आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'ए' अहमदाबाद।

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE SHRI R.P. TOLANI, JUDICIAL MEMBER AND SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

SN	ITA	AY	Appellant	Respondent
1	1295/Ahd/2009	2005-06	Gruh Finance Ltd., 'Gruh', Mithakhali Six Roads, Ellisbridge, Ahmedabad PAN : AAACG 7010 K	JCIT, Range-4, Ahmedabad
2	1556/Ahd/2009	2005-06	Revenue	Assessee
3	3338/Ahd/2009	2006-07	Assessee	Revenue
4	3260/Ahd/2010	2007-08	Assessee	Revenue
5	46/Ahd/2011	2007-08	Revenue	Assessee
6	614/Ahd/2012	2005-06	Assessee	Revenue
7	615/Ahd/2012	2008-09	Assessee	Revenue
8	625/Ahd/2012	2005-06	Revenue	Assessee
9	649/Ahd/2012	2008-09	Revenue	Assessee
10	1198/Ahd/2012	2006-07	Assessee	Revenue
11	1199/Ahd/2012	2009-10	Assessee	Revenue
12	1562/Ahd/2012	2006-07	Revenue	Assessee
13	1163/Ahd/2012	2009-10	Revenue	Assessee

Assessee by :	Shri M.G. Patel with Shri A.N. Shah, AR
Revenue by :	Shri Surendra Kumar, CIT-DR

सुनवाई की तारीख/**Date of Hearing : 26/07/2016**

घोषणा की तारीख /**Date of Pronouncement: 17/08/2016**

आदेश/O R D E R

PER AMARJIT SINGH, ACCOUNTANT MEMBER :-

These are the set of cross appeals filed by the assessee and revenue respectively against the orders of the Commissioner of Income-tax (Appeals)-VII, Ahmedabad, except ITA No. 3338/Ahd/2009 for AY 2006-06, which is assessee's appeal against the order of ld. CIT(A)-VII, Ahmedabad.

2. **The common ground raised by the assessee in AYs 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10 with regard to NCD(non-convertible debenture) expenses reads as under:-**

> *The learned Commissioner of Income-tax (Appeals)-VIII, Ahmedabad has erred in law and on facts of the case by confirming disallowance of Rs.17,19,535/- for AY 2005-06, Rs.55,12,739 for AY 2006-07, Rs.20,96,430/- for AY 2007-08, Rs.24,37,769/- for AY 2008-09 and Rs.29,21,584 for AY 2009-10 made by the Assessing Officer out of NCD expenses after holding that the same has to be allowed equally for 5 years as NCD are for 5 years period and the Appellant has also not charged the same to the Profit & Loss Account.*

2.1 We take the lead case as ITA No.1295/Ahd/2009 for AY 2005-06. The facts with regard to expense on account of NCD as emerge from the record of AY 2005-06 are that during the course of assessment proceedings the Assessing Officer has observed that in the statement of income the assessee has claimed expenses on issue of NCD at Rs.21,49,419/- and the same was not claimed in the profit and loss account. The assessee was asked to explain about its claim of expenses on issue of NCD at Rs.21,49,419/- in the statement of income but not having claimed in the P&L account and to explain why same should not be disallowed. He was further asked to explain that the NCD are redeemable after five years, and how the entire amount of NCD expenses to be allowed in the current year.

2.2 The assessee explained that the expenditure is in respect of NCD (non-convertible debenture) raised during the year. These expenditure relate to borrowing by way of issue of NCD and the same is allowable deduction u/s 37 of the Income-tax Act, 1961. These expenses was reduced from the share premium account in the books of accounts and not debited to profit and loss account but separately claimed as deduction while computing the income. The assessee relied on the case of Tuticorn Alkali Chemicals & Fertilizers Ltd vs. CIT, 227 ITR 172 (SC) on the issue of accounting entry vis-à-vis determination of income. The assessee has also placed reliance on the following judgments:-

i) CIT vs. Indian Discount Co. Ltd., 75 ITR 191 (SC)
ii) CIT vs. Mogullines Ltd, 46 ITR 590 (Bom)
iii) CIT vs. Shoorji Vallabhdas & Co., 46 ITR 144 (SC)
iv) CIT vs. Kalooram Govindram, 57 ITR 630 (SC)

2.3 The Assessing Officer has not accepted the assessee's contention and stated that it is an admitted fact that the said expenses was incurred for the issue of non-convertible debenture redeemable after five years. when the benefit of a particular expenditure has been accruing over a period of five years, the entire expenditure cannot be allowed in one year and it is also against the matching principles of income and expenditure. He relied on the decision of Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd vs. CIT, 225 ITR 802 (SC).

2.4 He also relied on the decision of Hon'ble Bombay High Court in the case of Taparia Tool Ltd, reported in 260 ITR 102 (Bom) wherein the Hon'ble High Court after considering the judgment of Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd vs. CIT, 225 ITR 802 (SC), has laid down the law in respect of 'matching principle of income'. The Assessing Officer held that total NCD expenses of Rs.21,49,419/- was required to be allowed in equal installments in five years. Accordingly, he allowed 20% of the expenses Rs.4,29,884/- as deduction in FY 2004-05 and the balance expenses of NCD of Rs.17,19,535/- was not allowed to the assessee.

2.5 The ld. CIT(A) has confirmed the disallowance made by the Assessing Officer on the ground that benefit to be accrued from the said expenditure will be available to the assessee in the period of five years. He also held that the claim of the appellant is also against the matching principles of income and expenditure. The ld. CIT(A) placed reliance on the decision of Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd vs. CIT (supra) and the Hon'ble Bombay High Court in the case of Taparia Tools Ltd (supra).

2.6 The ld. Counsel for the assessee submitted that the expenditure in respect of NCD was raised during the year and the entire expenditure is allowable as deduction. He placed reliance on the following judgments:-

a) India Cement Ltd vs. ITO, 60 ITR 52 (SC)
b) CIT vs. Office of the official liquidator, 316 ITR 181 (Guj.)
c) CIT vs. Mihir Textile Ltd, 316 ITR 403 (Guj)
d) Patel Filters Ltd vs. CIT, 264 ITR 21 (Guj.)

2.7 The ld. DR relied on the order of the ld. CIT(A).

2.8. We have heard the rival contentions, perused the material available on record and gone through the orders of the lower authorities. The Hon'ble Supreme Court in the case of Taparia Tools Ltd (372 ITR 605) has held that where assessee-company issued debenture for 5 years and the assessee did not want to spread over the interest expenditure over a period of 5 years, it claimed entire deductible expenditure in the same year in the return filed by it, in such a situation it was permissible in law to the assessee in consonance with the provisions of the Act to claim the expenditure in the year in which it was incurred. The decision of Hon'ble Bombay High Court in Taparia Tools Ltd (supra) is reversed by the Hon'ble Supreme Court in this case, whereby it was held as under:-

> *"(iv) That the assessee did not seek to spread this expenditure over a period of five years as in its return, it had claimed the entire interest paid up front as deductible expenditure in the same year. When this course of action was permissible in law to the assessee as it was in consonance with the provisions of the Act which permit the assessee to claim the expenditure in the year in which it was incurred, the fact that a different treatment was given in the books of account could not be a factor which would bar the assessee from claiming the entire expenditure as a deduction. Once a return in that manner was filed, the Assessing Officer was bound to carry out the assessment applying the provisions of the Act and not to go beyond the return. There is no estoppels against the statute and the Act enables and entitles the assessee to claim the entire expenditure in the manner it is claimed. "*

Therefore, in view of the judgment of the Hon'ble Supreme Court, we are of the considered view that the assessee is entitled to the entire deduction of NCD expenditure of Rs.21,49,419/- for AY 2005-06 and accordingly the balance NCD expenditure of Rs.17,19,535/- is allowed in AY 2005-06. Thus, the grounds of assessee's appeals on the same issue for AYs 2006-07, 2007-08, 2008-09 and 2009-10 are also allowed for the aforesaid reasoning.

3. **The second ground of the assessee for AYs 2005-06 and 2006-07 is against the disallowance made by the Assessing Officer out of prepayment charges made to NHB(National Housing Bank).**

3.1 For AY 2005-06, the Assessing Officer observed that the assessee-company has claimed in the statement of income a deduction on account of pre-payment charges to NHB amounting to Rs.2,62,45,000/-. The assessee claimed the said expenses in the Profit & Loss at Rs.42,02,920/- and the balance expenditure has been amortized in the books of account. In this regard, the assessee was asked to justify for claiming the entire NHB prepayment charges in the current year and also asked to explain why the expenses so incurred for refinancing of loan should not be considered as capital loss. Assessee has explained that during the year, the assessee-company has made early payment in respect of loan taken from National Housing Bank (NHB). In the books of account the same has been amortized at Rs.42,02,920/- and claimed Rs.2,62,45,400/- as deduction from the total income on actual payment basis. Treatment given in the books of accounts has no relevance to the computation of income under the provisions of the Income-tax Act, 1961. The assessee also relied on the decision of Hon'ble Supreme Court in the case of Tuticorn Alkali Chemicals & Fertilizers Ltd v/s. CIT (227 ITR 172 (SC)) wherein the issue in respect of accounting entry vis-à-vis determination of income has been discussed which is reproduced as below:-

> *"It is true that this Court has very often referred to accounting practice for ascertainment of profit made by a company or value of the assets of a company. But when the question is whether a receipt of money is taxable or not or whether certain deductions from that receipt are permissible in law or not, the question has to be decided according to the principles of law and not in accordance with accountancy practice. Accounting practice cannot override Section 56 or any other provision of the Act. As was pointed out by Lord Russell in the case of B.S.C. Footwear Ltd., the IT law does not march step by step in the footprints of the accountancy profession."*

The assessee has also placed reliance on the following judgments.:-

i) CIT vs. Indian Discount Co. Ltd., 75 ITR 191 (SC)
ii) CIT vs. Mogullines Ltd, 46 ITR 590 (Bom)
iii) CIT vs. Shoorji Vallabhdas & Co., 46 ITR 144 (SC)
iv) CIT vs. Kalooram Govindram, 57 ITR 630 (SC)

Regarding treating the same as capital loss by the AO, the assessee submitted that the same cannot be treated as capital loss as it is business expenditure and cannot be treated as capital loss.

The Assessing Officer was of the opinion that the expenditure so incurred cannot be allowed in one year as the said expenditure has been incurred for switching over of loan and the benefit out of the said expenditure will accrue over the balance period of loan refinanced. The AO stated that this was the reason why the assessee itself had claimed such expenses to the extent of Rs.42,02,920/- in the Profit and Loss account and the balance was amortized in the books of account. The AO placed reliance on the decision of Hon'ble Bombay High Court in the case of Taparia Tools Ltd, reported in 260 ITR 102 (Bom) wherein the Hon'ble High Court after considering the judgment of Hon'ble SC in the case of Madras Industrial Investment Corporation Ltd vs. CIT, 225 ITR 802 (SC) has laid down the law in respect of "matching principles of income". After considering the submissions of the assessee and the reliance placed on various judicial pronouncements, the ld. Assessing Officer allowed Rs.42,02,920/- for AY 2005-06 and balance amount of Rs.2,20,42,480/- was disallowed. On the similar reasoning, for AY, 2006-07, the Assessing Officer disallowed Rs.39,87,967/- against the total claim of Rs.49,87,459/-.

3.2 On appeal, the ld. CIT(A), after considering the submissions of the assessee, confirmed the aforesaid disallowances for both assessment years. Keeping in view the rational on the basis of which NCD expenses have been disallowed by following the decision of Hon'ble Supreme Court in the case of Madras Industrial Investment Corpn vs. CIT, 225 ITR 802 and the decision of the Hon'ble Bombay High Court in the case of Taparia Tools Ltd, 260 ITR 102.

3.3 Aggrieved by the order of the CIT(A), the assessee preferred this ground before the Tribunal.

The ld counsel of the assessee relied on the decision of Hon'ble Supreme Court in the case of Tuticorn Alkali Chemicals & Fertilizers Ltd v/s. CIT (

227 ITR 172 (SC)) and claimed that the entire expenditure is allowable as deduction during the year under consideration.

The ld. DR relied on the order of the ld. CIT(A).

3.4 We have heard the rival contentions, perused the material available on record and gone through the orders of the lower authorities. The issue raised in these two assessment years with regard to NHB prepayment charges is the similar issue that we already dealt with while dealing the issue of NCD expenses, where following the decision of Hon'ble Supreme Court in Taparia Tools Ltd (372 ITR 605), we held that assessee is entitled to the entire deduction of NCD expenditure. In view of the above facts and legal findings, we allow this ground of appeal of the assessee. Thus, the grounds of assessee's appeals on the same issue for AYs 2006-07 are also allowed for the aforesaid reasoning.

4. **The assessee's ground No.3 for AY 2005-06 is against the addition of Rs.24,01,200/- made by the Assessing Officer in respect of non-performing assets**.

4.1 During the assessment proceedings, the Assessing Officer noticed that the assessee has recognized revenue/income less to the extent of Rs.24,01,200/- due to change in NPA norms by National Housing Bank (NHB). The assessee was asked to explain why the said sum should not be brought to tax on accrual basis as it was following mercantile system of accounting and provision was made more than the prescribed norms of NHB. In response thereof, the assessee submitted that the National Housing Bank(NHB) has revised the norms for recognizing Non-Performing Assets(NPA) with effective from March 31,2005. As per the new norms,NPA are recognised on the basis of 90 days overdue as against 180 days past due under the old norms.As per the new norms,NPA are to be treated as Bad& Doubtfull if they remain outstanding for more than 15 months as against 31 months under the old norms.It was further stated that the assessee company has made compliance with these norms while preparation of accounts and the provisions have been made accordingly. It also explained that as a result of change in norms w.e.f. 31.03.2005 with regard to recognizing NPA the income has been recognized lesser to the extent of Rs24,01,200/. This explanation of the assessee was not found acceptable to the Assessing Officer and he held that the interest accrued upto 30.03.2005 was required to be recognized as per earlier norms effective till 30.03.2005 and he accordingly added the accrued interest of Rs.24,01,200/- in the income of the assessee.

4.2 Aggrieved, the assessee went in appeal before the ld. CIT(A) who, after considering the submissions of the assessee, confirmed the action of the Assessing Officer and dismissed the assessee's ground in this respect.

4.3 Aggrieved by the aforesaid order of the CIT(A), the assessee is further in appeal before us.

4.4 Ld. Counsel for the assessee drew our attention to National Housing Bank guidelines dated 31.03.2005, placed in the paper-book. He contended that the National Housing Bank (NHB) has revised the norms for recognizing non-performing assets (NPA) effective on 31.03.2005. He also contended that as per the new norms, NPA are recognized on the basis of 90 days overdue as against 180 days past due under the old norms. He submitted that the NHB guidelines for recognizing NPA was effective from 31.03.2005 and the accounts have been closed on 31.03.2005, therefore, the assessee has rightly followed the new norms of NHB for recognizing NPA, the action of Assessing Officer in this regard is not justified and the same may be deleted.

4.5 The ld. DR, on the other hand, supported the orders of the lower authorities.

4.6 We have heard the rival contentions, perused the material available on record and gone through the orders of the lower authorities. We find force in the submission of the assessee that the NHB guidelines for recognizing NPA were effective from 31.03.2005 and the accounts of the assessee have been closed on 31.03.2015. However, the same needs to be verified at the level of Assessing Officer. Therefore, in the interest of substantial justice, this issue is set aside to the file of the Assessing Officer for deciding afresh after taking into consideration all material facts as indicated above after providing due opportunity of hearing to the assessee. Thus, this ground of the assessee is allowed for statistical purposes.

5. **Next ground of the assessee relates to the disallowance of bad debts made by the Assessing Officer for A.Y.2005-06 toA.Y. 2009-10**

In the A.Y.2005-06, the Assessing officer has not allowed the bad debt claim of the assessee holding that the same has not become bad during the year under consideration. The ld. CIT(A) inclined his views to the AO's finding that the debt under reference cannot be claimed bad when the proceedings to recover the debt are being carried out by the appellant. He also relied upon the decisions of Hon'ble Gujarat High Court in the cases of Ahmedabad Electricity Co vs. CIT, 262 ITR 97 and Dhall Enterprise and Engineering Pvt Ltd vs. CIT, 295 ITR 48, emphasizing the requirement that the assessee should prove that the debt has become bad in that particular year. On appeal, the ld. CIT(A) confirmed these disallowances.

5.1 Aggrieved, the assessee is in appeal before us.

5.2 Ld. Counsel for the assessee contended that the bad debts written off during the year AY 2005-06 of Rs.2,44,43,353/- was in respect of individual home loans which were not recovered. He referred to various pages of submission in this regard furnished in the paper-books. It was stated that interest earned thereon has been duly credited to the Profit & Loss A/c in the earlier year and justify its claim of bad-debt. He further submitted that It is business loss of the assessee to be allowable under the Income-tax Act becouse of its business of providing loans for housing and non-housing purposes. The assessee also explained before the assessing officer that when the repayment of loan is not effected in normal course, the recovery team takes necessary steps to recover the outstanding amount, even after taking necessary steps if recovery not effected then the matter is referred to the legal team on the advise of the advocates for filing the suits before the appropriate authorities.Where recovery of loan amount with outstanding dues becomes irrecoverable even after legal action, the outstanding amount is written off. It was also submitted that as per the amended provisions of Section 36(1)(viii), once the amount is written off as bad debt, the same has to be allowed as deduction under the said provision. Reliance is placed on the judgment of Hon'ble High Courts in the case of (i) CIT vs. Morgen Securities & Credits Pvt Ltd, 292 ITR 339 (Del), (ii) CIT vs. Autometers Ltd, 292 ITR 345 (Del), (iii) CIT vs. Girish Bhagwat Prasad, 256 ITR 772 (Guj) and DCIT vs. Patidar Ginning & Pressing Co, 157 CTR 177 (Guj). He further placed reliance on the Hon'ble Apex Court judgments in the case of TRF vs. CIT, 323 ITR 397 (SC) and Vijaya Bank vs. CIT, 37 DTR 401 (SC.). He has also referred to the judgement of Vijay Bank vs. CIT, 37 DTR 401 (SC) decided by the Hon'ble Supreme Court.

5.3 Ld. DR, on the other hand, supported the orders of the lower authorities.

5.4 We have heard the rival contentions, perused the material available on record and gone through the orders of the lower authorities. We find that the Hon'ble Supreme Court in the case of TRF Ltd (supra) has held that it is not necessary for assessee to establish that debt, in fact, has become irrecoverable, it is enough if bad debt is written off as irrecoverable in accounts of assessee. The Hon'ble Apex Court in the case of Vijaya Bank (supra) has held as under:-

> *"The first question which arises for determination concerns the manner in which actual write off takes place under the accounting principles. Prior to Finance Act, 2001, many assessees used to take the benefit of deduction under s. 36(1)(vii) by merely debiting the impugned bad debt to the P&L a/c and, therefore, the Parliament stepped in by way of Explanation to say that mere reduction of profits by debiting the amount to the P&L a/c per se would not constitute actual write off. To this extent, submissions of the Revenue are sustainable. However, as stated by the Tribunal, in the present case, besides debiting the P&L a/c and creating a provision for bad and doubtful debt, the assessee-bank had correspondingly/simultaneously obliterated the said provision from its accounts by reducing the corresponding amount from loans and advances/debtors on the asset side of the balance sheet and, consequently, at the end of the year, the figure in the loans and advances or the debtors on the asset side of the balance sheet was shown as net of the provision "for impugned bad debt". After the Explanation, the assessee is now required not only to debit the P&L a/c but simultaneously also reduce loans and advances or the debtors from the asset side of the balance sheet to the extent of the corresponding amount so that, at the end of the year, the amount of loans and advances/debtors is shown as net of provisions for impugned bad debt. In the circumstances, the assessee was entitled to the benefit of deduction under s. 36(1)(vii) as there was an actual write off by the assessee in its books, as indicated above."*

We, therefore, respectfully following the aforesaid decisions of Hon'ble Apex Court in the case of TRF Ltd and Vijaya Bank (supra), delete the disallowance of bad debts made by the Assessing Officer. Thus, the grounds of assessee's appeals on the identical issue for AYs 2006-07, 2007-08, 2008-09 and 2009-10 are also allowed for the aforesaid reasoning.

6. **Next ground of the assessee relates to claim of deduction u/s 36(1)(viii).**

6.1 During the AY 2005-06 the assessee had claimed deduction u/ 36(1)(viii) to the amount of Rs.8,00,00,000/-. However, the Assessing officer noticed that the assessee was claiming deductions u/s 36(1)(viii) which was not derived from long term housing finance business. It was also found that assessee was transferring/assigning their housing loan portfolios to HDFC without holding for a period of 5 years. In this connection the Assessing officer stated that as per Explanation (e) to clause (viii) to sub-section (1) of Section 36 of the Act "long term finance" means only loan or allowances where the terms under which money are loaned or advanced provide for repayment along with interest there of during a period of not less than 5 years. The assessee claimed that in Section 36(1), nowhere it is provided that deduction u/s 36(1)(viii) will not be allowed if the tenure of the loan is reduced to less than 5 years.Once long term housing finance was made and necessary reserves created and maintained as provided in the Section, deduction u/s 36(1)(viii) is available. The assessee has also claimed on assigned/transferred of loan portfolios, the part of the interest received from the loanee was the interest income of the assessee on long term finance business and basic character of loans does not change at any point of time.

The Assessing Officer has not accepted the contention of the assessee on the reasoning as under:-

> *"8.3 (a) The section 36(l)(viii) as stood in the relevant assessment year stipulated as under "in respect of any special reserve created [and maintained] by a financial corporation which is engaged in providing long-term finance for [industrial or agricultural development or development of infrastructure facility in India or by a public company formed and registered in India with the main object of carrying on the business of providing long-*

term finance for construction or purchase of houses in India for residential purposes, an amount not exceeding forty per cent of the profits derived from such business of providing long-term finance (computed under the head "Profits and gains of business or profession" [before making any deduction under this clause]) carried to such reserve account:]........."

Further the Explanations to section 36(1)(viii) stipulates as under "[Explanation.—In this clause,—

(a) "financial corporation" shall include a public company and a Government company;
(b) "public company" shall have the meaning assigned to it in section 3 of the Companies Act, 1956 (1 of 1956);
(c) "Government company" shall have the meaning assigned to it in section 617 of the Companies Act, 1956 (1 of 1956);] [(d) "infrastructure facility" shall have the meaning assigned to it in clause (23G) of section 10;]
[(e) "long-term finance" means any loan or advance where the terms under which moneys are loaned or advanced provide for repayment along with interest thereof during a period of not less than five years;]

From the perusal of the above referred provisions of section 36(l)(viii) it can be seen that to be eligible for deductions u/s 36(1)(viii), the assessee should be providing long term finance and as per clause (e) of Explanations to Section 36(1)(viii), the long term finance is defined as the finance where the terms of repayment is not less than 5 years."

The assessee has given working of interest income arising from such loan portfolio transferred before holding for 5 years at Rs.1,27,02,648/- and other charges related to such transferred loan portfolio at Rs.9,78,625/-. The Assessing Officer has also observed that the assessee computed deduction u/s 36(1)(viii) by including bad debt recovered at Rs.18,73,000/- which was otherwise not an income derived from long term housing finance business. Similarly, the AO also noticed that the EMI residual related to earlier year transferred to the P & L A/c for taxation for the FY 2004-05 at Rs.3,81,42,000/- has been considered by the assessee as part of long term housing business which was in fact income arising out of such loan portfolio transferred by the assessee company in earlier years without holding the same for 5 years. The AO decided such above cited income as not derived from long term housing finance business and placed reliance on the following judicial decisions:-

i. Cambay Electric Supply Industrial Co. Ltd vs. CIT, 113 ITR 84 (SC);
ii. Eastern Seafood Exports P Ltd, 215 ITR 64 (Mad.);
iii. CIT vs. Sterling Foods, 237 ITR 579 (SC);
iv. CIT vs. Cement Distributors Ltd, 208 ITR 355 (Del.);
v. CIT vs. Cochin Refineries Ltd, 135 ITR 278 (Ker.);
vi. Pandian Chemicals Ltd vs. CIT, 262 ITR 278 (SC)

6.2 In view of above stated facts the AO has disallowed deductions u/s 36(1)(viii) of the following income:-

(i)	Bad Debts recovery	-	Rs. 18,73,000
(ii)	Interest earned on the loan portfolio Sold/transferred before 5 years, during the current financial year and included therein	-	Rs. 1,27,02,648
(iii)	Fees and other charges earned on the loan portfolio sold/transfer before 5 years, during the current financial year and included therein	-	Rs. 9,78,625
(iv)	EMI residual offered for taxation in current year and included therein	-	Rs.3,81,41,794

6.3 The ld. CIT(A) confirmed the above disallowances on the reasoning that in terms of loan transferred within the period of 5 years the assessee is not eligible for deduction u/s 36(1)(viii). The Ld.CIT (A) held that exclusion of Rs.1,27,02,648/- on portfolio transferred to HDFC in computing the deduction u/s 36(1)(viii) is justified, similarly the fees and charges amounting to Rs.9,78,625/- do not fall within the purview of Section 36(1)(viii). The ld. CIT(A) also held that bad debt recovery amounting to Rs.18,73,000/- was not established by the assessee with any cogent materials as income from long term housing finance. Regarding EMI residuaries offered during the year at Rs.3,81,41,794/-, ld. CIT(A) held that the debt contributing to the above source of income no longer owned by the assessee and the HDFC has been availing deduction in respect of interest from such assignments.

6.4 The ld. CIT(A) held that the re-computation of deduction u/s 36(1)(viii) resulting in addition of Rs.1,58,64,178/- is therefore confirmed.

During the course of proceedings before us,the ld. Counsel for the assessee relied on the judgment in the case of CIT vs. Weizmann, [2013] 33 taxmann.com 171 (Kar.), Rural Electrification Corporation Ltd, 221 CTR (AAR) 210. The ld. Counsel for the assessee also stated that the claim of the assessee regarding bad debt recovery of Ra.18,73,000/- for deduction u/s 36(1)(viii) is covered in favour of the assessee vide combined order of ITAT, Ahmedabad for AY 2004-05 and 2000-01 and referred to the various pages of paper-book.

6.6 The ld. DR relied on the order of the lower authorities.

6.7 We have carefully gone through the record and we are of the view that this aspect of the assessee's ground, i.e., bad debt recovery of Rs.18,73,000/- for deduction u/s 36(1)(viii), is covered by finding of the Co-ordinate Bench of ITAT, Ahmedabad vide combined order of ITA No.2238/Ahd/2007 for AY 2004-05 and ITA No.2601/Ahd/2008 for AY 2000-01. The finding of the Bench on this issue for the AY 2004-05 are reproduced as under:-

> *"19. As far as the bad debts recovered by the assessee are concerned, the AO haws observed that ratio of operating income from long term finance is 97.01%. In the year in which the loans have gone bad and the assessee has written off them, the eligible profit derived from long term housing finance was reduced by the amount written off by the assessee as bad debt. In this year, when the assessee recovered bad debts, its income from long term finance would be enhanced by that much amount. Thus, the AO has erred in rejecting the claim of the assessee. The AO has made reference to the*

judgment of the Hon'ble Supreme Court in the case of CIT Vs. Sterling Foods, 237 ITR 579 (SC). In that case while construing expression "derived", the Hon'ble Court has observed that there should be a nexus between the income "derived" from industrial undertaking. The assessee has sold import entitlement, and in that context, it was construed that such income was not "derived" from industrial undertaking. In the present case, income derived by the assessee is from long term finance i.e. interest income. It was reduced by virtue of written off of certain debts which has direct nexus with the income derived by the assessee. This year, these entries have been reversed by recovery of this bad debt. Thus, nexus is available. The AO is not justified to exclude the amount of bad debts recovered by the assessee for calculating the claim under section 36(1)(viii) of the Act."

6.8 Regarding the claim of the assessee pertaining to Rs.1,27,02,648/- interest earned on the loan portfolio sold/transfer before 5 years, the Ld. Counsel for the assessee relied on the order of Co-ordinate Bench of ITAT, Ahmedabad in assessee's own case for AYs 2004-05 and 2000-01 dated 11.07.2016. The ld. DR relied on the decision of lower authorities.

6.9. We have gone through the material on record carefully. It is noticed that Co-ordinate Bench of this ITAT in the case of the assessee (supra) held as under:-

"12. A bare perusal of the section would indicate that if an assessee is engaged in providing long term finance for industrial, agriculture or housing projects, then, out of profit derived from such business of providing long term finance, the assessee could claim a deduction of 40% and create a reserve of that amount. It is pertinent to observe that in this year, the assessee has created a special reserve of Rs.210 lakhs. As far as the conditions enumerated in section 36(1)(viii) is concerned, there is no dispute between the parties that the assessee has fulfilled conditions viz. (a) it is a public company, (b) it is engaged in providing finance for housing sector, (c) it has derived profit from such business of providing long term finance. It has created a special reserve. The short dispute between the AO and the assessee is whether by assigning of loan portfolio, the character of finance account which has generated profit or interest income to the assessee would change. The emphasis of the AO is on the interpretation of clause (e) appended to Explanation to the Section. According to the ld.AO, this clause suggests that loan account should be older than five year, only thereafter, the interest from such loan account would qualify for deduction. The case of the issue is that

by assignment of loan portfolio the character of loan account does not change. It still remains a long term finance. The right to receive interest has changed the hands. Accordingly the new company if fulfills other conditions contemplated in the Act, then, assessee will be entitled to claim deduction, otherwise, automatically it will not be available to any assessee after the assignment.

13. A perusal of section along with clause (e) no where reveals that the assessee is bound to maintain the account for five years, otherwise the Legislature would provide the deduction after completion of 5 years of such loan account. It only puts a condition about the nature of account. An assessee is entitled for deduction for the purpose of this section from the first year itself. The meaning construed by us can be further fortified by considering section 155 of the Income Tax Act. Under this section AO has been empowered to withdraw certain deduction to an assessee. For example investment allowance is being granted to an assessee u/s.32A in respect of ship and such ship was transferred before expiry of eight years in violation to the conditions, then u/s.155 it will be construed that such allowance was granted wrongly. Similarly, a provision has been made to withdraw number of such other benefits given under the Act. But, this section does not talk withdrawal of deduction granted u/s.36(1)(vii) of the Act. Therefore, we are of the view that the ld. Revenue authorities have erred in construing the meaning of clause (e) to section 36(1)(viii) of the Income Tax Act. We remit this issue to the file of the AO with a direction that he will verify the details of finance accounts, and if there is no change in the character of accounts i.e. their life span is more than five years, which continues even after assignment, then, interest income from those accounts upto the date of assignment would qualify for deduction under section 36(1)(viii) of the Act in the hands of the assessee. These directions are subject to fulfillment of other conditions which are not disputed before us. The ld.AO shall also ensure that double deduction should not be made i.e. by assessee as well as by HDFC."

6.10 In view of the above cited facts and judicial findings, we remit this issue to the file of the AO with a direction to verify the details of finance accounts, and if there is no change in the character of accounts, i.e. their life span is more than 5 years which continues even after assignment, then interest income from those accounts upto the date of assignment would qualify for deduction under secton 36(1)(viii) of the Act in the hands of the assessee. These deductions are subject to fulfillment of other conditions which are not disputed before us. The ld. AO shall also ensure that double deduction should not be made, i.e., by assessee as well as by HDFC.

7. Now, coming to Department's appeal for AY 2005-06. The ground No.1 reads as under:-

> *"1. The ld. CIT(A) erred in law and on facts in deleting the addition of Rs.9,83,32,951/- being the amount of EMI residuals accrued for the AY 2005-06."*

7.1 During the course of assessment proceedings, the Assessing Officer noticed from the notes forming part of accounts that the assessee company act as receiving and paying agent for effective recovery from borrower of loans which the company has sold/transferred and assigned until the loans are fully repaid. As a result of sale/transfer/assignment of such loans, surplus of Rs.9,83,32,951/- being the residual between the EMI recoverable from such individual borrower and payable to the buyer of loan was recognized during the year and credited to EMI Residual Account. The AO pointed out to the assessee why such EMI of Rs.9.83 crores should not be brought to tax. The assessee explained that the same cannot be taxed as income of the year on the following grounds:-

> *"5.1 In the computation of income filed along with the Return of Income, a sum of Rs.1,45,79,144/- has been reduced from the total income. The Appellant has sold/transferred/assigned individual loan portfolios in earlier year and profit in respect of the said loan portfolios was duly booked in profit of relevant previous year. During the year under consideration, due to earlier payment of loans and, therefore, reversal entry in respect of profit of those tranche which was booked in earlier year has been passed. Total amount of reversal entry of income is of Rs.5,27,35,943/-.*
>
> *5.2 During the year under consideration, the Appellant has sold/transferred or assigned individual home loans aggregating to Rs.40,13,87,920/-. As a result of the sale/transfer/assignment, entire surplus of Rs.9,83,32,951/- being the difference between EMI recoverable from such individual borrowers during the remaining tenure of loan and payable to the Buyer for the remaining tenure of the loan was recognized during the year in books of account. Out of the said EMI residual, the Appellant company has further*

set aside Rs.3,10,17,864/- being Reserve for contingencies to meet any contingency arising out of prepayment and the balance of Rs.6,73,15,087/- is transferred to Profit & Loss account. The said amount pertains to the whole un-expired period of loan portfolio.

5.3 As mentioned in paragraph 5.1 above, reversal entry being income of Rs.5,27,35,943/- has been passed during the year under consideration which is a notional entry and the same is required to be added while computing the income under the Income Tax Act, 1961, and, therefore, addition of Rs. 1,45,79,144/- has been made being the difference between the amount of Rs.5,27,35,943/- being reversal entry of income and Rs.6,73,15,087/- being the income in respect of EMI Residual recognized in the book of the year under consideration. In other words, amount of Rs.6,73,15,087/- has been added to the income and amount of Rs.5,27,35,943/- has been excluded from the total income for the reason that the same cannot be said to have accrued for the year under consideration. This treatment is in line with the guidance note on "Accounting for securitisation" issued by the Institute of Chartered Accountants of India.

5.4 Thus, after excluding EMI residual income of Rs.6,73,15,087/-, an amount of Rs.3,81,41,794/- has been offered for taxation and added to the total income which in fact has actually accrued during the year under consideration which has been offered for taxation in the Statement of Income.

5.5 The Assessing Officer asked the Appellant to explain why the amount of Rs.9,83,32,951/- be not brought to tax. With regard to this, it is submitted that the same cannot be taxed as income of the year on the following grounds:

(a) As explained above, the amount in question pertains to the entire un-expired period of loan portfolio. The same cannot be said to have accrued for the year under consideration and therefore, the same cannot be brought to the tax as income of the year under consideration.

(b) In the present case, the Appellant is appointed as agent by buyer for the purpose of recovery of loan amount assigned to buyer and for performing that tasks, the Appellant is entitled to certain portion of interest collected from the loanee by way of service charges. Therefore, on account of such transactions, out of the amount receivable as service charge for rendering the services over the period of loan, as mentioned above, the part of the said amount which is for the relevant year and which has accrued at the year end only can be the subject matter of tax for the year.

(c) It is also submitted that the agreement does not oblige buyer to continue to retain the services of the Appellant as agent for recovery of

loans throughout the period for which the installments are outstanding. Attention is invited to Clause 5.5 of the Agreement which reads as under:

> *"The seller shall act and continue to act as the Receiving and Paying Agent until all the Receivables shall have been paid. In the event of the occurrence of any Event or Default, and if so decided by the Beneficiary, the Seller shall cease to act as the Receiving and Paying Agent. In that event the Beneficiary may, at its option, terminate the appointment of the Seller as the Receiving and Paying Agent after giving 20 days notice. The Beneficiary shall appoint any bank or institution as the new Receiving and Paying Agent hereunder upon such terms and conditions as the beneficiary and the new Receiving and Paying Agent may mutually agree. All the fees payable to such new Receiving and Paying Agent shall be borne by and be to the account of the Beneficiary. "*

(d) This clause makes it clear that there is no guarantee that the company shall continue to act as agent for buyer. In the event of non-acting as agent, question of getting remuneration will not arise. Even otherwise, the Appellant is entitled to service charges for carrying out the work of collecting the amount from the loanee over a period of years. Under the circumstances, the difference between the amount of installments in respect of interest to be collected and be paid to buyer cannot be said to be income of the current year in as much as the said income is for running services over a period of years.

(e) In view of the above, the said difference cannot be treated as income of the Appellant for the current year because;

(i) It is conditional upon the company to continue to act as agent of buyer for the whole period; and
(ii) It is by way of remuneration for providing services for the whole period and therefore, must be taxed to the extent the income relates to the year only.

(f) The Appellant further submits that the EMI receivable recognized in the books will arise only if the borrower continues to serve the loan for the agreed term of loan. However in case if the borrower exercises the option of making the prepayment of loan, the EMI residual calculated may not actually become realizable and will have to be reversed in book in the year of prepayment, as the loan is foreclosed before the expiry of the agreed tenure, for the this reason during the under assessment reversal entry has been passed as mentioned in above para. In such case no income for the period after the prepayment of loan will

actually be realized and the same is reversed in the books. Thus, the income recognized in the books has not actually accrued and the same is contingent on the tenure of the loan. Thus, in lieu of this contingency the income cannot be taxed though the same has been recognized in the books.

(g) *Attention is also invited to the decision of the Supreme Court of India in case of Madras Industrial Investments Corporation Ltd. v. ITC [225 ITR 802]. In that case an assessee had claimed deduction of expenditure in one year though benefit of the same was available to it over a period of 12 years. The Supreme Court observed as under :-*

> *"Ordinarily, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety of years even if the assesses has written it off in his books over a number of years. However, the facts may justify an assessee who has ; incurred expenditure in a particular year to spread and claimed it over a period of ensuing years. In fact allowing the entire expenditure in one year might give a very distorted picture of the profits of a particular year."*

It is submitted that the above judgment of the Supreme Court is in the field of expenditure. However, the principles laid down in the said judgment are equally applicable in the field of computing of income for the purpose of taxing of the income.

(h) *Regarding the accounting entries passed in respect of EMI Residual Income in the books of accounts, it is submitted that the accounting entries cannot be made base for deciding the taxability of income. Attention is invited to the Supreme Court's decision in the case of Tuticorn Alkali Chemicals and Fertilizers Ltd. v. C.I.T. [227 ITR 172 (SC)], wherein issue in respect of accounting entry vis-a-vis determination of income has been discussed which is reproduced herein below: -*

"It is true that this Court has very often referred to accounting practice for ascertainment of profit made by a company or value of the assets of company. But when the question is whether a receipt of money is taxable or not or whether certain deductions from that receipt are permissible in law or not, the question has to be decided according to the principles of law and not in accordance with accountancy practice. Accounting practice cannot override section 56 or any other provisions of the Act. As was pointed out by Lord Russell in the case of B.S.C. Footwear Ltd. 91970) [77 ITR 857], 860 (CA), the income tax law does not march step by step in the foot steps of the accountancy profession. "

Reliance is also placed on the following judgments:
(a) CIT v. Indian Discount Co. Ltd. [75 ITR 191 (SC)]
(b) CIT v. Mogullines Ltd. [46 ITR 590 (Bom)]
(c) CIT v. Shoorji Vallabhdas & Co. [46 ITR 144 (SC)]
(d) CIT v. Ashokbhai Chimanbhai [56 ITR 42]
(e) CIT v. Kalooram Govindram (57 ITR 630 (SC)]

(i) It is also submitted that as per the scheme of Income Tax, actually accrued income can be brought to tax and not the hypothetical income, which has not accrued, can be brought to tax. Reliance is placed on the following judgments:
(a) State Bank of Travankore v. CIT [158 ITR 102 (SC)]
(b) Godhara Electricity Co.Ltd. v. CIT[225 ITR 746 (SC)]
(c) CIT v. Birla GwaliorLtd. [89 ITR 266 (SC)]
(d) Pune Electric Supply Co. Ltd. v. CIT [57 ITR 521 (SC) ;

(j) It is also pointed out that similar issue was involved in assessment year 2001-02, 2002-03, 2003-04 and 2004-05 and the Learned CIT(A)-VIII, Ahmedabad has decided the issue in our favour. It is therefore requested not to make any addition with this regard."

7.2 The AO has not accepted the explanation of the assessee and stated that in view of the detailed reasons mentioned in the orders of earlier yars for AY 2001-02 to AY 2004-05, the above sum of Rs.9,83,32,951/- was added back to the total income being the EMI residual not accounted by the assessee as income.

7.3 The ld. CIT(A) deleted the addition on the basis of following findings:-

"8.5 I have considered the facts of the case and the submissions of the Ld.A.R. carefully. There is no dispute about the fact that the appellant sold the home loan portfolios and the EMI residual under reference are relatable to future years. The income accrued during the period under reference has been offered in the statement of income. The appellant will offer the balance of EMI residuary is for taxation in the years to follow. Therefore, under these circumstances, there does not appears to be any justification for taxing the future income which has not accrued to the appellant during the relevant period, merely on the basis of book entries.

8.6 It is seen that similar addition was made on the identical facts in the income of the appellant in the A.Yrs.2001-02 to 2004-05. The additions so *made were deleted by my Ld. Predecessor by his appellate orders for respective assessment years. My Ld. Predecessor while deleting the addition on similar facts and circumstances in the A.Y.2003-04 observed as under:*

> *"3.1 Ad addition to taxable income could be made only on the concept of real income (accrued income) or on the basis of legal fiction. In this case, it is neither. Whatever accounting entries they have made are of no relevance unless they represent the accrual of income for the relevant year. In the appellant's case, the real income on the basis of accrual read with the agreement between the appellant and HDFC has been correctly offered in the computation statement and nothing more is required to be added. Further, the appellant has not sold its Housing Loan Portfolio with both principal and future interest components. It has only sold the principal loan part outstanding as on the date at par and the future interest components are to be recovered from the borrowers and passed it on to HDFC. HDFC has not paid to the appellant anything to cover the future interest accruals. As such the observation of the A.O. that the entire interest income is taxable in this year is out of place and does not have any legal basis.*
>
> *3.2 It is also relevant to note that similar additions have been disallowed by my predecessors. No new materials have been brought on record and the factual position being identical, I do not find any reason to differ with the findings of my predecessors on this issue. Even for the sake of argument, if the accounting entries were to be rejected as improper, even then only the accrued income will be taxed in this year and that is what the appellant has already offered. The agreement between the appellant and the HDFC has to be understood in a holistic perspective and any disjointed view would lead to incorrect understanding. In the light of the foregoing discussions and as laid down by the Apex Court cited above (227 ITR 172), addition made by the A.O. in this case is not sustain able and I direct him to delete the said addition as it only represents income for the future years."*

8.7 In view of the above discussion, it is held that in the year under reference only the accrued income for the relevant period is to be taxed in respect of loan portfolio sold to HDFC and being part of appellant share. The future share of the appellant subject to recovery during the unexpired period loans cannot be taxed as for the year under reference there is no right to receive the said amount as on 31.3.2005 from anybody, not even from HDFC. In view of this, the A.O. is directed to delete the addition of Rs.9,83,32,951/-. The appellant succeeds in this ground of appeal."

7.4 The ld. DR relied on the order of the Assessing Officer. The ld. Counsel for the assessee contended that this is covered issue and the Co-ordinate Bench of ITAT, Ahmedabad in assessee's own case vide a combined order for AY 2004-05 and 2000-01 in ITA No.2238/Ahd/2007 and 2601/Ahd/2008 has confirmed the order of the ld. CIT(A) in which the similar addition made by the Assessing Officer was deleted.

7.5 We have heard both the parties and gone through the material as per record carefully. It is seen that the identical issue was considered by the Co-ordinate Bench of the ITAT as cited above on the basis of similar issue decided by the ITAT in the AY 2001-02. The findings of the Tribunal on this issue read as under:-

> *"5. As far as second ground is concerned, an identical issue was considered by the ITAT in the Asstt.Year 2001-02. The finding of the Tribunal on this issue reads as under:*
>
> > *"18. In the appeal filed by the Assessing Officer, the assessee has raised the following grievance:*
> >
> > *The ld. CIT(A) erred in law and on facts of the case in deleting the disallowance of EMI residual account amounting to Rs.803.40 lacs, without appreciating the definition of income as explained by the Hon'ble Supreme Court in the case of Shiv Prakash Janak Raj & Co. reported at 222 ITR 583.*
> >
> > *19. So far as this issue is concerned, the relevant material facts are as follows. During the course of the assessment proceedings, the Assessing Officer noticed that the assessee has sold is portfolio of individual home loans aggregating to Rs 8,109.09 lakhs but the assessee is obliged to act as receiving and paying agent for effecting recoveries from the individual borrowers until the point of time when all these loans are fully recovered. Under this arrangement, the assessee is entitled to retain interest in excess of the agreed rate of interest recovered from the borrowers. It was in this backdrop that the assessee computed the surplus of Rs 932.42 lakhs being the difference between EMI recoverable form the borrowers during the remain loan tenure, and the amount payable by the assessee to the buyer of assessee's home loan portfolio. This represented, what was termed as, EMI residual. Out of this amount, the assessee further set aside a sum of Rs 428.31 lakhs on account of contingencies of pre-payments. The balance amount of Rs 507.29 lakhs was transferred to the profit and loss account. In the computation of income, it appears, that the assessee reduced this amount from net profit and then offered only Rs 132.02 lakhs as income of the relevant year. This computation was on the basis of income actually earned so far as interest differential was*

concerned. The Assessing Officer, however, was not satisfied with the same. He was of the view that entire difference between recovery value of housing loans and amount payable to the buyer of loan portfolio should be brought to tax in this year itself. He also held that even the amount of contingency set aside by the assessee at Rs 428.31 lakhs could not be allowed as it is only a contingent, and not real, liability. He thus proceeded to bring to tax the balance amount of Rs.803.40 lakhs (i.e. EMI residual of Rs 935.42 lakhs minus the amount already offered to tax amounting to Rs 132.02 lakhs) in this assessment year. Aggrieved by the stand so taken by the Assessing Officer, assessee carried the matter in appeal before the CIT(A) who deleted the addition on the ground that the income is to be brought to tax only when it accrues and the accrual takes place only in the year in which the amounts recovered from the borrowers are more than payable to the buyer of loan portfolio. It was also noted that the EMI residual income has been subsequently brought to tax in the year in which related recoveries have taken place. The Assessing Officer is aggrieved of the relief so given by the CIT(A) and is in appeal before us.

20. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

21. In the landmark judgment of Chainrup Sampatram Vs CIT [(1953) 24 ITR 481 (SC)], Hon'ble Supreme Court has observed that "While anticipated loss is thus taken into account, anticipated profit in the shape of appreciated value of the closing stock is not brought into the account, as no prudent trader would care to show increased profit before its actual realisation. This is the theory underlying the rule that the closing stock is to be valued at cost or market price whichever is the lower, and it is now generally accepted as an established rule of commercial practice and accountancy. As profits for income-tax purposes are to be computed in conformity with the ordinary principles of commercial accounting, unless of course, such principles have been superseded or modified by legislative enactments, unrealised profits in the shape of appreciated value of goods remaining unsold at the end of an accounting year and carried over to the following year's account in a business that is continuing are not brought into the charge as a matter of practice, though, as already stated, loss due to a fall in price below cost is allowed even if such loss has not been actually realised." The principle is thus unambiguous. The principles of conservatism, and considerations of prudence, in the accounting treatment require that no anticipated profits be treated as income until the profits are realized, and, at the same time, an anticipated loss to be deducted from commercial profits, at the first sign of its reasonable possibility. There may seem to be, at first sight, an element of dichotomy in this approach inasmuch as anticipated losses are *taken into account and anticipatory profits are ignored, but that is the impact of accounting principles sanctioned by the statute and the law laid down by Hon'ble Supreme Court. No matter how reasonable is it to assume that the assessee will make these profits, these profits cannot be brought to tax at this stage. That is what the legal position, for the detailed reasons set out above, is.*

22. In the case before us, whatever be certainty of the assessee realizing the profits in future as a result of this arrangement, these profits can only be brought to tax when these actually accrue and arise and that stage comes only when the recoveries are made from the individual borrowers. It is also not in dispute, in the light of the categorical finding given by the CIT(A), that the related incomes are brought to tax in subsequent period when these income accrue and arise. As for the reference to Hon'ble Supreme Court's judgment in the case of CIT Vs Shiv Prakash Janak Raj & Co Pvt Ltd [(1996) 222 ITR 583 (SC)], that was a case in which accrual had admittedly taken place. That is not the situation before us. In these circumstances, we see no infirmity in the well reasoned conclusion arrived at by the CIT(A) and decline to interfere in the matter.

23. The appeal filed by the Assessing Officer is thus dismissed.

24. To sum up, for the assessment year 2001-02 in quantum assessment proceedings, while the appeal filed by the assessee is partly allowed, the appeal filed by the Assessing Officer is dismissed."

6. There is no disparity of facts. The ground raised by the AO is identical, as was raised in the Asstt.Year 2001-02. Following the decision of the Co-ordinate Bench, we do not find any merit in this ground of appeal, which is accordingly rejected."

7.6 We have considered the same and found that the ground raised by the AO are identical as was raised in AY 2001-02 and in AY 2000-01; and following the decision of Co-ordinate Bench we do not find any merit in the ground of appeal of Revenue which is accordingly rejected. Similarly, the appeal of the Department on the identical issues of EMI Residual for AY 2007-08 to AY 2009-10 are also rejected.

8. Ground No.2 of the Revenue's appeal for AY 2005-06 reads as under:-

"The ld. CIT(A) erred in law and on facts in allowing the disallowance of Rs.1,71,000/- made by the Assessing Officer under the provision of Section 35D of the Act."

8.1 In their return of income the assessee had claimed deduction u/s 35D of the Act at Rs.1,71,000/- being the FCD issue expenditure; the AO disallowed the claim on the basis of earlier year's disallowance made on the similar ground. The ld. CIT-DR contended that the issue is squarely covered in favour of the Revenue by the Co-ordinate Bench of ITAT orders for AY 2000-01 dated 11.07.2016 and by the decision of the Hon'ble jurisdictional High Court. The relevant findings of the ITAT (supra) read as under:-

> *"4. It is pertinent to mention that section 35D of the Income Tax Act, provides that certain expenditure mentioned therein incurred before the commencement of business and which have been amortized is allowed as deduction. However, after the business has been commenced the expenditure mentioned therein can be amortized and allowed deduction u/s.35D of the Act only if the said expenditure is incurred in connection with the extension of industrial undertaking. It emerges out from the record that the assessee had incurred expenditure for issuance of fully convertible debenture. It has claimed 1/10 th of the expenditure. In this year, such expenditure was claimed at Rs.11,63,048/-. The ld.CIT(A) has allowed this claim of the assessee. However, in the case of Gujarat Ambuja Cotspin Vs. CIT, Hon'ble jurisdictional High Court has held that expenditure incurred on issue of convertible debenture is a capital expenditure. It cannot be allowed as deduction. Similar view has been taken in the case of Torrent Pharmaceuticals Ltd. Vs. ACIT, 55 taxmann.com 170 (Guj). Since assessee has incurred the expenditure on issue of convertible debenture, which is directly related to the expansion of capital base of the company, the Hon'ble High Court held that such expenditure is to be treated as capital expenditure. The ld. Counsel for the assessee was unable to controvert this contention of the ld. DR. We, therefore, allow this ground of appeal of the Revenue and set aside the order of the CIT(A) and restore the order of the AO on this issue."*

8.2 We have considered the material on record and the legal findings and accordingly, allow this ground of the Revenue and restore the order of the Assessing Officer in this issue.

9. Now, we consider the following penalty appeals:-

ITA No.614/Ahd/2012 – AY 2005-06, by assessee
ITA No.625/Ahd/2012 – AY 2005-06, by Revenue

ITA No.1198/Ahd/2012 – AY 2006-07, by assessee
ITA No.1562/Ahd/2012 – AY 2006-07, by Revenue

In the quantum appeals for respective years, we have deleted the respective additions on which the penalty has been made. When the addition in respect of which the penalty is sustained by the CIT(A) has been deleted by the ITAT, the penalty in respect of such addition cannot survive. Thus, the appeals of the assessee in this regard are allowed and that of Revenue are dismissed.

10. In the combined result, assessee's appeal bearing ITA Nos.1295/Ahd/2009, 3338/Ahd/2009, 3260/Ahd/2010, 615/Ahd/2012 & 1199/Ahd/2012 are allowed for statistical purposes, Revenue's appeals bearing ITA Nos.46/Ahd/2011, 625/Ahd/2012, 649/Ahd/2012, 1562/Ahd/2012 & 1163/Ahd/2012 are dismissed; Revenue's appeal bearing ITA No. 1556/Ahd/2009 is partly allowed and assessee's appeal bearing ITA Nos. 614/Ahd/2012 & 1198/Ahd/2012 are allowed.

Order pronounced in the Court on 17th August, 2016 at Ahmedabad.

Sd/-	**Sd/-**
(R.P. TOLANI)	**(AMARJIT SINGH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 17/08/2016
Biju T.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad