IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD

BEFORE SHRI D. MANMOHAN, VICE PRESIDENT
AND
SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER

I.T.A. No. 488/HYD/2017
Assessment Year: 2012-13

GVK Airport Developers Limited, (Previously known as GVK Airport Developers Private Limited), SECUNDERABAD **[PAN: AACCG5286D]**	Vs	Income Tax Officer, Ward-2(2), HYDERABAD
(Appellant)		**(Respondent)**

For Assessee : Shri Percy Pardiwala, AR
For Revenue : Shri Ashok Kumar Kardam, DR

Date of Hearing : 06-06-2018
Date of Pronouncement : 05-07-2018

O R D E R

PER B. RAMAKOTAIAH, A.M. :

This is an appeal by Revenue against the order of the Commissioner of Income Tax (Appeals)-2, Hyderabad, dated 29-12-2016.

2. Briefly stated facts are that assessee-company is the promoter of companies involved in construction, development and operation of domestic/international air ports. Assessee filed its return of income originally admitting total

income at NIL. Later, it revised the return of income declaring total loss of Rs. 1,64,12,60,724/- under the normal provisions of the Income Tax Act [Act] and also NIL income computed u/s. 115JB of the Act. In the course of scrutiny assessment, Assessing Officer (AO), after giving due opportunity to assessee, has disallowed the finance costs invoking the provisions of Section 36(1)(iii) and also disallowed other operating costs. AO also did not allow set-off of business loss against the interest income earned. There was one more issue of not granting TDS which is not subject matter of appeal before us.

3. Assessee made detailed submissions before the Ld.CIT(A), which Ld.CIT(A) has extracted but agreed with the AO dismissing the appeal. Hence the present appeal.

4. Assessee has raised the following grounds:

"1. On the facts and in the circumstances of the case and in law, the Learned Income Tax Officer Ward 2(2), Hyderabad (Ld.AO) erred in disallowing the finance costs of Rs. 1,64,08,45,837/- resulting into net addition of Rs. 1,64,08,45,837/- and the Learned Commissioner of Income-tax (Appeals)-2, Hyderabad [Ld.CIT(Appeals)] further erred in upholding the said action of the Ld.AO.

2. On the facts and in the circumstances of the case and in law, the Ld.AO erred in disallowing the other operating costs of Rs. 1,17,09,534/- resulting to net addition of Rs. 1,17,09,534/- and the Ld.CIT(Appeals) further erred in upholding the said action of the Ld.AO.

3. On the facts and in the circumstances of the case and in law, the Ld.AO erred in not allowing set-off of business losses amounting to Rs. 1,64,43,95,691/- incurred by the Appellant during the year

against 'Income from other sources' of Rs. 31,34,967/- and the Ld.CIT(Appeals) further erred in upholding the said action of the Ld.AO".

5. We have heard Ld. Counsel for assessee, Shri Percy Pardiwala and Ld.CIT-DR Shri Ashok Kumar Kardam. The issues are considered ground-wise:

Ground No. 1:

6. The issue in this ground is with reference to disallowance of finance costs of Rs. 164,08,45,837/- claimed by assessee as incurred for the purpose of business which the AO did not allow.

6.1. Briefly stated facts of the issue are that assessee has granted unsecured interest free advance to the tune of Rs. 1408.83 Crores and Rs. 1793.39 Crores to M/s. GVK Airport Holdings Pvt. Ltd., [GVKAHPL] and M/s. Bangalore Airport & Infrastructure Developers Private Limited [BAIDPL], considered as sister concerns (for the purpose of this order as level-2 companies). M/s. GVKAHPL and M/s. BAIDPL are wholly owned subsidiaries of assessee. It is admitted that the aforesaid advances to the sister concerns were made partly out of the unsecured interest free loan received by assessee from its holding company M/s. GVK Power and Infrastructure Ltd (GVKPIL) and balance of such advances were out of interest bearing borrowings from banks and financial institutions. During the year under consideration, assessee has not earned any interest on the advances given as they are interest free but

has incurred finance costs, on such loans obtained from third parties, to the tune of Rs. 164.08 Crores. This amount *inter alia* includes bank charges, borrowing costs amortized during the year, apart from the interest expenses. It was the contention that assessee was engaged in the development and operation of domestic air ports, one at Mumbai and another at Bangalore through its step down Special Purpose Vehicles [SPVs], Mumbai International Airport Private Limited (MIAPL) and Bangalore International Airport Limited (BIAL). Here these two companies are referred as SPVs (and level-3 companies for the purpose of this order). It is admitted that the interest free advances made by assessee to its sister concerns (level-2) were utilised by such concerns in the following manner:

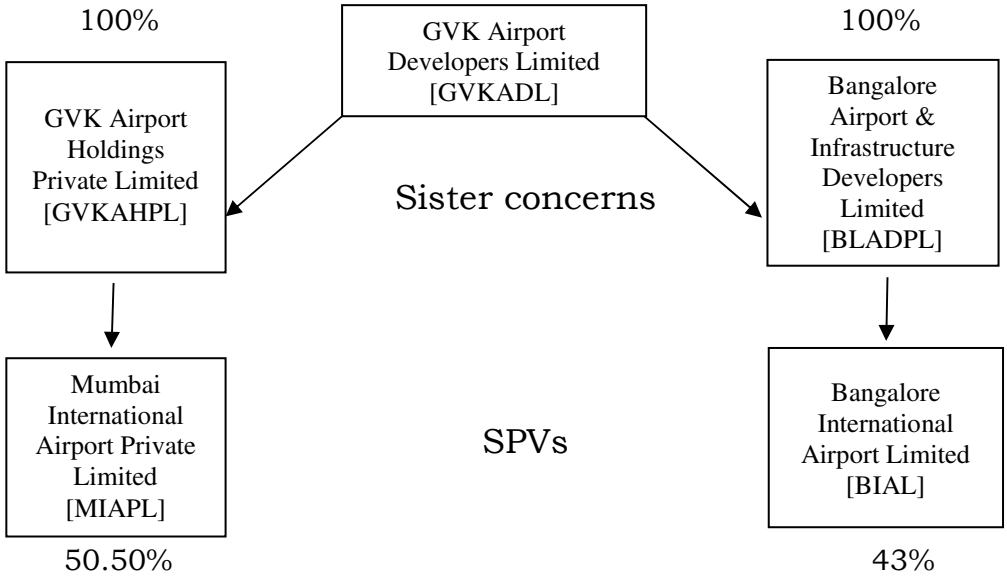
- Part of the advances made to M/s.GVKAHPL have been utilised to make additional infusion of capital in MIAPL (level-3 company) which was utilised for its airport business and part of the funds were utilised by M/s. GVKAHPL to acquire additional stake of 13.50% in MIAPL from another existing shareholder. Such transaction enabled M/s.GVKAHPL to acquire controlling interest in MIAPL.
- Similarly advances made to BAIDPL (level-2) was utilised to acquire stake of 43% in BIAL from the existing shareholder. Such transaction enabled BAIDPL to be shareholders with maximum stake in BIAL thus helping in getting a strategic control over BIAL.

Assessee has raised the issue of commercial expediency and eligible business expenditure in claiming the deduction of finance costs u/s. 36(1)(iii) of the Act.

6.2. AO, however, disallowed the finance cost on the following contentions:

- That the assessee is engaged in the business of advancing the interest-bearing funds to its sister concern as interest-free advances and not in construction and maintaining the airports;
- That the borrowed money has not been utilised by the Assessee in a way that makes more commercial sense and helps the Assessee in running the intended business in more efficient manner;
- That the assessee has diverted the interest-bearing funds to SPV's, wherein such SPV's are claiming tax holiday benefits and paying taxes under book profits, thus enabling such SPV's to create reserves in their hands for the purpose of utilization of such reserves amongst the group companies; and
- That the assessee has not carried out any activities which enabled the assessee to earn any direct income and also that there is no possibility of earning any income, since, the investment has been made by the assessee in the form of interest-free loans.

6.3. Before the Ld.CIT(A), it was submitted that like in any normal infrastructure project, SPVs are set up through which the projects are implemented. Since the development of air ports require lot of funds and therefore in order to attract strategic investors for each airport, there is a need for a separate SPV. Assessee has explained the investment pattern before the CIT(A) as under:



6.4. Assessee relied on the main objects of the company to submit that assessee is engaged in the business of construction and development of airports and further the objects also provide that infrastructure projects can be taken through SPVs. Given the factual position above, it was contended that any loan given to fund these SPVs is nothing but funding its own business operations and hence any interest incurred on such borrowed funds is totally allowable u/s. 36(1)(iii) of the Act. It was contended that the phrase 'for

the purpose of business' as occurring under the provisions of Section u/s. 36(1)(iii) is wider in scope than the expression 'for the purpose of earning income profits and gains' and advancing of loan to SPVs for carrying out business to SPVs is a business purpose and any interest incurred thereon is an expense for the purpose of the said business. Assessee relied on the following case law:

a. Madhav Prasad Jatia Vs. CIT [10 CTR 375] (SC);
b. CIT Vs. Dalmia Cement (Bharat) Ltd., [174 CTR 188](Delhi High Court);
c. CIT Vs. Kandagiri spinning Mills Ltd., [298 ITR 306] (Madras High Court);
d. S.A. Builders Vs. CIT [288 ITR 1] (SC);
e. CIT Vs. Marudhar Chemicals & Pharmaceuticals (P) Ltd., [319 ITR 75] (Punjab & Haryana High Court];
f. CIT Vs. Reliance Communication Infrastructure Ltd., [71 DTR 237] (Bombay High Court);
g. CIT Vs. Tulip Star Hotels Ltd., [338 ITR 482] (Delhi High Court);
h. CIT Vs. Bharti Televenture Limited [51 DTR 98] (Delhi High Court);
i. CIT Vs. Modi Entertainment Limited [89 CCH 014] (Delhi High Court);
j. M/s. Idea Cellular Limited Vs. Assistant CIT [ITA No. 3261/Mum/2008, dated 11th March, 2015];
k. Hero Cycles (P) Ltd., Vs. CIT [379 ITR 347] (SC);

6.5. Further, assessee also contended that contention of AO that there is no commercial expediency in advancing the funds is also not correct and relied on the case law in the Hon'ble Calcutta High Court in the case of CIT Vs. Kanoria Investments (P.) Ltd., [232 ITR 7] (Cal). It also relied on the principles laid down in the case of CIT Vs. Rajendra Prasad Moody [115 ITR 519] (SC). Assessee also relied on the Co-ordinate Bench decision in the case of M/s. Idea Cellular Limited Vs. Assistant CIT [ITA No. 3261/Mum/2008, dated 11th March, 2015] which in turn followed the Hon'ble Supreme Court judgment in the case of S.A. Builders Ltd., Vs. CIT [288 ITR 1) (SC) to submit that the amounts incurred by assessee is allowable as 'business expenditure'. Contending the contention that assessee has advanced interest free but other companies were benefitted by not claiming interest thereby claiming higher deduction u/s. 80-IA was also negatived to submit that they have not claimed deduction u/s. 80-IA of the Act.

6.6. Ld.CIT(A), however, did not consider any of these contentions and dismissed the ground, stating as under:

"6.2. I have gone through the AO's observations and AR's contentions. It is seen from the facts that the AO has disallowed the amounts of Rs. l,17,09,534/- and Rs. 1,64,08,45,837/- claimed by the assessee towards operating expenses and finance costs u/s 36(1)(iii) of the Act, with minor adjustments of exempt dividend income and expenses disallowed by the assessee in the computation. While doing so, the AO was of the view that the assessee has not carried out any business activity directly to earn any income and going by the investment it made in the form of interest-free loans / advances in its subsidiaries, there is also no possibility of earning any income. The AO concluded that as there was no commercial expediency in the overall activities of the assessee company, the allowability of the

expenses claimed towards operating expenses and finance costs does not arise. During the appeal proceedings also, the conclusions drawn by the AO were not rebutted by the AR with any supporting evidence except stating that the said expenditure was incurred for the purpose of business. In view of the elaborate observations made by the AO in the relevant paras of the assessment order, I am of the considered view that the AO's action disallowing the said amounts of Rs.1,17,09,534/- and Rs. 164,08,45,837/- claimed by the assessee towards operating expenses and finance costs respectively u/s 36(1)(iii) of the Act, is justified and hence confirmed. As a result, the grounds raised are dismissed".

6.7. Reiterating the submissions made before the Ld.CIT(A), Ld. Counsel referred to various documents placed in the Paper Book particularly with reference to objects and investment in subsidiaries, their financial statements to submit that various structures of various companies were created for operation purposes but the main promoter assessee is in the business of promoting companies in infrastructure, particularly of development of airports and therefore the interest claim is allowable as 'business expenditure'. He relied on the following decisions:

a. Madhav Prasad Jatia Vs. CIT [10 CTR 375] (SC);
b. CIT Vs. Dalmia Cement (Bharat) Ltd., [174 CTR 188](Delhi High Court);
c. CIT Vs. Kandagiri spinning Mills Ltd., [298 ITR 306] (Madras High Court);
d. S.A. Builders Vs. CIT [288 ITR 1] (SC);
e. CIT Vs. Marudhar Chemicals & Pharmaceuticals (P) Ltd., [319 ITR 75] (Punjab & Haryana High Court];
f. CIT Vs. Reliance Communication Infrastructure Ltd., [71 DTR 237] (Bombay High Court);

g. CIT Vs. Tulip Star Hotels Ltd., [338 ITR 482] (Delhi High Court);
h. CIT Vs. Bharti Televenture Limited [51 DTR 98] (Delhi High Court);
i. CIT Vs. Modi Entertainment Limited [89 CCH 014] (Delhi High Court);
j. M/s. Idea Cellular Limited Vs. Assistant CIT [ITA No. 3261/Mum/2008, dated 11th March, 2015];
k. Hero Cycles (P) Ltd., Vs. CIT [379 ITR 347] (SC);

and for the purpose of commercial expediency, the decision of the CIT Vs. United Breweries [89 ITR 17] CIT Vs. Tulip Star Hotels Ltd., [338 ITR 482] (Delhi High Court). Ld. Counsel also reiterated that the concept of investment company was accepted u/s 109 of the IT Act earlier and Hon'ble Supreme Court also accepted in the case of CIT Vs. Distributors (Baroda) (P.) Ltd., [83 ITR 377] (SC) that there is 'business of holding investment' and therefore, assessee's investment in sister concerns is to be considered as 'business activity' and since there is direct nexus with the operations of the airports and the requirement of funds, interest claimed is an allowable deduction.

6.8. On a query why there are level-2 and level-3 investments, Ld. Counsel explained the investment pattern and referred to submissions made before Ld. CIT(A) as under:

"Consider a scenario, that an investor approaches the. Appellant for 40 percent of the Appellant's stake in MIAPL.

- Assuming that the Appellant is holding the equity shares of MIAPL directly and not through an intermediate holding company i.e. GVKAHPL. Post the aforesaid transaction, the equity stake of the Appellant would be 30.30 percent. The same would result in the Appellant losing the controlling stake/interest in MIAPL.

If the Appellant would have made equivalent dilution in GVKAHPL, the same would have resulted the Appellant continue to hold controlling stake/interest in MIAPL even after the dilution.

Also this structure enables the Appellant to get primary investors at any of the vertical i.e. GVKAHPL or BIADPL level. Getting direct investors would not be possible at MIAPL or BIAL level, since, the same would lead to dilution of other investors (which includes AAI) of MIAPL or BIAL which they may not agree to.

• As provided above, the Appellant would like to submit that the existing structure is necessary for the Appellant to help in maintaining controlling interest/majority stake in the operating SPV's (i.e. at MIAPL or BIAL level)". (page 156 of Paper book)

6.9. It was the submission that these contentions were considered in the case of Principal CIT Vs. Sesa Resources Ltd., [250 Taxman 182] (Bombay) and in the case of Tata Industries Ltd., Vs. ITO [181 TTJ 600] (Mumbai-Trib) in the case of Dy. CIT Vs. Enercon India Ltd., (82 taxmann.com 334) (Mumbai-Trib). It was submitted that the expenditure is allowable.

6.10. In reply, Ld.DR reiterated the contentions of the above to submit that there is no commercial expediency. It was further submitted that assessee has only invested in the sister concern and is not in the business of operating airports, therefore, the activity cannot be considered as a business activity. Referring to the Memorandum of Association and

main objects, Ld.DR pointed out that assessee has only invested funds as a promoter. It was further submitted that there are no assets worth mentioning at all and there is no depreciation claimed. It was further submitted that the case law relied upon by the assessee does not apply as assessee has invested in sister concerns which are not in business, but in the SPVs which are doing business and there is only a remote investment and not a direct investment and so the principles does not apply.

6.11. In reply, Ld. Counsel submitted that all the assessees are directors on the companies of the other boards and referred to the financial statement to submit that assessee is in the business of promoting airports and therefore, the investments made by it in the form of loans are for commercial expediency and therefore, the expenditure incurred is to be allowed as a business deduction.

6.12. We have considered the rival contentions and perused the paper books placed on record and the case law relied upon. It is admitted that assessee is a promoter and has only invested in level-2 companies i.e., sister concerns, M/s.GVKAHPL and BAIDPL. Even these two companies which are level-2 are not operating the airports and they are also promoters of the real operating companies which are MIAPL and BIAL (SPVs/level-3 companies) which are involved in construction and maintenance of airports at Mumbai and Bangalore. There is no dispute with reference to the source of

funds which are interest bearing borrowals from banks and financial institutions. There is also no dispute that these amounts are advanced interest free to the sister concern i.e., level-2 companies, which in turn made investment in the capital of the level-3 companies. It is admitted that M/s.GVKAHPL invested in MIAPL towards capital and also acquired additional stake in MIAPL from existing shareholders. Likewise, the interest free advances made to BAIDPL was also utilised to acquire the stake of 43% in BIAL. Thus, the entire amount which was borrowed by assessee-company on interest have ultimately gone for investment in share capital of level-3 companies i.e., SPVs.

6.13. It is the contention of assessee that assessee is in business of promoting the companies and advances are for commercial expediency. Before adverting to the issue, it would be necessary to extract the main objects in the Memorandum of Association of assessee-company which are as under:

"1. To carry on the business of construction and development of domestic and international airports within or outside India, airport properties management, operating and maintenance activities of terminals, runways, escalators, lifts and other facility providers, mall management & maintenance, advisors etc., and for carrying the above objective acquire, hold, sell and lease any kind of land, properties. buildings, plant and machinery and to do other operational, management and maintenance activities.

2. To invest in all kinds of infrastructure development companies as a promoter, sponsor, developer, advisor, operator or otherwise by way of equity, preference, debentures, debt or otherwise and to carry on all such acts as are required to participate, float or acquire through bidding or negotiated process for any project either in infrastructure or otherwise".

The above objects indicate:

i. That assessee is to carry on the business of construction and development of domestic and international airports within or outside India, properties management, operating and maintenance of activities. It is to be admitted that assessee is not doing this business of construction and development of domestic and international airports by itself.

The other object is

ii. To invest in all kinds of infrastructure companies as promoter, sponsor, developer, advisor, operator or otherwise by way of equity or otherwise and also to carryon such acts as are required to participate, float or acquire through bidding or negotiated process for any project.

Thus, the two objects indicate that assessee-company carry on the business on itself [object-1] or to invest in other companies as promoter etc., [object-2].

6.14. As seen from the activities of assessee, it has only carried out the object-2 and has not done any business of construction or development of domestic or international airports by itself as provided in object-1. The activity undertaken by assessee is to promote other companies involved in construction and development of and operation of domestic or international airports at present within India.

6.15. It is in this context, one has to examine whether assessee is in the business of construction and development of domestic airports or only an investor as a promoter and sponsor etc. Assessee contends that the business of construction and development of airports by the SPVs is the business of assessee. This argument cannot be accepted for the simple reason that assessee's main object is to carry on the business of construction and development by itself which it has not undertaken and also to invest in other companies as promoter, sponsor, which is the only activity undertaken by assessee-company. As the Memorandum of Association is clear, we cannot consider that assessee is engaged in the business of construction and development of airports. Since the object provides that infrastructure projects can be undertaken through SPVs, that can only be considered under the head 'investment' not as a business activity of the assessee.

6.16. In order to consider that assessee is in the activity of business, there should be same regular and systematic activity so as to consider that assessee is involved in business activity. Except investing in the level-2 companies, which in turn are also investing in level-3 companies, there is no other systematic and regular business activity undertaken by assessee. As pointed out by Ld.DR, there are no assets and there is no claim for depreciation at all. What assessee has done is only investment in sister concern. What assessee can earn is by way of dividend from sister concerns or by way of

interest on the deposits made in the banks, if any surplus funds are available or temporary funds are available, as can be seen from the 'other income' earned by assessee-company during the year. Thus, assessee cannot be considered as an assessee carrying on business of construction and development of airports, but only as investor, sponsor, promoter etc. Since assessee is not carrying on any business activity on its own, the question of allowing the deduction u/s. 36(1)(iii) of the Act does not arise as there is no business activity and the investment itself cannot be considered as 'for the purpose of business' as there is no business activity at all.

6.17. One of the contentions raised is that the business activity of the SPVs is the business activity of assessee-company. The company has relied on various case law as stated in the submissions before the CIT(A) as well as before us in the arguments. It is to be noted that assessee has not directly invested either in the share capital or as an interest free loan in the SPVs. It has advanced funds to another level-2 sister concerns, which in turn is also not in the activity of construction and development of domestic or international airports. As admitted they are also considered as promoter, sponsor and developer, who invested further funds in acquiring the stake in two SPVs as stated in the facts of the case. Thus, there is a remote connection between assessee's investment in level-2 company and business activity conducted by level-3 company. Most of the case law relied upon by assessee is that those companies are in the business

and have also advanced funds to its sister concern as the part of business activity. Here neither assessee is in the business of construction or development of domestic or international airports on its own nor its level-2 companies are involved in the same activity. As the facts indicate, assessee invested funds in level-2 companies, who in turn invested in level-3 companies. Since the funds are advanced only for the purpose of investment by assessee in the level-2 company, the same cannot be considered as business activity of assessee so as to allow the deduction u/s. 36(1)(iii). Most of the case law relied upon by assessee do not apply to the facts of the case as there is one more intermediary level, which is not carrying on any business activity. As can be seen from the financials of those companies also (which are at level-2 placed in Paper Book) they are also earning interest and dividend income and not business income as such, as they are also not involved in any business activity *per se.* Thus, in our opinion, assessee cannot be considered to be engaged in the business of construction and development of airport which is its first object but only can be considered as an investor in all kinds of infrastructure development companies as per object-2. Since the principles laid down by various case law does not apply as the phrase 'for the purpose of business' is not applicable to assessee-company's investment, we are not in a position to apply those principles to the present facts of the case. There is merit in Revenue's argument that assessee is not earning any business income and its source of income is only income from other sources, like earning dividend. Since there is no regular

business activity of assessee on its own, the investment in level-2 company which in turn has invested in level-3 company cannot be considered as business activity of assessee. So the principles laid down by various case law does not apply and deduction u/s. 36(1)(iii) of the Act cannot be made for the interest paid by assessee-company for investment in level-2 sister companies.

6.18. One of the arguments raised by assessee-company is that investing in sister concerns itself is a business activity. Ld. Counsel relied on Section 109 (since deleted) and the principles laid down by the Hon'ble Supreme Court in the case of CIT Vs. Distributors (Baroda) P. Ltd., [83 ITR 377]. The issue in the above said case is with reference to clause-I of Explanation-2 to Section 23A of Income Tax Act, 1922 and corresponding Section of Section 109 of Income Tax Act, 1961. The Hon'ble Supreme Court while analyzing the issue particularly with reference to that section has this to state :

"We have now to see what exactly is the meaning of the expression "in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments" in the main section 23A and the expression "in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments" in clause (i) of Explanation 2 to section 23A. The Act contains many mind-twisting formulas but section 23A along with some other sections takes the place of pride amongst them. Section 109 of the 1961 Income-tax Act which has taken the place of the old section 23A of the Act is more understandable and less abstruse. But in these appeals we are left with section 23A of the Act.

Clause (i) of Explanation 2 to section 23A concerns itself with a company whose business consists" wholly or mainly in the dealing in or holding of investments". The word" mainly" in that clause as well

as in the main section 23A must necessarily take its colour from the word "wholly" preceding that word, in those provisions. In other words, the company which comes within the scope of those provisions must be one whose primary business must be "in the dealing in or holding of investments". If a company engages itself in two or more equally or nearly equally important business activities, then it cannot be said that the company's business consists "wholly or mainly" in dealing in a particular thing. Further, even in cases where a company has more than one business activity and one of its activities is more substantial than the others, unless that activity is the primary activity of the company, it cannot be said that that company is engaged in "wholly or mainly" in any one of its business activities. Section 23A, in our opinion, applies only to cases where the primary activity of the company is in "the dealing in or holding of investments". We shall presently see whether, on the facts found by the Tribunal, it can be said that the assessee-company's business in the relevant years consisted" of mainly in the dealing in or holding of investments" as it was not the case of the revenue that it was wholly engaged in that business.

We next come across another expression which is far more difficult to comprehend than the one that we were considering till now. Section 23A speaks of the business of "holding of investments". Here comes the enigma. It is easier to understand when the section speaks of a company having the business of dealing in investments though to say that the company is dealing in investments may, at first sight, look somewhat incongruous. When the legislature spoke of dealings in investments, it meant dealing in shares, stocks and securities, etc. But when a person invests in the shares of some of the companies, it is difficult to say that his business is one of investing. In commercial circles investing is not considered as business. An investor may feel perplexed if he is called a businessman.

This court in Bengal and Assam Investors Ltd. v. Commissioner of Income-tax came to the conclusion that an individual who merely invests in shares for the purpose of earning dividend, does not carry on a business and that the only way he can come under section 10 of the Act is by converting the shares acquired by him into stock-in-trade, i.e., by carrying on the business of dealing in stocks and shares. In that case this court was considering whether the dividend income of the assessee-company therein could be considered as business income under section 10 of the Act. Therein this court was not considering the scope of section 23A. But all the same in that case this court proceeded on the basis that no one can make a business of investing. But then section 23A speaks of the business of "holding of investments". We were told by the counsel for the assessee that that

expression is an incongruous one and that we should, following the decision of this court in Bengal and Assam Investors Ltd. hold that there is nothing like a business of "holding of investments". We feel unable to accede to that contention. We cannot say that the legislature did not know its own mind when it used that expression in Section 23A. We must give some reasonable meaning to that expression. No part of a provision of a statute can be just ignored by saying that the legislature enacted the same not knowing what it was saying. We must assume that the legislature deliberately used that expression and it intended to convey some meaning thereby. The expression "business" is a well-known expression in income-tax law. It means, as observed by this court in Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax : "some real, substantial and systematic or organised course of activity or conduct with a set purpose". This is also the meaning given to that expression in the earlier decisions of the High Courts and the Judicial Committee. We must, therefore, proceed on the basis that the legislature was aware of the meaning given by courts to that expression when it incorporated section 23A into the Act in 1957. Hence we must hold that when the legislature speaks of the business of "holding of investments", it refers to real, substantial and systematic or organised course of activity of investment carried on by an assessee for a set purpose such as earning profits".

The Hon'ble Supreme Court itself has expressed that is an enigmatic question and difficult to comprehend but since section itself has provided for 'business of investments' it was accepted for the purpose of that section, however, it went on to clarify that some real substantial systematic or organized course of activity of conduct with the said purpose is required to be considered as business which is lacking in this case. Therefore, reliance on the above said judgment does not apply to the facts of the case and since the provisions of Section 109 is no longer on statue, we cannot hold that assessee is in the 'business of investment'. At best, the interest payable can be capitalised to the cost of the investment and as and when any capital gains arises, the same can be claimed, but it cannot be

allowed as business loss as claimed by assessee u/s. 36(1)(iii) of the Act.

6.19. Another argument raised by the Ld. Counsel was that the directors are the directors in the SPVs as well and so the business of SPV can be considered as business of assessee. This argument cannot be accepted for the reason that directors can be appointed in any company based on their qualification or association but not because of business connection. If the argument is to be accepted, then, independent directors who are not connected to the promoters but are in various companies, such situation cannot be considered as having business connection with each company, in which they are directors. The argument is rejected.

6.20. Even though neither party raised the issue, since assessee's main source of income is only in the nature of dividend, the provisions of Section 14A of the Act may also apply to the facts of the case. Since there is evidence of nexus of borrowing funds being invested in sister concern and assessee sources of income can only be earning dividend income, the entire interest income has to be considered for disallowance u/s. 14A under Rule 8D2(i)/(ii) for the impugned assessment year. Since the direct nexus is available for investment in share capital of sister concern or further investment in level-3 SPVs, the direct nexus of the borrowed funds to that of investment certainly attract the provisions of Section 14A and on that reason also the deduction claimed by

assessee cannot be allowed. For these reasons, we agree with the orders of AO and CIT(A) on this issue. Ground is dismissed.

Ground No. 2:

7. This ground is with reference to allowance of operating cost of Rs. 1,17,09,534/-. This issue is also linked to the above issue and since we have taken the decision about the nature of activity the expenditure per se can not be allowed as business expenditure. Since assessee is not considered to be in the business of construction of airports *per se* on its own and is only investing as a promoter, it cannot be considered as business activity of assessee. However, necessary expenditure for running day to day activity of the company has to be allowed as a deduction accordingly either u/s. 37(1) or under the head 'other sources'. Such expenditure cannot be outrightly disallowed and as the claim is only for operating expenditure of assessee-company, AO is directed to examine and allow the expenditure. Accordingly, this ground is considered allowed for statistical purposes.

Ground No. 3:

8. This ground is with reference to set-off of business loss claimed in ground 1. Facts of the case are that assessee has received interest income of Rs. 31,34,967/-. Such interest was offered to tax under the head 'Income from Other Sources' while computing the total income. The business loss incurred by assessee during the year under consideration was set-off

against such income. The Ld. AO did not allow the set-off of business loss against the aforesaid income on contention that assessee has not commenced its business operations and expenses incurred by assessee are pre-operative in nature, and hence not eligible for tax deduction.

8.1. Before the Ld.CIT(A) it was submitted that assessee- company was incorporated on 10th June, 2005 with the main business objects as stated in its Memorandum of Association It was further submitted that as at the starting of the financial year under consideration, assessee had investment in various SPV's which was acquired/set-up in previous financial years. Further, such SPV's were operative from the first date of the year under consideration. The same is also evident from the audited financials statement of MIAPL and BIAL enclosed vide Annexure-4 and 5 respectively. Such SPV's are nothing but an extended arm of assessee. The business of assessee commenced from the date when assessee made the first investment and/or provided interest-free advances to its SPV's for carrying out the business operations. Given the above, it was contended that assessee has not only set-up its business operations but has also commenced the same in earlier year when such downstream investment was made by assessee by way of acquisition of shares/ advancement of interest-free advance to the SPV's. Hence, the action of the Ld. AO to not allowing the set-off of business loss against the interest income is bad-in-law. Without prejudice to the above, even if it is assumed that the assessee has not

commenced its business operations, the action of the Ld. AO to not allow the set-off of business loss against the interest income on the contention that assessee not commenced its business operations is not warranted, since, u/s. 3 of the Act, the date of setting-up of business is relevant and not the commencement date for claiming deduction of business expenditure. Reliance in this regard can be placed on the following judicial precedents:

- Western India Vegetable Products Ltd Vs. CIT (l954) [26 ITR 151] (Bombay High Court). The Hon'ble High Court held that there is a distinction between a person commencing a business and a person setting up a business and for the purpose of the Act, the 'setting-up' of business has to be considered.

- Similar views were also held in the following case laws:

- CIT Vs. LG Electronics (India) Limited (2005) (2006) [282 ITR 545] (Delhi High Court);

- CIT Vs. Hughes Escorts Communication Limited (2009) [311 ITR 253] (Delhi High Court);

- CIT Vs. Samsung India Electronics Limited (2013) [356 ITR 354] (Delhi High Court)

Given the above, it was contended that action of AO that the business of assessee has not commenced and not allowing the

set-off of business loss with the interest income earned during the year under consideration is without appreciating the fact that for the purpose of the Act the date of 'set-up of business' is relevant and not 'commencement of business'. In view of the submission, assessee prayed that the necessary direction should be given to Ld. AO to allow the set-off of business loss against the interest income.

8.2. Ld.CIT(A) has considered this in para 7.2 as under:

"7.2. I have gone through the AO's observations and AR's contentions. It is seen from the facts that the AO has not allowed set off of business losses against the interest income of Rs. 31,34,967/- stating that the assessee has not commenced its business operations and expenses incurred by the assessee are pre-operative in nature, and hence not eligible for set off. During the appeal proceedings also, the AR could not rebut the conclusions drawn by the AO. Therefore, I am of the considered view that the AO's action in not allowing set off of business losses against the interest income of Rs. 31,34,967/- is justified and hence confirmed. As a result, the grounds raised are dismissed".

8.3. It was the contention that set-off of losses is eligible for set-off against the interest income. There is no dispute with reference to setting up of the business by assessee-company and therefore, the losses which are already quantified in earlier year are to be set-off as per the provisions of the Act. The losses in earlier year if carried forward as business loss, the same can only be set-off to the business income. Since there is no business income during the year, the loss cannot be set-off to the other sources of income. However, current year's operational expenditure is to be allowed as set-off as per the provisions of the Act. AO is

directed to examine this aspect and whatever amount is allowable as operational cost of the company, allowed in Ground No.2 can be set-off to the income from other sources i.e., interest income earned during the year. AO is directed to examine the provisions of law and facts of the case and directed to do accordingly. Ground is considered allowed for statistical purposes.

9. In the result, appeal of assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 5th July, 2018

Sd/-	Sd/-
(D. MANMOHAN)	**(B. RAMAKOTAIAH)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Hyderabad, Dated 5th July, 2018

TNMM

Copy to :

1. GVK Airport Developers Limited, Paigah House, 156-159, Sardar Patel Road, Secunderabad.

2. The Income Tax Officer, Ward-2(2), Hyderabad.

3. CIT(Appeals)-2, Hyderabad.

4. Pr.CIT-2, Hyderabad.

5. D.R. ITAT, Hyderabad.

6. Guard File.