IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA

[Before Sri J. Sudhakar Reddy, Hon'ble AM & Sri Aby T. Varkey, Hon'ble JM]

I.T.A. No. 1749/Kol/2016
Assessment Year: 2008-09

C.O. No. 64/Kol/2016
A/o. I.T.A. No. 1749/Kol/2016
Assessment Year: 2008-09

I.T.A. No. 1750/Kol/2016
Assessment Year: 2009-10

C.O. No. 65/Kol/2016
A/o. I.T.A. No. 1750/Kol/2016
Assessment Year: 2009-10

I.T.A. No. 1829/Kol/2016
Assessment Year: 2010-11

C.O. No. 66/Kol/2016
A/o. I.T.A. No. 1829/Kol/2016
Assessment Year: 2010-11

I.T.A. No. 1830/Kol/2016
Assessment Year: 2011-12

C.O. No. 67/Kol/2016
A/o. I.T.A. No. 1830/Kol/2016
Assessment Year: 2011-12

I.T.A. No. 787/Kol/2017
Assessment Year: 2012-13

D.C.I.T. Circle-4(2), Kolkata……Appellant
4th Floor
Room No. 11B
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P-7, Chowringhee Square
Kolkata – 700 069

M/s. Vishnu Tea & Industries Private Limited……Respondent
8, Netaji Subhas Road
C3/3, Gillander House
Kolkata – 700 001
[PAN : AACCV 1846 Q]

Appearances by:
Shri Dev Kumar Kothari, FCA, appearing on behalf of the assessee.
Shri Saurabh Kumar, Additional CIT, DR., appearing on behalf of the Revenue.

Date of concluding the hearing : November 06, 2017
Date of pronouncing the order : , 2017

O R D E R

Per J. Sudhakar Reddy, AM :-

The appeals for the Assessment Years 2008-09, 2009-10, 2010-11 and 2011-12, are filed by the Revenue. Cross-Objections have been filed by the assessee. The appeal for the Assessment Year 2012-13, has been filed by the assessee.

2. As the issues arising in all these appeals are common, for the sake of convenience they are heard together and disposed off by way of this common order.

3. The assessee is a company and is engaged in the business of manufacturing tea. It files its return of income regularly.

4. First we take up the revenue appeal for the Assessment Year 2008-2009 and the C.O.'s filed by the assessee. The grounds raised by the revenue are as follows:-

> *"1. "Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing depreciation at a higher rate to the 'withering through' claimed by the assessee when the same does not find place in the restrictive definition in Depreciation Table appended to the I.T. Rules.*
> *2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in ignoring Hon'ble Madras High Court's decision on similar matter of restrictive definition in the case of CIT Vs. Adar Tea Products Co. reported in 178 Taxman 126 where the asset considered was only fluid bed drier.*
> *3. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing depreciation on goodwill which had merely been quantified*

on the revaluation and hence there had been no genuineness of such a valuation of an intangible asset.

4. Whether on the facts and in the circumstances of the case, the Ld CIT(A) erred in allowing Assessee's contention that MAT was applicable only when there was positive income and the same was less than Book Profit."

5. The facts relating to Ground No. 1 & 2 of the revenue appeal are that the assessee claims that it is entitled to higher rate of depreciation on "Enclosed Withering Trough Machine" on the ground that this is an energy-saving device and a pollution controlling equipment. The Assessing Officer was of the view that these machines are called Withering Trough Machinery and are required in all tea making factories and are integral part of the factories. He records at page 2 of his order that the function of the withering trough machine is to pass dry air over green leaves, to dry the green leaves procured from gardens so that the moisture in the green leave could evaporate gradually. He was of the view that the "Enclosed withering Trough Machine" is not an energy saving device or a pollution control equipment. The Assessing Officer asked the assessee as to the specific item to the appendix to the Income Tax Rules which prescribes the rate of depreciation read with Section 32 of the Income Tax Act, under which the machine has been listed as a power saving device. In reply the assessee compared these machines to a specialised boiler and furnace like fluidised bed boilers or a flameless furnace which are items of machinery listed in the said depreciation schedule. The Assessing Officer observed that such specialised boilers and flameless furnaces are used in iron and steel industry or in ore extraction industry and not in tea industry. He also observed that in no other tea industry cases dealt by him (as he is in charge of Tea Industry Circle), the depreciation was claimed at a higher rate of 80% on

withering trough machines on such grounds that they are power saving devices. He rejected the claim of the assessee for higher depreciation on this machine and allowed the depreciation at the normal rate allowable at plant and machinery. The assessee carried the matter in Appeal.

5.1. Before the ld. CIT(A), the assessee claimed that it converted "Open Withering Trough Machines" into "Enclosed Withering Trough Machines" by self-fabrication with a view to save energy, reduce carbon emission and control effect of pollution on the tea produced and also to reduce pollution to the environment. It claimed that "Enclosed Withering Trough Machines" is based on latest technology and it reduces energy consumption and also carbon emission. It claimed that the principle laid down for depreciation rate applicable in the case of FBD Dryer, as held by ITAT Kolkata in case of *Warrant Tea Ltd.,* is equally applicable to such "Enclosed Withering Trough Machines". He furnished certain data and claimed those as evidences of power saving by installation of this device. As an alternative claim, the assessee claimed that the entire cost of conversion of open withering trough system be allowed as revenue expenditure as it was, earlier powered by TD Oil, and this was converted to "Enclosed Withering Trough Machines" which is now powered by coal. This was to achieve more efficiency and product acceptability. Hence it was claimed that the expenditure incurred by way of fabrication cost was simply to carry on business more efficiently and effectively and, therefore, the entire expenditure should be allowed as revenue expenditure. Reliance was placed on the judgement of the Hon'ble Calcutta High Court in case of *The General Fibre Dealers P. Ltd.*, in which expenses for conversion of coal fired heater to oil fired heater was allowed as revenue expenditure. The AO did not consider this alternative claim.

5.1.2. The ld. First Appellate Authority, considered the submissions of the assessing and at para 4 onwards of his order held as follows:-

a. *That the entire process of withering is crucial to the manufacturing.*

b. *Installation of this particular device has been remunerative and economical to the assessee and the device has been installed with the clear intention to save energy, reduce carbon emission, control effect of pollution on tea produced.*

c. *The material figures of production appeared to justify the contention of the assessee that the "Enclosed Withering Trough Machines" is based on latest technology and it reduces energy consumption.*

d. *That "Enclosed Withering Trough Machines" is equal to "flameless furnace" and a "flat bed dryer".*

e. *Reliance was pleased on the decision in the case of Commissioner of Income Tax, WB-IV, KOLKATA versus MCLEOD RUSSEL (INDIA) LTD., in ITA No. 254of 2001, judgement dt. 10.02.2014 (2015) 55 taxmann.com 102(Cal).*

f. *The AO has not made similar disallowance on this higher rate of depreciation claimed for the Assessment Year 2012-13.*

5.2. Hence, he allowed the claim of the assessee by dismissing the issue in detail in his impugned order

5.3. Aggrieved, the Revenue is in appeal before us.

5.4. The assessee filed Cross-Objection, in support of the order of the ld. CIT(A).

5.5. The ld. Counsel for the assessee, Shri Dev Kumar Kothari, FCA, submitted 3 separate paper books and relied upon the order of the ld. CIT(A). He gave the

following chart and contended that "Enclosed Withering Trough Machines", is an energy-saving and pollution controlling machine.

open withering trough	enclosed withering trough
Tea leaves are kept in open on bed and hot air is blowing from one end which does not cover the entire Bed uniformly.	Tea leaves are kept in closed space on fluidized bed of hot air blowing underneath, and from sideways and upper side. Heat is preserved for longer duration & spread all over.
Open space means heated air is not effectively used due to evaporation of Hot Air without covering the entire withering of tea.	In enclosed space heated air is more effectively used due to delayed cooling as hot air keep on moving inside the bed & cover entire bed.
Greater heat loss or wastage of heat in open space.	Lesser heat loss or wastage as chamber is closed.
More power is required to achieve and maintain desired level of temperature of air in open troughs.	Less power is required to achieve and maintain desired level of temperature of air in closed troughs.
More space is required in case of open withering trough. So more space is to be fed with heated air.	Less space is required in closed withering troughs, there are layered withering trough fluidized trays. So less space is required to be fed with heated air.
Wind blowing in nearby area causes loss of heat and more consumption of energy.	There is no wind blowing in nearby area so there is no loss of heat and consumption of energy is reduced.
It can be compared with a tawa(in Hindi), Chatu (in Bengali). As Roti or fulka is cooked on open flat pan kept over heat.	It acts like a 'flameless furnace' – heated air is flown an enclosed chamber wherein heated air is spread below leaf bed and above leaves to reduce moisture.
In case of open withering trough there is lack of insulation.	It acts like a closed flameless furnace or oven wherein better advantage of insulation of walls on all sides is availed.
General illustration: It is like an open pan for heating anything e.g. for boiling water or to making tea , baking roti on tawa.	It is like a closed pan for heating anything e.g. for boiling water in a closed pan, or to make tea in a closed tea maker or to cook things in a domestic oven.

Aspect of pollution reduction:	
More power consumption means more exploitation of natural resources, more emission of heat and gases in environment right from stage of production of fuels, their transportation to Tea Estate, and in process of ultimate consumption for heating, lighting etc.	Less power consumption means lesser exploitation of natural resources, lesser emission of heat and gases in environment right from stage of production of fuels and their transportation to Tea Estate.
Heated air in open trough spreads in environment causing emission of heat in open environment.	There is minimal emission of heat in open environment when trough is enclosed, only while opening doors there is some emission.
Other pollution reduction:	
In open trough leaves are exposed to open environment and people moving nearby. Thus there is un-necessary interaction	Tea leaves in enclosed withering trough are saved from environmental factors, there is lesser interaction of environment and human being.
Due to uneven spread of hot air entire leaf does not wither and some are less withered and some are excess withered.	There is uniformity in withering as Temp. all along the bed is even and withering can be controlled.

He compared the machine to a cooking vessel and submitted that the Petroleum Conservation Research Association has stated that pressure cookers

when used for cooking of food save energy, as compared to cooking food in a vessel without a cover. The pith and substance of his submissions is that, when withering machines are enclosed they are comparable to cooking with the lid on and that this results in energy-saving. On a query from the bench, he was not able to produce any independent study by any institution, organisation or individual in support of his submission. There is no proof or report in support of his argument.

5.5.1. He submitted data and argued that this demonstrates that the assessee has saved energy. We would be dealing with the figures brought out in the detailed charts later submitted by the assessee. He submitted that these machines fall in the new Appendix to Income Tax Rules, under item No. (8)(ix), under the head: Energy Saving Devices

A. Specialised boilers and furnaces : falls within two categories:-

(a) Flameless Furnaces and continuous pusher type furnaces

(b) Fluidized bed type heat treatment furnaces

5.5.2. He relied on the decision of the Hon'ble Calcutta High Court in the case of *Commissioner of Income Tax, WB-IV, KOLKATA versus MCLEOD RUSSEL (INDIA) LTD (supra),* & on the decision of the 'C' Bench of the Kolkata Tribunal in the case of *Warren Tea Ltd.,* and submitted that 100 per cent depreciation was held to be allowable on vibratory fluid bed dryer though they were not specifically listed in the Depreciation Table. He relied on the decision of the Hon'ble Madras High Court in the case of *Commissioner of Income Tax versus Adar Tea Products Company [2009] 314 ITR 38 (Mad)*, and submitted that the same cannot be applied as the

judgement of the Hon'ble Jurisdictional High Court binds the ITAT Bench at Kolkata on this issue.

5.6. The ld. DR, Shri Saurabh Kumar, Additional CIT, DR, on the other hand, opposed to the contentions of the ld. Counsel for the assessee and submitted that the assessee claims to have fabricated certain covers to "Withering Trough Machines" and claimed that this is a power saving device. He argued that the so-called "Enclosed Withering Trough Machines" were non-standard equipment, at best improvised and that there is no material or literature, whatsoever in the public domain, to substitute the claims of the assessee. He submitted that the ld. CIT(A), has only listed out the function of withering process in a tea industry and had simply accepted the contentions of the assessee without application of mind and without going into the merits of the case. He submitted that there is no evidence, whatsoever of the assessee having saved energy or that these enclosures having done pollution control. He pointed out that in the alternative claim; the assessee submitted that an open withering trough machine which is powered by TD Oil was converted into "Enclosed Withering Trough Machines" powered by coal. This shows that there is no saving on energy and it was only a case of one fuel replacing the other.

5.6.1. In reply to this the ld. Counsel for the assessee submitted that, no standard equipment of this type was available in the market and hence the assessee had, itself designed this machine, fabricated the same at its site, installed them and used them for manufacturing tea. He referred to an Advisory Circular issued by the Tea Research Institute in September, 2003 and certain other material downloaded from the Internet, and argued that this machine is an energy-saving device. On a

query from the bench, the ld. Counsel for the assessee could not point out even a single sentence, in support of his contention that "Enclosed Withering Trough Machines" are energy-saving devices, from the Advisory Circular issued by the Tea Research Institute, or the material downloaded from the Internet. He furnished a comparison between FBD Dryer and "Enclosed Withering Trough Machines" and argued that both machines are similar. While agreeing that there is no standard machinery or equipment in the market, he argued that this is not the requirement of law. He prayed that the order of the ld. CIT(A), be upheld.

6. After hearing rival contentions, considering the papers on record and the orders of the authorities below as well as case-law cited, we will as follows:-

6.1. The ld. CIT(A), explained in his order, the necessity and process of withering, in the business of the manufacturing tea. The ld. Counsel for the assessee explained the same. This does not help in us, coming to a conclusion, as to whether "Enclosed Withering Trough Machines" is an "energy-saving device" or a "pollution control equipment", as claimed by the assessee. This assessee claims that he has designed this machine, fabricated the same on-site and installed the same. Except for these self-serving statements of the assessee, there is no evidence, whatsoever that this "Withering Trough Machines", when enclosed by fabricating a cover becomes an energy-saving device or a pollution controlling equipment. The Bench had granted sufficient time to the assessee to produce materials from independent sources like Tea Research Institute, Universities or any other organisation or professors etc., in support of its claim that enclosing the withering trough machines, would result in energy-saving. Only the process of withering is explained in all these materials furnished by the assessee and there is not iota of

evidence that enclosing a "Withering Trough Machine" would convert it into an energy saving device.

6.2. We also observe that earlier the assessee was using TD Oil for powering this withering trough machine and by enclosing the withering trough machines, it was powered by coal in place of TD oil. Nothing is said on whether using coal as a fuel in place of TD Oil would reduce the pollution. In fact coal as a fuel is a pollutant.

In view of the above discussion, we hold that by changing the fuel that is being used, from TD Oil to Coal, and by modifying the "withering trough machine" by enclosing it by fabrication, in our view does not make the machine an energy-saving equipment or pollution control equipment.

6.2.1. Be it as it may, the assessee furnished the following comparison of consumption of electricity in support of its claim of saving energy. This is reproduced below for ready reference:-

Comparison of Consumption of Electricity (Estimated at the rate of F.Y. 2007-08)

Sl. No.	Financial year	2006-07	2007-08	AT OLD RATES 2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
2)	**Withering Expenses**								
	a) **Electricity used for withering**								
	Units	325,815	320,510	295,050	255,244	246,824	225,420	242,124	177,976
	Value in Rs.	2,309,999	2,011,641	1,852,914	1,602,932	1,550,055	1,415,638	1,520,539	1,117,689
	Cost per Kg.	1.26	0.96	0.97	0.79	0.92	0.81	0.82	0.70
	Unit consumed / Kg.	0.18	0.15	0.15	0.13	0.15	0.13	0.13	0.11
	Rate / Units based on 2006-07 avg.	7.09	6.28	6.28	6.28	6.28	6.28	6.28	6.28
	b) **Coal used for Withering**								
	Qty in Kg.	-	-	-	-	-	44,404	12,930	-
	Value in Rs.	-	-	68,389	-	-	174,952	81,962	-
	Cost per Kg.	-	-	0.04	-	-	0.10	0.04	-
	Rate / Units	-	-	-	-	-	3.94	6.34	-
	c) **Firewood used for Withering**								
	Qty in Kg.	-	-	218,964	765,753	413,735	227,057	-	474,935
	Value in Rs.	-	-	105,093	367,561	198,593	125,090	-	341,953
	Cost per Kg.	-	-	0.06	0.18	0.12	0.07	-	0.21
	Unit consumed / Kg.								
	Rate / Units	-	-	0.48	0.48	0.48	0.55	-	0.72
	d) **T. D. oil used for Withering**								
	Qty in Kg.	28,700	51,300	1,000	-	-	-	-	-
	Value in Rs.	745,561	1,359,475	26,500	-	-	-	-	-
	Cost per Kg.	0.41	0.65	0.01	-	-	-	-	-
	Rate / Units	25.98	26.50	26.50	-	-	-	-	-
	Total Exp. for withering	**3,055,560**	**3,371,116**	**2,052,896**	**1,970,494**	**1,748,648**	**1,715,679**	**1,602,501**	**1,459,642**
	Production (in Kg.)	**1,839,938**	**2,093,202**	**1,908,965**	**2,018,188**	**1,680,061**	**1,751,092**	**1,848,960**	**1,593,276**
	Withering cost / Kg. Rs.	**1.66**	**1.61**	**1.08**	**0.98**	**1.04**	**0.98**	**0.87**	**0.92**
3)	**Remarks:-**	Cost / Kg. for withering was higher in open withering trough.		Cost / Kg. for withering decreased after installation of enclosed withering trough & consumption of TD oil stopped.		Cost / Kg. for withering increased due to production decreased by 338127 Kgs. (17% approx) as well as cost of diesel increased by Rs. 4.66 per ltr.		Cost / Kg. for withering increased due to rate of Electricity gone up by Rs. 0.47 per unit & cost of diesel increased by Rs. 3.25 per ltr.	Cost / Kg. for withering increased due to rate of Electricity gone up by Rs. 0.52 & cost of diesel increase by Rs. 8.53 per ltr as well as prod. decrease by 255684 Kgs. (14% approx) .

Difference of Cost for withering after installation of closed withering trough i.e during the fin. year 2008-09

Sl. No.	Financial year	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
1)	**Production (in Kg.)**	1,839,938	2,093,202	1,908,965	2,018,188	1,680,061	1,751,092	1,848,960	1,593,276
	Expenses incurred for withering	3,055,560	3,371,116	2,052,896	1,970,494	1,748,648	1,715,679	1,602,501	1,459,642
	Withering cost / Kg.	1.66	1.61	1.08	0.98	1.04	0.98	0.87	0.92
2)	If closed withering trough was not installed in place of open withering trough then cost / Kg. (Valued at cost of F.Y. 2007-08)			3,074,401	3,250,305	2,705,750	2,820,145	2,977,763	2,565,982
	Savings in comparison to cost / kg. of F.Y. 2007-08			1,021,505	1,279,812	957,102	1,104,466	1,375,261	1,106,339
	Saving per kg in comparison to 07-08 Res			0.53	0.63	0.57	0.63	0.74	0.69

Comparison of Consumption of Electricity — AT PREVAILING RATES

Sl. No.	Financial year	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
2)	**Withering Expenses**								
	a) **Electricity used for withering**								
	Units	325,815	320,510	295,050	255,244	246,824	225,420	242,124	177,976
	Value in Rs.	2,309,999	2,011,641	1,848,898	1,721,039	1,817,417	1,708,244	2,232,746	1,792,229
	Cost per Kg.	1.26	0.96	0.97	0.85	1.08	0.98	1.21	1.12
	Unit consumed / Kg.	0.18	0.15	0.15	0.13	0.15	0.13	0.13	0.11
	Rate / Units	7.09	6.28	6.27	6.74	7.36	7.58	9.22	10.07
	b) **Coal used for Withering**								
	Qty in Kg.	-	-	-	-	-	44,404	12,930	-
	Value in Rs.	-	-	68,389	-	-	174,952	81,962	-
	Cost per Kg.	-	-	0.04	-	-	0.10	0.04	-
	Rate / Units	-	-	-	-	-	3.94	6.34	-
	c) **Firewood used for Withering**								
	Qty in Kg.	-	-	218,964	765,753	413,735	227,057	-	474,935
	Value in Rs.	-	-	105,093	367,561	198,593	125,090	-	341,953
	Cost per Kg.	-	-	0.06	0.18	0.12	0.07	-	0.21
	Unit consumed / Kg.								
	Rate / Units	-	-	0.48	0.48	0.48	0.55	-	0.72
	d) **T. D. oil used for Withering**								
	Qty in Kg.	28,700	51,300	1,000	-	-	-	-	-
	Value in Rs.	745,561	1,359,475	27,800	-	-	-	-	-
	Cost per Kg.	0.41	0.65	0.01	-	-	-	-	-
	Rate / Units	25.98	26.50	27.80	-	-	-	-	-
	Total Exp. for withering	3,055,560	3,371,116	2,050,179	2,088,601	2,016,010	2,008,285	2,314,708	2,134,182
	Production (in Kg.)	1,839,938	2,093,202	1,908,965	2,018,188	1,680,061	1,751,092	1,848,960	1,593,276
	Withering cost / Kg. Rs.	1.66	1.61	1.07	1.03	1.20	1.15	1.25	1.34
3)	**Remarks:-**	Cost / Kg. for withering was higher in open withering trough.		Cost / Kg. for withering decreased after installation of enclosed withering trough & consumption of TD oil stopped.		Cost / Kg. for withering incresed due to production decreased by 338127 Kgs. (17% approx) as well as cost of diesel increased by Rs. 4.66 per ltr.		Cost / Kg. for withering increased due to rate of Electicity gone up by Rs. 0.47 per unit & cost of diesel increased by Rs. 3.25 per ltr.	Cost / Kg. for withering increased due to rate of Electicity gone up by Rs. 0.52 & cost of diesel increase by Rs. 8.53 per ltr as well as prod. decrease by 255684 Kgs. (14% approx).

Difference of Cost for withering after installation of closed withering trough i.e during the fin. year 2008-09

Sl. No.	Financial year	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
1)	**Production (in Kg.)**	1,839,938	2,093,202	1,908,965	2,018,188	1,680,061	1,751,092	1,848,960	1,593,276
	Expenses incurred for withering	3,055,560	3,371,116	2,050,179	2,088,601	2,016,010	2,008,285	2,314,708	2,134,182
	Withering cost / Kg.	1.66	1.61	1.07	1.03	1.20	1.15	1.25	1.34
2)	If closed withering trough was not installed in place of open withering trough then cost / Kg. (Valued at cost of F.Y. 2007-08)			3,074,401	3,250,305	2,705,750	2,820,145	2,977,763	2,565,982
	Savings in comparison to cost F.Y. 2007-08			1,024,222	1,161,704	689,740	811,860	663,054	431,800
	Saving per kg in comparison to 07-08			0.53	0.58	0.41	0.46	0.36	0.27

6.3. A perusal of the same demonstrates that use of TD oil was reduced drastically from the year 2008-09 and dis-continued from the Assessment Year

2009-10. Instead use of coal and firewood has increased from Assessment Year 2008-09. We do not see any saving that the assessee had achieved by replacing TD oil as fuel with firewood and coal. A perusal of the power consumption charts, show substantial increase in use of coal and firewood. Both these fuels are pollutants. The cost of firewood and coal is less than the cost of TD Oil. The charts filed prove that the change in the nature of fuel resulted in some saving. This does not make the machine an energy saving device. Thus we are not convinced with the submission of the ld. Counsel for the assessee. The ld. CIT(A) has, in our view simply accepted the contentions of the assessee without enquiry and proper appreciation of the facts.

6.3.1. Even otherwise, "Enclosed Withering Trough Machines", do not fall within the specified items of "energy-saving devices" in the Table of rates at which depreciation is admissible given in the "NEW APPENDIX-I, under Ruled 5 of Income Tax Rules, 1962. The assessee claims that this equipment is comparable with Flameless Furnace and continuous pusher type furnace. The function of Flameless Furnace is as follows:-

Flameless Furnaces/Combustion*: The phenomenon is created when the fuel temperature is above the ignition temperature or in general above 750°C. In these conditions, if the fuel is injected directly into the furnace, at given levels of turbulence and velocity, and bypassing the mixer with combustion air, this generate an oxidation reaction which does not occur in the visible range, but still produces thermal energy.*

The function of withering equipment cannot be by any stretch of imagination, compared with that of a flameless furnace.

Similar is the functionality of the fluidised bed type dryer.

Fluidized bed type heat treatment furnaces*: A method for rapid heat treatment, quenching and aging of an article includes placing the article in a fluidized bed and conveying the article through the bed. Heat treatment, quenching and aging of the part can be done in less than two hours using this method. The method also includes removing fluidizing media from the article as the article is removed from the fluidized bed. An elevator is used to remove the article from the fluidized bed. The elevator may include a conveyor for moving the article into another fluidized bed. The article can then be placed into the second fluidized bed and conveyed through that bed. Each fluidized bed is controlled so that a specific heat treatment can be applied to the article by the fluidized bed. The fluidized bed can be used as a portion of an automated production line. The retort of the fluidized bed includes a system for recycling the air passed through the fluidizing media in the furnace. The recycling system includes a fan positioned above the fluidizing media in the retort, a filter for removing any fluidizing media within the recycled air, and piping for reintroducing the recycled air to the retort. The heaters are placed within the retort and include heat exchangers for heating the incoming combustion air. The heaters are rigidly attached at one end and fit within sleeves attached to another portion of the retort. The heater tubes can be replaced with refrigeration tubes or units so that articles may be quenched.*

A plain reading of this takes us to a conclusion that the assessee's contention is devoid of merit.

6.3.2. It is clear that "Enclosed Withering Trough Machines", is not comparable with any of the energy-saving devices listed in the New Appendix-I to the Income Tax Rules, 1962. The assessee further claims that "Enclosed Withering Trough Machines", is pollution control equipment, but he has not specified as to under which item of the New Appendix-I to the Income Tax Rules, 1962, this equipment falls. In view of the above discussion, this claim on the ground that the functional test satisfies the requirement is also to be rejected.

6.4. Hence we hold that the assessee failed to substantiate his claim that "Enclosing Withering Trough Machine" is an "energy-saving device" or "pollution control equipment", which is entitled to higher rate of depreciation. Just because the Assessing Officer had not disturbed this claim of the assessee in the Assessment Year 2012-12, this claim cannot be allowed. The case-law relied upon by the assessee are not applicable to the facts of this case, as the facts are entirely different. The findings in those cases are that the machines therein fall within this category. We have given a factual finding otherwise. Before us, the assessee has not advanced any arguments on its claim for allowing this expenditure as revenue expenditure. We find that this so called alternative claim is a contradictory claim. The argument is that a machine is fabricated, and it is entitled to depreciation. This means that it is capital expenditure. Just because higher rate of depreciation is not allowed on an asset, it does not lead to a conclusion that the expenditure incurred for acquiring an asset is revenue expenditure. This is an untenable claim. In the result, we uphold the findings of the Assessing Officer on this issue and reverse the order of the ld. CIT(A). In the result, this ground of the revenue is allowed and the ground of C.O. is dismissed.

7. Ground No. 3, is on the issue of allowability of depreciation on good-will.

7.1. The facts relating to this issue are as follows:-

The assessee purchased "Dullabhcherra Teas Estate" through a deed dt. 01/01/2006 and sale deed was registered on 06/05/2006. It made a claim for allowance of depreciation on the ground that it had acquired intangible assets through this conveyance deed. This claim was not made by the assessee in the return of income. The claim was made before the ld. CIT(A). No "intangible asset" in the form of goodwill or other such rights sold by Dullabhcherra Tea Estate or purchased by the assessee company as per this conveyance deed. The assessee company reallocated the purchase consideration between different assets it had acquired through this sale and arrived at a value of an intangible asset which it claims to have purchased and it termed it as "Goodwill" and claimed depreciation on the same.

Some of the contentions of the assessee before the ld. First Appellate Authority are brought out for ready reference:-

> *"We may mention that at the time of planning and purchase of the Dullabhcherra T. E. we were advised to allocate value towards intangible assets as valuable and useful assets. However, at that time we had to accept the allocation as made by the vendors and we could not insist because of certain prejudices of the vendor and their executives. Just to have deal carried in appellants favour promoters of appellant accepted the allocation made by vendors because otherwise appellant may have lost opportunity to purchase the T.E. Furthermore the promoters were new in the business and this was first acquisition of T.E. by the promoters. Therefore, they had to accept the dictates of the vendor about allocation of higher amount towards land and plantations. From the original grounds of appeal it is clear that proper allocation of cost was contemplated from the beginning and it is not new issue.*

After gaining experience the directors after careful consideration of all facts, various intangible assets, their utility etc. decided to allocate Rs. 325 lakh towards intangible assets from land and plantation to have a proper allocation of costs for computing income." (Emphasis supplied).

This demonstrates that the vendors have not sold any intangible asset to the assessee and that the assessee had reduced the cost of acquisition of land and plantation and created a new asset called "Goodwill". The Assessing Officer rejected this claim of depreciation made by the assessee. Aggrieved, the assessee carried the matter in appeal

7.2. The ld. First Appellate Authority, allowed this claim of the assessee vide para 14 page 32 of his order to para 17 page 36 of his order by holding that:-

a) additional claim for deduction can be made by the assessee within the date of filing of revised return and before the appellate authorities.

b) the AO has not allowed the depreciation on intangible asset without assigning proper reasons.

c) the purchase was effective from 01/0/1/2006, though the conveyance deed was registered on 06/05/2006, as the business has been purchased as a core concern w.e.f 01/01/2006 and as possession of all movable properties was taken over by the assessee on 15/03/2006. Hence the assessee was entitled to claim depreciation from 01/01/2006

d) the Directors have very reasonably ascertained the cost of intangible assets at Rs. 325 Lakhs by comparing the issue with a similarly placed tea estate in Assam, namely, Suntok Tea Estate of Hirajulie Tea Co. Ltd. with the Tea Estate of the assessee i.e. Dullabcherra Tea Estate.

e) Reliance is placed on the decisions of the Hon'ble Supreme Court on the issue as to whether depreciation is allowable on goodwill and other intangible assets.

f) the actual cost of these intangible assets is Rs. 325 lakhs and depreciation at the rate of 25% of the same as allowable.

7.3. Aggrieved the Revenue is in appeal before us.

7.4. The ld. Counsel for the assessee, took this Bench through the various submissions made before the lower authorities as well as judgements of various Courts and argued that the value of intangible assets have been rightly arrived at by the management of the company by re-allocating the costs of purchase. He vehemently contended that, this is not a case of revaluation of assets and it was only a case of proper allocation of cost to various assets purchased. At pages 59 to 68 of the paper book, he filed certain papers to explain and justify the valuation of intangible assets at Rs. 325 lakhs, by reallocating the cost of purchase of land and plantation.

7.4.1. The ld. DR, on the other hand, submitted that the registered conveyance deed dt. 06/05/2006, gave the value of each and every asset that was transferred by the vendor of "Dullabcherra Tea Estate" M/s. Gillanders Arbuthnot & Company Ltd. to the assessee company and that the assessee has artificially created an "intangible asset" so as to claim depreciation on the same when in fact what was paid was towards cost of land and plantation. He pointed out that the assessee had admitted in its written submissions that no value has been assigned to "intangible assets" in the conveyance deed between the seller and the buyer and under those circumstances; the cost of each assets sold on accepted by both the parties in the registered conveyance deed is binding. The ld. DR argued that there is no

intangible asset acquired by the assessee and hence it is not entitled to any depreciation on the same.

7.5. After hearing rival submissions, consider the papers as record and orders of the authorities below we are in agreement with the submissions of the ld. DR. When a registered conveyance deed has been entered into between the two parties and the cost of each asset purchased and sold is specified in that particular deed, then it cannot be altered unilaterally by one party at its convenience. It is not open for the assessee to reduce the cost of land and plantation and reallocate such reduction in cost of tangible fixed asset to an intangible asset and thereafter claim depreciation. Cost of purchase of land and plantation cannot be reduced. The assessee has not filed details as to the cost of which asset has been reduced, so as to enable it to create a new asset called intangible asset/goodwill and thereafter claim depreciation on such asset, for which there is no cost of purchase. All the papers justifying the arriving at of the value of Rs. 325 Lakhs, as the cost of "intangible assets" are self-serving documents. The assessee has neither purchased nor has the seller sold any "intangible asset" in this case. The assessee's claim that its request to the seller to make such an allocation was rejected by the seller. The vendors were very clear that no intangible property of their is being sold to the company. What was sold intangible property. Under the circumstances the claim made by the assessee that it incurred the cost to purchase intangible asset is factually incorrect and false. This is a wrong and unjustified claim. It is an indirect way of claiming depreciation on land and plantation which is patently wrong and misleading.

7.6. Hence, the claim of the depreciation on such intangible asset is devoid of merit. Thus, the Ground No. 3 of the revenue is allowed and the corresponding

ground of cross-objection of the assessee supporting the order of the ld. CIT(A) i.e., Ground No. 5 is dismissed.

7.7 Ground No. 4 of the Revenue is on the legal issue as to whether Section 115JB of the Act is applicable only when there is no positive total income for the assessee.

7.7.1 The assessee relies on the judgement of the Jurisdiction Tribunal in the case of *Sasamus Sugar Works Ltd. vs. DCIT, ITA No. 1024/Kol/2007, order dt. 28/09/2007.*

In our view this decision does not hold the field any longer and in view of the subsequent decisions of the Apex Court in the case of *Apollo Tyres Ltd. vs. Commissioner of Income Tax (2002) 255 ITR 273 (SC)* as well as the decision of ITAT Kolkata in the case of *Bhatkawa Tea Industries Pvt. Ltd. vs. ACIT, Circle-4, Kolkata* in ITA No. 813/Kol/2010, for the Assessment Year 2005-06, wherein it was held as follows:-

> *"10.1 We are of the considered opinion that section 115JB of the Act is attracted in the case of the appellant. The appellant has not also been able to show us that the deductions as claimed by it from the net profit as per the P & L account were allowable as per the provisions of the Act, keeping in view the ratio laid down by the Hon'ble Apex Court's decision in the case of Apollo Tyres Ltd (supra). In this view of the matter, we find no infirmity in the impugned order of the ld.CIT(A) on the issues agitated by the appellant in the present appeal and confirm the same. Thus, we reject all the grounds of appeal of the assessee."*

7.7.2 Section 115JB of the Act reads as follows:-

"115JB.

(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, [2012], is less than [eighteen and one-half per cent] of its book profit, [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of [eighteen and one-half per cent]].

(2) [Every assessee,—

(a)being a company, other than a company referred to in clause (b), shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Part II of Schedule VI to the Companies Act, 1956 (1 of 1956); or

(b)being a company, to which the proviso to sub-section (2) of section 211 of the Companies Act,1956 (1 of 1956)is applicable, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of the Act governing such company:]"

7.8. On a plain reading of this section 115 JB, we are of the considered opinion that the same is attracted whenever the book profit "as calculated under this Section" is in excess of the income computed under the regular provisions of the Act. There is no requirement that the normal profit computed under the act should be a positive figure and that should be payable on the same, in order to attract the special provisions under section 115 JB of the Act. No such requirement is

mentioned in this Section. In fact such introspection would defeat the very objection of introduction of this Section.

Thus, we uphold the contention of the revenue and allow this ground of the revenue and dismiss the corresponding Ground No. 6 of the Cross-objection raised by the assessee.

7.9 In the result this appeal of the revenue is allowed and the C.O. of the assessee is dismissed.

ITA No. 1750/Kol/2016 & C.O. No. 65/Kol/2016, Assessment Year 2009-10

8. Ground No. 1 and 2 of the revenue appeal and Ground No. 2, 3 & 4 of the cross objection by the assessee are on the issue of rate of depreciation allowable on "Enclosed Withering Trough Machines".

8.1. We have adjudicated this issue in paragraph number 6 of this order for the Assessment Year 2008-09. Consistent with the view taken therein, we allow Ground number 1 and 2 of the revenue and dismiss Ground number 2, 3 & 4 of the cross objection.

8.2. Ground No. 3 of the revenue and Ground No. 5 of the cross objection is on the issue of depreciation on tangible asset.

8.2.1. Consistent with the view taken by us while disposing of this very issue for the Assessment Year 2008-09 we allow this ground of the revenue and dismiss the corresponding ground of the cross objection.

8.3. Ground No. 4 of the revenue appeal reads as follows:-

"whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing a deduction of Rs. 1,29,38,147/- u/s. 80IE which had not been claimed in the return nor any Audit Report has been filed in that regard."

8.3.1. The undisputed fact is that the assessee has not made a claim for deduction under section 80 IE in the return of income, nor did he file an audit certificate in support of his claim. The ld. CIT(A), was of the view that the assessee is entitled to make a claim before the AO, other than by way of filing the revised return of income. He held that the assessee has mentioned in its computation of income that, "deduction under section 80 IE may be allowed before setting aside past profits and depreciation". This position is not supported by the decision of the Hon'ble Supreme Court in the case of *Goetze (India) Ltd. vs CIT [2006] 284 ITR 323 SC,* wherein it has been held as follows:-

"Deduction—Allowability—Claim for deduction by way of application—Cannot be entertained by AO—AO cannot entertain claim for deduction otherwise than by filing a revised return—National Thermal Power Co. Ltd. vs. CIT (1999) 157 CTR (SC) 249 : (1998) 229 ITR 383 (SC) distinguished; judgment dt. 17th Dec., 2004 of the Delhi High Court in IT Appeal No. 770 of 2004 affirmed"

8.3.2. The assessee should have made a claim in its return of income or by filing a revised return of income. In an alternative, the assessee can make fresh claim before the appellate authorities, if all the facts are on record. In this case, the basic facts have not been brought on record. The audit report has also not been filed. We find that the assessee has not made any fresh claim.

8.3.3. The ld. First Appellate Authority, has not admitted this claim but has held that the assessing officer should have granted the deduction under section 80 IE equal to 100 percent of the profits of Dullabcherra Tea Estate, as the fact that the assessee is eligible for deduction under section 80 IE is not in dispute. How the ld. CIT(A) has come to a conclusion that the fact of the assessee being eligible for claim of deduction u/s 80-IE of the Act and that this fact is not in dispute is not known. There are no basic facts record and no authority has examined the facts and have come to a conclusion that the statutory requirements for claim of deduction u/s 80-IE have been complied by the assessee.

8.4. In our view, this finding is perverse. The assessing officer nor the ld. CIT(A), have examined the basic facts or have come to the conclusion that the assessee is eligible for deduction under section 80 IE equal to 100 per cent of the profits for the Dullabcherra Tea Estate. Without doing such an exercise the ld. CIT(A), has directed grant of this deduction. This is bad in law.

8.4.1. Hence, this Ground of the Revenue is allowed and the corresponding ground of the cross-objection is dismissed.

8.5. Ground No. 6, of the Revenue and Ground No. 7 of the Cross-Objection by the assessee, are on the issue of computation of profits under section 115JB of the Act. The issue is the same as was dealt by us while disposing of Ground Number 4 of the revenue appeal for the Assessment Year 2008-09. Consistent with the view taken therein, we allow Ground No. 6 of the revenue and dismiss Ground No. 7 of the cross objection by the assessee.

8.6. In the result, the appeal of the revenue is allowed and the cross-objection by the assessee is dismissed.

ITA No. 1829/Kol/2016 & C.O. No. 66/Kol/2016, Assessment Year 2010-11

9. Ground No. 1 of the Revenue appeal and Ground No. 2, 3 & 4 of the Cross-Objection are on the issue of rate of depreciation on "Enclosed Withering Trough Machines". Consistent with the view taken by us for the Assessment Year 2008-09, while adjudicating the very same issue, we allow this ground of the revenue and dismiss the corresponding ground of the cross-objection raised by the assessee.

9.1. Ground No. 2 of the Revenue and Ground No. 5 of the cross-objection are on the issue of depreciation on intangible assets. Consistent with the view taken by us while adjudicating the similar issue for the Assessment Year 2008-09, we allow Ground Number 2 of the revenue and dismiss Ground Number 5 of the assessee's cross objection to the extent it is on this issue, as the ground also raises and the issue of grant of "initial depreciation" which we will be dealing in the subsequent paragraphs.

9.2. Ground No. 3 of the Revenue is on the issue of allowability of initial depreciation under section 32 (1) (iia) of the Act. Ground No. 5, 2nd part of the cross-objection of the assessee also is on the same issue. This ground of the revenue is misconceived as the ld. CIT(A) has allowed initial depreciation at the rate of 10% as the new plant and machinery have been used for less than 180 days. The revenue is not per se disputing the allowability of initial depreciation. Hence both the parts of the Ground of Cross-objection and Ground No. 3 of the revenue are dismissed.

9.3. Ground No. 4, is on the issue as to whether the so-called interest subsidy received, is a capital receipt or revenue received. The facts leading to this issue is that the assessee had acquired "Dullabcherra Tea Estate". It is claimed that the unit

"Dullabcherra Tea Estate" received certain interest subsidy, which pertains to a period prior to the acquisition of Dullabcherra Tea Estate. The assessee claimed that such receipt is a capital receipt. The ld. CIT(A), had held that this is interest subsidy and hence a capital receipt.

9.3.1. In our view, this finding of the ld. CIT(A), is not correct. The interest subsidy in question pertains to a period prior to the acquisition of Dullabcherra Tea Estate by the assessee. The ld. Counsel for the assessee submits that, if the claim for refund of this amount of interest subsidy received is made by the former owners of Dullabcherra Tea Estate, then this amount needs to be returned, as it was not factored in computing the purchase price of the estate. In our view, this receipt had accrued during the year and the assessee got the right to receive the interest in this year only, as it is a successor of Dullabcherra Tea Estate. The nature of receipt is not interest subsidy in the hands of the assessee. There is no claim from the vendors of 'Dullabcherra Teas Estate' till date on the assessee for return of this amount to them. Hence the receipt is in the revenue field and it has accrued and arisen during the year. Thus this ground of the revenue is allowed.

9.4. Coming to Ground No. 6 & 7 of the cross objection, the assessee states that it's alternative claim for deduction under section 80 IE on this interest subsidy has to be allowed. This issue may be examined by the assessing officer, in accordance with law. Thus, Ground Nos. 6 and 7, of the Cross-objection filed by the assessee, are allowed for statistical purposes.

9.5. Ground No. 4 & 5 of the Revenue appeal is on the allowability of deduction under section 80 IE of the Act.

9.5.1. The facts of this issue is that the assessee claims that it had made additions to plant and machinery exceeding 25% of the opening book value during the

Financial Year 2007-08, relating to the Assessment Year 2008-09. The assessing officer held that this is the initial year of claim of deduction under section 80 IE. He held that, assessment year 2009-10 as the second year of this claim of deduction. The assessee had not claimed deduction under section 80 IE, for this year in the return of income as the gross total income was negative. During the Assessment Year 2010-11, the assessee claimed deduction under section 80 IE, on the ground that this is the initial year and stated that it could claim the deduction for the next 10 years, from Assessment Year 2010-11. The assessing officer held that the assessee is entitled to the claim of deduction under section 80 IE, as the 3rd year of claim and not as the initial year of the claim. The Assessing Officer rejected the claim of the assessee. The ld. First Appellate Authority, upheld this decision of the Assessing Officer.

9.5.2. Aggrieved, the revenue is in appeal before us. Cross objection has been filed on this issue by the assessee.

9.6. After considering the arguments of both the sides, we are of the considered opinion that the issue whether the assessee is eligible for deduction under section 80 IE. On profits from Dullabcherra Tea Estate, or not has to be examined in the initial assessment year. “Initial Assessment Year” has been defined for the purpose of this section as means the Assessment Year relevant to the previous year in which the undertaking begins the manufacturing or produces articles or things or completes substantial expansions.

Ten consecutive years commence from this initial Assessment Year. The assessee claims that it completed substantial expansion during the Financial Year 2007-08, relevant to the Assessment Year 2008-09. This claim has not been examined by any authority.The assessing officer has not examined this issue in any of the earlier

years. The deduction in the 3rd year has been allowed as if the entire facts have been considered in the earlier years.

When no authority has verified the fact as to whether the assessee has complied with the statutory conditions laid down u/s 80IE of the Act, in any of the years, we cannot understand as to how the Assessing Officer decided to allow the claim for the first time in the 3rd year.

The Honourable Delhi High Court in the case of *CIT VERSUS M/S JANSAMPARK ADVERTISING AND MARKETING (P) LTD. in ITA 525/2014, Judgement dt. 11th March, 2015,* at para 42, held as follows:-

> *"42. The AO here may have failed to discharge his obligation to conduct a proper inquiry to take the matter to logical conclusion. But CIT (Appeals), having noticed want of proper inquiry, could not have closed the chapter simply by allowing the appeal and deleting the additions made. It was also the obligation of the first appellate authority, as indeed of ITAT, to have ensured that effective inquiry was carried out, particularly in the face of the allegations of the Revenue that the account statements reveal a uniform pattern of cash deposits of equal amounts in the respective accounts preceding the transactions in question. This necessitated a detailed scrutiny of the material submitted by the assessee in response to the notice under Section 148 issued by the AO, as also the material submitted at the stage of appeals, if deemed proper by way of making or causing to be made a "further inquiry" in exercise of the power under Section 250(4). This approach not having been adopted, the impugned order of ITAT, and consequently that of CIT (Appeals), cannot be approved or upheld." (Emphasis ours)*

9.6.1. In the case on hand, the Assessing Officer has failed to conduct a proper enquiry. The ld. CIT(A) has also failed in his duty on this issue. Thus, applying the proposition of laid down by the Hon'ble Delhi High Court, to the facts of this case, we set aside this issue to the file of the Assessing Officer, for fresh adjudication, in accordance with law. The Assessing Officer is directed to examine whether the conditions laid down u/s 80IE of the Act, have complied with by the assessee

company in the "Initial Year" and then only come to a conclusion on this issue. We draw strength for this proposition, from the judgement of the Hon'ble Delhi High Court in the case of CIT vs. Delhi Patra Prakashan Ltd. 355 ITR 14(Del.) In the result this issue of allowability of u/s 80IE of the Act, is restored to the file of the Assessing Officer, for fresh adjudication.

9.7. Ground No. 8 of the Revenue is on the issue of computation of book profits u/s 115JB of the Act.

9.7.1. The issue is the same as was dealt by us while disposing of Ground No. 4 of the revenue appeal for the Assessment Year 2008-09. Consistent with the view taken therein, we allow this ground of appeal raised by the revenue.

9.8. In the result, appeal of the Revenue and the Cross-objections of the assessee are allowed in part.

ITA No. 1830/Kol/2016 & C.O. No. 67/Kol/2016, Assessment Year 2011-12

10. Ground No. 1 of the Revenue and Ground Nos. 2, 3 & 4 of the Cross-objection by the assessee are on the issue of rate of depreciation allowable on "Enclosed Withering Trough Machines".

10.1. Consistent with the view taken by us for the Assessment Year 2008-09, while adjudicating the very same issue, we allow this ground of the revenue and dismiss these grounds of cross-objection raised by the assessee.

11. Ground No. 2 of the Revenue and Ground No. 5 of the Cross-objection of the assessee on the issue of claim of depreciation, on intangible assets.

11.1. Consistent with the view taken by us while adjudicating this for the Assessment Year 2008-09, we allow this ground of the Revenue and dismiss the cross-objection of the assessee on this ground.

12. Ground No. 3 of Revenue and Ground No. 7 of the Cross-objection by the assessee is on the issue of 'initial depreciation'.

12.1. Consistent with the view taken by us for the Assessment Year 2010-11, while adjudicating the very same issue, we dismiss the ground of the revenue as well as the ground of cross-objection of the assessee.

13. Ground No. 4 of the Revenue and Cross-objection No. 7 of the assessee are on the allowability of deduction under section 80 IE of the Act.

13.1. Consistent with the view taken by us for the Assessment Year 2010-11, while adjudicating the very same issue, we set aside this issue to the file of the Assessing Officer, for fresh adjudication, in accordance with law.

14. Ground No. 5 of the Revenue and Ground No. 8 of the Cross-objection of the assessee are on the computation of book profits u/s 115JB of the Act.

14.1. Consistent with the view taken by us while disposing of Ground No. 4 of the revenue appeal for the Assessment Year 2008-09, we allow this ground of appeal raised by the revenue and dismiss this ground of cross-objection by the assessee.

ITA No. 787/Kol/2017, Assessment Year 2011-12, appeal by the Assessee

15. This appeal by the assessee is directed against the order of the ld. Commissioner of Income Tax (Appeals)-2, Kolkata, (hereinafter the 'ld. CIT(A)), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), arising out of Appeal No. 1236/CIT(A)-2/15-16, for the Assessment Year 2012-13, on the following grounds:-

> *"1. General for all grounds: For that learned CIT(A) has passed the order, with a prejudiced mind, denying various relief claimed, and*

mostly confirming order of the AO, without fully considering facts and circumstances of the case, written submissions of the assessee, precedence relied on by assessee, and not following binding precedence. Furthermore, learned CIT(A) was also wrong in not asking and not providing opportunity and time to file further details and evidences, or explanation, if any, which he required for proper adjudication of appeal and doing justice.

2. For that learned CIT(A) was wrong in ignoring even summarize chart which shows, how various issues are covered in favour of assessee as filed on top of written submission and paper book filed on 14.02.2017.

3. For that learned CIT(A) was wrong in confirming disallowance of Rs.19619/- being club expenses, which are nominal, and normal business expenses and allowable as allowed by AO in other years and also allowable as per order of ITAT in case of Warren Tea Ltd a copy of which was filed before CIT(A). The disallowance may be deleted.

4. For that learned CIT(A) was wrong in confirming invocation of S.14A and disallowance of Rs.63131/- ignoring provisions of S.14A, submissions of assessee and order of CIT(A) in earlier years.

5. For that AO may be directed not to invoke S.14A because any income by way of dividend is not an income which does not form part of chargeable income under I.T. Act, has been taxed under simplified taxation scheme, and therefore, S.14A is not at all applicable in relation to such income. The AO may be directed to delete disallowance

of Rs.1433/- made by assessee and further Rs.63131/- disallowed by AO.

6. For that learned CIT(A) was wrong in dismissing ground no. 5-7 and 11 before him holding that " the grounds as raised by the appellant are not arises from the impugned order".

7. For that learned AO may be directed to allow depreciation on correct WDV of block of intangible assets as allowed by the CIT(A) in earlier years.

8. For that learned AO may be directed to allow balance of incentive u/s 32.1. iia , in respect of AY 2012-13 and also some of earlier years, wherein 10% deduction was allowed instead of 20% due to less than 180 days after putting to use, 20% incentive in the first year is mandatory for the reason that one time incentive @20% of cost, is to be allowed as language used is "shall be allowed".

9. Alternately, in case incentive is restricted to 10% for the reason that any eligible plant and machinery was used for less than 180 days, then, AO may be directed to allow balance 10% in subsequent year wherein 180 days are completed.

10. For that learned AO may be directed to allow correctly depreciation on correct WDV of plant and machinery for which depreciation was claimed @80% in earlier years but was allowed @ 15% by AO, however, from AY 2012-13 AO allowed depreciation @80% but on wrong WDV b/f, as if 80% depreciation was allowed in earlier years.

11. For that learned AO may be directed to treat A.Y.2012-13 as 4th year based on order of CIT(A) in earlier years holding that AY 2009-10 is initial year for deduction u/s 80 IE.

12. For that learned AO may be directed to make computation of 100% of profit of eligible undertaking correctly by including all incidental receipts and recoveries and incomes in such profit and to allow deduction equal to 100% of such profit u/s 80lE.

13. For that learned AO may be directed to revise tax u/s 1150 on 40% of dividend declared as against 100% of dividend.

14. For that learned AO may be directed not to invoke S.115JB, as held by learned CIT(A) in earlier years.

15. For that learned AO may be directed to charge interest u/s 234B and 234C, if any, based on income as per return of income and not as per income assessed.

16. For that the appellant seek kind permission to raise new contentions and new grounds of appeal and to revise any grounds of appeal as may be required to seek justice."

15.1. We have heard the rival contentions. We find that Ground No. 1 & 2, are general in nature.

15.2. Ground No. 3, is against the order of the ld. CIT(A) confirming the disallowance of Rs. 19619/-, claimed as club expenses. The assessee relies on the decision of the ITAT in the case of *Warren Tea Ltd.* and claims that club expenses should be allowed. In our view, what is to be seen, is as to whether these expenses are incurred for official purposes or personal purposes. If it is incurred for

personal purpose, then the same has to be disallowed. Hence this matter is set aside to the file of the assessing officer for fresh adjudication, in accordance with law, after examining the vouchers of club expenses.

15.2.1. In the result, this ground of the assessee is allowed for statistical purposes.

15.3. Ground No. 4 & 5, are on the issue of disallowance made under section 14A of the Act.

15.3.1. The dividend earned by the assessee company is Rs. 9770/-. The disallowance made by the assessing officer is Rs. 63,131/-. The assessee's claim is that it has not incurred any expenditure for earning dividend income. We find that the assessing officer has not recorded his satisfaction as to why the contention of the assessee that it had not incurred any expenses for earning of dividend income is wrong. Unless the AO, records his satisfaction that the claim made by the assessee is not correct, Rule 8D of the Income Tax Rules, 1962, cannot be invoked as held by the Hon'ble Bombay High Court in the case of *Godrej & Boyce Manufacturing Co. Ltd. vs. DCIT (2010) 194 TAXMAN 203 (Bom) and Pr. CIT vs. Reliance Capital Asset Management Ltd. judgement dt. 19/09/2017*. In the case of *CIT v.Winsome Textile Industries Ltd. [2009] 319 ITR 204 (PH)*, it has been held that the disallowance made u/s 14A, cannot exceed the dividend earned. Keeping in this position of law, we uphold the contention of the assessee and delete this addition made under section 14 A, to the extent of Rs.63131/-. DMAT charges of Rs. 1433/-, is disallowed by the Assessing Officer twice. Hence the disallowance is deleted as it was a double disallowance.

16. Ground No. 6 to 12, are remanded to the file of the ld. CIT(A), with a direction to adjudicate the same on merits, for the reason that, the ld. First Appellate Authority was wrong in holding that these grounds do not arise for the

order of the Assessing Officer. In the result, these grounds are allowed for statistical purposes.

17. Ground No. 13, is on the issue whether 40 per cent of the dividend income or 100 per cent of the dividend income is to be considered for the purposes of Section 115O. Recently the Hon'ble Supreme Court in the case of *Union of India & ors. vs. Tata Tea Co. Ltd. in CA NO. 9178 OF 2012, judgement dt. 20/09/2017,* wherein it was held as follows:-

> *"33. This Court, however, while considering the nature of dividend in the above case held that although when the initial source which has produced the revenue is land used for agricultural purposes but to give to the words 'revenue derived from land', apart from its direct association or relation with the land, an unrestricted meaning shall be unwarranted. Again as noted above* ***Nalin Behari Lal Singha (supra)*** *observation was made that shares of its profits declared as distributable among the shareholders is not impressed with the character of the profit from which it reaches the hands of the shareholder. We, thus, find substances in the submission of the learned counsel for the Union of India that when the dividend is declared to be distributed and paid to company's shareholder it is not impressed with character of source of its income."*

17.1. Respectfully following this judgement, this Ground of the assessee is dismissed.

18. Ground No. 14, is on the issue of computation of book profits u/s 115JB. This issue has been dealt by us while disposing of Ground No. 4 of the revenue appeal for the Assessment Year 2008-09. Consistent with the view taken by us while, we allow this ground of appeal raised by the assessee.

19. Ground No. 15 is against the levy of penalty u/s 234B & 234C. Levy of interest is consequential in nature and hence this Ground of the assessee is dismissed.

20. Ground No. 20, is general in nature.

21. In the result, the appeal of the assessee is allowed in part.

Kolkata, the day of November, 2017.

[**Aby T. Varkey**]
Judicial Member

[**J. Sudhakar Reddy**]
Accountant Member

Dated : .11.2017
{SC SPS}

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3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

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By order

Senior Private Secretary
Head of Office/ D.D.O. ITAT, Kolkata Benches