Noida
Toll Bridge Co. Ltd.

August 11, 2023

The General Manager
Corporate Relations
Department Bombay Stock
Exchange Limited 1st Floor,
New Trading Ring Rotunda
Building, P J Towers, Dalal
Street, Fort
Mumbai – 400 001

Scrip Code No. 532481

Mr. K Hari
Listing Department
National Stock Exchange of India
Ltd. Exchange Plaza, 5th Floor
Plot No. C/1, G Block
Bandra-Kurla Complex, Bandra
(E) Mumbai – 400 051

Scrip Code No. NOIDA TOLL
EQ

Re : Update on Income –Tax Matter.

Dear Sir/Madam,

In continuation to our earlier letter dated February 17, 2019 on the captioned subject, appeal filed by the Company before Income Tax Appellate Tribunal ("ITAT") against the tax demand raised by the Income tax Department for the Assessment years 2006-07 to Assessment years 2011-12 was heard by the ITAT on July 26, 2023, August 01, 2023 and was concluded on August 02, 2023. The order on the website of ITAT was uploaded on August 10, 2023.

In the said Order issued by Hon'ble ITAT the appeals of the Revenue were dismissed and the ground of appeal of the Company was allowed. (Copy of ITAT Order attached)

In view of the above, this is to inform you that approx 72% of the total demand of Rs. 23,127 crores has been addressed by means of current order.

This is for your information and records.

T**hanking You**
For **Noida Toll Bridge Company Limited**

GAGAN SINGHAL
Digitally signed by GAGAN SINGHAL
Date: 2023.08.11 11:43:30 +05'30'

Gagan Singhal
Company Secretary & Compliance Officer
Mem No. F7525
Encl.A/A

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS. ASTHA CHANDRA, JUDICIAL MEMBER

SA No. 564/DEL/2018
[A/o ITA No.4410/DEL/2018 [A.Y. 2006-07]]

SA No. 565/DEL/2018
[A/o ITA No.4411/DEL/2018 [A.Y. 2007-08]]

SA No. 566/DEL/2018
[A/o ITA No.4412/DEL/2018 [A.Y. 2008-09]]

SA No. 567/DEL/2018
[A/o ITA No.4413/DEL/2018 [A.Y. 2009-10]]

SA No. 568/DEL/2018
[A/o ITA No.4415/DEL/2018 [A.Y. 2010-11]]

SA No. 569/DEL/2018
[A/o ITA No.4417/DEL/2018 [A.Y. 2011-12]]

&

ITA No.4410/DEL/2018 [A.Y. 2006-07]
ITA No.4411/DEL/2018 [A.Y. 2007-08]
ITA No.4412/DEL/2018 [A.Y. 2008-09]
ITA No.4413/DEL/2018 [A.Y. 2009-10]
ITA No.4414/DEL/2018 [A.Y. 2010-11]
ITA No.4415/DEL/2018 [A.Y. 2010-11]
ITA No.4416/DEL/2018 [A.Y. 2011-12]
ITA No.4417/DEL/2018 [A.Y. 2011-12]

Noida Toll Bridge Co. Pvt Ltd Toll Plaza, Opp. Sector 15A Noida	Vs.	The A.C.I.T Circle – 18(2), Noida

PAN : AAACN 3498 A

ITA No. 4968/DEL/2018 [A.Y. 2006-07]
ITA No. 4969/DEL/2018 [A.Y. 2007-08]
ITA No. 4970/DEL/2018 [A.Y. 2008-09]
ITA No. 4973/DEL/2018 [A.Y. 2009-10]
ITA No. 4971/DEL/2018 [A.Y. 2010-11]
ITA No. 4972/DEL/2018 [A.Y. 2011-12]

The A.C.I.T Circle – 18(2), Noida	Vs.	Noida Toll Bridge Co. Pvt Ltd Toll Plaza, Opp. Sector 15A Noida PAN : AAACN 3498 A
(Applicant)		Respondent)

Assessee By : Shri Ajay Vohra, Sr. Adv
Ms. Pallavi Sharma, CA
Shri Jeetan Nagpal, CA

Department By : Shri G.C. Srivastava, Adv
[Special counsel for Revenue]
Shri Mayank Patawri, CA
Shri Kalrav Mehrotra, Adv

Date of Hearing : 02.08.2023

Date of Pronouncement : 08.08.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above cross appeals by the assessee and the Revenue are preferred against the order of the ld. CIT(A) – 1, Noida dated 31.03.2018 pertaining to Assessment Years 2006-07 to 2011-12. Since common issues are involved in the captioned cross appeals and since the first appellate authority has decided the appeals by a consolidated order, all the appeals were heard together and are disposed of by this common order for the sake of convenience and brevity.

ITA No. 4410/DEL/2018 [A.Y 2006-07] [Assessee's appeal]

ITA No. 4411/DEL/2018 [A.Y 2007-08] [Assessee's Appeal]

ITA No. 4412/DEL/2018 [A.Y 2008-09] [Assessee 's Appeal]

2. Challenge of the assessee is three-fold:

(i) Reopening of the assessment;

(ii) Enhancement by the ld. CIT(A); and

(iii) Merits of the Addition.

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules and have also perused the judicial decisions relied upon by both the sides.

4. Vide notice dated 28.03.2013 issued u/s 148 of the Income-tax Act, 1961 [the Act, for short], the Assessing Officer initiated reassessment proceedings after recording reasons which read as under:

REASONS UNDER SECTION 147 OF THE IT ACT.

Return declaring a loss of Rs. 37,49,00,550/- was filed on 30.10.2004. The same was processed u/s 143(1) on 05.07.2005 and selected for scrutiny assessment by issue of notice u/s 143(2) of the IT Act dated 11.08.2005 duly served upon the assessee. Thereafter, assessment order u/s 143(3) were passed on 29.09.2006 where income was assessed as(5,90,38,760/-)

From the perusal of Audit report submitted by Assessee during the course of Assessment proceeding u/s 143(3), it is noticed that the Auditor has mentioned the following finding regarding Amortization of Zero coupon Bond series B:-

The company has issued zero coupon Bonds series B for an aggregate amount of Rs. 55.5422 crores against sacrifice made by lenders by way of reduction of interest rates from the contracted terms. The redemption of these Bonds will be made by March 31, 2014. The company has adopted the sinking fund method for accounting the liability and corresponding amount of interest has been debited to the P & L account'.

Further, it has been noticed that the assessee company has debited the amount of Rs.3,26,64127/- as amortization of zero coupon bonds out of which Rs.2,26,07,690/- has not been claimed as tax deductible expenditure. But remaining amount of Rs.1,00,56,437/- has been claimed as expenditure.

Thus, such amortization is not an expenditure of revenue nature. It bestows an advantage of enduring benefit to assessee so the expenditure

is a capital expenditure. Whereas the assessee company has claimed it as revenue expenditure, in its P&L account. Moreover, the undersigned has made an addition on the same issue for A.Y. 2010-11 in 143(2) proceedings amounting to 13,83,91,920/-. It is also worth mentioning that for A.Y. 2004-05, Assessing officer had treated such payment of Zero Coupon Bond as capital in nature and disallowed the same. On appeal by the assessee CIT(A) confirmed the addition made by AO on similar grounds by making following observations:

".....I have carefully considered the submissions made by the Ld. AR and perused the assessment order passed by the AO. I find that the appellant has liability of Rs. 5,16,01,434/- on account of amortization of zero coupon bonds. Out of this the appellant itself has disallowed an amount of Rs. 1,64,93,594/- u/s 43B. The AO has therefore disallowed the remaining amount of Rs. 3,51,07,840/- as capital in nature. I find that this amount was on account of zero coupon bonds issued to compensate the lenders for loss of the interest. Section 37(1) requires that in order to claim an expenditure as deductible, the assessee must have incurred an expenditure and it should not be of the capital nature. The appellant do not fulfill these conditions. Since the amount was incurred for raising the capital, the same was in the nature of the capital expenditure. Therefore, the addition made by the AO is confirmed. This ground of appeal is rejected....."

During the assessment year 2006-07, it's seen that AO has inadvertently over looked this issue as the assessee seems to have twisted the interpretation of such amortization of ZCBs with regard to applicability of section 36(1) of IT Act and has managed to escape assessment which should otherwise have been brought to taxation.

Hence, as discussed above, I have reasons to believe that income has escaped assessment of Rs.1,00,56,437/-. Issue notice u/s 148 for A.Y. 2006-07.

(Abhishek Gautam)
Asst. Commissioner of Income –Tax
Circle-1, Noida.

5. A perusal of the aforementioned reasons shows that the reassessment proceedings were initiated only to disallow amortization interest on zero coupon bonds.

6. Facts on record show that the original assessment was framed u/s 143(3) of the Act vide order dated 31.12.2008. Therefore, the notice issued u/s 148 of the Act is beyond four years. Therefore, the provisions of the 1st proviso to section 147 of the Act squarely apply wherein it has been provided that there has to be a failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment and reasons recorded by the Assessing Officer should specifically record such failure based on a tangible material and non recording of the same would render the entire reassessment null and void.

7. Our view is fortified by the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of Haryana Acylic Manufacturing Company 308 ITR 38 wherein the Hon'ble High Court has held as under:

> ***"20. In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be***

occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled. In our recent decision in Wel Intertrade (P.) Ltd.'s we had agreed with the view taken by the Punjab and Haryana High Court in the case of Duli Chand Singhania that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing Officer under section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our viewpoint, we hold that the notice dated 29-3-2004 under section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order dated 2-3-2005 are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above."

8. In light of the decision of the Hon'ble High Court of Delhi [supra], we are of the considered view that the Assessing Officer has grossly erred in not pointing out the failure on the part of the assessee to

disclose truly and fully all material facts necessary for assessment framed vide order dated 31.12.2008 u/s 143(3) of the Act. This, in itself, is sufficient to quash the reopening of the assessment.

9. We further find that the issue of amortization of interest on zero coupon bond was decided in favour of the assessee by the first appellate authority in A.Y 2004-05, who, in turn, followed the order of this Tribunal in ITA No. 925/DEL/2011.

10. This quarrel was considered by the Tribunal at Para 9 of its order. In our considered view, if the item of disallowance for which the reopening was initiated is deleted, then the very basis of initiation of reassessment proceedings does not survive. Therefore, the entire reassessment proceedings deserve to be quashed by the ld. CIT(A) himself.

11. The ld. DR vehemently stated that the cases relied upon by the ld. counsel for the assessee are cases where addition has been deleted and the deletion has attained finality, whereas in the case in hand, though the addition was deleted in the earlier A.Y, but that very deletion is under challenge. Therefore, the decision relied upon by

the ld. counsel for the assessee in the case of Adhunik Niryat Ispat Ltd 63 DTR 212 of the Hon'ble Delhi High Court is distinguishable.

12. We do not find any force in the contention of the ld. DR. Additions have been deleted and the Revenue has not filed any appeal. Therefore, it can be safely concluded that the deletion has attained finality and, therefore, the ratio laid down by the Hon'ble High Court of Delhi in the case of Adhunik Niryat Ispat Ltd [supra] squarely apply.

13. Ironically, we are somewhat shocked by the observations of the ld. CIT(A) that he does not have power to adjudicate on the validity of reassessment proceedings and that the Hon'ble Supreme Court in the case of G.K. Drive Shaft 259 ITR 19 held that reassessment proceedings can be challenged only by way of a writ petition.

14. Relevant findings of the first appellate authority read as under:

> **"125. In view of the above, the contention of the appellant that the assumption of jurisdiction *u/s.* 147 by Id. AO. and issuance of notice *u/s.* 148 of I.T. Act, 1961 was not proper & had therefore, vitiated the entire reassessment proceedings is neither correct nor maintainable before this office. Once the procedure laid down by the Hon'ble Apex Court to deal with the objections of the appellant to the assumption of jurisdiction stood dealt with**

by the Ld. AO. in the manner prescribed & appellant joined the reassessment proceedings waiving its right to challenge the same before the Constitutional Courts under writ jurisdiction; the objections of the appellant to assumption of jurisdiction by the Ld. AO. had become infructuous & needs to be given quietus. The challenge posed by the appellant to the assumption of jurisdiction by the Id. AO. *u/s.* 147 of I.T. Act, 1961 is, therefore, not maintainable in law and the ground taken by it is, therefore, rejected,

126. Therefore, the claim of the appellant that the Commissioner (Appeals) has the necessary appellate jurisdiction *u/s. 246/246A* of I.T. Act, 1961 r.w section 250 of LT. Act, 1961 to adjudicate the correctness of the assumption of the jurisdiction *u/s.* 147 of I.T. Act, 1961 & issuance of notice *u/s* 148 of LT. Act, 1961 that too in the course of the adjudication of the correctness of the assessment order is not correct and cannot be accepted by this office. The same is therefore, rejected & this office cannot adjudicate the correctness or otherwise of the assumption of jurisdiction by Ld. AO. u/s *147/148 of*. Act, 1961. Appellant is free to seek its remedies in law before the appropriate forum but It cannot expect this office to go beyond the jurisdiction conferred upon this office.

127. The Hon'ble Supreme Court while dealing with the issue of remedies available to an assessee in respect of re-opening of its assessment by the assessing officer u/s 147 of I.T. Act, 1961 & his legal intent of framing of assessment pursuant thereto in the case of "GKN Drlveshaft (India) Ltd. Vs. I.T.O." (2003) 259 ITR 19 SC has specifically directed that once the assessing officer exercises jurisdiction *u/s.* 147 of I.T. Act, 1961 8 Issues notice u/s. 148 of LT. Act, 1961; after complying with the said

notice u/s 148 of I.T Act, 1961 assessee is entitled to get a copy of the satisfaction recorded by the assessing officer for re-opening the assessment and after the same is provided by the A.O., the assessee can represent to the assessing officer regarding the correctness of the same and which the assessing officer must dispose off by passing a speaking order.

128. It is therefore clear that apart from seeking the copy of the satisfaction for re- opening the assessment as recorded by assessing officer and making a representation qua the correctness of the same before the assessing officer, an assessee whose assessments have been re-opened has no other remedy except approaching a writ Court under the extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India. Contesting the correctness of the notice *u/s.* 148 of I.T. 'Act, 1961 & resultant reopening of assessment before the office of the Commissioner (Appeals) is not the remedy permitted by the Hon'ble Apex Court. Otherwise also had there been such a remedy in the statute, the Hon'ble Apex Court would not have provided the remedy *of* obtaining the copy of satisfaction of the A.O. and then representing against the same.

129. Therefore, the issue being raised by appellant is not amenable to the jurisdiction conferred on this office and therefore, cannot be adjudicated. Regarding the remedies conferred by the Hon'ble Supreme Court, the Ld. A.O. has complied with the same and therefore, no interference is called

for with impugned assessment orders on this issue. There is no merit in the ground taken by the appellant company that this office had the jurisdiction to adjudicate the correctness of the initiation of proceedings u/s 147 of I.T. Act, 1961 by the Ld. A.O. beyond the mandate of Hon'ble Supreme Court in the case of "GKN Driveshaft (India) Ltd. Vs. I~03) 2591TR 19 SC & the same is rejected."

15. Such observations/findings of the ld. CIT(A) are nothing short of travesty of justice and can be termed as "harassment" to the tax payer.

16. Considering the facts of the case from all possible angles, we are of the considered view that the Assessing Officer has erred in assuming jurisdiction u/s 148 of the Act. Notice issued u/s 148 of the Act is hereby set aside and the resultant assessment order is quashed.

17. For the sake of completeness, we will address the issues on merits of the case.

18. The ld. CIT(A) has enhanced the assessment in respect of the following incomes:

(i) Arrear of designated return - Rs. 179.87 crores

(ii Lease of land treated as revenue subsidy - Rs. 1730.08 crores

(iii) Disallowance of depreciation claimed on toll bridge - Rs. 15.97 crores

19. Before embarking upon the merits of each issue, it would be pertinent to understand the powers of enhancement conferred upon the ld. CIT(A) by provisions of Section 251 of the Act. The relevant provisions of section 251(1a) read as under:

> *"In disposing of the appeals, the Commissioner (Appeals) shall have the following powers:*
>
> *In appeal against order of assessment, he may confirm/reduce, enhance or annul the assessment."*

20. In our understanding, the ld. CIT(A) can enhance the assessment only when the Assessing Officer has assessed something, which means, if the Assessing Officer has not assessed any income, the ld. CIT(A) cannot make enhancement by exploring new source of income. A perusal of the assessment order shows that the Assessing Officer has never considered the three issues mentioned hereinabove on which the ld. CIT(A) has made enhancement, nor they were part of the return of

income. Therefore, in our considered opinion, enhancement is bad in law.

21. The Full Bench of the Hon'ble High Court of Delhi in the case of Sardari Lal and Company 251 ITR 864 had the occasion to consider an identical issue on the following facts:

> ***"The question of first appellate authority's power to take into account a new source of income was referred for fresh adjudication.***
>
> ***The revenue contended that proceedings before the first appellate authority cannot b restricted to only the matters considered and decided by the assessing authority. It has the power to enhance income which Assessing Officer had failed and neglected to consider certain aspects and it has the power to adjudicate and decide everything necessary to ascertain the true and correct income of the assessee.***
>
> ***On the other hand, the assessee contended that if such a view was taken, the provisions for reopening in assessment available under section 147/148 and/or setting aside of the order on the ground that it was prejudicial to the interest of the revenue as available to the Commissioner under section 263 could be meaningless and purposeless."***

22. And held as under:

Having considered various decisions of the High Courts, as well as the Supreme Court, it is inevitable that whenever the question of taxability of income from a new source of income is concerned which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 and section 263, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions a similar power is available to the first appellate authority.

Accordingly the matter was disposed of."

23. The Hon'ble Supreme Court in the case of Shapoorji Pallonji Mistry 44 ITR 891 held as under:

"The question which arises in this appeal may be formulated thus: whether in an appeal filed by an assessee, the Appellate Assistant Commissioner can find a new source of income not considered by the Income-tax Officer and assess it under his powers granted by section 31 of the Income-tax Act? Section 31 reads as follows:

"31.(1) The Appellate Assistant Commissioner shall fix a day and place for the hearing of the appeal, and may from time to time adjourn the hearing.

(2) The Appellate Assistant Commissioner may, before disposing of any appeal, make such further inquiry as he thinks fit, or cause further inquiry to be made by the Income-tax Officer…….

(3) In disposing of an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment, -

(a) confirm, reduce, enhance-or annul the assessment, or

(b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment and determine where necessary the amount of tax payable on the basis of such fresh assessment...

There is no doubt that the Appellate Assistant Commissioner can "enhance the assessment". It is admitted also by the assessee that within the four corners of the sources processed by the Income-tax Officer, the Appellate Assistant Commissioner can enhance the assessment. This power must, at least, fall within the words "enhance the assessment", if they are not to be rendered wholly nugatory. The controversy in this case is about his discovering new sources, not mentioned in the return and not considered by the Income-tax Officer. The High Court held following its earlier view in Narrondas Manordass v. Commissioner of Income-tax [1195] 31 ITR 909, that the Appellate Assistant Commissioner has revisional powers, but that they are confined to what was before the Income-tax Officer and considered by the latter."

24. Again, the Hon'ble Supreme Court in the case of Rai Bahadur Hardutroy Motilal Chamaria 66 ITR 443 had an occasion to adjudicate on similar grievance as under:

"The AAC has no jurisdiction, under s. 31(3) of the Act, to assess a source of income which has not been processed by the Income tax Officer and which is not disclosed either in the returns filed by the assessee or in the assessment

order, and therefore. the Appellate Assistant Commissioner cannot travel beyond the subject matter of the assessment. In other words, the power of enhancement under s. 31 (3) of the Act is restricted to the subject-matter of assessment or the sources of income which have been considered expressly or by clear implication by the Income-tax Officer from the point of view of the taxability of the assessee.

In instant case, it is true that the ITO had referred to the remittance from the Calcutta brunch, but the ITO considered the dispatch of this amount only with a view to test the genuineness of the entries relating to the Forbesgang branch. It was manifest that the ITO did not consider the remittance of Rs. 5,85,000 in the process of assessment from the point of view of its taxability. It was also manifest that the AMC had considered the amount of remittance from a different aspect, namely, the point of view of its taxability. But since the ITO had not applied his mind to the question of taxability or non-taxability of the amount, the AAC had no jurisdiction in the circumstances of the instant case to enhance the taxable income of the assessee on the basis of this amount or of any portion thereof. It is not open to the AAC to travel outside the record, i.e., the return made by the assessee or the assessment order of the ITO with a view to find out new sources of income and the power of enhancement under section 31(3) of the 1922 Act is restricted to the sources of income which have been the subject-matter of consideration by the ITO from the point of view of taxability. In this context 'consideration' does not mean 'incidental' or 'collateral' examination of any matter by the ITO in the process of assessment. There must be something in the assessment order to show that the ITO applied his mind to the particular subject-matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection. In the instant case, it was manifest that the ITO had not considered the entry from the point view of its taxability and, therefore, the AAC had no jurisdiction, in an appeal under section 31 of the 1922 Act, to enhance the assessment."

25. Rebutting to the contentions of the ld. counsel for the assessee, the ld. DR placed strong reliance on the decision of the Hon'ble Supreme Court in the case of Nirbehram Deluram 224 ITR 610 and pointed out that the Hon'ble Supreme Court has held that the Hon'ble High Court was in error in holding that the appellate power conferred on AAC u/s 251 of the Act was confined to the matter which had been considered by the ITO and that the AAC has exceeded jurisdiction in making addition of Rs. 2,30,000/- on the basis of 10 other items of hundies.

26. The ld. DR further stated that the Hon'ble Supreme Court has categorically laid down that the AAC had jurisdiction or power to add the amount in the facts and circumstances in which he had added the same and has power to make addition not considered by ITO.

27. In further support, reliance was placed on the decision of the co-ordinate bench in the case of South Eastern Coalfields Ltd 85 ITD 608 and Metropolitan Trading Co. 89 ITD 662.

28. We have given thoughtful consideration to the submissions of the ld. DR. In our considered opinion, the Hon'ble High Court of Delhi in the case of Sardari Lal and Company [supra] has answered all the

questions raised by the ld. DR. Relevant findings of the Hon'ble High Court read as under:

"6. A similar question has been examined by the Apex Court as noted above, on several occasions. We do not think it necessary and appropriate to proliferate this judgment by making reference to all the decisions. A few of the important ones need to be noticed. One of the earliest decisions on the point was in CIT v. Shapoorji Pallonji Mistry (1962) 44 ITR 891 (SC). The matter related to the corresponding provisions of the Indian Income Tax Act, 1922 (hereinafter referred to as "the old Act"). It was held, inter alia, that in an appeal filed by the assessed, the Appellate Assistant Commissioner has no power to enhance the assessment by discovering a new source of income not considered by the Income Tax Officer in the order appealed against. A similar view was expressed in CIT v. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 (SC). That also related to a case under section 31(3) of the old Act. It was held that the power of enhancement under section 31(3) of the old Act was restricted to the subject-matter of the assessment or the source of income, which had been considered expressly or by clear implication by the assessing officer from the point of view of taxability and that the Appellate Assistant Commissioner had no power to assess the source of income, which had not been taken into consideration by the assessing officer. It is to be noted that strong reliance was placed by learned counsel for the revenue on the decision of the Apex Court in CIT v. Nirbheram Daluram (1997) 224 ITR 610. It was submitted that a different view was expressed about the scope and ambit of the power of the first appellate authority vis-a-vis

the sources considered by the assessing officer and even if the action of the first appellate authority related to a new source of income not considered by the assessing officer, it was not impermissible. It is to be noted that in Union Tyres' case (supra), this decision was also considered by this court in the background of what had been stated in Daluram's case (supra) and it was observed that there was really no difference from the view expressed earlier in Shapoorji's case (supra) and Chamaria's case (supra).

7. Learned counsel for the revenue also submitted that this conclusion of the Division Bench needs a fresh look. We have considered this submission in the background of what had been stated by the Apex Court in Jute Corporation's case (supra) and Daluram's case (supra). In Jute Corporation's case (supra), the Apex Court while considering the question whether the Appellate Assistant Commissioner has the jurisdiction to allow the assessed to raise an additional ground in assailing the order of assessment before it, referred to Shapoorji's case (supra), and drew a distinction between the power to enhance tax on discovery of a new source of income and granting a deduction on the admitted facts supported by the decision of the Apex Court. Relying on certain observations made by the Apex Court in CIT v. Kanpur Coal Syndicate (1964) 53 ITR 225 (SC), the Apex Court held that powers of the first appellate authority are coterminous with those of the assessing officer and the first appellate authority is vested with all the wide powers, which the subordinate authority may have in the matter. In Daluram's case (supra), the decisions of Kanpur Coal's case (supra) and Jute

Corporation's case (supra) were also considered and it was observed by the Apex Court that the appellate powers conferred on the first appellate authority under section 251 of the Act were not confined to the matter, which had been considered by the Income Tax Officer, as the first appellate authority is vested with all the wide powers of the assessing officer may have while making the assessment, but the issue whether these wide powers also include the power to discover a new source of income was not commented upon. Consequently, the view expressed in Shapoorji's case (supra) and Chamaria's case (supra) still holds the field. It may be noted that the issue was considered in CIT v. McMillan and Co. (1958) 33 ITR 182 (SC). Referring to a decision of the Bombay High Court in Narondas Manohar Dass v. CIT (1957) 31 ITR 909 (Bom), it was held that the language used in section 31 of the old Act is wide enough to enable the first appellate authority to correct the Income Tax Officer not only with regard to a matter which has been raised by the assessed but also with regard to a matter which has been considered by the assessing officer and determined in the course of the assessment. It is also relevant to note that in the Jute Corporation's case (supra), the Apex Court, inter alia, observed as follows :

> "The Appellate Assistant Commissioner, on an appeal preferred by the assessed, had jurisdiction to invoke, for the first time, the provisions of rule 33 of the Indian Income Tax Rules, 1922 (hereinafter referred to as 'the Rules'), for the purpose of computing the income of a non-resident even if the Income Tax Officer had not done so in the assessment proceedings. But, in Shapoorji

> Pallonji Mistry's case (supra), this court, while considering the extent of the power of the Appellate Assistant Commissioner, referred to a number of cases decided by various High Courts including the Bombay High Court judgment in Narrondas' case (supra) and also the decision of this court in McMillan and Co.'s case (supra) and held that, in an appeal filed by the assessed, the Appellate Assistant Commissioner has no power to enhance the assessment by discovering new sources of income not considered by the Income Tax Officer in the order appealed against. It was urged on behalf of the revenue that the words 'enhance the assessment' occurring in section 31 were not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. The court observed that there was no doubt that this view was also possible, but having regard to the provisions of sections 34 and 33B, which made provision for assessment of escaped income from new sources, the interpretation suggested on behalf of the revenue would be against the view which had held the field for nearly 37 years." (Emphasis, here italicised in print, supplied).

8. Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the assessing officer, the jurisdiction to deal with the same in appropriate cases

may be dealt with under section 147/148 of the Act and section 263 of the Act, if requisite conditions are fulfillled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority. That being the position, the decision in Union Tyres' case (supra) of this court expresses the correct view and does not need reconsideration. This reference is accordingly disposed of."

29. Considering the facts of the enhancement in light of the afore-mentioned judicial decisions, we have no hesitation to hold that the enhancement made by the ld. CIT(A) is bad in law and deserves to be set aside.

30. For the sake of completeness, we will now address to each issue of enhancement.

ADDTION ON ARREAR OF DESIGNATED RETURN Rs. 179.87 CRORES

31. The bone of contention is the following certificate by a Chartered Accountant:

Mr. Harish Mathur
Chief Executive Officer
Noida Toll Bridge Company Limited,
Toll Plaza, DND Flyway,
Opposite Sector-15A,

Noida-201301
Uttar Pradesh

Certification (revised) of the Statement of Computation of 'Return in Arrears as on 31 March 2013 in pursuance of the Concession Agreement

Dear Sir,

1. *As required by you vide letter dated 28 August 2013 we have verified the Statement of Computation of 'Return in Arrears' as on 31 March 2013 (Statement") prepared by the management based on the revised project cost. We understand that this certificate will over-ride the certificate as on 31 March 2013 issued by us dated 27 June 2013 as that was on the basis of provisional cost (i.e. without including any cost incurred from the commission date to 31 March 2013). The Statement (refer to Annexure-1) has been prepared in accordance with Article 14.2 read with Appendix F of the "Concession Agreement dated 12 November 1997 entered into between New Okhla Industrial Development Authority (NOIDA"), Infrastructure Leasing Financial Services Limited ('Sponsor") and Noida Toll Bridge Company Limited (the Company"), for the purpose of computation of recovery of total project cost and return of 20% thereon for the year ended 31 March 2013.*

2. *On the basis of our verification of the aforementioned Statement, by carrying out such cheeks as we considered appropriate and on the basis of information and explanations given to us by the management, we certify that there is a shortfall in the recovery of total project cost and return of 20% thereon of INR 29,551,405,164 (INR 2,955 crores) as at 31 March 2013.*

3. *The Statement is to be read in conjunction with Notes 3, 4 and 5, which form part of the Statement These notes provide the break-up of various heads comprised in the Statement and explain the management rationale for*

including or excluding certain items, which we have been informed, is consistent with the past practices.

4. In respect of this certificate, we invite attention to the following -

- ***As explained by the management in Note 1 of the Statement, Project Cost of INR 3,259,934,174 was incurred till the date of commissioning of the project, which represented the provisional cost incurred upto that date, determined in accordance with Article 83 of the Concession Agreement by the Project Engineer. The same was certified by AF. Ferguson & Co, previous auditors, vide their certificate dated 23 April 2001. The return in arrear was being certified on the basis of this provisional cost (pending finalization by the Independent Engineer as per Article 8.1(c) read with Article 10.2) wherein the costs incurred post commissioning date were not being considered. The last such certification (on the basis of provisional cost) was done for the year ending 31 March 2013.***

  The management has now updated the project cost incurred upto the year ended 31 March 2013 by including the actual costs incurred, year-wise and re-computing the return in arrear an that basis. Accordingly, the Return in Arrears as at 31 March 2013 has been recompute on the basis of the updated cost.

  Further, the Independent Engineer has certified the project cost incurred up to 31 March 2013 vide his certificate dated 15 November 2013

  The interest and other finance charges amounting to INR $30.01 million incurred till 31 March 2013, and included in the total project cost as mentioned above have not been considered for the purposes of computing the Return in Arrears in accordance with the formula mentioned in the Concession Agreement.

5. ***This certificate has been provided solely for the purpose stated in paragraph 1 above and may not be suitable for any other purpose. This certificate is not intended for general circulation or publication and is not to be reproduced or used for any purpose other than for the purpose stated above without our prior written consent.***

32. The aforementioned certificate has to be considered in light of the Concession Agreement dated 12.11.1997 for Delhi Noida Bridge Project among Noida and IL & FS and Noida Toll Bridge Company Ltd wherein the "Returns" has been defined as :

> ***"The returns of the Total Cost of Project recoverable by the Concessionaire from the effective date at a rate of 20% per annum, as defined in Section 14.2 of the Agreement".***

33. Section 2.1 Provides for Grant of Concession and the same reads as under:

> ***"Section 2.1 Grant of Concession***
>
> ***(a) NOIDA hereby weakly grants to the concessionare the exclusive right and authority during the Concession Period to develop, establish, finance, design, construct, operate and maintain the Noida Bridge as an Infrastructure Facility for the benefit of the residents, and industries, and for the development of commence in Noida and permits it to enter into the Ashram Flyover Construction Agreement and the Concessionaire hereby accepts the Concession granted to it by NOIDA and further agrees to***

implement the Project, in accordance with the terms and conditions of this Agreement.

(b) NOIDA further grants to the Concessionaire the exclusive right and authority during the concession Period to in accordance with the terms and conditions at this Agreement :

(i) develop, establish, finance, design, construct, own, operate, maintain use and regulate the use by third parties of the Noida Bridge;

(ii) Enjoy complete and uninterrupted possession and control of the lands identified as constituting the Bridge Site;

(iii) Own all or any part of the Project Assets;

(iv) determine, demand, collect, retain and appropriate a Fee from the Users of the Noida Bridge and apply the same in order to recover the Total Cost of Project and the Returns thereon;

(v) restrict the use of the Noida Bridge in motorized vehicles, bicycles and pedestrians and to dehar animal drawn vehicles, cycle-rickshaws and cattle from the Noida Bridge;

(vi) enforce the collection of Fee from delinquent Users of the Noida Bridge and impound the vehicles and goods of any such delinquent User for the purpose of enforcing collection;

(vii) develop establish, finance, design, construct, operate, maintain and use any facilities to generate Development Income arising out of the Development Rights that may be granted in accordance with the provisions of Article 4 herein;

(viii) enter into private contracts with the Users for any use or any special use of Noida Bridge and to sell, distribute or issue, at various outlets as may be determined by the Concessionaire, coupons or tokens against payment of Fee in advance, thus providing the Users with ready access to Noida Bridge without the necessity of paying fee on each incidental use of the Noida Bridge; and

(ix) appoint subcontractors or agents on its behalf to assist it in falling its obligation under this Agreement

34. Section 4.1 provides for Grant of Development Rights and the same read as under:

Development Rights

Section 4.1 Grant of Development Rights

(a) In the event that the Independent Auditor, upon reference by the Concessionaire, determines that the Project is not generating sufficient revenue for the Concessionaire to recover the Total Cost of Project and the Returns thereon, or the Independent Engineer in its decision under Section 3.5(a) determines that the Concessionaire must be granted such development Rights as may be specified, the concessionaire may requires that NOIDA grant or cause GOUP or DG, as the case may be, to grant to it, Development Rights within their respective jurisdiction for the purpose of generating Development Income. Upon receiving such a request from the Concessionaire, NOIDA in consultation with the Independent Authority, may in its role decretion, grant to the concessionaire Development Rights for the generation of Development Income.

(b) The Development Rights shall be granted under a separate agreement and shall be governed by the terms of agreement under which they are granted

(c) The Concessionaire shall make use of all Development Rights granted to it in such a manner so as not to repair the general integrity of the Project and with full regard for the safety of all Users and shall implement the Development Rights so as to avoid danger to any such persons.

35. Section 5.1 specifically provides for Lease by Noida [This is relevant for issue No. 2 relating to addition of Rs. 1730.08 crores as revenue subsidy] as under:

"Section 5.1 Lease by Noida

(a) NOIDA shall, pursuant to the Project Site Lease Agreement, lease to Concessionaire the Bridge Site in form reasonably satisfactory to the Concessionaire in order to enable to construction and maintenance of the Facilities and enjoyment of Development Rights, as and when granted to the Concessionaire under Section 4.1 hereinabove, without limiting the generality of this Section 5.1(a), the terms of the Delhi Land Lease Agreement, delhi Land Sub-Lease Agreement and Noida Site Lease Agreement shall be in the form and substance so as to further enable procurement of funds from Lenders for implementation of the Project. The said Project Site Lease Agreement shall be duly executed and registered with the Competent Authority as soon as practicable, but in any case within six months of the State hereof.

(a) The Project Site Lease Agreement shall initially be for a period of 31 years and shall be co-terminus with the Concession Agreement and shall be extended or earlier terminated to coincide with the Concession Period.

(b) In consideration of the lease of the Bridge Site, the Concessionaire shall pay to NOIDA as a sum of Rupee 1.00 per annum, which amount shall be paid as an advance lease rental in one lump sum of Rupee 50,00 (in consideration of a possible extension of the Concession Period) on or prior to the date upon which the Project Site Lease Agreements is executed. All lease rental amounts payable pursuant to this subsection(e) shall be considered as part of the Project Cost. Any excess lease rental payments shall be refunded to the Concessionaire on the Transfer Date, NOIDA shall not increase the lease rental amounts payable in accordance with this Section 5.1(e).

(c) All costs, expenses or charges incurred in making available the Bridge Site, including any compensation required to be paid for acquisition thereof or for the rehabilitation or resettlement of Persons in connection therewith or for the removal of structures, both above and underground, shall be borne and paid for by NOIDA or by the Concessionaire, upon

written request in this regard by NOIDA, which request may be agreed to by the Concessionaire at its sole discretion. In the event that the said costs and expenses are completely or partially borne by the Concessionaire, they shall be included as part of the Project Cost. NOIDA shall bold the Concessionaire harmless from any costs or claims relating to any such acquisition and removal of such structures and all costs, expenses of charges incurred in relocating, rehabilitating or resettling persons in connection with making available the Bridge Site shall be borne and paid for by the Concessionaire and shall be included as pan of the Project Cost.

(d) Each of the agreements constituting the Project Site Lease Agreements are independent of each other, The termination of Delhi Land Sub Lease Agreement or any part thereof caused due to termination of the Delhi Land Lease Agreement or any part thereof shall not effect the continuation and effectiveness of the Noida Site Lease Agreement.

36. Section 5.4 provides for Adjacent Areas.

37. A perusal of the findings of the ld. CIT(A) shows that the basis on which the ld. CIT(A) held that the assessee is entitled to designated return of 20% from the Government is the report of the Chartered Accountant wherein the following chart has been annexed, which is also heavily relied upon by the ld. DR:

Annexure-I

Noida Toll Bridge Company Limited
Statement of computation of 'Returns in Arrears' as at 31 March 2013
(in accordance with Article 14.2 of the concession agreement dated 12 November 1997)

(Amounts in Rupees)

Year / period	Opening balance of unrecovered project cost	Project cost incurred	Income from Toll (refer to note 3)	O&M Expenses (refer to note 4)	Corporate Income Tax (refer to note 5)	Surplus after tax but before Interest, Depreciation & Lease Rental	Returns	Closing balance of unrecovered project cost
	Debit	Debit	Credit	Debit	Debit	Credit	Debit	Debit
1	2=9 of previous year	3	4	5	6	7=4-5-6	8=20% p.a	9=2+3-7+8
Upto 6 February 2001 (refer to note 1)	-	-3,259,934,174	-	-	-	-	816,510,097	4,076,444,271
7 February 2001 to 31 March 2001	4,076,444,271	-	11,631,078	9,970,176	-	1,660,902	118,384,409	4,193,167,777
Year ended 31 March 2002	4,193,167,777	57,087,949	103,714,730	77,976,312	-	25,738,418	838,633,555	5,063,150,864
Year ended 31 March 2003	5,063,150,864	3,742,733	179,698,953	96,450,431	-	83,248,522	1,012,630,173	5,996,275,248
Year ended 31 March 2004	5,996,275,248	790,485	249,528,903	97,511,218	-	152,017,685	1,199,255,050	7,044,303,097
Year ended 31 March 2005	7,044,303,097	28,971,918	307,749,699	110,559,106	-	197,190,593	1,408,860,619	8,284,945,042
Year ended 31 March 2006	8,284,945,042	7,496,376	390,262,810	142,218,537	778,741	247,265,532	1,656,989,008	9,702,164,894
Year ended 31 March 2007	9,702,164,894	88,460,703	471,916,974	121,577,465	803,246	349,536,263	1,940,432,979	11,381,522,313
Year ended 31 March 2008	11,381,522,313	535,922,518	673,516,253	167,947,076	37,472,934	468,096,243	2,276,304,463	13,725,653,050
Year ended 31 March 2009	13,725,653,050	26,610,438	780,202,126	187,558,690	46,497,330	546,146,106	2,745,130,610	15,951,247,992
Year ended 31 March 2010	15,951,247,992	(2,910,118)	835,110,086	213,317,493	68,746,158	553,046,435	3,190,249,598	18,585,541,038
Year ended 31 March 2011	18,585,541,038	-	855,006,444	221,263,180	8,898,435	624,844,829	3,717,108,208	21,677,804,416
Year ended 31 March 2012	21,677,804,416	-	956,421,613	214,770,935	837,573	740,813,105	4,335,560,883	25,272,552,195
Year ended 31 March 2013	25,272,552,195	75,515,684	1,085,392,321	234,219,167	-	851,173,154	5,054,510,439	29,551,405,164

Notes referred to above form an integral part of the Statement

For and on behalf of Noida Toll Bridge Company Limited

Harish Mathur
Chief Executive Officer

Rajiv Jain
Astt. Vice President

NOIDA TOLL BRIDGE CO. LTD. NOIDA (UP)

Place :
Date : 15 NOV 2013

S.N. DHAWAN & CO. CHARTERED ACCOUNTANTS NEW DELHI

38. However, we find that the said certificate does not state that the assessee is entitled to the return @ 20% on the project cost. It appears that the ld. CIT(A) has completely misunderstood the entire arrangement with Noida and IL&FS. The relevant sections of the agreement are mentioned hereinabove.

39. As per section 2.3 of the Agreement, concession was granted for a period of 30 years or the date on which the assessee recovers the total cost of the project alongwith return which is also defined and mentioned elsewhere. The assessee was only authorized to collect fee from the users of Noida bridge during concession period and the same shall be retained by the assessee.

40. As per section 2.4 of the Agreement, in the event the assessee did not recover the total cost of the project plus 20% return, the agreement shall be extended by another two years or till the time the total cost of the project and return thereon was recovered by the assessee.

41. Further, section 4.1 of the Agreement provides that in a scenario where the assessee could not recover the total cost of the project plus 20% return, as certified by an independent auditor, then the assessee

would request NOIDA to grant development rights to carry out development activities to earn additional revenue to recover the total cost of the projects and returns thereon and that the development right was to be granted under a separate agreement.

42. A perusal of the Agreement shows that nowhere the assessee is entitled to earn a return @ 20% which shall accrue to the assessee. In fact, the return of 20% is the projected return and was set as a benchmark for the assessee to recover over and above the actual project cost and if the assessee could not recover the said 20% return on investment by collection of user fee or toll fee from the users of the bridge, then the concession period is extended for a period of two years or till the time the project cost alongwith the projected return of 20% is recovered or the assessee gets development rights in respect of certain lands not utilized for the construction of the bridge.

43. Thus, nowhere did the agreement contemplate a guaranteed return @ 20% to the assessee. In fact, what we understand is that any shortfall in the recovery will not be compensated either by Noida or by the Government. Even in the certificate given by the auditor, nowhere

there is any mention that the assessee is entitled to receive the shortfall in the recovery from the government.

44. A perusal of the aforementioned chart shows that the Chartered Accountant has only quantified the amount of returns on year to year basis. In our considered opinion, no right has accrued to the assessee nor there is any liability upon the payer in respect of the quantified amount.

45. The Hon'ble Supreme Court in the case of ED Sassoon & Co Ltd 26 ITR 27 had the occasion to consider the meaning of “earned”, “accrued” and “right to receive”. The Hon'ble Supreme Court observed as under:

> *"The word "earned" has not been used in section 4 of the Income-tax Act. The section talks of " income, profits and gains " from whatever source derived which (a) are received by or on behalf of the assessee, or (b) accrue or arise to the assessee in the taxable territories during the chargeable accounting period. Neither the word " income " nor the words "is received," "accrues" and " arises " have been defined in the Act. The Privy Council in Commissioner of Income-tax, Bengal v. Shau Wallace & Co.(1) attempted a definition of the term income " in the words following :-*

" Income, their Lordships think, in the Indian Income-tax Act, connotes a periodical monetary return ' coming in' with some sort of regularity, or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return excluding anything in the nature of a mere windfall."

Mukerji- J. has defined these terms in Rogers Pyatt Shellac & Co. v. Secretary of State for India(2):

" Now what is income? The -term is nowhere defined in the Act..... In the absence of a statutory definition we must take its ordinary dictionary meaning that which comes in as the periodical produce of one's work, business, lands or investments (considered in reference to its amount and commonly expressed in terms of money) ; annual or periodical receipts accruing to a person or corporation " (Oxford Dictionary). The word clearly implies the idea of receipt, actual or constructive. The policy of the\ Act is to make the amount taxable when it is paid or received either actually or constructively. i Accrues,' arises' and I is received' are three distinct terms. So far as receiving of income is concerned there can be no difficulty; it conveys a clear and definite meaning, and I can think of no expression which makes its meaning plainer than the word ' receiving' itself The words I accrue and arise also are not defined in the Act. The ordinary dictionary meanings of these words have got to be taken as the meanings attaching to them. Accruing' is synonymous with 'arising' in the sense of springing as a natural

growth or result. The three Expressions accrues, I arises ' and I is received ' having been used in the section, strictly speaking 'accrues' should hot be taken as synonymous with I arises' but on the distinct sense of growing up by way of addition for increase or as an accession or advantage; while the word I arises' means comes into existence or notice or presents itself. The former connotes the idea of a growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable. It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seem to denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases. It is clear, however, as pointed out by Fry L.J. in Colquhoun v. Brooks(1), [this part of the decision not having been affected by the reversal of the decision by the House of Lords(2)] that both the words are used in contradistinction to the word " receive " and indicate a right to receive. They represent a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate.

One other matter need be referred to in connection with the section. What is sought to be taxed must be income and it cannot be taxed unless it has arrived at a stage when it can be called 'income'."

The observations of Lord Justice Fry quoted above by Mukerji J. were made in Colquhoun v. Brooks(1) while construing the provisions of 16 and 17 Victoria Chapter 34 section 2 schedule 'D'. The words to be

construed there were' profits or gains, arising or accruing' and it was observed by Lord Justice Fry at page 59:

> *" In the first place, I would observe that the tax is in respect of 'profits or gains arising or accruing.' I cannot read those words as meaning I received by.' If the enactment were limited to profits and gains 'received by' the person to be charged, that limitation would apply as much to all Her Majesty's subjects as to foreigners residing in this country. The result' would be that no income-tax would be payable upon profits 'which accrued but which were not actually received, although profits might have been earned in the kingdom and might have accrued in the kingdom. I think, therefore, that the words I arising or accruing are general words descriptive of a right to receive profits."*

To the same effect are the observations of Satyanarayana Rao J. in Commissioner of Income-tax, Madras v. Anamallais Timber Trust Ltd.(1) and Mukherjea J. in Commissioner of Income-tax, Bombay v. Ahmedbhai Umarbhai & Co., Bombay(2) where this passage from the judgment of Mukerji J. in Rogers Pyatt Shellac & Co. v. Secretary of State for India(3), is approved and adopted. It is clear therefore that income may accrue to an assesee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed debitum in presenti, solvendum in futuro; See W. S. Try Ltd. v. Johnson (Inspector of Taxes)(4), and Webb v. Stenton and Others,

Garnishees(5). Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him.

The word "earned" even though it does not appear in section 4 of the Act has been very often used in the course of the judgments by learned Judges both in the High Courts as well as the Supreme Court. (Vide Commissioner of Income-tax, Bombay v. Ahmedbhai Umarbhai & Co., Bombay(6), and Commissioner of Income-tax, Madras v. K. R. M. T. T. Thiagaraja Chetty & Co.(7). It has also been used by the Judicial Committee of the Privy Council in Commissioners of Taxation v. Kirk(1). The concept however cannot be divorced from that of income accruing to the assessee. If income has accrued to the assessee it is certainly earned by him in the sense that he has contributed to its production or the parenthood of the income can be traced to him. But in order that the income can be said to have accrued to or earned by the assessee it is not only necessary that the assessee must have contributed to its accruing or arising by rendering services or otherwise but he must have created a debt in his favour. A debt must have come into existence and he must have acquired a right to receive the payment. Unless and until his contribution or parenthood is effective in bringing into existence a debt or a right to receive the payment or in other words a debitum in presenti, solvendum in futuro it cannot be said that any income has accrued to him. The mere expression "earned" in the sense of rendering the services etc., by itself is of no avail.

If therefore on the construction of the Managing Agency Agreements we cannot come to the conclusion that the Sassoons had created any debt in their favour or had acquired a right to receive the payments from the Companies as at the date of the transfers of the Managing Agencies -in favour of the transferees no income can be said to have accrued to them. They had no doubt rendered services as Managing Agents of the Companies for the broken periods. But unless and until they completed their performance, viz., the completion of the definite period of service of a year which was a condition precedent to their being entitled to receive the remuneration or commission stipulated thereunder, no debt payable by the Companies was created in their favour and they had no right to receive any payment from the Companies. No remuneration or commission could therefore be said to have accrued to them at the dates of the respective transfers.

It was however urged that even though no income can be said to have accrued to the Sassoons at the date of the respective transfers which could be the (1) [1900] A. C. 588 at p. 592, subject-matter of any assignment by them in favour of the transferees, the moment the remuneration or commission was ascertained at the end of the calendar year and became a debt due to the Managing Agents under the terms of the Managing Agency Agreements it could be referred back to the period in which it was earned and the portions of the remuneration or commission which were earned by the Sassoons during the broken period could certainly then be said to be the income which had accrued to them during the chargeable accounting period.

Reliance was placed is support of this position on Commissioners of Inland Revenue v. Gardner Mountain & D' Ambrumenil, Ltd. (1). The assessee in that case carried on inter alia the business of underwriting Agents, and entered into Agreements with certain underwriters at Lloyds under which it was entitled to -receive as remuneration for its services in conducting the Agency, commissions on the net profits of each year's underwriting. The Agreements provided that " accounts should be kept for the period ending 31st December in each year and that each such account shall be made up and balanced at the end of the second clear year from the expiration of the period or year to which it relates and the amount then remaining to the credit of the account shall be taken to represent the amount of the net profit of the period or year to which it relates and the commission payable to the Company shall be calculated and paid thereon." The accounts for the underwriting done in the calendar year 1936 were made up at the end of 1938 and the question that arose was whether the assessee was liable to additional assessment in respect of the commission on under writer's profits from the policies underwritten in the calendar year 1936 in the year in which the policies were underwritten or in the year when the accounts were thus made up. The assessee contended that the contracts into which it entered were executory contracts, under which its services were not completed or paid for, as regards commission, until the conclusion of the relevant account; that the profit in the form of commission was not ascertainable or earned, and did not arise, until that time and that the additional assessment which was made in the year in which the policies were underwritten should accordingly be discharged. The Special Commissioner allowed the assessee's contention and,

discharged the additional assessment. The decision of the Special Commissioners was confirmed on appeal by Macnaghten J. in the King's Bench Division of the High Court. The Court of Appeal however reversed this decision and a further appeal was taken by the assessee to the House of Lords. The House of Lords held that on the true construction of the Agreements, the commissions in question were earned by the assessee in the year in which the policies were underwritten, and must be brought into account accordingly and confirmed the decision of the Court of Appeal. It may be noted that the charge was on profits arising in each chargeable accounting period and the profits were to be taken to be the actual profits arising in the chargeable accounting period. The ratio of the decision was that the commission paid was remuneration for services completely performed in the particular year, that, the assessee had at the end of the year done everything it had to do to earn it and that it was remuneration for work done and completely done in the particular year though it was ascertained and paid two years later. Viscount Simon in his speech at page 93 stated that the assessee had acquired a legal right to be paid in futuro and that the principle was to refer back to the year in which it was earned so far as possible remuneration subsequently received even though it could only be precisely calculated. afterwards. Lord Wright in his speech at page 94 said that it was necessary to determine in what year the Commission was earned, or in the language of the Act, in what year the assessee's profits arose and observed at page 96 : -

> *"I agree with the Court of Appeal in thinking that the necessary conclusion from that must be that the right to the commission is*

treated as a vested right which has accrued at the time when the risk was underwritten, It has then been earned, though the profits resulting from the insurance cannot be then ascertained, but in practice are not ascertained until the end of two years beyond the date of underwriting. The right is vested, though its valuation is postponed,' and is not merely postponed but depends on all the contingencies which, are inevitable in any insurance risk, losses which may or may not happen, returns of premium, premiums to be arranged for additional risks, reinsurance, and the whole catalogue of uncertain future factors. All these have to be brought into account according to ordinary commercial practice and understanding. But the delays and difficulties which there may be in any particular case, however they may affect the profit, do not affect the right for what it eventually proves to be worth."

Lord Simonds in his speech at page 110 stated:

" It is clear to me that the commission is wholly earned in year 1 in respect of the profits of that year's underwriting. If so, I should have thought that it was not arguable that that commission did not accrue for income-tax- purposes in that same year though it was not ascertainable until later."

The fact that the account of the commission could not be made up until later did not make any difference to the position that the commission had been wholly earned during the chargeable accounting period and the income had accrued to the assessee during that period.

Learned counsel for the transferees also relied upon the decisions in Bangalore Woollen, Cotton and Silk Mills Co., Ltd. v. Commissioner of Income tax, Madras(1), and Turner Morrison and Co., Ltd. v. Commissioner of Income-tax, West Bengal(2), to show that as and when the sale proceeds were received by the Company the profits made by the Company were embedded in those sale proceeds and if that was so the percentage of the net profits which was payable by the Companies to the Managing Agents as and by way of commission was similarly embedded in those sale proceeds. If the profits thus accrued to the Company. during the chargeable accounting period the commission payable to the Managing Agents also could be said to have accrued to them during that period.

It is no doubt true that the accrual of income does not depend upon its ascertainment or the accounts cast by assessee. The accounts may be made up at a much later date. That depends upon the convenience - of the assessee and also upon the exigencies of the situation. The amount of the income, profits or gains may thus be ascertained later on the accounts being made up. But when the accounts are thus made up the income, profits or gains ascertained as the result of the account are referred back to the chargeable accounting period during which they have accrued or arisen and the assessee is liable to tax in respect of the same during that chargeable accounting period. "The computation of the profits whenever it may take place cannot possibly be allowed to suspend their accrual..:... ..... ". "The quantification of the commission is not a condition precedent to' its accrual." (Per Ghulam Hassan J., in Commissioner of Income-tax, Madras v. K. B. M. T. T. Thiagaraja Chetty and Co.(1). See also Isaac Holden and Sons,

Ltd. v. Commissioners of Inland Revenue(2), and Commissioners of Inland Revenue, v. Newcastle Breweries Ltd.(3). What has however got to be determined is whether the income, profits or gains accrued to the assessee and in order that the same may accrue to him it is necessary that he must have acquired a right to receive the same or that a right to the income, profits or gains has become vested in him though its valuation may be postponed or though its materialisation. may depend on the contingency that the making up of the accounts would show income, profits or gains. The argument that the income, profits or gains are embedded in the sale proceeds as and when received by the Company also does not help the transferees, because the Managing Agents have no share or interest in the sale proceeds received as such. They are not co-sharers with the Company and no part of the sale proceeds belongs to them. Nor is there any ground for saying that the Company are the trustees for the business or any of the assets for the Managing Agents. The Managing Agents cannot therefore be said to have acquired a right to receive any commission unless and until the accounts are made up at the end of the year, the net profits ascertained and the amount of commission due by the Company to the Managing Agents thus determined. (See Commissioners of Inland Revenue v. Lebus(1)).

It is cleat therefore that no part of the Managing Agency commission had accrued to the Sasoons at the dates of the respecxtive tranasfers of the agencies to eth transferees."

46. In light of the ratio laid down by the Hon'ble Supreme Court [supra] we have no hesitation to hold that no right was accrued to the assessee to receive alleged designated return and, therefore, the entire addition is on notional basis in contrast with the concept of real income.

47. It is pertinent to mention here that the Hon'ble High Court of Allahabad vide its order in PIL No 60214 of 2012 dated 26.10.2016 held that Article 13 and Articled 14 of the Agreement are not valid and to be severed from the agreement. The Hon'ble Court had struck down the levy of fee for the reason that the assessee had already recovered the entire cost of the project on actual basis from collection of tolls, advertisement and rental income and, therefore, the assessee cannot collect the toll.

48. In this light, it can be safely concluded that the assessee did not earn 20% designated return on the cost of the project. Thus, addition on account of designated return amounting to Rs. 179.87 crores does not have any legs to stand and deserves to be deleted. We order accordingly.

LEASE OF LAND TREATED AS REVENUE SUBSIDY – Rs. 1730.08 CRORES

49. The sole basis for this enhancement is that according to the ld. CIT(A), lands were transferred to the assessee by Noida without any consideration and that the assessee is the owner of the land and as the lands were transferred to commercially exploit for the purpose of development and that he assessee being the owner of the land, had not disclosed the same in the books of account. Therefore, the ld. CIT(A) ascertained the market value of the land by engaging a valuer for this purpose.

50. After arriving at the market value of the land, the ld. CIT(A) attributed a part of the same towards capital subsidy received to the extent the lands were utilized for the purpose of construction of the toll bridge. Balance amount, according to the ld. CIT(A), represented a compensation for possible or projected short fall in the revenue and treated the same as revenue subsidy and made enhancement of Rs. 1730.08 crores.

51. We have extracted the relevant articles of lease of land by Noida elsewhere. The very basis of the enhancement by the ld. CIT(A) that the lands were transferred to the assessee by Noida is fallacious and completely in disregard to the relevant articles mentioned elsewhere. The lands were given on lease and, therefore, there is no question of ownership being transferred to the assessee and, therefore, there is no question of any addition on this account. The same is directed to be deleted.

DISALLOWANCE OF DEPRECIATION CLAIMED ON TOLL BRIDGE Rs. 15.97 CRORES

52. Though the claim of depreciation was allowed to the assessee, as discussed in the aforementioned paras, the ld. CIT(A) treated the part market value of alleged transfer of land as capital receipt, he went on to reduce the written down value with the amount of capital subsidy and recomputed the depreciation and made the addition of Rs. 15.97 crores.

53. Since in the para above we have discarded the findings of the ld. CIT(A), for our detailed reasons therein, there is no capital subsidy to

be reduced and there is no basis for recomputing the depreciation. The same is deleted.

54. In addition to the issues considered in A.Y 2006-07 ITA No. 4411/DEL/2018, in this year the assessee has challenged the disallowance of unpaid interest of Rs. 1,71,04,300/-.

55. The underlying facts in the issue are that the assessee issued deep discount bonds to the public on which interest was payable on maturity. The assessee had recognized the interest year on year as the liability accrues every year but however, is payable on maturity. During the year, the assessee debited such interest to the tune of Rs. 14.41 crores to the Profit and Loss account whereas it had paid Rs. 12.70 crores

56. The Assessing Officer disallowed the difference of Rs. 1.71 crores for the reason that the same is unpaid.

57. In our understanding of the afore-mentioned facts, provisions of section 43B(e) of the Act apply only to loans/borrowings from any financial institutions. It does not apply to the deep discount bonds

issued to the public. In our considered opinion, the amount over and above the face value which is payable on maturity is nothing but the interest amount which accrues to the assessee every year and recognized by the assessee in its books of account. Therefore, the interest payable on deep discount bonds is to be allowed on accrual basis and not on payment basis. The Assessing Officer is directed to delete the same.

58. In the result, the appeals of the assessee are allowed.

[Revenue's Appeals]

ITA No. 4968/DEL/2018 A.Y 2006-07

ITA No. 4969/DEL/2018 A.Y 2007-08

ITA No. 4970/DEL/2018 A.Y 2008-09

59. The grievances of the Revenue read as under:

21. Whether on the facts and circumstances of the case, the Ld. CIT(A) is legally justified in allowing expenses of Rs. 10056437/- on appeal of 'amortization of expenses incurred in respect of restructuring of loans against the findings of the Assessing Officer (herein after referred as "the AO) that the expenses incurred by the assessee

company under this head were for raising the capital and so cannot be treated as revenue expenses?

22. Whether on the facts and circumstances of the case, the Ld CIT(A) is legally justified in the deleting the disallowance of Rs. 10056437/- on account of "amortization of expenses incurred in respect of restructuring of loans without appreciating the fact that the expenses were incurred to confer enduring benefits beyond the assessment year under consideration and, therefore, these cannot be termed as revenue expenses?

Prayer for condonation of delay:

23. It is prayed that condonation of delay in filing of appeal may be granted since it took some time to know the current status of the decision of the Hon'ble Allahabad High Court in this case.

24. That the appellant craves leave to add, amend, alter or forgo any ground/(s) of appeal either before or at the time of hearing of the appeal."

60. At the very outset, the ld. counsel for the assessee stated that the impugned issues have been considered and decided by this Tribunal in favour of the assessee and against the Revenue in A.Y 2004-05 which

assessment is followed by the Assessing Officer while making the impugned addition.

61. We find force in the contention of the ld. counsel for the assessee. This Tribunal in ITA No. 925/DEL/2011 has considered the grievance of the Revenue as under:

> ***"9. Regarding 2nd issue as contained in ground No.4, the challenge of the assessee is with regard to treating a sum of Rs.,3,51,07,840/- being amortization of zero coupon bonds (series B) issued to lenders as a part of the package of relief and concessions granted by CDR empowered group of the Corporate Debt Restructuring Cell (CDR) of the banks and financial institutions, as capital expenditure whereas the assessee claimed it as revenue expenditure pertains to disallowance of Rs.3,51,07,840/- being the amortization of zero coupon bonds (Series B) issued to leaders as a part of the package of relief and concessions granted by the CDR empowered group of the corporate debt restructuring cell (CDR) of the banks and financial institutions as capital expenditure as against the assessee's claim that it was a revenue expenditure. The A.O. was of the view that it was a capital expenditure. For the sake of convenience, the relevant findings of the A.O. are reproduced as under:***

'The submissions made by the assessee company year considered. As admitted by the assessee company itself in its submissions that thee bonds, which would be redeemed not later than March 31, 2014, were issued to the lenders towards compensation for the loss of interest they have suffered from the documented rate. Thus, such amortization is not an expenditure of revenue in nature. Accordingly, the expenditure claimed towards amortization of zero coupon bonds amounting to Rs.3,51,07,840/- (Rs.5,16,01,434 – Rs.1,64,93,594/-) is disallowed being capital in nature and added to the total income of the assessee company.'

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12. Still aggrieved, the assessee has come up in further appeal and while reiterating the submissions as made before the A.O. and Ld. CIT(A), has pleaded for deletion of the addition made by the A.O. confirmed by Ld. CIT(A). It has been submitted that zero coupon bonds and amortization is nothing but revenue expenditure amounting to Rs.5,16,01,434/- as zero coupon bonds (Series B) and zero coupon bonds issued to the lender as compensation towards the prevent value of loss of interest from the documents related as the part of relief. Concession granted by CDR empowered group of the Corporate Debt Restructuring Cell (CDR) of the banks and financial institutions vide their approval letter No.CDR/421 dated 6.1.2003 and letter No.CDR/461 dated 16.1.2003. As per the scheme, the assessee had issued Series B Zero Coupon Bonds of Rs.100 each to Banks, Financial Institutions and others which could be redeemed not later than March 31, 2014 towards the net present value of the sacrifice made by

them by way of reduction of interest rates from the contracted terms. The zero coupon bond is issued in order to compensate the loss of interest payable to them and accordingly amortization of zero coupon bond is nothing but the payment of interest to them and it is deductible expenditure as per Section 37(1) of the it act being revenue in nature. The assessee had created the provision on a year to year basis on the principle of sinking fund by applying the weighted average interest rate on outstanding borrowing prior to restructuring as the discount rate and thereby arrive at the amount of the yearly charge. The assessee has obtained confirmation from professional experts with respect to appropriateness of the sinking fund method as well as the adequacy of the charge on a year to year basis to for the liability towards the ZCBs in the books. Accordingly, the P & L account was debited with Rs.5,16,01,434/- being the required amount of provision and the corresponding liability was recognized under the said secured loan. As this was expenditure pertaining to the period under consideration and it was claimed as revenue expenditure which liability to be allowed by making reference to various details as submitted before Ld. CIT(A) and incorporated in his order and by relying upon the decision of Hon'ble Delhi High Court in case of CIT Vs Gujarat Guardian Ltd. as reported in 222 CTR 526 (Del.), it was pleaded for deletion of addition made by the A.O. and confirmed by Ld. CIT(A).

13. Ld. D.R. relied upon the orders of authorities below and pleaded for its confirmation. When specifically asked whether the

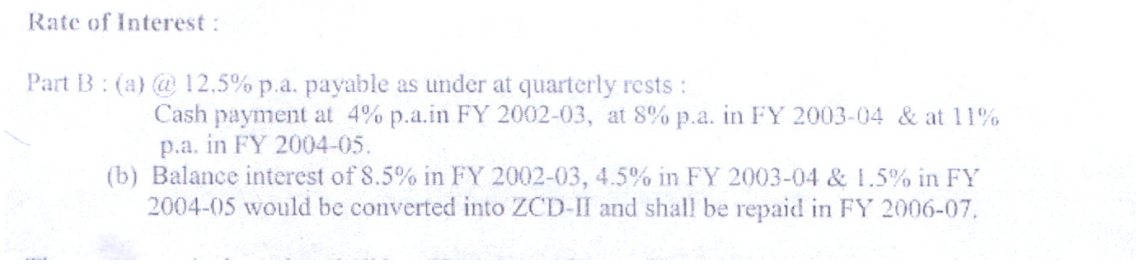
case of the assessee covered by decision cited by Ld. Counsel for the assessee, he could not be able to give any denial.

14. After haring both the sides and considering the material on record as well as the precedent relied upon by the Ld. counsel for the assessee, we are of the view that addition made by the A.O. and confirmed by Ld. CIT(A) could not be made in view of the facts and circumstances of the case in the light of the precedent relied upon by Ld. counsel for the assessee. We, therefore, while considering the entire facts and circumstances and material on record and the ratio of the decision relied upon by Ld. counsel for the assessee and not controverted by Ld. D.R., direct to delete the impugned addition made by the A.O. and confirmed by Ld. CIT(A)."

62. The ld. DR had raised strong objections on the reliance of the aforementioned judgment of the Tribunal stating that in that year, the Revenue failed to point out the glaring difference in the facts of the case in hand and the decision of the Hon'ble Delhi High Court relied upon by the ld. DR in the case of Gujarat Guardian Ltd 222 CITR 526.

63. We have given thoughtful consideration to the contentions raised by the ld. DR. The points raised by the ld. DR emanate from the Restructuring Proposal approved under the CDR System by Corporate Debt Restructuring Cell dated 06.01.2003 by which restructuring

package was approved by the CDR Empowered Group. The rate of interest was restructured as under:



Rate of Interest :

Part B : (a) @ 12.5% p.a. payable as under at quarterly rests :
Cash payment at 4% p.a.in FY 2002-03, at 8% p.a. in FY 2003-04 & at 11% p.a. in FY 2004-05.
(b) Balance interest of 8.5% in FY 2002-03, 4.5% in FY 2003-04 & 1.5% in FY 2004-05 would be converted into ZCD-II and shall be repaid in FY 2006-07.

64. Package of Reliefs and Concessions will be subject to the terms and conditions as under:

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5) Loss of interest to institutions/banks due to reduction in rate of interest from document rate, a agreed above, shall be compensated by issue of Zero Coupon Discount Bond and the same shall be redeemed by March 31,2014.

65. It is the say of the ld. DR that because of this restructuring, arrears of interest was converted into Zero Coupon Bonds and, therefore, any conversion of interest into debt would not amount to payment of interest u/s 43B of the Act r.w. Explanation 3C wherein it has been specifically mentioned that a deduction of any sum being interest payable shall be allowed if such interest has been actually paid and any interest referred to in that clause which has been

converted into loan or borrowing or debenture or any other instrument by which liability to pay is deferred to future date shall not be deemed to have been actually paid.

66. The ld. DR vehemently stated that these issues were never brought to the notice of the co-ordinate bench in A.Y 2004-05. Therefore, the decision laid down therein is not applicable for the year under consideration.

67. We have given thoughtful consideration to the issues raised by the ld. DR. In our considered view, the submission of the ld. counsel for the assessee that what is claimed is the interest year after year which is foregone for that particular year. In our considered opinion, it would be incorrect to say that the interest pertained to earlier years. In fact, interest upto A.Ys 2004-05 and 2005-06 have already been considered in those years and as the bonds are issued in A.Y 2004-05 as advance payment, the zero coupon bonds have been issued for liability accrued earlier, but paid in subsequent year.

68. We find that this aspect has been explained in the Financial Statement for F.Y. 2005-06 under the head "Notes on Accounts". Clause (e) Debt Restructuring reads as under:

Debt Restructuring:

Pursuant to the approved Debt Restructuring package, the Company has issued Zero Coupon Bonds (ZCBs) (Series A) of face value of Rs. 100 each aggregating to Rs. 51.385 crores to Financial Institutions and others towards conversion of Term Loan. ZCBs aggregating to Rs. 25.693 Crores were repaid on March 31,2005 and the balance have been repaid on March 31, 2006 as per terms of Restructuring.

Zero Coupon Bonds (Series B) of face value of Rs. 100 each aggregating to Rs. 55.5422 crores to Banks, Financial Institutions and others repayable no later than March 31,2014 towards the Net Present Value of the sacrifice made by them by way of reduction of interest rates from the contracted terms. The Company is creating provision on a year to year basis on the principle of Sinking Fund by applying the weighted average interest rate on outstanding borrowings prior to restructuring as the discount rate and thereby arrive at the amount of the yearly charge. The Company has obtained confirmation from professional experts with respect to appropriateness of the Sinking Fund Method as well as the adequacy of the charge on a year to year basis to account for the liability towards the ZCBs in the books. Accordingly, the Profit and Loss account has been debited with Rs. 32,664,127 (Previous Year Rs.

29,615,900) being the required amount towards provision and the corresponding liability has been created under the head Secured Loans. The company has redeemed ZCBs (Series B) aggregating to Rs. *27,771,1001-* during the year 2003-04 and the same has been adjusted against the face value of the Zero Coupon Bonds (Series B) issued by the Company.

- The Company has repaid Terms Loans to the Banks aggregating to Rs. 48.9111 Crores in the two Financial Years ending March 31,2005 and 2006 as per terms of restructuring."

69. In so far as application of section 43B is concerned, let us first consider the relevant provisions of the Act:

"43B(d). Any sum payable by the assessee as interest on any loan or borrowing from any public financial institutions [or a state financial corporation or a state industrial investment corporation], in accordance with the terms and conditions of the agreement governing such loan or borrowing [or]

XXXX

43B(e) any sum payable by the assessee as interest on any [loan or advances] from a scheduled bank [or a cooperative bank other than a primary agricultural credit society or a primary cooperative agricultural and rural development bank] in accordance with the terms and conditions of the agreement governing such loan [or advances].

70. Explanation 3C reads as under:

> "For the removal of doubts, it is hereby declared that a deduction of any sum, being interest payable u/s (d) of this section, shall be allowed if such interest has been actually paid and any interest referred to in that clause which has been converted into a loan or borrowing [or debentures or any other instrument by which the liability to pay is deferred to a future date] shall not be deemed to have been actually paid."

71. Applicability of this Explanation 3C to Section 43B of the Act has been explained by the Hon'ble Supreme Court in the case of M.M. Aqua Technologies Ltd 436 ITR 582. The relevant part reads as under:

> **"18. As has been pointed out hereinabove, the Finance Act, 2006 inserted Explanation 3C w.e.f. 1st April, 1989. The scope and effect of this provision was explained by the Board in Circular No.14/2006 dated 23rd December, 2006, as follows:**
>
> > **"16.2 It has come to notice that certain assessees were claiming deduction under section 43B on account of conversion of interest payable on an existing loan into a fresh loan on the ground that such conversion was a constructive discharge of interest liability and, therefore, amounted to actual payment. Claim of deduction against conversion of interest into a fresh loan is a case of misuse of the provisions of section 43B. A new Explanation 3C**

has, therefore, been inserted to clarify that if any sum payable by the assessee as interest on any loan or borrowing, referred to in clause (d) of section 43B, is converted into a loan or borrowing, the interest so converted, shall not be deemed to be actual payment.

16.3 This amendment takes effect retrospectively from 1st April, 1989 i.e. the date from which clause (d) was inserted in section 43B and applies in relation to the assessment year 1989-90 and subsequent years."

19. The object of Section 43B, as originally enacted, is to allow certain deductions only on actual payment. This is made clear by the non- obstante clause contained in the beginning of the provision, coupled with the deduction being allowed irrespective of the previous years in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by it. In short, a mercantile system of accounting cannot be looked at when a deduction is claimed under this Section, making it clear that incurring of liability cannot allow for a deduction, but only "actual payment", as contrasted with incurring of a liability, can allow for a deduction. Interestingly, the 'sum payable' referred to in Section 43B(d), with which we are concerned, does not refer to the mode of payment, unlike Proviso 2 to the said Section, which was omitted by the Finance Act, 2003 w.e.f. 1st April, 2004. The said Proviso reads as follows:

> **"Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date."**

20. This being the case, it is important to advert to the facts found in the present case. Both the CIT and the ITAT found, as a matter of fact, that as per a rehabilitation plan agreed to between the lender and the borrower, debentures were accepted by the financial institution in discharge of the debt on account of outstanding interest. This is also clear from the expression "in lieu of" used in the judgment of the learned CIT. That this is so is clear not only from the accounts produced by the assessee, but equally clear from the fact that in the assessment of ICICI Bank, for the assessment year in question, the accounts of the bank reflect the amount received by way of debentures as its business income. This being the fact-situation in the present case, it is clear that interest was "actually paid" by means of issuance of debentures, which extinguished the liability to pay interest.

21. Explanation 3C, which was introduced for the "removal of doubts", only made it clear that interest that remained unpaid and has been converted into a loan or borrowing shall not be deemed to have been actually paid. As has been seen by us hereinabove, particularly with regard to the Circular explaining Explanation 3C,

at the heart of the introduction of Explanation 3C is misuse of the provisions of Section 43B by not actually paying interest, but converting such interest into a fresh loan. On the facts found in the present case, the issue of debentures by the assessee was, under a rehabilitation plan, to extinguish the liability of interest altogether. No misuse of the provision of Section 43B was found as a matter of fact by either the CIT or the ITAT. Explanation 3C, which was meant to plug a loophole, cannot therefore be brought to the aid of Revenue on the facts of this case. Indeed, if there be any ambiguity in the retrospectively added Explanation 3C, at least three well established canons of interpretation come to the rescue of the assessee in this case. First, since Explanation 3C was added in 2006 with the object of plugging a loophole – i.e. misusing Section 43B by not actually paying interest but converting interest into a fresh loan, bona fide transactions of actual payments are not meant to be affected. In similar circumstances, in K.P. Varghese v. ITO, (1981) 4 SCC 173, this Court construed Section 52 of the Income Tax Act as applying only to cases where 'understatement' is be found – an 'understatement' is not to be found in the literal language of Section 52, but was introduced by this Court to streamline the provision in the light of the object sought to be achieved by the said provision. This Court, therefore, held:

> 13. Thus it is not enough to attract the applicability of sub- section (2) that the fair market value of the capital asset transferred by the assessee as on the date of the

transfer exceeds the full value of the consideration declared in respect of the transfer by not less than 15 per cent of the value so declared, but it is furthermore necessary that the full value of the consideration in respect of the transfer is understated or in other words, shown at a lesser figure than that actually received by the assessee. Sub-section (2) has no application in case of an honest and bona fide transaction where the consideration in respect of the transfer has been correctly declared or disclosed by the assessee, even if the condition of 15 per cent difference between the fair market value of the capital asset as on the date of the transfer and the full value of the consideration declared by the assessee is satisfied. ….

xxx xxx xxx

15. It is therefore clear that sub-section (2) cannot be invoked by the Revenue unless there is understatement of the consideration in respect of the transfer and the burden of showing that there is such understatement is on the Revenue. Once it is established by the Revenue that the consideration for the transfer has been understated or, to put it differently, the consideration actually received by the assessee is more than what is declared or disclosed by him, sub-section (2) is immediately attracted, subject of course to the fulfilment of the condition of 15 per cent or more difference, and the Revenue is then not required to show what is the precise extent of the understatement or in other words, what is the consideration

actually received by the assessee. That would in most cases be difficult, if not impossible, to show and hence sub-section (2) relieves the Revenue of all burden of proof regarding the extent of understatement or concealment and provides a statutory measure of the consideration received in respect of the transfer. It does not create any fictional receipt. It does not deem as receipt something which is not in fact received. It merely provides a statutory best judgment assessment of the consideration actually received by the assessee and brings to tax capital gains on the footing that the fair market value of the capital asset represents the actual consideration received by the assessee as against the consideration untruly declared or disclosed by him. This approach in construction of sub-section (2) falls in line with the scheme of the provisions relating to tax on capital gains. It may be noted that Section 52 is not a charging section but is a computation section. It has to be read along with Section 48 which provides the mode of computation and under which the starting point of computation is "the full value of the consideration received or accruing". What in fact never accrued or was never received cannot be computed as capital gains under Section 48. Therefore sub-section (2) cannot be construed as bringing within the computation of capital gains an amount which, by no stretch of imagination, can be said to have accrued to the assessee or been received by him and it must be confined to cases where the actual consideration received for the transfer is understated and since in such cases it is very difficult, if not impossible, to determine and prove the exact quantum of the suppressed consideration, sub-section (2) provides the statutory

measure for determining the consideration actually received by the assessee and permits the Revenue to take the fair market value of the capital asset as the full value of the consideration received in respect of the transfer.

22. Second, a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was stated in Sedco Forex International Drill. Inc. v. CIT, (2005) 12 SCC 717 as follows:

> **17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139] .) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of U.P., (1981) 2 SCC 585, 598] . If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482, 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that**

the phrases used are "it is declared" or "for the removal of doubts".

18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in S.G. Pgnatale [(1980) 124 ITR 391 (Guj)] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

19. When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively.

23. This being the case, Explanation 3C is clarificatory – it explains Section 43B(d) as it originally stood and does not purport to add a new condition retrospectively, as has wrongly been held by the High Court.

72. In light of our discussion above, in our considered opinion, the decision of the co-ordinate bench [supra] squarely apply and there are no new facts which makes the year under consideration different from A.Y 2004-05. Respectfully following the decision of the co-ordinate bench [supra] the appeal of the Revenue is dismissed.

73. In the result, the appeals of the Revenue are dismissed.

ITA No. 4413/DEL/2018 [A.Y 2009-10] [ASSESSEE's Appeal]

ITA No. 4414/DEL/2018 [A.Y 2010-11] [ASSESSEE's Appeal]

ITA No. 4415/DEL/2018 [A.Y 2010-11] [ASSESSEE's Appeal]

74. Challenge of the assessee is three-fold:

(i) Reopening of the assessment;

(ii) Enhancement by the ld. CIT(A); and

(iii) Merits of the Addition.

75. Reasons for reopening the assessment in A.Y 2009-10 read as under:

ANNEXURE-'A'

Name & address of assessee	:	M/s Noida Toll Bridge Co. Ltd., Toll Road DND Flyover, Opposite-Sector-15A, Noida.
PAN	:	AAACN3498A
Assessment Year	:	2009-10
Date	:	07.03.2016

REASONS UNDER SECTION 147 OF THE I.T. ACT.

Assessee was filed its Income Tax Return declaring taxable income of Rs. 1,49,80,613/- on 30.09.2009. The Case was selected for Scrutiny through CASS and assessment u/s 143(3) was completed on 23.12.2011. Further, it is noticed that the assessee company was to receive 20% of returns on its total cost of project as designated under the concession agreement dated 12.11.1997. The same was brought to notice of the department for the first time by means of report of independent auditor dated 15.11.2013 during F.Y. 2014-15 and showed returns at Rs. 274,51,30,610/- and which was recoverable to the assessee company as on 31.03.2009. The same was liable to be shown as receipts by the assessee company on accrual basis, but assessee failed to declare the same in its return of income for A.Y. 2009-10. Therefore, the fresh evidence shows an amount of Rs. 274,51,30,610/- has escaped assessment of the assessee company relevant to this A.Y.

Therefore, considering the above fact, I have reasons to believe that receipts amounting to Rs. 274,51,30,610/- accruing to the assessee during A.Y. 2009-10 has escaped assessment within the meaning of section 147 of the I.T. Act, 1961.Therefore, proceeding u/s 148 for the A.Y. 2009-10 under consideration is to be initiated with the approval of the Pr. Commissioner of Income Tax, Noida as per provision of Section 151(2) of the Income Tax Act, 1961. Accordingly proposal is being submitted to the Pr. Commissioner of Income Tax, Noida and notice u/s 148 of the I.T. Act, shall be issued accordingly.

(Rajesh Kumar, I.R.S)
Deputy Commissioner of Income Tax,
Circle-2, Noida.

76. Reasons for reopening the assessment in A.Y 2010-11 read as under:

ANNEXURE-'A'

Name & address of assessee	:	M/s Noida Toll Bridge Co. Ltd., Toll Road DND Flyover, Opposite-Sector-15A, Noida.
PAN	:	AAACN3498A
Assessment Year	:	2010-11
Date	:	07.03.2016

REASONS UNDER SECTION 147 OF THE I.T. ACT.

Assessee was filed its Income Tax Return declaring taxable income NIL on 13.10.2010. The Case was selected for Scrutiny through CASS and assessment u/s 143(3) was completed on 18.03.2013. Further, it is noticed that the assessee company was to receive 20% of returns on its total cost of project as designated under the concession agreement dated 12.11.1997. The same was brought to notice of the department for the first time by means of report of independent auditor dated 15.11.2013 during F.Y. 2014-15 and showed returns at Rs. 319,02,49,598/- and which was recoverable to the assessee company as on 31.03.2010. The same was liable to be shown as receipts by the assessee company on accrual basis, but assessee failed to declare the same in its return of income for A.Y. 2010-11. Therefore, the fresh evidence shows an amount of Rs. 319,02,49,598/- has escaped assessment of the assessee company relevant to this A.Y.

Therefore, considering the above fact, I have reasons to believe that receipts amounting to Rs. 319,02,49,598/- accruing to the assessee during A.Y. 2010-11 has escaped assessment within the meaning of section 147 of the I.T. Act, 1961.Therefore, proceeding u/s 148 for the A.Y. 2010-11 under consideration is to be initiated with the approval of the Pr. Commissioner of Income Tax, Noida as per provision of Section 151(2) of the Income Tax Act, 1961. Accordingly proposal is being submitted to the Pr. Commissioner of Income Tax, Noida and notice u/s 148 of the I.T. Act, shall be issued accordingly.

(Rajesh Kumar, I.R.S)
Deputy Commissioner of Income Tax,
Circle-2, Noida.

77, The reopening was challenged before the ld. CIT(A) and the ld. CIT(A) has not adjudicated this ground for the reasons discussed by us in detail while deciding the appeal for A.Y 2006-07 vide Para 16 above.

78. Before us, the ld. counsel for the assessee vehemently stated that the Assessing Officer was well aware of the Concession Agreement and the terms thereof and the assessee has explained in detail in the financial Statement for F.Y. 2008-09 with proper disclosure. Therefore, there was no new tangible material available with the Assessing Officer to invoke the provisions of section 147 of the Act. It is the say of the ld. counsel for the assessee that reopening is bad in law.

79. The ld. DR strongly supported the assessment order and vehemently stated that it is only after certificate of the Chartered Accountant designated return was quantified and at the stage of reopening, there should only be prima facie belief that certain income has escaped assessment. Therefore, reopening is valid and as per the provisions of law.

80. We have carefully perused the orders of the authorities below and the relevant documentary evidence brought to our notice. In the Schedule forming part of the accounts under the Significant Accounting Policy and Notes to Account, Clause (c) reads as under:

> **"The Independent Auditors of the Project appointed in terms of the Concession Agreement have ascertained the cost of the Delhi Noida Link Bridge incurred till March 31, 2001 on provisional basis pending certain payments, which would be effected on submission of the final bills by the contractor as per terms of the contract and clearance of the same by the Project Engineer designated under the Concession Agreement. The Independent Auditors have determined the amount to be recovered including 2()% return as designated under the Concession Agreement and due to the company till March 31, 2008 as Rs 12,841.30 million, The total amount to be recovered up to March 31, 2009 aggregates to Rs. 14,85.32 million as calculated by the Management and is subject to verification by the Independent Auditor".**

81. Thus, it can be seen that there was a full disclosure in the account itself. The ld. DR has raised strong objections to such disclosure drawing full support from Explanation 1 to Section 147 of the Act wherein it has been provided that production before the Assessing Officer of Account Book or other evidence from which

material evidence could, with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of Section 147 of the Act.

82. The issue which needs consideration is whether in the mentioned Notes forming part of the Account amounts to disclosure. This apprehension has been addressed by the Hon'ble Jurisdictional High Court of Delhi in the case of Sain Processing & Wvng Mills Pvt Ltd 325 ITR 565 wherein the Hon'ble High Court was seized with the following question of law:

> **"Whether the Income Tax Appellate Tribunal was correct in law in allowing depreciation of Rs 16,47,417/- in computation of book profits under Section 115J, even though it was not debited in the profit and loss account, although mentioned in the notes to the account?"**

83. The Hon'ble High Court answered as under:

> **"4.5 There is no dispute that the assessee has prepared the profit and loss account in the form prescribed i.e. Part II and III of Schedule VI to the Companies Act, as also that, the assessee has not charged depreciation in the profit and loss account and instead, has disclosed this fact alongwith the quantum**

of current year depreciation computed in accordance Section 205(2) of the Companies Act, as per the requirement of clause 3(iv) of Part II of Schedule VI of the Companies Act, by way of a note to the accounts. The said note as appearing in the profit and loss account and in so far as it is relevant is extracted hereinbelow:-

SAIN PROCESSING & WEAVING MILLS (P) LTD: DELHI

CONTINGENT LIABILITIES & NOTES ON ACCOUNTS

Annexed to the forming part of the accounts for the year ending on 31st March, 1990

Current yr. Previous yr.

Figures Period

1 to 3 *****

4. No provision for depreciation has been made due to inadequacy of profit. The unabsorbed amount of depreciation as Per Section 205(2)(b) of the Companies Act, 1956.

Depreciation for the year 1647417/- , 894275/- Unabsorbed depreciation carried 81,56,588/- 65,09,171/- Forward

4.6 The requirement of disclosure on failure to provide for depreciation, in the profit and loss account, as also, the quantum of such arrears, flows from Section 211, read with, clause 3(iv) of Part II of Schedule VI of the Companies Act. The reason

being; that there is, an obligation cast, on the company to present a true and fair view of its state of affairs to those who rely on its accounts. The provisions of Section 211 and clause 3(iv) of Part II of Schedule VI of the Companies Act, in so far, as they are relevant for the purposes of the present appeal are extracted below:-

"Section 211 (1) Every balance sheet of a company shall give a true and fair view of the state of affairs of the company as at the end of the financial year and shall, subject to the provisions of this section, be in the form set out in Part I of Schedule VI, or as near thereto as circumstances admit or in such other form as may be approved by the Central government either generally or in any particular case and in preparing the balance sheet due regard shall be had, as far as may be, to the general instructions for preparation of balance sheet under the heading „Notes" at the end of that part:

Provided that nothing contained in this sub-section shall apply to any insurance or banking company or any company engaged in the generation or supply of electricity or to any other class of company for which a form of balance sheet has been specified in or under the Act governing such class of company.

(2) Every profit and loss account of a company shall give a true and fair view of the profit or loss of the company for the financial year and shall, subject as aforesaid, comply with the

requirement of part II of Schedule VI, so far as they are applicable thereto.

(6) For the purpose of this section, except where the context otherwise requires any reference to a balance sheet or profit and loss account shall include any notes thereon or documents annexed thereto, giving information required by this Act and allowed by this Act to be given in the form of such notes or documents."

xxxx xxxx xxxx xxxx

"Part II

REQUIREMENTS AS TO PROFIT AND LOSS ACCOUNT

1. xxxxxx

2. xxxxxx

3. The profit and loss account shall set out the various items relating to the income and expenditure of the company arranged under the most convenient heads; and in particular, shall disclose the following information in respect of the period covered by the account:

I. xxxxxx

II. xxxxxx

III. xxxxxx

IV. The amount provided for depreciation, renewals or diminution in value of fixed assets. If such provision is not made by means of a depreciation computed in accordance with Section 205(2) of the Act shall be disclosed by way of a note."

4.7 Thus disclosure, according to us, in the notes to the account is obligatory by virtue of the provision of sub-section (1A) of Section 115J of the Act which requires that every assessee shall prepare profit and loss account in accordance with the provision of Parts II and III of Schedule VI of the Companies Act, 1956.

4.8 Having said that, the issue still remains as to whether notes to accounts form part of the accounts, and whether the fact that the current year depreciation which has not been debited to the profit and loss account would in any way deprive the assessee of its claim for the deduction from the „net profit" in arriving at the figure of "book profit" for the purposes of Section 115J of the Act.

4.9 The answer to this poser is found in sub-section (6) of Section 211 of the Companies Act, which provides that except where the context otherwise requires any reference to a balance sheet or profit and loss account shall include the notes thereon or documents annexed thereto, giving information required to be given and/or allowed to be given in the form of notes or documents by the Companies Act. As already noted it is obligatory under clause 3(iv) of Part II of Schedule VI to Companies Act to give information with regard to depreciation, which has not been provided for alongwith the quantum of arrears. According to us, once this information is disclosed in the notes to the account it would clearly fall within the ambit of the explanation to Section 115J of the Act which defines "book

profit" to mean „net profit" as „shown" in the profit and loss account for the relevant assessment year.

4.10 To our minds, as long as the depreciation which is not charged to profit and loss account but is otherwise disclosed in the notes of the accounts, it would come within the ambit of the expression „shown" in the profit and loss account, as notes to the account, form part of the profit and loss account by virtue of a sub-section (6) of Section 211 of the Companies Act, 1956. This is quite evident if the provisions of sub- section (6) of the Section 211 of the Companies Act, are read in conjunction with, sub-section (1A), as well as, the explanation to Section 115J of the Act.

4.11 Another important aspect of the matter is that the expression used by legislature is „net profit" in contra distinction to the well known accounting term „cash profit". The net profit of a company cannot be determined till all items of income and expenses as recognized, as well as, depreciation are taken into account. Depreciation is nothing but loss of value of an asset arising from its use, efflux of time or obsolescence over a period of its useful life. Depreciation, undoubtedly has a major impact in determination of the financial position of a company/enterprise.

4.12 To our minds the use of the expression „net profit" makes it clear that depreciation not debited to the profit and loss account will have to be taken into while determining "book profit" under Section 115J of the Act, as long as it forms part of the prescribed accounts. 4.13 This Bench, in the case of CIT Vs.

Khaitan Chemicals Fertilizers Ltd; being ITA No 301/2007, in its judgment dated 27.09.2008 dealt with a similar situation. In that case the issue which arose for consideration of the Court was whether prior period expenses/extraordinary items were required to be reduced from „net profit" as shown in profit and loss account in arriving at „book profits" for the purposes of Section 115JA of the Act. The assessee in that case had shown prior period expenses/extraordinary items in the profit and loss account after the figure of net profit had been struck in the profit and loss account. In other words, prior period expenses/extraordinary items had been shown in the profit and loss account though separately from the figure of net profit, in consonance with the provisions of Accounting Standard 5 issued by the Council for the Chartered Accountants of India. The Revenue had submitted that no adjustment to the figure of „net profit" could be made as the only deductions which could be made from the figure of net profit were those which were covered in Clause (i) to

(ix) of Section 115JA (2) of the Act. It was contended that since prior period expenses/extraordinary items did not find mention in any of the clauses, referred to above, no adjustment could be made to the „net profit" figure, as disclosed in the profit and loss account for arriving at the „book profit" for the purpose of Section 115JA. We rejected the submission made by the Revenue and held that there was a fundamental flaw in the Assessing Officer"s approach, in as much as, he was under the impression that the assessee was claiming a deduction in the net profit in terms of Clause (i) to (ix) of the explanation to Section

115JA (2). It was observed that assessee all along contended that the net profit was to be computed on the basis of the profit and loss account which, in turn, was required to be in accordance with the provisions of Parts II and III of Schedule VI of the Companies Act. It was further observed that the computation of net profit in view of the prescribed Accounting Standard (AS-5) required prior period expenses/extraordinary items to be shown separately and the fact that these items were shown separately did not mean that they would not constitute part of the net profit. 4.14 The court also observed that the normal approach is to include prior period items in the determination of net profit or loss for the current period; however, the alternative approach was to show such items in the statement of profit and loss account after determination of current net profit or loss so as to indicate the effect of such items on the current profit and loss.

4.15 In our view, the ratio of the said judgment would apply notwithstanding the fact that there is no debit to the profit and loss account, in view of our discussion above that net profit cannot be determined without taking into account the information disclosed in the notes appended to the accounts which as observed by us hereinabove, form part of the accounts of the company/assessee.

5. The matter can be looked at from another angle. Under clause (iv) of the Explanation to Section 115J, the net profit as shown in the profit and loss account is to be reduced by, the amount of loss or depreciation which would be required to be set off against profit of the relevant previous year as if the provisions of clause

(b) of the first proviso to sub- section (1) of Section 205 of the Companies Act, are applicable. In other words Section 205(1) proviso (b) of the Companies Act read with clause

(iv) of the explanation to Section 115J, permits reduction in the „net profit" to the extent of past losses or unabsorbed depreciation whichever is less. This makes the legislative intent clear. According to us, if unabsorbed depreciation can be reduced from „net profit" to arrive at book profit we see no reason why current year's depreciation even though, not charged, to the profit and loss account though disclosed in the notes appended to the accounts cannot be deducted from the "net profit" in determining "book profit" for the purposes of Section 115J of the Act. In our opinion the assessee is entitled to seek deduction of current year depreciation from net profit to arrive at the „book profit" even though it is not charged to the profit and loss account, though disclosed in the notes appended to the accounts.

6. In view of the discussions above, we answer the question of law framed by us in favour of the assessee and against the Revenue. In the result, the appeal is dismissed."

84. Considering the disclosure mentioned hereinabove, in light of the decision of the Hon'ble High Court [supra], we have no hesitation in holding that assumption of jurisdiction by issuance of notice u/s 148 of the Act is bad in law thereby making the reassessment proceedings invalid and assessment order bad in law.

85. Enhancement made by the ld. CIT(A) u/s 251 of the Act and merits of the addition have been considered and decided in extensio hereinabove while considering the appeal for A.Y 2006-07 [supra]. For our detailed discussion therein, we decide accordingly.

86. In addition to the identical grievances, the assessee has also challenged the disallowance of agency fees of Rs. 32.55 lakhs in A.Y 2010-11 in ITA No. 4415/DEL/2018.

87. The underlying facts show that in terms of concession agreement, the assessee was required to appoint and bear the cost of several consultants like the independent auditor and the independent engineer. These agents were hired by the assessee as per the terms of concession agreement. The agency fee paid by the assessee to such persons was disallowed by the Assessing Officer.

88. A similar issue was considered by the co-ordinate bench in ITA No. 5246/DEL/2012. The relevant findings read as under:

"3. As regards ground no.1, the brief facts of the case as emanating from the order of the AO are reproduced hereinbelow.

> "During the assessment proceedings assessee also filed concession Agreement. Perusal of concession agreement entered between NEW OKHLA INDUSTRIAL DEVELOPMENT AUTHORITY AND INFRASTRUCTURE LEASING & FINANCIAL SERVICES LIMITED AND NOIDA TOLL BRIDGE PROJECT ITAs No.5246, 5247, 5248, 5249, 5286/Del/2012 3 COMPANY LIMITED reveals that independent Engineer is sole Authority to determine whether to issue or not issue certificate of compliance or conditional certificate of compliance contingent upon satisfaction of conditions mentioned in the concession agreement within 365 days from the date of signing of this agreement on 12.11.1997. Independent Auditor is required to give a reasoned decision on the basis of various submission made to him by the concessionaire i.e. assessee and NOIDA on non fulfillment of conditions on the certificate. Hence the above clearly shows that the work of independent Auditor was related to setting up and commissioning of the Noida Toll Bridge. He would also take decisions related to the fact that the assessee has right to terminate the concession agreement or not. His work also involves revising terms and conditions of the concessioin agreement vide which assessee was given the Right to establish and operate DND flyway. There are several other duties of independent Engineers mentioned in the concession agreement which clearly establishes that the work of independent Engineer is related to establishment, construction and commissionf of the

DND Fly over and after its establishment, construction and commissioning to see whether or Noida and concessionaire i.e. assessee follow terms and conditions of the agreement or not and to alter the same as and when required. As per concessiion agreeemnt independent Auditors are required to determine the total cost of project from time to time and recovery vis a vis the project cost and give the estimated results thereof. Both independent Engineer and indepent Auditor are also requird to review cost and recovery position form time to time and be instrumental in determining whether development rights of the land around the Toll Bridge should or should not be granted to the concessionaire i.e. assessee, depending upon the recovery position. If recovery is slow Noida is required to allow assessee developmental rights of land around the flyway whereas if the recovery is fast the same is not required. When the in the same way concession agreement also mentions about retainers. All these details related to works assigned to independent Engineer, independent Auditor and, retainer is related to establishment, construction and commissioning of the DND Fly over to oversee and review position of recovery for the fly over vis-à-vis the cost involved. Hence the expense of Rs.22,55,046/- pais as Agency fee and claimed as expenditure in P & L account is not allowable since it is a capital expenditure. The same is treated as capital expenditure and the same is added back, to the income of the assessee."

4. Learned CIT(A) deleted the additions so made by the AO for the reasons mentioned in his order at pages 53 and 54 of his order.

5. We have heard the rival contentions and perused the facts of the case.

6. Learned CIT-DR, at the outset relied upon the order of the AO and page 547 of the concession agreement.

7. Learned AR, on the other hand, relied upon the order of the learned CIT(A).

8. After perusing the record, we are of the view that learned CIT(A) has passed a reasoned order and has rightly observed that the Independent Auditor and the Independent Engineer were to be appointed by the Lenders, NOIDA and the assessee were required to be there for the entire concession period. The Concession Agreement clearly differentiated between the activities of these agents during the pre-construction, commissioning and post commissioning period. Since the project got commissioned in February, 2001, the activities of these agents during the post commissioning period is of relevance to determine their deductibility while computing the taxable income of the AY 2006-07. As per Section 85 of Article 8 of the Concession Agreement, the function of Independent Engineer, post commissioning of the project, was to monitor that the maintenance of the Noida Bridge was being carried on in conformity with the terms of the agreement and to certify the cost of such maintenance while the function of the Independent Auditor was to independently audit and certify the books of account of the assessee on a quarterly basis and also to certify the recovery position of the assessee. The' reports of these agents were to be accessible to the Lenders, NOIDA and the other promoter shareholders only. Similarly, under the terms of the

inter-se Agreement. the assessee was required to appoint Trust & Retention Agent. Security Agent, etc. for the purposes of administrating the secured loans and the secured property, to coordinate the enforcement of the respective rights, powers and remedies of the Lenders etc. While the Security Agent was required to ensure that all charges created were duly registered and secure and proper asset cover is maintained by the assessee, the Trust & Retention Agent was required to create, maintain and operate a Trust and Retention Account and ensure that the funds were being utilized as per the terms on which the funding was done by the lenders and that no terms had not been violated and that the rights of the parties were protected. In view of the functions of these agents and contents of various clauses of the agreements, it is evident that the services of these agents were availed in order to ensure that the assessee has complied with the terms and conditions of the various agreements entered into by the assessee. The assessee was required to appoint these agents as a part of the agreements and in order to safeguard the interest of the stakeholders, was a business necessity for the assessee. The services were provided by these agents on a regular basis and thus were recurring in nature. The services of these agents helped the assessee in proper and efficient implementation of the agreements and thereby resulting in smooth functioning of the assessee's business. Further, the project got commissioned in February, 2001 and was fully operational during the FY 2005-06. The AO seems to have misread the Agreements to wrongly conclude that since the works assigned to independent Engineer, independent Auditor and, retainer is related to establishment, construction and commissioning of the DND Fly over and to oversee and review position

of recovery for the fly over vis-a-vis the cost involved, the expenses incurred by the assesse in this regard is capital in nature. In this context it is also worthwhile to mention the fact that the Tax authorities never questioned the deductibility of above expense (i.e. Agency Fee) while dealing with assessee's case in respect of AY 2002-03 to 2005-06 which speaks for inconsistency in the approach and also go to support the claim of the assessee that the expenses in question were allowable revenue expenditure. In view of the above, we are of the considered view that the ITAs No.5246, 5247, 5248, 5249, 5286/Del/2012 6 services performed by these agents are revenue in nature and fulfills the conditions prescribed under section 37(1) of the Act. Therefore, the agency fees incurred by the assessee during the F.Y. 2005-06 are allowed as revenue expenditure and the addition made by the Assessing Officer has rightly been deleted by the ld. CIT(A) and we find no infirmity in his order. Accordingly, Ground No.1 of Revenue is dismissed."

89. Respectfully following the decision of the co-ordinate bench (supra) we direct the Assessing Officer to delete the agency fee. This ground is accordingly allowed.

90. In the result, the appeals of the assessee are allowed.

ITA No. 4973/DEL/2018 A.Y 2009-10 [Revenue's Appeal]

ITA No. 4971/DEL/2018 A.Y 2010-11 [Revenue's Appeal]

91. Grievances of the revenue are identical to what has been considered by us in A.Y 2006-07. Identical issues have been elaborately discussed and decided by us hereinabove in extensio in A.Y 2006-07. For our detailed discussion therein, appeal of the Revenue are dismissed.

92. In the result, the appeals of the Revenue are dismissed.

ITA No. 4416/DEL/2018 [A.Y 2011-12] [ASSESSEE's Appeal]

93. Challenge of the assessee is two-fold:

(i) Addition on account of Agency Fee;
(ii) Enhancement by the ld. CIT(A); and

94. The aforementioned challenge has been decided by us in detail vide ITA No. 4414/DEL/2018 for A.Y 2010-11. For our detailed discussion therein, the ground of appeal of the assessee is allowed.

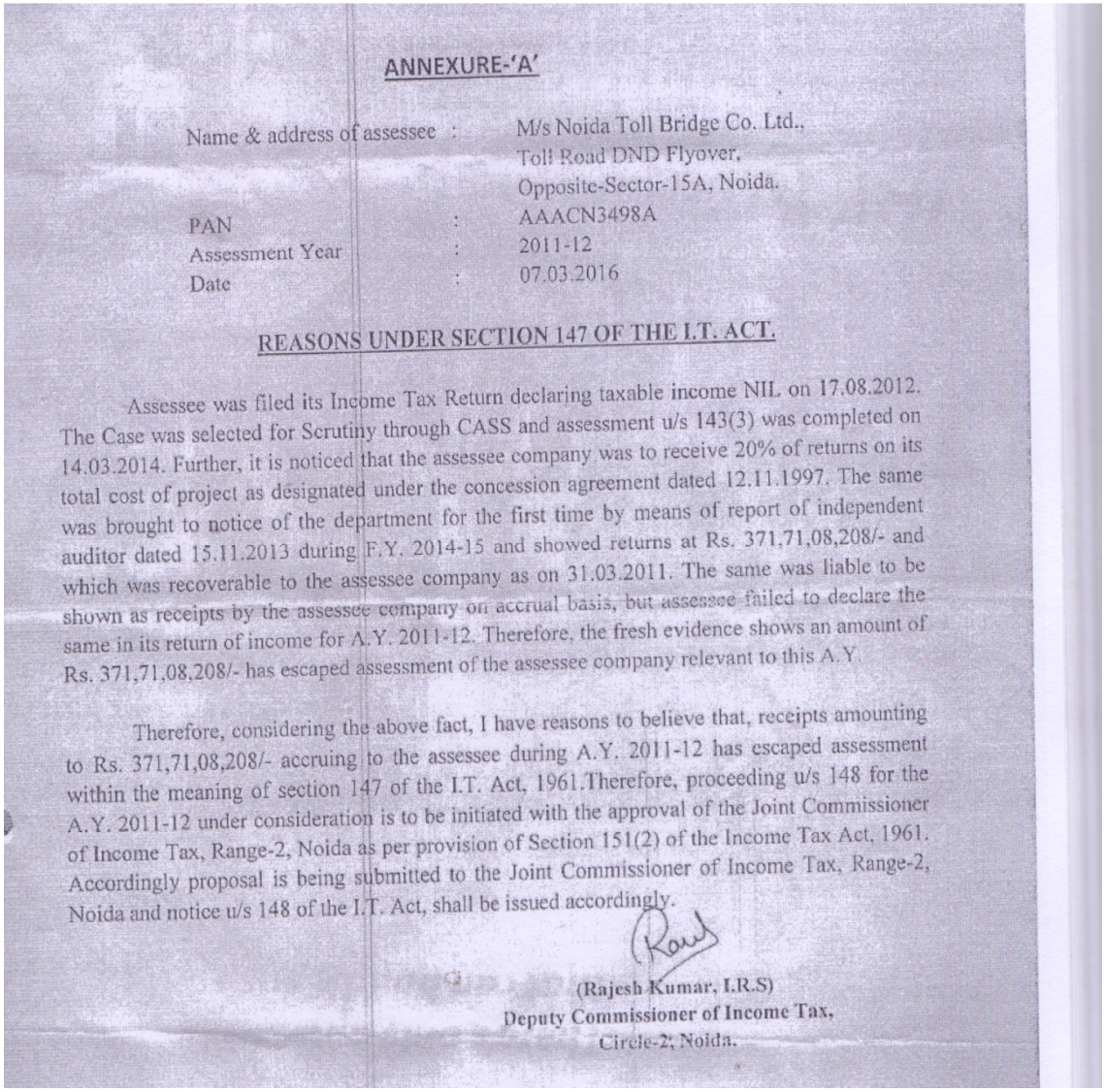
95. In the assessee result, the appeal of the assessee is allowed

96. Challenge of the assessee is two-fold:

(i) Reopening of the assessment;

(ii) Enhancement by the ld. CIT(A); and

97. Reasons for reopening the assessment read as under:



ANNEXURE-'A'

Name & address of assessee : M/s Noida Toll Bridge Co. Ltd.,
Toll Road DND Flyover,
Opposite-Sector-15A, Noida.

PAN : AAACN3498A
Assessment Year : 2011-12
Date : 07.03.2016

REASONS UNDER SECTION 147 OF THE I.T. ACT.

Assessee was filed its Income Tax Return declaring taxable income NIL on 17.08.2012. The Case was selected for Scrutiny through CASS and assessment u/s 143(3) was completed on 14.03.2014. Further, it is noticed that the assessee company was to receive 20% of returns on its total cost of project as designated under the concession agreement dated 12.11.1997. The same was brought to notice of the department for the first time by means of report of independent auditor dated 15.11.2013 during F.Y. 2014-15 and showed returns at Rs. 371,71,08,208/- and which was recoverable to the assessee company as on 31.03.2011. The same was liable to be shown as receipts by the assessee company on accrual basis, but assessee failed to declare the same in its return of income for A.Y. 2011-12. Therefore, the fresh evidence shows an amount of Rs. 371,71,08,208/- has escaped assessment of the assessee company relevant to this A.Y.

Therefore, considering the above fact, I have reasons to believe that, receipts amounting to Rs. 371,71,08,208/- accruing to the assessee during A.Y. 2011-12 has escaped assessment within the meaning of section 147 of the I.T. Act, 1961.Therefore, proceeding u/s 148 for the A.Y. 2011-12 under consideration is to be initiated with the approval of the Joint Commissioner of Income Tax, Range-2, Noida as per provision of Section 151(2) of the Income Tax Act, 1961. Accordingly proposal is being submitted to the Joint Commissioner of Income Tax, Range-2, Noida and notice u/s 148 of the I.T. Act, shall be issued accordingly.

(Rajesh Kumar, I.R.S)
Deputy Commissioner of Income Tax,
Circle-2, Noida.

98. Similar reasons were considered by us while deciding the appeal for A.Y 2010-11. For our detailed discussion therein, reopening is held as invalid.

99. Enhancement made by the ld. CIT(A) has been elaborately discussed and decided by us hereinabove in extensio in A.Y 2006-07. For our detailed discussion therein, enhancement made by the ld. CIT(A) is held to be bad in law.

100. In the result, appeal of the assessee is allowed.

ITA No. 4972/DEL/2018 A.Y 2011-12 [Revenue's Appeal]

101. Grievances of the revenue are identical to what has been considered by us in A.Y 2006-07. For our detailed discussion therein, appeal of the Revenue is dismissed.

102. In the result, the appeal of the Revenue is dismissed

103. Since the appeals by the assessee have been decided, the stay applications have become infructuous.

103. To sum up, the Stay Applications of the assessee in:

SA No. 564/DEL/2018	-	Infructuous
SA No. 565/DEL/2018	-	Infructuous
SA No. 566/DEL/2018	-	Infructuous
SA No. 567/DEL/2018	-	Infructuous
SA No. 568/DEL/2018	-	Infructuous
SA No. 569/DEL/2018	-	Infructuous

The appeals of the assessee in :

ITA No.4410/DEL/2018 [A.Y. 2006-07]	-	Allowed
ITA No.4411/DEL/2018 [A.Y. 2007-08]	-	Allowed
ITA No.4412/DEL/2018 [A.Y. 2008-09]	-	Allowed
ITA No.4413/DEL/2018 [A.Y. 2009-10]	-	Allowed
ITA No.4414/DEL/2018 [A.Y. 2010-11]	-	Allowed
ITA No.4416/DEL/2018 [A.Y. 2011-12]	-	Allowed
ITA No.4417/DEL/2018 [A.Y. 2011-12]	-	Allowed

The appeals of the Revenue in :

ITA No. 4968/DEL/2018 [A.Y. 2006-07]	-	Dismissed
ITA No. 4969/DEL/2018 [A.Y. 2007-08]	-	Dismissed
ITA No. 4970/DEL/2018 [A.Y. 2008-09]	-	Dismissed
ITA No. 4973/DEL/2018 [A.Y. 2009-10]	-	Dismissed
ITA No. 4971/DEL/2018 [A.Y. 2010-11]	-	Dismissed
ITA No. 4972/DEL/2018 [A.Y. 2011-12]	-	Dismissed

Order pronounced in the open court on 08.08.2023.

Sd/- **Sd/-**

[ASTHA CHANDRA]
JUDICIAL MEMBER

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 08th AUGUST, 2023.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	