IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

Before Shri Shailendra Kumar Yadav, Judicial Member
and Shri R.K. Panda, Accountant Member

ITA No. 772/PN/2013
(Assessment Year 2007-08)

Dy.CIT, Circle-1(1), Pune .. Appellant

Vs.

Bramha Corp. Hotels & Resorts Ltd.,
C/o. Hotels Le-Meridien,
RBM Road, Pune – 411001
PAN No. AAACB7054L .. Respondent

ITA No. 773 & 774/PN/2013
(Assessment Years 2008-09 & 2009-10)

Dy.CIT, Circle-1(1), Pune .. Appellant

Vs.

Bramha Bazaz Hotels & Resorts Ltd.,
C/o. Hotels Le-Meridien,
RBM Road, Pune – 411001
PAN No. AAACB7054L .. Respondent

Assessee by	:	Shri Kishor Phadke
Revenue by	:	Shri A.K. Modi & Shri P.S. Naik
Date of Hearing	:	07-10-2014
Date of Pronouncement	:	02-12-2014

ORDER

PER R.K. PANDA, AM :

The above 3 appeals filed by the Revenue are directed against the common order dated 30-02-2013 of the CIT(A)-I, Pune relating to Assessment Years 2007-08 to 2009-10 respectively. For the sake of convenience, all these appeals were heard together and are being disposed of by this common order.

ITA No.772/PN/2013 (Bramha Corps Hotels & Resorts Ltd., (A.Y. 2007-08) :

2. Grounds of appeal No. 1 to 5 by the Revenue reads as under :

> "1. The order of the Id. Commissioner of Income-tax (Appeals) is contrary to law and to the facts and circumstances of the case.
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> 2. The Id. Commissioner of Income-tax (Appeals) grossly erred in holding that in view of the decision in the case of Echjay Industries Ltd. Vs. DCIT, 88 TTJ 108(Mum), the premia of Rs.2,73,68,189/- and Rs.5,43,00,000/- paid by the assessee to Mac Charles(l) Ltd and the Gupta group respectively on account of buy-back of shares are in the nature of Revenue Expenditure.
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> 3. The Id. Commissioner of Income-tax(Appeals) grossly erred in deciding the issue in favour of the assessee without appreciating that the ratio of the decision of the Hon'ble Supreme Court in the case of Brook Bond India Ltd. Vs. CIT, 225 ITR 798, is clearly applicable to the issue in appeal.
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> 4. The Id. Commissioner of Income-tax (Appeals) grossly erred in holding the Premium paid on buying back of shares as Revenue Expenses when Sec. 77A of the Companies Act, 1956 provides for such purchase(buyback) from:
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> i) its free reserves; or
> ii) the securities premium account; or
> iii) the proceeds of any shares or other specified.
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> 5. The Id. Commissioner of Income-tax (Appeals) grossly erred in holding that the premium paid on buying back of shares as Revenue Expenses when Share Premium received is not a Revenue Receipt, and the direction given by the Id. Commissioner of Income-tax (Appeals) would lead to an absurdity where Receipts are considered as 'Revenue' in nature and Payments are considered as 'Capital' in nature under the same head of accounts."

2.1 Facts of the case, in brief, are that the assessee is a company and filed its return of income on 31-10-2007 declaring total income of Rs.11,88,20,036/-. During the course of assessment proceedings the AO noted from the various details furnished by the assessee that it has claimed deduction of Rs.8,16,68,190 on account of premium paid on buy back of shares from the Mac Charles group and the Gupta group. He observed from the details furnished by the

assessee that the company was formed in the year 1987 by the Agarwal Group who were then the only shareholders. Following a tie up with the Meridien Group who desired to create a world class hotel and to ensure adequacy of funds for the five star deluxe hotel project, the Agarwal Group joined hands with the Mac Charles (India) Ltd. group and the Gupta Group. Between the years 2001 to 2003, several civil and criminal cases were filed by Mac Charles (India) Ltd against the Agarwal family and the company due to certain disputes. Further, the Gupta group had also filed cases against the company alleging mismanagement etc. The matter was taken up before the Company Law Board Delhi by both the groups by invoking sections 397 398 of the Companies Act 1956. The suit filed by Mac Charles (India) Ltd against the company was numbered Company Petition No. 58 of 2002. Similar suit was filed by the Vijay Gupta Group bearing Company Petition No. 106 of 2006. The CLB passed the order on 23.7.2002 relating to Company Petition No. 58 of 2002 wherein the company was permitted to buy back 1,07,50,000 shares for an amount of Rs.19,21,00,000/- which had been paid by the Mac Charles Group over a period of 36 months. The interest at specified rates was directed to be paid on a sum of Rs. 1,85,95,007/- being the consideration for the balance 11,52,107 shares which remained to be transferred to Mac Charles Group. Due to the disputes with the recalcitrant shareholders the modernization, expansion and other obligations could not be addressed. Therefore, the company decided to protect its interest by

complying with the Company Law Board's decision to buy back the shares of the recalcitrant Group at a stipulated price which included premium over and above the face value of the shares. Further, the company entered into agreement with Vijay Gupta's Group on 26.11.2006 and agreed to settle CP No. 106 of 2006 by transferring the 36,20,000 shares to Vijay Gupta and family for a consideration of Rs.9,05,00,000/- on pro rata basis. This compromise was subsequently ratified by the Company Law Board in its order dated 28.11.2006. The sale consideration was arrived at the basis of payment of Rs.25 per share as against the face value of Rs.10 per share. Therefore, a premium of Rs.5,43,00,000/- was paid to the Gupta Group and an amount of Rs.2,73,68,189/- was paid to the Mac Charles Group. The assessee claimed the same as revenue expenditure.

2.2 The Assessing Officer disallowed the revenue expenditure of Rs.8,16,68,189 as claimed by the assessee for the A.Y. 2007-08 towards premium incurred on buy back of shares on the ground that the expenses incurred were not for the purposes of preservation or protection of assets and interests of the company. It is only one group of shareholders viz. Agarwal family who stands to benefit by the compromise by becoming the majority shareholders. He also analysed the financial functioning and the profitability of the company and held that since 2000-01 the company was showing a gradual improvement in profitability. The losses arising in the initial years were due to the creation of infrastructure, depreciation

and overheads, which was caused by heavy expenditure and gradually settled down over time. He also held that the assessee's contention that the functioning of business had been smoothened by the extinguishment of share holding of Mac Charles and Gupta group only goes to show that the company has been granted an enduring and long lasting enduring benefit even though no new assets are created. He relied on certain judicial decisions to show that expenditure related to increase of share capital base which changes the capital structure of the company has to be disallowed on capital account.

3. In appeal, the Ld.CIT(A) allowed the claim of expenditure on account of premium paid on buy back of shares as Revenue expenditure by holding as under:

> "4.6. I have considered the submissions made by the appellant. The hotel activity of the company was apparently started in 1998-99. Because the company was incurring huge losses and was in need of continuous capital infusion for working capital and capital expenditure, the promoters of the company namely Agarwal group entered into shareholder agreement with one Mac Charles group who owned and operated the five star hotel in Bangalore styled Le Meridien, Bangalore. However, after some time, the disputes regarding control and management arose between the two parties. The Mac Charles group spread malicious information about the promoters of the company to the bankers, Registrar of companies and the Le Meridien group. The Mac Charles group also filed criminal suit against the directors in the Bombay High Court vide Criminal Application No. 2108 of 2001, 2109 of 2001 and 2110 of 2001 following a complaint made by the promoter of the company Shri Surendrakumar Agarwal before the Judicial Magistrate, Pune. The Mac Charles group filed CP No. 58 of 2002 before the Company Law Board, Delhi and after hearing both the parties and taking into account the settlement arrived between the parties, the CLB passed final orders dated 23.7.2004 and 14.1.2005 directing refund of Rs.19,31,00,000 to the Mac Charles group in 36 monthly equal installments along with simple interest @ 4 % thereon. Further, the appellant company was permitted to buy back equity shares on pro rata basis after covering 11,50,107 shares already held by them. It was held by the CLB that the consequent reduction of shareholding in the hands of the appellant company would not attract provisions of section 77 of Companies Act 1956.

4.7. In respect of the buy back of the shares of Gupta group who were also agitating before the CLB with respect to the management and control of the company, I have perused the order of the CLB in company petition No. 106/2006. It is seen that the Gupta group has sought a consent order from the CLB in respect of the amicable settlement arrived at for resolution of all disputes between the two parties vide MOD/ agreement dated 27.11.2006. As per this agreement Gupta family which owned 36,20,000 shares would transfer the entire shares @ Rs.25 per shares for total sale consideration of Rs.9,05,00,000 only, as against the face value @ Rs.10 per share. Therefore, a premium of Rs.5,43,00,000 was to be paid to the Gupta Group. The order of the CLB dated 28ll 1.2006 pursuant to this MOD states as under:

"The petitioners have filed a joint application seeking for disposal of the petition in terms of an agreement dated 27.11.2006. The petition is disposed of in terms of said agreement which will form part of this order. The company is permitted to purchase the shares of the petitioner and reduce its share capital accordingly."

The documents evidencing the above have been filed before me and are part of the record. The learned AR has stated that all the documents relating to company petitions 58 of 2002, 106 of 2006, MOD between the company and Shri Vijaykumar Gupta dated 26.11.2006 and the CLB orders dated 23.7.2004, 14.1.2005 and 28.11.2006 were filed before the Assessing Officer who has however objected the copies of the original criminal cases/ civil cases were not filed in his office. However, he seems to have accepted the facts relating to the litigation since he notes at para 11.3 of the order ".....it transpires that the company was dragged into litigation between the shareholders, without any reason. However, the issue remains, can such expenditure be allowed as deduction."

4.8. The learned AR has placed reliance on the decision of the Mumbai Bench of ITAT in Echjay Industries Ltd. vs DCIT reported in 88 TTJ 1089 which subsequently was affirmed by the Hon'ble Bombay High Court by dismissing the appeal filed by Revenue by its order dated 30.7.2008 in ITA No. 237 of 2004. He has also relied upon the ITAT Mumbai Bench C decision in Chemosyn Ltd. vs ACIT reported in 25 Taxmann.com 325 wherein it was held that purchase of shares of recalcitrant group of share holders was an expenditure out of business expediency where the assessee did not obtain any right or advantage which would affect its capital structure. The purchase of shares of the recalcitrant shareholders at a premium in accordance with the agreement before High Court was an expenditure to ensure smooth running of the business of the company and therefore, on revenue account. I have perused the two decisions of the Mumbai ITAT and the Hon'ble Bombay High Court cited by the learned AR. In the Echjay Industries case, a dispute between two warring group of shareholders was terminated consequent to a consent term drawn up by the shareholders and approved by the Bombay High Court with the directions that the company would purchase the shares of some of the shareholders at a premium. It was held that the payment made to the shareholders was to secure smooth running of the company and avoid possible winding up of the company under the provisions of sec. 397 and

398 r.w.s. 402 of the Companies Act. The ITAT relied on certain case laws to hold that while accepting a compromise settlement between two groups, the court will keep in mind the prime interest of the company and also public interest even though it may not be in the interest of majority share holders. The case laws relied upon by the Assessing Officer are held to be inapplicable to the facts of the instant case as they pertain to expenses incurred to increase the capital base of the assessee. The detailed justification for holding so can be seen from the appellant's submissions reproduced in para 4.5. So far as the payments of Rs.2,73,68,190 to Mac Charles (I) Ltd. is concerned, since the same was made in pursuance to compromise order and duly ratified by the Company Law Board, the ratio of the decision in Echjay Industries Ltd. would apply and the amount in question is held to be revenue expenditure. Similarly, the payment of Rs.5,43,00,000 paid to the Gupta Group made in pursuance to compromise order and duly ratified by the Company Law Board is also held to be revenue expenditure in accordance with the ratio of the jurisdictional High Court and Mumbai ITAT decision quoted supra. Consequently, Ground No.6 for A.Y. 2007-08 is allowed, and additional ground sought to be raised for A.Y. 2007-08 (as per para 3 is treated as dismissed)."

4. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

5. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find in the instant case similar claim was made by the assessee during A.Y. 2006-07 which was allowed by the Assessing Officer as a revenue expenditure. The Ld. CIT invoked jurisdiction u/s.263 and set aside the issue to the file of the Assessing Officer with a direction to make addition of Rs.3,45,95,921/- by treating the same as a capital expenditure. We find when the assessee challenged the order of the CIT before the Tribunal, the Tribunal allowed the appeal filed by the assessee and cancelled the 263 order passed by the Ld. CIT by observing as under :

"4. We have heard the rival submissions of the parties and perused the record. The Ld Counsel relied on the decision in the case of Echjay Industries Limited Vs. DCIT, 88 TTJ 1089 (Mum) as well as Chemosyn Limited Vs. ACIT, Mumbai, ITA Nos. 6382/Mum/2011, order dated 7.9.2012. The Ld Counsel also relied on the decision of Hon'ble Supreme Court in the case of Malabar Industrial Company Limited, 243 ITR 83 to support his argument that both the conditions of Sec. 263 of the Act must be satisfied i.e. (1) the order must be erroneous and (2) it should be prejudicial to the interest of revenue. He submits that the decision of the Tribunal in the case of Echjay Industries Limited (Supra) has been approved by the Hon'ble High Court of Bombay by dismissing the appeal filed by the Revenue against the said decision i.e. Income Tax Appeal No. 337 of 2004, order dated 30th July 2008. The sum and substance of the argument of the Ld Counsel is that the issue which is a subject matter of revision u/s. 263 cannot be treated as a capital expenditure as the same is a revenue expenditure as held in the case of Echjay Industries Limited M/s. Brahma Bazaz Hotels Ltd. A.Y. 2006-07 (Supra). He pleaded that merely the revenue loss cannot be the criteria for exercising jurisdiction u/s. 263.

5. Per contra, the Ld. D.R. supported the order of the Ld CIT-I, Pune. As per the facts on record, we find that there was fierce litigation between the groups of the shareholders of the assessee company. One group of the shareholders i.e. Mac Charles India Ltd. filed the cases against the other groups of the shareholders as well as the company alleging the serious charges of the mis-management and oppression. To protect the business interest of the assessee company, proposal was put before the CLB, New Delhi to buy back the shares from Mac Charles India Ltd. by payment of extra premium over and above the face value. The assessee paid Rs.3,45,95,521/- on the shares and claimed the deduction as a revenue expenditure.

6. In the case of Echjay Industries Ltd.,(Supra) there were similar facts and in the said case also, there were two warring groups of the shareholders. The legal battle between the two warring groups of the shareholders reached before the Bombay High Court and after a period of over six years, good sense prevailed between those two groups and a consent terms were drawn by the shareholders and Hon'ble High Court of Bombay approved the consent terms giving direction to the company to purchase the shares of family members of Doshi group and to pay extra amount of Rs. 900/- per share as a premium over & above face value of Rs. 100/- per share. The amount paid as a premium was claimed as a revenue expenditure, but the same was disallowed by the A.O and the disallowance was confirmed by the CIT(A). The issue reached before the Tribunal. The operative part of the said decision is as under :

"29. From the case-laws referred to in the said commentary, it is amply clear that while accepting the compromise or settlement between the two warring groups, for a proceeding under ss. 397 and 398 of the Companies Act, 1956, the Court will keep in mind the prime interest of the company as well as public interest. Therefore, to say that the interest of only two warring groups has been kept in mind is not correct. It is difficult to contribute or accept the view canvassed by the Revenue that the assessee has

obtained any right or advantage which would affect its capital structure. The settlement in this regard, as pointed out earlier, was that as a result of the compromise the assessee acquired the shares and the share capital was reduced. Now this aspect of the matter, as we have stated earlier, merely represented the mode of settlement and it cannot, therefore, be the test to be applied to determine the question whether the assessee derived any benefit on capital account. In fact, the M/s. Brahma Bazaz Hotels Ltd. A.Y. 2006-07 assessee had got rid of the disadvantageous relationship which resulted as a result of disputes between the two warring groups of shareholders. The Supreme Court had occasion to consider similar controversy in the case of CIT vs. Ahok Leyland Ltd. 1973 CTR (SC) 9: (1972) 86 ITR 549 (SC) in which the apex Court has held that the principles which flow from the above cited decisions clearly suggest firstly that the enduring benefit in itself is not a conclusive test. Secondly, it is necessary to consider whether the enduring advantage consisted merely facilitating the assessee's operation or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, then such expenditure would be on revenue account. Thirdly, the question must be viewed in a larger context or business necessity or expediency. Having regard to the above test in the case of Empire Jut Co. Ltd. (supra), the point which would arise for consideration would be whether the expenditure incurred for getting rid of the minority shareholders, who were creating difficulties, would be an expenditure on revenue account. The authorities relied upon by the learned counsel for the assessee show that payment made to secure peace and harmony and smooth management of the company, the interest of business would serve and that is the whole purpose of such payment. Therefore, the amount paid for this purpose was on revenue account. Applying those principles, the position to our mind is clear that by getting rid of the minority shareholders, the company could not be said to have acquired any enduring benefit. Secondly, even if it is assumed that an enduring benefit has been obtained, even then such enduring benefit is not relatable to fixed capital structure of the company because it has neither increased the assessee's assets nor the company could be said to have acquired any right of income yielding nature. The act of writing off of share capital by way of reduction, may, on the first blush, suggest that the capital structure of the company has been affected, but it is not so if the facts are examined a little more closely. The reduction of the share capital was merely a consequence of the agreement which has to be given effect to, that too by an order of the Court where the interest of the company as well as of the public has to be necessarily kept in mind. Thus writing off of share capital by way of reduction as per the terms of consent decree merely was a consequential action and did not itself represent any effect on the capital structure or the acquisition of any right yielding income or advantage on capital account. Therefore, we have no hesitation in holding that the impugned expenditure, which was incurred in order to facilitate the smooth running of the business by getting rid of the recalcitrant group of shareholders, was an expenditure incurred out of business expediency and, therefore, wholly and exclusively incurred in the course of carrying on of the business. Similar issue came up for consideration before the Tribunal in the case of Atul Chemicals Industries Ltd. (supra) wherein the Tribunal considering the earlier decision in the case of Inland Revenue vs. Carron Co. 45 Tax Cases

> 18 and other cases, came to the same conclusion. The learned Departmental Representative has pointed out that a reference has been granted against the said decision. Therefore, it was pleaded that it has not reached finality. So far as this contention of the learned Departmental Representative is concerned, we are of the opinion that merely granting a reference of the question will not show that the decision is wrong. Unless it is disturbed, it is a sound decision, especially keeping in view the purpose of ss. 397 and 398 of the Companies Act, 1956."
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> 7. The above decision has been followed by the ITAT "C" Bench, Mumbai in the case of Chemosyn Limited (Supra). The decision in the case of Brooke Bond India Ltd. Vs. CIT, 225 ITR 798 (SC) has been explained in the decision of Echjay Industries Limited (Supra). Hence, in our opinion, the order of the A.O on the issue of the premium paid on the buy back of shares treating the same as a revenue expenditure cannot be said to be erroneous for exercising the jurisdiction u/s. 263. Both the conditions that (1) order must be erroneous and (2) same should be prejudicial to the interest of revenue must be satisfied for exercising jurisdiction u/sec. 263. In our opinion, it cannot be said that to the extent of the present issue, the assessment order is erroneous. We accordingly hold that to the extent of the issue of the allowability of the premium paid in the buy back deal to Mac Charleys India Limited, the assessment order cannot be said to be erroneous and to that extent, the order passed by the CIT -I, Pune is bad in law. We make it clear that on the issue of FBT, the assessee admitted before the Ld CIT that there was a mistake on his part. Hence, on the said issue, the order stands."

5.1 We find similar issue had also come up before the Mumbai Bench of the Tribunal in the case of USV Ltd., Vs. JCIT. We find the Tribunal vide ITA No.376/M/2001 order dated 18-12-2006 for A.Y. 1998-99 decided the issue in favour of the assessee by observing as under :

> "80. We heard the rival submissions, gone through the orders of the Revenue authorities and the decisions cited by the contending parties. First we will take up the contentions of the Revenue that the litigations were in fact only division of family assets and for controlling of the business of the assessee. Considering the facts and circumstances of the case and the dispute between the contending parties, CLB has already given a finding in its order that the pendency definitely affected the reputation and gave false signal in the pharmaceutical industry and seriously affected the growth and prosperity of the assessee company. Even if the starting point of the dispute is controlling of the assets, these findings of the CLB cannot be discarded out of context;. The facts brought on record clearly show, as we have mentioned in para 70 of the order that the assessee was ranking 23rd in December, 1994.

Subsequently from December, 1995 to December, 1998 it was lagging somewhere between 30 to 36. In December, 1999, immediately after the settlement, its rank went up to 23 and by April, 2000, it was 19, which itself shows that the settlement has taken the assessee out of the trouble period. The contention of the learned Counsel recorded vide para 68 is also relevant in this context. Assessee was approached by LIPHA, part of Merk Group and originator of bulk drug metformin for alliance but it was to be dropped because of the dispute; so also the talk with "Lanocare" of Australia and New Zealand for launching of skin care products. The negotiation with Alfa Wassermann was also dropped because of the disputes. These all indicate that the affairs of the company were not running well due to the disputes between the family members. Therefore, saying that the settlement is to control the assets of the company itself is oversimplification. Had these disputes not been settled, the company would not have revived well. It is not correct to say that reaching such a conclusion is out of context.

81. Now we come to the decisions relied upon by the contending parties. The decisions relied upon by the learned CIT(A), on which reliance has also been placed by learned Departmental Representative, i.e. Madurai District Central Co-operative Bank Ltd. v. ITO (supra) and Shailendra Kumar v. Union of India (supra), does not further Revenue's case. In the case of Madurai District Central Co-operative Bank Ltd. (supra), Hon'ble Supreme Court held, IT Act is a permanent enactment and in the case of Shailendra Kumar v. Union of India (supra), Hon'ble Allahabad High Court held that IT Act is a self-contained code and the taxability or otherwise of receipts to be determined with reference to the provisions of the Act. It does not mean that a finding of fact by an authority, though it is not binding as such, cannot be considered and taken note of while corning to a conclusion on facts. In the case of Shailendra Kumar v. Union of India (supra), at p. 508, the Hon'ble Allahabad High Court observed as under:

The question for consideration is whether to examine the scheme of Act of 1961, aid can be taken from the Fundamental Rules governing the service conditions of the Central Government employees or from the provisions of a statute which is not cognate or pan materia to the Act of 1961. The IT Act is a self-contained code and the taxability of house rent allowance, city compensatory allowance and dearness allowance or of any other allowance will have to be seen only within the scheme of the Act of 1961.

Their Lordships further relied upon the legal proposition as explained by their Lordships of Hon'ble Supreme Court in the case of S. Mohan Lal v. R. Kondiah , which reads as under:

It is not a sound principle of construction to interpret expressions used in one Act with reference to their use in another Act, more so if the two Acts in which the same word is used are not cognate Acts. Neither the meaning nor the definition of the term in one statute affords a guide to the construction of the same term in another

statute and the sense in which the term has been understood in the several statutes does not necessarily throw any light on the manner in which the term should be understood generally. On the other hand, it is a sound, and indeed, a well known principle of construction that meaning of words and expressions used in an Act must take their colour from the context in which they appear.

From the above it is clear that their Lordships observed that for interpretation of the meaning of the words and expressions used in one Act may not have the same meaning in another Act. It is not to say that the facts found out by a competent authority cannot be taken at all into consideration to arrive at the conclusion.

82. Coming to the decision relied upon by the Revenue authorities in the case of CIT v. Malayalam Plantations Ltd. (supra), the issue before their Lordships was whether the estate duty paid by the resident company incorporated outside India on behalf of the principal not domiciled in India is deductible from its profits while computing the assessable income under Section 10(2)(xv) of the Indian IT Act, 1922. At p. 149, their Lordships discussing the issue on the basis of the decision of the Hon'ble Supreme Court in the case of Badridas Daga v. CIT observed : "This decision, though not direct in point, lays down the principle that an expenditure can be deducted only if it arises out of the carrying on of the business and is incidental to it." In fact, this decision supports the case of the assessee. Discussing the issue, their Lordships held : "the expenditure incurred by the assessee in his capacity as agent of another is not a deductible item." In other words, the decision went against the assessee because it was a payment made as an agent. Assessee paid the estate duty on behalf of another person, which is not wholly and exclusively for the purpose of business, Hon'ble Supreme Court held.

83. Coming to the decision relied upon by the Revenue authorities in the case of Adarsha Dugdhalaya v. CIT (supra), this was a case wherein as directed by the award, payments were made by the assessee towards arbitrators' fees, solicitors' fees and costs on both sides in two suits and this amount was claimed as deduction in the assessment. Hon'ble Bombay High Court held, this was not an expenditure connected with carrying on of business of the assessee but to determine the mutual rights and obligations of the partners on the terms and conditions on which they had agreed to enter into partnership from time to time. Hence, their Lordships held, this is not expenditure in the nature of revenue but capital expenditure. At p. 61, the Hon'ble High Court held : "In the present case, however, the expenditure incurred is not for the purpose of protecting the assets but for the purpose of ascertaining what they are on settlement of the disputes between the partners in relation to them. In our opinion, therefore, having regard to the essential nature of the litigation and the purpose for which it was contested, we do not think that the expenses of litigation claimed by the assessee could be allowed to it as expenditure incurred wholly and exclusively for the purpose of carrying on its business." Coming to

the instant case of the assessee, the facts are distinguishable. Had the dispute not settled, the continuance of business of the assessee itself would have jeopardized.

84. The decision of the jurisdictional High Court, relied upon by the learned CIT(A), in the case of Premier Construction Co. Ltd. v. CIT (supra) is also distinguishable on facts. This was a case wherein a dispute arose between the directors of the company and its shareholders. Their Lordships held that the company is not justified in claiming the expenses incurred by it in the said litigation as expenses of its business. However, their Lordships further held : "In order that the expense of a civil litigation could be permissible as an expense wholly and exclusively laid out for the purpose of the business of the assessee, the expense must have been incurred by the assessee in its character as a trader and the transaction in respect of which the proceedings were taken must have arisen out of, or must have been incidental to, the assessee's business. An assessee could be said to have incurred the expenditure in his character as a trader if the litigation was necessary to be carried on by the assessee or defended by it to protect its trade or business or to avert a danger or threat to its carrying on of its business". In other words, the allowability or non-allowability of expenditure, even if it is incurred for the purpose of litigation, depends on the facts of that particular case. The stand of the Revenue authorities in the instant case of the assessee is that this is purely a domestic quarrel between the shareholders. It is further the stand of the Revenue authorities, as is clear from the order of the CIT(A), that the expenses may, in some indirect way be conducive to the benefit of the business or to the betterment of the business, even then, it cannot be held, it is an expenditure wholly and exclusively for the purpose of business. In the instant case of the assessee we have seen that had the settlement not been taken, the business itself would have jeopardized.

85. AO has given a chart of turnover, profit, etc. vide pp. 29 and 30 of his order, para 14(a), to show that assessee's business turnover and profit because of this litigation has never come down. In other words, it has not adversely affected. On the other hand, learned Counsel for the assessee has contended that mere increase in the turnover and profit alone is not criteria to decide whether the business adversely affected or not. We have mentioned in para 70 of this order, the ranking given and also the parties who entered into negotiations with the assessee and because of the litigations/dispute between the warring groups of the family, withdrawn from the negotiations. This clearly shows that the business of the assessee or the growth potential of the assessee had definitely been affected. In short, we are of the opinion that the view canvassed by the learned Counsel is to be accepted.

86. Coming to the decision relied upon by the learned Counsel, in the case of Dalmia Jain & Co. Ltd. v. CIT (supra), the Hon'ble Supreme Court held : "where litigation expenses are incurred by the assessee for the purpose of creating, curing or completing the

> assessee's title to the capital, then the expenses incurred must be considered as capital expenditure. But if the litigation expenses are incurred to protect the business of the assessee they must be considered as a revenue expenditure." In the instant case of the assessee the facts clearly show that the business of the assessee due to infighting between the two groups of the family members, was in a difficult situation and the assessee lost many business opportunities for its growth. Even if the payments were to settle this dispute but the determinate character is to protect the business as well and, therefore, this decision of the Hon'ble Supreme Court supports assessee's case. Hence, the appeal of the assessee on this ground is allowed."

5.2 Since the Tribunal has already taken a view in favour of the assessee on this very issue and nothing contrary was brought to our notice by the Ld. Departmental Representative against the order of the Tribunal in assessee's own case in the preceding year, therefore, respectfully following the same as well as the decision of Mumbai Bench of the Tribunal cited (Supra), we find no infirmity in the order of the CIT(A) allowing the premium paid on buy back of shares as a revenue expenditure. The decision of the Hon'ble Supreme Court in the case of Brook Bond India Ltd., (Supra) as argued by the Ld. Departmental Representative is distinguishable and not applicable to the facts of the present case. Further, the same has already been discussed in the order of the Tribunal in assessee's own case for A.Y. 2006-07. In this view of the matter and in view of the detailed reasoning given by the Ld.CIT(A) while allowing the premium paid on account of buy back of shares as revenue expenditure, we find no infirmity in the same. Accordingly, the order of the CIT(A) on this issue is upheld and the grounds raised by the Revenue are dismissed.

6. Grounds of appeal No.6 by the Revenue reads as under :

> "The Id. Commissioner of Income-tax (Appeals) grossly erred in not confirming the disallowance of Rs. 10,27,230/- made in the assessment u/s 43B when the assessee had clearly make the payments after the prescribed due dates."

6.1 Facts of the case, in brief, are that the AO made addition of Rs.10,27,230/- u/s.43B on the ground that the assessee has paid PF liability of Rs.7,10,205/- and ESI liability of Rs.3,17,025/- after the prescribed due date mentioned in the respective Act.

7. Before the CIT(A) it was submitted that the amounts were actually paid on or before the due dates by the assessee by way of cheque to the State Bank of India, Bund Garden Branch, Pune. However, the auditor has considered the date on which State Bank of India has deposited the cheques with the PF/ESI authorities. The Ld.CIT(A) therefore directed the AO to verify these facts and allow consequential relief u/s.43B of the I.T. Act.

7.1 Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

8. We have considered the rival arguments made by both the sides. We find the AO disallowed an amount of Rs.10,27,230/- on the ground that the assessee has paid the PF and ESI dues beyond the due dates mentioned in the respective Act. The details of such disallowance are as under :

PF Liabilities (Rs.)	Due date	Paid date
2,33,975/-	15.01.200	24.01.200
2,35,773/-	15.02.200	02.03.200
2,40,457/-	15.03.200	22.03.200
7,10,205/-	Total	
ESIC Liabilities (Rs.)	Due date	Paid date
21,098/-	21.05.200	24.05.200
21,701/-	21.06.200	24.06.200
21,634/-	21.07.200	25.07.200
21,517/-	21.08.200	23.08.200
22,152/-	21.09.200	22.09.200
25,506/-	21.10.200	26.10.200
29,184/-	21.11.200	24.11.200
29,172/-	21.12.200	27.12.200
30,331/-	21.01.200	02.03.200
30,725/-	21.02.200	02.03.200
31,220/-	21.03.200	28.03.200
32,785/-	21.04.200	26.04.200
3,17,025/-	Total	

9. Before the CIT(A) it was argued that the assessee has paid the amounts on or before the due dates by way of cheques, however, the auditors has considered the date on which the SBI has deposited the cheques with the PF/ESI authorities as the date of payment. However, it is an undisputed fact from the above details that the payments have been made much prior to the due date of filing of return.

9.1 It has been held in various judicial decisions that PF & ESI dues, if paid before filing of the return prescribed u/s.139(1) is an allowable deduction. The latest decision in this regard is the decision of Hon'ble Bombay High Court in the case of CIT Vs. M/s. Hindustan Organics Chemicals Ltd. vide ITA No.399/2012

order dated 11-07-2014, a copy of which was filed by the Ld. Counsel for the assessee at the time of hearing of the case. Since in the instant case the assessee has paid/deposited the PF & ESI dues much prior to the due date of filing of the return, therefore, we find no infirmity in the order of the CIT(A). The ground raised by the Revenue is accordingly dismissed.

10. Grounds of appeal No. 7 & 8 being general in nature are dismissed.

ITA No.773/PN/2013 (A.Y. 2008-09) :

11. The grounds raised by the Revenue are as under ;

> "1. The order of the learned Commissioner of Income-tax (Appeals) is contrary to law and to the facts and circumstances of the case.
>
> 2. The learned Commissioner of Income-tax (Appeals) grossly erred in allowing an amount of Rs. 32,00,000/- from out of the payment of Rs.2,00,00,000/- made by the assessee to M/s. Jay Arts by holding the same as revenue expenditure instead of confirming the assessment on this issue wherein the entire payment had been treated as capital expenditure.
>
> 3. The learned Commissioner of Income-tax (Appeals) grossly erred in failing to appreciate that the payments related to the original work pertaining to furniture and fixtures, when the hotel was started, and also the assessee had capitalised the concerned assets; and, in the circumstances, no part of the payment could be treated as revenue expenditure.
>
> 4. The learned Commissioner of Income-tax(Appeals) grossly erred in allowing the interest paid on arrears outstanding as a revenue expenditure by relying on the decision in the case of Bombay Steel Navigation Co P Ltd Vs CIT(56 ITR 52), without giving any finding that the interest paid was an integral part of the profit-earning process and had not been incurred for acquisition of assets.
>
> 5. The learned Commissioner of Income-tax(Appeals) grossly erred in failing to appreciate and apply the ratio of the decision of the Hon'ble Jurisdictional High Court in the case of Prabhat Theatre (P)Ltd, Vs CIT (1979)118 ITR 953(Bom.) wherein it was held that compensation by way of interest was not allowable as business expenditure.

> 6. The learned Commissioner of Income-tax(Appeals) grossly erred in directed the Assessing Officer to allow depreciation on the capital expenditure without appreciating that the asset was put to use from the A.Y. 2000-01 and had also already depreciated; and, moreover, there is no provision in the Act to allow adjustment to WDV as would enable computing depreciation.
>
> 7. For these and such other grounds as may be urged at the time of the hearing, the order of the Ld. Commissioner of Income-tax(Appeals) may be vacated and that of the Assessing officer be restored.
>
> 8. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal during the course of the appellate proceedings before the Hon'ble Tribunal."

11.1 Facts of the case, in brief, are that the Assessing Officer during the course of assessment proceedings observed that M/s. Jay Arts was assigned the work of interior design of 106 rooms of the hotel in the year 1997. The said work was completed by the said party. Some extra works were also assigned to the said party. As regards the overall consideration, dispute arose between the said party and the assessee for which a case was filed before the Civil Court. The Civil Court in its judgement dated 10-08-2007 granted compensation to M/s. Jay Arts against the work done with respect to interior designing of 106 rooms of the hotel in the year 1997 and some additional work. The assessee debited compensation of Rs.2 crores paid to M/s. Jay Arts in its profit and loss account for A.Y. 2008-09. The Assessing Officer noted that Jay Arts was the interior decorator for the assessee and all the payments made to Jay Arts during the period 1997 to 2001 have been capitalised and taken into fixed assets under the head 'Furniture and Fixtures". Therefore, he was of the opinion that the payments made out of the compensation should also be in the nature of capital expenditure.

He accordingly issued a show cause notice to the assessee asking it to explain as to why the payments made to Jay Arts should not be disallowed as being capital in nature. The assessee made a detailed submission which has been reproduced by the Assessing Officer in the body of the assessment order and which reads as under:

> *"13.2 The assessee's submission dated 16.12.2010 is reproduced below: -*
>
> *Dispute with Jay Arts - The said party was assigned the work of interior designing of the 106 rooms of the hotel in the year 1997. The said work was completed by the said party. Some extra works were also assigned to the said party. As regards the overall consideration, dispute arose between the said party and the assessee. The said party made a large demand of damages on the assessee company. A case was filed before the Civil court, Pune. Copy of the judgment dated 10/8/2008 is enclosed.*
>
> *Key observations from the judgment of the said case are as follows.*

Page No.	*Contents*
1	*The case is decided on 10/8/2007. The said party (Jay Arts) has filed a suit for recovery of Rs.3,49,26,892*
3	*Original estimate as per the said party was for 106 rooms @ Rs.2,23, 704/- per room*
3	*The company insisted for 106 rooms @ Rs.2,10,000 per room*
5	*Extra work lobby, courtyard, stair-case etc. was given to the said party*
7	*At the conclusion of the work, the said party asked for settlement of Rs.1.8 Cr.*
11	*Dispute as to whether Mock-up rooms making was an integral part of the said party's work*
15	*Claim of the company that there were delays in completion work by the said party*
19	*Company claimed that the workmanship of the said party was bad*
19	*Company (BBHL) lodged a counter claim of recovery of Rs.2,56,72,442/- on the said party*
29-35	*Findings given by the court*
27	*Order that the company has to pay Rs.2.07 Cr. with simple interest @12% from 1-4-99*

> *The liability with interest @ 12% comes to the following amount.*

Yearly interest	*24,87,880*	
No. of years	*9 years*	
Total interest	*2,23,90,919*	*(i.e. 52% of total liability)*
Original amount	*2,07,32,332*	*(i.e. 48% of the Total liability)*
Total liability as on 1-2-2008 (say)	*4,31,23,251*	*(i.e. 100%) -*

On 22/2/2008, the entire liability was settled for Rs.3,50,00,000/-. Now, if the said overall liability is segregated in the ratio of 52% : 48%, the interest expenditure that ought to have been claimed for A. Y. 2008-09 works out to Rs.1,82,00,000/- and the balance amount of Rs.1,68,00,000/- could be considered as liquidated damages arising out of a court case settlement In either case, the deduction of Rs.3,50,00,000/- ought to have been claimed by the company. By mistake, deduction of Rs.2,00,00,000 has only be claimed. Kindly grant the balance amount of deduction.

Alternatively, if your goodself intend to treat the amount of Rs.1,68,00,000 as capital expenditure, the same ought to be taken back to A.Y. 2001-02 and depreciated accordingly. The working of the said depreciation will be as follows :

A.Y.	*Rate of dep.*	*Addition/ Opening WDV*	*Depreciation*	*Closing WDV*
2001-02	*20%*	*16,800,000*	*3,360,000*	*13,440,000*
2002-03	*20%*	*13,440,000*	*2,688,000*	*10,752,000*
2003-04	*10%*	*10,752,000*	*1,075,200*	*9,676,800*
2004-05	*10%*	*9,676,800*	*967,680*	*8,709,120*
2005-06	*10%*	*8,709,120*	*870,912*	*7,838,208*
2006-07	*10%*	*7,838,208*	*783,821*	*7,054,387*
2007-08	*10%*	*7,054,387*	*705,439*	*6,348,948*
2008-09	*10%*	*6,348,948*	*634,895*	*5,714,054*
Accumulated Depreciation			*11,085,946*	

As such on an alternative basis, the deduction which needs to be granted to the company works out to Rs.2,92,85,946 (i.e. Rs.1,82,00,000 interest + Rs.1,10,85,946 Accumulated depreciation).

It is submitted, the appropriate view needs to be adopted so that the genuine bonafide expenditure (though emanating from serious contractual dispute) of the assessee company is not disallowed".

12. However, the Assessing Officer was not satisfied with the explanation given by the assessee. He noted that the amount paid to M/s. Jay Arts is related to the fixed assets created during the period when the hotel was set up which is in the nature of capital

expenditure. The compensation granted to Jay Arts has accrued to this asset. Therefore, the compensation paid is also a capital expenditure. He accordingly held that the amount of Rs.2 crores paid to Jay Arts cannot be allowed as an expenditure u/s.37 of the I.T. Act.

12.1 As regards the alternate claim of the assessee that the depreciation on the above expenditure should be allowed if it is treated as capital expenditure, the Assessing Officer noted that the assessee has put to use these assets from A.Y. 2000-01. Since then it is claiming depreciation on the above amounts paid to M/s. Jay Arts. The said asset was already worn out and is depreciated. Since the amount has been paid in F.Y. 2007-08 and corresponding liability was never shown in the balance sheet in the previous years, therefore, the change in asset schedule cannot be done. He accordingly held that depreciation cannot be allowed on this payment made by the assessee. He accordingly disallowed the claim of the assessee.

13. Before the CIT(A) the assessee made elaborate submissions based on which the Ld.CIT(A) gave part relief to the assessee by holding that since the liability to pay the interest has accrued during the relevant assessments years and the same has been incurred as bonafide expenditure, the corresponding interest element paid during those years, i.e. Rs. 32 lakhs for A.Y. 2008-09 and balance Rs. 1, 50,00,000/- for A.Y. 2009-10 are to be allowed as Revenue

expenditure. The relevant observation of the Ld.CIT(A) reads as under :

> *"6.3. I have considered the submissions made. At the outset, it needs to be examined as to whether the amounts in question are contractual 'amounts, in respect of which liquidated damages are payable. In this regard the order of the 6th Additional Judge, Small Causes Court, and Joint Civil Judge, Sr. Division, Pune has been examined in great detail. The findings of the learned judge are recorded at pages 22 to 37 of the order. It is clearly recorded at pages 24, 26, 27, 31 of the order that there is no written contract between the two parties viz. Jay Arts and the appellant company. The main dispute between the two parties is regarding the rate approved per room and the payments in accordance with such rates. The dispute is regarding the approval of estimates furnished by Jay Arts. It is found that on all issues i.e. the number of rooms given for interior decoration work to Jay Arts, the rate for which the work is approved, the method of certification and verification of work done by Jay Arts through Architect, the order of the Court is against the appellant. Accordingly, excluding the interest component the amount of Rs.2,07,32,232 which has been directed to be paid by the court to Jay Arts is in respect of outstanding bills of the contractor. The appellant company failed to make payment of the rightful claims of the contractor when such amounts were due and instead of payment, made counter claims and allegations against the-'contractor. The withdrawal of the appellant's suit before the Bombay HC is an acceptance of the incorrect claims regarding the payments due to the contractor. It has been submitted that the appellant had decided to contest the Civil Court's decision before the Hon'ble Mumbai High Court but considering business wisdom and with a view to end the protracted litigation, the appellant preferred to settle the compensation issue by way of an MOU with M/s Jay Arts. Accordingly, the appellant has treated this expenditure as liquidated damages and debited the same to its P&L account.*
>
> *6.4. The definition of liquidated damages as it emerges from Black's Law Dictionary is "an amount contractually stipulated as a reasonable estimation of the actual damages to be recovered by one party if the other party breaches." In other words, there has to be a contractual liability clearly spelt out in a written contract as to the consequence of breach of contract by one or the other party. Similar is the definition of compensation for breach of contract u/s 74 of the Indian Contract Act, 1872, which provides for payment of reasonable compensation in cases of breach of contract, irrespective of whether any actual damage/ loss has been proved to have been caused, not exceeding the amount or as the case may be the penalty stipulated in the contract. In the present case, it is seen that there is no written agreement or contract between the appellant and M/s Jay Arts. There is therefore, no contractual obligation to pay liquidated damages.*

6.5. However, there is a court order directing the appellant to pay the compensation and interest thereon. The court has directed that the compensation paid to M/s Jay Arts related to amounts which was payable by the appellant in respect of the works executed by the said party, although disputed by the appellant. The amount of Rs.2,07,32,232 at the least relates to the outstanding amounts payable to M/s Jay Arts and have been directed to be paid during the year by the Civil Court. It is well settled that where a suit for damages is entertained by a court of law, the right to receive damages and the corresponding liability to pay damages accrue or arise only when the matter is finally decided by the courts. Therefore, in a case where the claim for damages is not initially accepted and the matter is disputed before the court, the acceptance by both of parties of the judgment and decision of the court will signal the accrual of the right to receive and the concomitant liability to pay the compensation as decreed by the court. In the present case, the approval is signaled at the time when the parties to the dispute entered into a memorandum of compromise following the decision of the court. This has been so held by the Madras Bench of ITAT in Kaveri Engineering Industries Ltd. vs DCIT reported in 43 ITD 527 and International Services vs ITO reported in 43 ITD 25.

6.6. The payments in question spread over two assessment years namely A.Ys. 2008-09 and 2009-10 pertained to capital expenditure for the interior of the hotel rooms. The same relates mostly to furniture and fixture, false ceiling, and other carpentry work. Some of the amounts relate to interior work in the hotel lobby, courtyard, staircase, terrace etc. but majority of the expenditure relates to wood work which requires constant upgradation, repairs and replacement. The court had directed that the amount of compensation to be paid to M/s Jay Arts was Rs.2,07,32,232 (on account of outstanding amounts due) which works out to 48% of the total liability. As per court order, the interest to be paid w.e.f. 1.4.1999 till payment is Rs.2,23,90,919 which translates to 52% of the total liability. The appellant has settled the claim at Rs.3,50,00,000. On the pro rata basis, the capital expenditure and interest component is seen to be as per following table :

Particulars	*Amount (as per court)*	*Remarks*	*Amount (as per MOU)*
Additional amount to be paid *Interest to be paid for 9 Yrs Total liability payable as per court order*	*20,732,332* *22,390,919* *43,123,251*	*(i.e. 48% of the total liability)* *(i.e. 52% of total liability)* *(i.e. 100%)*	*16,800,000* *18,200,000* *35,000,000*

Accordingly, the Assessing Officer's action in treating the amount paid during the year as capital expenditure is upheld. However, the Assessing Officer is directed to allocate the capital expenditure (pro rata) of Rs.1,68,00,000 to the block of assets of building and allow depreciation thereon. The justification for allocating the capital asset to building is that the rates of depreciation for building and furniture and fixture are the same i.e. 10% for the A.Y. 2008-09.

6.7. So far as the interest amount of Rs.1,82,00,000 (details as per para 6.6) is concerned, a view could be taken as upheld by the Hon'ble Supreme Court in Bombay Steel Navigation Co.(P) Ltd. vs CIT reported in 56 ITR 52 that whether a particular expenditure is incurred for purposes of business must be determined on consideration of all facts and circumstances and by the application of principles of commercial trading. In view of the discussion at para 6.5 above since the liability to pay the interest has accrued during the relevant assessment years, and the same has been incurred as bonafide expenditure, the corresponding interest element paid during those years viz. Rs.32,00,000 for A.Y. 2008-09 and balance Rs.1,50,00,000 for A.Y. 2009-10 are to be allowed as revenue expenditure. Therefore, Grounds No. 2 to 4 for A.Y. 2008-09 and Ground Nos. 1 to 3 for A.Y. 2009-10 are treated as partly allowed."

13.1 Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

14. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find in the instant case the assessee had assigned the work of interior design of 106 rooms of the Hotel in the year 1997 to one M/s. Jay Arts. Due to certain disputes that arose between the said party and the assessee, a case was filed before the Civil Court who in its judgment dated 10-08-2007 had granted compensation to Jay Arts against the work done with respect to interior designing of the hotel in the year 1997 and some additional work. The assessee had debited compensation of Rs. 2 crores paid to Jay Arts in its profit and loss account for the A.Y. 2008-09. It was the submission of the assessee before the Assessing Officer that the entire liability was settled for Rs.3,50,00,000/- as per MOU dated 22-02-2008 after the

Pune Sessions Court order dated 10-08-2007. If the same is segregated in the ratio of 52% and 48% then the interest expenditure comes to Rs.1,82,00,000/- being 52% of the total liability and the balance amount of Rs.1,68,00,000/- could be considered as liquidated damages arising out of a court case settlement. We find the Assessing Officer rejected the same on the ground that the payments out of compensation should also be in the nature of capital expenditure since all the payments made to Jay Arts during the period 1997 to 2001 have been capitalised and taken into fixed assets under the head Furniture and Fixtures. We find the Ld.CIT(A) allowed an amount of Rs.32 lakhs out of the said Rs.1,82,00,000/- being revenue in nature for the impugned assessment year and the balance amount of Rs.1,50,00,000/- in the subsequent year on the ground that there is a court order directing the assessee to pay compensation and interest thereon. According to her, the amount of Rs.2,07,32,232/-, i.e. 48% of the total liability relates to the outstanding amounts and the balance amount is towards interest. Since the assessee has settled the claim of Rs.3,50,00,000/-, therefore, on prorata basis, the capital expenditure comes to Rs.1,68,00,000/- and the interest portion comes to Rs.1,82,00,000/-.

14.1 So far as the issue of accrual of liability to pay damages from the date on which the MOU is signed for full and final settlement, we find the order of Ld.CIT(A) is supported by the decision of the Madras Bench of the Tribunal in the case of Kaveri Engineering

Industries Ltd., (Supra) reported in 43 ITD 25. The Tribunal has observed as under (Short Notes) :

> "CD was functioning as a senior director of GW Ltd. which earlier represented two foreign firms. The aforesaid two foreign firms transferred their business connections to the assessee firm consisting of three partners, namely CD's wife, daughter and son. Thereupon, GW Ltd. filed a suit alleging, inter alia, that CD had in a clandestine manner got hold of the business of the foreign principals, and claimed, inter alia, liquidated damages. By their order dated 30-04-1982, the High court awarded to the plaintiff a sum of Rs. 42 lakhs as and by way of liquidated damages. CD, firstly by interlocutory petition, got the operation of the Judgment stayed and, secondly, on 28-10-1991, a memorandum of compromise was entered into by the parties to the dispute, under which the assessee-defendant paid a sum of Rs. 17 lakhs to GW Ltd. in full and final compromise/settlement of the claims and counter claims involved in the dispute. Thereupon, by their order dated 31-10-1991, the High Court confirmed the said memorandum of compromise. For the assessment year 1983-84, the assessee-firm set up a claim for revenue deduction in a sum of Rs. 14 lakhs on the ground that the liquidated damages of Rs. 42 lakhs awarded by the High Court on 30-4-1982 were to be shared equally by the assessee-firm and its two foreign principals. The Assessing Officer, however, negatived the assessee's claim. On appeal, the Commissioner (Appeals) upheld the ITO's order.
>
> On second appeal:
> HELD
> There is a difference between a statutory liability and a liability arising on account of a breach of contract or breach of faith. Statutory liability arises on the happening of the taxable event. Such liability arises by reason of the statute itself and merely because the assessee disputes the liability, its accrual does not get postponed.
>
> That, however, is not a case where a claim is made for damages on account of breach of contract or breach of faith. In such cases, the liability does not arise merely because a claim for damages is made. The liability arises the moment the assessee accepts the claim. If, on the contrary, the assessee disputes the claim, the liability arises in the year in which adjudication took place. Thus, a claim for contractual breach cannot be equated with statutory liability. Where the claim is disputed, the liability does not accrue till the claim is adjudicated upon or it is accepted by the assessee.
>
> In the instant case, the High Court awarded damages on 30-4-1982. At the first blush, it appeared the liability to pay the damages got fastened on to the assessee on that day. But a closer look at the facts of the case would indicate to the contrary. As pointed out earlier, the parties to the dispute subscribed to a memorandum of compromise dated 28-10-1991. That meant that it was only on that day that the assessee accepted its liability to pay liquidated damages. It was significant to note that by the act and deed of

> subscribing to a memorandum of compromise, both the parties to the dispute had not acted upon the order dated 30-4-1982. And the memorandum of compromise dated 28-10-1991 signalled the acceptance by both the parties to the dispute of' the mode and mechanics of resolution of the dispute between them. Secondly, there was also the significant fact that the Division Bench of the High Court stayed the judgment and decree dated 30-4-1982. The effect of the terms on which the stay was granted was that GW Ltd. did not have any absolute right to receive the amount of Rs. 42 lakhs at that stage. Since the right to receive and the corresponding liability to pay a certain amount were co-equal, coextensive and concomitant, the assessee could not be regarded as having been visited with an enforceable liability to pay the sum awarded by way of damages. Further, in view of the Supreme Court decision in CIT v. Hindustan Housing & Land Development Trust Ltd. [1986] 261 ITR 524 /27 Taxman 450A the liability of the assessee-firm to pay its share of the liquidated damages arose on 31-10-1991 when the memorandum of compromise was made the decree of the Court. It should, therefore .follow that the assessee's claim must fail.
>
> Therefore, the liability to pay the assessee's share of the damages as finally quantified on compromise would have to be dealt with in the assessment year relevant to the previous year in which the date 31-10-1991 fell."

14.2 So far as treating the expenditure of Rs.1,82,00,000/- as interest is concerned, we find the Ld.CIT(A) following the decision of Hon'ble Supreme Court in the case of Bombay Steel Navigation Company (P) Ltd., Vs. CIT reported in 56 ITR 52, has decided the issue in favour of the assessee and accordingly allowed interest expenditure of Rs.32 lakhs for the impugned assessment year and the remaining Rs.1,50,00,000/- revenue expenditure in the subsequent year. We find the Hon'ble Supreme Court in the case of Bombay Steam Navigation Company (1953) Pvt. Ltd., while deciding the issue of interest on borrowed capital as business expenditure has observed as under (Short Notes) :

> "Pursuant to a scheme of amalgamation between two shipping companies, the assessee-company was incorporated on August 10, 1953, to take over certain passenger and ferry services carried on by one of the former. On August 12, 1953, the assessee-company took

over assets, which were finally valued at Rs. 81,55,000, and agreed that the price was to be satisfied partly by allotment of 29,990 fully paid up shares of Rs. 100 each and the balance was to be treated as a loan and secured by a promissory note and hypothecation of all movable properties of the assessee-company. The balance remaining unpaid from time to time was to carry simple interest at 6 per cent. By a supplemental agreement the original agreement was modified to the effect that the balance shall be paid by the assessee-company and until it was paid in full the assessee-company shall pay simple interest at 6 per cent, per annum on so much of the balance as remained due. The balance was also to be secured by hypothecation of all the movable properties of the assessee-company. During the relevant accounting years the assessee paid interest on the balance outstanding and the question was whether the interest paid was allowable as a deduction under section 10(2)(iii) or (xv) of the Indian Income-tax Act, 1922, in computing its profits:

Held, (i) (per SHAH and SIKRI JJ.) that the expression " capital" used in section 10(2)(iii), in the context in which it occurred, meant money and not any other asset: there was in truth no capital borrowed by the assessee in this case.

An agreement to pay the balance of consideration due by the purchaser did not in truth give rise to a loan. Therefore, the claim for deduction of the amount of interest under section 10(2)(iii) was not admissible.

(ii) (By the Full Court) that, however, the interest paid by the assessee was business expenditure and was allowable as a deduction under section 10(2)(xv). The transaction of acquisition of assets was closely related to the commencement and carrying on of the assessee's business and interest paid on the unpaid" balance of the consideration for the assets acquired had, in the normal course, to be regarded as expended for the purpose of the business which was carried on in the accounting periods.

STATE OF MADRAS vs. COELHO [1964] 53 I.T.R. 186 (S.C.) followed.

The expenditure made under a transaction which is so closely related to the business that it could be viewed as an integral part of the conduct of the business, may be regarded as revenue expenditure laid out wholly and exclusively for the purposes of the business.

Expenditure for satisfying liability unrelated to the business, even if incurred for avoiding danger, apprehended or real, to the conduct of the business, cannot be said to be revenue expenditure.

In considering whether expenditure is revenue expenditure, the court has to consider the nature and the ordinary course of business and the objects for which the expenditure is incurred. The question whether a particular expenditure is revenue expenditure incurred for the purpose of the business must be viewed in the larger context of business necessity or expediency. If the outgoing or expenditure is so related to the carrying on or conduct of the business that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition to the carrying on of the business,

> the expenditure may be regarded **as** revenue expenditure.
>
> Tax is payable under section 10(1) by an assessee on his profits or gains turned in the business, profession or vocation carried on by him in the year of account. If no business at all is carried on in that year, liability to tax does not arise under section 10(1)."

14.3 In view of the above 2 decisions cited (Supra), we find no infirmity in the order of Ld.CIT(A) in allowing an amount of Rs.32,00,000/- out of the payment of Rs.2,00,00,000/- to M/s. Jay Arts treating the same as revenue expenditure.

14.4 So far as the decision of the Hon'ble Bombay High Court in the case of Prabhat Theatres (P) Ltd., (Supra) relied on by the Revenue is concerned, we find the same is not applicable to the facts of the present case and is distinguishable. In that case, the assessee company was carrying on business of exhibiting motion pictures in a theatre which had been taken on lease by two partnership firms. Since the lessees of the theatre did not pay lease rent, the lessor filed a suit in 1945 for recovery of rent and for eviction against the partnership firms and also respective partners. The owner of the theatre filed a suit alleging that the lessees had illegally allowed the assessee company to use the theatre for its business purposes and the assessee company was impleaded as a party defendant in the suit. The suit ended in a compromise and by a consent decree the assessee company was declared to be the lawful tenant of the owner of the theatre on condition that the assessee company agreed to pay rent from 1950 and compensation by way of interest. In pursuance of that decree, the assessee

company paid interest of Rs.34,080/- to the owner of the theatre and claimed it as a deduction in the computation of its assessable income for the A.Y. 1959-60. The Assessing Officer disallowed the claim holding that the expenditure was in the nature of capital expenditure. According to the Assessing Officer, the assessee had agreed to compromise and paid rent and interest because it was in illegal occupation of the property and it would have been required to vacate the premises in the event of disputing the compromise and by a consent decree the assessee managed to legalise the occupation of the building. The AAC allowed an amount of Rs.5,400/- only. On further appeal, the Tribunal found that none of the leases that were executed from time to time was filed, that only the consent decree in a suit was filed and held that the assessee failed to establish that it was in occupation of the theatre as a tenant from the very beginning. The Tribunal further held that the amount of interest was paid by the assessee in order to legalise the assessee's right to occupation and not for preserving its tenancy right and hence the payment of interest was capital expenditure. Under these circumstances, the Hon'ble High Court upheld the order of the Tribunal. The relevant observation of the Hon'ble High Court at page 957 reads as under :

> "So far as question No. 3 is concerned, the Tribunal has been careful enough to point out that there was no material on record to indicate the time from which the assessee company started occupying the Kibe Theatre. Without knowing the time when the assessee company was in occupation of the theatre it will be difficult for the Tribunal to come to a definite finding as regards the liability for an amount of Rs. 34,080 which was described as the amount of interest in the consent decree. It will not be out of place to refer to the fact that the claim in the suit for arrears of interest

> was Rs. 70,500 while in the consent decree that amount was reduced to Rs. 44,600. In the plaint an amount of Rs. 9,500 was claimed by way of interest while in the consent decree a sum of Rs. 40,882 was agreed to be paid by way of interest and court expenses. How those figures were arrived at is not made clear by the contents of the compromise decree nor was it made clear by other material brought on record on behalf of the assessee before the taxing authorities and the Tribunal. In that view of the matter, the Tribunal came to the conclusion that this sum of Rs. 34,080 was agreed to be paid under the compromise decree in order to legalise the assessee's right for occupation and not for preserving its tenancy rights. Actually it found that even the deduction of Rs. 5,400 that was allowed by the AAC was unjustified but as there was no appeal by the revenue that finding could not be disturbed. So far as the claim for the remaining part of the interest was concerned, it was disallowed in view of this conclusion of the Tribunal because as a result thereof what was described as payment of interest was in fact capital expenditure which was not allowable as a business expenditure."

14.5 However, in the instant case, all the details are available and the facts are entirely different. Therefore, the decision relied on by the Revenue is not applicable to the facts of the present case. In this view of the matter and in view of the detailed reasoning given by the Ld.CIT(A), we find no infirmity in allowing Rs.32 lakhs out of interest of Rs.1,82,00,000/- as revenue expenditure for the impugned assessment year. Accordingly, we uphold the same.

14.6 So far as the order of the CIT(A) in directing the Assessing Officer to allow depreciation on the capital expenditure is concerned, we find no infirmity in the same. When certain amount is allocated towards capital assets of the assessee company, the assessee is entitled to claim depreciation on the same. We, therefore, find no infirmity in the order of the CIT(A) on this issue and accordingly uphold the same. The grounds raised by the Revenue are accordingly dismissed.

ITA No.774/PN/2013 (A.Y. 2009-10) :

15. The grounds raised by the Revenue are as under :

"1. The order of the learned Commissioner of Income-tax (Appeals) is contrary to law and to the facts and circumstances of the case.

2. The learned Commissioner of Income-tax (Appeals) grossly erred in allowing the assessee's claim of deduction of Rs.1,50,00,000/-, being payment made to M/s. Jay Arts, as revenue expenditure instead of confirming the assessment of the said sum by the Assessing Officer as capital expenditure.

3. The learned Commissioner of Income-tax (Appeals) grossly erred in allowing the interest paid on arrears outstanding as a revenue expenditure by relying on the decision in the case of Bombay Steel Navigation Co P Ltd Vs CIT(56 ITR 52), without giving any finding that the interest paid was an integral part of the profit-earning process and had not been incurred for acquisition of assets.

4. The learned Commissioner of Income-tax(Appeals) grossly erred in failing to appreciate and apply the ratio of the decision of the Hon'ble Jurisdictional High Court in the case of Prabhat Theatre (P)Ltd, Vs CIT (1979)118 ITR 953(Bom.) wherein it was held that compensation by way of interest was not allowable as business expenditure.

5. The learned Commissioner of Income-tax(Appeals) grossly erred in directed the Assessing Officer to allow depreciation on the capital expenditure without appreciating that the asset was put to use from the A.Y. 2000-01 and had also already depreciated; and, moreover, there is no provision in the Act to allow adjustment to WDV as would enable computing depreciation.

6. For these and such other grounds as may be urged at the time of the hearing, the order of the Ld. Commissioner of Income-tax(Appeals) may be vacated and that of the Assessing officer be restored.

7. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal during the course of the appellate proceedings before the Hon'ble Tribunal."

15.1 After hearing both the sides, we find the above grounds raised by the Revenue are identical to grounds of appeal filed by Revenue in ITA No.773/PN/2013. We have already decided the issue and the grounds raised by the Revenue have been dismissed. Following the same ratio, the grounds raised by the Revenue are dismissed.

16. In the result, all the 3 appeals filed by the Revenue are dismissed.

Pronounced in the open court on 02-12-2014.

Sd/- **Sd/-**

(SHAILENDRA KUMAR YADAV) (R.K. PANDA)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Pune Dated: 02nd December, 2014
Satish

Copy of the order forwarded to :

1. Assessee
2. Department
3. The CIT(A)-I, Pune
4. The CIT-I, Pune
5. The D.R, "B" Pune Bench
6. Guard File

By order

// True Copy //

Assistant Registrar
ITAT, Pune Benches, Pune