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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G' DELHI
BEFORE SHRI N.K. KARHAIL AND SHRI K.G. BANSAL

ITA No. 3572(Del)/2003
Assessment year: 1998-99

Airports Authority of India, Rajiv Gandhi Bhawan, Safdarjung Aairport, New Delhi-3. PAN-AAACA 6412D	Vs.	Jt. Commissioner of Income tax, Spl. Range-14, New Delhi

ITA No. 711(Del)/2004
Assessment year: 1999-00

ITA No. 1830(Del)/2004
Assessment year: 2000-01

Airports Authority of India, Rajiv Gandhi Bhawan, Safdarjung Aairport, New Delhi-3.	Vs.	Asstt. Commissioner of Income tax, Circle 1(1), New Delhi
(Appellant)		(Respondent)

Appellant by : S/Shri Ved Jain, Miss Rama Jain & H. Goyal, C.As

Respondent by: Shri Satibir Singh, CIT, DR

PER BANSAL : AM

ORDER

These three appeals of the assessee, relating to assessment years 1998-99, 1999-00 and 2000-01, raise common grounds. Therefore, a consolidated order is passed.

ITA No. 3572(Del)/2003-A.Y. 1998-99

2. Ground no. 1 is against the finding of the learned CIT(Appeals) that the assessee was not entitled to exemption u/s 10(29) of the Act in respect of net income earned on cargo warehousing activity. It was the common ground of both the parties that the issue stands covered by the order of ITAT, Delhi Bench "E", New Delhi, in the case of assessee in ITA No. 2398(Del)/2004 for assessment year 2000-01 dated 8.12.2006. According to paragraph 10 of that order, the matter was restored to the file of the Assessing Officer to re-examine the matter regarding the application of the appropriate law and to determine whether the assessee is running or establishing warehouses or cargo complexes. Respectfully following that decision, this matter is restored to the file of the Assessing Officer to re-examine the matter in the light of the directions of the Tribunal and make fresh assessment on this issue after hearing the assessee. Thus, this ground is treated as allowed for statistical purposes.

3. Ground no. 2 contains averments to the effect that the learned CIT(Appeals) was not justified in not granting deduction for a sum of

Rs. 20.00 crore provided in the books on mercantile system of accounting towards the liability on account of removal of encroachments in and around the technical area of the airport. It is further mentioned that it was explained to him that the provision was necessitated on the considerations safety and security and, thus, made in the normal course of business.

3.1 It was submitted before the learned CIT(A) that due to influx and increase in population in metropolitan cities, the land around the airport area was illegally encroached and hutments were constructed thereon, thus, endangering the safety of aircraft while taking off or landing. The cluster of hutments also attracted vultures and birds which prove dangerous to the aircraft. Over the years the hutments became slums. In Mumbai alone it was estimated that there were about 63 slum pockets with about 85,000 hutments. These illegal encroachments were sought to be removed with the help of the State Governments. It was further submitted that expenditure on such removal was estimated at about Rs. 200 crore in Mumbai alone. Similar situations existed in other metropolitan cities. The expenditure was only to secure the existing assets and no new asset came into existence in the books of the assessee.

Since removal of encroachments was an on-going process, a liability of Rs. 20.00 crore was provided in the books of this year. It was also submitted that since the assessee is maintaining books of account on mercantile method, it was necessary to take this liability on its books in view of the decision of Hon'ble Supreme Court in the case of Bharat Earth Movers Vs. CIT, 112 ITR 61, wherein it was held that if a liability has been incurred, the deduction should be allowed even though it may have to be quantified and discharged at a future date. What is to be seen in such a case is whether the liability has been definitely incurred or not. Reliance was also placed on the decision of Hon'ble Supreme Court in the case of Bikaner Gypsum Ltd. Vs. CIT, (1991) 187 ITR 39, in which it was held that any expenditure incurred in the case of business for removal of any obstruction, restriction or disability would be on revenue account. Thus, it was argued that what was to be seen in the instant case was whether liability has been incurred and it is capable of being estimated with reasonable certainty although the actual quantification and payment may take place in future. The learned CIT(A) considered these submissions. It was pointed out by him that the provision was made on the basis that it was necessary to evict the illegal occupiers and rehabilitate them. However, the work on these

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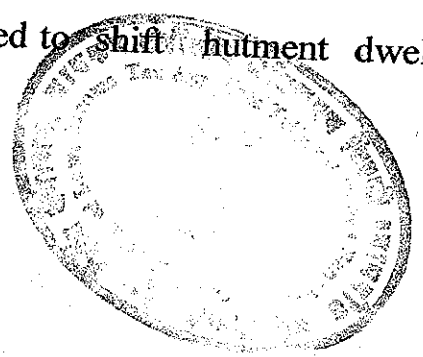
aspects did not start during the previous year. No operation for removing or shifting the hutments started during the year. Thus, it was held that the liability was not incurred in this year.

3.2 Before us, the learned counsel filed a written note regarding the steps taken for removal of encroachments and re-settlement of hutment dwellers. It appears from the note that the Government of Maharashtra conducted a survey of hutment dwellers on airport land in 1976, which showed that approximately 14,000 unauthorised hutments existed on the land. In 1987, the Chief Secretary, Government of Maharashtra and Secretary, Civil Aviation agreed to remove encroachments and re-settle hutment dwellers on Central Government land in Salt Pan area in Mumbai admeasuring about 200 acre. The Salt Pan land was to be acquired from the assessee and the cost of development of the land was estimated @ Rs. 10,000/- per hutment. In pursuance of this plan, a sum of Rs. 1.00 crore was paid by the assessee to Bombay Municipal Corporation as advance for development of the land through Maharashtra Housing & Area Development Authority. However, the lessees of Salt Pan land agitated the matter via litigation and the shifting of the hutments could not proceed further. At the request of the assessee

another survey was conducted by Government of Maharashtra in 1993-94 for removal of encroachments from the area which are in the approach funnel of the Mumbai Airport. It was revealed that there were 11,400 unauthorised hutment dwellers in this area existing prior to 1.1.1985 (being the protection date fixed by the State Government), who were eligible for alternate sites for settlement. The cost for such re-settlement in Malwani and Mandala was estimated at Rs. 32.00 crore. It was agreed that 80 acres of land of the assessee which was not immediately required for airport use will be transferred to the state government, who will commercially exploit 50% of this land and in the balance land four storeyed tenements will be built out of the monies received from commercial exploitation of the other half. The assessee also agreed to pay Rs.25,000/- per hut towards on-site infrastructure cost. However, nothing materialized either under this scheme or earlier scheme. In 1996, Joseph Committee was commissioned to go into the whole problem of the encroachments and to determine the priority areas required by the assessee for operational and commercial use. It was found that there were 63 pockets of land which were unauthorisedly encroached and there were 85,000 hutment dwellers as on 1.1.1995. The Committee made various recommendations, which were as under:-

- "To accept in principle the slum rehabilitation scheme of the Government of Maharashtra in Brihan Mumbai;
- To indicate the precise boundaries of slums to be shifted in the first instance, but not exceeding 2500 in numbers;
- Setting aside 5.5 hectares land for re-settlement of aforesaid 2500 slum dwellers;
- To provide access, enable the authorities concerned to get water, sewerage, light, road and other facilities to the site of rehabilitation;
- To allow construction of temporary transit camps near the new site and to relax height and other restrictions to enable the buildings to come up."

3.3 For this purpose, a Slum Rehabilitation Authority was also constituted to achieve the aforesaid objectives by creating awareness about the necessity of the scheme. It appears that certain meetings were held amongst Airport Authority, Slum Rehabilitation Authority and SPARC (NGO), which took certain decisions for removal of encroachments and rehabilitation of the slum dwellers. Various options given by the Committee were examined by the board of the assessee company and it was decided that a Statement Government agency, SPPL, may be requested to shift hutment dwellers from Jari Mari land, Mumbai. The



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area was to be used for extension of B-3, Taxi Track. It was mentioned that the aforesaid land was urgently required due to operational necessity for extension of B-3 Taxi Track which will augment capacity of the existing runway. This would have necessitated rehabilitation of 1855 hutment dwellers. This figure increased to 2116 hutments, the cost of removal of which was approximately Rs. 25.92 crore. The assessee paid a sum of Rs.16.01 crore. The working of the cost was furnished which is reproduced below:-

No. of instalment	Percentage of payment of each instalment @ 1.20 lakhs per hutment	On the basis of total 2116 hutments as per agreement.
1.	2	3
1st	25% at the signing of agreement	6.34.80,000/-
IInd	50% after completion of internal/external plaster work	12,69,60,000/-
IIIrd	25% within 15 days of the occupation certificate by SRA	6,34,80,000/-
	Sub total	25,39,20,000/-
Addl.	Community Development cost @ 2500/- per hutment	52,90,000/-
	Grand total(A+B)	25,92,10,000/-

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The assessee was also required to furnish a copy of the account maintained in its books in this behalf, which was not filed.

3.4 In reply, the learned DR pointed out that no liability was incurred by the assessee in this year, as there is no evidence on record that either hutment dwellers agreed for their rehabilitation or any rehabilitation scheme was notified by the Bombay Municipal Corporation or the State Government. There is no evidence on record regarding the determination of the number of hutments to be removed in this year or the area to be cleared in this year and the basis of working of the liability. It was pointed out that encroachment of the land made a dent in the capital asset of the assessee and, therefore, any loss occurring therefrom was a capital loss. Thus, the provision made in the books was only to meet any liability which may arise in future on fructification of the scheme to evict and rehabilitate illegal encroachments. There was no liability incurred in presenti. Thus, it was a case of a contingent liability arising only if any scheme for removal and rehabilitation came through either by agreement with the hutment dwellers or through specific statutory notification of the State Government. No agreement took place in this

year and no scheme was notified by the government in this year. Therefore, no liability was incurred. Thus, it was argued that the order of the learned CIT(A) may be upheld.

3.5 We have considered the facts of the case and rival submissions. In the case of Bharat Earth Movers Vs. CIT (2000) 245 ITR 428, the Hon'ble Supreme Court dealt with accrual of contractual liability on account of leave encashment of the employees. In that case, there were two sets of employees which could be conveniently termed as officers and staff. Both kinds of employees were entitled to earned leave, being 2.5 days per month in the case of officers and 1.5 days per month in the case of staff. The earned leave could be accumulated. It could be encashed subject to the ceiling of accumulation. The question before the Hon'ble Court was whether, on the facts and in the circumstances of the case, the provision for meeting the liability for encashment of earned leave was an admissible deduction? The law laid down by the apex court is that if a liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is incurring of the liability. It should also be capable of being estimated

with reasonable certainty although the actual quantification may not be possible. If these requirements are met, the liability is not a contingent one. The liability is in presenti though it will be discharged at a future date. For this purpose, it does not make any difference if the future date on which the liability shall have to be discharged is not certain. On the facts of the case, the Hon'ble Court held that the liability arose from year to year on the basis of agreement between employees and the assessee company and it was capable of fair ascertainment and, therefore, it was an admissible deduction. The first question before us is whether, the impugned liability is contractual in nature or statutory in nature? No argument was made by the learned counsel in this behalf although the principles of accrual may be somewhat different in case of contractual and statutory liability. In case of a contractual liability, what is to be seen is whether the liability has been incurred as per contract and it is capable of fair ascertainment, as discussed above. However, a statutory liability depends upon the provision of law, which fastens the liability on the assessee. Since the assessee has relied upon the decision in the case of Bharat Earth Movers (supra), a case decided under the contractual liability, it follows that the case of the assessee is that its liability is contractual in nature. Thus, the second question is whether, any

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agreement between the hutment dwellers and the assessee came into existence in this year to fasten any liability on the assessee which was capable of fair ascertainment? We may also refer to the decision of Hon'ble Supreme Court in the case of Bikaner Gypsum Ltd., in which it was held that any sum paid for removal of disability in carrying on the business will be of revenue nature. Obviously, removal of hutments is in the nature of removal of disability and, therefore, if any liability has been incurred in this year, it will constitute an admissible deduction. From the narration of past events regarding removal of unauthorized hutments, it is seen that a number of meetings took place between the assessee and the Government of Maharashtra and even some NGOs were involved. However, apart from making certain recommendations and estimating the likely expenditure for obtaining the aforesaid purpose, no agreement came into existence between the assessee and the hutment dwellers with or without involvement of any third party. Therefore, the meetings and their resolutions were merely in the nature of intendments, which did not bring into existence any enforceable agreement of paying certain charges by the assessee for removal of the hutments. It is also mentioned in the note that the assessee has released a payment of rs. 16.01 crore, but the date of release of the money and

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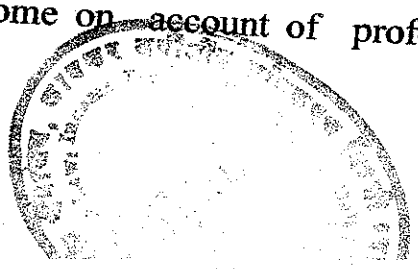
the person to whom the money has been paid is not stated therein. Thus, it cannot be ascertained as to whether this amount was paid in this year. From this, it can be reasonably inferred that the payment was not released in this year and we are fortified in coming to this conclusion because in spite of our requests to furnish the account, the same was not furnished. As no agreement between assessee and hutment dwellers has been filed, we are of the view that no legally enforceable liability was fastened on the assessee in this year and, therefore, even under mercantile system of accounting, the assessee is not entitled to deduct the impugned amount simply because a provision was made. We may again refer to the decision of Hon'ble Supreme Court in the case of Bharat Earth Movers, which laid down that the liability should have been actually incurred in the year and it should be capable of reasonable ascertainment. In this case, there is no evidence that the liability has certainly been incurred in this year. Therefore, we are of the view that the assessee is not entitled to deduct the impugned amount in computing the income of this year. Thus, ground no. 2 is dismissed.

4. Ground no. 3 is against the finding of the learned CIT(Appeals) that the income on account of proforma advices, amounting to Rs. 22.53



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crore, represented real income, which accrue to the assessee, owing to the reason that there was remote possibility of recovery of the amount. Both the parties agreed that this issue stands covered by the aforesaid order of the Tribunal against the assessee. In paragraph 16 of that order, it was pointed out that some departments had made payments against the invoices. Therefore, the issue of accrual of income from various government departments cannot be disputed. Respectfully following th order of the Tribunal, this ground of the assessee is dismissed.

5. Ground no. 4 is to the effect that the learned CIT(A) erred on facts and in law in rejecting the claim that the terminal building was plant for the purpose of deduction of depreciation in spite of the fact that in earlier years such a claim had been accepted and there was no change in facts in this year vis-à-vis the earlier years.

5.1 In the aforesaid connection, it is mentioned in the assessment order that the assessee claimed depreciation @ 25%, being applicable to machinery and plant. In the earlier years, the depreciation was allowed @ 10% applicable to building. It was explained that the terminal building was not an ordinary structure but it was machinery and plant for all

practical purposes. The Assessing Officer considered the claim. It was pointed out that in the past depreciation was deducted on the footing that the terminal building was building and not machinery or plant. The learned CIT(Appeals) accepted the case of the assessee, but appeals to Tribunal were pending. He held that the assessee was entitled to deduct depreciation @ 10% only on the terminal buildings.

5.2 It was explained to the learned CIT(A) that the assessee owned pavements system which includes runway, taxiway, apron areas; terminal buildings and other ancillary technical building with air tank, electric system, conveyor belt, escalators and elevators within the buildings. These assets were necessary to maintain, operate and manage transport services at 87 airports situated all over India. It was further explained that the aforesaid assets were tools of the business and were essential for successful operation of the airports. The first component, namely, the pavement system including runway, taxiway, and apron areas had already been accepted as "plant" although they were laid on land. This component undergoes heavy wear and tear and, therefore, has been accepted as tools of the business. The second component, namely, the terminal building, ancillary technical buildings and equipments used

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within the building are not ordinary building, undergoing ordinary depletion. Therefore, it was claimed that both assets should be treated as "plant". The learned CIT(A) considered the submissions of the assessee. He referred to the provisions of section 32 and pointed out that in respect of all structures which were functionally essential and adjunct premises of the building, the deduction for depreciation was admissible @ 10%. If some expenses are incurred for repairs due to heavy depletion, the expenses will be in the nature of current repairs. Thus, the finding of the Assessing Officer was upheld.

5.3 Before us, the learned counsel for the assessee pointed out that the terminal building does not merely contain enclosures for the passengers but also contains aero-bridges, cargo hold area, escalators and conveyor belts. The building is specially designed to accommodate these assets and work smoothly throughout the year without disruption of flights. In a way, these buildings become part of the aircraft for ingress and egress of the passengers. Therefore, the whole of the building ought to have been treated as plant for the purpose of deduction of depreciation.

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5.4 In order to support his contention, reliance was placed on the decision of Hon'ble Supreme Court in the case of CIT Vs. Dr. B.Venkata Rao (2000) 243 ITR 81, in which it was pointed out that the order of the Tribunal showed that the nursing home contained a sterilization room equipped to enable sterilization of surgical instruments and bandages. In these circumstances, it was reasonable to assume, particularly having regard to the finding that sterilization room admeasured 250 sq. ft., that the nursing home was also equipped with an operation theatre. In such circumstances, the finding of the High Court that the building was 'plant' should be upheld. Further, he relied on the decision of Hon'ble Supreme Court in the case of CIT Vs. Karnataka Power Corporation (2001) 247 ITR 268, in which a reference was made to the observations of the Hon'ble Apex Court in the case of CIT Vs. Anand Theatres (2000) 244 ITR 192, in which it was pointed out that except in exceptional circumstances, the building in which the plant is situated must be distinguished from the plant itself. However, it will be difficult to read the judgment of Anand Theatres so broadly. In that case, the court had considered a number of authorities of this country and England and came to the conclusion that a building which was used as a hotel or a cinema theatre should not be given depreciation on the basis that it was a plant. The Hon'ble Court

was at pains to add that that was a case where building was specially designed and constructed with some special features to attract more customers and that by itself did not convert a building into plant. The observations were limited to hotels and cinema theatres and will not always apply otherwise. The question will be one of fact and what has to be seen is whether a building has been planned and constructed to serve special technical requirements and, if yes then, the building will be plant for the purpose of the deduction of depreciation. The CIT(A) had noted that the building had been constructed for the purpose of potential transformer, cable duct system, outdoor yard structures and tail race channel. The process of generation of electricity started from flow of water from the reservoir into penstocks and ducts, which was the later carried to conductor system for turbines. On production of electricity, it had to be conducted for storage and this process continued to the stage when the electricity is flowed into transmission tower. The water used for rotation of turbines had to be removed and this was done through tail race channel. For stepping up the electricity, transformers were used in the outdoor yards. The conduction of electricity was through conductors held in ducts, called cable duct system, which were specifically designed for this purpose. All these parts were specially

designed and generators and were part of the electricity generation plant. A finding of fact had been given that the generating station building constructed was an integral part of the power plant. Therefore, it was held that it must be held as plant, entitled to investment allowance.

5.5 The learned counsel also relied on the decision of Hon'ble Andhra Pradesh High Court in the case of CIT Vs. Krishna Bottlers Pvt. Ltd. (1989) 175 ITR 154, in which it was held that bottles and shells used in the business of soft-drinks manufactured and sold by the assessee constituted plant, as they were tools of the trade through which the soft-drinks was passed from the assessee to the customer. The Hon'ble Court laid down eight principles to decide the issue whether a particular item was plant, namely, that –(i) the word "Plant" is to be construed in the popular sense as the people conversant with the subject matter would attribute to it, (ii) the building or setting in which the business is carried cannot be plant, (iii) the thing need not be part of the machine used in the manufacturing process but could be merely an apparatus for carrying on the business having a degree of durability, (iv) merely because the asset has a passive function in carrying on the business, it cannot be said that it is not plant, (v) the thing should have functional

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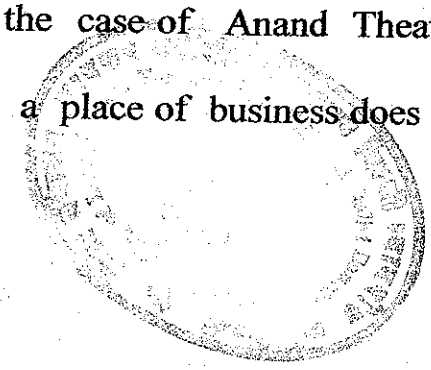
use in the operation of the business, (vi) gross materiality or tangibility is not necessary as intangible thing like designs could also be plant, (vii) for deciding whether a thing is a plant or a premise, one should look at the finished product and not at the bits and pieces as they arrive from the factory. The mere fact that the building holds machinery and plant does not convert it into plant, and (viii) the functional test is the decisive test.

5.6 The learned counsel also relied on the decision of Hon'ble Rajasthan High Court (Jaipur Bench) in the case of CIT Vs. R.G. Ispat Ltd. (1994) 210 ITR 1018, in which it was pointed out that a functional test has to be applied to determine whether a structure is a building or a plant. In that case, massive re-enforcement concrete structure, specially designed to take heavy loads of the cranes was held to be plant. He also relied on the decision of Hon'ble Bombay High Court in the case of Siemens India Ltd. Vs. CIT (1996) 217 ITR 622, in which it was pointed out that generally two tests are applied to distinguish a building from "plant", namely, that (i) the common parlance or trade parlance test, and (ii) functional test. In that case the plumbing and drainage required to take out corrosive chemicals from the electroplating shop

were held to be plant. He also relied on the decision of Hon'ble Allahabad High Court in the case of CIT Vs. Kanodia Cold Storage (1975) 100 ITR 155, in which the freezing chamber by way of building in the cold storage of the assessee was held to be plant. He also relied on the decision in the case of Inland Revenue Commissioners Vs. Barclay, Curie & Co. Ltd. (1969) 76 ITR 62 (HL), CIT Vs. Bank of India Ltd. (1979) 118 ITR 809 (Bom.) and Leela Movies Vs. CIT (1991) 191 ITR 113 (All.). The learned counsel dealt with the order of Hon'ble ITAT, Rajkot Bench in the case of Kandla Port Trust Vs. ACIT (2007) 104 ITD 1, in which it was pointed out that the real test is to see whether the building or structure constituted an apparatus or tools of business or it was merely a place from where the business was carried on. On the facts of the case wharves, pavements, docks including dry docks, drains, jetties, railways rolling stock were held to be critical apparatus with which the port carries on its business and, therefore, these assets were held to be plant.

5.7 In reply, the learned DR relied on the decision of Hon'ble Supreme Court in the case of Anand Theatres (supra), in which it was pointed out that a place of business does not become a plant merely because it



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is constructed in an attractive manner so as to have more customers. It was his case that the terminal building is a place where the passengers are housed till necessary formalities are completed for them to board the aircraft. The conveyor belts to carry the luggage etc. are merely amount to providing better facilities as otherwise the luggage can be carried even manually. His case was that a reactor building, which is specifically designed to withstand high temperatures and accommodating highly radio-active material, may be plant, but terminal building is merely a building as the nomenclature will show and it is not a tool with which the business is carried on. He also stated that the air-strip may be plant, as it is designed for landing of heavy aircraft and is filled with navigational system but the terminal building is not plant.

5.8 We have considered the facts of the case and rival submissions. We find that the facts have rather been mentioned sketchy in the order of the learned CIT(A). No technical report has been placed on record to describe the building, its specification or it is specifically designed. The learned counsel has also made only legal arguments that the whole of the building and for that matter the whole of the airport complex constitutes 'plant' in the business of the assessee, as it becomes a part of the

aircraft for providing ingress into it or egress from it. We are afraid that such a sweeping generalization cannot be accepted till on the basis of facts on record, it is shown that the test of functionality is applicable to the terminal building. Thus we are also of the view that all facts have not been properly brought on record examined by the assessee and the authorities below with reference to the nature of construction and functions of the building. It is also not stated as to what really constitutes terminal building, namely, whether escalators, conveyor belts etc. have been shown as part of the building or shown separately as machinery or plant. Therefore, we are of the view that it will best serve the interest of justice if the matter is restored to the file of the Assessing Officer with a view to examine various assets of the assessee at the airport termed as 'terminal building' and examine whether as a whole they are plant or building by applying functional test, namely, as to whether the assets are for housing the passengers in transit and other assets or tools of the trade or some assets are building or some are plant. Needless to say that the assessee shall furnish a detailed list of various assets claimed to be plant and their functions so that an informed decision can be taken in the matter. Thus, this ground is treated as allowed for statistical purposes.

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6. Ground no. 5 is against the finding of the learned CIT(A) that the assessee is not entitled to deduct a sum of Rs. 40.67 crore, being the provision made for liability towards increase in salary and allowances payable to its employees in terms of Fifth Pay Commission constituted by Government of India and in spite of the submission that the assessee had to provide for this accrued liability under the mercantile system of accounting consistently followed by it.

6.1 In this connection, it is mentioned in the assessment order that there were about 20,000 employees. The wage revision of the employees was due on 1.1.1997. The liability on this account was estimated at Rs. 40,66,99,731/-. The wage revision was implemented by the central government and other public sector undertakings. The liability has been estimated on the basis of the pay scales of the officers and staff members with the Central Government. It was further explained that actual disbursement was likely to be much higher than the amount provided in the books. The Assessing Officer disallowed the expenditure entered in the books by way of provision by pointing out that additions

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were made in the past and the relief given by the CIT(A) has been challenged before the ITAT.

6.2 Before the learned CIT(Appeals), it was pointed out that the order of the Assessing Officer is based on a totally wrong premise since the present provision was based upon the recommendations of the Fifth Pay Commission and as such it had no nexus with any disallowance made in the past. The case of Bharat Earth Movers Vs. CIT, 112 Taxman 61, was quoted, in which it was held that if a business liability has definitely arisen, the deduction should be allowed although the liability may have to be quantified and discharged at a future date because what should be definite is that the liability has been incurred. The learned CIT(A) considered the facts of the case and rival submissions. It was mentioned that the assessee estimated salaries and wages payable in view of revision of wages w.e.f. 1.1.1997, as approved by Government of India. However, it has not been explained as to why the pay scales have not been revised by the assessee although the new wage structure was to be effective from 1.1.1997. In such circumstances, the assessee can claim the deduction in the previous year in which wages on account of revision are paid.

6.3 Before us, the learned counsel referred to the discussion made by the Assessing Officer in paragraph 12 on page 7 of his order. In reply, the learned DR pointed out that the approval of the government had not been taken by the assessee in this year for implementation of the revision of wages and salaries.

6.4 We have considered the facts of the case and rival submissions. The liability on account of wages and salaries is in the nature of a contractual liability, which arises either as a consequence of increase in the wages allowed by the employer or on account of any agreement or settlement reached between the employer and the union of employees. There may also be a third situation in the case of a public sector undertaking if the revision of wages and salaries of the employees is a subject matter of decision by the pay commission and the recommendations of the commission are accepted by the Government. From the record as well as from the arguments made before us, it is not clear under what circumstances the liability has been incurred, if it has been incurred at all. It is admitted position that the employer has not granted higher salary and wages to the employees. No agreement between the assessee

and the union of the employees has been brought on record. It is nowhere pointed out either by way of evidence or argument that recommendations of the Fifth Pay Commission also included within its scope of work the wages and salaries of the employees of the public sector undertakings, including the assessee, and that its recommendations have been accepted either by the assessee or the Government. Thus, in absence of proper evidence on record and clarification of the matter in the course of arguments, we have no option but to restore the matter to the file of the Assessing Officer with a direction to the assessee to furnish the basis on which it is claimed that the liability has been actually incurred. It is only after this that the question of applicability of the decision of Hon'ble Supreme Court in the case of Bharat Earth Movers (supra) will have to be considered. The Assessing Officer shall examine whether the evidence produced by the assessee leads to a conclusion that the liability has been actually incurred. If yes, the assessee will be entitled to the liability represented by the provision if the overall liability is equal to or more than the provision. Thus, this ground is treated as allowed for statistical purposes.

7. Ground no. 6 is against the finding of the learned CIT(A) in which he confirmed the disallowance of Rs. 15.22 crore made by the Assessing Officer in respect of the liability towards interest on loan portion of commencing capital by holding it to be prior period expenses and without considering that the provision was made on the recommendations of Comptroller & Auditor General (C&AG), which was an existing liability.

7.1 In this connection, it is mentioned in the assessment order that the aforesaid liability was debited to profit & loss account, being interest for the period 1.6.1986 to 31.3.1991 on loan portion of the commencing capital provided by the Government of India. It was explained that this interest was provided on the suggestion made by the C&AG for financial year 1995-96. The Assessing Officer mentioned that the liability pertained to the period to the years 1986-87 to 1990-91, thus, does not pertain to the year under question. The same was disallowed as prior period liability.

7.2 It was explained to the learned CIT(A) that National Airport Authority was established in June, 1986, by transferring of assets and liabilities to it by the Central Government. In July, 1991, the Ministry of

Civil Aviation recommended that the commencing capital should be tentatively fixed at Rs. 315 crore, consisting of equity capital of Rs. 200 crore and loan capital of Rs. 115 crore. In view of this directive, the assessee started providing for interest on loan payable to the Government on the loan capital in its accounts. However, such interest was not provided for the period 1.6.1986 to 31.3.1991. However, the C&AG felt that since loan was granted to the National Airport Authority since its formation, the liability for interest came into existence notwithstanding the fact that the same has not been quantified. In compliance to this note of the C&AG, the interest was determined for the aforesaid period and it was also decided to defer the charge of interest over five years. Thus, a sum of Rs. 15.22 crore was charged towards interest liability for the year under consideration It was argued that there was no justification to disallow the provision made by the assessee on the recommendation of C&AG. The Assessing Officer did not dispute that interest is a business liability, but, disallowed the same on the ground that it related to prior period. Reliance was placed on the decision in the case of Bharat Earth Movers Ltd. (supra), in which it was pointed out that if a liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be

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quantified and discharged at a future date. The learned CIT(A) considered the facts of the case and submissions of the assessee. It was pointed out that the liability pertains to the period 1986 to 1991. Therefore, the same cannot be allowed in this year on the basis of provision made by the assessee. Thus, the addition made by the Assessing Officer was confirmed.

7.3 No argument was made either by the learned counsel for the assessee or by the learned DR on this issue.

7.4 We have considered the facts of the case and the submissions available to us in the order of the learned CIT(A). It is seen that the liability does not pertain to this year. The loan was given to the assessee in the year 1991. The date of formation of the authority was fixed as 1.6.1986. However, interest was provided for the period 1.6.1986 to 31.3.1991 in this year. The interest was provided on the advise of C&AG. However, the interest neither pertains to this year nor it was paid in this year. Since the assessee is following mercantile method of accounting, the liability should have been provided on year to year basis as the liability arose in various years comprised in the period 1.6.1986 to

31.3.1991. No fact exists that there was any dispute between the assessee and the government about the chargeability of interest which was settled in this year. Therefore, it cannot be said that the liability has arisen in this year, as was the position in the case of Bharat Earth Movers. Therefore, we are of the view that the learned CIT(A) was right in disallowing this provision. Thus, this ground is dismissed.

8. In the result, the appeal is partly allowed.

ITA No. 711(Del)/2004- A.Y. 1999-00

9. Ground no. 1 is regarding exemption u/s 10(29) of a sum of Rs. 85,11,15,884/-, being processing charges. This ground is similar to ground no. 1 in ITA No. 3572(Del)/2003 (supra). Following our order in that case, the matter is restored to the file of the Assessing Officer with a direction to apply the appropriate law and examine whether the assessee is running or establishing warehouses or cargo complexes. Thus, this ground is treated as allowed for statistical purposes.

10. Ground no. 2 is regarding provision of Rs. 20.00 crore made in the books in respect of rehabilitation expenses. This ground is identical to

ground no. 2 in ITA no. 3572(Del)/2003 (supra). Following our order in that appeal, this ground is dismissed.

11. Ground no. 3 is regarding the taxation of income relating to proforma bills. This ground is identical to ground no. 3 in ITA No. 3572(Del)/2003. Following our order in that appeal, this ground is dismissed.

12. Ground no. 4 is regarding the rate of depreciation on terminal buildings. This ground is identical to ground no. 4 in ITA No. 3572(Del)/2003. Following our order in that appeal, this matter is restored to the file of the Assessing Officer. Thus, this ground is treated as allowed for statistical purposes.

13. In the result, the appeal is partly allowed as indicated above.

ITA No. 1830(Del)/2004- A.Y. 2000-01

14. Ground no. 1 is regarding exemption u/s 10(29) of a sum of Rs. 96,13,31,601-, being processing charges. This ground is similar to ground no. 1 in ITA No. 3572(Del)/2003 (supra). Following our order in that

case, the matter is restored to the file of the Assessing Officer with a direction to apply the appropriate law and examine whether the assessee is running or establishing warehouses or cargo complexes. Thus, this ground is treated as allowed for statistical purposes.

15. Ground no. 2 is regarding provision of Rs. 20.15 crore made in the books in respect of rehabilitation expenses. This ground is identical to ground no. 2 in ITA no. 3572(Del)/2003 (supra). Following our order in that appeal, this ground is dismissed.

16. Ground no. 3 is regarding the taxation of income relating to proforma bills. This ground is identical to ground no. 3 in ITA No. 3572(Del)/2003. Following our order in that appeal, this ground is dismissed.

17. Ground no. 4 is regarding the rate of depreciation on terminal buildings. This ground is identical to ground no. 4 in ITA No. 3572(Del)/2003. Following our order in that appeal, this matter is restored to the file of the Assessing Officer. Thus, this ground is treated as allowed for statistical purposes.

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18. In the result, the appeal is partly allowed as indicated above. er

Order pronounced in the court on 27 July, 2007.

Sd/-

(N.K.Karhail)
Judicial Member

Sd/-

(K.G. Bansal)
Accountant Member

Dated: July 27 ,2007.
SP Satia

Copy of the order forwarded to:-

1. Airport Authority of India, New Delhi.
2. DCIT, Co. Circle 1(1), New Delhi.
3. CIT(A)
4. CIT
5. The DR, ITAT, New Delhi.

Assistant Registrar.

Assistant Registrar
आयकर अपीलीय अधिकरण
Income Tax Appellate Tribunal
दिल्ली पीठ नई दिल्ली
Delhi Bench New Delhi