$~8, 11 and 12

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 12th April, 2022*

\+ **ITA 930/2019**

PRINCIPAL COMMISSIONER OF INCOME TAX, (CENTRAL) -3 ..... Appellant

Through: Ms. Vibhooti Malhotra, Sr.Standing counsel with Mr.Shailendra Singh, Jr.Standing counsel with Mr.Udit Sharma, Advocates

versus

M/S GAHOI BUILDWELL (P) LTD. ..... Respondent

Through: None.

\+ **ITA 936/2019**

PRINCIPAL COMMISSIONER OF INCOME TAX, (CENTRAL)-3 ..... Appellant

Through: Ms.Vibhooti Malhotra, Sr.Standing counsel with Mr.Shailendra Singh, Jr.Standing counsel with Mr.Udit Sharma, Advocates

versus

M/s GAHOI BUILDWELL (P) LTD. ..... Respondent

Through: None.

\+ **ITA 952/2019**

PRINCIPAL COMMISSIONER OF INCOME TAX , (CENTRAL)-3 ..... Appellant

Through: Ms.Vibhooti Malhotra, Sr.Standing counsel with Mr.Shailendra Singh, Jr.Standing counsel with Mr.Udit Sharma, Advocates

versus

M/S GAHOI BUILDWELL (P) LTD. ..... Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA,J (ORAL):

CM APPL. 47931/2019 (delay) in ITA 930/2019
CM APPL. 48109/2019 (delay) in ITA 936/2019 &
CM APPL.49116/2019 (delay) in ITA 952/2019

1. The present applications have been filed by the appellant for condonation of delay of 47 days in filing the present appeals.
2. For the reasons mentioned in the applications, the delay of 47 days in filing the appeals is condoned.
3. Accordingly, all the applications stand disposed of .

CM APPL. 48108/2019 in ITA 936/2019 (exemption)

4. Exemption allowed, subject to all just exceptions.
5. Application stands disposed of.

ITA 930/2019, ITA 936/2019 & ITA 952/2019

6. The present three ITAs bearing ITA No. 930 of 2019 (AY- 2009-10), ITA No. 936 of 2019 (AY- 2007-2008) and ITA No. 952 of 2019 (AY -2008-2009) have been filed by the appellant challenging the impugned order of Income Tax Appellate Tribunal (ITAT) dated 29.03.2019 whereby the appeals filed by the Revenue were dismissed. ITAT also disposed of cross-objections raised by the Respondent.
7. In ITA No. 930 of 2019, the appellant department has submitted that from the impugned order following substantial questions of law arise, which need to be framed and determined by this court:

   A. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in confirming the Order of the

CIT(A) when the Respondent has failed to provide the bifurcation of the brokerage and commission expenses incurred, before the assessing officer?

B. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in confirming the Order of the CIT(A) while ignoring the fact that during the assessment proceedings, the Respondent had failed to establish that the interest bearing loans have not been utilized for the purpose of giving interest free advances to related and unrelated parties?

C. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in confirming the Order of CIT(A) and ignoring the finding of the assessing officer that the Respondent had failed to establish the said buildings were being used for its business purpose?

D. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in confirming the Order of the CIT(A) completely ignoring the fact that the Director of the Respondent had estimated profit of Rs.2.5Crore in his statement recorded on 24.02.2009 whereas the loss computed on the close of the balance sheet on 31.03.2009 was Rs. 5.4 Crore?

E. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in appreciating the fact that the Respondent could not substantiate the reasons for the variations in the profit figures between the above two dates?

F. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in appreciating the fact that the

rental loss claimed by the Respondent was not allowable as per the provisions of Section 22 read with Section 23 of the Act as the ALV of the properties in question, had not charged and therefore the loss claimed under the said head was not allowable?

G. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in ignoring the findings of the assessing officer that utilization and mobilisation of the sum so received toward the maintenance of the commercial complex/ replacement of assets was only an application of the income received by the Respondent at the time of sale as a part of the sale consideration?

H. Whether on facts and in the circumstances of the case and also the prevailing law, the ITAT has erred in confirming the order of the CIT(A) and dismissing the Revenue's appeal?

I. Whether, the CIT(A) was justified in ignoring the findings of the Ld. assessing officer when there were incriminating documents?

J. The Appellant craves leave, to modify, add or forego any grounds of appeal at any time before or during the hearing of the present appeal.

8. In ITA No. 936 of 2019, the appellant department has submitted that from the impugned order following substantial questions of law arise, which need to be framed and determined by this court:

A. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in estimating the amount of expenses incurred in earning the dividend income ignoring the detailed working provided in Section 14A of the Income tax Act, 1961 read with Rule 80 of the Income Tax Rules, 1962?

B. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in confirming the Order of the CIT(A) when the Respondent had failed to provide the bifurcation of the brokerage and commission expenses incurred, before the assessing officer?

C. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in confirming the Order of CIT(A) when the Respondent had failed to rebut the presumption u/s.132(4A) that the Respondent has received the interest on the delayed payment?

D. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in confirming the Order of the CIT(A) when the Respondent had failed to establish before the assessing officer that the interest bearing loans have not been utilised for the purpose of giving interest free advances?

E. Whether on facts and in the circumstances of the case and also prevailing law, the. ITAT has erred in confirming the Order of the CIT(A) where as during the assessment proceedings the Respondent had failed to prove the identity creditworthiness and genuineness of the share applicant despite being provided sufficient opportunity by the assessing officer?

F. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has failed to appreciate the findings of the assessing officer, that during the assessment proceedings, the bill/vouchers submitted by the Respondent did not have

mandatory/requisite information like TIN No, Bill No and so on, and therefore apparently seemed to be dubious?

G. Whether on facts and in the circumstances of the case, the Hon'ble Tribunal has erred in confirming the Order of the CIT(A) and dismissing the appeal preferred by the Revenue.

H. Whether the impugned Order passed by the Ld. Tribunal has erred as the Order of CIT(A) was passed in ignorance of the findings of the assessing officerthat there existed incriminating circumstances.

I. The Appellant craves leave, to modify, add or forego any grounds of appeal at any time before or during the hearing of the present appeal.

9. In ITA No. 952 of 2019, the appellant department has submitted that from the impugned order following substantial questions of law arise, which need to be framed and determined by this court:

A. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in ignoring the findings of the assessing officer that while submitting the premise-wise details of the rent paid, the column titled 'Purpose' was left blank by the Respondent?

B. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in confirming the commitment charges on account of deficiency of assured lease rent and actual rent paid to the buyer after realisation of sale price?

C. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in confirming the Order of CIT(A) and ignoring the fact that during the assessment proceedings

the Respondent had failed to establish that interest bearing loans had not been utilized for the purpose of giving interest free advances to related and unrelated parties?.

D. Whether on facts and in the circumstances of the case and also prevailing law, the ITAT has erred in confirming the Order of the CIT(A) and has failed to appreciate the findings of the assessing officer that during the assessment proceedings, the bill/vouchers submitted by the Respondent did not have mandatory information like TIN No./Bill No. And thus the same apparently seemed to be dubious?

E. Whether on facts and in the circumstances of the case, the has Tribunal has erred in confirming the Order of the ClT(A) and dismissing the appeal preferred by the Revenue.

F. Whether the impugned Order passed by the Tribunal has erred as the Order of CIT(A) was passed in ignorance of the findings of the AO that there existed incriminating circumstances.

G. The Appellant craves leave, to modify, add or forego any grounds of appeal at any time before or during the hearing of the present appeal.

10. In ITA 930/2019, the department has assailed the order of ITAT on the ground that the Tribunal has erred by upholding the Order of CIT(A) wherein it deleted Rs.22,97,392/- added by assessing officer on account of Brokerage and Commission. The order has also been assailed on the ground that CIT (A) had wrongly deleted Rs. 2,19,47,951/- added by assessing officer on account of 'Commitment Charges'. It has been submitted that ITAT has wrongly followed its

finding pertaining to AY 2008-09 and failed to consider the findings of the Assessing Officer in this regard.

11. The Department has submitted that the Tribunal has erred by upholding the Order of CIT(A) wherein it had partly allowed the appeal of the assessee by allowing relief of Rs.32,58,548/- and sustained the balance amount of Rs.3,18,000/- from the total disallowance of Rs. 35,76,548/- as added by the Assessing Officer on account of 'Balance Interest'. It was submitted that the Tribunal has wrongly followed its findings pertaining to the AY 2008-09 on the ground of no change in the fact that the assesee had huge surplus fund available. The department has submitted that the Tribunal has erred by upholding the Order of CIT(A) wherein it had deleted Rs.7,68,370/- added by Assessing officer on account of 'Depreciation disallowed'. The order has also been assailed on the ground that Tribunal has erred by upholding the Order of CIT(A) wherein it had deleted Rs. 5,15,34,000/- added by AO on account of 'Loss disallowed'. The department submitted that the tribunal has erred by upholding the order of CIT(A) wherein it had deleted Rs.5,73,898/- added by AO as 'disallowance under house property'. The department has submitted that in the impugned order the Tribunal has erred by sustaining the finding of CIT (A) for deleting the addition of Rs.1,37,33,018/-, as added by the AO on account of 'Sinking fund'. The appellant has submitted that the impugned order is perverse and ought to be set aside.

12. In ITA 936 of 2019 pertaining to AY 2007-08, the department has assailed the impugned order on the ground that the Tribunal has erred

by ignoring the findings of the AO in regard to the addition of Rs.91,28,981/- on account of disallowance under Section 14A. The department stated that ITAT has wrongly upheld the order of the CIT(A) whereby an amount of Rs.90,28,981/- was deleted by stating that the assessee had earned dividend income of Rs.82,41,610/-, which were mostly from the mutual funds. The department has submitted that the Tribunal has erred by sustaining the Order of the CIT (A) regarding deletion of Rs. 82,83,857/- which were added to the income of the assessee by the Order of AO on account of Brokerage and commission in terms of provisions of Section 37 of the Act.

13. The department has also submitted that in the impugned order the Tribunal has wrongly sustained the deletion of the addition made by AO on account of Interest on delayed payments of Rs.7,48,856/-. The department has stated the said addition was partly deleted by the CIT(A) in so far as it allowed relief to the assesee for an amount of Rs. 61,39,630/- whereas the remaining amount of Rs.21,43,957/- was sustained against the assessee. The department has challenged the impugned order on the ground that it has erred by sustaining the finding CIT(A) whereby the addition of Rs 7,48,856/- made by the AO on account of Delayed payment, was deleted by the CIT(A). The impugned order has also been assailed on the ground that the tribunal has erred by sustaining the deletion of the addition of Rs.81,98,798/- made by the AO on account of disallowance of interest, as deleted by the CIT(A). The department submitted that the tribunal has wrongly held that none of such advances could be considered to be interest

bearing funds and therefore the finding of the tribunal is not acceptable in so far as on this ground, the addition was made by AO after due consideration of reply by the assessee.

14. The department has challenged the order of the Tribunal on the ground that it has erred by sustaining the Order of the CIT(A) regarding the deletion of addition of Rs.17,65,000/- made by AO on account of the Unexplained cash credit under Section 68 of the Act. The finding of the tribunal that above amount was not a fresh credit appearing in the books of accounts of the assessee is not correct. The findings have also been challenged on the ground that the order of CIT (A) regarding deletion of Rs.5,95,27,614/- as added by the AO on account of the Deemed dividend under Section 22(2)(e) of the Act of has wrongly been upheld. It has been submitted that the tribunal has erred in sustaining the Order of the CIT(A) regarding deletion of Rs. 10,20,212/- as added by the AO on account of expenses disallowed to the assessee. The impugned order has been challenged to be perverse and ought to be set aside.

15. In ITA 952 of 2019 pertaining to the year 2008-09, the department has submitted that the tribunal has erred by ignoring the findings of the AO in so far as it made addition of Rs. 22,80,000/- on account of rent disallowed. The order has also been challenged on the ground that tribunal has erred by ignoring the findings of the AO regarding the addition of Rs.2,54,24,680/- made on account of 'Commitment Charges' and the findings of the assessing officer has wrongly been ignored by the tribunal. The order of the tribunal has also been challenged on the ground that it has erred by passing the impugned

Order wherein it has upheld the Order of CIT(A) regarding deletion of Rs. 1,06,13,292/- which were added to the income of the assessee on account of 'Balance interest Disallowed. It has been submitted that the tribunal has wrongly upheld the order of CIT (A) regarding the deletion of Rs. 6,48,726/- on account of 'Expenses disallowed'. The impugned order has been stated to be perverse and ought to be set aside.

16. Ms. Vibhooti Malhotra, learned standing counsel for the department/appellants stated that for all the three years the tribunal has fallen into a grave error and therefore, the impugned orders are liable to be set aside. It has been submitted that the substantial questions of law as raised in the appeals need to be framed by this court. Ms. Vibhooti Malhotra stated that the appeals filed by the appellants need deeper examination.

17. We have heard Ms.Vibhooti Malhotra, learned standing counsel for the department/appellants.

18. Before embarking on the facts as raised in the appeals it is necessary to examine the scope of jurisdiction under Section 260A.

19. The scope of jurisdiction in Section 260A is very well settled. It is a settled proposition that ITAT is the final arbiter of the facts. High Court can interfere in the order of the ITAT only if there is substantial question of law or there is manifest illegality or it suffers from perversity.

20. It is settled proposition of law that the High Court can entertain an appeal against the order of ITAT only if it involves any substantial question of law. The ITAT is considered to be the final arbiter of the

facts and if there is a finding on the facts, the settled law is that High Court should be slow in interfering into the same. Reference can be made to the judgment of the Apex Court in ***M.Janardhana Rao vs. Joint Commissioner of Income Tax***, (2005) 2 SCC 324 and judgments of this Court in ***Principal Commissioner of Income Tax vs. BhadaniFinaciers Pvt. Ltd***., 2021 SCC Online Delhi 4430 and in ***Goodyear India Ltd. vs. CIT***, 2000 SCC Online Del 1023.

21. In the case of ***M.Janardhana Rao****(supra)*, the Apex Court has *inter alia* held as under:

> *"14. Without insisting on the statement of substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Court is not empowered to generally decide the appeal under Section 260A without adhering to the procedure prescribed under Section 260A. Further, the High Court must make every effort to distinguish between a question of law and a substantial question of law. In exercise of powers under Section 260A, the findings of fact of the Tribunal cannot be disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in Section 260A must be strictly fulfilled before an appeal can be maintained under Section 260A. Such appeal cannot be decided on merely equitable grounds."*
>
> (emphasis supplied)

22. In ***BhadaniFinaciers Pvt. Ltd***.'s case (*supra*), this Court has observed as under:

> *"8. Substantial" means "having substance, essential, real, of sound worth, important or considerable." To be "substantial", a question of law must be debatable, not previously settled. The Supreme Court and several High*

> *Courts have held that a substantial question of law is involved if it directly or indirectly affects substantial rights of the parties or it is of general public importance, it is an open question in the sense that the issue has not been settled by a pronouncement of the Court or it is not free from difficulty or it calls for a discussion for alternate views. A High Court under Section 260A of the Act has limited jurisdiction to interfere with findings of fact recorded by the Tribunal. If findings of Tribunal are irrational, perverse or unreasonable, then only interference of court would be justified. It would also be justified if a finding of fact is arrived at by the Tribunal without any evidence. Section 260A is akin to Section 100 of the CPC, 1908.[See : Sampath Iyengar's Law of Income Tax].''*
>
> (emphasis supplied)

23. In the judgment of ***Goodyear India Ltd.***(supra), this court has held as under:

> *8. …… There is no scope for interference by the High Court on a finding recorded when such finding could be treated to be a finding of fact. A finding of fact must, therefore, be held to have become final.*

24. The ITAT in the impugned order has given the separate finding on all the issues for all the three assessment years i.e. 2007-08, 2008-09 and 2009-10. The findings of the ITAT for the assessments years have been discussed hereinbelow for the proper understanding of the facts.

ASSESSMENT YEAR 2007-2008

25. In the assessment year 2007-08, besides appeal having been filed by the department, the assessee had also filed the cross objections. The delay in filing of the cross-objections were condoned by the ITAT. The ITAT *inter alia* held that the base figure for computing the

assessable income will start from the loss of Rs.1,34,03,902/- and the cross objections filed by the assessee on this ground was allowed.

26. In the Assessment year 2007-08, the additions were made by the AO under the following heads:

(i) Brokerage and Commission

(ii) Share application money of Rs.17,60,000/-

(iii) Addition on account of interest of Rs.7,48,856/-

(iv) Disallowance under Section 14A

(v) Disallowance of interest

(vi) Deemed dividend

(vii) Addition of Rs.10,20,212/- on account of expenses for which bills/vouchers were not furnished

(i) Brokerage and Commission

In respect of brokerage and commission the tribunal after discussing the entire findings given by the assessing officer and CIT(A) *inter alia* has held as under:

"12. After hearing both the parties and on perusal of the relevant finding given in the impugned orders, we find before the AO assessee categorically stated that the brokerage and commission paid were for two kind of activities, firstly, one paid for booking of units/ space and therefore, it was incurred during the course of carrying out activity of construction and sale of spaces in the mall. The second was with regard to leasing out the available space on lease rent for which again brokerage and commission has been paid. AO has erroneously treated the brokerage and commission paid under both heads as claimed towards income from house property, which on the facts has been found to be incorrect. It has already been demonstrated before the Ld.CIT(A), as incorporated above, that out of total claim of Rs.82,83,587/-, the amount of Rs. 61,39,630/- was paid on account of sale of unit/ property and

hence the finding of the Ld. CIT(A) and the direction to the AO to delete the disallowance of brokerage & commission to the extent of sale of unit properties is affirmed. In so far as the brokerage paid for amount of Rs. 21,43,957 /- which was claimed towards leasing of the properties, the same cannot be allowed, because the income from the house property has to be computed strictly in accordance with the items provided in section 24.Accordingly, the order of the Ld. CIT (A) is upheld and revenue's ground No. 1 is dismissed and cross objection No. 3 as raised by the assessee is also dismissed."

(ii) Share application money of Rs.17,60,000/-

The tribunal after discussing the finding of the assessing officer and the CIT (A) inter alia held as under:

"14. After hearing both the parties and on perusal of the relevant material placed on record, we find that it is an undisputed fact that the amount of Rs.17,65,000/- is not a fresh credit appearing in the books of accounts of the assessee. In fact, this amount of share application money was received by M/ s Heaven Barter Ltd from M/s. Novaflex Cable Care System Ltd. in the earlier years i.e., during the financial year 2004-05 and 2005-06. Thus, the credit was appearing in the books of accounts of another entity, M/s. Heaven Barter Ltd. in the earlier year which got merged with the assessee company during the year under consideration. It was due to this merger the old credit had come into the books of assesse which cannot be reckoned credit appearing in the books of accounts for the relevant financial year and therefore, the deeming fiction of section 68 cannot be attracted. Accordingly, on this score, the order of the Ld. CIT (A) is affirmed and consequently revenue's ground No.2 is dismissed."

(iii) Addition on account of interest of Rs.7,48,856/-

The tribunal discussed the findings of the Assessing officer and the CIT (A) thread bear and *inter alia* held as under:

"16. After considering the relevant submissions and on perusal of the relevant finding given in the impugned orders as well as seized

material referred to before us at the time of hearing, we find that there is rough noting of calculation of interest on account of delayed payment by the purchaser which assessee has calculated to be @ 24%. Nowhere, as held by the Ld. CIT(A), it has been found or there is even mention in any seized document that interest rate so calculated has been realised from the said party. The AO has made the addition on the ground that, section 132(4A) raises the presumption against the assessee if something has been found from the possession of the assessee during the course of search. However, first of all such a presumption ujs 132(4A) is a rebuttal presumption and it is applicable only in the cases where assessee tries to give explanation contrary to the evidence found during the course of search. Here in this case, assessee is not denying the possession of the seized material found, albeit has been pointed out that the seized material does not indicate any undisclosed income. It was only prepared to pressurize the buyers to make the due payment in time. In any case, if the booking itself was cancelled in subsequent year, then the whole accrual of interest itself gets vitiated and the income which has not been received by the assessee cannot be taxed, because, only such income can be taxed when the other party also acknowledges the payment to be made or debt towards the assessee. Thus, under these facts and circumstances Ld. CIT (A) has rightly deleted the said addition. Accordingly, the ground No. 3 raised by the revenue is dismissed.

(iv) Disallowance under Section 14A

The tribunal minutely examined the entire facts as well as considered the judgment of Supreme court in case of ***CIT vs. Essar Teleholdings Ltd.***, (2018) 401 ITR 445 and *inter alia* held as under:

19. We have heard the rival submissions and also perused the relevant finding given in the impugned orders. In so far as first contention of the Ld. Counsel is concerned, that rule 8D is not applicable for the assessment year 2007-08, same now stands covered by the judgment of Hon'ble Supreme Court in the case of ***CIT vs. Essar Teleholdings Ltd. (supra)*** *wherein it has been*

settled that disallowance u/s 14A cannot be computed under Rule 8D, prior to A.Y. 2008-09. Accordingly, the computation of disallowance under the Rule 8D for the A.Y. 2007-08 has to be rejected. Even otherwise also,in this year huge disallowance has been made on account of interest expenditure, which here in this case is an admitted fact that assesse company, as on 31st March 2007, had a huge surplus fund of more than Rs. 96.56 crores, as brought out by the Ld. CIT(A), which is sufficient to cover investment of Rs. 8.88 crores and accordingly, in view of settled principle laid down in various judgements, like CIT vs. Hero Cycles, [2010] 323 ITR 158 (P&H); CIT vs. HDFC Bank Ltd. [2104 366 ITR 505 (Bom) & (2016 383 ITR 589 (Bom,), no disallowance can be made.

19.1 In so far as what should be the reasonable basis for disallowance prior to the applicability of rule 80, we find that assessee has earned dividend income of Rs. 82,41,6101-, which are mostly from mutual funds. For deployment of funds and monitoring of such investments, it would be reasonable to estimate expenditure of Rs.1,00,000 on account of salary of the concerned persons looking after the mutual funds. Accordingly, the disallowance u/s 14A is restricted to Rs. 1 lac and consequently, the revenue's appeal is dismissed and assessee's cross objection No. 4 is partly allowed.

(v) Disallowance of interest

The tribunal while discussing this issue also minutely examined the entire facts and law and *inter alia* has held as under:

> *"23. After hearing both the parties, we find that the finding of the Ld. CIT(A) is borne out from the records that most of the interest free advances appearing in the books of the assessee company were on coming from the accounts of the merging companies who were not having interest burden. It was not an amount given by the assessee, albeit they have inherited the advances on account of merger of the companies with the assessee company. Therefore, there could not be allegation of giving any advance from assessee's interest bearing fund. In another set of parties as evident from the above chart, the funds*

were mobilised/advances to the contractors for the purpose of construction business, which ostensibly was for the purpose of business, which got adjusted in the subsequent year. Further, one advance was given as investment in the business firm, wherein assessee was a partner. Thus, none of these advances can be held to interest free advances for non-business purpose or given out of interest-bearing funds. Hence, under these facts it cannot be held that any interest-bearing loan amount raised from the bank account has been diverted to make any interest free advances and therefore, there is no question of making any notional disallowance of interest. Accordingly, order of Ld. CIT (A) is upheld and the ground of the revenue is dismissed."

(vi) Deemed dividend

On the issue of deemed dividend under Section 2 (22) (e) the tribunal discussed in detail the findings of the assessing officer CIT (A) as well as considered the judgment of this Court in ***CIT vs. Ankitech (P) Ltd. vs. Ors.,*** (2012) 240 ITR 14 (Del) *inter alia* held as under:

"27. We have heard the rival submissions, perused the relevant finding given in the impugned order as well as material referred to before us at the time of hearing. From facts as noted by the AO in the impugned assessment order itself shows that M/s Appollo Traexim(P) Ltd. had made advances against booking of space to M/s Y.M.C.Buildmore Pvt. Ltd. amounting to Rs. 6,48,63,965/ - ,which was purely a commercial transaction. As culled out from the record, M/s. Y.M.C .Buildmore Pvt. Ltd. was later on merged with the assessee company. Such an advance has come in the books of the assessee by way of merger. Such a payment for booking of space in the mall has been treated as deemed dividend by the AO u/s 2(22)(e), which cannot be in manner be reckoned as advance or loan in the nature of deemed dividend. AO has further held that Shri Y.C. Kurele was having shareholding of more than 10% in both the companies, which fact has been found to be incorrect by the Ld. CIT (A) as he was not holding substantial share in YMC Buildmore Ltd. First of all, for invoking the deeming

fiction of section 2(22)(e), one has to see, whether the nature of payment falls within the category of loans or advances which can be treated to be payment out of accumulated profits and is in the nature of dividend. If the payment has been made for booking of space/unit in a mall, then it is purely a commercial and business transaction; and now in view of the clarification given by the ***CBDT Circular No.19/2017 dated 12th June, 2017,*** *any advances given for commercial and business transaction cannot be brought within the mischief of deemed dividend. Thus, on this ground alone the deeming fiction of section 2(22)(e) could not have been invoked. Otherwise also, for invoking the provision of deemed dividend, it is sine-qua-non that the payment made by a company to a person should be a beneficial owner of the shares holding not less than 10% of the voting power. Admittedly, M/s Y.M.C. Buildmore (P) Ltd. was never a shareholder in Appollo Traexim (P) Ltd. Not only that, the inference drawn by the AO that one Shri Y.C. Kurele was having substantial interest in both the companies is also not correct, because he had only 0.9% shareholding in M/s Y.M.C. Buildmore (P) Ltd. Hence, this premise of the AO for invoking the provision of deemed dividend has no legs to stand. Thus, on both these counts the addition u/s 2(22)(e) could not have been made. Here in this case, Ld. CIT(A) has not straightaway deleted the addition, in fact he has given the direction to the AO to verify, whether recipient company i.e. M/s. Y.M.C. Buildmore (P) Ltd. which has now been merged with the assessee company is a registered shareholder ofthe said company or not. We do not find any infirmity in such a direction which is purely in accordance with law. Accordingly, the ground raised by the revenue on this score is dismissed."*

(vii) In regard to the addition of Rs.10,20,212/- on account of certain expenses for which, as per Assessing officer, bills/vouchers were not given, the tribunal *inter alia* held as under

"30. After hearing both the parties and on perusal of the relevant finding in the impugned orders, we find that the AO without any material on record or any inquiry conducted by him has simply disallowed the expenditure incurred during the course of the

business, on the ground that the bills submitted by the assessee does not contain information like bill no. Tin No. It is a matter of record that these payments have been made through account payee cheques to the parties who were suppliers and contractors and on such payment, wherever applicable, TDS has also been deducted and deposited in the Government account. Nowhere, either the services or material supplied by them have been doubted based on inquiry or any adverse material coming on record. If the assessee has submitted the complete address, PAN No., telephone no. and in some of the cases, TIN No was also given, then in wake of such evidences, genuineness of the expenditure incurred during the course of business cannot be disallowed. We agree with the finding of the Ld.CIT (A) that once assessee has discharged its onus by providing the copy of bills containing entire details with telephone no. and payment has been made through banking channel after having TDS, then no disallowance can be made. Accordingly, order of the Ld. CIT (A) is affirmed and a ground raised by the revenue is dismissed."

ASSESSMENT YEAR 2008-2009

27. The department had challenged the order of the CIT (A) on the following grounds:

(i) Depreciation on wind mill Rs. 28,79,999/-;

(ii) Direction of the Ld. CIT(A) to allow rent paid for Director's residence after verification Rs. 22,80,000/-

(iii) Disallowance of commitment charges Rs. 2,54,24,680/-.

(iv) Disallowance u/s 14A r.w.r. 8D Rs. 2,76,169/-

(v) Disallowance of interest Rs. 1,02,95,292/-

(vi) Disallowance of expenses Rs. 6,40,726/-.

28. The tribunal also considered the cross objections filed by the assessee after condoning the delay.

(i) Depreciation on wind mill Rs.28,79,999

The tribunal considered the case of the assesse and the department and *inter alia* has held as under:

"36. On perusal of the relevant finding given in the impugned orders as well as material referred to before us at the time of hearing, we find that it is not in dispute that the assessee has installed wind mill turbine on which assessee had made initial claim for depreciation in the assessment year 2007-08 on the ground that it was installed at the last day of the year 31st March, 2007 and consequently, depreciation was claimed on the ground that it was ready for use. However, said claim has not been allowed to the assessee company for the assessment year 2007-08 by the AO on the ground that there was no income from generation of electricity. Ld. CIT (A) too had disallowed the depreciation in assessment year 2007-08. However, the Ld. CIT (A) in that year had given direction to the AO that he should start allowing depreciation from Asst. Year 2008-09 onwards from the cost of wind mill, as assessee has started earning revenue from A. Y. 2008-09. This fact has not been controverted by the department. Accordingly, when depreciation stood disallowed to the assessee company in Asstt. Year 2007-08, then WDV for the assessment year 2008-09 will get increase and consequently, the assessee would be entitled for depreciation on enhanced claim which will get increase in the following manner:-

Particulars	*As claimed in ITR*	*Position on Disallowance of Depreciation in A. Y. 2007-08*	*Consequential effect*
Cost of the 'Wind Mill Turbine' inthe F. Y. 2006- 07 i.e. A. Y. 2007-08	*8,99,99.840*	*8.99,99,840*	
Less: Depn. @ 40% (A. Y. 2007-08)	*3,59.99,936*		
WDV as on 31.3.2007	*5.39,99.904*	*8,99,99.940*	
Less: Depn.@ 80%, (A. Y. 2008-09)	*4,31,99.923*	*7,19,99,872*	*Rs.2,87,99.949*
WDV as on 31.3.2008	*1,07,99,981*	*1, 79,99,968*	
Less: Depn. @ 80% (A. Y. 2009-10}	*86.36,985*	*1.43,99,974*	*Rs. 57,59,991*
WDV as on 31.3.2009	*21.59.996*	*35.99,994*	

Thus the ground raised by the department stands dismissed.

(ii) Rent paid for Director's residence

The tribunal considered the findings of the Assessing officer and CIT (A) and inter alia held as under:

"38. After considering the aforesaid findings given by the AO as well as by the Ld. CIT (A), we find that Ld. CIT (A) has mainly directed the AO to verify, whether the rent paid for the premises at New Friends Colony was used as a residence of Directors of the company or not; and whether such a usage was in terms of their employment or not. If company has provided accommodation on concessional rent to the Directors in terms of their employment, ostensibly such a payment is for the purpose of business. We do not find any infirmity in the directions given by the Ld. CIT (A) to the AO to verify this fact. Consequently the ground raised by the revenue is dismissed."

(iii) Disallowance of commitment charges Rs.2,54,24,680/-.

The tribunal considered the response to the show cause notice submitted by the assessee, finding of the assessing officer and the CIT (A) and gave its findings as under:

"42. After considering the rival submissions and on perusal of the material l placed on record, we find that the assesee in order to sell the space/shop in the mall has to lure to the customer for fixed return on his investment. Otherwise, it was very difficult to sell the space in the mall. Thus, its commitment charges were directly linked with the sale/allotment of space and for commercial expediency. From the plain reading of the relevant agreement between the parties in the allotment letter as incorporated above, it is clear that Assessee Company had assured to the allottee that he shall be entitled to receive rent from a particular date and if he does not get the rent then assessee had agreed to pay the rent to the allottee. However, the maintenance charges were paid by the allottee. It was in terms of this allotment letter, assessee was paying the commitment charges to the buyers and such a payment by the assessee has not been doubted. If assessee has made a payment in consideration of commercial and business expediency dully supported by written/allotment letter, then we do not find any reason why such a disallowance should be made. Accordingly, the deletion of such disallowance made by the Ld. CIT

(A) is affirmed and consequently ground raised by the revenue is dismissed."

(iv) Disallowance u/s 14A read with Rule 8D Rs. 2,76,169/-

The tribunal after considering the case of both the parties *inter alia* held as under:

"46. After considering the aforesaid submission and on perusal of the relevant material placed on record, we find that there is no rebuttal at any stage in so far as the assessee's contention that, firstly, assessee itself had huge surplus interest free funds in the form of reserves and surplus which far exceeded the investment made; and secondly, no interest bearing funds were ever utilised for the purpose of making investment in shares and mutual funds; and lastly, all these investments were made earlier by the 13 merging companies out of their own interest free finds. Under these facts and circumstances, no addition, whatsoever on account of disallowance of interest can be made. However, in so far as disallowance u/s 8D(ii) is concerned, we agree with the contention of the Ld. DR that assessee has not been able to substantiate or give any explanation why no expenditure is attributable for the purpose of exempt income and therefore, disallowance made u/s 8D(2)(iii) is confirmed. Consequently, the appeal of the revenue as well as cross objection raised by the assesse on this score stands dismissed."

(v) Disallowance of interest Rs. 1,02,95,292/-

The tribunal under this aspect also minutely considered the case of the assesse and the department and inter alia held as under:

"50. From the perusal of the relevant finding given by the AO and Ld. CIT (A), we first of all find that, precisely similar issue was involved for the assessment year 2007-08, wherein we have upheld the finding of the Ld. CIT (A) that most of the advances were in the nature of business advance and therefore, it cannot be treated as interest free advance given for the non business purpose; and secondly, there was no diversion of interest bearing loan in giving such advances. The aforesaid finding of the Ld. CIT (A) is based on appreciation of facts and records and therefore, such finding cannot

be tinkered with and consequently ground raised by the revenue is dismissed."

(vi) In regard to the issue of disallowance of the expenditure by the assessing officer of Rs.6,48,726/-.on account of bills and vouchers submitted by the assessee, the tribunal has held that similar issue was involved in the appeal for the AY 2007-08 wherein it was held that the assesse had submitted the bills raised by the contractors/material supplied which contain full address, phone number, nature of services rendered or goods supplied and the payments have been made through account payee cheque after deducting the TDS and without their being any inquiry by the AO or any adverse material on record, no such disallowance can be made.

ASSESSMENT YEAR 2009-10

29. In the appeal for the Assessment year 2009·10, the department has raised the following issues:

(i) Depreciation on Wind Mill

(ii) Brokerage & Commission

(iii) Commitment charges

(iv) Disallowance u/s.14A

(v) Disallowance of interest

(vi) CIT(A) direction to allow Claim of depreciation on Bhikhaji Cama Place and Jammu Site office after verification.

(vii) Disallowance of loss

(viii) Debit entries in the Rent Received account

(ix) Sinking Fund from buyers

(i) Depreciation on Wind Mill

The tribunal held that issue regarding depreciation on wind mill is similar to the assessment year 2008-09 and directed the assessing officer to allow depreciation at a higher written down value (WDV)

(ii) Brokerage & Commission

The tribunal followed its findings for the assessment year 2008-09 and directed AO to restrict the disallowance of brokerage and commission to the extent of renting/leasing of the property and allow the brokerage and commission on sale/booking of space.

(iii) Commitment charges

The tribunal followed its findings as given in the year 2008-09 and upheld the deletion made by CIT (A).

(iv) Disallowance u/s.14A r/w Rule 8D.

The tribunal held that in view of the findings given earlier the deletion of interest expenditure under Section 8D (2) (ii) and disallowance under section 14A read with R. 8D (2) (iii), the findings of the CIT (A) were upheld.

(v) Disallowance of interest

The tribunal followed its findings for AY 2007-08 and 2008-09 and found there was no change in the fact that assesse had huge surplus fund available and thus, disallowance of the interest made by the AO was deleted.

(vi) Depreciation on site of Bhikhaji Cama Place and Jammu Site office

The tribunal noted that AO had made additions solely on the ground that both these premises do not find mention in the detail of business premises of the assesee company. The tribunal has held that AO had

not even issued any show cause notice to the assesse. The CIT (A) had directed to allow depreciation after verifying the fact whether it is used for the purpose of business of the assesse or not and once it is found so, then depreciation may be allowed. The tribunal upheld the findings of the CIT (A).

(vii) Disallowance of loss

The tribunal has examined this fact in quite detail and *inter alia* held that addition on this score deleted by CIT (A) is based on correct appreciation of facts and that it has no co-relation at all with statement of Sh.Y.C.Kurele, Director of the company.

(viii) Issue of Debit entries recorded in the Rent Received account

The tribunal considered the entire material on the record and held as under :

"74. After considering the submissions made by the parties and on perusal of the relevant findings given in the impugned order, we find that assessee company has made reversal of rent receivable for certain properties which relates to the period for which the property was not handed over to the tenants. Thus, the same were liable to be kept out of ALV under the provisions of Section 23 (1) (c). Further in case of two properties, the same sold subsequently and for that period the rent was reversed in the books. Thus, rental income was not chargeable in the hands of the assessee at all. Further, if assessee has being shown rent on accrued basis and rent has not been realised for various reasons and corresponding debit entries have been made, then there cannot be deemed rental income of the amount of reversal of debit entries. Accordingly, the deletion of such addition made by the AO is affirmed and consequently the ground of appeal of the Revenue is dismissed."

(ix) Sinking Fund

The tribunal considered the findings of the AO and CIT (A) and *inter alia* held as under:

"78. After hearing both the parties and on perusal of the relevant finding given in the impugned orders, it is seen that in the terms of allotment letter, at the time of handing over the shop to the allottee, a maintenance agreement is being executed between assessee company and the allottee and as per the said agreement, a 'sinking fund' is created for the purpose of replacement, upgradation, addition, repair of plant and machinery, etc., within the mall. This was collected at the time of allotment itself with the condition that same shall be utilized for the maintenance by the maintenance agency. Thus, when fund is collected under a specific covenant and assessee is merely the custodian/ trustee of these funds which was to be handed over to maintenance agency to be used for the maintenance of various common facilities, then same cannot be treated as part of the revenue or sale consideration of the assessee so as to be treated as income. The order of CIT (A) is in accordance of law and on facts, hence same is firmed."

30. The cross objections of 2009-10 were also disposed of by the Tribunal on similar lines.

31. The discussion made hereinabove indicates that the tribunal has considered all the issues in depth. The findings given by the tribunal are based on the appreciation of facts. The issues raised by the department does not involve any substantial question of law. We have also found that there is no perversity in the order of the tribunal. In view of the above discussion, all the appeals are dismissed.

DINESH KUMAR SHARMA, J

MANMOHAN, J

APRIL 12, 2022/*rb*