IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI

Before Shri P K Bansal, Vice President &
Shri Pawan Singh, Judicial Member

ITA No. 1295/Mum/2012 Assessment Year : 2000-01
ITA No. 1296/Mum/2012 Assessment Year : 2001-02
ITA No. 1880/Mum/2010 Assessment Year : 2004-05
ITA No. 1881/Mum/2010 Assessment Year : 2005-06
ITA No. 898/Mum/2013 Assessment Year : 2006-07
ITA No. 899/Mum/2013 Assessment Year : 2007-08
ITA No. 900/Mum/2013 Assessment Year : 2008-09

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| Spectrum Coal & Power Ltd (Formerly ST-CLI Coal Washeries Ltd), New Delhi PAN AADCS9860J | Vs. | ACIT Circle 1(3)/DCIT Circle 1(3) Mumbai |
| (Appellant) | | (Respondent) |

ITA No. 1813/Mum/2013 Assessment Year : 2006-07

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| DCIT 1(3) Mumbai | Vs. | Spectrum Coal & Power Ltd Hyderabad 500 082<br><br>PAN AADCS9860J |
| (Appellant) | | (Respondent) |

For the Revenue : Shri Ram Tiwari
For the assessee : Shri Salil Kapoor

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| Date of Hearing : 31.07.2017 | | Date of Pronouncement : 03.08.2017 |

## O R D E R

**Per P K Bansal, Vice-President:**

All these appeals since relate to the same assessee, therefore, they are being disposed of by this common order.

2. The grounds of appeal in ITA No. 1295/Mum/2012 for AY 2000-01 & ITA No. 1296/Mum/2012 for AY 2001-02 are common. In both these appeals the assessee has taken as many as eight grounds of appeal. Ground no.1, 7 & 8 are general in nature, therefore, does not require any adjudication. Ground nos. 5 & 6 were not pressed in both the ears and, therefore, dismissed as not pressed. The only common grounds, which survive for our adjudication, read as under:

> *"2. That in the facts & circumstances of the case, the CIT(A) and Assessing Officer has erred on facts and in law in reducing the value of plant and machinery by Rs.9,97,28,611/- for A.Y. 2000-01 for the purpose of allowing depreciation under the Income Tax Act, 1961.*
> *3. That the Assessing Officer has erred on facts and in law in treating the amount of Rs.9,97,28,611/- as "cost borne by any other person or authority" and reducing the same from the cost of plants and machinery for the purpose of allowing depreciation for A.Y. 2000-01 and CIT(A) has erred in law and facts in upholding the same.*
> *4. That the CIT(A) and Assessing Officer has failed to appreciate that the said amount of Rs.9,97,28,611/- received as a conditional grant which is in the shape of a loan repayable @200% of the said amount under the PACER agreement."*

3. At the outset, both the parties agreed that similar grounds have been taken as ground nos.4 & 5 in A.Y. 2004-05, ground no.3 in A.Ys. 2005-06, 2006-07 and 2007-08. Both the parties agreed that the grounds relate to the claim of depreciation by the assessee. It was also agreed that these grounds be decided on the basis of the facts involved for A.Y. 2000-01 and whatever

view may be taken by this Tribunal for A.Y. 2000-01, the same may be taken in all other years also.

4. The facts relating to these grounds are that the Assessing Officer noted that the assessee had received a sum of ₹ 9,97,28,611/- from US Aid through ICICI under the Program for Acceleration of Commercial Energy Research (PACER) in the years 1996-97, and 1997-98, which was credited to the capital reserve in the balance sheet of the company's accounts. In the F.Y. 1999-2000, the assessee company had adjusted this amount against the investment in plant and machinery made during the year. However, the cost of plant & machinery was not reduced to this extent while calculating the written down value (WDV) for the purpose of determining the depreciation as per the provisions of the Income tax Act. This resulted in excess allowance of depreciation as claimed by the assessee while the case was processed u/s. 143(1). The Assessing Officer treated the grant received by the assessee from US Aid through ICICI as cost met directly or indirectly by any other person or authority as per the provisions of Section 43 of the I.T.Act. While framing the assessment u/s 143(3), the first appellate authority dismissed the appeal of the assessee vide order dated 27.02.2006. When the matter went in first round before the ITAT, the Tribunal set aside the assessment and directed the Assessing Officer to adjudicate afresh the issue in accordance with law, after giving adequate opportunity of hearing to the assessee. The

Assessing Officer took the view that the amount of the grant received under PACER from US aid through ICICI amounted to cost met by US aid on the purchase of plant and machinery by the assessee company as per the provisions of Section 43(1) of the IT Act and, therefore, he took the WDV of the plant and machinery for the purpose of calculation of depreciation at the cost of plant and machinery reduced by the amount of grant received by the assessee company from US aid through ICICI under PACER. The assessee went in appeal before the CIT(A). The CIT(A) confirmed the order of the Assessing Officer by observing as under:

> *3.3.1 On the first issue, whether the amount of grant received by the Appellant Company from ICICI Ltd. Mumbai under PACER agreement, is a loan or an assistance, I am inclined to agree with the views of the assessing officer that this amount of Rs. 9,97,28,611/- received by the Appellant Company is a Conditional grant and not a loan, It is noted that the first agreement was signed between ICICI Ltd. and US Agency for International Development (USAID) dated 31/08/1987 wherein USAID had agreed to give project grant for Programme for Acceleration for Commercial Energy Research (PACER) and ICICI Ltd was to disburse the grant funds received under AID grant for financing of approved sub-projects. USAID had contributed 20 Million Dollars for this project. And in this agreement, there was no provision for return of grant by the ICICI Ltd. back to USAID. The ICICI Ltd was to provide in kind support sufficient to meet the purposes of the project and the sub project participants to contribute an amount of not less than 40% of the total cost of the project. Whereas in the Second agreement between the ICICI Ltd. and the Appellant Company dated 12 Sept, 1996 titled "Agreement for PACER assistance" the ICICI Ltd. has agreed to provide finance for the implementation of the proposal given by the Appellant Company. This conditional grant was to be disbursed only up to 31st August 1997 as per Clause C1 of this agreement, it was agreed that the Appellant Company shall make payments to ICICI based on*

*gross annual sales derived from the commercial exploitation of the innovation commencing with the first such'" commercial transaction. Such payments shall be made on the following basis subject to the maximum 200% of the conditional Grant in any event. An amount equivalent to one hundred percent of the conditional grant shall be paid to ICICI Ltd at the rate of (i) 4% of the gross annual sales of the coal beneficiated in the future project, (ii) 2% of the gross annual sales of the coal beneficiated in the proposed commercial project. 1 find it very strange that on one hand IC1CI Ltd. is getting USAID for PACER project on Non returnable basis, on the other hand, ICICI Ltd is making this grant conditional for the Appellant Company demanding double the amount of the grarlt given to the Appellant Company over a period of time when the grant given to the appellant company is returnable to the ICICI Ltd. by twice the amount of grant taken for PACER project then how such grant can be taken to be in the nature of Grant/Assistance/subsidy/aid was argued by the authorized representative. However in my view, after examining both agreements and clauses therein, the preponderance of probability suggests that the origin of this amount is from a AID project run by USAID and the amount was given to the Ltd. for running a specific energy project under PACER. However, the ICICI Ltd. has turned this assistance into a conditional grant while extending this amount to the Appellant Company, repayable amount, being twice the amount of conditional grant given as a royalty linked to the sales. It is also a fact that the Appellant Company had returned a sum of Rs. 20 Lac to the ICICI Ltd. as a Royalty as per agreement, however thereafter no payments have been made by the Appellant Company to the ICICI Ltd. Neither the ICICI Ltd. has recovered the balance amount of royalty from the Appellant Company as per agreement nor the Appellant Company has provided for any Royalty payable to the ICICI Ltd, in its books of accounts. The conduct of the Appellant company and its method of accounting over many assessment years show that it has treated this conditional grant given by the ICICI Ltd. as an aid/assistance/grant/subsidy and not as a loan. No royalty was repaid or repayable by the Appellant company to the ICICI Ltd. after making a payment of Rs.20 lacs to the ICICI Ltd. Therefore, I find no infirmity in the assessment order of Assessing Officer wherein he has held that this amount given by ICICI Ltd. to the Appellant Company is basically an aid/assistance/grant/subsidy and not in the nature of loan given to the Appellant Company. In case, the amount given by the ICICI Ltd. was a loan in that case, the ICICI Ltd, should have charged interest on the amount given to the*

*Appellant Company. However, the agreement between the Appellant Company and the ICICI Ltd. does not show any clause wherein it is written that loan was repayable on interest. Consequently, I find no merit in the argument of the authorized representative of the Appellant Company that such amount may be treated as a loan when the entire transaction as per agreements deals with aid or grant given to the Appellant Company under PACER agreement. Therefore, all these grounds No. 2 to 5 are dismissed. Further, the sixth ground of appeal is also decided against the Appellant Company because no provision for payment of royalty to the ICICI Ltd, was made in the books of accounts of the Appellant Company, in case, any royalty was payable as a genuine business expenditure by the Appellant Company to the ICICI Ltd., in that case the Appellant Company must have made a provision in its books of accounts for making such payment. Therefore, it is apparent that the Appellant Company has treated the amount received from ICICI Ltd. as a onetime grant / assistance which was not returnable by the Appellant Company.*

*3.3.2 On the Second issue, whether the amount of grant should be reduced from the cost of assets or not for granting Depreciation, I am of the view that the Explanation 10 to Section 43(1) will cover all kind of grants conditional or otherwise, irrespective of their purposes and must be reduced to work out the actual cost under Section 43(1) of the Income Tax Act, 1961. To sum up, 1 find no reason to interfere with the order of Assessing officer wherein he has granted Depreciation on the assets to the Appellant Company after reducing the amount of grant received by the Appellant Company.*

5. The learned AR before us drew our attention to page 116 of the paper-book and contended that there was a project grant agreement between ICICI & the USA for Program for Acceleration of Commercial Energy Research. Referring to page 118, it was pointed out that the purpose of this agreement was to set up the understandings of the parties with respect to the undertaking by ICICI of the project described at page 119 and with respect to the financing of the project. Referring to page 119 it was pointed out that

the project is defined with three inter related components for seeking to create an institutional environment for relevant technology innovation in the energy sector. ICICI will disburse grand funds received under AID grant for financing of approved subprojects and related activities and organize secretariat for the executing of the project. Our attention was drawn towards Section 43(1), which defines the "actual cost" means the actual cost of the assets to the assessee reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority. On the basis of this definition, it was contended that for the purpose of determining the actual cost only that portions will be reduced from the actual cost which has to be met by any other person or authority. In this case, the grant under the agreement has been given not by any person or the authority; it has been given by USA, which is sovereign. Our attention was also drawn towards Explanation 10 to Section 43. On the basis of this explanation, it was contended that only that portion of the cost of assets acquired by the assessee, which has been met directly or indirectly by the Central Government or the State Government or any authority established under any law or by any person in the form of subsidy or grant or reimbursement has to be reduced from the actual cost of assets for the purpose of depreciation. USA is neither Central Government/State Government entity nor any authority established under any law in India. Even otherwise, it was contended that in view of the decision of the Visakhapatnam Bench of this Tribunal in the case

of Sasisri Extractions Limited v. ACIT (122 ITD 428) and the decision of Kolkata Bench of the Tribunal in the case of Universal Cables Limited vs. DCIT (57 taxmann.com 95), even after insertion of Explanation 10 to Section 43(1), there is no change in the basic concept and the first test has to be satisfied is that the portion of the cost of asset should be met either directly or indirectly by any authority either in the form of subsidy or otherwise. So long as the subsidy was intended to encourage entrepreneurs to establish industries, the mere fact that a specified percentage of the fixed capital cost was taken as the basis for determining the subsidy should not be mistaken as a payment intended to subsidize the cost of capital of the new industry. It was pointed out that even after the insertion of Explanation 10 to Section 43(1), the basic principle underlying in the decision of Apex Court in the case of P J Chemicals Ltd 210 ITR 830 (SC) still holds good. In that decision, their Lordships analyzed the expression "met directly or indirectly" to come to the conclusion that only in a case where a subsidy or other grant was given to offset the cost of an asset, such payment/grant would fall within the expression 'met' whereas the subsidy received merely to accelerate the industrial development of the State cannot be considered as payments made specifically to meet a portion of the cost of the assets. In this case, grant was not given to meet the cost of any specific asset but to create an institutional environment for our technology innovation in the energy sector. It was further contended that in the case of the assessee, the grant was given for setting up advanced

plant for beneficiation of high ash Indian coal as an integrated coal beneficiation plant. Our attention was also drawn towards agreement for PACER assistance entered into between ICICI and the assessee. On this basis, it was stated that as per clause 'C' the agreement was for financing out the PACER Grant Resources and ICICI has agreed to provide finance for the implementation of the proposal. This grant was repayable by the assessee although there was no limitation for the repayment. The repayment has to be made @2% of the gross annual sales of the coal beneficiated in the proposed commercial project but subject to the condition that the repayment amount will not exceed 100% of conditional grant. The assessee has paid back a sum of ₹ 20 lacs. For the terms and conditions, our attention was drawn towards clause C.1. of the agreement appearing at page 98 of the paper-book. Thus, it was contended that it was a financing arrangement and in fact not a subsidy or a grant. Further, it was submitted that during the assessment years 2003-04, 2009-09 and 2009-10, the Assessing Officer after examining the issue, allowed the claim of the assessee by passing order u/s. 143(3). Therefore, in view of res adjudicate and following the principle of consistency, depreciation should be allowed to the assessee. In this regard reliance was placed on the following decisions:

CIT vs. Gopal Purohit 336 ITR 287 (Bom)
CIT vs. Neo Poly Pack (P) Ltd. 245 ITR 492 (Del)

Our attention was also drawn towards the queries raised and the submissions made by the assessee during the assessment years 2003-04 and 2008-09 in respect of claim of depreciation by the assessee while framing the assessment u/s. 143(3). Lastly, it was submitted that the fact that the assessee has transferred the said amount to the machinery account will not make any difference as the entry will not determine the real income.

6. The learned DR, on the other hand, referred to the findings given by the CIT(A) and on that basis it was contended that the true nature of the amount received by the assessee was not loan but it was a grant. The preponderance of probability suggests that origin of this project is the grant by US aid through ICICI under the Program for Acceleration of Commercial Energy Research. But the ICICI Ltd has turn this assistance into a conditional grant while extending this amount to the assessee, repayable amount being twice the amount of conditional grant given as royalty linked to the sales. The assessee has merely returned a sum of ₹ 20 lacs to ICICI, however, thereafter the assessee has not made any payments to the ICICI Ltd neither the ICICI Ltd has recovered the amount from assessee company nor the assessee has provided for any royalty payable to ICICI Ltd in its books of account. The conduct of the assessee shows that it has treated this amount given by ICICI Ltd as a aid/assistance/grant/subsidy and not as a loan. So far as the applicability of Explanation 10 to Section 43(1) is concerned, it was

contended that whatever grant was received, whether conditional or not, it has to be reduced for working out the actual cost u/s. 43(1) of the Act.

7. We heard the rival submissions and carefully considered the same along with the order of the tax authorities below. We have also gone through the agreement entered between the assessee as well as ICICI Ltd under which the assessee has been given the said amount. Not only this, we have also gone through the agreement entered into between ICICI Ltd and USA under which USA has authorized ICICI Ltd to disperse grant of funds received under the head 'grant'. It is not disputed that the assessee has received the said grant as per the agreement with ICICI Ltd for which the government of USA has agreed to contribute certain sum of money as per the agreement dated 31.08.1987. The agreement between the assessee and ICICI Ltd for special assistance was entered into on 12.09.1996. Under the said agreement, the assessee was given a special grant of ₹ 9,97,28,611/-. As per the Assessing Officer, said grant was to meet the part of the project cost under PACER and during the assessment year 2000-01, the assessee has adjusted the said grant against the cost of plant & machinery. The Assessing Officer allowed depreciation to the assessee on the WDV of the plant & machinery as has been worked out after reducing the said grant. Now the question before us is whether the said grant has to be reduced from the WDV of the plant & machinery for the purpose of allowance of depreciation. From

the agreement dated 12.09.1996, between ICICI Ltd and the assessee, we noted that clause 5 states as under:

> *"5) In accordance with the provisions of the PACER Agreement, the appropriate authority has examined and approved the Proposal for financing out of the PACER Grant Resources and ICICI has agreed to provide finance for the implementation of the Proposal on the terms and conditions hereinafter set forth."*

Similarly, clause B of the terms and conditions read as under:

> ***"B. PROJECT FINANCING***
>
> *B1. ICICI hereby agrees to finance, by Conditional Grant, the implementation of the Proposal up to the maximum amount of Rs 188 lacs and US$ 2,243,011 equivalent in aggregate to US $ 2,765,233 or 75% percent of the actual expenditure whichever is less. The Approved Proposal Budget as contemplated is set forth in Annex A. hereto.*
>
> *B1. The portion of the actual expenditure on the project which ICICI provides to the Proposers by way of Conditional Grant shall hereinafter be described as 'Conditional Grant'.*
>
> *B2. The Proposers shall provide in timely fashion their contribution as budgeted in the 'Annex A and in the event the proposers do not avail of the conditional grant on or before Project Assistance Completion Date which is August 31. 1997, the proposers shall provide such additional finance required for the implementation of the proposal from their own resources.*
>
> *B3. ICICI shall disburse the Conditional Grant to the other-Proposers as described in Annex B hereto only upto August 31,1997.*
>
> *B4. ICICI shall under no circumstances be liable for any loss, compensation or damage to the Proposers, or any third party in connection with such project financing or Conditional Grant in any manner whatsoever."*

On the basis of these clauses, it is apparent that the ICICI Ltd agreed to finance conditional grant to the assessee under the Program for acceleration of Commercial Energy Research. This conditional grant shall be repayable by the assessee to ICICI, which is apparent from clause C1 of the agreement, which states as under:

> *"C.I. PAYMENTS TO ICICI BY THE MAIN PROPOSER.*
>
> *In the event of the main Proposer putting the proposal for commercial use/ unless otherwise agreed to in writing subsequently, the main Proposer shall make payments to ICICI based on gross annual, sales derived from the commercial exploitation of the innovation commencing with the first such commercial transaction. Such payments Shall be made on the following basis subject to the maximum 200% of the Conditional - Grant in any event.*
>
> *a) An amount equivalent to one hundred percent of the conditional grant referred to in Sub-Section B1 above, shall be paid to ICICI at the rate of (1) 4% (four percent only) of the gross annual sales of the coal beneficiated in the future projects, (ii) 2% (two percent only ) of the gross annual sales of the coal beneficiated in the proposed commercial project.*
>
> *b) When payment of conditional grant has been completed according to sub section (a) above, the rate of further payment shall be paid to ICICI at the rate of (i) 4% (four percent only) of the gross annual sales of the coal beneficiated in the future projects, (ii) 2% (two percent only ) of the gross annual sales of the coal beneficiated in the proposed , commercial project.*
> *Such further payments to continue until a further amount equivalent to one hundred percent of Conditional Grant shall have been paid to ICICI.*
>
> *The term "Gross Annual Sales" means the gross income realised by way of washing charges received from the commercial exploitation of the Innovation in India or Abroad and shall include all specific*

*export incentives or bonuses .received by the Main Proposer but shall exclude sales tax and excise duties."*

On the basis of this clause, it is apparent that the assessee has to repay the said conditional grant subject to the condition that the maximum repayment amount will not exceed to 200% of the conditional grant and till that the assessee has to pay 2% of the gross annual sales of the coal beneficiated under the proposed commercial project. The grant from this agreement is conditional. The grant so received by the assessee is a financial arrangement and cannot be regarded to be a subsidy grant. Since this grant has been given under the agreement which ICICI has entered into with USA therefore, we have also gone through the agreement entered into between them, copy of which is available at pages 116 to 130 of the paper-book. From the said agreement, it is apparent that the agreement is for financing the project grant under PACER. The project has been defined under Article 2, which reads as under:

*Article 2: <u>The Project</u>*

*SECTION 2.1. <u>Definition of Project.</u> The Project, with three inter-related components, which is further described in Annex 1, will, under the overall direction of the Department of Non-Conventional Energy Sources (DKES) .of the Ministry of Energy of the Government of India support selected research and technology development proposals while seeking to create an institutional environment for relevant technology innovation in the energy sector. ICICI will disburse Grant funds received under AID Grant for financing of approved subprojects and related activities and organize secretariat for the execution of the project. Within the limits of this definition of the Project, elements*

> *of the amplified description in Annex 1 may be changed by written agreement of the authorised representatives of the Parties named in Section 9.2, without formal amendment of this Agreement, however, these be vetted by the DEA in the MOF prior to their incorporation."*

From this it is apparent that the grant is to create an institutional environment for technological innovations in the energy sector and disbursement of the grant is to be made by ICICI. This agreement, even if we take the contention of the learned DR, that it is not a financial arrangement but a subsidy, it is not for a specific plant & machinery. We have also gone through the provisions of Section 43(1) as well as Explanation 10 thereof. We noted that Section 43(1) defines the actual cost to mean the actual cost of the assets of the assessee reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by other person or authority. In the impugned case, we noted that what the ICICI has financed by way of conditional grant to the assessee is the amount received from USA under the project grant agreement for the Program for Acceleration of Commercial Energy Research. Now the question arises whether USA can be regarded to be a person or authority. In our view, this provision cannot be read without Explanation 10. Explanation 10 there to reads as under:

> *"Explanation 10 : Where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or*

*reimbursement shall not be included in the actual cost of the asset to the assessee."*

From the reading of the said explanation, it is explicitly clear that if a portion of a cost of an asset acquired by the assessee has been met directly or indirectly by Central Government or State Government or any authority established under any law or by any other person in the form of a subsidy or a grant or reimbursement, said subsidy grant or reimbursement as is relatable to the asset shall be reduced out of the actual cost of the assessee to the assessee. USA is a sovereign and cannot be Central Government or State Government or any authority established by any law in India. Now the question arises, whether USA can be regarded to be a person. A person has been defined u/s. 2(31) as under:

*"person includes –*

*(i) an individual,*
*(ii) a Hindu undivided family,*
*(iii) a company,*
*(iv) a firm,*
*(v) an association of person or a body of individuals, whether incorporated or not,*
*(vi) a local authority, and*
*(vii) every artificial juridical person, not falling within any of the preceding sub-clauses.*
*(Explanation – For the purposes of this clause, an association of persons or a body of individuals or a local authority or an artificial juridical person shall be deemed to be a person, whether or not such person or body or authority or juridical person was formed or established or incorporated with the object of deriving income, profits or gains "*

From the said definition, we are of the view that USA cannot be regarded to be a person under the IT Act. Even on this basis also financial assistance given by ICICI cannot be regarded to be a cost met directly or indirectly by any other person. We have also gone through the decision of Visakhapatnam Bench of this Tribunal in the case of Sasisri Extractions Limited v. ACIT122 ITD 428. We noted that in this case, the Tribunal has categorically held under para 11 of its order that even after insertion of Explanation 10 to Section 43(1) of the I.T Act, the basic principle underlying the decision of the Apex Court in the case of CIT vs. P J Chemicals 210 ITR 830, still holds good. In this decision, their Lordships analyzed the expression "met directly or indirectly" to come to the conclusion that only in a case where a subsidy or other grant is given to offset the cost of an asset, such payment/grant would fall within the expression 'met' whereas the subsidy received merely to accelerate the industrial development of the State cannot be considered as payment made specifically to meet a portion of the cost of assets. This decision in our view is equally applicable in the case of the assessee as the conditional grant was given under the Program for Acceleration of Commercial Energy Research. As per the agreement entered into between ICICI and USA, we noted that the same view has been taken by Kolkata Bench of this Tribunal in the case of Universal Cables Limited vs. DCIT 57 taxmann.com 95. While holding so, the Tribunal under para 18 of its order relied on the order of the order of the Visakhapatnam Bench in the case of

Sasisri Extractions Limited (supra). In view of this fact, respectfully, following the decisions and legal position explained by the Hon'ble Supreme Court in the case of P J Chemicals (supra), we are of the view that the condition of financial grant received by the assessee could not be reduced from the actual cost of fixed assets for computing the depreciation under the Income tax Act.

8. Now coming to the last bit of the submission made by the learned AR, we noted the fact that during the assessment years 2003-04, 2008-09 and 2009-10, the Assessing Officer, under the same set of facts, after examining the issue in detail, allowed depreciation to the assessee. The learned DR even though vehemently relied on the order of the CIT(A) could not distinguish that the facts involved in assessment years 2003-04, 2008-09 and 2009-10 were different from the impugned assessment years. We, therefore, on the basis of the principle of consistency, respectfully, following the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Gopal Purohit 336 ITR 287 (Bom) and that of Hon'ble Delhi High Court in the case of CIT vs. Neo Poly Pack (P) Ltd. 245 ITR 492 (Del) hold that the conditional grant received by the assessee cannot be reduced out of the WDV of the assets for the purpose of computing the depreciation. In our view, the contention of the learned DR that the assessee has credited the said amount to the assets in the books of account will not make any difference. As to claiming of the depreciation by the assessee in the income tax return, in view

of the decision of the Hon'ble Supreme Court in the case of Kedarnath Jute Manufacturing Co. Ltd. vs. CIT 82 ITR 363 (SC), wherein it has been held that whether the assessee is entitled to a part deduction or not will depend on the provision of the law relating thereto and not on the view which the assessee may take of his rights; nor can the existence or absence of entries in his books of account be decisive or conclusive in the matter.

9. In view of our aforesaid discussion, we set aside the order of the CIT(A) in each of the assessment years on this issue and direct the Assessing Officer to allow depreciation to the assessee without deducting the amount of the conditional grant received by the assessee from the actual cost/WDV of the plant and machinery. Thus, this ground in each of the assessment years is allowed. This disposes of appeals in ITA Nos. 1295 & 1296/Mum/2012

10. **ITA No. 1880/Mum/2010 for Assessment Year : 2004-05**

Ground no.1, 11, 12,13 and 15 are general in nature, therefore, it does not require any adjudication. Ground no. 2 is the summary of other grounds taken by the assessee and, therefore, does not require any adjudication. Ground nos. 6 and 8 were not pressed, hence stands dismissed as not pressed.

11. Ground nos. 3 and 4 read as under:

> *"3. The CIT(A) has, in view of the facts and circumstances of the case and in law, grossly erred in upholding the action of the Assessing Officer in treating the expenditure incurred on obtaining a*

*technical report as expenditure incurred on acquiring a capital asset and hence not allowing the same as revenue expenditure.*

*4. The CIT(A) has failed in appreciating the fact that no new capital asset has been created/acquired by obtaining the technical report."*

12. The facts relating to these grounds are that the Assessing Officer noted that the assessee has claimed technical knowhow as capital expenditure. However, during the course of assessment proceedings, the assessee vide letter dated 9.11.2006 by submitting a note claimed these expenditure as revenue expenditure. The assessee claimed that he has added in the balance sheet under the head 'Plant & Machinery' a sum of ₹ 4 crores as amount paid for technical knowhow and claimed depreciation. This expenditure has been incurred for coal beneficiation and, therefore it is in the nature of revenue expenditure and not a capital expenditure. In this regard a copy of the agreement dated 23.08.2003 between the assessee and BSES Ltd was also submitted. The Assessing Officer did not agree with the assessee and treated the same as capital expenditure in view of the provisions of Section 32(1)(ii), which categorizes that technical know-how acquired by the assessee as an intangible asset and any expenditure incurred towards acquisition of such asset as capital expenditure, eligible for depreciation. The Assessing Officer therefore rejected the claim of the assessee treating the sum of ₹ 4 crores as revenue expenditure. Aggrieved the assessee went in appeal before the CIT(A). The CIT(A) as per the findings given by him under para 4 to 8

rejected the claim of the assessee. Hence, the assessee is in appeal before us.

13. We have heard the rival submissions and have carefully considered the same along with the orders of the tax authorities below. The question before us is whether the sum of ₹ 4 crore paid by the assessee as per technical knowhow agreement dated 23.08.2003 between the assessee and BSES is capital expenditure or a revenue expenditure. We have gone through the said agreement, copy of which is placed at pages 59 to 66 of the paper-book. As per clause 5 of this agreement, the assessee has to pay a sum of ₹ 4 crore as technical know-how fees in installments of ₹ 2 crore each in consideration of the preparation and completion of the report and the services to be provided by BSES to the assessee. The scope of the work has been described under clause 1 as under:

> *"1.1 ST-BSES hereby appoints BSES to prepare for its use and benefit for the purpose of its Project (defined hereinabove) a Technical Know-how Project Report (hereinafter referred to as the "Report") and BSES hereby accept such appointment and agrees to prepare the Report and provide the services hereinafter mentioned, on the terms and conditions contained in this Agreement.*
>
> *1.2 The Report shall contain information and data including, without limitation, know-how, statistics, logistics, evaluations, proposals, analysis, plans, methodology, standards, factors, forecasts, projections, conclusions and recommendations and such other incidental and necessary details and matters to provide to ST-BSES a comprehensive and detailed Report to assist ST-BSES in the operation and maintenance of the Project by ST-BSES in an optimum manner for improvements in the coal beneficiation activity for power grade coal.*

*1.3 BSES shall, from time to time, upon every reasonable request of ST-BSES -provide all such incidental services to ST-BSES in connection with the Project as are required by ST-BSES to utilize the information and data contained in the Report in a beneficial manner and to provide all required clarifications in relation to any matter contained in the Report.*

*1.4 The Report shall be and remain the property of ST-BSES and BSES shall not be concerned with the purpose for which, or the manner in which ST-BSES uses the Report."*

From clause 1.2, it is apparent that the payment has been made by the assessee for improvement in the coal beneficiation activity for power grade coal. Now the question arises whether the payment so made is revenue expenditure or a capital expenditure.

14. The learned AR before us vehemently contended that the technical report obtained was to facilitate business as well as smooth and efficient functioning thereof. It is incurred for improvement of coal beneficiation activity for power grade coal, thereby improving the existing business of the assessee. Our attention was drawn towards the decision of the Hon'ble Supreme Court in the case of Alembic Chemical Works Co. Ltd. vs. CIT 177 ITR 377 (SC) to support the contention that the expenditure incurred for the improvement of the existing business is revenue expenditure. We have gone through the decision and noted that at page 390, the Hon'ble Supreme Court has held as under:

*"In the present case, the principal reason that influenced the option of the High Court was that the initiation and exploitation of the new*

*process brought in their wake a new venture requiring an altogether new plant. We are afraid this view may not be justified. Clauses 2, 4 and 6 of the agreement provide :*

*"(2) For and in consideration of the sub-cultures, design, flow sheet and written description to be furnished by Meiji to ALEMBIC pursuant to paragraph (1) hereof, Alembic shall pay to MEIJI in advance and in lump sum, such an amount as MEIJI is able to collect fifty thousand U. S. Dollars ($ 50,000) net in Tokyo after deducting any taxes and charges to be imposed in India upon MEIJI with respect to the said payment to MEIJI."*

*"(4) MEIJI will give advice, to the extent considered necessary by MEIJI on any difficulty ALEMBIC may encounter in applying the sub-cultures and informations obtained by ALEMBIC from MEIJI to the large scale manufacture. The above provision shall be in force after MEIJI's receipt of the amount set forth in paragraph (2) hereof until the end of two (2) years from the effective date of this agreement . . ."*

*"(6) Any of the sub-cultures and informations obtained by ALEMBIC from MEIJI shall be regarded as strictly confidential by ALEMBIC and its personnel and shall be used by ALEMBIC only in its Penicillin G plant in India, and shall not be disclosed to any other person, firm or agency,*

*Governmental or private. Alembic shall take all reasonable steps to ensure that such sub-cultures and information will not be communicated. ALEMBIC shall take all possible precautions against the escape from its premises of the strain obtained from MEIJI or propagated therefrom.*

*ALEMBIC shall not apply for any patent to any country in relation to any of the sub-cultures and information obtained by ALEMBIC from MEIJI".*

*As noted earlier, the Tribunal, in the course of its order, held:*

*". . . Meiji agreed to give the designs, etc., not only for a pilotplant but for the manufacture of penicillin according to Meiji's process on commercial scale. The assessee has to put in a larger plant modelled on the pilot-plant. " (emphasis * supplied).*

*Having regard to the terms of clause 4 of the agreement, this conclusion is non sequitur.*

*The improvisation in the process and technology in some areas of the enterprise was supplemental to the existing business and there was no material to hold that it amounted to a new or fresh venture. The further circumstance that the agreement pertained to a product already in the line of the assessee's established business and not to a new product indicates that what was stipulated was an improvement in the operations of the existing business and its efficiency and, profitability not removed from the area of the day-to-day business of the assessee's established enterprise.*

*It appears to us that the answer to the questions referred should be on the basis that the financial outlay under the agreement was for the better conduct and improvement of the existing business and should, therefore, be held to be revenue expenditure."*

15. The learned DR, on the hand, vehemently relied on the orders of the authorities below and submitted a note on what does coal beneficiation mean. We have gone through that note. We noted that coal beneficiation has been defined as cost effective and significant step towards improving power plant efficiency and reducing the GHG emissions from the coal fired power plants in India would be to increase the availability of clean beneficiated coals using appropriate beneficiation technologies. In fact, it improves the quality of coal. From the note it is not denied that it is not for the improvement in the coal beneficiating activity for power grade coal. Power grade coal is the existing business of the assessee. This means improvement in the coal beneficiation effects the day to day business of the assessee and improves the operations of the existing business. It does not relate to a new product and, therefore, in our view the case of the assessee is duly covered by the aforesaid finding of the Hon'ble Supreme Court in the

case of Alembic Chemical Works Co. Ltd. We also noted that the Supreme Court in the case of Empire Jute Co0. Ltd. vs. CIT 124 ITR 1 (SC) has observed that here may be cases where expenditure, even if incurred for obtaining an advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. Since the expenditure incurred is for the improvement of the existing business and has not created a new business for the assessee, therefore, it will be a revenue expense. We therefore, set aside the order of the CIT(A) and delete the disallowance.

16. Ground no.5 have already been disposed of while dealing with the appeals for assessment years 2001-01 and 2001-02 in the preceding paragraphs, which we have allowed.

17. Ground no.7 read as under:

> *"The CIT(A) has, in view of the facts and circumstances of the case and in law, grossly erred in upholding the action of the AO in treating the expenses on repairs and maintenance of roads and bridges as capital expenditure and consequently disallowing the assessee's claim for revenue expenditure to the extent of Rs.46,33,463/-"*

Similar ground has been taken in assessee's appeals as ground no. 5 for A.Ys. 2005-06, 2006-07, 2007-08 and as ground no.2 in A.Y. 2008-09 (except change in figure). Both the parties agreed that this ground be disposed of on the basis of the facts involved in the case of the assessee for A.Y. 2004-05

and whatever view this Tribunal may take shall be the view taken for A.Ys 2005-06, 2006-07, 2007-08 and 2008-09.

18. The facts relating to this ground are the Assessing Officer noted from the profit and loss account that the assessee has incurred expenditure on repairs of the roads and bridges, which has been claimed as revenue expenditure. The Assessing Officer found that the assessee has constructed roads on the land taken from South East Coalfields Ltd for doing business of beneficiation of coal. According to the Assessing Officer the expenditure so incurred bring into existence the asset giving benefit of enduring nature. Similarly, the Assessing Officer took the view that the expenses made for the repairs to bridges are nothing but construction of bridges. Therefore, he took all these expenses to be capital in nature. The Assessing Officer relying on the decision of Hon'ble Gujarat High Court in the case of Gujarat Mineral Development Corporation Ltd v. CIT (143 ITR 822) and Calcutta High Court decision in the case of Indian Aluminium Co. Ltd. vs. CIT (198 ITR 202 took a view that the expenditure incurred by the assessee was capital expenditure and allowed depreciation @10%.

19. We have gone through the judgments of Hon'ble High Courts in the case of Gujarat Mineral Development Corporation Ltd and Indian Aluminium Co. Ltd (supra), and noted that in both these cases the land does not belong to the assessee. The land was taken on a long term lease as is the case of the assessee. On the leasehold land the assessee has incurred expenses for

construction of approach bridge, for laying the pipelines to the beneficiating plant. In each of the cases the Hon'ble High Court took a view that the expenditure so incurred is capital expenditure. Therefore, in our view the expenditure incurred on the construction of roads and bridges, although termed as 'repairs and maintenance of roads and bridges' has to be regarded as capital expenditure. Further, we also noted that, the Assessing Officer while making assessment u/s. 143(3) for A.Ys 2003-04 and 2009-10, similar expenditure has been allowed by in as revenue expenditure. There is no change in the facts in the impugned assessment years as compared to A.Ys. 2003-04 and 2009-10. In view of the decision of jurisdictional High Court in the case of CIT vs. Gopal Purohit (336 ITR 287), the principle of consistency has to be followed. We are bound to follow the decision of the Jurisdictional High Court and, accordingly, ground no.7 in A.Y 2004-05, ground no.5 in A.Ys. 2005-06, 2006-07 & 2007-08 and ground no.2 in A.Y. 2008-09 is allowed.

20. Ground nos. 9 & 10 in A.Y. 2004-05 and ground no.6 in A.Y 2005-06 relate to common issue pertaining to disallowance of non-competition fees. The facts relating to these grounds are that during the A.Y. 2005-06, the Assessing Officer noticed that the assessee had debited ₹ 6 crores as non-compete fees to the profit and loss account. When enquired, the assessee submitted that the said sum has been debited to the profit and loss account in respect of the fees paid to Reliance Energy Ltd. This fees has been paid

on 25.08.2003. The period of non-competition has been completed this year therefore, the same has been debited to the profit & loss account. The essence of the agreement was that for one year from the date of agreement, Reliance Energy Ltd. could not compete with the assessee company in coal washing business. Therefore if there was a contravention of agreement, during the period 1.8.2003 to 31.7.2004, the same amount would have to be paid back to the assessee company. The Assessing Officer did not agree with the assessee but allowed the claim for 127 days amounting to ₹ 2.08 crores and the balance ₹ 3.92 crores is added to the income of the assessee. The assessee during the appellate proceedings for A Y 2004-05 filed an additional ground before the CIT(A). But the CIT(A) did not adjudicate the additional ground.

21. After hearing the rival submissions and going through the orders of the authorities below, we have noted that the additional ground, in this respect, raised by the assessee before the CIT(A) for the A.Y. 2004-05 has not been adjudicated. We, therefore, restore this issue to the file of the CIT(A) with a direction that the CIT(A) shall adjudicate this ground and decide it on merit in accordance with law, as in our opinion this is a legal ground. So far as A.Y. 2005-06 is concerned, since the claim of deduction of entire amount of ₹ 6 crore will depend on the outcome of the additional ground for A.Y 2004-05 before the CIT(A), we set aside the issue to the file of the CIT(A) with a direction that the CIT(A) shall adjudicate this ground afresh in A.Y. 2005-06

viz-a-viz similar issue arising in A.Y. 2004-05, and re-decide the issue in accordance with law in each year and how much amount the assessee shall be entitled for deduction. Needless to state that while adjudicating this ground, the CIT(A) must appreciate there is no dispute between the assessee and the revenue that the said expenditure is revenue expenditure. Thus, ground nos. 9 & 10 in A.Y. 2004-05 and ground no.6 in A.Y. 2005-06 are allowed for statistical purpose.

22. Ground no.14 is consequential in nature and, therefore, the Assessing Officer is directed to compute interest u/s. 234A and 234D after giving effect to this order. This disposes off the appeal for A.Y. 2004-05.

23. **ITA No. 1881/Mum/2010 Assessment Year 2005-06**

Ground nos. 1, 7, 8, 9 and 12 are general in nature and does not require any adjudication. Ground no.2 is the summary of all the other grounds. Ground no.3 relating to the claim of depreciation on plant & machinery has already been disposed off while disposing of the ground nos. 2, 3, and 4 for A.Y. 2000-01 in the preceding paragraphs. Ground no.4 was not pressed hence, stands dismissed as not pressed. Ground nos. 5 and 6 stands disposed of while disposing of ground nos. 7 & 9 for A.Y. 2004-05.

24. Ground no.10 and 11 are consequential in nature and, therefore, the Assessing Officer is directed to compute interest u/s. 234A and 234D after giving effect to this order.

25. **ITA No. 898/Mum/2013 Assessment Year 2006-07**

Ground no. 1, 6, 7 and 8 are general in nature and does not require any adjudication. Ground no.2 is the summary of the effective grounds taken by the assessee and, therefore, does not require separate adjudication. Ground no.3 relating to the claim of depreciation on plant & machinery has already been disposed off while disposing of the ground nos. 2, 3, and 4 for A.Y. 2000-01 in the preceding paragraphs. Ground no.4 was not pressed hence, stands dismissed as not pressed. Ground no. 5 relates to the issue whether the expenses on repair and maintenance of road and bridges are capital expenditure. This ground stands disposed of while disposing ground no.7 for A.Y. 2004-05. Thus, there remains no other ground for our disposal.

26. **ITA No. 899/Mum/2013 Assessment Year 2007-08**

Ground no. 1, 7, 8 and 10 are general in nature and does not require any adjudication. Ground no.2 is the summary of the effective grounds taken by the assessee and, therefore, does not require separate adjudication. Ground no.3 relating to the claim of depreciation on plant & machinery has already been disposed off while disposing of the ground nos. 2, 3, and 4 for A.Y. 2000-01 in the preceding paragraphs. Ground no.4 was not pressed hence, stands dismissed as not pressed. Ground no.5 relates to the issue whether the expenses on repair and maintenance of road and bridges are capital expenditure. This ground stands disposed of while disposing ground no.7 for A.Y. 2004-05. Ground no.9 is consequential in nature and, therefore,

the Assessing Officer is directed to compute interest u/s. 234B after giving effect to this order.

27. **ITA No. 900/Mum/2013 Assessment Year 2008-09**

Ground nos. 1, 3, 4 and 6 are general in nature and does not require any adjudication. Ground no.2 relates to the issue whether the expenses on repairs and maintenance of road and bridges are capital expenditure. This ground stands disposed of while disposing ground no.7 for A.Y. 2004-05. Ground no.5 is consequential in nature and, therefore, the Assessing Officer is directed to compute interest u/s. 234B after giving effect to this order.

28. **ITA No. 1813/Mum/2013 Assessment Year 2006-07**

This appeal has been filed by the Revenue against the order of the CIT(A) by taking the following effective ground of appeal:

> *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing additional depreciation on Plant & Machinery without appreciating the fact that the assessee is in the business of coal beneficiation only and no new product is manufactured?"*

The facts relating to this ground are that the Assessing Officer noted that the assessee is carrying on the business of coal beneficiation. The assessee claimed additional depreciation amounting to ₹.1,18,56,604/- The Assessing Officer was of the view that the assessee is not producing any new product but is processing raw coal to bring out marketable coal. Therefore, he disallowed the claim of the assessee in respect of additional depreciation u/s. 32(1)(iia) of the I.T Act. The assessee went in appeal before the CIT(A).

The CIT(A) after analyzing various decisions as well as the decision of the Hon'ble Supreme Court in the case of Aspinwall and Co. Ltd. vs. CIT 251 ITR 323 (SC) took a view that beneficiated coal is commercially different product than the natural coal extracted from the earth and therefore, held as under:

> *"I have gone through the detailed submissions made by the appellant with regard to its claim that the appellant is engaged in the manufacturing of goods. The appellant's contention is that in the manufacturing process, the appellant converts the raw coal into beneficiated coal and the beneficiated coal is commercially known as a different product than the raw coal extracted from the earth. The appellant has relied on various case laws. In the case of Shiv Oil and Dal Mill 281 ITR 0221(A11), the Hon'ble Allahabad High Court has held that refining of oil will amount to manufacture. The appellant is doing similar process to coal which makes the raw coal taken from earth to beneficiated coal which can be used by thermal power companies. I am of the view that beneficiated coal is a commercially different product than the natural coal extracted from the earth. In view of this, I hold that the appellant is entitled for additional depreciation."*

29. We have heard the rival submissions and carefully considered the same. We noted that this issue is no more res integra in view of the decision of Hon'ble Supreme Court in the case of CIT vs. Sesa Goa Ltd. 271 ITR 331 (SC), in which the Hon'ble Apex Court has held that extraction and processing of mineral ore amounts to "production". In view of the said decision, extraction of coal and processing thereof will tantamount to production and converting raw coal into beneficiated coal is a manufacturing process, as beneficiated coal is a different marketable product. No contrary decision was

brought to our knowledge. We, therefore, confirm the order of the CIT(A) and dismiss the ground taken by the Revenue.

30. In the result, the Revenue's appeal is dismissed and the assessee's appeals are partly allowed.

Order pronounced in the open court on 3rd day of August, 2017.

| **Sd/-** | **Sd/-** |
|---|---|
| (Pawan Singh) | (P K Bansal) |
| **JUDICIAL MEMBER** | **VICE-PRESIDENT** |

Mumbai; Dated: 3rd August, 2017

SA

**Copy of the Order forwarded to :**

1. The Appellant.
2. The Respondent.
3. The CIT(A)
4. The CIT
5. DR, 'E' Bench, ITAT, Mumbai

BY ORDER,

*#True Copy #*

Assistant Registrar
Income Tax Appellate Tribunal, Mumbai