

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “A” NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

I.T.A. No.1615/DEL/2020
Assessment Year: 2015-2016

M/s. BCL Secure Premises Pvt. Ltd., 7 th Floor, Plot No.14A, VIOM Building Maruti Industrial Complex, Gurgaon, Haryana.	vs.	Assistant Commissioner of Income Tax, Circle-4(1), New Delhi.
TAN/PAN: AACCB7913Q		
(Appellant)		(Respondent)

Appellant by:	Shri S.K. Tulsiyan, Adv. Ms. Parnashree Banerjee, Adv. Shri Lakshya Budhiraja, CA		
Respondent by:	Ms. Rinku Singh, Sr.DR		
Date of hearing:	11	08	2021
Date of pronouncement:	08	10	2021

ORDER

PER AMIT SHUKLA, JM

The aforesaid appeal has been filed by the Assessee against the impugned order dated 28.08.2020, passed by Ld. Commissioner of Income Tax (Appeals)-II, New Delhi for the Assessment Year 2015-16. In the grounds of appeal, the assessee has raised following grounds.

“1. That the Ld. A.O. and the Ld. C.I.T.(A) have erred in ignoring the fact that the Appellant has incurred a loss incidental to business, due to the non-recovery of certain business advances made to certain parties in the normal course of its business.

2. That the Ld. A.O. and the Ld. C.I.T.(A) have erred in ignoring that such loss incidental to business, upon being written off in the Books of the Appellant is a claimable deduction allowable u/s 28 r.w.s. 37 of the Income Tax Act, 1961.

3. That the Ld. A.O. and the Ld. C.I.T.(A) have erred in holding that the deduction claimed on account of advances written off was a claimable deduction only u/s 36(l)(vii) r.w.s.36(2) of the Income Tax Act, 1961 but was impermissible in the case at hand since the Appellant had failed to meet the statutory pre-conditions stipulated therein.

4. That the Ld. A.O. and the Ld. C.I.T.(A) have erred in holding that the Appellant's method of computing the disallowance u/s 14A of the Income Tax Act, 1961 is not in accordance with Rule 8D of the Income Tax Rules, 1962.

5. That the Impugned Orders of the Ld. A.O. and the Ld. CIT(A) suffer from illegality, infirmity, and are devoid of any merit. The same are therefore prayed to be quashed and the relief(s) prayed for by the Appellant may be pleased to be allowed by this Hon'ble ITAT.

6. That the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/or rescind any or all of the above grounds."

2. The facts in brief are that the assessee-company, BCL Secure Premises Private Ltd. (hereinafter referred to as 'BCL' in short) is a Micro Small & Medium Enterprises (MSME) Company registered under the MSME Act, 2006. It is engaged in the business of providing security solutions, such as provisions of security guards, installation and maintenance of electronic security systems (including CCTV Surveillance, Access Control System, Intrusion Detection Systems, Metal Detection Systems, Visitor Management Systems, Fire Detection and Prevention Systems etc.), Provision of facility management services etc. The assessee had filed return of income on 30.09.2015 declaring total income of Rs.1,53,79,220/-. During the course of assessment proceedings, the Assessing Officer noted that assessee has claimed an expenditure of Rs.7,39,00,401/- on account of bad debts under the head "other expenses". In response to the show cause notice, the assessee submitted that it had incurred loss incidental to

the operation of the business due to non recovery of business advance made from the following parties in the normal course of its business.

(i)	M/s. Govinda Infraproperty Pvt. Ltd.	Rs.3,92,00,000/-
(ii)	M/s. Linton Distributors Pvt. Ltd.	Rs.1,17,50,000/-
(iii)	M/s. Om Sai AssotechPvt. Ltd.	Rs.1,56,77,731/-
(iv)	Nine other parties with small balances	
-	Metro Railways, Kolkata	Rs.71,21,635/-
-	Others	<u>Rs. 1,51,035/-</u>
		Rs. 72,72,670/-
		<u>Rs.7,39,00,401/-</u>

3. The appellant thereafter explained that consequent to the loss incurred by it, the same was written off in the accounts and was claimed as deduction for the purpose of computing the profit and loss of the business/profession u/s. 28 r.w. section 37 of the Act for the relevant assessment year. During the course of the assessment proceedings the ld. A.O. had sought details in respect of the aforesaid business advances, the reasons for the appellant writing off the same in the books and the justification for claiming the same as business loss for computation of income. All the details along with evidences were duly provided to the ld. A.O. The appellant also explained that business advance given by the appellant to the parties during the course of business with them could not be received back by the appellant despite best efforts and, therefore, it took a business decision to write off the same. Thereafter, the appellant urged the ld. A.O. that the loss incurred in not getting back the trade advances and consequential writing off the same in the accounts should be allowed as a deductible expenditure u/s 28 r.w. section 37 of the Act.

4. Further, ld. Assessing Officer noted that the assessee had made investment of Rs.219,58,096/- in equity shares as on 31st March, 2015 as against Rs.1,86,83,563/- as on 31.03.2014 and has computed the disallowance of Rs.1,418 u/s.14A read with Rule 8D. The ld. Assessing Officer thereafter had proceeded to make the disallowance of Rs.1,88,838/- and after giving the benefit of disallowance made by the assessee finally added at Rs.1,87,024/-. The Assessing Officer made disallowance of loss claimed at Rs.7,39,00,401/- on account of business loss on following reasoning.

“5.1 The ld. A.O., rejecting all the explanations and evidences as filed by the appellant, however considered the case of the appellant within the scope of provisions of section 36(1)(vii) read with section 36(2) of the Act and deduction of Rs.7,39,00,401/- on account of business loss u/s 28 r.w.section 37 of the Act was disallowed on the following alleged premises:

*“The amended provisions of section 36(1)(vii) read with section 36(2), applicable from assessment year 1989-90, provides that **no deduction on account of bad debts shall be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which amounts of such debts or part thereof is written off or of an earlier previous year, or represents money lent in the ordinary course of the business of banking or money-lending which is carried on by the assessee.***

As the assessee was not engaged in the business of money lending, the assessee was again requested to file the documents which may prove that whether the advances written off were taken into tax net in earlier years or not.

Assessee submitted its reply on 22.12.2017 and 23.12.2017 arguing that assessee company has made efforts to recover the advances. The details/documents submitted by the assessee has been duly considered and it is found that the money advanced to the above parties claimed to be paid

against some contracts/agreements or towards purchases to be made but somehow the deals could not be materialized because of some disputes/agreements and the assessee forced to write off the amounts, as per version submitted by the assessee.

The ledger account of these parties have been seen and it is noticed that M/s Govinda Infraproperty Pvt. Ltd., has paid Rs. 25 lakhs to the assessee on 22/10/2014 (in the current year itself). In the account of M/s Linton Distributors Pvt. Ltd., there is opening Debit balance of Rs. 1,11,50,000/- as on 01/04/2012 and assessee going to make it payments continuously upto 09/12/2013. When there was disagreement between them, what was the need to make further payments. In the case of M/s Om Sai Assotech Pvt. Ltd., the assessee has not submitted the ledger accounts of earlier period and in the F.Y. 14-15, the opening balance was Rs. 1,56,77,731/- which has been written off.

Regarding the efforts made for recovery, copy of two e-mail printouts have also been submitted by the assessee where the message are as under:-

1. "please note as informed earlier we are unable to refund the advances since the funds are not readily available with us."
2. "Presently we are not in a position to refund the advances."

The above communication is not sufficient to prove that there were proper efforts to make the effective recovery, that too against such a huge amount of advances.

Besides these facts, which were considered relevant to discuss here, the legal position as discussed above also cannot permit an assessee to make claim of amounts written off which were earlier not taken into account as income. The provisions of Sec. 36(1)(vii) read with section 36(2) are very much clear in this regard. The apex court has also made it clear in the decision of *Hasimara Industries Ltd. vs. CIT* (231 ITR 842)."

5. Finally, the assessment was completed on the total income of Rs.9,13,82,440/- after making the following additions:-

(i) <i>“Addition on account of disallowances of advances written off</i>	<i>Rs.7,39,00,401/-</i>
(ii) <i>Addition on account of bank interest not disclosed.</i>	<i>Rs. 19,15,791/-</i>
(iii) <i>Disallowance u/s14A of the Income Tax Act, 1961 read with Rule 8D(2) of the Income Tax Rules, 1962</i>	<i>Rs. 1,87,024/-</i>

6. Before the ld. CIT (A), assessee had filed the very detailed submission with regard to advances made to various parties and the reasons for write it off claiming it as business loss or deduction. Since voluminous documents and explanation was given to substantiate the loss upon which CIT (A) called for remand report and in the remand proceedings Assessing Officer has given his report after inquiry which has been rebutted by the assessee. All these facts are being discussed in detail for understanding the issues and evidences filed on record. The Ld. Counsel in his written submissions has explained the entire sequence of events and facts which are discussed hereinafter.

7. For **M/s. Govinda Infraproperty Pvt. Ltd.** (hereinafter referred to as '**Govinda**' for short), it was submitted that the appellant being an emerging company in the business of integrated security solutions provider, was in the lookout for more business and growth and thereafter a proposal was given to the appellant by Govinda for engaging it as aService Provider. Govinda being actively engaged in the business of providing Business Development services to its various clients in PAN India and due to its' expertise in the said field and also based on their strong connections in the various Government Departments, the proposal of Govinda was accepted.

8. Thereafter an agreement was executed by the appellant with Govinda for purposes of developing its Security Business in PAN India. Govinda, as per the Agreement decided to charge a Service fee of 10%

of the business value that the Service Provider would generate for the Client (appellant). Yearly business of Rs.50,00,00,000/- was also promised by Govinda and Advance of Rs.4,15,00,000/- was given on 03/05/2011 to Govinda as per the Agreement dated 02/05/2011.

9. Thereafter disputes arose between the appellant and Govinda regarding the following businesses procured by appellant, which were claimed to have been sourced/procured by Govinda –

- *Business developments with Kolkata Metro Railways (F.Y. 2011-12),*
- *Business developments with M/s Environ Energy Corpn. India P. Ltd. (F.Y. 2012-13)*
- *Business developments with AGC Network Ltd. for subcontract of work of Hindustan petroleum Corporation Ltd. (F.Y. 2013-14)*
- *Business developments with Wal-mart India.*

10. In view of these disputes with regard to business development services of Govinda and being observed that no substantial, profit earning business was received by the appellant by virtue of the efforts of Govinda, the appellant made several correspondences with Govinda (copies of which were submitted before the Id. CIT (A)) for pursuance of business with them, extension of the contract, seeking of refund of the advance and ultimately the recovery of the advance.

11. Pursuant to this, the appellant was able to recover only a sum of Rs.23,00,000/- on 22/10/2014. Since inspite of all correspondences and recovery proceedings, Govinda refunded a meagre sum of Rs.23 lakhs only, out of outstanding amounts to the tune of Rs.4,15,00,000/- and that too when the agreed period of time limit being March 31, 2013 expired and Govinda was still unable and

unwilling to refund the whole amount, the appellant decided to write off the same in its books before the F.Y. end 2014-15.

12. For **M/s. Linton Distributors Pvt. Ltd.** (hereinafter referred to as '**Linton**' for short), it was submitted by the appellant that Purchase Order (PO) dated 11.05.2010 was placed with Linton for Rs.1,17,50,000/- for supply of Uniforms and shoes for the Care Taker/Security Guard @ 2 uniform plus 1 shoes pair for each care taker. Initial deposit of Rs.1,00,00,000/- was paid as advance.

13. This was followed by several exchanges of correspondences between the appellant and Linton regarding the progress of the work, when in one instance the appellant expressed concern over the status of the order and that they were using the buffer stock of the uniforms which needed immediate replacements and also its desire to inspect the fabrics.

14. Linton acknowledging the advance of Rs.1,00,00,000/- duly informed the appellant that the inspection may be carried out, pursuant to which such inspection was carried out and it came to the notice of the appellant that the fabrics procured by Linton were not to the specifications of the appellant and were substandard and not fit to be made into the uniforms. Linton was immediately informed about the situation and they were asked to change the fabric or else the advance may be refunded. In response to this, Linton expressing displeasure to the rejection, however promised the appellant of changing the fabric and they assured the appellant of completing the Order as per specifications. Further advance for procurement of other

materials as per the Order for its proper execution was requested by Linton and the same was also advanced by the appellant in good faith.

15. Meanwhile, the appellant company being concerned about the proper execution of the Order kept expressing the same to Linton. However, suddenly on 13/06/2012, when an advance of Rs.1,11,50,000/- was all made to Linton, Linton intimated the appellant that it had suffered a loss of Rs.25,00,000/- on the disposal of the rejected fabric and it was thus requested by them to the appellant to increase the Contract value by Rs.25,00,000/-.

16. Vehemently opposing the above, the appellant company immediately vide its letter dated 25/06/2012 informed Linton that they were in no way liable for any loss that Linton may suffer due to its negligence. It was also informed to Linton that based on the assurances extended by them to the appellant about the execution of the PO, the termination of the Order was not sought.

17. Also, as per the request for further advance by Linton, the appellant company again in full and good faith made all advance payments totaling to the total consideration as per the PO by the year end of 2013 which was duly acknowledged by Linton vide its letter dated 04/04/2013.

18. Thereafter as four years had passed and there was no work yet done on the said order, thus, finally realizing the futility of the Order, the appellant company immediately vide its letter dated 15/01/2014 informed Linton of the termination of the Order. The advance lying with Linton was directed to be immediately refunded.

19. To this, Linton gave evasive replies regarding market conditions. The appellant, realizing the futility of the entire proceedings was left with no other option than to terminate the said Contract which was also brought to the notice of Linton vide the letter dated 15/04/2014. Thereafter on 27.03.2015, the advance of Rs.1,17,50,000/- given to Linton was written off in its books by the appellant.

20. For **OM Sai Assotech Pvt. Ltd.** (hereinafter referred to as '**OM Sai**' for short) the appellant would like to submit that it was awarded a Works Contract vide Letter of Award(LOA)dated14/08/2012 executed by M/s Environ Energy Corpn. India P. Ltd. (hereinafter referred to as 'Environ' for short) for comprehensive operations and maintenance of sites in Rest of West Bengal (ROWB) circle maintained by VIOM Networks (Principal). In connection to the award by Environ, the appellant in order to sub-contract the work, entered into a LOA dated 20/08/2012 with OM Sai in terms of which it sub-contracted the work for comprehensive operations and maintenance of Passive Infrastructure of sites in ROWB Circle maintained by VIOM Networks (Principal).

21. In terms of the LOA, OM Sai was required to undertake the construction work in different stages till 31/03/2014 on the basis of which the payments were required to be made to OM Sai.

22. Thereafter disputes arose between OM Sai and the appellant: (few documented ones out of all)

- *With regard to Statutory Liabilities, OM Sai had failed to discharge its liabilities under the Employees Provident Fund and thus the appellant was requested to*

make the payment of Rs.23,90,031/- on its behalf which was guaranteed by the Director of OM Sai, Mr. Neeraj Kumar vide undertaking dated 10/06/2013. Copy of the said Undertaking is enclosed at pages 193-194 of the paper book.

- *Another amount of Rs.8,24,528/- was similarly paid by the appellant against guarantee of director on account of payments on Employee State Insurance Corporation. Copy of the said Undertaking is enclosed at pages 195-196 of the paper book.*

23. Om Sai raised its invoices for the period from August 2012 to April and the appellant in settlement out of the said amount, based on invoices, made total payments amounting to Rs.468.59 lakhs. It was then learnt that certain excess payments were made by the appellant on behalf of OM Sai and thus a total amount of Rs.1065.37 lakhs were required to be deducted from the total payments required to be made to OM Sai. The said amount also included the amount paid by VIOM Networks towards the salary of Orion Security guards on the different sites on behalf of OM Sai.

24. To the above, OM Sai vide its email dated 17.07.2013 accepted the payments required to be made to Orion Securities, which was by mistake made to OM Sai.

25. The appellant company vide repeated mails duly informed OM Sai about the said proposed deductions and also of its liability towards the sub-contractors which was discharged by it. Emails were sent requesting OM Sai to come forward and hold a meeting to settle the accounts between the parties. However, OM Sai failed to hold any discussions for settlement of accounts and in fact made false allegations on the appellant of acting unreasonably.

26. Eventually, since OM Sai failed and neglected to settle the account and to refund the excess amount towards deductions proposed by Environ, the appellant was constrained to address a final Demand Notice dated 01.04.2014 to OM Sai, calling upon it to make a payment of Rs.1,56,64,000/- towards the excess amount towards deductions proposed by Environ.

27. However, OM Sai instead of making the payments towards the legitimate demands raised by the appellant, sent a reply dated 08.04.2014, making false and baseless averments about being entitled to claim an amount of Rs.9,30,10,552/- from the appellant. Thus the appellant in light of the above facts, filed on 28/08/2014, before the Hon'ble High Court of Delhi, a Suit for recovery of an amount of Rs.1,56,64,000/- along with interest thereon @ 18% per annum from the date of the filing of the suit till realization of the said amount.

28. Pursuant to the above, OM Sai, with no desire to settle the accounts in fact filed a counter claim against the appellant before the Hon'ble Delhi High Court for recovery of Rs.9.30 crores from the appellant.

29. Thus pursuant to all of the above sequence of events, the appellant finally considering and realizing that the matter was likely to go through protracted litigation involving huge costs and harassment, took the decision to write off the amount in its books.

30. For **Metro Railways, Kolkata** (hereinafter referred to as 'KMR' for short), the appellant would like to submit that it was awarded the Contract for 'Supply, installation, commissioning, operation &

maintenance of IP based Surveillance system, Personal Baggage Screening system and Explosive Detection & Disposal System at 23 Metro Railway station premises and Metro Rail Bhavan vide Letter of Acceptance issued on 25/02/2011. The Contract value of the work was Rs.17,07,35,271/-.

31. A total Security Deposit for the Contract @ 5% of the accepted value being Rs.85,36,764/- was to be deposited. However, Rs.14,15,130/- being the Earnest Money Deposited with the offer was retained by KMR as part of the Security Deposit. Thus the balance amount of Rs.71,21,634/- was to be paid by the appellant to KMR as a 'Retention Security Deposit'. The said Retention Security Deposit of Rs.71,21,634/- was to be deducted by KMR at the rate of 10% from the bills raised on KMR as and when they were raised.

32. Another LOA dated 11/04/2011 was issued by KMR in continuation of the previous letter giving in details the description of works, units, quantities, etc. Memorandum of Agreement dated 03/06/2011 ('MOA' for short) was finally executed between the appellant and KMR. Immediately upon signing of the MOA, the appellant started mobilizing manpower and material and commenced activities which included site visits. The appellant was however shocked to notice that when it's personnel arrived at the respective locations/sites, the said sites were not ready for the appellant to perform its obligations as per the MOA. As a result of the inaction on the part of KMR, the appellant incurred substantial losses in the form of project overrun cost. The appellant had communicated this situation to KMR vide letters dated 27.01.2014 and 11.02.2014. The appellant however did not receive a response from KMR, without which

it could not get necessary clearance to begin with the vital security equipment. The foregoing also resulted in failure of the appellant to utilize various listed materials because the KMR failed to release dispensation of overseas inspection under the provisions of the tender document, despite requests to this effect, being made by the appellant.

33. Surprisingly however, despite the considerable delays attributable to KMR, the appellant was shocked to receive a SCN dated 01/03/2014 from KMR in connection with the alleged delay of the appellant to complete the work within the extension. To this, a detailed Reply dated 10/03/2014 was sent by the appellant.

34. As the situation was reaching a deadlock, the appellant in all earnestness and to demonstrate its bona fides, as also with a view to recover its dues (which were still not paid), engaged with KMR and began seeking release of due payments and to try and chart out a course for the future of the project. KMR had paid only Rs.8,34,59,446/- till date out of the contract value of Rs.17,07,35,271/-. The appellant had completed more than 90% of the contracted work and raised a bill out of which Rs.10,24,09,303/- became receivable by the appellant. However Rs.8,34,59,446/- only, was paid to the appellant out of the said receivable amount. Thus a sum of Rs.1,89,49,857/- along with interest was due and payable by KMR to the appellant. Despite repeated requests and reminders KMR had failed and neglected to pay the aforesaid amount and in fact on the contrary, the KMR had been writing letters to the appellant mentioning alleged defects and berating the appellant for doing unsatisfactory work.

35. Here, at this stage before closing the books of the accounts as on 31/03/2015 for the A.Y. 2015-16, the appellant in view of the discussions made in the preceding paras, realized that in a situation where there were outstanding to the tune of more than Rupees 8 crores, the Retention Security Deposit of Rs.71,21,634/- was no longer realizable at all. Thus on 27/03/2015 the management of the appellant company took the decision to treat the impugned sum as loss incidental to business and thus the appellant wrote off the said sum in its books. Meanwhile KMR after extending the period of completion of work till July 10, 2015 and while such period was yet to expire, issued a Notice dated June 01, 2015 for termination of the contract within 7 days' notice by claiming that the appellant was doing unsatisfactory work. The appellant too served a Legal Notice dated 04/06/2015 on KMR for release of balance payments. Also vide its letter dated 08/06/2015 the appellant replied to the said notice and explained the work done so far and the shortcomings caused due to the non-performance on the part of KMR. KMR however paying no heed to such reply, issued another notice dated June 25, 2015 stating that it is serving the 48 hours' notice on the appellant and thenceforth the contract shall stand rescinded and that after the expiry of the 48 hour period, the contract shall stand rescinded with immediate effect in terms with clause 62 of General Condition of Contract, the balance work will be carried out without the participation of the appellant and the Tender Security Deposit shall be forfeited and the Performance Bank Guarantee shall be encashed.

36. Thus in order to cover up its own failures and omissions, KMR invoked the extreme measure of terminating the MOA which was

disputed by the appellant, of forfeiting the tender security deposit and also encashing the BG.

37. Inasmuch as disputes and differences arose between the parties as aforesaid, the appellant by its letter dated August 12, 2015 invoked the Arbitration clause in its MOA. KMR having agreed to go ahead with the arbitration, thereafter again a difference/dispute arose between KMR and the appellant regarding appointment of arbitrator for adjudication of the disputes relating to termination of the contract. The matter travelled upto the Hon'ble Calcutta High Court where certain directions were given by the Hon'ble Court to KMR for suggesting/nominating names for arbitrators in a panel, out of which the arbitrators can be selected.

38. However since KMR did not abide by the directions of the Hon'ble Calcutta High Court in nominating members for appointment of arbitrator as directed by the Hon'ble Court, the appellant filed a case of contempt against KMR as it had committed contempt of the court orders and the said case is pending.

39. Regarding other small Write off, of advances to parties GSID Furniture (Rs.83,190), Wage advance paid to two persons (Rs.8,000), Security Deposit Electricity (Rs.2,000), WCT – Haryana (Rs.1,440), EMD Haldia Dock (Rs.20,000), EMD Deposits (Rs.26,280), Inventory w/o (Rs.10,125) totaling to Rs.1,51,035/-, the appellant submitted that the said advances were very much trade advances which on becoming irrecoverable were accordingly written off by the it and enclosed copy of the ledger accounts of the said heads of Advances for the Ld. CIT(A)'s perusal.

40. The appellant having explained its case in detail to the ld. CIT(A) further went on to submit before him that the ld. A.O. had considered the appellant's case as that of write off of bad debt within the scope of provisions of section 36(1)(vii) read with section 36(2) of the Act as against write off, of business advances as business loss u/s. 28 r.w. section 37 of the Act.

41. It was submitted that the ld. A.O. held that since the appellant was not engaged in money lending business, it failed to prove that the advances written off were taken into tax net in earlier years in terms of **section 36(1)(vii) r.w. section 36(2) of the Act** and held that in view of the decision of the Apex Court in ***Hasimara Industries Ltd. vs. CIT (231 ITR 842)***, the provisions of **section 36(1)(vii) r.w. section 36(2) of the Act** stood attracted to the case of the appellant.

42. The appellant thus submitted before the ld. CIT(A) that in view of the ld. A.O.'s action and on perusal of the assessment order it was apparent that the ld. A.O. had not disbelieved the advances made by the appellant to the parties aforesaid during the course of its business and entirely for the purpose of running its business and he had also not disputed the fact of non-recovery of the said advances during the relevant A.Y. and write off, of the same in the accounts of the appellant. If that would be so, it was totally irrational when he disallowed such advances, which had already become irrecoverable, as not business loss and considered the same as bad debt falling within the scope of provisions of section 36(1)(vii) r.w. section 36(2) of the Act. The appellant thus submitted before the ld. CIT(A) that the basis of disallowance was therefore, a misunderstanding of facts and an

erroneous application of the provisions of the said sections. The appellant also submitted before the ld. CIT(A) that the ld. AO on the basic wrong presumption that the said write off of the business advances fell under the provisions of section 36(1)(vii) r.w. section 36(2) of the Act had failed to appreciate that for giving a bona fide business advance, that too as per agreement/purchase order/mutual consent, as the case may be, it is not necessary for an assessee to be engaged in the business of money lending. The appellant thereafter submitted that thus it's case is that for such advances, the same cannot be included in the income of earlier years, as is the case with bad debts coming within the scope of section 36(1)(vii) r.w. section 36(2) of the Act. The appellant further submitted before the ld. CIT(A) that the ld. A.O. had not made any discussions in the Assessment Order about the actual nature of claim of the appellant, being write off, of trade advances which is loss incidental to operation of business and which undoubtedly falls and is allowable within the meaning of section 28 r.w. section 37 of the Act.

43. In addition to the above submitted before the ld. CIT(A), the appellant further submitted that the ld. AO had relied on the Apex Court's decision in the case of ***Hasimara Industries Ltd. (supra)*** and how the reliance placed by the ld. AO on the said decision in the background of the facts of this case are totally misplaced. The said decision was thus distinguished.

44. Lastly, the appellant submitted before the ld. CIT(A) that section 28 of the Income Tax Act, 1961 imposes a charge on the profits or gains of business or profession and the expression '*Profits and gains of business or profession*' is to be understood in its ordinary commercial

meaning and the same does not mean total receipts. What has to be brought to tax is the net amount earned by carrying on a profession or a business which necessarily requires deducting expenses and losses incurred in carrying on business or profession.

45. The appellant concluded that thus, what is relevant for claiming write off of advances is that (i) the said advance should not of capital in nature and (ii) the same should have been incurred wholly and exclusively for the purpose of the business and both of these conditions were undisputedly well existed, entitling it to adjust the loss occurred in relation to the operation of business with its income as per provisions of section 28 r.w. section 37 of the Act.

46. As there were additional evidences submitted before the ld. CIT(A) while making the aforesaid submissions, which included several exchange of letters/correspondences, agreements etc. between the appellant and the parties (**Govinda, Linton, OM Sai and KMR**) and for which Rule 46A of the Income Tax Rules, 1962 was pressed by the appellant, the ld. CIT(A) forwarded a copy of the paper book and the submission filed before him to the then A.O./DCIT for her examination of the same and comments on the same.

47. The appellant thereafter received a notice from the ld. DCIT dated 03.10.2018 seeking information and explanation from the appellant u/s. 133(6) of the Act, in connection with the evidences submitted by the appellant before the ld. CIT(A), during the appellate proceedings of the relevant A.Y. (2015-16).

48. The ld. DCIT had asked the appellant vide the said letter dated 03.10.2018 that the letter dated 20/12/2013 placed at Page 104 of the

Paper book filed with the written Submission before the Id. CIT (A), purported to be written by the appellant to Govinda, was however issued on the letter head of Govinda instead of the letter head of the appellant and thus why the same should not be considered to be fabricated.

49. The appellant in response to this query submitted and explained that the same was very clearly a mistake on its part whereby the draft prepared by Govinda was inadvertently enclosed in the Paper book submitted by the appellant.

50. The appellant submitted that Govinda, being the Service Provider to the appellant, had procured a business proposal for the appellant with AGC Network Ltd. for sub-contract of work of Hindustan petroleum Corporation Ltd. on back to back basis and the proposal for the same was given by Govinda to the appellant vide the letter dated 15/12/2013 which had been placed at page 103 of the Paper book. The appellant had immediately given the go ahead for the said proposal verbally. However Govinda wanted a go ahead in writing and thus it prepared a draft of the said letter to be issued by the appellant, in its own letter head and under its signature. The go ahead having already been given verbally, the appellant did not issue a formal written letter. However the said draft so prepared by Govinda remained in the possession of the appellant and during the course of the hearing before the Id. CIT(A) inadvertently got submitted as such.

51. The Id. DCIT further vide her letter dated 03.10.2018, with regard to the exchange of letters between the appellant and Govinda and Linton, asked for an explanation from the appellant as to how the

letters between the appellant and the other two companies were exchanged.

52. The appellant responded to the said query by submitting that it has its Branch office in Kolkata at 216, AJC Bose Road, 2nd Floor, Flat No. 2C, Kolkata- 17. The appellant, having secured the Contract with Metro Railway Department, Kolkata (KMR) had set up its Branch office in Kolkata since the year 2011 and for the said purpose enclosed the 'Certificate of Enlistment' of the Kolkata Municipal Corporation in the name of the appellant at it's Kolkata office (*which is also now enclosed at pages 555 to 558 of the paper book*).

53. The appellant submitted that thus having its Branch office in Kolkata, all the communications received and sent by it to Govinda and Linton were all hand delivered. The Receipt Acknowledgement of the letters of the appellant, as stamped by the two Companies were all enclosed by the appellant along with the reply to the ld. DCIT, for her perusal which are now also enclosed at pages 559 to 577 of the paper book.

54. The ld. DCIT further vide her letter dated 03.10.2018 sought information as to the reason why the evidence submitted before the ld. CIT(A) could not be furnished during the assessment proceedings.

55. In this regard the appellant submitted that having it's branch office in Kolkata, most of the documents and correspondences relating to the debtors from Kolkata were all kept in the Kolkata office. During the course of the assessment proceedings before the A.O., however the person of the appellant's office in Delhi dealing with the A.O. was not aware of the correspondences at the Kolkata office, because after

2016, due to disputes with the KMR contract, the Kolkata office was lying closed and defunct. The appellant submitted that it was only during the appellate proceedings, when the Director of the Company came to know of the matter, that the documents were all traced and recovered from the Kolkata office. Hence for this reason the evidences submitted before the ld. CIT(A) could not be furnished during the assessment proceedings.

56. Pursuant to the above, the ld. DCIT in connection to the appellant's case, gave her specific comments in a Remand Report dated 15.11.2018 to the ld. CIT(A), accompanied by a covering letter of the Additional Range Head dated 16.11.2018. A copy of the ld. DCIT's Remand Report was thereafter forwarded to the appellant by the ld. CIT(A).

57. The appellant submitted its response to the ld. DCIT's Remand Report before the ld. CIT(A) vide Reply dated 21.12.2018

58. The ld. DCIT referring to her earlier notice issued u/s 133(6) of the Act to the appellant, stated in the Remand Report that the appellant's response to her query regarding is not verifiable as the justification given by the appellant has no substance in it. The ld. DCIT also stated that if the appellant's contentions are accepted true and correct then the notices issued u/s 133(6) of the Act by her office to these companies should have been replied to, but no reply from these companies had been received by her office.

59. In response to the above, the appellant submitted it's detailed response in pages 01 to 03 of the Reply dated 21.12.2018 reiterating

its submissions made in this regard before the ld. DCIT earlier (vide response dated 16.10.2018).

60. The ld. DCIT referring to her earlier notice issued u/s 133(6) of the Act to the appellant, stated in the Remand Report that from the perusal of appellant's records and its ITR/Form 3CD/Ledger accounts (submitted during assessment proceedings), it is revealed that there is no branch office at Kolkata, that the letter head of the appellant showed no branch office with Kolkata address and that the letters from these two parties (Govinda and Linton) were addressed to the appellant company at its Delhi address. The ld. DCIT also stated that not a single letter was found addressed to the appellant's Kolkata branch office, however, during the course of appellate proceedings before the ld. CIT(A), the documents submitted by the appellant showed that it had obtained registration certificate at 216A A.J.C. Bose Road, 2nd Floor, Kolkata – 700017. Hence the appellant's contentions were not verifiable.

61. In response to the above, the appellant submitted its detailed response in pages 03 to 04 of the Reply dated 21.12.2018.

62. The ld. DCIT with regard to why the evidence submitted before the ld. CIT(A) could not be furnished during the assessment proceedings, stated that if the contention of the appellant, regarding Branch office is not verifiable, then the question of correspondence with Kolkata office does not arise and thus the justification given by the appellant lacks conviction. She also stated that it appears strange that the appellant company's Delhi based officials dealing with A.O. were not aware of the correspondence at Kolkata office especially when

major financial disputes with multiple parties were supposedly going on for years.

63. In response to the above, the appellant submitted its response in pages 04 to 05 of the Reply dated 21.12.2018.

64. The ld. DCIT in the impugned Remand Report had stated with regard to Govinda (Rs.3,92,00,000/-) that the appellant's contention appears to be true that it had offered around Rs.98 lacs receipts on account of dispute, but this fact was not confirmed by the other party and the contention of the appellant cannot be viewed in isolation.

65. In response to the above, the appellant submitted its detailed response in page 05 of the Reply dated 21.12.2018.

66. The ld. DCIT in the impugned Remand Report had stated that the appellant had submitted documents related to suit filed in the High Court of Delhi vide petition dated 28/08/2014 for recovery of the excess payments made. However, the appellant had written off the amount due in the same F.Y. 2014-15 without waiting for even the initiation of legal proceedings. The ld. DCIT with regard to the appellant's write off, of retention security deposit given to Metro Railway, Kolkata, stated that the appellant claims to have filed case of contempt before Calcutta High Court and on the other hand writing off the amount before waiting for the outcome of the case.

67. With regard to the other small balances of advance written off by the appellant, the ld. DCIT stated in the Remand Report that the appellant had not submitted any documents for these parties.

68. The ld. DCIT stated in the impugned Remand Report that the aggregate amount of Rs.7,39,00,401/- written off by the appellant was disallowed in accordance with provisions of section 36(1)(vii) read with section 36(2) which provides that no deduction on account of bad debts shall be allowed unless such bad debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which amount of such debts or part thereof is written off or of an earlier previous year, or represents money lent in the ordinary course of the business of banking or money lending which is carried on by the assessee. In this connection the ld. DCIT mentioned that these amounts were never offered for taxation as revenue receipt, however it is also true that these are the business advances given by the appellant during the course of business and dispute has also been raised by the appellant.

69. In response to the above, the appellant submitted before the ld. CIT(A) that this issue (mentioned by the ld. DCIT in the Remand Report) was raised by the A.O. in his Assessment Order and the same had been dealt with in full details in the earlier submission filed before him (ld. CIT(A)) which was again being relied upon.

70. Ld. CIT(A) however confirmed the disallowance in respect of the parties to the tune of Rs.7,37,49,366/- and disallowances of Rs.1,87,024/- made u/s.14A after discussing the entire remand order has completely disagreed with the contention and the submission made by the assessee as incorporated above.

71. Before us, ld. counsel has filed detailed submission in respect of claim of advance written off amounting to Rs.7,37,49,366/- and has given a party-wise submission and counter replies, various

observations and the findings of the Id. CIT(A) and Assessing Officer, which for the sake of understanding, the entire issue is discussed herein below:

A. FOR GOVINDA INFRAPROPERTY PVT. LTD. (GOVINDA) -ADVANCE WRITTEN OFF: RS.3,92,00,000/-:

Herein firstly the appellant would like to submit that for confirming the disallowance of appellant's claim of write off, of advance given to Govinda the Id. CIT (A) made various allegations against the appellant. Before going into the **specific allegations** of the Id. CIT(A) vis-à-vis the appellant's submission, it is pertinent to explain the **background facts** which gave rise to the **advance** given to **Govinda** being **written off**:

BACKGROUND:

(i) The appellant being an emerging company in the business of integrated security solutions provider, was in the lookout for more business and growth. In this connection Govinda was a Private Limited Company actively engaged in the business of providing Business Development services to its various clients in PAN India.

Govinda thus approached the appellant company on 10/08/2010 with a proposal to engage them as a Service Provider who, based on their expertise in the said field and also based on their strong connections in the various Government Departments could help the appellant company, being an emerging company, gain various businesses. *Letter dated 10/08/2010 is enclosed at pages 83 of the paper book.*

The said proposal was accepted by the appellant company vide its letter dated 12/08/2010 (*copy of letter enclosed at page 84 of the paper book*) and pursuant to various discussions and formalities, the proposal was formalized with an **Agreement dated 02/05/2011 with Govinda** for purposes of developing the appellant's Security Business in pan India. *Copy of the said Agreement dated 02/05/2011 is enclosed at pages 85-91 of the paper book for Your Honours' perusal.*

(ii) As per the **Agreement**, the appellant company being the '*Client*' appointed Govinda as the '*Service Provider*' wherein the Client was to pay as Service Fee, 10% of the business value that the Service Provider would generate for the Client. It was represented by the Service Provider that it would generate business of at least Rs.50,00,00,000/- per year in F.Y.s. 2011-12 and 2012-13, each. Invoice for the business development services would be raised by the Service provider on realization of fees by the Client from the business generated by the Service Provider.

In the interim, on the request of the Service provider, a sum of **Rs.4,15,00,000/-** was given to the Service Provider during the course of business, as a refundable business advance/deposit. The purpose of advancing such money to the service provider and the conditions thereof, as reduced in writing in the said agreement, are reproduced below:

"III. COMMERCIALS

.....

Refundable Advance/Deposit

In the interim, on the request of Service Provider, the Client has agreed to pay Rs.4,15,00,000 (Rupees Four Crore Fifteen Lakh only) as a non-interest bearing and non-adjustable refundable advance/deposit.

It is expressly agreed between the parties that amount would be refunded forthwith in case the Service Provider fails to develop business for the client as committed hereinabove by the end of the year.

In any case, the advance/deposit are refundable latest by March 31, 2013.”

With regard to **Breach of Contract** or any differences and claims, it was laid out in the Agreement vide **Clause XIII** that “*in case of any dispute or differences or claims or demands whatsoever between the First party and the second party which do not get resolved amicably, the matter shall be referred to Arbitration before a Sole Arbitrator to be mutually appointed by both the parties.*”

In terms of the **Agreement** the **first instalment** of **Rs.4,15,00,000/-** was paid on 03/05/2011 to the Service provider as **Advance** against the said services to be provided. A further sum of Rs.2,00,000/- was paid to Govinda on 14/05/2013 but it was on account of a certain payment made merely on behalf of the Service provider. It was not on account of Advance against the Agreement entered into by the Appellant with the Service Provider.

(iii) Now, however during the years, business was gradually obtained by the appellant company and there was continuous dispute with Govinda as to whether the same was on account of the efforts of Govinda or due to efforts of the appellant company. Also there were disputes regarding sums to be paid to Govinda. The disputes arising between the appellant company and Govinda are listed out as under:

- Re: Business developments with Kolkata Metro Railways (KMR) - F.Y. 2011-12

Pursuant to initial discussions and proposals to the appellant company, Govinda on 02/09/2010 vide a letter (***Copy enclosed at page 92 of the paper book***) informed the appellant company of a Tender by Kolkata Metro in connection with providing security arrangements in the form of CCTV, etc at the Stations, with the suggestion that the appellant company should participate in the same and try to secure the said business which would be of a big amount.

The appellant Company on 25/02/2011, pursuant to its effective and competitive bidding, managed to secure the Contract with KMR and Letter of Acceptance by KMR to the appellant was issued on 25/02/2011(***copy enclosed at pages 273 to 277 of the paper book***).

However, pursuant to the above business being acquired by the appellant company, Govinda, claiming that the said business was secured due to their efforts and sent an immediate congratulatory message on 26/02/2011 vide a letter(***copy enclosed at page 93 of the paper book***).

In the meanwhile on 11/04/2011, the above Letter of Acceptance was formalized vide a written contract dated 11/04/2011 with KMR for providing electronic security systems. The said Agreement with Kolkata Metro was entered into for a contract value of 17 crores. The Contract was secured after very tight bidding and due to the whole team effort of the appellant company.

Again pursuant to the above, Govinda, claiming its credit of the said contract, acknowledging the receipt of the advance of Rs.4,15,00,000/- sent a letter dated 05/05/2011 enclosing therewith an Invoice of Rs.1.7 crores being 10% of the project value. ***Copy of the said letter dated 05/05/2011 is enclosed at page 94-94a of the paper book.***

The appellant company on receipt of the said Invoice, vide its letter dated 30/06/2011 totally denied the claim of Govinda of having any role to play in securing the business of KMR. The appellant further reminded Govinda to fulfil its commitment with regard to the generation of business to the tune of Rs. 50 crores. ***Copy of the said letter dated 30/06/2011 is enclosed at page 95 of the paper book.***

Thus it is seen that from the very beginning of the contract itself, dispute was created with Govinda. It should also be noted that Govinda from the very inception of the Contract with KMR was in constant touch with the appellant claiming that the said businesses were all acquired by the appellant due to the efforts of Govinda which was denied by the appellant.

- Re: Business developments with M/s Environ Energy Corpn. India P. Ltd (referred to as 'Environ' for short) - F.Y. 2012-13

Here Govinda vide its letter dated 10/08/2012 informed the appellant about its ongoing discussions with Environ in order to secure the contract for providing Security and O & M services for the various Telecom Towers on PAN India basis. Pursuant to the same the appellant vide its letter dated 12/08/2012, duly confirmed to Govinda for going ahead with the said discussions. ***Copy of the said letters are enclosed at pages 96 and 97 of the paper book.***

Thus, pursuant to the above, Contract dated 14/08/2012 was executed with **Environ** for comprehensive operations and maintenance of sites in Rest of West Bengal (ROWB) circle maintained by VIOM Networks (Principal) amounting to Rs.18.00 Cr.

Immediate to the above, Govinda immediately raised its Invoice on the appellant vide its letter dated 14/08/2012. ***Copy enclosed at page 98-98a of the paper book.***

Acknowledging the above Invoice, the appellant company vide its letter dated 16/08/2012 informed Govinda to take the necessary steps to ensure that Environ does not impose unnecessary and frivolous deductions on them. ***Copy of the same is enclosed at page 99 of the paper book.***

However, without taking any steps to ensure that Environ does not impose frivolous deductions on the appellant, Govinda, simply in a hurry to extract money from the appellant, raised its Invoice vide letter dated 15/04/2014 on the appellant for the said business with Environ. ***Copy of the same is enclosed at page 100 of the paper book.***

The appellant noting that no efforts whatsoever were put into by Govinda to avoid the deductions and that Environ had imposed considerable deductions of Rs.5.86 cr on them, the appellant informed Govinda vide its letter dated 02/08/2014 that since due efforts and diligence was not displayed by Govinda, the invoice raised was not justified and thus they denied the payment against them. ***Copy of the same is enclosed at page 101 of the paper book.***

Thus it is seen that in case of business developed with Environ, admittedly due to the efforts of Govinda, again disputes arose on account of the unjust and unreasonable deductions imposed by Environ on the appellant company which left the business with Environ with no profitability.

- **Re: Business developments with AGC Network Ltd. (referred to as ‘AGC’ for short) for sub-contract of work of Hindustan petroleum Corporation Ltd. (referred to as ‘HPCL’ for short) - F.Y. 2013-14**

In connection with the above, Govinda vide its letter dated 15/12/2013 informed the appellant that it was in efforts to secure the sub-contract from AGC with regard to the main contract of AGC with HPCL on back to back basis. It was informed that the value of the sub-contract may be to the tune of Rs.15 to 16 crores. *Copy of letter enclosed at page 103 of the paper book.*

Pursuant to the above, the appellant vide its letter dated 20/12/2013 (*copy enclosed at page 104 of the paper book*) gave the go ahead to Govinda.

In the meanwhile, the appellant company secured the contract with AGC for a contract value of Rs.16.31Cr, which was again claimed by Govinda to be on account of their efforts and accordingly Govinda, vide its letter dated 16/01/2014 raised its Invoice on the appellant company. (*copy of invoice enclosed at page 105- 105a of the paper book*).

Again it was the stand of the appellant that the said business was not secured through Govinda and thus nothing was payable to them. Correspondence to this effect vide letter dated **20/01/2014** is *enclosed at page 106 of the paper book.*

Thus again it is seen that disputes were raised with Govinda Infra.

- **Re: Business developments with Wal-mart India (referred to as ‘Wal-mart’ for short)- F.Y. 2014-15**

Regarding Wal-mart India it was informed by Govinda vide its letter dated 10/04/2014 that it proposed to enter into discussions with the said company for securing its business for the appellant which would work out to Rs.8 crores in value. *Copy of the said letter is enclosed at page 107 of the paper book.*

Immediate to the above, the appellant company, vide its letter dated 15/04/2014 informed Govinda that they were already in discussions with Wal-mart for the said business and thus Govinda was not required to proceed with any discussions at their end. *Copy of the said letter is enclosed at page 108 of the paper book.*

Thus it is again seen that the appellant company regarding its business with Wal-mart also entered into disputes with Govinda.

(iv) Thus, over a period of time, in view of the above disputes with regard to business development services of Govinda and being observed that no substantial, profit earning business was received by the appellant by virtue of the efforts of Govinda, the appellant made several correspondences, with this debtor party during the span of the four years, for pursuance of business with them, extension of the contract, seeking of refund of the advance and ultimately the recovery of the advance. *Copies of the letters in the said connection dated 31/08/2011, 11/10/2011, 01/04/2013 and 30/06/2014 are all enclosed at pages 108a to 108d of the paper book.*

Finally pursuant to the letter of the appellant dated **30/06/2014** asking for refund, the appellant was able to recover only a sum of **Rs.23,00,000/-** on **22/10/2014**. (Rs.25,00,000/- was refunded by

Govinda on 22/10/2014 which included the Rs.2,00,000/- paid on behalf of it by the Appellant). *Copy of the letter dated 22/10/2014 refunding the said amount is enclosed at page 108e of the paper book.*

(v) Here, derouting from the facts, it may be relevant to mention that the Id. A.O. in his Assessment Order has stated that it was noticed by him that Rs.25,00,000/- was paid by the Party in the current year itself and tried to draw analogy that the party was thus a paying party and thus the write off was unjustified.

In the said connection it is pointed out that the above sequence of events clearly prove and substantiate that inspite of all correspondences and recovery proceedings, the party was unwilling to refund the entire amount and after much deliberations a meagre sum of Rs.23 lakhs was paid by them. The said payment in no way points out to the fact that the party was paying. Infact the action of the Party in refunding only a sum of **Rs.23,00,000/-** out of **outstanding** amounts to the tune of **Rs.4,15,00,000/-** reinstates that the Party was unable and unwilling to refund the whole amount.

(vi) Coming back to the issue, it is stated that the numerous facts of dispute between the appellant and Govinda on account of the various businesses claimed to have been secured by Govinda and the various letters of claims filed by Govinda, made the appellant company weary of the recovery of the advance given to Govinda. The appellant was also not sure of its desire to enter into protracted lengthy legal recovery methods which would involve huge amounts of legal fees and also unfruitful investment of time and effort.

Thus the appellant company, pursuant to the recovery of only Rs.23,00,000/-, after total non refund of the advance even after the expiry of the agreed period of time limit being March 31, 2013 and beyond, desirous thus of not pursuing the balance refund and of not carrying forward the unrealizable and dead amounts of advance, decided to write off the same in its books before the yearend 2014-15.

Accordingly on 27/03/2015, the balance advance of **Rs.3,92,00,000/-** lying unpaid in it's books of account was written off, by the appellant and resultantly the appellant incurred a **loss of Rs.3,92,00,000/-in carrying out the operation of the business.**

The said action of the appellant shall be evident from the copy of the ledger accounts of the said party in the books of the appellant for the F.Y.s.2011-12, 2012-13, 2013-14 & 2014-15 *placed at pages 109-112 of the paper book.*

Herein it is pertinent to mention that this advance of **Rs.4,15,00,000/-** given to Govinda by the appellant on 03/05/2011 was the subject matter of assessment for A.Y.s. 2012-13, 2013-14 and 2014-15 wherein the efficacy of the advance given to Govinda was never questioned in the previous A.Y.s. Now when the said advance was written off in the assessment year under consideration, it being questioned on the grounds of commercial expediency thereby a ploy by the Department for disallowing the appellant's claim.

Also, it is a matter which is in the domain of a business man where considering the commercial expediency of his business, an advance is given in course of his business. The same cannot be questioned by the Department. The Hon'ble S.C. in its recent decision has held that commercial expediency has to be adjudged from the **point of view** of the assessee and not the Revenue in the case of *Shiv Raj Gupta vs. CIT* reported in (2020) 425 ITR 420, where the **Hon'ble Apex Court** held that *commercial expediency has to be adjudged from the point of view of the assessee and that*

the Income-tax Department cannot enter into the thicket of reasonableness of amounts paid by the assessee.(para 15, page 12 of the Order). Following are the relevant extracts of the decision:

“This finding flies in the face of settled law. A catena of judgments has held that commercial expediency has to be adjudged from the point of view of the Assessee and that the Income Tax Department cannot enter into the thicket of reasonableness of amounts paid by the Assessee.”

(vii) Pursuant to such write off, the said loss incidental to the operation of the business was claimed as deduction for computing the profit and loss of the business/profession **u/s 28 of the Act** for the assessment year under appeal.

(viii) The aforesaid facts leading the appellant to write off the advance given to Govinda were explained in details before the Id. CIT(A) as well.

(ix) As submitted above, thereafter the submission and paper book filed by the appellant before the Id. CIT(A) was forwarded by him to the Id. DCIT/A.O.

The appellant thereafter received a notice from the Id. DCIT dated **03.10.2018** seeking information and explanation from **itu/s 133(6) of the Act**, in connection with the evidences submitted by it before the Id. CIT(A), during the appellate proceedings. *Copy of the notice dated 03.10.2018 is enclosed at page 551 of the paper book.*

INFORMATION SOUGHT U/S 133(6) OF THE ACT.

(x) Information as sought by the Id. DCIT vide the notice issued **u/s 133(6) of the Act** concerning Govinda and the appellant's response to the same are as mentioned in a **table** hereunder (*copy of the written response submitted by the appellant before Id. DCIT dated 16.10.2018 enclosed at pages 552 to 577 of the paper book*):

Point raised by DCIT in 133(6) notice	Appellant's Response
Letter dated 20/12/2013 placed at Page 104 of the Paper book filed with the written Submission before the Id. CIT(A), purported to be written by the appellant to Govinda, was however issued on the letter head of Govinda instead of the letter head of the appellant and thus why the same should not be considered to be fabricated.	The same was very clearly a mistake on the appellant's part whereby the draft that was prepared by Govinda was inadvertently enclosed in the paper book and submitted by the appellant. The fact is that Govinda, being the Service Provider to the appellant, had procured a business proposal for the appellant with AGC Network Ltd. for sub-contract of work of Hindustan petroleum Corporation Ltd. on back to back basis and the proposal for the same was given by Govinda to the appellant vide the letter dated 15/12/2013 which had been placed at page 103 of the paper book. The appellant had immediately

	given the go ahead for the said proposal verbally. However Govinda wanted a go ahead in writing and thus it prepared a draft of the said letter to be issued by the appellant, in its own letter head and under its signature. The go ahead having already been given verbally, the appellant did not issue a formal written letter. However the said draft so prepared by Govinda remained in the possession of the appellant and during the course of the hearing before the Id. CIT(A) inadvertently got submitted before him as such. The appellant further requested the Id. DCIT to acknowledge the inadvertent action on the part of the appellant as also of the authorised representative and requested her to excuse the same.
With regard to the exchange of letters between the appellant and Govinda, asked for an explanation from the appellant as to how the letters between the appellant and Govinda were exchanged.	The appellant submitted that it has its Branch office in Kolkata at 216, AJC Bose Road, 2nd Floor, Flat No. 2C, Kolkata- 17. The appellant, having secured the Contract with Metro Railway Department, Kolkata (KMR) had set up its Branch office in Kolkata since the year 2011 and for the said purpose enclosed the 'Certificate of Enlistment' of the Kolkata Municipal Corporation in the name of the appellant at the Kolkata office (which is also now enclosed at pages 555 to 558 of the paper book). Thus having its Branch office in Kolkata, all the communications received and sent by it to Govinda were all hand delivered. The Receipt Acknowledgement of the letters of the Appellant, as stamped by Govinda were all enclosed by the appellant along with the reply to the Id. DCIT, for her perusal which are now also enclosed at pages 559 to 567 of the paper book.
Explanation as to the reason why the evidence submitted before the Id. CIT(A) could not be furnished during the assessment proceedings.	The appellant submitted that having its branch office in Kolkata, most of the documents and correspondences relating to the debtors from Kolkata were all kept in the Kolkata office. During the course of the assessment proceedings before the A.O., however the person of the appellant's office in Delhi dealing with the A.O. was not aware of the correspondences at the Kolkata office, because after 2016, due to disputes with the KMR contract, the Kolkata office was lying closed and defunct.

	It was only during the Appellate proceedings, when the Director of the Company came to know of the matter, that the documents were all traced and recovered from the Kolkata office. Hence for this reason the evidences submitted before the Id. CIT(A) could not be furnished during the assessment proceedings.
--	--

REMAND REPORT AND ISSUES RAISED:

(xi) Pursuant to the above, the Id. DCIT provided specific comments and raised queries as well, in a **Remand Report** dated **15.11.2018** to the Id. CIT(A), accompanied by a covering letter of the Addl. CIT, Range-4, New Delhi dated 16.11.2018. *Copy of the Remand Report is enclosed at pages 578 to 582 of the paper book.*

(xii) A copy of the Id. DCIT's **Remand Report** was thereafter forwarded to the appellant by the Id. CIT(A), in response to which the appellant submitted its Reply dated **21.12.2018** (*copy enclosed at pages 584 to 593 of the paper book*) before the Id. CIT(A), as detailed out in a **table** hereunder:

Issue raised/stated by DCIT in Remand Report	Appellant's Response
The appellant's response to query regarding (<i>letter dated 20/12/2013 placed at Page 104 of the Paper book filed with the written Submission before the Id. CIT(A), purported to be written by the appellant to Govinda, being however issued on the letter head of Govinda instead of the letter head of the appellant is thus fabricated</i>), is not verifiable, as the justification given by the appellant has no substance in it. Also if the appellant's contentions are accepted true and correct then the notices issued u/s 133(6) of the Act by her office to Govinda should have been replied to, but no reply from Govinda had been received by her office.	Appellant vide response dated 21.12.2018 (<i>pages 584 to 586 of the paper book</i>) reiterated its submissions made in this regard before the Id. DCIT earlier (vide response dated 16.10.2018), also reproduced above at page 21. The appellant further added by submitting that the last transaction between the appellant and Govinda was on 22/10/2014, when, after lots of insistence and follow ups, a refund of Rs.25,00,000/- was received from it. Since then, it had no business transacted with Govinda and no communication whatsoever had been there with the appellant. It was also submitted by the appellant that Govinda is now a defunct company and even all efforts by the appellant to contact them had failed. The appellant thus concluded by submitting that the notices u/s 133(6) of the Act had been issued by the Id. DCIT at the end of the year 2018, after a gap of more than four years and that too when there was zero communication of the appellant with Govinda. Thus the notices having gone non replied to in such a scenario, the appellant could not be held responsible.
From the perusal of appellant's records and its ITR/Form 3CD/Ledger accounts submitted during assessment proceedings, it is revealed that there is no branch office at Kolkata.	The Id. DCIT had clearly admitted that the documents submitted by the appellant during the appeal proceedings did show that it had obtained registration certificate at 216A A.J.C. Bose Road, 2nd Floor, Kolkata – 700017. Further the "<i>Certificate of Enlistment</i>" of the Kolkata Municipal Corporation in

The letter head of the appellant showed no branch office with Kolkata address and that the letters from Govinda were addressed to the appellant company at its Delhi address. Not a single letter was found addressed to the appellant's Kolkata branch office. However, during the course of appellate proceedings before the Id. CIT(A), the documents submitted by the appellant showed that it had obtained registration certificate at 216A A.J.C. Bose Road, 2nd Floor, Kolkata – 700017 but it was not mentioned in any correspondence with the parties as well as in the return of income. Hence the appellant's contentions in this regard were not verifiable.	the name of the appellant showed the said address in Kolkata which clearly prove beyond any doubt that indeed the appellant has a Branch (Work) office in Kolkata. Thereafter, the statement of the Id. DCIT that the said fact still remained unverified was indeed a very casual statement which could hold any weightage at all. Further it was submitted by the appellant that nowhere is it a requirement of law that the Branch office of any Company has to be stated in the Returns, in the accounts, in the letter head or in the letters of the Company. The appellant also submitted that the Id. DCIT also pointed out that the letters from Govinda were all addressed to the appellant at its Delhi address without appreciating that the Kolkata Branch office was in the nature of a Work station, set up for easy coordination in the KMR project. The contracts between the appellant and Govinda had nothing to do with the Kolkata Work office as it's dealings were with the appellant company in Delhi, however since Govinda was based out of Kolkata, simply for convenience sake, the letters were received in the Kolkata office by hand delivery. The appellant in this regard submitted that the Receipt Acknowledgement of the letters of the appellant company, as stamped by Govinda were all enclosed and available for the scrutiny of the Id. DCIT and nowhere had she raised any objections or doubts regarding the same.
With regard to why the evidence submitted before the Id. CIT(A) could not be furnished during the assessment proceedings, DCIT stated that if the contention of the appellant regarding Branch office is not verifiable, then the question of correspondence with Kolkata office does not arise and thus the justification given by the appellant lacks conviction. She also stated that it appears strange that the appellant company's Delhi based officials dealing with A.O. were not aware of the correspondence at Kolkata office especially when major financial disputes with multiple parties were supposedly going on for years.	It was submitted that the person of the appellant's office in Delhi dealing with the A.O. was not aware of the correspondences at the Kolkata office because after 2016, due to disputes with the KMR contract, the Kolkata office was lying closed and defunct. Post 2016, thus there was no correspondences received or issued from the Kolkata office. The office being defunct and the KMR work being totally stalled, there was absolutely no activity between the Delhi office and the Kolkata Branch office. During the assessment proceedings in the year 2017, the person looking after the taxation matter of the Delhi main office was not aware of the correspondences which were exchanged by the parties in the Kolkata office. Only when during the appellate proceedings, the Director of the appellant company came to know of the matter, that the documents were all traced and recovered from the Kolkata office, as he informed the Delhi office of the correspondences between the appellant company and the parties in Kolkata office. In

	fact it was that since major financial disputes had taken place, that the Director remembered that certain correspondences could be found at the Kolkata office and thus after intensive searching that the file was retrieved from the Kolkata office.
With regard to advances given to Govinda being written off (Rs.3,92,00,000/-), the appellant's contention appears to be true that it had offered around Rs.98 lacs receipts on account of dispute, but this fact was not confirmed by the other party and the contention of the appellant cannot be viewed in isolation. The Id. DCIT stated that in view of the background of the dealings between the appellant and the party, it is a matter of perspective to infer that whether the appellant had gained Rs.0.98 Cr or it had lost Rs.3.92 Cr.	The appellant submitted that it had stated earlier, in the alternative and without prejudice to the fact that the sum due from Govinda had in fact become irrecoverable and thus the same was written off, and that if the dispute had not arisen with Govinda, then 10% of the contract value as claimed and contracted with Govinda amounting to Rs. 4.90 crores would have become payable as service fees. As opposed to that, the appellant had written off a sum of Rs.3.92 crores only. Thus it was explained by the appellant that in the event of the write off, thus a sum of Rs.0.98 crores (Rs.4.90 crores – Rs.3.92 crores) was offered extra as income. Also it was submitted that without appreciating the honest act of the appellant and the fact that the write off actually resulted in a higher income of Rs.0.98 crores, the DCIT had raised the absolutely irrelevant query as to whether this fact was confirmed by the other party, totally ignoring the facts of the appellant wherein it had amply been explained that the write off was unilateral action of the appellant in business prudence wherein the irrecoverable sums from Govinda were written off as loss incidental to business. Any confirmation from the other party thus does not arise. The Ld. DCIT thus, without correctly appreciating the evidences and the facts of the case of the appellant had made the passing by reference as to the commercial angle to the said write off.

CIT(A)'s ALLEGATIONS and APPELLANT's RESPONSE:

(xiii) As has already been submitted above, pursuant to the appellant's submissions made before the Id. CIT(A) and also the Reply filed before the Id. CIT(A) in response to the Id. DCIT's comments concerning Govinda in the impugned Remand Report, the Id. CIT(A) without paying heed to any of such submissions, explanations and evidences filed before him at the appellate stage, finally passed the **Appellate Order** on **28.08.2020**, making the following **allegations against the appellant**, thus confirming the Id. A.O.'s disallowance of the claim of Write off, of advances given to **Govinda**.

The appellant's **Reply** to each of the allegations are also submitted hereunder:

1. CIT(A)'s Allegation:

That in the Remand Report, the Ld. A.O. mentioned that Govinda did not comply with the notices issued.

Appellant's Reply:

The appellant in this regard would like to submit (as also submitted in response to the Remand Report) that the Id. CIT(A), completely without any basis stated on the basis of the Id. AO's observation in the Remand Report that Govinda did not reply to the notice issued **u/s 133(6) of the Act**.

The appellant submits that the last transaction between the appellant and Govinda was on 22/10/2014 when, after lots of insistence and follow ups, a refund of Rs.23,00,000/- was received from them. Pursuant to that, on realizing the futility of recovery of the balances, on 27/03/2015 the balance lying in the account of Govinda Infra was written off as loss incidental to business (evidencing the same, Govinda's ledger account from 01.04.2011 to 31.03.2015 is enclosed at pages 109-112 of the paper book). The appellant further submits that since then, it had no business transactions with Govinda and no communication whatsoever has been there between Govinda and the appellant. Lastly it is submitted by the appellant in this regard that Govinda is now a defunct company and even all efforts by the appellant to contact them has failed.

Thus the notices **u/s 133(6) of the Act** issued by the Id. DCIT/AO at the end of the year 2018 had seemingly gone non replied to by Govinda.

The appellant in this regard would like to add by submitting that it is not understood it as to how the 'no reply' from Govinda can determine the genuineness of its transactions with the appellant which were dated four years back. In such a scenario, after a gap of more than four years and that too with zero communication with the said party of the appellant, no adverse inference can be drawn against the appellant for any absence of reply from Govinda.

In view of the above the impugned alleged premise of the Id. CIT(A) for upholding the Id. A.O.'s disallowance of the claim of Write off, of advances given to Govinda has no basis to stand.

2. CIT(A)'s Allegation:

The Id. CIT(A) alleged that the Id. AO in the Remand Report mentioned that in the letter dated 20.12.2013 purported to be written by the appellant to its service provider Govinda, it was noticed that the letter head used for this correspondence belongs to Govinda. The AO has mentioned that the appellant has admitted the mistake by stating that Govinda prepared a draft letter to be issued by the appellant, in its own letter head and inadvertently got submitted before the Id. CIT(A).

Appellant's Reply:

In this regard the appellant would like to reiterate that Govinda, being the Service Provider to the appellant, had procured business proposal for the appellant with AGC Network Ltd. (AGC) for sub-contract of work of Hindustan petroleum Corporation Ltd. (HPCL) on back to back basis and the proposal for the same was given by Govinda to the appellant vide the letter dated 15/12/2013 which was placed at page 103 of the Paper book, submitted earlier before the Id. CIT(A) and is further now submitted before Your Honours at page 103 of the paper book.

Pursuant to the same, the appellant had immediately given the go ahead for the said proposal verbally. However Govinda wanting a **go ahead in writing**, thus prepared a draft of the said letter to be issued by the appellant, however in its own letter head and under its signature. The go ahead having already been given verbally, the appellant did not issue a formal written letter. The said draft so prepared by Govinda however, remained in the possession of the appellant and during the course of the hearing before the Id. CIT(A) inadvertently got submitted before the Id. CIT(A) as such.

The appellant further in light of the above submits that the same was very clearly a mistake on the part of the appellant whereby the draft that was prepared by Govinda was inadvertently enclosed in the paper book submitted by the appellant. It was therefore humbly submitted by the appellant both before the Id. AO and the Id. CIT(A) to acknowledge the inadvertent action on the part of the appellant and to excuse the same.

The appellant thereafter submits that however, the Id. CIT(A) has completely ignored the humble and honest admission of mistake of the appellant and based on this alleged premise upheld the Ld. AO's disallowance of advance written off.

The appellant also submits in this regard that it is pertinent to mention that a perusal of the paper book submitted before the Ld. CIT(A) would reveal that the appellant, with regard to its transactions with Govinda had enclosed documents supporting the same, from pages 83 to 112. The same contained various letters exchanged between the appellant and Govinda with regard to numerous discussions and transactions. All the said letters and documents have been all examined in full details by the Id. AO and the Id. CIT(A) and all of them have been found to be genuine. The appellant submits that out of the 21 (to be specific) letters exchanged between the appellant and Govinda, only one letter has been found to be incorrect which has also been in full humility accepted as a mistake.

In these circumstances, it is grossly unfair of the Id. CIT(A) to arrive at the conclusion of confirming the Ld. AO's disallowance of the claim of Write off, of advances given to Govinda, based on a sole letter.

3. CIT(A)'s Allegation:

The Id. CIT(A) relying on the Id. AO's Remand Report has alleged that there is no evidence of correspondence between the parties as the appellant has only mentioned that the acknowledgment letters of various dates have been hand delivered and the said letter needs to be accepted as proof of delivery.

Appellant's Reply:

In this regard the appellant would like to submit that it has its Branch office in Kolkata at 216, AJC Bose Road, 2nd Floor, Flat No. 2C, Kolkata- 17. The appellant having secured the Contract with Metro Railway Department, Kolkata (KMR) had set up its Branch office in Kolkata since the year 2011. In this connection the 'Certificate of Enlistment' of the Kolkata Municipal Corporation in the name of the appellant at the Kolkata office is enclosed at pages 556 to 558 of the paper book.

Thus the appellant having its Branch office in Kolkata and since Govinda was based out of Kolkata, simply for convenience sake, all the communications received and sent by the appellant to Govinda were all hand delivered at the Branch office in Kolkata. The **Receipt Acknowledgement** of the letters of the appellant, as stamped by Govinda, are all enclosed at pages 559 to 567 of the paper book.

In view of the above, therefore the Id. CIT(A) alleging that there is no evidence of correspondence between the parties is factually incorrect. Further acknowledgment letters of various dates, hand delivered between the Govinda and the appellant are sufficient and valid proof of correspondence.

Accordingly, the abovementioned alleged premise of the Id. CIT(A) for arriving at the conclusion of confirming the Id. A.O.'s disallowance of the claim of Write off, of advances given to Govinda, does not hold good and has no basis to stand.

4. That with regard to the Id. A.O. stating the following in the Remand Report, the Id. CIT(A) further made several allegations:

- The justification given by the appellant regarding letter dated 20.12.2013 (purported to be written by it to its service provider Govinda, using the letter head of Govinda for this correspondence) has no substance in it as the content of the said letter was a mere consent to proceed with the order procurement. Therefore it is beyond comprehension why one party will guide and advise the other party in drafting a simple two line letter and that too under its signature and letter head.
- That appellant's contention regarding Kolkata office is not verifiable as from the perusal of appellant's records and its ITR/Form 3CD/Ledger accounts submitted during assessment proceedings it is revealed that there is no branch office at Kolkata. The letter head of the appellant showed no branch office with Kolkata address and that the letters from these two parties were addressed to the appellant company at its Delhi address. Not a single letter was found addressed to the appellant's Kolkata branch office, however, during the course of appellate proceedings before the Id. CIT(A), the documents submitted by the appellant showed that it had obtained registration certificate at 216A A.J.C. Bose Road, 2nd Floor, Kolkata – 700017 but it was not mentioned in any correspondence with the parties as well as in the return of income.
- That if the contention of the appellant, that whether there is any branch office at Kolkata or not, is not verifiable, then the question of correspondence with Kolkata office does not arise and thus, the justification given by the appellant lacks conviction. Also it appears strange that the appellant company's Delhi based officials dealing with AO were not aware of the correspondence at Kolkata office especially when major financial disputes with multiple parties were supposedly going on for years.

On the basis of the aforesaid observations of the Id. DCIT in the Remand Report, the Id. CIT(A) thus alleged that:

4. (i) CIT(A)'s Allegation:

That the dealing with the entity (Govinda) shows opaqueness and ambiguities. The appellant had advanced various sums of money from time to time without entering into legally recognized correspondence. The confusion regarding letterhead (as mentioned in the remand report) is also an important pointer to the ambiguity in the nature of the transaction. Theory of prudence would suggest that no prudent business man will advance such sums without well laid down outcome agreements and during remand or appellate proceedings the appellant has not come up with any cogent reasons as to why the entity was chosen with respect to its proven track record.

Appellant's Reply:

In this regard the appellant would like to reiterate that it had entered into an **Agreement dated 02/05/2011** with Govinda for the purpose of developing its Security Business in PAN India wherein the appellant company being the '*Client*' appointed Govinda as the '*Service Provider*' and the Client was to pay as Service Fee, 10% of the business value that the Service Provider would generate for the Client. It was also represented by the Service Provider that it would generate business of at least Rs.50,00,00,000/- per year in F.Y.s. 2011-12 and 2012-13. Invoice for the business development services would be raised by the Service provider on realization of fees by the Client from the business generated by the Service Provider. Copy of the **Agreement dated 02/05/2011** is enclosed at pages 85 to 91 of the paper book.

Meanwhile on the request of the Service provider, i.e. Govinda, a sum of **Rs.4,15,00,000/-** was given/advanced to it during the course of business as a refundable business advance/deposit. The purpose of advancing such money to the service provider and the conditions thereof, as reduced in writing in the said agreement, are (at the cost of repetition) reproduced below:

“III. COMMERCIALS***.....*****Refundable Advance/Deposit**

In the interim, on the request of Service Provider, the Client has agreed to pay Rs.4,15,00,000 (Rupees Four Crore Fifteen Lakh only) as a non-interest bearing and non-adjustable refundable advance/deposit.

It is expressly agreed between the parties that amount would be refunded forthwith in case the Service Provider fails to develop business for the client as committed hereinabove by the end of the year.

In any case, the advance/deposit are refundable latest by March 31, 2013.”

With regard to **Breach of Contract** or any differences and claims, it was laid out in the Agreement vide **Clause XIII** that “*in case of any dispute or differences or claims or demands whatsoever between the First party and the second party which do not get resolved amicably, the matter shall be referred to Arbitration before a Sole Arbitrator to be mutually appointed by both the parties.*”

Thus in terms of the **Agreement dated 02/05/2011**, the first instalment of Rs.4,15,00,000/- was paid on 03/05/2011 to the Service provider as Advance against the said service to be provided.

From the above it is crystal clear that it is not the appellant's case that it had advanced various sums of money to Govinda from time to time without entering into legally recognized correspondence.

Further the Id. CIT(A) stated that the appellant's contention regarding Kolkata office is not verifiable as from the perusal of appellant's records and its ITR/Form 3CD/Ledger accounts submitted it is revealed that there is no branch office at Kolkata. The letter head of the Appellant showed no branch office with Kolkata address and that the letters from these two parties were addressed to the appellant company at its Delhi address. Not a single letter was found addressed to the appellant's Kolkata branch office, however, during the course of appellate proceedings before the Id. CIT(A), the documents submitted by the appellant showed that it had obtained registration certificate at 216A

A.J.C. Bose Road, 2nd Floor, Kolkata – 700017 but it was not mentioned in any correspondence with the parties as well as in the return of income.

Stating the above the Id. CIT(A) has alleged that confusion regarding letterhead is also an important pointer to the ambiguity in the nature of the transaction.

In this connection that appellant would like to submit that there is no confusion regarding letterhead (as alleged by the Id. CIT(A)). The appellant submits that in the above paras it has clearly explained and established that it did have a Branch (Work) office in Kolkata at 216, AJC Bose Road, 2nd Floor, Flat No. 2C, Kolkata- 17. The “*Certificate of Enlistment*” of the Kolkata Municipal Corporation in the name of the appellant at the Kolkata office was also duly enclosed.

However the Id. CIT(A) with an absolute prejudiced and predetermined mind has tried to deny the existence of the Registered Branch/Work Office of the appellant since the Branch office was not mentioned in the Returns or in the letterhead of the appellant. The appellant in this connection reiterates that nowhere is it a requirement of law that the Branch office of any Company has to be stated in the letter head of the Company.

Besides the above, the appellant would like to submit that the Id. CIT(A) pointing out that the letters from Govinda were all addressed to the appellant at its Delhi address was without appreciating that the Kolkata Branch office was in the nature of a Work station, set up for easy coordination in the Metro railways, Kolkata project. The appellant submits that the contract between the appellant and Govinda had nothing to do with the Kolkata Work office. Govinda’s dealing was with the appellant company in Delhi, however since it was based out of Kolkata, simply for convenience sake, the letters were received by the appellant in its Kolkata office.

Thus this allegation of the Id. CIT(A) that confusion regarding letterhead is also an important pointer to the ambiguity in the nature of the transaction is indeed a very casual statement/allegation which cannot hold any weightage at all and thus has no basis to hold ground.

In addition to the above the appellant would further like to submit that the Id. CIT(A) has alleged that theory of prudence would suggest that no prudent business man will advance such sums without well laid down outcome agreements and during remand or appellate proceedings the appellant has not come up with any cogent reasons as to why the entity was chosen with respect to its proven track record.

The appellant in this regard would like to reiterate that it had advanced **Rs.4,15,00,000/-** to Govinda on the basis of a well laid down **Agreement dated 02/05/2011** (copy enclosed at pages 85 to 91 of the paper book) as submitted above, and the said advance was given during the course of business as a refundable business advance/deposit. The purpose of advancing such money to the Govinda and the conditions thereof, have been reduced in writing in the said agreement in ‘**Chapter III: Commercial**’ (which have been reproduced in detail above). Therein it was also mentioned and agreed to, by both Govinda and the appellant that if Govinda failed to develop business for the appellant, the advance given to it would be refunded by it.

Thus it is not the appellant’s case that it advanced money to Govinda without well laid down outcome agreements as alleged by the Id. CIT(A).

Further it was also not the case that the appellant did not come up with cogent reasons as to why Govinda was chosen with respect to its proven track record. The appellant very well submitted

before the Id. CIT(A) that Govinda was a Private Limited Company actively engaged in the business of providing Business Development services to its various clients in PAN India and held expertise in the field of providing security services and solutions (similar to the appellant's line of business) and had strong connections in the various Government Departments which would help the appellant source and facilitate business. Hence Govinda was chosen as a service provider.

In view of the above the Ld. CIT(A)'s allegation that the dealing with the entity shows opaqueness and ambiguities is incorrect and baseless and the impugned alleged premises of the Ld. CIT(A) for upholding the Id. A.O.'s disallowance of the claim of Write off, of advances given to Govindah as no basis to stand.

4. (ii) CIT(A)'s Allegation:

That even if the argument advanced by the appellant is to be accepted, it is in the nature of a commission. The appellant has not brought on record any evidence to suggest that tax was deducted on the said amount.

Appellant's Reply:

In this regard the appellant would like to submit that the sum advanced by it to Govinda was not in the nature of a commission but was in the nature of a refundable 'advance' as is clear from the **Agreement dated 02/05/2011** (copy enclosed at pages 85 to 91 of the paper book), **Chapter III** (also reproduced above). Commission is a nature of payment which is made after the completion of the work assigned, as an incentive/remuneration for successful completion of such work and is different from 'advance' which is given before completion of the work assigned.

Since the appellant had given refundable advance of Rs.4,15,00,000/- to Govinda (which by no stretch of imagination can be considered as a commission), hence there was no requirement of deducting tax on such payment as has been held in the following judicial pronouncements:

The **Hon'ble ITAT, Hyderabad** in the case of **Shri A. Naga Srinivas vs. DCIT, Circle 13(1), ITA No. 944/Hyd/2017** held the following:

"10. Even on merits, we find that the advance received by the assessee towards his professional fee, when it is returned, is not covered by any of the provisions of Chapter XVIIIB requiring TDS. However, in view of our holding that the re-assessment proceedings are not valid, the grounds against the disallowance u/s 40(a)(ia) of the Act need no adjudication. Therefore, grounds 5 & 6 are not adjudicated at this stage."

The **Hon'ble ITAT, Bangalore** in the case of **Prestige Estates Projects Ltd. vs. ACIT, Circle 18(1), Bangalore** reported in **[2021] 125 taxmann.com 127** held that:

Assessee a real estate development company entered into a joint development agreement (JDA) with 54 landowners for construction of superstructure and paid 'interest free refundable security deposit' which was refundable after 18 months of commencement of construction - Assessing Officer held that refundable security deposit given to landowners constituted 'consideration' for transfer of immovable property (land) under section 194-IA and assessee having failed to deduct tax under section 194-IA from 'refundable security deposit' given to land owners, it was in default of not discharging TDS liability - Assessee submitted that there was no applicability of section 194-IA since there was no transfer in terms of section 2(47)(v) in relation to JDA - Revenue however submitted that since

deposit would be recovered through sale of part of owners' constructed area, it constituted advance payment - However, as seen from JDA, assessee was only permitted by landowners to develop scheduled property as residential apartment buildings and it could not be construed as delivery or possession in terms of section 53 of Transfer of Property Act read with section 2(47)(v), as legal possession of scheduled property continued to remain with possession of landowner - Further, even if it was advance payment, it was not linked to transfer of immovable property as enumerated in section 194-IA, so as to deduct TDS by assessee on said refundable security deposit - Whether therefore, assessee could not be held as the assessee-in-default under section 201(1) and 201(1A) - Held, yes [Paras 5.4, 5.8 and 6] [In favour of assessee]

Further without prejudice to the above it is submitted that even if as per law, TDS was required to be deducted for refundable advances paid, the appellant having defaulted in the same could not have been penalized by treating the non-recoverability of its advances as non genuine and thereafter treating the write off of such advances as non genuine.

In view of the above the impugned alleged premises of the Id. CIT(A) for upholding the Id. A.O.'s disallowance of the claim of Write off, of advances given to Govindahas no basis to stand.

4. (iii) CIT(A)'s Allegation:

That it is important to analyze whether payments made to the entity also measures upto the principle of commercial expediency. Various payments were made to Govinda for procurement of business and payment amounting to Rs.4,15,00,000/- was made on 03/05/2011. Further Govinda was engaged for procuring business for the appellant from various concerns like Metro Railways, Kolkata, Environ Energy Corporation India Pvt. Ltd., AGC Network Ltd. and Walmart India, out of which two concerns are in the nature of PSUs and it is not known how the appellant could take advantage of the tendering process by engaging an entity like Govinda. Most of the public procurements done by such companies are transparent and undertaken through an open competitive bidding process. Similarly Walmart India is a reputed MNC and therefore explanation offered by appellant is of doubtful vintage.

Moreover during the course of remand proceedings the AO brought out inconsistencies in the approach of the appellant which includes issues of clarifications on behalf of Govinda and non delivery of letter u/s 133(6) of the Act at the designated address. Under the provisions of the Act, the onus of proving that expenditure has wholly and exclusively related to the business of the appellant and that the same was incurred on account of commercial expediency rests solely on the appellant itself. It is the responsibility of the appellant to advance evidence which would render the evidence/documents submitted acceptable from the prospective of tax proceedings.

Appellant's Reply:

In this regard the appellant would firstly like to submit that the procurement of business of companies in the public sector or of the private limited companies involves several procedures and steps which begins with good professional connections with such concerns (both private limited companies and companies in the public sector). Service providers (in this case Govinda) usually have good connections with private limited companies and companies in the public sector who bring out tenders from time to time for purchase of various goods and services. The service providers are usually informed of such tenders even before they are published and brought out and thus they are hired by sellers (like in this case the appellant) for informing them about such tenders and preparation in advance for bidding for such tenders.

The service providers further develop connections between the buyer and the seller (in this case the appellant) once a tender is out for bidding which facilitates the chances of winning a tender for the prospective bidder/seller (in this case the appellant). Besides, the procurement policies of companies go for an overhaul many a times which is studied and understood in detail by the service providers for an efficient bidding and such knowledge is then shared by the service provider with the ultimate seller (in this case the appellant) for an efficient bidding.

Thus the service providers act as a bridge between the buyer and the seller and Govinda in this case was hired by the appellant for a similar role of procuring business, developing connections with the buyer and passing on of first hand information regarding the tender, for an efficient participation in the bidding of the tender.

Further the appellant was earlier only involved in providing manpower security systems and it was venturing into providing electronic security systems for the first time when Govinda was hired as a Service Provider in helping it source more business and tender information in this specific field.

Therefore the Id. CIT(A)'s allegation in this regard that it is not known how the appellant could take advantage of the tendering process by engaging an entity like Govinda (*when out of concerns like Metro Railways, Kolkata, Environ Energy Corporation India Pvt. Ltd., AGC Network Ltd. and Walmart India, two concerns were in the nature of PSUs and Walmart was a MNC*), stands explained from the role of Govinda as a Service Provider, explained above.

Further there is no such requirement of law that for participating in tenders of PSUs or MNCs, the help of Service Providers cannot be taken or are not required. It is quite a practice in the service industry to hire Service Providers for successful bidding of tenders as explained above.

Having submitted the above with regard to the Id. CIT(A)'s further allegations it is submitted by the appellant that there is no inconsistency in the appellant's approach regarding issues of clarifications on behalf of Govinda and non delivery of letter u/s 133(6) of the Act at the designated address. Firstly it is submitted herein that the Id. CIT(A) has not specified which issues were clarified by the appellant on behalf of Govinda which led to inconsistency, hence the said allegation cannot be met completely.

As far as the Id. CIT(A)'s allegation regarding the appellant's approach being inconsistent is concerned with regard to non delivery of letter u/s 133(6) of the Act at the designated address, it is submitted (at the cost of repetition) that the last transaction between the appellant and Govinda Infra was on 22/10/2014 when, after lots of insistence and follow ups, a refund of Rs.23,00,000/- was received from them. Pursuant to that, on realizing the futility of recovery of the balances, on 27/03/2015 the balance lying in the account of Govinda Infra was written off as loss incidental to business. The appellant further submits that since then, it had no business transactions with Govinda and no communication whatsoever has been there between Govinda and the appellant. Lastly it is submitted by the appellant in this regard that Govinda is now a defunct company and even all efforts by the appellant to contact them has failed.

Thus the notices u/s 133(6) of the Act issued by the Id. AO at the end of the year 2018 had gone non replied to, by Govinda.

Therefore the appellant submits that the 'no reply' to notices u/s 133(6) of the Act by Govinda should not lead to the appellant's approach being inconsistent and thereafter determine the

genuineness of its transactions with Govinda which were dated four years back. In such a scenario, after a gap of more than four years and that too with zero communication with the said party of the appellant, no adverse inference can be drawn against the appellant for any absence of reply from Govinda.

Lastly with regard to the Ld. AO's observation that the onus of proving that expenditure has wholly and exclusively related to the business of the appellant and that the same was incurred on account of commercial expediency rests solely in the appellant itself and the appellant is to advance evidence which would render the evidence/documents submitted acceptable from the prospective of tax proceedings, it is submitted that –

the submissions made **above**, before Your Honours' along with the documentary evidences under the heading '**Background**', amply establish that the advance given to Govinda being written off and claimed as loss incidental to business was wholly and exclusively related to the business of the appellant and that the same was incurred on account of commercial expediency. The said submissions made above may be referred to for the same.

Herein it is pertinent to mention that this advance of **Rs.4,15,00,000/-** given to Govinda by the appellant on 03/05/2011 was the subject matter of assessment for A.Y.s. 2012-13, 2013-14 and 2014-15 wherein the efficacy of the advance given to Govinda was never questioned in the previous A.Y.s. Now when the said advance was written off in the assessment year under consideration, it being questioned on the grounds of commercial expediency thereby a ploy by the Department for disallowing the appellant's claim.

Also, it is a matter which is in the domain of a business man where considering the commercial expediency of his business, an advance is given in course of his business. The same cannot be questioned by the Department. The Hon'ble S.C. in its recent decision has held that commercial expediency has to be adjudged from the **point of view** of the assessee and not the Revenue in the case of *Shiv Raj Gupta vs. CIT* reported in (2020) 425 ITR 420, where the **Hon'ble Apex Court** held that **commercial expediency has to be adjudged from the point of view of the assessee and that the Income-tax Department cannot enter into the thicket of reasonableness of amounts paid by the assessee.**(para 15, page 12 of the Order). Following are the relevant extracts of the decision:

"This finding flies in the face of settled law. A catena of judgments has held that commercial expediency has to be adjudged from the point of view of the Assessee and that the Income Tax Department cannot enter into the thicket of reasonableness of amounts paid by the Assessee."

In view of the above the impugned alleged premises of the Id. CIT(A) for upholding the Id. A.O.'s disallowance of the claim of Write off, of advances given to Govinda has no basis to stand.

4. (iv) CIT(A)'s Allegation:

That under the income tax proceedings, evidentiary value is on a different footing. Theory of human probability has an important role to play in acceptance and rejection of such explanations wherein the applicable standards of evidence is based on preponderance of probabilities and thereafter the decision of the **Hon'ble Supreme Court of India** in the cases of *CIT vs. Durga Prasad Moore* (1971) 82 ITR 540 and *Sumati Dayal vs. CIT* (1995) 214 CTR 124 were relied upon and it was alleged by the Id. CIT(A) that in view of all the facts stated by him in the above paras, the explanation of the appellant fails the test of human probability.

The Id. CIT(A) also **alleged** that the appellant has failed to prove the genuineness and commercial expediency of the expenditure incurred. No prudent reasonable man would advance such a substantial amount for procuring orders from other entities. It raises legitimate presumptions about the legitimacy of the payment made. Moreover no tax has been deducted on the amounts paid to the entity, which shows that the payment was not above-board. The onus on the appellant with regard to establishing the commercial expediency involved in the transaction cannot be said to have been discharged.

Appellant's Reply:

In this regard the appellant would like to submit that the Id.CIT(A) has referred to decisions of the **Hon'ble Supreme Court of India** in the cases of **CIT vs. Durga Prasad Moore** reported in [1971] 82 ITR 540(SC) and **Sumati Dayal** reported in [1995] 214 ITR 801 (SC) and pointed out that the Apex Court has held in these cases that the test of human probability after considering the surrounding circumstances should be applied. Thereafter in light of these decisions the Id. CIT(A) has held that the appellant's explanation fails the test of human probability, without **however specifying and/or explaining** as to how these decisions are applicable in the appellant's case or how the appellant's explanations fails the test of human probabilities as per these decisions.

Further both these decision of **Durga Prasad Moore** (*supra*) and **Sumati Dayal** (*supra*) are distinguishable on facts from the appellant's case.

In the case of **Sumati Dayal** (*supra*), the assessee had explained that the credited amounts represent her winnings in races. On facts, it was found that the explanation was unsatisfactory because the assessee had no expertise in races; to accept that a race goer had won jackpot events so many times in a short period of two years, was highly improbable; in the books of account of the assessee, the amount representing travelling expenses of assessee to Hyderabad and Bangalore had not been debited at all; likewise, losses suffered by the assessee in the races had not been shown at all in the books of account and lastly, from the year 1972 onwards, she had stopped going to races as from that year onwards, winnings in races were brought within the tax purview. These reasons were found to be cogent and convincing reasons to reject the explanation offered by the assessee.

In light of the above, it is submitted that in the appellant's case no such specific instances of doubt/suspicion have been pointed out/alleged by the Id. CIT(A) or no such surrounding circumstances have been pointed out by the Id. CIT(A) as doubtful or suspicious on which the test of human probability (as laid down in the case of **Sumati Dayal** (*supra*) where the facts peculiar to that case led the Hon'ble Apex Court to apply the theory of preponderance of probabilities) can be applied to.

All the allegations/suspicion of the Id. CIT(A) regarding - notice u/s 133(6) of the Act not being replied to by Govinda, correspondences between the appellant and Govinda being hand delivered in the appellant's Branch Office in Kolkata but address on the letter head being that of the appellant's Delhi office, one letter out of 21 letters to Govinda being submitted on the letterhead of Govinda and signed by Govinda as an inadvertent mistake by the appellant, have all been duly explained by the appellant before the Id. CIT(A).

Hence there is no such surrounding circumstances (none of such circumstance even being pointed out by the Id. CIT(A) while applying the Supreme Court decision) on which the test of human probability (as laid down in the case of **Sumati Dayal** (*supra*)) can be applied to.

Similarly in the case of **Durga Prasad Moore (supra)** the **Hon'ble Supreme Court** was considering the explanation offered by the assessee that the property, from which income was generated was the trust property; the sale deed in favour of the assessee showed that he purchased the property as a trustee and there was a subsequent deed creating a trust which recorded a corpus of Rs. 2 lakhs left in the hands of the assessee. In this case it was held that if all that an assessee who wanted to evade tax was to have some recitals made in a document either executed by him or executed in his favour then the door would be left wide-open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. In that context it was held that it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real.

In light of the above, it is submitted that in the appellant's case the Id. CIT(A) has nowhere alleged that the appellant has executed any document itself or that it has got any document executed in its favour so as to evade tax, as in the case of **Durga Prasad Moore (supra)**. Also no doubtful/suspicious instances have been pointed out by the Id. CIT(A) or no such surrounding circumstances have been pointed out by the Id. CIT(A) which showed that the apparent was not the real on which the test of human probability (as laid down in the case of **Durga Prasad Moore (supra)**) can be applied to.

All the allegations/suspicion of the Id. CIT(A) regarding - notice u/s 133(6) of the Act not being replied to by Govinda, correspondences between the appellant and Govinda being hand delivered in the appellant's Branch Office in Kolkata but address on the letter head being that of the appellant's Delhi office, one letter out of 21 letters to Govinda being submitted on the letterhead of Govinda and signed by Govinda as an inadvertent mistake by the appellant, have all been duly explained by the appellant before the Id. CIT(A).

Hence in the appellant's case, there are no such surrounding circumstances (none of such circumstance even being pointed out by the Id. CIT(A) while applying the Supreme Court decisions) on which the test of human probability (as laid down in the case of **Durga Prasad Moore (supra)**) can be applied to.

Further the **Hon'ble jurisdictional ITAT, Delhi** in the case of **Brij Bhushan Singhal vs. ACIT, Central Circle – 3, ITA Nos. 1415 to 1417, 1483, 1484 and 1479 to 1481/Del/2018** held the following:

“that the preponderance of probabilities would come into play only when the basic test of direct and factual evidences fails.”

It was further held by the **Hon'ble ITAT, Delhi** in the decision of **Brij Bhushan (supra)** that when the complete evidences have been placed by the assessee before the revenue authorities and if they are not found to be false but only allegation has been made that transactions are sham, then the theory of preponderance of probabilities invoked by the learned assessing officer is merely a conjecture and surmises.

The **Hon'ble ITAT** further held that only on the theory of preponderance of probabilities addition cannot be sustained. The theory of "preponderance of probability" is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn based on certain admitted facts and materials and not based on presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been

carried out, then nothing can be implicated against the assessee. The reliance placed by the learned AO on the decision of the honourable Supreme Court is clearly distinguishable.

In view of the interpretation of the theory of 'preponderance of probability' as laid down by the **Hon'ble ITAT, Delhi** in the case of **Brij Bhushan (supra)** it is thus easily discernible that in the appellant's case the theory of 'preponderance of probability' cannot be applied as the basic test of direct and factual evidences has not failed in the appellant's case. Further the complete evidences placed by the appellant before the Id. CIT(A) have not been found to be false but only allegation has been made that transactions are sham, hence the theory of preponderance of probabilities cannot be again invoked by the Id. CIT(A).

Moreover it is laid down by the **Hon'ble ITAT, Delhi** in the case of **Brij Bhushan (supra)** that the theory of "preponderance of probability" is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side and the conclusions have to be drawn based on certain admitted facts and materials and not based on presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material, then nothing can be implicated against the assessee. In light of the same as in the appellant's case nothing has been proved against it with aid of any direct material, the theory of "preponderance of probability" cannot be applied in the appellant's case.

In view of the above the Id. CIT(A)'s alleged premise for upholding the Id. A.O.'s disallowance of the claim of Write off, of advances given to Govinda has no basis to stand.

Lastly, the appellant would further like to submit that the Id. CIT(A) has alleged that the appellant has failed to prove the genuineness and commercial expediency of the expenditure incurred. No prudent reasonable man would advance such a substantial amount for procuring orders from other entities. It raises legitimate presumption about the legitimacy of the payment made.

In this regard the appellant would like to submit that it has sufficiently proved the genuineness and commercial expediency of the expenditure incurred in the above paras in this submission. Reiterating further it is submitted that over a period of time, in view of the disputes with regard to business development services of Govinda Infra and being observed that no substantial profit earning business was received by the appellant by virtue of the efforts of Govinda Infra, the appellant made several correspondences with Govinda for pursuance of business with them, extension of the contract, seeking of refund of the advance and ultimately the recovery of the advance. **Copies of the letters in the said connection dated 31/08/2011, dated 11/10/2011, 01/04/2013 and 30/06/2014 are all enclosed at pages 108a to 108d of the paper book.**

Finally pursuant to the letter of the appellant dated 30/06/2014 asking for refund, the appellant was able to recover only a sum of Rs.23,00,000/- on 22/10/2014 (Rs.25,00,000/- was refunded by Govinda Infra on 22/10/2014, which included the Rs.2,00,000/- paid on behalf of it by the appellant). **Copy of the letter dated 22/10/2014 refunding the said amount is enclosed at page 108e of the paper book.**

The above sequence of events clearly prove and substantiate that inspite of all correspondences and recovery proceedings, the party (Govinda) was unwilling to refund the entire amount and after much deliberations a meagre sum of Rs.23 lakhs was paid by them. However the said payment in no way points out to the fact that the party was paying. In fact the action of the Party in refunding only a sum of Rs.23,00,000/- out of outstanding amounts to the tune of Rs.4,15,00,000/- reinstates that the Party was unable and unwilling to refund the whole amount.

Thus all these facts of dispute between the appellant and Govinda Infra on account of the various businesses claimed to have been secured by Govinda and the various letters of claims filed by Govinda, made the appellant weary of the recovery of the advance given to Govinda Infra. The appellant was also not sure of its desire to enter into protracted lengthy legal recovery methods which would involve huge amounts of legal fees and also unfruitful investment of time and effort.

Hence the appellant, pursuant to the recovery of only Rs.23,00,000/- (after total non refund of the advance even after the expiry of the agreed period of time limit being March 31, 2013 and beyond), desirous thus of not pursuing the balance refund and of not carrying forward the unrealizable and dead amounts of advance, decided to write off the same in its books before the year end 2014-15.

Accordingly on 27/03/2015, the balance advance of Rs.3,92,00,000/- lying unpaid in its books of account was written off by the appellant and resultantly the appellant incurred a loss of Rs.3,92,00,000/- in carrying out the operation of the business. The said action of the appellant shall be evident from the copy of the ledger accounts of the said party in the books of the appellant for F.Ys 2012-13, 2013-14 & 2014-15 **placed at pages 109-112 of the paper book.**

Thus the above sufficiently proves the **genuineness** and **commercial expediency** of the expenditure incurred by the appellant.

As far as the Id. CIT(A)'s **allegation** is concerned that no prudent reasonable man would advance such a substantial amount for procuring orders from other entities and it raises legitimate presumptions about the legitimacy of the payment made, it is submitted by the appellant that-

the advance of **Rs.4,15,00,000/-** paid by the appellant to Govinda was for business purposes only and were reasonable considering the volume of the business (i.e. worth Rs.50,00,00,000/-) that Govinda was supposed to source. The appellant further submits that as a company running its business, the appellant is the best judge of its affairs and knows the best way to run its business and incur expenses in the process accordingly. The Id. CIT(A) cannot step into the appellant's shoes or sit in his armchair and decide about the expenditure and the reasonableness, commercial expediency and justifiability of such expenditure. It all has to be judged from the point of view of the appellant.

Reliance in this regard is placed in the following judicial pronouncements:

The **Hon'ble Supreme Court of India** in the case of **S.A. Builders Ltd. v. CIT (Appeals)** reported in **[2007] 281 ITR 1** held the following:

"We agree with the view taken by the Delhi High Court in CIT v. Dalmia Cement Ltd. [2002] 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profit. The income-tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of borrowed funds to a sister concern from the point of view of commercial expediency and from the point of view whether the amount was advanced for earning profits."

The Hon'ble Supreme Court of India in the case of **Shiv Raj Gupta (supra)**.

Further, the **Hon'ble Delhi High Court (jurisdictional High Court)** in the case of **CIT vs Dalmia Cement (Bharat) Ltd** reported in [2002] 254 ITR 377 had held that once it was established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. Relevant extracts of the same are reproduced below:

“Under section 37(1) of the Income-tax Act, 1961, the jurisdiction of the Revenue is confined to deciding the reality of the business expenditure, viz., whether the amount claimed as a deduction was factually expended or laid out and whether it was wholly and exclusively for the purpose of the business. It must not, however, suffer from the vice of collusiveness or colourable device. The reasonableness of the expenditure could be gone into only for the purpose of determining whether, in fact, the amount was spent. Once it is established that there was a nexus between the expenditure and the purpose of the business, the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profits.”

Further with regard to the Id. CIT(A)'s allegation that no tax has been deducted on the amounts paid to the entity, which shows that the payment was not above-board, the appellant would like to reiterate that as per law, no tax is required to be deducted on payment of refundable advance. Reliance in this regard is once again placed on the following judicial pronouncements:

- The **Hon'ble ITAT, Hyderabad** in the case of **Shri A. Naga Srinivas (supra)**.
- The **Hon'ble ITAT, Bangalore** in the case of **Prestige Estates Projects (supra)**.

Thus in view of the above, the appellant's payment of advance to **Govinda** cannot be held as above-board on the alleged premise that no tax was deducted on the amounts advanced to Govinda, as done by the Id. CIT(A).

Also in view of the submissions made above, the appellant has sufficiently discharged the onus on it of establishing the commercial expediency of the transaction.

B. FOR LINTON DISTRIBUTORS PVT. LTD. (LINTON) - ADVANCE WRITTEN OFF: RS.1,17,50,000/-:

Herein firstly the appellant would like to submit that for confirming the disallowance of appellant's claim of write off, of advance given to Linton the Id. CIT(A) made various **allegations against the appellant**. Before going into the **specific allegations** of the Id. CIT(A) vis-à-vis the appellant's submission, it is pertinent to explain the background facts which gave rise to the advance given to **Linton** being written off:

BACKGROUND:

(i) The appellant company being involved in providing Security Solutions through manpower supply, had in pursuance of its routine business, entered into contract to secure the various 2,625 sites of **Quippo Telecom Infrastructure Limited** by providing Care Taker/Security Guards to take the position over the sites.

It was in this regard that the appellant company issued **Purchase Order (PO) dated 11/05/2010 to Linton** for supply of Uniforms and shoes for the said Care Takers/Security Guards @ 2 uniform plus 1 shoes pair for each care taker. ***A copy of the Purchase Order with the details of security guards are placed at pages 113-152 of the paper book.***

(ii) The Order was for 5250 pieces of Complete Uniform comprising of Shirt, Trouser, Belt and Cap at Rs.2000/- per set. Also 2625 number of shoes at the rate of 480 was ordered. Thus a total **Purchase Order (after discount) of Rs.1,17,50,000/-** was drawn up. A complete list of such caretakers including the Site/Tower Number, the Site/Tower Name and the Caretaker's name who manned the said site whose uniforms were to be made were also provided with the PO and the same can be seen ***at pages 114-152 of the paper book.***

(iii) The Purchase Order, laying down the Terms and Conditions of the Purchase/ Supply, laid out that against such order of Purchase, 100% advance would be given in as much the uniforms required immediate investment in the materials and also the uniforms being tailor made specific to each caretaker, the payment was all to be made in advance.

With regard to defective material it was clearly laid out that *“Any material which is found defective due to manufacturing defects/not as per specifications, will be notified to you within 15 days from the receipt at site, will be rejected and the same will be replaced and removed at own cost by M/s Linton Distributors Pvt. Ltd.”.*

With regard to Arbitration in case of disputes, it was laid out that *“if any dispute arises in reference of this Purchase Order, the matter to be referred to an arbitrator with mutual consent of both the parties.”*

(iv) In pursuance of the Purchase Order, the appellant duly paid within a month of the PO, an initial deposit of Rs.1,00,00,000/- as advance towards purchase of uniform and shoes for the caretakers manning the various tower sites. ***A copy of the complete ledger account of Linton as standing in the books of the appellant is enclosed at pages 153-157 of the paper book.***

(v) Work progressed as per the PO and there were continuous updates from Linton as to the progress of the Order vide letters dated 21/09/2010 and 05/12/2010 whereby the appellant company was informed about the infrastructural set up and of the purchase of the fabrics for the uniforms. ***(Copies enclosed at pages 158 and 159 of the P/B.)***

The appellant duly vide its letters dated 22/11/2010, 24/12/2010 and 01/06/2011 expressed concern over the status of the order and that they were using the buffer stock of the uniforms which needed immediate replacements and also its desire to inspect the fabrics. ***(Copies of the letters in the said connection are enclosed at pages 160-163 of the paper book).***

Linton vide its letter dated 06/06/2011, acknowledging the advance of Rs.1,05,00,000/- from the appellant duly informed the appellant that the inspection may be carried out. In response to the said letter, the appellant vide its letter dated 28/06/2011 fixed the date for inspection on 11/07/2011. ***Copy of the said letters dated 06/06/2011 and 28/06/2011 are enclosed at pages 164 and 165 of the paper book.***

However pursuant to such inspection by Mr. Saurabh Agarwal, it came to the notice of the appellant that the fabrics so procured by Linton were not to the specifications of the appellant and were

substandard and not fit to be made into the uniforms. Linton was immediately informed about the situation and they were asked by the appellant vide its letter dated 15/09/2011 to change the fabric or else the advance may be refunded. ***Copy of the said letter dated 15/09/2011 is enclosed at page 166 of the paper book.***

In reply to the above letter, Linton vide its letter dated 27/09/2011(***copy enclosed at page 167 of the paper book***), expressing displeasure to the rejection, however promised the appellant of changing the fabric and they assured the appellant of completing the Order as per specifications. Further advance for procurement of other materials as per the Order was requested and the same was also advanced by the appellant in good faith. The appellant company was concerned about the proper execution of the Order and the same was expressed to Linton vide letters dated 05/12/2011 and 15/12/2011. ***Copy of the said letters are enclosed at pages 168 and 169 of the paper book.***

(vi) However, suddenly on 13/06/2012, when an advance of Rs.1,11,50,000/- was all made to Linton, vide its letter dated 13/06/2012 Linton intimated the appellant that it had suffered a loss of Rs.25,00,000/- on the disposal of the rejected fabric and it was thus requested by them to the appellant to increase the Contract value by Rs.25,00,000/- (***Copy enclosed at page 170 of the paper book***).

Vehemently opposing to the abovementioned, the appellant company immediately vide its letter dated 25/06/2012 informed Linton that they were in no way liable for any loss that Linton may suffer due to its own negligence. It was also informed to Linton that based on the assurances extended by them to the appellant about the execution of the PO, the termination of the Order was not sought.(***Copy of the letter dated 25/06/2012 is enclosed at page 171 of the paper book***).

Also, as per the request for further advance by Linton, the appellant company again in full and good faith made all advance payments totalling to Rs.1,11,50,000/- which was duly acknowledged by Linton vide its letter dated 04/04/2013. (***copy of letter dated 04/04/2013 enclosed at page 172 of the P/B***). Thereafter advance payments totalling to Rs.1,17,50,000/- was paid by the year end of 2013.

It is here relevant to mention that the appellant was using its buffer stock of uniforms which were wearing out due to wear and tear. The appellant was thus in need for the Order to go through and thus the appellant, based on the continuous assurances of Linton, in complete good faith and hope that the Order would be executed, even if with delay, kept making the said balance payments.

(vii) Entire advances having been made, the appellant company in the month of January 2014 was made aware that Linton had not even initiated the purchase of the new fabric after being informed in September 2011 of the change of the fabric.

It was seen by the appellant that 4 years had passed and there was no work yet done on the said order. Thus, finally realizing the futility of the Order, the appellant company immediately vide its letter dated 15/01/2014 informed Linton of the termination of the Order. The advance lying with Linton was directed to be immediately refunded.(***Copy of letter dated 15/01/2014 enclosed at pages 173 of the paper book***).

Linton giving evasive replies as to market conditions, with no intention to refund the advances, infact made a claim of further Rs.25,00,000/- supposedly incurred by it on the disposal of the rejected fabric vide its letters dated 18/02/2014 and 21/05/2014.***Copies of the letters enclosed at pages 174 and 176 of the paper book.***

(viii) Ultimately, the appellant company, realizing the futility of the entire proceedings was left with no other option than to terminate the said Contract which was also brought to the notice of Linton vide the letter dated 15/04/2014 (*copy enclosed at page 175 of the paper book*).

Ultimately in view of the delay in the entire Order, and in order to avoid long drawn litigation process, the appellant company was consequently forced to write off, as on 27/03/2015 before closing the books for the said year, the entire advance lying unpaid in its books of account and resultantly incurred in the said year, a loss of Rs.1,17,50,000/- in carrying out the operation of the business. *The Ledger account of Linton is enclosed at pages 153-157 of the paper book.*

It is to be noted here that the appellant all along, having paid the huge sums of Rs.1,11,50,000/- was hopeful that the Order would be completed. Only during the year under assessment being the F.Y.2014-15 did the appellant realize that inspite of repeated correspondences and pressures, the money was irrecoverable and only then the write off was done.

(ix) Accordingly, the said loss incidental to the operation of the business was claimed as deduction for computing the profit and loss of the business/profession **u/s 28 of the Act** for the assessment year under appeal.

(x) Before concluding on the said topic, bringing out the action of the Id. A.O., it is stated that the Id. A.O. in his assessment Order (referring to said transaction) has stated that in the said account there was opening debit balance of Rs.1,11,50,000/- as on 01.04.2012 not realizing that the Order was made on 11/05/2010 and the alleged opening balance was the payment made from the period 28/06/2010 to 01/04/2012 against the said Order placed by the Appellant on Linton. The balance sum of Rs.6,00,000/- was paid during the period 01/04/2012 to 09/12/2013. The detailed and complete account of Linton as standing in the books of the appellant can be referred to.

(xi) The abovementioned detailed facts were also submitted by the appellant before the Id. CIT(A).

INFORMATION SOUGHT U/S 133(6) OF THE ACT

(xii) As submitted above, the submission and paper book filed by the appellant before the Id. CIT(A) was forwarded by him to the Id. DCIT/A.O.

The appellant thereafter received a notice from the Id. DCIT dated **03.10.2018** seeking information and explanation from the appellant **u/s 133(6) of the Act**, in connection with the evidences submitted by it before the Id. CIT(A), during the appellate proceedings. Response to the same was submitted by the appellant vide **Reply** dated **16.10.2018**, copy enclosed at pages 552 to 577 of the paper book.

Information as sought by the Id. DCIT concerning Linton vide the notice issued **u/s 133(6) of the Act** and the appellant's response to the same are as mentioned in a **table** hereunder:

Issue raised by Id. DCIT in 133(6) notice	Appellant's Response
With regard to the exchange of letters between the appellant and	The appellant submitted that it has its Branch office in Kolkata at 216, AJC Bose Road, 2 nd Floor, Flat No. 2C, Kolkata- 17. The appellant, having secured the Contract

Linton, the Id. DCIT asked for an explanation from the appellant as to how the letters between the appellant and Linton were exchanged.	with Metro Railway Department, Kolkata (KMR) had set up its Branch office in Kolkata since the year 2011 and for the said purpose enclosed the 'Certificate of Enlistment' of the Kolkata Municipal Corporation in the name of the appellant at the Kolkata office (which is also now enclosed at pages 555 to 558 of the paper book). Thus having its Branch office in Kolkata, all the communication received and sent by it to Linton were all hand delivered. The Receipt Acknowledgement of the letters of the appellant, as stamped by Linton were all enclosed by the appellant along with the reply to the Id. DCIT, for her perusal which are now also enclosed at pages 568 to 577 of the paper book.
The Id. DCIT sought an explanation as to the reason why the evidence submitted before the Id. CIT(A) could not be furnished during the assessment proceedings.	The appellant submitted that having its branch office in Kolkata, most of the documents and correspondences relating to the debtors from Kolkata were all kept in the Kolkata office. During the course of the assessment proceedings before the A.O., however the person of the appellant's office in Delhi dealing with the A.O. was not aware of the correspondences at the Kolkata office, because after 2016, due to disputes with the KMR contract, the Kolkata office was lying closed and defunct. It was only during the Appellate proceedings, when the Director of the Company came to know of the matter, that the documents were all traced and recovered from the Kolkata office. Hence for this reason the evidences submitted before the Id. CIT(A) could not be furnished during the assessment proceedings.

REMAND REPORT AND ISSUES RAISED:

(xiii) Pursuant to the above, the Id. DCIT provided specific comments and raised queries as well, in a **Remand Report** dated 15.11.2018 forwarded to the Id. CIT(A), accompanied by a covering letter of the Additional range Head. Copy of the **Remand Report** is enclosed at pages 578 to 582 of the paper book.

(xiv) A copy of the Id. DCIT's Remand Report was thereafter forwarded to the appellant by the Id. CIT(A), in response to which the appellant submitted its Reply dated **21.12.2018** (copy enclosed at pages 584 to 593 of the paper book) before the Id. CIT(A), as detailed out in a table hereunder:

Issue raised/stated by DCIT in Remand Report	Appellant's Response
The notice issued u/s 133(6) of the Act by the DCIT to Linton should have been replied to, but no reply from Linton had been received by the	The appellant submitted that with Linton, the last transaction whereby a payment of Rs.30,000/- was made by the appellant was on 09/12/2013. In this connection Ledger Account was enclosed at pages 153-157 of paper book. After this, the last communication with Linton was on 21/05/2014, post which the appellant before closing

DCIT/AO's office.	the books for the said year, decided in business prudence to write off the unrealizable balance from Linton. Further it was submitted by the appellant in this regard that Linton is now a defunct company and even all efforts by the appellant to contact it has failed. Also notice u/s 133(6) of the Act had been issued by the Id. DCIT at the end of the year 2018, after a gap of more than four years, which had gone non replied to. In such a scenario and that too with zero communication of the appellant with Linton, the appellant could not be held responsible for any reply or absence of reply from the said party. The appellant also submitted that it was not understood as to how the 'no reply' from Linton determined the genuineness of transactions with the appellant Company which were dated four years back.
With regard to the exchange of letters between Linton and the appellant, the appellant's contentions regarding its Branch office in Kolkata at is also not verifiable as from the perusal of appellant's records and its ITR/Form 3CD/Ledger accounts submitted during assessment proceedings it is revealed that there is no branch office at Kolkata. It was also stated that the letter head of the appellant showed no branch office with Kolkata address and that the letters from these two parties were addressed to the appellant at its Delhi address. Not a single letter was found addressed to the appellant's Kolkata branch office. However during appellate proceedings before the Id. CIT(A), the documents submitted by the appellant showed that it had obtained registration certificate at	The Id. DCIT had clearly admitted that the documents submitted by the appellant during the appeal proceedings did show that it had obtained registration certificate at 216A A.J.C. Bose Road, 2nd Floor, Kolkata – 700017. Further the "<i>Certificate of Enlistment</i>" of the Kolkata Municipal Corporation in the name of the appellant showed the said address in Kolkata which clearly proved beyond any doubt that indeed the appellant has a Branch (Work) office in Kolkata. Thereafter, the statement of the Id. DCIT that the said fact still remained unverified was indeed a very casual statement which could hold any weightage at all. Further it was submitted by the appellant that nowhere is it a requirement of law that the Branch office of any Company has to be stated in the Returns, in the accounts, in the letter head or in the letters of the Company. The appellant also submitted that the Id. DCIT also pointed out that the letters from Linton were all addressed to the appellant at its Delhi address without appreciating that the Kolkata Branch office was in the nature of a Work station, set up for easy coordination in the KMR project. The contracts between the appellant and Linton had nothing to do with the Kolkata Work office as it's dealings were with the appellant company in Delhi, however since Linton was based out of Kolkata, simply for convenience sake, the letters were received in the Kolkata office by hand delivery. The appellant in this regard submitted that the Receipt Acknowledgement of the letters of the appellant company, as stamped by Linton, were all enclosed and

216A A.J.C. Bose Road, 2nd Floor, Kolkata – 700017 but it was not mentioned in any correspondence with the parties as well as in the ROI.	available for the scrutiny of the Id. DCIT and nowhere had she raised any objections or doubts regarding the same.
With regard to why the evidence submitted before the Id. CIT(A) could not be furnished during the assessment proceedings, DCIT stated that if the contention of the appellant regarding Branch office is not verifiable, then the question of correspondence with Kolkata office does not arise and thus the justification given by the appellant lacks conviction. She also stated that it appears strange that the appellant company's Delhi based officials dealing with A.O. were not aware of the correspondence at Kolkata office especially when major financial disputes with multiple parties were supposedly going on for years.	The person of the appellant's office in Delhi dealing with the A.O. was not aware of the correspondences at the Kolkata office because after 2016, due to disputes with the KMR contract, the Kolkata office was lying closed and defunct. Post 2016, thus there was no correspondences received or issued from the Kolkata office. The office being defunct and the KMR work being totally stalled, there was absolutely no activity between the Delhi office and the Kolkata Branch office. During the assessment proceedings in the year 2017, thus the person looking after the taxation matter of the Delhi main office was not aware of the correspondences which were exchanged by the parties in the Kolkata office. Only when during the appellate proceedings, the Director of the Company came to know of the matter, that the documents were all traced and recovered from the Kolkata office, as he informed the Delhi office of the correspondences between the appellant company and the parties in Kolkata office. Infact it was that since major financial disputes had taken place, that the Director remembered that certain correspondences could be found at the Kolkata office and thus after intensive searching that the file was retrieved from the Kolkata office.
That Linton was given an advance of Rs.1,00,00,000 on 28.06.2010. On 21.09.2010, Linton while acknowledging receipt of advance informed the appellant that it had duly set up the required infrastructure for the preparation and delivery of order. Thus it was to be noted that such a huge order with 100% advance payment was placed with a party which did not even possess	The Id. DCIT travelled beyond her scope of investigation wherein she was questioning the terms and conditions of the Contract and the viability of the same especially when the basic facts of the case including the ledger account of the party was all before her for examination. The appellant submitted that the contract being evidenced by a proper Purchase Order laying down in black and white the terms of the same, there was no reason to look beyond what was laid out and followed. The appellant submitted that every contract with every individual party is party specific and is dependent on the then existing circumstances and is thus termed accordingly, like in the case of the appellant, the PO clearly laid out that the same was against an advance of 100%. The appellant further submitted before the Id. DCIT

the required infrastructure.	bringing her attention to the letter dated 21/09/2010 of Linton written to the appellant (placed at page 158 of the paper book submitted before Id. CIT(A)), that from the said letter it can be seen that the infrastructure referred to therein is the particular Order specific against which Linton had to incur huge expenditure which was funded out of the advance given by the appellant company.
That the entire correspondence between the appellant and Linton revolved around reminders by the appellant for delivery and the party assuring progress on the basis of money it has spent. No delivery schedule was given in the purchase order but payment terms were 100% advance. All the letters were signed by the same person from respective sides in their capacity as Authorised Representative without disclosing their name and designation. That the appellant in its letter dated 15/09/2011 complained of substandard material and asked for replacement / refund of advance given to the tune of Rs.1,10,00,000/- but on the other hand, the appellant made further payments of Rs.50,000 each on 13/01/2012, 22/02/2012 and 30/03/2012. The appellant also continued to make payments which aggregated to Rs.6,00,000 between 17/08/2012 to 09/12/2013 without receiving supply of even a single rupee. In this regard the Id. DCIT stated that it was pertinent to mention that the appellant fulfilled	The Id. DCIT with an absolute prejudiced and predetermined mindset was picking up individual terms of the Contract. The appellant also submitted that the Order having been placed and evidenced by the Purchase Order, the payments having been made by the appellant vide the regular banking channels, all evidenced by supporting communications, the commercial intelligence of the appellant was being unnecessarily questioned by the Id. DCIT who travelled beyond her jurisdiction as pointed out earlier. The appellant also submitted that the Id. DCIT had time and again pointed out that no delivery was made by Linton which infact supports the facts of the appellant's case that indeed the party was failing its commitments and thus the fact of the appellant that the amount advanced was in all surety irrecoverable stands confirmed. The appellant further submitted that the Id. DCIT pointed out to the fact that inspite of non delivery and empty promises, the appellant kept making the payments to Linton, ignoring the fact that the same were all made in good faith and with the honest belief that Linton would fulfil its obligations. The appellant submitted before the Id. CIT(A) that each and every complaint and promise was all supported by ample exchanges between the parties and were all put before him for perusal. The payments were all made after repeated requests and promises by the party and the entire detailed exchanges had all been explained before the Id. CIT(A) and the Id. DCIT relying upon the same was misinterpreting the same in her vain effort to prove that the transactions were all not genuine.

its obligation of giving 100% advance by making full payment of Rs.1,17,50,000/- even when there were no sign of delivery by the party.	
That Linton Distributors Pvt. Ltd. shared the same address as that of Govinda Infraproperty Pvt. Ltd., with similar kind of disputes.	That the Id. DCIT without any basis, for no reason has pointed out that Govinda and Linton share the same address which is a matter of record all placed well before the Id. DCIT herself. The appellant also submitted that how the said fact affected the recoverability of the due sums from the said party or even the genuineness of the transactions with it was not understandable.

CIT(A)'s ALLEGATIONS and APPELLANT's RESPONSE

(xv) As has already been submitted above, pursuant to the appellant's submissions made before the Id. CIT(A) and the Reply filed before the Id. CIT(A) in response to the Id. DCIT's comments concerning **Linton** in the impugned Remand Report, the Id. CIT(A) without paying heed to any of such submissions, explanations and evidences filed before him at the appellate stage, finally passed the **Appellate Order** on **28.08.2020**, making the following **allegations against the appellant**, thus confirming the Id. A.O.'s disallowance of the claim of Write off, of advances given to **Linton**.

The appellant's Reply to each of the allegations are also submitted hereunder:

1. CIT(A)'s Allegation:

That both Linton and Govinda shared the same address and the payments to both proceeded on similar trajectory.

Appellant's Reply:

In this regard the appellant would like to submit that the Id. CIT(A), like the Id. A.O. in the Remand Report, has for no reason alleged that Govinda and Linton share the same address which is a matter of record all placed well, both before the Id. CIT(A) and the Id. AO. Also if two parties, with whom the appellant has had transactions, share a common address, how the said fact affects the recoverability of the due sums from each of them or even the genuineness of the transactions with them is not understood.

Further the payments to Govinda and Linton do not proceed on the same trajectory as alleged by the Id. CIT(A). This is because Govinda was paid an advance money of Rs.4,15,00,000/- as a Service Provider for sourcing business relating to providing of security services worth Rs.50,00,00,000/-, i.e. 8.3% of the worth of business to be sourced was paid as advance to Govinda. As for Linton, 100% advance was given by the appellant and that too for making/procuring of uniform and shoes for security guards/care takers. Thus it is amply clear that the payments to both Govinda and Linton did not proceed on similar trajectory and both the parties having the same address cannot lead to drawing of an adverse conclusion against the appellant.

In view of the above, the Id. CIT(A)'s alleged premise for confirming the Id. A.O.'s disallowance of the claim of Write off, of advances given to Linton has no basis to stand.

2. CIT(A)'s Allegation:

That 100% advance was paid on 10.05.2010 amounting to Rs.1,17,50,000/- and as per Id. A.O.'s Remand Report, the payment was made to an entity which did not possess the necessary infrastructure to execute the order and did not have proven capacity.

Appellant's Reply:

In this regard it is submitted by the appellant that the Order having been placed with Linton and evidenced by the Purchase Order, the payments having been made by the appellant vide the regular banking channels, all evidenced by supporting communications, the commercial intelligence of the appellant is being unnecessarily questioned by the Id. CIT(A) by alleging that payment was made to an entity which did not possess the necessary infrastructure to execute the order and did not have proven capacity.

Further infrastructure for the purpose of supplying uniforms and shoes to the appellant involved hiring/appointing tailors and karigars specifically skilled to stitch and prepare the uniforms to the specific measurement of every individual security guard/care taker of the appellant to be deployed at the various sites, in a certain set pattern (as required by the appellant), with the appellant's monogram and name of the security guard embossed on it.

Thus upon receipt of the order for supply of uniforms and shoes for security guards/care takers from the appellant, Linton had to set up infrastructure which was particular Order specific (specifications as mentioned above) and for which Linton had to incur huge expenditure which was funded out of the advance given by the appellant. The same shall be clear from the letter dated 21.09.2010 of Linton to the appellant (copy placed at page 158 of the paper book). This however by no stretch of imagination implies that Linton had no required infrastructure or proven capacity to execute the order. Infact Linton had the potential and connections to immediately hire and appoint skilled tailors and karigars for preparing the uniforms as per the specifications of the appellant, upon receipt of the order and that further corroborates the capacity of Linton to meet the order.

In view of the above the Id. CIT(A)'s allegation that the payment was made to an entity which did not possess the necessary infrastructure to execute the order and did not have proven capacity is baseless and cannot hold ground.

3. CIT(A)'s Allegation:

The Id. CIT(A) alleged that Linton is an entity with which the appellant had only 'one time' commercial transaction and it is not at all probable that a prudent businessman would make a payment of Rs.1,17,50,000/- as a one off transaction to one entity, which did not have any prior experience in manufacturing products which the appellant required. The entire transaction of advancing of an amount to Linton therefore cannot be taken on face value.

That the Remand proceedings also clearly brought out the anomalies which needs to be accepted against the appellant.

Appellant's Reply:

In this regard the appellant would like to reiterate that that the appellant issued **Purchase Order dated 11.05.2010 (PO) to Linton** for supply of Uniforms and shoes for Care Takers/Security Guards @ 2 uniform plus 1 shoes pair for each care taker. **(Copy of the Purchase Order with the details of security guards are placed at pages 113-152 of the paper book).** The Order was for 5250 pieces of Complete Uniform comprising of Shirt, Trouser, Belt and Cap at Rs.2,000/- per set. Also 2625 pair of shoes at the rate of Rs.480/- per pair was ordered. Thus a total Purchase Order (after discount) of Rs.1,17,50,000/- was drawn up. A complete list of such caretakers including the Site/Tower Number, the Site/Tower Name and the Caretaker's name who manned the said site whose uniforms were to be made were also provided with the Purchase Order (PO) and the same can be seen **at pages 114-152 of the paper book.**

The Purchase Order, laying down the Terms and Conditions of the Purchase/Supply, laid out that against such order of Purchase, 100% advance would be given in as much the uniforms required immediate investment in the materials and also the uniforms being tailor made specific to each caretaker, the payment was all to be made in advance.

Infact it is an industry norm that for stitching of uniforms/shoes etc which are specific to the measurement of every individual and if not accepted/used goes bad/useless leading to a loss as the same set cannot be used for another individual (being specific to the measurement of the concerned individual), hence 100% advance is paid for such orders. Thus as a one off transaction, **100% advance** amounting to Rs.1,17,50,000/- was paid to **Linton** by the appellant in a 'one time' commercial transaction.

In view of the above, the Id. CIT(A)'s allegation that it is not at all probable that a prudent businessman would make a payment of Rs.1,17,50,000/- as a one off transaction to one entity, which did not have any prior experience in manufacturing products which the appellant required is completely baseless and has no legs to stand.

Moreover the Id. CIT(A) cannot step into the appellant's shoes or sit in his armchair and decide about the expenditure and the reasonableness, commercial expediency and justifiability of such expenditure. It all has to be judged from the point of view of the appellant.

Reliance in this regard is placed in the following judicial pronouncements:

- The **Hon'ble Supreme Court of India** in the case of **S.A. Builders (supra).**
- The **Hon'ble Supreme Court of India** in the case of **Shiv Raj Gupta (supra).**
- The **Hon'ble Delhi High Court (jurisdictional High Court)** in the case of **Dalmia Cement (Bharat) Ltd. (supra).**

In addition to the above it is further submitted by the appellant that the Id. CIT(A) on his own whims and fancies made a bald allegation that Linton did not have any prior experience in manufacturing products which the appellant required without however considering the material facts in this regard and what constituted infrastructure for the purpose of the appellant's orders and further without bringing any material/information across which would substantiate his allegations. Hence the same cannot be relied upon to draw any adverse inference against the appellant.

The Id. CIT(A) further alleged that the Remand proceedings also clearly brought out anomalies which needs to be accepted against the appellant. In this regard it is firstly submitted that all the anomalies brought out in the Remand Report has been duly responded to by the appellant vide reply dated **21.12.2018** (copy enclosed at pages 584 to 593 of the paper book) and have been further

reproduced in this submission above at **pages 49 to 52**. Reliance on the same is once again placed in response to the Id. CIT (A)'s allegation that Remand proceedings also clearly brought out anomalies which needs to be accepted against the appellant.

4. CIT(A)'s Allegation:

That as brought out in the Theory of Human Probability as laid down in CIT vs. Durga Prasad (1971) 82 ITR 540 (SC), [Sumati Dayal vs. CIT (1995) 214 CTR 124; 80 taxman 89 (SC)], are equally applicable to the factum of transaction.

Appellant's Reply:

In this regard the appellant would like to submit that the Id.CIT(A) has referred to decisions of the **Hon'ble Supreme Court of India** in the cases of **CIT vs. Durga Prasad Moore** reported in [1971] 82 ITR 540(SC) and **Sumati Dayal** reported in [1995] 214 ITR 801 (SC) and stated that these decisions are equally applicable to the factum of transaction of the appellant, without however specifying and/or explaining as to how these decisions are applicable to the facts of appellant's case or how the appellant's explanations fails the test of human probabilities as per these decisions.

Further both these decision of **Durga Prasad Moore** (*supra*) and **Sumati Dayal** (*supra*) are distinguishable on facts from the appellant's case.

In the case of **Sumati Dayal** (*supra*), the assessee had explained that the credited amounts represent her winnings in races. On facts, it was found that the explanation was unsatisfactory because the assessee has no expertise in races; to accept that a race goer had won jackpot events so many times in a short period of two years, was highly improbable; in the books of account of the assessee, the amount representing travelling expenses of assessee to Hyderabad and Bangalore had not been debited at all; likewise, losses suffered by the assessee in the races had not been shown at all in the books of account and lastly, from the year 1972 onwards, she had stopped going to races as from that year onwards, winnings in races were brought within the tax purview. These reasons were found to be cogent and convincing reasons to reject the explanation offered by the assessee.

In light of the above, it is submitted that in the appellant's case no such surrounding circumstances have been pointed out by the Id. CIT(A) as doubtful or suspicious on which the test of human probability (as laid down in the case of **Sumati Dayal** (*supra*) where the facts peculiar to that case led the **Hon'ble Apex Court** to apply the theory of preponderance of probabilities) can be applied to.

All the allegations/suspicion of the Id. CIT(A) regarding - Linton having no infrastructure or experience in supplying to the appellant the uniforms and shoes, 100% advance being paid to Linton without delivery of any items, Govinda and Linton both sharing the same address or payments to them being made in the same trajectory, have all been duly explained by the appellant before the Id. CIT(A) and also before Your Honours' now.

Hence there is no such surrounding circumstances (none of such circumstance even being pointed out by the Id. CIT(A) while applying the Supreme Court decisions) on which the test of human probability (as laid down in the case of **Sumati Dayal** (*supra*) based on the facts of that case) can be applied to.

Similarly in the case of **Durga Prasad Moore** (*supra*) the Hon'ble Supreme Court was considering the explanation offered by the assessee that the property, from which income was generated was the

trust property; the sale deed in favour of the assessee showed that he purchased the property as a trustee and there was a subsequent deed creating a trust which recorded a corpus of Rs. 2 lakhs left in the hands of the assessee. In this case it was held that if all that an assessee who wanted to evade tax was to have some recitals made in a document either executed by him or executed in his favour then the door would be left wide-open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. In that context it was held that it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real.

In light of the above, it is submitted that in the appellant's case the Id. CIT(A) has nowhere alleged that the appellant has executed any document itself or that it has got any document executed in its favour so as to evade tax, as in the case of **Durga Prasad Moore (supra)**. Also no doubtful/suspicious instances have been pointed out by the Ld. CIT(A) or no such surrounding circumstances have been pointed out by the Id. CIT(A) which showed that the apparent was not the real on which the test of human probability (as laid down in the case of **Durga Prasad Moore (supra)**) can be applied to.

All the allegations/suspicion of the Ld. CIT(A) regarding - Linton having no infrastructure or experience in supplying to the appellant the uniforms and shoes, 100% advance being paid to Linton without delivery of any items, Govinda and Linton both sharing the same address or payments to them being made in the same trajectory, have all been duly explained by the appellant before the Ld. CIT(A) and also before Your Honours' now.

Hence there is no such surrounding circumstances (none of such circumstance even being pointed out by the Ld. CIT(A) while applying the Supreme Court decisions) on which the test of human probability (as laid down in the case of **Durga Prasad Moore (supra)**) can be applied to.

Further the **Hon'ble jurisdictional ITAT, Delhi** in the case of **Brij Bhushan Singhal vs. ACIT, Central Circle – 3, ITA Nos. 1415 to 1417, 1483, 1484 and 1479 to 1481/Del/2018** held the following:

“that the preponderance of probabilities would come into play only when the basic test of direct and factual evidences fails.”

It was further held by the **Hon'ble ITAT, Delhi** in the decision of **Brij Bhushan (supra)** that when the complete evidences have been placed by the assessee before the revenue authorities and if they are not found to be false but only allegation has been made that transactions are sham, then the theory of preponderance of probabilities invoked by the learned assessing officer is merely a conjecture and surmises.

The **Hon'ble ITAT** also held that only on the theory of preponderance of probabilities addition cannot be sustained. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn based on certain admitted facts and materials and not based on presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee. The reliance placed by the learned AO on the decision of the honourable Supreme Court is clearly distinguishable.

In view of the interpretation of the theory of 'preponderance of probability' as laid down by the **Hon'ble ITAT, Delhi** in the case of **Brij Bhushan (supra)** it is thus easily discernible that in the

appellant's case the theory of 'preponderance of probability' cannot be applied as the basic test of direct and factual evidences does not fail in the appellant's case. Further the complete evidences placed by the appellant before the Id. CIT(A) have not been found to be false but only allegation has been made that transactions are sham, hence the theory of preponderance of probabilities cannot be again invoked by the Id. CIT(A).

Moreover it is laid down by the **Hon'ble ITAT, Delhi** in the case of **Brij Bhushan (supra)** that the theory of "preponderance of probability" is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side and the conclusions have to be drawn based on certain admitted facts and materials and not based on presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material, then nothing can be implicated against the assessee. In light of the same as in the appellant's case nothing has been proved against it with aid of any direct material, the theory of "preponderance of probability" cannot be applied in the appellant's case.

In view of the above the Id. CIT(A)'s alleged premise for upholding the Id. A.O.'s disallowance of the claim of Write off, of advances given to **Linton** has no basis to stand.

C. M/S. OM SAI ASSOTECH PVT. LTD. (OM SAI) –ADVANCE WRITTEN OFF RS.1,56,77,731/-:

Herein firstly the appellant would like to submit that for confirming the disallowance of appellant's claim of write off, of advance given to OM Sai, the Id. CIT(A) made various **allegations against the appellant**. Before going into the specific allegations of the Id. CIT(A) vis-à-vis the appellant's submission, it is pertinent to explain the background facts which gave rise to the advance given to **OM Sai** being written off:

BACKGROUND:

(i) As has been submitted above that the appellant company is engaged in the business of undertaking contract works on project basis. The appellant was awarded a Works Contract vide letter of Award (LOA) dated 14/08/2012 executed by M/s Environ Energy Corpn. India P. Ltd. (hereinafter referred to as 'Environ' for short) for comprehensive operations and maintenance of sites in Rest of West Bengal (ROWB) circle maintained by VIOM Networks (Principal). ***Copy of the said LOA is enclosed at pages 177-180 of the paper book.***

(ii) Now OM Sai was a company which was engaged in the business of undertaking civil contract and maintenance works.

(iii) In connection to the award by Environ, the appellant company in order to sub-contract the work, entered into a Letter of Award dated 20/08/2012 with OM Sai in terms of which it sub-contracted the work for comprehensive operations and maintenance of Passive Infrastructure of sites in ROWB Circle maintained by VIOM Networks (Principal). ***Copy of the said LOA is enclosed at pages 181-192 of the paper book.***

In terms of the LOA, OM Sai was required to undertake the construction work in different stages till 31/03/2014 on the basis of which the payments were required to be made to OM Sai.

The LOA clearly defined the scope of the services required to be undertaken by OM Sai and also provided for the payment terms required to be made by the appellant to OM Sai. As per the LOA, the 1st year rate was of Rs.12,000/- per site per month and the 2nd year rate was Rs.11,500/- per site per

month. The payments required to be made by the appellant to OM Sai were subject to the deductions on account of uptime, fuel pilferage and non performance. OM Sai was solely responsible for any deductions made by Environ Energy.

(iv) During the process of the execution of the Contract, however, the appellant company and Environ Energy, both made lots of payments to the sub-contractors and vendors of OM Sai and had also made payments towards statutory dues for OM Sai, a few of which are listed as below:

- One of the vendors of OM Sai, M/s Smart Project, addressed a letter dated 31/03/2013 to Environ regarding release of payment of Rs.8.58lakhs + TDS towards fuelling services for the cell sites in West Bengal stating that they have been engaged by the appellant through OM Sai. Pursuant to the said, Environ Energy accordingly made the said payment to M/s Smart project and deducted the said amount from the amount payable to the appellant.
- Environ Energy was receiving mails and reminders from sub-contractors M/s Teletech and Vodafone being the vendors supplying their services to OM Sai, asking Environ Energy to clear the payments towards services provided to OM Sai.

Thus Environ was facing constant pressures from vendors and subcontractors who had provided services to OM Sai.

- OM Sai was constantly executing settlement agreements with its sub-contractors, Teletech, Ringo Services, etc and requesting the appellant company to make the payment on its behalf, which would be adjusted in the payments to be made by the appellant to OM Sai against the LOA.
- The appellant and also Environ Energy were making payments with regard to salaries and allowances of the workers and technicians on the site on behalf of OM Sai upon the same assurance that the same may be deducted from the payments due to them.

There are several mails exchanged between the parties and OM Sai had also issued Debit Notes towards reimbursement of salary and bonus paid by the appellant on behalf of OM Sai.

- With regard to Statutory Liabilities also OM Sai had failed to discharge its liabilities under the Employees Provident Fund and thus the appellant was requested to make the payment of Rs.23,90,031/- on its behalf which was guaranteed by the Director of OM Sai, Mr. Neeraj Kumar vide undertaking dated 10/06/2013. ***Copy of the said Undertaking is enclosed at pages 193-194 of the paper book.***
- Another amount of Rs.8,24,528/- was similarly paid against guarantee of director on account of payments on Employee State Insurance Corporation. ***Copy of the said Undertaking is enclosed at pages 195-196 of the paper book.***

(v) OM Sai raised its invoices for the period from August 2012 to April and the appellant in settlement out of the said amount, based on invoices, made total payments amounting to Rs.468.59 lakhs.

(vi) However after making the entire payments in terms of the demands raised by OM Sai, it was learnt by the appellant that due to certain defaults/ shortcomings of OM Sai, Environ Energy had made certain deductions which the appellant, after making repeated requests and having series of

discussions with the top level management of Environ Energy, managed to get the said deductions / penalties reduced.

(vii) Also it was learnt that certain excess payments were made by the appellant on behalf of OM Sai and thus a total amount of Rs.1065.37 lakhs were required to be deducted from the total payments required to be made to OM Sai. The said amount also included the amount paid by VIOM Networks towards the salary of Orion Security guards on the different sites on behalf of OM Sai.

To the above, OM Sai vide its email dated 17.07.2013 accepted the payments required to be made to Orion Securities, which was by mistake made to OM Sai. ***Copy of the same is enclosed at pages 197- 199 of the paperbook.***

(viii) The appellant company vide repeated mails duly informed OM Sai about the said proposed deductions and also of its liability towards the sub-contractors which was discharged by it. Emails were sent requesting OM Sai to come forward and hold a meeting to settle the accounts between the parties. ***Copy of the emails are enclosed at pages 200-210 of the paper book.***

(ix) However, OM Sai failed to hold any discussions for settlement of accounts and in fact made false allegations of acting unreasonably on the appellant company.

(x) Eventually, since OM Sai failed and neglected to settle the account and to refund the excess amount towards deductions proposed by Environ Energy, the appellant was constrained to address a final Demand Notice dated 01.04.2014 to OM Sai, calling upon it to make a payment of Rs.1,56,64,000/- towards the excess amount towards deductions proposed by Environ Energy. ***Copy of the said Demand Notice is enclosed at pages 211-213 of the paper book.***

(xi) However OM Sai, instead of making the payments towards the legitimate demands raised by the appellant, sent a reply dated 08.04.2014(***copy enclosed at pages 214-215 of the paper book***)making false and baseless averments about being entitled to claim an amount of Rs.9,30,10,552/- from the appellant.

(xii) Thus the appellant in the light of the above facts, filed on **28/08/2014**, before the **High Court of Delhi**, a **Suit for recovery** of an amount of Rs.1,56,64,000/-along with interest thereon @ 18% per annum from the date of the filing of the suit till realization of the said amount. ***Copy of the said Suit filed is enclosed at pages 217 -239 of the paper book.***

Also in the said connection, a Board Resolution was passed by the appellant company whereby Mr. Rajesh Verma, Assistant manager- Billing was appointed to represent the company before the Court in all legal matters against OM Sai. ***Copy of the said Board Resolution is enclosed at page 216 of the paper book.***

(xiii) Pursuant to the above, OM Sai with no desire to settle the accounts in fact filed a **counter claim** against the appellant before the **Hon'ble Delhi High Court** for recovery of Rs.9.30 crores from the appellant. ***Copy of the Counter Claim filed is enclosed at pages 240-263 of the paper book.***

(xiv) Thus pursuant to all of the above sequence of events, the appellant company finally considering and realizing that the matter was likely to go through protracted litigation involving huge costs and harassment, took the decision to write off the amount in its books. The said write off was

accordingly done on 27/03/2015. *Copy of the ledger account of OM Sai for the entire period 01/09/2012 to 31/03/2015 is enclosed at pages 264-272 of the paper book.*

(xv) Pursuant to such write off, the said loss incidental to the operation of the business was claimed as deduction for computing the profit and loss of the business/ profession **u/s28 of the Act** for the assessment year under appeal.

(xvi) The abovementioned detailed facts were also submitted by the appellant before the Id. CIT(A).

REMAND REPORT AND ISSUES RAISED:

(xvii) Pursuant to the above, the Id. DCIT provided specific comments and raised queries as well, in a Remand Report dated 15.11.2018 to the Id. CIT(A), accompanied by a covering letter of the Additional Range Head. Copy of the **Remand Report** is enclosed at pages 578 to 582 of the paper book.

(xviii) A copy of the Id. DCIT's Remand Report was thereafter forwarded to the appellant by the Id. CIT(A), in response to which the appellant submitted its Reply dated **21.12.2018** (copy enclosed at pages 584 to 593 of the paper book) before the Id. CIT(A), as detailed out in a table hereunder:

Issue raised/stated by DCIT in Remand Report	Appellant's Response
That the appellant had submitted documents related to suit filed in the High Court of Delhi vide petition dated 28/08/2014 for recovery of the excess payments made. However, the appellant had written off the amount due in the same F.Y. 2014-15 without waiting for even the initiation of legal proceedings.	It can be seen that the Id. DCIT had accepted that the contract with OM Sai was genuine and had however raised doubts on the decision of the appellant company to write off the said amount without waiting for initiation of legal proceedings on the Suit filed on 28/08/2014 before the Hon'ble Delhi High Court. The appellant submitted before the Id. CIT(A) in connection to the above that the Id. DCIT had totally failed to consider all the events which led to the filing of the Suit by the appellant and also the immediate events that followed the filing of the said Suit which prompted the action of the appellant in writing off the said due balances from the said party. By submitting the same, the appellant reproduced and explained the numerous events and correspondences that led to the filing of the Suit by the appellant company, followed by OM Sai filing a counter claim before the Hon'ble Delhi High Court. It was reiterated that in the year 2012, the appellant in order to sub-contract the work for comprehensive operations and maintenance of Passive Infrastructure of sites in ROWB Circle maintained by VIOM Networks (Principal), entered into the LOA dated 20/08/2012 with OM Sai. Keeping up with the terms of the contract, during the process of the execution of the same, numerous payments were made, both

	by the appellant company and Environ Energy, to the sub-contractors and vendors of OM Sai. Also bills raised by OM Sai were all settled by the appellant. However after making the entire payments in terms of the demands raised by OM Sai, it was learnt by the appellant that due to certain defaults/ shortcomings of OM Sai, Environ Energy had made certain deductions in the payments to the appellant. The appellant submitted that also it was learnt that certain excess payments were made by the appellant on behalf of OM Sai and thus a total amount of Rs.1065.37 lakhs were required to be deducted from the total payments required to be made to OM Sai. The appellant vide repeated mails duly informed OM Sai about the said proposed deductions and also of its liability towards the sub-contractors which were discharged by the appellant. Eventually, since OM Sai failed and neglected to settle the account and to refund the excess amount towards deductions proposed by Environ Energy, the appellant was constrained to address a final Demand Notice dated 01.04.2014 to OM Sai, calling upon it to make a payment of Rs.1,56,64,000/- towards the excess amount towards deductions proposed by Environ Energy. However OM Sai, instead of making the payments towards the legitimate demands raised by the appellant, sent a reply dated 08.04.2014, making false and baseless averments about being entitled to claim an amount of Rs.9,30,10,552/- from the appellant. Thus the Appellant in the light of the above facts, filed on 28/08/2014 the Suit for recovery of an amount of Rs.1,56,64,000/- along with interest thereon @ 18% per annum. Immediately pursuant to the above, OM Sai with no desire to settle the accounts infact filed a counter claim against the appellant before the Hon'ble Delhi High Court for recovery of Rs.9.30 crores from it. The appellant in light of the above thus, realizing the offensive and aggressive stand of OM Sai and finally considering and realizing that the matter was likely to go through protracted litigation involving huge costs and harassment, took the decision to write off the amount in its books.
--	--

(xix) As has already been submitted above, pursuant to the appellant's submissions made before the Id. CIT(A) and the Reply filed before the Id. CIT(A) in response to the Id. DCIT's comments concerning OM Sai in the impugned Remand Report, the Id. CIT(A) without paying heed to any of such submissions, explanations and evidences filed before him at the appellate stage, finally passed the **Appellate Order** on **28.08.2020**, making the following **allegations against the appellant**, thus confirming the Id. A.O.'s disallowance of the claim of Write off, of advances given to **OM Sai**.

The appellant's **Reply** to each of the allegations are also submitted hereunder:

CIT(A)'s Allegations:

The Id. CIT(A) has alleged that since the appellant had filed suit for recovery before the **Hon'ble Delhi High Court** which is pending, deduction of the 'advances written off' claimed by the appellant, without waiting for outcome of the legal proceedings is premature as the transaction is still the subject matter of litigation.

The Id. CIT(A) has further held that in respect of damages for breach of contract, it is established law that such damages arise only when it is either accepted by the other party or decreed by the competent court. He also held that an award by the arbitrator may stand on a same footing like the court award. In either case when the award is not accepted but is the subject matter of further appeal, a part payment even if it is received could not be treated as income. For this purpose the Id. CIT(A) placed reliance on the judgments of Paragon Constructions (I) Pvt. Ltd. vs. CIT [2005] 274 ITR 413 (Delhi) following the decision of the Supreme Court in CIT vs. Hindustan Housing and Land Development Trust Ltd. [1986] 161 ITR 524 (SC). Having stated this the Id. CIT(A) further stated that the same argument can be extended to issues relating to expenditure as well. Thus the Id. CIT(A) held that during the pendency of a judicial dispute, the amount can be treated as neither determined nor crystallized and hence the same cannot be allowed as a business expenditure.

Appellant's Reply:

In this regard the appellant would like to submit that since in light of the disputes with OM Sai regarding recovery of advance, the appellant filed before the **Hon'ble High Court of Delhion 28/08/2014 a Suit for recovery**. Thereafter the Id. CIT(A)'s allegation that deduction of the 'advances written off' claimed by the appellant, without waiting for outcome of such legal proceedings is premature as the transaction is still the subject matter of litigation, is **grossly incorrect**.

There is no such law which prohibits writing off, of non recoverable advances and claiming deduction of the same if the transaction is a subject matter of litigation or is pending adjudication before a Court. This is so when on the other hand OM Sai, with no desire to settle the accounts in fact filed a **counter claim** against the appellant before the **Hon'ble Delhi High Court** for recovery of **Rs.9.30 crores** from the appellant thus leading the matter going through protracted litigation involving huge costs and harassment, with probably no fruitful outcome which eventually lead to surety regarding complete non recovery of the advances.

However on the eventuality of such disputes getting resolved in future and passing of an appropriate order by the Court wherein the advances in dispute and which are written off by the appellant are refunded to the appellant or a part of it is refunded, the same shall be offered to tax by the appellant as 'income' in its ROI in that concerned Assessment Year. However that does not bar the appellant

from writing off these advances and claiming the written off amount as a deduction, since as per the prevailing situation and circumstances, the advances on becoming non recoverable, it was only justified that they were written off.

It is further submitted in this regard that the Id. CIT(A) relying on the decision in the case of **Paragon Constructions (I) Pvt. Ltd. vs. CIT [2005] 274 ITR 413 (Delhi)** which followed the decision of the **Supreme Court** in **CIT vs. Hindustan Housing and Land Development Trust Ltd. [1986] 161 ITR 524 (SC)**, stated that the ratio of this decision is that in respect of damages for breach of contract, it is established law that such damages arises only when it is either accepted by the other party or decreed by the competent court. He also stated that an award by the arbitrator may stand on a same footing like the court award and in either case when the award is not accepted but is the subject matter of further appeal, a part payment even if it is received could not be treated as income.

Based on this ratio the Id. CIT(A) held that the same can be applied on the **reverse** in the appellant's case and extended to issues relating to expenditure as well and thereafter alleged that the advances given by the appellant to OM Sai being written off can be treated as neither determined nor crystallized and hence cannot be allowed as a business expenditure.

In this connection it is firstly submitted by the appellant that the decision in the case of **Paragon Constructions (supra)** relied on by the Id. CIT(A) is distinguishable on facts from the appellant's case at hand.

In the case of **Paragon Constructions (supra)**, in the appeal for the A.Y. 1992-93 the question of law which arose for consideration was *whether the Tribunal was right in law in holding that interest amounting to Rs.6,63,275 accrued to the assessed during the previous year relevant to asst. yr. 1992-93 was includible in its total income.*

The facts of this case were that there was a contract between Paragon Construction and the New Delhi Municipal Commissioner (for short "NDMC"). There were disputes about implementation of the contract in time and the default committed by NDMC. Ultimately the matter was referred to the arbitrator and the arbitrator by his award dated 27th Aug, 1987, held that NDMC shall pay to Paragon Constructions a sum of Rs.33,45,669.24 with simple interest as specified in the award. Paragon Constructions moved the High Court praying that the arbitrator be directed to file the original award for making the award a rule of the Court. Against the award, objections were filed by NDMC and in those proceedings NDMC deposited the amount in the Court without prejudice to its objections to the award in order to avoid further interest.

By an order dated 23rd March, 1988, the High Court directed that the amount of Rs.49,61,856.64 be paid to the Paragon Constructions subject to its furnishing a bank guarantee of a nationalised bank within one month for restitution and to the effect that if NDMC succeeds, Paragon Constructions shall refund the amount to NDMC along with interest.

The amount was thereafter withdrawn by Paragon on furnishing a bank guarantee and the same was deposited in fixed deposit account with the bank. The AO held that the interest accrued on the amount so deposited is a taxable income for the year under consideration, i.e. A.Y. 1992-93. Before appeal was preferred before the Tribunal, the High Court decided the issue in favour of Paragon Constructions during the financial year that ended on 31st March, 1995. Paragon Constructions offered the principal sum awarded, namely, Rs.33,45,669 and interest accrued thereon totalling to

Rs.61,46,020 for tax for the A.Y. 1995-96 and these amounts were duly brought to tax in the previous year relevant to A.Y. 1995-96.

The Tribunal, however, held that since Paragon Constructions was following the mercantile system, it was liable to pay tax on the interest which was earned by it in the relevant year (i.e. A.Y. 1992-93) and not in the year of determination by the High Court (i.e. A.Y. 1995-96).

On appeal before the **Hon'ble Delhi High Court**, the counsel for the Revenue submitted that in view of the Supreme Court decision in *Babulal Narottamdas & Ors. v. CTT*, the interest which was earned by Paragon Constructions was required to be charged in the relevant year (i.e. A.Y. 1992-93) and not on the date when the Court made the order finally (i.e. A.Y. 1995-96).

However the **Hon'ble Delhi High Court** held that in that case (*Babulal Narottamdas*) what was deferred was not the accrual of the right, but date of payment. As such, the right to receive the remuneration could not be said to have arisen on the date of the judgment of the High Court. Whereas Paragon Construction's case is not one where merely the date of payment was deferred. There, the entire right to receive the same was in question and jeopardy and the right accrued to it when the award was affirmed by the High Court. Therefore, the **Hon'ble Delhi High Court** held that the decision of *Babulal Narottamdas* sought to be relied on by the counsel for the Revenue was not applicable to Paragon Construction's case.

The **Hon'ble Delhi High Court** thereafter relying on the **Hon'ble Supreme Court's** decision in the case of *CIT v. Hindustan Housing & Land Development Trust Ltd.* reported in (1986) 161 ITR 524 (SC) and its own decision in the case of *Harish Chandra & Ors. v. CW* reported in (1985) 154 ITR 478 (Del) held that in the instant case (Paragon Construction's case), it was very clear that it was only in view of the order made by the Court that the amount was permitted to be withdrawn and that too on the furnishing of a bank guarantee of a nationalised bank. Further the appellant (Paragon Constructions) was required to refund the amount with interest to the respondent (NDMC) in case the respondent succeeded. Therefore, the determinative date would be the date on which the decision was rendered by the Court and it would be for that relevant year (i.e. A.Y. 1995-96) that the income-tax will have to be assessed as it can be said that the amount accrued on that date only.

Paragon Constructions (*supra*) distinguished:

From a bare reading of the judgment in the case of **Paragon Constructions (*supra*)** it is clear that the same **firstly** pertains to receipt of income while the appellant's case pertains to incurring of expenditure on account of non recoverable advance being written off and hence the said judgment being on a complete different footing cannot be applied to the facts of the appellant's case.

Secondly, in the case of **Paragon Constructions (*supra*)** the income to be taxed was the interest that accrued on the damages received by the assessee (Paragon Constructions) from NDMC which was fixed deposited in the bank. The dispute was whether:

- I. The said interest would be taxed in the **year** the damages were received by Paragon Constructions from NDMC on furnishing of a bank guarantee (on the condition that if NDMC succeeds, Paragon Constructions shall refund the amount to NDMC along with interest)

OR

- II. Whether the said interest would be taxed in the **year** the Court finally decided the issue of dispute (about implementation of the contract between Paragon and NDMC in time and

the default committed by NDMC) in favour of Paragon Constructions i.e. during the financial year that ended on 31st March, 1995 and the amount of damages stood granted to Paragon Constructions finally, without any conditions.

The **Hon'ble Delhi High Court** in the above factual backdrop held that the said interest that accrued on the damages received by Paragon Constructions from NDMC, which was fixed deposited in the bank, would be taxed in the year the Court finally decided the issue of dispute (about implementation of the contract between Paragon and NDMC in time and the default committed by NDMC) in favour of Paragon Constructions i.e. during the F.Y. 31st March, 1995 and the amount of damages stood granted to Paragon Constructions without any conditions.

Thus the case of **Paragon Constructions (supra)** involved the **issue** as to which would be the year of taxability of interest accrued on amount of damages received and fixed deposited as the specific right to receive the damages was not yet finalised as on A.Y. 1992-93.

Whereas the instant case of the appellant involves the issue of allowability of expenditure incurred on account of excess payment* made by the appellant to OM Sai, which being excess payments were refundable but however became non recoverable firstly due to OM Sai's denial to refund and then due to protracted litigation for filing of suit by appellant and counter claim by OM Sai before Hon'ble Delhi High Court, which led to writing off, of the said excess payments by the appellant. In the appellant's case the protracted litigation with no timeline of ending does not determine its right to receive the refund of excess payment made to OM Sai as in the case of **Paragon Constructions (supra)**.

*excess payment made by appellant to OM Sai included 'deductions made by the Contractor Environ Energy Corp. India Pvt. Ltd. on the appellant for payment made by Environ Energy on behalf of OM Sai' and 'payment made by the appellant towards the sub-contractors of Om Sai on behalf of Om Sai'.

From the above it is clearly evident that the issues involved in the decision of **Paragon Constructions (supra)** are also completely different, besides the facts of the two cases also being distinguishable from each other.

In view of the above thus the Id. CIT (A) cannot disallow the write off, of excess payments/advance made to OM Sai by the appellant, alleging that during the pendency of a judicial dispute, the amount can be treated as neither determined nor crystallized and hence the same cannot be allowed as a business expenditure, by relying on the decision of **Paragon Constructions (supra)**.

Infact the appellant by entering into the Letter of Award with OM Sai had sub-contracted a work for comprehensive operation and maintenance of work assigned and in reference to that, the appellant had paid Rs.1,56,77,731/- to the various parties on behalf of the said sub-contractor. The said party failed to settle such amount and the appellant carried the matter to the High Court for getting back its trade advance given to business party. Therefore, the loss incurred by the appellant due to fraudulent act towards breach of commitment was incidental to operation of the business and allowable as business expenditure. This has been held by the **Hon'ble Supreme Court of India** in the case of **Badridas Daga vs. CIT** reported in (1958) 34 ITR 10 (SC) by holding as under-

"Loss resulting from embezzlement by an employee or agent in a business is, however, admissible as a deduction under section 10(1) of the Indian Income-tax Act, if it arises out of the carrying on of the business and is incidental to it. It makes no difference in the admissibility of the deduction whether

the employee occupies a subordinate position in the establishment or is an agent with large powers of management. It is a question turning on the facts of each case whether the embezzlement in respect of which deduction is claimed took place in the carrying on of the business.”

In view of the above the impugned alleged premises of the Id. CIT (A) for upholding the Id. A.O.’s disallowance of the claim of Write off, of advances given to OM Sai has no basis to stand.

D. METRO RAILWAYS, KOLKATA (KMR) – ADVANCE RS.71,21,635/-:

Herein firstly the appellant would like to submit that for confirming the disallowance of appellant’s claim of write off, of advance given to KMR, the Id. CIT(A) made various **allegations against the appellant**. Before going into the specific allegations of the Id. CIT(A) vis-à-vis the appellant’s submission, it is pertinent to explain the background facts which gave rise to the advance given to KMR being written off:

BACKGROUND:

(i) As stands as a matter of fact, it is known that the appellant company has specialized knowledge and expertise in supply, installation, commissioning, operation & maintenance of Internet Protocol (“IP”) based surveillance system, personal baggage screening system, as well as explosive detection and disposal system.

(ii) Notice Inviting Tender (NIIT) dated 30/08/2010 was issued by the Metro Railway Department, Kolkata (KMR) for ‘Supply, installation, commissioning, operation & maintenance of IP based Surveillance system, Personal Baggage Screening system and Explosive Detection & Disposal System at 23 Metro Railway station premises and Metro Rail Bhavan’, in response to which the appellant company (BCL) had bid for the same.

(iii) Having satisfied the technical parameters required under the NIIT and since the appellant’s bid was the lowest, it was awarded the contract for ‘Supply, installation, commissioning, operation & maintenance of IP based Surveillance system, Personal Baggage Screening system and Explosive Detection & Disposal System at 23 Metro Railway station premises and Metro Rail Bhavan’, vide Letter of Acceptance issued on 25/02/2011. ***Copy at page 273-277 of the paper book.***

The Contract value of the work was at Rs.17,07,35,271/-.

A total **Security Deposit** for the Contract @ 5 % of the accepted value of Rs.17,07,35,271/- being Rs.85,36,764/- was to be deposited. However, Rs.14,15,130/- being the Earnest Money Deposited (EMD) deposited with the offer was retained by KMR as part of the Security Deposit. **Thus the balance amount of Rs.71,21,634/- was to be paid by the appellant to KMR as Retention Security Deposit.** The said Retention Security Deposit of Rs.71,21,634/- was to be deducted by KMR at the rate of 10% from the bills raised on KMR as and when they were raised. Ledger copy for such security deposit with KMR in the books of the appellant can be seen ***at pages 505-509 of the paper book.***

Also, the appellant company was to immediately furnish the performance bank guarantee to the tune of Rs. 85,36,764/- equivalent to 5% of the Contract value.

Another Letter of Acceptance dated 11/04/2011 was issued by KMR in continuation of the previous letter giving in details the description of works, units, quantities, etc. ***Copy at page 278-284 of the paper book.***

(iv) However, after a delay of almost four months from the date of issuance of the Letter of Acceptance, a Memorandum of Agreement dated 03/06/2011 (“MOA”) was finally executed between the appellant and KMR whereby the appellant’s scope of work included supply, installation, commissioning of Internet Protocol based Surveillance System, Personal and Baggage Screening System and Explosive Detection and Disposal System at 23 Metro Railway Station premises and Metro Rail Bhavan. The appellant was to maintain equipment at all locations as specified by KMR. The said contract would require deployment of manpower in the number of 145 personnel. ***Copy of the said MOA is enclosed at pages 285-289 of the P/B.***

The payment terms were as follows:

- (i) The KMR was to pay 70% of the value of supply against physical receipt of material in good condition in Railways store;
- (ii) The KMR was to pay 10% of the value of supply and 80% of the value of installation in commissioning after successful installation;
- (iii) The KMR was to pay 10% of the value of supply and 10% of the value of installation and commissioning after successful installation and commissioning on production of Acceptance Test Certificate;
- (iv) The KMR was to pay remaining 10% of the value of supply and 10% of the value of installation and commissioning on production of Completion Certificate.
- (v) Notably, the execution of MOA was dependent upon KMR performing its obligation under the MOA. It is pertinent to mention that the performance of the MOA by the appellant depended on the KMR performing their reciprocal promises which included inter alia approval of vendors within time, approval of drawings and allotment of store on time, control room preparation and finalization.
- (vi) Immediately upon signing of the MOA, the appellant started mobilizing manpower and material and commenced activities which included site visits.
- (vii) The appellant was however shocked to notice that when its personnel arrived at the respective locations/sites, the said sites were not ready to enable the appellant to perform its obligations of the MOA.

Among the actions/approvals that the KMR had failed to carryout were approval of vendors within time, approval of drawings and allotment of store on time, control room preparation and finalization, infrastructure to be provided to integrate the Respondent’s surveillance system of all 23 stations using the existing WAN/infrastructure on optical/microwave backbone network.

KMR also did not provide the diagrams for installation locations, nor approved the number of CCTVs or the surveillance cameras to be installed at each station to enable the appellant to execute its obligations of the MOA.

- (viii) As a result of the inaction on the part of KMR, the appellant had incurred substantial losses in the form, inter alia, of project overrun cost.

The appellant states that the delay in work was caused by the indecisive attitude and the trial and error method of issuing technical instructions adopted by the KMR's Technical Department (S&T) since December 2012.

Other instances of delays attributable to KMR include undue delay in the port clearance formalities.

(ix) The appellant had communicated this situation to KMR vide letters dated **27.01.2014 and 11.02.2014**. By these communications the appellant clarified its stand in regard to the accessories of Multi Zone DFMD. *Copy of the said letters are enclosed at pages 290-294 of the paper book.*

The appellant however was still to receive a response from KMR, without which it could not get necessary clearance to begin with the vital security equipment.

The foregoing also resulted in failure of the appellant to utilize various listed materials because the KMR failed to release dispensation of overseas inspection under the provisions of the tender document, despite requests to this effect, being made by the appellant.

(x) Surprisingly however, despite the considerable delays attributable to KMR, the appellant was shocked to receive a SCN dated 01/03/2014 from KMR in connection with the alleged delay of the appellant to complete the work within the extension. *Copy of the same is enclosed at pages 295-299 of the paper book*

A detailed Reply dated 10/03/2014 was sent by the appellant, copy of which is enclosed at *pages 300-331 of the paper book.*

(xi) As the situation was reaching a deadlock, the appellant in all earnestness and to demonstrate its bona fides, as also with a view to recover its dues (which were still not paid), engaged with KMR and began seeking release of due payments and to try and chart a course for the future of the project.

KMR had paid only Rs.8,34,59,446/- till date out of the contract value of Rs.17,07,35,271/-. The appellant had completed more than 90% of the contracted work and raised a bill out of which Rs.10,24,09,303/- became receivable by the appellant. However Rs.8,34,59,446/- only, was paid to the appellant out of the said receivable amount. Thus a sum of Rs.1,89,49,857/- along with interest was due and payable by KMR to the appellant.

(xii) Despite repeated requests and reminders KMR had failed and neglected to pay the aforesaid amount and in fact on the contrary, the KMR had been writing letters to the appellant mentioning alleged defects and berating the appellant for doing unsatisfactory work.

(xiii) Here, at this stage before closing the books of accounts as on 31/03/2015 for the A.Y. 2015-16, the appellant in view of the discussions made in the preceding paras, realized that in a situation where there were outstanding to the tune of more than Rs. 8 crores, the **Retention Security Deposit of Rs.71,21,634/-** was no longer realizable at all. Thus on 27/03/2015 the management of the appellant company took the decision to treat the impugned sum as loss incidental to business and thus the appellant company wrote off the said sum in its books.

The Security Deposit Ledger Account namely "Security Deposit at Kol Metro" for the period 01/04/2011 to 31/03/2015 is enclosed at pages 505 to 509 of the paper book. A perusal of the same will reveal that as and when the Sales Bill was raised on KMR, a 10% Security Deposit, as per the Letter of Acceptance, was deducted and retained as Retention Security Deposit by KMR.

(xiv) In the continued recovery proceedings of the contract amount, KMR after extending the period of completion of work till July 10, 2015 and while such period was yet to expire, issued a Notice dated June 01, 2015 with termination of the contract with 7 days' notice by claiming that the appellant was doing unsatisfactory work. ***Copy of the same is enclosed at pages 332-333 of the paper book.***

(xv) The appellant too served a legal Notice dated 04/06/2015 on KMR for release of balance payments. ***Copy of the same is enclosed at pages 334-338 of the P/B.***

Also the appellant, vide its **letter dated 08/06/2015** replied to the said notice dated 01.06.2015 and explained the work done so far and the shortcomings caused due to the non-performance on the part of KMR. ***Copy enclosed at pages 339-343 of the paper book.***

(xvi) KMR however paid no heed to such reply and issued another notice dated June 25, 2015 stating that it is serving the 48 hours' notice on the appellant and thenceforth the contract shall stand rescinded. ***Copy enclosed at pages 344-345 of the paper book.***

(xvii) Immediately thereafter another notice dated July 9, 2015 was served upon the appellant by KMR that since the 48 hours' notice had expired, the following would happen(***copy enclosed at pages 346 – 347 of the paper book***):

- contract shall stand rescinded with immediate effect in terms with clause 62 of General Condition of Contract
- the balance work will be carried out without the participation of BCL and
- the Tender Security Deposit shall be forfeited and the Performance Bank Guarantee shall be encashed.

In view of the above it is clearly understandable that in order to cover up its own failures and omissions, KMR invoked the extreme measure of terminating the MOA which is disputed by the appellant, of forfeiting the tender security deposit and also encashing the BG.

(xviii) KMR instead of invoking the arbitration clause had shifted onus of its performance on the appellant and had wrongfully terminated the contract and it had the performance bank guarantee of Rs.85,36,764/- encashed. ***The letter dated 24/07/2015 addressed by KMR to the Yes Bank for release of the BG is enclosed at pages 348-350 of the P/B.***

Letters from KMR addressed to the appellant dated 21/07/2015, 29/07/2015 and 25/08/2015 intimated the appellant of taking over possession of the uninstalled materials and the CCTV systems. ***Copy of the said letters are enclosed at pages 351-357 of the paper book.***

(xix) In light of the abovementioned delays, it is clear that KMR was evading payment and had terminated the contract without referring the point of dispute to arbitration and invoking Performance BG by encashing it. It had misused its superior position in the entire arrangement and time and again issued baseless claims of unsatisfactory work alleging the appellant to create dispute.

The appellant had duly discharged its obligation in terms of the agreement and was entitled to receive the outstanding payment of Rs.5,10,44,112/- (billed and unbilled amount) as aforesaid from KMR and KMR was obliged to make payment thereof, which notwithstanding repeated demands and/or requests, KMR failed and/or neglected and/or refused to do.

(xx) By reason of the aforesaid, disputes and differences arose between the appellant and KMR, which required adjudication.

The MOA, inter-alia, contained an **arbitration and jurisdiction clause**, the detailed clause being mentioned in the Tender Documents forming part of the MOA(further reproduced below):

“69.0 Arbitration:

69.1 Other than Expected Matters, the matters in question, dispute or difference to be arbitrated shall be referred to by the contractor to the Railway for reference to Arbitration. This matter may be settled by appointing (a) a Sole Arbitrator who will be the General Manager or a person nominated by him, (b) two Arbitrators and one Umpire, as per merit and/or financial involvement of the question, dispute or difference. Nomination of Arbitrator(s) and proceedings thereon will follow the provision of “Settlement of Disputes” as contained in General Conditions of Contract ‘2001 (corrected upto date).

69.2 The supply order, including all matters connected with this supply order shall be governed by the Indian Law both substantive and procedural for the time being in force and shall be subject to the exclusive jurisdiction of Indian Courts at the place from where the Purchase Order has been placed.

69.3 Foreign companies, operating in India or entering into Joint Venture in India, shall have to obey the law of the land and there shall be no compromise or excuse for the Ignorance of the Indian legal system in any way.”

Since the appointment procedure is to be governed by the GCC in terms of 64(3)(a)(ii) which reads as follows:

“64.(3) (a)(ii) In cases not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor’s nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor’s nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the ‘presiding arbitrator’ from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor’s nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator.”

(xxi) Inasmuch as disputes and differences arose between the parties as aforesaid, the appellant by its letter dated August 12, 2015 invoked the said Arbitration clause and requested KMR to provide a panel of more than 3 names so that the appellant could suggest two names for appointment for adjudication of the disputes in terms of the said arbitration agreement. ***Copy enclosed at pages 359-364 of the paper book.***

(xxii) KMR however did not dispute the arbitration agreement between the parties and had agreed to go ahead with the nominations as per the Agreement and also chose the three nominees being the Railway Officers. (vide letter dated 09/09/2015, ***copy enclosed at page 365 of the paper book***). The appellant was further asked to complete its nomination.

Various further communications vide letters dated 08/04/2016 and 26/04/2016 were exchanged between the parties. ***Copies enclosed at pages 366 -367 of the paper book.***

(xxiii) However, it is pertinent to state here that the conditions stipulated for nomination of Arbitrator in the **arbitration clause** of the **MOA** was prima facie **prejudicial** to the interests of the **appellant**.

It was the contention of the appellant that the arbitration clause provided that in one way or the other only Railway officials could be appointed as Arbitrator. Needless to state, that the Arbitrator(s), if appointed as per the arbitration clause of MOA, might not have been impartial while adjudicating the dispute. It was very apparent from the arbitration clause that KMR had been misusing its superior position and had attempted to enforce conditions which were adverse to the appellant.

(xx) Next, in view of the neglect and/or wrongful refusal of KMR to appoint an arbitrator in terms of the said agreement, the agreed procedure between the parties failed and an Application was made by them before the **Hon'ble Calcutta High Court** u/s 11 of the Arbitration and Conciliation Act, 1996, for appointment of an arbitrator.

(xxi) The said Application was disposed off, by the Hon High Court vide **Order dated 29/06/2016** whereby the Hon'ble High Court directed KMR to take a decision for nomination in terms of Clause 64(1)(i) of the contract within a period of 120 days.

(xxii) KMR in spite of the said Order failed and neglected to comply with the directions of the High Court's Order dated 29/06/2016.

Several communications dated 14/10/2016, 15/11/2016 and 15/12/2016 to this effect were exchanged. ***Copies of the letters are enclosed at pages 368-373 of the paper book.***

(xxiii) Thus again Application was made by the appellant u/s 11 of the Arbitration and Conciliation Act, 1996, (AP 52 of 2017) pursuant to which, by an **Order dated 15th February, 2017** the **Hon'ble Calcutta High Court** directed KMR to furnish the names of three persons for nomination of an arbitrator to be made by the contractor "keeping in mind the fifth schedule to the Act".

(xxiv) On 24/02/2017, KMR forwarded to the appellant three names. According to the arbitration clause the contractor had to choose two out of which the railways would appoint one as the arbitrator. ***(copy enclosed at page 374 of the P/B)***

(xxv) However again the appellant filed an Application before the **Hon'ble Calcutta High Court** challenging the above Order on the ground that the said Order was against the permitted relationship of the arbitrator with the parties, mentioned in the fifth and seventh schedules.

(xxvi) The aforesaid application was disposed of by the **Hon'ble High Court** vide Order dated July 19, 2017, (*copy enclosed at pages 375-381 of the paper book*) directing KMR to forward a panel of atleast 30 names of persons of different backgrounds and professional avocations and attainments to the appellant. The Hon'ble Court had also directed in the said Order that the said panel may contain names of serving or retired officers of other organizations, thereby, implying that the names to be forwarded to the appellant must exclude those persons who belong to the Respondent/KMR.

(xxvii) Pursuant to the said Order KMR forwarded a panel of 31 names consisting of retired and serving officers along with a cryptic and acronymic description of their designation along with the letter dated 14/08/2017(*copy enclosed at pages 382-383 of the paper book*).

(xxviii) Subsequently, the appellant sent another letter dated 10/11/2017(*copy enclosed at page 384 of the paper book*) calling upon KMR to choose two names from the list of 31 names provided along with the letter dated August 14, 2017, fully disregarding the fact that the Hon'ble High Court had directed the panel to consist of persons of different backgrounds and professional avocations and attainments from other organizations. It is clearly stated that the list of Arbitrators provided by KMR was not in conformity with the Order dated July 19, 2017 passed by the Hon'ble Court.

(xxix) However despite further continued exchanges of letters, KMR acted in wilful, deliberate and contumacious violation of the said order dated July 19, 2017 and continued to defy the directions of this Hon'ble Court as contained in the said order.

(xxx) Thus in view of the above it was the contention of the appellant that KMR had committed contempt of the orders of this Hon'ble Court and was accordingly liable to be dealt with in accordance with law for the aforesaid contumacious acts and conduct.

(xxxi) Thus the appellant-company ultimately filed on 30/04/2018 vide C.C.No.21 of 2018 (A.P.No.374 of 2017) a **Contempt Case** before the **Hon'ble Calcutta High Court**. *A copy of the said Contempt Suit is enclosed at pages 385-504 of the paper book*. It was stated therein that the Contemner (KMR) should be held guilty of Contempt of Court and be suitably punished by imposition of fine and/or by imprisonment in civil prison for an appropriate term as this Hon'ble Court may deem fit and proper.

(xxxii) The abovementioned detailed facts were also submitted by the appellant before the Id. CIT(A).

REMAND REPORT AND ISSUES RAISED:

(xxxiii) Pursuant to the above, the Id. DCIT provided specific comments and raised queries as well, in a **Remand Report** dated **15.11.2018** to the Id. CIT(A), accompanied by a covering letter of the Additional Range Head. *Copy of the Remand Report is enclosed at pages 578 to 582 of the paper book*.

A copy of the Id. DCIT's **Remand Report** was thereafter forwarded to the appellant by the Id. CIT(A), in response to which the appellant submitted it's **Reply** dated **21.12.2018**(*copy enclosed at pages 584 to 593 of the paper book*) before the Id. CIT(A), as detailed out in a **table** hereunder:

Issue raised/stated by DCIT in Remand Report	Appellant's Response
With regard to the appellant's write off, of retention security deposit given to Metro Railway, Kolkata, it was stated that the appellant claims to have filed case of contempt before Calcutta High Court and on the other hand it is writing off the amount before waiting for the outcome of the case.	The appellant submitted before the Id. CIT(A) that all the complete details were before him for adjudication which were being relied upon and that the Id. DCIT was overstepping her jurisdiction in commenting on the facts which were all before the Id. A.O. and the Id. CIT(A).

CIT(A)'s ALLEGATIONS and APPELLANT's RESPONSE

(xxxiv) As has already been submitted above, pursuant to the appellant's submission made before the Id. CIT(A) and also the appellant's Reply filed before the Id. CIT(A) in response to the Id. DCIT's comments concerning KMR in the impugned Remand Report, the Id. CIT(A) without paying heed to any of such submissions, explanations and evidences filed before him at the appellate stage, finally passed the **Appellate Order** on **28.08.2020**, making the following **allegations against the appellant**, thus confirming the Id. A.O.'s disallowance of the claim of Write off, of advances given to KMR.

The appellant's **Reply** to each of the allegations are also submitted hereunder:

CIT(A)'s Allegation:

The appellant's retention security deposit being written off by it during the A.Y. 2015-16, the same was claimed as a deduction by the appellant which was disallowed by the Id. A.O. and was further upheld by the Id. CIT(A) alleging that the deduction claimed is premature as the matter is sub-judice (as the appellant had filed a case of contempt before Hon'ble Calcutta High Court against the Metro Railways, Kolkata for not following the Hon'ble Court's Orders in the matter of appointment of arbitrators relating to Metro railways, Kolkata terminating its contract with the appellant). Further the Id. CIT (A) has stated that the said view of his is in line with the decision of the Hon'ble Supreme Court of India in the case of **CIT v. Hindustan Housing & Land Development Trust Ltd.** reported in (1986) 161 ITR 524 (SC).

Appellant's Reply:

In this regard the appellant would firstly like to submit that the Id. CIT(A) has not disbelieved the advances (in the form of retention security deposit) made by the appellant to Metro Railways, Kolkata (KMR) during the course of its business and entirely for the purpose of running its business. The Id. CIT(A) has also not disputed the fact of non-recovery of the said retention security deposit during the relevant Assessment Year.

It is that the Id. CIT(A) has alleged that the claim of write off, of the said non recoverable advance (in the form of retention security deposit) has not crystallized during the relevant

Assessment Year owing to the appellant having filed a case of contempt against KMR before the **Hon'ble Calcutta High Court** which is still sub judice.

In this connection it is firstly submitted that there is no such law which prohibits writing off, of non recoverable advances/deposits and claiming deduction of the same if the transaction is pending adjudication before a Court or is sub judice.

Besides, it is pertinent to mention that KMR in order to cover its own failures and omissions having taken the extreme step of terminating its contract with the appellant after July 09, 2015 and having forfeited the appellant's tender security deposit and encashed its Bank Guarantee, the appellant invoked the **Arbitration Clause** in its MOA. KMR having agreed to go ahead with the arbitration, thereafter, a difference/dispute arose between KMR and the appellant regarding appointment of arbitrator for adjudication of the disputes in the matter of termination of the contract. The matter travelled up to the **Hon'ble Calcutta High Court** where certain directions were given by the Hon'ble Court to KMR for suggesting/nominating names for arbitrators in a panel, out of which the arbitrators can be selected.

However since KMR did not abide by the directions of the **Hon'ble Calcutta High Court** in nominating members for appointment of arbitrator as directed by the Hon'ble Court, the appellant filed a **case of contempt** against KMR as it had committed contempt of the court orders and the said case is pending before the **Hon'ble Calcutta High Court**.

Now the write off, of the retention security deposit by the appellant was made within 31st March, 2015. **Whereas** the above dispute regarding appointment of arbitrator and thereafter filing of **case of contempt** for not abiding by the **Hon'ble High Court's** Orders regarding appointment of arbitrator, all related to and arose on KMR terminating its contract with the appellant on a 48 hours' notice and that too in June-July, 2015 i.e. after the appellant had written off the retention security deposit at the time of closing of its books for F.Y. 2014-15.

Therefore the appellant's write off, of the retention security deposit at the time of closing of its books as on 31st March, 2015 as the same became non recoverable along with pending bill/receipts of more than Rs. 8 crores, has no connection or link with the case of contempt pending before the **Hon'ble Calcutta High Court** which was filed much later and pursuant to KMR not following the Hon'ble High Court's directions regarding appointment of arbitrator for adjudication KMR's sudden termination of the Contract with the appellant.

Hence the said matter being sub judice cannot have an impact on the allowability of the appellant's claim of **write off of advance** (in the form of retention security deposit) and the said allowability is not dependent on the outcome of the **case of contempt** pending before the **Hon'ble Calcutta High Court**.

It is further submitted in this regard that the Id. CIT(A) held that his decision of upholding the Id. AO's disallowance of the appellant's deduction claimed on account of retention security deposit written off, is in line with the **Hon'ble Supreme Court of India's** decision in the case of **CIT vs. Hindustan Housing and Land Development Trust Ltd. [1986] 161 ITR 524 (SC)**. However the said decision is distinguishable on facts from the appellant's case and hence cannot be relied upon for this purpose.

In this connection it is submitted that the **FACTS** of the decision of **Hindustan Housing** (*supra*) is that the assessee (**Hindustan Housing**), a company dealing in land maintained its accounts in the mercantile system. By an order dated June 21, 1946 under Defence of India Rules read with Defence of India Act, 1939 certain plots of land measuring about 19.17 acres in village Kankulia in the District of 24 Parganas and belonging to **Hindustan Housing**, were requisitioned by the Government of West Bengal. Subsequently the land was acquired permanently in the State Government under s. 5, Requisition of Land (Continuance of Powers) Act, 1951 by a notice of acquisition dated December 27, 1952 published in the Gazette dated January 8, 1953. **The Land Acquisition Officer awarded a sum of Rs.24,97,249/- as compensation payable to Hindustan Housing who, however was not satisfied with the amount of compensation, and preferred an appeal before the Arbitrator, 24 Parganas, Calcutta. The Arbitrator made an award dated July 29, 1955 whereby he fixed the amount of compensation at Rs.30,10,873/- on account of the permanent acquisition of the land, thus enhancing the original amount of compensation by Rs.5,13,624/- on which he directed interest at 5 per cent per annum from January 8, 1953, the date of acquisition, to the date of payment. The Arbitrator also directed that further recurring compensation at Rs.6272/10/4 per mensem should be paid to Hindustan Housing from the date of requisition till the date of the acquisition.**

The State Government then appealed to the High Court and during the pendency of the appeal on April 25, 1956 it deposited Rs.7,36,691, which the assessee (**Hindustan Housing**) was permitted to withdraw on May 9, 1956 on furnishing security. On receipt of the amount Hindustan Housing credited it in its suspense account on the same date.

During the assessment proceedings for the A.Y. 1956-57, the relevant accounting period being the year ended March 31, 1956, the ITO brought to tax a sum of Rs.7,24,914 in the assessee's (**Hindustan Housing's**) business income, which represented the difference between the sum of Rs.7,37,190/- payable to **Hindustan Housing** in terms of the award dated July 29, 1956 of the Arbitrator and a sum of Rs.12,276, out of that amount which had already been assessed to tax. The ITO treated the sum as liable to income-tax during that year on the basis that the income accrued to the assessee (**Hindustan Housing**) on the date of the award.

The assessment was confirmed by the Appellate Assistant Commissioner of Income-tax on first appeal.

In second appeal by the assessee (**Hindustan Housing**) before the Income-tax Appellate Tribunal, the assessee raised a contention that in any event the amount did not accrue to the assessee as its income during the relevant previous year ended March 31, 1956. The Appellate Tribunal, accepted the assessee's contention that the sum of Rs.7,24,914 was not taxable in the assessment year 1956-57 and allowed the appeal accordingly by its order dated February 22, 1964.

At the instance of the Revenue, the Appellate Tribunal referred the question of law set out earlier to the Calcutta High Court for its opinion, and by its judgment dated January 9, 1973 the High Court answered the question in favour of the assessee and against the Revenue.

Thereafter the Revenue was is appeal before the Hon'ble Supreme Court of India and the following issue was involved in the said appeal:

ISSUE: Whether the Revenue can claim that the sum of Rs.7,24,914/- payable to the assessee (**Hindustan Housing**) as compensation can be said to have accrued to it as income during the previous year ended March 31, 1956 relevant to the A.Y. 1956-57.

DECISION: Several decisions were relied on which held that it was on the final determination of the amount of compensation that the right to such income in the nature of compensation would arise or accrue and till then there was no liability in present in respect of the additional amount of compensation claimed by the owner of the land.

The **Apex Court** thus held in the case of **Hindustan Housing (supra)**:

- That there was a clear distinction between cases such as the assessee's (**Hindustan Housing**), where the right to receive payment is in dispute and it is not a question of merely quantifying the amount to be received, and cases where the right to receive payment is admitted and the quantification only of the amount payable is left to be determined in accordance with settled or accepted principles. The Apex Court thereafter held that the High Court was right in the view taken by it and, therefore, the Revenue's appeal must be dismissed.
- That in the present case, although the award was made by the Arbitrator on July 29, 1955 enhancing the amount of compensation payable to the assessee, the entire amount was in dispute in the appeal filed by the State Government. Indeed, the dispute was regarded by the Court as real and substantial, because the assessee was not permitted to withdraw the sum of Rs.7,36,691 deposited by the State Government on April 25, 1956 without furnishing a security bond for refunding the amount in the event of the appeal being allowed. There was no absolute right to receive the amount at that stage.

It shall be clear from the above that the decision in the case of **Hindustan Housing (supra)** is clearly distinguishable on facts from the present case of the appellant.

Decision of Hindustan Housing (supra) distinguished:

Firstly, the case of **Hindustan Housing (supra)** was concerning the issue whether the extra amount of compensation amounting to Rs.7,24,914 was **income** arising or accruing to the assessee during the previous year relevant to the A.Y. 1956-57.

Whereas the issue involved in the appellant's case is whether the retention security deposit of Rs.71,21,635/- having become non recoverable (as there being receivables outstanding to the tune of more than Rs. 8 crores to the appellant, the Security Deposit of 71,21,635/- was no longer realizable at all) and thus written off during the relevant Assessment Year, was an allowable **expenditure** or not.

Thus the case of **Hindustan Housing (supra)** was concerning accrual and taxability of the **income** while the present case of the appellant was concerning the allowability of the **expenditure** incurred, both the cases therefore being on separate footing from each other.

Secondly, in the case of **Hindustan Housing (supra)** the right to receive payment was in dispute before the Court as although the award was made by the Arbitrator on July 29, 1955 enhancing the amount of compensation payable to the assessee, the entire amount was in dispute in the

appeal filed by the State Government and during this period of pendency, assessee was not permitted to withdraw the sum of Rs.7,36,691 deposited by the State Government on April 25, 1956 without furnishing a security bond for refunding the amount in the event of the appeal being allowed. There was no absolute right to receive the amount at that stage.

Whereas in the appellant's case the retention security deposit of Rs.71,21,635/- was to be deducted by Metro railways, Kolkata at the rate of 10% from the bills raised on it as and when they were raised. Ledger copy for such security deposit with Metro Railways, Kolkata in the books of the appellant can be seen at **pages 505-509 of the paper book**. Thus in the appellant's case, the appellant having completed 90% of the work, its right to receive the retention security deposit (deducted by Metro Railways, Kolkata on the bills raised on it) had accrued and become absolute and crystallized during the relevant Assessment Year itself. It is not dependant on the outcome of the case of contempt and hence deduction claimed on write off, of the said retention security deposit (on having become non recoverable) is allowable at this stage.

Thirdly, since in the case of **Hindustan Housing (supra)** the right to receive payment was in dispute before the Court during the relevant A.Y. i.e. A.Y. 1956-57, therefore it was held by the Hon'ble Apex Court that the income was not received by the assessee during that year.

However in the appellant's case, during the relevant Assessment Year the non recoverability of the retention security deposit was not in dispute either before a Court or even otherwise as the appellant's bills more than Rs.8 crores were pending with Metro Railways, Kolkata during the relevant Assessment Year which were not paid. Therefore there was no way the retention security deposit of Rs.71,21,635/- would be paid by Metro railways, Kolkata. Thus the retention security deposit having become non recoverable and thereafter written off by the appellant during the relevant Assessment Year stands allowable during the relevant Assessment Year itself as it is not dependant on the outcome of any matter pending before the Court and definitely not on the outcome of the contempt case pending before the Court.

In view of the above the impugned alleged premises of the Id. CIT(A) for upholding the disallowance of the appellant's advances written off (in the nature of retention security deposit paid to Metro Railways, Kolkata) has no basis to stand.

E. Having submitted the above the appellant in summing up its contentions would like to submit that it is the case of the appellant that it has claimed the loss on account of non-receipt of refundable trade advance as loss incidental to business within the scope of **section 28 r.w. section 37 of the Income Tax Act, 1961**.

Section 28 of the income tax Act, 1961 imposes a charge on the profits or gains of business or profession. The expression '*Profits and gains of business or profession*' is to be understood in its ordinary commercial meaning and the same does not mean total receipts.

What has to be brought to tax is the net amount earned by carrying on a profession or a business which necessarily requires deducting expenses and losses incurred in carrying on business or profession.

Thus, what is relevant for claiming write off of advances is that

- (i) the said advance should not of capital in nature and
- (ii) the same should have been incurred wholly and exclusively for the purpose of the business.

In the case of the appellant, as explained above, these two conditions are undisputedly well existed, entitling it to adjust the loss occurred in relation to the operation of business with its income as per provisions of **section 28 r.w. section 37 of the Income Tax Act, 1961.**

In view of the above facts of the case of the appellant, it places reliance on the following authorities, the ratios of which are squarely applicable to the facts and circumstances of the appellant's case.

- ***Badridas Daga vs. CIT (1958) 34 ITR 10 (SC):***

According to this decision, in assessing the amount of profits and gains liable to tax, one must necessarily have regard to the accepted commercial practice that deduction of such expenses and losses is to be allowed, if it arises in carrying on business and is incidental to it.

It was held as under:

“While section 10(1) of the Indian Income-tax Act, 1922, imposes a charge on the profits or gains of a business, it does not provide how these profits are to be computed. Section 10(2) enumerates various items which are admissible as deductions but they are not exhaustive of all allowances which could be made in ascertaining the profits of a business taxable under section 10(1). Profits and gains which are liable to be taxed under section 10(1) are what are understood to be such under ordinary commercial principles. When a claim is made for a deduction for which there is no specific provision under section 10(2), whether it is admissible or not will depend on whether, having regard to accepted commercial practice and trading principles, it can be said to arise out of the carrying on of the business and be incidental to it. The loss for which a deduction is claimed must be one that springs directly from the carrying on of the business and is incidental to it, and not any loss sustained by the assessee even if it has some connection with his business. If that is established, then the deduction must be allowed, provided that there is no provision against it, express or implied, in the Act.”

To reiterate, the appellant by entering into the Letter of Intent with Om Sai Assotech P. Ltd. had sub-contracted a work for comprehensive operation and maintenance of work assigned and in reference to that, the appellant had paid Rs.1,56,77,731/- to the various parties on behalf of the said sub-contractor. The said party failed to settle such amount and the appellant carried the matter to the High Court for getting back its trade advance given to business party. Therefore, loss resulting from fraud/cheating by the agent in a business is admissible as if it arises out of the carrying on of the business and is incidental to it.

Similar was the case with KMR wherein disputes arose and the contract and its dues being in dispute the Security Deposit having been forfeited was forced to be written off by the appellant.

Similar was the case in respect of refundable trade advance given to Govinda Infraproperty P. Ltd. in terms of an agreement for business development services which the party failed to

develop business for the appellant and also refused to refund the advance, as committed. In the case of other party Linton Distributors P. Ltd., the appellant had advanced Rs.1,17,50,000/- towards purchase of uniform and shoes for security guards. Neither the goods were supplied nor was the advance refunded despite best efforts.

Therefore, the loss incurred by the appellant due to fraudulent act towards breach of commitment was incidental to operation of the business and allowable as business expenditure. This is what has been held by the Hon'ble Supreme Court in the case of **Badridas Daga vs. CIT (supra)** by holding as under-

“Loss resulting from embezzlement by an employee or agent in a business is, however, admissible as a deduction under section 10(1) of the Indian Income-tax Act, if it arises out of the carrying on of the business and is incidental to it. It makes no difference in the admissibility of the deduction whether the employee occupies a subordinate position in the establishment or is an agent with large powers of management. It is a question turning on the facts of each case whether the embezzlement in respect of which deduction is claimed took place in the carrying on of the business.”

- **CIT vs. Mysore Sugar Co. Ltd. (1962) 46 ITR 649 (SC)**

In this case, the assessee, a sugar manufacturer, gave seedlings, fertilizers and money in advance to sugarcane growers to be adjusted towards price of sugarcane to be supplied latter. The assessee incurred loss for non-delivery of sugarcane and the said loss was allowed as trading loss and not as a capital loss.

For better appreciation, the finding of the Hon'ble Supreme Court is reproduced below:

“The assessee who carried on the manufacture of sugar used to advance seedlings, fertilisers and money to sugarcane growers under an agreement by which the growers agreed to sell the next crop of the sugarcane grown by them exclusively to the assessee at current market rates and to have the advances adjusted towards the price of the sugarcane to be delivered to the company. In a certain year owing to drought the sugarcane growers could not grow sugarcane and the advances remained unrecovered. A Committee appointed by the Government recommended that the assessee should ex gratia forgo some of its dues. The assessee accordingly waived its right in respect of Rs. 2,87,422 and claimed this amount as a deduction under sections 10(2)(xi) and 10(2)(xv) of the Income-tax Act. The question was whether the amount of Rs. 2,87,422 which was given up represented a loss of capital or was a revenue expenditure:

Held, that so far as the assessee company was concerned it was merely making a forward arrangement for the next year's crops and paying an amount in advance out of the price; there was no element of a capital investment in making the advance and the loss incurred by the assessee was, therefore, a loss on the revenue side and was deductible.”[Emphasis given]

- **CIT vs. National Bank Ltd. (1965) 55 ITR 707 (SC)**

The Hon'ble Supreme Court has held that u/s. 10(1) of 1922 Act (sec. 28 of 1961 Act), the trading loss of a business is deductible in computing the profits earned by a business. However, every loss is not deductible unless it is incurred in carrying out the operation of the business and is incidental to the operation. Whether loss is incidental to the operation of a business or not, is a question of fact to be decided on facts of each case, having regard to the nature of the operation carried on and the nature of risk involved in carrying them out. The degree of the risk or its frequency is not much relevant but its nexus to the nature of the business is material.

- ***Ramchander Shiv Narayan vs. CIT (1978) 111 ITR 263(SC)***

Taking into consideration the ratios of decisions of Hon'ble Supreme Court in the cases of *CIT vs. Badridas Daga (supra)* and *CIT vs. National Bank Ltd. (supra)*, the Hon'ble Supreme Court in this case has held that loss is deductible where there is a direct and proximate nexus between the operation and the loss or where the loss is incidental to it as, without the business operation and doing all that is incidental to it, no profit can be earned.

The relevant portion of the judgement is quoted below:

“It is to be remembered that the direct and proximate connection and nexus must be between the business operation and the loss. It goes without saying that a businessman has to keep money either when he gets it as sale proceeds of the stock-in-trade or for disbursement to meet the business expenses or for purchasing stock-in-trade and if he loses such money in the ordinary course of business, the loss is a deductible trading loss. It is immaterial whether the money is a part of the stock-in-trade, such as, of a banking company or a money-lender, or is directly connected with the other business operations. The risk is inherent in the carrying on of the business and is either directly connected with it or incidental to it.”

- ***Mohan Meakin Ltd. vs. CIT (2012) 348 ITR 109 (Del)***

The facts before the Hon'ble jurisdictional High Court were that the assessee was dealing in leather products and had made advance payments for import of materials to a supplier in the U.S.A. The advances were not adjusted or realised. The assessee was unsuccessful in its attempts for recovery. The Tribunal accepted the Revenue's objection that the write-off of such advances could not be the subject-matter of deduction for bad debt u/s. 36(1)(vii) of the Act. But the Hon'ble High Court found that it could be allowed as a business loss u/s. 37 of the Act. The High Court further found that giving such advance is a normal trade practice and that there was no reason for disallowing the same, when it was admissible even as a normal business loss. The held portion of the judgment is reproduced below:

“Held, allowing the appeal, that continuity of supply was essential to honour the agreement with C and it was to continue the business without any break that the advances were made to B. It was only on account of non-recovery of the huge amount from C that the work had to be cancelled and the supplies had to be abruptly stopped by the assessee and consequently production necessarily required to be stopped. Usually a manufacturer gives advances to the workers which are adjusted or carried forward against the works done by them. This was not an unusual practice. The advances made by the assessee in the case were certainly of a type which would be within the contemplation of the words “laid out or expended wholly and exclusively for the purposes of the business”. As no portion of the advances could be stated to be loss of capital

expenditure, and it being a plain case of business loss, it would certainly be allowable to be deducted under the provisions of section 37.”

In view of all the submissions made above it is humbly urged by the appellant before Your Honours’ that it’s claim of advances of written off, as disallowed by the Ld. AO and confirmed by the Ld. CIT(A) to the tune of **Rs.7,37,49,366/-** may kindly be allowed.

- **Disallowance of Rs.1,87,024/-u/s 14A of the Income Tax Act, 1961 read with Rule 8D(2) of the Income Tax Rules, 1962:**

As is evident the appellant earned exempt dividend income amounting to **Rs.6,525/-** during the relevant Assessment Year and made a suo moto disallowance of Rs.1,418/-u/s 14A of the Income Tax Act, 1961 r.w. Rule 8D(2) of the Income Tax Rules, 1962 for earning the said exempt income.

However the Ld. Assessing Officer disallowed **Rs.1,87,024/-u/s 14A of the Income Tax Act, 1961 read with Rule 8D(2) of the Income Tax Rules, 1962** over and above the suo moto disallowance of Rs.1,418/- offered to tax by the appellant as per Rule 8D(2) of the Income Tax Rules, 1962, which has been further upheld by the Ld. CIT(A).

In this connection the appellant would like to submit that the Ld. AO for the purpose of computing disallowance **u/s 14A of the Income Tax Act, 1961 r/w Rule 8D(2) of the Income Tax Rules, 1962** attributed disallowance of **Rs.87,234/-** as per **Rule 8D(2)(ii)** (where the proportionate interest expense is worked out on the basis of a prescribed formula – Interest Expense*Average Investment/Average Assets) and **Rs.1,01,604/-** as per **Rule 8D(2)(iii) of the Income Tax Rules, 1962** (which provides for attribution of 0.5% of the dividend yielding average investments).

Thereafter it is submitted that for the purpose of computing proportionate expenses as per **Rule 8D(2)(ii) of the Income Tax Rules, 1962** by applying the prescribed formula of Interest Expense*Average Investment/Average Assets, the Ld. AO has computed proportionate interest at a figure of Rs.87,234/-. However the exempt dividend income of Rs.6,525/- being earned from the investment in shares of **LIC Housing Finance Corporation Ltd.** which stood at a figure of **Rs.2,83,563/-** both as on 31.03.2015 and 31.03.2014, no interest bearing funds were invested during the relevant Assessment Year in earning the exempt dividend income and hence no interest expenditure can be attributed for disallowance **u/s 14A of the Income Tax Act, 1961 read with Rule 8D(2)(ii) of the Income Tax Rules, 1962.**

Therefore no disallowance on account of interest expense can be made in the appellant’s case under **Rule 8D (2)(ii) of the Income Tax Rules, 1962.**

Further as per **Rule 8D (2)(iii) of the Income Tax Rules, 1962** disallowance of 0.5% of the average value of investment is to be made. However **Rule 8D(2)(iii) of the Income Tax Rules, 1962** for the purpose of disallowance of 0.5% of the average value of investment envisages only those investments which yield dividend during the relevant Assessment Year.

In this regard reliance is placed on the decision of the **Hon’ble ITAT, Kolkata** in the case of **REI Agro Ltd., Kolkata vs. DCIT, Central Circle-XXVII, Kol, ITA No. 1331/Kol/2011** and

DCIT, Central Circle-XXVII, Kol vs. REI Agro Ltd., Kolkata, ITA No. 1423/Kol/2011 the **Hon'ble ITAT Kolkata**, wherein the following was held:

“Thus, not all investments become the subject-matter of consideration when computing disallowance under section 14A read with rule 8D. The disallowance under section 14A read with rule 8D is to be in relation to the income which does not form part of the total income and this can be done only by taking into consideration the investment which has given rise to this income which does not form part of the total income. Under the circumstances, the computation of the disallowance under section 14A read with rule 8D(2)(iii), which is issue in the assessee's appeal, is restored to the file of the AO for recomputation in line with the direction given above. No disallowance under section 14A read with rule 8D(2)(i) and (ii) can be made in this case.”

Further, on appeal by the Revenue before the **Hon'ble Calcutta High Court** against the order of the **Hon'ble ITAT, Kolkata** in the case of **REI Agro**, the appeal was again decided in favour of the assessee on **09.04.2014** holding the following:

“The Revenue has once again come up in appeal before us. Mr. Bhowmick, learned Counsel appearing for the appellant /Revenue drew our attention to a judgment of this Court in the case of Dhanuka & Sons Vs. Commissioner of Income Tax reported in 339 ITR 319.

Mr. Khaitan, learned Senior Counsel appearing for the assessee submitted that the judgment in the case of Dhanuka & Sons has no manner of application to the facts and circumstances of this case. In that case, the assessee was unable to produce any material before the authorities showing the source from which the shares were acquired. He contended that no such finding has been recorded by the Assessing Officer in this case. The Assessing Officer, as a matter of fact, did not record his dissatisfaction with the correctness of the claim made by the assessee. Therefore, the judgment cited by Mr. Bhowmick has not manner of application. We have considered the rival submissions and are of the opinion that on the basis of the judgment cited by Mr. Bhowmick, it cannot be said that the appeal raises any question or substantial question of law. The appeal is, therefore, not admitted and is, consequently, dismissed.”

Hence, the investment which gave rise to the dividend of Rs.6,525/- in the relevant Assessment Year being the shares of *LIC Housing Finance Corporation Ltd.* which stood at a figure of **Rs.2,83,563/-** both as on 31.03.2015 and 31.03.2014, disallowance u/s 14A r/w Rule 8D(2)(iii) of the Income Tax Rules, 1962 stands at **Rs.1,418/-** {0.5% of [(2,83,563 + 2,83,563)/2]}.

Thus the total disallowance in the appellant's case as per **Rule 8D(2) of the Income Tax Rules, 1962** comes to **Rs.1,418/-**.

69. On the other hand, ld. DR referred to each and every observation of the ld. CIT(A) and strongly relied upon the said order and submitted that there is a categorical finding as to why such advances cannot be allowed as business loss as the transaction is commercial or assessee was not able to substantiate the claim in the

light of various discrepancies found during the course of inquiry by the Assessing Officer in the remand proceedings which has been discussed threadbare by the ld. CIT(A).

DECISION

70. We have heard the rival submissions and perused the relevant finding given in the impugned orders and the material referred to before us. Though, we have incorporated the exhaustive submissions which are borne out from the records and also discussion made by the Assessing Officer in the remand report and Ld. CIT(A) in his order with a view to have a clear picture of the issues involved which are purely based on facts and evidences. First of all, even though assessee might have claimed as a bad debt in the profit and loss, but before the Assessing Officer as well as ld. CIT(A) the assessee claimed that it was actually a business loss in the normal course of carrying on business, as the advances were given to aforementioned parties during the course of business in the earlier years for the reasons mentioned above as business advance and then it was duly explained the circumstances in which these advances could not be recovered either due to dispute or for different various reasons as discussed above, and therefore, it was claimed as business loss while computing the profit and loss account for the year under consideration.

71. From the perusal of the discussion made above with regard to disallowance of claim advance written off which has been confirmed by the ld. CIT(A), it is seen that, firstly in the case of **Govinda Infraproperty Pvt. Ltd. (Govinda)** in whose account the assessee has written off the advance of Rs.3,92,00,000/-, there was an agreement between the assessee and the said party for the purpose of developing

the assessee's security business across the India wherein the assessee was required to pay service fee of 10% of the business value that service provider would generate for the assessee. In the agreement itself it was agreed by the service provider that it would generate business of Rs. 50 crore per year in the Financial Years 2011-12 and 2012-13 each and the invoice for the business development service would be raised by the service provider on realization of fees by the client from the business generated by the service provider. However, the service provider has requested for interim sum of Rs.4,15,00,000/- during the course of business as a refundable business advance /deposits, but thereafter there arose a dispute with the said party as assessee claimed that sufficient efforts were not made the said party for bringing the business and most of the efforts was made by the assessee. The nature of disputes along with various documentary evidences and the submission has been filed and discussed in the foregoing paragraphs with regard to each and every business development arrangement with Govinda Infraproperty. Nowhere has it been disputed that such an advance was not given nor it has been found that it was not a genuine transaction. The only reason given by ld. CIT (A) is that why such an advance was given and same has been rejected by the Ld. CIT (A) flimsy ground. Each and every point raised by the DCIT in response to inquiry u/s. 133(6) and the finding of the Assessing Officer in the remand report which has been followed by the ld. CIT (A) has duly been explained with cogent reasons and documents. Thus, it cannot be held that there was no business advance or there can be any iota of doubt that such advance had become irrecoverable which assessee has written off. Once, during the course of carrying out business any advance has been given for the

business purpose and the same was not being recovered or it had become irrecoverable due to dispute, then if it has been written off by the assessee, then such a loss has to be allowed in the computation of profit and loss account. It is a decision of the company or the businessman to write off such an advance. There are cogent reasons for non recovery and consequently any loss arising from such writing off cannot be questioned nor the prudence of the businessman and can be questioned as held by the Hon'ble Supreme Court in the judgment cited above. All the submission and explanation by the Id. counsel incorporated above are not only plausible explanation but also fully supported by documentary evidences filed before the authorities below. We are thus in tandem with the submission of the Ld. Counsel and accordingly, the loss claimed on such an advance given to Govinda Infraproperty is accepted and same is directed to be allowed.

72. Similarly, with regard to advance written off in the case of **Linton Distributors Pvt. Ltd.**, the assessee had entered into contract with the said party to secure more than 2600 sites of Quippo Telecom Infrastructure Limited by providing Care Taker/Security Guards to take the position over the sites. The company has also issued purchase order for supply of shoes for the said caretaker/security guards for which the copy of purchase order has also been placed in the paper book. As per the purchase order, there 5250 pieces of complete uniform @ Rs. 2000/- per set and 2625 shoes @ Rs. 480/- was ordered. The total purchase order amounting to Rs.1,17,50,000/- was agreed between the parties as per the terms and conditions of the purchase and supply 100% amount was to be given and if there was any defect in the material supply the same was also agreed to replace/remove at own cost of the supplier. The assessee in pursuance

of such purchase order had paid amount of Rs. 1 crore for which there is no dispute by the lower authorities. Thereafter from various exchange of letters and continuous update from the said party for the progress of orders as there was delay and concern over the status of the order, it is seen that certain disputes has arisen between the parties which has been explained from the exchange of letters placed in the paper book as incorporated above. It is also not in dispute that the Linton has also acknowledged the amount of Rs.1,05,00,000/-. Further, it was found that the fabrics so procured by Linton was not to the specification of the appellant and were sub-standard, and there further dispute to the supply of materials with regard to the quality and the Linton has also made a counter claim of loss of Rs.25 lacs. It then requested to increase the contract value by the said amount which was immediately opposed. The factum of the transaction and the dispute between the parties has been discussed in detail which was for more than four years and no work was done on the said order and accordingly the order was terminated resulting into loss to the assessee. Assessee in order to avoid long drawn litigation process hence decided to write off the advance on 27.03.2015. Again there is no dispute that the assessee did paid the amount for purchase order and also demonstrated that such an order was not carried out in the manner in which both the parties have agreed and serious dispute arose between the parties which force the assessee to write of the said advance given towards purchase order. Therefore, the loss claimed in this year cannot be held to be non genuine. Even the inquiry and observations made by the Assessing Officer u/s.133(6) had already been explained by the assessee in detail as incorporated above and also each and every observation of the Assessing Officer in the remand

report which has no adverse inference. Neither the Assessing Officer nor Id. CIT (A) can question the credibility of assessee whether the said party was capable of complying with the said order or did not had any experience or there is any inquiry leading to any finding that said party was itself bogus. Again the wisdom and the business prudence of the assessee cannot be questioned to test the said transaction on preponderance of probability when there is no adverse material against the assessee with regard to business dealing of the assessee with the said party. The reasoning given by the Id. CIT(A) for disallowing the said claim of loss cannot be accepted and the explanation and the submission given by the assessee with the documentary evidence as discussed above are accepted and hence the loss claimed with regard to advance paid to this party is allowed as business loss.

73. In the case of Om Sai Assotech Pvt. Ltd., again it was on account of works contract awarded by the appellant executed by M/s. Environ Energy Pvt. Ltd. for comprehensive operations and maintenance of sites in Rest of West Bengal (ROWB) circle maintained by VIOM Networks. This company was engaged in the business of undertaking civil contract and maintenance works. The assessee company in order to sub-contract the work awarded by Environ Energy had entered into agreement with Om Sai for comprehensive operations and maintenance of Passive Infrastructure of sites in ROWB Circle. The letter of award clearly defines the scope of services required to be undertaken by Om Sai and also provided for the payment terms required to be made by the appellant. During the course of process of execution of the contract, payment was made by the assessee-company and Environ Energy to the sub-contractors and vendors of Om Sai and has also made payments towards statutory dues which

has been incorporated above. Various invoices were also raised from time to time by the Om Sai for the settlement of the said amount based on invoices and payments aggregating to Rs.468.59 lacs was made after the payment as per the demand raised by the Om Sai, it was discovered that due to certain defaults and short comings of Om Sai in the execution of the work Environ Energy had made certain deduction for which the assessee after making repeated request and series of discussion managed to get the said deduction/penalty reduced. The assessee also realized that certain excess payments were made by the appellant on behalf of Om Sai as discussed above. The assessee requested and duly informed Om Sai about the proposed deduction and liability towards the sub-contractor which were discharged by the assessee on its behalf, however, Om Sai failed to settled the accounts and there arose a dispute between the assessee and Om Sai. There is a letter written by the assessee raising a final demand notice on 01.04.2014 calling upon it to make a payment of Rs.1,56,64,000/- towards the excess amount towards deductions proposed by Environ Energy. However, the said party did not make the payment. The assessee has also filed the suit against the High Court claiming the amount along with interest and OM Sai has filed a counter claim before the High Court against the assessee for recovery of sum of Rs.9.30 crores against the appellant. Thereafter, the assessee finally considered that there is no point going through for protracted litigation and took a business decision to write off the amount in its books. Such write off of loss is incidental to the business operation; therefore, we do not find any reason as to why such loss can be disallowed.

74. In so far as the issues raised in the remand report and the allegations of the ld. CIT(A) has been duly explained with proper facts

and evidences which has been discussed in the foregoing paragraphs, and therefore, in the light of the explanation given by the assessee, the finding and observation of the Id. CIT(A) is unacceptable and the same is rejected. Accordingly, the said loss given by the assessee on account of advance/payment made to Om Sai is allowed.

75. Lastly, with regard to Metro Railways Kolkata also there was notice inviting tender issued by Metro Railway Department Kolkata for (KMR) for 'Supply, installation, commissioning, operation & maintenance of IP based Surveillance system, Personal Baggage Screening system and Explosive Detection & Disposal System at 23 Metro Railway station premises and Metro Rail Bhavan', in response to which the appellant company (BCL) had bid for the same. Having satisfied the technical parameters required under the NIIT and since the appellant's bid was the lowest, it was awarded the contract for 'Supply, installation, commissioning, operation & maintenance of IP based Surveillance system, Personal Baggage Screening system and Explosive Detection & Disposal System at 23 Metro Railway station premises and Metro Rail Bhavan', vide Letter of Acceptance issued on 25/02/2011. The Contract value of the work was at Rs.17,07,35,271/- . A total Security Deposit for the Contract @ 5 % of the accepted value of Rs.17,07,35,271/- being Rs.85,36,764/- was to be deposited. However, Rs.14,15,130/- being the Earnest Money Deposited (EMD) deposited with the offer was retained by KMR as part of the Security Deposit. Thus the balance amount of Rs.71,21,634/- was to be paid by the appellant to KMR as Retention Security Deposit. The said Retention Security Deposit of Rs.71,21,634/- was to deducted by KMR at the rate of 10% from the bills raised on KMR as and when they were raised. Ledger copy for such security deposit with KMR in the books of

the appellant can be seen at pages 505-509 of the paper book. Also, the appellant company was to immediately furnish the performance bank guarantee to the tune of Rs. 85,36,764/- equivalent to 5% of the Contract value. Another Letter of Acceptance dated 11/04/2011 was issued by KMR in continuation of the previous letter giving in details the description of works, units, quantities, etc. However, after a delay of almost four months from the date of issuance of the Letter of Acceptance, a Memorandum of Agreement dated 03/06/2011 ("MOA") was finally executed between the appellant and KMR whereby the appellant's scope of work included supply, installation, commissioning of Internet Protocol based Surveillance System, Personal and Baggage Screening System and Explosive Detection and Disposal System at 23 Metro Railway Station premises and Metro Rail Bhavan. The appellant was to maintain equipment at all locations as specified by KMR. The said contract would require deployment of manpower in the number of 145 personnel. The payment terms were as follows:

- (i) The KMR was to pay 70% of the value of supply against physical receipt of material in good condition in Railways store;*
- (ii) The KMR was to pay 10% of the value of supply and 80% of the value of installation in commissioning after successful installation;*
- (iii) The KMR was to pay 10% of the value of supply and 10% of the value of installation and commissioning after successful installation and commissioning on production of Acceptance Test Certificate;*
- (iv) The KMR was to pay remaining 10% of the value of supply and 10% of the value of installation and commissioning on production of Completion Certificate.*

However, later on, the assessee discovered that the said party had failed to carry out its obligation for providing the correct infrastructure in time to carry out the task/work assigned to it as discussed above it

has been stated that assessee had computed more than 90% of the contract work for which it has raised the bill of Rs.10,24,0930/- it has become receivable by the appellant. However, Rs. 8,34,59,446/- was only paid to the appellant and more than Rs.18949857/- was payable by KMR to the assessee. After repeated requests and reminders KMR, the KMR had failed and neglected to pay the aforesaid amount and in fact pointing out certain defects for doing unsatisfactory work the assessee-company thereafter decided that the deposit of Rs.71,21,634/- was no longer realizable at all and the same was treated as loss which was written off with the account. The entire detail and discussion about the manner in which the dispute had arisen and why the assessee was forced to write off the said deposit paid to the KMR has been discussed in detail in the foregoing paragraphs. The matter had also reached to stage of an arbitration as per the Hon'ble Kolkata High Court order and the consequence of written off had already been stated above. In a nutshell, there is no dispute that either the assessee's explanation is not correct or the transaction entered with KMR was not genuine.

76. Once assessee had any business transaction with any party during the course of which if assessee had incurred any loss and for which detailed justification and explanation has been given with documentary evidences, we failed to understand as to why such a loss can be disallowed once there is no controversial material or inquiry denied by the said party. Simply rejecting the explanation on flimsy grounds without any inquiry cannot be sustained. Accordingly, we do not find any reason to uphold such findings. Accordingly, the entire claim of advance written off of Rs.737,49,366/- is allowed.

77. Lastly with regard to disallowance of Rs.1,87,024/-, it is an undisputed fact that assessee has earned **exempt income of Rs.6,525** against which assessee had made suo moto disallowance of Rs.1,418 u/s.14A whereas the Assessing Officer has proceeded to make disallowance of Rs.1,87,024/- once since exempt income itself is Rs.6,525/-, the disallowance u/s.14A cannot exceed more than exempt income as held by Hon'ble Delhi High Court in the case of **Cheminvest Ltd. vs. CIT, (2015) 378 ITR 33** (Del) which has also been followed by the Hon'ble Delhi High Court in the case of **GVK Project Ltd. in ITA No.646/2018**. Thus, the disallowance made by the Assessing Officer is restricted to Rs.6,525/- and balance is deleted.

78. In the result, the appeal of the assessee is allowed.

Above decision was announced on conclusion of Virtual Hearing in the presence of both the parties on 8th October, 2021

Sd/-

[PRASHANT MAHARISHI]
[ACCOUNTANT MEMBER]

DATED: 08/10/2021

PKK:

Sd/-

[AMIT SHUKLA]
JUDICIAL MEMBER