IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" NEW DELHI
BEFORE SHRI R.P. TOLANI AND SHRI SHAMIM YAHYA

ITA No. 1217/Del/2011
Asstt. Yr: 2004-05

BSC & CJV Vs. ACIT, Circle 38(1),
74, Hemkunt Colony, New Delhi.
Opposite Nehru Place, N. Delhi.
PAN/GIR No. AADFB8115G

AND

ITA No. 1752/Del/2011
Asstt. Yr: 2004-05

ACIT, Circle 38(1), Vs. BSC & CJV
New Delhi. 74, Hemkunt Colony, N. Delhi.

(Appellant) (Respondent)

Appellant by : Shri Ajay Vohra, Adv.
Shri Amit Sachdeva Adv. &
Shri Amarjit Singh CA
Respondent by : Mrs. Geetmala Mahamoney CIT (DR) &
Mrs. Anusha Khurana Sr. DR

O R D E R

PER R.P. TOLANI, J.M :

These are cross appeals one by assessee and other by revenue against the CIT(A)'s order dated 11-1-2011 relating to A.Y. 2004-05.

i) Concise grounds raised by assessee are as under:

"1. That the Commissioner of Income Tax (Appeals) ("the CIT(A") erred on facts and in law in upholding the jurisdiction of the assessing officer to reassess the income of the appellant under sections 147/143(3)/145(3) of the Income-tax Act, 1961 ("the Act").

1.1. That on facts and in law, the CIT(A) erred in failing to appreciate that the reassessment proceedings were based on mere change of opinion and incorrect facts.

2. That on facts and in law, the CIT(A) erred in upholding disallowance of additional depreciation to the tune of Rs. 4,05,12,853 and Rs. 1,52,73,164 on plant and machinery and tippers respectively without appreciating that the appellant was engaged in manufacture or production, inter alia, of mixed concrete.

3. That on facts and circumstances of the case and in law, the CIT(A) erred in upholding the jurisdiction of the assessing officer to make additions/ disallowances on various issues on the basis of roving and fishing enquiries conducted during reassessment proceedings de hors the basis and the issues on which reassessment proceedings were initiated under section 147/148 of the Act.

4. That on facts and circumstances of the case and in law, the CIT(A) erred in not admitting additional evidence filed by the appellant under Rule 46A of the Income-tax Rules, 1962 merely on the ground that the same was in the nature of unsigned photocopies.

5. That on facts and circumstances of the case and in law, the CIT(A) erred in upholding the action of the assessing officer in rejecting the books of account and assessing the income of the appellant from Indian Projects at Rs. 81,28,034 (@ 4% of gross receipts) on ad hoc and arbitrary basis, as against loss of Rs. 5,51,20,396 declared by the appellant.

5.1. That the CIT(A) erred on facts and in law in upholding the action of the assessing officer:

- on the basis of ex parte enquiries admittedly conducted behind the back of the appellant without confronting or affording ade4quate opportunity for rebuttal/ cross-examination;
- on the ground that the appellant did not furnish confirmations from such parties; and

- on the ground that the appellant had failed to produce quantitative details of stock and consumption.

5.2. Without prejudice, on the facts and circumstances of the case and in law, the CIT(A) erred in upholding estimation of profits from the Indian Projects @ 4% of the gross receipts.
5.3. That without prejudice, on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the action of the assessing officer in considering gross receipts for the purpose of estimation of income from the Indian Projects to be Rs. 20,32,00,856 as against receipts of Rs. 19,40,54,608 declared by the appellant.

6. Without prejudice, that the CIT(A) erred in upholding the action of the assessing officer in not allowing deduction for employees' contribution towards provident fund of Rs. 1,23,096, deposited before the due date of filing of return, merely on the ground that no separate addition in respect thereof was made by the assessing officer.
7. That the CIT(A) erred on the facts and in law, in upholding denial of deduction in respect of prior period expenses of Rs. 2,40,586 without appreciate that liability in relation thereto crystallized during the relevant previous year.
8. Without prejudice, that the CIT(A) erred on the facts and in law in not directing the assessing officer to allow deduction in respect of prior period expenses of Rs. 2,40,586 in earlier year(s).

9. Without prejudice, that the CIT(A) erred on the facts and in law in not directing the assessing officer to recomputed deduction allowable under section 80HHB of the Act, with reference to the assessed profits of the eligible projects, consistent with the additions/ disallowances sustained in the impugned order.

10. That the CIT(A) erred on the facts and in law in not adjudicating upon the ground raised by the appellant challenging the levy of interest under section 234D of the Act."

II: Revenue grounds are as under:

> 1. On the facts and circumstances of the case, the ld. CIT(A) erred in deleting the addition of Rs. 87,15,926/- made on account of excess depreciation claimed on the ground that the same is debited in misc. expenses of P&L account.
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> 2. On the facts and circumstances of the case, the ld. CIT(A) erred in deleting the addition of Rs. 54,594/- made on account of wrong depreciation claimed on office equipment on the ground that the same is debited in misc. expenses of P&L account.
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> 3. The appellant craves to add, amend or modify the grounds of appeal at any time.

2. Assessee has filed an application for additional evidence, same shall be dealt along with the relevant issue.

2.1 Brief facts are: The assessee is an AOP, formed by way of a joint venture of two company's viz. M/s B. Seenaiah & Co. Projects Ltd.; and M/s C&C Constructions Pvt. Ltd. The assessee is engaged in the business of road construction in India and Afghanistan. For A.Y. 2004-05 original return was filed on 1-11-2004 declaring income of Rs. 13,46,14,926/- which was assessed u/s 143(3) on 28-12-2006 at Rs. 13,51,99,283/-.

2.2. Subsequently, AO noticed that assessee had claimed excess depreciation in audit report at Rs. 17,89,98,964/- as against depreciation shown in P&L A/c at Rs. 18,77,14,890/-. Consequently assessee had claimed excess depreciation of Rs. 87,15,926/- which had escaped assessment. AO had further reasons to believe that assessee had claimed additional depreciation which was not eligible to it by provisions and excess

additional depreciation also was wrongly allowed. Thus the income to the extent of additional depreciation had also escaped assessment. Consequently, AO recorded following reasons for reopening the assessment u/s 148 of the Act:

> "The assessee M/s BSC C&C, Joint Venture, 74, Hemkunt Colony, New Delhi is engaged in the business of road construction. Return of income in this case was filed on 1-11-2004 declaring income at Rs. 13,46,14,926/-. Assessment was completed under section 143(3) on 28-12-2006 at an income of Rs. 13,51,99,283/-. Subsequently, it was noticed that assessee has claimed depreciation and additional depreciation on plant & machinery @ 25% and 15% respectively at Rs. 10,80,85,264/- as per annexure II of Audit Report. However, depreciation @ 25% is allowable in this case comes to Rs. 6,75,72,411/-. Thus the assessee has claimed excess depreciation amounting to Rs. 4,05,12,853/- in its return of income. The additional depreciation claimed at Rs. 4,05,12,853/- is not allowable as the assessee do not fulfill the conditions as laid down in sub section (iia) of Section 32 of the Act which reads as under:-
>
> > "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 2002, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to fifteen percent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii).
> >
> > (A) A new industrial undertaking during any previous year in which such undertaking begins to manufacture or produce any article or thing on or after the Ist day of April, 2002; or
> >
> > (B) Any industrial undertaking existing before the Ist day of April, 2002, during any previous year in which it achieves the substantial expansion by way of increase in installed capacity by not less than ten per cent."

Since the assessee is not engaged in the business of manufacture or production of any article or thing, hence the additional depreciation is not allowable to it. The Hon'ble Supreme Court in the case of CIT Vs. N.C. Budhiraja & Co. (1993) 204 ITR 307 (SC) has held that construction activity do not fall in the category of manufacture or production of any article or thing. Since the assessee do not qualify the basic condition, the additional depreciation claimed at Rs. 4,05,12,853/- is not allowable.

2. On scrutiny of the record, it has been further observed that assessee has claimed depreciation and additional depreciation on "Tippers" @ 25% and 15% respectively at Rs. 4,07,28,435/- as per annexure II of the audit report. Since, the assessee is not engaged in the business of manufacture or production of any article or thing, as discussed in para 1 above, additional depreciation claimed is not allowable to it. The depreciation allowable on this asset is Rs. 2,54,55,271/-. Thus the assessee has claimed excess depreciation of Rs. 1,52,73,164/-.

3. It has also been observed that assessee has debited to the profit and loss account, an amount of Rs. 18,77,14,890/- on account depreciation instead correct figure of Rs. 17,89,98,764/-. The mistake resulted in excess claim of depreciation at Rs.87,15,926/-. In response to show cause notice the assessee has stated that difference is on account of Exchange Fluctuation Account. However, no details were filed by the assessee neither during assessment proceeding nor in response to show cause notice. Thus the assessee has claimed excess depreciation at Rs. 87,15,926/-.

4. The assessee has also claimed depreciation on office equipment at 25% amounting to Rs. 6,38,713/-. The allowable depreciation on office equipment was Rs. 5,85,119/-. The mistake resulted in excess depreciation of Rs. 53,594/-.

5. In view of above, the assessee has claimed excess depreciation at Rs. 6,45,55,537/-. The assessee's case covered under clause (c)(iv) of Explanation 2 of Section 147 of the Act.

I have therefore reasons to believe that income to the extent of Rs. 6,45,55,537/- has escaped assessment under section 147 of the I.T. Act. Hence notice under section 148 for the A.Y. 2004-05 is issued".

2.4. On the basis of these reasons, notice u/s 148 was issued on 30-10-2008 by AO reopening the assessment and asking the assessee to file a return of income. The assessee vide letter dated 21-11-2008 requested to treat the return already filed as the one filed in response to notice u/s 148. Thereafter, AO issued notice u/s 143(2) and conducted the assessment proceedings. The excess claims of depreciation and claim of additional depreciation were objected and proposed to be withdrawn by AO. Assessee objected to reopening of assessment and proposed additions by way of detailed reply mainly contending as under:

2.5 Reopening of assessment u/s 148

2.6. Additional Depreciation

"The expansion in capacity is based on the increased production capacity of the crusher, hot mix plant, WMM plant and batching plant. It is further stated that the crusher is used to crush big stones into aggregate. This aggregate is the mixed with bitumen and the new material which is neither aggregate nor Bitumen, but is rather a new product are subsequently used in the construction of roads. Strictly applying the decision of the Supreme Court in N. C. Budhiraja's case. Such activity does not result in manufacture/ production an article/ object. However, it is submitted that the mixtures, so produced by the aforesaid plants in different entitles/ work sites of the assessee are entirely different and different and distinct, in terms of its chemical composition and use, from the raw material used to manufacture such mixtures and since the mixtures are movable objects, the decision of Apex Court in N.C. Budhiraja's case is inapplicable."

Reliance was placed on following case laws:

- Dy. CST Vs. PIO Food Packers (1980) 46 STC 63 (SC);
- CIT v. Tata Locomotive & Engineering Co. Ltd. (1968) 68 ITR 325 (Bom.);
- Union of India Vs. Delhi Cloth & General Mills CO. Ltd. AIR 1963 SC 791 (SC);
- Narne Tulaman Manufacturers Pvt. Ltd. V. Collector of Central Excise (1990) 183 ITR 577 (SC).
- Sterling Foods Vs. State of Karnataka AIR 1986 SC 1809 (SC).

2.7. Excess depreciation on a/c deference in Computation and P & L a/c

2.7.1. In respect of excess depreciation of Rs. 87,15,926/- it was contended that there was no mistake and the difference in cost of asset was occasioned by exchange rate fluctuation as the assets were purchased in US $ terms and the said difference was to exchange fluctuation account. Assessee furnished a chart in this behalf. The detailed submissions are on record.

3. Apart from issues of additional and excess depreciation, during the course of reassessment proceedings AO further observed that assessee though had shown profits from construction contract; however in respect of Indian projects net loss of 28.40% on gross receipts was shown. AO thus proposed to verify the reasons for losses in respect of Indian projects and asked to submit following information vide letter dated 26-11-2009:

> "1. You have claimed loss in respect of projects executed in India. In this regard the following information please may be furnished:-
>
> i) Reasons for why you have suffered the loss in the Indian projects.
>
> ii) Please furnish the copy of the tenders. Also state the percentage of profit quoted in the tender in respect of Indian projects.
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> iii) Is there any escalation clause in the tender, if any the same may also be explained/ furnished.
>
> iv) Whether you have filed any claim for escalation with any arbitrator, if so the details there of may also be furnished.

v) The name of the projects in which you have suffered loss.

You have furnished the list of creditors without furnishing the addresses. The complete address of the creditors may please be furnished.

You have claimed expenses in respect of spare parts. The details of purchases under this head above Rs. 5,00,000/- along with a one copy of purchase bill of each party may please be furnished.

The basis of valuation of WIP may be furnished.

Please state whether the deduction u/s 80HHB has been claimed on other income also which you have earned in India.

Relevant extracts of the bank statements from which the payments for self assessment and advance tax for the A.Y. 2004-05, 2005-06 and 2006-07 were withdrawn and deposited in the government account.

The details of additional depreciation claimed in the A.Y. 2005-06, 2006-07 and 2007-08.

You have claimed prior period expenses Rs. 2,40,586/- the nature of these expenses and the period to which it pertain may be furnished.

Capital accounts of the JV partners may be furnished.

You have credited an amount of Rs. 1,45,65,520/- in the miscellaneous expenditure, the details for the same may be furnished.
Copy of return of income, along with audit report, balance sheet and P&L account of the JV members please may be furnished for the A.Y. 2004-05, 2005-06 and 2006-07.

Copy of assessment order passed by the I.T. authorities in the cases of JV members, if any, for the A.Y. 2004-05, 2005-06 and 2006-07 may also be furnished."

The assessee was also asked to furnish some more information vide this office letter no. 1306 dt. 08-12-2009:-

Copies of tender forms submitted to the contractee departments/ parties in respect of projects executed in India.

Project wise agreed tender values viz-viz projected cost file with the evidence.

Reasons for loss in each and every project.

Separate working of expenses and receipts with regard to each project.

Furnish the detail consumption with regard to quantitative consumption of various items in comparison to tender file as well as tender granted.

Stock register of all the items maintained separately of together with regard to verification of issue as well as consumption of material.

Copy of ledger account of major items purchased above Rs. 10 lacs along with complete address of the party with two sample copy of the bills. Books of account including stock register."

3.1. In response to these letters, assessee in respect of losses from Indian projects replied as under:

"For the losses incurred on India projects, we have to submit as follows:

a. With regard to loss on Indian projects, we have to state that the loss has been incurred due to delay in completion of projects, which has resulted in extra cost on account, idle manpower, increase in hire cost of machinery, increase in the cost of raw material. In some cases contract value at the time of completion was reduced.

b. We are submitting herewith details of start and completion of the Indian projects alongwith copy of award letters and completion certificate that in all the projects there was delay in completion of the same. In some cases contract value at the time of completion of project was also reduced because of delay in execution of the projects, which has also been detailed in the completion certificate.

c. Further, we have to state that due to delay in completion of projects, cost of the project was also increased. An example has been given as below:

S. No.	Detail	Rates at the time of start of the project (Amount in Rs.)	Rates at the time of completion of the projects (Amount in Rs.)	Percentage increase.
1.	Bitumen	Rs. 9,772/- per M.T.	Rs. 13,280 per M.T.	36%

Major component of raw material in construction of roads in Bitumen. From the above said statement, increase in cost of Direct Expenses may be considered at 30% approx.

d. We are submitting herewith project wise profit & loss Account of Indian Project. Your Honour would observe from the said chart that against total work done of Rs. 16.20 crores, raw material cost is Rs. 9.82 crores and other direct operating expenses is Rs. 8.54 crores. If 30% increase in the cost of Direct Expenses is considered, it has contributed to Rs. 4.25 crores in the total of Rs. 5.50 crore.

e. Further, your honour would observe from the project-wise Profit & Loss Account that in the Indirect Expenses major components are Depreciation and Finance Cost, which are Rs. 1.39 crores and Rs. 0.74 crores respectively. These have also contributed to loss along with other indirect expenses.

f. Further, since the projects were delayed, we had to incurred fixed overhead expenses such as salaries etc. continuously, which resulted in loss.

g. In some of the sites final contract value at the time of completion of the projects were reduced. In the Behram Site final contract value was reduced by a sum of Rs. 1.00 crore and in the Nakodar site the same was reduced by a sum of Rs. 0.98 crore. This has also impacted the profitability of the Indian project.

h. Further the accounts of the assessee have been duly audited for which proper bills and vouchers are available with the assessee.

In view of the above, it is submitted that the assessee has actually suffered a loss of Rs. 5.50 crores on Indian Projects, due to delay in execution of projects, which has resulted in increase in both, Indirect and Direct cost to the assessee."

3.2. The assessee has also filed the written submission on 21-12-2009 which are reproduced as under:-

"1. Copies of completion certificates of Indian Projects are attached herewith for your kind perusal. Your honour would observe from the completion certificate that all the projects were delayed. Further in some cases, contract value at the time of completion of project was also reduced, which has also resulted into losses on Indian projects.

2. Projects-wise agreed tender value and final amount received from the projects is also mentioned in the completion certificate submitted as above.

3. Copies of tenders of all the Indian projects are attached herewith for your kind perusal. These are very voluminous tenders and are being submitted in separate box files.

4. No profit percentage is quoted in the tenders. We only give consolidated price chargeable from the contractee.

5. Escalation clause varies from tender to tender. In some tenders escalation clause is agreed and income tender it is not. It is tender-specific.

6. No claim has been filed with any arbitrator for escalation for Indian projects

7. Projects-wise profit & loss of Indian sites has already been submitted to your good self vide letter dt. 16-12-2009. The assessee has suffered losses on following Indian projects:

a. Amritsar, Punjab

b. Hyderabad (only interest for the amounts financed to project from Hyderabad and depreciation on the machineries purchased from Hyderabad has been charged in Hyderabad books).

c. Kamha, Punjab
d. Rahon, Punjab
e. Jagraon, Punjab
f. Jangal, Punjab (This is a crusher site only)

The assessee has earned profit on following Indian sites.

a. Behram, Punjab
b. Nakodar, Punjab
c. Delhi

8. …..

9. For receipts and expenses on each project, we have already submitted project-wise profit & loss account for the year under consideration vide letter dated 16-12-2009.

10. Quantitative consumption of various items of raw material in comparison to tender filed as well as tender granted cannot be made as the maintenance of stock records of raw material is not feasible and possible. The same fact has already been mentioned in the Tax Audit

Report. Hence no stock registers are maintained for the Raw Material.

11. Reasons of losses have already been explained vide letter dated 16-12-2009."

4. AO however held that the claim of additional depreciation was not allowable to assessee and the same was disallowed by following observations:

"6. The above reply of the assessee was examined in detail. In the light of following fact and legal pronouncements.

6.1. The case law relied upon by the assessee do not relate to the facts of the case of the assessee. The additional depreciation claimed is not allowable as the assessee do not fulfill the requisite conditions as laid down in sub section (iia) of section 32 of the act which reads as under:-

> "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, 2002, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to fifteen per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii).;

Provided that such further deduction of fifteen per cent shall be allowed to:

(A) a new industrial undertaking during any previous year in which such undertaking begins to manufacture or produce any article or thing on or after the Ist day of April, 2012; or

(B) Any industrial undertaking existing before the Ist day of April, 2002, during any previous year in which in achieves the substantial expansion by

way of increase in installed capacity by not less than per cent;"

Since the assessee is not engaged in the business of manufacture or production of any article or thing, hence the additional depreciation is not allowable to it. The Hon'ble Supreme Court in the case of CIT Vs. N.C. Budhiraja & Co. (1993) 204 ITR 307 (SC) has held that construction activity do not fall in the category of manufacture or production of any article or thing.

The relevant part of the judgment is reproduced as under:

> "Commonly manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place."
>
> 8.The word "production" or "produce" when used in juxtaposition with the word "manufacture" takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the byproducts, intermediate products and residual products which emerge in the course of manufacture of goods. The next word to be considered is "articles", occurring in the said clause. What does it mean? The word is not defined in the Act or the Rules. It must, therefore, be understood in its normal

connotation the sense in which it is understood in commercial world. It is equally well to keep in mind the context since a word takes its colour from the context. The word "articles" is preceded by words "it has begun or begins to manufacture or produce". Can we say that the word "articles" in the said clause comprehends and takes within its ambit a dam, a bridge, a building, a road, a canal and soon? We find it difficult to say so. Would any person who has constructed a dam say that he has manufactured an article or that he has produced an article? Obviously not. If a dam is an article, so would be a bridge, a road, an underground canal and a multi-storied building. To say that all of them fall within the meaning of word 'articles' is to over-strain the language beyond its normal and ordinary meaning. It is equally difficult to say that the process of constructing a dam is a process of manufacture or a process of production. It is true that a dam is composed of several articles; it is composed of stones, concrete, cement, steel and other manufactured articles like gates, sluices etc. But to say that the end product, the dam, is an article is to be unfaithful to the normal connotation of the word. A dam is constructed; it is not manufactured or produced. The expressions "manufacture" and "produce" are normally associated with moveables articles and goods, big and small but they are never employed to denote the construction activity of the nature involved in the construction of a dam or for that matter a bridge, a road or a building. The decisions of the Bombay High Court in CIT v. N. U. C. Pvt. Ltd. I and in CIT v. Shah Construction Co. Ltd.2 relied upon by Shri Murti are no doubt not decisions rendered under Section 80-HH or under Section 84 they arose under the relevant Finance Acts, the question being whether

the assessees were industrial companies they do contain observations which tend to support the stand of the Revenue.

9.It may be that the petitioner is himself manufacturing some of the articles like gates, windows and doors which go into the construction of a dam but that makes little difference to the principle. The petitioner is not claiming the deduction provided by Section 80-HH on the value of the said manufactured articles but on the total value of the dam as such. In such a situation, it is immaterial whether the manufactured articles which go into the construction of a dam are manufactured by him or purchased by him from another person. We need not express any opinion on the question what would be the position, if the petitioner had claimed the benefit of Section 80-HH on the value of the articles manufactured or produced by him which articles have gone into/consumed in the construction of the dam.

10.In the Judgment under appeal, the Orissa High Court has relied upon the meaning assigned to the word "article" in Shorter Oxford English Dictionary, to the effect "a commodity; a piece of goods or property". Since article means a piece of property, the learned Judges said, it can as well mean immovable property. Accordingly, they held, a dam is also an article. In our opinion, the High Court was not right in dissociating the said word from its context viz., the preceding words - which has led them to attach an unnatural meaning to the said word.

4.1. Assessee claim of regular depreciation i.e. deference in P & L a/c and computation of income was also reduced by following observations:

> "As regards excess depreciation of Rs. 87,15,926/- claimed by the assessee in P&L account is concerned the assessee has stated that this amount is on account of foreign exchange fluctuation which it has shown under the miscellaneous expenses head. The reply of the assessee was not accepted in view of the fact that increase in the cost amount pertains to fixed assets on account of foreign exchange fluctuation can not be treated as expenses of the year and necessarily be capitalized in the respective head of the plant & machinery. The assessee has incorrectly debited the miscellaneous expenses account. The assessee has camouflage the accounts of concealing the amount under the miscellaneous expenses. The assessee should have shown this amount separately. The assessee has violated the accounting principle of disclosure also. Thus the contention of the assessee that he has debited the amount of Rs. 87,15,926/- in the miscellaneous expenses head is not accepted and the same is added back to the income of the assessee. Since the assessee has also taken the plea in respect of depreciation claimed on office equipment at Rs. 53,594/-, the same is also disallowed in view of above discussion and added to the income of the assessee."

5. In respect of losses in Indian projects, AO was of the view that books of accounts and records maintained by the assessee were not proper so as to reflect true profits and to compute the taxable income properly. A/c books were consequently rejected by AO with following observations:

(i) Assessee has not maintained stock register and failed to furnish the detail regarding quantitative consumption of various items in comparison to tenders filed and tender granted.

(ii) The assessee failed to file complete copy of account of the parties and gave only two sample purchase bills.

(iii) The other assessees engaged in similar line of road construction business have declared net profit rate of 3 to 4%.

(iv) Assessee failed to file details of purchase/ creditors in the following proforma, asked for:

S. No.	Name and address of the party	Opening balance as on 01-04-03	Purchases During the Year	Payments During The year	Balance as On 31-03-04.

(v) Assessee failed to file details in respect of purchases above Rs. 5 lacs in the proforma and only the names and addresses of the persons were supplied.

(vi) From the details of material consumed, it is not known how much was the value of opening stock of material, how much purchases have been made during the year and what was the closing stock of material at the end of the year. Further, it is not on record the quantitative details of various such items which are consumed in road building with regard to opening stock, purchases, Material issued for consumption, material sold in the market or closing stock of material which are also of different types such as rodi, bitumen, sands, stones, dusts, diesel, petrol etc.

(vii) The assessee was asked to furnish the details of quantitative consumption of various items in comparison to tender filed as well as tender granted. The assessee in his reply dated 21-12-2009 submitted that quantitative consumption of various items of raw material in comparison to tender filed as well as tender granted cannot be made as the maintenance of stock records of raw material is not feasible and possible. The same fact has already been mentioned in the Tax Audit Report. Hence no Stock Registers

are maintained for the raw material". Since the assessee has not furnished any detail of quantitative consumption, assessee's claim for excessive costs is not found acceptable.

(viii) The importance of stock register is very relevant in the construction industry. It is the basis of ascertaining correct consumption and adequate correlation between various material purchased, issued for consumption at various sites and also in arriving at closing stock of construction material which is not being consumed. The keeping of a stock register is of great importance because that is a means of verifying the assessee's accounts by having a "quantitative tally". It is very relevant in order to correlate input and output. From the verification of books of accounts, it is noticed that the assessee has not maintained and not kept stock register for the various material such as rodi, petrol, diesel, bitumen, crushed stone which are purchased a well as claimed to have consumed by the assessee. If, after taking into account all the materials including the non-maintenance of a stock register, it is found that from the method of accounting the correct profits of the business are not detectible, the operation of the proviso to section 145(3) of the Income tax Act becomes inherent in the case of this assessee.

(ix) From the perusal of the P&L A/c it is seen that assessee has shown opening WIP of Rs. 7,50,07,877/- and closing WIP of Rs. 4,28,52,479/-. During the course of assessment proceeding, the assessee was requested vide letter no. 26-11-2009 to furnish the detailed basis along with reasons with evidences for the above valuations for each work/ project separately."

(x) The counsel vide his letter dt. 16-12-2009 only mentioned the amount of WIP. The basis for valuation of WIP was not given. This does not suggest at what rate and how WIP has been valued. The assessee has also not submitted any detailed basis pertaining to opening WIP. It is not known whether while valuing the WIP the assessee has included relatable direct cost or not. In the absence of such information, the correct method of valuation and basis thereof has not been furnished.

5.1. AO further observed that in the immediately preceding year the assessee had shown profit of 1.21% in comparison to current year stunning losses which worked out to 28.40% on receipts. Thus on historical comparison also the assessee's books were not acceptable. AO issued notice u/s 133(6) on some of the parties mentioned in the accounts. Some of them did not appear and those who complied there statements and balances could not be reconciled with the assessee's books. AO held that in view of these discrepancies the assessee's books were not verifiable. AO thus proposed to reject the books of accounts, assessee filed explanation in this behalf. AO however was not convinced the reply and rejected the books of accounts u/s 145 by following observations:

> "With the present defects as detected in the books of account of the assessee, correct profit for the year under assessment could not be deducted from the records submitted by the assessee. Considering the various defects and irregularity in the books of account, it becomes a necessity to reject the account books in order to compute the correct profits of the assessee on the basis of turnover. Thus, in the case of assessee, as there were various faults in books of assessee like non-maintenance of stock register, unvouched and unverifiable expenditure, coupled with fact of steep fall in net profit rate of relevant year as compared to last year, there is no option but to reject books of account of

assessee by applying section 145(3) for correct determination of profits of the business. To sum up for the reasons mentioned in detail in above paragraphs books of accounts of assessee are rejected u/s 145(3) of the I.T. Act to determine the correct assessable profits.

The above finding is also get supported from the judgment of Hon'ble Supreme Court in the case of CIT Vs. British Paints India Ltd. (1991) 188 ITR 44(SC), wherein it has been held that as from the books of the assessee, due to reasons detailed by the Assessing Officer in his order, correct income of the assessee was not detectible, the application of section 145 was upheld.

5.2. After rejecting the books of accounts, AO estimated the net profit of the assessee at 4% of gross receipts by following observations:

"Now after rejecting the books of accounts, in the estimation of net profit of the assessee following material facts are to be considered:

a) Section 44AD of Income tax Act provides for determination of income @ 8% on gross receipts in case of contract business were not required who are maintain the accounts and not required to gets its account audited u/s 44AB of the I.T. Act. However, this section is not applicable in the case of assessee but it provides a basis and sets the direction for estimation of income.
b) Similar assessee's who are in the similar line of business activity which is identically comparable with assessee's line of contract business do invariably offer income in the range of 3% to 5% of gross receipts when their books of accounts are audited u/s 44AB of I.T. Act.
c) On comparison it is found that the assessee has declared huge loss in this year as compared to earlier years in which the net profit rate was declared at 1.2%.
d) Since the assessee has received contract receipts at Rs. 203200856/- the income of the assessee from contract business is assessed @ 4% of gross receipts which comes to Rs. 81,28,034/-.

e) On account of differences in the accounts of the profits as mentioned in the para 8.8 above, no separate addition is made in the total income of the assessee on account of above non verification as well as other discrepancies as the income of the assessee was estimated u/s 145(3) of the I.T. Act.
f) The assessee has not deposited the PF contributed by the employees amounting to Rs. 1,23,096/- within the specified date. The same is not allowable u/s 2(24)(x) read with section 36(va) of the I.T. Act. However, no separate addition is made in the total income of the assessee under this head as the income of the assessee is estimated u/s 145(3) of the I.T. Act.
g) The assessee has claimed prior period expenses amounting to Rs. 240586/-. However the same are not admissible because the claim of these expenses relate to earlier year and not to the current financial year. However no separate addition is made in the total income as it is covered under the estimation of income.

In the original assessment passed u/s 143(3) on 28-12-2006, it is seen that the total income was determined at Rs. 13,51,99,283/-. However, while computing such income, the loss on account of Indian Projects of Rs. 5,51,20,396/- has been adjusted against the net income of the foreign projects. Since the current assessment is done u/s 147 of the Act, income from the Indian projects is determined at Rs. 81,28,034/- as discussed in para 9 of this order. The business loss of Rs. 5,51,20,396/- from Indian projects is adjusted earlier is now withdrawn and added back to the total income of the assessee."

5.3. The AO thus computed the income of the assessee as under:

1.	Income assessed vide order u/s 143(3) dt. 28.12.06	13,51,99,283/-
2.	Addition on account of additional and excess depreciation.	6,45,55,537/-
3.	Addition on account of estimation of income from Indian projects.	81,28,034/-
4.	Addition on account of loss on Indian Projects as allowed in regular assessment.	5,51,20,396/-

	Total taxable income	26,30,03,250/-

6. Aggrieved against AO's order, assessee preferred first appeal, raising various grounds thereby challenging the reopening of assessment; disallowance of additional depreciation; reduction in claim of depreciation and additions on account of rejection of books of accounts books of accounts. CIT(A) decided various issues as under:

7. Assessee challenged reopening of assessment by following ground :

> That in the facts in circumstances of the case, the impugned order was bad in law being based on mere change of opinion and there was no formation of reasonable belief regarding escapement of income, which is a sine qua non for valid assumption of jurisdiction under section 147/148 of the Act.

7.1. CIT(A) considered the submissions and rejected the ground of reopening of assessment by following observations:

> "3.3. The submissions of the appellant and the facts have been carefully considered. The arguments of the appellant are not acceptable for the following reasons:
>
> (i) In this case, assessment u/s 143(3) has been completed on 28-12-06 and notice u/s 148 has been issued on 30-10-08 which is within the period of 4 years. The proviso below section 147 saying that no action shall be taken after four years unless there is failure on the part of the assessee to disclose fully and truly all material facts, is therefore, not applicable. The amended provisions of section 147 enable the AO to reopen the assessment in such cases where the reopening is within four years. It is only when the reopening is beyond four years that additional requirements are required to be fulfilled.

(ii) It is significant that in the assessment order u/s 143(3) dated 28-12-06, the AO has not given any finding regarding whether additional depreciation is allowable or not. The appellant has stated that in the questionnaire dated 13-06-06, the AO did raise a query on this issue. However, this query does not find any mention in the assessment order. In fact, the asstt. Order does not have any discussion on the issue of additional depreciation. The issues on which asstt. Has been reopened have not been discussed in the asstt. Order dated 28-12-06. This shows that these issues had not been considered at all by the AO and he had not taken any conscious decision on these issues. In view of these facts, this is not a case of change of opinion because the AO had in fact, nor opined on these issues. Therefore, there is no question of his opinion being changed.

(iii) The appellant has also argued that there was no formation of reasonable belief regarding escapement of income. This argument is not justified because in the reasons recorded for issue of notice u/s 148, the AO has given detailed reasons for his belief that income has escaped assessment. A perusal of these reasons shows that the AO had a reasonable belief regarding income having escaped assessment.

(iv) The appellant has argued that on the basis of incorrect information received from the audit party, the AO proceeded to reopen the assessment without applying his mind to the information and the submissions available on record. In the assessment order, there is no discussion about any information from the audit. In any case, information from audit is 'information' in terms of the pre-amendment provisions of section 147 and there is no bar to considering information from any source. There is nothing to suggest that the AO acted on the directions of any authority. A perusal of the reasons recorded u/s 148 clearly shows application of mind by the AO. He has discussed in detail the reasons for his belief that income

has escaped assessment. In view of these facts, the appellant's arguments are not acceptable."

7.2. Reliance was placed by CIT(A) on following case laws:

- Consolidated Photo & Finvest Ltd. (2006) 281 ITR 394 (Del.);
- Bawa Abhai Singh Vs. DCIT (2002) 253 ITR 83 (Del.)
- Dr. Amin's Pathological Laboratory Vs. JCIT (2001) 252 ITR 673 (Bom.)
- Lakshmi Machine Works Ltd. Vs. ACIT (2010) 126 ITD 263 (Chennai)
- A.L.A. Firm Vs. CIT (1991) 189 ITR 285 (SC)

73.3. Thus CIT(A) rejected assessees grounds about reopening based on issued about – proper disclosure, audit party information as not constituting proper information, change of opinion by AO, absence of reasonable belief for escapement of income.

8. Additional depreciation: After considering assesses submissions and case laws, CIT(A) disallowed the claim of additional depreciation by following observations:

"The appellant was engaged in manufacturing/ production of Aggregate/ GSB/ WMM/ bituminous concrete, which was used in construction of roads. The expansion undertaken by the appellant was based on the increased production capacity of the Crusher, solid mix plant, WMM plant and Batching plant, which are used in manufacture/ production of the said concrete mixture. All these facts are clearly mentioned in the report of the Chartered Accountant in Form no. 3AA submitted under section 32(1)(iia) of the Act.

The manufacture/ production activity of the mixture, it is submitted, involved use of crusher to crush brick stone into aggregates. The aggregates to obtained are mixed with bitumen. The new product so obtained is neither aggregate nor bitumen, but an altogether new and distinct commercial article or product. The mixture so produced is entirely different and

distinct from the raw material in terms of its chemical composition and use. Furthermore, bitumen concrete is independently marketable and has a separate, distinct commercial identity.

On a perusal of the aforesaid processes undertaken by the appellant in order to manufacture/ produce bitumen concrete mixture, it will kindly be appreciated that it would be totally incorrect to hold that the same does not tantamount to manufacture/ production of an article or thing. The final product so obtained as a result of series of processes applied by the appellant, in our respectfully opinion, clearly satisfies the test of manufacture/ production of an article or thing"

5.3. The appellant has stated that they are in the business of construction of roads, highways, bridges etc. They have argued that they are required to mix bitumen with certain other components in order to prepare concrete mixture which is used for construction of roads etc., and this amounted to manufacture/ production. It was argued that although the appellant is engaged in construction of roads etc., in order to undertake such activity, they are also engaged in manufacture/ production of bituminous concrete, which is used in construction of roads. It was stated that the manufacture/ production activity of mixing involves use of crusher to crush brick stones into aggregate, which are mixed with bitumen. It was argued that the new product obtained is neither aggregate nor bitumen but all together a new and distinct article or product, which is different from the raw material. It was stated that bitumen concrete is individually marketable and has a distinct commercial identity. The appellant therefore, argued that this amounted to manufacture/ production and they were therefore, entitled to additional depreciation.

5.3. The submissions of the appellant and the fact have been carefully considered. The appellant is engaged in the construction of roads, highways and bridges. For construction of roads, concrete mixture is required to be prepared but this is only an input in the construction of roads. The business of the appellant is construction of roads and not sale of the concrete

and similar material, used for construction of roads. Therefore, the claim that the appellant is engaged in manufacture or production is not justified. In N.C. Budharaja's case, the Hon'ble Supreme Court has held that such activity does not amount to manufacture/ production. The ratio of this case is squarely applicable to the case of the appellant.

8.1. Reliance was placed by CIT(A) on following case laws:

- Builders Associations of India Vs. Union of India (1994) 209 ITR 877.
- CIT v. Vaish Bros. & co. (2001) 247 ITR 385 (All.);
- CIT v. Minocha Bros P. Ltd. (1986) 160 ITR 134 (Del.) affirmed by the Hon'ble Supreme Court in (1993) 204 ITR 628.
- Bhagat Construction Co. (P) Ltd. (1998) 232 ITR 722 (Del.)

8.2. CIT(A) thus partly allowed the appeal of the assessee deciding the issue as under:

i. Reopening of assessment was upheld.

ii Claim of additional depreciation was dismissed.

iii. Rejection of books of Indian Projects and estimation of income was upheld.

iv Regular depreciation was allowed as per computation.

8.3. Aggrieved both parties by raising various grounds are before us - assessee is in appeal on issues i to iii and revenue is in appeal on issue iv. Both the parties have filed written submissions which are appropriately dealt hereunder:

9. Ld counsel for the assessee Shri Ajay Vohra vehemently contends that the reopening of assessment is bad in law being based on mere change of opinion of AO in respect of claim of depreciation and additional depreciation. During the course of original assessment AO raised necessary

querries and assessee by filing necessary explanation discharged its burden by making full disclosure of all primary and material facts and by supporting the claim in the return with prescribed CA certificate in Form 3AA in terms of Section 32(1)(iia) of the Act

9.1. Insofar as alleged excessive claim of depreciation on account of exchange fluctuation, there was, in fact, no such excess claim, considering that the difference in the claim of depreciation on account of foreign exchange was credited to miscellaneous expenses account which is given in Schedule 4 of the Audited Financial Accounts.

9.2. The issues which are the subject matter of the reassessment had been categorically enquired into by the assessing officer at the time of the original assessment proceedings:

- The AO, vide questionnaire dated 13.06.2006, directed the assessee to explain the difference in the depreciation claimed by the assessee.
- In response to the aforesaid, the assessee filed detailed reply dated 04.10.2006 explaining that no excessive deprecation had, as a matter of fact, been claimed by the assessee.

9.3. While recording the reasons no new information / material has come in the possession of the assessing officer after framing of the original scrutiny assessment and the reassessment is based on reappraisal of material already on record.

9.4. The basis for reassessment is audit objection(s) raised by the audit party, a copy of objection was officially supplied to and responded to by the

assessee. The audit party brought to the attention of the assessing officer, the decision of the Supreme Court in the case of NC Budhiraja: 204 ITR 412 and the consequent suggestion that additional depreciation, in law, had been incorrectly allowed in the original assessment to the assessee company engaged in road construction.

9.5. Ld counsel contends that as the issues about difference in figures of depreciation and claim of additional depreciation have been specifically examined by the assessing officer in the original assessment. Initiation of reassessment proceedings is thus caused by a mere change of opinion and therefore the reopening is bad in law and liable to be quashed. Reliance, is placed on the following decisions:

- CIT v. Kelvinator of India Ltd.: 320 ITR 561 (SC) *approving* CIT v. Kelvinator India Ltd: 256 ITR 1 (Del.)(FB)
- CIT v. Eicher Ltd.: 294 ITR 310 (Del)
- CIT v. Goetze Ltd: 321 ITR 431 (Del)
- Carlton Overseas (P) Ltd v. ITO 318 ITR 295 (Del.)
- Northern Strips Ltd v. ITO WP 8265 of 2008 (Del.)

9.6. Once the claim of depreciation was examined by the assessing officer in the course of the assessment proceedings, even assuming that there is no discussion in the assessment order in relation thereto, it cannot be said that no opinion had been formed at the time of original assessment.

- CIT v. Eicher Ltd.: 294 ITR 310 (Del) Affirmed in CIT v. Kelvinator of India Ltd: 320 ITR 561 (SC).

9.7. All the primary and material facts in relation to the claim of depreciation including additional depreciation were duly disclosed by the assessee.

9.8. Assuming that the claim was not examined at all, since the assessment was framed under Section 143(3), there is presumption of application of mind and reassessment on change of opinion is impermissible – to hold otherwise would amount to giving premium to an authority for its own wrong:

- CIT v. Kelvinator of India Ltd: 256 ITR 1 @ pg. 19 (Del HC) (FB)

  Affirmed in CIT v. Kelvinator of India Ltd: 320 ITR 561 (SC)

9.9. Reassessment based on audit objection, which makes a suggestion as to the legal treatment of an issue/ item, as opposed to adverting attention to a point of fact, is bad and unsustainable:

- Indian & Eastern Newspaper Society v. CIT: 119 ITR 997 (SC)
- CIT v. Lucas TVS Ltd: 249 ITR 306 (SC)
- Affirming: CIT v. Lucas TVS Ltd: 234 ITR 296 (Mad)
- CIT v. PVS Beedies P Ltd.: 237 ITR 13 (SC)
- Carlton Overseas v. ITO: 318 ITR 294 (Del)
- Transworld International Inc. v. JCIT: 273 ITR 242 (Del)

9.10. It is, therefore, submitted that the very assumption of jurisdiction to reassess the income of the assessee was invalid, bad in law and void ab initio.

9.11. Apropos allowability of additional depreciation on plant and machinery and tippers, Ld counsel contends that The assessee though is in

road construction however it is primarily engaged in the business of manufacture/production of aggregate/ GSB/ WMM/ bituminous concrete, which is used in construction of roads. The manufacture/production activity of the mixture. involves use of crusher to crush brick stone into aggregates. The aggregates so obtained are mixed with bitumen. The new product so obtained is neither aggregate nor bitumen, but an altogether new and distinct commercial article or product**.** The mixture so produced is entirely different and distinct from the raw material in terms of its chemical composition and use. Furthermore, bitumen concrete is independently marketable and has a separate, distinct commercial identity**.** The expansion in capacity undertaken by the assessee for eligibility to claim of additional depreciation is based on the increased production capacity of the crusher, solid mix plant, WMM plant and batching plant, which are used in manufacture/ production of the said concrete mixture.

9.12. It is pleaded that assessee is to be construed as manufacturing/ producing an article or thing i.e. Bitumen Mix which is a separate, distinct and independently marketable commodity based on following propositions:

a. Where a change or a series of changes results in emergence of a new and different article as understood in commercial circles, the same amounts to "manufacture or production":

- DCST v. PIO Food Packers [1980] 46 STC 63 (SC)
- Kores India Ltd V. CCE: 174 ELT 7 (SC)
- Ujagar Prints v. UOI: 179 ITR 317, 341 (SC)
- CIT vs. Oracle Software India: 320 ITR 546 (SC)
- Orient Longman Ltd V. ITO: 130 ITR 477 (Del.)

b. Mixing of various raw materials in specified quantities so as to result in "bitumen concrete mixture" which is a commercially different article having a different chemical formula and different physical and chemical properties as well as independently marketable, amounts to manufacture or production of article or thing and the assessee is entitled to additional depreciation

YFC Projects Pvt. Ltd v. DCIT in (2010) 134 TTJ 167 (Del ITAT)

c. Similar activities held to amount to manufacture or production of article or thing:

- Titanor Components Ltd v. CIT : 241 CTR 255 (Del HC) – held, that coating of noble metals with oxides on titanium metal electrode/anode bringing about a change in its character and use for making it fit for use in the production of chlorine and caustic soda in an electrolytic process constituted manufacture or production of article or thing within the meaning of Section 80IA of the Act.

- DJ Stone Crusher v. CIT: 229 CTR 195 (HP HC) - Process of crushing stone into stone concrete/grit in stone crusher is a manufacturing activity

- Midas Polymer Compounds v. ACIT: 237 CTR 401 (Ker) (FB) – held, mixing rubber with chemicals, process oil, etc for making "compound rubber" constituted manufacture. Further held that the eligibility of the same is unaffected by the fact whether such compound rubber was intermediate or final product.

d. Merely because the article or thing manufactured or produced by an assessee is captively consumed, tax incentives, inter alia, under Sections 10A/ 10AA 10B/ 80I/ 80HH, 80IA, 80IB/ 80IC etc, cannot be denied

- Textile Machinery Corporation Limited v. CIT: 107 ITR 195 (SC)
- DCM Shriram Consolidated Ltd v. CIT: 322 ITR 486 (Del.)
- CIT v. Orissa Cement Ltd.: 254 ITR 412 (Del)
- CIT v. Dalmia Dadri Cement Ltd.: 263 ITR 364 (Del)
- CIT v. Standard Motor Products: 131 ITR 300 (Mad)
- Ahmedabad Mfg. & Calico Co: 162 ITR 760 (Guj)

e. Additional depreciation would be allowable where the installation capacity of only the intermediate products is increased, even though there is no change in the installation capacity of the final product; allowability of additional depreciation is undertaking specific

- CIT v. Hindustan Newsprint Ltd.: 227 CTR 571 (Ker) – Held: increase in production capacity of intermediate product would entitle claim for additional depreciation.

- Madhu Industries Ltd. v. ITO: 132 TTJ 233 (ITAT Ahd) – Held: Increase in production capacity of intermediate product would entitle claim for additional depreciation

- CIT v. Texmo Precision Castings: 321 ITR 481 (Mad) – Held: Assessee engaged in business of manufacturing castings entitled to additional depreciation on wind mill installation notwithstanding that the same did not increase the production capacity of manufacturing castings

- CIT v. Hi Tech Arai Ltd: 321 ITR 477 (Mad) **-** Held: No requirement of increase in production capacity of the article or thing being manufactured or produced

- NRB Bearings Ltd v. DCIT: 133 ITD 306 (Mum ITAT)

f. Where there is manufacture or production of intermediary article or thing, which is captively consumed in an activity which does not amount to manufacture or production of an article or thing, additional depreciation in respect of plant and machinery used for the manufacture or production of intermediary article or thing would be allowable

- CIT v. Hydle Constructions: 259 ITR 344 (Del HC) **–** In this case, the assessee claimed investment allowance under section 32A of the Act since it was engaged in manufacture/ production of intermediary article used in construction activity. The CIT(A) allowed the claim of the assessee. The Tribunal, however, remanded the case to the assessing officer to ascertain facts and consider the claim of the assessee. In further appeal, the jurisdictional Delhi High Court considered at length various decisions, including the decision of the Supreme Court in the case of N.C. Budhiraja (supra) and impliedly held that merely because the final product is not eligible to investment allowance would not bar the assessee from claiming deduction under section 32A of the Act, in respect of plant and machinery installed in the industrial undertaking producing intermediate products.

9.13. It is pleaded that assessee is eligible for additional depreciation allowance. Additional depreciation on plant and machinery and tippers has been wrongly denied.

9.14. Apropos the ground about validity of jurisdiction of the assessing officer in reassessing the income of the assessee relating to loss in Indian projects, ld. counsel sought to challenge the validity of proposing to reject the losses earlier allowed by following grounds:

(a) the reasons recorded by the AO under Section 147 of the Act did not propose reassessment in respect of the above item and was totally unconnected with reasons recorded; and,

(b) reassessment of Indian losses is result of roving and fishing enquiries conducted by the AO during the reassessment proceedings.

9.15. In the reasons recorded under Section 147 of the Act, the AO alleged escapement of income of the assessee only in respect of:

(a) claim of additional depreciation; and,

(b) excess depreciation.

9.16. According to ld. Counsel the reassessment should have been confined to these issues, however AO exceeded the reasons and proceeded to make fresh roving and fishing enquiries in respect of losses from Indian Projects. AO himself has recorded that "in order to ascertain claims in the return of income, the assessee was asked to furnish various information…"

9.17. It is submitted that:

a. Reassessment based on roving and fishing enquiries is impermissible as has been held in the following decisions:

- CIT V. Sun Engineering Works Private Limited: 198 ITR 297 (SC)

- Jay Bharat Maruti Ltd vs. CIT: 324 ITR 289 (Del.)

- Vipan Khanna V. CIT: 255 ITR 220 (P&H)

b. Reassessment, based on roving and fishing enquiries, in respect of issues wholly unconnected with reasons recorded is impermissible notwithstanding Explanation 3 to Section 147 of the Act,

- Ranbaxy Laboratories Ltd.: 336 ITR 136 (Del)

> "As per Explanation (3) if during the course of these proceedings the Assessing Officer comes to conclusion that some items have escaped assessment, then notwithstanding that those items were not included in the reasons to believe as recorded for initiation of the proceedings and the notice, he would be competent to make assessment of those items. However, the legislature could not be presumed to have intended to give blanket powers to the Assessing Officer that on assuming jurisdiction under Section 147 regarding assessment or reassessment of escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with the reasons to believe, on the basis of which he assumed jurisdiction. For every new issue coming before Assessing Officer during the course of proceedings of assessment or reassessment of escaped income, and which he intends to take into account, he would be required to issue a fresh notice under Section 148."

c. It is pleaded that in any case, no reassessment is permissible for the purpose of "verification" by AO, reliance is placed on

- Chhugamal Rajpal v. S.P. Chaliha: 79 ITR 603 (SC)

- CIT v. Batra Bhatta Co: 321 ITR 526 (Del)
- Maniben Galji Shah: 283 ITR 453/ 204 CTR 249 (Bom.)
- Chunnilal Surajmal V. CIT: 160 ITR 141 (Pat) @ 148, 151

9.18. Having accepted the books of account as well as the claim and quantum of loss from the Indian projects in original assessment , it was not open to the assessing officer to reassess the income of the assessee in relation to the said issue since the action of the assessing officer amounted to mere reappraisal of existing material on record and, on that basis, coming to a "changed" opinion that the claim and/or quantum of loss from Indian operations was not admissible

10. Ground of appeal No. 4: Admissibility of additional evidence filed before the CIT(A) under Rule 46A of the Income-tax Rules, 1962.

10.1. In order to rebut the AOs allegation that the assessee did not maintain stock register before the CIT(A), application for admission of additional evidence under Rule 46A of the Income-tax Rules, 1962 was filed. The additional evidence was filed to bring on record the copy of management representation letter certifying taking of physical verification of inventory, raw materials, etc along with requisite verifications sheets.

10.2. The CIT(A), without appreciating that the additional evidence extremely crucial to rebut the allegations levelled by the AO and for judicial disposal of the appeal, as also without appreciating the fact that the assessee had been prevented by good and sufficient cause from producing the same earlier, rejected the additional evidence.

10.3. It is trite law that application for additional evidence must be dealt with in order to advance the cause of substanaital justice and not on a hypertechnical view of the matter:

- CIT v. Text Hundred India P Ltd : 239 CTR 263
- Virgin Securities : 332 ITR 396

10.4. The additional evidence placed by the assessee is crucial for the judicious disposal of the appeal, which is urged to be admitted and taken into account while disposing the appeal.

11. Grounds of Appeal No. 5 to 5.3: Disallowance of loss on Indian operations and estimation of income therefrom.

11.1. Ld. counsel pleads that assessee has business operations in India and Afghanistan, in respect of which the assessee has maintained separate books of account. During the relevant previous year, the assessee suffered huge losses to the tune of Rs.5.51 crores from the Indian Projects on account of delay in completion of the projects resulting in cast overruns and reduction in consideration payable by the Government Departments / contractee.

11.2. The assessing officer rejected the books related to Indian projects, alleging that:

- In the immediately preceding and succeeding years, the assessee had profit of 1.28% and 10.34% respectively.
- Non-maintenance of stock registers at respective sites.
- Some of the parties had not responded to summons issued by the assessing officer for confirmation of transactions with the assessee

11.3. AO proceeded to make an estimated addition of Rs.81,28,034 in place of loss of Rs.5.51 crores which was otherwise accepted during the original

assessment proceedings under section 143(3) of the Act.

11.4. Ld counsel for the assessee contends that rejection of books and estimation are not justified as:

i. In the assessment proceedings, the assessee had properly explained that the loss from Indian operations, had resulted on account of delay in completion of certain projects which lead to:

(a) substantial extra costs over and above the costs originally anticipated by the assessee at the time of making the tender bid; and,

(b) reduction in final contract value/ consideration payable by the counter parties to the assessee.

(c) In support, the assessee submitted details of the commencement, projected/contract date of completion, actual date of completion and the total delay in completion, copies of the tender bids, award letters and completion certificates as well as copy of project-wise profit and loss account containing the details of work executed, consumption of raw material, purchases made, direct expenses, indirect expenses and taxes in relation to each of the project site.

(d) The said extra cost included both fixed and variable costs and was mainly on account of idle manpower, increase in hire cost of machinery and increase in the cost of raw material. As an illustration of the substantial increase in purchase price of bitumen, which is a raw material consumed in substantial quantity in the business of the assessee, the assessee furnished the following details:

Particulars	Purchase price at start of project (PMT)	Purchase price at completion of project (PMT)	Total difference

Bitumen	Rs.9772	Rs.13280	Rs. 3508 (36% of the anticipated cost)

(e) It is pleaded that all the contracts in respect of which the loss in question had arisen had been entered into with the public authorities. Consequently there can not be any question of receipts, delay in contracts and resultant cast overruns.

ii. Profits in the immediately preceding and succeeding years in such contracts are incomparable - For the immediately preceding year, the assessee only had Indian operations and in the succeeding year, the assessing officer has taken the profit ratio of the aggregate receipts and aggregate profit for Indian as well as Afghan operations, whereas in the year under consideration, receipts and profit from Indian projects only had been extracted.

iii. Assessee had furnished all details relating to stock - During the course of assessment proceedings, when the AO directed the assessee to produce quantitative tally of consumption of raw material, the assessee explained that such quantitative tally is not practically feasible in the nature of activities carried on by the assessee. However, the assessee produced/filed the following details/documents in support of the loss claimed by the assessee from operation at Indian sites:

(a) Project-wise profit and loss account;

(b) Copies of tender documents.

(c) Details of start and completion of the Indian project;

(d) Completion Certificate of the project;

(e) Copy of Award Letters;

(f) Details of raw material purchases along with Ledger accounts of purchase of raw materials;

(g) Copies of bills for purchase of raw material on sample basis;

(h) Details of spares and consumables;

(i) Details of closing working progress of Indian sites;

iv. Non-maintenance of stock register of consumption of raw material was not practicable:

- As far as raw materials are concerned, the same, being bulky in nature, are normally packed in bags/ barrels. Raw materials like steel, aggregates, stone, dust, boulder, etc., are normally stocked in measured lots/ heaps. Consumables like oils and lubricants, diesel, etc, are stored in barrels/tanks.
- Considering the nature of materials, it was not practically feasible for the assessee to maintain stock register containing quantitative tally of the aforesaid items. In such circumstances, mere non-maintenance of stock register cannot, it is respectfully submitted, be the sole basis for rejecting the book results and estimating the profits.

v. The assessee has adopted the following methodology to quantify and control the quantity of raw materials consumed:

- Each construction site is supervised by a Site in-charge/ Supervisor, who is given the overall responsibility over the entire site operations. It is the responsibility of the Site Incharge/ Supervisor to control the receipt, issuance and holding of various raw material and consumables at the site. Orders for raw material/consumables required at any particular site

are directly placed on the vendors in case of the main raw material, i.e. bitumen, oil and lubricants, diesel, etc. The suppliers are primarily PSU Oil companies like HPCL, BPCL, IOL, etc Thereafter, based on the requirements, the raw material is issued for construction of road and related activities under the overall supervision of the Site In-charge/ Supervisor.

- At regular intervals, the stock of raw material and consumables is physically verified at every site under the supervision of the Site In-charge/ Supervisor and such physical verification is also carried out at the year end at all the sites, in the presence of the representatives of the auditor at certain locations.
- Each and every purchase of raw material and consumables is duly recorded in the books of account in separate ledgers maintained for every site on the basis of the bills/vouchers received from the vendors and also the confirmation/ bills of receipt of material from the respective sites. Closing stocks are recorded in the books of account on the basis of physical verification as carried out at various sites referred above.

vi. Before the CIT(A), the assessee also placed on record the management representation letter dated 30.04.2004 certifying the physical verification of the inventory as on 31.03.2004 along with the details of inventories at various sites. The said evidence was however not admitted by the CIT(A) under Rule 46A of the Rules. The CIT(A) further held that the copies placed on record were unsigned copies of the relevant document, which, too, rendered the same inadmissible.

vii. The AO and the CIT(A) failed to appreciate the distinction between (a) non-maintaining of stock register and (b) absence of records of stock and consumption of materials, which had been duly placed on record.

viii. In any case, mere failure to produce details of quantitative consumption, without more, cannot be the sole basis for recourse to Section 144/145 of the Act.

- CIT v. Jas Jack Elegance Exports: 324 ITR 95 (Del HC)
- CIT v. Jacksons House (ITA No. 651/2010 rendered on 26.04.2010)
- CIT v. Shere Punjab Silk Stores 1981 Tax 63(1) (Del HC)
- Asoke Refractories (P) Limited: 279 ITR 457 (Cal.)
- Pandit Bros v. CIT 26 ITR 159 (P&H)
- Veeriah Reddiar V. CIT: 38 ITR 152 (Ker.)
- M. Durai Raj v. CIT, Ernakulam 83 ITR 484 (Ker.)
- Jhandu Mal Tara Chand v. CIT : 73 ITR 192 (P&H)
- Bhagwati Emporium: (1995) 80 Taxman 227 (Ahd.)
- ITO v. Oswal Emporium (1989) 30 ITD 241 (Del)
- Kabir Leathers V. Addl. CIT: [2009] 27 SOT 498 (Delhi ITAT)
- Axia Engg. Co. v. ITO: 56 ITD 335 (Chd)
- Ganesh Foundry v. ITO (2000) 67 TTJ (Jd) 434.

ix. It is not the case of the assessing officer that there is inflation of purchases or suppression of contract receipts. There is no allegation of pilferage or sale of material outside books of accounts. In such circumstances, it has been held by the Courts that estimation of profits is impermissible.

- Setia Plastic Industries: 316 ITR 133 (Del)
- R.B. Bansilal Abhirchand Spng & Wvng Mills v. CIT: 75 ITR 260 (Bom)

- Surat District Co-operative Milk Producers Union Ltd: 99 TTJ 390 (ITAT Ahd)
- Geetanjali Woollens (P) Ltd. v. ACIT: (1991) 121 CTR (Trib) 128 (ITAT Ahd)
- ITO v. Himalaya Drug Co : 17 TTJ 9 (ITAT Del)

Reconciliation of receipts with TDS certificates

11.5. The AO estimated the taxable income of the assessee at an *ad hoc* profit percentage of 4% of the gross receipt. In the return of income and the accompanying final accounts, the assessee had declared gross receipt at Rs.19,40,54,608.

11.6. However, during the course of reassessment proceedings, the assessing officer recomputed the gross receipts of the assessee from the Indian project at Rs.20,32,00,856 on the basis of the income/ receipts shown in the TDS certificates filed by the assessee. The assessing officer, accordingly, adopted the aforesaid figure of Rs.20.32 crores as the gross receipts on the basis of which taxable profits @ 4% was computed, which was calculated at Rs.81,28,034.

11.7. It is submitted that the assessing officer erred in adopting gross receipt at Rs.20.32 crores merely on the basis of the TDS certificate, instead of gross receipt of Rs.19.40 crores declared by the assessee. The assessing officer failed to appreciate that the receipts to the tune of Rs.91,46,248, being the difference between the aforesaid receipts of Rs.20.32 crores as per TDS certificate and the receipt of Rs.19.40 crores declared during the year, had already been offered for tax in the immediately preceding assessment year by the assessee on accrual basis. The addition and taxation of Rs.81.28 lacs by the assessing officer has, in fact, resulted in double taxation of the

said amount, i.e. in the immediately preceeding and in the year under consideration.

11.8. It is submitted that there was no warrant for taking recourse to the provisions of Section 145(3) of the Act and to complete reassessment on estimate basis by adopting ad hoc rate of gross profit.

12. Alternate grounds: If it is held that the books were rejected unjustifiably:

i) Ground of appeal no. 6: Disallowance of payment of employees contribution:

12.1. During the relevant previous year, the assessee received employees' contribution towards provident fund of Rs.1,23,096, which was not deposited on or before the due date as stipulated in the relevant statute. However, the aforesaid employees' contribution was duly deposited before the date of furnishing of return of income. No separate disallowance in respect thereof was however made in view of the fact that the AO had estimated the income of the assessee on ad hoc basis. The same is allowable deduction, in light of the decision of the jurisdictional High Court of Delhi in the case of CIT v. AIMIL Ltd: 321 ITR 508.

ii) Ground of appeal no. 7 & 8: Disallowance of prior period expenses:

12.2. During the year, the assessee company incurred the following prior period expenses.

Travelling Expenses	89115
Mess Expenses	53396
Taxi Expenses	7105
Petrol Expenses	970
Salary	90000
TOTAL	240586

12.3. During the course of the reassessment proceedings, the assessing

officer held that no deduction was admissible in respect of prior period expenses of Rs.2,40,586 on the ground that the same related to earlier year and not the assessment year in question. The said conclusion was arrived at without considering the nature and character of such expenses and the submissions of the assessee on merits in this regard.

12.4. The said expenses related to the preceding assessment year. However, the same were claimed, by way of receipt of invoices, only during the year. In that sense, since the liability in respect of the said expenses crystallized during the year, the same was allowable deduction during the assessment year under appeal.

12.5. Alternatively and without prejudice, it is submitted that the same would merit a direction for deduction during the preceding assessment year.

13. Ground of appeal no. 9: Recomputation of deduction U/s 80-HHB of the Act:

13.1. Without prejudice and in the alternative, it is further submitted that the CIT(A)/assessing officer failed to appreciate that the assessee had claimed deduction under Section 80HHB of the Act in respect of profits of the profits derived from the eligible projects in Afghanistan, inasmuch as the said deduction is computed as a percentage (10% in the relevant year) of the assessable profits and gains derived from eligible projects.

13.2. AO erred in not re-computing deduction under that section after making the additions/disallowances which had the effect of increasing the business income of the assessee from eligible projects, on the basis of which deduction is computed under section 80HHB of the Act.

13.3. In appeal, the CIT(A) declined to direct recomputation of deduction under the said section on the ground that the assessee maintained separate “Foreign Projects Reserve Account”.

13.4. It is submitted that that all the relevant details are in the accounts, assessee should be allowed opportunity of creating such reserve the assessable profits and gains stand inflated due to the disallowance of addl. Depreciation which were not foreseen. A direction may be issued

14. Ground of appeal no. 10: Interest U/s 234D of the Act:

14.1. In the reassessment order, the assessing officer has charged interest, inter alia, under Section 234D of the Act. In holding that interest under Section 234D, being interest on excess refund, is chargeable on refund granted to the assessee, the CIT(A) failed to appreciate that this section applies on “regular assessment” and the only case in which interest on excess refund may be charged pursuant to order under Section 147 of the Act is where such “assessment is framed for the first time”. Accordingly, no interest was leviable under Section 234D of the Act. Reliance is placed on Vishakhapatnam Bench of the Tribunal in Dredging Corporation of India v. ACIT: ITA 6/Vizag/2011, rendered on 25.07.2011.

14.2. The CIT(A), however, has not adjudicated this ground in the impugned order.

REVENUE’S APPEAL (ITA 1752/Del/2011):

15. Ground nos. 1 & 2: For the relevant assessment year, the assessee debited depreciation of Rs.18,77,14,890 on plant and machinery and Rs.6,38,713 on office equipment in the profit and loss account. The said depreciation was claimed in respect of plant and machinery and office

equipment installed at the Afghanistan site of the assessee. The fixed assets of the Afghanistan site are merged with those of the Indian site and consolidated in the balance sheet of the assessee in India. For the said purpose, the assessee applies the exchange rate applicable at the relevant time.

15.1. For the purpose of computing depreciation in the Tax Audit Report, the assessee adopted Rs.43.39 as the rate of conversion of US Dollars into Indian Rupees, being the rate of conversion prevailing on the closing date. Accordingly, depreciation was worked at Rs. 17,89,98,764 and Rs. 5,85,119 on plant and machinery and tippers respectively. On the other hand, for claiming depreciation in the profit and loss account, the assessee, in accordance with the Accounting Standard-11 issued by the Institute of Chartered Accountants of India, adopted the average rate of conversion of foreign exchange at Rs.45.68 per US dollar.

15.2. The difference of depreciation as debited to the profit and loss account vis-à-vis depreciation as per tax audit report amounting to Rs.87,15,926 and Rs. 53,594 on plant and machinery and tippers respectively was credited to miscellaneous expenses account and finally transferred to the profit and loss account as thereby eliminating the difference arising on account of exchange fluctuation.

15.3. This treatment was to the knowledge of the assessing officer, who, however, failed to appreciate the effect of the aforesaid treatment of exchange fluctuation on depreciation as appearing in the Profit & Loss Account, on the one hand, and the amount of depreciation reflected in the tax audit report, on the other. Add would amount to double addition.

16. Ld CIT(DR) Ms Gitmala Mohnaney vehemently argues that:

16.1. After original assessment AO observed that claim of the additional depreciation is not admissible as assessee is not engaged in the business of manufacture or production of any article or thing. Thus the assessee has claimed excess depreciation of Rs. 4,05,12,853/- on Plant & Machinery . Similarly, the assessee has claimed excess depreciation of Rs. 1,52,73,164/- on Tippers.

16.2. It was further observed by the Assessing officer that the assessee has debited an amount of Rs. 18,77,14,890/- on account of depreciation instead of correct figure of Rs. 17,89,98,764/-. The mistake resulted in excess claim of Rs. 87,15,926/-. Since income had escaped assessment on account of excess depreciation granted to assessee AO had valid reasons to believe in terms of clause (c) (iv) of Explanation 2 to section 147 of the Act that income had escaped assessment. In this eventuality AO had no other choice to record reasons for reopening the assessment, thus complying with law reasons were recorded and notice u/s 147 was issued.

16.3. Assessee has raised various objections with regard to the action of reopening pleading that:

a. all the details were before the Assessing officer during original assessment proceedings;
b. that the assessee had filed statutory audit report in Form No. 3AA;
c. that the Assessing Officer was aware of the claim of additional depreciation and action taken u/s 147 is a change of opinion;
d. that the Assessing Officer has taken action u/s 147 due to audit objection.

e. It has also been submitted that why the provisions of section 263 or 154 were not invoked instead of section 147.

16.4. A careful perusal of the facts of the present case clearly reveal that the objections raised by the assessee are without merit. The assessment year involved is 2004-05 and the notice u/s 148 was issued on 30.10.2008. The present case is covered under the main provisions of section 147 of the Act. The case has been re-opened under clause (c) (iv) of Explanation 2 to section 147 of the Act which reads as under :

> Explanation 2- For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :-
> ------------
> (c) Where an assessment has been made, but –
> ----------
> (iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

16.5. The assessee being a road laying contractor is not engaged in the business of manufacture or production of any article or thing, therefore, not eligible for claim of additional depreciation. This aspect is squarely covered by the decision of Hon'ble Supreme Court in the case of N.C. Budharaja & Co., 204 ITR 412 which clearly lays that activities like construction of dam, building or roads does not amount to production of article or thing.

16.6. Assessee and his CA prepared its accounts contrary to this Hon'ble Supreme Court findings and thus availed a patently wrong claim of additional depreciation.

16.7. Similarly, the assessee has claimed excess depreciation of Rs.87, 15,926/- and Rs. 53,594/- . Both the items i.e. additional depreciation and

differential depreciation resulted in grant of excess depreciation. In such cases the statutory deeming provision i.e. Sec 147 expln. 2 clause iv) comes in to play. The action of reopening of assessment is totally in conformity of the statutory provisions. Grant of excessive depreciation is deemed to be escapement of income in that case source of information of excess claim is not material for such deeming provisions.

16.8. In the accounts or return or during the original assessment proceedings, the assessee did not make any submissions as to how the conditions laid down in section 32(1) (iia) were satisfied when it was not manufacturing an article or thing. The original assessment proceedings are silent on this aspects of eligibility of additional depreciation. During the appeal proceedings, it has been submitted by the appellant that Form 3AA was filed alongwith the return as a procedural requirement which is to be verified on the touchstone of allowability conditions which remain unanswered.

16.9. A claim cannot be allowed contrary to Hon'ble supreme Court judgment in the case of N C Budharaja &co, (supra). AO is under statutory obligation to redeem this aberration. In such cases allowance of unjust excess depreciation itself becomes a reason which obliges AO take up reassessment proceedings.

16.10. In the reasons for re-opening, the Assessing officer has also mentioned at the time of recording of the reasons that details in this regard were not filed. The assessee has wrongly mentioned that the relevant details were filed given during the assessment proceedings a perusal of paper book reveals that these details mentioned are enclosed with a letter dt.

24.8.2009 during the re-assessment proceedings. Thus assessee had not filed details along with documents during the original proceedings. This is indicative of the fact that during the course of original proceedings selective papers were filed for the reasons best known to assessee. This again justifies the reopening and belies the assesses claim about true and full disclosure. Therefore, it cannot be said that the Assessing Officer formed a valid opinion of the issue of additional depreciation which was changed in reassessment.

16.11. The assessee has also raised the objection that the reassessment proceedings have been initiated because of an audit objection. This aspect has been dealt with by the CIT(A) in his order on page 7 mentioning that there is no discussion about any information from the audit. Besides Assessing Officer duly applied his mind to information available on record taking support from this audit intimation. The entire material was analyzed vis a vis the issues involved and the applicability of ratio laid down in the case of N C Budharaja & co, (supra) The Assessing Officer has himself looked into the record, explanation, facts of the case in the light of the observations of Hon'ble Apex Court in the case of N C Budhraja, consequently there is neither a case of change of opinion nor non application of mind.

16.12. The action of the reopening by Assessing officer under deeming provisions i.e. Sec 147 expln. 2 clause iv) is supported by following judicial pronouncements:

a) Honda Siel Power Products Ltd. 197 Taxman 415(Delhi)

   Explanation to section 147 stipulates that mere production of books of account or other evidence is not sufficient. [Refer paragraph 11 above wherein judgment in Consolidated Photo

& Finvest Ltd.'s case (supra) has been quoted]. Therefore merely because material lies embedded in material or evidence, which the Assessing Officer could have uncovered but did not uncover is not a good ground to deny or strike down a notice for reassessment. Whether the Assessing Officer could have found the truth but he did not, does not preclude the Assessing Officer from exercising the power of reassessment to bring to tax the escaped income.

The Hon'ble Supreme Court has dismissed the SLP in this case which is reported in 2011-TIOL-72-SC-IT.

b) Ankita Deposits & Advances (P.) Ltd.193 TAXMAN 36(AP)

The powers of the Assessing Officer to reopen assessment are very wide. True it is that the term 'reason to believe' does not mean a mere change in opinion. If the Assessing Officer has at any time expressed an opinion or come to a finding on the facts before him and decided the matter in a particular way, then just because a different interpretation is possible, the Assessing Officer may not have the power to issue a notice under section 148. However, in case, no opinion has been expressed, then whatever be the reason, as long as they prima facie satisfy the conscience of the Court, the Court would not interfere with the issuance of a notice.

c) Dalmia Pvt. Ltd. 2011-TIOL-628-HC-DEL-IT (Delhi)

Question of change of opinion arises when an Assessing Officer forms an opinion and decides not to make an addition and holds that the assessee is correct. In the present case the Assessing Officer had asked specific and pointed queries with regard to the sundry creditors of Rs. 1,66,37,402/- asked for confirmations, names, addresses and details of services rendered. An addition of Rs.19,86,551/- was made for failure to furnish confirmation and explain what services were rendered by the creditors. There is no discussion, ground or reason why addition of Rs.32,97,507/- was not made inspite of the failure of the assessee to furnish conformation and

details. It will be appropriate in this regard to refer to Explanation 1 to Section 147 of the Act, which reads:-

"Explanation 1. - Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."

d) Referring to the said explanation in Consolidated Photo and Finvest Ltd. (supra) it has been held:-

"8. It is clear from the above that the two critical aspects which need to be addressed in any action under section 147 are whether the Assessing Officer has "reason to believe" that any income chargeable to tax has escaped assessment and whether the proposed reassessment is within the period of limitation prescribed under the proviso to section 147. Explanation 1 to the said provision makes it clear that production of account books or other evidence from which the Assessing Officer could with due diligence discover material evidence would not necessarily amount to disclosure within the meaning of the proviso that stipulates an extended period of limitation for action in cases where the escapement arises out of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment…..

"19. …The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the Assessing Officer proposes to examine in the course of reassessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the Assessing Officer and had been held in favour of the assessee is too far-fetched a proposition to merit acceptance. There may indeed be a presumption that the assessment proceedings have been

regularly conducted, but there can be no presumption that even when the order of assessment is silent, all possible angles and aspects of a controversy had been examined and determined by the Assessing Officer…."

e) Kantamani Venkata Narayana v. First Addl. ITO(63 ITR 638(SC) -

the apex court held that in proceedings under article 226 of the Constitution of India challenging the jurisdiction of the Income-tax Officer to issue a notice for reopening the assessment, the High Court was only concerned with examining whether the conditions which invested the Income-tax Officer with the powers to reopen the assessment existed. It is not, observed the court, within the province of the High Court to record a final decision about the failure to disclose fully and truly all material facts bearing on the assessment and consequent escapement of income from assessment and tax. The court also held that from a mere production of the books of account, it could not be inferred that there had been full disclosure of the material facts necessary for the purposes of assessment. The terms of the Explanation, declared the court, were too plain to permit an argument that the duty of the assessee to disclose fully and truly all material facts would stand discharged when he produces the books of account or evidence which has a material bearing on the assessment. The court observed (page 644) :

> "It is the duty of the assessee to bring to the notice of the Income-tax Officer particular items in the books of account or portions of documents which are relevant. Even if it be assumed that from the books produced, the Income-tax Officer, if he had been circumspect, could have found out the truth, the Income-tax Officer may not on that account be precluded from exercising the power to assess income which had escaped assessment."

f) Malegaon Electricity Co. P. Ltd. v. CIT [1970] 78 ITR 466(SC)

It is true that if the Income-tax Officer had made some investigation, particularly if he had looked into the previous assessment records, he would have been able to find out what the written down value of the assets sold was and consequently he would have been able to find out the price in excess of their written down value realised by the assessee. It can be said that the Income-tax Officer if he had been diligent could have got all the necessary information from his records. But that is not the same thing as saying that the assessee had placed before the Income-tax Officer truly and fully all material facts necessary for the purpose of assessment. The law casts a duty on the assessee to 'disclose fully and truly all material facts necessary for his assessment for that year'."

g) In Indian & Eastern Newspaper Society vs. CIT (1979) 119 ITR 996 (SC) - it was held that the observations in Kalyanji Mavji & Co. v. CIT, (1976) 102 ITR 287 (SC) that reopening would cover a case where income had escaped assessment due to the "oversight, inadvertence or mistake" was too widely stated and, therefore, did not lay down the correct law. This was stated in the context of re appreciation or reconsideration of the same material. It was clarified and stated as under (at page 1005):-

> "A further submission raised by the revenue on s. 147(b) of the Act may be considered at, this stage. It is urged that the expression "information" in s. 147(b) refers to the realisation by the ITO that he has committed an error when making the original assessment. It is said that, when upon receipt of the audit note the ITO discovers or realizes that a mistake has been committed in the original assessment, the

discovery of the mistake would be "information" within the meaning of s. 147(b). The submission appears to us inconsistent with the terms of s. 147(b). Plainly, the statutory provision envisages that the ITO must first have information in his possession, and then in consequence of such information he must have reason to believe that income has escaped assessment. The realisation that income has escaped assessment is covered by the words "reason to believe", and it follows from the "information" received by the ITO. The information is not the realisation, the information gives birth to the realisation."

In this case, the Supreme Court had primarily concerned with the expression "information" as stipulated in Section 147(b) of the Act as it existed and it was held that information of an internal audit party on a point of law cannot be regarded as information within the meaning of the said Section.It doesnot concern the deeming provision u/s 147 which was subsequently introduced by legislative amendment.

h) It is well settled that audit objection on the point of fact can be a valid ground for reopening of assessment. In the case of New Light Trading Co. vs. Commissioner of Income Tax, (2002) 256 ITR 391 (Del), referring to the decision of Supreme Court in CIT vs. P.V.S. Beedies Pvt. Ltd. (1999) 237 ITR 13 (SC), has held as under (at page 393) :

"In the case of P. V. S. Beedies Pvt. Ltd. [1999] 237 ITR 13, the apex court held that the audit party can point out a fact, which has been overlooked by the Income-tax Officer in the assessment. Though there cannot be any interpretation of law by the audit party, it is entitled to point out a factual error or

> omission in the assessment and reopening of a case on the basis of factual error or omission pointed out by the audit party is permissible under law. As the Tribunal has rightly noticed, this was not a case of the Assessing Officer merely acting at the behest of the audit party or on its report. It has independently examined the materials collected by the audit party in its report and has come to an independent conclusion that there was escapement of income. The answer to the question is, therefore, in the affirmative, in favour of the Revenue and against the assessee."

16.13. In the light of these arguments and case laws ld CIT(DR) pleads that the reopening of assessment is perfectly justified and assesses objections have no merit.

Ground No. 2:

17. Apropos ground No. 2 of the concise of grounds of appeal ld CIT(DR) pleads that, the appellant has raised objections on disallowance of additional depreciation of Rs. 4,05,12,853/- and Rs. 1,52,73,164/- on plant and machinery and tipper respectively. The appellant has taken a general plea that it is engaged in road construction contract but it should be deemed to be engaged in manufacture or production of concrete mix which a distinct commercial commodity. It has been claimed that the appellant company is in the business of road construction and it is required to prepare concrete mixture which is used for construction of roads etc. The crushers are used to crush big stones into aggregate, which is then mixed with Bitumen and a new product comes into existence which is used in construction of roads. It has been pleaded that the aspect of road construction may be ignored and assessee be treated as manufacturer/producer of concrete mix. Therefore additional

depreciation is allowable on the ground that assessee should be deemed to be engaged in manufacturing of intermediate products.

17.1. These submissions made by the assessee are without merit and additional depreciation is not allowable assumptions. Section 32 (i)(iia) of the Act lays down obligatory conditions which are to be fulfilled for claiming the additional depreciation.

17.2. In the present case the assessee is engaged in the business of road construction, bridges & highways etc. The nature of the assessee's business by no stretch of imagination can be termed as manufacturing or production of any article or thing, which has been held in the case of N C Budharaja & Co. supra, by the Hon'ble supreme Court.

> The words 'manufacture' and 'production' have received extensive judicial attention both under the Income-tax Act as well as Central Excise Act and the various sales tax laws. The word production' has a wider connotation than the word 'manufacture' while every manufacture can be characterised as production, every production need not amount to manufacture.
>
> The word 'production' or 'produce' when used in juxtaposition with the word 'manufacture' takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the byproducts, intermediate products and residual products which emerge in the course of manufacture of goods. Further, the word 'article' is not defined in the Act or the Rules. It must, therefore, be understood in its normal connotation - the sense in which it is understood in commercial world. The word 'articles' in section 80HH is preceded by words 'it has begun or begins to manufacture or produce'. The word 'articles' occurring in section 80HH(2)(i) does not comprehend and take within its ambit a dam, a bridge and so on. If a dam is an article, so would be a bridge, a road, an underground canal and a multi-storeyed building. To say that

all of them fall within the meaning of word 'articles' is to overstrain the language beyond its normal and ordinary meaning. It is equally difficult to say that the process of constructing a dam is a process of manufacture or a process of production. It is true that a dam is composed of several articles, viz., stones, concrete, cement, etc. But to say that the end-product, the dam, is an article is to be unfaithful to the normal connotation of the word. A dam is constructed; it is not manufactured or produced.

The expressions 'manufacture' and 'produce' are normally associated with movables - articles and goods, big and small - but they are never employed to denote the construction activity of the nature involved in the construction of a dam or for that matter a bridge, a road or a building.

Further, the principle of liberal construction as contended by the assessee could not be carried to the extent of doing violence to the plain and simple language used in the enactment. It would not be reasonable or permissible for the Court to rewrite the section or substitute words of its own for the actual words employed by the Legislature in the name of giving effect to the supposed underlying object. After all, the underlying object of any provision has to be gathered on a reasonable interpretation of the language employed by the Legislature.

Therefore, the activity of construction of a dam could not be characterised as manufacture or producing of article or articles, as the case may be, within the meaning of section 80HH(2)(i).

17.3. Apropos plea about the intermediary product being a new commodity Hon’ble Supreme Court in N C Budharaja, has rejected such plea. Assessee as declared is engaged road construction and not the intermediary products as end product. What cannot be claimed directly cannot be claimed indirectly. Issue whether the crushing of stones and

mixing it up with the Bitumen for the purpose of constructing roads can be called an activity of production is answered Hon'ble Bombay High Court in the case of CIT vs N. U. C. Ltd. 126 ITR 377. Here assessee was carrying on the business of building, constructing, erecting, planting, executing etc., building, structures, factories etc. In the process and for the purpose of the said construction and repairs of buildings, it manufactured windows, doors, frames, concrete beams and slabs. Hon'ble High Court held that :

> **1.** The assessee manufactured windows, door frames, concrete slabs and beams for the purpose of particular building under construction or repair and not independently. These were not manufactured for sale in the market as such but for use in its own work of construction of buildings. Its business was a complete whole and there was no scope of artificially dividing its business into two parts— one of manufacture of window and door frames, etc., and the other of construction and repairs of buildings for which the said manufacture was done. The Tribunal was, therefore, wrong in treating the window and other door frames, concrete slabs and beams as goods like any other goods which were independently manufactured and sold in the market.
>
> **2.** The Tribunal failed to consider whether the assessee fell within the special definition of "industrial company" as per section 2(7)(d) of the Finance Act, 1966 relevant in the instant case. According to this definition "industrial company" is one which is mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining. The words "construction", "manufacture" and "processing" have all been used but "construction" has been used only in the case of ships indicating thereby that any other type of construction would not fall within this definition. The assessee, carrying on business of construction and/or repair of buildings, was, therefore, not an "industrial company".

> **3.** There was nothing on record to show separately the income derived by the asses see from its so called different activities of constructing buildings and manufacturing frames. Further, it was not carrying on the said activity independently or of, other wise than in the process of, the construction of the buildings. Thus, there was no merit in the assessee's claim that the CBDT's Circular No. 103 [F. No. 166/1/73-IT(A-I)], dated 17-2-1973 extended the meaning of "industrial company" as defined in section 2(7)(d) and since its income derived from manufacture of window and door frames, etc., constituted a large portion of its total income, it fell within the said definition.

17.4. Identical issue came up before Hon'ble Delhi High Court held in the case of Bhagat Construction Co. (P) Ltd. 232 ITR 722. In that case, the assessee company derived income from construction work including mining work for extracting stones to be used in construction. Hon'ble High Court observed as under:

> "The Supreme Court in the case of CIT v. N.C. Budharaja & Co. [1997] 204 ITR 412/ 70 Taxman 312 held that the expressions 'manufactured' and 'produced' are normally associated with the moveables - articles and goods big and small—but they are never employed to denote the construction activity of the nature involved in the construction of a dam or for that matter, a bridge, a road or a building.
>
> In the instant case, the assessee might be extracting minerals such as stones by carrying out mining operations but the product of such mining operations was not the article or thing in which the assessee was dealing. The minerals produced by the assessee were consumed by him in the process of civil engineering works which was the business activity of the assessee. It could not, therefore, be said that the assessee was an industrial undertaking for the purpose of producing a article or thing for which the machinery or plant was wholly used.

> The main business of the assessee would have to be determined. Whether it was a construction business and any step involved in that construction business was only ancillary to the construction activity of the assessee or production of any goods was itself the main business activity of the assessee? An assessee may be engaged in the activity of building work as a contractor and in the process of completing that work some manufacture may be done at interim stages. The product of such manufacturing activity would not result in the production of goods but the product of such activity would be consumed by the assessee in its building work. In that case, the assessee would not be a producer but a consumer, for at the end of its business activity, it would be producing not any goods or articles but only constructing a building. The statement of law in the case of CIT v. Minocha Bros. (P.) Ltd. [1986] 160 ITR 134/ 26 Taxman 648 which was binding, is that inasmuch as the assessee is a manufacturer of buildings or constructor of buildings, an intermediary stage should not be taken to convert the assessee into a manufacturer of goods. A transitory or evanescent product like an R.C.C. block or a door is only a step towards making the whole building.

17.5. Similar issue came up in the case of CIT Vs Minocha Bros. (P) Ltd. 160 ITR 134. The assessee company was engaged in the business of construction of building and it claimed that various manufacturing processes were involved in the construction of buildings and hence it was an industrial company. Hon'ble Delhi High Court has held in this case as under:

> "In the instant case, the assessee-company did building work as a contractor and in the process of that work some manufacture had to be done, like the manufacture of doors, windows, R.C.C. slabs and so on. These activities could be said to result in the manufacture of goods, but they were really part of the building work. On the other hand, to give a meaningful purpose to the Act, it must be understood that the definition is to operate in respect of companies which are industrial companies in the proper sense, that is, they must be manufacturing or processing goods. However, in this case, the assessee consumed doors,

> windows and bricks in making buildings. Hence, the assessee could not be described as a manufacturer or processor in respect of this activity.
>
> This decision is affirmed by Hon'ble supreme Court in 204 ITR 628.

17.6. It is thus clear that since assessee's only business is road construction, it cannot be said that assessee is involved in the business of manufacture or production of any article or thing. Other activities of mixing up of various products in the process of road construction business are neither the end product nor can they be called as manufacturing/production of any article or thing. In the case of CIT Vs Ansal Prop. & Indus. Overseas Projects, 9 taxmann.com 294, Hon'ble Delhi High Court has held that:

> 'An assessee who is engaged in building construction activity would not be treated as industrial undertaking."

17.7. Assessee's additional depreciation u/s32(1)(iia) has rightly been rejected in reassessment, therefore, the appeal deserves to be rejected.

<u>Ground No. 3 to 5</u>

18. By these grounds assessee has raised issues about:

(a) additions/disallowances on various issues on the basis of the enquires conducted during re- assessment proceedings.

(b) Rejection of books of accounts, disallowance of loss and estimation of profits from the Indian Projects @ 4% of the gross receipts.

(c) Non admission of the additional evidences by the CIT(A).

18.1. Secs 147/148 specifically provide that in re-assessment proceedings entire assessment stands reopened and AO can also examine any new issue. Assessing Officer found that assessee had claimed whopping 28.4% losses on Indian Projects at Rs. 5,51,20,396/- on gross receipts of Rs. 19,40,54,608/-. This loss was found to be abnormal compared to assessee's earlier and subsequent years results and other business entities of similar nature. In immediately preceding year the assessee has shown the profit of 1.21% and in succeeding year, profit is shown at 10.34%. This abnormality called was dutifully verified by Assessing officer who called for various details, which are elaborately discussed in the assessment order at pages 12 to 25. Assessing officer demonstrated that the stock registers, quantity tally and format information were not filed before him despite opportunities.

18.2. Assessee claimed material consumed at Rs. 13,79,68,931/-; stores, spares and consumables are claimed at Rs.4,07,78,007/-, as the material consumed formed significant cost towards contracts, the A O called for specific details which were not filed. Consequently value of opening stock of material, purchases made during the year and the closing stock of material could not be ascertained. Thus quantitative details of various items rodi, bitumen, sand, stones, dust, diesel, petrol etc on diverse site could not be ascertained.

18.3. The Assessing officer also asked the assessee to furnish the details of quantitative consumption of various items in comparison to tenders filed and tender, assessee expressed inability to file such details making a lame excuse that maintenance of stock records of raw material is not feasible and possible. Undoubtedly, maintenance of stock register is a very material aspect for ascertainment of correct profits. An organization like assessee

cannot perform such huge activities year after year without effective checks and control over quantities and stocks. Thus the inability was only an excuse to set off Afghan profits with Indian losses.

18.4. Assessee claimed consumption of material of Rs. 13.79 crores being 71.08% of gross receipts, with stores/spares/consumables at Rs. 4.07 crs i.e. 20.98 % of gross receipts without having any stock details for the purpose of control, consumption or valuation. Assessee even in 2nd round of assessment could not produce such details with the help of books of accounts, purchase bills, manufactured quantities, road trips and sale Invoices etc. For such non production of record sec 145 specifically provides a statutory exercise of rejection of books and estimation of profits, which is carried out by AO.

18.5. Further, assessee has shown opening WIP of Rs. 7,50,07,877/- and closing WIP of Rs. 4,28,52,479/- During the course of assessment proceedings, the assessee was asked to furnish details along with reasons for the valuations for each work/project separately. The assessee also did not submit any detailed basis pertaining to opening WIP thus whether while valuing the WIP the assessee has included relatable direct cost or not also remained unverified.

18.6. Contention that the prices/rates of construction materials increased during the year, is a factor which will be true for other assessees in similar line of civil constructions who have shown net profit in the range of 3 to 4 %.

18.7. The assessee did not furnish any proof of payment of labour charges either.

18.8. To verify the claim of expenses under the head purchases of material, the Assessing Officer issued enquiry letters u/s 133 (6) in six cases,no reply was received in four cases, in two of the cases discrepancies were noticed.

18.9. Apropos ground about refusal of additional evidence, objections raised by the AO are relied. It is pleaded that assessee till second round i.e. reassessment also could not produce its own documents, which gives rise to an inference that the deficiencies were sought to be covered up by additional evidence. There was no hitch for assessee to explain his own accounts in two rounds for which burden lies squarely on it. No justification is given as to how it was prevented from filing in earlier proceedings. Management certificates for site stocks are prepared at the end of the accounting period which in case is 31-3-2004, filing these after 6 years in 2010 by way of additional evidence itself is a reason enough for refusal by CIT(A).

18.10. Apropos discrepancies in the receipts shown by the assessee vis-à-vis TDS certificates for which no reconciliation is filed by the assessee. Besides discrepancies with regard to claim u/s 2(24)(x)) read with section 36(va) of the Act & prior period expenses etc. were reasons for rejection of accounts resulting in estimation of net income @ 4% of gross receipts.

19. Apropos allegation that the Assessing Officer could not make roving and fishing enquires during the re-assessment proceedings, and reliance on the decision of Hon'ble Delhi High Court in the case of Ranbaxy Laboratory Ltd. 12 Taxman.com 74. Neither such plea was taken by assessee at ld. CIT (A) stage nor there is any application for additional ground, therefore, this ground/ plea should be rejected. On merits Expln3 to Section 147 provides:

> "for the purpose of assessment or re-assessment under this section, the Assessing Officer may assess or reassess the income

> in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."

19.1. In the case of Balbir Chand Maini vs CIT, 12 Taxmann.com 276, Hon'ble Punjab & Haryana High Court has held as under :

> *Explanation 3* to section 147 of the Act has been inserted by Finance (No. 2) Act, 2009, retrospectively from 1-4-1989 wherein it has been provided that the Assessing Officer is justified in making addition even in respect of those issues which come to his notice subsequently in the course of reassessment proceedings though such issue was not included in the reasons recorded while initiating proceedings under section 147 of the Act. In view of this, the argument raised by the learned counsel for the assessee does not carry any weight.

19.2. Assessee's reliance on Ranbaxy Laboratories Ltd., supra, is misplaced as the basis of initiation of proceedings for which reasons to believe were recorded were income escaping assessment in respect of items of club fees, gifts and presents, etc., but the same having not been done, the Assessing Officer proceeded to reduce the claim of deduction under sections 80HH and 80-I which was held to be not permissible. In the present case the AO made disallowances on the issues for which case was re-opened. Hence his action for making disallowances for issues which came to his notice subsequently during the re-assessment proceedings is justified.

Alternate Grounds:

Ground No. 6:

20. Deduction for employees' contribution towards provident fund, amounting to Rs. 1,23,096/-. Order of AO is relied.

Ground No. 7 & 8 ::

21. The Assessing Officer noticed that Prior period expenses of Rs. 2,40,586/- are not admissible because these expenses relate to earlier year. However, no separate addition is made by the Assessing Officer as it is covered under the estimation of income. The action of the Assessing officer is upheld by the CIT(A) and while doing so he has specifically pointed out that no evidence is filed by the appellant to substantiate the claim that these expenses have crystallized during the year. Neither any details of these expenses were given nor were any supporting evidences filed. Looking into the facts of the case, this ground of appeal deserves to be dismissed.

Ground No. 9

22. Apropos deduction u/s 80HHB CIT(A) has held that the appellant has not filed any particulars regarding his fulfillment of the conditions for claiming deduction u/s 80HHB, in respect of the additions to income made in the assessment order. The CIT(A) has further elaborated by saying that the appellant has not pleaded anything regarding whether the requirements in section 80HHB(3)(ii) & (iii) are fulfilled or not. The CIT(A) also observed that the appellant has stated that his application u/s 154 on this issue is under consideration by the Assessing officer. In view of the specific findings given by the CIT(A), this ground of appeal deserves to be dismissed.

Ground No. 10

23. Apropos issue of interest u/s 234D of the Act, the Assessing officer has charged interest u/s 234D as the assessee has not paid advance tax as per

the provisions of the Act. In such circumstances, there is no merit in the contentions.

24. Ld counsel for the assessee in rejoinder contends that Reliance on the following provisions/ decisions by the Revenue is misplaced:

a) Explanation 2 to Section 147 of the Act - The concept of "change of opinion" which is a jurisdictional condition, must be shown to be met before the assessing officer could be said to have validly assumed jurisdiction. (CIT v. Kelvinator of India Ltd: 320 ITR 561 (SC)).

Explanation 2 enacts a deeming fiction which deems the allowance of exclusive claim of depreciation as income escaping assessment. The said *Explanation* provides only an illustration of income escaping assessment and does not efface the jurisdictional conditions which must be shown to be satisfied before valid jurisdiction may be assumed to reassess the income of the assessee. In other words, *Explanation* 2 comes into play only once the jurisdictional fact which is inherent to "reason to believe" is shown to exist; and, consequently, the said Explanation cannot be read as conferring power upon the assessing officer, which is not otherwise conferred under the main provisions of Section 147 (to which Explanation 2 is appended).

24.1. Reliance, in this regard, is placed on the following decisions:

a) IPCA Laboratories v. DCIT: 251 ITR 416 (Bom HC)

b) Bhor Industries Ltd v. ACIT: 267 ITR 161 (Bom HC)

c) ICICI Prudential Life Insurance v. ACIT: WP(C) 2471 of 2009 (Bom HC)

d) General Insurance Corporation of India v. DCIT: WP(C) 2560 of 2011 (Bom HC)

e) International Global Networks v. DCIT: ITA 6314/Mum/2010 (Mum ITAT)

24.2. Following cases relied on by the revenue are distinguished:

a) Honda Siel Power Products: 197 Taxman 415 (Del.):

24.3. The said decision has been rendered in the context of the failure of the assessee in making full and true disclosure, despite retrospective amendment in law. In that case, after the filing of the return of income for the assessment year 2001-02, the provisions of section 14A of the Act were retrospectively amended. During the course of original assessment, even though the said provisions were in force, the assessee did not declare any facts relating to disallowance under section 14A of the Act, thereby failing to comply with the retrospectively inserted obligation under that section. On account of such failure on the part of the assessee in complying with such statutory obligation of disclosing amount disallowable under section 14A, the reassessment proceedings were upheld by the High Court. The aforesaid decision was thus rendered in the context of failure to comply with a categorical statutory obligation, and thus has no application to the present controversy.

24.4. In the present case, the controversy is with regard to claim of additional depreciation in respect of which the assessee has made full and complete disclosure about the preliminary and material facts and has further complied with the requirement of filing certificate of a chartered accountant in Form 3AA. There is no further obligation on the assessee to suggest legal inferences that may be drawn by the assessing officer from the stated facts. In that view of the matter, the decision in the case of Honda Siel does not advance the case of the Revenue.

b) Dalmia Brothers Private Limited v. CIT: 2011-TIOL-628-HC-DEL-IT (Del HC)

In that case, in the original assessment proceedings, the assessing officer disallowed *only* a portion out of the total creditors in respect of which confirmation had not been received. The balance "unconfirmed creditors" had been allowed. Meaning thereby, part of the creditors, in respect of which confirmation had not been received was allowed and part thereof was disallowed by the assessing officer in the original assessment, despite the assessing officer having raised query in that behalf which remained uncomplied. The reassessment proceedings were initiated to disallow the balance unconfirmed creditors, which had not been disallowed in the original assessment. In those circumstances, the High Court held that the reassessment proceedings were validly initiated and it was not a case of change of opinion.

24.5. It is pointed out that the said decision had been rendered in the peculiar facts of the case. The same was clarified by the High Court in the order passed in the review petition filed by the assessee therein. The Court clarified that the "facts of the case are very peculiar and unusual"

c) Ankita Deposits & Advances Ltd: 193 Taxman 36 (HP HC)

In the said decision, the returns for the assessment years in question had been accepted under Section 143(1) of the Act, as opposed to scrutiny assessment having been framed in the case of the present assessee. The decision, therefore, has no bearing on the present case.

d) New Light Trading Co. v. CIT: 256 ITR 391 (Del)

In that case, the audit party had adverted the attention of the assessing officer to the *fact* that interest had been paid by the assessee therein to one Mr Gulzari Lal in his capacity as an individual and not as Karta of an HUF. Since a point of fact was pointed out by the audit party (and not opinion on any legal issue), the Court upheld reassessment proceedings based on such audit observation.

e) Oriental Insurance Co Ltd. v. ACIT: ITA 3910/Del/2007

The basis for initiation of reassessment was information that came to light during the assessment proceedings for a succeeding year, which the Tribunal upheld as permissible. There was thus, fresh information (in the form of assessment order for subsequent year), which came to the possession of the assessing officer and hence the reassessment proceedings were held to be validly initiated.

24.6. Apropos issue of manufacture or production of intermediary articles or things, reliance on the following provisions/ decisions by the Revenue is misplaced:

(i)Minocha Brothers Pvt Ltd v. CIT : 204 ITR 628 (SC)
Affirming, CIT v. Minocha Brothers Pvt Ltd: 160 ITR 134 (Del HC).

In that case, the issue for consideration was whether the assessee could be regarded as an ‘industrial company as per the definition given in Finance Acts of 1971 and 1972 so as to be eligible for concessional rate of taxation. The said Finance Acts defined the expression ‘industrial company’ to mean a company engaged,

inter alia, in the business of manufacture. Explanation given below the definition of the expression 'industrial company' explained that if 51% or more of the total income of the company is derived from any one or more of the specified activities, then the company shall be treated as industrial company.

The assessee was engaged in the business of construction of building. The assessee claimed that construction of building involves manufacturing of various items and hence the assessee should be treated as `industrial company'. The Courts held that since 51% or more of the income of the company was not from manufacturing process, the assessee could not be treated as `industrial company'.

The aforesaid case, thus, dealt with an altogether different issue of classification of company as "Industrial Company" for the purpose of beneficial rate of taxation on the entire income of the company. The said case was, thus, decided in altogether different facts and the issue involved was also altogether different.

For determination of the question whether the assessee is an industrial company, it needs to be seen whether the income earned by the company from manufacture of final products is more than 51%. In that view of the matter, the adjudication of the aforesaid question would not take into consideration any intermediate products manufactured by that assessee. In so far as allowance of additional depreciation is concerned, the same is with reference to plant and machinery installed in the qualifying

industrial undertaking, which may be one of the several undertakings owned by the assessee. An eligible undertaking manufacturing intermediate products which are captively consumed would be eligible for grant of additional depreciation provided the condition laid down under section 32(1)(ii) of the Act are met by such eligible / qualifying undertakings (as opposed to the assessee).

24.7. In the present case, the issue is regarding eligibility of the assessee to claim "additional depreciation" in respect of new plant and machinery installed in an industrial undertaking, which is used in manufacture/ production of goods.

24.8. The aforesaid decision has also been distinguished by the Delhi High Court in the cases of:

(i) Hydel Constructions (supra).

(ii) CIT v. Vaish Brother's and Co : 247 ITR 385 (All HC)

(iii) Bhagat Construction Co. Vs CIT : 232 ITR 722 (Del)

24.9. In view of the above case laws, the assessee satisfies the condition for grant of additional depreciation in as much as new plant and machinery was installed for manufacture and production of bitumen concrete mixture and the installed capacity had been increased by more than 25%.

24.10. Reliance on the following provisions/ decisions by the Revenue is misplaced:

24.11. Ranbaxy Laboratories Ltd.: 336 ITR 136 (Del): As the appellant is not disputing the position that in terms of Explanation 3 to section 147 new issues may also be gone into by the assessing officer. The caveat, however, is that the assessing officer is not permitted to make roving and fishing

enquiries and then make addition/ disallowance of any unconnected issue. Further, as held by the High Court, fresh notice would be required to be issued in such cases.

24.12. In case of Balbir Chand Mani v. CIT: 12 taxmann.com 276 (P&H) cited by revenue, P&H High Court held that “in view of Explanation 3 to Section 147 of the Act, it was open for the assessing officer to reassess income in respect of issues other than those referred to in the reasons recorded.” This decision is however not applicable to the facts of the appellant’s case since in that case, there were no roving or fishing enquiries by the assessing officer, leading to reassessment of unconnected issues.

25. We have heard the rival contention perused the case laws and material placed on the record. We proceed to decide the issues in following order:

REOPENING OF ASSESSMENT:

26. Apropos challenge to reopening, ld counsel shri Ajay Vohra in fine has pleaded that

(i) Reopening is by change of opinion as issues of additional depreciation and depreciation were specifically considered in original assessment as the claims were allowed after due application of mind reconsideration thereof amounts to change of opinion which is impermissible, hence the reopening on these issues is bad in law.

(ii) Information from audit party is the sole basis of reopening which does not constitute valid information for reopening.

(iii) Hon'ble Supreme court in N C Budharaja does not lay down a binding precedent and was rendered in peculiar facts not comparable to assessee's case. Thus AO without analyzing the applicability of judgment adopted it as a reason for reopening, which is not permissible.

26.1. In our view, following observations of Hon'ble Supreme court in the case of N C Budharaja (supra), are note worthy, as they lay down important propositions on the issues of manufacture and production in cases of construction of immovable properties including roads:

> "….. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place.…"
>
> "……It is true that a dam is composed of several articles; it is composed of stones, concrete, cement, steel and other manufactured articles like gates, sluices etc. But to say that the end product, the dam, is an article is to be unfaithful to the normal connotation of the word. A dam is constructed; it is not manufactured or produced. "The expressions "manufacture" and "produce" are normally associated with moveable articles and goods, big and small but they are never employed to denote the construction activity of the nature involved in the construction of a dam or for that matter a bridge, a road or a building."…

26.2. These observation clearly lay down that it is not the intermediate product, but only the end product, which will be decisive test whether the

end product amounts to production of article or thing. Since the road is not an article or thing it will not entitle the assessee for claim of additional depreciation u/s 32(i)(iia).

26.3. In our considered view:

(i) at the time of passing original assessment order, AO was bound to follow the law of land as declared by Hon'ble Suprme court in the case of N.C. Budhiraja (supra). This itself indicates not forming of a valid opinion by AO in original assessment proceedings. Whether judgment is distinguishable or not will fall in the realm of examining sufficiency of reasons which is not required at the level of recording of reasons. In these facts reopening in this case does not amount to change of opinion.

(ii) From the reading of the reasons it clearly emerges from the record that the AO did not act merely on the audit information alone and he applied his independent mind also to come to a satisfaction for escapement of income and recording reasons. From this angle also, the AO's action in referring to audit objection, cannot be found fault with as held by Hon'ble Delhi High Court in the case of New Light Trading Co. (supra), cited by ld. DR.

(iii) We may also add that notwithstanding N.C. Budhiraja judgment; section 147 was specifically amended thereby creating a deeming provision u/s 147 expln. 2 clause iv, providing that if the excess depreciation is allowed to any assessee, it will constitute deemed escapement of income. Provisions of law are to be given plain and ordinary meaning. In case of ambiguity also they are to be interpreted in logical and harmonious manner so as not to make them

redundant or defeat the legislative intent. Therefore, on the count of clause (iv) to Explanation 2 of Section 147 also, reopening is fully valid as the excess depreciation allowance required statutory remedial action, for which proper reasons are recorded by AO.

(iv) Apropos regular depreciation also, there was a big deference in the figures as given in the P & L A/c and Computation of income filed by the assessee. Assessment record did not reflect reconciliation of this difference, there was no mention as to how higher depreciation was claimed than P & L A/c, on the plant and machinery purchased at Afghanistan. In the absence of any reconciliation on record the AO was fully justified in believing a reason about deemed excess claim of depreciation. It may have been pointed out by revenue audit party which is to be read together with statutory deeming provision of expln.2 to sec 147. Thus the reasons to believe for initiating proceedings u/s 147/148 were properly recorded.

26.4. In view of these facts and circumstances, we hold that the original assessment allowing excess depreciation and additional depreciation to assessee was not in conformity of Hon'ble Supreme Court judgment in the case of N.C. Budhiraja & Co. (supra). Grant of excess depreciation and additional depreciation constituted valid reasons for reopening of assessment. Clause (iv) of Explanation 2 to Sec. 147 and Hon'ble Delhi High Court judgment in the case of New Light Trading Co. (supra). This demonstrates that the action of reopening of assessment by AO is fully justified. The AOs opinion while granting additional depreciation in original proceedings being contrary to law together with reading of expln.2 to sec 147 does not make out a case that the reassessment is based only on change of AO's opinion. In our view the assessee's reliance on the cases of

Kelvinator of India Ltd.; Eicher Ltd.; Goetze Ltd.; Carlton Overseas (P) Ltd.; & Northern Strips Ltd. (supra) and other cases is of no avail to the assessee's case in the given facts and circumstances. We have no hesitation to uphold the order of AO and ld. CIT(Appeals) upholding the validity of reassessment. The assessee's grounds in this behalf are dismissed.

27. Additional Depreciation U/s 32(1)(iia): Coming to merits of the disallowance of additional depreciation on plant & machinery, detailed facts have been narrated above. The assessee is engaged only in road construction, as held by Hon'ble Supreme Court in the case of N.C. Budhiraja (supra). the laying of road does not constitute manufacture or production of any article or thing, Learned counsel for the assessee has emphatically pleaded that N.C. Budhiraja's is not applicable as:

(a) The judgment was rendered in peculiar facts and circumstances;

(b) For road construction, the main ingredients of cost of laying road are Bitumen mix and labour charges. The alternate plea is to the effect that the Looking at the whole process Bitumen mix manufactured as an intermediary product constitutes a separate commercial commodity and is marketable independently. Therefore to the extent of Bitumen mix production, the assessee may be treated as a manufacturer, producing a new article i.e. Bitumen mix. It is thus argued that the assessee being engaged in the manufacturing of a new intermediate product i.e. Bitumen mix therefore this may be considered as new product. Since the expansion capacity has gone up by 10%, of the manufacture, therefore, the assessee is eligible for additional depreciation. Reliance is placed on YFC Projects P Ltd, Titanor components Ltd. D J Stone crusher(Supra). Besides further

reliance is placed on Textile Machinery Corporation Limited v. CIT: 107 ITR 195 (SC)

- DCM Shriram Consolidated Ltd v. CIT: 322 ITR 486 (Del.)
- CIT v. Orissa Cement Ltd.: 254 ITR 412 (Del)
- CIT v. Dalmia Dadri Cement Ltd.: 263 ITR 364 (Del)
- CIT v. Standard Motor Products: 131 ITR 300 (Mad)
- Ahmedabad Mfg. & Calico Co: 162 ITR 760 (Guj)

27.1. In our considered view, Hon'ble Supreme Court in the case of N.C. Budhiraja (supra) has specifically dealt with the issue about the relevancy of new intermediate product. It has been unequivocally held that if the assessee's end product does not amount to production of a new article or thing, it cannot be given benefit because of any intermediate product. We are unable to accept the argument and case laws advanced by ld. counsel. Thus, we are unable to hold that Hon'ble Supreme Court judgment in the case of N.C. Budhiraja (supra) is distinguishable from the facts of assessee's case. The judgment in the case of N.C. Budhiraja (supra) specifically refers to road construction and intermediate products and lays down a ratio decidendi that the construction of dam, building or road construction cannot be treated as producing or manufacturing of any article or thing and that a new intermediate product is irrelevant.

27.2 Ld DR in reply has relied on the decisions in the cases of NUC Ltd (Bom) (supra); Delhi High Court judgment in Minocha Bros. which has subsequently been upheld by Supreme Court; Delhi High Court judgment in the case of Bhagat Construction Co. etc. (supra). All the case laws lay down a proposition that when assessee is in construction of buildings it will not be

held to be manufacture because of any intermediate product. Respectfully following Hon'ble Supreme court judgment in the case of N C Budhraja and other citations relied on by ld CIT(DR), assessee's arguments and grounds in this behalf are rejected.

28. Thus as the assessee cannot be held to be a producer of any article or thing, we are unable to accept the plea that to the extent of manufacturing of intermediate Bitumen mix, it may be treated as eligible for additional depreciation. In view of foregoings, on merits also the assessee's grounds are rejected.

29. **A**. Challenge to jurisdiction of AO in reassessing the Indian losses:

29.1. Learned counsel for the assessee has relied on Ranbaxy Laboratories case (supra) and claimed that the AO cannot make fishing and roving inquiries during the course of reassessment proceedings about Indian losses. Explanation 3 to Sec. 147 has been reproduced above, which provides that while making the reassessment, AO can proceed in respect of other issues though not mentioned in reasons and come to his knowledge subsequently in the course of reassessment proceedings. The explanation clearly lays down that reassessment of new issues is permissible even though the reasons for new issue are not recorded in the original reasons. With this statutory provision on record, we are unable to accept the assessee's plea that AO initiated roving and fishing inquiries in respect of Indian losses.

29.2. During the course of reassessment proceedings, AO found that as compared to preceding and subsequent years, assessee has suffered huge losses only in respect of Indian projects. To verify the same, AO proceeded to examine the issues of losses, which he is empowered to do. Reliance of ld. counsel in the case of Ranbaxy Laboratories Ltd. (supra), is on different

facts in respect of club fees, gifts, presents etc. In our vie, ld. DR has rightly cited Punjab & Haryana High Court judgment in the case of Balkram Chand Maini (supraw). Consequently, this technical plea is not accepted.

29.3. We may also add that this ground was not taken before ld. CIT(Appeals) consequently, it does not arise from his order. The assessee has not filed any application for additional ground also before us also. Such plea which constitutes a specific ground cannot be adjudicated only because it is raised in memo of appeal filed before ITAT. Second appeal lies to ITAT on a ground which arises out of CIT(A)'s order. In view of the foregoings, this ground of the assessee is dismissed.

30. **B**. Rejection of additional evidence by CIT(Appeals):

30.1. It will be pertinent to observe here that original assessment was completed u/s 143(3), in the course of second round i.e. reassessment proceedings, AO asked all the relevant queries about Indian losses. The assessee did not file the additional evidence in these two proceedings, after a gap of 6 years the additional evidence relating to accounts was proposed to be filed before ld. CIT(Appeals). The books of a/cs, relevant statements or any management certificates are integral part of the books of A/c, in control and knowledge of the assessee. Besides, at the time of statutory audit, these statements in respect of closing stock inventory at various sites is important. Assessee in the application for additional evidence has made averments that sufficient opportunity to produce them was not given by AO. In our view, assessee's averments are not correct. In the memo of first appeal, it has not been alleged that sufficient opportunity was not given by AO. Thus the assessee's application for additional evidence suffers from lapses of

inordinate delay and contradictions. In view of these facts and circumstances, we do not find any infirmity in the order of ld. CIT(Appeals), refusing to admit the additional evidence. This plea of the assessee is also dismissed.

31. **C**. Merit of rejection of books and Estimate of profits from Indian projects @ 4%:

31.1. Assessee claimed whopping 28.4% losses on Indian Projects at Rs. 5,51,20,396/- on gross receipts of Rs. 19,40,54,608/-. This loss was found to be abnormal compared to assessee's earlier +1.21% and subsequent years +10.34% profits and other business entities of similar nature. Despite repeated requests stock registers, quantity tally and format information were not filed before AO.

31.2. AO called for details of material consumed at Rs. 13,79,68,931/-; stores, spares and consumables are claimed at Rs.4,07,78,007/-, which is significant costs towards contracts; they were not filed. Consequently value of opening stock of material, purchases, quantitative details of various items rodi, bitumen, sand, stones, dust, diesel, petrol etc on diverse site could not be ascertained by AO

31.3. The details of quantitative consumption of various items in comparison to tenders filed and tenders granted also were not filed on the lame excuse that maintenance of stock records of raw material was not feasible and possible. Maintenance of relevant stock registers is a very important aspect for ascertainment of correct profits. An organization like assessee cannot perform such mammoth activities year after year without effective checks and control over quantities and stocks.

31.4. Assessee thus failed to produce important details for ascertainment of cost and quantities. Legislature has enacted sec 145 which specifically

provides a statutory exercise of rejection of books and estimation of profits, if proper income cannot be ascertained.

31.5. A general contention has been raised by assessee that the prices/rates of construction materials increased during the year and there was cost overrun. This fact has not been demonstrated in factual terms with project wise specific details. In this eventuality assessee would not have earned any profit from other sites in India. Besides such universal increase will be true for other assessees in similar line of civil contractors who have shown net profit in the range of 3 to 4 %.

31.6. It is further accepted by the assessee that on every site relevant record was maintained and certified by the management. The assessee is liable to statutory audit, which shall enable the AO to determine correct profits. On one hand, assessee contends that it is not feasible to maintain the record and inventories at various sites. On the other hand the management certificates certifying the stock details are proposed to be filed as additional evidence. Thus, the assessee is taking contradictory stands. Huge losses are sought to be replied by vague statements that there was increase in the cost of Bitumen, therefore, the losses are genuine. In our view the assessee's stand cannot be accepted. AO for rejection of books has given very important reasons that :

(a) The purchases above Rs. 5 lacs in proforma could not be given
(b) Details of material consumed, stock inventory for different material were not filed.
(c) Details of quantitative consumption and comparison between tenders filed/ tenders granted could not be given.
(d) Proper details in respect of work in progress could not be given.

31.7. Because of all these deficiencies assessee's claim of huge losses could not be verified by the AO, in view of these unanswered deficiencies, AO rightly rejected the books of accounts. There was much more to the Indian project loss than what meets the eye. In these circumstances, AO had no choice but to reject the books of account and estimate the income. In these facts and circumstances, we see no infirmity in the order of AO rejecting the books of the assessee and making an estimate of profits.

32. **D**. Reasonableness of estimate at 4% of gross receipts:

32.1 The average of assesses preceding 1.21% and succeeding years 10.34% of profits comes to 5.77%. AO looking at the profits shown by similar type of road contractors has estimated it at 4%, which is lesser than assesses own average profits for two years.

32.2. If assessee was aggrieved on the estimate of 4% profits by AO, it could have dislodged it before CIT(A), by giving comparison with other road contractors who may have earned lesser profits. In the absence of any such exercise carried out by assessee we are unable to hold that AOs estimates should be interfered. If assessee chooses to be silent on material aspects of ascertainment of computation of correct profits and dislodge the estimate by specific details , the same is at its risk. Consequently AOs estimate cannot be held to be arbitrary, unreasonable or capricious. Thus assessee's grounds about rejection of books and estimation of profits fail.

32.3. Since we have upheld the estimation of profits on the basis of gross receipts, assesses ground 6,7 and 8 becomes infructious and are dismissed.

33. Apropos ground no. 9 relating to claim u/s 80HHB, we are of the view that due to denial of additional depreciation assesses business profits from eligible Afghan projects will go up. In our view assessee will be eligible for proper deduction u/s 80HHB in respect of assessed eligible profits. In case

of disputed eligible business profits, it is a recognized practice to allow the assessee to create suitable reserve in the books of accounts. Under these facts and circumstances we hold that the assessee be given 80HHB claim in accordance with law and be allowed to create appropriate reserve in it's accounts. This ground of the assessee is allowed.

34. Apropos ground no 10 regarding Interest u/s 234Dit is pleaded that Sec 234D reads as under:

> **Interest on excess refund.**
> **234D**. (1) Subject to the other provisions of this Act, where any
> refund is granted to the assessee under sub-section (1) of section 143, and -
> (a) no refund is due on regular assessment; or
>
> (b) the amount refunded under sub-section (1) of section 143 exceeds the amount refundable on regular assessment, the assessee shall be liable to pay simple interest at the rate of [one-half] per cent on the whole or the excess amount so refunded, for every month or part of a month comprised in the period from the date of grant of refund to the date of such regular assessment.
> (2) -------

34.1. Original assessment was completed u/s 143(3), thereafter, this reassessment was carried out. The assessing officer erroneously charged interest, under Section 234D of the Act without appreciating that it applies only to "regular assessment" or in reassessment and in case where such "assessment u/s 147 is framed for the first time". Thus no interest was leviable under Section 234D of the Act on the assessee. The CIT(A), however, has not adjudicated this ground in the impugned order.

34.2. Reliance is placed on Vishakhapatnam Bench of the Tribunal in Dredging Corporation of India v. ACIT: ITA 6/Vizag/2011, dated 25.07.2011.

34.3. We find that a plain reading of provisions of sec. 234D makes it clear that they are applicable to regular assessments only. In our considered view this issue stands squarely decided by the coordinate Vishakhapatnam bench. Hon'ble Bombay high Court also has taken a similar view in the case of M/s Delta Airlines vide order dated 5-9-2011. Respectfully following these authorities, this ground of the assessee is allowed.

Revenue's Appeal:

35. As the facts emerge, plant and machinery and office equipment installed at the Afghanistan site were acquired by the assessee on $ term loans. As a matter of accounting policy the fixed assets of the Afghanistan and Indian sites are consolidated in the balance sheet in rupee terms applying the exchange rate of Rs.43.39 for conversion of US $ into Indian Rupees at the purchase value.

35.1. At the time of closing of accounts $ loans were revalued at 31-3-04 prevailing exchange rate of Rs.45.68 per US dollar by method of average cost. This resulted in variation of the cost of Afghan fixed assets and consequent depreciation as on 31-3-04 value. The difference of increased depreciation was to be incorporated in accounts i.e. of Rs.87,15,926 and Rs. 53,594 on plant and machinery and tippers respectively. This was credited to miscellaneous expenses account and to balance this entry, it was finally transferred to the profit and loss account. This was carried out in

accordance with the Accounting Standard-11 issued by the Institute of Chartered Accountants of India.

35.2. Ld DR has neither disputed the facts about $ term loans for Afghan assets; effect of AS-11 nor disputed the average value of $ at Rs Rs. 45.68. In our considered view no fault emerges in the accounting entries. The increased cost of $ loans has been incorporated in the books through Misc. Expenses a/c. Since the accounting treatment by AS-11 and average conversion rate has not been disputed before us, we see no infirmity in the order of CIT(A) deleting this addition. Consequently revenue appeal is dismissed.

36. In the result assesses appeal is partly allowed and that of revenue dismissed.

Order pronounced in open court on 15-05-2012.

Sd/-	Sd/-
(SHAMIM YAHYA)	(R.P. TOLANI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 15-05-2012.

MP

Copy to :

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR