IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI JASON P BOAZ, ACCOUNTANT MEMBER

ITA Nos. and Assessment Years	Appellant	Respondent
1551 /Bang/2016 2012-13	M/s. Manipal Health Systems Pvt. Ltd., No. 14, Manipal Towers, Old Airport Road, Bengaluru – 560 008. **PAN : AACCM 2872 M**	Assistant Commissioner of Income-tax, Circle-2(3)(1), Bengaluru.
1552/Bang/2016 2011-12	M/s. Manipal Health Systems Pvt. Ltd., **PAN : AACCM 2872 M**	Additional Commissioner of Income-tax, Range-5, Bengaluru.
1667/Bang/2016 2009-10	M/s. Manipal Health Systems Pvt. Ltd., **PAN : AACCM 2872 M**	Joint Commissioner of Income-tax, Range-5, Bengaluru.
1668/Bang/2016 2010-11	M/s. Manipal Health Systems Pvt. Ltd., **PAN : AACCM 2872 M**	Additional Commissioner of Income-tax, Range-5, Bengaluru.
1557/Bang/2016 2011-12	M/s. Manipal Health Enterprises Pvt. Ltd., **PAN : AAGCM 5933 R**	Addl. Commissioner of Income-tax, Range-5, Bengaluru.
1558/Bang/2016 2012-13	M/s. Manipal Health Enterprises Pvt. Ltd., **PAN : AAGCM 5933 R**	Assistant Commissioner of Income-tax, Circle 2(3)(1), Bengaluru.
1076/Bang/2017 2013-14	M/s. Manipal Health Enterprises Pvt. Ltd., **PAN : AAGCM 5933 R**	Assistant Commissioner of Income-tax, Circle 2(3)(1), Bengaluru.
1208/Bang/2017 2009-10	Assistant Commissioner of Income-tax, Circle 2(3)(1), Bengaluru.	M/s. Manipal Health Systems Pvt. Ltd., **PAN : AACCM 2872 M**
1209/Bang/2017 2011-12	Assistant Commissioner of Income-tax, Circle 2(3)(1), Bengaluru.	M/s. Manipal Health Systems Pvt. Ltd., **PAN : AACCM 2872 M**

Assessee by	:	Shri. S. K. Tulsiyan, Advocate Mrs. Abha Agarwal, FCA Ms. Bhoomija Verma, Advocate
Revenue by	:	Dr. P. V. Pradeep Kumar, Addl. CIT

Date of hearing	:	06.04.2018
Date of Pronouncement	:	27.06.2018

O R D E R

Per Bench

There are two sets of appeals, one is filed by M/s. Manipal Health System Pvt. Ltd., and the other is filed by M/s. Manipal Health Enterprises Pvt. Ltd. In Manipal Health Systems Pvt. Ltd., cross appeals are filed by the assessee as well as Revenue and the issues involved in these appeals are interrelated, therefore these appeals were heard together and are being disposed off through this consolidated order. We, however, prefer to adjudicate these appeals one after the other:

2. **ITA Nos.1667 and 1668/Bang/2016:**

These appeals are preferred by the assessee against the respective orders of the CIT(A) on common grounds. For the sake of reference, we extract the grounds raised in appeal No. 1667/Bang/2016 as under:

1. *That the order of the Ld. Commissioner of Income Tax (Appeals) -4, Bangalore, [CIT(A)], confirming some of the additions/disallowances as made by the Ld. Assessing Officer [AO] is uncalled for and hence liable to be deleted.*

2. *That on the facts and in the circumstances of the case of the appellant, without prejudice to the action of the Ld. CIT(A) in capitalizing u/s 43A of the Act, the net amount of Rs.18,27,377/- being the loss in lieu of foreign exchange fluctuation and directing the ld. A.O. to allow the consequential adjustment of depreciation on the same, it is the contention of the appellant that the ld. CIT(A) erred in confirming the action of the ld. A.O that the same was not revenue in nature.*
3. *That on the facts and in the circumstances of the case of the appellant, the Ld. CIT(A) erred in confirming the disallowance of Rs.66,54,726/- made by the Ld. A.O. u/s 40A(2) of the Act to the extent of 1/3rd of the Service Charges paid to Holding Company, M/s MEMG International Private Limited.*
4. *That on the facts and in the circumstances of the case of the appellant, the Ld. CIT(A) erred in confirming the disallowance made by the ld. A.O. to the extent of Rs.68,000/-u/s 14A of the Act read with Rule 8D on the exempt dividend income of Rs.68,000/-earned by the appellant.*
5. *That further ground(s) of appeal may be submitted on or before the date of hearing.*

3. Ground No. 2 in both the appeals relate to the confirmation of disallowance made by the AO under section 40A of the Income Tax Act (hereinafter called as an ‘Act’) holding that the said amount being the foreign exchange loss on reinstatement of closing balance of foreign currency loan amount, was capital in nature. The facts in brief on these issues borne out from the record are that during the assessment year 2010-11, the AO has observed that the assessee has charged around Rs.70 lakhs as loss on foreign exchange difference. The assessee was asked to explain regarding this expenditure. In response thereto, it was contended that it was a forex loss booked amounting to Rs.69,98,309/- rounded off to Rs.70 lakh primarily arising on the account shows that the reinstatement of loan to subsidiary company has given a loss of around Rs.77.4 lakhs but by netting off certain gains the assessee has arrived at loss of Rs.69.98 lakhs (round off to Rs. 70 lakhs) and charged to revenue expenses. The AO noticed from the

submission that this loss is on account of capital advance made to subsidiary. This is clearly a capital advance made for whatever reasons. Therefore, any loss on account of capital payment cannot be treated as revenue loss and AO accordingly disallowed this forex loss of Rs.70 lakh and added back to the returned income as ineligible expenditure.

4. Assessee preferred an appeal before the CIT(A) with the submission that assessee has offered an income under the head 'foreign exchange fluctuation gain'. The assessee charged loss of Rs.77.4 lakhs on purchase incurred during the year and gain of Rs.7.42 lakhs on certain other purchases. Hence, the net amount of Rs.68.98 lakhs (rounded off to Rs.70 lakhs) was incurred as loss in lieu of purchase of various plants and machinery. It was further contended that the appellant, being a company, while preparing a financial statement, it should follow all the accounting standards notified by the Institute of Chartered Accountants of India as well as section 211(3)(c) of the Companies Act. He has also placed reliance upon the notification issued by Ministry of Corporate Affairs. It was further contended that the appellant has opted for accounting standard 11 (revised) and accordingly debited to its profit and loss account an exchange loss of Rs.70 lakhs. This contention was examined by the CIT(A). Being not convinced with the contention of the assessee, the CIT(A) confirmed the disallowances. The relevant observation of the CIT(A) is extracted hereunder for the sake of reference:

> *"The rival contentions have been considered, in light of the available judicial precedents on the subject. Having considered the relevant facts & circumstances, I am in agreement with the AO's stand. In the case of Sultlej Cotton Mills Ltd., it was settled that the Loss arising to the Assessee on account of Depreciation in the value of Foreign Currency held by it on Conversion into*

another currency, such Loss would ordinarily be Trading Loss if the Currency is held by the Assessee on Revenue Account or as a Trading Asset or as a part of circulating Capital embarked in the business. But in the case of the Assessee Company as the Restatement is on account of loan and the same is in the Nature of Capital item (hence, Not an allowable Expenditure as Capital Liability) the same cannot be set off as Revenue expenditure.

The Principle of Accountancy lays down that the Provision refers to charge against the Profits or Surplus to meet any unknown Liability. If no such unknown Liability were to exist the same is to be Added Back to the Total Income of the assessee. Foreign Exchange Loss on the closing balance of loan has only been restated by the Assessee as on 31st March, 2010 and therefore is a national loss. While the provisions of Section 32 to 36 of Income Tax Act, 1961 clearly lays down as to what is an admissible expenditure that maybe allowed against an income, section 317 is residuary in nature. Deduction in respect of loss in foreign Exchange is as this is not an Ascertained Liability.

The Assessee Company contents that the above Expenditure should be allowable, placing reliance on the case of Woodward Governor India Limited. In the of Woodward Governor India Limited 2009 179 Taxman 326, the Excess on account of Foreign Exchange fluctuation was of a revenue nature and claimed u/s 37(1) of the Income Tax Act, 1961. However, in the case of the Assessee company the claim is towards Restatement of Foreign Currency loan, which is a capital Item, and not an allowable expenditure u/s 43A of the Income Tax Act, 1961.

In accordance with Accounting Standard 11the Monetary item denominated Currency should be reported using the closing rate. In the instant case the Company has Debited the transaction in its Books in Rupee terms by Converting the same at the prevailing Rate of Exchange. Regarding Loss on account Foreign Exchange Fluctuation paragraph 12 of the Accounting Standard 11, the same envisages that when the Transaction is settled within the same Accounting Period as in which it occurred, the entire Exchange difference arises in that period.

In the background of the above discussion and facts & circumstances of the present case, the impugned amount being foreign Exchange Loss on Restatement of Closing Balance of Foreign Currency Loan Amount which is essentially capital in nature is liable to be added back to the Total Income of the Assessee Company. The Grounds of appeal of the assessee's on this account are therefore disallowed."

5. Aggrieved, the assessee preferred an appeal before the Tribunal and reiterated its contentions as raised before the CIT(A). During the course of hearing, similar ground was also raised in the assessment year 2009-10 in ITA No.1667/Bang/2016 wherein the assessee has opted not to press the ground. But in this appeal, assessee intend to argue the ground but once the finding on the similar issue by the CIT(A) is confirmed, a contrary view cannot be taken in subsequent appeals for subsequent year, following the rule of consistency. We, however, carefully examined the submissions raised by the assessee recorded in the order of CIT(A) and we find that CIT(A) has properly adjudicated the issue and no interference therein is called for. In assessment year 2009-10 in ITA No.1677/Bang/2016, the ground No. 2 raised in this regard is not pressed and we accordingly dismiss the same being not pressed. Accordingly, ground No. 2 in both the appeals are dismissed.

6. Ground No.3 in both the appeals relate to the confirmation of disallowance of Rs.71,30,121/- in assessment year 2010-11 and Rs.66,54,726/- in assessment year 2009-10 made by the AO under section 40A(2) of the Act, restricting the claim upto 1/3rd of service charge paid to holding company M/s. MEMG International India Pvt. Ltd., by the assessee. The facts in brief borne out from the record are that assessee has entered into service agreement with its holding company M/s. MEMG International India Pvt. Ltd., and in pursuance to the same the appellant claims that holding company undertakes various services which includes Fund- management and financial services; Treasury operations; Brand Royalty, Contract Purchasing; Marketing and P.P / Road-

shows; Tax Advisory services. It was also contended that in consideration of above services, appellant has paid 0.5% of total turnover as fees for MEMG International India Pvt. Ltd. The AO disallowed an amount of Rs.71,30,121/- in AY 2010-11 and Rs.66,54,726/- in assessment year 2009-10 being 1/3rd of total payments made to MEMG International India Pvt. Ltd., by invoking the provisions of section 40A(2) of the Act.

7. Aggrieved, assessee has preferred an appeal before the CIT(A) with the submission that while making a disallowance under section 40A(2), the AO has stated that assessee company is unduly benefitting the holding company and diverting the legitimate profit of the company through a colourable device termed as service agreement. Whereas, the service agreement entered into between the assessee and MEMGIIPL envisages provisions of various services by MEMG International India Pvt. Ltd., to the appellant which includes giving services like Fund- management and financial services; Treasury operations; Brand Royalty, Contract Purchasing; Marketing and P.P / Road-shows; Tax Advisory services, etc., and in lieu thereof assessee has to pay 0.5% of its total turnover. It was further contended that the appellant company was incorporated on 1.2.1999 where the Manipal Group is in existence for more than 50 years, which attracts more clients or the customers than the new company, which is relatively new and incurring losses. Hence, the intangible benefits of using ‘Manipal’ logo cannot be quantified in revenue terms. The contentions of the assessee was duly examined by the CIT(A) in the light of the relevant provisions of the Act. Having noted

that the MEMG International Pvt. Ltd., is a related party (being holding company) in terms of section 40A(2) of the Act, the CIT(A) has held that it is a plain business logic that no such excess / continued payment would be made, for similar services, to third party in an independent business environment. Taking into account all the relevant facts the CIT(A) confirmed disallowance made by the AO to the extent of 1/3rd of the total claim raised by the assessee.

8. Now the assessee has preferred an appeal before the Tribunal and reiterated its contentions as raised before the CIT(A). Whereas the learned DR has contended that this transaction was undertaken with the related parties and onus is upon the assessee to demonstrate that the payment made by the assessee to its holding company is at arm's length.

9. Having carefully examined the orders of lower authority in the light of rival submissions we find that this service agreement was executed on 1.4.2009, according to which assessee was required to pay 0.5 % of the total turnover as fees for the services rendered by the holding company MEMG International India Pvt. Ltd. The services envisaged in this agreement are as under:

Fund management and financial services
Accounting and Auditing services
Treasury operations (Direct and Indirect) Advisory Services
Management and Advisory Services
Secretariat and Legal Services

Project Feasibility & Implementation

Real Estate & Facilities Services

Human Resources Development

Quality & Information Technology Services

Central Processing

Brand Royalty

Brand Royalty – JVs

Marketing, PR and Road Shows

10. On perusal of the record, we also find that AO was not consistent in restricting the disallowances during the assessment year 2009-10 to 2011-12. In assessment year 2009-10, 2010-11 he made a disallowance of 33% of the total claim and in the impugned assessment year he made a disallowance of 50% without assigning any reasons. Whereas the assessee has placed substantial material on record to establish that various services were rendered by MEMGIIPL. We have also carefully perused the judgement referred to by the assessee and we find that it has been repeatedly held through various judicial pronouncements that the onus is on the AO to bring on record the comparable cases to prove that payment made by the assessee is in excess of fair market value and hence the same in his opinion is found to be excessive or unreasonable. It was also held that provisions of section 40A(2) are not automatic and can be called into play only if the AO establishes that expenditure incurred is in fact in excess of fair market value. In the case of CIT Vs. Modi Revlon (Pvt.) Ltd., (supra), the Hon'ble Delhi High Court has held that in order to determine whether the payment is not sustainable, the AO has to first return a finding that payment made is excessive,

under section 40A(2) of the Act. If it is found to be so, that AO has to determine what constitutes the fair market value of the services rendered and disallow the difference between what is claimed and what is such value determined fair market value. In the case of the DCIT Vs. Institute of planning and Management Pvt. Ltd., (supra) it was held that if incurring of expenses had not been doubted, there should be some evidence on the basis of which action of the AO would be held to be justified to show that expenses are unreasonable or excessive. In the case of DCIT Vs. Microtex Separators Ltd., (supra) the jurisdictional High Court has held that so long as there is no intention to evade tax and so long as the commission is not shocking, the said commission has to be accepted particularly in the light of the wordings of the section 40A(2) of the Act.

11. Having carefully examined the orders of the authority below in the light of these judicial pronouncements and the arguments advanced by the parties, we find that AO has not doubted the payment made by the assessee to MEMGIIPL on account of services rendered by them. But he has made the disallowance of its part without assigning any reason. He has not brought any comparable case to demonstrate that the payment made by the appellant is in excessive. Therefore, we are of the view that without bringing any cogent material on record to demonstrate that the payment made by the appellant is in excessive no disallowance can be made; more so in the light of the fact that both the companies are assessed to Income tax at maximum marginal rate. In the light of these facts, we are of the view that the disallowance made by the AO is not proper and accordingly we set aside the order of the CIT(A) and delete the additions in this regard.

12. The next ground relates to disallowance made under section 14A of the Act. In both the appeals, the facts borne out from the record in this regard are that during the course of assessment proceedings, the AO has noted that assessee has received dividend income of Rs.40,000/- in the assessment year 2010-11 and Rs.68,000/- in assessment year 2009-10. The AO has also noted that the assessee has made the investment to the tune of Rs.1.5 crores in its subsidiary companies. In response to the AO's query with regard to allocation of disallowance of proportionate expenditure in relation to exempted income, the assessee claimed that no specific expenditure has been incurred. The AO accordingly invoked the provisions of section 14A r.w.r.8D of the Income-tax Rule (Rules) and made disallowance of Rs.78,325/- being 0.5% of the average investment in assessment year 2010-11. Similarly, a disallowance of Rs.68,000/- was made in assessment year 2009-10.

13. Assessee preferred an appeal before the CIT(A) and CIT(A) has re-examined the claim of the assessee and reiterated its contentions that no expenditure was incurred in earning the dividend income. The CIT(A) re-examined the claim in the light of provisions of section 14A r.w.r. 8D of the Rules and was of the view that indirect cost attributable towards exempted income has to be disallowed for which it has to be computed as per Rule 8D(2)(iii) of the Rules. Now aggrieved, assessee is before us and during the course of hearing he could not demonstrate that no indirect expenditure was incurred to earn the exempted income from the investment of Rs.1.52 crores. Therefore, we find no infirmity in the order of the CIT(A). Accordingly, we confirm the same.

14. <u>ITA No.1208/Bang/2017</u>

This appeal is preferred by the Revenue against the order of the CIT(A) pertaining to the assessment year 2009-10, inter alia, on following grounds:

1 *The order of the CIT(A) is opposed to law and facts of the case*

2 *On the facts and circumstances of the case and in law, the ld.CIT(A) has erred in treating the addition to the tune of Rs.3,95,19,428/- made by the AO, as revenue expenditure without giving any rationale and appreciating the fact the expenditure incurred for developing a capital asset is not at all eligible for claim as revenue expenditure.*

3 *On the facts and circumstances of the case, the learned CIT(A) failed to appreciate the fact that the amount of Rs.3,95,19,428/- treated as indirect costs incidental to capital expenditure is instrumental and vital expenditures for actually developing the capital asset and should be tagged along with the costs of acquisition of capital assets. There are specifically no indirect costs which can be categorized as revenue and direct costs which can be categorized as capital, all costs that have gone into the development of any capital asset should be treated as capital in nature. Income tax envisages that even interests cost that have been incurred in the process of acquisition or setting up of a capital asset also should be tagged to the capital asset and capitalized.*

4. *Even by entering into a termination agreement with Guru Harikishan Medical Trust (GHKMT) the respondent is not eligible to write off any capital expenditure i.e. there is no provision or eligibility to write off an expenditure on abortive capital expenditure as revenue expenditure, (reliance is placed on the gist of the judgement in the case of CIT Vs. Bazpur Co-operative Sugar Factory Ltd., 1983 (14 ITR 1 (All) and Kanoria Chemicals and Industries Ltd., Vs. CIT (1995) (Calcuta High court).*

5. *The termination agreement speaks that the above amounts are recoverable and actually there is no loss to the respondent company. It also speaks that GHMT will make all out efforts to see that the interests of the respondent company will be met first before entering into agreement with any other party, which will ensure that expenditure made by the respondent is reimbursed. Thus, GHMT would not keep idle such a big asset.*

6. *As per the agreement the Capital Work in progress is shown at Rs.22 crores, whereas the closing capital work in progress in A.Y 2009-10 is only Rs.18.3 crores, which shows that further development in the project has not stopped during A.Y 2009-10. Thus, the respondent has made attempts to unduly classify certain capital expenditure as not recoverable by taking them as indirect costs.*

7. *The appellant craves leave to add, alter or amend in the ground of appeal either before or at the time of hearing.*

15. Though various grounds are raised but they all relate to an addition to the tune of Rs.3,95,19,428/- made by the AO having held that the expenditures incurred for developing a capital asset is not at all eligible for claiming as revenue expenditure.

16. The facts in brief borne out from the record are that the assessee i.e., Manipal Health System Pvt. Ltd., (MHS) entered into collaboration agreement dated 23.11.2007 with the Guru Harikishan Medical Trust (GHMT) for establishing and operating hospital at Kilokari, Ring Road, New Delhi (Delhi Project). As on 31.03.2009 a total amount of Rs.18,33,09,582/- was spent on Delhi Project hospital which includes the following:

- Civil, Plumbing and Other civil construction related costs (Amounts Paid against Bills and Work certified and mobilization advance paid
  Rs.14,37,90,154

<u>Non Recoverable Cost:</u>

- Lease Rent Paid (GHMT)	Rs.2,40,00,000	
- Other Miscellaneous Assets	Rs. 38,96,457	
- Consultant Related Payments	<u>Rs.1,16,22,</u>971	<u>Rs.3,95,19,428</u>
		<u>Rs.18.33,09,582</u>

17. It was explained before the AO that Rs.14,37,90,154/- was incurred directly in creating the physical infrastructure like civil structure, plumbing, lift, etc., and Rs.3,95,19,428/- was incurred on other expenditures like lease rent paid to GHMT, other miscellaneous assets and amount paid to consultants. The collaboration agreement did

not go well and the assessee entered into termination lease agreement with GHMT on 16.10.2009 wherein the assessee expressed its inability to pursue further with the project as raising funds to further develop the project was becoming difficult and the parties agreed to the Agreement to terminate the contract. It was also agreed between the parties to write off the rent paid and other pre-operating expenditures incurred and GHMT is no way liable to pay the said amount to MHSPL. It was also agreed that if the GHMT enters into arrangement with future collaborator, the future collaborator undertakes to pay to the assessee an amount mutually acceptable among the three parties to the said agreement towards reimbursement of the amount of expenditure incurred by MHSPL in relation to proposed hospital. The trust (GHMT) reaffirms its intention to facilitate the recovery by MHSPL of all sums invested by the assessee on the date of this agreement. In view of the above, it was claimed by the assessee that GHMT only agreed to help in recovering the amount spent on the project by the assessee. There was no certainty that amounts would be recovered by the assessee. Similarly, both parties have agreed to waive off the rent and the pre-operating expenditure incurred i.e., Rs.3,95,19,4258/- as on 31.03.2009 as per the termination release agreement. Thus, the assessee has made a provision for bad debts to the tune of Rs.3,94,19,428/-.

18. The AO treated the above amount written off as in eligible expenditure and added the same to the returned income. The AO disallowed the same on the ground that since the intention of the appellant/assessee was to acquire and establish Capital Asset (hospital), the expenditure related to the payments which are essentially capital in nature.

19. Aggrieved, assessee preferred an appeal before the CIT(A) with the submission that expenditures are incurred during the ordinary course of business of the appellant and hence it should be treated as revenue in nature. It was further contended that it is a settled position of law that the expenditures although incurred for the purpose of acquiring an asset or advantage for running of the business with a view to produce profit, it would be a revenue expenditure. It was further contended that the appellant and the GHMT have entered into termination release agreement dated 16.10.2009 wherein MHSPL expressed its inability to pursue further with the project as raising funds to further develop the project was becoming difficult and GHMT and the assessee/appellant agreed to terminate the contract. They have also agreed in this agreement that there is no certainty that amounts would be recovered by the appellant and they have agreed to waive off the rent and the pre-operating expenses incurred. Therefore, whatever initial project feasibility expenditure incurred, has been written off during the impugned assessment year. In support of his contention that the expenditure incurred on expansion of business by the assessee and the project was abandoned without creating new asset in existence, is a revenue expenditure, the assessee has relied upon the following decisions :

a. CIT vs. Ashok Leyland Ltd., (86 ITR 549) (SC).
b. Indo Rama Synthetics (I) Ltd., Vs. CIT (333 ITR 0018) (Delhi).
c. CIT Vs. Priya Village Road Shows Limited (332 ITR 594) (Delhi).
d. CIT Vs. EsselPropack Ltd., (325 ITR 185) (Mumbai).

20. The assessee has also made the alternative submission before the CIT(A) that the project cost/non-recoverable cost amounting to Rs.3,95,19,429/- be treated as deferred revenue expenditure and may be spread over 5 years and 1/5th of the total claim of Rs.3,95,19,429/- which comes to Rs.79,03,885/- to be allowed during the year under question.

21. The CIT(A) re-examined the issue in the light of rival submissions and partly convinced with the contentions of the assessee, has directed the AO to spread the claim over 5 years and allow 1/5th of total claim of Rs.3,95,19,429/- which comes to Rs.70,03,885/- during the year under consideration. The balance of Rs.3,25,15,544/- is disallowed during the assessment year 2009-10 under consideration. The relevant observation of the CIT(A) is extracted hereunder for the sake of reference:

<u>*"Having examined the position, in light of the available facts. I am of the considered view that, the project-expenditure cannot be held to be capital in nature, for the following reasons:*</u>

(1) The Assessee being a Reputed Medical Entrepreneurship Group-entity in the area of running Hospital-establishments (and related activities in Health-care) sector) across India, there is no doubt that, establishing / running of Hospitals is its routine business-activity. The mere act of entering into certain collaboration and subsequent termination of such agreement therefore does not in itself alter the basic business-character of the Appellant. It is obvious that, most of the Hospital projects in itself happen to be Long-term projects, which involve substantial gestation-periods in setting up and final functional operability. This in itself would not therefore be a lone reason to discount the Assessee's claim that, its primary intention behind the collaboration agreement with the GHKMT was part of its business activity in the normal course, and not to establish a capital asset of its own.

(2) In this overall perspective of the nature of Assessee's business activity, it is of crucial importance to ascertain whether the collaboration-agreement with the GHKMT — resulted in giving any tangible possession / ownership rights so as to constitute a capital asset in Assessee's hand, or on the converse, the driving motive behind the collaboration was to earn and share revenues over a long period of time. In my considered view the

latter and not former is the overriding motive behind the agreement entered by the Appellant. That, the primary intention behind the Mutual-collaboration was only of Revenue-sharing and not divesting / transfer of permanent rights is corroborated by the following facts, which emanate from the contents of the collaboration agreement dated 23/11/2007.

- *The first and foremost fact for consideration is that, the Land & Building Housing the impugned project is in the legal ownership of the Charitable Trust in the name of 'The Guru Hari Krishnan Medical Trust', which runs under the Aegis of the Delhi Sikh Gurudawara Management Committee. The land on which the Hospital is established was allotted by the Delhi Development Authority, in pursuance to which a 50 Bed-Hospital (Guru Hari Krishnan Hospital) was already operational, for running on charitable basis. In such circumstances there is no legal mandate or possibility of transfer of ownership / possession of any permanent rights of the asset to a third party.*

  The clause 4.1.1 of the collaboration agreement specifically lays that the assessee, shall be responsible for establishing, operating managing the proposed Hospital without any rights of ownership or lien on the said property or any superstructure thereon. It is clear therefore, that, the Assessee, cannot be held to be in a position to hold the impugned property as a capital asset, at any point of time.

- *The salient features of the revenue / income sharing arrangements as appearing at clause 19 and sub-clauses thereof, reveal that, the trust. GHKMT holds the complete lien over the Gross-annual revenues; As per the agreement the Assessee was entitled to only the remaining revenues earned from the Hospital activity, after paying the trust its operational minimum guaranteed amounts or percentage share as stipulated therein.*

  It is clear therefore that, the business-agreement between the respective parties does not partake the nature of a capital expenditure but, rather that of revenue expenditure. Upon the termination of the said agreement, the character of the same remains that of revenue nature.

5.4. The next Question that, arises for consideration is whether in the context of the collaboration agreement and its subsequent termination, the Assessee is entitled to claim the amount of Rs. 3,95,19,429/- as project-cost write-off entirely during the current year under consideration. To this contention of the Appellant the answer has to be in the negative. Even though the impugned expenditure is held to be of revenue nature. yet the Assessee's plea for allowing the ser-off during 1 year is not acceptable, for the following reasons:

- *The claim of total write-off of Rs. 3,95,19,429/- within the current AY: 2009-10, is not acceptable primarily on basis of the fact that, the termination agreement dated 16/10/2009, with the GHKMT-in itself reveals that the possibility of future receipts / reimbursements is not foreclosed.*

The agreement at clauses 2.14.3 and 2.14.5, stipulates that, the GHKMT Trust has agreed to facilitate the Assessee in reimbursement of the impugned cost from the future collaborations. Besides this fact, the agreement at clause 2.24 also stipulates that, the present termination agreement does not bar the assessee from entering into a fresh collaboration with GHKMT, under new terms. It is therefore apparent that. not only is there possibility of renewed agreement with the Trust. but. there is a clear indication of recovering the investments claimed to be entirely lost. In tnese facts and circumstances, write-off of the entire expenditure amounting to \ Rs. 3.95.19.429/- in one go, is not appropriate.

- *The Assessee itself has not applied consistent accounting yard-sticks for adjusting the impugned project-expenditure-claims from the AY: 2009-10 onwards. It is evident from the AO's orders (for the years under consideration), that in AY's 2009-10 and 2010-11 the assessee has claimed write-off of Rs. 3.95 crores and Rs. 0.94 crores respectively. It has been specifically stated by the Appellant in these years that the said cost written-off represented certain indirect-cost and the balance direct-cost was not written off. It is further sated by the AO, that, in the AY: 2010-11, though the Appellant claimed write-off of Rs. 0.94 crores, yet, the same was added back, while computing its gross total income. In the AY: 2011-12, the Assessee has claimed a major amount (out of total claim of Rs. 25,34,10,284/-) as write-off for the same reason, as discussed above.Thus, the Appellant has been giving different accounting treatment to the impugned project cost expenditure which lacks consistency.*

It has already been held that, the expenditures incurred in the impugned Delhi project are revenue in character. However, the claims of the entire expenditure to the extent of Rs. 3,95,19,429/- during the current year, is not acceptable for reasons elaborated, herein above. In the facts and circumstances, I am in agreement with Assessee's alternate plea to treat the project cost amounting to Rs. 3,95,19,429/- as deferred revenue expenditure by spreading the same to a certain period. Having regard to the overall facts and circumstances, I direct the AO to spread the claim to 5 years, and to allow 1/5th of Rs. 3,95,19,429/- which comes to Rs. 70,03,885/-, during year under consideration. The balance of Rs. 3,25,15,544/-/- is disallowed for set-off during the AY: 2009-10 under consideration. The same issue was subject matter of appeal, which was decided by the undersigned (for AY:2011-12) in ITA No: 14/DCIT-4(1)(2)/CIT(A)-4/12-13 dated 29th June,2016, wherein similar direction have been passed in respect of the write-off claim. It is also to place on records that, it remains legally obligatory on part of the appellant, to write-back any recoveries made / receipts accruing (in the subsequent years) in respect of this head of expenditures claimed. AO is accordingly directed to give necessary appeal effect in this regard, after verifying the total write-off claim in AY: 2011-12, so as to avoid duplicationof relief, on this account."

22. Aggrieved, the Revenue is in appeal before the Tribunal. Besides placing heavy reliance upon the assessment order, the learned DR Dr. Pradeep Kumar strongly contended that the main purpose of the collaboration agreement was to develop/construct full-fledged 250 bedded multispeciality Hospital in Delhi on the land and superstructure belonging to Trust/ The Delhi Sikh Gurudwara Management Committee (DSGMC), where already 50 bedded hospital was functional in the name of Guru Harikrishan Hospital. For assessment year 2009-10, assessee claimed Rs.3,95,19,428/- as revenue expenditure in the profit and loss account under the head provisions for capital work in progress. During the assessment proceedings and before the CIT (A), assessee claimed this amount as indirect cost incidental to the capital expenditure. Further in assessment year 2011-12 the assessee claimed an amount of Rs.25,00,99,767/- spent on Delhi hospital project on 31.03.2011 as revenue expenditure on the ground that this amount has been spent during the course of its business. The AO disallowed the said claim of the assessee for both the assessment years after treating this amount as capital expenditure incurred towards construction, substantial renovation and owning of new asset. The CIT(A) agreed to the assessee's alternate plea to treat the amount in question as deferred revenue expenditure by spreading it over 5 years and directed the AO to allow 1/5th of it during the year under consideration. The learned DR further contended that through collaboration agreement, assessee has acquired certain rights in the existing superstructure at measuring 29,000 sq. mtrs. built over at approximate ground coverage of 1.6 acre with existing 50 bedded hospital and

open space area not exceeding 4 acres along with existing accesses and easement for expanding or setting up of 250 bedded multi-speciality Hospital. Therefore, whatever expenditures are incurred towards infrastructure or others it would be a capital expenditure and assessee can only claim depreciation under section 32(1) of the Income-Tax Act. As per collaboration agreement the assessee has to bear all costs and expenditures for the purpose of establishment and management of the proposed hospital and as per clause 8.2 of the collaboration agreement the amount of investment by the assessee shall not be less than 125 crores. Therefore the capital expenditures so incurred by the assessee was for the purpose of business / profession and the arrangements or collaboration agreement squarely attract provisions of explanation 1 to section 32(i) of the Income-Tax Act. In support of his contentions, he placed reliance upon the following judgments:

- *CIT Vs. Madras Auto Serivce (P.) Ltd., [1998] 233 ITR 468 (SC)*
- *Assam Bengal Cement Co. Ltd., Vs. CIT [1995] 27 ITR 34 (SC).*
- *Atherton Vs. British Insulated & Helsby Cables Ltd., [1925] to Tax cases 155 (SC).*
- *Mother Hospital (P.) Ltd., Vs. CIT, Trichur. [2017] 392 ITR 628 (SC)*
- *CIT & another Vs. Shri. Rupesh Anand in ITA Nos. 254 – 257/2015 dated 21.09.2016.*
- *ACIT, Circle 2(1), Vijayawada Vs. Efftronics Systems (P.) Ltd., [2011] 15 taxmann.com 345 (Vishakapatnam).*
- *ABT Ltd., Vs. ACIT, Co. Circle – 1(2), Coimbatore (2013) 30 taxmann.com 11 (Chennai-Trib)*
- *Continental Enterprise Vs. ITO, (2017) 87 taxmann.com 257 (Chennai – Trib.)*
- *ACIT Vs. SRF Ltd., [2008] 21 SOT 122 (Delhi).*

23. The learned Counsel for the assessee besides placing reliance upon the order of the CIT(A) has contended that undisputedly assessee company has entered into a tripartite collaboration agreement dated 23.11.2007 with Guru Harikrishan Medical Trust (GHKMT) and Delhi Sikh Gurudwara Management Committee (DSGMC) for expansion of existing GHKH and operation, management and provision for care services from the said Hospital. It is also an undisputed fact that assessee company is a renowned Healthcare service and hospital management company providing Healthcare service to the public at large from its established/managed hospitals and Health Care Centres located at various locations in India. As many as 15 hospitals is spread across the country were owned/ managed/ operated by the appellant during the year 2009-10 and 2011-12 and establishing running and managing of hospital had been routine business activity of the company since its very incorporation in the year 1999. Therefore, the collaboration agreement entered upon by the assessee with GHMT and DSMC for the purpose of expansion, operation, management of existing Guru Hari Krishan Hospital in the course of its routine business of establishing running/managing of hospitals and not separate/new business activity. It was further contended that it has been repeatedly held by various courts that where existing business is to expand/set up a new unit in the same business fold, expenditure incurred on setting up of such new unit/expansion of existing unit is admissible as business expenditure. In support of this contention the learned Counsel for the assessee has placed a heavy reliance upon the following judgments:

- *Alembic Chemical Works Co. Ltd. Vs. CIT (1989) 177 ITR 377 (SC) (pages 202-211 of the PB)*
- *CIT Vs. Priya Village Road Shows Ltd. (332 ITR 594) (Delhi) (pages 212-217 of the PB)*
- *Woodcraft Products Ltd. Vs. CIT (1993) 69 taxman 415 (Calcutta)*
- *CIT Vs. Aluminium Industries Ltd. (1995) 214 ITR 541 (Ker)*
- *Hindustan Commercial Bank Ltd., in Re (1952) 21 ITR 353 (All)*
- *CIT Vs. Malwa Vanaspati & Chemical Co. Ltd. (1997) 226 ITR 253 (High Court of Madhya Pradesh, Indore Bench)*
- *CIT Vs. Jyoti Electric Motors Ltd. (2002) 255 ITR 345 (Guj)*
- *CIT Vs. Indian Telephone Industries Ltd. (1989) 175 ITR 215 (Kar)*
- *Indo Rama Synthetics (I) Ltd. Vs. CIT (2011) 333 ITR 18 (Del)*
- *CIT Vs. Usha Iron & Ferro Metal Corpn. Ltd. (2008) 296 ITR 140 (Del)*
- *CIT Vs. Honda Siel Power Products Ltd. (2010) 36 DTR 456 (Del)*

24. The learned Counsel for the assessee further contended that impugned project was abandoned by the assessee midway on account of business exigencies, financial considerations and commercial prudence. The appellant and the GHMT entered into termination release agreement dated 16.10.2009 wherein the appellant expressed its inability to proceed further with the contract on account of factors beyond its control. The parties therefore agreed to terminate the contract and discharged each other's obligations under previous agreement. As such, although substantial expenditure is incurred by the appellant under the interim collaboration agreement but no Capital Asset or advantage of enduring benefit came into existence for the appellant company pursuant to such abandoned project. Therefore, the expenditure incurred in expanding its business is a revenue expenditure and not a capital in nature. In support of this proposition, the learned Counsel for the assessee has placed a reliance upon the following judgments in which it has been held that if expenditures incurred on setting

up a new unit which has inextricable linkage with the existing business of the assessee and such new unit is subsequently abandoned, such expenditure is treated as revenue in nature as no new industrial assets comes into existence:

- *CIT Vs. Priya Village Road Shows Ltd. (332 ITR 594) (Delhi) (pages 212-217 of the PB)*
- *Indo Rama Synthetics (I) Ltd. Vs. CIT (2011) 333 ITR 18 (Del)*
- *Idea Cellular Ltd., Vs. Addiitonal CIT, (2014) 65 SOT 15 (Mum).*
- *Jwala Prasad Radha Kishan Vs. CIT (1971) 79 ITR 530*
- *NarandasMathuradas& Co. Vs. CIT (1959) 35 ITR 461 (Bom).*
- *Tata Iron & Steel Co. Ltd., Vs. D. V. Bapat, ITO &Anr (1975) 101 ITR 292*
- *BadridasDaga Vs. CIT Civil Appeal No.149/1956, dated 25th April, 1958*

25. The learned Counsel for the assessee further contended that the expenses are in the nature of preoperational, infrastructural expenses required for operation and function of the hospital and were incurred by the appellant pursuant to the collaboration agreement but since the assessee was finding it difficult to raise funds to meet the contractual requirements requiring investment to not less than 125 crores, the said collaboration agreement is to be terminated by termination release agreement dated 16.10.2009 wherein the said expenditure was endeavoured to be reimbursed to the appellant by trust on third parties but on account of lack of any update in that regard, the same is to be written off by the appellant. Therefore, carrying out of expansion of the existing Hospital property of the trust is for the purpose of running and operating the same on the revenue share basis where the part of the business activity of the appellant company and incurring of the impugned expenses under the contract was incidental to such business. Reliance was also placed upon the judgment of Bombay High Court in the case of NarandasMathuradas& Co. Vs. CIT (1959) 35 ITR 461 (Bom).

26. Having heard the rival submissions and from the careful perusal of the record we find that undisputedly assessee company is engaged in Healthcare services and hospital management providing Healthcare services to the public at large from its establishment/ management hospital and Health Care Centres located at various locations in India since its inception from 1999. The contention of the assessee that it has as many as 15 Hospitals spread across the country and is being managed and operated by the appellant, has not been disputed by the Revenue. It is also an admitted fact that in the course of carrying on such business, appellant entered into tripartite agreement dated 23.11.2007 with GHMT and DSGMC for expansion of the existing Guru Harikishan Hospital (GHH) and operation management of Healthcare services. It is also an undisputed fact that this project did not went well and in its midway the appellant had abandoned the project on account of business exigencies, financial considerations and commercial prudence according to the assessee. Consequently, the appellant entered into a termination release agreement dated 16.10.2009 with GHMT where the appellant expressed its inability to proceed further with contract on account of factors beyond its control. Thereafter, the parties have agreed to terminate the contract and discharged each other’s of all obligations under the provisions of the agreement. These facts were not disputed by the revenue. Therefore, now the question arises as to whether the expenditure incurred in expansion of its business is in the nature of revenue or capital. Besides, it is also to be examined as to whether on abandonment of the project the expenditure incurred can be claimed to be the revenue expenditure. In this regard,

our attention was invited to various judicial pronouncements. In the case of CIT Vs. Malwa Vanaspati & Chemical Co. Ltd. (supra), the Hon'ble High Court of Madhya Pradesh have observed that where the facts go to indicate that the setting up of the new project was only expansion of an existing business of the assessee company and it cannot be created as a new line of business for a business activity, the setting up of the unit at place though little away from the business place of the assessee company is of little consequence and the expenditure incurred therein would be a revenue expenditure. Similarly, in the case of CIT Vs. Jyoti Electric Motors Ltd., the Hon'ble Gujarat High Court has again held that technical report fees paid by the assessee for ascertaining feasibility of manufacturing a new kind of product was an expenditure incurred for the purpose of expansion of existing business, and, therefore same was deductible as revenue expenditure. Again, in the case of CIT vs. Indian Telephone Industries Limited (supra) the Hon'ble jurisdictional High Court has held that if the expenditure incurred in connection with the new unit and overall control of the business of new units remains with assessee and production by new units would also be production of assessee, establishment of new unit is not an independent unit but just an expansion of the existing business and expenditure incurred in new unit, therefore, allowable as revenue expenditure.

27. In the case of CIT Vs. Usha Iron & Ferro Metal Corpn. Ltd. (supra), the High Court of Delhi again examined the aspect of nature of expenditure whether it is capital or revenue and their Lordship have held that expenditure on establishment of unit for

manufacturing raw material was an expansion of existing business, hence revenue expenditure. Their Lordship further held that merely because the assessee treated the amount as capital expenditure in its books, it would not be bound by it and there is no doubt that expenditure incurred by the assessee was for the expansion and betterment of its existing business. Manufacture of raw material for the benefits of its existing business cannot amount to setting up of a new business.

28. Again, the Hon'ble Delhi High Court in the case of CIT vs Honda Siel Power Products Ltd., (supra) has held that "new projects setup by assessee company is a part of existing business as there is unity of control, common management and funds as well as interlacing of two businesses and, therefore, expenditure incurred on salaries, rent, travelling, etc., in relation to the new project is allowable revenue expenditure".

29. In the case of CIT vs Priya Village Road Shows Ltd., their lordship of Delhi High Court have made a detailed analysis of the nature of expenditure incurred in such circumstances and has held "if expenditure incurred is in respect of the same business which is already carried on by the assessee, even if it is for the expansion of the business, namely, to start new unit which is same as earlier business and there is unity of control and a common fund, then such expenditure is to be treated as business expenditure. In such a case whether new business or asset comes into existence or not would become an irrelevant factor". If there is no creation of new asset, then the expenditure incurred would be revenue expenditure. However, if the new asset comes into existence which

is of enduring benefit, then such expenditure would be of capital in nature. In that case, the expenditure was incurred in respect of the same business which is carried on by the assessee in two projects which were undertaken by the expansion of same business, namely, one for taking over S.Cinema for conversion into Multiplex and operation management thereof and other for conversion of P.Cinema into four multiplexes. Payments were made to the consultants for preparing feasibility reports in respect of both the projects. However, ultimately the projects were not found to be financially and technically viable and were shelved. Thus, no new assets came into existence but the AO treated the expenditure as capital expenditure. In the case of Indo Rama Synthetics (I) Ltd., vs. CIT, their Lordship of Delhi High Court further held that if expenditure is incurred on setting up a new unit which has inextricable linkage with the existing business of the assessee and such new unit is subsequently abandoned, such expenditure will be treated as revenue in nature as no new industrial asset comes into existence. Similar view was also expressed by the Bombay High Court in the case of Idea cellular Ltd., Vs. Additional CIT (2014) 65 SOT 15 (Mum) by holding that since the project of erecting towers was abandoned by the assessee, there was no question of any new asset coming into existence. Accordingly, the expenditure incurred thereon would be allowable as revenue expenditure. Similar view was expressed in the case of Jwala Prasad Radha Krishna Vs.CIT (supra), NarandasMathuradas&Co.Vs. CIT (supra) and Tata Iron and Steel Co. Ltd., Vs. D. V. Bapat, ITO &Anr (supra). In the case of Ramachandra Shivanarayan vs. CIT, A.P., 1977 4 SCC 529, their Lordship of the Apex

Court have observed that for seeking deduction under loss being incidental to business, the principle applicable is that if there exists a direct and proximate nexus between the business operation and the loss or it is incidental to it, the loss is deductible, as, without the business operation, and doing all that is incidental to it, no profit can be earned. Thus in commercial sense such loss can be construed as a trading loss and becomes deductible from the total income.

30. Turning to the facts of the case, we find that appellant is involved in the business of establishing, running and managing hospitals and as part of its routine business activity, the appellant entered into collaboration agreement dated 23.11.2017 with GHMT for expansion of existing Guru Hari Krishna hospital and managing, operating and provisions of Healthcare services from the said hospital on a revenue share basis. Undisputedly, certain expenses in the nature of preoperational and infrastructural expense as required for the operation of the hospital was incurred by the appellant pursuant to the agreement but since the appellant was finding it difficult to raise funds to meet the contractual requirements requiring investment of not less than 125 crores according to assessee, the said collaboration agreement was terminated vide termination release agreement dated 16.10.2009. Therefore, carrying out expansion of existing hospital property of the trust for the purpose of running and operating of the same on a revenue share basis was part of the routine business activity of the appellant and therefore incurring the impugned expenses under the contract was incidental to such business. Though it was agreed in termination release agreement that the said

expenditure was endeavoured to be reimbursed to the appellant by the trust from third parties but nothing was materialized and the appellant wrote off the said amount in the books of account.

31. The CIT(A) re-examined the claim of the assessee in the light of assessee's contentions and having agreed to the contentions of the assessee, the CIT(A) has concluded the expenditure to be allowable as a revenue expenditure but he was of the view that the entire expenditure can be spread over 5 years and accordingly he directed the AO to spread entire claim of Rs.3,95,19,429/- for 5 years and allow 1/5th of total claim which comes to Rs.70,03,885/- during the year under consideration. The balance of Rs.3,25,15,554/- was disallowed for set off during assessment year 2009-10. This order of the CIT(A) was challenged by the Revenue, but the assessee did not dispute these findings. In the light of various judicial pronouncements discussed in foregoing paras, we are of the considered opinion that the expenditures incurred was an account of expansion of business and the project was finally abandoned without acquiring any new asset for enduring benefit, therefore, the entire claim is allowable as revenue expenditure. But the CIT(A) spread over the entire claim for 5 years and allowed 1/5th of the claim in the impugned assessment year and these findings are not challenged by the assessee. Therefore, we are confirming the order of the CIT(A) passed in this regard having found no merit in the contention of the Revenue that the expenditures are of capital in nature. Accordingly, the Revenue's appeal in ITA No.1208/Bang/2017 is disposed off.

32. ITA Nos. 1552/Bang/2016 and 1209/Bang/2017

These are cross appeals preferred by the assessee as well as the Revenue against the order of the CIT(A), inter alia, on various grounds which are as under:

33. Grounds of appeal in ITA No.1552/Bang/2016

(la) That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in upholding the AO's action of bringing to tax negative net-worth of Rs. 6,36,75,195/- under the deeming provisions of section 50B alongwith the sale consideration of Rs. 10,00,000/-.

(lb) That the Ld. CIT(A) erred in not considering the decision of the Hon'ble Income-tax Appellate Tribunal, Mumbai Bench in the case of Zuari Industries Ltd. Vs. ACIT (105 ITD 569) relied upon by the appellant based on which the appellant had computed capital gains on slump sale by adopting net worth of the company as nil.

(1c) That the Ld. CIT(A) grossly erred in not appreciating that if liability is to be added to sale consideration, then the same has also to be excluded from computation of 'net worth'.

(1d) That the Ld. CIT(A) failed to understand that no prudent person would buy an asset unless the value of the assets is more than the liabilities.

(2) That the Ld. CIT(A) while correctly holding that non-recoverable project cost of Rs. 25,34,10,284/- was in the nature of revenue expenditure erred in not allowing complete write off of the same during the current year under consideration i.e. A.Y 2011-12.

(3a) That the Ld. CIT(A) erred in upholding the AO's action of adding to the returned income a sum of Rs. 52,39,220/- as adjustment made under section 40A(2) as deemed income, being 50% of the service charges paid to Holding Company MEMG International Pvt. Ltd. amounting to Rs. 1,04,78,440/-.

(3b) That the Ld. CIT(A) failed to understand that payments of service charges were made against services in the form of financial advisory services, royalty payment

for usage of "MANIPAL" Iogo etc. rendered by the holding company and as such, no disallowance was warranted under section 40A(2) of the Act.

(3c) That the Ld. CIT(A) erred in not appreciating that the service charges paid to holding company is also taxed at the same rate in their hands and as such, there is no tax evasion or avoidance.

(4a) That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in upholding the disallowance of Rs. 97,0000/- made by the A.0 under section 14A read with Rule 8D as expenditure pertaining to exempt income.

(4b) That the Ld. CIT(A) failed to appreciate that investments in shares yielding dividend income which were claimed as exempt from tax u/s 10(34) of the Income-tax Act, 1961 were made out of own funds of the appellant and no borrowed funds were used for the said purpose.

(4c) That the Ld. CIT(A) grossly erred in not appreciating that no direct or indirect expenses were attributable to the exempt dividend income.

(5) That the appellant craves leave to add, amend and/or alter any of the foregoing grounds and such other grounds as may be urged at the time of hearing.

34. During the course of hearing, assessee has also raised the following additional grounds:

<u>Additional grounds raised in ITA No.1552/Bang/2016</u>

la. That on the facts and in the circumstances of the case and in law, the Ld. A.0 and the Ld. CIT(A) erred in treating the composite sale of assets and liabilities (excluding land & building) of the hospital business as 'slump sale' u/s 2(42C) read with Explanation 1 to section 2(19AA) of the Income-tax Act, 1961 (the 'Act').

lb. That the Revenue Authorities erred in not appreciating that since the Lands & Buildings forming the core of the hospital business were not transferred, the composite sale of remaining assets and liabilities of the dismembered hospital *business cannot be treated as 'slump sale' u/s 2(42C) r.w. Expl 1 to section 2(19AA) and hence, the gains, if any are not assessable to tax u/s 50B r.w.s 45 of the Act.*

lc. *That further, the Revenue Authorities misguided themselves in placing reliance on the decision of the Hon'ble Special Bench, Mumbai Tribunal in the case of* ***M/s. DCIT Vs. Summit Securities Ltd. (68 DTR 201: 135 ITD 99)*** *which being clearly distinguishable on facts is not applicable to the present assessee's case.*

2a. *That without prejudice to the above, the Revenue Authorities further erred in not appreciating that even if it is assumed without conceding that provisions of section 50B are attracted in the instant case, the value of lands & buildings forming the core of the hospital 'undertaking', although not transferred are required to be included in the calculation of net-worth leading to a long term capital loss u/s 50B r.w.s 48 of the Act.*

2b. *That the Revenue Authorities fell in error in not realizing that the appellant-assessee having already offered excessive long term capital gains of Rs. 10 lacs u/s 50B of the Act, cannot be taxed any further on the impugned transfer.*

3a. *That, without prejudice to the above, the Revenue Authorities erred in not realizing that even if the `net-worth' of the transferred 'undertaking' (if at all an 'undertaking') is deemed at a negative figure, such 'undertaking' with a negative net-worth cannot be treated as 'capital asset' for the purpose of creating a charge under Chapter IV-E of the Act.*

3b. *That the Revenue Authorities fell in error in not appreciating that the capital receipts arising on the impugned transfer falling outside the purview of Chapter IV-E of the Act, cannot be brought to tax under the provisions of the Income-tax Act, 1961.*

35. Grounds of appeal in ITA No.1209/Bang/2017

1. *The order of the CIT(A) is opposed to law and facts of the case.*
2. *On the facts and circumstances of the case and in law, the Id.CIT(A) has erred in treating the addition to the tune of Rs.25,34,10,284/- made by the AO, as revenue expenditure without giving any rationale and appreciating*

the fact the expenditure incurred for developing a capital asset is not at all eligible for claim as revenue expenditure.

3. *On the facts and circumstances of the case, the learned CIT(A) failed to appreciate the fact that the amount of Rs.25,34,10,284/- treated as indirect costs incidental to capital expenditure is instrumental and vital expenditures for actually developing the capital asset and should be tagged along with the costs of acquisition of capital assets. There are specifically no indirect costs which can be categorized as revenue and direct costs which can be categorized as capital, all costs that have gone into the development of any capital asset should be treated as capital in nature. Income tax envisages that even interests cost that have been incurred in the process of acquisition or setting up of a capital asset also should be tagged to the capital asset and capitalized.*
4. *The amount of Rs.25,34,10,284/- was spent consequent to the agreement with Guru Hari Kishan Medical Trust (GHMT) for opening new avenues generating business income, thus trying to establish a revenue yielding capital asset.*
5. *Even by entering into a termination agreement the respondent is not eligible to write off any capital expenditure incurred on abortive capital asset acquisition projects i.e. there is no provision or eligibility to write off an expenditure on abortive capital expenditure as revenue expenditure, (reliance is placed on the gist of the judgement in the case of (a) CIT Vs. Bazpur Co-operative Sugar Factory Ltd., 1983 (14 ITR 1 (All) (b) Kanoria Chemicals and Industries Ltd., Vs. CIT (1995) (Calcuta High court) (c) Shri Digvijay Woolen Mills Ltd., Vs. CIT (Guj) 204 ITR 398 (d) KTMTM Abdul Khayoom Vs. CIT (SC) 44 ITR 689.*
6. *The respondent has expended the money so as to develop a capital asset but in the process has lost (likely to be lost) the investments due to unforeseen economic conditions, i.e. the respondent has a 'loss of capital' which cannot*

be claimed as revenue expenditure (reliance is placed on the judgement in the case of JP Srivastava & Sons Vs. CIT (All) 86 ITR 730.

7. *The termination agreement speaks that the above amounts are recoverable and actually there is no loss to the respondent company. It also speaks that GHMT will make all out efforts to see that the interests of the respondent company will be met first before entering into agreement with any other party, which will ensure that expenditure made by the respondent is reimbursed. Thus, GHMT would not keep idle such a big asset.*
8. *For the A.Y 2009-10 and A.Y 2010-11 the respondent claimed a write off of Rs.3.95 crores and Rs.0.94 crores respectively as they are indirect costs and not writing off the balance as they are direct costs. For A.Y 2010-11 the respondent claimed the write off of Rs.0.9 crores after adding back the same while computing the gross total income. Thus, the respondent is taking different stands to take undue benefit by making undue classification.*
9. *The appellant craves leave to add, alter or amend in the ground of appeal either before or at the time of hearing.*

36. Since the additional grounds raised in ITA No.1552/Bang/2016 are legal ground and goes to the merit of the case, we admit the same and adjudicate it along with the grounds raised on merit. The soul ground in Revenue's appeal and ground number 2 in assessee's appeal are almost similar. Therefore, Revenues appeal will be disposed of along with the ground number 2 in assessee's appeal.

37. Apropos Ground No.1 in the assessee's appeal, the facts in brief borne out from the record are that the appellant entered into a Business Transfer Agreement (BTA) on 20.08.2010 with effect from 01.09.2010 with M/s. Manipal Health Enterprises Private Limited (MHEPL) and transferred hospital business by way of a Slump-sale. As per

the said agreement, the appellant transferred its Hospital business as a going concern and valued all its movable and other assets at amount of Rs. 210.61 crores (excluding land and building) along with the total liabilities at Rs.276.98 crores as per books of accounts which resulted in negative net worth of Rs.66.36 crores. While computing the capital gain on slump sale under section 50B of the Income Tax Act, the appellant has considered a lump-sum consideration for Rs.10 lakhs as full value of consideration and for deduction has taken the value of net worth at Nil, offering the same for capital gains tax. The AO did not accept the computation of capital gain. He, however, brought the negative net worth figure of Rs.66.36 crores to long term capital gain tax along with lump-sum consideration of Rs. 10 lakhs. The AO accordingly worked out the long-term capital gain at Rs. 66,34,75,195/- having observed that the assessee should have taken the negative net worth figure of Rs.66.36 crores in the true sense of deemed provisions under section 50B of the Act and should have added to the lump-sum consideration of Rs.10 lakhs and arrived at a capital gain of Rs.66.46 crores.

38. Aggrieved, assessee preferred an appeal before the CIT(A) and placed heavy Reliance upon the order of the Tribunal in the case of Zuari Industries limited Vs. ACIT 105 ITD 569 with the submission that he has computed the capital gain on sale proceeds of Rs.10 lakhs by adopting net worth of company taken at Nil, following the aforesaid orders in which the Tribunal has held that if liabilities exceeds assets, the net worth is to be taken as zero, as the capital gain cannot exceed sale consideration as no prudent person would buy an asset unless the value of the asset is more than the liabilities and if

the liabilities is to be added to the sale consideration, the same has also to be excluded from the computation of the net worth. He also placed reliance upon the order of the Tribunal in the case of Paperbase company Vs. CIT 19 SOT 163, Mrs. Pushpa Safot Vs. ITO 81 ITD 1, in which it was held that in the case of slump-sale if the liabilities are more than the value of the asset, net worth i.e., cost of acquisition, has to be taken at Nil and entire sale consideration is liable to be capital gain tax. The CIT(A) re-examined the claim of the assessee. Being not convinced with explanations of the assessee, he confirmed the computation of capital gain done by the AO.

39. Aggrieved, the assessee preferred an appeal before the Tribunal with the submission that Lands and Buildings forming the core of the hospital business were not transferred under this business transfer agreement. Therefore, the transfer of the business cannot be treated to be slump-sale under section 2(42C) r.w.Expl. 1 to section 2(19AA) of the Act. Hence, the gain, if any, are not assessable to tax under section 50B r.w.s. 45 of the Act. Without prejudice to this argument, the learned Counsel for assessee has contended that even if it is assumed without considering that provisions of section 50B are attracted in the instant case, the value of land and building forming the core of the hospital undertaking, although not transferred, is required to be included in the calculation of net worth leading to long term capital loss under section 50B r.w.s. 48 of the Act. It was further contended without prejudice to the above arguments that assuming that the value of the land and building is to be excluded for the purpose of calculating the net worth under section 50B such net worth in the case of capital asset

being undertaking cannot be in negative figure as held by the Tribunal in the case of Zuari industries limited Vs. ACIT (supra) and Paperbase company Vs. CIT 19 SOT (supra), as a capital gain under section 50B in the instant case cannot exceed Rs 10 lacs as offered by the assessee in its return of income. It was further contended that even the net worth of the transfer undertaking is deemed at negative figure, such undertaking with negative net worth cannot be treated as Capital Asset for the purpose of creating charge under chapter IV-E of the Act.

40. The Learned Counsel for the assessee further contended that the slump-sale implies sale of going concern, lock stock and barrel on "as is where is basis" where nothing is left with the vendor and wherever all significant assets and liabilities are not sold, it will not be a case of slump-sale. In support of this proposition, the learned Counsel for the assessee has placed reliance upon the following judgements:

1. *CIT Vs. NarkeshariPrakashan Ltd., 196 ITR 438 (Bom)*
2. *Weikfield Products Co. (I)(P) Ltd., Vs. DCIT 71 TTJ 518 (Pune)*
3. *Kampli Co-operative Sugar Factory Ltd., Vs. JCIT 83 ITD 460 (Bang)*
4. *Harrisons Malayalam Ltd., Vs. Asstt. CIT (32 SOT 497 (Cochin)*
5. *DCIT Vs. Tongani Tea Co. Ltd., 156 ITD 188 (Kol)*
6. *ACIT Vs. Asea Brown Boveri 14 SOT 18 (Mumb)*
7. *Swastik Household and Industrial Products Vs. ITO 25 ITD 479*
8. *PNB Finance Ltd., Vs. CIT 307 ITR 75*

9. *CIT Vs. B. V. Reddy Marketing Pvt. Ltd., 222 Taxmann.com 309 (kol)*

41. The Learned Counsel for the assessee further contended that in the instant case since the assets and liabilities (excluding land and building) comprised in the composite sale of the dismembered Hospital business having sold for a lump-sum consideration of Rs. 10 lakhs without values being assigned to individual assets and liabilities in such sale, item wise earmarking of the sale consideration is not possible. No part of the sale consideration is indicated against different and definite items comprised in the composite sale on the date of sale and sale considerations cannot be apportioned on the capital asset. Therefore, computation provision provided under section 48 will be incapable of computing capital gains on the transferred capital asset comprised in the composite sale under section 45 of the Act. Accordingly, the transfer of such Capital asset in the instant case will fall outside the purview of the charging section contained under section 45. Therefore, it will not be possible to ascertain the cost of acquisition and cost of improvement of such dismembered business for the purpose of computing capital gain under section 48. It was further contended that since the said case is not being that of slump-sale, the deeming fiction contained under section 50B(1) of the Act determining the nature of capital asset (long term/short term) will not be attracted. Accordingly, it will not be possible to determine the period of holding of the dismembered hospital business if at all viewed as a capital asset (as a whole). The computation provided under section 45 will fail and accordingly the charging section provided under section 45 will not be applicable. Hence, the sale consideration of Rs.

10 lakhs will be capital receipt not exigible to capital gain tax under section 45 of the Act.

42. The Learned Counsel for the assessee further contended that since the composite sale in the instant case falls outside the purview of section 50B, the capital gains if at all falling within the purview of any other section contained in Chapter IV-E of the Act, cannot exceed Rs. 10 lakhs being the sale consideration arising under the impugned business transfer agreement which has already been offered for taxation by the assessee in its return of income. It was further contented that mere recital in the agreement that it was slump-sale of a going concern is not decisive of the exact nature of the transactions for the purpose of Income Tax matter. In support of this proposition, the learned Counsel for the assessee further placed reliance upon the following judgements:

- *DCIT Vs. Tongani Tea Co. Ltd., 156 ITD 188 (Kol)*
- *Harrisons Malayalam Ltd., Vs. Asstt. CIT (32 SOT 497 (Cochin)*

43. The learned DR, besides placing heavy reliance upon the order of the CIT(A), has contended that under the business transfer agreement, assessee has transferred its hospital business (excluding land and buildings) in one go as a going concern for a lump-sum consideration of Rs.10 lakhs without assigning value to individual assets and liabilities. Therefore, it leaves no doubt that the business as a whole was sold for Rs. 10 lakhs and it was not an item-wise sale of assets. It was further contended that as per the clauses of the business transfer agreement, that assets under transfer comprises all assets

necessary for the continuation and effective operation of the hospital business as now carried out. Thus, no more assets are required for continuation and effective running of hospital business by MHEPL after the transfer date. He further invited our attention to the recital of business transfer agreement with the submission that it has been categorically mentioned in the business transfer agreement that buyers had purchased the hospital business from the seller on slump-sale and a going concern basis. He further placed reliance upon the judgement of the Apex Court in the case of Vatsala Shenoy Vs. DCIT 74 taxmann.com 143 in which it was held that sale in question to be treated as slump sale only where there was no value assigned to individual asset and liabilities in such sale. Reliance was also placed upon the judgement of the Apex Court in the case of CIT Vs. Mugneeram Bangur & Co. 57 ITR 299 and CIT vs Artex Manufacturing Company 227 ITR 260. The Learned DR further contended that this objection was raised for the first time before the Tribunal. He further placed reliance upon the following judgements in support of his contention that where the transferee is in a position to carry on business without any interruption then such sale should be a slump-sale even if certain assets and liabilities are retained by the transferrer:

DCIT Vs. Max India Ltd., 112 TTJ 726,

CCB Chemicon Pvt. Ltd., Vs. CIT 371 ITR 78 (Kar),

CCIB Dy. CIT Vs. Mahalasa Gases and Chemicals Pvt. Ltd., 142 Taxman 92.

44. Having carefully examined the orders of lower authority is in the light of rival submissions, materials placed on record and the judgement referred to by the parties we

find that as per this business transfer agreement appearing at page Nos. 52 to 92 of the compilation, the appellant has agreed to transfer the hospital business as a going concern basis on the closing date in accordance with subject to and upon the fulfilment of the terms and conditions contained in the agreement with effect from 1.9.2010 for a lump sum consideration payable by the buyer as slump-sale consideration for purchase of the hospital business of Rs. 10 lakh payable on the closing date to the seller, i.e., assesseee. This business transfer agreement was executed between the appellant and the M/s. Manipal Health Enterprises Private Limited (MHEPL) on 20.08.2010. All rights and benefits of movable properties of the hospital business were transferred to the buyer under this agreement but the immovable property of the hospital was not transferred under this said business transfer agreement. Though before the lower authorities, assessee has contended that the hospital business was transferred along with the Assets and liabilities and the net worth of the assessee was negative therefore net worth to be taken as Nil which shall be deemed to be the cost of asset for the purpose of computing capital gains under section 48 r.w.s. 50B of the Act, but before the Tribunal, the learned Counsel for the assessee has raised legal arguments that in the transfer of hospital business the hospital building was not transferred and only the movable assets like goodwill, technical know-how and other intangibles were transferred and without a transfer of land and building, the entire transfer of hospital business as a going concern cannot be called to be a slump sale. In support of his contention he placed heavy reliance upon various judicial pronouncements. Therefore, before going on merit as to what would be the capital gain on transfer of this hospital business as a going concern in slump-sale, we feel it proper to adjudicate this issue whether this transfer of business is a slump sale and provisions of section 50B can be attracted for the purpose of computing the capital gain.

45. From careful perusal of the orders of the lower authority, we find that there is no dispute in this regard that lands and buildings pertaining to the hospital were not transferred by the appellant to MHEPL. According to assessee, the slump sale implies sale of going concern, lock stock and barrel on "as is where is basis" where nothing is left with the vendor and wherever all significant asset and liabilities are not sold, it will not be a case of slump-sale. We have examined the judgement of the Bombay High Court in the case of CIT Vs. Narkeshari Prakashan Ltd., (supra) in which the Bombay High Court has held that a mere look at the agreements would clearly indicate that what was sold was the entire branch of business as a whole lock stock and barrel. Profit chargeable under section 41(2) do not arise where whole business is transferred as a going concern on a slump price along with Assets and liabilities.

46. In the case of Weikfield Products Co. (I)(P) Ltd., Vs. DCIT (supra), the Pune Bench of the Tribunal has held that the transfer of going concern means transfer by lock stock and barrel where nothing is left with the vendor. It includes not only the transfer of each asset, tangible or intangible, but also the transfer of each debt and liability including any obligation. It was further held that according to definition, Slump-sale

means "transfer of one or more undertaking as a result of the sale for a lump sum consideration without values being assigned to the individual asset and liabilities in such sale". It was further held that definition talks of both the assets and liabilities. It includes not only the transfer of each asset, tangible or intangible but also transfer of each debt and liabilities including any obligation. It was further observed that where current asset and liabilities were retained by the assessee, it could not be considered as transfer of going concern and did not fall within the definition of slump sale as provided under section 2(42C) of the Act. In the case of Kampli Co-operative Sugar Factory Ltd., Vs. JCIT, the Bangalore Bench of the Tribunal has examined the case and held that where the transaction involved is a slump sale or explicit sale where only the assets excluding investments and deposits were sold and liabilities remain with the vendor, it was not a slump sale. The relevant observation of the Tribunal is extracted hereunder for the sake of reference:

> *"A careful reading of cls. 1 and 13 of the agreement reveals that liabilities do not enter into this transaction and what is sold is the assets, movables and immovables, comprised in the annexures and not the liabilities. Clause 13 of the agreement makes it more clear that the liabilities will be the responsibility of the liquidator. Thus, it was not a slump-sale, rather only the assets excluding investment and deposits was sold and the liabilities remained with the assessee/ According to s. 2(42C), slump sale means the transfer of one or more undertakings for a lump sum consideration without values being assigned to the individual assets and liabilities. And what s. 50B makes chargeable to capital gains, is the difference between slump price and the net worth of the undertaking without giving the benefit of indexation and the net worth for this purpose is defined as the sum total of paid up capital and free reserves by importing the definition of s. 3(1)(ga) of the Sick Industries Companies (Special Provisions) Act, 1985. Thus the transaction in the present case of the assessee, is entirely different from the transaction of slump sale i.e., the sale of a running business as a whole and prior to insertion of s. 508, w.e.f. 1st April, 2000, no Court had given verdict that in case of such slump sale of running*

business, long-term capital gains will have to be computed with reference to the entire assets. Where no part of consideration could be attributed to particular assets, depreciable or otherwise, no amount would be chargeable either under s. 41(2) or as capital gains. The CIT(A) has rightly observed that the agreement dt. 18th March, 1996, and its annexures, details different assets that were sold and the components of the consideration at Rs. 8.01 crores, attributable to depreciable and non-depreciable assets can easily be found out on proportionate basis and s. 50(2) can be applied; out of these only the land was not a depreciable asset, hence the consideration attributable to land will give rise to long-term capital gains under s. 45 and the consideration attributable to the depreciable assets will give rise to deemed short-term capital gains under s. 50(2). Only the consideration attributable to intangibles i.e., self-generated assets having no cost cannot be taxed."

47. Again, in the case of Harrisons Malayalam Ltd., Vs. Asstt. CIT (supra) the Cochin Bench of the Tribunal has held where the assessee company has not transferred the estate with all assets and liabilities and of the financial assets available to the assessee up to date of transaction have been retained by the assessee company, the transfer was not a slump sale. Relevant observation of the Tribunal is extracted hereunder for the sake of reference:

"In the present case, the rubber estate has been sold by the assessee excluding cash in hard, stock in hand receivables, finance, assets and liabilities. it was notes-case of sale by lock, stock and barrel. The assessee company has made conscious exclusions. The assets sold by the assessee have been listed out in different schedules and Annexure. The consideration has been specifically assigned to the sale of immovable property by way of rubber estate. Separate consideration has been assigned to the sale of movable properties including vehicles and other properties. Therefore, it is not a case of slump sale fora lump sum amount of consideration where the consideration is no a tri iTh51rd51.Eto any particular item of asset. There is no such a statement of blanket consideration in the present case. Here, the sale of every asset is attributable to a specified sum of consideration. Therefore, we cannot say that there is a "slump sale". What is reflected is only "total consideration". As all the assets and liabilities have not been sold as per the agreement, this is not a slump sale as construed in s. 50B of the Act. It is a sale of several assets through a common agreement with different amounts of consideration ultimately culminating into a total consideration. The facts being so, in the light of the judgment of different Benches of the Tribunal as stated in the

above paras, we hold that this is not a "slump sale" answerable to s. 50B of the Act.”

48. Similar view was expressed by the Tribunal of the Kolkata Bench in the case of DCIT Vs. Tongani Tea Co. Ltd., (supra) DCIT Vs. XPRO India Ltd.,161 ITD 963. In the case of ACIT Vs. Asea Brown Boveri (supra), the Mumbai Bench of the Tribunal has examined the issue in detail and held that the slump sale envisages sale of entire business as a going concern at its realisable value without allocation of slump price to the individual items of business and not as part of going concern. It was further held that all composite sales are not necessarily slump sale. A sale of various items put together may not constitute a sale unless it satisfies the following tests:

1. The business has been sold as a whole and as a going concern at its realizable value.
2. The seller has not withdrawn an asset or liability from the business sold or the purchaser has not rejected any asset or liability comprising the business.
3. The material available on record do not indicate item wise value of the assets transferred.
4. There is no material on record to infer severity in the sale.

49. Therefore, all composite sales are not necessarily slump sales. In the case of Swastik Household and Industrial Products Vs. ITO (supra) in which matter was referred to the third member. According to majority view it was held that transfer of industrial undertaking and business with all assets, property rights and benefits including goodwill cannot be said to be the slump sale where land and building could not be transferred on

account of certain dificulties. The relevant observation of the Tribunal is extracted hereunder for the sake of reference:

> *"The lands and buildings (as also the tenancy/occupancy rights) were not an insignificant part of the undertaking transferred. They reflected the core of the undertaking. The book value of the lands and buildings as on 28th Feb., 1971 stood at Rs. 94,63,924.15. There was a liability of Rs. 45,22,410 against the properties as unpaid purchase price. Thus the assets and the liabilities not transferred with the rest of the undertaking were by no means insignificant. And how do you carry on a business without the lands and buildings forming part of it? The-vendee was put in possession no doubt. But no rent was charged at all as it was not fully an arm's length transaction. It was a domestic arrangement between a holding company and its subsidiary. It did not show the indicia of a transfer of immovable property as understood in law. It was contended for the assessee that in any case after 12 years the vendee would have got the title by adverse possession. This argument does not appeal. As on 30th June, 1977 there was no transfer in law. By July 1982, even the possibility of adverse possession had disappeared. The assessee dealt with the lands and buildings as an unfettered owner (as indeed it was) in July 1982, when it decided to amalgamate with A Ltd., taking the lands and buildings along with it. Thus, the lands and buildings never reached the vendee here. As_ regards the claim that for a sale as a going concern each and every asset/liability need not be transferred, there* is *no authority for such bald proposition. The claim lacks substance.*
>
> *If the building where the business is carried on is not transferred, be it sentiment or for any other reason, there is obviously no sale of a going concern. What is sold in such a case is the sale of a dismembered business and not of the organic whole that would fit the description "sale of a going concern"*
>
> *where there is a slump sale or the sale of a business as a going concern, then no part of the slump price can be attributed to any particular asset or assets. Hence, there would be no tax to be levied under s. 41(2). It must be noted here that no attempt was made to value any of the assets to be transferred, at their market values. All were listed at book values. This is normally a pointer to the position that the transfer is for a slump price. But this by itself is not conclusive against the Revenue. The basic test is to see whether there has been a sale of a going concern. That test, in terms of law, is not satisfied here.*
>
> *Having come to the conclusion that is was not a slump sale, the assessee was liable to be taxed on the profit under s. 41(2)."*

50. We have also carefully perused the judgements referred to by the Revenue. Though the learned DR has made a reference of series of judgements but the

copy of the judgement has not been filed for perusal. We, however, examined these judgements and we find that wherever any left-out asset is insignificant to the assessee's business and the entire business has been sold as a going concern, it would be a slump sale but wherever any significant asset without which business of the assessee could not be continued, sale of entire business leaving that asset would not be a slump sale. Turning to the facts of the case, we find that undisputedly the appellant is engaged in the hospital business and lands and buildings of the hospital is a significant asset of the hospital business. Without lands and buildings, it is not possible to run a hospital business. Undisputedly, in the instant case, through business transfer agreement the appellant has transferred the hospital business to MHEPL as a going concern for a sum of Rs. 10 lakh. The other assets and liabilities, tangibles or intangible, movable properties were also transferred but the question arise in the absence of transfer land and building of the hospital; can the transfer of business be called to be a slump sale as envisaged under section 2(42C) of the Act? The facts of the instant cases are almost similar to the facts of the case in the case of Swastik Household and Industrial Products Vs. ITO (supra). Therefore, the transfer of hospital business to MHEPL cannot be called to be the slump sale as a going concern. Thus, the capital gain cannot be computed as per provisions of section 50B of the Act. Since we have held that it is not a slump sale of a going concern, we find no justification to deal with the other issues with regard to the net worth of the assets and its cost of acquisition and computation of capital gain.

51. So far as receipt of Rs. 10 lakh by the assessee on account of transfer of hospital business is concerned, no argument was advanced by the Revenue. The assessee however offered this amount by way of long term capital gain under section 50B in his return of income. Since we have already held that it is not a transfer of business as a going concern as it is not a slump sale and capital gain cannot be computed, the receipt of Rs. 10 lakhs be taxed in accordance with law in the hands of the assessee. We also do not wish to adjudicate other issues with regard to inclusion of land and building to the transferred undertaking while calculating net worth and whether net worth of a capital asset can be in negative figure. Accordingly, we set aside the order of the CIT(A) and delete the additions made in this regard.

52. The next ground i.e., ground No.2, relate to the non-recoverable project cost of Rs.25,34,10,284/-. In this regard, the facts borne out from the orders of the lower authority are that the appellant entered into a collaboration agreement dated 23.11.2007 with GHKMT Trust for establishing/ for establishing and operating hospital at Kilokari, Ring Road, New Delhi (Delhi Project) as on 31.03.2011 a total amount of Rs.25,99,00,767/- was spent on Delhi Project Hospital, Rs.10,88,203/- and Rs.22,22,314/- was spent on Tumkur Project and Goa Project respectively. The AO has added back to the returned income the above expenditure aggregating to Rs.25,34,10,284/- by treating the same as capital expenditure incurred on above said capital asset holding the same as ineligible for claiming as revenue expenditure.

53. The assessee preferred an appeal before the CIT(A) with the submission that entire amount is spent during the ordinary course of business of the appellant and hence it should be treated as revenue in nature. It was further contented that the expenditure although incurred for the purpose of acquiring asset or advantage for running of business for working out that asset with a view to produce profit, it would be revenue expenditure. It was further contended that appellant and Guru Harikrishan Medical Trust have entered into termination and release agreement dated 16.10.2009 wherein the appellant expressed its inability to pursue further with the project as raising funds to further develop the project was becoming difficult and GHMT and MHSPL agreed to terminate that contract. The CIT(A) examined the claim of the assessee. Being convinced with it, he treated the expenditure to be of revenue in nature but spread over the entire expenditure over 5 years and allowed 1/5th of the total expenditure which comes to Rs.5,06,82,057/-during the year under consideration. The balance of Rs.20,27,28,227/- was disallowed for set off during the assessment year 2011-12 under consideration. The assessee objected the spread over of the entire expenditure over a period of 5 years. It claimed that it should be allowed in the impugned assessment year once it is held to be revenue expenditure, as the project was aborted in the impugned assessment year.

The learned DR on the other hand has placed a reliance upon the order of the CIT(A).

54. Having carefully examined the order of lower authorities in the light of rival submissions we find that identical issue was examined by us in foregoing appeals where certain expenditures incurred in expansion of business was considered to be revenue expenditure by the CIT(A) but it was spread over for a period of 5 years and 1/5th of the same was allowed as revenue expenditure in that assessment year. In that case, the assessee has not challenged the allowances of 1/5th of the total expenditure. Therefore, we restrain ourselves from giving any finding as to whether the entire claim is to be allowed or is to be spread over for a period of 5 years. But in this case, the appellant has objected to the spread over of the total claim. In this case, once the total expenditure incurred in expansion of the business of the assessee, which was later on aborted is held to be revenue expenditure, it should be allowed during the financial year in which the project was aborted though CIT(A) has spread over the entire expenditure over 5 years. Moreover, we do not find any provision under the Act in which the expenditure incurred in the project of expanding the business is aborted for certain reasons, can be spread over a period of 5 years. Therefore, we are of the view that once the expenditure incurred in expansion of existing business and the project was later on aborted, it should be allowed as revenue expenditure in the year in which the project was aborted. Accordingly, we modify the direction of the CIT(A) and direct the AO to allow the entire expenditure in the impugned assessment year. If subsequently assessee got compensated or reimbursed the losses suffered by it, it would be taxed in the year of receipt of compensation or reimbursement.

55. Apropos ground No. 3, the facts in brief borne out from the record are that appellant has entered into a service agreement with its holding company that is MEMG International India Private Limited according to which the holding company undertakes various services including fund management financial services, treasury operations, brand royalty, etc. As per the agreement, the consideration for the above services was stipulated to be at 0.5 % of the total turnover as fee to MEMG International India Private Limited. The AO has invoked the provisions of section 40A(2) of the Act and restricted it to 50% of the total claim having observed that the assessee company is having separate sound setup for legal, audit and financial works/requirements of the assessee and is duly incurring and also debiting huge costs under these heads. The assessee preferred an appeal before the CIT(A) with the submission that the service agreement entered between the appellant and MEMG International India Private Limited envisages provisions of various services by MEMG International India Pvt. Ltd., to the appellant which includes financial advisory services, royalty payment for usage of 'Manipal' logo etc. It was further stated that the appellant company was incorporated on 01.02.1999 whereas the Manipal group is in existence for more than 50 years. Thus, a loss-making company which represents established group which is in existence for more than 50 years attracts more clients/customers than new company which is relatively new and incurring losses. Hence the intangible benefits of using 'Manipal' logo cannot be quantified in revenue terms. It was further contended that that assessee has paid 0.5% i.e., Rs.1,04,78,440/- MEMG International India Pvt. Ltd.,

which is at arm's length rate and there is no basis with the AO to disallow 50% of the expenditure under section 40A(2) of the Income Tax Act. The learned Counsel for the assessee further contented that AO has not brought out any comparable case to demonstrate that assessee has made an excess payment to MEMG International India Private Limited. It was further contended that earlier years similar expenditures were incurred but no disallowance was ever made by the AO in this regard. Therefore, following the rule of consistency no disallowance should have been made. The CIT(A) re-examined the claim of the assessee but was not convinced with it and he confirmed the disallowance.

56. Now the assessee has preferred an appeal before the Tribunal with the submission that in earlier years revenue has not made any disallowances by invoking provisions of section 40A(2) of the Act. It was further contended that while making a disallowance under section 40A(2), the Revenue has not brought any instances or a comparable case where lesser amount was paid for such services. It was further contented that assessee was incurring huge losses and was facing difficulties in raising loans from Banks at reasonable market rate. MEMG International India Pvt. Ltd., as a holding company represents the entire group when it negotiates with the bank and when large volume of loans/business is assured to the banks with group corporate guarantee, banks are more comfortable to lend money to an individual company even though the company is relatively new. The loan syndication fee is generally paid in the market is around 2 to 5 % of loan disbursed. Whereas, MEMG International India Pvt. Ltd., is charging only

0.5% of total turnover for a host of services including inter alia facilitation of bank loans which is not excessive or unreasonable. It was further contended that the AO has not brought out anything on record for diverting its stand from earlier years in which no disallowance was made and in assessment year 2009-10 and 2010-11 disallowance was made to the extent of 33.33%. In support of his contention, the learned Counsel for the assessee placed reliance upon the following judgements:

M/s. Diwakar Solar Systems Ltd., Vs. DCIT in ITA No.1301/Kolkata/2015
CIT Vs. L. Parameswari 2017 TaxPub (DT) 0897 (Mad-HC) : (2017) 246 TAXMAN 0126
CIT Vs. Modi Revlon (Pvt.) Ltd., (2012) 78 DTR 342 (Delhi)
DCIT Vs. International Institute of Planning and Management P. Ltd., (2015) 41 ITR (Trib) 733.
DCIT Vs. Microtex Separators Ltd., (2007) (293 ITR 451) (Kar)

57. It was further contended that both the companies i.e., assessee company as well as holding company are assessed to tax at maximum marginal rate. Therefore, there would not be evasion of taxes by any other companies. He further invited our attention that in assessment year 2008-09 the similar claim of Rs 1.44 crore paid to MEMGIPL was allowed by the AO. Therefore, disallowance was made on the basis of suspicion. The learned DR placed heavy reliance upon the order of the CIT(A).

58. The identical issue has been examined by us in foregoing paras where we have examined the issue in detail and concluded that no disallowance can be made without establishing that claim raised by the assessee is excessive against the fair market rate. Since we have taken a view on similar set of facts, we find no justification to

adjudicate the issue again in this appeal. Accordingly, we set aside the order of the CIT(A) and direct the AO to allow the claim of the assessee.

59. Apropos ground No. 4 it is noticed that assessee has received these dividend incomes at Rs.2,17,681/- on investment to the tune of Rs. 2.3 crores in its subsidiaries. Besides, the assessee has also made the investment by way of acquiring long term unquoted trade and also current non-trade shares. In response to the AO's query with regard to allocation/ disallowance of proportionate expenditures in relation to exempted income, the assessee claimed that no specific expenditure had been incurred. The AO proceeded to invoke the provisions of section 14A r.w.r. 8D of the Rules and made a disallowance of Rs.97,000/- being 0.5 % of the average investments. Against the disallowance, assessee preferred an appeal before the CIT(A) with the submission that since the investment in shares were made out of own funds and no borrowed funds were used in such investments therefore it hardly requires any time to maintain the investment and income received thereon. Thus, no direct or indirect expenses is attributable to the exempted income. It was further contended that the assessee cannot utilize the borrowed funds obtained from banks for investment in shares as it was utilized for carrying on the business activities. Therefore, the interest paid in respect of capital borrowed for the purpose of business/ profession has to be allowed as deduction. The CIT(A) re-examined the contentions of the assessee and finding no merit therein, he confirmed the order of the AO and while doing so the CIT(A) has observed that by keeping in view the overall investments pattern in absence of specific

indirect cost by the assessee towards earning of exempted income, the AO's action of invoking section 14A cannot be summarily rejected. The CIT(A) further observed that section 14A r.w.r. 8D(iii) provides the legal mandate for working out/ estimating the indirect costs attributable towards the exempted income and the percentage of 0.5 % has been prescribed in the rules to mitigate the situation where the assessee claims Nil or minimal expenditure against such exempt income. The CIT(A) further observed that onus remain on the assessee to provide relevant expenditure breakup so as to specify direct or indirect cost which most often is not provided before the AO, specially when common expenditure pertains to different heads of business activity.

60. Aggrieved, assessee has preferred an appeal before the Tribunal with the submission that investment in mutual funds were made out of own funds and no borrowed funds were used for the said purposes. The AO's finding that no exempted income can be earned without incurring any expenditure is baseless and cannot be approved. He has not given any basis for estimating a reasonable nexus between the expenditure disallowed and dividend income received. He placed reference on the judgements of the Apex Court in the case of Godrej and Boyce Manufacturing Co. Ltd., Vs. DCIT 151 DTR 89 (SC).

61. The learned Counsel for the assessee further contented that as per clause iii of Rule 8D (2), half percent of the average of the value of investment, income from which it does not form part of total income is required to be taken into consideration. The AO,

in the instant case has however considered the average of total investments including investments in subsidiary companies, joint venture/group companies/other companies which have not received any exempted income/dividends during the year under consideration. This has resulted in abnormal increase in the figure of disallowance under section 14A of the Act. It was further contended that where the investments which yield taxable income, investment have not yielded any tax-free income investment which made for business or strategic reasons need to be excluded from the working of the average value of investments under Rule 8D(2)(iii) of the Rules. In support of this preposition, he placed reliance upon the various judgments:

i. *CIT vs. M/s. Delite Enterprises (Bom HC) ITA No. 110 of 2009*
ii. *REI Agro Ltd. Vs. DCIT 144 ITD 141 (Kol ITAT) – affirmed by Kolkata High Court in G.A. No. 3581 of 2013*
iii. *CIT Vs. Holcim India P. Ltd. [272 CTR 2821 (Del HC)*
iv. *CIT Vs. Lakhani Marketing Inc. [272 CTR 265] (P & H HC)*
v. *REI Agro Ltd. Vs. DCIT [144 ITD 141] (ITAT. Kolkata) (Affirmed by Calcutta High Court)*
vi. *Cheminvest Limited Vs. CIT (378 ITR 33) (Del HC)*
vii. *CIT Vs. Corrtech Energy Pvt. Ltd. (214) 272 CTR (Guj) 262 (45 taxmann.com116) (Guj HC)*
viii. *CIT Vs. Winsome Textile Industries Ltd. (319 ITR 204) (P&H)*
ix. *CIT Vs. Shivam Motors (P) Ltd. 272 CTR 277(A11) :230 Taxman 63 (All HC)*
x. *Videocon Industries Ltd. Vs. DCIT Mumbai `K' Bench (2017) 186 TTJ (Mum) 353*

62. The learned Counsel for the assessee further contended that in the instant case only current investment in mutual funds have yielded tax free dividend income which have been claimed by the assessee as exemption under section 10(34) of the Act. The long-term investments in subsidiary companies have not yielded any tax-free income during the years under appeal. Accordingly, the long-term investment cannot be

considered for the purpose of reckoning disallowance under section 14A r.w.r. 8D(iii) of the Rules. In support of this preposition that the investment made in subsidiaries out of commercial expediency and with a view to exercise control over the investee company cannot be subject matter of disallowance under section 14A of the Act, he placed the reliance upon the judgement of the Delhi High Court in the case of CIT Vs. Oriental Structural Engineers Pvt. Ltd., (216 Taxmann 92), Cheminvest Ltd., Vs. CIT (378 ITR 33) and the order of the Tribunal in the case of Interglobe Enterprises Ltd., Vs. DCIT (40 CCH 22).

The learned DR placed a reliance upon the order of the CIT(A).

63. Having carefully examined the orders of the lower authorities we find that the assessee has made the investment in long term unquoted trade, and also current non-trade shares and in subsidiary companies. Assessee was asked to furnish the details of expenditures incurred on earning this exempted income and also in making the huge investment which are made with an intention of earning dividend/gaining controlling interest. In response thereto, it has simply stated that he has not incurred any expenditure in earning the dividend income and hence no disallowance can be made on this account. In the absence of the specific details, the AO invoked the provisions of section 14A of the Act and computed disallowance as per Rule 8D(2)(iii) of the Rules at Rs.97,000/-. Even before the CIT(A), it was not specifically stated by the assessee has to how much investment was made in earning dividend income or in subsidiaries in

order to acquire the controlling interest. We have also carefully perused the judgement of the Apex Court in the case of Godrej and Boyce Manufacturing Co. Ltd., Vs. DCIT (supra), and we find that the assessee is required to furnish the details of expenses incurred. If he does not furnish the details, AO is required to invoke the provisions of section 14A read with Rule 8D of the Rules in order to compute the disallowance of expenditures incurred on earning the exempted income. Undisputedly, sub section 2 and 3 of section 14A read with Rule 8D merely prescribes formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act as held by the Apex Court in the case of Godrej and Boyce Manufacturing Co. Ltd., (supra) but where the AO is not satisfied that the claim of the assessee that there was no expenditure was incurred to earn income, the AO has to compute the disallowance as per Rule 8D of the Rules. In the instant case, whatever arguments is advanced before us it was not advanced before the lower authorities. Moreover, he has not furnished the detailed explanations with regard to expenditure incurred for earning exempted income. He blatantly said that no expenditure was incurred and this stand of the assessee cannot be accepted in the light of the fact that investment was made to the tune of Rs. 1.943 crore on which assessee has earned the exempted income. Therefore, we are of the view that lower authorities have rightly adjudicated the issue in the light of given facts and circumstances of the case. Accordingly, we confirm the order of the CIT(A).

64. ITA No.1551/Bang/2018

In this appeal, the assessee has assailed the order of CIT(A) only on the sole ground that CIT(A) has erred in not directing the learned AO to disallow set off of brought forward losses of Rs.22,21,43,020/- as claimed by the assessee. In this regard, we have carefully perused the order of the CIT(A) and we find that AO has disallowed the brought forward losses on the ground that same was nullified by way of assessment order under section 143(3) dated 28.02.2013 for preceding year 2011-12 therefore no brought forward losses remain to be carried forward to the current year 2012-13. The CIT(A) while dealing with the issue has observed that order under section 143(3) for assessment year 2011-12 being pending in the first appeal, appropriate action would therefore be consequential. Taking into account these facts, the CIT(A) has directed the AO to take appropriate rectificatory action in the light of the findings therein in respect of the adjustments of the brought forward losses after giving necessary appeal effect. The CIT(A) accordingly disposed off the appeal. Now the assessee is before us assailing the order of the CIT(A) with the submission that the set off of brought forward losses should be allowed. The learned DR contented that CIT(A) has simply given direction to the AO to pass a consequential order keeping in mind the fate of the assessment order for assessment year 2011-12. Therefore, no interference in the order is called for.

65. Having carefully examined the orders of lower authority, we find that CIT(A) simply issued directions to the AO to pass a consequential order in the light of the findings of the CIT(A) for the assessment year 2011-12. Now we have already disposed off the assessee's appeal for the assessment year 2011-12 and we therefore are of the view that AO is required to pass a consequential order with regard to set off of brought forward losses keeping in mind the outcome of the appeal for the assessment year 2011-12. Therefore, we find no infirmity in the direction of the CIT(A). Accordingly, this appeal of the assessee stands dismissed.

66. <u>ITA Nos. 1557, 1076 and 1558/2016</u>

These appeals are preferred by the assessee against the respective order of the CIT(A) pertaining to assessment years 2011-12, 2012-13 and 2013-14 on common grounds. Therefore, these appeals were heard together and are being disposed off through this consolidated order.

67. Ground No. 1 in ITA Nos. 1557, 1558 and ground No. 2 in ITA No. 1076/2017 relate to the disallowance made under section 14A r.w.r. 8D of the Rule. The facts in brief borne out in this regard are that assessee has received exempted income to the tune of Rs.3,57,10,000/- in assessment year 2011-12, Rs.30,28,00,500/- in assessment year 2012-13 and Rs.41,89,405/- in assessment year 2013-14. The AO invoked the provisions of section 14A and made computation of disallowances under rule 8D of the

Rules and disallowance of Rs.53,33,215/- was made in assessment year 2011-12 and Rs. 30,28,500/- in assessment year 2012-13 and Rs.41,89,405/- in assessment year 2013-14 having observed that the huge investment can only be managed by employees and finance and accounts section and the usage of infrastructure of the company will certainly have an element of expenditure relevant to this aspect. He accordingly computed the disallowance at Rs.0.5% of average amount of tax exempted investments. Assessee preferred an appeal before the CIT(A) but did not find favour with him.

68. Now the assessee is before the Tribunal with the submission that in assessment year 2011-12, the opening investment was Nil and closing investment was of Rs.110,66,43,000/- and therefore the average investment calculated by the AO was at Rs.110,66,43,000/- and computed the disallowance under section 14A at 0.5% of the average investments. Similarly, in 2012-13, the opening investment was Rs.110,66,00,000/- and the closing investments was Rs.10,48,00,000/-. The average investment comes to Rs.60,57,00,000/- of which 0.5% was disallowed under section 14A of the Act.

69. The learned Counsel for the assessee further contended that at least for the assessment year 2011-12, the average investment comes to Rs.55.33 crores as opening investment was Nil. Thus the 0.5% of R.55.33 crores comes to Rs.22.66 lakhs as against the disallowance made by the AO at Rs.55.33 crores.

70. The learned Counsel for the assessee further contended that in assessment year 2012-13 and 2013-14, the AO has made the disallowance of the entire exempted income after treating it to be the expenditure incurred to earn that much of income which is not possible at all under any circumstances. No doubt the disallowances are to be computed as per section 14A r.w.r. 8D of the Rules but the entire exempted income cannot be disallowed. While making a disallowance, the AO is required to exempt the nature of investments whether investment was made to earn the dividend income or to make a strategic investment to control its subsidiaries.

The learned DR placed the heavy reliance upon the order of the CIT(A).

71. Having carefully examined the order of the lower authorities in the light of rival submissions, we find that AO has computed the disallowance invoking the provisions of section 14A r.w.r. 8D of the Rules. While doing so, the AO did not examine the nature of investment whether the investment was made with the intention to earn dividend income or to make strategic investment in subsidiaries to have control over it. With regard assessment year 2011-12, we find that average of investment is to be taken. In that year, opening investment was Nil, therefore, the investment made in that year cannot be called to be the average investment. We however find force in the contention of the assessee that average investment should be Rs.55.33 crores but it requires a proper adjudication. We accordingly set aside the order of CIT(A) in all assessment years and restore the issue to the file of the AO to re-examine the claim of

the assessee in the light of nature of investments and also the opening and closing balance of investments.

72. Ground No. 2 in ITA No. 1557 relate to the disallowance of payments made to Allegro Corporate Finance Advisors Pvt. Ltd., amounting to Rs.3,31,00,000/- and treating the same as capital expenditure. The facts in brief borne out from the record in this regard are that during the course of assessment proceedings, AO has reported that under the head "Legal and Professional Charges" assessee has paid an amount of Rs.3,31,00,000/- to M/s. Allegro Corporate Finance Advisors Pvt. Ltd., seeking explanation regarding this expenditure, the assessee has provided the invoices of payment and also the agreement entered into by the assessee company and M/s. Allegro Corporate Finance Advisors Pvt. Ltd., whereby the assessee company has appointed Allegro Corporate Finance Advisors Pvt. Ltd., in raising equity funds of approximately Rs. 100 crores from interested investors. On entering into agreement, Allegro Corporate Finance Advisors Pvt. Ltd., has successfully completed its project and has claimed Rs. 3,30,90,000/- as service charge. Assessee has paid the same and charged this expenditure as revenue under the head legal and professional charges. AO has not allowed the claim of the assessee after treating it to be capital in nature as it was incurred to raise equity for the assessee company and it also had expenditure directly having nexus to expand the equity base of the assessee company. Assessee preferred an appeal before the CIT(A) with the submission that the appellant has taken a project of its holding company M/s. MEMG seeking to raise equity funding of approximately 100

crores so as to implement expansion plan and in order to execute this project assessee has appointed Allegro Corporate Finance Advisors Pvt. Ltd., who has successfully completed the project and claimed the aforesaid amount as service charges. It was further contended that all expenditures involving/pertaining to subject of share capital cannot be called to be a share capital and not allowable under section 37 of the Act. He has placed reliance upon the judgment of the Apex Court in the case of CIT Vs. General Insurance Corporation 286 ITR 332 in which it was held that expenses by way of stamp duty and registration fees for issuance of bonus shares are revenue in nature. The Supreme Court further held that the allotment of bonus shares did not result in acquisition of any benefit or advantage of enduring nature. The CIT(A) was not convinced with the contentions of the assessee and he accordingly confirmed the disallowance.

73. Aggrieved, assessee preferred an appeal before the Tribunal with the submission that in terms of the said agreement, the Allegro Corporate Finance Advisors Pvt. Ltd., agreed to assess the appellant company in providing corporate advisory services in connection with expending its existing business in terms of new beds and services and aid in raising equity funds of approximately 100 crores from interested investors to finance its expansion plan. The scope of services provided by Allegro Corporate Finance Advisors Pvt. Ltd., as per terms and conditions of the agreement was mentioned in the agreement according to which they have to perform different kinds of services at different stages.

74. It was further contended that the expenses were incurred in the ordinary course of business with a view to expand the existing business, hence allowable as revenue expenditure. He has also invited our attention to the various judicial pronouncements in which it was held that improvisation in the process and technology in some areas of enterprises was supplemental to the existing business. Therefore, the expenditure incurred are of revenue in nature. Reliance was placed upon the following judgments:

Alembic chemicals work co ltd vs cit 177 itr 377
CIT vs. Priya Village Road Shows Ltd., 332 I.T.R. 594(Del.)
Woodcraft Products Ltd., Vs. CIT (1993) 69 taxman 415 (Calcutta)
CIT Vs. Aluminium Industries Ltd., (1995) 214 ITR 541 (Ker).
Hindustan Commercial Bank Ltd 21 ITR 353
CIT Vs. Malwa Vanaspati & Chemical Co. Ltd., (1997) 226 ITR 253
CIT Vs. Jyoti Electric Motors Ltd., (2002) 255 ITR 345 (Guj)
CIT Vs. Indian Telephone Industries Ltd., (1989) 175 ITR 215 (Kar)
Indo Rama Synthetics (I) Ltd. Vs. CIT (2011) 333 ITR 18 (Del)
CIT Vs. Usha Iron & Ferro Metal Corpn. Ltd. (2008) 296 ITR 140 (Del)
CIT Vs. Honda Siel Power Products Ltd. (2010) 36 DTR 456 (Del)

The learned DR placed heavy reliance upon the order of the CIT(A).

75. Having carefully examined the orders of lower authorities in the light of rival submissions, we find that assessee undisputedly has engaged Allegro Corporate Finance Advisors Pvt. Ltd., to render certain services in raising equity funds of approximately 100 crores from investors to finance its expansion plans. The scope of services provided as per terms of agreement are summarised as under:

Stage 1: Review and Finalisation of Business Plan & Valuation:

- Obtain a good understanding of the company's existing business and strategic objectives.
- Analyse the business plans to identify the key assumptions made therein with respect to growth prospects, price trends in the markets, projected patient volumes and price realizations, resident doctor costs & professional fees, consumables costs, expansion in capacities, working capital, capital investment.
- Assess reasonableness of the, key assumptions identified above based on historical trends, market information available with the company and in the public domain and management's methodology and logic for the business plan.
- Prepare flexible spreadsheet model of the business plans of the company.
- Determine the sensitivity range for the key assumptions; and
- Perform analysis to ascertain the EBITDA and cash flow sensitivity to changes in key assumptions
- Detailed valuation exercise of the company with a view to ascertaining the best and worst case valuations for the business. The valuation would be done using various methods including discounted cashflow method, comparable multiple method

(ii) Stage II: Fund raising: Work with the company in approaching potential private
equity investors for the proposed equity fund raising:

- Identifying potential investors for the equity fund raising;
- Assisting in presenting the opportunity and the Company's future strategies to identified investors;
- Inviting expressions of interest from identified investors;
- Shortlisting investor(s) for negotiations and further discussions;
- Coordinating management discussions, hospital visits etc with shortlisted investor(s);
- Negotiating structure and terms of the fund raising with shortlisted investor(s);
- Assisting in final negotiation with identified investor(s).
- Project managing the activities of other professional advisors, where required, and
- Assisting in completion of documentation required to achieve financial closure.

76. It is also an undisputed fact that the project was completed and the appellant has paid services fees of Rs.3,30,90,000/- to Allegro Corporate Finance Advisors Pvt.

Ltd. The appellant claimed it to be revenue expenditure under the head legal and professional charges but treated it to be a capital expenditure. The quantum of expenditure incurred by the appellant in obtaining services from Allegro Corporate Finance Advisors Pvt. Ltd., was not disputed by the Revenue. The dispute before us is only with regard to nature of expenditure whether it is a capital expenditure or a revenue expenditure. Before dwelling upon the nature of expenditure, we would like examine the various judicial pronouncements referred to by the parties during the course of hearing. In the case of Alembic Chemical Vs. CIT (supra), the facts of the case are that the business of the assessee from the commencement of its plant was the manufacture of pencillin and after the agreement, the product manufactured continued to be pencillin. The agreement with the foreign firm stipulated the supply of the “most suitable sub-cultures” evolved by the foreign firm for the purpose of augmentation of the unit-yield of pencillin per milli-litre of the culture-medium. In that case, it was held “the improvisation in the process and technology in some areas of the enterprises was supplemental to the existing business and there was no material to hold that it amounted to new or fresh venture. The further circumstance that the agreement pertained to a product already in the line of the assessee’s stipulated business and not 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. There is also no single definitive criterion which, by itself, is determinative as to whether a particular outlay is capital or revenue. The once for all payment test is also inclusive. What is relevant is the purpose of the outlay and its intended object and effect, considered in a commonsense way having regard to the business realities. Therefore, the payment made for technical know-how fees is allowable as deduction."

77. In the case of CIT vs. Priya Village Road Shows Ltd., (supra), the Hon'ble Delhi High Court has held that one has to keep in mind the essential purpose for which such expenditure is incurred, if the expenditure incurred for starting new business which was not carried out by the assessee earlier then such expenditure is held to be of capital in nature. If the expenditure incurred is in respect of the same business, which is already carried on by the assessee, even if it is for the expansion of business namely to start new unit which is same as earlier business and there is unity of control and a common fund, then such expenditure is to be treated as business expenditure. A similar view was expressed by the Calcutta High Court in the case of Wood Craft Products Ltd., Vs. CIT (supra) wherein their Lordship has observed that travelling expenses were incurred in connection with the expansion scheme of the assessee company to set up a new plywood factory at Kenya under same management with common administrative control. Therefore, the expenditure has to be accepted as revenue expenditure because the expenditure has direct nexus with the existing business carried on by the assessee. Similarly, in the case of CIT Vs. Aluminium Industries Ltd., (supra) the Hon'ble Kerala High Court has held that there is no merit in the contention raised on behalf of the Revenue that the amount spent by the assessee in connection with the inaugural function

of its new project is in the nature of capital expenditure as it was incurred not after the commissioning of the new unit. The assessee was already having manufacturing units, and the "relay" project which is inaugurated in January, 1982, was one in expansion of its existing business. Therefore, merely because the expenditure was incurred not after the commissioning of the new unit would not make it any the less an expenditure coming under s. 37(1) if it satisfies all the other conditions.

78. Again, in the case of Hindustan Commercial Bank Ltd., way back in 1952, similar observations were made by the Hon'ble High Court of Allahabad.

79. In the case of CIT Vs. Malwa Vanaspati & Chemical Co. Ltd., 226 ITR 253, Hon'ble Madhya Pradesh High Court has held that where the fact goes to indicate that setting of the new project was only an expansion of the existing business of the assessee company it cannot be created as a new line of business or a distinct business activity. The setting up of unit at a place little away from the business place of the assessee company was held to be of little consequence and the expenditure incurred are to be revenue expenditure.

80. The issue of nature of expenditure in the case MHS Pvt. Ltd., on expansion of business has already been examined by us in foregoing appeals and we have concluded that the expenditure incurred for the expansion of the existing business, should be treated as revenue expenditure. Therefore, following the same view, we hold in this case that since the expenditure was incurred for the expansion of the existing business in terms of

new beds and services and aid in raising equity funds approximately 100 crores from the interested investors to finance its expansion plan is certainly a revenue expenditure and be allowed as deduction under section 37 of the Act. We accordingly set aside the order of the CIT(A) and direct the AO to allow the expenditure as revenue expenditure.

81. Ground No. 3 in assessment year 2011-12 and ground No. 2 in assessment year 2012-13 and ground No. 1 in assessment year 2013-14 relate to disallowance under section 40A(2) of the Act. The brief facts borne from the record in this regard are that the appellant has entered into service agreement with its holding company M/s. MEMG International India Pvt. Ltd., and in pursuance to the same, the holding company undertakes the various services which includes fund management, finance services, treasury operations, brand royalty, contract purchases, tax advisory services etc., and in consideration of the above services, the appellant paid 0.5% of total turnover as fees to MEMGIIPL. The claim raised by the assessee was not fully allowed and the AO has restricted it to 50% of the amount debited and added back to the returned income of the assessee as adjustments made under section 40A(2) of the Act, having observed that the assessee company is having separate and sound set up for audit and financial works/requirements of the assessee and is duly incurring and also debited huge costs under these heads.

82. The assessee preferred an appeal before the CIT(A) but did not find favour with him. Now the assessee is before the Tribunal with the submission that the assessee

company was facing difficulties in raising loans from banks at reasonable market rates whereas the MEMG, the holding company, represents the entire group and when it negotiates with the various banks and when large volumes of loans/business is assured to the banks with group corporate guarantee, banks are more comfortable to lend money to an individual company even though the company is relatively new. It was further contended that loan syndication fee that is generally paid in the market is around 2% to 5% of the loan disbursed whereas the MEMGIIPL is charging only 0.5% of the total turnover for a host of services including inter alia facilitation of bank loans which is not excessive or unreasonable. Besides, holding company is providing other services to the assessee as per the agreement. It was further contended that Revenue has not brought any comparable case while making the disallowance.

The learned DR placed heavy reliance upon the order of the CIT(A).

83. Having carefully examined the orders of lower authorities in the light of rival submissions, we find that the AO has made a disallowance of Rs.76,46,601/- in assessment year 2011-12 and Rs.1,62,70,159/- in assessment year 2012-13 and Rs.1,92,50,000/- in assessment year 2013-14 having invoked the provisions of section 40A(2) of the Act and restricted the claim of the assessee to 50%. Now the question arises whether entire claim raised by the assessee under the agreement entered with the holding company is allowable or it is to be restricted to some extent. The identical issue has been examined by us in foregoing paras where the Hindustan Health Systems Pvt.

Ltd., has entered into agreement with holding company on similar terms and conditions and in that case we have examined the issue in detail and concluded no disallowance can be made without establishing that claim raised by the assessee is excessive against the fair market rate. Since we have taken a view on similar set of facts, we find no justification to adjudicate the issue again in this appeal. Accordingly, we set aside the order of the CIT(A) and direct the AO to allow the claim of the assessee.

84. Ground No. 4 in assessment year 2011-12 and ground No. 3 in assessment year 2012-13 relate to the disallowance of consultancy fees paid to MHSPL. The facts borne out from the record in this regard are that during the course of assessment proceedings, AO has observed that appellant claimed an amount of Rs.5 crore as management consultancy fees to M/s. Manipal Health Systems Pvt. Ltd., (MHSPL) in assessment year 2011-12 and Rs.2,69,14,089/- in assessment year 2012-13 on the basis of the agreement executed between the parties according to which the MHSPL will provide assistance for business expansion plan in future. The AO, after analysing the assessee's reply, has disallowed the sum not only on the ground of absence of business exigencies but also on account of tangible proof of service rendered.

85. The assessee preferred an appeal before the CIT(A) with the submission that the appellant has entered into an agreement with MHSPL in assisting the appellant in identifying new areas of growth in identifying properties that were purchased or taken on lease in order to expand business of the appellant and in view of this appellant would

pay to MHSPL total amount of Rs.14,97,50,000/- for the financial years 2010-11 to 2014-15 and during the impugned assessment year, he has paid Rs. 5 crores as a part of it. It was further contended that since the expenditure was incurred in the course of the business of the appellant, it should be allowed as a revenue expenditure. The CIT(A) re-examined the issue but was not convinced with it and he confirmed the disallowance. While doing so, the CIT(A) has observed that there is no tangible proof or details regarding any specific project or activities undertaken by the MHSPL for the proposed objectives of the assessee during the period under consideration. The CIT(A) further observed that there is no indication of any concrete or visible benefit which has accrued to the appellant in view of such an expenditure. Moreover, the assessee has not provided sufficient evidence or details to prove that internal arrangement was based on crucial business exigencies, commercial prudence and that the quantum of money outflowed was at arm’s length.

86. Aggrieved, now the assessee is before the Tribunal and reiterated its contentions as raised before the CIT(A) with the submission that he has furnished all the relevant evidences before the lower authorities to demonstrate as to what services are rendered by the MHSPL. He has also tried to demonstrate that though he has entered into agreement with different entities but their field of service are demarcated and there is no overlapping of services rendered by group entities. He has also placed the reliance upon the following judgments:

CIT Vs. Dhanraj Girji Raja Narasingherji (1973) 91 ITR 544 (SC)

CIT Vs. Walchand and Co. (1967) 65 ITR 381 (SC)
Gujarat Guardian Ltd., Vs. JCIT (2008) 114 TTJ 565 (Delhi)
Voltamp Transformers P. Ltd., (1981) 129 ITR 105, 113 (Guj)
CIT Vs. Dalmia Cement (Bharat) Ltd., (2202) 254 ITR 377 (Delhi)
S. A. Builders Ltd., Vs. CIT [2007] in 288 ITR 1

87. The learned DR, besides placing reliance upon the order of the CIT(A) has strongly contended that assessee has already entered into an agreement for all these services with MEMG International to whom he has paid 0.5% of total turnover as fees. Therefore, there is no commercial expediency with the assessee to enter into new agreement for the same services with MSHPL, another group company of the assessee. Therefore, it is nothing but diversion of profit to other companies and in fact to a loss-making company. Therefore, the claim of the assessee cannot be allowed.

88. Having carefully examined the order of the authorities below in the light of rival submissions, we find that for the financial services, fund management, treasury operations or other types of services, assessee has already entered into agreement with the MEMGIIPL to whom 0.5% of total turnover as fees are payable and we have already dealt in foregoing paras with regard to services rendered by MEMG. Once the assessee has already entered into agreement with its holding company for rendering the financial and management services, there is no justification to enter into separate agreement with the other group companies for which substantial amount is to be paid. The AO has doubted the very fact of rendering of certain services. During the course of hearing, nothing has been placed before us to specify a particular type of services rendered which

could not be rendered by MEMG International Pvt. Ltd. In the light of these facts, we are of the view that the expenditure incurred by the assessee under this agreement is not on account of commercial expediency and we therefore are of the view that Revenue authorities have rightly disallowed the claim. Accordingly, we confirm the order of the CIT(A) in this regard in both the years.

89. Ground No. 4 in assessment year 2012-13 relates to the complete set off brought forward of losses claimed by the assessee. In this regard, facts borne out from the record are that AO has denied the assessee's claim of brought forward losses in view of the fact that in the preceding assessment year 2011-12 vide order under section 143(3) dated 16.02.2014, the loss was set off against the addition made therein. Before the CIT(A), the assessee has clarified his position and the CIT(A) has directed the AO to give necessary consequential effect in the light of finding of the CIT(A) in assessee's appeal for assessment year 2011-12. We do not find any infirmity in the directions. Now we have already disposed off the appeal of the assessee for assessment year 2011-12 and therefore the consequential effect is to be given in this impugned assessment year keeping in view the finding of the appeal of assessee for the assessment year 2011-12. Accordingly, these appeals are disposed off.

90. In the result, assessee's appeals in ITA No. 1551/Bang/2016 is dismissed, ITA Nos. 1552, 1667, 1668, 1557, 1558/Bang/2016 and 1076/Bang/2017 are partly allowed

for statistical purposes. Revenue's appeals in ITA Nos. 1208& 1209/Bang/2017 are dismissed.

Pronounced in the open court on 28th June, 2018.

Sd/-	Sd/-
(JASON P BOAZ)	**(SUNIL KUMAR YADAV)**
Accountant Member	**Judicial Member**

Bangalore.
Dated: 28th June, 2018.
/NS/*

Copy to:

1. Appellants 2. Respondent
3. CIT 4. Guard file

By order

Sr. Private Secretary,
ITAT, Bangalore.