आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 566/JU/2009
निर्धारण वर्ष/Assessment Year : 2007-08.

The Asstt. Commissioner of Income-tax, Circle-2, Udaipur.	बनाम Vs.	M/s Hindustan Zinc Ltd., Yasad Bhawan, Udaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. AAACH 7354 K		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

राजस्व की ओर से/ Revenue by : Shri D.S. Kothari (CIT)
निर्धारिती की ओर से/ Assessee by : Shri K. Sampat (Advocate)

सुनवाई की तारीख/ Date of Hearing : 05.05.2017.
घोषणा की तारीख/ Date of Pronouncement : 30/06/2017.

आदेश/ ORDER

PER SHRI KUL BHARAT, JM.

This Appeal by the Revenue pertaining to Assessment Year 2007-08 is directed against the order of Ld. Commissioner of Income Tax (Appeal), Udaipur., dated 26.08.2009.

The Revenue has raised the following grounds of appeal :-

"1. Deleting the disallowance of Rs. 4,02,00,058/- u/s 40A(9).
2. Deleting the disallowance made on account of Publicity & PR expenses amounting to Rs. 8,19,065/-.
3. Deleting the disallowance made on account of depreciation amounting to Rs. 5,93,19,746/- claimed on shares of APGPCL in relation to right to purchase the power.
4. Deleting the disallowance made of depreciation in respect of assets retired from active use amounting to Rs. 28,37,994/-.
5. Deleting the addition of Rs. 45,99,638/- on account of enabling assets written off.

6. Deleting the disallowance of Rs. 96,64,389/- on account of treating expenses incurred wholly and exclusively for the purpose of business as donation.
7. Deleting the disallowance of Rs. 3,96,00,000/- as exchange rate difference on loan.
8. Deleting the disallowance of claim of deduction u/s 80IA of the Act of Rs. 2,27,07,02,911/- in respect of CPP-Chanderiya and Rs. 4,37,25,425/- in respect of CPP-DZS.
9. Deleting the disallowance of claim of deduction u/s 80IA in respect of CPP-CLZS after setting off of unabsorbed depreciation of earlier year against the profit of the year consideration.
10. Deleting the disallowance of deduction of Rs. 18,95,19,900/- as claimed u/s 80IA of the Act shown as profit on account of generation and transfer of steam.
11. Deleting the reduction of Rs. 3,28,75,948/- and Rs. 32,66,274/- for CPP-CLZS and CPP-DZS respectively, on account of apportionment of expenses and depreciation on the assets of HO made by the AO for the claim u/s 80IA of the Act.
12. Deleting the disallowance of claim of depreciation of Rs. 65,74,36,484/- on plant and machineries in case of Hydro-2.
13. Deleting the addition of Rs. 6,62,18,029/- u/s 40(a)(ia) of the Act for non deduction of tax at source on transmission charges, wheeling charges and SLDC charges paid to Rajasthan Rajya Vidhut Prasaran Nigam Ltd.

That the appellant craves to ad, amend, alter delete or modify any of all the above grounds of appeal before or at the time of hearing."

2. Briefly stated the facts are that the case of the assessee was picked up for scrutiny assessment and the assessment was framed under section 143(3) of the I.T. Act, 1961 (hereinafter referred to as the Act) vide order dated 23.03.2009 pertaining to the AY 2007-08. While framing the assessment, the AO made various disallowances of expenses i.e. disallowance u/s 40A(9) of the Rs. 4,02,00,058/-, Publicity & Public Relation Expenses of Rs. 8,19,065/- the depreciation value on the share of APGPCL of Rs, 5,93,19,746/-, depreciation on assets retired from active use of Rs. 28,37,994/-, enabling assets written off of Rs. 45,99,638/-, disallowance of

charity and donation of Rs. 96,64,389/-, exchange rate difference of Rs. 3,96,00,000/-, disallowance of deduction u/s 80IA of Rs. 2,27,07,02,911/- in respect of captive power project, Chanderiya and Rs. 4,37,25,425 in respect of CPP-DZS, disallowance of claim of depreciation on plants and machineries in case of hydro-2 to Rs. 65, 74,36,484/-, and disallowance of expenditure u/s 40(a)(ia) of the Act of Rs. 6,62,18,029/-. Aggrieved by this, the assessee preferred an appeal before Ld. CIT(A), who after considering the submissions deleted all the disallowance, thereby he allowed the appeal of the assessee.

3. Now, the Revenue is in appeal before this Tribunal.

4. At the time of hearing, it was contended that most of the issues are covered by the decision of the Tribunal pertaining to the earlier years. In respect of the issues, which are not covered, the revenue has filed written submission. The Ld. Counsel for the assessee has filed brief synopsis.

5. Ground no.1, is against the disallowance u/s 40A(9) of the Act.

5.1 The facts are identical to ITA No. 612/JU/2009 pertaining to the AY 2005-06. The Respective Representatives of the parties have adopted the same argument as were addressed in ITA No. 612/JU/2009 as ground no. 1. This Tribunal had decided this issue by observing as under:-

> "4. ***Ground no. 1****, it is stated by the Representatives of the parties, that the issue is covered by the decision of the Co-ordinate Bench in assesee's own case. We find that the Co-ordinate Bench in ITA No. 235/JU/2008, decided this issue in para 11.1 to 11.2 by observing as under:*
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> "11.1 As regards ground 5 of the Revenue challenging staff welfare expense u/s 40A(9), we find that the similar issue stands decided by us in assessee's

own case for the assessment year 2003-04 vide our order dated 11-03-2016 (in ITA No. 537/JU/2007-Revenue) wherein Revenue's relevant ground No. 5 has been dismissed by following observations:

"15.2 We have heard the rival contentions and perused the materials available on record. We find that Ground no. 7, 8 and 9 of the Revenue is similar to Ground no. 7,8 and 9 of the Revenue for the assessment year 2002-03 and this issue has been decided against the Revenue by this Bench vide its order dated 09-03-2016 by following observations.

"16.1 Ground No. 7,8,and 9 as mentioned hereunder are similar in nature:-

(vii) deleting the disallowance of Rs. 3,79,96,220/- on account of staff welfare expenses u/s 40A(9) of the IT Act.

(viii) deleting disallowance of Rs. 62,90,317/- on account of contribution towards welfare fund

(ix) deleting disallowance of Rs. 1,73,43,466/- on account of other welfare expenses.

16.2 Ld. Dr relied on the order of the AO in this behalf.

16.3 The Ld. AR of the assesee contends that the above expenditure being for business purposes and falling within the parameters of relevant provisions have been rightly allowed by the ld. CIT (A) by detailed order, which is relied on.

16.4 We have heard the rival contentions and perused the materials available on record. We find merit in the order of the ld. CIT (A) who has rightly allowed the above expenditure agitated by revenue qua Ground no. 7,8, and 9. This Bench of ITAT vide its order dated 03-03-2016 has allowed similar expenses by following observations.

"13.5 we have heard the rival contentions and perused the material available on record. Assessee is a PSU governed by statutory as well as internal regulations for incurring the expenditure, its approval as per a hierarchical administrate frame work. On facts neither of the auditors i.e. statutory and tax auditors have indicated anything adverse in respect of staff welfare expenditure. It is also a fact that the staff welfare expenditure is incurred

through various bodies in consultation with such staff unions. These facts coupled with findings of ld. CIT (A) that expenditure is genuine. Wholly for business purposed and allowed in various earlier years even after verification have neither been dislodged by revenue nor controverted in any manner except raising a specious plea that issue may be set aside again. Its vehemently contended that setting aside amounts to be a burden of fresh proceedings on assessee which should not be restored to be appellate authorities in routine and casual manner. Ld. Counsel contends that it amounts to reassessment proceedings and in this case after 15 years, various courts have expressed their strong displeasure on perfunctory reassessment. In our considered view the following propositions of law in the realm of tax jurisprudence as contended by ld. Counsel for the assessee deserve merit that:

(i) Principles of res Judi cata do not apply to IT proceedings

(ii) Every assessment yea is a separate and distinct unit of assessment and stands on its own facts.

(iii) What is settled should not be ordinarily unsettled unless there are justifiable reasons i.e. the principles of consistency as enunciated by Hon'ble Supreme Court in Radha Soami Satsang (supra)

It is not disputed by revenue that the expenditure on staff welfare has been allowed by AO himself in various earlier years while re-varying also in set aside fresh proceedings. From the record it emerges that no specific item of expenditure is pointed out to be not covered by sec. 40A(9), no such indication is given by auditors and ld. CIT(A)'s finding on facts and law have not been dislodged by revenue. Adverting to the plea of set aside as raised by revenue, it can be acceded as no lawful justification exists to support it. In pat so many years even after re-verification AO himself has allowed such expenditure. Such orders may have been passed after the impugned assessment order was passed respectfully following the Hon'ble Supreme Court in the case of Radha Soami Satsang we cannot gloss over the obvious legal position that revenue by its AO has allowed the staff welfare expenditure in successive assessment years after direction of Hon'ble High Court and ITAT during re-verification as proceedings of set aside assessment years. The legal propositions as canvassed by ld. Counsel deserved merit, consequently we hold that the set aside of proceedings cannot be recourse by appellate authorities in perfunctory manner and there must exist valid and justifiable reasons for subjecting the assessee to second round of proceedings. The order

of ld. CIT(A) on the issue of staff welfare expenditure is upheld, this ground no. 7 of the Revenue is dismissed."

The nature of expenditure and facts and circumstance qua ground no. 7, and 9 of this year are similar. Therefore, following our decision in assessee's own case (supra) for the assessment year 2001-02, we uphold the order o the ld. CIT(A) in this behalf. Thus, Ground Nos. 7,8, and 9 of the Revenue are dismissed.

15.3 Facts and circumstances of the case being similar to earlier years and also following our own decision in the above grounds of appeal (supra), the ground no. 7,8 and 9 o the Revenue are dismissed.

11.2 Respectfully following the decision of the Co-ordinate Bench in assessee's own case(supra), the ground no. 5 of the Revenue challenging staff welfare expense u/s 40A(9) is dismissed."

4.1 *Therefore, taking a consistent view, the Ground no. 1 of Revenue's appeal is dismissed."*

5.2. For the same reasoning, this ground of Revenue's appeal is dismissed.

6. Ground no. 2, is against deleting the disallowance made on account of Publicity & PR expenses.

6.1. The facts are identical to ITA No. 612/JU/2009 pertaining to the AY 2005-06. The Respective Representatives of the parties have adopted the same argument as were addressed in ITA No. 612/JU/2009 as ground no. 2. The Tribunal had decided this issue by observing as under:-

"5. *Apropos to **Ground no. 2** it is stated by the representative of the parties, that the issue is covered by the decision of the Co-ordinate Bench in assessee's own case. We find that the Co-ordinate Bench in ITA No. 235/JU/2008, decided this issue in para 12.1 and 12.2 by observed as under:*

"12.1 As regard ground 6 of the Revenue challenging allowability of publicity and PR expense, we find that the similar issue has been decided by us in assessee's own case for the assessment year 2003-04 vide our order dated 11-03-2016 (in ITA No. 537/JU/2007- Revenue) wherein Revenue's Ground no. 6 has been dismissed by following observations.

"**16.2 We have heard the rival contentions and perused the materials available on record. We find that this issue has already been decided by this Bench vide its order dated 09-03-2016 (A.Y. 2002-03) in favour of the assessee by observing as under:-**

"5.3 We have heard the rival contentions and perused the material available on record, similar issue came up in assessment year 2001-02 on the same issue i.e. Gujarat Earthquake itself. The amount provided for such relief on the call of District Collector has been allowed in assessment year 2001-02 by us by following observations.

" 5.1 Ground no. 4 for an amount of Rs. 20,000/- of the assessee deserves to be allowed as it is not disputed that it was incurred for sending Gujarat Earthquake relief in the form of a truckload of food items consequent to chittorgarh district Collectors Clarion Call. The amount being for social good and for discharge of corporate social responsibility is allowable as business expenditure u/s 37(1). This ground No. 4 of the assessee is allowed.

Following above judgment in assessee's own case for the assessment year 2001-02, the ground no. 3 of the assessee is allowed."

16.3 Facts and circumstances of the case being similar to earlier years and also following our own decision in the above ground of appeal(supra), the ground no. 10 of the Revenue is dismissed.

12.2 Respectfully following the decision of the Co-ordinate Bench in assessee's own case(supra), the ground no. 6 of the Revenue challenging allowability of publicity and PR expenses is dismissed."

5.2 *The facts are identical and there is no change into the facts and circumstances pointed out by the Revenue. Therefore, taking a consistent view, this ground of the Revenue's appeal is dismissed."*

6.2 For the same reasoning, this ground of Revenue's appeal is dismissed.

7. Ground no. 3, is against deleting the disallowance made on account of depreciation claimed on shares of APGPCL in relation to right to purchase the power.

7.1 The facts are identical to ITA No. 612/JU/2009 pertaining to the AY 2005-06. The Respective Representatives of the parties have adopted the same argument as were addressed in ITA No. 612/JU/2009 as ground no. 3. The Tribunal had decided this issue by observing as under:-

"6. *Apropos to **ground no. 3,** it is stated by the ld. Representatives of the Parties, that the issue is covered by the decision of the Co-ordinate Bench in assessee's own case. We find that the Co-ordinate Bench in ITA No. 235/Jodhpur/2008 decided this issue in para 10.1 to 10.2 by observed as under:-*

" 10.1 As regards ground 4 of the Revenue regarding the allowability of depreciation on APGPCL shares, we find that the similar issue has been decided by us in assessee's own case for the assessment year 2003-04 vide our order dated 11-03-2016 (in ITA No. 537/JU/2007 – Revenue) wherein revenue's Ground No. 4 has been partly allowed by following observations.

"**14.2 We have heard the rival contentions and perused the materials available on record. We find that Ground No. 6 of the Revenue is similar to Ground No. 6 of the Revenue for the assessment year 2002-03 and this**

ground is partly allowed by this Bench vide its order dated 09-03-201 by following observations.

"15.1 Apropos ground No. 6 regarding deleting disallowance of depreciation of Rs. 19,50,74,094/- on shares of APGPCL claiming it to for acquisition of intangible commercial rights for use of power generated by APGPCL at a cost. Both parties agreed that the issue is similar to AY 2001-02 and the same decision may be applied.

"15.2 We have heard the rival contentions and perused the materials available on record. Similar issue came up first time before us n assessment year 2001-02, by a detailed order we have partly upheld the order of the ld. CIT(A) by directing that 2/3rd value of the investment in APGPCL, shares should be attributed for acquisition of intangible rights embedded therein and depreciation should be allowed on 2/3rd value in terms of Section 32(1)(ii) thereon. Besides 1/3rd value of investment is attributable to the equity shares. Whenever shares of APGPCL are transferred the sale proceeds shall be accordingly allocated i.e. 1/3rd towards the share corresponding cost of share for computing Long-term capital gains in accordance with relevant provisions and 2/3rd towards block of assessee's intangible assets by following observations:-

"17.21 The circumstances that the declaration of lawin CIT v. Smifs Securities Ltd. [2012] 348 ITR 302/210 Taxman 428/24 taman.com 222(SC) envisions inclusion of goodwill as an asset and, therefore, entitled to depreciation, in other words does not necessarily mean that in every case the goodwill claim has to be allowed. In the present case, though termed as goodwill, what was actually parted with by STL was a commercial right, i.e. exclusively to the network which would not have been otherwise available but for the terms of the arrangement.

17.22 In both the above cases, it is to be appreciated that in case of Smifs Securities, the whole of the business was acquired and amalgamated with the assessee company and the consideration paid over and above the net book value of the assets (i.e. the tangible assets) termed as goodwill was held eligible for depreciation on intangible asset. Similarly, in the case of MIS Bharti, the assessee-company apart from paying consideration to acquire shares of company 'S', as per terms of agreement, also had to pay specific amount to transfer to get commercial right for marketing, customer support, distribution and associate set ups; otherwise such market/customer network would not have been transferred to assessee –company by company 'S'. The amount so paid to acquire the commercial rights (and not the consideration to acquire shares) was held eligible for depreciation.

17.23 These facts, circumstances and judicial decisions lead us hold that in such type of business transactions, there are always some tangible assets and some intangibles assets which are sold and acquired and each case will have its own peculiarities in terms of dominant objective of such acquisition and a reasonable estimation of valuation of dominant intangible asset and other rights is to be arrived at. In the cases a discussed above, the value of intangibles are either deduced by way of a residuary methodology where consideration paid over and above the net book value has been considered as value of intangible or there could be a specific consideration agreed with the seller towards acquisition of intangibles.

17.24 In light of above discussion facts, circumstances and case laws of Smiff Securities. Bharti Teletech and others (supra) we hold that to ascribe 2/3rd value of the APGPCL investment to intangible commercial rights of cost effective power supply rights an 1/3rd value to the tangible rights a share

holder will be a reasonable estimate ascribable to these constituents. The AO will accordingly word out the eligible depreciation on intangible rights u/s 32(I)(ii) on 2/3rd value of APGPCL investment and 1/3rd to share holder rights and work out the block of asset of intangible rights for depreciation and 1/3rd to value of APGPCL shares. The allowances, claim of LTCG on sale of shares whenever sold will be worked out accordingly.

17.25 In the entirety of facts, circumstances, contentions and case laws we partly upheld the assessee's claim of depreciation in this behalf u/s 32(I)(ii) in terms of para 17.24 above by holding that:-

(i) Principle of ejusdem generis a held by Hon'ble Supreme Court in Techno Shares is applicable to interpretation of sec. 32(I)(ii). Legislature did not intend to provide or depreciation only in respect of specified intangible assets but also to other categories of intangible assets as it is not possible to exhaustively enumerate each and every intangible asset or right.

(ii) In the instant case, it is the intangible asset in form of right to procure power at cost which qualified for depreciation under section 32 of the Act. Given that there is no separate consideration for value of shares an value of such intangible rights, the asessee and AO have to come up with an appropriate methodology. On the limited issue of determining the valuation the intangible rights which otherwise qualify for depreciation u/s 32(I)(ii) of the Act, the matter is set aside to the file of AO to examine the same after providing reasonable opportunity to the assessee.

(iii) Care shall be taking to consider the nature of intangible and tangible commercial rights acquired by assessee in a composite transaction and to ascribe reasonable valuation to respective rights.

(iv) The categories of specific intangible assets referred in Section 32(I)(ii) are not of the same kind and are clearly distinct from one another. Like wise unremunerated rights need not strictly answer the description of "knowhow, patent, trademarks, licenses or franchises" but must be of similar of nature as the specified assets. In our view the assessee's claim conform to this parameter.

(v) Intangible assets, like securing expedient and useful power supply obtained from APGPCL are invaluable for carrying on the business by the assessee.

(vi) Acquisition of such intangible assets which are whole or part of acquisition value, therefore, correspondingly comparable to a license to carry out the existing transmission and distribution business of the transferor. In this case also APGPCL got the rights of earlier allotee in favour of the assessee.

(vii) Hon'ble SC in Techno Shares and Stocks Ltd. held that intangible assets owned by the assessee and used for the business purpose which enables the assessee to access the market and has an economic and money value is a "license" or "akin to a license" which is one of the items falling in Section 32(I)(ii).

(viii) Even if strictly the rights do not amount to license, in any case they constitute another genus of other commercial rights of similar nature as envisaged by sec. 32(I)(ii).

(ix) The shares are the written means to acquire and enjoy the rights of electricity under a policy formulated by APSEB and AGPGCL under the aegis of policies of AP Govt. Therefore the rights being achieved in the form of zero dividend share certificated cannot militate aginst the real nature of transaction. Our view is fortified by Hon'ble Supreme Court judgments in the case of Kedarnath Jute Mill and Sutlej Cotton Mills (supra), Therefore, acquisition of rights being the dominant and prime motive in impugned transaction, depreciation in terms of sec. 32(I)(ii) is to be allowed in terms of para 17.24 above.

(x) Though no adverse judgment has been cited on the interpretation and scope of sec.32(I)(ii) and the issue, assuming even that more than one interpretation is possible, even the one favourable to assessee is to be adopted in view of the Hon'ble Supreme Court judgments in the case of Vegetable Product and Vatika Township(supra)

17.26 in view of the foregoing we partly uphold the order of ld. CIT(A) on this issue on allowing impugned depreciation in terms of para 17.24 above, same is upheld. Revenue ground no. 2 is partly allowed."

15.3 In these facts and cirumstnces, following our own judgment dated 03-03-2016 in assessee's own case for the assessment year 2001-02, the Ground

No. 6 of the Revenue is accordingly partly allowed on the similar terms as mentioned above. Thus Ground no. 6 of the Revenue is partly allowed."

14.3 Facts and circumstances of the case being similar to earlier years and also following our own decision in the above grounds of appeal (supra), the Ground no. 6 of the Revenue is partly allowed."

10.2 Respectfully following the decision of the co-ordinate Bench in assessee's own case (supra) the Ground No. 4 of the Revenue regarding the claim of depreciation on APGPCL shares is partly allowed."

6.1 *Therefore, taking a consistent view, this ground of the Revenue's appeal is dismissed."*

7.2 For the same reasoning, this ground of Revenue's appeal is partly allowed, allowance of depreciation is restricted to 2/3rd value in terms of Section 32(1)(ii) thereon.

8. Ground no. 4, is against the deleting the disallowance of depreciation claimed on the assets retired from active use.

8.1. The facts are identical to ITA No. 612/JU/2009 pertaining to the AY 2005-06. The Respective Representatives of the parties have adopted the same argument as were addressed in ITA No. 612/JU/2009 as ground no. 5. The Tribunal had decided this issue by observing as under:-

" 7. ***Ground no. 5****, it is stated by the ld. Representatives of the Parties, that the issue is covered by the decision of the Co-ordinate Bench in assessee's own case. We find that the Co-ordinate Bench in ITA No. 235/JU/2008 has decided this issue in para 16.1 to 16.2 by observed as under:-*

"16.1 As regards ground 11 of the Revenue challenging claim of depreciation on assets retired from active, use we find that the similar issue has been decided by us in assessee's own case for the assessment year 2003-04 vide our order dated 11/03/2016 (in ITA No. 537/JU/2007 – Revenue) wherein Revenue's Ground no. 11 has been dismissed by following observations.

"22.2 We have heard the rival contention and perused the materials available on record. We find that Ground no. 18 of the Revenue is similar to Ground No. 15 of the Revenue for the assessment year 2002-03 and the issue in question has been decided against the Revenue by this Bench vide its order dated 09/03/2016 by following observations.

22.7 We have heard the rival contentions and perused the materials available on record. We find that this issue is squarely covered by the decision of Hon'ble Delhi High Court in the case of CIT vs. Yamaha Motor India(P) Ltd. (2010), 328 ITR 297 wherein it is held as under:-

"Held dismissing the appeal, that as long as the machinery was available for use, though not actually used, it feel within the expression "used for the purpose of the business" and the asessee could claim the benefit of depreciation. An actual user was not required as had been contended by the

Revenue. Use and discarding were not in the same field and could not stand together. However, a harmonious reading of the expressions "used for the purpose of the business" and "discarded" it would show that "used for the purposes of the business" only means that the assessee had used the machinery for the purpose of the business in earlier years. The expression "used for the purposes of the business" as found in section 32 when used with respect to discarded machinery would mean that the user in the business was not in the relevant financial year/ previous year but in the earlier financial years. Any other interpretation would lead to an incongruous situation because on the one hand the depreciation was allowed on discarded machinery after allowing, inter alia, an adjustment for scrap value, yet, on the other hand user would be required of the discarded machinery which was not possible because of various reasons. The discarded machinery would not be actually used in the relevant previous year as long as it was used for the purposes of business in the earlier years. The Tribunal was correct in directing the assessing officer to recomputed depreciation after reducing the scrap value of the assets which had been discarded and written off in the books of account for the year under consideration from the written down value of the block of assets. Actual user of the machinery was not required with respect to discarded machinery ad the condition for eligibility for depreciation that the machinery being used for the purpose of the business would mean that the discarded machinery was used for the purpose of the business in the earlier years for which depreciation had been allowed.

[The Supreme Court has dismissed the special leave petition filed by the Department Against this judgment : See [2010] 328 ITR (St.)10.]"

22.8 Respectfully the decision of Hon'ble Delhi High Court in the case of CIT vs. Yamaha Motor India (P) Ltd. (supra) and the decision of ITAT Jodhpur Bench in the case of DCIT vs. Udaipur Distillery Co. Ltd. (supra), we uphold the order of the ld. CIT (A) on this issue. Thus Ground No. 15 of the Revenue is dismissed."

22.3 Facts and circumstances of the case being similar to earlier years and also following our own decision in the above ground of appeal(supra), the ground no. 18 of the Revenue is dismissed."

16.2 Respectfully following the decision of the Co-ordinate Bench in assessee's own case(supra), the Ground No. 11 of the Revenue challenging claim of depreciation on assets retired from active use is dismissed."

7.1 *Therefore, this ground of the revenue's appeal is dismissed."*

8.2. For the same reasoning, this ground of Revenue's appeal is dismissed.

9. Ground no. 5, is against deleting the addition on account of enabling assets written off.

9.1 The facts are identical to ITA No. 612/JU/2009 pertaining to the AY 2005-06. The Respective Representatives of the parties have adopted the same argument as were addressed in ITA No. 612/JU/2009 as ground no. 6. We have decided this issue by observing as under:-

"8. *Apropos to **ground no. 6**, it is stated by the ld. Representatives of the Parties, and that identical issue is decided by the Co-ordinate Bench in ITA No. 235/JU/2008 in assessee's own case pertaining to the assessment year 2004-05 in para 13.1 to 13.2 has reads as under:-*

"13.1 As regards ground 7 of the Revenue challenging Ghosunda Damn expenses we find that the similar issue has been decided by us in assessee's own case for the assessment year 2003-04 vide our order dated 11-03-2016(in ITA No. 537/JU/2007- Revenue) wherein Revenue's Ground No. 7 has been dismissed by following observations.

"17.2 We have heard the rival contentions and perused the materials available on record. We find that Ground No. 11 of the Revenue is similar to Ground No. 10 of the Revenue for the assessment year 2002-03 and this issue has been decided against the Revenue by this Bench vide its order dated 09-03-2016 by following observations;

"17.1 Apropos revenue Ground No. 10 regarding deleting disallowance of Rs. 4,19,12,571/- u/s 37(I) on account of enabling assets written off being expenses incurred on Gosunda Dam for procuring water.

17.2 We have heard the rival contentions and perused the materials available on record. This issue is one going one from earlier years. In assessment year 2001-02, this Bench of ITAT vide its order dated 03-03-2016 (supra) has upheld the order of the ld. CIT(A) on this issue by following observations:-

"15.1 Revenue ground no. 9 challenging allowance of Rs. 9,33,45,17/- on account of expenses incurred on Ghosunda Dam for procuring water. L. CIT(A) allowed this claim by following observation.

"11.2 During the course of appellate proceedings, the ld.AR contended that with reference to the expenditure incurred on alteration effected in the construction of Gosunda Dam were in earlier years also and allowable u/s 37(I) of the Act but the same were not allowed by the AO. He further submitted that the expenditure incurred only enabled a more efficient and economical sate of business operation and that no new asset was created or any property acquired. In support of this the ld. AR placed reliance in the case of CIT vs. Bongaigaon refinery & Petrochemicals Ltd. 222 ITR 206 (Gau). National

Organic Chemical Industries Ltd. vs. CIT203ITR 410(Bom). Bikaner Gypsum vs CIT, 187 ITR 39 (SC) and CITvs. Associated Cement Company Ltd. 172ITR 257 (SC). He further stated that similar issue has been considered in ITA No. 1106/JP/94 for AY 1991-92 and ITA No. 321/JP/96 for AY 1992-93 wherein the Hon'ble ITAT has dismissed the Departmental appeal and decided in various of the appellant. He further stated that after submitting the break up of the amount, no other information was required by the AO. The ld.AR furnished complete details of expenditure incurred for Ghosunda Dam. In view of the above, the ld. AR contended that the disallowance deserved to be deleted.

As far as the disallowance of bad debts amounting to Rs. 4,79,519/- complete details from all the units could not be filed at the time of assessment. He further stated the claim of the appellant deserve to be allowed on the basis of audited balance sheet as the amounts are audited by the auditors appointed by C & AG.

11.3 I have considered the facts of the case and also gone through the decision of Hon'ble ITAT (supra). Respectfully following the decision of the Hon'ble IT, Act in the case of the appellant cited above, I hold that the AO was not justified in disallowing the expenditure incurred on Gosunda Dam amounting to Rs. 9,3,45,17/- , the same is deleted.

With regard to other disallowances of Rs. 4,79,519/- in the appellant proceedings also, the ld. AR did not file any details. Therefore, the ascertainment is not possible. Hence, the disallowance is confirmed."

15.2 Ld. Counsel for the assessee contends that this issue is covered and settled in its favour of the assessee, ITAT allowed these claims in AYs 1991-92 and 1992-93; aggrieved revenue preferred appeals before Hon'ble Rajasthan High Court which was pleased to dismiss revenue appeals by the order dtd. 30/01/09 in ITA Nos. 52 & 78/2002 by following observations:-

"12 Adverting to the facts of the present case, admittedly, the assessee's super smelter plant requires adequate quantity of water for its operation and unless and until, water is available, the super smelter plant would not function and would not be able to produce any items. Admittedly, the Ghosunda Dam

has been constructed by the State Govt. and the assessee has made expenditure for its alteration so as to ensure sharing of the water with the State Govt. without having any right or ownership in the Dam or the water. Even the assessee's share of water is also determined by the State Govt. Thus, the expenditure incurred by the assessee for commercial expediency relates with carrying on of business and falls within such expenditure as prudent businessman may incur for the purpose of the business. The operational expenses incurred by the assessee solely intended for furtherance of the enterprise can be no means be treated as expenditure of capital nature.

13.Keeping in view the object and purpose of the expenditure and totality of the facts and circumstances of the case noticed above, in our considered opinion, the benefit received by the assessee company on account of the expenditure incurred cannot be said to be an advantage in the capital field. We are in agreement with the view taken by the CIT(A) and affirmed by the ld. ITAT that the object and effect of the expenditure made by the assessee is to facilitate its trade operation and enable the management to conduct business more efficiently or more profitably. Therefore, the question no. 1 (supra) deserves to be answered in affirmative i.e. in favour of the assessee and against the revenue.

15.3 Revenue further preferred SLP which was dismissed on 18-07-11. Copies of the Orders are referred to.

15.4 Ld. DR is heard.

15.5 We have heard the rival contentions and perused the material available on record. In view of the above legal history issue in question stands settled in favor of the assessee, consequently this ground No. 9 of Revenue is dismissed."

17.3 Respectfully following our own decision in this case for the assessment year 2001-02 (supra), the Ground No. 10 of the Revenue is dismissed."

17.3 Facts and circumstances of the case being same as earlier and also following our own decision in the above ground of appeal(supra), the ground No. 11 of the Revenue is dismissed.

13.2 Respectfully following decision of the Co-ordinate Bench is assessee's own case(supra), Ground No. 7 of the Revenue challenging Ghosunda damn expenses is dismissed."

8.2 *The facts are identical and taking into consistent view, this appeal of the revenue is dismissed*."

9.2 For the same reasoning, this ground of Revenue's appeal is dismissed.

10. Ground no. 6, is against deletion the disallowance of Rs. 96,64,389/- on account of treating expenses incurred wholly and exclusively for the purpose of business as donation.

10.1. The facts are identical to ITA No. 638/JU/2008 pertaining to the AY 2006-07. The Respective Representatives of the parties have adopted the same argument as were addressed in ITA No. 638/JU/2008 as ground no. 9. The Tribunal had decided this issue by observing as under:-

*"**10. Ground no. 9**, is against allowing the donations of Rs. 1,10,52,000/- given to Nandi Foundation as an expenditure allowed under section 37(1) of the Act, in spite of the view taken by the Assessing Officer in allowing the same u/s 80G at the rate of 50%. The ld. D/R submitted that the Ld. CIT (A) was not justified in deleting the addition. He submitted that there is a specific provision under the Act, wherein such donations are allowable. He submitted that the nature of the donation is beyond the scope of section 37(1) of the Act.*

***10.1** On the contrary, ld. Counsel for the assessee supported the orders of the ld. CIT(A) and submitted that the issue was decided by this Tribunal in ITA No. 235/JU/2008, pertaining to the assessment year 2004-05.*

***10.2** We have heard the rival contentions, perused the material available on record and gone through the order of the authorities below. Ld. Counsel for the assessee submitted that the issue is covered in favour of the assessee in ITA No. 235/JU/2008 pertaining to the assessment year 2004-05. The contention of the ld. Counsel for the assessee is that this amount is allowable u/s 37(1) if the Act, as the same has been incurred for the purpose of business. The amount was spent under the mid-day-meal scheme of the Rajasthan in the adjacent area of the assessee's mine. Ld. CIT(A) allowed the same. We have given our thoughtful consideration to the rival contentions of the parties. We do not see any merit into the contention of the ld. Counsel for the assessee that the donation of Nandi foundation for providing mid-day-meal under the Government of Rajasthan Scheme, is allowable as business expenditure. Section 37(1) operates in a different field. In our view there has to be direct nexus between the amounts spent and the business of the assessee. In the present case, there is no evidence suggesting that the expenditure is laid out or expended wholly and exclusively for the purpose of business of the assessee. Therefore, this ground of the Revenue's appeal is allowed. The finding of the Ld. CIT(A) on this issue is set aside and that the*

Assessing Officer is restored. Thus, ***Ground no. 9*** *of the revenue's appeal is allowed."*

10.2 For the same reasoning, this ground of Revenue's appeal is allowed.

11. Ground no. 7, is against deleting the disallowance of expenses claimed on account of fluctuation of exchange rate.

11.1 The facts are identical to ITA No. 638/JU/2008 pertaining to the AY 2006-07. The Respective Representatives of the parties have adopted the same argument as were addressed in ITA No. 638/JU/2008 as ground no. 11. The Tribunal had decided this issue by observing as under:-

12.2 *We have heard the rival contentions, Ld. CIT(DR) strongly urged that the ratio of the judgment of the Hon'ble Supreme Court in the case of Woodword Governor (supra) is not applicable on the facts of the present case. However, we find merit into the contention of the Ld. Counsel for the assessee that after capitalization, the ECB had changed its nature and assumed character of circulating capital. Such treatment is in consonance with the accepting accounting principles and accounting standards. As such loss on account of exchange difference is a revenue charge and is allowable deduction under section 37(1) of the Act. In view of these un rebutted facts in our considered view, the ratio of the judgment of the Hon'ble Apex Court rendered in the case of CIT vs. Woodward Governor (supra) is squarely applicable on the present case. The Hon'ble Court has held as under:-*

29. To answer the controversy, we need to analyse section 43A (unamended). The period in question in the batch of civil appeal is prior to the Finance Act, 2002, therefore, we are required to consider the scope of section 43A (unamended).

30. Section 43A starts with a non obstante clause. Section 43A(1) overrides the other provisions only as regards cases falling under that sub-section. For instance, in a case where the asset is acquired, or the liability to pay in foreign exchange arises, after the change in the rate of exchange, the said sub-section has no application and the general principles of law must be applied in decided where ther actual cost is increased or reduced as a result of such change. In other words, section 43A(1) applies only where as a result of change in the rate of exchange there is an increase or reduction in the liability of the assessee in terms of the India rupee to pay the price of any asset payable in foreign exchange or to repay moneys borrowed in foreign currency specifically for the purpose of acquiring the asset. Section 43A(1), therefore, has no application unless the asset is a acquired and the liability existed, before the change in the rate of exchange takes effect. In such a case, section 43A contemplates recomputation of the cost of the assets for the purposes of depreciation (section 32 and 43(1), and also as regards capital assets for scientific research (section 35(1)(iv) and also regarding patent right or copyrights (section 35A).

31. As held in Arving Mills' case (1992) 193 ITR 255 (SC) (supra) increase or decrease in liability in the repayment of foreign loan should be taken into account to modify the figure of actual cost in the year in which the increase or decrease in liability arises on account of the fluctuation in the rate of exchange. Thus, the adjustments in the actual cost are to be made irrespective of the date of actual payment in foreign curreny made by the assessee. This position also finds place in the clarification issues by the Ministry of finance dated January 4, 1967, which, inter alia, reads as under:

> *"2. The Government agrees that for the purposes of the calculation of depreciation allowance, the cost of capital assets imported before the date of devaluation should be written off to*

the extent of the full amount of the additional rupee liability incurred on account of devaluation ad not what is actually paid from year to year. The proposed legal provision in the matter is intended to be framed on this basis." (emphasis supplied)

32. One more aspect needs to be mentioned. Section 43(1) defines actual cost for the purpose of grant of depreciation, etc. to mean "the actual cost of the assets to the assessee". Till the insertion of the unamended section 43A there was no provision in the Income-tax Act for adjustment of the actual cost which was fixed once an for all, at the time of acquisition of the asset. Accordingly, no adjustment could be made in the actual cost of the assets for purposes of grant of depreciation for any increase/decrease of liability subsequently arising due to exchange fluctuation. Consequently, section 43A was introduced in the Act by the Finance Act, 1967, with effect from April 1, 1967, in the above terms to provide for adjustment in the actual cost of assets pursuant to change in the foreign currency exchange rates. As a consequence of the insertion of the said section, if became possible to adjust the increase/decrease in liability relating to acquisition of capital assets on account of exchange rate fluctuation, in the actual cost of the assets acquired in foreign currency and for, inter alia, depreciation to be allowed with reference to such increased/decreased cost. This position is also made clear by Circular No. 5-P dated October 9, 1967, issued by the Central Board of Direct Taxes. One more point needs to be mentioned. Section 43A (unammended) corresponds to paragraph 10 of AS-11 similarly providing for adjustment in the carrying cost of fixed assets acquired in foreign currency, due to foreign exchange fluctuation at each balance-sheet date. The relevant paragraph reads as follows:

"10. Exchange differences arising on repayment of liabilities incurred for the purpose of acquiring fixed assets, which carried in terms of historical cost, should be adjusted in carrying amount of the respective fixed assets. The carrying amount of

such fixed assets should, to the extent not already so adjusted or otherwise accounted for, also be adjusted to account for any increase or decrease in the liability of the enterprise, as expressed in the reporting currency by applying the closing rate, for making payment towards the whole or a part of the cost of the assets or for repayment of the whole or a part of the monies borrowed by the enterprise from any person, directly or indirectly, in foreign currency specifically for the purpose of acquiring those assets."

33. *As state above, what triggers the adjustment in the actual cost of the assets, in terms of the unamended section 43A of the 1961 Act is the change in the rate of exchange subsequent to the acquisition of asset in foreign currency. The section mandates that at any time there is change in the rate of exchange, the same many be given effect to by way of adjustment of the carrying cost of the fixed assets acquired in foreign currency. But for section 43A which corresponds to paragraph 10 of AS-11 such adjustment in the carrying amount of the fixed assets was no possible, particularly in the light of section 43(1). The unamended section 43A nowhere required as condition precedent for making necessary adjustment in the carrying amount of the fixed asset that there should be actual payment of the increased/decreased liability as a consequence of the exchange variation. The words used in the unamended section 43A were "for making payment" and no "on payment" which is now brought in by amendment to section 43A, vide the Finance Act, 2002.*

34. *Lastly, we are of the view that the amendment of section 43A by the Finance Act, 2002, with effect from April 1, 2003, is amendatory and not clarificatory. The amendment is in complete substitution of the section as it existed prior thereto. Under the unamended section 43A adjustment to the actual cost took place on the happening of change in the rate of exchange whereas under the amended section 43A adjustment in the actual cost is made on cash basis. This is indicated*

by the words "at the time of making payment". In other words, under the unamended section 43A, "actual payment" was not a condition precedent for making necessary adjustment in the carrying cost of the fixed asset acquired in foreign currency however, under the amended section 43A with effect from April 1, 2003, such actual payment of the decreased enhanced liability is made a condition precedent for making adjustment in the carrying amount of the fixed asset. This indicates a complete structural change brought about in section 43A, vide the Finance Act, 2002. Therefore, the amended section is amendatory and not clarificatory in nature.

Conclusion:

35. For the reason given hereinabove, we find no infirmity in the impugned judgments of the Delhi High Court and accordingly the civil appeals filed by the Department stand dismissed with no order as to costs."

Respectfully following the same, we do not see any reason to interfere into the order of the Ld. CIT(A), same is hereby affirmed. This ground of the Revenue' appeal is dismissed.

11.2 For the same reasoning, this ground of Revenue's appeal is dismissed.

12. Ground no. 8, is against deleting the disallowance of claim of deduction u/s 80IA of the Act of Rs. 2,27,07,02,911/- in respect of CPP-Chanderiya and Rs. 4,37,25,425/- in respect of CPP-DZS.

12.1 Ld. D/R supported the order of the Assessing Officer.

12.2 On the contrary, the Ld. Counsel for the assessee supported the order of the Ld. CIT(A) and submitted that this issue has been arising and decided in favour of the assessee by decision of the Co-ordinate Bench of this Tribunal pertaining to the

AY 2004-05 in ITA no. 235/JU/2008 and ITA No. 612/JU/2009 pertaining to the AY 2005-06. He submitted that under these facts, the AO have allowed the claim.

12.3 We have heard the rival contentions, perused the material available on record. We find that the Co-ordinate Bench in ITA No. 455/JU/2010 pertaining to the AY 2004-05. Since the issue has already decided by the Co-ordinate Bench. There is no change into fat and circumstances we do not see any reason to take a different view in this matter. For the same reasoning, this ground of Revenue's appeal is partly allowed for statistical purposes.

13. Ground no. 9, is against deletion of disallowance of deduction claimed u/s 80IA in respect of CPP-CLZS.

13.1. Apropos to Ground no. 9, the Ld. D/R supported the order of the AO and submitted that Ld. CIT(A) was not justified in deleting the disallowance.

13.2 On the contrary, Ld. Counsel for the assessee supported the order of the Ld. CIT(A) and reiterated the submissions as made in the written submissions.

13.3 We have heard the rival contentions, perused the material available on record and gone through the order of the Ld. CIT(A). We find that Ld. CIT(A) has observed that the AO finally concluded that deduction u/s 80IA of the Act, is calculated after carried forward and set off of depreciation of Rs. 97,02,48,037/- against profit of 227,07,02,911/- of CPP-CLZS unit and in resultant deduction u/s 80IA of the Act is allowed only to the extent of Rs. 1,30,04,54,874/-. This resulted in disallowance of deduction u/s 80IA of Rs. 97,02,48,037/-. The Ld. CIT(A) decided the issue by observing as under:-

"Section 801A(5) says that the profit and gains of eligible business to which these provisions of sub-section (1) applied for the purpose of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding initial assessment year or by subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during previous year relevant to the initial assessment year and to every subsequent assessment year upto and including the assessment year for which the determination is to be made. On plain reading of this sub-section, it is found that this sub-section consist of mainly the following things:-

i) The eligible business;

ii) The profit and gains of eligible business;

iii) The initial assessment year and subsequent assessment year including assessment year for which the determination is to be made; and

iv) The only source of income of the eligible business.

In case of the appellant company, CPP-CLZS engaging in manufacturing and generation and distribution of power is the eligible business claiming deducting us 801A (1) of the Acct. There is a profit of Rs. 227,07,02,911/- in CPP-CLZS in the year under consideration i.e. 2007-08. The quantum of deduction is 100 %. Undoubtedly the quantum of deduction has to be calculated as if the CPP-CLZS is the only source of income of the appellant. The initial dispute arises as to which initial assessment year in which the deduction u/s 801A is to be given. As per the AO, the CPP-CLZS unit is a separate unit engaged in generation or generation and distribution of power in A. Y. 2005-06, the same year should be initial assessment year. There has been profit of Rs. 21,80,792,/- in A. Y. 2005-06 and of Rs. 153,38,50,851/- in A. Y. 2006-07 but after giving deduction of depreciation for Rs. 134,74,07,792/- in the A.Y. 2005-06, there is a loss of Rs.

154,52,27,000/- and given deduction of Rs. 115,88,71,888/-, there is profit of Rs. 37,49,78,963/- in the A. Y. 2006-07. Although, there is profit in the A.Y. 2006-07 after depreciation, but the appellant company did not opt for claiming deduction u/s 801A for the first two years i.e two years 2005-06 and 2006-07. The appellant company has opted assessment year 2007-08 being the initial assessment year for claiming deduction u/s 801A of the Act. As per the appellant's submission, the A. Y. 2007-08, being first initial assessment year, the loss or profit or depreciation in the A.Y 2005-06 and 2006-07 is immaterial. The depreciation should be taken at Nil. The AR has also impressed upon the fact that in section 801B and 801C, the Legislature has clearly mentioned as to which would be the first initial assessment year itself but in case of section 801A (2), initial assessment year not defined, it has been left to the assessee's option to choose first initial assessment year for claiming deduction u/s 801A then another subsequent nine years out of total 15 years. As the appellant has chosen A. Y. 2007-08 being first initial assessment year for claiming the deduction u/s 801A, this year itself would be the first assessment year. The unabsorbed depreciation of earlier assessment years 2005-06 and 2006-07 would be treated as Nil. It would be presumed that there is no loss or depreciation which is to be set off against the profit of A. Y. 2007-08. The AO has wrongly taken the stand that the depreciation of A. Y. 2005-06 and 2006-07 has to be first set off against the profit for A. Y 2007-08 and computed the deduction u/s 801A on the balance amount of profit. The provisions of section 801A (2) read with section 80B (5) do not support the contention of the AO but in fact are in favour of the appellant. The AO has also discussed the provisions 801A (7), 801A (2), 801A (6), 80A (2) and 80B (5).

There is no dispute in respect of deduction and profit and gains derived from undertaking as the appellant has maintained separate books of account and audited by the Accountant as defined in the Explanation below to

sub-section (2) of section 288 and the appellant has also furnished the report of such audit in the prescribed from duly signed and verified by such an Accountant along with its return of income. Further, there is also no dispute about the gross total income as mentioned in sub-section (5) of section 80B as the appellant has taken gross total income before making any deduction under chapter VIA. Section 801(6) deals with profit and gains of industrial undertaking or the ship or business of hotel or business of repairs of ocean going vessels or other power craft after certain date which is not relevant with the appellant's present case. As per the provisions of section 80A (2), the aggregate amount of deduction under this chapter shall not in any case exceed the gross total income of the assessee. In the appellant's case, the deduction claimed has not exceeded the gross total income, is therefore irrelevant.

As per the provisions of section 801A(2), the appellant has the option to take any 10 consecutive years out of 15 years for claiming deduction u/s 801A (1) of the Act. But once the appellant chooses any assessment year being the initial assessment year then in that case the appellant has to continue calcimining deduction in the subsequent nine years continuously without any break. In the appellant's case, the option is for A. Y 2007-08, being the first initial assessment year.

The provisions of section 801A are to be applied only in the year in which the deduction is claimed but when the claim is made, deduction has to be computed as if such eligible business were only the source of income of the assessee during previous year relevant to the initial assessment year and to every subsequent assessment year.

In view of the above facts and arguments, the disallowance of appellant's claim of unabsorbed depreciation u/s 801A of the Act on the total profit of CPP-CLZS by the AO is deleted and appeal is thus allowed on this ground."

13.4 It is contended by the Ld. Counsel for the assessee that exercising the choice for lodging claim in the year, subsequently to the due date. In the first of these two years of the operation, when the incentives was not claimed the depreciation was adjusted against the income otherwise available. Furthermore, depreciation at the accelerated rate is available for the category of machinery utilized in the process of electricity generation. So most of the requisite depreciation had got absorbed and adjusted in the income of the earlier two years and when it came to the 3rd year, and when for the first time of the benefits of deduction of priority income u/s 80IA of the Act was claimed, no depreciation existed unobserved that being the case the claim of the revenue for set off of notional unobserved depreciation is completely erroneous. Ld. Counsel placed reliance upon the Judgment of the Hon'ble Rajasthan High Court rendered in the case of Mewar Oil and General Mill Ltd. (2004) 271 ITR 311 (Raj.). He submitted that this decision was followed by the Hon'ble Madras High Court . The Hon'ble High Court has decided the issues as under:-

> *"Having considered the rival contentions which follow on the line noticed above, we are of the opinion that on finding the fact that there was no carry forward losses of 1983-84, which could be set off against the income of the current assessment year 1984-85, the recomputation of income from the new industrial undertaking by setting off the carry forward of unabsorbed depreciation or depreciation allowance from previous yer did not simply arise and which has not been disturbed by the Tribunal and challenged before us, there was no error much less any error apparent on the fact of the record which could be rectified. That question would have been germane only if there would have been carry forward of unabsorbed depreciation and unabsorbed development rebate or any other unabsorbed losses of the previous year arising out the priority industry and whether*

it was required to be set off against the income of the current year. It is not at all required that losses or other deductions which have already been set off against the income of the previous year should be reopened again for computation of current income under section 80-I for the purpose of computing the admissible deductions there under.

In view thereof, we are of the opinion that the Tribunal has not erred in holding that there was no rectification possible under section 80_I in the present case, albeit, for reason somewhat different from those which prevailed with the Tribunal. There being no carry forward of allowable deductions under the head depreciation or development rebate which needed to be absorbed against the income of the current year and, therefore, recompilation of income for the purpose of computing permissible deduction under section 80-I for the new industrial undertaking was not required in the present case."

13.4 In the light of the judgment of the Hon'ble High Court, we do not see any infirmity into the order of the Ld. CIT(A), same is hereby affirmed. The Ground raised in this appeal is dismissed.

14. Ground no. 10, is against deleting the disallowance of deduction of Rs. 18,95,19,900/- as claimed u/s 80IA of the Act shown as profit on account of generation of steam and transfer of steam.

14.1 The Respective Representatives of the parties have reiterated the submissions as made in the written submission. It is submitted by the Ld. CIT(DR) had claimed deduction u/s 80IA in respect of claim profit on transfer of steam from power generation units to its manufacturing unit. As per section 80IA(8) of the Act, the said transfer is required to be made at 'market value', which is defined in Explanation thereto as the price that normally be fetched in the open market. Since, there is no

market for steam; such market value is incapable of being determined. Even the assessee has failed to provide any basis for valuation of such steam. In such a situation, the profit calculated and deduction of Rs. 18.95 crores claimed has no basis. Without prejudice to be above argument, it is submitted that the steam has been used as an input in manufacturing certain of end products. Therefore, the closing stock of such end product should include the proportionate value of steam as per accepted accounting norms, which has not been done by the assessee.

14.2 Per contra, the Ld. Counsel for the assessee submitted that the contention of the revenue is that in the absence of market value of steam costing has not been done in appropriate manner by the assessee. It is contended that this contention is wrong in view of the fact that the assessee maintains complete production records and cost computation data has been the basis for the ascertainment of the cost. It is on the basis of cost so arrived at that computation of profit from steam generation has been evaluated. That computation is backed and attested by an accountant's certificate as visualized in sub-section (7) of Section 80-1 A of the Act. Ld. Counsel relied upon the CIT(A)'s order and submitted that this ground deserves rejection.

14.3 We have heard the rival contentions perused the material available on record. The Ld. CIT(A) allowed relief on the basis that appellant company maintained all kinds of documentary evidences for production of steam and transfer of the same to Hydro and Pyro Ausmelt. As prescribed in provisions of section 80IA, eligible business i.e. CPP-CLZS has worked out value/price/rate of steam based upon cost of steam so generated including water, coal, consumable item and manpower and administrative expenses; and has done it at arm's length basis. Since no other

method has been prescribed by the statute in this respect, the appellant had to work out value on the facts available with it.

14.4 We have given out thoughtful consideration to the rival contentions, there is no dispute with regard to the fact that some value has to be attributed to the steam and such value should be based upon certain facts and figures duly verifiably by the scientific method. In the present case it is case of the assessee that all details were furnished before AO with regard to the value of the steam. The Accountant has examined the facts and figure and after analyzing the same issued the certificate. We find that while disallowing the claim, the AO has not given any other value. For generation of steam essentially some cost ought to have incurred, furthermore the market value of steam would be the value for the purpose it is utilized, the value of end product in this case is electricity.

14.5 For disallowing the claim of the assessee the objection of the AO are two-fold. Firstly, the steam is not an electricity hence not eligible for deduction u/s 80IA of the Act and secondly the assesee failed to support the claim of cost price of steam and sale price of steam. The first objection of the AO in our view, is not correct as for the purpose of claiming deduction u/s 80IA. The eligibility condition for deduction u/s 80IA is that an undertaking and an enterprise form any business referred to section 80IA(4). For the sake of clarity, the relevant provision of section 80IA(iv) is reproduced as under:-

"(iv). An undertaking which,-

(a) Is set up in nay part of Indian for generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2017.

(b) Starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on the 1st day of April, 1999 and ending on the 31st day of March 2014.

Provided that the deduction under this section to an undertaking under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution.

(c) Undertakes substantial renovation and modernization of the existing network of transmission or distribution lines at any time during the period beginning on the 1st day of April,2004 and ending on the 31st day of March, 2017.

Explanation- For the purposes of this sub-clause, "substantial renovation and modernization" means an increase in the plant and machinery in the network of transmission or distribution lines by at least fifty per cent of the book value of such plant and machinery as on the 1st day of April, 2004."

As per the section 80IA(iv) sub clause from 1 (iv) and undertaking which is setting up in any part for the generation and distribution of power begin to generate power at any times during the period beginning on 1st April 1993 and ending on 31st day

of March 2017. From the aforesaid provision it is clear that the benefit is not confined to the undertakings which are into generation or generation and distribution of electricity. Had this been the intention of the legislation to confine it within the field of generation of electricity, the word 'power' would have not been used. Steam is essentially one of the forms of power. Therefore, the first objection of the AO is not justified.

14.6. The second objection is that the assessee has not furnished in support of claim evidences to compute the profit out of sale of steam. However, the contention of the assessee is that the accountant has analyzed the facts and figures and accordingly he has furnished the certificate. The AO has not given any finding, as to how, this certificate is not correct whether the facts and figures so analyzed were not correct as per accounts of the assessee. Merely, saying that the assessee could not furnish the evidences in our view, it is not proper for denying the deduction. In case the AO had any doubt with regard to correctness of the claim of the profit, he should have computed by taking into account, the profit declared by the undertaking engaged in this similar business. Hence, the finding of the AO on this ground cannot be sustained. As the Ld. CIT has given a finding on fact that the appellant company has produced log book of CPP unit 1 on CPP unit 2. As per this log book, 2,52,693/- tons of steam was produced. Out of this, 63,735/- tons was transferred to Pyro Ausmelt and 1,88,958/- tones to Hydro. The steam was used for manufacturing of final product of Zinc and Led by Pyro Ausmelt. We agree with the finding of the Ld. CIT(A) that in the absence of any alternative valuation/working/calculation of the steam, other than the working given by the assessee company. The AO was not

justified in declining the claim of the deduction. This ground of the Revenue's appeal is dismissed.

15. Ground no. 11, is against the reduction and apportionment of expenses Head Office and Captive Power Plant.

15.1 The facts are identical to ITA No. 612/JU/2009 pertaining to the AY 2005-06. The Respective Representatives of the parties have adopted the same argument as were addressed in ITA No. 612/JU/2009 as ground no. 7. The Tribunal had decided this issue by observing as under:-

> ***"10. Coming to ground no. 7*** *is against deleting of reduction of Rs. 4,36,36,093/- the ld. CIT(DR) submitted that the ld. CIT(A) was not justified in deleting the reduction of Rs. 4,36,36,093/- the Ld. DR submitted that the ld. CIT(A) failed to appreciate the facts of expenses related to Captive Power Plant can only be eligible for the purpose of section 80IA of the Act, he submitted that the ld. CIT(A) ignored the fact that the assessee has taken both Head Office Expense and Captive Power Plant expenses together. He has drawn our attention to the assessment order at page no. 29. He submitted that director's fee for the head-office and the total fee is the same as well as payment to auditors is same and also charity and donation is also same, he submitted that directors worked for activities power plant and also looked after same activities was the case with the auditors. He further submitted that charity and donation is given as an entity as a whole. The assessee ought to have apportioned this expense between the Head Office and the captive power plant. Which has not been done that goes to show that the working of the assessee is not in accordance with the law.*
>
> *10.1 On the contrary, the ld. Counsel for the assessee supported the orders of the ld. CIT(A) he submitted that the Assessing Officer has reduced claim u/s 80IA by Rs. 4,36,36,093/- with regard to CPP, Jawar and CPP Debri on the ground that Head Office Expenses have not been allocated. He submitted*

that the expense are: depreciation on residential premises, computers, furniture, motor-vehicles at HO Rs. 91,29,936 and other Head Officer Expenses of Rs. 68,92,62,690/-. It is contended that these expenses have been allocated to eligible unit in the ratio of turnover. On the ground that the term derived from used in the section reference to both income and expenditure. Reliance is placed on: Cambay Electric Supply Company Vs. CIT (1978) 113 ITR 84 (SC) and CIT Vs. Sterling Foods (1999) 237 ITR 579. On the ground that the term derived that use in this section reference to both income and expenditure. The reliance was also placed on the judgment of the Hon'ble Bombay High Court reported at 350 ITR 366(Bom). The ld. Counsel submitted that the co-ordinate Bench in ITA No. 235/JU/2008, had dismissed the similar ground of the revenue in ITA No. 235/JU/2008.

10.2 We have heard the rival contentions, perused the material available on records and gone through the orders of the authorities below. We find that the identical issue was in the year 2004-05 in ITA No. 235/JU/2008. The coordinate Bench has decided the issue in Para 17.9 holding as under:-

"17.9 We have heard the rival contention and perused the material available on record. It is settled law that when the assessee claims any allowable deduction the explanation and evidence submitted in this behalf is to be objectively considered by ld. AO. In case of any infirmity in the claim, the same should be effectively dealt and the claim should be denied by proper discharge of onus. Without effective rebuttal and objective consideration assessee's beneficial claim cannot be disallowed on assumptions and intendments. It is also settled jurisprudence that while interpreting the beneficial legislations a liberal approach should be adopted. This is so as a very strict interpretation will defeat the legislative intent of encouraging captive power plants in electricity starved nation in general and power short state of Rajasthan. Provisions of Sec. 80IA of the IT Act are undoubtedly beneficial in nature, so in case of ambiguity about its interpretation a liberal approach is mandates by settled judicial precedents. The undisputed facts which emerge from the record indicate that assessee by evidence and explanation brought on record objective material to demonstrate in this cae HO and other common assets have no proximate connection which the CPP, Debari which is an industrial undertaking eligible to deduction under section 80IA. The HO and other common assets existed even prior to installation of CPP. The alleged expenses represent general corporate expenditure which can't be allocated or assigned to an independent unit engaged in power

generating activity on standalone basis. While reducing the deduction u/s 80IA, ld. AO has ignored the crucial term "derived from" used in sec. 80IA A term which became subject matter of judicial decision and settled by Hon'ble supreme Court. This crucial omission has resulted in AO's conclusion that:

(i) The proportionate depreciation of other common assets is allocable to be reduced from the profits of eligible CPP unit.

(ii) The proportionate part of the employees' remuneration and benefits, administrative and selling expense such a remuneration of managers, directors, auditors, financial advertisers, amenities and Head Officer assets is also require to be allocated to CPP Debari.

(iii) Ld. AO instead of establishing any direct of proximate relation between these unconnected proportionate expenses reduced them from eligible profits under a notion that even the remote and unconnected proportionate expenses are allocable.

(iv) The ld. AO held that HO is not a profit earning centre and Captive Power Plant, Debari, is not a standalone unit, having independent functioning and a separate profit center and on such erroneous assumption reduced the deduction u/ 80IA by aforesaid expenses of other independent and functionally different units.

Ld. Counsel has demonstrated that other units of the Company cannot use the fixed assets, like permanent residential buildings of Udaipur unit which are wholly and exclusively for the operation of Udaipur unit only; there is no basis to assume that they were even impliedly used by other operating units including CPP. Consequently there being no direct nexus between two independent industrial units the question of proportionate apportionment of their user or depreciation to CPP does not arise. Moreover, it has been demonstrated that the Udaipur based office equipment, furniture, fixtures, computers, motor vehicles etc. are also exclusively used for the day to day working of Udaipur Unit and they can in no way be supposed to be used for CPP. Since respective units retain control over their assets, they have no occasion of user by CPP. Rom the facts and circumstances emerging form the record and contentions. We observe that:

a) No allocation of Ho and other expenses is justified since such expenditure on Ho and other units was incurred even prior to setting up of eligible CPP unit.

b) The assessee is primarily engaged in the activities of mining and manufacturing of Zinc and lead metals. This business of the assessee is one and indivisible from CPP unit. In the absence of any direct nexus the apportionment is not mandated by the correct interpretation of sec 80IA.

c) It has not been rebutted that after the commencement of CPP activity there was no increase in the HO expense relatable to employee's remuneration & benefits an Administrative expense as a whole, in comparison to the earlier year. Rather HO expenses for the year under consideration have been reduced drastically. Thus there is no reason to assume any notional increase in these expenses after the commencement of CPP Debari, Consequently, the conclusion that impugned allocation of expenses has no direct nexus with eligible CPP unit, has no basis or valid justification.

d) Apropos expenses like, rates & taxes, fees to auditors, cot auditors, directors travelling, reimbursement of corporate expense as well as consultancy charges etc., such expenses were required to be incurred irrespective of the CPP Unit.
e) Eligible profits of any industrial undertaking which exits on standalone footing, according to accepted accounting the legal principles, are to be computed after taking into account all the receipts and expenditure incurred only by it and not by notionally attributing the proportionate depreciation or administrative expenses on assumptions.
f) The aforesaid expenses of salary and wages, contribution to provident fund etc. and other benefits to employee' insurance, consultancy and other administrative expense as alleged by ld. AO, have in fact, been incurred at Udaipur Office for goods manufactured i.e. zinc and lead by the appellant . Consequently, such expenditure is deductible while computing the profit of assessee's manufacturing business of zinc and lead. Any part thereof cannot be hypothetically attributed to independent CPP unit situated at Debri. Such presumptive and notional reduction of claim u/s 80IA is arbitrary and unsustainable.
g) The words "derived from" have been used by the Legislature in the restricted sense and therefore, there must be direct nexus between the expenditure and industrial activity. Since there is no direct nexus of the alleged expense with CPP unit, neither allocation nor reduction of 80IA claim has justification. It is settled law that allocation, if any, cannot be made by demonstration of direct nexus between alleged proportions of expenses with power generation operations of PP unit situate at Debari, ld. CIT(A) has rightly deleted the reduction in 80IA claim.

i) The Legislature has used the words "derived from" in contradiction to the words "attributable to" in other sections.

a. In the case of Cambay Electric supply Co vs. CIT 1978 CTR (SC) 50: (197) 113 ITR 84 Hon'ble Supreme Court has squarely held that the Words "derived from" have been used by the legislature in restricted sense as the Words "attributable to" are much wider in meaning than the words "derived from".
b. Hon'ble Supreme Court in the case of IT vs. Sterling Foods (1999) 153 ITR CTR (SC) 439: (1999) 237 ITR 579 (SC) has held that or application of the words "derived from". There must be a direct nexus between the profits and the activity of the industrial undertaking, consequently, it is by now a settled proposition that remote or indirect nexus would not be sufficient for application of the words "derived from".
c. In the case of IT vs. Strawboard Manufacturing Co Ltd. {(1989) 177 ITR 43} in the context of deduction under section 80E, Hon'ble Supreme Court held that:

"The provision for rebate has been made for the purpose of encouraging the setting up of new industries. It is necessary to remember the when a provision is made in the context of a law providing for concessional rate of tax for the purpose of encouraging an industrial activity, a liberal construction should be put upon the language of the statute.

In our view, the controversy in question stands squarely covered by the case of Zandu Pharmaceuticals Works Ltd. (supra) in favor of the assesee. In this case assessee incurred expenditure for the R & D work in the HO and there were independent manufacturing units. Assessee claimed deduction u/s 80IA without allocating any proportionate expenses of HO Ld. AO adopted the same course as in the case of this assessee. It was held that the HO was maintained for the overall benefit of the manufacturing units only and HO was not a profit earning centre; it had no income other than the manufacturing units. Therefore, R& D expense incurred for the development of new drugs were assumed to be for the benefit of all manufacturing units. On this basis, ld. AO allocated proportionate and similarly reduced them from eligible income while calculating deduction u/s 80IA. CIT(A) and ITAT upheld AO's action rejecting the appellant's contention that the R & D expense incurred by HO had nothing to do with the eligible units and proportionate expenses should not be reduced while calculating deduction u/s 80IA. Hon'ble Bomaby High Court upheld assessee's claim. Ld. CIT(A) in this case while deleting the reduction from assessee's claim u/s 80IA has applied nearly similar observation. In view thereof no infirmity can be attributed to the order of ld. CIT(A) which is upheld. In the given facts, circumstances and legal position, we hold that the said HO Expenses with the eligible industrial undertaking i.e. CPP, therefore the unrelated proportionate HO expenses cannot be reduced while computing deduction u/s 80IA. This ground no. 12 of the Revenue is dismissed."

However, we find that the certain expenses which are common to both to the Head Office and Captive Power Plant has not been allocated. Therefore, the issue is restored to the file of the Assessing Officer for re-computation of reduction. The Assessing Officer would re-work allocation of the expenses related to the director's fees, auditor's fees and donation for charity. To this extent, the order of the Ld. CIT(A) is modified. This ground of the Revenue's appeal is partly allowed for statistical purposes."

15.2 For the same reasoning, this ground of Revenue's appeal is partly allowed for statistical purposes.

16. Ground no. 12, is against deletion of disallowance of claim of depreciation of Rs. 65,74,36,484/- on plant and machineries in case of Hydro-2.

16.1 Ld. Departmental Representatives supported the order of the Assessing Officer and reiterated the submissions as made in the written submissions. The submissions of the Ld. D/R are reproduced a under:-

> *"The assessee has set up/ installed a new plant (hydro-2) which is the first process in zinc production. This installation has been done in the end of March, 2007. The plant was under testing stages in the end of March. Certain consumables like LDO were used in this testing process. However, there was neither trial production nor commercial production associated with this plant. No excise records showing production linked to Hydro-2 unit were produced. At para L(20), Page 139, the AO has observed that not even trail production was there from Hydro-2 plant, what to speak of commercial production. The assessee has claimed depreciation of Rs. 65.7 crore on Hydro-2 plant without the said plant being put to use during the year. The AO has cited several judgments in support of the legal position that the "kept ready for use" theory cannot form basis for claim of deprecation, which requires actual user of plant & machinery. The Ld. CIT(A) has relied on a certificate by Excise Officer, which only certifies installation of new plant in March, 2007 and does not certify commencement of any production (Moreover this certificate was not furnished before the AO and is hence violative of Rule 46A also). Be that as it may, the crucial aspect is that there was admittedly no production whatsoever from Hydro-2. The assessee and CIT(A) have also relied on the jurisdictional HC decision in the case of Nakoda Metals (2006) 204 CTR 514 (Raj.). However, this decision is distinguishable since in that case at least trial production had started and there was both purchase of raw materials & manufacture of finished product, but in the case of assessee there was no trial production also. Therefore, the ground related*

to disallowance of depreciation of Hydro-2 is justified and may kindly be allowed."

16.2 On the contrary, Ld. Counsel for the assessee opposed the submissions and reiterated the submissions as made in the written synopsis. The submissions of the assessee are reproduced as under:-

"11. Ground no. 12 is on account of depreciation on hydro plant no.2. The said plant was set up during the subject year. It underwent the requisite trial runs and the necessary permission for the commissioning of the plant from the several regulatory and approving bodies were taken and the plant was commissioned in the middle of March of the subject previous year. Yet on the ground that this plant was not utilized in production the claim for depreciation was refused. There is a full discussion of the relevant facts in the order of the Ld. CIT(A) in paras 46-49 at pages 62-73 of the order. The hydro-2 is an adjunct to Hydro-1 already in the production line and stands linked to it. The order also contains mention of the various tests on which the several items of equipment were commissioned and put to use. All that is done before the commissioning of the plant. The plant & machinery as been kept ready for use after the installation and testing commissioning. All approvals are in place at the relevant time. It is , therefore, entitled to depreciation as per several case laws as cited the synopsis. Following ratios o those cases it is pleaded the order of the CIT(A) be up-held."

16.3 We have heard the rival contentions, the Ld. CIT(A) after considering the submissions as made a finding on fact as under:-

"49. *<u>Decision</u>*

I have considered the facts of the case and submissions of the appellant and gone through the various judicial rulings in this regard.

Section 32 provides for claim of depreciation which is reproduced below:

"32. (1) In respect of depreciation of-

(i) Building, machinery, plant or furniture, being tangible assets:,

(ii) Know-how, patents, copyrights, trademarks, licences, franchise or any other business of commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April 1998,

Owned, wholly or partly by the assessee and used for the purpose of the business or profession, the following deduction shall be allowed….."

From the above it is clear that to claim depreciation, tangible and intangible assets are to be

1) *Owned by the assessee;*
2) *Used for the purpose of business or profession.*

As regards the ownership of the assets, there is no dispute us all the plant and machinery were owned by the Appellant Company in the normal course of business.

The next question is regarding use of the asset. It is fond that following documents were furnished to the Assessing Officer which has also been enclosed as Annexure to the Assessment Order:

- *Mechanical Completion Certificate as obtained from the Technical personnel duly authorized by Project controller:*
- *Operational Log Book as maintained by the shift in-charge of the plant having mention to the various aspects of plant operations like pressre, temperature, LDO burning etc; and*
- *Records from the SAP system showing consumption of LDO, spares and other consumables.*

Out of depreciation of Rs. 65,74,36,484/-, the depreciation for non-residential building and temporary erection is Rs. 1,21,51,150/-. The chart showing addition to building in Hydro-2 Smelter Containing description of

asset, gross amount, rate of depreciation, amount of depreciation claimed and remarks is as under:-

Desricption of asset	**Gross Amount**	**Rate of Depn.**	**Amount of Depn.**	**Remarks**
1	**2**	**3**	**4**	**5**
Calcine Silo	10,862,781/-	5	543,139	Not related to Roaster Plant, the same is used for storage of intermediate product.
CDSS Building	135,74,764/-	5	6,789,238	This is the Officer Building for staff and hence not related to the plant & machinery.
Utility Sub Station	24,169,689/-	5	1,208,484	This is the Building for power utilities and hence not related to the plant & machinery of the Roaster Plant.
Roads & Drains	40,192,291/-	5	2,009,615/-	These are the general rods and drains in the plant and not concerned with the working of the Roaster Plant.
Building structure/sheds for Ro & DM.	4,566,713/-	5	228,336/-	These structure for storage of raw material of concentrate and water tanks for DM water and hence not related to the plant & machinery of the Roaster Plant.
Raw material storage sheds	17,380,450/-	5	869,023/-	These structures for storage of raw material of concentrate and water tanks for DM water and hence not related to the plant & machinery of the Roaster Plant.
Screen house shed.	391,060/-	5	19,553/-	These are the structure for screening of the raw material and hence not related to the Roaster Plant.
Drain at Factory Gate	14,84,357/-	5	74,218/-	These are the general roads and drains in the plant and not concerned with the working of the Roaster Plant.
Shed for transformation.	208,835/-	5	10,442/-	This is the building structure for power utilities and hence not related to the plant &

				machinery of the Roaster Plant.
Porta cabin.	7,982,056/-	50	3,991,028/-	These were the temporary structures used for the offices and not cornered with the plant & machinery.

Thus, it is seen that they are in no way related to the plant and machinery on which depreciation is claimed. This is used for general purpose and thus there is no doubt about the use of these assets before 31st March, 2007. Therefore, the depreciation claimed on these assets is allowable and allowed also. Coming to the depreciation on plant & machinery there is no dispute about the ownership; the dispute is only for use of plant & machinery before 31.3.2007. The AO has held that only trial run of plant & machinery was made before 31.3.2007 and no trial production or any commercial production was made by the appellant company and this fat has been admitted by the company itself. Having gone through various case laws cited by the AR of the company, it is seen that trial production or commercial production is not only criteria on the basis of which the claim of depreciation can be allowed. The plant and machinery must be ready for put to use whether it is active or passive used. The depreciation even on standby asset though not put to use during the year would still be eligible for depreciation. When the assessee bonafide installed any machinery and it becomes defective and non-functional, it cannot be said that it is not put to use for the purpose of business and, therefore, the depreciation cannot be denied. In the case of CIT vs. Nakoda Metals by Hon'ble Rajasthan High Court, Jodhpur Bench 196 Taxation 696 and 204 CTR 514, the Hon'ble Bench has held that the assessee used the machinery during the relevant year when the trial production was taken and that it was entitled to depreciation and investment allowance and deduction of other business expenses. In case of appellant company, the plant & machinery of Hydro-2 were duly installed before 31.3.2007, certificates in this regard by technical personnel and by the Assistant Commissioner, Central Excise were also produced before the AO.

The daily log book, details of consumables and LDO were also furnished. The word 'use' has to be construed in the broader sense and must include the trial run as well. As the activities like consumption of LDO for raising of temperature, pressure etc. were essential to get the production and hence must be eligible to be termed as 'used'. Although there was no trial production or commercial production during the financial year, it was because of the fact that the processes of production in Hydro-2 is compliable process and there is always time lag between charging of raw material and receipt of output as it takes time to stabilize. The output of the roaster plant is only intermediary product which is used in other processes of the plant and hence nor saleable in the market. The allowability of depreciation on plant & machinery has to be looked considering overall circumstances, various processes of the machinery and the final product itself. The issue of Delhi High Court in case of CIT vs. Panacea Biotech Ltd. in ITA No. 422/2007 supports the view of the appellant company. The court has held that the expression "used for the purpose of business" includes passive use of the assets in the business. It was held that the assets cannot be said to be not used when the same is kept ready for use. The Division Bench of this court have even much earlier in Capital Bus Service Pvt. Ltd. held that the expression used for the purpose of business and depreciation would be allowed whether the bus were kept ready by the owner for its use. Merely, the buses did not ply cannot mean that the depreciation was not allowable.

Keeping in view the above facts and submissions, the depreciation claimed by the appellant company on plant & machinery is also allowable. The disallowance made by the AO is deleted and appeal is allowed on this ground."

16.4 Ld. D/R could not controvert the finding of the Ld. CIT(A) that the plant and machinery were put to use as per the operational log book as maintained by the

shift charge. Under these facts, we do not see any reason to interfere into the finding of the Ld. CIT(A), same is hereby affirmed. This ground is dismissed.

17. Ground no. 13, is against deletion of Rs. 6,62,18,029/- made by invoking the provision of section 40(a)(ia) of the Act for non-deduction of tax at source on transmission charges, wheeling charges and SLDC charges paid to Rajasthan Rajya Vidhut Prasaran Nigam Ltd.

17.1 The Ld. C/R supported the order of the Assessing Officer and submitted that the assessee was liable to deduct tax.

17.2 On the contrary, the Ld. Counsel for the assessee opposed the submissions and submitted that the issue is covered in favour of the assessee. He submitted that the Asessing Officer made disallowance by invoking provision of section 40(a) (ia) of the Act on account of transmission charges, wheeling charges and SLDC charges paid to Rajasthan Rajya Vidhut Prasaran Nigam Ltd. He submitted that in earlier years, the Tribunal had deleted the disallowance by holding that transmissions and wheeling of SLDC charges do not come under section 194(J) of the Act.

17.3 We have heard the rival contentions, the identical issue came before the Tribunal in assessee's own case in ITA No. 487/JU/2010 and also in the case of Jaipur Vidhyut Vitran Nigam Ltd. v. Dy. CIT (2009) 123 TTJ 888(Jp.)

> *"8. Therefore, by respectfully following our own order and the order of Jaipur Bench of Appellate Tribunal rendered in the case of Jaipur Vidhut Vitran Nigam Ltd. vs. ITO in ITA no. 127 to 131/JP/2009 reported in 123 TTJ (2008) 888, we do not find any merit in this appeal of the Revenue.*

Therefore, we confirm the finding of the Ld. CIT(A) and hence cannot allow this appeal."

17.4 The facts are identical; there is no change into fact and circumstances. Therefore, taking a consistent view, we do not see any reason to interfere into the order of the Ld. CIT(A), same is hereby affirmed. This ground of Revenue's appeal is dismissed.

18. In the result, appeal of the Revenue in **ITA No. 566/JU/2009** is partly allowed for statistical purpose.

Order pronounced in the open court on Friday, the 30th day of June 2017.

Sd/- Sd/-

(विक्रम सिंह यादव) (कुल भारत)
(VIKRAM SINGH YADAV) (KUL BHARAT)
लेखा सदस्य / Accountant Member न्यायिक सदस्य / Judicial Member

Jaipur
Dated:- 30/06/2017.
Pooja/
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- The Asstt. CIT, Circle-2, Udaipur.
2. The Respondent- M/s Hindustan Zinc Ltd., Yasad Bhawan, Udaipur.
3. The CIT,
4. The CIT (A)
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 566/JU/2009)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar