IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BANGALORE BENCHES, BANGALORE
BEFORE S/SHRI CHANDRA POOJARI, AM & SMT. BEENA PILLAI, JM

ITA Nos. 3040 & 3041/Bang/2018
Assessment Years: 2013-14 & 2014-15

The Deputy Commissioner of Income-tax, Central Circle-1(3), 3rd Floor, C.R. Building, Queen's Road, Bengaluru-560 001.	**Vs.**	M/s. Coffee Day Global Limited, No.23/2, CoffeeDay Square, Vittal Mallya Road, Bengaluru-560 001. [PAN: AABCA 5291P]
(Revenue-Appellant)		**(Assessee-Respondent)**

Revenue by	Shri Muzaffar Hussain, CIT(DR)
Assessee by	Shri C. Ramesh, CA

Date of hearing	30/01/2020
Date of pronouncement	24/02/2020

O R D E R

Per CHANDRA POOJARI, AM:

These two appeals by the Revenue are directed against the different orders of the CIT(A)-2, Bengaluru dated 23/07/2018 and pertain to the assessment years 2013-14 and 2014-15.

2. The Revenue has raised following common grounds except for variation in figures:

(1) The order of the CIT(A) is opposed to the facts and position of the law.

(2) Whether on facts and circumstances of the case, the CIT(A) is erred in deleting the addition u/s. 14A r.w. Rule 8(iii) of Rs.3,25,375/- keeping in view that the decision relied upon by the CIT(A) in this regard viz. M/s.

Cheminvest Ltd. vs. CIT reported in 378 ITR 33 (Delhi) ha not become final and the Revenue's appeal is pending before the Supreme Court?

(3) Whether on facts and in circumstances of the case, the Ld.CIT(A is justified in deleting addition of Rs 13,66,95,452/- by not appreciating the fact that Coffee, beverage and food stuffs are not distinct and new articles or things within the meaning of section 32(1)(iia) & 2(29BA) and the disallowance made on additional depreciation u/s. 32(1)(iia) claimed by the assessee ought to have been upheld.

(4) Whether on facts and in circumstances of the case, the Ld.CIT(A) is justified in deleting aforesaid addition by observing that the AO has accepted the Assessee's claim for the earlier years on this issue whereas the said assessments were re-opened on the very same issue and pending for assessment as on date?

(5) Whether on facts and in circumstances of the case, the Ld. CIT(A) erred in allowing relief to the assessee on the interest capitalization towards work in progress of Rs.1,45,80,683/- ignoring the fact that in the order in ITA No.1501/Bang/2013 (assessee's appeal) dated 21.06.2017, the Hon'ble ITAT has decided the issue in favour of the Revenue?

(6) Whether on facts and circumstances of the case, the Ld. CIT(A) is justified in deleting addition of Rs.1,49,85,698/- by allowing expenditure related to establishment of outlets as revenue expenses instead of capitalizing the same.

(7) Whether on facts and circumstances of the case, the Ld. CIT(A) is justified in deleting addition of Rs.20,02,41,512/- by allowing the Forex Loss as a revenue expenditure ignoring the proviso to section 43A of the Act any adjustment can be done only on final settlement of the liability?

(8) The appellant craves leave to add, alter, amend or to delete any of the grounds of appeal.

3. The first common ground in both the Revenue's appeals, is general in nature and does not require adjudication.

4. The next common ground, Ground No. 2 is with regard to deletion of addition made u/s. 14A r.w. Rule 8D(2)(iii) of the I.T. Rules. at Rs.3,22,375 and Rs.3,47,125/- for the assessment years 2013-14 and 2014-15 respectively by placing reliance on the judgment of the Delhi High Court in the case of M/s. Cheminvest Ltd. vs. CIT (378 ITR 33). According to the Ld. DR, the decision of the Delhi High Court has not become final and the Revenue's appeal is pending before the Supreme Court. .

4.1 The facts of the issue as narrated in ITA No. 3040/Bang/2018 are that the Assessing Officer by placing reliance on the CBDT Circular No. 5/2014 dated 11/02/2014 quantified the disallowance u/s. 14A r.w.Rule 8D(2)(iii) of the I.T. Rules. The Assessing Officer considered the following investment made by the assessee for the purpose of disallowance u/s. 14A r.w. Rule 8D(2)(iii) of the Rules:

Name of the party	Year Ended 31.03.2014 Rs.	Year Ended 31.03.2013 Rs.
Classic Coffee Curing Works (Firm Capital)	2,52,02,305	2,52,02,305
Amalgamated Holding Ltd.	2,29,41,330	2,29,41,330
Ganga Coffee Curing Works Ltd.	1,12,81,274	1,12,81,274
Coffee Day Properties India (P) Ltd.	1,00,00,000	1,00,00,000
Total	6,94,24,909	6,94,24,909

4.1.1 The Assessing Officer noticed that all the investments above were in group companies/concerns and had been made in the interest of the business activity of

the assessee. Further, majority of the investments above were opening balances nd there were no fresh investments during the year.

4.2 Before the CIT(A), it was contended that the assessee had not incurred any expenditure in holding the investments above and also the investments were in the interest of business and not for earning any exempt income. It was submitted that the Assessing Officer had considered the investments in partnership firm namely, M/s. Classic Coffee Curing Works as having been made for the purpose of earning exempt income and had quantified disallowance u/s. 14A of the Act. It was submitted that the profits of the firm were taxed in the hands of the firm and what would be allocated was income which had already suffered tax and the share of profit from a registered firm of which the assessee was a partner cannot be considered as income exempt for invoking the provisions of section 14A of the Act. It was submitted that investment in a partnership firm cannot be treated on par with investment in equity, since a partner participates in the activity of the firm and the income earned is taxable in the hands of the firm. Further, it was submitted that if any expenditure is incurred, the same would be charged against the income of the firm and the question of a partner incurring any expenditure on behalf of the firm does not arise. According to the assessee, the situation would be different if certain expenditure is incurred by a share holder in connection with equity investments and such expenditure would be a charge on his income and not on the income of the company. It was submitted that in the case of a capital investment in a firm by a partner, the question of incurring any expenditure independent of

expenditure allowable in the hands of the firm would be incurred by the partner and hence, the question of invoking provisions of section 14A of the Act would not arise. Thus, it was submitted that a capital investment in a partnership firm cannot be considered on par with investment in equity and therefore. such investment cannot be considered as for the purpose of earning exempt income, all the more so for the reason that the profits of the partnership firm are taxed in the hands of the firm and hence, not taxed in the hands of the partner.

4.3 After considering the submissions, the CIT(A) observed that Assessing Officer had quantified the disallowance u/s. 14A of the Act by relying Board Circular No.5/2014 dated 11.02.2014 at 0.5% of the investment. The CIT(A) relied on the order of the Bengaluru Bench of the Tribunal in the case of M/s. J.P. Distilleries vs. ITO in ITA No. 470/Bang/2018 dated 29/06/2018 wherein the Tribunal held that when there is no exempt income no disallowance can be made under the provisions of Section 14A of the Act. The Tribunal had relied on the decision of the Delhi High Court in the case of CIT V. FS Energy Developments Co., Ltd 84 taxmann.com 86 and also Cheminvest Ltd V. CIT 378 1TR 33 (Delhi). Following the binding decisions of the Tribunal in similar situation, when there is no exempt income earned, no disallowance can be made under the provisions of section 14A of the Act, the CIT(A) deleted the disallowance of expenses for both the assessment years under the provisions of section 14A of the Act.

4.4 Against this, the Revenue is in appeal before us. The Ld. DR relied on the order of the Assessing Officer and grounds of appeals.

4.4.1 The Ld. AR relied on the judgment of the Supreme Court in the case of Pr. CIT vs. Caraf Builders & Constructions (P) Ltd. 11 Taxmann.com 322 wherein it was held that since the assessee had not earned any tax free income, corresponding expenditure could not be worked out for disallowance.

4.5 We have heard the rival submissions and perused the record. It is admitted fact that the assessee has not earned exempted income. In similar circumstances, the Bengaluru Bench of the Tribunal in the case of M/s. J.P. distilleries (P) Ltd. vs. ITO in ITA No.470/Bang./2017 dated 20/06/2018 held that where there is no exempt income no disallowance can be made under the provisions of section 14A of the Act. The same view was taken by the Delhi High court in the case of Cheminvest Ltd. vs. CIT (378 ITR 33) wherein it was held that the expression "does not form part of the total income" u/s. 14A of the I.T. Act envisages that there should be actual receipt of income which was not includible in the total income, during the relevant previous year, for the purpose of disallowance of any expenditure incurred in relation to the said income. In other words, section 14A of the Act would not apply if no exempt income was received or receivable during the relevant previous year. Since in the present case, the Assessing Officer has not brought on record any earning of exempt income so as to invoke the provisions of section 14A r.w. Rule 8D(2)(iii) of the Act, we are in agreement with the finding of the CIT(A) on this issue. Accordingly, this ground of appeal of the Revenue in both the appeals is dismissed.

5. The next common ground in both the appeals, Ground No. 3 is with regard to deletion of addition made u/s. 32(1)(iia) of the I.T. Act of Rs 13,66,95,452/- and Rs.12,88,15,686/- for the assessment years 2013-14 and 2014-15 respectively without appreciating the fact that coffee, beverage and food stuffs are not distinct and new articles or things within the meaning of section 32(1)(iia) & 2(29BA) of the I.T. Act.

5.1 The facts of the issue as narrated in ITA No. 3040/Bang/2018 are that the assessee is in the activity of manufacture and trading in coffee and allied products. Though the activity right from procurement to the sale of either the end product or coffee through its outlets is single activity, for the purpose of administrative and accounting convenience, depending on the activity carried on the following divisions have been identified:

(i) Café
(ii) Production, Procurement and Export Division (PPE)
(iii)Vending
(iv) Express Kiosks

The assessee had installed and used machinery in all these divisions for the manufacturing activity and the assessee claimed additional depreciation as follows:

Café	1,32,13,947
Vending	11,76,53,339
Express Kiosks	58,28,164
PPE	17,21,930

It was the case of the assessee that since the activity carried on are manufacturing in nature, the assessee was eligible for additional depreciation as claimed above. The Assessing Officer allowed additional depreciation on the PPE division. However,

he disallowed additional depreciation in respect of the other divisions listed out hereunder by placing reliance on the decision of the Supreme Court in the case of M/s. Indian Homes Co. Ltd. vs. ITO (112 taxmann 46): -

Café	1,32,13,947
Vending	11,76,53,339
Express Kiosks	58,28,164
	13,66,95,450

5.2 Before the CIT(A), the assessee contended that the major item of addition are the "B2C machines" installed in various corporate offices and institutions. They are also installed in cafe coffee day outlets, cafe coffeeday the lounge, cafe coffee day-the square outlet. It was submitted that the B2C machines means 'bean to cup' and the raw material for the machines is the roasted coffee beans. According to the assessee, the machines would convert bean to liquid coffee ready for consumption and the machines are capable of manufacturing varieties of liquid coffee as per the requirement of the customer. These machines are installed in Cafes and also various working places at the request of the corporate entities and organizations. Brochures having the details of the machinery and also explaining the functioning of the machinery were placed on record which formed major portion of the assets on which additional depreciation was claimed.

5.3 The assessee submitted that the other major item of machinery is basically used under the vending division or the vending machines and the entire machine is designed by the Coffee Tech Hub (CTH) using latest CAD software and is fully assembled/manufactured using all the components. The automatic coffee vending

machine is used in the day to day manufacturing and trading activity of the assessee company. It was submitted that in automatic coffee fine machine fresh coffee beans in required quantity is ground inside the machine black coffee in desired strength comes out of the outlet using sophisticated brewing mechanism and subsequently milk is also sucked inside the device and variety of drinks delivered. The assessee reiterated that the manufacturing activity of the assessee ranged from fabricating and assembling the coffee vending machine to the point of installation in various places and serving customers with liquid coffee fit for consumption. It was reiterated that the activity of the assessee was in the nature of manufacture or production of an article or thing and therefore, the assessee was eligible for additional depreciation as contemplated under the provisions of section 32(1)(iia) of the Act.

5.4 The assessee submitted that the machineries used in express kiosks are also similar machineries and the machineries used in express kiosks are mainly thick shake machines and coffee machines. Hence, this activity of the assessee is that of converting roasted bean coffee to liquid coffee for consumption. In addition to the above machineries, the Ld. AR submitted that in cafes machineries like coffee machine, mixers, grinders etc., are also used. It was submitted that all the above machineries are used in the manufacturing activity of the assessee It was submitted that depreciation was therefore rightly claimed.

5.5 It was submitted that the Assessing Officer had allowed additional depreciation on the machineries installed in PPE division considering the activity of the PPE

division as that of manufacture. It was submitted that the PPE division carries on the activity of procuring raw coffee and processing for export which involves various operations like storage, drying, hulling/pealing/polishing, grading, colour sorting etc, of raw coffee beans. These activities have been considered as manufacturing activity for the purpose of the provisions of section 32(1)(iia) of the I.T. Act and additional depreciation claimed has been allowed. The Supreme Court in the case of Aspin Wall & Co., V. CIT (2001) 251 ITR 323 had held the following processes as manufacturing activity for the purpose of 32(1)(iia) of the Act.

i) Receipt of coffee from the estates
ii) Storage of coffee in covered godowns
iii) Drying of coffee to the required standards prescribed by the coffee board in drying yards
iv) Hulling/pealing/polishing
v) Grading of coffee mechanically
vi) Colour sorting
vii) Garbling and manual grading
viii) Out-turning of garbled coffee
(ix) Bulking

Thus, the assessee submitted that the activities carried out by the other units like café vending and express kiosks are to be considered as manufacturing activity for the purpose of the provisions of section 32(1)(iia) of the Act.

5.6 The assessee referred to the word manufacture which is defined in the provisions of section 2(29BA) of the Act as follows:

> "29BA 'manufacture' with its grammatical variations, means a change in a non-living mechanical object or article or thing –
>
> (a) Resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use or

(b) Bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure."

5.7 Thus, it was submitted that all the activities in respect of machineries in each of the divisions above are covered by the definition of manufacture under the provisions of section 2(29BA) of the Act. It was submitted that the above machineries are eligible for additional depreciation and the Assessing Officer had erred in disallowing the same.

6. On appeal, the CIT(A) after considering the submissions of the assessee held that the company was eligible for additional depreciation as claimed and directed that the same be allowed. According to the CIT(A), under the circumstances, converting raw coffee beans which are not fit for human consumption as such to 'liquid coffee' which is fit for human consumption has to be considered as manufacturing activity, as it is an irreversible process producing different marketable product fit for human consumption. Considering the fact that the same being a irreversible process, the CIT(A) concluded that there is a change in the chemical composition of the product. Alternatively, one cannot say that the same is not a 'processing'. In the light of this fact, the CIT(A) was of the view that the machinery like coffee making machine, vending machine, express kiosks etc., on which the additional depreciation was claimed by the assessee cannot be rejected. In the light of the various decisions relied upon by the assessee which are squarely on the concept of manufacture for the purpose of the provisions of section 32(1)(iia) of the Act, the CIT(A) was of the view that the reliance placed by the AO on the judgment of Supreme Court cite supra which was in the context of the

provisions of section 32A & 80J of the Act, was not appropriate. According to the CIT(A), the position of law has changed and the allowance, in the instant case, is under a different provisions of the Act. Before the CIT(A), it was further submitted that, even for the A.Ys.2011-12 & 2012-13, there was a connected claim of additional depreciation under the provisions of section 32(1)(iia) of the Act in respect of the very same assets. This issue was examined by the Assessing Officer and claim was allowed in the orders u/s. 143(3) of the Act, dated 30.03.2015 and 19.03.2015 respectively. The CIT(A) observed that on some of the machinery additional depreciation was claimed at 50% of the rates, for the A.Y.2012-13, since such machinery were installed and used for a period, less than 180 days. According to the CIT(A), the balance 50% additional depreciation in respect of this machinery was claimed for the A.Y.2013-14. Since, the issue of allowability of additional depreciation was examined and allowed in scrutiny assessments for the A.Y.2012-13, the CIT(A) held that the balance of 50% is to be allowed for the A. Y.2013-14.

6.1 Against this, the Revenue is in appeal before us. The Ld. DR relied on the order of the Assessing Officer.

6.2 The Ld. AR submitted that the Assessing Officer had disallowed additional depreciation solely relying on the decision of Supreme Court in the case of M/s.Indian Hotels Co., Ltd V. ITO (2000) 112 Taxmann 46 (SC). The Ld. AR submitted that the decision of Supreme Court was in the context of deductions under the provisions of section 80J/32A of the Act and has no relevance to the provisions of section 32(1)(iia) of the Act. It was also the claim of the Ld. AR that

the time of the decision of the Supreme Court in the case of M/s. India Hotels Co., Ltd. cited supra, the word manufacture was not defined under the provisions of the act. As of now, the word has been defined under the provisions of section 2(29BA) of the Act and the judgment of the Supreme Court is no longer relevant. It was submitted that the allowability of additional depreciation has to be considered in the context of definition of the word "manufacture" as provided for under the provisions of section 2(29BA) of the Act. The Ld. AR relied on the ratios laid down in the following judgments, justifying the claim of additional depreciation:

1. DCIT, Circle-11(1), Kolkata v. Bengal Beverages (P) Ltd (2017) 87 Taxmann.com 103(Kolkata-Trib)
2. D.J. Stone Crusher Vs. CIT (2010) 229 CTR 195 (HP)
3. CIT, Shimla Vs. Smt.Supriya Gill (2013) 31 Taxmann.com 69 (HP)
4. Lucky Mineral (P) Ltd V. CIT (2000) 162 CTR (SC) 404 : (2000) 245 ITR 830 (SC)
5. Poabs Rock Products (P) Ltd V. ACIT,Circle-1, Thiruvalla (2013) 40 Taxmann.com 302 (Cochin -Trib)
6. Kores India Ltd. vs. CCE (2004) 174 ELT 7 (SC)
7. M/s.Aspin Wall & Co.. V. CIT (2001) 251 ITR 323 (SC)
8. CIT V. Prabhudas Kishoredas Tobacco Products (P) Ltd (2006) 282 ITR 568 (Guj).
9. Commissioner of Sales Tax Vs. Dr.Sukhdeo (1969) 23 STC 385, 387 (SC).
10. CST Vs. Jagannath Cotton Company (1995) 99 STC 83, 86 (SC)
11. Devidas Goplakrishnan Vs. State of Punjab (1967) 20 STC 430 (SC)
12. CIT Vs. N.C.Budharaja & Co., (1993) 204 ITR 412 (SC)
13. CIT Vs. Shree Thriven! Foods (2015) 59 Taxmann.com 292 (HP)
14. Idandas V. Anant Ram Chandra Phadke AIR 1982 SC 127
15. CIT-7 V. Radio Today Broadcasting Ltd (2015) 64 taxmann.com 164 (Delhi).
16. Pr. Commissioner of Income Tax - 1 Vs. Vijay Pataka Synthetics (2015) 63 Taxmann.com 214 (Gujarat)
17. ITO, Ward-6(4), Surat V. Yash Creation (2015) 61 taxmann.com 358 (Ahmedabad-Trib)

6.3 The Ld. AR relied on the judgment of the Madras High Court in the case of CIT vs. M.R. Gopal 58 ITR 598 wherein it was held as follows:

"'Manufacture', as we find from Webster's Dictionary means: 'Anything made from raw materials by the hand, by machinery, or by art as clothes, iron utensils, shoes, machinery etc.; a manual occupation or trade; to produce by labour especially now, according to an organized plan and with division of labour and usually with machinery'. It seems to us to be unarguable having regard to the meaning of manufacture that the progress employed in converting boulders into small chips of stones with the aid of labour and machinery is not a manufacturing process. Surely labour is employed and something is converted into something else; a product which is of value and is used, and in that sense the chips are a new production as a result of a manufacturing process."

6.5 The Ld. AR also relied on the following judicial pronouncements:

1) DCIT vs. Bengal Beverages (P) Ltd. 87 taxmann.com 103 (Kolkata – Trib.)
2) ACIT vs. Gamma PizzaKraft (P) Ltd. (61 taxman.com 199 (Delhi-Trib.)

Thus, the Ld. AR submitted that the assessee was eligible for additional depreciation under the provisions of section 32(1)(iia) of the Act as claimed.

6.3 We have heard the rival submissions and perused the record. Now the question before us is whether storing, drying of coffee, hulling, pealing, polishing, grading, colour sorting, garbling and manual grading, out-turning of garbled coffee and bulking thereby turning to liquid coffee is a manufacturing activity or not and whether it falls under section 2(29A) of the I.T. Act which resulted in manufacturing of object or article and bringing a distinct new product with different commercial composition or individual structure. In the present case, converting raw coffee beans which are not fit for human consumption as such to 'liquid coffee' which is fit for human consumption has to be considered as manufacturing activity, as it is an irreversible process producing different marketable product fit for human consumption. It came to that position by storing, drying of coffee, hulling, pealing,

polishing, grading, colour sorting, garbling and manual grading, out-turning of garbled coffee and bulking, thereby, the same being a irreversible process, there is a change in the chemical composition of the product. Alternatively, one cannot say that the same is a 'processing'. It amounts to production and manufacture of a distinct commercial product different from original product. In view of this, the machinery like coffee making machine, vending machine, express kiosks etc., which are used for such activities, on which the additional depreciation was claimed by the assessee is to be allowed. It would be relevant to reproduce the relevant provision i.e. section 32(1) (iia) of the Act:

> "32(1)(iia) In the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing or in the business of generation or generation and distribution of power, a further sum equal to twenty per cent of the actual cost and such machinery or plant shall be allowed as deduction under clause (ii):
>
> Provided that no deduction shall be allowed in respect of-
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> (A) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or
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> (B) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or
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> (C) any office appliances or road transport vehicles; or
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> (D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year".

64 The Supreme Court in the case of Commissioner of Income-tax vs. N.C. Budharaja and Co. and another reported in [1993] 204 ITR 412, has held that for

determining whether manufacturing can be said to have taken place is where the commodity which is subject to the process of manufacturing can no longer be regarded as the original commodity but is recognized in a trade as a new and distinct commodity.

6.5 Reference needs to be made to the decision rendered in the case of Commissioner of Income-tax vs. Prabhudas Kishordas Tabacco Products P.Ltd reported in [2006] 282 ITR 568 (Guj), wherein it was held:-

> *"9. The tests to ascertain whether an activity amounts to manufacture or production of an article or thing have been laid down and reiterated by various decisions of the apex court and this High Court. Broadly, the requirement is that the raw material must be, in the first instance, subjected to a process of such a nature that it cannot be termed to be the same as the end-product after the raw material undergoes the process of manufacture, In other words, the goods purchased as raw material should go in as inputs in the process of manufacture and the result must be manufacture of other goods, The article produced must be regarded by the trade as a new and distinct article having an identity of its own, an independent market after the commodity is subjected to the process of manufacture. The nature and extent of the process would vary from case to case, and in a given case, there may be only one stage of processing, while in another case, there may be several stages of processing, and perhaps, a different kind of process at every stage. That with every process, the commodity would experience a change, but ultimately, it is only when the change, or a series of changes, bring about a result so as to produce a new and distinct article, that it can be said that the commodity used as raw material has been consumed in the manufacture of the end-product. To put it differently, the final product does not retain the identity of the raw material after it has undergone the process or processes of manufacture."*

6.6 Thus, the whole process of conversion of the raw material when leads to production of new article and when its character, use and nature also indicate complete transformation bringing into existence the new product altogether. The

assessee has rightly been allowed the benefit of additional depreciation by the CIT(A) .

6.7 In light of the discussion hereinabove, we hold that the ground raised in both the appeals by the Revenue is dismissed.

7. The next common ground, Ground No. 4 is with regard to deletion of aforesaid addition by observing that the AO had accepted the Assessee's claim for the earlier years on this issue whereas the said assessments were re-opened on the very same issue and pending for assessments as on date.

7.1 Since we have decided the issue by granting additional depreciation on merits in Ground No. 3 in both the assessment years , this ground of appeals for both the assessment years have become infructuous and dismissed as same. Accordingly, this ground of appeals of the Revenue is dismissed.

8. The next common ground, Ground No. 5 is with regard to allowing relief to the assessee on the interest capitalization towards work in progress of Rs.1,46,80,683/- for the assessment year 2013-14 and Rs.1,37,31,128/- for the assessment year 2014-15 ignoring the fact that in the order in ITA No.1501/Bang/2013 (assessee's appeal) dated 21.06.2017, the ITAT had decided the issue in favour of the Revenue.

8.1 The facts of the issue as narrated in ITA No.3040/Bang/2018 are that the assessee was in the business of manufacturing and trading in coffee and allied products with a turnover of Rs.1049,89,62,456/-. The assessee had more than

thousand and odd coffee shops with brand name Cafe Coffeeday which were being run by company to sell the products. The assessee had capital work in progress of Rs. 35,85,50,924/- as on 31.03.2013 which represented various coffee shops being setup for the purpose of business activity. The process of setting up generally took a period of two to three months and was put to use immediately thereafter. The capital work in progress is a running account. While concluding the assessment the Assessing Officer disallowed an expenditure of Rs.1,37,31,128/- calculated at 4.05% of the average work in progress on the ground that, till the shops are not put to use and not transferred from work in progress to fixed assets, the corresponding interest expenditure needs to be capitalized. The Assessing Officer disallowed the expenditure quantifying the same notionally with a finding that the said expenditure to the extent quantified above needs to be capitalised.

8.2 On appeal, the CIT(A) deleted the addition for the reason that this issue was the subject matter of appeal in the assessee's own case for the A.Ys.2011-12 and 2012-13. The CIT(A) passed an order in ITA Nos.19 & 20/CIT(A)-1/Co/15-16 dated 20.12.2016 holding that the interest attributable to capital work in progress cannot be considered as capital in nature and has to be allowed as revenue. In the light of the judgment of the Supreme Court in the case of Vardhaman Polytex vs.CIT 349 ITR 690 on definition of expansion and also in the light of the decision of the Bangalore Bench of the Tribunal in the case of M/s.Emdee Apparels vs. ACIT 54 SOT 600, particularly considering the availability of interest free own funds, the

CIT(A) was of the view that there was no case for disallowing interest on estimated capital attributable to work in progress by treating the same as capital nature.

8.3 Against this, the Revenue is in appeal before us. The Ld. DR submitted that the Tribunal in its order in ITA No. 1501/Bang/2013 and 1586/Bang/2013 dated 21/06/2017 for the A.Y.2010-11 had decided the issue in favour of the revenue and therefore, the CIT(A) could not have allowed relief on this issue.

8.4 The Ld. AR submitted that the process of setting up new coffee shops is to increase the turnover of existing business activity of the assessee and the investments thereon cannot be considered as not for the purpose of business activity, which was already being carried on and the process of establishing new cafes was only expansion of an existing business. In the light of these facts, it was submitted that no interest on borrowed capital allegedly attributable to such work in progress can be disallowed.

8.5 The Ld. AR submitted that the issue is a covered matter in the order of ITAT, in ITA No.1501/Bang/2013 and 1586/Bang/2013 for the A.Y.2010-11 cited supra in favour of the revenue. The assessee is now before the High Court of Karnataka on this issue. Hence, the position as of now is that, consequent to order of the Tribunal the issue is decided in favour of the revenue for the A.Y.2010-11 and the matter however, is pending before the Hon'ble High Court of Karnataka.

8.6 It was submitted that the decision of the Tribunal for the A.Y.2010-11 cited supra was with reference to the facts of the said year and also on the basis of the

ratios of various decisions which were available as on that date. The CIT(A) for the A.Ys. 2011-12 to 2014-15 had allowed relief on the basis of case laws referred during the course of hearing and also in the light of ratios laid down by Supreme Court and various High Courts which were not before the Tribunal while the grounds for the A.Y.2010-11 was decided in favour of revenue. Under the circumstances, it was requested to reconsider the facts and merits of the case in the light of the following submissions:

> (1) The claim of interest on borrowed capital is allowable under the provisions of section 36(1)(iii) of the Act. The said provision reads as under -
>
> > 36(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the referred to in section 28.
> >
> > (i) .....
> > (ia) .....
> > (ib) .....
> > (ii) .....
> > (iia) .....
> > (iii) The amount of the interest paid in respect of capital borrowed for the purposes of the business or profession.
> >
> > Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset for extension of existing business or profession (whether capitalised in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.
> >
> > (iiia)..... "

(2) The Ld. AR submitted that the Assessing Officer in para 9.2 of the order stated that as per the provisions of the Act, all costs which are incurred in bringing the capital asset into operational use need to be necessarily capitalized. The above finding is not as per the provisions of section 36(1)(iii) of the Act. The interest on borrowed capital is to be allowed as revenue once the business has commenced irrespective of the fact as to whether such borrowed funds are utilized for either revenue purposes or for capital purposes, unless the case falls under the proviso above which was introduced by Finance Act 2003 w.e.f A. Y.2004-05.

(3) The proviso above was introduced by Finance Act 2003 w.e.f A.Y.2004-05. On the issue of allowability of interest under the provisions of section 36(1)(iii) of the Act, the ratios laid down by the Hon'ble Supreme Court is that interest on borrowed capital is to be allowed as a deduction, once such borrowed capital is for the business or profession, irrespective of the fact that such borrowed funds are utilized either for revenue expenditure or for capital expenditure. In the case of the assessee the fact that the borrowed funds are for the purposes of business activity is not disputed. Under the circumstances, it was submitted that no portion of the interest on borrowed capital could have been disallowed under the provisions of the Act.

(4) Reliance was placed on the judgment of Supreme Court in the case of M/s.Vardhaman Polytex Ltd Vs. CIT (2012) 349 ITR 690 (SC) on the issue wherein it was held as follows:.

"whether interest paid in respect of borrowings for acquisition of capital assets not put to use in the concerned financial year can be permitted as allowable deduction under section 36(1)(iii) of the income tax act 1961."

The question has been answered in favour of the assessee.

(5) The Ld. AR relied on the judgment of the Supreme Court in the case of DCIT Vs. Core Health Care Ltd (2008) 298 ITR 194 wherein it was held as follows:

"Section 36(1)(iii) of the income tax act, 1962, has to be read on its own terms; it is a code by itself. It makes no distinction between money borrowed to acquire a capital asset or a revenue asset. All that the section requires is that the assessee must borrow capital and the purpose of the borrowing must be for business which is carried on by the assessee in the year of account. Unlike section 37 which expressly excludes an expense of a capital nature, section 36(1)(iii) emphasizes the user of the capital and not the user of the asset which comes into existence as a result of the borrowed capital. The legislature has, therefore, made no distinction in section 36(1)(iii) between "capital borrowed for a revenue purpose" and "capital borrowed for a capital purpose". An assessee is entitled to claim interest paid on borrowed capital provided that the capital is used for business purpose irrespective of what may be the result of using the capital which the assessee has borrowed."

(6) The Ld. AR submitted that as far as the position of law in regard to the provisions of section 36(1)(iii) of the Act is concerned the interest on borrowed capital is to be allowed as a deduction irrespective of the fact as to whether such borrowed capital is utilized for a revenue expenditure

or for acquiring a capital asset whether put to use or not, once the business activity has commenced and is in progress.

(7) The Ld. AR submitted that from A.Y.2004-05 the following proviso has been introduced below the provisions of section 36(1)(iii) of the Act.

> *"Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset for extension of existing business or profession (whether capitalised in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction."*

(8) The Ld. AR submitted that consequent to introduction of the above proviso, the law has differentiated situations such as acquisition of asset out of borrowed funds for extension of existing business or otherwise. In the case of the assessee the setting up of new coffee shops are not in the nature of extension of an existing business. The assessee was in the business of selling its coffee products through various outlets/coffee shops identified as Cafe Coffee Day. As an ongoing process the coffee shops were setup in various places regularly. Till the coffee shops are complete and put to use, such investment would be temporarily shown under capital work in progress. The amount spent on capital work in progress is not with reference to extension of an existing business which is only in the nature of expansion. On this issue the Ld. AR relied on the decision of ITAT Bangalore Bench 'B' in the case of Emdee Apparels Vs. ACIT (2012) 54 SOT 600 which was with reference to A. Y.

2006-07 which is after the introduction of the proviso to section 36(1)(iii) of the Act. The assesses was in the business of retail trading of Reebok Footwear. The assessee was setting up new show rooms. The issue involved was as to whether the expenditure incurred in connection with setting up such show rooms is revenue or capital. Relying on the following decisions, the Tribunal held that setting up of new show rooms in an existing business of retail trading is expansion of the business and not extension:

i) CIT V. Sakthi Sugars Ltd (2010) 194 Taxman 91 (Mad)
ii) Digital Equipment India Ltd V. Dy. CIT (2006) 103 TTJ 329 (Bang - ITAT)

iii) CIT V. Escorts Finance Ltd (2006) 155 Taxman 559 (Delhi)
iv) Fition Hotel V. ITO (2008 40-A BCA) 293 - ITAT- Mumbai)
v) CIT V. Rex Talkies (1984) 148 ITR 560 (Kar)
vi) CIT V. B.V.Ramachandrappa & Sons (1991) 191 ITR 34 (Kar)
vii) CIT V. HEDE Consultancy (P) Ltd (2003) 127 Taxman 597 (Bom)
viii) CIT V. Bharat Commercial Corpn., (1997) 226 ITR 242 (Pat)
ix) Banashankari Medial & Oncology Research Centre Ltd V. Asstt. CIT (IT Appeal No.1217/Bang/07) (Bang- ITAT).
(x) CIT vs. Reliance Industries Ltd. 102 taxmann.com 218 (SC).
(xi) CIT vs. Mangalam Cement Ltd. 99 taxmann.com (Raj. HC)

(9) The Ld. AR submitted that even after introduction of proviso to section 36(1)(iii) of the Act, the investment in capital work in progress cannot be considered as in the process of extension of an existing business and no interest on borrowed capital can be disallowed. It

was reiterated that the process is only that of expansion of an existing business and not extension.

(10) The Ld. AR submitted that the concept of extension of an existing business has been discussed and parameters have been laid down in the various decisions of High Courts and also Supreme Court. The Ld. AR relied on the recent judgment of Supreme Court in the case of Commissioner of Income Tax Vs. Monnet Industries Limited (2012) 25 Taxmann.com 236 which deals with the issue of interest on borrowed capital utilised for acquisition of asset in the case of extension of existing business. The facts of the case are that M/s. Monnet Industries Limited was having a ferro alloys manufacturing unit. It set up a sugar plant at a different place out of its borrowed fund. There was unity of control and management in respect of both plants and there was also intermingling of funds and dove-tailing of business. Under the circumstances, it was held that setting up a sugar plant was considered as an act of extension of existing business of the assesses, i.e., running a ferro alloys manufacturing unit.

(11) It was submitted that in the case of the assessee the work in progress does not represent any investment in the nature of setting up a new business. The work in progress as explained is in the nature of coffee shops which are at different stages of completion and required

for expanding the activities of an existing business which resulted in increased turnover and corresponding profits of the same business.

(12) Under the circumstances, it was submitted that even considering the proviso introduced w.e.f A.Y.2004-05, interest on work in progress cannot be capitalized under the provisions of the Act. The expenditure, if any, has to be allowed as revenue.

(13) The Ld. AR also relied on the decisions of the Mumbai Bench of the Tribunal in the case of Divan Chand Ram Saran Industries (P) Ltd V. ACIT, Mumbai (2016) 68 Taxmann.com 181 (Mum Trib). In the context of the issue of expansion of an existing business, the Tribunal held as under:

> *"It can be said that when the assessee acquired new rigs, these rigs became available for hire from the time these rigs were acquired by the assesses as the assessee is in a position to charter hire these newly acquired rigs and these rigs are available and ready to be put to use from the time these rigs are acquired by the assessee in its continuing and existing business of chartered hiring of rigs, the said existing business of chartered hiring is admittedly already set-up in the earlier years. With the import of these new rigs it cannot be said that the new business is set up or new source of income has come into existence rather it is the same old business of chartered hiring of rigs which is existing and continuing, rather there is an expansion or capacity addition through these newly acquired four rigs in the same business of charter hiring of rigs which was carried on the assessee company admittedly since earlier years. The business and source of income of the assessee company is same and continuing. Thus, the mobilization expenditure are incurred in connection with newly acquired rigs prior to the completion of mobilization of rigs, commissioning of rigs and rigs becoming operational at client's site. The said mobilization expenditure so disallowed by the authorities below even in the interregnum period before mobilization being completed and the rigs getting commissioned and operational at*

client site cannot be held to be capital expenditure rather these mobilization expenses with respect to new rigs imported by the assessee by way of expansion of existing and continuing business of charter hiring of rigs are revenue expenditure in nature keeping in view that the said new rigs are available for charter hire and ready to be put to use once the said rigs are acquired by the assessee and that the same business of charter hiring of rigs is continuing and no new source of business having been come into existence, as the business or the source of income is already set-up by the assessee admittedly in the preceding years and is in existence which is a continuous and existing business of the assessee, and these mobilization expenses are to be treated as revenue expenditure as these expenses are incurred after the business is being set-up and is not a capital expenditure as the rigs after acquisition are available for hire and ready to be put to use, i.e., giving them on charter hire. Thus, these rigs which are imported are ready and available to be put to use being available for charter hiring after acquisition by the assessee so far as assessee concerned as the same are available for being given on charter hiring from the time the rigs are acquired by the assessee and are merely to be moved to and installed at the site of the clients desirous of taking the same on hire for oil drilling, so that all the mobilization expenses which is in connection with these new rigs till these new rigs mobilization is completed and these rigs are installed at clients site and start commencing drilling of oil for the client is a revenue expenditure and not a capital expenditure. These new four rigs were acquired as an expansion of the existing business of the assessee to charter hire the rigs which was admittedly set-up in the earlier years and no new business had been set up with acquisition of these four new rigs nor any new source of income has come to existence as there is a unity of management, control and interlacing in the business of the assessee company, therefore, it is held that the mobilization expenses incurred by the assessee company is to be allowed as revenue expenditure."

(14) The Ld. AR submitted that the Tribunal held that the process of acquiring new rigs is in the nature of expansion of an existing business and therefore any expenditure incurred in connection with such acquisition cannot be held as capital. The ratio laid down by the Tribunal squarely applies to the facts of the assessee, as

business and source of income of the appellant company is same and continuing.

(15) The Ld. AR further relied on the decision of ITAT, Mumbai in the case of Reliance Wellness Ltd V. DCIT in ITA No.3444 & 4273/Mumbai/2013. In the said case, the assesses was engaged in the business of trading and merchandising goods and services. The assessee had already started its operations in various stores. The assessee was also in the continuous process of establishing new shops. The issue before the tribunal was the allowability of expenditure relatable to new shops being established. The Tribunal in this context held that the process of setting up new shops is expansion of an existing business and hence the expenditure incurred is allowable as revenue.

(16) On the same analogy, it was submitted that setting up of new shops is a part of the process of expansion of an existing business and hence interest on any borrowed capital attributable to such investments is to be allowed as revenue.

(17) Without prejudice to the submissions above that no portion of interest on borrowed capital is disallowable under the provisions of the Act, it was submitted that the assessee was in possession of the following funds which are interest free.

Share capital	61,40,50,597
Reserves & Surplus	690,67,43,157
	752,07,93,754

(18) It was submitted that the investment in the closing work in progress was hardly Rs.35,85,50,924/-. Since the assessee had huge interest free funds at its disposal which were enough to cover up the work in progress, there was no case for the Assessing Officer to presume that borrowed capital was utilized for the purpose of investment in work in progress. It was submitted that the borrowed funds had been utilized for the purpose for which they had been borrowed and there was no nexus between such funds and work in progress.

(19) The Ld. AR also relied on the following decisions wherein it was held that if the assessee is in possession of non-interest bearing funds exceeding the investments, it cannot be presumed that, borrowed funds have been diverted for such purpose and interest disallowed.

i) Commissioner of Income Tax V. Reliance Industries Ltd (2019) 102 Taxmann.com 52 (SC)
ii) Pr. Commissioner of Income Tax V. Basti Sugar Mills Co. (2018) 98 Taxmann.com 401 (Delhi)
iii) CIT V. Smt.Satish Bala Malhotra (2017) 79 Taxmann.com 50 (P&H)

8.7 Thus, the Ld. AR submitted that the work in progress under consideration was Rs.35,85,50,924/- as on 31.03.2013 which is far less than the funds available above. In the light of the ratios laid down in the decisions above, it was submitted

that considering substantial interest free funds available, it cannot be presumed that any portion of the borrowed funds were diverted for investments above. It was requested to consider the submissions above and reconsider the issue afresh for the A. Y.s 2013-14 and 2014-15.

8.8 We have heard the rival submissions and perused the record. We find that a similar issue came up for consideration before the Tribunal in the case of Maxim India Integrated Circuit Design Pvt. Ltd. vs. DCIT in ITA No.287/Bang/2014 dated 06/07/2019 wherein the issue was decided in favour of the assessee by holding as follows:

> "*From the above para reproduced from the Tribunal order, it comes out that if the borrowed funds are not used for extension of existing business and the same are used for continuation of the existing business only, then the proviso to section 36(1)(iii) of the IT Act is not applicable. In our considered opinion, purchasing of land for construction of new office premises cannot be said to be for extension of assessee's business and hence, in our considered opinion, in the facts of present case, this Tribunal order is applicable and hence, respectfully following this Tribunal order, we hold that the interest disallowance made by the A.O. is not justified because the funds were borrowed for continuance/expansion of existing business and not for extension of existing business and therefore the proviso to section 36(1)(iii) is not applicable in the present case because the amendment in this proviso was made by the Finance Act, 2015 w.e.f. 01.04.2016 as per which the words "for extension of" were omitted and therefore in our considered opinion upto Assessment Year 2015-16, the proviso is applicable in only those cases where borrowed funds was used for acquisition of asset for extension of existing business. In the present case, the Assessment Year involved is Assessment year 2009-10 and therefore, in the facts of present case, in the present year, this proviso is not applicable and hence, we delete this disallowance by respectfully following this Tribunal order rendered in the case of AT &T Global Network Services (India) Pvt. Ltd. vs. DCIT (supra). Accordingly, ground no. 4(b) is allowed."*

8.9 However, we find that this issue came up for consideration before this Tribunal in assessee's own case for assessment year 2010-2011 in ITA No.1501 & 1586/Bang/2013, wherein the Tribunal vide order dated 21.06.2017 held on this issue as under:-

> *"20. We have heard the rival submissions and perused the material on record as well as the case laws relied upon by the ld.AR. But the proviso to section 36(1)(iii) inserted by the Finance Act, 2003 w.e.f. 01.04.2004 is very relevant for this issue. As per the same, till the asset for which the loan is borrowed is put to use, interest is not allowable. The judgments cited by the learned AR are for the period before insertion of this proviso and hence, not relevant. Hence, there is no merit in these grounds of the assessee and therefore, rejected. Ground No.4 of Revenue is allowed."*

8.9.1 Further, it is to be noted that the Miscellaneous Application filed by the assessee in MA No.211 & 212/Bang/2017, the Tribunal dismissed the claim of the assessee vide order dated 06.12.2017. Hence, we have no option other than following the earlier order of the Tribunal in assessee's own case. Accordingly, this ground raised by the Revenue in both the appeals is allowed.

9. The next common ground in Revenue's appeals, Ground No. 6 is with regard to deletion of addition of Rs.1,49,85,698/- for A.Y. 2013-14 and Rs.1,50,73,998/- for A.Y. 2014-15 by allowing expenditure related to establishment of outlets as revenue expenses.

9.1 The facts of the case as narrated in ITA No.3040/Bang/2018 are that the AO out of the total expenditure incurred of Rs.5,56,17,277/- had held that

Rs.1,49,85,698/- is to be capitalized as attributable to setting up of new cafes asper accounting standard AS-10. Details of expenditure are as under:

Particulars	Amount (Rs.)	Allowed as revenue expenditure	Held as to be capitalized
Salaries	4,06,31,579	4,06,31,579	Nil
Travelling expenses	31,02,312	Nil	31,02,312
Conveyance expenses	28,85,578	Nil	28,85,578
Accommodation	19,64,326	Nil	19,54,326
Telephone/Mobile charges	7,39,818	Nil	7,39,818
Mobile & Data Card	2,82,701	Nil	2,82,701
Retainership fee	26,79,000	Nil	26,79,000
Generator maintenance	13,57,178	Nil	19,74,784
Security charges	19,74,784	Nil	19,74,784
Total	5,56,17,277	4,06,31,579	1,49,85,698

9.2 The Assessing Officer disallowed a portion of the expenses above as capital in nature for the reason that out of Rs.5.56 crs., Rs.4.06 crs. related to salaries and the balance of Rs.1,49,85,698/- related to other expenses on generator, mobiles etc. The Assessing Officer noticed that though employees could have been utilized for the other purposes relating to existing/operational cafes, the balance part is only relating mainly to the un-commenced care's actually not put to use and they are out and out capital items and calls for capitalization as it is contributing towards

expansion of the existing business. Hence, the Assessing Officer added back the amount of Rs.1,49,85,698/- to the income returned and accordingly, brought it to tax.

9.3 Before the CIT(A), it was contended that the expenditure above was a small portion of the total expenditure incurred during the previous year and only to the extent above were capitalized in the books as attributable to setting up new cafes and this treatment was only for the purpose of the books accounts as per AS 10 which is mandatory as per the company law. The assessee submitted that the expenditure above are in the nature of salary, travelling/conveyance etc., and which are revenue in nature. These are expenditure incurred in respect of the regular employees of the assessee company and the assessee is already carrying on the business activity and has declared substantial revenue/income. There are also small quantums like generator maintenance used for setting up coffee shops and security charges which are also revenue in nature. Under the circumstances, it was submitted that the above expenditure incurred in respect of the regular employees of the assessee company is allowable as revenue under the provisions of the Act. Accordingly, the expenditure was claimed as revenue in the statement of assessable income for the A.Y.2013-14.

9.4 On appeal, the CIT(A) deleted the addition by observing that the above expenditure consisting of salary, travelling/conveyance etc. is in the nature of revenue. The Assessing Officer had allowed the salary expenses but had disallowed the other expenses like travelling, conveyance, etc. which were linked to the above

expenditure and are of the same nature. Further, the CIT(A) observed that even for the AYs. 2011-12 and 2012-13 similar disallowances were made. The said disallowance was a subject matter of appeal before the CIT(A) and the CIT(A) had passed an order in ITA Nos.19 & 20/CIT(A)-1/CO/15-16 dated 20/12/2016, wherein considering the ratios laid down in the above decision, the disallowance was deleted. The CIT(A) held that expenditure is of such nature that there is no enduring benefit accruing to the assessee for incurring such expenditure. According to the CIT(A), the provisions of Income Tax Act also do not provide for capitalization of such expenses. The CIT(A) by relying on the decisions of the Bangalore Bench of the Tribunal in the case of EMDEE Apparels cited supra and the Mumbai Bench of the Tribunal in the case of Reliance Wellness Ltd. supra and the also considering the decision of the CIT(A) for the A.Ys. 2011-12 & 2012-13, held that the disallowance made in the impugned assessment order was not warranted, as the expenditure on setting up of new outlets being an expansion of the business, is an allowable expense. Accordingly, the CIT(A) deleted the disallowance under project expenses made by the Assessing Officer.

9.5 Against this, the Revenue is in appeal before us. The Ld. DR relied on the order of the Assessing Officer.

9.6 The Ld. AR relied on the decision of the Delhi Bench of the Tribunal in the case of Honda Siel Cars India Ltd Vs. CIT (2007) 109 ITD 1 wherein the Tribunal held as follows:-

"The assessee claimed deduction of the expenditure incurred in connection with the launch of new model of car manufactured by the assessee. The Assessing Officer found that the expenditure incurred was for travelling, training and seminar and the sale promotion of the new model of the car and disallowed the same on the ground that by incurring said expenditure, the assessee had obtained a benefit of enduring nature by way of establishing a car model in the automobile market. On appeal, the Commissioner (Appeals) upheld the disallowance on the ground that the new model car was going to be an asset and, therefore, the expenditure, related to the capital asset formation."

On second appeal:

There was no doubt about the fact that the assessee was already engaged in the business of manufacture of cars and the production had commenced about three years before. The new model of the car related to the same line of business which the assessee had been carrying on. The assessee had not set up a separate and independent unit to manufacture new model of the car. From the details of the expenses given, it was clear that the expenses related to travelling, training and seminar and advertisement, technical guidance fee, etc., of the on-going business. It is common knowledge that there is a cut through competition in the automobile market and the assessee was required to bring new models in the market in order to retain/capture market. Therefore, the expenditure incurred by the assessee in respect of on-going business was a revenue expenditure. The marketability of the new entirely depended on the sale promotion, holding of training and seminar so that new model was well received in the market.

9.7 The Ld. AR also relied on the decision of ITAT, Mumbai in the case of Reliance Wellness Ltd V. DCIT in ITA No.3444 & 4273/2013 wherein it was held as follows:

"6.1 From the submissions made by the assessee before the AO it is also clear that opening of stores at various places was one composite business of the assessee and in that course the assessee had started operation in its stores at Bangalore and Hyderabad. It was the contention of the assessee that operations of these stores at various locations is one composite business and once business had been started then the expenditure cannot be linked only to the stores which became operational during the year under consideration. Such submission of the assessee has not been controverted by the AO. All these details were submitted before the AO and it is not the case of the AO that assessee had not incurred such expenditure for its business. In the letter submitted by the assessee before AO it is clearly mentioned that when the expenditure is incurred for the purposes of expansion of business which is

already in existence and, which is in the nature of revenue, then the same is allowable as revenue expenditure irrespective of the treatment given by the assessee to such expenditure in its books of account. No material has been bought on record by the AO to negate such submissions made by the assessee. These propositions put forth by the assessee before AO are supported by the decision ITA No.3444/and 4273Mum/2013 of the Honble Bombay High Court in the case of CIT V/s Kothari Auto Parts Manufacturers Pvt Ltd (supra), and the decision of Honble Gujarat High Court in the case of CIT V/s Alembic Glass Industries Ltd (supra). Therefore, it has to be held that these expenditures incurred by the assessee are for the purposes of expansion of its business and those expenditure are in the nature of revenue (being mostly paid to employees). These are allowable in the year itself as per ratio of aforementioned decision of the Honble Bombay High Court in the case of CIT V/s Kothari Auto Parts Manufactures Pvt Ltd (supra) and Honble High Court of Gujarat in the case of CIT V/s Alembic Glass Industries Ltd (supra). These expenditures did not create any asset and also *did not provide enduring benefit to the business of the assessee so as to say that the expenditure was capital in nature Therefore, we hold that expenditure are allowable in the year under consideration irrespective of the fact that assessee has given dual status to such expenditure in its books of account vis-a-vis computation of income filed along with return."*

……."

"*16. In view of the foregoing discussions, we set aside the orders passed by Ld CIT(A) in both the years under consideration and direct the assessing officer to allow the impugned expenditure in both the years."*

9.8 The Ld. AR relied on the judgment of the High court of Punjab & Haryana in the case of CIT Vs. Max India Ltd (No. 1) (2016) 388 ITR 74 (P & H), wherein it was held as under:

"while determining whether two or more lines of businesses of the assessee are the same "business" or "different businesses" regard must be had to the common management of the main business and other lines of businesses, of trading organization, common employees, common administration, a common fund and a common place of business. For evaluating the "same business", the test of unity of control and the nature of business is to be applied. The Commissioner (appeals) after *appreciating the evidence produced on record had observed that various businesses carried on by the assessee including health care constituted the same business of the assessee. The Appellate Tribunal was right in law in allowing the expenses in*

setting up new business of Rs. 6,70,78,483/- treating it as revenue in nature."

9.9 The Ld. AR also relied on the following decisions:

i) Reliance Hypermart Ltd. vs. ACIT (ITAT, Mumbai)
ii) Olive Bar & Kitchen (P) Ltd. vs. DCIT 102 taxmann.com 98 (Mum Trib.)
iii)Daimler India Commercial Vehicles Pvt. Ltd., vs. DCIT 107 taxmann. com 243 (Mad.)

Thus, the Ld. AR requested the Tribunal to consider the submissions above.

9.9.1 We have heard the rival submissions and perused the record. The above expenditure consisting of salary, travelling/conveyance etc. is in the nature of revenue. The Assessing Officer had allowed the salary expenses but had disallowed the other expenses like travelling, conveyance, etc. which were linked to the above expenditure and are of the same nature and there is no enduring benefit accruing to the assessee for incurring such expenditure. The provisions of Income Tax Act also do not provide for capitalization of such expenses. The CIT(A) by relying on the decisions of the Bangalore Bench of the Tribunal in the case of EMDEE Apparels cited supra and the Mumbai Bench of the Tribunal in the case of Reliance Wellness Ltd. supra and the also considering the decision of the CIT(A) for the A.Ys. 2011-12 & 2012-13, held that the disallowance made in the assessment order was not warranted, as the expenditure on setting up of new outlets being an expansion of the existing business, is an allowable expense. Accordingly, the CIT(A) deleted the disallowance under project expenses made by the Assessing Officer. We do not find any infirmity in the order of the CIT(A) and confirm the order of the CIT(A). This ground of appeals of the Revenue is dismissed.

10. The next common ground in the Revenue's appeal, Ground No.7 is with regard to deletion of addition of Rs.20,02,41,512/- for A.Y. 2013-14 and Rs.32,85,70,301/- for A.Y. 2014-15 by allowing the Forex Loss as a revenue expenditure ignoring the proviso to section 43A of the Act any adjustment can be done only on final settlement of the liability.

10.1 The facts of the case as narrated in ITA No.3040/Bang/2018 are that during the previous year there was exchange fluctuation loss of Rs.20,02,41,512/- relatable to foreign currency loans. The loss represented both on actual repayment and also on reinstatement. The assessee all along recognized the gain/loss consequent to exchange fluctuation as revenue. The details of the gain offered as income and loss claimed as expenditure right from A.Y.2004-05 is as under: -

Assmt. Year	Gain offered as income	Loss claimed as expenditure
2004-2005	-	85,71,644
2005-2006	1,44,98,726	-
2006-2007	-	62,65,130
2007-2008	4,41,20,801	-
2008-2009	6,90,51,525	-
2009-2010	-	14,49,92,136
2010-2011	10,91,42,862	-
2011-2012	6,20,65,764	-
2012-2013	-	39,32,28,754
2013-2014	-	20,02,41,512

The Assessing Officer noticed that the judgment in the case of M/s. Woodward Governor India Pvt Ltd Vs. CIT (312 ITR 254) does not speak anything in the context of losses or gains on reinstatement of capital liabilities which does not attract or fall into the ambit of Sec. 43A of the IT Act, 1961 which means, the judgment in the case of M/s. Woodward Governor India Pvt Ltd Vs. CIT (312 ITR 254) does not apply to the facts of the instant case, as in the assessee's case, the issue involved is loss or gain on reinstatement of a capital loans that are not falling within the ambit of Sec 43A of the IT Act 1961 (i.e., here, the forex losses on ECB loans) were utilized for acquiring machinery in India and not abroad. The Assessing Officer also noticed that in the assessee's case the re-in-statement of capital loans does not fall within the ambit of section 43A of the Act.

10.2 Before the CIT(A), it was contended that the assessee had consistently followed this system of accounting and was accepted by the department upto A.Y.2011-12. As per the company law the treatment of exchange fluctuation gain/loss is governed by AS-11. Upto A.Y.2011-12 the exchange fluctuation gain/loss was recognized as revenue as provided for under AS-11. By way of a notification No.GSR-914(E), dated 29.12.2011, paragraph no.46A was notified which provided that, a company can exercise the option of capitalizing exchange fluctuation gain/loss in the books. Exercising such option the assessee capitalized the exchange fluctuation loss of Rs.39,32,28,754/- in the books for the A.Y.2012-13. The same accounting principle was continued for the A.Y.2014-15 also. The treatment was only for the purpose of requirement of company law. However, as far

as the provisions of Income Tax Act are concerned the expenditure was allowable as revenue and hence, claimed in the statement of total assessable income. Since, there were no assets acquired from outside India, the provisions of section 43A of the Income Tax Act were not applicable. Hence, the assessee submitted that the exchange fluctuation loss was in the nature of revenue expenditure.

10.3 The CIT(A) deleted the addition by observing that the assessee had been consistently treating the gain/loss as revenue. The CIT(A) observed that there are various occasions in the past wherein the similar gain had been offered as income and the same was accepted by the department from A. Y.2004-05 till A. Y.2011-12. According to the CIT(A), the AO, for the first time, disturbed the similar loss on Forex claimed by the assessee for the A.Y.2012-13 by making the disallowance of forex loss. The CIT(A) had deleted the addition in his order in ITA No.19 & 20/CIT(A)-1/CO/15-16, dated 20.12.2016, relying on the various judicial pronouncements and also based on the principles of consistency as the assessee's treatment of similar Forex Gain was accepted as income by the AO in earlier years. In the light of the ratios laid down by the Hon'ble Supreme Court in the cases above and also considering the principles of consistency and the order of CIT(A) for the A.Y. 2012-13, the CIT(A) held that the foreign exchange fluctuation loss here in the peculiar facts and circumstances, is an allowable revenue expense and deleted the addition made consequent to disallowance of expenditure of Forex Loss.

10.4 Against this, the Revenue is in appeal before us. The Ld. DR relied on the order of the Assessing Officer.

10.5 The Ld. AR drew our attention to the provisions of section 43A of the Act which reads as under: -

> *"43A. Notwithstanding anything contained in any other provisions of this Act, where an assesses has acquired any asset in any previous year from a country outside India for the purposes of his business or profession, and in consequence of a change in the rate of exchange during any previous year after the acquisition of such asset,..... ".*

The Ld. AR submitted that the provision can be invoked only when an assessee has acquired any asset from a country outside India. In the case of the assessee loans were in foreign currency but there were no assets acquired from a country outside India. Hence, the provisions of section 43A of the Act are not applicable.

10.6 The ld. AR relied on the judgments of the Supreme Court in justification of the claim that the exchange fluctuation loss is allowable as revenue:

i) Commissioner of Income Tax_V. Woodward Governor India (P) Ltd (2009) 312 ITR 254

The Supreme Court has given a finding that the exchange fluctuation loss as on the last day of the accounting year has to be recognized on accrual notionally and considered for expenditure U/s. 37 of the Act.

ii) CESC Ltd V. CIT (1998) 233 ITR 50 (SC).

The Supreme Court held that the value of an asset which is acquired out of foreign currency is the value as at the time of acquisition of the asset. The subsequent fluctuations in foreign exchange value would not affect the cost of the asset and hence such fluctuation has to be allowed as revenue.

Even after introduction of provisions of section 43A of the Act the position would not change if the assets are acquired in India. Provisions of section 43A of the Act would be applicable only when an assessee has acquired any asset from a country outside India and not otherwise.

(iii) Taparia Tools Ltd V. JCIT (2015) 55 Taxmann.com 361 (SC)

The Supreme Court held that the allowability of expenditure is as per the provisions of the Act and the treatment of such expenditure in the books of accounts is immaterial. There by the Supreme court has again confirmed its own decision in the case of M/s.Kedarnath Jute Manufacturing Co., Ltd V. CIT (1971) 82 ITR 363 (SC). It is therefore a decided position of law that, merely because a different treatment was given to an expenditure in the books, the assessee cannot be denied of such expenditure while computing the total income as per the provisions of the Act, if such expenditure is otherwise allowable as per the said provisions.

10.7 The Ld. AR also relied on the following case laws:

i) Likproof India Pvt. Ltd. vs. Addl. CIT
ii) Pr. CIT vs. Seagram Manufacturing Pvt. Ltd. 78 Taxmann.com 293 (Delhi)
iii) MFAR Hotels & Resorts Ltd. vs. ACIT (105 taxmann.com 335 (cochin Trib.)

iv) Baby Memorial Hospital Ltd. vs. ACIT 111 taxmann.com 189 (Cochin Trib.).

Thus, the Ld. AR requested the Tribunal to consider the submissions above.

10.8 We have heard the rival submissions and perused the record. The Supreme Court in the case of Sutlej Cotton Mills Ltd. vs. CIT reported in (1979) 116 ITR 1 held as under:

> *"The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee of account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as a part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature".*

The ratio of the above decision is whether the gain or loss should be brought to tax or allowed as deduction depends upon whether the foreign currency transactions were carried on account of capital or revenue items. If the foreign currency transactions are undertaken on capital account, the gain made out of such transaction is outside ambit of taxation, of course subject to the application of provisions of section 43A of the Act. If the transactions undertaken are on account of revenue items, the gain is clearly taxable and so the loss also is clearly allowable. In the present case, in the assessment year 2013-2014, Rs.18.12 crore represent the notional forex loss that is reinstatement of loan as on 31st March by marking to marketing rate and the balance amount is incurred on actual payment made during the year. In the assessment year 2014-2015, Rs.25.55 crore represent notional forex loss as above and balance amount is incurred on actual payment during the year. The Assessing Officer except making bald assertion that the transactions were undertaken on account of capital items no evidence was brought on record to establish that the foreign currency transactions were undertaken on capital items.

The Supreme Court in the case of CIT vs. Woodward Governor India Pvt. Ltd. (2009) 312 ITR 254 had already held that the actual payment was not a condition precedent for making adjustment in respect of foreign currency transactions at the end of the closing year. We are, therefore, unable to concur or agree with the view of the Assessing Officer that liability could arise only when the contract would have matured as such a stand is totally divorced from the accounting principles and is in variance with the principle upheld by the Apex Court in the case of Woodward Governor India Pvt. Ltd. (supra). It is also not in dispute that assessee is following the mercantile system of accounting consistently. The foreign exchange loss is due to the reinstatement of the accounts at the end of the financial year as well as loss incurred on account of exchange fluctuation on repayment of borrowings is similar to the interest expenditure and it is to be allowed as revenue expenditure u/s 37 of the I.T.Act, as per the accounting standard approved by the Institute of Chartered Accountants of India. Hence, we do not find any infirmity in the finding of the CIT(A) on this issue and confirm the same. This ground of appeals of the Revenue is dismissed.

11. In the result, the appeals of the Revenue are partly allowed.

Order pronounced on this 24th day of February, 2020.

Sd/-	Sd/-
(SMT.BEENA PILLAI)	**(CHANDRA POOJARI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Place: Bangalore
Dated: 24th February, 2020

GJ / Devadas

Copy to:
1. M/s. Coffee Day Global Limited, No.23/2, CoffeeDay Square, Vittal Mallya Road, Bengaluru-560 001.
2. The Deputy Commissioner of Income-tax, Central circle-1(3), 3rd Floor, C.R. Building, Queen's Road, Bengaluru-560 001.
4. The Commissioner of Income-tax(Appeals)-2, Bengaluru.
5. The Pr. Commissioner of Income-tax-2, Bengaluru.
6. D.R., I.T.A.T., Bengaluru Benches, Bengaluru.
7. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T, Bengaluru