IN THE INCOME TAX APPELLATE TRIBUNAL,
" D " BENCH, AHMEDABAD
Before Shri D. K. TYAGI, JUDICIAL MEMBER
and Shri A. K. GARODIA, ACCOUNTANT MEMBER

I.T.A. Nos. 128, 186/ Ahd/2005,
1114/Ahd/2006, 1244, 1245/Ahd/2007
(Assessment years 2000-01, 2001-02 and 2002-03, 2000-01, 2001-02 respectively)

Gujarat Mineral Dev. Corpn. Ltd., Kanji Bhavan, 132 Ft. Ring road, Nr. University Ground, Vastrapur, Ahmedabad PAN/GIR No. : AAACG7987P	Vs.	ACIT, Circle 4, Ahmedabad

I.T.A.No. 402/Ahd/2005, 1036/Ahd/2006,
and 1182, 1184, 4483/ahd/2007,
(assessment years 2001-02, 2002-03, 2000-01,2001-02, 2002-03 respectively)

ACIT, Circle 4, Ahmedabad	Vs.	Gujarat Mineral Dev. Corpn. Kanji Byhavan, 132 ft Ring Road, Vastrapur Ahmedabad
(APPELLANT)	..	(RESPONDENT)

Appellant by:	Shri S N Soparkar, Sr. Adv. Shri J T Shah, Adv.
Respondent by:	Shri D P Gupta, CIT DR

Date of hearing: 26.04.2012
Date of pronouncement: 25. 05.2012

O R D E R

PER BENCH:-

Out of this bunch of ten appeals, there are various appeals of the assessee and the revenue for different assessment years against separate

orders of Ld. CIT(A) VIII, Ahmedabad. All these appeals were heard together and are being disposed off by way of this common order for the sake of convenience.

2. First, we take up the appeal of the assessee for the assessment year 2000-01 in I.T.A.No. 128/Ahd/2005.

2.1 Ground No.1 is regarding disallowance of Rs.91273931/- for claim of depreciation on assets leased to GSRTC.

2.1.1 It was submitted by the Ld. A.R. that this issue is covered in favour of the assessee by the tribunal order in the assessee's own case for the assessment year 1997-98 in I.T.A.No. 2728/Ahd/2000. It is further submitted that this tribunal order is available on pages 21-83 of the decision paper book and the relevant discussion is in para 83 of this Tribunal decision on page 75 of the paper book. He further fairly conceded that this issue is covered against the assessee by the decision of Special bench of the Tribunal rendered in the case of Indusind Bank Ltd. Vs Addl. CIT as reported in 145 TTJ 409 (SB). Ld. D.R. placed reliance on this decision of Special bench of the Tribunal and submitted that when the decision of Special bench of the Tribunal decision is against the assessee, the same should be followed in preference to the Division Bench order in assessee's own case cited by the Ld. A.R.

2.1.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and we find that this issue is covered against the assessee by the decision of Special bench of the Tribunal rendered in the case of Indusind Bank Ltd (supra) and, therefore, respectfully following the decision of Special bench of the Tribunal, this issue is decided against the assessee. In addition to holding this that in the case of financial lease, lessor is not entitled to

depreciation, it is also held by the Special bench of the Tribunal in the case of Indusind Bank Ltd (supra) that the entire lease rental received by the assessee lesser, cannot be considered as income and only the interest component of lease rental finance charge i.e. interest, should be recognized as income. The decision of Ld. CIT(A) is on this very line and hence, we do not find any reason to interfere in the order of Ld. CIT(A) on this issue. This ground is rejected.

2.2 The ground No.2 of the assessee's appeal is regarding disallowance of expenditure incurred on project of Mata No Madh being Rs.2936016/- revised by the assessee to Rs.3646532/-.

2.2.1 It was submitted by the Ld. A.R. that this issue is covered in favour of the assessee by various Tribunal decisions in assessee's own case for various earlier years. He submitted that first such decision of the tribunal is for the assessment year 1990-91 in I.T.A.No. 3232/Ahd/1996, which is available in the paper book page 6 and the relevant paras are 16-18. He further submitted that the 2nd such decision of the tribunal is in assessee's own case for the assessment year 1992-93 in I.T.A.No. 936/Ahd/199 and the relevant portion is available on pages 8-9 of the decision paper book and the relevant para is para 2. It was also submitted that the 3rd such decision is in respect o assessment year 1994-95, 1996-97 and 1997-98 in I.T.A.No. 89, 90 & 91/Ahd/2001 and the relevant portion of this tribunal order is available on pages 42-49 and the ultimate conclusion of the Tribunal is in para 33. He further submitted that although in assessment year 1998-99 and 1999-2000, as per Tribunal order dated 16.11.2007, available on pages 77-83 of the paper book, the issue was restored to the file of the A.O. but in the subsequent tribunal decision dated 31.08.2009

for the assessment year 1997-98 on pages 71-73 of the paper book, the same issue was decided in favour of the assessee.

2.2.2 Ld. D.R. supported the orders of authorities below.

2.2.3 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the various tribunal decisions cited by the Ld. A.R. of the assessee. Ld. D.R. could not point any difference in the facts in the present year as compared to the earlier years for which Tribunal decisions are available. In the combined tribunal order for the assessment years 1994-95, 1996-96 and 1997-98 in para 25 of this tribunal order, this fact is noted by the tribunal that the issue in dispute was regarding expenses incurred in respect of Boxite project at Ghadsesa and Lignite project at Mata No Madh. It is further noted by the tribunal in para 28 of the tribunal decision that the A.O. disallowed the expenditure of Mata No Madh project by treating the same as capital expenditure. It is further noted by the tribunal that it was submitted by the Ld. A.R. before the tribunal that this issue is covered in favour of the assessee by the tribunal decision in the assessee's own case in I.T.A.No. 3232/Ahd/1996 for the assessment year 1990-91 as per order dated 05.05.2005 and also for assessment year 1992-93 in I.T.A.No. 936/Ahd/1999 as per tribunal order dated 12.07.2005. As per this tribunal order for the assessment year 1994-95, 1996-97 and 1997-98, the issue in dispute was decided in favour of the assessee by respectfully following the earlier tribunal order for the assessment years 1990-91 and 1992-93. Regarding the tribunal order for assessment year 1998-99 and 1999-2000 in which the issue was restored by the Tribunal to the A.O., we find that in the subsequent order, the Tribunal has decided the issue in favour of the assessee although the earlier tribunal order was not brought

to the notice of the tribunal but since, we feel that in the facts of the present case, the later order should be followed. In the present year also, Ld. D.R. could not point out any difference in facts and hence, we do not find any reason to take a contrary view in the present year. Therefore, by respectfully following earlier tribunal decisions as discussed above, we decide this issue in favour of the assessee in the present year also. This ground of the assessee is allowed.

2.3 Ground No.3 is regarding disallowance of the claim of depreciation of Rs.3741345/- holding that asset of Shriram Cement Ltd. were not used by the assessee for the purpose of business.

2.3.1 It was fairly conceded by the Ld. A.R. that his issue is covered against the assessee by various tribunal decisions in assessee's own case for earlier years such as assessment year 1998-99 and 1999-2000 in I.T.A.No. 999 and 1000/Ahd/2003, which is available on pages 78-79 of the paper book and for the assessment year 197-98 in I.T.A.No. 91/Ahd/2001, which is available on page 60 para 50 of the paper book. Respectfully following these earlier tribunal decisions, this issue is decided against the assessee and accordingly, ground No.3 of the assessee's appeal is rejected.

2.4 Ground No.4 is regarding initiation of penalty proceedings. This ground is premature and hence, rejected.

2.5 Ground No.5 is regarding charging of interest u/s 234B and 234C of the Act and this issue is consequential and hence, no adjudication is called for at this stage.

2.6 In the result, this appeal of the assessee stands partly allowed.

3. Now, we take up assessee's appeal for the assessment year 2001-02 in I.T.A.No. 186/Ahd/2005.

3.1 Ground No.1(a) is regarding confirmation of disallowance of Rs.2231740/- being the expenditure on project Mata No Madh holding the same as capital in nature. It was agreed by both the sides that this issue is identical to ground No.2 raised by the assessee in the assessee's appeal for the assessment year 2000-01 and hence, the same can be decided on similar line. In that year, this issue was decided by us in favour of the assessee as per para 2.2.3 above and on the same lines, in this year also, this issue is decided in favour of the assessee. This ground of assessee is allowed.

3.2 Ground No.1(b) of the assessee is regarding confirmation of disallowance of Rs.424239124/- made by the A.O. on account of expense relating to Akri Mota Power Project. It was also an alternative contention that in any case, financial charges of Rs.2.21 crores are fully allowable u/s 36(1)(iii) of the Income tax Act, 1961.

3.2.1 It was submitted by the Ld. A.R. that these are the expenses on diversification and forward integration and the same is allowable and in support of this contention, reliance was placed on the following judgements. There was an alternative contention that interest part is allowable in any case. In support of this contention reliance was placed on the following judgements.

(a) 81 ITD 553 United Phosphorus Ltd. Vs JCIT
(b) 393 ITR 459 (Mad.) CIT Vs Rane (Madras) Ltd.
(c) 296 ITR 140 CIT Vs Usha Iron and Ferro Metal Corporation Ltd.
(d) 318 ITR 140 CIT Vs Denso India Ltd.
(e) 323 ITR 11 CIT Vs Escorts Auto Components Ltd.
& Eco Auto Components Ltd.
(f) 251 ITR 61 (Guj.)
(g) 298 ITR 194 (S.C.) DCIT Vs Core Health Care Ltd.

3.2.2 As against this, it was submitted by the Ld. D.R. that this is a new project and, therefore, various judgments cited by the Ld. A.R. are not applicable in the facts of the present case because this is a power project and there was no power project prior to this and hence, it is a new project. In the rejoinder, it was submitted by the Ld. A.R. that admittedly it is a first power project but it is for forward integration of existing business and, therefore, deduction is allowable in respect of these expenses incurred on this project

3.2.3 We have considered rival submissions, perused the material on record and have gone through the orders of authorities below and various judgments cited by the Ld. A.R. We find that this is admitted factual position that Akri Mota Power Project is a new line of business because this is the first power project being put up by the assessee because the assessee did not have any business of power generation in the earlier assessment years including assessment year 2000-01 as has been noted by Ld. CIT(A) on page 2 of his order. In the light of these facts, we examine the applicability of various judgements cited by the Ld. A.R.

- The first judgement cited by the Ld. A.R. is the tribunal decision rendered in the case of United Phosphorus Ltd. Vs JCIT (supra). As per this tribunal decision, it was held by the tribunal that the assessee is entitled for deduction on account of interest paid on funds borrowed for business purpose including for the purpose of setting up of a new unit of existing running business u/s 36(1)(iii) irrespective of the fact whether such a new unit has commenced production or not in the year under consideration. This tribunal decision supports the case of the assessee regarding alternative contention in respect of granting deduction for the interest part if it is ultimately held that the unit being set up out of

borrowed funds in question is a new unit of the existing running business. This aspect we will decide later.

- The 2nd decision cited by the Ld. A.R. is the judgment of Hon'ble Madras High Court rendered in the case of CIT Vs Rane (Madras) Ltd. (supra). In that case, the facts were that the assessee was engaged in the production of recalculating ball type steering gears and in the relevant assessment year, the assessee started a new industry at different place for manufacture of rack and pinion steering gears and incurred an expenditure of Rs.208 lacs during assessment year 1996-97 and Rs.9.48 lacs during assessment year 1997-98 in respect of interest on Exim Bank Loan, various raw material consumed, stores consumed, tools consumed, travel expenses, salaries and wages, printing and stationery, computer stationery, freight inward, freight outward, power and fuel, insurance, repairs and maintenance, central overheads of Madras plant and other various miscellaneous expenses. The assessee claimed in that case that the entire expenditure is revenue expenditure but the A.O. treated these expenses as capital in nature on this basis that the proposal unit is entirely a new unit. On appeal, it was held by Ld. CIT(A) in both the years that these are revenue expenditure and on further appeal, the order of Ld. CIT(A) was confirmed by the tribunal and against such tribunal order, the revenue preferred an appeal before Hon'ble Madras High Court. It was held by the Hon'ble Madras High Court that the product remained one and the same i.e. steering gear and, therefore, the new business set up is nothing but an extension of the existing industry at Velachery and Mysore and the deduction claimed by the assessee was regarding the expenditure incurred for the new unit in Pondichary is allowable as revenue expnediture. In the present case, the product is not the same

because the power project product will be the power whereas in the existing unit the product is different i.e. lignite and hence, this judgment of Hon'ble Madras High Court is not applicable in the present case.

- The next judgement cited by the Ld. A.R. is the judgment of Hon'ble Delhi High Court rendered in the case of CIT Vs Usha Iron & Ferro Metal Corporation Ltd.(supra). In that case, the issue involved was regarding the expenditure incurred for setting up steel melting shop for manufacture of raw material for the existing business. Under these facts, it was held in that case that the expenditure incurred is revenue expenditure. In the present case, the facts are different and the expenditure incurred was not for manufacture of raw material for an existing business. In fact the final product of the existing unit is the raw material for the new unit and, therefore, this judgement of Hon'ble Delhi High Court is also not applicable in the present case.

- The next judgement cited by the Ld. A.R. is also the judgment of Hon'ble Delhi High Court rendered in the case of CIT Vs Denso India Ltd (supra). In that case, the assessee was manufacturing auto electrical parts and the expenditure in question was incurred for setting up of a separate cell for developing import substitute components. Under these facts, it was held by the Hon'ble Delhi High Court that such expenditure is revenue expenditure. In the present case, the facts are different. The unit being set up will not result into any substitute of import component being used by the existing unit and, therefore, this judgement is also not applicable in the present case.

- The next judgment cited by the Ld. A.R. is the judgement of Hon'ble Punjab & Haryana High Court rendered in the case of CIT Vs Escorts (supra). In that case, this finding was recorded by Ld. CIT(A)

that the expenditure incurred by the assessee was in respect of development of new product/modification of the product with the same organization within the existing infrastructure, the same management and same building and no capital asset had been created out of this expenditure. The Tribunal observed in that case that the assessee has bifurcated sum of Rs.72.60 lacs out of the total expenditure on salary and wages, telephone, traveling expenses and other administrative expenses and allocated to modification of existing product/development of new product with the same management and same workforce and expertise. By making this observation, the order of Ld. CIT(A) was confirmed by the Tribunal. Under these facts, it was held by the Hon'ble Punjab & Haryana High Court that the expenditure is revenue expenditure because there is clear finding of the tribunal and CIT(A) that no capital asset has come into existence and this finding was not challenged before the Hon'ble Punjab & Haryana High Court. In the present case, the facts are different. In the present case, it is noted by the A.O. that the expenditure in question relate to expenditure incurred on a new power project being set up at Akri Mota and the total expenditure as stated was shown at Rs.1562.63 lacs and after deduction of opening balance of the expenditure of Rs.1138.34 lacs, the expenditure on the new power project being set up is claimed at Rs.424.29 lacs and in the original return, assessee did not claim deduction for this expenditure. This finding is also given by the A.O. that this is totally a new product and is not expansion of the assessee's existing business and it is totally different and distinct industrial undertaking. When a new industrial undertaking is being constructed, it cannot be said that no new asset has come into

existence and, therefore, this judgment of Hon'ble Punjab & Haryana High Court is also not applicable in the present case.

-The next judgement cited by the Ld. A.R. is the judgement of Hon'ble Gujarat High Court rendered in the case of DCIT Vs Core Health Care Ltd. (supra). In that case, the issue involved was regarding interest expenditure incurred on borrowings for purchase of machinery to increase production in the existing business and the machinery was not put to use in the relevant year. Under these facts, it was held by the Hon'ble Gujarat High Court that interest on borrowed capital is deductible. In that case, the assessee was engaged in the business of manufacturing intra venus injection of two types i.e. LVP and SVP. During the relevant year, the assessee company installed three more machines in addition to the existing three machines for the production of the same product resulting in substantial increase in the capacity of manufacturing of the product. Under these facts, it was held by the Hon'ble Gujarat high Court that the interest expenditure is to be allowed even if the machines purchased out of borrowed funds were not put to use in the relevant year. In the present case, this is not the factual position that the same equipments is the existing equipments were purchased. In the present case, a power project altogether is being set up and the assessee is not in the business of power generation up to assessment year 2000-01 and, therefore, the facts in the present case are different. Hence, this judgement of Hon'ble Gujarat High Court is also not applicable in the present case.

- The last judgment cited by the Ld. A.R. is the judgment of Hon'ble Apex Court rendered in the case of DCIT vs Core Health care Ltd. As per this judgement, Hon'ble Apex Court has simply confirmed the

judgment of Hon'ble Gujarat High Court rendered in the same case as reported in 251 ITR 61 (Guj.). While examining the applicability of this judgement of Hon'ble Gujarat High Court, we have seen that this judgment of Hon'ble Gujarat High Court is not applicable in the present case because the facts are different and therefore, for the same reason, this judgment of Hon'ble apex Court is also not applicable in the present case.

3.2.4 As per above discussion, we have seen that none of the judgements cited by the Ld. A.R. is rendering any help to the assessee in the present case except the tribunal decision rendered in the case of United Phosphorus Ltd. (supra). In that case, it was held by the Tribunal that interest paid on funds borrowed for business purpose, including for the purpose of setting of anew unit of the existing running business is allowable u/s 36(1)(iii) of the Act. While examining the applicability of this tribunal decision, we have noted above that interest expenditure will be allowable if it is found that borrowed fund were used for the purpose of setting up of a new unit of the existing running business. As per above discussion, while examining the applicability of various other judgments, we have seen that borrowed funds were not used for setting up of a new unit of an existing running business but it was setting up of a new unit for production of an altogether new product i.e. power whereas the existing business of the assessee was production of lignite. Since this aspect is not fulfilled in the present case, even interest expenditure is not allowable in the present case u/s 36(1)(iii) because in the present case, the product to be manufactured by the new unit is an altogether new product.

3.2.5 In view of the above discussion, we do not find any reason to interfere in the order of Ld. CIT(A) on this issue. This ground of the assessee is rejected including the alternative contention.

3.3 Ground No.2 is regarding confirmation of addition of Rs.1,32,000/- made by the A.O. in respect of salary to staff.

3.3.1 The brief facts of the case are that it is noted by Ld. CIT(A) on page 5 of his order that the A.O. has disallowed the expenditure in respect of payment of salary to staff at the residence of the Chairman of the company. He further observed that it was noted by the A.O. that the expenditure is not in accordance with the guidelines issued by the Government of Gujarat dated 28.08.1998 referred to at page 7 of the order and is also against Article No.192 of the Articles of Corporation. It is further noted by Ld. CIT(A) that it was submitted by the Ld. A.R. that the expenses have been approved by the Board of Directors and are not contrary to the provisions of Companies Act 1956. Ld. CIT(A) was not satisfied and he confirmed the disallowance on this basis that this is covered under Explanation to Section 37 of the Income tax Act, 1961. Now, the assessee is in further appeal before us.

3.3.2 It is submitted by the Ld. A.R. that there is no violation of any law and, therefore, deduction should be allowed. As against this, the Ld. D.R. supported the order of the authorities below.

3.3.3 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We find that this disallowance was confirmed by Ld. CIT(A) on this basis that the same is covered by Explanation to Section 37(1) of the Income tax Act, 1961. As per the Explanation, it is seen that if any expenditure being incurred by the assessee is for any purpose which an offence or which is

prohibited by law, the same shall not be allowed. Hence, it is to be seen that as to whether in the present case, the expenditure incurred by the assessee is for any purpose which is an offence and/ or which is prohibited by law and if it is not so, these provisions of explanation to Section 37(1) is not attracted. As per the submission of Ld. CIT(A) and as per the finding of Ld. D.R., this expenditure is in violation of the guidelines issued by the Government of Gujarat dated 28.08.1998 and is against Article 192 of the Articles of Corporation. In our considered opinion, this will not tantamount to an offence and also it does not tantamount to an expenditure which is prohibited by law. The guidelines of the Government of Gujarat and the Articles of Corporation cannot be considered as law of the Country. Hence, in our considered opinion, this disallowance is not justified. If the expenditure is incurred in violation of the guidelines of Government of Gujarat and against Article 192 of the assessee corporation then the remedy lies somewhere else and action can be taken as per law against the person responsible for such violation but this cannot be the basis for making disallowance of expenses without proving that it is not for the purpose of assessee's business. This is not the claim of the revenue that this expenditure is not for the purpose of business and therefore, this disallowance is deleted. This ground of the assessee is allowed.

3.4 Ground No.3 is regarding confirmation of disallowance of Rs.2220392/- in respect of obsolete stores/stock. This ground is interconnected with ground No.4 of the revenue's appeal for the same assessment year.

3.4.1 The brief facts of the case are that it is noted by Ld. CIT(A) on page 5 and 6 of his order that the A.O. made an addition of Rs.8881569/-

in respect of obsolete stock/stores. We have further noted that this was also noted by the A.O. in the assessment order that Assessee Company had written off obsolete stores/spares as per Schedule XI to the P & L account. It was further noted that this was on the basis of report of various committee/personnel that the stock is obsolete having 'zero' value. The A.O. did not accept this contention and made the disallowance. Before Ld. CIT(A), it was submitted by the Ld. A.R. that the assessee company is following system of valuing stock at cost or market price, whichever is lower, for the closing stock. It was held by Ld. CIT(A) that since the write off is supported by the report of various technical committees/personnel, the same is to be allowed but it cannot be ruled out that spares of the machinery could not be having any value including scrap value. He held that 25% of the total amount should be considered as scrap value and to this extent, the disallowance should be confirmed. Now, the assessee is in further appeal for 25% disallowance confirmed by Ld. CIT(A) and the revenue is in appeal for 75% disallowance deleted by Ld. CIT(A).

3.4.2 It was submitted by the Ld. A.R. that scrap value will be accounted for and offered to tax as and when realized. Ld. D.R. sported the assessment order.

3.4.3 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We find that in the facts and circumstance of the present case, writing off of the value of closing stock should be allowed to the extent it brings the value of closing stock at level with cost or market price whichever is lower. The market price of obsolete items of stock will be definitely very low than its cost. At the same time, it is not acceptable that the value of such

obsolete items will be 'nil'. Now, the question is what can be the scrap value of such obsolete items. Ld. CIT(A) has considered the same @ 25% of the cost. In our considered opinion, the same is reasonable. Regarding the submissions of the Ld. A.R. that scrap value will be declared and offered to tax when sold, we would like to observe that the assessee is following mercantile system of accounting and hence, scrap value has to be considered in the present year itself and it could not be deferred till the actual sale of scrap. Needless to say, the scrap value of stock has to be considered as opening stock in the year of sale and we hold accordingly. This ground of the assessee as well as the revenue is rejected.

3.5 Ground No.4 of the assessee's appeal is regarding confirmation of disallowance of Rs.56459076/- in respect of depreciation claimed on assets leased to GSRTC and GEB.

3.5.1 It was agreed by both the sides that this issue is to be decided by following the decision of Special bench of the Tribunal rendered in the case of Indusind Bank Ltd. (supra) as submitted in the course of arguments for ground No.1 of the assessee's appeal in assessment year 2000-01. In that year, we have held that the claim of the assessee regarding depreciation has to be disallowed but as per the decision of Special bench of the Tribunal, out of lease rental received by the assessee, only interest portion has to be considered as income as has been held by Special bench of the Tribunal in that case. In that year, since the order of Ld. CIT(A) was on the same lines as held by the special bench of the Tribunal, this ground of assessee was rejected in that year. Since, both the sides agreed that the facts are identical in this year, we reject this ground of the assessee in this year also.

3.6 Ground No.5 is regarding initiation of penalty proceedings u/s 271(1)(c) of the Act. Since this is a premature ground raised by the assessee, the same is rejected.

3.7 Ground No.6 is regarding charging of interest u/s 234B and 234C of the Income tax Act, 1961. This issue is consequential and held accordingly.

3.8 In the result, this appeal of the assessee stands partly allowed.

4. Now, we decide the remaining grounds of the revenue's appeal for assessment year 2001-02 in I.T.A.No. 402/Ahd/2005.

4.1 Ground No.1 is regarding deletion of disallowance of Rs.5 lacs being depreciation on multimodal project at Ambaji.

4.2 It was submitted by the Ld. A.R. that this issue is covered in favour of the assessee by the tribunal decision in assessee's own case for the assessment year 1998-99 and 1999-2000 in I.T.A.No. 1392 and 1422/Ahd/2003. He further submitted that the relevant portion of this tribunal order is at para 19-23 which are available on page 81-82 of the decision paper book. He further submitted that this tribunal order was followed by the tribunal in assessment year 1997-98 in I.T.A.No. 2728/Ahd/2000 and the relevant discussion is in para 84 of the Tribunal order on page 76 of the decision paper book.

4.2.1 Ld. D.R. of the revenue although supported the order of the A.O. but he could not point out any difference in facts in the present year as compared to earlier three years for which the tribunal decision had been cited by the Ld. A.R. Hence, we do not find any reason to interfere in the order of Ld. CIT(A) on this issue. This ground of the revenue is rejected.

4.3 Ground No.2 of the revenue's appeal is regarding deletion of disallowance of prior period expenses of Rs.4147429/-.

4.3.1 Ld. D.R. supported the assessment order whereas the Ld. A.R. supported the order of Ld. CIT(A). He further submitted that this issue is now covered in favour of the assessee by the tribunal decision in assessee's own case for the assessment year 1990-91 in I.T.A.No. 3232/Ahd/1996 and the relevant para of this tribunal decision are para 14-15 on page 6 of the paper book.

4.3.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the decision cited by the Ld. A.R. We find that in assessment year 1990-91, it is observed by the Tribunal in para 15 of the tribunal order that the liability has crystelised during the year under consideration and there is no dispute on this fact that on this basis of order of Ld. CIT(A) was upheld by the tribunal in that year. In the present year, no finding is given by Ld. CIT(A) as to whether the expenses in question have utilized during this year or not. It is further noted by Ld. CIT(A) on page 4 of his order that the A.O. has not given this finding that the expense did not crystelise during the present year. Therefore, in our considered opinion, this fact has to be brought out on record as to whether the expenses in question have crystelised during this year and if the assessee is able to do so, no disallowance should be made. The A.O. should pass necessary order as per law as per above discussion after providing adequate opportunity of being heard to the assessee. Ground No.2 of the revenue's appeal is allowed for statistical purposes.

4.3 Ground NO.3 of the revenue's appeal is regarding deletion of addition of Rs.5827429/- in respect of bonus and royalty. Ld. D.R. supported the assessment order whereas the Ld. A.R. supported the order of Ld. CIT(A).

4.3.1 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We find that this issue has been decided by Ld. CIT(A) as per the following para on pages 4-5 of his order which is reproduced below:

> "Ground No. 5: This relates to addition of Rs.58,27,429/- (Rs. 25,65,772/- on account of bonus and Rs.32,61,656/- on account of royalty). This has been discussed by the Assessing Officer in para 3F, age. 6 of the assessment order.
> The Assessing Officer has stated that since the expenses have not been proved in the books of accounts, the deductions cannot be allowed. On the other hand, assessee's representative Shri Shah has stated that the liability for bonus and royalty was realized and crystallized during the accounting period ending 31/03/2001 which is not disputed by the Assessing Officer. The disallowance has been made on the ground that the liability has not been provided in the books of accounts for the year 2000-01. Having regard to the decision of Kedarnath Jute Manufacturing Co. Ltd Vs CIT of the Supreme Court (82 ITR 363) I am inclined to accept the argument of the assessee that if liability is crystallized during the year, the same is allowable even if not claimed in the books of accounts. The fact that the liability or expenses are covered U/s. 43B, the disallowances also cannot be upheld since the liability has been filed before filing of return of income within the prescribed period and the reference was made to the Assessing Officer vide letter dtd. 23/02/2004 whereby proof of payment had also been attached. A copy of the same has also been furnished to me, at page 40 of the paper book. In view of the above facts, the expenses cannot be held even U/s. 43B of the Act and the addition/ made therefore cannot be sustained and accordingly deleted."

4.3.2 From the above para of the order of Ld. CIT(A), we find that Ld. CIT(A) has given this finding that as per the provisions of Section 43B, deduction has to be allowed with regard to these expenses because the payment was made before the due date of filing of return of income. Under these facts, we do not find any reason to interfere in the order of

Ld. CIT(A) on this issue. Hence, this ground of the revenue is also rejected.

4.4 Ground No.4 of the revenue has been already decided while deciding ground No.3 of the assessee's appeal above.

4.5 There is no other gerund of the revenue's appeal. In the result, appeal of the revenue stands partly allowed for statistical purposes.

5. Now, we take the cross appeals of the assessee and the revenue for assessment year 2002-03 in I.T.A.No. 1114/Ahd/2006 (assessee's appeal) and I.T.A.No. 1036/Ahd/2006 (revenue's appeal).

5.1 The first ground raised by the assessee is regarding confirmation of disallowance of Rs.9658220/- made on account of expenses relating to Akri Mota project which include financial charges of Rs.6.63 crores. It was agreed by both the sides that this issue is identical to ground No. 1(b) in assessment year 2001-02 and the same can be decided on similar lines. In that year, this issue has been decided by us against the assessee as per para 3.2.3 above and accordingly in the present year also, this ground of the assessee is rejected.

5.2 Ground No.2 of the assessee's appeal is regarding confirmation of addition of Rs.242000/- in respect of salary to staff.

5.2.1 Regarding this issue also, it was agreed by both the side that this issue is identical to ground No.2 in assessee's appeal for assessment year 2001-02 and it can be decided on similar lines. In that year, this issue was decided by us in favour of the assessee as per para 3.3.3 above and accordingly, in the present year also, this issue is decided in favour of the assessee. This ground is allowed.

5.3 Ground No.3 of assessee's appeal is regarding confirmation of disallowance of Rs.82,049/- in respect of obsolete stock/stores and

connected issue in revenue's appeal is ground no.4 as per which the revenue is aggrieved regarding the order of Ld. CIT(A) as per which he restricted the addition made on account of obsolete stock to Rs.82049/-.

5.3.1 It was agreed by both the sides that this issue is identical to ground No.3 of the assessee's appeal in assessment year 2001-02 and ground No.4 of the revenue's appeal in that year.

5.3.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We find that in the assessment year 2001-02, we have confirmed the order of Ld. CIT(A) on this issue and the grounds of the assessee as well as of the revenue were rejected. In that year, disallowance was confirmed by Ld. CIT(A) to the extent of 25% of the total claim of the assessee for provision on account of obsolete stock/stores. In the present year also, Ld. CIT(A) has confirmed the disallowance to the extent of 25% of the total claim as in assessment year 2001-02 and hence, as per our decision for assessment year 2001-02 as per para 3.4.3 above, in the present year also, ground No.3 of the assessee's appeal as well as ground No.4 of the revenue's appeal are rejected.

5.4 Ground No.4 of the assessee's appeal is regarding confirming disallowance of Rs.33473931/- in respect of depreciation claimed on assets leased to GSRTC and GEB. Both the sides agreed hat this issue is identical to ground No.4 in assessee's appeal for the assessment year 2001-02 and the same can be decided on similar lines. In that year, as per para 3.5.1 above, we have held that the assessee is not eligible for depreciation and the lease rental income cannot be taxed in full and only the interest portion of such lease rental income after deducing principal

portion of the same has to be taxed. Since, the order of Ld. CIT(A) is on similar lines, we confirm the same. This ground is rejected.

5.5 Ground No.5 of the assessee's appeal is regarding confirming disallowance of depreciation claimed of Rs.343800/- on assets used in Mata No Madh project and Rs.4358210/- on assets used in Akri Mota Power Project.

5.5.1 It was submitted by the Ld. A.R. that the assets were used in implementation of these two projects and, therefore, the claim of the assessee regarding depreciation is allowable. As against this, Ld. D.R. supported the orders of authorities below.

5.5.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. Regarding the claim of the assessee in respect of depreciation claimed ofRs.343800/- on the assets used in Mata No Madh project, we are of the considered opinion that the expenses incurred for this project were allowed as revenue expenditure in earlier year included deprecation on those asset which were used in the implementation of this projects and, therefore, in the present year also, the same is allowable. Regarding the depreciation claimed on the assets used in Akri Mota Power Project, we are of the considered opinion that since the expenses incurred in respect of Akri Mota Project were not allowable by us in the earlier year, the claim of deprecation on those assets which were used during implementation of Akri Mota Power Project is not allowed as revenue expenditure and the same have to be included in preoperative expenses of Akri Mota Power Project. We hold accordingly. This ground is partly allowed.

5.6 Ground NO.6 of the assessee's appeal is regarding disallowance of Rs.43,81,470/- claimed as prior period expenses.

5.6.1 It was submitted by the Ld. A.R. that this issue is covered in favour of the assessee by the tribunal order in the assessee's own case for the assessment year 1990-91 in I.T.A.No. 3232/Ahd/1996. He further submitted that the relevant discussion is in para 14-15 of the tribunal order which can be seen on page 6 of the decision paper book. Ld. D.R. submitted that the assessee could not establish that the expenses have crystallized during the present year and, therefore, this ground should be rejected.

5.6.2 The connecting ground in revenue's appeal is ground No.3 as per which revenue is aggrieved regarding deletion of disallowance of prior period expense of Rs.43,81,470/-.

5.6.3 While deciding this issue, Ld. CIT(A) had explained regarding each and every expenses and where assessee could establish that the expenditure had crystallized in this year, he has allowed deduction and where he found that assessee could not establish that the expenditure has crystallized in this year, he has confirmed this disallowance. In the tribunal order for assessment year 1990-91, the disallowance was deleted by the tribunal on this basis that the expenses in question had crystallized during the relevant year. In the light of the facts of the present case, we feel that the order of Ld. CIT(A) in the present year is in line with the tribunal order in assessment year 1990-91 and hence, no interference is called for in the order of Ld. CIT(A) on this issue. This ground No.6 of the assessee's appeal as well as ground No.3 of revenue's appeal are rejected.

5.7 Ground No.7 of the assessee's appeal is regarding confirmation of disallowance of Rs.30,19,123/- under the heard "interest on share loan written off".

5.7.1 The brief facts of the case are that it is noted by Ld. CIT(A) on page 7 of his order that the A.O. made addition of Rs.30,19,123/- by rejecting the claim of interest on share loan written off. Before Ld. CIT(A), it was submitted by the Ld. A.R. that at the time of investment of shares of the company by staff members of the company they were provided loan for subscribing 200 shares of the company. It was also submitted that the interest charged on such loan was already offered for taxation. But at a later stage, considering the representation made by GMDC and to maintain cordial relations with the employees, it was decided to waive the interest to the extent of Rs.30,19,123/- and such waiver is debited to P & L account. Ld. CIT(A) was not satisfied and he confirmed the disallowance. Now, the assessee is in further appeal before us.

5.7.2 It is submitted by the Ld. A.R. that the present claim of the assessee is equivalent to bad debt written off because income on account of interest on loan to staff was accounted for as income and in the present year the same was written off and this is not in dispute. Therefore, deduction should be allowed. Ld. D.R. supported the orders of authorities below.

5.7.3 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We find that this is not in dispute that interest on share loan to staff was offered to tax by the assessee in the earlier year and the same was written off in the present year. Once these two aspects are admitted, the disallowance made by the A.O. and confirmed by Ld. CIT(A) is not justified. We, therefore, delete the same. This ground is allowed.

5.8 Ground No.8 of the assessee's appeal is regarding confirmation of addition of Rs.1,77,663/- on Mata No Madh project and Rs.47,10,091/- on Akri Mota Power Project on account of miscellaneous receipts.

5.8.1 Ld. A.R. placed reliance on the judgment of Hon'ble Apex Court rendered in the case of CIT Vs Bokaro Steel Ltd. as reported in 236 ITR 315 (S.C.) and Bongaigaon Refinery and Petrochemicals Ltd. Vs CIT as reported in 251 ITR 329 (S.C.). Ld. D.R. supported the order of Ld. CIT(A).

5.8.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the judgements cited by the Ld. A.R. We find that Ld. CIT(A) has followed the judgement of Hon'ble Apex Court rendered in the case of Tuticorin Alkali & Chemicals ltd. as reported in 227 ITR 172 (S.C.). In the case of Bokaro Steels Ltd. (supra) and in the case of Bongaigaon Refinery and Petrochemicals Ltd. (supra), this judgment of Hon'ble Apex Court rendered in the case of Tuticorin Alkali & Chemicals Ltd. (supra) was duly considered and it was held that when the income earned is directly connected and incidental to construction of the plant by the assessee, the same is capital receipt and not income of the assessee from any independent source. In the present case, we find that when the A.O. made this addition, there is no discussion as to whether these two incomes were directly connected or incidental to construction of plant by the assessee or not. In the order of Ld. CIT(A) also, there is no finding on this aspect of the matter. Before us also, although reliance was placed by the Ld. A.R. on these two judgements of Hon'ble Apex Court but this fact is not available on record as to whether the income in question were directly connected and incidental to construction of plant by the assessee

or not. Under these facts, and in the interest of justice, we feel that this issue should go back to the file of the A.O. for a fresh decision in the light of these two judgements of Hon'ble Apex Court relied upon by the Ld. A.R. before us. Hence, we set aside the order of Ld. CIT(A) on this issue and restore the matter back to the file of the A.O. for a fresh decision in the light of above discussion after providing adequate opportunity of being heard to the assessee. This ground of the assessee is allowed for statistical purposes.

5.9 The next ground of assessee's appeal is regarding initiation of penalty proceedings u/s 271(1)(c) of the Act. This ground is premature and hence, rejected accordingly.

5.10 The last ground is regarding charging of interest u/s 234B and 234C of the Income tax Act, 1961. Since this is consequential issue, no adjudication is called for.

5.11 In the result, appeal of the assessee stands partly allowed.

6. Now, we take up the remaining issues as per the appeal of the revenue.

6.1 Ground No.1 is regarding deletion of disallowances of Rs.37,92,357/- debited under the head project expenses of Mata No Madh.

6.2 It was agreed by both the sides that this issue is identical to ground No.1(a) of the assessee's appeal for the assessment year 2001-02 and the same can be decided on similar lines. In that year, as per para 3.1 above, we have decided this issue in favour of the assessee. Accordingly, in the present year also, this issue is decided in favour of the assessee. This ground is rejected.

6.3 Ground No.2 of the revenue's appeal is regarding deletion of disallowance of Rs.5 lacs being discount on multimodal project Ambaji.

6.3.1 Both the sides agreed that this issue is identical to ground No. 1 of the assessee's appeal in assessment year 2001-02 and the same can be decided on similar lines. In that year, this issue was decided by us in favour of the assessee as per para 3.2.3 above. Accordingly, in the present year also, this issue is decided in favour of the assessee. Ground No.2 of the revenue's appeal is rejected.

6.4 Grounds No.3 & 4 of the revenue's appeal are already decided by us along with the connected grounds of the assessee's appeal.

6.5 Grounds No.5 & 6 are general.

6.6 In the result, appeal of the revenue is dismissed.

7. Now, we take up the cross appeals of the revenue in I.T.A.No. 1182/Ahd/2007 and the assessee in I.T.A.No. 1244/Ahd/2007 for the assessment year 2000-01, which are directed against the ore of Ld. CIT(A) VI, Ahmedabad dated 26.12.2006 in respect of penalty imposed by the A.O. u/s 271(1)(c) which was partly deleted by Ld. CIT(A) as per the impugned order.

7.1 At the very outset, it was submitted by the Ld. A.R. that after the appeal effect order passed by the A.O. on 31.01.2007, which is available on pages 30-31 of the relevant paper book, the assessed income of the assessee stands at Rs.780811972/-. He further submitted that as per the original assessment order passed by the A.O. on 24.03.2003, copy of which is available on pages 8-16 of the paper book, it can be seen that the return of income was filed by the assessee declaring total income at Rs.882773178/-. He submitted that as per the appeal effect order dated 31.01.2007, the assessed income is lower than the returned income and

therefore, no penalty is justified. Considering these facts, we hold that in the facts and circumstances of the present case, when the ultimate income assessed as per the appeal effect order passed by the A.O. is at lower amount as compared to the income declared by the assessee in the return of income, no penalty u/s 271(1)(c) is justified. We hold accordingly.

7.2 In the result, appeal of the assessee stands allowed and the appeal of the revenue stands dismissed.

8. Now we taken up the cross appeals field by the assessee and the revenue for the assessment year 2001-02 in I.T.A.No. 1245/Ahd/2007 and 1184/Ahd/2007 directed against the order of Ld. CIT(A) VI, Ahmedabad dated 26.12.2006 in the course of penalty proceedings.

8.1 At the very outset, it was submitted by the Ld. A.R. that in this year also, ultimately the assessed income is lower than the returned income and therefore, no penalty is justified.

8.2 Regarding the ultimately assessed income, it is submitted that the appeal effect order passed by the A.O. for this year is dated 31.01.2007 and the same is available on page 66 of the relevant paper book as per which the total income was determined at Rs.110.57 lacs. He further submitted that copy of the original assessment order dated 26.02.2004 is available on pages 31-43 of the paper book and on the 1st page of the assessment order, it is noted by the A.O. that in the return of income filed by the assessee on 29.10.2001, the income was declared at Rs.126.52 lacs. He submitted that ultimately assessed income is lower than the returned income and, therefore, in this year also, penalty u/s 271(1)(c) is not justified. Considering this fact that the ultimately the assessed income as per the appeal effect order passed by the A.O. on 31.01.2007

for this year also is lower than the returned income, we hold that no penalty is justified in the facts of the present case u/s 271(1)(c) of the Act.

8.3 In the result, appeal of the assessee for this year is also allowed and the appeal of the revenue for this year is also dismissed.

9. Now, the remaining appeal is revenue's appeal for the assessment year 2002-03 in I.T.A.No. 4483/Ahd/2007. The grounds raised by the revenue are as under:

> "1. The Ld. CIT(A) erred in law and on the facts of the case in deleting the penalty of Rs.3,44,79,852/- levied u/s 271(1)(c) of the Income tax Act, 1961 after holding that no penalty u/s 271(1(c) was leviable in respect of disallowance of project expenses of Akri Mota Power Project of Rs.9,65,82,220/-.
> 2. On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the A.O.
> 3. It is, therefore, prayed that he order of Ld. CIT(A) may be cancelled and that of the A.O. may be restored to the above effect."

9.1 Ld. D.R. supported the penalty order. It was submitted by the Ld. A.R. that the quantum appeal of the assessee for this year is also heard on the same day in which assessee has raised a ground regarding disallowance of project expenses of Akri Mota Power Project of Rs.96582220/-. He submitted that if the disallowance is deleted then no penalty can be leviable. He also submitted that even if the disallowance is confirmed then also penalty is not justifiable because this is held by Ld. CIT(A) that the disallowance is merely a rejection of debatable claim and the assessee had made full disclosure in the return of income. He supported the order of Ld. CIT(A).

9.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We would like to observe that while deciding the quantum appeal of the assessee for this year, this disallowance was confirmed by us as per para 3.2.4 above

but still we feel that the penalty is not justified. The issue regarding penalty was decided by Ld. CIT(A) as per para 5.10 of the impugned order which is reproduced below:

> "5.10 In view of the above facts and relying on the ratio of the above cited case laws and following the order of CIT(A)-VI for the earlier year and considering the fact that the appellant had made full disclosure in both the returns of income, both original and revised and it is only a rejection of debatable claim, I hold that in the present case, there is no justification for levy of concealment penalty. Accordingly, the penalty levied is deleted."

9.3 From the above para of the order of Ld. CIT(A), it is seen that a clear finding is given by Ld. CIT(A) that the assessee has made full disclosure in the return of income both original and the revised and it is only a rejection of debatable claim. This is by now, a settled position of law that on account of rejection of debatable claim, penalty is not justified. We hold accordingly and decline to interfere in the order of Ld. CIT(A) on this issue.

9.4 In the result, this appeal of the revenue is dismissed.

10. In the combined result, all the three appeals of the assessee as well as two appeals of the revenue in quantum proceedings are partly allowed, whereas all the three appeals of the revenue in penalty proceedings are dismissed and all the two appeals of assessee in penalty proceedings are allowed.

11. Order pronounced in the open court on the date mentioned hereinabove.

Sd./-	Sd./-
(D. K. TYAGI)	(A. K. GARODIA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Sp

Copy of the Order forwarded to:

1. The applicant
2. The Respondent
3. The CIT Concerned
4. The Ld. CIT (Appeals)
5. The DR, Ahmedabad
6. The Guard File

By order

AR,ITAT,Ahmedabad

1. Date of dictation…… 17-21/5.2012
2. Date on which the typed draft is placed before the Dictating Member……21.05.2012.Other Member ……
3. Date on which the approved draft comes to the Sr. P.S./P.S.24/5
4. Date on which the fair order is placed before the Dictating Member for pronouncement … 25/05/2012
5. Date on which the fair order comes back to the Sr. P.S./P.S.25/5
6. Date on which the file goes to the Bench Clerk …25/5/12
7. Date on which the file goes to the Head Clerk ……..
8. The date on which the file goes to the Assistant Registrar for signature on the order …….
9. Date of Despatch of the order. …….