/-.

6. On the facts and circumstances of the case the appellant submits that they have not received any income in respect of the Toll Road and the matter is in dispute. The Learned Commr. of Income Tax (Appeals) has erred in directing the Learned Assessing Officer to estimate the interest income due from MPSIDC. The appellant prays that they are not entitled to and have not received any interest income from MPSIDC and hence the direction of the Learned Commr. of Income Tax (A) to tax the estimated interest income may be set aside.

7. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in confirming the disallowance of Rs.25.02 crores being the expenditure relating to exempt income while computing book profit u/s. 115JB. On the facts and circumstances of the case the appellant submits that the disallowance of Rs.25.02 crores is not justified and be deleted.

8. The Learned Commr. Of Income Tax (Appeals) has erred in confirming the levy of interest u/s 234B. On the facts & circumstances of the case the appellant denies the liability for payment of interest u/s 234B. The appellant prays that they are not liable to pay any interest u/s 234B and the levy of interest u/s 234B may be deleted.

9. The Learned Commr. Of Income-tax (Appeals) has erred in confirming the levy of penalty u/s. 234D. On the facts & circumstances of the case the appellant denies the liability for payment of interest u/s. 234D. The appellant prays that they are not liable to pay any interest u/s. 234D and the levy of interest u/s. 234B may be deleted."

4. At the outset, Ld. Counsel for the assessee submits that ground No.1 of grounds of appeal relating to disallowance of depreciation on residential properties was held in favour of the assessee by the Tribunal for the A.Y. 2004-05 to A.Y. 2007-08. It is further submitted that consequential order was passed by the Assessing Officer for the A.Y. 2004-05 vide order dated 31.12.2018 allowing depreciation.

5. On the other hand, Ld. DR strongly supported the orders of the authorities below.

6. We have perused the order of the Tribunal for the A.Y. 2004-05 in ITA No. 3203/Mum/2008 and ITA.No. 3156/Mum/2008 dated 28.06.2017 wherein the Tribunal decided this issue in favour of the assessee at page No. 4 Para No. 3.2 observing as under: -

> *"3.2 We have heard the rival contentions and perused the cited case laws. We find that Hon'ble Delhi High Court in the cited case laws has observed that under the new scheme of depreciation prescribed in amended Section 32, the depreciation is to be allowed on WDV of each 'block of assets' at such percentage as may be prescribed and therefore, with the introduction of concept of 'block of assets', an individual asset loses its identity and there was no requirement to compute depreciation for each and individual asset separately. Making these observations, the assessee was allowed depreciation on assets held by assessee with respect to his closed units. Similar view has been taken in the cited decision of Mumbai Tribunal. We also find that no mechanism has been provided in the statute to bifurcate the WDV in such a situation. Therefore, after perusal of statutory provisions and cited judgments, we also conclude that each asset has lost its identity, in the concept of block of assets and therefore, no segregation thereof could be done the fact that the income from certain properties was offered under the head "Income from House property". Therefore, we allow this ground of assessee's appeal by deleting the impugned disallowance."*

7. Similar view has been taken by the Tribunal for the A.Y. 2005-06 to A.Y. 2007-08 in ITA.Nos. 3339/Mum/2011, ITA.No. 3340/Mum/2011 and 3341/Mum/2011 dated 30.04.2019 at Para No. 9 which reads as under: -

> *"9. We have heard both the parties, perused materials available on record and gone through the orders of authorities below. We find that the Co-ordinate Bench of ITAT, 'I' Bench in assessee's own case for AY 2004-05 had considered an identical issue and after considering the relevant facts, held that with introduction of concept of block of assets, an individual assets losses its identity, therefore, no segregation thereof could be done notwithstanding the fact that the income from certain property was offered under the head 'income*

from house property'. However, when the Bench has posed specific question to the Ld. AR for the assessee to the effect that whether the assessee has claimed standard deduction as provided u/s 24(a) of the Act or not in respect of 'income from house property' in addition to depreciation and other maintenance expenses claimed, the Ld. AR for the assessee, fairly accepted that this aspect has not been examined by the authorities below and also there is no finding from the Tribunal in the earlier years. Therefore, the issue may be set-aside to the file of the AO for verification of facts with regard to standard deduction claimed u/s 24(a) of the Act and further if at all the assessee has claimed deduction u/s 24(a) of the Act, it amounts to double deduction and the same may be directed to be disallowed. Therefore, consistent with view taken by the Co-ordinate Bench for earlier years, we direct the AO to allow depreciation as claimed by the assessee on residential premises, but verify the fact with regard to deduction claimed u/s 24(a) in the light of our discussions given hereinabove. In case, the assessee claimed deduction u/s.24(a), then the same needs to be disallowed."

8. We have observed that the Tribunal while disposing off appeal for the A.Y. 2005-06 to A.Y. 2007-08 directed the Assessing Officer to allow the depreciation as claimed by the assessee on residential premises however it is also directed to verify the fact as to whether deduction U/s.24(a) was claimed by the assessee or not and if it is claimed the same is to be disallowed. As the facts being identical respectfully following the said decision, we direct the Assessing Officer to carry out similar exercise as directed by the Tribunal in the order for the A.Y. 2005-06 to A.Y. 2007-08 and decide accordingly. This ground is partly allowed.

9. Coming to Ground No. 2 of grounds of appeal the Ld. Counsel for the assessee fairly submitted that this ground relating to disallowance of amortization of premium paid on leasehold land has been decided in favour of the Revenue in ITA No. 3203/Mum/2008 and ITA.No. 3156/Mum/2008 dated 28.06.2017 at Para No. 4.6 observing as under: -

> *"4.6. The Ld. AR contended that the same was revenue in nature and no TDS was deducted there-from since the land was acquired long ago when there was no requirement to deduct the TDS against the said payment. However, we find that the issue before us is regarding the nature of the impugned expenditure and since we have already noted that the said expenditure was capital in nature, the same was not allowable to the assessee. Therefore, after considering the factual position and various judicial pronouncements, we are of the considered opinion that the amortization of lease premium over the lease period was capital in nature and hence, not allowable to the assessee. The ground of assessee's appeal stands dismissed."*

10. It is submitted that similar view has been in taken by the Tribunal for the A.Y. 2005-06 to A.Y. 2007-08 in ITA.Nos. 3339/Mum/2011, ITA.No. 3340/Mum/2011 and 3341/Mum/2011 dated 30.04.2019. Facts being identical following the said decision we dismiss the ground raised by the assessee.

11. Ld. Counsel for the assessee submitted that Ground No.3 of grounds of appeal is relating to disallowance U/s. 14A r.w.s 8D(2)(iii) of I.T. Rules in respect of interest and the Tribunal for the A.Y. 2004-05 in ITA No. 3203/Mum/2008 and ITA.No. 3156/Mum/2008 dated 28.06.2017 set-aside the matter to the file of the Assessing Officer. It is also submitted that for the A.Y. 2005-06 to A.Y. 2007-08 the Tribunal restored this matter to the file of the Assessing Officer.

12. On the other hand, Ld. DR strongly supported the orders of the authorities below.

13. We have heard the rival submissions and perused the orders of the authorities below and the decision of the Tribunal in assessee's own cases. For the A.Y. 2004-05 the Tribunal at Para No. 6.2 held as under:

"6.2. We have heard the rival contentions. We find it is fairly settled legal position that strategic investments not capable of yielding exempt incomes and investments held as stock in trade are not to be considered for computation of Section 14A disallowance. Further, if the net-worth of the assessee is quite sufficient so as to cover the investments held by the assessee, a presumption has to be drawn that investments are out of own funds unless the nexus of borrowed funds with investments is established by the revenue. A perusal of Balance Sheet, at a glance, reveals that the assessee' Share Capital and Reserves & surplus stood at Rs.725.23 crores as against investment of Rs. 1394.44 crores, which prima-facie weakens the argument advanced by Ld. AR. However, the Ld. AR has contended that investment includes strategic investments, investment not capable of earning exempt incomes and investment held as stock in trade, which are not includible in the value of investments for the purpose of Section 14A disallowance. The Ld. AR has provided before us detailed working of adjusted investments in the light of his contentions. Also, we note that in the preceding paragraph, we have already restored the matter back to the file of AO to find out the closing stock valuation of the securities held as stock in trade and the income of which has been offered under the head business income. Therefore, in the light of these facts / observations, we remit the matter back to the file of AO to re-compute the said disallowance qua interest and administrative expenses after properly appreciating the capital structure of the assessee. The assessee is also directed to substantiate its claim forthwith in the light of our observations before the lower authorities, falling which the authorities shall be at liberty to decide the same on the basis of available material on record. The assessee's grounds of appeals stand allowed for statistical purposes."

14. Similarly, the Tribunal for the A.Y. 2005-06 to A.Y. 2007-08 in ITA.Nos. 3339/Mum/2011, ITA.No. 3340/Mum/2011 and 3341/Mum/2011 dated 30.04.2019 at Para No. 19 held as under: -

"19. We have heard both the parties, perused materials available on record and gone through the orders of authorities below. The facts with regard to applicability of provisions of section 14A was not disputed by the assessee. The only dispute is with regard to quantification of average value of investment considering the investment made in group/associate concerns for strategic investment purpose and also the element of commercial expediency in making investment. We find that the Hon'ble Supreme Court in the case of Maxopp Investment Ltd. vs CIT (supra) had considered the

issue of disallowance of expenses incurred in relation to exempt income including interest in light of arguments of the assessees that strategic investments made in group/associate concerns for the purpose of holding controlling interest cannot be considered for determination of average value of investments and held that even though investment are made in group/associate concerns for the purpose of holding strategic investment disallowances contemplated u/s 14A of the Act triggers the moment the assessee earned exempt income. However, the Hon'ble Court has not touched the concept of commercial expediency and consideration of disallowance on actual dividend yielding investment. Further, various Hon'ble Court including the High Court of Bombay in number of cases had held that only investment which yield exempt income needs to be included in average value of investment for the purpose of determination of interest expenditure and other expenditure. Therefore, we are of the considered view that the issue needs to be go back to the file of the AO for the purpose of determination of average value of investment and also quantum of disallowance of interest expenditure and other expenditure keeping in view that of the decision of the Hon'ble Supreme Court in the case of Maxopp Investment Ltd. vs CIT (supra), hence, we set-aside the issue to the file of the AO and direct him to reconsider the issue in light of our discussion hereinabove."

15. Following the above said orders of the Tribunal we restore this issue to the file of the Assessing Officer to follow the directions of the Tribunal for the A.Y. 2004-05 to 2007-08 and recompute the disallowance in accordance with the directions therein. We also direct the Assessing Officer to recompute the disallowance keeping in view the decision of the special bench of Delhi in the case of ACIT v. Vireet Investments Private Limited [165 ITD 27]. This ground is allowed for statistical purpose.

16. Ground No.4 of grounds of appeal is relating to disallowance of lease equalization charges. Ld. Counsel for the assessee submits that this issue has been decided in favour of the assessee for the A.Y.2004-05 to 2007-08 by the Tribunal. It is further submitted that the Assessing Officer allowed the deduction for lease equalization for the A.Y.2004-05 by passing consequential order dated 31.12.2018. It is also

submitted that the Hon'ble Bombay High Court in I.T. Appeal No. 411 of 2014 dated 14.02.2019 has dismissed the revenue's appeal for the A.Y.1994-95 to A.Y.1998-99.

17. On the other hand, Ld. DR strongly supported the orders of the authorities below.

18. We have heard the rival submissions and perused the orders of the authorities below and the Tribunal decision in assessee's own case. For the A.Y. 2004-05 the Tribunal at Para No. 7.2 of the order wherein the Tribunal held as under: -

> *"7.2. We have appreciated the rival contentions and perused the Tribunal's decisions cited by the representatives. Upon appreciation of Guidance note on Leases issued by ICAT and the above cited judgments, we note that the four elements have to be considered for proper treatment of lease rentals viz., Lease rentals, Implicit Rate of Return [IRR], Depreciation and lease equalization charge. Lease rental in monetary terms is a sum total of the financing charge and the amount embedded in it in the form of a capital sum. The said financing charge constitutes the real income, which is to be offered for tax, which is determined by applying the IRR to the net investment made in the asset. The lease equalization charge is the result of the adjustment, which the assessee has to make whenever the amount put aside towards capital recovery is not equivalent to the depreciation claimed by the assessee. Lease equalization charges is a method of recalibrating the depreciation claimed by the assessee in a given accounting period. If the depreciation claimed is less than the capital recovery, the difference is debited in the profit & loss account in the form of lease equalization charge and similarly if, for any reason the depreciation claimed is more than the capital recovery, then the difference is credited, once again, in the form of lease equalization charge to the Profit & Loss Account. Therefore, the assessee in effect debits are credits its profit & loss account with a lease equalization charge depending on whether or not the depreciation claimed is less or more than the capital recovery. The method employed by the assessee, therefore, over the full term of the lease period would result in the lease equalization amount being*

reduced to naught, as the credits and debits in the Profit and Loss Account would square off with each other.

7.3. Further a perusal of earlier orders of Tribunal, we find that while prima facie allowing the claim of lease equalization charges, it has been held that deprecation which is to be taken for this purpose should be the depreciation allowable as per the Income Tax Act only and not the book deprecation. Therefore, in the light of these observations and following the judicial precedence, the matter is restore back to the file of AO with the direction to decide the issue afresh after giving adequate opportunity to the assessee to substantiate his claim in this regard. It is clarified that to maintain consistency, the depreciation which is to be considered for the purpose of calculating lease equalization charges would be the Income Tax Depreciation and not the book depreciation as held by the Tribunal in earlier years. The grounds stands allowed for statistical purpose."

19. The Tribunal for the A.Y. 2005-06 to A.Y. 2007-08 in ITA.Nos. 3339/Mum/2011, ITA.No. 3340/Mum/2011 and 3341/Mum/2011 dated 30.04.2019 at Para No. 24 and 25 considered this issue observing as under:

"24. We have heard both the parties, perused materials available on record and gone through the orders of authorities below. An identical issue has been considered by the Co ordinate Bench of the Tribunal in asessee's own case for AY 2004-05. The Tribunal, after considering relevant facts held that lease equalisation reserve is an allowable deduction, however, for the purpose of computation of quantum of allowances, lease equalisation reserve should be computed on the basis of tax depreciation instead of book depreciation. The relevant observations of the Tribunal are as under:-

7.2. We have appreciated the rival contentions and perused the Tribunal's decisions cited by the representatives. Upon appreciation of Guidance note on Leases issued by ICAI and the above cited judgments, we note that the four elements have to be considered for proper treatment of lease rentals viz. Lease Rentals, Implicit Rate of Return [IRR], Depreciation and lease equalization charge. Lease rental in monetary terms is a sum total of the financing charge and the amount embedded in it in the form of a capital sum. The said financing charge constitutes the real income, which is to be *offered for tax, which is determined by applying the IRR to the net investment made in the asset. The lease equalization charge is the result of the adjustment, which the assessee has to make whenever the amount put aside towards capital recovery is not equivalent to the depreciation claimed by the assessee. Lease equalization charges is a method of recalibrating the depreciation claimed by the assessee in a given accounting period. If the depreciation claimed is less than the capital recovery, the difference is debited in the profit & loss account in the form of lease equalization charge and similarly if, for any reason the depreciation claimed is more than the capital recovery, then the difference is credited, once again, in the form of lease equalization charge to the Profit & Loss Account. Therefore, the assessee in effect debits are credits its profit & loss account with a lease equalization charge depending on whether or not the depreciation claimed is less or more than the capital recovery. The method employed by the assessee, therefore, over the full term of the lease period would result in the lease equalization amount being reduced to naught, as the credits and debits in the profit & loss account would square off with each other.*

7.3 Further a perusal of earlier orders of Tribunal, we find that while prima facie allowing the claim of lease equalization charges, it has been held that deprecation which is to be taken for this purpose should be the depreciation allowable as per the Income Tax Act only and not the book deprecation. Therefore, in the light of these observations and following the judicial precedence, the matter is restore back to the file of AO with the direction to decide the issue afresh after giving adequate opportunity to the assessee to substantiate his claim in this regard. It is clarified that to maintain consistency, the depreciation which is to be considered for the purpose of calculating lease equalization charges would be the Income Tax Depreciation and not the book depreciation as held by the Tribunal in earlier years. The grounds stands allowed for statistical purposes."

25. We further noted that the Hon'ble Supreme Court has considered an identical issue in light of accounting standard prescribed by ICAI and held that lease equalisation reserve computed as per accounting standards prescribed by ICAI is an allowable deduction because there is no express bar in the IT Act, 1961 regarding application of such accounting standards. The Hon'ble Court further held that only real income i.e. finance income should be taxed for the purpose of Income Tax which can be arrive *only after applying such method which is prescribed in the guidance note. Therefore, we are of the considered view that prima-facie, the issue is settled by the decision of the Hon'ble Supreme Court, however, consistent with view taken by the Co-ordinate Bench for earlier years, we restore this issue to the file of the AO and direct him to decide computation of lease equalisation reserve in accordance with the direction of Hon'ble Supreme Court in the case of Virtual Soft Systems Ltd. (supra)."*

20. Following the said order, we restore this issue to the file of the Assessing Officer and direct the Assessing Officer to follow the directions of the Tribunal in assessee's own case for the A.Y.2004-05 to A.Y.2007-08 and decide the issue accordingly. This ground is partly allowed for the statistical purpose.

21. Ground No. 5 of grounds of appeal is relating to disallowance of depreciation on toll road. The Ld. Counsel for the assessee submits that this issue has been decided in favour of the assessee by the Tribunal for the A.Y. 2004-05 to A.Y. 2007-08. It is also submitted that the Assessing Officer while passing the consequential order allowed the depreciation for the A.Y. 2004-05 vide order dated 31.12.2018. On a perusal of the Tribunal we find that this issue has been decided in favour of the assessee by the Tribunal for the A.Y. 2004-05 at Para No. 11.22 observing as under:

"11.12. Since, we have already directed the Ld. Assessing Officer. to tax the estimated income from the toll road, as a logical consequence, the assessee becomes entitled to claim the depreciation on the on the toll road. After considering the cited decisions relied upon by respective representative, we find that since the assessee is not the owner of the toll road, depreciation thereupon could not be allowed to him in terms of decision of Hon'ble Bombay High Court in North Karnataka Expressway Ltd. Vs. CIT [supra]. However, depreciation on the same as intangible assets being 'any other business or commercial rights of similar nature' as per Section 32 would be available to the assessee in terms of decision of Special Bench of the Tribunal, Hyderabad rendered in Progressive Constructions Ltd. Vs. ACIT [ITA No. 1845/Hyd/2014 order dated

14/02/2017]. Respectfully following the cited decision, we direct so. The Ld. AO is directed to re-compute the same and grant depreciation thereupon as intangible assets. The assessee is also directed to substantiate his claim in this regard. The grounds of assessee's appeal stands allowed for statistical purposes."

22. The Tribunal for the A.Y. 2005-06 to A.Y. 2007-08 in ITA.Nos. 3339/Mum/2011, ITA.No. 3340/Mum/2011 and 3341/Mum/2011 dated 30.04.2019 at Para Nos. 31 & 32 considered this issue observing as under:

"31. We have heard both the parties, perused materials available on record and gone through the orders of authorities below. The issue of depreciation on toll road as well as estimation of income from such road is subject matter of consideration by the Tribunal for AY 2004-05. The Tribunal after considering rival submissions of the assessee and also relied upon certain judicial precedence held that the depreciation on toll road is not allowed as plant and machinery because the assessee is neither owner of the asset nor said asset is in the nature of plant and machinery. However, the Tribunal allowed depreciation as intangible asset being right to collect the toll. Similarly, in respect of estimation of income from toll road, direct the AO to ascertain correct facts with regard to attainment of arbitration proceedings before estimation of income. The relevant findings of the Tribunal are as under:-

"11.10 We have heard the rival contentions. So far as the estimation of income from the toll road is concerned, we find that the issue in hand is related with estimation of income only and not with notional income since the claim of the assessee has already been crystallized by the Appellate Tribunal and the assessee has certain right to claim the same particularly when the payment is backed by the guarantee of the state government. There is no dispute as to the fact that the assessee has unfettered right to claim the same from the government agency and only the quantification thereof is in dispute. The contention of the Ld. AR is that since the government agency has agitated the same before higher authorities, the same has not yet attained finality. However, whatever the case may be, the assessee following mercantile system of accounting is obliged to offer the same to tax in view of crystallization thereof by Appellate Tribunal.

11.11 Therefore, on the facts and circumstances, we restore the matter back to the file of Ld. AO with a direction to estimate the income on the basis of latest decision of the Appellate Tribunal or any higher authority, as the case may be. The assessee is directed to substantiate his claim in this regard forthwith failing which the Ld. AO shall be at liberty to decide the same on the basis of material available on record.

11.12 Since, we have already directed the Ld. AO to tax the estimated income from the toll road, as a logical consequence, the assessee becomes entitled to claim the depreciation on the toll road. After considering the cited decisions relied upon by respective representative, we find that since the assessee is not the owner of the toll road, depreciation thereupon could not be allowed to him in terms of decision of Hon'ble Bombay High Court in North Karnataka Expressway Ltd. Vs. CIT [supra]. However, depreciation on the same as intangible assets being 'any other business or commercial rights of similar nature' as per Section 32 would be available to the assessee in terms of decision of Special Bench of the Tribunal, Hyderabad rendered in Progressive Constructions Ltd. Vs. ACIT [ITA No. 1845/Hyd/2014 order dated 14/02/2017]. Respectfully following the cited decision, we direct so. The Ld. AO is directed to re-compute the same and grant depreciation thereupon as intangible assets. The assessee is also directed to substantiate his claim in this regard. The grounds of assessee's appeal stands allowed for statistical purposes."

32. In this view of the matter and consistent with view taken by the Co-ordinate Bench of the Tribunal in assessee's own case for earlier period, we restore this issue to the file of the AO and direct him to decide in accordance with direction given by the Tribunal for AY 2004-05.

23. Following the said decision, we restore this matter to the file of the Assessing Officer with a direction to decide the issue following the directions of the Tribunal for the A.Y. 2005-06 to 2007-08. This ground is allowed for statistical purpose.

24. Ground No.6 of grounds of appeal of the assessee is relating to the addition made towards notional interest in respect of toll road from Madhya Pradesh State Industrial Development Corporation.

25. It is submitted that by the Ld. Counsel for the assessee that this issue was also decided by the Tribunal in Para No. 11.10 for the A.Y.2004-05 and Para Nos. 32 for the A.Y. 2005-06 to 2007-08 and the Assessing Officer passed consequential order dated 31.12.2018 for the A.Y. 2004-05 restricting addition only to the amount awarded by arbitrator of Arbitration Tribunal and granted relief for the balance amount.

26. On a perusal of the order of the Tribunal we find that this issue was also considered by the Tribunal in Para No. 11.11 for the A.Y. 2004-05 and for the A.Y. 2005-06 to A.Y. 2007-08 and restored to the file of the Assessing Officer as extracted above. Thus, respectfully following the said decision, we restore this issue to the file of the Assessing Officer with a direction to follow the order the Tribunal for the A.Y. 2004-05 and for the A.Y. 2005-06 to A.Y. 2007-08 and decide accordingly. This ground is allowed for statistical purpose.

27. Ground No. 7 of the grounds of appeal relates to disallowance U/s.14A while computing the book profits U/s. 115JB of the Act. Ld. Counsel for the assessee submits that this issue has been decided by the Tribunal for the A.Y. 2005-06 to A.Y. 2007-08 in ITA.Nos. 3339/Mum/2011, ITA.No. 3340/Mum/2011 and 3341/Mum/2011 dated 30.04.2019 at Para Nos. 47 to 49 observing as under:

> *"47. The next issue that came up for our consideration from ground no. 19 is addition of the amount disallowed u/s 14A while computing book profit u/s 115JB of the Act. The AO has made addition u/s 14A*

of the Act towards expenditure incurred in relation to exempt income. Further, a similar adjustment has been made towards amount disallowed u/s 14A of the Act, while computing book profit u/s115JB of the Act.

48. The Ld. AR for the assessee, submitted that this issue is covered in favour of the assessee by the decision of ITAT, Delhi, Special Bench in the case of ACIT vs Vireet Investment Pvt Ltd. (2017) 82 taxmann.com 415 (Del. ITAT), wherein, the Tribunal held that disallowance contemplated u/s 14A shall not be added back while computing book profit u/s 115JB of the Act.

49. We have heard both the parties, perused materials available on record. We find that both issue is covered in favour of the assessee by the decision of ITAT Delhi Special Bench in the case of ACIT vs Vireet Investment Pvt Ltd.(supra). But, fact remains that the issue of disallowance contemplated u/s 14A of the Ac read with Rule-8D has already been discussed by us in preceding paras in ground no. 4, 5, 7 and 10 of assessee's appeal, where the matter has been restored back to the file of the AO to recompute disallowance of expenditure by excluding investment which do not yield exempt income. The issue of computation of book profit with reference to 14A disallowance is bearing on the outcome of computation of disallowance u/s 14A of the Act in light of our discussions given in the grounds of appeal taken for the assessee's in its appeal. Therefore, we restore this issue back to the file of the AO and direct him to first re-compute disallowance contemplated u/s 14A and then decide this issue in accordance with findings of the Special Bench of ITAT, Delhi in the case of ACIT vs Vireet Infest Pvt. Ltd. (supra) and also the Hon'ble Bombay High Court in the case of CIT vs Ms/ Bengal Finance Investment Pvt. Ltd. in Income Tax Appeal No.337 of 2013."

28. Respectfully following the said decision, we direct the Assessing Officer to recompute the disallowance U/s. 14A following the observations of the Tribunal for the A.Y. 2005-06 to A.Y. 2007-08. This ground is allowed for statistical purpose.

29. Ground Nos. 8 and 9 of the grounds of appeal relates to levy of interest U/s. 234B and 234D of the Act which are only consequential and

thus, we restore these grounds to the file of the Assessing Officer to decide in accordance with law.

30. Now we take up the appeal of the assessee in ITA.No. 3786/Mum/2013 for the A.Y. 2009-10.

31. The assessee has raised the following grounds in its appeal: -

> *"1. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in confirming the disallowance of the claim of the depreciation of Rs. 15,80,623/- in respect of residential properties. On the facts and circumstances of the case the appellant submits that the disallowance of depreciation of Rs. 15,80,623/- is not justified and the said disallowance may be deleted.*
>
> *2. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in confirming the disallowance of the amortization of the premium paid on leasehold land on which the commercial complex has been constructed by the appellant amounting to Rs.22,32,084/-. On the facts & circumstances of the case the appellant submit that the disallowance of the claim of amortisation of land premium amounting to Rs.22,32,084/- is not justified and the said disallowance may be deleted.*
>
> *3. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in confirming the disallowance u/s 14A amounting to Rs.71 crores attributing the interest relating to the exempt income earned by appellant. On the facts & circumstances of the case the appellant submit that the determination of interest attributable to earning interest income which is exempt u/s 10 is not justified and the said disallowance may be deleted.*
>
> *4. The Learned A.O. has erred in disallowing the sum of Rs.71.97 crores being the administrative / establishment expenses attributable to earning exempt income u/s 10 of Income Tax Act, 1961. On the facts & circumstances of the case the appellant submit that the disallowance of Rs.71.97 crores being the administrative / establishment expenses is not justified and the said disallowance may be deleted.*
>
> *5. On the facts and circumstances of the case the Learned Commr. of Income Tax (Appeals) has erred in confirming the disallowance of depreciation on the Toll Road amounting to Rs.2,69,200/-.*

6. On the facts and circumstances of the case the appellant submits that they have not received any income in respect of the Toll Road and the matter is in dispute. The Learned Commr. of Income Tax (Appeals) has erred in directing the Learned Assessing Officer to estimate the interest income due from MPSIDC. The appellant prays that they are not entitled to and have not received any interest income from MPSIDC and hence the direction of the Learned Commr. of Income Tax (A) to tax the estimated interest income may be set aside.

7. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in confirming the additions of Rs.2,41,00,000/- based on the information of AIR transactions The appellant states that they have not entered into transactions for Rs 2,41,00,000/- as recorded in the AIR Information. The appellant prays that the addition confirmed by the CIT (Appeals) may be deleted.

9. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in confirming the disallowance of Rs.85,81,73,026/- being the expenditure relating to exempt income while computing book profit u/s. 115JB. On the facts and circumstances of the case the appellant submits that the disallowance of Rs.85,81,73,0267- is not justified and be deleted.

32. Ground Nos. 1 of Grounds of appeal for the A.Y. 2009-10 is relating to disallowance of depreciation on residential properties. This ground which is similar to Ground No.1 in the appeal for the A.Y. 2008-09 has been decided while disposing off the appeal and the decision taken therein shall apply mutatis mutandis for this year also i.e. A.Y. 2009-10. We order accordingly.

33. Ground No. 2 of Grounds of appeal for the A.Y. 2009-10 is relating to disallowance of amortization of premium paid on leasehold land. This ground which is similar to Ground No.2 in the appeal for the A.Y. 2008-09 has been decided while disposing off the appeal and the decision taken therein shall apply mutatis mutandis for this year also i.e. A.Y. 2009-10. We order accordingly.

34. Ground Nos. 3 & 4 of Grounds of appeal for the A.Y. 2009-10 is relating to disallowance interest u/s. 14A of the Act. This ground which is similar to Ground No.3 in the appeal for the A.Y. 2008-09 has been decided while disposing off the appeal and the decision taken therein shall apply mutatis mutandis for this year also i.e. A.Y. 2009-10. We order accordingly.

35. Ground No. 5 of Grounds of appeal for the A.Y. 2009-10 is relating to disallowance of depreciation on toll road. This ground which is identical to Ground No.5 in the appeal for the A.Y. 2008-09 has been decided while disposing off the appeal and the decision taken therein shall apply mutatis mutandis for this year also i.e. A.Y. 2009-10. We order accordingly.

36. Ground No. 6 of Grounds of appeal for the A.Y. 2009-10 is relating to disallowance of notional interest income in respect of toll road from Madhya Pradesh State Industrial Development Corporation. This ground which is identical to Ground No.6 in the appeal for the A.Y. 2008-09 has been decided while disposing off the appeal and the decision taken therein shall apply mutatis mutandis for this year also i.e. A.Y. 2009-10. We order accordingly.

37. Ground No. 7 of grounds of appeal relates to confirming the addition of ₹.2.41 crores based on the information of AIR transactions.

38. Ld. Counsel for the assessee submitted that the assessee has not entered into any transaction for ₹.2.41 Crores as recorded in the AIR information and therefore, addition is unjustifiably sustained by the Ld.CIT(A).

39. Ld. DR submitted that the matter may be restored to the file of the Assessing Officer for verification.

40. On hearing both the sides, we are of the view that this matter has to go back to the Assessing Officer in view of the submission that the assessee has not entered into any transaction in respect of the addition made to the extent of ₹.2.41 Crores. Thus, we restore this issue to the file of the Assessing Officer with a direction to Assessing Officer to furnish necessary information to the assessee so as to reconcile the transactions by the assessee. The Assessing Officer shall provide complete details in respect of the transactions for the purpose of the reconciliation by the assessee. Thus, this issue is restored to file of the Assessing Officer for denovo adjudication after providing adequate opportunity of being heard.

41. Ground No .8 of the grounds of appeal is relating to disallowance of interest on loan given to IL & FS Employees Welfare Trust. Briefly stated the facts are that, while completing the assessment Assessing Officer noticed that during the year under consideration assessee has given interest free loans to IL & FS Employees Welfare Trust. The Assessing Officer is of the view that the loan given is for non-business purposes and taking note of the fact that the assessee is having mixed funds i.e., borrowed as well as own funds, proportionate interest of ₹.30.01 Crores @ 5.63% was disallowed while computing the income of the assessee.

42. Before the Ld. CIT(A) the assessee has contended that the loan was given for IL & FS Employees Welfare Trust and it is for the welfare of the employees and for the business purpose only. Alternatively, it was submitted that there is error in calculation of the Assessing Officer and if

the correct method of calculation is applied the proportionate interest works out to only ₹.11 Crores and not ₹.30.01 Crores and requested the Ld. CIT(A) that if entire addition is not deleted Assessing Officer may be directed to rectify and compute the disallowance at ₹.11 Crores as calculated by the assessee.

43. Before us, Ld. Counsel for the assessee submitted that the loan was given to employee’s welfare trust for the benefit of employees and therefore the said loan is for the purpose of business of the assessee and hence no disallowance is warranted.

44. On the other hand, Ld. DR strongly supported the orders of the authorities below.

45. We have heard the rival submissions and perused the orders of the authorities below. This aspect of the matter has been considered by the Ld. CIT(A) and sustained the disallowance to the extent of ₹.11 Crores as requested by the assessee observing as under: -

> *“14.3. I have considered all the facts that appellant presented before me and I have examined evidences. The appellant had provided during appellate proceedings Trust Deed, activities of trust and stated that these activities are, however, for employees of the appellant but appellant could not produce any direct evidence which shows that this is providing benefit to the employees of the company and appellant has not shown any evidence before me that it is for the business purpose of the appellant. The appellant could not satisfy the condition of business purpose, the disallowance is recomputed the whole calculation based on the details provided by the appellant and disallowance is restricted to Rs.11,00,00,000/-, hence appellant's ground of appeal is* ***partly allowed*** *and the appellant will be obtaining relief for Rs.19,00,00,000/:*

46. It is the finding of the Ld. CIT(A) that the assessee has not proved that the loan is given for the purpose of business of the assessee. Even before us the assessee could not substantiate that the loan has been given for the purpose of business of the assessee. In the circumstances, we are not inclined the disturb the finding of the Ld. CIT(A) hence, the action of the Ld.CIT(A) is sustained. Ground raised by the assessee is rejected.

47. Ground No. 9 of Grounds of appeal for the A.Y. 2009-10 is relating to disallowance u/s. 14A While computing book profits u/s. 115JB of the Act. This ground which is similar to Ground No.7 in the appeal for the A.Y. 2008-09 has been decided while disposing off the appeal and the decision taken therein shall apply mutatis mutandis for this year also i.e. A.Y. 2009-10. We order accordingly.

48. Now we take up the appeal filed by the revenue in ITA.No. 3700/Mum/2013 for the A.Y. 2008-09.

49. Revenue has raised the following grounds in its appeal: -

> "On the facts and *in* the circumstances of the case and in law the Ld. CIT appeal erred in:-
>
> > *1(i). restricting the disallowance u/s.14A to Rs.25.03 crs. as against Rs.47.47 crs computed by the AO; thereby erred in not accepting the working required as per Rule 8D of the Income Tax Rules as applied by the AO during assessment.*
> >
> > *l(ii). restricting the Interest attributable to the earning of exempt income to Rs. 24.37 crs. as against the disallowance of Rs.46.56 crs. computed by the AO U/S.14A of the Act. Further erred in not appreciating that the assessee company has inter-mix of huge amount of borrowed funds since long time with that of reserve funds and ignoring the fact that the*

assessee has not substantiated if it earned the exempt income only out of its reserve fund.

l(iii). restricting the Other Expenses attributable to the earning of exempt income to Rs. 0.66 crs as against the disallowance of Rs. 0.92 crs computed by the AO U/S.14A of the Act.

2. holding that expenditure of Rs.6,01,694/- was incurred by the assessee towards the license fee paid for acquiring right to use software and the said expenditure incurred on accounting software was allowable as revenue expenditure.

3. ought to have upheld the action of the AO in estimating the income from the toll road at Rs. 1,50,00,000 as the assessee has the right to receive such income from the Madhya Pradesh Govt.

4. in deleting the disallowance of payment made to clubs amounting to Rs. 21,05,325/-.

5. deleting the disallowance of Rs.1,33,690/- made by AO on account of sec.40(a)(ia) of the Income Tax Act. Ignoring the fact that assessee company had failed to deduct the TDS as required at the prescribed rate during the year out of the payments made u/s. 194-1 & 194-J and thereby allowing the assessee to deduct TDS at a shorter rate than what is prescribed as per the Act.

6(i). allowing the claim of deduction of Rs.6,30,00,000/- u/s.36(l)(viii) of the Income Tax Act which otherwise the assessee was not eligible for.

6(ii). allowing the claim of deduction of Rs.6,30,00,000/- u/s.36(l)(viii) of the Income Tax Act ignoring the fact that there was a major business re-organization w.e.f. 1.4.2007 through which the assessee company had transferred its (i) financial services business to M/s.ILFS Ltd, (ii) depository back office and capital market related services to M/s.ILFS Securities Services Ltd, (iii) portfolio management and related services to M/s.ILFS Portfolio Managers Sendees Ltd.

6(iii). ignoring the stipulated condition laid down in sec.36(l)(viii) wherefrom it is noted by AO that the assesses business was not eligible business for the deduction.

6(iv). ignoring further that, after re-orgnization of business w.e.f. 1.4.2007, the assessee company is only engaged in managing its investments within group entities.

7. deleting the adjustment of Rs. 28,48,716/- made by the AO on account of Lease Equalisation Reserve while ... ailing the Book Profit u/s.115JB(2) of the Act.

8. restricting the amount of disallowance U/S.14A to Rs.25.03 crs as against Rs.47.47 crs made by AO towards adjustment of expenses attributable to exempted income while compiling the Book Profit u/s.115JB(2) of the Act."

50. Ground No. 1 of Grounds of appeal of the Revenue is relating to disallowance u/s. 14A r.w. Rule 8D of the Act. This ground which is similar to Ground Nos. 8 & 9 in the appeal of the assessee for the A.Y. 2008-09 has been decided while disposing off the appeal and the decision taken therein shall apply mutatis mutandis for this appeal also. Since we have decided this issue by restoring the ground to the file of the Assessing Officer this ground is also restored to the file of the Assessing Officer. We order accordingly.

51. Ground No.2 of grounds of appeal relates to disallowance of software development expenditure. Ld. Counsel for the assessee submits that this issue has been decided in favour of the assessee by the Tribunal at Para No. 20.2 for the A.Y. 2004-05. Similarly, Tribunal for the A.Y. 2005-06 to A.Y. 2007-08 in ITA.Nos. 3165/Mum/2017, ITA.No. 3339/Mum/2011, ITA.No. 3340/Mum/2011 and ITA.No. 3341/Mum/2011 dated 30.04.2019 at Para Nos. 60 and 61 decided the issue in favour of the assessee.

52. On the other hand, Ld. DR strongly supported the orders of the authorities below.

53. We have heard the rival submissions and perused the orders of the authorities below and the decision of the Tribunal in assessee own case. We find that he Tribunal while disposing of the Revenue's appeal in ITA 3165/Mum/2017 for the A.Y. 2007-08 held as under: -

"60. We have heard both the parties and perused the material available on record. The Tribunal has considered an identical issue for AY 2004-05 where it was held that Software Development Expenses is debited under the head miscellaneous expenses are in the nature of AMC Charges, internet access charges, lease line expenses, anti-virus expenses and other software expenses for accounting package, therefore, being revenue in nature and allowable as deduction. The relevant findings of the Tribunal are as under:-

> *"20. Facts qua Ground No. 1 are that the assessee claimed certain software development expenses of Rs.1.16 crores, the details of which were not filed before the AO which led the AO to believe that the same expenditure, being capital in nature, was not allowable to the Assessee. The assessee provided the details thereof before Ld. CIT(A) who noted that the impugned expenses were in the nature of AMC Charges, internet access charges, lease line expenses, anti-virus expenses, charges for link facility, software charges for accounting package and therefore, being revenue in nature and hence allowable to the assessee.*
>
> *20.1 The Ld. DR has contended that no details were filed by the assessee before Ld. AO and therefore, the assessee has rightly been saddled with impugned additions and Ld. CIT(A) erred in providing relief to the assessee. The Ld. AR placed reliance on the findings of Ld. CIT(A) and drew our attention to details of expenses as placed in Page No. 543 of the paper-book to support the contention that impugned expense, being revenue in nature, were allowable to the assessee and the Ld. CIT(A) provided relief to the assessee after due appreciation of the material facts.*
>
> *20.2 We have considered the rival contentions and inclined to agree with the findings of Ld. CIT(A) who after appreciating the relevant material came to the right conclusion that the impugned expenditure being revenue in nature, were allowable to the assessee. A bare perusal of the said expenses reveals that the said expenditure are primarily revenue in nature and the Ld. AO disallowed the same on mere presumption. However, Ld. CIT(A) examined the same and provided relief to the assessee after appreciating the material and therefore, we find no reason to interfere with the same. The revenue's ground of appeal stands dismissed."*

61. In view of the matter and consistent with view taken by the Co-ordinate Bench, we do not find any infirmity in the findings of the Ld. CIT(A) and hence, we are inclined to upheld the findings of the ld. CIT(A) and reject the ground taken by the Revenue.'

54. No distinguishable facts have been brought to our notice. Thus respectfully following the said decision, we uphold the order of the Ld. CIT(A) and reject the ground raised by the revenue.

55. Ground No. 3 of Grounds of appeal of the revenue is relating to addition of notional interest income in respect of toll road from Madhya Pradesh State Industrial Development Corporation. This ground which is identical to Ground No. 6 in the appeal of the assessee for the A.Y. 2008-09 has been decided while disposing off the appeal and the decision taken therein shall apply mutatis mutandis for this appeal also. Since we have decided this issue by restoring the ground to the file of the Assessing Officer this ground is also restored to the file of the Assessing Officer. We order accordingly.

56. Ground No.4 of grounds of appeal relates to disallowance of payments made to clubs. Ld. Counsel for the assessee submitted that this issue has been decided in favour of the assessee for the A.Y. 2005-06 to A.Y.2007-08 at Para No. 70 of the Tribunal order.

57. On the other hand, Ld. DR strongly supported the orders of the authorities below.

58. We have heard the rival submissions and perused the orders of the authorities below. We find that the Tribunal while disposing off the appeal filed by the Revenue in ITA.No. 3165/Mum/2017 for the A.Y. 2007-08 held as under: -

> *"69. The next issue that came up for our consideration from ground. 6 of Revenue's appeal is expenditure on club facilities. The Ld. AR for the assessee, at the time of hearing, submitted that this*

issue is covered in favour of the assessee by the decision of Hon'ble Bombay High Court in asessee's own case for AY 1997-98 in Income Tax Appeal No.2402 of 2013 where under identical set of facts, the Hon'ble High Court by following its earlier decision in the case of Otis Elevator Co. (India) Ltd. vs CIT (1992) 195 ITR 682 (Bom.) held that Club membership fee paid to the club is in the nature of revenue expenditure, which is allowable as deduction.

70. Having heard both sides and considered the material available on record, we find that Hon'ble Bombay High Court has considered an identical question of law in assessee's own case for AY 1997-98 and by following its earlier order in case of of Otis Elevator Co. (India) Ltd. vs CIT (1992) 195 ITR 682 (Bom.) held that expenditure incurred on club facilities is revenue in nature, which is allowable deduction. Therefore, respectfully following the decision of the Hon'ble Bombay High Court in assesseee's own case, we direct the AO to delete the additions made towards disallowance of payments to Clubs."

59. Facts being identical, respectfully following the said decision of the Tribunal in assessee's own case we direct the Assessing Officer to delete the disallowance made towards payments to clubs. This ground is allowed.

60. Ground No.5 of grounds of appeal of the revenue is in respect of deleting the disallowance of ₹.1,33,690/- for short deduction of TDS.

61. The Assessing Officer while completing the assessment noticed from the Tax Audit Report that there was a short deduction in respect of the expenditure of ₹.1,33,690/- and applying the provisions of section 40(a)(ia) of the Act Assessing Officer disallowed the said expenditure. On appeal the Ld. CIT(A) deleted the disallowance.

62. Ld. Counsel for the assessee strongly placing reliance on the decision of the Calcutta Bench in the case S.K. Tekriwal's

[46 taxmann.com 444] submitted that there shall not be any disallowance when there is a short deduction of tax.

63. Ld. DR vehemently supported the orders of the Assessing Officer.

64. We have heard the rival submissions and perused the orders of the authorities below. The Calcutta Bench of the Tribunal in the case of S.K. Tekriwal's [48 SOT 515] held as under: -

> *"5. From the order of CIT(A), we find that CIT(A) has gone into the controversy of assessee falling under the head 'sub contractor' or falling under the head 'rent', the expenses made under the head 'machinery hire charges'. It is also a fact that the assessee has deducted TDS u/s. 194C(2) of the Act and covered itself under the head 'sub contractor'. We find that CIT(A) after verifying records and explanation submitted by assessee reached to a conclusion that payments are in the nature of contract payments made to sub contractors. On merits, we are in agreement with the findings of CIT(A) and even revenue before us could not controvert the same. Another facet of this issue is that once the assessee has deducted TDS u/s. 194C(2) of the Act, whether disallowance can be made by invoking the provisions of section 40a(ia) of the Act. The relevant provision reads as under: "40a(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under chapter XVII-B and such tax has not been deducted or after deduction has not been paid on or before the due date specified in sub-section (1) of section 139:" In this provision it is provided that where in respect of any sum, as referred in this section, tax has not been deducted or after deduction has not been paid on or before the due date specified in sub-section (1) of section 139 of the Act, such sum shall be disallowed as a deduction while computing the income of the assessee for the previous year relevant to AY under consideration. But in the present case before us, the assessee has deducted tax, although u/s. 194C(2) of the Act and it is not a case of non-deduction of tax or no deduction of tax as is the import of section 40a(ia) of the Act. Even otherwise if it is considered that this particular sum falls under section 194I of the Act, it may be considered as tax deducted at a lower rate and it cannot be considered a case of non-deduction or no deduction. Similar view is taken by 'C' Bench of Mumbai ITAT in ITA No. 20/Mum/2010 in the case of DCIT v M/s Chandabhoy & Jassobhoy dated 08.07.2011,*

wherein it is held that there is no dispute with reference to the deduction of tax u/s 192 of the Act with the fact that the alleged consultants, in their individual assessments declared these payments as salary payments and accepted by revenue as it is. Further, it is held that the assessee had deducted tax u/s. 192 of the Act as against the allegation of revenue that the provisions of section 194J of the Act would be attracted as these consultants are in the capacity of professionals. The Bench held that the provisions of section 40(a)(ia) of the Act will not apply as the said provision can be invoked only in the event of non-deduction of tax but not for lesser deduction of tax. In that case the assessee has deducted tax u/s. 192 of the Act as against section 194J of the Act as against the claim of revenue.

6. In the present case before us the assessee has deducted tax u/s. 194C(2) of the Act being payments made to sub-contractors and it is not a case of non-deduction of tax or no deduction of tax as is the import of section 40a(ia) of the Act. But the revenue's contention is that the payments are in the nature of machinery hire charges falling under the head 'rent' and the previous provisions of section 194I of the Act are applicable. According to revenue, the assessee has deducted tax @ 1% u/s. 194C(2) of the Act as against the actual deduction to be made at 10% u/s. 194I of the Act, thereby lesser deduction of tax. The revenue has made out a case of lesser deduction of tax and that also under different head and accordingly disallowed the payments proportionately by invoking the provisions of section 40(a)(ia) of the Act. The Ld. CIT, DR also argued that there is no word like failure used in section 40(a)(ia) of the Act and it referred to only non-deduction of tax and disallowance of such payments. According to him, it does not refer to genuineness of the payment or otherwise but addition u/s. 40(a)(ia) can be made even though payments are genuine but tax is not deducted as required u/s. 40(a)(ia) of the Act. We are of the view that the conditions laid down u/s. 40(a)(ia) of the Act for making addition is that tax is deductible at source and such tax has not been deducted. If both the conditions are satisfied then such payment can be disallowed u/s. 40(a)(ia) of the Act but where tax is deducted by the assessee, even under bonafide wrong impression, under wrong provisions of TDS, the provisions of section 40(a)(ia) of the Act cannot be invoked. Here in the present case before us, the assessee has deducted tax u/s. 194C(2) of the Act and not u/s. 194I of the Act and there is no allegation that this TDS is not deposited with the Government account. We are of the view that the provisions of section 40(a)(ia) of the Act has two limbs, one is where, inter alia, assessee has to deduct tax and the second where after deducting tax, inter alia, the assessee has to pay into Government Account. There is nothing in the said section to treat, inter alia, the assessee as defaulter where there is a shortfall in deduction. With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not as required *by or under the Act, but the facts is that this expression, 'on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction has not been paid on or before the due date specified in sub-section (1) of section 139'. This section 40(a)(ia) of the Act refers only to the duty to deduct tax and pay to government account. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s. 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act."*

65. This decision of the Tribunal has been affirmed by the Hon'ble Calcutta High Court in the case of CIT *v.* M/s. S.K. Tekriwal in ITA.No. 183 of 2012 dated 03.12.2012 holding as under: -

"The Court : We are satisfied that the order under challenge is a just order. The reasoning appearing at paragraph 6 of the judgment and/or order under challenge reads as follows :

6. In the present case before us the assessee has deducted tax u/s. 194C(2) of the Act being payments made to sub-contractors and it is not a case of non-deduction of tax or no deduction of tax as is the import of section 40a(ia) of the Act. But the revenue's contention is that the payments are in the nature of machinery hire charges falling under the head 'rent' and the previous provisions of section 194I of the Act are applicable. According to revenue, the assessee has deducted tax @ 1% u/s. 194C(2) of the Act as against the actual deduction to be made at 10% u/s. 194I of the Act, thereby lesser deduction of tax. The revenue has made out a case of lesser deduction of tax and that also under different head and accordingly disallowed the payments proportionately by invoking the provisions of section 40(a)(ia) of the Act. The Ld. CIT, DR also argued that there is no word like failure used in section 40(a)(ia) of the Act and it referred to only non-deduction of tax and disallowance of such payments. According to him, it does not refer to genuineness of the payment or otherwise but addition u/s. 40(a)(ia) can be made even though payments are genuine but tax is not deducted as required u/s. 40(a)(ia) of the Act. We are of the view that the conditions laid down u/s. 40(a)(ia) of the Act for making addition is that tax is deductible at source and such tax has not been deducted. If both the conditions are satisfied then such payment can be disallowed u/s. 40(a)(ia) of the Act but where tax is deducted by the assessee, even under bonafide wrong impression, under wrong provisions of TDS, the

> *provisions of section 40(a)(ia) of the Act cannot be invoked. Here in the present case before us, the assessee has deducted tax u/s. 194C(2) of the Act and not u/s. 194I of the Act and there is no allegation that this TDS is not deposited with the Government account. We are of the view that the provisions of section 40(a)(ia) of the Act has two limbs, one is where, inter alia, assessee has to deduct tax and the second where after deducting tax, inter alia, the assessee has to pay into Government Account. There is nothing in the said section to treat, inter alia, the assessee as defaulter where there is a shortfall in deduction. With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not as required by or under the Act, but the facts is that this expression, 'on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction has not been paid on or before the due date specified in sub-section (1) of section 139'. This section 40(a)(ia) of the Act refers only to the duty to deduct tax and pay to government account. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s. 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act.*
>
> *Accordingly, we confirm the order of CIT (A) allowing the claim of assessee and this issue of revenue's appeal is dismissed."*

66. Facts being similar respectfully following the above decision, we hold that there cannot be any disallowance u/s. 40(a)(ia) for short deduction of TDS. Thus, we do not find any infirmity in the order passed by the Ld.CIT(A) and we uphold the order of the Ld.CIT(A) on this issue.

67. Ground No.6 of grounds of appeal relates to disallowance of claim for deduction U/s. 36(1)(viii) of the Act.

68. Briefly stated the facts are that, Assessing Officer while completing the assessment denied deduction claimed U/s. 36(1)(viii) observing as under:

"17.1 During the assessment proceedings, it was noticed that me assessing was claiming deduction u/s.36(1)(viii) of the Act of Rs.63000000/-. It was further noticed from the annual report, that there was the major reorganization of the business w.e.f. 01.04.2007 in which the assessee has transferred

i) its financial services business to M/s. ILFS Ltd.,
ii) depository back office and capital market related services to M/s. ILFS Securities Services Ltd. and
iii) portfolio management and related services to M/s. ILFS Portfolio Managers Services Ltd.

The assessee company, after this became a non-banking, non-financial company that primarily manages its investments in group entities and effects loans and advances to its subsidiaries and affiliate. It also owns and manages reality assets. As per sec.36(l)(viii) of the Act, the deduction is available only on the profits derived from eligible business and eligible business is defined as a business of providing long term finance for industrial or agricultural development or development of infrastructural facility in India or construction or purchase of houses in India for residential purposes.

17.2 After the reorganization of the business the assessee is only engaged in managing its investments in group entities. Assessee company became a non-financial and non-banking company, and thus is nowhere engaged in directly providing long term finance as specified for the- eligible business in section 36(l)(viii). Therefore, the deduction claimed by the assessee of Rs.63000000/- is disallowed and added to the income of the assessee. Penalty proceedings initiated separately for furnishing inaccurate particulars of income / concealment of income.

(Addition: Rs.63000000/-)"

69. On appeal the Ld. CIT(A) allowed the claim for deduction U/s.36(1)(vii) of the Act holding that the assessee fulfills the conditions of section 36(1)(viii) of the Act.

70. Before us the Ld. DR strongly placed his reliance on the order of the Assessing Officer and on the other hand Ld. Counsel for the assessee placed reliance on the order of the Ld. CIT(A).

71. We have heard the rival submissions and perused the orders of the authorities below. We observe from the order of the Ld.CIT(A) that considering the submission and evidences produced by the assessee the Ld.CIT(A) held that the assessee is entitled for deduction U/s.36(1)(vii) of the Act observing as under: -

> *"13.1. The facts of the case were that the A.O. has disallowed the claim of the appellant u/s.36(l)(viii) for Rs.6,30,00,000/- as the appellant is not advancing any loans for long term finance and appellant is not only managing its investment in group companies. As appellant is not providing long term finance for infrastructure projects, the A.O. had disallowed the claim of the appellant.*
>
> *13.2. During appellate proceedings, the appellant submitted as under:*
>
>> *"Ground No. 6 deals with the rejection of the claim of the appellant of deduction u/s.36(l)(viii) (amounting to Rs.6,30,00,000/-) on the inference that "the company after the reorganization has become a non-banking non-finance company and after the reorganization, the assessee is only engaged in managing its investments in group entities". It is submitted that the inference of the Hon'ble AO is erroneous. Even after the reorganization, the company is engaged in the business of granting of loans to all its infrastructure and other group companies and it continues to be a Finance Company as stipulated by the RBI and continues to be under the direct supervision of the RBI even after the reorganization. The company has earned an interest income of Rs. 128.74 crores in FY 2008, breakup of which is as follows:*
>>
>> *Interest income on loans Rs. 110.02 crores*
>> *Interest income on securities Rs.18.72 crores*
>> *The copy of the audited "Notes to Accounts" evidencing the same has already been enclosed.*
>>
>> *Further, as of March, 2008 the company has granted loans amounting to Rs.1401.24 crores to its various group companies towards infrastructure projects.*
>>
>> *The company has claimed deduction u/s.36(l)(viii) on only those net interest income which has been earned on long term financing.*
>>
>> *As such the income from the long term loans given to the group companies are eligible for deduction u/s.36(l)(viii). It is*

submitted that the disallowance ofRs.6.3 crores made by the A.O. may be deleted."

…….

(A) Industrial or agricultural development;
(c) "banking company" means a company to which the Banking Regulation Act, 1949 applies and includes any bank or banking institution referred to in section 51 of that Act;
(h) "long term finance" means any loan or advance where the terms under which moneys are loaned or advanced provide for re-payment alongwith interest thereof during a period of not less than five years."

As per sec.36(l)(viii) the appellant is eligible if it fulfills two conditions i.e. one is appellant should be specified entity and 2nd condition is extend loans for infrastructural facilities for a long term basis i.e. above 5 years. I had examined appellant's detailed submissions produced before me alongwith the loans extended by the appellant. The appellant had advanced loans for infrastructural facilities to group entities which are developing the infrastructural facilities in separate company. This separate company formed as group entity develops infrastructural facility and income from this accrues to this group entities. The appellant's extended loan for development of infrastructural facilities on long term basis which is the 2nd condition which appellant has to fulfill to claim sec.36(l)(viii). As appellant is fulfilling the condition of specified entity and extending the loan for infrastructural facilities though they are group companies which are themselves developing infrastructural facilities, the appellant is eligible for deduction u/s.36(l)(viii). Hence this ground of appeal is allowed."

72. On a careful perusal of the order of the Ld.CIT(A), we do not see any infirmity in the order of the Ld.CIT(A). The findings of the Ld.CIT(A) are on consideration of evidences produced by the assessee and therefore, no inference is called for especially when these finding of the Ld.CIT(A) were not rebutted with evidences. Thus, we sustained the order of the Ld.CIT(A) and reject the ground raised by the Revenue.

73. Ground No. 7 of the ground of appeal is relating to the deletion of adjustment of lease equalization reserve while computing the books profits U/s. 115JB(2) of the Act.

74. It is submitted that the Tribunal in assessee's own case for the A.Y.2004-05 restored this matter to the file of the Assessing Officer with a direction to recompute the book profits after consideration of the decision of the Hon'ble Supreme Court in the case of Virtual Soft Systems Ltd.,

75. On the other hand, Ld. DR strongly supported the orders of the authorities below.

76. We have heard the rival submissions and perused the orders of the authorities below. We find that this issue has been decided by the Tribunal for the A.Y. 2005-06 to A.Y. 2007-08 in its order at Para No. 73 wherein the Tribunal held as under: -

> *"73. We have heard both sides and perused the material available on record. This issue has been considered by the Tribunal for AY 2004-05, where, in respect of normal provisions of lease equalisation reserve, the issue has been restored back to the file of the AO to re-compute lease equalisation reserve, considering tax depreciation instead of book depreciation. However, in respect of determination of book profit and the relevancy of computation of lease equalisation reserve by taking note of depreciation as per Income Tax may not be appropriate. But fact remains that since the Tribunal has already considered this issue, we do not want to deviate from the findings recorded by the Tribunal for AY 2004-05. Hence, we restore this issue also to the file of the AO and direct him to re compute book profit by taking note of findings of the Tribunal in assessee's own case for AY 2004-05 and also considering the latest judgment of Hon'ble Supreme Court in the case of CIT vs Virtual Soft Systems Ltd. in Civil Appeal No. 4358 to 4376 of 2018."*

77. Facts being identical, we restore this issue to the file of the Assessing Officer to follow the directions of the Tribunal in its order for A.Y. 2005-06 to A.Y. 2007-08 and recompute the book profits accordingly. This ground is allowed for statistical purpose.

78. Ground No. 8 of Grounds of appeal of the revenue is relating to disallowance u/s. 14A while computing book profits u/s. 115JB(2) of the Act. This ground which is similar to Ground No. 7 in the appeal of the assessee for the A.Y. 2008-09 has been decided while disposing off the appeal and the decision taken therein shall apply mutatis mutandis for this appeal also. Since we have decided this issue by restoring the ground to the file of the Assessing Officer this ground is also restored to the file of the Assessing Officer. We order accordingly.

79. Now we take up the appeal filed by the Revenue in ITA.No. 3699/Mum/2013 for the A.Y. 2009-10.

80. Revenue has raised the following grounds in its appeal: -

> *"On the facts and in the circumstances of the case and in law the Ld. CIT appeal erred in :-*
>
> *l(i) restricting the disallowance U/S.14A to Rs.71.97 crs.; thereby erred in not accepting the working required as per Rule 8D of the Income Tax Rules as applied by the AO during assessment.*
>
> *l(ii) restricting the Interest attributable to the earning of exempt income to Rs.71 crs. as against the disallowance of Rs. 104.86 crs. computed by the AO U/S.14A of the Act. Further erred in not appreciating that the assessee company has inter-mix of huge amount of borrowed funds with that of reserve funds and ignoring the fact that the assessee has not substantiated if it earned the exempt income only out of its reserve fund.*
>
> *l(iii) restricting the Other Expenses attributable to the earning of exempt income.*
>
> *2. holding that expenditure of Rs.75,353/- was incurred by the assessee towards the license fee paid for acquiring right to use software and the said expenditure incurred on accounting software was allowable as revenue expenditure.*
>
> *3. ought to have upheld the action of the AO in estimating the income from the toll road at Rs. 1,50,00,000 as the assessee has the right to receive such income from the Madhya Pradesh Govt.*

4. in deleting the disallowance of payment made to clubs amounting to Rs.18,59,191/-.

5(i). allowing the claim of deduction of Rs.6,20,00,000/- u/s.36(l)(viii) of the Income Tax Act which otherwise the assessee was not eligible for.

5(ii). allowing the claim of deduction of Rs.6,20,00,000/- u/s.36(l)(viii) of the Income Tax Act ignoring the fact that there was a major business re-organization w.e.f. 1.4.2007 through which the assessee company had transferred its (i) financial services business to M/s.ILFS Ltd, (ii) depository back office and capital market related services to M/s.ILFS Securities Services Ltd, (iii) portfolio management and related services to M/s.ILFS Portfolio Managers Services Ltd.

5(iii) ignoring the stipulated condition laid down in sec.36(l)(viii) wherefrom it is noted by AO that the assessees business was not eligible business for the deduction.

5(iv). ignoring further that, after re-orgnization of business w.e.f. 1.4.2007, the / assessee company is only engaged in managing its investments within group / entities.

6. restricting the disallowance of the interest to the extent of Rs. 11,00,00,000/- as against the disallowance of Rs.30,01,92,990/- computed by the AO in respect of the interest-free loans given to IL&FS Employees Welfare Trust."

81. Ground No. 1 of Grounds of appeal of the revenue for the A.Y.2009-10 is relating to disallowance u/s. 14A of the Act r.w. Rule 8D of the Act. This ground is similar to Ground No.1 in the appeal of the Revenue for the A.Y. 2008-09 and it has been decided while disposing off the appeal. The decision taken therein shall apply mutatis mutandis for this year also i.e. A.Y. 2009-10. We order accordingly.

82. Ground No. 2 of Grounds of appeal of the revenue for the A.Y.2009-10 is relating to disallowance software development expenditure. This ground is similar to Ground No.2 in the appeal of the Revenue for the A.Y. 2008-09 and it has been decided while disposing off

the appeal. The decision taken therein shall apply mutatis mutandis for this year also. We order accordingly.

83. Ground No. 3 of Grounds of appeal of the revenue for the A.Y.2009-10 is relating to addition of notional interest income in respect of toll road from Madhya Pradesh State Industrial Development Corporation. This ground is similar to Ground No.3 in the appeal of the Revenue for the A.Y. 2008-09 and it has been decided while disposing off the appeal. The decision taken therein shall apply mutatis mutandis for this year also i.e. A.Y. 2009-10. We order accordingly.

84. Ground No. 4 of Grounds of appeal of the revenue for the A.Y.2009-10 is relating to disallowance of payments to clubs. This ground is similar to Ground No.4 in the appeal of the Revenue for the A.Y.2008-09 and it has been decided while disposing off the appeal. The decision taken therein shall apply mutatis mutandis for this year also. We order accordingly.

85. Ground No. 5 of Grounds of appeal of the revenue for the A.Y.2009-10 is relating to allowance of claim of deduction u/s. 36(1)(viii) of the Act. This ground is similar to Ground No.6 in the appeal of the Revenue for the A.Y. 2008-09 and it has been decided while disposing off the appeal. The decision taken therein shall apply mutatis mutandis for this year also. We order accordingly.

86. Ground No. 6 of Grounds of appeal of the Revenue for the A.Y.2009-10 is relating to disallowance of interest on loan given to IL & FS Employee Welfare Trust. This ground is similar to Ground No. 8

in the appeal of the assessee for the A.Y. 2009-10 and it has been decided while disposing off the appeal. The decision taken therein shall apply mutatis mutandis for this appeal also. We order accordingly.

87. In the result, appeals of the assessee as well as revenue are partly allowed as indicated above.

Order pronounced in the open court on the 28th November, 2019

Sd/- Sd/-
(G. MANJUNATHA) **(C.N. PRASAD)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Mumbai / Dated 28/11/2019
Giridhar, Sr.PS

<u>Copy of the Order forwarded to</u>:

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

BY ORDER

(Asstt. Registrar)
ITAT, Mum