IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH **'E'** MUMBAI.

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND

SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA NO 2592/Mum/2008
Assessment year: - 2005-06

Jindal Drugs Limited Bakhtawar, 6th Floor, B&C, 229, Nariman Point, Mumbai – 400 021.	Vs.	The Asst. Commissioner of Income Tax, Central Circel – 8 Aaykar Bhavan, M.K. Road, Mumbai – 400 020.
Appellant		Respondent
PAN/GIR No. AAACJ1000A		

ITA NO 4342/Mum/2008
Assessment year: - 2005-06

The Asst. Commissioner of Income Tax, Central Circel – 8 Old CGO Bldg, Annexe, M.K. Road, Mumbai – 400 020.	Vs.`	Jindal Drugs Limited Bakhtawar, 6th Floor, B&C, 229, Nariman Point, Mumbai – 400 021.
PAN/GIR No. AAACJ1000A		
Appellant		Respondent

ITA NO 3818/Mum/2009
Assessment year: - 2006-07

Jindal Drugs Limited Bakhtawar, 6th Floor, B&C, 229, Nariman Point, Mumbai – 400 021.	Vs.	The Asst. Commissioner of Income Tax, Central Circel – 8, Aaykar Bhavan, M.K. Road, Mumbai – 400 020.
PAN/GIR No. AAACJ1000A		
Appellant		Respondent

ITA NO 3885/Mum/2009
Assessment year: - 2006-07

The Asst. Commissioner of Income Tax, Central Circel – 8 Old CGO Bldg, Annexe, M.K. Road,Mumbai – 400 020.	Vs.	Jindal Drugs Limited Bakhtawar, 6th Floor, B&C, 229, Nariman Point, Mumbai – 400 021.
PAN/GIR No. AAACJ1000A		
Appellant		Respondent

ITA NO 376/Mum/2010
Assessment year: - 2007-08

The Asst. Commissioner of Income Tax, Central Circel – 8, Old CGO Bldg, Annexe, M.K. Road, Mumbai – 400 020.	Vs.	Jindal Drugs Limited Bakhtawar, 6th Floor, B&C, 229, Nariman Point, Mumbai – 400 021.
PAN/GIR No. AAACJ1000A		
Appellant		Respondent

CO No. 149/Mum/2010
Arising out of ITA NO 376/Mum/2010
Assessment year: - 2007-08

Jindal Drugs Limited Bakhtawar, 6th Floor, B&C, 229, Nariman Point, Mumbai – 400 021.	Vs.	The Asst. Commissioner of Income Tax, Central Circel – 8 Old CGO Bldg, Annexe, M.K. Road, Mumbai – 400 020.
PAN/GIR No. AAACJ1000A		
Appellant		Respondent

ITA NO 7500/Mum/2013
Assessment year: - 2008-09

Jindal Drugs Limited Bakhtawar, 6th Floor, 229, Nariman Point, Mumbai – 400 021.	Vs.	Deputy. Commissioner of Income Tax, Range Central Circle 8, Mumbai.
PAN/GIR No. AAACJ1000A		
Appellant		Respondent

ITA NO 4247/Mum/2012
Assessment year: - 2008-09

Jindal Drugs Limited Bakhtawar, 6th Floor, 229, Nariman Point, Mumbai – 400 021.	Vs.	Deputy. Commissioner of Income Tax, Range Central Circle 8, Commissioner of Income Tax (Appeals) – 37.
PAN/GIR No. AAACJ1000A		
Appellant		Respondent

ITA NO 4752/Mum/2012
Assessment year: - 2008-09

Deputy. Commissioner of Income Tax, Central Circle 8, Room No. 805, 8th Floor, Old CGO Annexe, M.K. Road,Mumbai.	Vs.	Jindal Drugs LimitedBakhtawar, 6th Floor, B&C,229, Nariman Point,Mumbai – 400 021.
		PAN/GIR No. AAACJ1000A
Appellant		Respondent

ITA NO 1628/Mum/2013
Assessment year: - 2009-10

Deputy. Commissioner of Income Tax, Central Circle 8, Room No. 805, 8th Floor, Old CGO Annexe, M.K. Road, Mumbai.	Vs.	Jindal Drugs LimitedBakhtawar, 6th Floor, B&C,229, Nariman Point,Mumbai – 400 021.
PAN/GIR No. AAACJ1000A		
Appellant		Respondent

CO No. 74/Mum/2014
Arising out of ITA NO 1628/Mum/2013
Assessment year: - 2009-10

Jindal Drugs Limited Bakhtawar, 6th Floor, B&C, 229, Nariman Point, Mumbai – 400 021.	Vs.	The Asst. Commissioner of Income Tax, Central Circel – 8 Old CGO Bldg, Annexe, M.K. Road, Mumbai – 400 020.
PAN/GIR No. AAACJ1000A		
Appellant		Respondent

Appellant By	Shri V. Sridhahran & Shri Prakash Shah
Respondent By	Shri Manjunata R. Swamy

Date of hearing	29.10.2015
Date of pronouncement	20.11.2015

ORDER

PER R.C. SHARMA, A.M

These are cross appeals filed by the assessee and the Revenue against the order of CIT(A) for assessment years 2005-06 to 2009-10, in the matter of order passed u/s 143(3)/ 147 read with section 143(3) of the Income Tax Act. As common grounds have taken in all the years under consideration, therefore, all the appeals were heard together and are being disposed of by this single consolidated order.

2. We first take up the appeal of assessee for assessment year 2005-06.

2.1 Facts in brief are that assessee is engaged in the business of manufacturing, trading and export of essential oils and die intermediaries. During the course of scrutiny assessment, the AO made disallowance u/s 14A, deduction claimed u/s 80IB was also disallowed; addition on account of excise duty not included in closing stock was also made. By the impugned order the CIT(A) allowed assessee's proportionate claim of deduction u/s 14A. The CIT(A) confirmed the disallowance of deduction u/s 80-IB. The AO has disallowed interest u/s 36(1)(iii) and the CIT(A) has deleted the disallowance so made. In this background of the matter, both assessee and revenue are in appeal before us.

2.2 We have considered the rival submissions and found that during the year under consideration, AO has disallowed expenses to the extent of 10% of the exempt dividend and interest income amounting to Rs. 21,70,628/-

treating them as incurred for earning tax free dividend income. The CIT(A) has upheld the disallowance to the extent of Rs. 4,29,880/- being the total administrative expenses in the proportion of exempt income to the total receipts of the business. We found that exactly similar issue has been decided by the Tribunal in assessee's own case for assessment year, wherein, after recording the finding at para 3 to 5.1, the Tribunal has upheld the addition as sustained by the CIT(A).

2.3 We have carefully gone through the order of the Tribunal as well as facts of the case during the year under consideration and found that the assessee was having sufficient own funds out of which investments have been made. A statement showing the availability and utilization of own funds was furnished before the lower authorities. From the same, it can be seen that assessee had enough own funds from which it has utilized the funds for purchase of shares. Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd. 313 ITR 340, wherein it has been held that where the assessee has both own funds as well as borrowed funds and the own funds are sufficient as compared to the amounts of investments, then it is to be presumed that investments have been made out of own funds. The Co-ordinate Bench of Tribunal in the case of Tata Projects Ltd. (ITA No. 5862/Mum/2006, after considering the decision in the case of Daga Capital Management Ltd., 117 ITD 169, held that if the investments are made out of own funds no disallowance can be made u/s 14A of the Act..

2.4 Respectfully following the decisions referred above, we do not find any infirmity in the order of the CIT(A) deleting the disallowance of interest so

made. So far as the CIT (A) has upheld the disallowance of administrative expenses u/s 14A in the ratio of exempt income to the total turnover of business, the issue is covered by the decision of Tribunal in assessee's own case for assessment year 2004-05. Accordingly, we find no infirmity in the order of CIT (A) to this extent.

3. The next grievance of assessee relate to disallowance of interest u/s 36(1)(iii). From the record, we found that assessee has debited interest on banking credit, interest on bill discounting Rs. 6,83,090/- and bank charges totaling to Rs. 2,08,08,332/- to the Profit & Loss Account. The AO disallowed the interest so paid to the bank on the ground that assessee had given interest free advances to Ashish Ship breaking Ltd. and M/s. BV Metals and Tien Yuan India Pvt. Ltd. The CIT(A) deleted the disallowance by recording the finding to the effect that there is no diversion of interest bearing funds. We found that exactly similar issue was dealt by the Tribunal in assessee's own case for assessment year 1999-00, 2000-01, 2002-03 and also for assessment year 2002-03 and 2004-05, wherein the Tribunal after giving the detailed finding deleted the disallowance of interest. The precise observation of Tribunal is as under:-

> *"9. We have heard both the parties, perused the orders of the Revenue Authorities as well as the contents of para 19 of the order of the Tribunal for AY 2003-2004 in the context of Revenue's appeal where the assessee was given relief and the disallowance of interest was finally deleted. Relevant para 19 is reproduced here under:*
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> > *"19. We have heard the rival submissions and considered them carefully. We have also gone through the case laws on which out attentions were drawn by the respective parties. After considering the submissions and also taking into consideration the various case laws, we find that there is no infirmity in the findings of the Ld CIT (A). The contention of the assessee that interest free*

advances were given to the sister concern for business purposes neither is incorrect nor false. The assessee advances money on account of purchase of goods from sister concerns. The details of purchases and the purpose for giving advance free loans were explained before the CIT (A)and also before the AO. The AO merely disallowed the claim of the assessee following the decision of the jurisdictional High Court in the case of Phalton Sugar Works Ltd reported in 208 ITR 989 wherein it has been held that any funds given to the sister concern on interest free, the interest can be disallowed u/s 36(1)(iii). The decision of the Hon'ble Bombay High Court in the case of Phalton Sugar Works Ltd has been reversed by the Hon'ble Supreme Court in the case of SA Builders in 288 ITR 1 =(2006-TIOL-179-SCIT). The Hon'ble Supreme Court has categorically held that if funds given to the sister concern or its subsidiary for the purpose of own business or their business, then no disallowance can be made u/s 36(1)(iii) as it has to be taken into consideration that those funds are to be treated as used for business purposes. The ratio of the decision of the Supreme Court is squarely applicable on the facts of the present case. Moreover, the assessee has its own funds on which no interest has been paid and they are much more than the amount given to its sister concern as interest free advances.

The CIT (A) has considered this aspect then only came to the conclusion that the disallowance made by the AO was not justified.

19.1. The contentions of the Ld DR that the funds available should be taken on day to day basis and not on the basis of closing balance at the end of the year; in our view, is not well founded on the facts of the present case. It has to be taken into consideration that what is the amount available with the assessee on the first day of the accounting year and what is the amount has been given to its sister concern and thereafter what is the closing balance at the end of the year. Therefore, in our considered view, the contention of the Ld Counsel of the assessee that totality of the circumstances has to be taken into consideration and not on day to day basis utilization of the funds. Moreover, as stated above, the department could not prove that these funds were not given for the purpose of business. Therefore, in view of these facts and circumstances, we confirm the finds of the Ld CIT (A) on this issue."

10. Considering the above settled nature of the issue, we are of the opinion that the ground raised by the Revenue is required to be dismissed. Accordingly, ground no.(iii) of the Revenue's appeal is dismissed.

3.1 We have carefully gone through the orders of the Tribunal of earlier years and found that exactly similar disallowance of interest was deleted. As the facts and circumstances during the year under consideration are same,

therefore, respectfully following the order of Tribunal, we affirm the action of CIT(A) deleting the disallowance of interest so made.

3.2 On merits, we found that Both the concerns belong to Mr. Harikishan Agarwal. The company since number of years has business relations with these parties. In fact, the entire purchases of non ferrous metals made in A.Y. 1995-96 onwards (against the Duty Exemption Pass Book Credit Scheme) was organized and arranged by Mr. Harikishan Agarwal. The total imports arranged was organized by Mr. Harikishan Agarwal in these years were to the tune of Rs.250 crores. With a view to further import some specified type of non ferrous metals, the assessee Company had given advance of Rs.75 lacs and Rs.80 lacs to these concerns in the year 1999 and 2001. However, due to the wide fluctuation in the non ferrous metal prices and after the expiry of Duty Exemption Pass Book Scheme, the Assessee had to cancel the purchase orders. Due to the fluctuation in the prices of non ferrous metal, the various concerns of Mr. Harikishan Agarwal Group had to carry on with the large amount of stocks and in this process, some financial loss was suffered by them. Therefore, looking to long business relations, the assessee agreed to receive the outstanding amount in installments and/or adjust to subsequent purchases. It is clear that it was a business advance which being recovered over the period of time and the delay was on account of weak financial position of these concerns.

3.3 In respect of advance to Tien Yuan India Pvt. Ltd., we found that Tien is engaged in the manufacture of menthol products and essential oils like menthol crystals, menthol oil, Dementholized peppermint oil, etc. Almost 97%

to 98% of the production of this company is purchased by the Appellant for the purpose of export. The menthol products and essential oils are manufactured from raw mentha oil. The mentha oil is an agricultural based produce which is generally available and procured during the period June to November. For manufacture and supply of the products i.e. menthol products and essential oils, M/s. Tien procures the raw menthol as and when available and stores it for supply throughout the year after carrying out necessary production processes to the Appellant Company. Since the entire production (more than 97%) is manufactured and sold by M/s. Tien to the Assessee Company, it expects that finances required for procuring and storing of the raw menthol, needs to be provided by the assessee. It is in the interest of the Assessee Company to provide the funds to M/s. Tien so that it can purchase the raw mentha oil at appropriate time at most reasonable prices so that it can supply the finished menthol products and essential oil as and when required by the assessee Company.

3.4 As per the details of opening and closing balance and purchases made in last three years, it is very clear that this is not a non business advance but it is a pure business advance given in the interest of business, accordingly there is no infirmity in the order of CIT(A) appeal for deleting the disallowance of interest so made. From the record we also found that there has been no disallowance in earlier years up to assessment year 2001-02 when these advances had been given. However, in the current year, the department cannot make such a disallowance unless there is any change in the facts during the year. Accordingly, we do not find any merit in the action of the AO for disallowing the interest even in view of consistency principle laid down by

the Hon'ble Supreme Court in the case of Radhasoami Satsang 193 ITR 321 and by Jurisdictional High Court in the case of Paul Brothers 216 ITR 548. Accordingly, we uphold the action of CIT(A) deleting the disallowance of interest u/s 36(1)(iii) of the I.T. Act.

4. The next grievance of the assessee relates to denial of deduction u/s 80IB in respect of new unit set up at Daman. Ld. AR placed on record order of Tribunal in assessee's own case for assessment year 2004-05 wherein the matter was restored to AO with certain directions and also the order of AO giving effect to the Tribunal's order wherein, AO had allowed Assessee's claim of deduction u/s 80-IB.

4.1 We have considered the rival contentions and have carefully gone through the orders of authorities below and found that the assessee had commenced manufacturing activity at the new unit in Daman on 10.03.2004. The assessee had installed machinery of Rs. 55,41,526 at the new unit 3. In the year under consideration, the AO, following the order for AY. 2004-05, denied the deduction u/s 80-IB.The AO raised the following objections in addition to those raised in A.Y. 2004-05.

- The Appellant had furnished a list of 17 workmen employed by it. However names of B workmen out of the 17 were the same as those who had been employed by Rutuja Enterprises as per the statement of Mr. Udaysingh M. Ghorpade of Rutuja Enterprises. Thus, the Appellant had not employed more than 10 workmen for the purpose of manufacture during the year and hence was not eligible for deduction u/s 80-IB

- Further, it was noticed by the AO that the bill of Technip Engg. Works (P) Ltd for the distillation unit was dated 31.3.04. Thus the AO came to the conclusion that the Appellant had not installed machinery before 31.3.2004 and hence had not commenced manufacture.

4.2 By the impugned order the CIT(A) confirmed the action of the AO following the decision of the CIT(A) in A.Y. 2004-05.

4.3 We have considered the rival contentions carefully gone through the orders of authorities below and so far as objection of the AO which are similar to the objection raised by him in assessment year 2004-05 is concerned, we found that the Tribunal has set aside the order of lower authorities in assessment year 2004-05 and remanded the matter back to the file of AO and after considering the specific directions given by the Tribunal, the AO passed an order giving effect to the order of Tribunal and allowed assessee's claim for deduction u/s 80IB. Thus to the extent of objections which are similar to the objections raised in assessment year 2004-05, we found the issue to be covered both by the order of Tribunal as well as consequential order passed by the AO. With respect to the additional objections raised by the AO, we found that the basis for denial of deduction u/s 80-IB on account of employment of less than 10 workers based on the statement of Mr. Udaysingh M. Ghorpade u/s. 131 is not well founded. We found that statement of Mr. Udaysingh M. Ghorpade was recorded on 20.03.2007 but extract of the same was provided to the assessee only on 14.12.2007. Further assessee was

not provided any opportunity to cross examine Mr. Udaysingh M. Ghorpade. A full copy of the statement was not provided to the assessee. In relation to the extract provided to the assessee, we find that the contractor Mr. Udaysingh M. Ghorpade was fired by Assessee Company with effect from July 2004 and the contract employees supplied by him were directly employed by the Assessee. Thus his statement was biased. The contractor has accepted that 12 workmen were working at the factory in Daman under the control and supervision of the assessee. The contractor has not maintained a proper record of the workmen provided to the Assessee. The contractor has also said that the workmen were used to shift and install the machinery. This shows that the machinery was installed at the factory and workmen were working in the factory. The workers were under the control and supervision of the Assessee and hence the contractor could not have any information about the nature of work done by the workmen. Thus the statement of the contractor that the workmen were not involved in manufacturing process cannot be accepted. Further proper records have been maintained by the Assessee Company and those maintained by the contractor cannot be relied upon as the names of only 8 of the 12 workmen are available in his records. The contentions of the Assessee are further strengthened by the fact that the Assessee has been regularly deducting and paying to the credit of the Central Government the employee contribution to Provident fund in respect of all its workers. We have also verified the copy of month-wise statement and challans of PF placed at page 29 to 42 of the Paper Book, according to which, we are satisfied that assessee had employed more than 10 workmen during the year. Our finding is supported by the decision of Co-ordinate Bench of Tribunal in case of Vishal S. Ruia V. ITO (1 SOT 902), wherein it was held that in view of the

salary records being furnished by the assessee, deduction u/s 80-IB cannot be denied on the basis of the statement of the supervisor that less than 10 workmen were employed during the year.

4.4 In respect of the allegation of the AO that the bill of Technip Engg. Works (P) Ltd was dated 31.3.04 and thus the manufacturing activity had not commenced before 31.3.04, we found that the said machinery was purchased on 8.3,04 (Delivery Challan enclosed at Pg X and Copy of Invoice enclosed at Pg X). On successful running and implementation of said distillation unit, balance invoice was raised by M/s Technip Engineering on 31.3.2004. Likewise, in case of Shiv Engineering also, the labour work was continuously done by them and on completion and after successful commission, invoice was raised by them on 20.3.2004.

4.5 In view of the above discussion, considering the facts and circumstances of the case vis-à-vis order of the Tribunal in assessee's own case for assessment year 2004-05 and also the order of the AO giving effect to the order of Tribunal allowing assessee's claim of deduction u/s 80-IB, we do not find any merit in the action of lower authorities in declining assessee's claim for deduction u/s 80IB in respect of new unit set up at Daman during the assessment year 2005-06 and 2006-07. Accordingly, the AO is directed to allow assessee's claim for deduction u/s 80IB for assessment year 2005-06 and 2006-07.

5. Next grievance of assessee relate to denial of deduction u/s 80IB on interest income treating it as income from other sources instead of business income.

5.1 We have considered the rival contentions and found from the record that the assessee has earned interest income of Rs. 8,47,25,116 from fixed. The fixed deposits were kept with Canara Bank and State Bank of India as a Bank Guarantee for the purpose of issue of Letter of Credit. The AO has treated the interest income as income from other sources and denied deduction u/s 80-IB on the same. The CIT(A) upheld the action of the AO on the ground that the interest was earned on fixed deposits and hence could not be considered as business income..

5.2 It is clear from the above facts that fixed deposits were kept for the purposes of business it partakes the character of business income. The earning of interest income is incidental to the main business of the assessee, therefore, it does not constitute a separate activity in itself for it to be taxed separately. The words used in Sec 80-IB are 'profit and gains derived from any business' are wide enough to cover the interest income. Reliance is placed on the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Eltek SGS Private Ltd (300 ITR 6), and ACIT V. Dharampal Premchand Ltd. (221 CTR 133).

5.3 We also found that exactly similar issue was considered by Tribunal in assessee's own case for assessment year 1999-00, 2001-02, & 2003-04 for interest on FD kept as margin money to be considered as business income and

deduction to be allowed u/s 80HHC. The issue is also covered by the decision of Hon'ble Bombay High Court in the case of CIT Vs. Jagdishprasad M. Joshi 318 ITR 420 (Bom) and also the decision of Hon'ble Delhi High Court in the case of CIT Vs. Eltek SGS (P) Ltd. [2008] 300 ITR 6 (Del).

5.4 The assessee has also raised alternate claim for excluding only net interest income and not the gross interest while computing the eligible income for deduction u/s 80IB and for this purpose reliance was placed on the decision of Hon'ble Supreme Court in the case of ACG Associated Capsules (P) Ltd. Vs. CIT [2012] 343 ITR 89 (SC). We found that the issue of netting of interest is squarely covered by the decision of Hon'ble Supreme Court in the case of ACG Associated Capsules (P) Ltd. (supra). However, in view of the fact that interest being earned out of the deposit given to the bank as business compulsion, we have held that entire interest is eligible for deduction u/s 80-IB of the Income Tax Act. We direct accordingly.

6. Next grievance of the assessee relate to addition on account of excise duty to closing stock of finished goods which were not subject to duty under excise Act. This issue is squarely covered by the decision of Hon'ble Bombay High Court in the case of Loknet Balasaheb Desai SSK Ltd 339 ITR 288 and by the Hon'ble Bombay High Court in the case of SPV Industries 228 Taxmann 104. In the case of Loknet Balasaheb Desai SSK Ltd. (supra), the Hon'ble Bombay High Court held that excise duty liability crystallizes on the day of clearance of excisable goods and not on the date of manufacture and, therefore, excise liability was not incurred by the assessee in respect of unsold sugar lying in the stock and cannot be included in the value of closing stock of

sugar. Respectfully following the order of Jurisdictional High Court, we do not find any merit in the action of lower authorities for making additions on account of excise duty to closing stock of finished goods which were not subject to duty under the excise Act. Consequently the Ground no. 9, 10 11 &12 of assessee's appeal are allowed.

7. Now we take up the appeal for assessment year 2006-07.

7.1 In Ground no. (a), of the assessee's appeal, the issue relates to denial of deduction u/s 80-IB of Rs. 4,42,16,581/-. We have already discussed this issue in assessment year 2005-06 vide para 4.5 of this order. Following the same reasoning, we direct the AO to allow assessee's claim for deduction u/s 80IB.

8. In Ground No. (b) the issue relate to addition of excise duty in the valuation of closing stock u/s 145A. We have already discussed the issue in assessment year 2005-06, following the same reasoning, we allow assessee's ground of appeal.

9. In this year, revenue is aggrieved for allowing deduction u/s 80IB on the hedging profit earned in the commodity exchange from the Jammu unit amounting to Rs. 18.23 crores. At the outset, it was submitted by the Ld. AR that issue is covered by the order of Tribunal in assessee's own case for assessment year 1998-99, 2000-01 and 2001-02 vide order dated 30.09.2008 in the forex fluctuation and section 80HHC. Ld. AR further submitted that issue is also covered by the decision of Hon'ble Gujarat High Court in the case of Pankaj Oil Mills v. CIT [1978] 115 ITR 824 (Guj.)

9.1 We have considered the rival contention and carefully gone through the orders of the authorities below. We had also deliberated upon the judicial pronouncements cited at bar by the ld. AR and DR in the context of factual matrix of the case. We have also deliberated upon the judicial pronouncements referred by lower authorities in their respective orders. From the record we find that the assessee is a recognized export housed dealing in menthol products since last several decades. The assessee has set up a unit at Gangyal, Jammu. The main raw material for all products dealt by the company in Jammu is Mentha Oil. This product is an agro based product, which is grown only in some parts of India where the environment is suitable for the growing of the Mentha Arvensis plant. The plant has to be used to extract oil immediately after cutting the same, else the plant would dry out and no oil could be extracted from it. This crop is seasonal and is grown only during certain period of the year. The plant or the oil is not available throughout the year making its prices vulnerable to fluctuation on either side. The assessee company has therefore to store the goods during the harvesting season for the entire year. The product manufactured by the company is used in oral health care products such as toothpaste, shaving cream, certain food items, medicines, etc. The demand for the product is continuous and buyers (both national as well as international) in order to maintain its costs would like to enter in to long term fixed price contracts with the companies. The company is therefore faced with the problem of supplying finished products at fixed price, where as the price of raw material keeps varying depending on the season and availability of scarce product in the market. It was contended by ld. AR that the company would not be able to supply finished goods and make profits if the prices of the raw material fall after the harvesting season

and therefore to protect its stock from price fluctuation the assessee enters in to contracts in commodity exchange. Accordingly, the assessee has hedged only part of the stock a statement is prepared year wise to show that the assessee has only hedged 50% of the total stock available in order to hedge against price fluctuation of the stock available in hand. From the record we found that the assessee has only two manufacturing unit both of which are manufacturing Menthol based products and both of which are eligible to deduction under section 801B. The assessee does not trade in raw menthe oil and therefore the stock which is used only for manufacturing and the hedging profit and loss for such stock would be directly related to the manufacturing activity. Like the cost of bring the goods to the godown and the cost of storing the raw material are directly related to manufacturing so also the profit / loss related to the hedging of raw material are directly related to the manufacturing activity. The assessee has maintained a consistent stand and also reduced the loss incurred in A Y 2007-08 and onwards from the eligible deduction under section 80IB. During the year the AO has declined deduction u/s 80IB on such profits. By the impugned order, CIT(A) allowed assessee's claim after observing as under:-

> *" I have carefully and dispassionately considered the facts and circumstances of the case, the relevant assessment order, the statement of facts, grounds of appeal, Paper Book filed, the written submissions made and the arguments made by the Ld. AR. In the present case, the appellant has entered into various hedging transactions on the multi commodity exchange in order to hedge against the cost of raw material namely Metha Oil, used for its manufacturing at Jammu unit and exports. It is not disputed that the main raw material for all products manufactured by the appellant is Mentha Oil. This product is an agro based product, which is grown only in some parts of India where the environment is suitable for*

the growth of Mentha Arvensis Plant. Ld. AR submitted that Mentha Oil is extracted from Mentha Arvensis plant. The plants severed cut off from the land have to be used to make the oil in a few hours otherwise the plants dry off In view of the peculiarity of the raw material, the raw material has to be purchased in the harvesting season only to meet requirement of the whole year. The prices are low at the time of season and then fluctuate widely depending upon the demand and supply position. The appellant company sells the product manufactured from Mentha Oil throughout the year. The prices of Menthol products fluctuate widely in the domestic as well as in the international markets. These fluctuations in Mentha Oil prices severely affects the cost of company's product and the profitability of the company as the raw materials are already purchased and stored for the entire year's production. Therefore, the appellant had to carry the inventory at a very high value since the supply after the harvest season is meagre. Further, export order/sales commitments are made at predetermined prices. The appellant company has to safeguard against adverse price fluctuations of the raw material product i.e. Mentha Oil. For this purpose, the appellant company enters into future sale contracts through the recognized commodity exchanges.

3.3.1 It was explained by the Ld. AR that the hedging transactions were only in respect of its raw material products i.e. Mentha Oil. He, further submitted that the quantity of Mentha Oil available with the company is substantially higher than the quantity of future contracts entered into by the appellant and squared off. Ld. AR added that if the appellant was made to hand over the delivery of Mentha Oil then the actual inventory was available with the appellant. This fact clearly proves that the hedging transactions were entered into hedge against the future uncertainty of the raw material of the appellant.

3.3.2 Ld. AR further submitted that the Mentha Oil was listed on commodity exchange in May, 2005 and trading was permitted from May, 2005 for the conracts for the month of August, 2005 in accordance with Circular No. MCX/153/2005 dated 21/4/2005 read with Circular No. MCX/163/2005 dated 2814/05 issued by Multi Commodity Exchange of India Ltd. Initially, appellant did not enter into any transactions on the said MCX as the appellant was not aware of operational modalities. Further, the appellant had admittedly never done any trading in any of

the commodities earlier and hence it was not possible to enter into such transactions unless entire concept was understood. Accordingly, appellant entered into contract of forward sales effectively from December, 2005. All the purchases of Mentha Oil have been made around October and November and hence the hedging transactions commenced in December. As a result of such hedging transaction the appellant was able to earn profit of Rs. 18,23,08,181/- in Asstt.Year 2006-07. However, in subsequent years, the appellant has incurred substantial losses from such hedging transactions. In subsequent assessment years, the appellant has reduced such hedging losses from the profits of business of its Jammu Industrial Undertaking which is eligible for deduction U/s. 80IB and the claim of deduction U/s. 80IB was correspondingly reduced by the appellant itself.

3.3.3 . Mr. George Kleinman has discussed the hedging transactions in is book named "Commodity Futures and Options a step-by-step guide to successful trading' published by Taxman. Mr. George Kleinman writes on pages 17 and 18 of this book that there are two major players or participants in the futures and options market: the hedger and the speculator. Hedger account for up to half of all the participants in most of the major futures contracts. Hedgers use commodity exchanges to offset the risk of fluctuating prices when they buy or sell physical supplies of a commodity. To illustrate, a copper manufacturing company may sell copper futures- in "lock-in" a sale price say, on 1st April, of a particular year for their future production. In this way, the said company protect its profit margins and revenue stream should copper price fall in the future. Should copper price rise, the said copper manufacturing company will loose on its future position, but the value of its physical copper metal shall rise. In this illustration, the cooper manufacturing company is just trying to offset, or hedge, its price risk. A hedger can be a buyer or seller.

3.3.3.1. A copper vessel manufacturer who buys copper as a raw material in the production of copper vessel, might buy copper futures to "lock-in" its cost of copper for future purchase. If the price of copper rises, it will have a profit on its hedge, which can be used to offset the higher price of physical copper it will need to purchase in the market. If the copper prices fall, it will show a loss on the future side of the transaction, but it will be

able to buy the copper cheaper in the market. This is the essence of hedging transactions.

3.3.4 Hedging transactions differ from speculative transactions on account of the fact that they are not entered into, to make profits only. Their purpose is entirely different. Their purpose is to create a "hedge" primarily to provide an insurance medium against risk of unfavourable price fluctuations. Such a contract enables the concerned trader dealing in a commodity to hedge himself, that is to say insure himself against adverse price fluctuations. A dealer or a merchant enters into a "hedge" contract when he sells or purchases a commodity in the forward market for delivery at a future date. His transaction in the forward market may correspond to a previous purchase or sale in the ready market or he may propose to cover it later by a corresponding transaction in the ready market, or he may off-set it by a reverse transaction on the forward market itself [Please see Regulation of Forward Markets by W.R. Natu, page 9, quoted in Pankaj Oil Mills vs. CIT - 1977 - CTR (Guj.) (FB) 154; (1978) 115 ITR 824 (FB)].

3.3.5. These forward contracts by way of hedge transactions usually afford to cover to a trader in as much as his loss in the ready market is offset by a profit in the forward market and vice versa. It, therefore, follows that in order to effectively hedge against adverse price fluctuations of the manufactured goods or merchandise, a manufacturer or merchant has necessarily to enter into forward transaction of sale and purchase both, and without these contracts of sale and purchase constituting hedge transactions, there would be no effective insurance against the risk of loss In the price fluctuation of the commodity manufactured or merchandise sold (pankaj Oil Mills vs. CIT 1977 CTR (Guj)(FB) 154: (1978) 115 ITR 824 (Guj) (FB). It is not correct to state that in order to be a genuine hedging transaction there should be a spot purchase and forward transactions or purchase and a part of sale or forward transaction land the said transactions must be so interconnected that one is reflected in the other. The transaction of a person in the forward market may correspond to a previous purchase or sale in the ready market or he may propose to cover it later by a corresponding transaction in the ready market or he may off-set it by reverse transaction of the forward market itself. It is not essential that in order to be a genuine hedging transaction there must be a ready purchase and forward

sale or ready sale and forward purchase (CIT vs. Mohanlal Ranchhoddas (1992) 108 CTR (Guj) 22 : (1993(203 ITR 304 (Guj) :. This decision was subsequently followed in CIT vs. Ashokbhai B. Shah (1996) 131 CTR (guj) 234 : (1996) 218 ITR 331 (Guj).

Hedging contracts contemplated by proviso to section 43(5):

Proviso to section 43(5) lays down that for the purpose of section 43(5) contracts mentioned in cls. (a) to (c) of the proviso would not be deemed to be speculative transactions. In other words, although contracts mentioned in cls. (a) to (c) would otherwise fall within the definition of speculative transactions, by virtue of deeming provisions contained in the proviso they would not be regarded as speculative transactions. The contracts mentioned in cls. (a) to (c) are hedging contracts of specific category. When the question arises as to whether a particular transaction represents hedging transaction, the fact that such transaction comes within the general concept of hedging transaction would not be enough: it should come strictly within the ambit of one of the three clauses, viz. cls. (a),(b) or (c) of the proviso.

3.3.6. Clause (a) deals with the case of a person carrying on business of manufacturing of goods and a person carrying on merchanting business. Clause (b) deals with the case of a person who is a dealer or an investor in stocks and shares while cl. (C) deals with the person who is member of a forward market or a stock exchange.

3.3.7. As far as person manufacturing goods is concerned, the contract contemplated by cl.(a) is a contract in respect of raw materials which is entered into by him in the course of his manufacturing business to guard against future price fluctuations in respect off his contracts for actual delivery of goods manufactured by him. As far as person carrying on merchanting business is concerned, the contract contemplated by this clause is a contract in respect of merchandise which is entered into by him in the course of his merchanting business to guard against future price fluctuation in respect of contracts for actual delivery of mechandise sold by him.

3.3.8 Hon'ble Bombay High Court in the case of Kirtilal Jaisinqhlal & Co. Vs.Commissioner of Income Tax reported in (1980) -121 -ITR - 279 has

held that loss arising from bonafide forward sales to guard against the risk of fall in the value of raw materials or merchandise to the extent of stock on hand is allowable as normal business loss. CBDT in its circular dated 12th September, 1960 had instructed the Income-tax Officers to treat bonafide forward sales entered into with a view to guard against the risk of raw materials or merchandise in stocks falling in value as normal business losses and not as speculative losses. The clarification was clearly restricted to hedging sales limited to the extent that the total of such transactions did not exceed the total stock of raw materials or merchandise in hand. The appellant has clearly proved that the total of its transaction did not exceed the total stock of raw material or Menthol Oil in hand. - Therefore, in view of the aforesaid discussion and in the light of Hon'ble Bombay High Court judgment in the case of Kirtilal Jaisinghlal & Co. vs. Commissioner of Income Tax (supra) and CBDT's circular dated 12th September, 1960, the profits or losses from hedging transactions are normal business profits or normal business losses and not speculative losses.

3.3.9. Ld. AR had further brought to my notice that Ld. CIT(A)-III as well as Hon'ble ITAT in the appellant's own case of Asstt.Year 1998- 99 as well as for Asstt.Year 2000-2001 and 2001-2002 have held that loss on forward exchange contract was not hit by the provisions of Section 43(5) of the Act. Appellant in Asstt. Year 1998-1999, 2000- 2001 and 2001-2002 as reported had earned income by entering into speculative transactions in foreign exchange, on whose profit deduction U/s. 80HHC was claimed. Ld. Assessing Officer held it has a speculative income Ld. CIT(A)-III accepted the appellant's claim by relying on CIT Vs. Badridas Gauridas P.Ltd. (2004) 261 - ITR - 256 (Bom.) Hon'ble ITAT 'C' Bench, Mumbai in Appeal Nos. ITA No. 5549/M/2005, 5550/M/2005, 5489/M/2005 and 5490/M/2005 dated 30th " September, 2008 for Asstt. Years 2000- 2001 and 2001- 2002 clearly held that loss suffered by the appellant on account of failure to honour certain contracts was not speculation loss but was allowable as business loss. Hon'ble ITAT 'H' Bench, Mumbai in the case of the present appellant in ITA No. 4637/M/2003 for Asstt.Year 1998-99 in its order dated 15/3/2007 has also held vide para 8 on page 4 of the impugned order that the loss on forward exchange contract was not hit by the provisions of Section 43(5) of the Act. Hon'ble ITAT 'C' Bench, Mumbai have relied on Hon'ble Bombay High Court decision in the case of CIT Vs. Badridas Gauridas P.Ltd. (supra). In the said case, the assessee was an

exporter of cotton. In order to hedge against losses, the assessee had booked foreign exchange in the forward market with the bank. However, the export contracts entered into by the assessee for e-xport of cotton in some cases failed. In the circumstances, Hon'ble Bombay High Court held that the assessee was entitled to claim deduction in respect of payment made on account of cancellation of forward booking of foreign exchange with banks as a business loss.

3.3.10. As a matter of fact, Section 43(5) itself reads as under:-

> *"SECTION 43(5) - SPECULATIVE TRANSACTON*
>
> *This section reads as under:*
>
> *Speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scripts.*
>
> *Provided that for the purposes of this clause -*
>
> *(a) a contract in respect of raw materials or merchandise entered into by a person in the course of the manufacturing or merchanting business to guard against loss through future price fluctuations in respect of the contracts for actual delivery of goods manufactured by him or merchandise sold by him; or*
>
> *(b) a contact in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or*
>
> *(c) a contract entered into by member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member;*
>
> *(d) an eligible transaction in respect of trading in derivatives referred to in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognized stock exchange;*
>
> *Shall not be deemed to be a speculative transaction."*

Therefore, it is resolved that the profit earned by the appellant out of hedging transaction in respect of raw material i.e. Mentha Oil used for its manufacturing in Jammu Unit was a business profit of Jammu unit which was accordingly credited into the Profit and Loss Account of the appellant company. Whenever the appellant has incurred losses from such hedging transactions the appellant has reduced its profit and has claimed less deduction U/s. 80IB suo motu.

3.3.11 Once it is resolved that the profit from hedging transactions in Mentha Oil used for manufacturing by Jammu unit of the appellant was business profit, the second question arises whether such business profit is eligible for deduction U/s. 80IB or not. Ld. Assessing Officer has followed the decisions of Hon'ble Supreme Court in the cases of Pandian Chemicals Ltd. vs. CIT - 262 ITR 278 (supra) and CIT Vs. Sterling Foods 237 – ITR 579 and has held that the Industrial undertaking itself had to be source of the profit for claiming deduction.

3.3.12 It is observed that there is a material difference between the language used in Section 80HH, section 80I and section 80IB. Whereas section 80HH, requires that the profit and gains should be derived from the Industrial undertaking , Section 80IB requires that the profits and gains should be derived from any business of the Industrial Undertaking. In other words, there need not necessarily be a direct nexus between the activity of an Industrial Undertaking and the profits and gains. This view has been taken by the Hon'ble Delhi High Court in the case of CIT Vs. Eltek SGS (P) Ltd, reported in (2008)-300- ITR-6 (Del). Hon'ble Delhi High Court has discussed the Hon'ble Supreme Court Judgments in the case of CIT Vs. Sterling Foods (supra) and Pandian Chemicals (supra) and also CIT Vs. Ritesh Industries Ltd in 274-ITR-324 (Del). And held that it is sufficient if one sticks to the language used in section 80IB which is very different from the language used in Section 80HH of the Act.

3.3.13 Hon'ble Delhi High Court again in the case of CIT Vs. Dharam Pal Prem Chand Ltd. (2009) 221- CTR -133 discussed issue of deduction U/s. 80IB and appreciated that the difference in Section 80HH, 80I and 80IB of the Act. While the language used in section 80HH and 80I of the Act is similar. There is a clear departure in the languages used in section 80IB of the Act and Hon'ble Delhi High Court held that it is this choice of words by

the legislature that makes all the difference that the Hon'ble High Court is concerned with.

3.3.14.Apart from Hon'ble Delhi High Court decisions distinguishing the Hon'ble Supreme Court judgments in the case of CIT vs. Sterling Foods (supra) and Pandian Chemicals (supra), it may be noted here that Section 80IB of the Act does not use the expression "Profit and Gains derived from an Industrial Undertaking" as used in Section 80HH of the Act but uses the expression. "Profits and Gains derived from any business referred to in sub-section". Section 80IB of the Act reads as under:-

> *"Sec. 80-IB(1) of the Act reads as follows:*
>
> *"80-IB(1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-ss. (3) to (11), (l1A) and (l1B) such business being hereinafter referred to as the eligible business, there shall, in*
> *accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section."*
>
> *A perusal of the above would show that there is a material difference between the language used in s. 80HH of the Act and s. 80-IB of the Act. While s. 80HH requires that the profits and gaH1s should be derived from the industrial undertaking, s. 80-B of the Act requires that the profits and gains should be derived from any business of the industrial undertaking. In other words, there need not necessarily be a direct nexus between the activity of an industrial undertaking and the profits and gains".*

3.3.15. Having regard to the facts and circumstances of the case and in the light of the provisions of Section 80IB and in accordance with the latest judgments of Section 80IB as pronounced by Hon'ble Delhi High Court and Hon'ble Mumbai Tribunal and other decisions as noted below. I am of the considered opinion that the language used in Section 80IB is distinct from the language used in Section 80HH and Section 80I of the Act. There was no occasion for Hon'ble Supreme Court to consider the deduction U/s.

80IB of the Act in the cases of Pandian Chemicals Ltd. (supra) and in the case of Sterling Foods Ltd. (supra). Therefore, the decisions of Hon'ble Supreme Court given in the context of Section 80HH and in the context of Section 80I are not squarely applicable in deciding the deduction U/s. 80IB of the Act because there is a clear departure in the language used in Section 80IB of the Act from the languages used in section 80HH and Section 80I of the Act.

(i) CIT Vs. Eltek SGS (P) Ltd. – (2008) 300- ITR -6 (Del).
(ii) CIT vs. Dharam Pal Prem Chand ltd. – (2009) 221-CTR -133
(iii) Ranbaxy Laboratories Ltd. Vs. CIT (2009) – TIOL 02-HC-Del.-IT
(iv) Shah Originals – 112 TTJ 754 (Mum Trib):
(v) ITO Vs. Kiran Enterprises – 92- TTJ-104 (Chd.); and
(vi) Saraf Seasoning Udyog Vs. ITO – 219-CTR-461 (Raj.)

3.3.16. A combined reading of Section BOIB read with the facts and circumstances of the case and the finding that the profit from hedging transactions in Menthol Oil which is the raw material of the appellant company is a business profit, makes it abundantly clear that deduction U/s. BOIB is available to the appellant in the impugned Asstt.Year 2006- 07. Therefore, following the Hon'ble Delhi High judgments, Hon'ble IT AT Mumbai decisions and other decisions referred to in the preceding paragraphs, the deduction U/s. BOIB in respect of business profits of Jammu unit of the appellant are eligible for deduction U/s. BOIB of the Act. Accordingly, Ld. Assessing Officer is directed to allow deduction U/s. BOIB on business profits of Jammu unit including the business profits on hedging transactions of Menthol Oil amounting to Rs. 18,23,OB,l81/-. Hence, Ground No.3, Issue No.2 is allowed."

9.2 We have considered rival contentions and carefully gone through the orders of the authorities below and found that the assessee had set-up a new manufacturing unit at Pot No. 1-A, Extn-III, Industiral Area, Gangyal Jammu for the manufacture of fractioned and deterpinated Mentha Oil.Ld. Assessing Officer has observed that the assessee had commenced manufacturing on 19/4/2005 and, therefore, Asstt.Year 2006-07 was the first year of operation.

He called for various details and justification from the appellant for claiming deduction U/s. 80IB of the Act. After going through various details, Ld. Assessing Officer observed that the appellant had, inter-alia, claimed deduction U/s. 80IB on hedging profit of Rs. 18,23,08,181/- from hedging transactions routed through MCX exchange with reference to its raw material namely Mentha Oil for its Jammu Unit. The Assessing Officer observed in para 4.4. of the relevant assessment order that the question in the case of the appellant was not regarding the nature of transaction. According to him, the issue was whether profit from hedging transaction through commodity exchange, was profit derived from manufacturing or producing of an article or a thing. For this proposition, he discussed the cases of CIT Vs. Tata Locomotive & Engg. Co. Ltd. (1968) 68 - ITR - 325 (Bom.) and the decision of Hon'ble Supreme Court in the cases of CIT Vs. Sterling Foods - 237 - ITR - 579 and Pandian Chemicals Ltd. Vs. CIT - 262 - ITR - 278 (S.C.). To come to a conclusion that hedging profit has not earned by manufacturing or producing an article or a thing, he also was of the opinion that the hedging profit was not derived from the Jammu Industrial Undertaking in view of the decisions of Hon'ble Apex Court in the cases of Sterling Foods (supra) and Pandian Chemicals Ltd. (supra). He, therefore, disallowed the appellant's claim for Section 80rB on such hedging profits of Rs. 18,23,08,181/-.

9.3 From the record we found that the assessee entered into forward contracts of sale of Mentha Oil for the purpose of hedging against the fluctuation in price of raw material i.e. mentha oil which is used for manufacturing at its Jammu Unit. This product is an agro based product, which is grown only in some parts of India where the environment is suitable

for the growth. In view of the peculiarity of the raw material, the raw material had to be purchased in the harvesting season to meet requirement of the whole year. The prices are low at the time of season and then fluctuate widely depending upon the supply scenario. The Appellant sells the products manufactured at Jammu Unit from Mentha oil throughout the year. The fluctuations in Mentha oil prices severely affects the cost of Company's products and the profitability of the Company as the raw materials are already purchased and stored for the entire year's production and fluctuation in price of raw menthe oil effects the price of finished products. This means that if the price of the raw material falls later on, the appellant is unable to take advantage of a fall in the price of the raw material though simultaneously prices of the final product also fall. Thus the Appellant has to carry the inventory at a very high value since the supply after the season is scarce. Further, the export order/ sales commitments were made at pre determined prices. The company had to safeguard against adverse price fluctuations of the raw material product (being Mentha oil). For this purpose, the company entered in to future sale contracts through the recognized commodity exchanges.

9.4 We had verified the statement showing month-wise details of quantities of stock and quantities of future sale contract for the Mentha Oil entered into by the company. It was evident from the same that the quantity of Mentha oil available with the company was substantially higher than the quantity of future contracts entered and squared off. Thus if the Assessee was required to give the delivery of goods then sufficient quantity for actual delivery was available. This clearly shows that the contracts were entered into for hedging

against the future uncertainties of the business. Further, the Assessee has commenced hedging in the month of December 2005. This is so because Mentha OH was listed on commodity exchanges in May 2005 and trading was permitted from May 2005 for the contracts for the month of August 2005. It was also explained that the Assessee did not start entering into hedging contracts from May 2005 to September 2005 as initially the Assessee was not aware of operational modalities like how the trade will take place, how the deliveries would be made and by whom etc. Further the Assessee had never done any trading in any of the commodities earlier and hence it was not possible to enter into such transactions unless entire concept was understood and trading pattern was studied for initial months. Hence, the Assessee did not enter into hedging transactions till December 2005. Copy of relevant circular issued by Multi Commodity Exchange was also placed on record. We also found that the assessee has continued to undertake the hedging transactions in subsequent years. However, in subsequent years, the assessee has incurred a loss from such hedging transactions. The assessee has reduced the loss from the profits eligible for deduction under section 80-IB in the Return of income for subsequent year.

9.5 We have also carefully gone through the order of the Tribunal in assessee's own case for AY 1998-99 and AY 2000-01 and 2001-02, wherein the Tribunal has held that the foreign exchange fluctuation gain on forward contract constituted business income and was eligible for deduction under section 80HHC. The profit from hedging transactions is similar to the exchange fluctuation gain on forward contract and hence is in the nature of business income eligible for deduction under section 80-IB. There is no

dispute that profit derived from hedging transaction is business income. For this purpose reliance can be placed on the decision of Hon'ble Gujarat High Court in the case of Pankaj Oil Mills V. CIT (115 ITR 824) (FB) which explains the concept of 'Hedge'. In the instant case, we found that the activity of hedging against the price fluctuation of menthe oil has been done to protect the profits of the company. Since the Jammu unit is the only manufacturing activity of the company, the hedging profit has a direct nexus with the Jammu unit. If Assessee Company had not entered into such transaction, price fluctuation would have affected profitability of the company. Hence the hedging profit is eligible for deduction under section 80-IB which is derived from the business of the eligible industrial undertaking. For this purpose reliance can be placed on the decision of the Hon'ble Kerala High Court in the case of Commissioner of Income Tax Vs. Ajit Spices (165 ITR 755) wherein it has been held that that a forward contract of sale can be treated as a hedge transaction if such a contract is supported by a pre existing contract.

9.6 The AO has placed reliance on the decisions of Pandian Chemicals Vs. CIT (262 ITR 278)(SC) and CIT Vs. Sterling Foods (237 ITR 579) (SC) and holding that the hedging profit cannot be said to be forming a part of the profits of business of the industrial undertaking. In this regard, the decision of Hon'ble Delhi High Court in the case of Eltek SGS (P) Ltd (300 ITR 6), in case of CIT V. Dharam Pal Prem Chand (2008-TIOL-664-HC-Del-IT) are relevant, which had considered the Hon'ble Apex Court decision in the case of Pandian Chemicals (supra) and Sterling Foods Ltd (supra) and distinguished them and held that the language used in section 80-IB is different from the language in section 80-HH/80-I. The expression used in section 80-IB i.e.

profit derived from business of the industrial undertaking is much wider than the expression used in section 80-HH/80-I i.e. 'profits and gains derived from an industrial undertaking. We also found that the profit earned out of squaring off future contracts is profit earned on account of hedging transaction. Thus there is a direct nexus between the activity of Jammu unit and the profit earned in the hedging contracts. The hedging Mentha Oil stemmed from the activity of Jammu unit of manufacturing Menthol Products. Thus the income from hedging in Mentha oil formed an integral part of the income of the Jammu unit and was eligible for deduction u/s. 80-IB.

9.7 The detailed finding recorded by the CIT(A) while concluding that when such profit was eligible for deduction u/s 80IB is as per material on record and the same has not been controverted by bringing any positive material by Ld. DR. Accordingly, we do not find any reason to interfere with the finding recorded by the CIT(A) holding that assessee is eligible for deduction u/s 80IB in respect of such profit.

9.8 In the result ground taken by the Revenue is dismissed.

10. Now we take up the appeal for assessment year 2007-08 ITA No. 376/Mum2010

10.1 The only ground taken by the revenue relate to CIT(A)'s direction to AO to allow the deduction u/s 80IB on business profit of Jammu Unit after reducing the business loss of Rs. 88,12,803/- on hedging transactions of Mentha Oil. We have already discussed this issue while deciding the appeal for

assessment year 2006-07 vide para 9. Following the same reasoning as well as the order of Tribunal in assessee's own case for assessment year 1998-99, 2000-01 and 2001-02 in the context of forex fluctuation and the decision of Hon'ble Gujarat High Court in the case of Pankaj Oil Mills (supra), we do not find any infirmity in the order of CIT(A).

11. In the Cross objection filed by the assessed, the issue relates the directing the AO to grant increase deduction u/s 80IB in case of loss to be held as speculation loss. This ground is consequential to the ground decided in revenue's appeal.

12. Now we take up the appeal in ITA No. 1628/Mum/2013, assessment year 2007-08.

12.1 In this year, the department has challenged the action of CIT(A) in deleting the disallowance of Rs. 30,54,540/- representing speculation loss which cannot be treated as loss from business of hedging activity. We have already discussed this issue while dealing with the appeal for assessment year 2006-07 vide para 9. Following the same reasoning we dismiss the ground raised by the Revenue.

13. In the cross objection, the assessee is aggrieved by the order of CIT(A) directing the AO to grant increased deduction u/s 80IB in case of loss of Rs. 30,54,540/- is to be held as speculative loss, is consequential in nature.

14. Now we take up the appeal in ITA Nos. 4752/Mum/2012 and 4247/Mum/2012 for assessment year 2008-09.

14.1 In this year, the assessee is aggrieved for confirming disallowance of Rs. 5,44,101/- by AO on the plea that the Daman unit had discontinued its business activity.

14.2 From the record, we found that during this year, the assessee has filed return at income of Rs. 73,40,60,272/- u/s 115JB. In the return of income assesee has claimed deduction u/s 80IB for Rs. 68,34,32,421/- from Jammu unit. The assessee had manufacturing unit in two locations, one in Daman and other in Jammu. In the assessment year 2006-07, assessee has temporarily closed down the factory at Daman, however assessee continued to maintain the factory in hope to revive production as and when the demand would increase. During the year under consideration, the assessee has incurred expenditure in Daman unit on account of depreciation of Rs. 6,69,252/-, electricity Rs. 28,851/-. The assessee has also offered income on account of sundry balances written off amounting to Rs. 1,54,002/-. Thus, out of the total expense of Rs. 5,44,101/-, the major expenses claimed by the assessee were on account of depreciation. It is a matter of record that assessee has not disposed off the assets. These assets are part of the block of asset. As the assessee has a central accounting system and management and both the units are part of the one management and there is unity of control, therefore, it cannot be said that the assessee has discontinued the manufacture of Mentha Oil products. Only because of temporary lull in business, the AO was not justified in declining expenditure of Rs. 5,45,101/-. The issue is covered by the

decision of co-ordinate bench of Tribunal in the case of Shanti Synthetics Ltd. ITA No. 1165/M/2006, wherein it was held that assets of the unit was forming part of the block of assets along with other assets used for the purpose of business in earlier years. The year under consideration is not the first year of asset acquiring, therefore, the assets of closed unit will remain part of the block of assets. The said block of assets was used for the purpose of business during the year. Under these circumstances, the assets of the said closed unit amounts to use for the purpose of business in the year under consideration. It was, therefore, held that assessee is entitled for depreciation. Similar view has been taken by the Delhi High Court in the case of KJS India Pvt. Ltd. 340 ITR 380, and by the Hon'ble Bombay High Court in the case of Pfizer Ltd. 233 CTR 521. Respectfully following these decisions, we do not find any ground/reason for declining the assessee's claim for depreciation in respect of assets forming part of block of asset. AO is, therefore, directed to allow the assessee's claim.

15. In ITA No. 4752/Mum/2012 for assessment year 2008-09, the ground taken by the revenue with regard to deleting addition on account of speculation loss, has been discussed by us in the assessment year 2006-07 vide para no 9. Following the same reasoning, we do not find any infirmity in the order of CIT(A).

16. ITA No. 755/Mum/2013 for assessment year 2008-09, in this appeal Assessee is aggrieved for reopening of assessment u/s 147 and also for the addition made u/s 14 A read with Rule 8D.

17. We have heard the rival contentions and found that in this case the assessment framed u/s 143(3) was reopened within four years. Reopening was on the plea that disallowance was not made as per Rule 8D of the Income Tax Rules, 1962 while computing the disallowance u/s 14A of the Act. Accordingly, there is escapement of income. Contentions of learned A.R. was that full particulars were filed before the AO at the time of the original assessment proceedings in respect of expenditure incurred in earning exempt income. No new fact has come to the notice of the AO and there was only change of opinion. In view of the decision in the case of Kelvinator Indian Ltd., reopening was not justified. However, the learned DR relied on the orders of the lower authorities.

18. We have considered the rival contentions and we found that assessee had offered disallowance of Rs. 1,15,284/- against exempt income which was Rs.4.78 crores. While framing assessment, the AO has not applied Rule 8D for working of disallowance of expenditure incurred for earning exempt income and accepted the disallowance offered by the assessee. Thus, there was reason to believe that to the extent of disallowance warranted under Rule 8-D which came into force from the assessment year 2008-09 which is under consideration, there was escapement of income and the A.O. was justified in reopening the assessment. Coming to the merits of disallowance, we found that the assessee is exporter of Menthol products and other oils in the international market. The company had surplus funds in its balance sheet which were invested in tax free securities during the prior years. There is no fresh/ additional investment made during the year. There was only reshuffling of investments. The total investments have reduced by

Rs.11.13 crores. As per the figure of share capital and free reserves vis-a-vis investment during the years, we found that the assessee had Rs.39.84 crores in the form of share capital and reserve surplus against which investment was merely Rs.9.16 crores. Applying proposition of law laid down in the case of Reliance Utilities Ltd. (supra) we do not find any merits in disallowing proportionate interest. With respect to claim of administrative expenses, we found that main administrative expenditure of the assessee was towards manufacturing activity. However, full detail of such expenses have not been furnished, therefore, we restore the issue of disallowance of administrative expenditure as per Rule 8D for deciding afresh as per law.

19. In ITA No. 1628/Mum/2013 for assessment year 2009-10, the ground taken by the Revenue for deleting addition representing speculation loss already decided in earlier years, we accordingly disallow this ground of Revenue appeal.

20. In the cross objection, the assessee is aggrieved for disallowing expenses of Rs.129576. We have considered the rival contentions and found from the record that the assessee has 2 units; one at Daman and the other at Jammu. Eventhough during the year, manufacturing at Daman was closed but normal expenditure on maintenance have been incurred. The expenses are incurred in the normal maintenance of the business which have to be incurred inspite of closure of operation of the unit. The unit is part of the same management which operates units at both Dam and Jammu and the closure of operation of one unit cannot be said to be closure of business. The details of the expenses so incurred had been submitted and same are verifiable. The

expenses are revenue in nature, therefore, allowable. Precise details of such expenses were as under:-

Particulars	Amount(Rs)
Electricity expenses	26,080
Professional fees	50,000
Repairs	35,000
Sundry Bal w/off	18,386
Bank charges	110
Total expenses	129,576

Since the entire expenses are revenue in nature, we direct the A.O. to allow the same.

21. In the result, appeals filed by the assessee are allowed in part whereas the appeals filed by the Revenue are dismissed. The cross objections filed by the assessee are allowed in terms indicated above.

Order pronounced on this 20th day of Nov. 2015

Sd/-	Sd/-
(Sandeep Gosain)	(R.C. Sharma)
(Judicial Member)	(Accountant Member)

Mumbai dated 20-11-2015
SKS Sr. P.S

Copy to:

The Appellant
The Respondent
The concerned CIT(A)
The concerned CIT
The DR, "E" Bench, ITAT, Mumbai

By Order

Assistant Registrar
Income Tax Appellate Tribunal,
Mumbai Benches, MUMBAI