IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J",MUMBAI

BEFORE SHRI KULDIP SINGH (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)

I.T.A. No.2382 /Mum/2022
(Assessment year: 2016-17)

Deputy Commissioner of Income-tax (Central Circle)-7(3), Mumbai Room No.655, Aayakar Bhavan, M.K. Road, Mumbai-400 020	vs	M/s Macrotech Developers Limited 412, 4th Floor, 17G, Vardhman Chamber, Cawasji Patel Street, Fort, Mumbai-400 001 **PAN : AAACL1490J**
APPELLANT		**RESPONDENT**

I.T.A. No.2383 /Mum/2022
(Assessment years : 2016-17)

Deputy Commissioner of Income-tax (Central Circle)-7(3), Mumbai Room No.655, Aayakar Bhavan, M.K. Road, Mumbai-400 020	vs	M/s Macrotech Developers Limited (formerly known as Lodha Developers Pvt Ltd., (successor of M/s.Bellissimo Crown Buildmart Pvt Ltd)) 412, 4th Floor, 17G, Vardhman Chamber, Cawasji Patel Street, Fort, Mumbai-400 001 **PAN : AAACL1490J**
APPELLANT		**RESPONDENT**
Present for the Assessee		Shri Niraj Sheth
Present for the Department		Shri Samuel Pitta – Sr.AR

Date of hearing	02/11/2023
Date of pronouncement	08/11/2023

O R D E R

Per Padmavathy. S (AM):

These two appeals of the revenue are against separate orders of assessment by the Commissioner of Income-tax (Appeals)-57, Mumbai both dated 17/06/2022 for the assessment years 2016-17. The issues contended are common in both the appeals and hence, they were heard together and disposed off by this common order.

2. The issues and the grounds raised in both the appeals are tabulated as under:-

Issues	**ITA.No.2382 / Mum/2022**	**ITA.No.2383 / Mum/2022**
Disallowance under section 14A	Ground No.1	Ground No.1
Disallowance under section 14A of the Act while computing the book profit u/s 115JB of the Act	Ground No.2	Ground No.2
Disallowance of depreciation on sample Flat		Ground No.3 & 4
Capitalisation of foreign exchange loss to work in progress		Ground No.5
Disallowance of Director's salary and Handover facility expenses	Ground No.3	
Taking ALP of guarantee commission at 0.352% instead of 1.25%	Ground Nos. 4 to 6	Ground Nos. 6 to 8

ITA No.2382/Mum/2022

3. The assessee is engaged in the business of real estate, construction and development. For the year under consideration, the assessee filed the return of income on 17/10/2016 declaring total income of Rs.62,08,53,170/- and book profit under section 115JB of Rs.45,42,04,660/-. Subsequently, the return was revised on 29/03/2018 declaring Nil income after setting off all brought forward losses of

Rs.21,37,37,597/-. The case was selected for scrutiny under CASS and the notices were duly served on the assessee. The revised return is filed due to the merger of M/s Suryakripa Constructions Ltd with effect from 01.04.2015 vide order dated 24.04.2017 of the National Company Law Tribunal (NCLT). The Assessing Officer during the course of assessment noticed that there are specified domestic transactions and also international transactions in the nature of guarantee. Accordingly, the Assessing Officer made a reference to the Transfer Pricing Officer (TPO) for determination of arm's length price. The TPO passed an order under section 92CA(3) dated 28/06/2019 determining the total transfer pricing adjustment of Rs.4,32,22,246/- towards corporate guarantee given by the assessee towards security cum Guarentee given on senior notes and Tenancy Agreement. The Assessing Officer passed the assessment order incorporating the Transfer Pricing adjustment. The Assessing Officer, in addition to the TP adjustment also made a disallowance under section 14A, disallowance of expenses of director's office and handover facility expenses and loan processing fees. The Assessing Officer also made adjustment of the disallowance under section 14A to the book profits computed under section 115JB. The assessee preferred appeal before the CIT(A) against the final order of assessment. The CIT(A) deleted the TP adjustment and other disallowances made by the Assessing Officer. The revenue is in appeal before the Tribunal against the order of the CIT(A).

Disallowance under section 14A

4. The Assessing Officer noticed that the assessee has claimed dividend income of Rs.11,91,27,112/- as exempt income. The Assessing Officer called on the assessee to furnish the details of the exempt income and also the expenditure incurred to earn the exempt income since the assessee has not made any

disallowance under section 14A in the return of income. The assessee submitted that they are having own funds more than investments earning exempt income and, therefore, no disallowance under section 14A can be made in its case. The assessee relied on the decision of the Hon'ble Bombay High Court in the case of CIT vs HDFC Bank Ltd (49 taxmann.com 335(Bom)) in this regard. The assessee also submitted that the assessee was engaged in the business of real estate development and construction and the interest and other expenses was incurred for the construction business and not for earning dividend income.

5. The Assessing Officer did not accept the submissions of the assessee that own funds are more than the investments. The Assessing Officer relied on the decision in the Maxopp Investments Pvt Ltd vs CIT (91 taxmann.com 154 (SC) to hold that all investments including purchase of shares for gaining control over the investing company to be considered for making disallowance under section 14A and therefore held that the total current and non-current investments are more than the shareholders funds as of 31.03.2015 as well as 31.03.2016. The Assessing Officer though had accepted that investment in gold and in foreign companies income from which is taxable should be excluded but while computing the disallowance under section 14A r.w.r.8D(2)(iii) had included the same. Thus the Assessing Officer proceeded to compute the disallowance by applying rule 8D(2)(ii) and 8D(2)(iii) to the tune of Rs.12,88,29,482/-. The Assessing Officer while computing the book profits under section 115JB of the Act also considered disallowance under section 14A.

6. The CIT(A), with respect to the disallowance under rule 8D(2)(ii) noted that the assessing officer himself has accepted that investment in gold and in foreign companies should be excluded and if the same excluded the CIT(A) held that the

assessee is having sufficient own funds, which are in excess of investments related to exempt income and accordingly deleted the addition. With regard to the disallowance under section 8D(2)(iii), the CIT(A) relied on the decision of Special Bench in the case of Vireet Investments Private Limited (165 ITD 27 (Del)(SB)) wherein it was held that for the purpose of disallowance, the investments yielding exempt income only should be considered. Accordingly, the CIT(A) directed the Assessing Officer to re-compute the disallowance. In so far as the disallowance being considered for computing book profit under section 115JB, the CIT(A) held that the same could not be made following various judicial precedence.

7. The Ld.AR submitted the below workings to submit that the own funds of the assessee is more than the investments made in tax free income earning investments.

Own Funds workings **(Rs in lakhs)**

Particulars	**As at 31/03/2015**	**As at 31/03/2016**
Share Capital	11,810.80	11,810.80
Reserves and Surplus	77,763.24	95,505.53
Total	**89,574.04**	**1,07,316,33**

(Rs. In lakhs)

Particulars	**Page of PB**	**As at 31/03/2015**	**As at 31/03/2016**
Non current investments	78	95,303.52	1,07,952.98
Current investments	78	1,0117.75	1,017.75
Total investments as per Balance Sheet		**96,321.30**	**1,08,970.74**
Less : Investment in Gold	91	36.68	0.00
Less: Investment in Bonds / Optionally Convertible Redeemable Debentures	91	42,384.86	48,477.16
Less: Investment in Share Warrants	89	25.47	25.47

Less: Investment in Foreign Companies*		1,922.37	1,953.79
Investments to be considered for 14A		**51,977.40**	**58,539.79**

8. Accordingly, the ld AR submitted that no disallowance under section 14A r.w.r. 8D(2)(ii) is warranted. Regarding the disallowance under section 14A r.w.r. 8D(2)(iii) the Ld.AR submitted that the Assessing Officer had considered the entire investments for the purpose of computing disallowance whereas he should have considered only the tax free income earning investments. On the issue of disallowance under section 14A made to the book profits under section 115JB the ld AR placed reliance of the decision of the special bench in the case of Vireet Investments Private Limited (supra) and submitted that the disallowance under section 14A cannot be made while computing book profit under section 115JB. Accordingly, the Ld.AR submitted that the CIT(A) order be upheld. The Ld.AR further drew our attention that similar issue has been considered by the co-ordinate bench of the Tribunal in the case of M/s. Macrotech Developers Limited (Successor of Shreeniwas Cotton Mills Ltd.,ITA No.2384 & 2040/Mum/2022 dated 27.03.2023) where the issue has been held in favour of the assessee. The Ld.AR also raised contention with regard to the legal issues that the Assessing Officer has not recorded any satisfaction for the purpose of making disallowance under section 14A.

9. The Ld.DR, on the other hand, relied on the order of the Assessing Officer. With regard to the contention that satisfaction is not recorded, the Ld.DR drew our attention to para 6.3 of the assessment order, in which the Assessing Officer has given finding justifying the disallowance under section 14A and this would mean that the Assessing Officer has recorded the satisfaction before making the

disallowance under section 14A of the Act. On the merits of the issue the ld DR relied on order of the Assessing Officer.

10. We heard the parties and perused the material on record. The submission of the Ld.AR in order to substantiate the claim that assessee's own funds are more than the investments earning tax free income, with the breakup of own funds and investments to be considered for the purpose of section 14A is extracted in the earlier part of this order. From the perusal of the said details it is clear that the investments made by the assessee are funded out of the own funds of the assessee. It is a settled principle that when the own funds are more than the investments, no disallowance is warranted towards operating cost and therefore, we see no infirmity in the order of CIT(A) deleting the disallowance made under section 8D(2)(ii) read with section 14A.

11. With regard to the disallowance under section 8D(2)(iii) read with section 14A, the Special Bench in the case of Vireet Investments Private Ltd (supra) wherein it has been held that only those investments which yielded exempt income during the year are to be considered for computing the average value of investment. Respectfully following the Special Bench decision, we see no merit in the ground raised by the Revenue. We also notice that the issue of disallowance under section 14A made to book profit under section 115JB is considered by the co-ordinate bench in assessee's own case in ITA No.2266 & 2239/Mum/2022 dated 17.04.2023 wherein it has been held as under:-

> *081. Ground number 3 is with respect to the disallowance under section 14 A of the act added by the learned assessing officer while computing the book profit under section 115JB of the act. Identical issue arose in the case of the assessee for assessment year 2017 – 18 wherein we have followed the decision of the honourable Karnataka High Court and held that disallowance under section 14 A of the act cannot be added to the book*

profit under section 115JB of the act. Accordingly we direct the learned assessing officer to not to make any adjustment in the book profit with respect to disallowance under section 14 A of the act. Ground number 3 of the appeal is allowed.

12. Respectfully following the decision of the co-ordinate bench decision quoted above we see no merit in the ground raised by the Revenue. Accordingly, the ground no 1 and 2 raised by the revenue are dismissed.

Disallowance of Director's Salary & handover facilities:

13. During the course of assessment, the Assessing Office called on the assessee to furnish details of salary overhead costs and its allocation to the cost of project. The assessee submitted the details and the basis on which such allocation has been done to the cost of project. The Assessing Officer noticed from the details furnished that the employee cost allocated to the project includes directors office expenses of Rs.74,51,510/- and handover facility expenses of Rs.62,44,565/-. The Assessing Officer called on the assessee to explain why 50% of the above expenditure should not be capitalized to the cost of project. In response, the assessee submitted that the role of the Director is inclusive for the company as a whole and not for specific project. The assessee further submitted that the salary paid to director is irrespective of the development stage of the project and hence, the fixed cost of the company. Accordingly, the assessee submitted that the salary cost is debited to the P&L Account and not capitalized to any project. In respect of handover facility, the assessee submitted that the said department look after the administrative facility of the company and not part of cost of project. Therefore, the cost of handover facility expenses was not capitalized to any specific project. The Assessing Officer did not accept the submissions of the assessee and

disallowed 50% of the expenses towards capitalization to the cost of project. On further appeal, the CIT(A) held that the directors salary and handover facility expenses are incurred year after year and they are related to the business of the assessee in general and not project specific expenses. The Ld.CIT(A) further held that these expenses are neither capital in nature nor deferred revenue expenditure. The Ld.CIT(A) relied on the decision of the co-ordinate bench in assessee's sister concern's case M/s Lodha Palazzo in ITA No.2298/Mum/2012 and held that director's salary and handover facility expenses had to be allowed in the year of spending as the same is in the nature of overhead cost not specific to any project.

14. We heard the parties and perused the materials on record. We notice that similar issue has been considered by the co-ordinate bench in ITA No.2384 & 2040/Mum/2022 order dated 27/03/2017 where it is held that –

> *"018. We find that the identical issue has been decided by the coordinate bench in assessee's sister concerns case on identical facts anc circumstances. In case of Lodha Plaza versus ACIT in ITA number 2298/M/2012 for assessment year 2008 - 09 the issue before the tribunal was that whether the indirect expenses such as employees cost, office and administration and marketing and selling expenses have to be allowed as a revenue expenditure in the year in which they are incurred or are to be included in the cost of work in progress. The coordinate bench after considering the accounting standard - 1 and 7, the guidelines issued by the Institute of chartered accountants of India and after considering the provisions of section 145A of the act held that such expenses are to be allowed in the year in which they are incurred and not to be included in the cost of work in progress. The identical issue was also decided by the coordinate bench in ITA number 4579/M/2013 for assessment year 2009 - 10 in case of Hiranandani Palace Gardens private limited per order dated 30/12/2015, following the order of Lodha Plaza held that such costs are not included in the cost of work in progress. Identical issue arose in ITA number 5283/M/2014 for assessment year 2007 - 08 wherein coordinate bench for order dated 27/12/2018 held that expenditure pertaining to employee cost, administrative expenses and selling and marketing expenses debited to the profit and loss account are to be allowed in the year in which*

those are incurred. The same view is further taken by the Bangalore bench in ITA number 1576/2017 for assessment year 2012 - 13 per order dated 3/3/2020. The learned GIT - A while deciding the appeal of the assessee relied on the order of the sister concern for the same assessment year wherein he followed all these judicial precedents, therefore, we do not find any infirmity in the order of learned CIT(A). Accordingly ground number 2

15. Respectfully following the above decision of the co-ordinate bench we see no reason to interfere with decision of the CIT(A). Accordingly, ground no.3 raised by the revenue is dismissed.

Transfer Pricing (TP) Adjustment of Guarantee Commission:

16. The assessee had an Associated Enterprise (AE) in Mauritius – Lodha Developers (LDIL). LDIL had raised USD 200 million by way of issuance of 12% Senior Notes Due 2020(Bonds) listed in the Singapore Exchange to be used for the purpose of construction and development of real estate projects in UK. The assessee submitted before the TPO that for the issue of bonds, the assessee along with few other group companies had given corporate guarantee as shareholders / direct subsidiary. The TPO noticed that in lieu of the financial guarantee given by the assessee, no commission or guarantee fee was charged by the assessee to the AE. The assessee initially submitted that the guarantee is given as part of shareholder activity and, therefore, not within the purview of transfer pricing provisions. The assessee based on the bench marking submitted that a margin of 0.35% is at ALP. The TPO rejected the bench marking done by the assessee and proceeded to make TP adjustment of Rs.4,14,84,664 by applying the guarantee commission rate of 1.25% i.e. USD 200 x Rs.66.33 x 1.25% x 365/1459.

17. The TPO also noticed that the AE of the assessee has taken office premises on lease in UK for a period of 9 years with the total rental of GBP 25,89,307 payable on quarterly basis. The TPO noticed that the assessee had given a guarantee to the landlord in this regard. The assessee submitted that the guarantee given is in the nature of additional security to the rental to the insure in case of recovery of unpaid rent over the lease period of 9 years and therefore, the assessee has not charged any amount towards the same. However, the TPO proceeded to make a TP adjustment towards the guarantee given by the assessee as per below working:-

Calculation of Guarantee Commission on Lease Rentals			
Guarantee given on lease rentals for 9 years	GBP		25,89,307
Lease Rentals Outstanding upto F.Y. 2015-16	GPB		14,60,309
Lease Rentals outstanding upto F.Y. 2015-16	INR		13,90,06,06,521
Rate adopted for Guarantee Commission		1.25%	
Amount of Guarantee Commission @ 1.25%	INR		**17,37,582**

18. On appeal, the CIT(A) held that rejecting the TP analysis without giving any specific reasons was not justified. The CIT(A) further held that the assessee has followed 'other method' that is, interest saving approach and, therefore, there was no need to provide comparables. The CIT(A) also held that the assessee when submitted the TP report has discharged its onus. Accordingly, the CIT(A) directed the AO / TPO to accept assessee's TP report and compute the ALP towards guarantee commission @ 0.3523% .

18. The Ld.AR submitted that this issue is recurring where the co-ordinate bench has been consistently holding the issue in favour of the assessee. The

Ld.DR, on the other hand, vehemently argued that the assessee has not done any TP study, the benchmarking as reproduced by the CIT(A) does not pertain to the year under consideration. The Ld.DR further submitted that the CIT(A) in the order has mentioned that the guarantee fee of 0.2% to 0.53% as reasonable without any basis. It is also argued that the CIT(A) had mentioned to 50 : 50 is the ratio in which the economic benefit is share between the assessee and its AE and there is no reason for this mentioned in the order of CIT(A). The Ld.DR also submitted that the CIT(A) before holding that 0.3523% is reasonable, did not do any factual analysis of the terms of the deal. Accordingly, the Ld.DR submitted that there is no basis for the findings given by the CIT(A).

20. We heard the parties and perused the material on record. We notice that the issue of guarantee fees has been considered by the co-ordinate bench in ITA No.2384 & 2040/Mum/2022 order dated 27/03/2017 where it has been held that –

> *024. Ground number 6 is with respect to the direction of the learned CIT – A2 the learned AO/learned TPO to take the arm's-length price of the guarantee commission at the rate of 0.3523 percentage instead of 1.25%. The fact shows that the associated enterprises in Mauritius of the assessee M/s Lodha developers international Ltd has raised bonds for US dollar 200 million which is listed on the Singapore stock exchange. For the issuance of bonds along with its parent company and to other group companies (total 6 entities) has given joint and several corporate guarantees as shareholders as well as direct subsidiary of the Mauritius entity. ODI forms were also submitted. The assessee did not charge any guarantee commission leading that it is a shareholders activity and therefore is not an international transaction. The learned AO held to be an international transaction and further determine the arm's-length price of the international transaction at the rate of proportionate amount of guarantee commission adopting the arm's-length price at the rate of 1.25% and made an adjustment of ₹ 5,910,140. The learned CIT (A) rejected arguments of the assessee that it is not an international transaction in view of explanation (c) to section 92B (1) introduced by the finance act 2012 wherein it is clearly held that guarantee is an international transaction. For benchmarking, following his own order in assessee's own case for assessment year 2016 – 17 on issue of guarantee with respect to the above bonds as mentioned in*

paragraph number 7.8 of that order and reproduced at Page | 19 ITA No.2384 & 2040/MUM/2022 Macrotech Developers Ltd (Successor of Shreeniwas Cotton Mills Ltd),;A.Y.2016-17 page number 46 of his order for this year. In that appellate order, on the same transaction in case of Bellissimo Crown build mart private limited (Lodha Crown build mark private limited), the benchmarking of the guarantee commission was made. The method adopted was interest saving approach. The guarantee transactions were analyzed based on the creditworthiness of the borrower from Moody's RiskCalc where standalone credit rating of the issuer company was found act one year and five-year credit rating act B 3 (S&P equivalent B-). Further, the search was made on the Dealscan database applying the filter of time period, deal currency and interest rate. Additional adjustments were also made with respect to Tenor adjustment finding the scrap rates from ZC curve using Bloomberg swap manager. On the basis of nonguaranteed deals 839 and guarantee deals number 12, the arm's-length rate was 470.13 for nonguaranteed deals whereas for guarantee deals was worked out at 399.67 BPs. Thus saving in interest cost you to the guarantee provided by the assessee was worked out at 70.46BPS. It was then shared on the basis of sharing of the economic benefit as per the relative contributions on 50:50 basis. Therefore, the arm's-length rate of guarantee commission was determined at 35.23%. This finding is challenged by the learned AO.

025. The learned departmental representative supported the order of the learned assessing officer/transfer pricing officer. The assessee supported the order of the learned CIT – A. The assessee further submitted that guarantee is not an international transaction is challenged by ground number 2 and 3 of its ground.

026. We have carefully considered the rival contention and perused the orders of the lower authorities. Whether the guarantee issued by the assessee to its AE is an international transaction or not, we find that the amendment made to the provisions of section 92B (1) by introduction of explanation (C) by the finance act 2012, clearly provides that it is an international transaction. Further, the honourable madras High Court in case of principal Commissioner of income tax versus Redington (India) P Ltd has also held that corporate guarantee is an international transaction. Therefore, the learned CIT – A has correctly rejected this argument. Accordingly, we dismiss Page | 20 ITA No.2384 & 2040/MUM/2022 Macrotech Developers Ltd (Successor of Shreeniwas Cotton Mills Ltd),;A.Y.2016-17 ground number 2 and 3 of the appeal of the assessee. With respect to the benchmarking of the guarantee commission, the find that on the same transaction, adopting interest saving approach after considering the credit rating of the issuer company and after making all the adjustments, sharing of the risk on the interest saving approach, the arm's-length price of the rate of guarantee commission was determined at 0.3523% base points. The learned departmental representative could not show us any reason

that the guarantee commission rate determined by the learned CIT – A is faulty for any reasons. The rate of guarantee commission is required to be determined on the basis of credit rating of the issuer company, comparison of interest rates without guarantee and with guarantee. The difference of the two is required to be shared between the issuer as well as the guarantor. The proper database for credit rating was used. The database for scanning of various deals was used. The tenor adjustments were also made. No reasons were shown for sharing of the interest saving not properly applied. Further, in some of the cases the honourable Bombay High Court has also applied guarantee commission rate at 0.20% i.e. additional CIT versus Asian paints limited ITA number 2126/M/2012 and CIT versus Everest Kanto cylinders limit Ltd in ITA number 1165 of 2013. In case of reliance industries Ltd versus ACIT in ITA number 4475/M/2007, the coordinate bench has adopted the guarantee commission rate at 0.38%. In view of this, we do not find any infirmity in the order of the learned CIT – A in holding that arm's-length price of the guarantee commission is 0.3523 percentage. Accordingly, ground numbers 6 – 8 of the appeal of the AO are dismissed.

21. We further notice that similar view has been held by the co-ordinate bench in assessee's own case in ITA No.2266 & 2239/Mum/2022 dated 17.04.2023 where the co-ordinate bench upheld guarantee commission @0.3523%. Respectfully following the above decisions of the co-ordinate bench, we do not see any infirmity in the findings given by the CIT(A). Accordingly, this ground of the revenue is accordingly is dismissed.

I.T.A. No.2383 /Mum/2022

22. We have in the earlier part of this order have tabulated the issues contended by the revenue in both the appeals, from which it is clear that Ground No.1 and 2 regarding disallowance under section 14A and Ground no.6 to 8 regarding the TP adjustment are common for both the appeals. Considering that the facts for appeal in ITA No.2383/Mum/2022 being similar to issues contended in ITA No.2382/Mum/2022, in our considered view our decision in appeal ITA No.2382/Mum/2022 is mutatis mutandis applicable to ITA No.2383/Mum/2022 also. Accordingly Ground No.1 and 2 regarding disallowance under section 14A

and Ground no.6 to 8 regarding the TP adjustment raised by the revenue are dismissed.

23. Ground No. 3 and 4 are regarding the depreciation on sample flat. During the course of assessment the AO noticed that the assessee has claimed depreciation on building by applying the rate 100% and claimed 50% of depreciation at Rs. 1,85,92,541/-. The AO called on the assessee to furnish details of why depreciation is claimed by applying depreciation rate at 100%. The assessee further submitted that the sample flat is purely a temporary structure created at sight for the purpose of showing to the customer when the building is under construction and the same would be demolished subsequently in the year 2020. Therefore the assessee had applied depreciation rate at 100%. The assessee further submitted that the sample flat was constructed at a cost of Rs. 3,71,85,082/- during FY 2014-15 and was put to use on 31.03.2015. Accordingly, the assessee submitted that the depreciation @ 50% was claimed during AY 2015-16 i.e. Rs. 3,71,85,082 * 100% * 50% since the asset was put to use for less than 180 days and that the balance 50% is claimed during the year consideration. The assessee also made an alternate claim before the AO that since the expenses incurred towards sample flat is for the purpose of business the same should be allowed as a deduction under section 37(1). The AO held that since the gestation period of the project is four year from it inception as per the submissions of the assessee the depreciation on the overall cost incurred towards the sample structure should be claimed over four years. The AO accordingly allowed depreciation at 25% of Rs. 1,85,92,541/- i.e. Rs. 46,48,135 and disallowed a sum of Rs. 1,39,44,406/-.

24. On further appeal, aggrieved the assessee filed further appeal before the CIT(A). The CIT(A) held that the issue of allowance of depreciation should be

considered and decided in the first year itself. If depreciation is allowed for the first year action in subsequent years with respect to depreciation becomes consequential. Therefore, the CIT(A) held that in assessee's case since the depreciation is allowed in the first year i.e. AY 2015-16 at 50% of the depreciation, the AO should not have disturbed the allowance in the subsequent year i.e. 2016-17.

25. The Ld. AR submitted that the building on which 100% depreciation is claimed is purely a temporary structure which was completed and put to use during the immediately preceding year. Since during the immediately preceding year the asset was used for less than 180 days the assessee claimed 50% of the depreciation which was duly allowed. Therefore, the ld. AR submitted that the CIT(A) has correctly allowed the claim by observing that the issue of allowance of depreciation should be considered and decided in the first year itself and cannot be disturbed in the subsequent years. The ld. AR further submitted that as per section 32 read with new Appendix-1 of the Income Tax Rules as applicable for AY 2016-17 purely temporary building structures are eligible for 100% depreciation. In assessee's case it is submitted that the sample flat is a temporary structure created for showing to the customers when the building is under construction and also to use as sales office and therefore eligible for depreciation at the rate of 100%. The ld. AR also submitted that the depreciation claimed during the year under consideration being 50% balance depreciation should be allowed. The ld. AR in this regard placed reliance on the following judgments:

(1) KHs Machinery (P.) Ltd. V. ACIT (2023) 146 taxmann.com 230 (Ahmedabad-Trib.)

(2) ACIT v. PSN Automotive Marketing (P.) Ltd. (2023) 147 taxmann.com 397 (Cochin – Trib.)

26. We have heard the parties and perused the material on record. The assessee has applied 100% as the rate of depreciation to be applied on the sample flat which is a temporary structure built for showing to customers when the building is under construction. Since the asset was put to use for less than 180 days during the immediately preceding previous year, assessee has claimed the depreciation at 50% between two assessment years i.e. AY 2015-16 & 2016-17. In this regard it is noticed that the 50% of depreciation claimed during AY 2015-16 has been allowed by the revenue and the same is disallowed in the year under consideration. The CIT(A) has allowed the claim stating that the depreciation claim in terms rate etc., can be questioned only in the first year of claim and once allowed in the first year cannot be disturbed in the subsequent year. From the perusal of the assessment order we notice that the assessing officer has not disputed the fact that the sample flat is a temporary structure since the AO himself is holding that the gestation period is four years based on the assessee's submission that the sample flat is demolished in 2020. Taking note of the fact that temporary structures are entitled to depreciation at the rate of 100% as per the depreciation rates under Income-tax Rules,1962, as per rule 5, Appendix-I, and considering the fact that the structure being temporary not controverted by the Revenue, we see no infirmity in the claim of the assessee to the entire amount of expenditure on construction of temporary flat as sample flat is eligible for depreciation at 100% . Further the revenue has allowed the claim of 50% of the depreciation claimed by the assessee in the first year when the sample flat was put use for less than 180 days and nothing has been brought on record to show that the said claim is disputed by the revenue. Considering the facts that the revenue has not disputed the fact that the sample flat is a temporary structure and no contrary findings being brought on record in

present case we hold that the assessee's claim of 50% of the cost of construction for the year under consideration be allowed. The disallowance made in this regard is deleted.

27. Ground No. 5 is with regard to capitalization of foreign exchange loss to work-in-progress. The AO noticed that the assessee has claimed foreign exchange loss to the tune of Rs. 2,22,36,855/-. The assessee was asked to furnish the details of the foreign exchange loss and also to show-cause why the amount should not be capitalized. The assessee submitted that the loss incurred towards purchase of material for construction activity and therefore, claimed as a revenue expenditure. The assessee also submitted that in accordance with AS-11 on accounting for effect of changes in foreign exchange rates, the entire amount of gaining/loss should be charged to P& L A/c irrespective of the nature of accounting followed by the assessee. The AO did not accept the submissions of the assessee and held that in assessee's case the material purchased form part of the cost of construction which is added to the cost of project and not to the P&L A/c and therefore, the foreign exchange loss attributable to purchase of material should also be added to the cost of construction. Accordingly, the AO disallowed the entire foreign exchange loss claimed by the assessee. On further appeal, the CIT(A) held that the issue is covered by the decision of Hon'ble Supreme Court in the case of Woodward Governor (I.) Pvt. Ltd. (179 taxman 376) and therefore, decided the issue in favour of the assessee by the deleting the disallowance made by the AO.

28. The ld. AR submitted that the issue is covered by the decision of the Hon'ble Tribunal in assessee's own case in ITA No.2266 & 2239/Mum/2022 dated 17.04.2023 where the Tribunal has allowed the issue in favour of the assessee. The

facts being identical the ld. AR submitted that the issue should be allowed in favour of the assessee.

29. The ld. DR relied on the order of the AO.

30. We have heard the parties and perused the material on record. We notice that the coordinate bench in assessee's own case in ITA No.2266 & 2239/Mum/2022 dated 17.04.2023 has considered the similar issue and held that –

> *036. We have carefully considered the rival contentions and perused the orders of the lower authorities. The assessee is engaged in the business of construction and development of realistic projects including purchase and sale of building materials. The assessee purchases various materials for its construction activity. During the year, it earned foreign exchange loss by making payment for the various raw materials imported by the assessee for the purpose of its business. The expenditure incurred on material purchased by the assessee for its construction activity business is debited to the profit and loss account of the assessee. The foreign exchange gain or loss arises when the amount of sundry creditors outstanding at the time of payment are settled. The sundry creditors are the monetary items as per the Ind As 21. Even as per the Accounting Standard 2, monetary items are not required to be carried to the cost of inventory. Therefore, the foreign exchange gain or loss arising on settlement of dues of sundry creditors does not have any correlation with the cost of inventory or putting 88 the present location. Hence, it is not required to be included in the cost of project/cost of inventory. The accounting treatment of the assessee is supported by the authoritative pronouncement of the Institute of chartered accountants of India as well as the Ministry of corporate affairs. In view of this, we do not find any substance in the findings of the lower authority that foreign exchange loss on purchase of material should be included in the cost of project. Accordingly, the foreign exchange loss of ₹ 9,906,468/– incurred by the assessee is revenue expenditure and cannot be included in the cost of project. Accordingly, we allow ground number 3 of the appeal of the assessee.*

31. Respectfully following the above decision of the coordination bench we hold that the foreign exchange loss cannot be included in the cost of project and accordingly should be allowed as a deduction. The ground of the revenue in this regard is rejected.

32. In result the appeal **in I.T.A. No.2382 /Mum/2022** and **I.T.A. No.2383 /Mum/2022** are dismissed.

Order pronounced in the open court on 08/11/2023

Sd/- **sd/-**

(KULDIP SINGH)	**PADMAVATHI S.**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dt : 8th November, 2023
Pavanan

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai