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Deepak Fertilisers & Petrochemicals Corporation Ltd. v. Dy. CIT ()

INCOME TAX ACT, 1961

--Capital or revenue receipt--Application money received against partly convertible debentures forfeited due to non-payment of call monies--Assessee had issued partly convertible debentures in financial year 1989-90 against which it received application money. However, after the allotment the applicants could not make the payments as per terms of issued debentures. In assessment year 1999-2000, assessee forfeited the amount received against applications money on account of non-payment of call-monies and credited the forfeited amount to P&L A/c. Assessee contended before the AO that since the forfeiture of application money was related to debentures, the amount received was capital in nature. Not satisfied with explanation of the assessee, the AO made additions in computing total income of assessee in assessment year 1999-2000. **Held:** Not correctly so. Forfeiture of application money amounted to capital receipt and the same could not be charged to tax. [*Para 14*]

Income Tax Act, 1961 Section 4

INCOME TAX ACT, 1961

--Depreciation--*Ownership Purchase of shares of company entitling assessee to exclusive right to use and occupy flats constructed by said company--*Assessee had purchased shares of Y company on the basis of which it got exclusive rights to use and occupy certain flats constructed by the said company. AO was of the view that assessee had only purchased the shares and not buildings, therefore, depreciation was not allowable under section 32. Before CIT(A), assessee drew attention to Articles of Association of company to point out that shareholders of company holding the shares bearing distinctive numbers as specified are allotted and given the exclusive rights to use and occupy the premises in specified buildings. Assessee contended that ownership of flats is attached with said purchased shares having particular distinctive numbers and consequently, whoever hold such shares shall be entitled to exclusive use and occupation of such flats. CIT(A) after considering Articles of Association of company |Y|, provisions

of section 27(iii), section 2(47)(vi) and section 269UA alongwith ruling of Apex Court in *CIT v. Podar Cement (P) Ltd. & Ors., (1997) 226 ITR 625 (SC)* held that assessee was owner of the premises allotted to it by virtue of purchase of shares and consequently it was entitled to depreciation thereon. **Held:** Justified. Word |owned| in section 32 has to be understood in a wider sense and not in the legal sense in terms of provisions of TP Act. The true test would be whether assessee can exercise the right of the owner in his own right to the exclusion of others. Objection of AO that property cannot be transferred through transfer of shares cannot be sustained. Articles of Association of company |Y| engaged in business of real estate provide that by virtue of holding of particular numbers of shares having particular distinctive numbers, the holder would be entitled to have exclusive possession of a particular number of flats so as to have exclusive use and occupation of the said flat. Thus, ownership of a flat is attached with a particular and specific share having specified distinctive numbers. Therefore, if that share is transferred, then the absolute ownership of that flat is automatically transferred to the other party and the company has no power to refuse the transfer of such share from one person to another. This is an acceptable mode of transfer of property in the case of a company and is duly recognized by section 2(47)(vi), section 27(iii) as well as section 269UA(d). Assessee had become the owner of the properties by virtue of holding of shares of Y Ltd. and consequently, it was entitled to claim depreciation thereon.

There is no dispute that in order to claim the depreciation in respect of any property it is the condition precedent that assessee must be the owner of that property and the same is used for the purpose of business. The word |owner| has not been defined in the Income Tax Act and therefore, the question arises as to what meaning should be assigned to the word |owned| used by the legislature in section 32. [Para 5] The word |owned| in section 32 has to be understood in a wider sense and not in the legal sense in terms of the provisions of Transfer of Property Act. The true test would be whether the assessee can exercise the rights of the owner in his own right to the exclusion of others. If the answer is in affirmative, then assessee would be entitled to depreciation under section 32. [Para 8] The assessing officer has observed that purchase of shares cannot be equated with the purchase of property. There cannot be any dispute that generally, mere purchase of shares in a company would not entitle the shareholder to enjoy the rights of an owner in respect of the properties owned by the company since both the entities are distinct and separate. However, articles of association of a company engaged in the business of real estate may provide that shareholder of particular shares would be entitled to exercise the rights of owner in respect of properties owned by the company. Such mode of transfer is duly recognized by the legislature in the provisions of section 2(47)(vi), section 27(iii) and section 269UA(d)(ii). It is because of the provisions of section 269UA(d)(ii) that assessee was required to obtain no objection certificate from the competent authority prescribed under Chapter XX. All these provisions, if read together, lead to the only inference that legislature has accepted the fact of transfer of property through the transfer of shares of a company. Therefore, the objection of the assessing officer that property cannot be transferred through the transfer of shares cannot be sustained. [Para 9] Articles company |Y| shows that by virtue of holding of particular numbers of shares having particular distinctive numbers, the holder would be entitled to have exclusive possession of a particular number of flat so as to have exclusive use and occupation of the said flat. Thus,

ownership of a flat is attached with a particular and specific share having specified distinctive numbers. Therefore, if that share is transferred then the absolute ownership of that flat is automatically transferred to the other party and the company has no power to refuse the transfer of such share from one person to another. This is an acceptable mode of transfer of property in the case of a company and is duly recognized by section 2(47)(vi), section 27(iii) as well as section 269UA(d). Assessee had become the owner of the properties by virtue of holding of shares of Y Ltd. and consequently, it was entitled to claim depreciation. [Para 10]

Income Tax Act, 1961 Section 32

INCOME TAX ACT, 1961

--Business deduction under section 36(1)(iii)--Interest on borrowed capital utilised for setting up of new unit--Assessee-company was engaged in the business of manufacturing of liquid ammonia since the year 1983. It was entirely dependent on two other companies to sustain production. In order to reduce this dependency and also with a view to optimize utilization of existing ammonia plant and further to diversify its operations, assessee-company decided to set up an additional plant for manufacture of ammonia nitro phosphate, diluted nitric acid and other similar products. The basic raw-material for all these products was liquid ammonia which was already manufactured by assessee-company in existing plant. In order to finance the new project, company issued debentures and also procured loans on which interest was paid by the assessee. Such payment of interest was claimed as deduction under section 36(1)(iii). AO disallowed the claim of assessee. CIT(A) allowed the claim of assessee by holding that new project was an expansion of the existing business and, therefore, the interest on borrowed funds utilized for new project was deductible under section 36(1)(iii). **Held:** Justified. Setting up of new unit by the assessee-company to reduce dependency in sustaining production was an expansion of existing business, therefore, interest on borrowed funds utilised for new unit was allowable as deduction under section 36(1)(iii). [Para 1]

Income Tax Act, 1961 Section 36(1)(iii)

INCOME TAX ACT, 1961

--Business expenditure--Allowability *Assessee following consistently accounting system of booking expenses only when bills/vouchers received or claims settled--*For assessment years 1997-98 to 2000-01, assessee claimed certain expenditure as prior period expenses.

AO disallowed the same without much discussion. Before CIT(A) it had been contended that certain expenses were not supported by the bills/vouchers and sometimes, the claims were not processed and accepted by the accounts department. As and when such bills/vouchers were received or claims were settled the expenses were booked though; sometimes it might relate to earlier years. It was also submitted that such procedure was being followed consistently. CIT(A) taking into consideration earlier decision of jurisdictional court in the case of *CIT v. Nagri Mills Co. Ltd. (1958) 33 ITR 681 (Bom)* wherein Bombay High Court observed that where the deduction is obviously a permissible deduction, then the department should not dispute as to the year in which deduction should be allowed. Following the aforesaid observations of jurisdictional High Court and for the sake of consistency, CIT(A) upheld the contention of assessee and consequently, disallowances made by AO were deleted. **Held:** Justified. The issue being covered by the decision of Tribunal dated 31-12-2004 in assessee's own case for the assessment year 1990-91, wherein system of accountancy adopted by the assessee had been accepted, therefore, orders of CIT(A) upheld. [Para 11]

Income Tax Act, 1961 Section 37(1)

INCOME TAX ACT, 1961

--Interest under section 234C--Chargeability *Income computed under section 115JA--*
For the assessment years 1997-98 and 1998-99 the income of assessee-company was computed under section 115JA and interest under section 234C was levied. **Held:** Not justified. Book profits under section 115JA cannot be computed unless the books of accounts are finalized and consequently, the question of estimating book profits before the end of the financial year does not arise. Unless there is a liability to pay the advance tax under section 207 and onwards, the question of levying of interest under sections 234B and 234C would not arise. [Para 15]

Income Tax Act, 1961 Section 234C

Deepak Fertilisers & Petrochemicals Corporation Ltd. v. Dy. CIT

In the ITAT, Mumbai 'C Bench K.C. Sihgal, J.M. & A.K. Garodia, A.M.

ITA Nos. 2188, 2189, 2717, 2718 & 7956/Mum/2004; 21 September, 2007 A.Y. 1997-98 to 2001-02

Income Tax Act, 1961, section 32(1);In favour of: Assessee

Counsel : H.P. Mahqjani, *for the Assessee* KM. Prasad, *for the Revenue*

ORDER

By The Bench

These are cross-appeals filed by the assessee as well as revenue pertaining to assessment years 1997-98 to 2001-02, which have been heard together and are being disposed of by the common order for the sake of convenience.

Departmental Appeals :

The first issue relates to. disallowance of interest under section 36(1)(iii) of Income Tax Act, 1961 (the Act). This issue arises in the appeals relating to assessment years 1997-98, 2000:01 and 2001-02. Since facts are identical and the issue originates from the assessment year 1990-91, the facts as found by the Tribunal in the appeal relating to, assessment year 1990-91 are being narrated hereafter. The assessee company was engaged in the business of manufacturing of liquid ammonia since the year 1983, The basic raw material was industrial gas which was supplied by ONGC. The goods manufactured were sold to Rashtriya Chemicals & Fertilisers (RCF) and Zuari Agro Chemicals Ltd. (ZACL). The assessee company was entirely dependent on the aforesaid two companies to sustain the production. In order to reduce this dependancy and also with a view to optimize utilization of existing ammonia plant and further to diversify its operations, the assessee company decided to set up an additional plant for the manufacture of ammonium nitro-phosphate, diluted nitric acid and certain other similar products. The basic raw material for all these products was the liquid ammonia which was already manufactured by the assessee company in tile existing plant. In order to finance the new project, the company issued debentures and also procured loans on which interest was paid by the assessee. Such payment of interest was claimed as deduction under section 36(1)(iii) of the Act in the assessment year 1990-91 and the subsequent assessment years. The assessing officer following his earlier order, disallowed the claim of the assessee but the learned Commissioner (Appeals) following his earlier order allowed the claim of the assessee by holding that the new project was an expansion of the existing business and therefore the interest on borrowed funds utilized for the new project was deductible under section 36(1)(iii) of the Act. Aggrieved by the same, the revenue is in appeal before the Tribunal.

2. After hearing both the parties, we find that this issue is covered in favour of the assessee by the decision of the Tribunal dated 31-12-2004 in assessee's own case pertaining to assessment year 1990-91 wherein it has been held that setting up of new unit was an expansion of the existing business and therefore the interest on borrowings was allowable as deduction under section 36(1)(iii) of the Act. Following the said decision, the orders of learned Commissioner (Appeals) for the years under consideration are upheld.

3. The next issue relates to the claim of the assessee regarding the depreciation on premises acquired by purchase of shares. Briefly stated the facts are that the assessee had claimed depreciation of Rs. 1,23,79,682 comprising of Rs. 5,98,625 for residential buildings and Rs. 1,17,81,057 for non-residential buildings. In the course of assessment proceedings, it was found by the assessing officer that assessee had purchased 13,772 equity shares of Yarrowda Investments Ltd. having face value of Rs. 10 each for a total consideration of Rs. 2,582.25 lakhs on the basis of which the assessee got the exclusive right to use and occupy certain flats constructed by the said company. The assessing officer was of the view that assessee had only purchased the shares and not the buildings and therefore depreciation was not allowable under section 32 of the Income Tax Act. Accordingly, the assessee was asked to show cause why the depreciation should not be disallowed. In response to the same, the assessee *vide* letter dated 13-11-1999 provided the complete details of equity shares purchased along with their distinctive numbers and the specified area of entitlement. Thereafter, it was stated by the assessee as under :

"The said shares entitle the company to have exclusive right to use and occupy for purpose of its business the said premises. Also, please note that such shares are freely transferable and the board of directors of the issuing company shall have no power to refuse, to register transfer or transmission of the share on any ground except for non-compliance with administrative formalities and law relating to transfer of shares.

The above situation is indeed *in pari materia* with a co-operative housing society wherein a society is the legal owner of the building while members, by virtue of their shareholding in the society, have exclusive right to use and occupy the premises. Form 37-I were also filed and no objection certificates under section 269UL(3) of the Income Tax Act, 1961 were obtained from the income-tax appropriate authority."

Further *vide*, letter dated 19-1-2000, it was reiterated that on the basis of purchase of shares, the assessee company became entitled to have exclusive right to use and occupy certain premises which are freely transferable. Thus, the transaction is *in pari materia* with a co-operative housing society. The possession of the said premises were taken by the assessee company and the valuation of such property has also been shown in the Wealth Tax return. Reliance was also placed on the Supreme Court judgment in the case of *Mysore Minerals Ltd. v. CIT (1999) 239 ITR 775 (SC)*. Reference was also made to the provisions of section 27(iii) of the Income Tax Act which treats such transactions as transaction of deemed ownership. However, the assessing officer was not satisfied with the submissions of the assessee since in his view, the assessee was only the owner of shares and not the immovable property and consequently the assessee was not entitled to any depreciation in the absence of any specific provisions. According to him, the ownership of shares could not be equated with the ownership of building. Further the fact that such properties are considered for the purpose of wealth-tax assessment and the fact that clearance in Form No. 37-I has been obtained are not relevant for deciding this issue. Regarding the definition provided in section 27, it was observed by him that had there been any intention of the legislature, as incorporated in section 27(iii), the same could have also been incorporated in section 32 of the Act. Therefore, rejecting all the contentions of the assessee, the claim of the assessee for depreciation was rejected.

4. The matter was carried in appeal before the learned Commissioner (Appeals) before whom the submissions as raised before the assessing officer were reiterated. In addition, the assessee drew attention of the learned Commissioner (Appeals) to the articles of association of the company to point out that shareholders of the company, holding the shares bearing certain distinctive numbers, as mentioned in Annex. 'A' are allotted and given an exclusive right to use and occupy the premises in different buildings specified in Annex. 'A'. The illustration was given to the effect that shares bearing distinctive Nos. 52401 to 52428 evidenced by share certificate No. 304 are entitled to exclusive right to use and occupy 350 sq. ft. being flat 1 in 'A' Wing of residential building No. A-I. Thus, ownership of this flat is attached with the aforesaid share having the said distinctive numbers and consequently, whosoever holds such shares shall be entitled to exclusive use and occupation of such flat. The learned Commissioner (Appeals), considering the articles of association of the company, the provisions of section 27(iii), section 2(47)(vi) and section 269UA of the Income Tax Act as well as the judgment of Supreme Court in the case of *CIT v. Podar Cement (P) Ltd. & Ors. (1997) 226 ITR 625 (SC)*, held that assessee was the owner of the premises allotted to it by virtue of purchase of shares and consequently was entitled to claim depreciation in view of the Supreme Court judgment in the case of *Mysore Minerals Ltd. (supra)*. Aggrieved by the same, the revenue is in appeal before the Tribunal.

5. Both the parties have been heard at length. The learned departmental Representative has strongly relied on the reasons given by the assessing officer while the learned counsel for the assessee has relied on the reasons given by the learned Commissioner (Appeals). Since we have already dealt with such submissions in the earlier paras, the same need not be repeated. After considering the submissions of both the sides as well as relevant provisions of the Income Tax Act, we are of the view that order of learned Commissioner (Appeals) must be upheld on this issue. There is no dispute that in order to claim the depreciation in respect of any property it is the condition precedent that assessee must be the owner of that property and the same is used for the purpose of business. The word 'owner' has not been defined in the Income Tax Act and therefore, the question arises as to what meaning should be assigned to the word 'owned' used by the legislature in section 32 of the Act.

6. At this stage it would be useful to refer to the judgment of Hon'ble Supreme Court in the case of *R.B. Jodha Mal Kuthiala v. CIT (1971) 82 ITR 570 (SC)* where the Hon'ble Court had to consider the meaning of the word 'owner' appearing in section 9 of the Indian Income Tax Act, 1922 (1922 Act) analogous to section 22 of the Act. Their Lordships observed that the word 'owner' in section 9 of 1922 Act means a person who can exercise the rights of an owner, not on behalf of the owner but in his own rights. Accordingly, it was held that the assessee whose property remained vested in the custodian of evacuee property by virtue of section 6(1) of the Pakistan (Administration of Evacuee Property) Ordinance, 1949 as evacuee property was not the owner of the property for the purpose of section 9 of 1922 Act since the assessee could not exercise any rights in that property except with the consent of custodian. The assessee had merely some residual interest in property which could not be considered to be ownership for the purpose of section 9.

7. This controversy again arose before the Hon'ble Supreme Court in the case of *Mysore Minerals Ltd.* (supra) with reference to the word 'owned' in section 32 of the Act with which we are also concerned in the present case. The controversy is noted by the Hon'ble court at p. 778 of the report as under :

"It is the word 'owned' as occurring in sub-section (1) of section 32 which is the core of controversy. Is it only an absolute owner or an owner of the asset as understood in its legal sense who can claim depreciation ? Or, a vesting of title short of full-fledged or legal ownership can also entitle an assessee to claim depreciation under section 32 ?"

The contention of the learned counsel for the revenue was that the term 'owned' should be assigned its legal meaning and therefore, so long as the assessee had not become an owner of the property in the sense, that the title had not come to vest in him, in the meaning contemplated by law, he could not claim the benefit of deduction under section 32 of the Act. According to him, the assessee must be the owner in terms of the provisions of section 54 of the Transfer of Property Act. In other words, if the title in the immovable property was not transferred by execution of registration of sale deed then, the transferee who got the possession of the property after payment of consideration could not be considered as owner of the property for the purpose of claiming depreciation under section 32 of the Act. On the other hand, the contention of the learned counsel for the assessee was that the word 'owner' should be understood in the sense in which the Hon'ble Supreme Court understood in the case of *R.B. Jodha Mal Kuthiala* (supra) and in the case of *Podar Cement Ltd.* (supra). In other words, it was submitted that the term 'owned' in section 32(1) of the Act should be assigned a contextual sense. According to him, the benefit arising in section 32 should not be denied merely on the ground that conveyance deed was not executed. After considering the submission from both the sides, their Lordships observed as under :

"Section 32 of the Income Tax Act confers a benefit on the assessee. The provision should be so interpreted and the words used therein should be assigned such meaning as would enable the assessee securing the benefit intended to be given by the legislature to the assessee. It is also well-settled that where there are two possible interpretations of a taxing provision the one which is favourable to the assessee should be preferred.

What is ownership ? The terms 'own', 'ownership' and 'owned', are gene, are generic and relative terms. They have a wide and also a narrow connotation."

Subsequently, after considering various dictionary meanings, the decision of the Court in the case of *Podar Cement Ltd.* (supra) and in the case of *R.B. Jodha Mal Kuthiala* (supra), their Lordships held as under :

"In our opinion, the term 'owned' as occurring in section 32(1) of the Income Tax Act, 1961, must be assigned a wider meaning. Anyone in possession of property in his own title exercising such dominion over the property as would enable others being excluded therefrom and having the right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings though a formal deed of title may

not have been executed and registered as contemplated by the Transfer of Property Act, the Registration Act, etc. 'Building owned by the assessee' the expression as occurring in section 32(1) of the Income Tax Act means the person who having acquired possession over the building in his own right uses the same for the purposes of the business or profession though a legal title has not been conveyed to Itfm consistently with the requirements of laws such as the Transfer of Property Act and the Registration Act, etc., but nevertheless is entitled to hold the property to the exclusion of all others."

8. The legal position emerging from above discussion is that the word 'owned' in section 32 of the Act has to be understood in a wider sense and not in the legal sense in terms of the provisions of Transfer of Property Act. The true test would be whether the assessee can exercise the rights of the owner in his own right to the exclusion of others. If the answer is in affirmative, then assessee would be entitled to depreciation under section 32 of the Act.

9. The assessing officer has observed that purchase of shares cannot be equated with the purchase of property. There cannot be any dispute that generally, mere purchase of shares in a company would not entitle the shareholder to enjoy the rights of an owner in respect of the properties owned by the company since both the entities are distinct and separate. However, articles of association of a company engaged in the business of real estate may provide that shareholder of particular shares would be entitled to exercise the rights of owner in respect of properties owned by the company. Such mode of transfer is duly recognized by the legislature in the provisions of section 2(47)(vi), section 27(iii) and section 269UA(d)(ii) of the Act. It is because of the provisions of section 269UA(d)(ii) that assessee was required to obtain no objection certificate from the competent authority prescribed under Chapter XX of the Act. All these provisions, if read together, lead to the only inference that legislature has accepted the fact of transfer of property through the transfer of shares of a company. Therefore, the objection of the assessing officer that property cannot be transferred through the transfer of shares cannot be sustained.

10. Now the question arises whether in the present case, the assessee can exercise the rights of an owner in its own rights in respect of the property acquired by it through the purchase of shares of Yerrowda Investments Ltd. We have gone through the articles of association of the company Yerrowda Investments Ltd. The arts. 5 to 7 of the said articles of association which are relevant are being reproduced as under :

"5. The company is developing a property bearing Plot Nos. 190 (Part) and 192 (Part) situated at National Games Road, Shastri Nagar, Opp. Golf Course, Yerrowda, Pune-411 006. The company has already constructed 18 buildings on the said property. The company will also construct further area of 3,00,000 sq. ft. on the said premises for which building plans will hereafter be prepared.

The shareholders of the company, holding the shares bearing the distinctive numbers as mentioned in 'Annex. A' shall be allotted and shall have an exclusive right to use and occupy the premises in different buildings specified in 'Annex. A' hereto and mentioned, opposite the relative distinctive number of shares. In respect of the area of 3,00,000 sq. ft.

for which the building plans are yet to be prepared, the concerning members are tentatively allotted floor areas (without identifying the buildings/floor) as mentioned in the said 'Annex. A'. The identification numbers of the premises to be allotted to such members shall be finalized on the building plans being finally approved by the authorities.

6. The shareholder shall hold the concerned premises as allotted on the terms and conditions specified in 'Annex. B' hereto.

7. Save as herein provided, the company shall be entitled to treat the person whose name appears upon the register in respect of any share as absolute owner thereof, and shall not be under any obligation to recognize any trust or equity or equitable claim to or partial interest in such share, whether or not it shall have express notice thereof."

A bare reading of the aforesaid articles shows that by virtue of holding of particular numbers of shares having particular distinctive numbers, the holder would be entitled to have exclusive possession of a particular number of flat so as to have exclusive use and occupation of the said flat. Thus, ownership of a flat is attached with a particular and specific share having specified distinctive numbers. Therefore, if that share is transferred then the absolute ownership of that flat is automatically transferred to the other party and the company has no power to refuse the transfer of such share from one person to another. This is an acceptable mode of transfer of property in the case of a company and is duly recognized by section 2(47)(vi), section 27(iii) as well as section 269UA(d) of the Act. In view of the above discussions, we are of the view that assessee had become the owner of the properties by virtue of holding of shares of Yarrowda Investments Ltd. and consequently it was entitled to claim depreciation in accordance with the law. The order of the learned Commissioner (Appeals) is therefore upheld on this issue.

11. The next issue relates to the disallowance in respect of prior period expenses. This issue arises in the assessment years 1997-98, 1998-99 and 2000-01. The disallowance has been made without much discussion by the assessing officer in these years but the learned Commissioner (Appeals) following his earlier order decided the issue in favour of the assessee. It had been contended before learned Commissioner (Appeals) that certain expenses are not supported by the bills/vouchers and sometimes the claims are not processed and accepted by the accounts department. As and when such bills/vouchers are received or claims are settled, the expenses are booked though sometimes it may relate to the earlier years. It was also submitted that such procedure was being followed consistently. The learned Commissioner (Appeals) accepted the contention of the assessee. The learned Commissioner (Appeals) also took into consideration the decision of Bombay High Court in the case of *CIT v. Nagri Mills Co. Ltd. (1958) 33 ITR 681 (Bom)* wherein their Lordships observed that where the deduction is obviously a permissible deduction then the department should not dispute as to the year in which deduction should be allowed. Following the aforesaid observations of Bombay High Court and for the sake of consistency, the learned Commissioner (Appeals) upheld the contention of the assessee and consequently, disallowances made by the assessing officer were deleted. Aggrieved by the same, the revenue is in appeal before the Tribunal. After

hearing both the parties, we find that the issue is covered in favour of assessee by the decision of the Tribunal dated 31-12-2004 in assessee's own case for the assessment year 1990-91, wherein the system of accounting adopted by the assessee has been accepted. Therefore, following the same, the orders of the learned Commissioner (Appeals) are upheld.

12. The next issue relates to the addition on account of forfeiture of the application money received against issue of partly convertible debentures. The assessee had issued partly convertible debentures in financial year 1989-90 against which it received application money. However, after the allotment the applicants could not make the payments as per the terms of the issued debentures. In the assessment year 1999-2000, the assessee forfeited the sum of Rs. 87.22 lakhs on account of non-payment of call moneys and credited the sum to the Profit and Loss account. Similarly, the sum of Rs. 6,36,949 was forfeited in assessment year 2000-01. This amount was not offered for taxation by the assessee. In the course of assessment proceedings the assessee was asked to show cause why such amount should not be treated as income in view of the Supreme Court judgment in the case of *CIT v. T.V. Sundaram Iyengar & Sons Ltd. (1996) 222 ITR 344 (SC)*. In response to the same, it was submitted before the assessing officer that the said judgment is applicable only when the money was initially received from the customers as trading receipt *i.e.* during the course of carrying on its business. Therefore, the said judgment cannot be applied where the money is not received as a trading receipt. Since, the forfeiture is related to debentures, the amount received was capital in nature and therefore it cannot be treated as revenue receipt when such amount is forfeited. Not satisfied with the explanation of the assessee, the assessing officer made the additions in computing the total income of the above assessment years.

13. The matter was carried in appeal before the learned Commissioner (Appeals) who has deleted the additions made by assessing officer by holding that the judgment of Supreme Court in the case of *T.V. Siundaam Iyengar & Sons Ltd. (supra)* was not applicable to the facts of the present case. On the other hand, the case was covered by the decision of the Bombay High Court in the case of *Mahindra & Mahindra Ltd. v. CIT (2003) 261 ITR 501 (Bom)*. Aggrieved by the same, the revenue is in appeal before the Tribunal.

14. After hearing both the sides, we do not find merit in the appeals of the revenue. We have gone through the decision of the Hon'ble Supreme Court. In that case, the deposits were received in the course of trading activity and because of this fact the court held that it was converted into income when the amount was written off. On the other hand, the Bombay High Court in the case of *Mahindra & Mahindra Ltd. (supra)* was concerned with a case where a loan was given by an American company to the assessee to facilitate the purchase of plant and machinery. Subsequently, the amount of loan was waived and therefore the question arose where such amount can be assessed as income either under section 28 itself or by virtue of section 41(1) of the Act. The Hon'ble Bombay High Court held that It was a capital receipt at the time when there was a cessation of liability and could not be assessed as income either under section 28 or under section 41. Similar view has been taken by the Tribunal in the case of *Prism Cement Ltd. v. Jt CIT (2006) 103 TTJ (Mumbai) 63 : (2006) 101 ITD 103 (Mumbai)*. In that, case, the company issued certain

non-convertible debentures and some of which were forfeited due to non-payment of call money. The Bench held that forfeiture amounted to capital receipt and the same could not be charged to tax. This case was decided after considering the Supreme Court judgment in the case of *T.V. Sundaram Iyengar & Sons Ltd.* (supra). The facts of the present case are similar to the facts before the Tribunal in the case of *Prism Cement Ltd.* (supra). Therefore, following the same, the orders of the learned Commissioner (Appeals) are upheld.

15. The next issue relates to the levy of interest under section 234C of the Act *vis-a-vis* the income computed under section 115JA of the Act. This issue arises in assessment years 1997-98 and 1998-99. After hearing both the parties, we find that this issue is covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of *CIT v. Kwaliti Biscuits Ltd.* (2006) 205 CTR (SC) 122 : (2006) 284 ITR 434 (SC) wherein, it has been held that book profits under section 115JA of the Act cannot be computed unless the books of accounts are finalized and consequently the question of estimating book profit before the end of the financial year does not arise. Unless there is a liability to pay the advance tax under section 207 and onwards, the question of levying of interest under sections 234B and 234C would not arise. Their Lordships observed that the provisions of section 207 and onwards could not be invoked for the purpose of computation of income under section 115J for the reason that income would be computed only after the finalization of books of accounts *i.e.* after the end of financial year. Consequently, no interest can be charged for non-payment of advance tax. However, the Department has reargued this issue with reference to computation of income under section 115JA on account of the provisions contained in sub-section (4) of section 115JA which provides that "same as otherwise provided in the section, all other provisions of this Act shall apply to every assessee, being a company mentioned in this section", This issue has also been resolved by the Tribunal in the case of *IBM India Ltd. v. CIT* (2007) 108 TTJ (Bang) 531 ; (2007) 105 ITD 1 (Bang) and in the case of *Escapade Resorts (P) Ltd. v. Asstt. CIT* (2007) 107 TTJ (Coch) 871 : (2007) 107 ITD 323 (Coch) wherein it has been held that the principle laid down by the Hon'ble Supreme Court in the case of *Kwaliti Biscuits Ltd.* (supra) would also apply to the computation of book profits under section 115JA and consequently no interest under section 234B would be chargeable. Following these decisions, the issue is decided in favour of the assessee. Consequently, the orders of the learned Commissioner (Appeals) are upheld on this issue.

Assessee's appeals :

16. The first issue arising from the appeal for the assessment year 1997-98 relates to disallowance of guest house expenses. The learned counsel for the assessee concedes that this issue is covered against the assessee by the decision of the Hon'ble Supreme Court in the case of *Britannia Industries Ltd. v. CIT* (2005) 198 CTR (SC) 313 : (2005) 278 ITR 546 (SC). Therefore, following the same, the ground raised by the assessee is dismissed.

17. The next issue relates to the disallowance of entertainment expenses out of canteen expenses relating to assessment year 1997-98. The learned Commissioner (Appeals) has held that only 25 per cent of canteen expenses should be considered as entertainment

expenses. Still aggrieved, the assessee is in appeal before the Tribunal. The learned counsel for the assessee concedes that this issue is also covered against the assessee by the decision of the Tribunal dated 21-12-2006 in assessee's own case pertaining to assessment year 1989-90 wherein it has been held that only 25 per cent expenses should be treated as entertainment expenses. Following the said decision, the ground raised by the assessee is dismissed.

18. The next issue arising from the appeal for the assessment year 1997-98 relates to the disallowance of annual general meeting expenses. 50 per cent of the expenses has been disallowed by the learned Commissioner (Appeals) following his earlier order. The learned counsel for the assessee has conceded before us that this issue is also covered against the assessee by the aforesaid decision dated 21-12-2006. Following the same, the ground raised by the assessee is dismissed.

19. The next issue relates to amortised premium on leasehold expenses arising from the appeal relating to assessment year 1997-98. This ground of the assessee is dismissed as not pressed.

20. The next issue relates to disallowance of premium paid under Investors Welfare Scheme, This ground is common to all the appeals. The learned counsel for the assessee concedes that this issue is also covered against the assessee by the decision of the Tribunal dated 21-12-2006 in assessee's own case. Therefore, following the same, the ground raised by the assessee is dismissed.

21. The next issue common to all the appeals relates to disallowance of provisions for obsolete inventory. For the sake of convenience the facts relating to the assessment year 1997-98 are being narrated. The assessee had written off the sum of Rs. 11,20,000 on account of items considered obsolete. Such items included instrument items, cement, paint and paint materials, safety shoes and dress material. The assessing officer disallowed the claim of the assessee following the Bombay High Court judgment in the case of *CIT v. Heredilla Chemicals Ltd. (1997) 140 CTR (Bom) 181 : (1997) 225 ITR 532 (Bom)* wherein it was held that such loss cannot be claimed in any year in which assessee likes. Such loss can be claimed only in the year in which such items are sold and disposed of. On appeal, the disallowance made by assessing officer was confirmed. Aggrieved by the same the assessee is in appeal before the Tribunal for all the years.

22. Contention raised on behalf of the assessee is that the decision of the Bombay High Court did not consider the Accounting Standard prescribed by the ICAI which were binding on the assessee. Therefore, the said decision should not be relied. It was also contended that the stocks can be valued at cost or market value as per the decision of Hon'ble Supreme Court in the case of *Chainrup Sampatram v. CIT (1953) 24 ITR 481 (SC)*. In our opinion both the contentions are without force. Normally, the Accounting Standards is accepted but it cannot override the provisions of the Income Tax Act as held by the Supreme Court in the case of *Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT (1997) 227 ITR 172 (SC)*. The judgment of Bombay High Court would therefore apply to the present case wherein it has been clearly held that loss can be claimed only in the year

in which such items are sold. The decision of Supreme Court in the case of *Chainrup Sampatram* (supra) is applicable only where stock-in-trade is to be valued and not other items. In the present case, the items written off do not form part of stock-in-trade. Hence, the said decision would not apply. No other contention has been raised. Therefore, following the judgment of Bombay High Court in the case of *Heredilla Chemicals Ltd.* (supra) we do not find any merit in the appeals of the assessee on this issue. The orders of the learned Commissioner (Appeals) are therefore upheld on this issue. The assessee would, however, be at liberty to claim deduction on account of loss in the years in which such items are sold. The assessing officer shall look into the matter if necessary evidences are filed before him. To that extent, the order of the learned Commissioner (Appeals) is modified.

23. The last ground is whether the interest income should be assessed as business income or income from other sources. This issue arises in the appeals relating to assessment years 1997-98 to 2000-01. This ground is dismissed as not pressed.

24. In the result, all the appeals are partly allowed.