INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI VIMAL KUMAR, JUDICIAL MEMBER

ITA No. 1962/Del/2023
(Assessment Year: 2010-11)

Indus Towers Ltd (formerly known as Bharti Infratel Ltd), 4th Floor, DLF Cybercity, Building No. 10, Tower A, DLF QE, SO Gurgaon, Haryana	Vs.	DCIT, Circle-12(1), New Delhi
(Appellant)		(Respondent)
PAN: AADCV0274F		

ITA No. 2212/Del/2023
(Assessment Year: 2010-11)

ACIT, Central Circle-10, New Delhi	Vs.	Indus Towers Ltd, 4th Floor, DLF Cybercity, Gurgaon, Haryana
(Appellant)		(Respondent)
PAN: AADCV0274F		

ITA No. 2762/Del/2023
(Assessment Year: 2010-11)

Indus Towers Ltd (formerly known as Bharti Infratel Ltd), 4th Floor, DLF Cybercity, Building No. 10, Tower A, DLF QE, SO Gurgaon, Haryana	Vs.	DCIT, Circle-12(1), New Delhi
(Appellant)		(Respondent)
PAN: AADCV0274F		

Assessee by :	Shri Ajay Vohra, Sr. Adv Shri Rohit Jain, Adv Shri Deepesh Jain, Adv Ms. Shaurya Jain, CA
Revenue by:	Shri Mukesh Kumar Jain, CIT DR
Date of Hearing	12/09/2024
Date of pronouncement	10/12/2024

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O R D E R

PER M. BALAGANESH, A. M.:

1. These are the appeals filed by the assessee and revenue in ITA Nos.1962/Del/2023, 2212/Del/2023 for AY 2010-11, arise out of the order of the Commissioner of Income Tax (Appeals)-31, New Delhi [hereinafter referred to as 'ld. CIT(A)', in short] in Appeal No. 1135/22-23 dated 05.06.2023 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 09.02.2019 by the Assessing Officer, DCIT, Circle-12 (1), New Delhi (hereinafter referred to as 'ld. AO').

2. The appeal in ITA No.2762/Del/2023 for AY 2010-11, arise out of the order of the Commissioner of Income Tax (Appeals)-31, New Delhi [hereinafter referred to as 'ld. CIT(A)', in short] in Appeal No. 1135/22-23 dated 03.08.2023 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'.

3. Ground No. 1, 1.1, 2, 10, 10.1 raised by the assessee are with regard to issue of depreciation of passive infrastructure assets (PIAs).

3.1 We have heard the rival submissions and perused the material available on record. The assessee is engaged in the business of providing passive infrastructure (PI) telecommunication services to the telecom operators. The return of income for AY 2010-11 was filed by the assessee on 30.09.2010 declaring total loss of Rs. 403.85 crores. In the meanwhile, Vodafone Infrastructure Limited ('VInfL'), Bharti Infratel Ventures Limited ('BIVL') and Idea Cellular Towers Infrastructure Limited ('ICTIL') (hereinafter referred to as 'transferor companies' or 'TowerCos') jointly filed a scheme of arrangement (hereinafter referred to as the 'Scheme') under

sections 391 to 394 of the Companies Act, 1956, seeking approval/ sanction of the Court for merger of the transferor companies with the assessee. The Scheme was sanctioned by the Hon'ble Delhi High Court vide its order dated April 18, 2013, with the appointed date being 1-4-2009. Pursuant thereto, the assessee revised its financial statements to give effect to the Scheme approved by the Hon'ble High Court and basis the same, filed a revised return of income on 29.11.2013 after giving due effect to the aforesaid merger, reporting a loss of (Rs.793,20,41,502/-) under normal provisions of the Act and a book profit of Rs.4,69,90,41,333/- as per the provisions of section 115JB of the Act. The aforesaid revised return of income was treated as invalid and non-est by the learned AO basis the reasoning that such return of income was filed beyond the time limit as specified under section 139(5) of the Act, which had already expired on 31-3-2013. Accordingly, the learned AO issued a reassessment notice under section 148 of the Act requiring the assessee to file its return of income. Aggrieved by the action of the learned AO, the assessee preferred a writ petition before the Hon'ble Delhi High Court in WP(C) No. 239/2014 which was disposed-off vide order dated 11-11-2014 holding that the assessment for the subject year (i.e AY 2010-11) should be concluded basis the consolidated revised return filed by the assessee and the assessment of the subsequent years, i.e., AY 2011-12 and AY 2012-13 will be carried out sequentially. It was further held that in view of the merger, the only surviving taxable entity is the assessee. It was concluded that no reassessment proceedings are thus necessitated.

3.2 In compliance with the above directions of the Hon'ble High Court, the assessment proceedings for AY 2010-11 were initiated basis the consolidated revised return filed by the assessee. During the assessment proceedings, the assessee filed various submissions/ details as required by

the AO. After considering the facts of the case and the submissions on record, the AO, citing complexity in the accounts of the assessee, directed for a special audit under section 142(2A) of the Act on 17-3-2015. Resultantly, the Special Audit proceedings were conducted by Special Auditor, G. K. Choksi & Co., and a report to this effect was issued on 12-12-2018.

3.3 Pursuant to the above, assessment proceedings were conducted by the office of the learned AO and detailed questionnaires were issued in response to which the assessee furnished various submissions/clarifications/details. During the assessment proceedings, the assessee also filed a detailed letter dated 6-2-2019 correcting/re-computing the following claim as per the return of income:

-Claim of additional depreciation on energy saving devices amounting to Rs. 1534,67,20,392/- and
-Offering disallowance of Rs.3,32,37,255/- under section 40(a) (i) of the Act.

3.4 The assessee company was formed as a joint venture between Bharti Infratel Limited ('BIL'), Vodafone India Limited ('VIL') and Aditya Birla Telecom Limited ('ABTL') [referred as Operating Companies- OpCos.] and was incorporated on 20-11-2007 with the objective of providing PI support services to the telecom operating entities of the shareholder groups [OpCos.] and other independent telecom operators. For consolidation of their PIAs, the shareholders (including the relevant group entities) entered into a Framework agreement dated 8-12-2007, which inter-alia provided a two-step restructuring with effect from 1-4-2009:-

-Step 1 - Transfer of the PIAs owned by the shareholder groups to their respective Tower Companies ('TowerCo(s)') under a Court approved scheme (hereinafter referred to as 'Transfer Scheme'); and

-Step 2- Merger of the TowerCos with applicant under a Court approved Merger Scheme.

3.5 The aforesaid Framework was entered pursuant to Project "MOST" (Mobile Operator Shared Towers) conceived by the telecom operators in pursuant to recommendation of Telecom Regulatory Authority of India (TRAI) for sharing of Passive Infrastructure. Framework Agreement is placed at pages 1114 to 1201 of Vol. II of Paper Book.

3.6 The aforesaid rearrangement/ reorganization was proposed/ done in line with the recommendation/ plan of the Ministry of Information and Technology (Department of Telecommunication). The eleventh five-year plan (2007-2012) of the Planning Commission provided for promotion of sharing of telecom infrastructure (towers), so as to reduce the costs and also for facilitating rural penetration. The said policy of the Government was based on report of the working group on the telecom sector for the Eleventh Five Year Plan (2007-2012), which repeatedly mentioned about sharing of resources/ tower infrastructure.

3.7 Accordingly, in order to give effect to the above and transfer the PIAs to the TowerCos (under Step - 1 above), each of the shareholder groups, i.e. Bharti, Vodafone and Idea decided to transfer their specified

PIAs to their TowerCos, i.e. BIVL, VInfl and ICTIL, respectively without any consideration under separate Court approved Transfer Schemes.

3.8 The Transfer Schemes were duly approved by different Hon'ble High Courts [Gujarat High Court- affirmed by apex Court, Delhi High Courts, Bombay High Court and Calcutta High Court); schemes were implemented with effect from the appointed date being 1-4-2009 in case of Bharti and Vodafone and 1-1-2009 in case of the Idea Group.

3.9 Since the PIAs were acquired by the TowerCos without any consideration, transfer of the PIAs 'gift' As per Explanation 2 to section 43(1) of the Act, where an asset is acquired by the assessee by way of 'gift' or 'inheritance', the actual cost of the asset to the assessee shall be the actual cost to the previous owner as reduced by the depreciation that would have been allowable to the assessee. In other words, the tax written down value ('WDV') of the assets in the hands of the transferor/ donor is considered as the 'actual cost' of such gifted assets in the hands of the recipient/donee.

3.10 Accordingly, tax depreciation on such PIAs, which were gifted by the OpCos to the TowerCos under the De-merger Schemes were determined based on the tax WDV of such PIAs in the hands of the OpCos as on 1-4-2009, which represents the 'actual cost' in the hands of the TowerCos for the purpose of claiming tax depreciation in FY 2009-10 and for subsequent years.

3.11 Subsequent to the transfer of the PIAs into the TowerCos under Step 2, the TowerCos (i.e. VInfL, BIVL and ICTIL) were merged into the

assessee under a scheme of amalgamation (i.e. the Merger Scheme) which took effect from the appointed date of 1-4-2009. The merger was duly sanctioned vide the order dated 18-4-2013 passed by the Hon'ble Delhi High Court. Importantly, merger of TowerCos under Step 2 with the assessee undisputedly qualified as tax neutral amalgamation under section 2(1B) of the Act.

3.12 Since the merger of TowerCos with the assessee undisputedly qualified as an 'amalgamation', as defined under section 2(1B) of the Act, as per Explanation 2 to section 43(6) of the Act, the tax WDV of the PIAs in the hands of the TowerCos became the actual cost of such assets in the hands of the assessee and accordingly, the assessee claimed tax depreciation for FY 2009-10 (AY 2010-11) with reference to such tax WDV.

3.13 The assessee submitted that gift of PIAs by operating companies to tower company as part of first step was specifically considered and approved by the Hon'ble High Court, which fact is not accepted by the revenue which has given rise to instant proceedings before us. Further, the fact that the second step of merger of tower companies with the assessee as a tax neutral merger is not disputed by the revenue. Pursuant to the aforesaid transfer of PIAs in 2 steps, the tax WDV of the PIAs in the hands of the operating companies (which gifted the assets to tower companies which later got merged with the assessee) became part WDV in the hands of the assessee for the purpose of claiming depreciation in AY 2010-11. It was specifically clarified that no tax depreciation was claimed by the operating companies on the PIAs transfer to the tower companies under the transfer schemes which was specifically transferred to the assessee under the Merger Scheme w.e.f 1.04.2009 and that it is the assessee alone

that had claimed depreciation on 1334,19,48,510/- on PIAs transferred to the assessee under the Merger Scheme on the WDV on the PIAs in the hands of the operating companies.

3.14 The learned AO disputed the first step and disallowed tax depreciation of Rs.1344,19,48,510/- alleging that the transfer of PIAs from the OpCos to the TowerCos was not in the nature of 'gift' and therefore, held that the benefit under section 47(iii) or Explanation 2 of section 43(1) of the Act cannot be taken to determine the actual cost/ tax WDV in the hands of the TowerCos and thus, the tax WDV in the hands of the OpCos cannot become the actual cost/ tax WDV in hands of the TowerCos and resultantly, in the hands of the assessee.

3.15 The learned AO concluded that it is a case of simple transfer and the actual cost of the PIAs in hands of the assessee would be determined basis the amount of consideration paid by the TowerCos, which in the present case is Nil. Therefore, the actual cost of the PIAs in the hands of the appellant should be Nil and the assessee would, thus, not be entitled to claim any tax depreciation on such Nil cost.

3.16 The learned AO has primarily provided the following reasoning to hold that the transfer of PIAs from the OpCos to the TowerCos cannot be construed as 'gift':-

a) The initial transaction was made as an arrangement of demerger under section 391/394 of the Companies Act, 1956 and was not sanctioned as a gift by the Hon'ble High Courts of Gujarat and Delhi.

b) Issue regarding examining tax liability is left open for income tax Department, mere sanction of scheme cannot take away right of the Department to examine tax liability.

c) The learned AO treated the two separate steps of restructuring as one and consequently alleged that the ultimate result of the transaction was transfer of PIAs by OpCos to the assessee for consideration (being shares issued pursuant to second step of amalgamation), and thus there was no 'gift' in step (1) above.

d) The learned AO alleged that essential element of gift, being divesture of ownership was missing, inasmuch as ownership was retained by the Opcos in a circuitous manner as Opcos were allotted shares by the assessee pursuant to amalgamation.

e) There is a consideration involved inasmuch as Rs.484 crores is paid by ABTL and VIL to BIL.

f) There was no intent to commission the transfer as a 'gift, nor was there an offer or an acceptance of PIAs as a 'gift'.

g) The transfer has not been registered through an instrument of gift deed and accordingly, procedure laid down under section 123 of Transfer of Property Act, 1882 (TPA) has not been followed.

As regards step 2 of the restructuring, the learned AO has accepted that the merger of the TowerCos with the assessee qualifies as an amalgamation defined u/s 2(1B) of the Act.

3.17 The learned CIT(A) upheld the action of the learned AO by holding that the transfer by OpCos to TowerCos cannot constitute gift' and hence WDV in the hands of OpCos cannot be considered as cost in the hands of transferee TowerCos and consequently in the hands of the assessee primarily on the grounds that - (i) the two steps of restructuring are to be seen in conjunction and hence the transfer of PIAs ultimately vesting in the assessee is in lieu of shares issued by the assessee in amalgamation; and (ii) by subscribing to shares in assessee pursuant to amalgamation, the ownership of PIAs is circuitously held by OpCos only.

3.18 The learned AR submitted that the entire conclusion of the learned CIT(A) is based on non consideration of the correct order of the Hon'ble Delhi High Court approving the scheme of arrangement and in fact based on incorrect observation/ complete misreading of the binding order of the Hon'ble Delhi High Court approving demerger scheme for one of the tower company i.e. VImfL in Company Petition No. 334/2009. The learned CIT(A) held that para 45 of the order of the Hon'ble Delhi High Court relied upon by the assessee is non-existent and therefore, reliance placed on the said para is misplaced. It was submitted that the learned CIT(A) completely failed to consider the order of the Hon'ble High court dated 29.03.2011 which was placed before him and proceeded to adjudicate the matter as if no such order exists. Subsequently, the assessee filed an application u/s 154 of the Act before the learned CIT(A) pointing out the apparent error in the aforesaid order specifically relating to non consideration of the correct order of the Hon'ble High Court. The said rectification application was disposed off by the learned CIT(A) vide order dated 03.08.2023 whereby certain objections of the revenue while approving the scheme which does not tantamount to finding that impugned transfer was by way of gift. Against the said rectification order, the assessee has filed separate appeal

before us in ITA 2762/Del/2023 which is also heard along with impugned appeal for AY 2010-11. This aspect of pendency of appeal in ITA No. 2762/Del/2023 would be covered by us while adjudicating the issue in dispute vide ground No. 1, 1.1, 2, 10 and 10.1 in ITA No. 1962/Del/2023 itself as the dispute in ITA No. 2762/Del/2023 is only for wrong mentioning in para 45 of order of Hon'ble Delhi High Court by the learned CIT(A) wherein, the grievance of the assessee is that the learned CIT(A) had referred to the wrong paragraph of the said judgment. If the core issue in ITA No. 1962/Del/2023 vide above mentioned ground is decided, the appeal of the assessee against section 154 order in ITA No. 2762/Del/2023 gets subsumed and no separate finding need to be given thereon.

3.19 The learned AR drew our attention to the substituted provision of Section 47(iii) of the Act by the Act by the Finance (No. 2) Act, 2024 w.e.f. 01.04.2025 wherein, company has been restricted from making gifts. In other words, if any company has made gift up to 31.03.2024, the same shall not be regarded as transfer as per Section 47(iii) of the Act and whereas the same would be regarded as transfer w.e.f AY 2025-26 onwards. We find that the powers of a company to make a gift was subject matter of adjudication by the Hon'ble Madras High Court in the case of PCIT Vs. Redington India Ltd reported in 430 ITR 298 (Mad) wherein in para 38 of the said decision, Hon'ble Madras High court had upheld the power of a company to execute the gift. Though that decision was ultimately rendered against the assessee on the issue in dispute before the Hon'ble Court, the powers of a company to execute a gift was upheld. Hence, the arguments advanced by the revenue that company cannot make a gift at any point in time even without the amendment in Section 47(iii) of the Act, has no legs to stand.

3.20 Now what is to be seen is whether the PIAs were acquired by the tower companies without any consideration from the operating companies would qualify as a gift is to be seen and adjudicated. In this regard, the learned AR submitted that this transaction to be qualified as gift was approved upto the level of the Hon'ble High Court and revenue's Special Leave Petition (SLP) was dismissed by the Hon'ble Supreme Court. Hence, he submitted that the aspect of gift cannot be questioned at this stage more so when the scheme is being implemented. He submitted that as per Section 49(1)(iii) of the Act, where the capital asset becomes a property of a person under a gift, cost to the previous owner is to be considered. The same is provided in Explanation 2 to section 43(1) of the Act. The learned AR before us filed his rebuttal to the various allegations leveled by the learned AO and learned CIT(A) in tabular form which is reproduced as under:-

Allegations of the AO/ CIT(A)	**Rebuttal**
Initial transaction was an arrangement of demerger and was not sanctioned as 'gift' by the Hon'ble High Courts of Gujarat and Delhi	As mentioned supra, the Hon'ble Delhi High Court while approving the Demerger Scheme for one of the TowerCos (i.e., VInfL) (in Company Petition No 334/2009) and after considering the objections of the Department, specifically affirmed that the transaction for transfer of PIAs without any consideration is al 'gift and is permissible under Section 391-394 of the Companies Act, 1956. The fact that the above-mentioned transaction qualifies as 'gift" was also confirmed by the Hon'ble Gujarat High Court in the case of Vodafone West Limited (Vodafone Essar Gujarat Ltd as it was known then) in Co petition No. 183/2009 vide OJ Appeal no 81 of 2010, wherein the same Demerger Scheme (as approved by the Hon'ble Delhi High Court) was filed.

	Considering the specific findings of the High Court(s), it is not open for the tax Department to question the impugned transaction. Be that as it may, it would be appreciated that once the fundamental character of transaction is held to be gift by the High Court(s), the same is binding on the tax Department. It is undisputed that the tax Department can examine the taxability as observed by the Court(s), but it cannot be construed that the tax Department is entitled to disregard the character of transaction which is expressly held to be 'gift' by the Court. The tax liability can be determined by the Revenue as per the provisions of the Act, considering the fundamental nature of the transaction to be 'gift'. Moreover, although the term 'gift' is not defined under the Act, the same is defined under section 122 of TPA as a) transfer of; b) existing movable or immovable property; c) by any living person (includes company); d) made voluntarily; and e) without any consideration. Even as per section 2(xii) of erstwhile Gift Tax Act, 1958, 'gift' was defined to mean 'transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth...". Thus, impugned transfer qualifies as 'gift' as per ascribed statutory meanings.
AO/ CIT(A) treated two separate steps of restructuring as one consolidated consequently step alleged and that ultimate result of the transaction was transfer of PIAs by OpCos to the appellant for consideration in form of shares and there was no element	As regards the observations that the two steps of restructuring merely constitute one single step involving transfer of PIAs from OpCos to the appellant, is not only based on the erroneous factual premise and is also contrary to the voluminous undisputed/ contemporaneous evidence(s) placed on record as evident from following: -The two separate steps are undertaken through separate Scheme of Arrangements-Step 1 involves transfer/ gift of PIAs by OpCos to TowerCos through independent schemes by

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<td>of 'gift' in step 1.</td>
<td>each group; and Step 2 is through a separate Scheme of merger as subsequent to Step 1;

-The two steps are independently and separately approved by different order of the High Courts

-On approval of schemes relating to Step 1, the TowerCos duly recorded PIAs in their books and also in relevant fixed asset registers; It will kindly be appreciated that the existence of separate two-steps is further supported by the following:

<u>Step 1</u>

(a) Approval of scheme of transfer of PIAs by the board of directors, creditors, shareholders of Bharti, Vodafone and Idea, each of which is (was) a listed entity;

(b) Approval of scheme of transfer of PIAs by the board of directors, creditors, shareholders of the TowerCos, i.e., BIVL, VInfl and ICTIL,

(c) Approval of scheme/ intimation of transfer of PIAs by various regulatory authorities, including but not limited to SEBI, recognized stock exchanges, TRAI, etc.;

(d) Acceptance of transaction of "gift" in the respective assessments and/ or appeals in the case of OpCos and/or TowerCos;

<u>Step 2</u>

(e) Approval of scheme of merger by the board of directors, creditors, shareholders of TowerCos and the applicant;

(f) Nature of amalgamation is not doubted by any regulatory authority.

Having regard to the aforesaid, it will kindly be appreciated that two separate and independent transactions between separate and independent</td>
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	companies/legal entities, and more particularly on account of the schemes in respect of the two separate steps being approved by the High Courts, cannot be regarded as one composite transaction and therefore, the conclusion arrived at is patently erroneous on the face of records. The action of considering the two steps as composite/ single step tantamount to ignoring the existence and lifting of corporate veil of, inter alia, the TowerCos which is blatantly contrary to the order of the High Courts and in clear disregard to the express acceptance of the two steps by all the regulatory and governing authorities, which is grossly impermissible. Be that as it may, structure involving multiple entities cannot be ignored/ disregarded by the Revenue at whims and fancies without any justifiable reason. It may be pointed out that multilayered holding subsidiary company structure is well recognized by the apex court in the case of Vodaphone International Holdings B. V. V. Union of India 341 ITR 1. The Court categorically held that one has to merely look at the transaction and not look through the same.
OpCos have circuitously retained ownership of PIAs due to their shareholding in the appellant and hence there is no divesture of title to treat the transfer as 'gift'.	The AO has grossly erred in holding that merely due to their shareholding in the appellant company, the Opcos have not divested themselves of the property in the PIAs. As regards gift, it is essential that the donor should divest himself of the ownership and dominion over the subject of the gift, which is exactly what has happened in the present transfer i.e., transfer of the PIAs from the OpCos to the Tower Cos. It is a settled principle that a company is distinct from its members, and hence, the shareholders had completely divested their ownership and dominion of the PIAs in the favour of the TowerCos who infallibly had the dominion over the PIAS.

	The allegation that the Opcos have circuitously retained the PIAs, is an absurd argument to allege that the Opcos had not divested the property in the Pl assets. This effectively implies that whenever a company gifts an asset to any of its subsidiaries, then by the way of beneficiary holding, it would never be said to have gifted an asset. The said allegation primarily disregards the separate legal identity of the corporate assessee which is impermissible.
There is a consideration involved. The tangible consideration was that the appellant finally issued shares to the transferor company.	In the present facts, it is clear that merger of the TowerCos with the appellant and the preceding transaction of transfer of PIAs by the OpCos to the TowerCos were two separate and distinct transactions. In fact, the same has also been accepted by the AO as separate and distinct transactions in the assessment order, wherein he has accepted that merger of the TowerCos with the appellant qualifies as an amalgamation which means that the shares issued by appellant were issued as consideration for the amalgamation and not for transfer of the Pl assets from the OpCos to the TowerCos.
As per the Supplementary Framework agreement dated December 19, 2008, for determination of contribution basis the shareholding ratio, it was decided that an amount of Rs.484 cr. is payable by ABTL and VIL to BIL. The said amount Es considered as consideration for transfer of PIAs by OpCos to TowerCos, and the same is alleged to be outside purview of gift.	In order to explain the nature of the payment, it is important to highlight that the Merger Scheme effectuated with effect from the appointed date 1.4.2009. At the time of entering into the Framework Agreement, it was agreed that the operating companies, apart from transferring their existing Pl sites (i.e., sites existing at that time), would also develop new sites to be referred to as 'Interim Sites' Since the same were to be ultimately transferred to the appellant, the cost of these Interim Sites was agreed to be shared between the shareholders of the appellant in the proportion of their shareholding in the appellant. However, to avoid a situation where the Interim Sites to be transferred to the appellant by the respective groups are not in accordance with the agreed ratio, it was provided that where the costs incurred by any party (or parties) for

	development of the Interim PIAs was in excess of the costs that it ought to have incurred in to accordance with the specified ratio, then such excess shall be compensated by the other shareholders to keep is the specified ratio intact. As per the agreement, any excess costs incurred by any party for development of the Interim PIAs shall be compensated by the other shareholders to keep the specified ratio intact. Pursuant to the above, a Supplement to the Framework Agreement dated 19th December, 2008 (enclosed at pages 1179-1201 of PB Vol II), as referred by the AO in the impugned assessment order, was entered between the parties, wherein it was agreed that party incurring lesser costs (i.e. shortfall) was obligated to pay the shortfall to appellant and such an amount would be payable by the appellant to such party incurring excess costs on development of the Interim sites. Also, clause 2(h) of the Supplement to Framework Agreement provided that upon completion of merger of the TowerCos with appellant, the parties would cease to be entitled to receive/ pay the amounts due from/to appellant and the receivables/ payables recorded in the books of the shareholder group(s) in relation to such Interim Pl assets would be cancelled or reversed. In order to ensure recovery of the amount in case of any dispute amongst the shareholders groups or non- approval of the merger scheme by the High Court(s), it was agreed that the **payment would be routed through appellant instead of a direct settlement between the shareholders.** Since costs incurred by BIL on account of development of the Interim sites were more than the costs attributable to BIL, i.e. it incurred more than proportionate costs on development of Interim sites, VIL and Idea group were required to compensate BIL for the

	excess costs incurred by BIL. Towards the end, the following payments were payable by VIL and Idea group to BIL: Rs.321.76 Cr. by VIL-Rs.179.44Cr. in FY 2008-09 and Rs.142.32Cr. in FY 2010-11. Rs.162.67 Cr. by Idea group-Rs.77.44Cr. in FY 2008-09 and Rs.85.23Cr. in FY 2010-11. The aforesaid amounts were paid by VIL and ABTL to the appellant instead of paying directly to BIL. and appellant thereafter made an immediate corresponding payment to BIL. Therefore, in the books of appellant, both legs of the transaction, i.e., security deposit payable by VIL/ABTL and security deposit receivable by BIL were netted-off against each-other and therefore, were not shown separately in the financial statements of the appellant for any financial years. Screenshot of accounting entry and copy of Business Transfer Agreement are placed at pages 1374A-13740 of the PB Vol II. In the books of VIL and Idea group, amount paid to appellant was reported as a 'current asset' in the form of 'Security Deposits' placed with appellant and amount received by BIL was recorded as 'current liability in the form of 'Security Deposits' received from appellant. Accountant certificates furnished by VIL, Idea group and BIL reflecting the accounting treatment in relation to security deposits are placed at pages 13741. 1374V of the PB Vol II. In view of the aforesaid, it is respectfully submitted that the appellant company was just a pass through, or escrow agent as far as said transaction is concerned. In this regarded, it is humbly submitted that payment of Rs.484.4 crores was settled between the shareholders towards excess interim sites constructed by BIL. The appellant only acted as an intermediary for settlement of such dues. Accordingly, such consideration

	cannot be alleged to be a consideration for transfer of PI assets by BIL or for that matter the other shareholders to their Tower Cos under the Demerger Schemes.
There was no intent to commission the transfer as gift nor was there an offer or acceptance of PIAs as a gift. The transaction is in the nature of demerger.	Neither the OpCos nor the TowerCos or appellant have ever contended that transfer of the PIAs from the OpCos to TowerCos qualified as a demerger within the ambit of section 2(19AA) of the Act. Accordingly, it was never intended that benefits envisaged under the Act with respect to a demerger should be applicable in relation to the subject transfer. Therefore, tax depreciation was never claimed by the Tower Cos. The AO failed to appreciate the fact that even if for the sake of argument, it is agreed that the intent of the OpCos was of demerger, it would have been imperative for the OpCos to issue shares of the resulting company on a proportionate basis to the shareholders (being an ineluctable condition to satisfy a transaction as a demerger as per the Act), without which the OpCos could not have filed for the scheme of arrangement with the respective authority. On the contrary, the Opcos filed respective Transfer Scheme(s) void of any consideration or issue of shares in lieu of consideration, thereby intending to undertake such transfer as a gift, which is further corroborated by the fact that the Tax Department itself agitated that the appellant be debarred from arguing that the transfer of assets is a gift for the purpose of the Act. It shall not be out of place to mention that such plea of the tax authorities was not only rejected by the Hon'ble High Court, but the Court also took note of the enabling provisions in the Memorandum of Association of these transferor companies to make gifts (refer page 786- 787 of the PB-Vol II)
Transfer and registered through a gift deed and	*Section 122 of TPA expressly defines gift as voluntary transfer of property without consideration by one person to another person,*

procedures laid down in Transfer of Property Act, 1882 (TPA) not followed.	*who accepts the gift. In the present case, transfer under Step 1 is without consideration and satisfies the characteristics of 'gift' under TPA.* *Section 123 of the TPA reads as under:* *"For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.* *For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.* *Such delivery may be made in the same way as goods sold may be delivered."* Since the PIAs qualify as moveable asset, the same may be gifted by way of an instrument or by delivery. Accordingly, since the PIAs stood delivered to the TowerCos which companies accepted the possession post implementation of the Transfer Schemes, requirements of section 123 of TPA are satisfied. Moreover, the transfer of PIAs through a court approved scheme does not require any registration more so when the Schemes expressly provided that pursuant to approval of the Scheme(s), the assets shall stands transferred to the transferee without any document or instrument. It is submitted that the PIAs have legally vested into the TowerCos, pursuant to approval of Transfer Schemes by the respective High Courts. Reliance in this regard is placed on the Hon'ble Punjab and Haryana High Court in the case of Hotel skylark & Restaurant (P) Ltd v CIT 221 ITR 283 wherein it has been held that ownership can be can also be transferred by Court decree and it is not mandatory the modes provided in the TPA are not exhaustive.

3.21 It was vehemently pleaded by the learned AR that the transfer of PIAs under Step 1 of the arrangement being considered as gift stands settled by the decision of the Hon'ble High Court and consequentially the actual cost of the asset to the assessee shall be WDV of the assets in the hands of the transferor and thus depreciation thereon would be allowable.

3.22 Per contra, the learned DR drew our attention to the decision of the Hon'ble Delhi High Court in Company Petition No. 334 of 2009 by reading the various paragraphs thereon and submitted that the question of gift has not attained finality at the level of Hon'ble High Court. Further, the decision of the Hon'ble Delhi High Court in Company Petition No. 334/2009 dated 29.03.2011 gave the power to the Income Tax Department to question the scheme sanctioned by the Hon'ble High Court. The learned DR drew our attention to the observations made by the ld CIT(A) in paras 8.3 to 8.8, 8.11, 8.15, 8.18, 8.21 of his order in support of the contentions of the revenue.

3.23 We find that the first step of demerger scheme in the case of Vodafone Essar Ltd was subject matter of examination and adjudication by the Hon'ble Delhi High Court in company Petition No. 334/2009 dated 29.03.2011 which is enclosed in pages 1074 A to 1074W of the Paper Book. This decision was vehemently relied upon by the learned DR before us wherein, it was held that the petitioners had fairly admitted that any question of tax liability was within the purview of income tax department and that the department would be free to pursue either transferor company or transferee company notwithstanding the sanction of the Court. The scheme per se was sanctioned by the Hon'ble Delhi High Court to be

proceeded, with liberty given to the Income Tax Authorities to move against any of the parties concerned in case the department was of the view or belief that there had been any impermissible evasion of payment of tax by the petitioners. The entire essence of the arguments advanced by the learned DR before us is effectively captured in the said judgment. But what is to be seen is to understand the scheme of demerger as first step and scheme of merger as a 2nd step. The entire scheme of demerger has been accepted and approved by the Hon'ble High Court which indeed contained the fact of gift of assets also. The department cannot try to rewrite the scheme. All the objections of the department had to be filed when due notice was given to them prior to the sanction of the scheme of arrangement. The department cannot question the validity of the sanction of the scheme when the approved scheme is at the stage of implementation. The scheme once sanctioned by the competent court is binding on all the stakeholders which admittedly include the department also. Accordingly, the revised return filed by the assessee by giving due effect to the scheme of demerger and merger had to be accepted and given effect to by the revenue. In support of this proposition, the learned AR rightly placed reliance on the decision of the Hon'ble Supreme Court in the case of Dalmia Power Ltd Vs. ACIT reported in 420 ITR 339 (SC) . Since, the due notices were issued to the income tax department before sanctioning of the scheme by the competent court, the binding nature of the scheme cannot be questioned or challenged at the time of implementation of the scheme as the scheme had attained statutory force not only between the transferor or transferee company but also between statutory authorities to whom notices were issued by the Court. Needless to mention that every scheme of arrangement and amalgamation must provide for an 'appointed date' which is the date on which the assets and

liabilities of the transferor company vest in, and stand transferred to the transferee company so that the scheme comes into effect from the 'appointed date' unless the same is modified by the Court.

3.24 Further, we also find that the Hon'ble Madras High Court in the case of Ponni Sugars (Erode) Ltd Vs. ACIT in WP No. 12510 and 12511/2004; 12255/2006; 3830/2007; 1054/2008, 2629/2009 among others dated 16.10.2020 had also considered the aspect of slump sale under the demerger scheme. The issue that was before the Hon'ble Madras High Court was whether depreciation is eligible to that assessee on the fair market value of assets. The brief facts of that case are Ponni Sugars and Chemicals Ltd (PSCL) set up Erode Sugar Mill in Tamil Nadu in the year 1984. Subsequently, another sugar mill was set up in Orissa in 1994. In view of the loss in sugar mill at Orissa, PSCL became a sick industrial company. Consequently, a scheme of arrangement was confirmed by the Company Court, the said scheme contemplated a slump sale u/s 2(42C) of the Act wherein transfer of assets of Erode Unit was made on fair market value to the transferee company and transferee company claimed depreciation on the basis of fair market value of assets in the return of income. The learned AO in that case disallowed the depreciation claim by treating the scheme as one of the "demerger" u/s 2(19AA) of the Act thereby restricting the claim of depreciation only on written down value of assets being transferred from PSCL to Ponni Sugars (Erode) Ltd. Hon'ble High Court held that the order sanctioning scheme of arrangement by the company Court pursuant to Section 391 to 394 of the Companies Act, 1956 will have a statutory force binding on all the concerned and the sanction of the Court would operate as a judgment in rem. It observed that the Company Court, while considering the petition for sanctioning under the Companies Act, had approved the scheme of demerger and the

statement u/s 393 of the Companies Act. The statement being in conformity with the scope of the terms of the scheme of arrangement, becomes an integral part of the scheme, which was sanctioned by the Company Court, and thus the transfer of the undertaking will not be considered to be one of the demerger within the meaning of Section 2(19AA) of the Income Tax Act, 1961. The Hon'ble Madras High court held that impugned proceedings itself is fallacious and further proceedings thereon cannot be sustained and accordingly quashed the same.

3.25 Keeping this proposition laid down by the Hon'ble High Court and Hon'ble Supreme Court into consideration, in our considered opinion, the action of the learned CIT(A) in the instant case before us merging both the schemes, is wrong. It is to be noted that parties to the scheme in the first step of demerger are different and parties to the scheme in the 2nd step of merger are different. By merging both schemes together, the learned CIT(A) is only try to rewrite the scheme which is not permissible. Now coming to the liberty given by the Hon'ble Delhi High Court to the Income Tax Department to question any possible tax evasion in the scheme of arrangement sanctioned by the court, the same had to be understood only in the context of any tax evasion being carried out by the assessee while giving effect to the scheme need to be looked into by the Income tax department if there is some tax evasion as liberty is given by the Hon'ble High Court while sanctioning the scheme. But the very basis of sanction of the scheme per se cannot be challenged or looked into by the tax department at the time of implementation of the scheme. Under the erstwhile provisions of the Companies Act, 1956, there is specific provision in Section 394(7) of the Companies Act, 1956 wherein, liberty was given to the tax department to challenge the scheme of arrangement sanctioned by the competent court before the higher court. This admittedly was not done

in the instant case before us by the income tax department. Hence, the scheme of arrangement under 2 independent steps carried out in the instant case before us cannot be questioned at all. The first scheme which was sanctioned did contain the element of gift of assets. Hence, the aspect of gift, as rightly contended by the learned AR before us, attaining finality, is correct and deserve to be accepted. At the cost of repetition, we would like to state that initial transaction of demerger of PIAs without any consideration is a case which is specifically affirmed by the Hon'ble Delhi High Court while approving the demerger scheme for one of the tower company i.e. Vodafone Infrastructure Ltd in Company Petition No 334/ 2009 referred supra. Further, the very same transaction qualifying as gift was confirmed by the Hon’ble Gujarat High Court in the case of Vodafone West Ltd (Vodafone Essar Gujarat Ltd as it was then known) in Company Petition No. 183/2009 wherein, the same demerger scheme as approved by the Hon'ble Delhi High Court was filed. Hence, in view of the specific finding of the Hon’ble High Courts, the income tax department again questioning the impugned transaction as not qualifying for gift at this stage cannot be permitted.

3.26 Further, the entire gamut of transaction was subject matter of consideration by the coordinate bench of Mumbai Tribunal, where one of the members herein was the author in the case of Vodafone Idea Ltd Vs. ACIT reported in 149 taxmann.com 169 (Mumbai Tribunal) wherein, the case was sought to be reopened by recording the following reasons:-

> *"The assessee transferred the Passive Infrastructure Assets(PAs) amounting to Rs. 1622,77,10000-10 Idea Cellular Tower Infrastructure Ltd. ITCIL., a 100% subsidiary of Mis. Aditya Birla Telecom Ltd. (ABTL)who in turn is 100% subsidiary of the assessee Idea Cellular Ltd) through Demerger at Nil consideration with an appointed date of 1-1-2009. Subsequently, ICTIL amalgamated in Indus Towers Ltd. (Indus), resulting into transfer of PIAs amounting to Rs. 1622,77,60,000/- to Indus. Thus,*

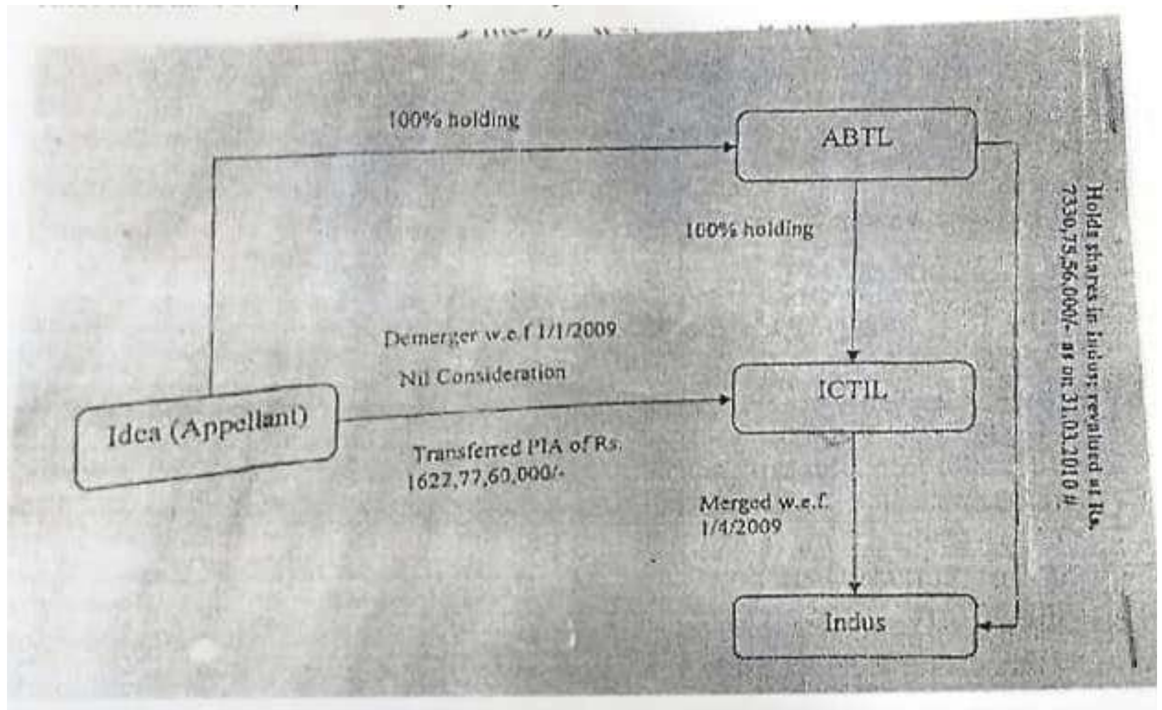
the PIASS of the assessee, having a book value of Rs. 1622,77,60,000/-as on 31-12-2008, stood transferred to Indus without payment of any taxes. This business arrangement is a colourable device through which PIA having book value of Rs. 1622,77,60,000/- have been transferred out of the block of assets of the assessee at Nil consideration and without payment of due taxes. In view of this there is reason to believe that the colourable device created through a scheme of De-merger and Amalgamation is only for tax evasion and no taxes on these transactions have been paid. The Balance Sheet of ABTL indicates that the investment in Indus, have increased from Rs. 1,90,000/- as on 31-3-2009 to Rs. 7330,75,56,000/- as on 31-3-2010 as ABTL fair valued its investment in Indus. Since the assessee is a holding company of ABTL, therefore, this increase in fair valuation of Indus is due to the transfer of PIAs from Idea Cellular Ltd. to Indus. The fair valuation of ABTL's investments in Indus has increased by Rs. 7330,75,56,000/- as a result of receipt of PIAS of Idea Cellular Ltd. by Indus Therefore, this increase in fair valuation of investment in Indus of Rs. 7330,75,56,000/- is, effectively the fair market value of PIAS of Idea Cellular Ltd. which were transferred at book value at Rs. 1622,77,60,000/-through a scheme of De-merger and subsequent Amalgamation. Therefore, I have reason to believe that the difference of Rs. 5707,97,96,000/- (Rs.7330,75,56,000 -Rs.1622,77,60,000) is the value of benefit received by Idea Cellular Ltd. from business which has escaped assessment due to failure on the part of the assessee to disclose all material facts at the time assessment u/s 143(3) and is required to be taxed u/s 28(iv) of the I.T. Act."

3.27 This aspect of the reasons was adjudicated by the Mumbai Tribunal by observing as under:-

"8. With regard to issue mentioned in point (v) of the reasons recorded, the facts of the case pertaining to the issue and the treatment given by the ld. AO are explained below:-

(a) The assessee under a court approved Scheme of Arrangement transferred its Passive Infrastructure Assets (PIAs) having book value of Rs. 1622,77,60,000/- to Idea Cellular Tower Infrastructure Ltd.(ICTIL) at nil consideration with the appointed date of 1-1-2009. ICTIL was a 100% subsidiary of/s. Aditya Birla Telecom Ltd. (ABTL) which in turn was a 100% subsidiary of the assessee. Subsequently, ICTIL amalgamated into Indus Towers Ltd. (Indus) resulting in transfer of PIAS having book value of Rs. 1622,77,60,000/- to Indus: By a separate Scheme of Arrangement u/s. 391r.w.s. 394 of the Companies Act, 1956, the telecom undertaking of ABTL

(comprising Bihar and Jharkhand telecom circles and related assets and liabilities) was demerged into the assessee with the Appointed Date of April 01, 2009. Pursuant to this separate Scheme, ABTL revalued its investment in shares of Indus from Rs. 1,90,000/- as on 31-3-2009 to Rs. 7330,75,56,000/- as on 31-3-2010.These facts have been pictorially explained by the assessee as under:-



This was done as part of a separate scheme u/s. 391 r.w.s. 394 of the Companies Act, 1956 under which the telecom undertaking of ABTL (comprising Bihar and Jharkhand telecom circles and related assets and liabilities) was demerged into Idea with the Appointed Date of April 01, 2009.

(b) From the above facts, the ld. AO held that the Scheme of Arrangement through which the PIAs of the assessee having book value of Rs. 1622,77,60,000/- was transferred to ICTIL for Nil consideration and then from ICTIL to Indus on the subsequent amalgamation of ICTIL with Indus was a colorable device to evade taxes. That this was a transfer of assets of the assessee to an entity outside the Group, and that ICTIL was only an intermediary through which the assets were being routed to avoid taxes and duties that would otherwise be attracted. The ld. AO also observed that not only the assessee but two other shareholders of Indus namely, Vodafone and Bharti Airtel had also resorted to such subterfuge. The ld. AO noted that in the related case of M/s Vodafone Essar

Gujarat Limited, by an Order dated 9th December 2010, the Hon'ble Gujarat High Court had accepted the submissions of the Income-tax Department upholding the locus of the Income-tax Department and rejected similar Scheme of Arrangement proposed by Vodafone Essar Gujarat Limited under sections 391 to 394 of the Companies Act, 1956 vide Company Petition No. 183 of2009. That the present Scheme of Arrangement in the assessee's case also had been challenged bythe Department before the Hon'ble Gujarat High Court vide Civil Application No. 2933 of 2013.

(c) The ld. AO held that since the entire undertaking of the PIAs had been transferred ultimately to Indus, the gains accruing to the assessee had to be considered as flowing from the slump sale as per section 50B of the Act. The revaluation of ABTL's investment in Indus at Rs. 7330,75,56,000/- ason 31-3-2010 which was apparently because of the transfer of PIAs from the assessee to Indus was treated as the full consideration and the book value of the PIAs of Rs. 1622,77,60,000/- was taken as the cost of acquisition. In this manner, the ld. AO computed short term capital gains of Rs.5707,97,96,000/-.

(d) The ld. AO did not accept the Scheme of Arrangement as he was of the view that it was a colorable device to evade tax and since in the related case of M/s Vodafone Essar Gujarat Limited, similar Scheme of Arrangement proposed by Vodafone was rejected by the Hon'ble Gujarat High Court and the Department had challenged the Scheme of Arrangement in the assessee's case also.

(e) On the issue of colorable device to evade tax, the assessee has submitted that Indus is a separate independent entity assessable to tax and it is paying taxes. That it is a joint venture company between Bharti Airtel Group, Vodafone Group and the assessee, formed to provide Passive Infrastructure (PI) services on commercial basis to telecom operators including the foregoing parties. Indus is registered with DOT as IP-1 to provide PI and related maintenance services to various telecommunications operators in India on a shared basis. Indus was formed as part of joint efforts of telecom operators to economise on cost of maintenance of PI Assets by pooling in towers in a jointly owned company. Presently, Indus is the largest telecom tower company in India. Govt. of India had also issued directions to promote sharing of infrastructure by telecom operators to achieve economies of scale and focus on active telecom services by the operators. Pursuant to the Govt. directive, the cellular operators in India initiated Project MOST (Mobile Operators Shared Towers). Thus, formation of Indus met with the regulatory directions as well as commercial advantage

to the promoters of Indus. This rationale was stated in all the Schemes of Arrangement entered into to meet this purpose which has been approved by various High Courts. That similar arrangements were entered into by the other Promoters of Indus namely Vodafone and Bharti Airtel.

(f) The Department in the case of Vodafone had challenged the demerger of the PI Undertaking of Vodafone Essar Gujarat Ltd into Vodafone Infrastructure Ltd. before the single judge of the Hon'ble Gujarat High Court on the ground that the said demerger scheme was formulated with the purpose of evading taxes/stamp duties etc. The single judge did not approve the said demerger of Vodafone Essar Infrastructure Ltd. This is the decision referred to by the ld. AO in the assessment order.

(g) The assessee submitted that the decision of the Single Judge in case of Vodafone referred to by the ld. AO was reversed by the decision of the Division Bench of the Hon'ble Gujarat High Court which approved the demerger scheme in the case of Vodafone Essar Gujarat Ltd. v. Department of Income-tax(2013) 353 ITR 222 dated August 27, 2012. In this case, the Hon'ble Division Bench of the Gujarat High Court, while appreciating that the ultimate effect of the Scheme of Demerger without consideration may result into some tax benefit or tax avoidance, nevertheless, approved the Scheme of Demerger considering the commercial rationale advocated by the applicant which was also backed by the Government directive. The objective was to separate non-telecom assets of the was approved by the DOT to provide passive infrastructure services on competitive basis.

(h) The Department had further filed SLP before the Hon'ble Supreme Court against the order of the division bench. The Hon'ble Supreme Court vide its order dated 15 April 2015 dismissed the SLP filed by the Department and confirmed the division bench decision of the Hon'ble Gujarat High Court. In the assessee's case, the petition filed by the Department [C.A. (OJ) No. 693 of 2013] before the Hon'ble Gujarat High Court for recalling the demerger order in the case of ICTIL has been dismissed vide order dated 22 July 2015 following the order of the Hon'ble Supreme Court in the case of the SLP filed by Vodafone. Similarly, Hon'ble High Court of Delhi has dismissed the application of the Department [CO. APP 25/2016) vide order dated March 22, 2017 following the order of the Hon'ble Supreme Court in the SLP filed by Vodafone. In view of the dismissal of the Department's appeals for recalling the order approving the Scheme of Arrangement, the question of treating the Scheme as a colorable device to evade tax does not arise anymore.

> *The Scheme as approved by the court will have to be accepted. The Scheme of Arrangement provides for transfer of the assessee's PIAs to ICTIL at Nil consideration. This cannot be substituted by any other notional consideration. Once the consideration is taken as Nil, there is no basis for the addition made by the Id. AO.*

8.1. The main crux of the reopening made by the ld. AO in respect of this issue based on demerger of Passive Infrastructure Assets (PIA) from assessee to Idea Cellular Tower infrastructure Ltd (ICTIL) worth Rs. 162,77,60,000/- w.e.f. 01/01/2009 for 'Nil' consideration. ICTIL later merged with Indus Tower Ltd on 01/04/2009. ICTIL is a 100% subsidiary of M/s. Aditya Birla Telecom Ltd. (ABTL) who in turn is 100% subsidiary of the assessee. Pursuant to the merger of ICTIL with Indus Tower Ltd, ABTL was issued shares of Indus Towers Ltd. On 31/03/2010 ABTL revalued its shares held in Indus Towers Ltd. for Rs. 7330,75,56,000/-. Based on this revaluation of shares in Indus Towers Ltd made by ABTL on 31/03/2010, the ld. AO treated the entire transaction of demerger and merger as a colourable devise. We have already held hereinabove based on the facts that there is no colourable devise involved at all in the instant case. It is a fact that the scheme of demerger and the merger had been duly addressed by the Hon'ble High Courts.

8.2. Moreover, the revaluation of shares has been made by ABTL on 31/03/2010 which falls in A.Y.2010-11. Hence, the event which had occurred in A.Y.2010-11 in the hands of ABTL can never be a ground for reopening in the case of assessee for A.Y.2009-10. Hence, reopening on this issue fails directly for A.Y.2009-10.

8.3. Further the ld. AO had stated that this entire device would result in benefit u/s.28(iv) of the Act to the assessee in the sum of Rs. 5707,97,96,000/- (7330,75,56,000-1622,77,60,000). Even if the entire contentions of the revenue and the ld. DR are to be accepted it is ABTL who had revalued its shares for Rs. 7330,75,56,000/- in Indus Towers Ltd. It is ABTL pursuant to the merger of ICTIL with Indus Towers were issued shares in Indus Towers Ltd. Hence, by way of a scheme of demerger and merger if the Passive Infrastructure Assets worth Rs. 1622,77,60,000 has been transferred to ICTIL (by way of demerger) and subsequently by way of merger with Indus Towers, for Nil consideration, the benefit, if any, on this entire transaction, would only arise for ABTL and certainly not the assessee herein. Hence, the applicability of the provisions of section 28(iv) of the Act in the hands of the assessee absolutely fails in the instant case.

We are making it very clear that we are not even suggesting that the said sum of Rs. 5707,97,96,000/- would become benefit u/s.28(iv) of the Act in the hands of the ABTL. The above observations are made only for the limited purpose of addressing the issue that provisions of section 28(iv) of the Act can never be applied in the hands of the assessee herein for A.Y.2009-10 in the facts and circumstances of the assessee herein.

8.4. In any case, we find that the revaluation of shares in Indus Tower to the extent of Rs. 7330 Crores duly captures the value of Passive Infrastructure Assets transferred by other telecom operators like Bharti Airtel, Vodafone and also assessee herein. As stated earlier, the transfer of these towers to a separate company was made as per the policy decision taken by the Government of India. Because of the fact that Indus Towers was holding the huge towers pursuant to the transfers made by Vodafone, Airtel and assessee, the value of shares of Indus Towers Ltd had increased substantially. This increased value of shares had been captured in the revaluation of shares made by ABTL as on 31/03/2010 to the extent of its shareholding in Indus. Hence, there cannot be any benefit in the sum of Rs. 5707.9796 Crores u/s.28(iv) of the Act in the hands of the assessee for A.Y.2009-10.

8.5. Moreover, we find that the ld. AO had relied on the decision of the single Bench of Hon'ble Gujarat High Court dated 09/12/2010 which rejected the merger scheme in the case of Vodafone Essar Gujarat Ltd., In re [2013] 33 taxmann.com 544/[2012] 342 ITR 135 In this decision, the Scheme of Arrangement proposed by Vodafone Essar Gujarat Ltd. u/ss.391-394 of the Companies Act, 1956 vide Company Petition No.183 of 2009 was rejected by the Hon'ble Gujarat High Court by accepting the stand of the Income-tax department that this has been made against public interest and with a view to evade payment of taxes. Accordingly, the case of the Revenue is that this is a transfer of assets of the assessee to an entity outside the group, and ICTIL is only an intermediary through which the assets are being routed, to avoid taxes and duties that would otherwise be attracted and therefore the Scheme of Amalgamation was neither a scheme nor arrangement nor a compromise contemplated u/s.391 of the Companies Act, 1956. The scheme of arrangement as envisaged was not really a scheme of arrangement or a scheme of demerger, so as to be eligible for a sanction by the Hon'ble Company Judge u/ss.391-394 of the Companies Act 1956. The Revenue's case is that the scheme of demerger was to transfer the PIAs to Indus Towers through the intermediary ICTIL. Hence, the transfer of assets by way of

demerger tantamount to gift. The case of the Revenue is also that the company cannot gift its assets. The Revenue also says that the demerger is not section 2(19AA) compliant and that ICTIL is merely a paper company prior to amalgamation with Indus.

8.6. We are unable to comprehend ourselves to accept to the aforesaid averments made by the ld. AO in his assessment order which were also heavily relied upon by the ld. DR before us. It is pertinent to note that the single Bench decision of the Hon'ble Gujarat High Court which has been heavily relied upon by the ld. AO and the ld. DR before us has been reversed by the Division Bench order of the Hon'ble Gujarat High Court itself. The date of decision of the single Bench of the Hon'ble Gujarat High Court order is 09/12/2010. The date of the Division Bench order of Hon'ble Gujarat High Court is Vodafone Essar Gujarat Ltd. v. Department of Income-tax [2013] 35 taxmann.com 397/216 Taxman 187 (Mag.)/353 ITR 222, 27/08/2012. It is also further pertinent to note that this Division Bench order of the Hon'ble Gujarat High Court has been approved by the Hon'ble Supreme Court in the case DIT v. Vodafone Essar Gujarat Ltd. [2016] 66 taxmann.com 374/[2015] 373 ITR 525 vide its order dated 15/04/2015. Hence, the decision of the Division Bench of the Hon'ble Gujarat High Court arising out of the decision of the Single Bench of Gujarat High Court had attained finality by the decision of the Hon'ble Supreme Court.

8.7. In view of the above, the entire contentions made by the ld. AO and the ld. DR before us on merits of the issue and also challenging the claim of demerger and claim of merger with the respective parties stated supra, deserves to be dismissed.

3.28 Further, we find that the entire issue in dispute is covered by the decision of Delhi Tribunal in case of Bharti Infra Tel Ltd, one of the tower companies for AY 2010-11 in ITA 5332/Del/2014 dated 26.04.2022 wherein, it was observed as under:-

"9. We have heard the rival contentions and perused the material available on records and gone through the orders of the authorities below. We find that Ld.CIT(A) has given finding on fact by observing as under:-

4. Findings on ground of appeal No.1 to 1.7:-

"The facts of the appellant's case with respect to the above grounds lie in a narrow canvas. The appellant has transferred certain specified telecom infrastructure to its wholly owned subsidiary for which the Scheme of Arrangement was approved by the Hon'ble Delhi High Court vide order dated 29.03.2011 in Company Petition no 324/2009. In para 9 of the said order has been noted that the scheme is intended to restructure, within the group of companies controlled by the transferor company (ie. the assessee) the holding of the passive infrastructure assets in a more efficient manner consistent with the diverse needs of the business. That the transferee company shall not be required to issue any shares or pay any consideration to the transferor company or its shareholders. In para 16 of the said order it has again been mentioned by the Hon'ble High Court that the passive infrastructure assets are being transferred without any consideration and the value of investment of the shareholders of the transferor company shall not deplete in any manner.... In the concluding para no 35 sanction has been granted by the Hon'ble High Court to the scheme of arrangement under sections 391 and 394 of the Companies Act, 1956 with the observation that the passive infrastructure assets of the transferor company shall stand merged with the transferee company from the appointed date i.e. 01.04.2009.

Thus the stand of the assessee before the AO was that since the above said infrastructure assets were transferred to the subsidiary company at Nil consideration therefore there has been a resultant loss on such transfer effected on 05.05.2011 for Rs.5992,05,10,000/-. This loss was added back in the computation of income by the assessee.

The AO has however held that the provision of Section 45 of the Act are applicable to such transfer of assets made by the appellant company to its wholly owned subsidiary and has computed Short Term Capital Gain on the same. The working of such short term capital gain has been made by taking the value of sale consideration of the transferred assets based on the value assigned to such assets (which remained with the assessee company after the transfer) in the red herring prospectus issued on 11.12.2012 for the purposes of IPO. Further for computing the Short Term Capital Gain the AO in his assessment order has referred to the Explanation 7A to Section 47 of the LT. Act 1961 for determining the actual cost which has been taken by him as per the books of the assessee company at Rs. 5992,05,10,000..

As against the above finding of the AO the substance of the submission of the appellant is that the Scheme of Arrangement has been approved by the Delhi High Court and that the transfer of assets of the passive infrastructure was made at Nil value and thereby the transaction is in the nature of gift in terms of Section 122 of the Transfer of Property Act, 1882 as the term "gift" has not been defined under the Income Tax Act, 1961. That accordingly the provision of Section 47(iii) of the Act are attracted in respect of transfer of capital asset under a gift and consequently provision of Section 45 of the Act do not apply to such transfer.

Without prejudice, to the above primary argument, the appellant has without prejudice submitted that as there was no sale consideration involved in the impugned transfer therefore even otherwise the computation mechanism for capital gains would also fail in terms of Section 50 (this being depreciable asset) read with section 48 and 49 of the Act.

The appellant lastly also objected to the adoption of a notional and hypothetical value of sale consideration based on the value given in the red herring prospectus issued for the purposes of IPO which was a date much later than the date of actual transfer of the assets. The said issue of IPO was in December 2012 whereas the transfer of assets was effected on 05.05.2011. That under the law the sale consideration cannot be based on deemed sale value as there is no provision under the law to undertake such exercise for the purpose of computing Capital gains and that as per section 50 the full value of consideration has to be the actual consideration which has to pass hands.

I have considered the submission of the appellant with respect to chargeability of short term capital gain u/s 45 of the Act on the impugned transfer. In facts of the case it is observed that appellant has transferred specified telecom assets under the scheme of arrangement approved by the Hon'ble Delhi High Court under Section 391 and 394 of the Companies Act. In paras 22 & 23 of the Hon'ble Delhi High Court order dated 29.03.2011 in Company Petition no 324/2009 (the assessee's case) it has inter alia been held that the objections of the Income Tax Department to the scheme of arrangement are akin to that filed by them in the matter of Vodafone Essar Infrastructure Ltd in Company Petition no 334/2009 and that since these objections stand dismissed in that petition therefore no separate orders are required to be passed in the Petition No. 324/2009. It is a matter of record that the scheme of arrangement approved by the Hon'ble High Court in assessee's case entails transfer of the passive infrastructure assets at Nil

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consideration. Moreover the AO has not brought any fact on record to controvert the assessee's claim that the said transfer was effected without consideration. Therefore, such transaction being without consideration, falls within the definition of "gift" in terms of Transfer of Property Act, 1882 which also movable assets.

While on this issue it is relevant to note that in Company Petition No 334/2009 in the case of M/s Vodafone Essar Infrastructure Ltd the Income Tax Department had while objecting to the approval of the Scheme of Arrangement had raised a broad submission that Section 391 of the Companies Act, 1956 does not contemplate a gift from one party to the Scheme to the other party for the reason that the expression of "arrangement" with members contemplated an arrangement in the nature of the contract with a consideration involved, which is missing in this case. With regard to this objection of the Income Tax Department the Hon'ble High Court in para 30 of the said order observed after making reference to the meaning assigned to the word "gift" in various Court decisions has noted that it seems that there is no legal impediment to a company transferring property by a gift. After detailed discussion as to whether transfer of assets by way of a gift is covered within the meaning of the word "arrangement" as appearing in Section 391 394 of the Companies Act, 1956 the Hon'ble Court has concluded in para 45 of this petition that the I.T. Department has failed to persuade the court that a transfer by way of gift is not permissible under section 391 of the Companies Act, 1956. In my considered view the above observations of the Hon'ble High Court supports the contention of the assessee that the transfer of impugned asset without consideration in the instant... case to its subsidiary company is transaction in the nature of "gift" and therefore falls within the provision of Section 47(iii) of the Income Tax Act, 1961 and accordingly, the transaction question would not be regarded as transfer for the purposes of section 45, which is the charging section for capital gains.

I have also considered the alternate submission of the appellant with regard to the failure of computation mechanism provided in case of depreciable assets as under section 50 of the I.T. Act which mandates appropriate modifications with respect to the provisions of section 48 and 49 and lays down that for the mode of computation there must be a full value of consideration received or accruing. However as in the present fact of the case as no consideration has either been received or accrued to the appellant, hence the computation mechanism for computing the capital gain fails.

Further, for the purpose of computing short term capital gain, the AO has adopted sale consideration on the basis of value given in the red herring prospectus issued for the purposes of IPO in December 2012. In this connection the principle laid down by the Supreme Court in the case of Shoorji Vallabhdas & Co. 46 ITR and in the case of Godhra Electricity Co. Ltd v. CIT 225 ITR 746 would be applicable to appellant's case, wherein it is held as under:-

> *"Income tax Act takes into account two points of time at which the liability to' tax is attracted, viz, the accrual of the income or its receipt, but the substance of the matter is income. If income does not result at all, there cannot be tax, even through in book keeping, an entry is made about hypothetical income", which does not materialize ".*

Based on the above discussion the AO was not justified in computing Short Term Capital Gain on the transfer of assets and hence the Ground 1 to 1.7 are allowed in favour of the appellant and the addition made for Rs. 505,72,00,000/- is directed to be deleted."

10. The above finding on fact is not rebutted by the Revenue by placing any contrary material before us. We find that Ld.CIT(A) has taken note of the judgement of Hon'ble Delhi High Court in Company Petition No.324/2009 in the case of Vodafone Essar Infrastructure Ltd. wherein the Revenue had raised similar objection in respect of the taxability of transaction. The Hon'ble High Court after considering the arguments of the Revenue ruled in favour of the assessee. Therefore, in view of the binding precedents, we do not see any reason to interfere in the finding of Ld.CIT(A), the same is hereby affirmed. Thus, Ground. No.1(i) of Revenue's appeal is dismissed being devoid of any merit."

3.29 Hence, the aspect of gift has been accepted up to Hon'ble High Court and SLP filed by the revenue before the Hon'ble Supreme Court is also dismissed.

3.30 In view of the aforesaid observations, the assessee would be entitled for claim of depreciation on the assets (PIAs) transferred to the tower companies under the transfer scheme which was specifically transferred to assessee under the merger scheme w.e.f. 01.04.2009 in the sum of Rs.

1344,19,48,510/-. Further, if depreciation benefit is not given to the assessee at the value of assets which ultimately stood transferred, then none of the parties could have claimed depreciation on those assets. On this ground also and considering and totality of the facts and circumstances and in view of the detailed observations made herein above by taking due cognizance of scheme of arrangement under two steps process being sanctioned independently by the Hon'ble High Court by duly accepting the element of gift involved in the first step and respectfully relying on the judicial precedent herein above, we hold that the assessee should be eligible for allowance of depreciation in its hands. Hence, disallowance made on account of depreciation is hereby directed to be deleted. **Accordingly, ground No. 1, 1.1, 2 are hereby allowed.**

3.31. The Ground Nos. 10& 11 raised by the assessee are challenging the upward adjustment of depreciation on aforesaid assets obtained pursuant to the scheme of arrangement, while computing book profits under section 115JB of the Act.

3.32 We have heard the rival submissions and perused the materials available on record. The Passive Infrastructure Assets (PIAs) vested in the assessee with effect from 1-4-2009 pursuant to a two-step court approved scheme, the assessee in its books in accordance with the mandate of the court approved scheme, recorded the PIAs at its fair value of Rs 16306 crores. The book depreciation thereon was debited to the Profit and Loss Account as per the applicable accounting policy and applicable standard and was claimed as reduction while computing book profits under section 115JB of the Act. The Learned AO since had treated that PIAs were received for nil consideration, observed that accounting of PIAs in the books by the assessee at its fair value tantamount to revaluation and

accordingly depreciation on the so-called revalued amount would not be allowed as reduction under clause (iia) of Explanation 1 to section 115JB of the Act. Consequentially, the Learned AO made an upward adjustment of Rs 1112.30 crores on account of this transaction while computing book profit under section 115JB of the Act. This was reduced to Rs 1030.95 crores by the Learned CITA rectifying the factual errors committed by the Learned AO.

3.33 We have already held that transaction of gift of assets under the first step court approved scheme as a genuine gift. The transfer of assets at fair value to the assessee has already been accepted as genuine as the same was done in accordance with the approved schemes of the Hon'ble High Courts. Hence the claim of book depreciation on fair value of assets cannot be questioned by the department. The same does not tantamount to revaluation. It is pertinent to note that the entire accounting treatment in the books of tower companies on receipt of PIAs from operating companies under court approved scheme with specific reference to accounting treatment in the books of the transferee company and the accounting treatment pursuant to merger of tower companies into assessee had already been part of the approved schemes of the Hon'ble High Court, which cannot be questioned at this stage.

3.34 Pursuant to the scheme of amalgamation, the value of assets are to be recognized at their fair values only. The Delhi bench of this Tribunal in the case of Priapus Developers Pvt. Ltd. vs. ACIT reported in 104 taxmann.com 298 had considered an identical issue where shares acquired pursuant to amalgamation were recognized at their fair values, wherein the learned AO treated the same as revaluation and denied deduction of fair

value as cost of acquisition while computing book gains on transfer of shares. The Tribunal held that recognition of shares at fair value does not amount to revaluation. The conclusion drawn by the Delhi Tribunal in this regard are as under:-

> ***17.*** *Such a premise of the Assessing Officer cannot be approved for the reason that;*
>
> - *Firstly, this reserve has not been created on revaluation of asset albeit same has been acquired through amalgamation and the shares have been valued as per the purchase method for a certain price.*
> - *Secondly, it is not revaluation of any asset held by the assessee, because no such reserve has been created by the assessee on revaluation of shares. Revaluation of assets takes place only when the assessee decides to revalue the asset existing in the balance sheet.*
> - *Lastly, in this case all the assets belonged to amalgamating companies, that is, the shares of IHFL originally belonged to PREPL and PPPL and appeared in their balance sheet; and these assets entered in the books of assessee by virtue of amalgamation valued on fair market value as mandated by the order of Hon'ble High Court. Thus, it would be wrong to say that there was any kind of revaluation of assets.*
>
> *Therefore, there could not be any question of invoking clause (j) of Explanation to section 115JB for calculation of book profit u/s. 115JB. Here in this case, nowhere it has been disputed that the profit and loss account has not been prepared in compliance of requirement of Part-I and Part-II of the Companies Act, 2013 and as per accounting standard. The profit and loss account has been approved by the Statutory Auditors and also laid before the Members in the AGM, which is sacrosanct for computing the book profit u/s. 115JB. Thus, once the accounts have been prepared in accordance with the Companies Act duly certified by statutory auditors and approved by Company AGM, then same cannot be disturbed as held by Hon'ble Supreme Court in the case of Apollo Tyres (supra). Here the Assessing Officer cannot tinker with such profit and loss account or treat the part of capital reserve by holding that it should have been routed through regular profit and loss account. The reasoning given by the ld. CIT (A) too cannot be upheld for the same reason.*

3.35 Hence the assessee would be entitled for claim of depreciation in the computation of book profits under section 115JB of the Act. **Accordingly, the Ground Nos. 10 & 11 raised by the assessee are allowed.**

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4. Ground Nos. 3 to 3.1 raised by the assessee is challenging the disallowance of Capital Work In Progress (CWIP) written off amounting to Rs. 9,71,61,370/-.

4.1. We have heard the rival submissions and perused the material available on record. During the relevant assessment year, the assessee had debited an amount of Rs.9,71,61,370/- in its profit and loss account under the head "Provision for obsolescence of capital work in progress/services". The said amount represents the amount actually written off by the assessee in its books of account in relation to part completed projects/ tower sites which are abandoned/aborted before actual setting-up of tower site due to unavoidable reasons such as cancellation of service orders by the customers, cancellation of tenancy agreements etc. As stated supra, the assessee is engaged in the business of providing Passive Infrastructure ('PI') telecom services to several telecom operators. The business model of the assessee is that the assessee sets-up tower sites at the premises of the landlord. The setting up of a tower site involves preparation of civil foundation, assembly of towers, installation of shelter, which involves following types of expenditure:-

(a) Purchase of equipment in relation to setting-up of new sites;

(b) Service charges incurred by the assessee testing charges, freight expenses, rent vic.

During the set-up phase of the tower, the above expenditure forms part of CWIP and are accounted as such as per the consistent accounting practices followed by the assessee which is in accordance with the applicable accounting standards. Once the site is ready for activating, the entire expenditure incurred towards set-up is capitalized in the books as asset

used for business purposes. A completed tower site is capable of generating revenue to the assessee company as part of its regular business activity over the period through rendering of passive infrastructure services on the said towers to the telecom operators.

4.2. The ld AO however disregarded the contentions of the assessee and proceeded to disallow the sum of Rs. 9,71,61,370/- on account of CWIP written off holding the same to be capital in nature. The ld AO observed that merely because a particular business project had been abandoned by the assessee as it did not materialize, the nature of expenditure which is primarily capital in nature cannot be converted into revenue expenditure by claiming loss thereon. This action of the ld AO was upheld by the ld CIT(A).

4.3. From the modus operandi adopted by the assessee in its business model which is referred supra, we find that if the tower site before its setting up gets cancelled by the customers due to cancellation of service order or cancellation of tenancy agreement with the landlord or due to any other business reason, gets aborted before setting-up of the tower or before it gets ready for active installation, the expenditure already incurred thereon would not result in setting up of a tower site cable of generating any revenue out of it and the expenditure incurred thereon would have to be ultimately written off by the assessee as there would be no value/ benefit by retaining the same in the books of account. The purpose of incurrence of such expenditure is intricately and inextricably linked with the primary business of the assessee vis-à-vis the project that is aborted due to aforesaid reasons beyond the control of the assessee, is not doubted by the revenue in the instant case. The genuineness of incurrence of such expenditure is also not doubted by the revenue. The only grievance of the revenue is that the expenses were incurred by the assessee for setting up

of a new tower site which is capital in nature and since the said project of setting up of tower site got abandoned / aborted, the said entries of expenditure continues to remain as capital in nature and the abandoned project loss would only have to be construed as capital loss and not revenue business loss. The fact of the project getting aborted/ abandoned is not disputed by the revenue. That the project is linked with the primary business of the assessee is not doubted. Hence, if such business project gets abandoned, the amount already spent on the said project would only have to be construed as a business loss when the same is written off in the books and hence squarely allowable as deduction. This issue is also no longer res integra in view of the decision of the Hon'ble Bombay High Court in the case of CIT vs Idea Cellular Ltd reported in 76 taxmann.com 77 (Bom HC) wherein that assessee was engaged in providing cellular mobile services, claimed deduction for sum of Rs. 3.90 crores being the amount of expenses incurred on setting up of cell towers, which were subsequently abandoned by the assessee since, the site was found to be unsuitable and written off in the books of accounts. The Hon'ble Bombay High Court held that since the new cellular towers were constructed in addition to the existing towers and no new business was being set up by assessee, expenditure incurred in respect of the said abandoned cell towers would be allowable business expenditure u/s 37(1) of the Act. Similar view was also taken by the Hon'ble Calcutta High Court in the case of Binani Cements Ltd vs CIT reported in 380 ITR 116 (Cal). Similar view was taken by the Hon'ble Jurisdictional High Court in the case of CIT vs Priya Village Roadshows Ltd reported in 332 ITR 594 (Del).

4.4. In view of the aforesaid observations and respectfully following the judicial precedents relied upon herein above, **Ground Nos. 3 to 3.1 raised by the assessee are hereby allowed.**

5. Ground Nos. 4, 9, 11 and 12 raised by the assessee are challenging the disallowance of Provision for Site Restoration Obligation (SRO)/ Asset Restoration Obligation (ARO) amounting to Rs. 101.11 crores under normal provisions of the Act and also in the computation of book profits u/s 115JB of the Act.

5.1 We have heard the rival submissions and perused the material available on record. We have already stated that the assessee is engaged in the business of providing passive infrastructure (PI) telecom service to several telecom operators. In order to provide PI services, the assessee enters into long term lease agreements with the land/ premises owners for setting-up of telecom towers, shelters, DG sets etc. Since such setting-up of telecom towers involves substantial modification of the premises to enable installation of such steel structures, shelters, generators, foundation etc., it is agreed by the assessee to restore such sites back to their original condition at the time of termination of the lease agreement. Accordingly, Site Restoration Obligation (SRO) arises in respect of the setting-up , installation, alteration or modification, which the assessee undertakes for the purpose of setting-up of towers on the leased premise.

5.2 The assessee placed copies of sample lease agreement which contained such obligations to be performed by the assessee before the lower authorities in order to restore the site to its original condition as agreed in the lease agreement. The assessee had to incur substantial expenditure to be incurred on un-installation and restoring back the premises to its original condition. Accordingly, the assessee estimated the site restoration cost to be incurred at the end of lease period on a reasonable and scientific basis and made a provision thereon in accordance with Accounting Standard-29 (AS-29) (provisiond, contingent liability and

contingent assets) issued by the Institute of Chartered Accountants of India (ICAI) on account of expenses for ARO/ SRO. During the year under consideration, the assessee created a provision of Rs. 2129 crores. The estimated cost of dismantling of the tower per site was arrived taking the base rate for ground-based towers (GBT) of Rs. 53,180 and base rate for other towers of Rs. 1,16,604/-. The assessee obtained quotation from the third party vendors for dismantling cost and used the same while making the estimate after due application of inflation rates thereon. The cost of dismantling the tower was multiplied by factor worked out based on the inflation rate and useful life of the tower was estimated to be 20 years. For the purpose of applying the discounting factor for computing the present value of SRO/ ARO, the assessee considered 10 years Indian Govt Bond yield rate. The entire workings for provision of ARO/ SRO are enclosed at page 1457 to 1463 of Paper book Volume-III. In the books of accounts, the fixed assets are depreciated as per the prescribed rates for accounting purposes and the site restoration cost is amortized over the remaining period of lease of the site, in line with the matching principle in accounting. For the purpose of computing income under normal provisions of the Act, the assessee excludes such SRO cost from the cost of fixed assets and therefore does not claim any tax depreciation thereon. Following the mercantile system of accounting and the law enunciated by the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd v. CIT [1997] 225 ITR 802 (SC) and Rotork Controls India (P.) Ltd. vs. CIT [2009] 314 ITR 62 (SC), such SRO is amortized over the tenure of the lease and claimed as business expenditure deductible. During the relevant assessment year, the assessee amortized Rs.101,11,00,000 in the books of accounts in respect of site restoration obligation. For the purposes of MAT, since ARO liability represents an ascertained liability, the same has been

accordingly claimed as an allowable expense under provisions of Section 115JB of the Act.

5.3 The ld AO concluded that the provision of expenses on account of SRO/ ARO as an unascertained liability not eligible for deduction both under the normal provisions of the Act as well as in the computation of book profit u/s 115JB of the Act and accordingly, disallowed the sum of Rs. 101.11 crore amortized during the year by making the following observations:-

> -The term for lease period for tower sites is normally 20 years; during this period - the lease period may be extended on mutual agreement, terms of lease agreement may be altered; the appellant may not remove tower at all on its expenses.
>
> -Cost of removal of tower after period of 20 years cannot be reliably determined at the beginning of the lease term.
>
> -In the books of accounts, the appellant is capitalizing such obligation but for the purpose of the Act, same is being claimed as revenue expense.
>
> -Had the provision been made on the basis of adopting any scientific or technical basis or on the basis of past experience, there could not have been such a huge balance in the provision for ARO obligation account. There is no doubt that the provision are made in excess without any basis; if provisions are based on scientific basis and if working is robust, then the question of reversal in the subsequent year(s) may not arise in a significant way.

5.4 Further, the ld AO made the following observations as regards the quantification of SRO provisions:-

> -The assessee company has not provided any evidence in support of the estimate- consideration of base rate is arbitrary;
>
> -The change in base rate of SRO /ARO would be considered as error on account of significant variation and hence, effect is to be given retrospectively and excessive depreciation claimed earlier should be reversed and credited to Profit and Loss Account,

-The assessee company has not discounted SRO /ARO to the date of their original capitalization. Had the assessee company considered the discounting, SRO/ARO of the assessee company would have been lower;

-Only one sample agreement has been provided by the assessee. Considering the number of towers owned by the assessee, it is not established that SRO /ARO exists for all the tower sites;

-The working/ method of computing SRO/ARO followed by the transferor companies have not been provided;

-Base rate considered for SRO /ARO has continuously reduced over a period of 3 years which has resulted in significant reduction in SRO/ ARO in FYs 2009-10 and FY 2010-11 as compared to FY 2008-09 and 2009-10-estimate is thus not reliable.

5.5 The aforesaid disallowance made by the ld AO based on the observations and allegations reproduced supra were upheld by the ld CIT(A). We find that as per the lease agreement entered into by the assessee, the assessee is duly obligated to restore the premises/ site to its original condition. For this purpose, obviously the assessee had to incur expenses towards un-installation of the tower sites together with various other equipments and also had to incur expenses towards leveling, converting etc to restore the premises to its original condition. These expenses had to be obviously incurred by the assessee at the expiry of the lease period. Expiry date of the lease period is known from the lease agreement itself. Hence, on the date of entering the lease agreement itself, the assessee is very well aware about the date of expiry of agreement. Hence, the obligation on the part of the assessee to incur such expenses is crystallized on the date of entering lease agreement itself that there is expenditure towards SRO/ ARO which had to be incurred necessarily and

positively by the assessee in future. Hence, the existence of such liability towards expenditure on account of SRO/ ARO is real and not contingent liability. We have gone through the workings made for provision on account of ARO/ SRO which are enclosed in pages 1457 to 1463 of Vol-III of Paper Book and find that the same is made on a scientific basis by the assessee by considering all the relevant documents including obtaining quotations from the 3rd party vendors for estimating the dismantling cost. It is not in dispute that the said lease agreement was entered during the course of regular business of the assessee and provisions made on account of SRO/ ARO is part of regular business activity of the assessee. Hence, the expenditure provided thereon becomes an expenditure wholly and exclusively for the purpose of business of the assessee. This issue was subject matter of consideration of the Hon'ble Rajasthan High Court in the case of Udaipur Mineral Development Syndicate Pvt Ltd vs DCIT reported in 261 ITR 706 (Raj) wherein, the Hon'ble Court was dealing with the facts where there existed a clause in the agreement between the assessee and the state that the lessee (assessee) should restore the surface land so used to its original condition (in the similar nature of SRO). With regard to allowability of expenses, the Court held that very moment assessee dug pits, liability did arise, and it was entitled for deduction of expenses which it was supposed to incur for filling those pits, as it was following mercantile system of accounting.

5.6 Similarly the Hon'ble Madras High Court in the case of Vedanta vs JCIT in Tax Case (Appeal) Nos. 2117 to 2119/2008 dated 23.01.2020 had held that the provision made by the assessee for site restoration cost under the contractual obligation by the assessee in the product sharing contract, made on scientific basis was squarely allowable business expenditure u/s 37(1) of the Act. The Hon'ble Madras High Court while referring the same

also relied on the decision of the Hon'ble Supreme Court in the case of Calcutta Discount Co Ltd wherein, it was held 'expend' included 'expendable in future' and accordingly making of a provision by an assessee is a matter of key business or commercial prudence and it is set apart fund computed on scientific basis to meet the expenditure to be incurred in future.

5.7 We hold that whenever the said provision exceeds the actual expenditure incurred at the time of expiry of lease period, excess provision, if any, would get reversed by credit to Profit and Loss account and consequentially becomes taxable u/s 41(1) of the Act. Hence, we have no hesitation to hold that the provision made for expenses on account of SRO/ ARO as an ascertained liability. Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of Rotork Constrols India (P) Ltd vs CIT reported in 314 ITR 62 (SC) and Bharat Earth Movers Ltd reported in 245 ITR 428 (SC). Hence, it become an allowable expenditure both under the normal provisions of the Act as well as in the computation of book profit u/s 115JB of the Act. **Accordingly, Ground Nos. 4, 9, 11 and 12 raised by the assessee are hereby allowed.**

6. Ground No. 5, 5.1, 9 and 13 raised by the assessee are challenging the disallowance of provision for expenses treating the same as unascertained liability both under normal provisions of the Act as well as in the computation of book profit u/s 115JB of the Act.

6.1 We have heard the rival submission and perused the material available on record. Pursuant to the mercantile system of accounting followed by the assessee, the assessee accounts for all the expenses pertaining to the relevant year while arriving at the profit for that year.

Once, the expenditure is accrued, the assessee account for the same even if the invoices have not been received for the same in order to follow the accrual and matching principle of accounting. Accordingly, the assessee makes provision for expenditure that had actually accrued and become due in the month of March 2010 for which the invoices were received by the assessee in April 2010 or May 2010. For these expenses, the expenditure is provided on accrual basis in the month of March 2010 itself to depict the true and fair state of affairs of the company and also to ensure that only 12 months expenditure are reflected under each head of expenditure. Accordingly, the assessee had recognized the following provision for expenses as on 31.03.2010:-

Operating expenses	Rs. 343.30 crores
Rate and taxes	Rs. 19.57 crors
Salary	Rs. 18.33 crores
Power and fuel	Rs. 469.02 crores
Total	Rs. 850.22 crores.

6.2 The ld AO considered the aforesaid provision for expenses as unascertained liabilities having no rational/ scientific basis and accordingly, disallowed an amount of Rs 583.17 crores both under the normal provisions of the Act as well as in the computation of book profit u/s 115JB of the Act after restricting the disallowance relating to power and fuel expenses to 201.97 crores. While doing so, the ld AO doubted the estimation of quantification of provision. The ld CIT(A) further restricted the said disallowance to Rs 518.83 crores as under:-

Operating expenses	343.30 crores
Rate and taxes	19.57 crores
Power and fuel	155.26
Total	518.83 cores.

6.3 It was submitted by the ld AR that while making the said disallowance, the ld CIT(A) failed to appreciate that out of closing provision of Rs. 831.89 crores (excluding closing provision for salary), amount of Rs. 501.28 crores (338.43+19.57+142.68) has been actualized/ reversed in subsequent years and therefore no disallowance was warranted to that extent. The ld AR drew our attention to the synopsis in pages 42 to 46 thereon to explain as to how each of the aforesaid category of expenses had indeed crystallized during the year on accrual basis and that how the same have been subsequently paid/ reversed in the books of account for each of the expenses. On perusal of the same, we are convinced that the said provision of expenses have been actually made by the assessee on scientific/ rational basis in consonance with the accrual system of accounting regularly employed by the assessee and in consonance with AS-29 issued by ICAI. In our considered opinion, the said expenditure would have to be squarely allowed as deduction both under normal provisions of the Act as well as in the computation of book profit u/s 115JB of the Act as it falls under the category of ascertained liability. **Accordingly, the Ground No. 5, 5.1, 9 and 13 raised by the assessee are allowed.**

7. Ground Nos. 6 and 14 raised by the assessee are challenging the confirmation of disallowance of provision for Service Level Adjustment (SLA) credits both under normal provisions of the Act as well as computation of book profit u/s 115JB of the Act.

7.1 We have heard the rival submission and perused the material available on record. During the year under consideration, the assessee accounted for SLA provision of Rs. 133.36 crores and raised credit notes amounting to Rs. 68.67 crores. The closing balance of SLA provision amounting to Rs. 64.12 crores was reflected in the financial statements.

The assessee enters into non-cancellable (long term) service arrangements, i.c., Master Service Agreement ('MSA'), with the telecom operators (customers) to provide Passive Infrastructure services. The MSA includes the terms for the minimum standards of operations and maintenance levels to be maintained which are defined in Schedule 2: Operation and Maintenance services of the MSA. The relevant clauses specify an expected uptime service level in each circle for each month at 99.95% across all sites (other than Strategic Sites) and at 99.99% for all strategic sites in that circle. Pursuing the relevant Schedule-2 of the MSA, the SLA (Service Level Agreement) credit is the amount of credit to be given to the operators on account of deficiency in the provision of services which become payable upon the settlement of the dispute with the operators. Since SLA credit is determined post raising of the invoice, the same is passed on to the telecom operator through subsequent credit notes. It is thus evidently clear that SLA credit is nothing but reversal of revenue owing to deficiency in the provision of services. Since SLA credit is determined post raising of the invoice, the same is passed on to the telecom operator through subsequent credit notes.

7.2 The ld AO treated the aforesaid provision for SLA credits as unascertained liability and proceeded to disallow the same both under normal provisions of the Act as well as in the computation of book profit u/s 115JB of the Act. The ld AR submitted that the aforesaid SLA provision is based on the automated report known as “downtime report” reflected from dedicated software and there is absolutely no manual intervention in generation of downtime report and the data time report and the data is self generated based on the actual outage. This report generates the frequency/ percentage of the downtime, basis which the deficiency levels in the provision of services that may have been experienced by the telecom

operators is determined. Subsequently, as and when the telecom operators provide details of downtime/ service deficiency levels experienced by them as per their system, the assessee issues a credit note to the respective party post a final sign off. In case of failure of requisite uptime levels, the assessee is required to bear the penalties under the relevant clauses of the MSA as referred above.

7.3 The assessee has enclosed the workings for provision of SLA credit for various circles together with the credit notes issued thereon in pages 1964 to 1976 of the paper book Volume IV on sample basis.

7.4 Apart from that, the ld AR drew our attention to accounting policy qua SLA provision created on scientific basis which is enclosed in pages 1580 to 1594 of Vol –III of Paper Book; month-wise break up of provision along with details of actualization which are enclosed in pages 1963 to 1976 of Volume IV of Paper Book; sample credit notes together with the detailed workings and customers sign off of the same which are enclosed in pages 1977 to 1980 and 1984 to 2015 of Vol-IV of Paper Book. Hence, we find that the said provision of SLA credits made by the assessee is made on a scientific basis having proper rationale for the same as it is akin to provision made for warranty. In view of the decision of the Hon'ble Supreme Court in the case of Rotork Controls Pvt Ltd reported in 314 ITR 62 (SC), we hold that the aforesaid provision of SLA credit would have to be construed as an ascertained liability eligible for deduction both under normal provisions of the Act as well as in the computation of book profit u/s 115JB of the Act. **Accordingly, ground No. 6 and 14 raised by the assessee are allowed.**

8. Ground No. 7 raised by the assessee is challenging the confirmation of disallowance of interest paid u/s 36(1)(iii) of the Act amounting to Rs. 3.74 crores.

8.1 We have heard the rival submission and perused the material available on record. During the year under consideration, the assessee had incurred and claimed interest expenditure of Rs. 785,74,73,000/-. The assessee is engaged in the business of providing passive infrastructure telecommunication services to the telecom service providers in various circles. Even prior to the merger of the tower companies into the assessee, assessee was engaged in providing such passive infrastructure services. Out of the aforesaid interest expenditure, the ld AO disallowed a sum of Rs. 91,80,00,000/- (net of 15% depreciation) applying proviso to Section 36(1)(iii) of the Act holding that interest expenditure relates to acquisition/ construction of tower sites and is therefore a capital expenditure. The said amount was computed by the ld AO by applying 12% interest on total borrowed capital utilized for capital expenditure for the period of 150 days (alleged to be average days for construction/ acquisition of tower sites). The ld CIT(A) held that the borrowed funds are utilized for construction of tower sites. For computation of the amount of interest attributable to construction of tower sites, the CIT(A) considered the amount of CWIP in excess of capex creditors; the said difference is held to be amount funded through borrowed funds. Applying the rate of 12% for 150 days, interest allegedly attributable to acquisition of tower sites is determined at Rs.4,10,87,293/-, which is held to be capitalized to cost of towers. After allowing 15% depreciation, amount of Rs. 3,74,56,978/- was disallowed applying proviso to section 36(1)(iii) of the Act.

8.2 We find in the instant case that there is no extension of existing business. The assessee has merely got new circles to render telecom services wherein towers are installed. Accordingly, in our considered opinion, proviso to section 36(1)(iii) of the Act per se is not applicable. Further, we find that the issue in dispute is covered in favour of the assessee by the decision of this Tribunal in assessee's own case for AY 2009-10 in ITA No. 2242/Del/2014 and 1040/Del/2014 dated 07.06.2019. In any event, once it is held that borrowed capital has been utilized for the purpose of business of the assessee, the interest paid on such loan becomes an allowable deduction u/s 36(1)(iii) of the Act. Reliance in this regard has been rightly placed by the ld AR on the decision of Hon'ble Supreme Court in the case of DCIT Vs. Core Healthcare Ltd reported in 167 taxman 206 (SC). Further, we find that there is absolutely no basis for the lower authorities to arrive at the average credit period of 90 days obtained from the vendors or average period taken for installation/ construction of tower sites. In view of the aforesaid observations and respectfully following the judicial precedents relied upon herein above **ground no. 7 raised by the assessee is hereby allowed.**

9. Ground No. 8 raised by the assessee is challenging the denial of additional claim of enhanced depreciation of energy saving device @80% as against 15% granted by the revenue.

9.1 We have heard the rival submission and perused the material available on record. The telecom tower sites comprises two infrastructure facilities namely passive infrastructure (owned by the assessee) and active infrastructure (owned by the customers/ telecom operators). Further, as

part of the standard business offerings, the assessee renders following telecom infrastructure support services to customers/ telecom operators:-

> -Access to passive infrastructure installed/constructed (i.e. towers, shelter room) by of active infrastructure equipment (i.e. microwave radio, antenna, base transmission station etc.) by telecom operators. the assessee to be used for installation and safe keeping
>
> -24x7x365 uninterrupted power supply at desired current and voltage levels
> - Temperature below 35 degrees Celsius inside the shelter room all the time.

9.2 To ensure uninterrupted power supply at the tower sites at the required temperature level, besides the power connection taken from the respective state electricity boards, the assessee has installed following energy saving equipments:-

- Auto Mains Failure (AMF) Panel
- Switch Mode Power Supply (SMPS)
- Free Cooling Unit (FCU)
- Power Factor Capacitors (PFC)
- Power Management Systems (PMS)/Power Interface Unit (PIU)
- Integrated Power Management Systems (IPMS)
- AC/DC Energy Meters

9.3 In the return of income, the assessee had inadvertently claimed depreciation on abovementioned energy saving devices at the rate of 15%, whereas the same qualify for depreciation at the rate of 80%, being energy saving devices. Accordingly, claim for higher depreciation was raised before the ld AO vide letter dated 06.02.2019. To substantiate that the specified assets qualify as 'Energy Saving Device', the assessee had also furnished a detailed technical report from a Chartered Engineer defining nature and functionality of each of above-mentioned devices and how these devices

help in saving energy and how such devices qualify as energy saving devices under the Act highlighting the relevant entry of the depreciation.

9.4 The ld AO completely disregarded the aforesaid submissions of the assessee and proceeded to deny the claim of enhanced depreciation @ 80% of energy saving device and granted 15% which was the claim of the assessee. This action of the AO was upheld by the ld CIT(A). We have gone though the depreciation schedule wherein we find that the energy saving device which had been installed with the assessee fall under category of 80% rate of depreciation. The ld AO had applied the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd reported in 284 ITR 323 (SC) to deny the claim of additional allowance towards enhanced rate of depreciation on energy saving devices. We find that the said decision is not applicable to appellate authorities and hence, the ld CIT(A) ought to have considered the claim of the assessee on merits. Since, the said issue is glaring on us, we proceed to decide the same at our level instead of sending it back to the file of the ld CIT(A). We find that the devices installed by the assessee are only to ensure uninterrupted power supply at the tower sites at the required temperature level. Hence, these equipments do fall under the category of energy saving device eligible for enhanced rate of depreciation of 80%. Hence, the ld AO is directed to grant 80% depreciation on this energy saving device and recompute the allowable income tax deprecation u/s 32 of the Act for the year under consideration and also for subsequent years consequentially. **Accordingly, ground No. 8 raised by the assessee is hereby allowed.**

10. The Ground Nos. 10& 11 raised by the assessee are challenging the upward adjustment of depreciation on aforesaid assets obtained pursuant to the scheme of arrangement, while computing book profits under section 115JB of the Act.

10.1 We have heard the rival submissions and perused the materials available on record. The Passive Infrastructure Assets (PIAs) vested in the assessee with effect from 1-4-2009 pursuant to a two-step court approved scheme, the assessee in its books in accordance with the mandate of the court approved scheme, recorded the PIAs at its fair value of Rs 16306 crores. The book depreciation thereon was debited to the Profit and Loss Account as per the applicable accounting policy and applicable standard and was claimed as reduction while computing book profits under section 115JB of the Act. The Learned AO since had treated that PIAs were received for nil consideration, observed that accounting of PIAs in the books by the assessee at its fair value tantamount to revaluation and accordingly depreciation on the so-called revalued amount would not be allowed as reduction under clause (iia) of Explanation 1 to section 115JB of the Act. Consequentially, the Learned AO made an upward adjustment of Rs 1112.30 crores on account of this transaction while computing book profit under section 115JB of the Act. This was reduced to Rs 1030.95 crores by the Learned CITA rectifying the factual errors committed by the Learned AO.

10.2 We have already held that transaction of gift of assets under the first step court approved scheme as a genuine gift. The transfer of assets at fair value to the assessee has already been accepted as genuine as the same was done in accordance with the approved schemes of the Hon'ble High Courts. Hence the claim of book depreciation on fair value of assets cannot

be questioned by the department. The same does not tantamount to revaluation. It is pertinent to note that the entire accounting treatment in the books of tower companies on receipt of PIAs from operating companies under court approved scheme with specific reference to accounting treatment in the books of the transferee company and the accounting treatment pursuant to merger of tower companies into assessee had already been part of the approved schemes of the Hon'ble High Court, which cannot be questioned at this stage.

10.3 Pursuant to the scheme of amalgamation, the value of assets are to be recognized at their fair values only. The Delhi bench of this Tribunal in the case of Priapus Developers Pvt. Ltd. vs. ACIT reported in 104 taxmann.com 298 had considered an identical issue where shares acquired pursuant to amalgamation were recognized at their fair values, wherein the learned AO treated the same as revaluation and denied deduction of fair value as cost of acquisition while computing book gains on transfer of shares. The Tribunal held that recognition of shares at fair value does not amount to revaluation. The conclusion drawn by the Delhi Tribunal in this regard are as under:-

> *"**17.** Such a premise of the Assessing Officer cannot be approved for the reason that;*
>
> - *Firstly, this reserve has not been created on revaluation of asset albeit same has been acquired through amalgamation and the shares have been valued as per the purchase method for a certain price.*
> - *Secondly, it is not revaluation of any asset held by the assessee, because no such reserve has been created by the assessee on revaluation of shares. Revaluation of assets takes place only when the assessee decides to revalue the asset existing in the balance sheet.*
> - *Lastly, in this case all the assets belonged to amalgamating companies, that is, the shares of IHFL originally belonged to PREPL and PPPL and appeared in their balance sheet; and these assets entered in the books of assessee by virtue of amalgamation valued on fair market value as*

mandated by the order of Hon'ble High Court. Thus, it would be wrong to say that there was any kind of revaluation of assets.

Therefore, there could not be any question of invoking clause (j) of Explanation to section 115JB for calculation of book profit u/s. 115JB. Here in this case, nowhere it has been disputed that the profit and loss account has not been prepared in compliance of requirement of Part-I and Part-II of the Companies Act, 2013 and as per accounting standard. The profit and loss account has been approved by the Statutory Auditors and also laid before the Members in the AGM, which is sacrosanct for computing the book profit u/s. 115JB. Thus, once the accounts have been prepared in accordance with the Companies Act duly certified by statutory auditors and approved by Company AGM, then same cannot be disturbed as held by Hon'ble Supreme Court in the case of Apollo Tyres (supra). Here the Assessing Officer cannot tinker with such profit and loss account or treat the part of capital reserve by holding that it should have been routed through regular profit and loss account. The reasoning given by the ld. CIT (A) too cannot be upheld for the same reason."

10.4 Hence the assessee would be entitled for claim of depreciation in the computation of book profits under section 115JB of the Act. **Accordingly, the Ground Nos. 10 & 11 raised by the assessee are allowed**.

11. Ground No. 15 raised by the assessee is challenging the interest u/s 234B of the Act, which is consequential in nature and does not require any specific adjudication.

12. **In the result, the appeal of the assessee in ITA No. 1962/Del/2023 for Assessment Year 2010-11 is allowed.**

ITA No. 2212/Del/2023 – Revenue Appeal – Assessment Year 2010-11

13.The Ground No. 1 raised by the revenue is challenging the deletion of disallowance made on account of depreciation in relation to provisional capitalization added to the cost of fixed assets.

13.1 We have heard the rival submissions and perused the materials available on record. During the year under consideration, the assessee has added to the cost of plant and machinery an amount of Rs. 170,31,70,112/- on account of provisional capitalization. The Learned AO in the assessment order proceeded to disallow 15% depreciation thereon aggregating to Rs. 25,54,75,517/- primarily alleging that the same does not constitute actual cost. The Learned AO held that provisional capitalization has been booked on the basis of standard cost which is impermissible for the purpose of allowance of depreciation. The Learned CITA deleted the aforesaid addition holding that the sites corresponding to the provisional capitalization were ready for use and the cost for acquisition / construction of asset has been incurred and accordingly the assessee is eligible for claim of depreciation on the cost capitalized.

13.2 The Learned DR vehemently relied on the order of the Learned AO. Per Contra, the learned AR before us explained the modus operandi adopted by the assessee with regard to the said provisional capitalization of assets by explaining as under:-

> -Whenever a telecom service provider wishes to avail passive infrastructure support services, it sends a request describing the tower location, tower specifications such as the angle or height required, latitude and longitude and equipment details (which would be kept on the tower site and connected to the passive infrastructure) etc. Post assessee's response, the assessee receives the order from customer and tower site is set-up for use by the customer.
>
> -Tower site requires installation of various complex and technical equipment (detailed in submissions) and requires services of highly technical personnel.

-To foster the process, the assessee, as a policy, procures certain infrastructure/ regular items/ materials in bulk and stores them in its warehouses maintained at various locations. Items are then released from warehouse to tower sites as and when required. For other items and civil work, various vendors are identified who work on number of sites simultaneously in a particular geographical area and furnish their invoices for approval to the appellant on time-to-time basis.

-The invoices are sent for approval by the relevant team and the same are then accounted and recorded under Capital Work in Progress ("CWIP') account. Therefore, on a need basis, the procured materials and engaged vendors are directed to the identified sites in order to set-up/ configure such sites. Such process of issuing of invoice by the vendors and subsequent accounting in books may extend up to a considerable period of time usually beyond date of completion of setting-up of tower site.

-Once a tower site is set-up (i.e., all the necessary structure and equipment have been installed) and is 'ready to use', the same is capitalized from the Ready for Active Installation ('RFAI) notice generation date, i.e, transferred from CWIP account to fixed assets account and depreciation (i.e. book depreciation as well as tax depreciation) is claimed by the assessee from such date. When a tower site is set-up and ready to use, all the cost incurred in relation to various equipment such as tower structure, shelter, complex electrical fittings, civil work etc. is capitalized for accounts as well as tax purposes.

-Considering that at the RFAI notice generation date or on the date of capitalization, it may not be possible to identify the exact materials/ components of tower-site used or the cost relating to such tower sites since - (1) some of the invoices may not be received; (ii) invoices are pending for approval; (iii) materials are identified subsequently, (iv) mapping within company between warehouse and tower site can eventually extend beyond RFAI date etc.

-However, since the tower sites is ready to use, it is essential to capitalize the same with cost incurred on such date both from the perspective of accounts as well as tax. Therefore, the process of provisional capitalization followed by the assessee to record the cost of tower sites as under

> ✔The materials/vendor invoices to the extent available are mapped to the identified tower sites to determine the actual cost on such month end.
>
> ✓ The available actual cost of towers and civil works at the cut-off date is compared to the standard cost based on which provisional capitalization is done.

✔ Provisional capitalization is reversed on the first day of the succeeding month.

✔Provisional capitalization is made only for an asset which has already been put to use.

-Accordingly, the assessee has resorted to a standard set of procedure to capitalize the cost of equipment or services (for which it has not received the invoice as on the date of capitalization or the cost of which cannot be accurately allocated on the date of capitalization) on the basis of purchase orders received and standard cost determined for setting-up of site. The said method of capitalization adopted by the assessee is termed 'provisional capitalization'.

-Further, provisional capitalization made during each month of the year stands fully reversed during the same year itself and the only the amount of provisional capitalization created for the month of March thus appears as the closing balance at the year-end (i.e. year-end provisional capitalization). In addition, such year-end provisional capitalization is regularized basis actual invoices received in subsequent year.

-Based on the above, book depreciation as well as tax depreciation is claimed on the (1) actual cost of the tower sites/assets (as appearing in the fixed asset register) as well as (ii) year-end provisional capitalization as on 31st March of the financial year. As against this provisional capitalization for 31st March of previous year, the actual cost is identified in next year and any excess or deficient cost as compared to provisional capitalization is adjusted in the tax fixed asset register of the next year."

13.3 Further it is pertinent to note in the special audit report issued for the assessment year 2010-11, the special auditor has categorically accepted the accounting policy/ basis adopted by the assessee and had specifically noted that provisional capitalization needs to be added to the cost base of tower site in order to measure the cost of fixed assets capitalized and depreciation there on.

13.4. In view of the modus operandi adopted by the assessee which stood uncontroverted by the revenue before us and in view of the report of the Special auditor, we hold that no fault could be attributed on the basis of

derivation of provisional capitalization by the assessee as narrated and detailed supra. Accordingly, we hold that the depreciation on aforesaid provisional capitalization deserves to be allowed as the corresponding assets thereon are already ready for use. We find that the learned CITA had duly appreciated this contention of the assessee and on which , we do not find any infirmity. **Accordingly Ground No. 1 raised by the revenue is dismissed.**

14. The Ground No.2 raised by the revenue is challenging the deletion of disallowance of depreciation on tower sites from RFAI notice generation date.

14.1 We have heard the rival submissions and perused the materials available on record. During the year, the assessee capitalized several telecom tower sites made up of passive infrastructure facilities and other ancillary equipments, which is used by the customers / telecom operators for the purpose of installation of their active infrastructure equipment. The different dates involved in the commercial deployment of the tower site for use by customer / telecom operator as coming out of Master Service Agreement (MSA) are explained in brief as under:-

> "Stage 1: First RFAI notice generation date (also known as DPIS date): Date when telecom tower site is ready to use as per the site norms and is ready to be leased out and offered to the ultimate customer/ operator by the assessee. At this time, the site has fulfilled all technical requirements and internal controls and technical tests of the appellant leaving no question as to the readiness of the towers. Accordingly, on this date the appellant capitalizes its telecom tower site and claims depreciation for both accounts as well as for tax purposes.
>
> Stage 2: RFAI date: Date on which customer confirms its acceptance of the site for installation of its active infrastructure equipment. Customers generally give the confirmation within 14 days of the RFAI notice generation date. However, in case of no response, the 14th day is deemed as RFAI date,

> Stage 3: Billing start date: Date from which the actual billing is done to the customers. This may in some circumstances, due to certain practical difficulties, be more than 14 days apart from the RF. FAI Notice generation date."

14.2 The Learned AO held that the RFAI notice generation date cannot be treated as date of ready to use/ put to use (i.e., date of capitalisation of asset) of tower site since(1) That the customer can use the tower site only with effect from "active installation" i.e installation of active infrastructure devices (Le. RFAI date); (ii) customer may point certain deficiency in such tower sites, which the assessee is obligated to rectify, thereby meaning that such tower sites were not ready for use on RFAI Notice Generation Date; and (iii) assessee is entitled to raise invoice for billing from RFAI date only considering that generally billing start date and RFAI date are same except in few cases of practical difficulties. The view of the AO is based on the observations of the Special Audit report for the subject years, viz., assessment year 2010-11. Accordingly, the AO has considered the RFAI date (which is normally after 14 days of RFAI notice generation date) as date of put to use of telecom tower and has disallowed an amount of Rs.17,78,55,500 (being the amount of depreciation calculated at half of applicable rate on the additions of Rs.1,77,62,29,934 made during 20.09.2009 to 02.10.2010 and depreciation claimed by the assessee at half of applicable rate on additions of Rs.93,87,48,394 made during 19.03.2011 to 31.03.2011.

14.3. The Learned CITA held that the passive infrastructure assets were ready for use on the RFAI notice generation date. Accordingly by following the various rulings of the Hon'ble Jurisdictional High Court, the Learned CITA held that the assessee would be eligible to claim depreciation on such passive infrastructure assets and accordingly deleted the disallowance made by the Learned AO. We find that the RFAI notice generation date

had to be considered as 'put to use' date for claim of depreciation on tower sites. The revenue had contended that billing date should be the determinative factor and not the date when sites are ready for active installation of the assets to the customers and accordingly had denied depreciation. In our considered opinion, this view is based on the point of view of the sharing operator and not taken from the perspective of the assessee and hence liable to be ignored. In order to determine the date of 'put to use' for the purpose of allowance of depreciation under Section 32 of the Act, the same needs to be considered from the perspective of the assessee i.e. whether the tower site is 'ready for use' as per norms of the assessee and agreed with customers and has it been offered for testing and evaluation to the sharing operators. This view is no longer res integra in view of the decision of Hon'ble Punjab and Haryana High Court in the case of CIT vs Piccadilly Agro Industries Limited reported in 311 ITR 24 (P&H) ; decision of Hon'ble Bombay High Court in the case of Larsen and Toubro Limited vs PCIT reported in 403 ITR 248 (Bom). It is pertinent to note that the SLP preferred by the revenue against this decision was dismissed by the Hon'ble Apex Court which is reported in 259 Taxman 79 (SC).

14.4. We find that the Hon'ble Courts have already held that the term 'use' as referred to in Section 32 of the Act is not restricted to 'actual use', but also includes 'passive use' i.e. assets kept 'ready for use' which should also be considered for the purpose of claim of depreciation. Reliance in this regard has been rightly placed by the Learned AR on the decision of Hon'ble Jurisdictional High Court in the case of CIT vs Refrigeration and Allied Industries Limited reported in 113 Taxman 103 (Del). In any event, the date on which the depreciation is being claimed by the assessee and the date for which depreciation is granted to the assessee by the revenue

only results in a timing difference and effectively becomes revenue neutral and hence the revenue need not have any grievance on the same. Reliance in this regard has been rightly placed on the decision of Hon'ble Jurisdictional High Court in the case of CIT vs Triveni Engineering and Industries Limited reported in 196 Taxman 94 (Del) and decision of Hon'ble Supreme Court in the case of Excel Industries Limited reported in 358 ITR 295 (SC).

14.5. In view of the aforesaid observations and respectfully following the judicial precedents relied upon herein above, we hold that depreciation on tower sites are to be allowed from RFAI notice generation date. Hence, we do not find any infirmity in the order of the Learned CITA granting relief to the assessee. **Accordingly, Ground No. 2 raised by the revenue is hereby dismissed.**

15. The Ground No. 3 raised by the revenue is challenging the action of capitalization of salary expenses.

15.1 We have heard the rival submissions and perused the materials available on record. During the year under consideration, the learned AO disallowed salary expenditure aggregating to Rs. 13,29,08,545/- relating to employees working for Supply Chain Management (SCM), Site Acquisition and Infra Quality teams of the assessee, treating the same to be capital expenditure. While holding the expenditure to be capital in nature, the learned AO observed as under:

> (a) That the functions performed by the staff engaged in SCM, Site Acquisition and Infra Quality teams form an integral part of setting-up of towers and they are not related to day to day operations.
>
> (b) Since the cost of setting-up of towers is capitalised, the salary paid to the team of dedicated staff which has carried out this job should also be capitalised.

(c) The assessee derives enduring benefits and therefore the salary expenditure of such staff should form part of cost of towers.

Based on the above, the learned AO disallowed salary expenditure of SCM, site acquisition team and infra quality team amounting to Rs.13,29,08,545/-, i.e., actual salary of Rs. 14,94,18,079/- as reduced by depreciation of Rs. 1,65,09,534/-. The aforesaid depreciation is allowed by AO assuming that half of the aforesaid salary expenditure is attributable to assets put to use for more than 180 days and remaining half is attributable to assets put to use for less than 180 days. The Learned CITA deleted the addition by holding that salary expenses pertain to the three divisions mentioned supra of the assessee and are engaged in both pre as well as post commencement activities after the towers are set up.

15.2 The Learned DR vehemently relied on the orders of the Learned AO by arguing that the Learned AO was duly justified in capitalization of salary expenses and granting depreciation thereon in the facts and circumstances of the case. Per contra, the Learned AR before us duly placed on record the detailed work profile and scope of work undertaken by the employees in the aforesaid divisions in a tabular form which are reproduced here under:-

Term	Work profile	Amount	Allegations of AO	Post capitalization functions actually performed
Infra quality	The team is responsible for managing big team of field support engineers who are responsible at ground level for safe and continuous working of telecom towers sites and function on 24x7x365 day basis. They also take care of newer aspects which could be brought in different aspects of	1,18,22,646	The division namely infra quality is doing only pre capitalization work.	Responsible for managing a big team of field support engineers who are responsible at ground level for safe and continuous working of telecom towers sites and function

	tower site maintenance such as replacement of parts, upgradation of various equipment, tower design, etc. They also work with external agencies to ensure audits of sites pre-delivery. The department ensures that right quality of site is delivered to customers as per their requirements.			on 24x7x365 days basis. • Responsible for tower site maintenance such as replacement of parts, etc. • Responsible for upgradation of various equipment, tower design, etc.
Site acquisition	It is responsible for servicing landlord community which is one of the most critical part of the business. In this regard, it is responsible for ensuring timely payment, updation & renewal of rental agreements, handling issues such as property tax liabilities faced by the landlords, the interface between landlords & site-maintenance department. The acquisition of new tower site is just an incidental aspect of the department. Over the years, while the number of towers has increased, the number of telecom sites have come down but the strength of this department has gone up due to single reason as explained above, i.e., their involvement in current operations rather than one time nature of their task.	6,13,46,065	Moreover as the name suggests, the land acquisition division is also undertaking only pre-capitalization work	• Responsible for maintaining landlord relations. • Responsible for ensuring timely payment to landlords throughout the life of tower. • Responsible for updation & renewal of rental agreements. • Responsible for handling issues such as property tax liabilities faced by the landlords.

Supply chain management	The department takes care of procurement function and make sure that there is no delay in setting-up of sites for want of materials. It is responsible for capex (capital expenditure), opex (operating expenditure) management and warehouse management. The team's task is to effect all commercial purchases for the company except rental agreement with the landlords. It is responsible for buying/ procuring all the material/ spares/ diesel for running the telecom tower sites. The team also procures the capital goods for the company, however, it is only incidental to the overall work stream of the department and while the new towers set-up have substantially reduced by FY 2011-12, the strength of this department has increased since a lot of critical parts/ equipment require frequent replacement in the industry such as battery bank, DG sets, and interaction with different service vendors who assist the appellant in upkeep and maintenance of the telecom tower	7,62,49,368	Similar is the case for SCM division	• Responsible for entire procurement function and effect all commercial purchases for the company except rental agreement. • Responsible for buying/ procuring all the material/ spares/ diesel for running the telecom tower sites • Responsible for procurement of spares and replacements such as battery bank, DG sets, etc. • Responsible for interaction with different service vendors who assist the appellant in upkeep and maintenance of the telecom tower sites.

	sites.			

15.3 The above facts were not controverted by the revenue before us. We find that the employees are not only engaged in setting up of tower sites, rather majority of responsibilities relate to post setting up of tower sites and help in day to day operations of the assessee company. Hence it could be safely concluded that there is absolutely no basis for the Learned AO to even allege that these divisions perform only pre-capitalization work. We find that these salary expenditures are incurred in a routine course of business having direct nexus with the business operations of the assessee company and hence would be squarely allowable as deduction which fact has been duly appreciated by the Learned CITA while granting the relief to the assessee. Hence we do not find any infirmity in the order of the Learned CITA granting relief to the assessee. **Accordingly, the Ground No. 3 raised by the revenue is hereby dismissed.**

16. The Ground Nos. 4 and 5 raised by the revenue are challenging the partial deletion of disallowance made on account of provision for expenses, treating it as an ascertained liability are already discussed by us in assessee's appeal vide Ground Nos. 5, 5.1, 9 and 13 supra. Hence the decision rendered thereon in assessee's appeal shall apply mutatis mutandis for Ground Nos. 4 and 5 of revenue's appeal. We have already held that the provision has been made for expenses on a rational basis by strictly following the principles mandated for mercantile system of accounting and those provided in AS-29 issued by ICAI and they are to be construed only as an ascertained liability consequentially allowable as deduction. Accordingly, we do not find any infirmity in the order of the learned CITA granting relief to the assessee qua the same. **Accordingly, the Ground Nos. 4 and 5 raised by the revenue are dismissed.**

17. The Ground No. 6 raised by the revenue is challenging the deletion of addition of Rs 110.13 crores made by the Learned AO on account of difference in turnover reported in service tax return and income tax return.

17.1. We have heard the rival submissions and perused the materials available on record. The assessee filed its half-yearly service tax returns on a standalone basis on 26.10.2009 and 23.04.2010 and reported following details relating to revenue generated on 'Business Support Services':

Table 1

Business support services	**Apr'9 to Sep'09**	**Oct'09 to Mar'10**	**Total**
Gross amount received	4,163.26	4,718.22	8,881,48

17.2. Copy of service tax return filed by the assessee (on standalone basis) is placed at pages 4211-4231 of the PB Volume VII. In the financial statement, the assessee reported total revenue of Rs.5,88,85,830 (net of passthrough expense of Power & Fuel). Breakup of the same is as under:

Table 2

Schedule	**Indus (standalone)**	**Income of TowerCos (net of elimination entries**	**Total**
Service Income	8,771.34	462.17	9,266.51
Less: Power and fuel charges recovered	3,344.92	-	3,344.92
Total	5,426.42	462.17	5,888.58

17.3. During the assessment proceedings, the learned AO determined a gap of Rs.110,13,00,000/- (i.e. income as reported in the service tax returns of Rs 8,881.48 crores less income reported in the standalone

financial statements of Rs 8,771.34 crores- refer amounts in Table 1 & 2 above) and accordingly made addition of said amount alleging that the assessee has not provided the complete reconciliation of the income as reported in the service tax returns vis-a-vis income tax return for the captioned assessment year.

17.4 In the proceedings before the learned CIT(A), the assessee duly furnished the reconciliation of the aforesaid amounts, The learned CIT(A) has, vide order dated 05.06.2023, after admitting the additional evidences including the reconciliation, filed by the assessee under Rule 46A of the Income Tax Rules directed the learned AO assessing officer to delete the addition subject to verification of reconciliation by the assessee.

17.5. We find that the Learned CITA had rightly admitted the additional evidences filed by the assessee under Rule 46A of the Income Tax Rules containing the turnover reconciliation statements between service tax returns and income tax return as the same are very much required for determination of the issue in dispute before him. The Learned DR before us could not draw our attention to any errors or deficiencies in the said reconciliation statement submitted before the Learned CITA. The Learned CITA on due verification of the said reconciliation statement was convinced that there was no difference in the turnover declared in the income tax return vis-à-vis the service tax return. Hence we do not find any infirmity in the order of the Learned CITA granting relief to the assessee in this regard. **Accordingly, the Ground Nos. 6 and 7 raised by the revenue are hereby dismissed.**

18. The Ground No. 8 raised by the revenue is challenging the deletion of disallowance of Rs 75,79,87,500/- made on account of upfront fees.

18.1. We have heard the rival submissions and perused the materials available on record. The assessee has paid upfront fee aggregating to rupees 89,17,50,000/- to various banks for processing application of new loans / for sanction and disbursement of loans to the assessee. The party wise details of the said upfront fees are enclosed in page 4263 of volume VII of the Paper Book filed before us. The aforesaid expense of upfront fee was claimed as deduction for income tax purposes by the assessee. The assessee also enclosed the sample invoices for payment of the upfront fees. The learned AO held that the upfront fees paid by the assessee is of capital nature as assessee has made heavy investment in its tower infrastructure and therefore, the loan upfront fee paid to banks is incurred for acquisition of capital assets and accordingly need to be capitalized with the cost of plant and machinery. Having held so, the learned AO proceeded to grant depreciation at the rate of 15 percent on the same and disallowed the remaining sum of Rs 75,79,87,500/- in the assessment. The learned CITA deleted the said addition by following the order of this Tribunal in assessee's own case for Assessment Year 2009-10 wherein it was held as revenue in nature.

18.2. The issue in dispute is no longer res integra in view of the decision of this Tribunal in assessee's own case for assessment year 2009-10 which is reported in 110 taxmann.com 176 wherein the loan upfront fees paid by the assessee was held to be revenue expenditure. It is also pertinent to note that the appeal preferred by the revenue against this Tribunal order was dismissed by the Hon’ble Jurisdictional High Court in ITA No. 89 / 2020 dated 31-10-2023. Hence the learned CITA was duly justified in granting relief to the assessee by treating the entire upfront fees paid as a revenue expenditure. Accordingly, the Ground No. 8 raised by the revenue is hereby dismissed.

19. The Ground Nos. 9 and 10 raised by the revenue are challenging the deletion of disallowance of interest partially by the learned CITA.

19.1. We have heard the rival submissions and perused the materials available on record. The issue of disallowance of interest under section 36(1)(iii) of the Act has been already elaborately dealt hereinabove in assessee's appeal vide Ground No. 7. The decision rendered in assessee's appeal thereon shall apply mutatis mutandis for Ground Nos. 9 and 10 in Revenue's appeal also. Accordingly, the Ground Nos. 9 and 10 raised by the revenue are hereby dismissed.

20. The Ground No. 11 raised by the revenue is challenging the deletion of disallowance of unverifiable expenses by the Learned CITA.

20.1. We have heard the rival submissions and peruse the materials available on record. During the year under consideration, special audit was mandated as per the provisions of the Act by the income tax department to be carried out on the assessee. The special auditor selected a sample of about 400 transactions from various expenses heads aggregating to approximately Rs 680 crores and directed the assessee to furnish documentary evidences in the form of invoices, agreements, supporting workings basis which invoices are raised, evidences of tax withholding done on the same, if any, etc. After analysis of the documents and explanation submitted by the assessee, the special auditor noted that some of the evidences were not supported by documentary evidences or backup workings. The Special auditor observed that in the absence of such information, the accuracy of the same cannot be verified and accordingly the special auditor reported the details of 39 such transactions in his special audit report and requested the learned AO to verify such expense. During the course of assessment proceedings, the assessee once

again reached out to the various circle officers and requested the data / documents corresponding to 39 cases / transactions pointed out by the special auditor. Accordingly, the following documents were submitted during the assessment proceedings in support of the contentions of the assessee:-

1. Copy of invoices of all the 39 cases
2. Copy of agreements entered into with 5 vendors out of the total 6 vendors
3. Copy of Form 16A corresponding to 22 sample transactions out of the total of 39 transactions
4. Copy of TDS statements filed for the subject assessment year evidencing compliance to the withholding provisions
5. Copy of certificate obtained from the independent chartered accountant certifying the appropriateness of TDS compliance of the assessee and identifying certain exceptional and insignificant transactions on which tax was not withheld by the assessee.

20.2. The learned AO accepted the explanations given by the assessee for the 22 transactions, however, with respect to balance 17 transactions, he proceeded to disallow the amounts on the pretext that mere furnishing of invoice does not establish the genuineness of such transactions. Accordingly, the learned AO disallowed expenses aggregating to Rs 8,83,62,379/- corresponding to 17 transactions which are listed as under:-

S.no	Name of the Supplier	Nature of Expense	Amount (INR)
1.	Tops Security Limited	Security Guard Expenses	23,36,382
2.	NISA Industrial Services Pvt. Ltd.	Infrastructure R&M	48,18,954
3.	PRO Interactive Services India Pvt. Ltd.	Security Guard Expenses	21,91,521
4.	PRO Interactive Services India Pvt. Ltd.	Security Guard Expenses	21,48,993
5.	PRO Interactive Services India Pvt. Ltd.	Security Guard Expenses	44,37,030

6.	PRO Interactive Services India Pvt. Ltd.	Infrastructure R&M	81,03,885
7.	PRO Interactive Services India Pvt. Ltd.	Infrastructure R&M	57,30,957
8.	PRO Interactive Services India Pvt. Ltd.	Infrastructure R&M	40,55,485
9.	PRO Interactive Services India Pvt. Ltd.	Infrastructure R&M	40,40,854
10.	PRO Interactive Services India Pvt. Ltd.	Infrastructure R&M	41,92,042
11.	PRO Interactive Services India Pvt. Ltd.	Infrastructure R&M	42,33,275
12.	Raven beck Security India Ltd.*	Security Guard Expenses	46,95,030
13.	Raven beck Security India Ltd.*	Security Guard Expenses	53,49,636
14.	Raven beck Security India Ltd.*	Security Guard Expenses	64,00,122
15.	Sri Sai Telecom Services*	Infrastructure R&M	1,25,92,800
16.	Sri Sai Telecom Services*	Infrastructure R&M	1,29,19,500
17.	Core Logistic Pvt. Ltd.	Transportation	1,15,913
Total			**8,83,62,379**

20.3. Before the Learned CITA, the assessee filed additional evidences in support of the amount of expenditures disallowed by the Learned AO under Rule 46A of the Income Tax Rules. The said additional evidences were duly admitted by the Learned CITA. The Learned CITA duly appreciated the said additional evidences and proceeded to delete the disallowance made by the Learned AO. From the perusal of the details filed by the assessee, we find that assessee has not only placed the invoices, but also agreements of almost all the vendors for the 17 transactions, both during the assessment proceedings as well as before the Learned CITA proceedings. The assessee on its part had duly discharged its onus of genuineness of the expenditure. These facts were not appreciated by the Learned AO, whereas the Learned CITA appreciated the same and granted relief to the assessee. Nowhere the incurrence of the expenditure wholly and exclusively for the purpose of business has been doubted by the Learned AO. Hence the expenses becomes an allowable deduction in accordance with the mercantile system of accounting followed by the assessee. **Accordingly, the Ground No. 11 raised by the revenue is dismissed.**

21. The Ground No. 12 raised by the revenue is challenging the deletion of disallowance of unverifiable expenses in the sum of Rs 16,24,22,328/- due to discrepancy in the PAN.

21.1. We have heard the rival submissions and perused the materials available on record. The special auditor for the purpose of examining the accuracy of the tax deducted at source (TDS) statements filed by the assessee, examined the same. On examination and verification, the special auditor reported list of instances where either a permanent account number (PAN) was quoted for more than one party / vendor or more than one PAN number was quoted for the single person / entity. During the assessment proceedings, the learned AO attempted to correlate the said discrepancies on verification of the details filed by the assessee. The learned AO proceeded to disallow the corresponding expenditure on the premise that existence of the expenditure remains unverifiable as under:-

Particulars	**No. of cases/ transactions**	**Amount (Rs.)**
Incorrect name mentioned in the TDS returns against the PAN	**40**	**8,99,31,077**
Different/incorrect PAN mentioned for the same person/entity	**20**	**7,24,91,251**
Total	60	16,24,22,328

21.2. Before the learned CITA, the assessee filed additional evidences in terms of Rule 46A of the Income Tax Rules. The learned CITA admitted those additional evidences and observed that the corresponding expenditure for the tax deducted at source were duly supported by all evidences. The learned CITA observed that the expenditure cannot be disallowed merely because of some mistakes prevailing in the TDS returns. With these observations, the learned CITA deleted the disallowance made by the learned AO.

21.3. The learned DR vehemently relied on the order of the learned AO and stated that the assessee had not taken any efforts to set right the discrepancies prevailing in the TDS statements. Hence the corresponding expenditure has been rightly disallowed by the learned AO. Per contra, the learned AR before us submitted that admittedly the disallowance was made on account of expenses due to some errors or manual deficiencies in the TDS statements filed by the assessee, which are clerical in nature. These clerical errors could be rectified by filing of revised TDS statements. Such inadvertent errors cannot automatically lead to the disallowance of expenditure and resultantly fall in the category of unverifiable expenses. The company's transactions are voluminous and multiple in nature to be incorporated in the TDS statement where human / clerical errors are bound to be present. In any event, the books of accounts of the assessee were not rejected by the learned AO.

21.4. With regard to the discrepancies mentioned, the following documents submitted by the assessee prove the genuineness of the incurrence of the expenditure for the purpose of business beyond reasonable doubt:-

Sr No	Particulars	Cases	Amount (INR)	Remarks
1	Repeated Observation	3	1,18,17,895	The AO seems to have inadvertently reported the following transaction over multiple line items which has led to double disallowance: **Aggarwal Electric store:** Transaction value of **INR 73,83,245** **[Refer item no 23 of Table at Pg 194 and Item 13 of Table at Pg 196 of impugned assessment order]** **Shivam Infocom Pvt Ltd:** Transaction value of **INR 6,37,050** and **INR 37,97,600** **[Refer item no 34.35 of Table at Pg 194 and Item 11 of Table at Pg 196 of impugned assessment order]** Please refer to Sr No 2 & 3 below for details of documents/evidences supporting the above transactions.
2	Incorrect Observation	2	79,89,541	The Ld, AO has noted that incorrect PAN has been mentioned for Vidyut Engineers (PAN as mentioned: AAAHA7593Q) and Lloyd Insulations (India) Ltd (PAN as mentioned:

				AAACL0486E). Such observation is however incorrect and supporting documents are placed at **pages 4505-4516 of the PB Volume VIII.**
3.	Incorrect vendor name inadvertently mentioned in the TDS statement	36	7,67,50,021	The PAN as mentioned in the TDS statements are correct and mere error in the name of vendor reported in the TDS statement, cannot imply any adverse observation as regards the genuineness of the expense. In any case, the below mentioned details/documentary/supporting evidences, substantiates the genuineness of the expenditure: Copy of invoices on a sample basis - Copy of agreements on a sample basis - Form 16A issued to all the parties as identified in the 12 cases Supporting documents for transaction wise listing are placed at **pages 4517-4730 of the PB Volume VIII.**
4	Incorrect PAN details inadvertently mentioned in the TDS statement	19	6,58,64,871	The following documentary/supporting evidences are being submitted to substantiate the corresponding expenditure: Copy of invoices on a sample basis Copy of agreements on a sample basis Supporting documents for transaction wise listing are placed at **pages 4731-5221 of the PB Volume VIII.**

21.5. In view of the above, we find that the learned CITA had duly appreciated the contentions of the assessee and rightly deleted the disallowance made on account of expenses. We do not find any infirmity in the order of the learned CITA granting relief to the assessee. Accordingly, Ground No. 12 raised by the revenue is dismissed.

22. The Ground No. 13 raised by the revenue is general in nature and does not require any specific adjudication.

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

ITA No. 2762/Del/2023 – Assessment Year 2010-11 – Assessee Appeal against rectification order of Learned CITA dated 3-8-2023

24. The dispute arising out of this appeal is already covered by us while adjudicating the issue in dispute vide ground No. 1, 1.1, 2, 10 and 10.1 in

ITA No. 1962/Del/2023 itself as the dispute in this appeal is only for wrong mentioning in para 45 of order of Hon'ble Delhi High Court by the learned CIT(A) wherein, the grievance of the assessee is that the learned CIT(A) had referred to the wrong paragraph of the said judgment. Since the core issue in ITA No. 1962/Del/2023 vide above mentioned grounds 1, 1.1, 2. 10 & 10.1 are decided in favour of the assessee, the appeal of the assessee against section 154 order in ITA No. 2762/Del/2023 gets subsumed and no separate finding need to be given thereon. **Accordingly, the grounds raised by the assessee in this appeal are hereby allowed**.

25. To sum up, both the appeals of the assessee are allowed and appeal of the revenue is dismissed.

Order pronounced in the open court on 10/12/2024.

-Sd/-	-Sd/-
(VIMAL KUMAR)	**(M. BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 10/12/2024
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi