IN THE INCOME TAX APPELLATE TRIBUNAL
"I" Bench, Mumbai
Before Shri B.R. Baskaran (AM)& Shri Pawan Singh (JM)

I.T.A. No. 1875/Mum/2014 (Assessment Year 2009-10)
I.T.A. No. 285/Mum/2015 (Assessment Year 2010-11)
I.T.A. No. 286/Mum/2015 (Assessment Year 2011-12)
I.T.A. No. 2208/Mum/2016 (Assessment Year 2012-13)

M/s. Saf Yeast Company Private Limited 419, Swastik Chambers Chembur Mumbai-400 71.	Vs.	DCIT/ACIT CC-40/7(1) CGO Building M.K. Road Mumbai-400020.
(Appellant)		(Respondent)

I.T.A. No. 2758/Mum/2014 (Assessment Year 2009-10)
I.T.A. No. 652/Mum/2015 (Assessment Year 2010-11)
I.T.A. No. 653/Mum/2015 (Assessment Year 2011-12)
I.T.A. No. 2271/Mum/2016 (Assessment Year 2012-13)

DCIT/ACIT CC-40/7(1) CGO Building M.K. Road Mumbai-400020.	Vs.	M/s. Saf Yeast Company Private Limited 419, Swastik Chambers Chembur Mumbai-400 71.
(Appellant)		(Respondent)

PAN : AADCS9080J

Assessee by	Shri J. P. Bairagra
Department by	Ms. S. Padmaja
Date of Hearing	5.03.2018
Date of Pronouncement	16.05.2018

O R D E R

PER BENCH:-

These cross appeals are directed against the orders passed by ld CIT(A)-38, Mumbai and they relate to the assessment years 2009-10 to 2012-13. Since common issue is urged in these appeals, they were heard together and are being disposed of by this common order, for the sake of convenience.

2. The common issue relates to the deduction u/s 80IA claimed by the assessee in all these years. The assessee claimed deduction u/s 80IA of the Act in respect of profits arising from steam power and refrigeration power generated by it and consumed in-house. The assessing officer rejected the said claim on various reasons in all these years. The Ld CIT(A) held that the assessee is eligible for deduction u/s 80IA in respect of profit arising from generation and consumption of steam power and refrigeration power. However he changed the methodology of arriving at the profit, which resulted in reduction of the profit as well as quantum of deduction u/s 80IA. Both the parties are aggrieved by the decision of ld CIT(A). While the revenue is aggrieved by the decision of ld CIT(A) in holding that the assessee is eligible for deduction u/s 80IA in respect of its power generation activities, the assessee is aggrieved by the decision of Ld CIT(A) in reducing the quantum of deduction.

3. In the grounds urged by the revenue, there is a reference that the deduction u/s 80IA is claimed to the activity of Dry yeast production. Both the parties agreed that the assessee has not claimed deduction u/s 80IA in respect of Dry yeast production and hence the ground so raised by the revenue is erroneous and does not require adjudication.

4. Besides the above said common issue, both the parties have raised some more issues, which we will deal separately.

5. The facts relating to the deduction claimed u/s 80IA are set out in brief. We take up AY 2009-10 as lead year. The assessee is engaged in the business of manufacture of Bakers yeast and also engaged in trading of bakery ingredients. The assessee has also generated power and accordingly received subsidy from Government agencies. The assessee's factories are located in Chiplun in Ratnagiri District of Maharashtra and at Sandila District, Hardoi, U.P.

6. The AO noticed that the tax auditor has reported in his tax audit report that it is generating Cooling power (also known as Refrigeration power) and

Steam power in both of its units through Cooling Tower and Bio-Gas Plant respectively. The AO further noticed that the assessee has claimed deduction u/s 80IA(4)(iv)(a) in respect of profit arising from Steam power and Refrigeration power activities. The deduction u/s 80IA(4)(iv)(a) is applicable to an undertaking set up in any part of India for generation or generation and distribution of power, if it begins to generate power at any time during the period from 01-04-93 to 31.3.2010.

7. The AO took the view that the assessee is not eligible for deduction u/s 80IA(4)(iv)(a) of the Act for the following reasons:-

(a) The word "Power" is not defined in the Act. In the common parlance, "power" is referred to as "**Electricity**". Hence deduction u/s 80IA(4)(iv)(a) is available only to an undertaking which is set up for the generation or generation and distribution of electricity.

(b) Section 80IA(4)(a) requires setting up of **an undertaking** for the generation or generation and distribution of power. The term "Undertaking" is not defied in the Act. In common parlance, an undertaking is understood as a concern started or formed for specific purpose or project. However, the assessee has not set up any separate undertaking for generation of power. Further following aspects also make it clear that there was no separate undertaking:-

(i) The Accounting Standard 17 requires reporting of Segment results. The assessee has not treated power generation activity as separate segment and accordingly did not report segmental results.

(ii) No separate books of accounts have been maintained for power generation undertakings. The assessee has maintained only one set of accounts.

(iii) Under sub-clause (i) of sec. 32(1) of the Act, depreciation is allowed at such percentage on actual cost of assets to an undertaking engaged in generation or generation & distribution of power. The percentages are prescribed in Appendix 1A. However, the assessee has been claiming depreciation at the rates prescribed in Appendix 1 on Written Down Value of assets in respect of assets used in generation of power. Though the second proviso to sub rule 1A of Rule 5 provides an option to the

assessee, but the assessee has not exercised the option within the time prescribed therein.

(iv) The assessee has not obtained separate permission from Government authorities for its power generating units.

(c) Assuming but without admitting that the assessee has setup undertakings for generation of power, the same has been formed by transfer of machinery or plant previously used for other purposes.

(d) The eligible business should make profit for claiming deduction u/s 80IA, i.e., the eligible business should be dealing in products or services which can be traded with or offered to others, i.e., If the goods or services are such that if cannot be traded with or offered to others, there will be no question of the eligible business making any profits or gains and there will be no question of any deduction u/s 80IA. When wood or coal is burnt, heat energy is produced. However this heat energy can only be used by the producer, but it is not practical to trade it. One can trade in wood or coal, but the heat energy produced from it cannot be traded. In the instant case, the steam power and refrigeration power were used for captive consumption. It is a settled principle that no one make profit by trading with himself and hence captive consumption of steam and refrigeration power do not earn profit to the assessee.

(e) Sub-section (8) of section 80IA talks of a situation, where any goods or services are transferred to any other business carried on by the assessee and also determination of profit there from. However this section shall come into play only in cases where the goods or services are capable of trading with or offered to others. However, the assessee was not able to show that the steam power and cooling power are tradable.

8. In the alternative, the AO has observed that if any of the appellate authorities hold that the assessee is eligible for deduction u/s 80IA in respect of its power generation activities, then the quantum of deduction should be determined by applying over all net profit rate declared by the assessee. In AY 2009-10, the AO worked out the net profit rate as per consolidated profit and loss account at 11.32%.

9. Accordingly the AO rejected the claim for deduction u/s 80IA of the Act claimed by the assessee in all the years under consideration.

10. The Ld CIT(A) noticed that identical claim was made by the assessee in AY 2003-04 and 2004-05 and the AO has disallowed the same for identical reasons. The Ld CIT(A) noticed that his predecessor has held that the units installed by the assessee generate different forms of energy, which is equivalent to "Power" and hence they qualify for deduction u/s 80IA of the Act. However the Ld CIT(A) had held that the conversion rate to be adopted to arrive at the electrical energy should be 1.02 KW for one ton of refrigeration energy, i.e., the Ld CIT(A) had modified the conversion factor from 3.516 KW adopted by the assessee for one ton of refrigeration power to 1.02 KW. In this process, the profit from the activity of generation of Refrigeration power was reduced resulting in reduction of quantum of deduction allowable u/s 80IA of the Act. Following the order passed for AY 2003-04 and 2004-05, the Ld CIT(A) held in all the years under consideration that the assessee is eligible for deduction u/s 80IA for its steam and refrigeration power generation activities. He further held that the quantum of deduction should be determined as per the methodology prescribed by his predecessor for AY 2003-04. While the revenue is aggrieved with the decision of Ld CIT(A) in holding that the assessee is eligible for deduction u/s 80IA(4) of the Act, the assessee is aggrieved by the decision of Ld CIT(A) in reducing the quantum of deduction.

11. The ld A.R submitted that the assessing officer had made identical disallowances on identical reasons in AY 2005-06 to 2008-09 also. The Ld CIT(A) has also passed identical orders for the above said years by following the order passed by him in AY 2003-04. He submitted that both the parties challenged the orders passed by Ld CIT(A) in AY 2005-06 to 2008-09 by filing appeals before the Tribunal. The Tribunal has already disposed of the appeals, vide its common order dated 24-11-2017 passed in ITA No.1634 to 1637/Mum/2014 (assessee's appeal) and in ITA No.1777 to 1780/Mum/2014 (revenue's appeal), wherein revenue's appeals were dismissed and the assessee's appeals on this issue was allowed. Accordingly he submitted that all the issues urged by the assessee as well as revenue relating to deduction

claimed u/s 80IA are covered by the order passed by the Tribunal for AY 2005-06 to 2008-09 (referred supra).

12. The Ld CIT-D.R submitted that the assessing officer has given detailed reasoning in support of his view that the assessee is not eligible for deduction u/s 80IA of the Act. The Ld CIT submitted that the question whether the steam and refrigeration power are eligible for deduction within the meaning of "Power" used sec. 80IA(4) is a technical matter and hence the co-ordinate bench of Tribunal should have referred the same to a Technical expert before taking any decision on it. For this proposition, the ld D.R relied upon the decision rendered by Hon'ble Supreme Court in the case of CIT Delhi Vs. M/s Bharti Cellular Ltd (Civil Appeal No.6691 of 2010 dated 12-08-2010), wherein the Hon'ble Supreme Court has restored the issue relating to interconnectivity charges paid by Cellular companies to the file of the AO with the direction to obtain technical report and decide the issue. She submitted that the AO has interpreted "power" to mean electricity only, while the assessee is claiming to generate Steam power and Refrigeration Power. She submitted that these are technical matters and hence the report of a technical expert will help to decide the matter in fair and correct manner. Accordingly she submitted that the Tribunal may ask for a technical report in this matter. She submitted that the term "power" used in sec. 80IA(4) should be understood in common parlance and it means only "electrical power" under common parlance.

13. The Ld CIT-DR further submitted that the deduction u/s 80IA is available only to an Undertaking. She submitted that the assessee has not created any separate undertaking for the power generation units and also did not consider it as separate undertakings in its books of accounts. That is why, the assessee did not furnish segmental reports as required by Accounting Standard 17. The Ld CIT-DR further submitted that the ITAT had placed reliance on the decision rendered by Delhi bench of Tribunal in the case of SIAL SBEC Bioenergy Ltd Vs. DCIT (2004)(83 TTJ 866) in order to told that "steam" is a form of power as contemplated u/s 80IA of the Act. However in

the case of SIAL SBEC Bioenergy Ltd, the assessee therein had created a separate undertaking for generation of steam. However, in the instant case, no separate undertaking was created and hence the assessee cannot take support of the above said decision.

14. She submitted that the Income tax Act does not define the term "Power" and hence its meaning should be taken as understood under Common Parlance. She submitted that under common parlance, the power means "electricity" only. Hence the AO has rightly held that the steam power and refrigeration power generated by the assessee cannot be called as electricity and hence the assessee is not eligible for deduction u/s 80IA of the Act. The Ld D.R further submitted that neither the Act nor the Memorandum explaining provisions indicate that the steam power or refrigeration power are included in sec. 80IA(4) of the Act. Further the assessee has not shown that the power generated by it is capable of being sold and in the absence of same, the question of earning profit from those activities does not arise.

15. Accordingly, the ld D.R submitted that the decision rendered by the co-ordinate bench in AY 2005-06 to 2008-09 should not be followed. She further submitted that the Tribunal has not also recorded the argument of DR in its order.

16. In the rejoinder, the Ld A.R submitted that the Tribunal has passed a very comprehensive and reasoned order in AY 2005-06 to 2008-09 duly considering the arguments that were advanced by both the parties. He submitted that the Ld CIT-DR, without knowing what was argued by the then CIT-DR, was not justified in contending that the arguments of Ld DR were not recorded. The Ld A.R submitted that each and every point discussed by the AO as well as Ld CIT(Appeals) were duly considered by the Tribunal and hence there is no reason to deviate from the decision already rendered by the Tribunal.

17. With regard to the contention of Ld D.R that a report of technical expert should be obtained, the Ld A.R submitted that the assessee has submitted technical information in the form of patents, copies of relevant text books and technical articles before Ld CIT(A) in AY 2005-06 and before the AO during the course of present assessment proceedings. Accordingly a remand report was called for by Ld CIT(A) in AY 2005-06 from the assessing officer, as noted down by the Tribunal in paragraph 10 of its order. He submitted that the AO has not disputed or controverted the technical information and evidences filed by the assessee. He further submitted that there is no dispute with regard to the fact that the assessee is generating steam power and refrigeration power. The question is whether the assessee is eligible for deduction u/s 80IA(4) of the Act on the profits arising from generation of steam power and refrigeration power. He submitted that the issue relating to Steam power has been examined by the Tribunals as well as the High Courts and all of them have expressed the view that Steam power is eligible for deduction u/s 80IA(4) of the Act. With regard to refrigeration power, the assessee has furnished sufficient technical information and the same has not been questioned by the AO. Accordingly the Ld A.R submitted that there is no complexity involved in the present issue as submitted by Ld D.R and hence there is no requirement of obtaining technical experts report.

18. We have heard rival contentions and perused the record. The Ld D.R submitted that the question as to the steam and refrigeration power generated by the assessee can be considered as falling under the definition of "power" within the meaning of provisions of sec. 80IA(4) is a technical matter and accordingly suggested that the said issue may be decided after obtaining report from technical experts. In this regard, the Ld D.R placed reliance on the decision rendered by Hon'ble Supreme Court in the case of Bharati Cellular Ltd (supra), wherein the Hon'ble Supreme Court has directed the AO to get technical expert's report on the issue of interconnectivity charges paid by the telecom operators. In the instant case, we notice that the assessee has furnished various Patents, copies of text books, technical articles to the Ld

CIT(A) during the course of hearing pertaining to AY 2005-06, as noted down by the Tribunal in paragraph 10 of its order. It was also stated that the Ld CIT(A) has forwarded the same to the AO for his comments and the AO has not disputed or controverted the technical information and evidences filed by the assessee. Further the case of the AO is that the provisions of sec. 80IA(4) uses the expression "Power" and it denotes only to "electricity". Hence the issue before us is whether the expression "power" denotes only "electricity" or it encompasses all forms of energy? In this regard, the assessee has furnished technical information before Ld CIT(A) in AY 2005-06 and the same was also confronted to the AO, wherein the AO did not object to the said technical reports, meaning thereby, the AO has accepted that the "Steam power" and "Refrigeration Power" are different forms of "Power". The Ld A.R submits that those technical reports were also furnished before the AO during the course of present assessment proceedings. Further, the issue that needs to be decided is whether the provisions of sec. 80IA(4) is applicable to all forms of power or not. Hence we are of the view that there is no necessity to obtain technical reports, as the same has already been supplied to the tax authorities by the assessee.

19. The Ld D.R reiterated various reasons stated by the AO in the assessment order for rejecting the claim for deduction u/s 80IA(4) of the Act. Those reasons were the same as mentioned in the earlier years by the assessing officer. We notice that all those reasons were considered by the co-ordinate bench of Tribunal in the order passed for AY 2005-06 to 2008-09 (referred supra). We shall examine them one by one and also refer to the decision rendered by the co-ordinate bench thereon. The first reason stated by the AO is that the term "Power" denotes only electricity. We notice that this issue has been considered in detail by the co-ordinate bench and the relevant discussions find place in paragraph 7 to 17 of the order. The Tribunal has discussed in detail the arguments of Ld A.R, wherein he had placed reliance on the decision rendered by the Delhi Bench of Tribunal in the case of SIAL SBEC Bioenergy Ltd (2004)(83 TTJ 866), wherein it has been held that "steam" is a

form of power as contemplated u/s 80IA of the Act. The same view has been expressed in the following cases also:-

(a) DCIT Vs. Maharaja Shree Umaid Mills Ltd (2009)(120 TTJ (Jp) 711)

(b) DCW Ltd Vs. ACIT (37 SOT 322)(Mum)

(c) Tanfac Industries Ltd (Case No.1773 of 2008)(Mad HC)

20. The Tribunal has discussed in detail various arguments advanced by the assessee in respect of Refrigeration/cooling power in paragraph 18 to 23 of its order. The assessee has placed reliance on the International Patent Number W02004094928 on Cooling power titled Absorption Chiller for the production of Cooling power from Low temperature Hot water granted under International Application number PCT/FR2004/000025 bearing International Patent Classification F35B17/08. It is stated that this patent is valid in 96 countries including India and it confirms the existence, generation and utilization of Cooling Power. The assessee has also placed reliance on the Patent No.PL838609/ W09908055 on method of Generating Refrigeration Power which describes the method of production of Cooling Power. The Tribunal has also discussed about the method of generation of Steam power in paragraphs 24 to 29 of its order.

21. The Tribunal has given its decision on the definition of "Power" in Paragraph 69 of the order, wherein it has been held that the Steam Power from Bio-gas, Cooling power from Cooling Towers and Cooling power from Ammonia Absorption Refrigeration Plant are entitled for deduction u/s 80IA of the Act, i.e., the view of the AO that "power" denotes only "electrical power" has been rejected. Following this decision of the co-ordinate bench, we hold that the steam power generated by the assessee from Bio-gas and the Cooling power generated by the assessee from Cooling towers would fall under the definition of "Power" within the meaning of sec. 80IA(4) of the Act.

22. The next reason cited by the assessing officer is that the assessee did not establish separate "undertaking" and hence it is not eligible for deduction u/s

80IA(4) of the Act. In this connection, the AO has also stated that the assessee has not given segmental reports as required under AS-17, did not maintain separate books of accounts and did not claim depreciation as per Appendix 1A of the IT Rules, did not obtain separate permission from Government. These issues have been discussed by the co-ordinate bench in its order referred above. The issue relating to "undertaking" is discussed in Paragraphs 34 to 37 of the order as under:-

> *34. The assessee submitted Factory Inspector's Certificate in respect of Cooling Power and Steam Power undertakings at Sandila and of Cooling Power generation and Steam Power generation undertakings at Chiplun and that these power generation undertakings are separate and distinct from the yeast manufacturing unit. The power produced in these power generation undertakings are used for captive consumption in the yeast manufacturing unit. The assessee has separate plant and machinery for its Steam Power generation undertaking and Cooling Power generation undertakings which is distinct and separate from the yeast manufacturing unit. In this regard the assessee relied on Factory Inspector's certificates dated 08.11.2006, a copy of which is enclosed. Further this fact has also been appreciated by the AO who in the last few paras of the remand report stated as under:*
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> > *"The Assessee has submitted the copy of factory inspector's certificate in respect of cooling power plant and biogas power plant. The certificate revels that the cooling power plant and biogas power plant is separate from Fresh Baker Yeast and Instant Dry Yeast."*
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> *The assessee submitted separate and duly audited Profit and Loss accounts giving the revenues and expenses from such power generation undertakings at Sandila and Chiplun and also furnished Balance Sheets which give details of assets and liabilities of each power generation undertaking. These details are available at pages no 195 to 473 of the assessee Paper book No I. It has been held that if new a industrial unit is established as a part of an existing industrial establishment and if the newly established unit is itself an integrated independent unit in which new plant and machinery is put up and that by these is capable of production of goods independently, the said unit could be classified as newly established undertaking.*
>
> *35. The assessee has separate plant and machinery, separate labour for each of its power generation undertakings. In the assessee's case, the three elements of systematic activity, employment of labour and*

equipment and production of goods are present and, therefore, the Cooling Power and Steam Power generation undertakings have been setup for generation of power. The CIT(A) has correctly held so in the assessee's case. Hon'ble Supreme Court in the case of Textile Machinery Corpn. Ltd. vs. CIT [1977] 107 ITR 195 held that in order to be entitled to the benefit under Section 15C of the Act, the following facts have to be established by the assessee, subject always to time-schedule in the Section:

1. *Investment of substantial fresh capital in the industrial undertaking set up,*
2. *Employment of requisite labour therein,*
3. *Manufacture or production of articles in the said undertaking,*
4. *Earning of profits clearly attributable to the said new undertaking, and*
5. *Above all, a separate and distinct identity of the industrial unit set up.*

36. Similarly, Hon'ble Gujarat High Court in the case of Gujarat Alkalies & Chemicals Ltd vs CIT (350 ITR 94) while relying on the judgement of Textile Machinery Corpn. Ltd. vs. CIT [1977] 107 ITR 195 further held that so far as the fifth test is concerned i.e. a separate and distinct identity, only because to a certain extent the new undertaking is dependent on the existing unit, will not deprive the new undertaking the status of a separate and distinct identity. It all depends on the nature of the technology and the mechanism of production. In CIT vs. Chanda Diesels 216 ITR 639 (BOM), Hon'ble Bombay High Court examined the meaning of 'Industrial Undertaking' in the context of a claim of section 80HHof the Act and held that if a new industrial unit is established as a part of an existing industrial establishment and if the newly established unit is itself an integrated independent unit in which new plant and machinery is put up and that by these is capable of production of goods independently, the said unit could be classified as a newly established industrial undertaking for the purpose of deduction under Section 80HH. Hon'ble Madras High Court in another case CWT vs P. Devasahayam 236 ITR 885, interpreted an industrial undertaking as an undertaking engaged in the business of generation or distribution of electricity or any other form of power.

37. The AO has taken an objection that the power generation unit is a part of a larger undertaking and assessee's power generation undertakings are not independent unit with a distinct name, address or product and that in various documents filed before various Government authorities, the name and address of the factory is that of "Saf Yeast Co.Pvt. Ltd." and the product manufactured is stated to be yeast. There is no need nor is there any statutory obligation to have a different name and the address obviously has to be the same as the assessee's power

generation undertakings are situated in the same premises as the yeast producing factory. The Mumbai Bench of ITAT in the case of West Coast Paper Mills, 100 TTJ 833 observed that Section 80IA of the Act does not speak of the consumption of power and there is no fetter against using the power generated for self consumption. The Bench was of the view that the assessee was eligible for deduction for power generated by the two DG sets, which was used for captive consumption. In taking this view, the Tribunal relied on the decision of the Supreme Court in Textile Machinery Corporation Ltd. vs. CIT regarding exemption under section 15C of the 1922 Act and the Bombay High Court decision in CIT vs Sahney Steel & Press Works (1989) 177 ITR 354.

23. The issue relating to segmental reporting has been discussed in paragraph 39 of the order. Since the assessee has used the steam power and cooling power for captive consumption, it has been held that there is no requirement of disclosing segmental results. Regarding the question as to whether separate books of accounts are required to be maintained, it was observed by the Tribunal that the provisions of sec 80IA only require preparation of separate Profit and Loss account and getting a report from a Chartered Accountant as per Form 10CCB for the purpose of availing deduction u/s 80IA of the Act. Accordingly it was held that there was no requirement of maintenance of separate books of accounts. In this regard, the reliance has been placed by the Tribunal on the decision rendered by Hon'ble Supreme Court in the case of CIT Vs. Bongaigaon Refinery and Petrochemicals Ltd (349 ITR 352). Accordingly it was held that there is no specific requirement of maintaining separate books of accounts.

24. The issue relating to depreciation claimed by the assessee under Appendix 1, the Tribunal has discussed the same in paragraph 41 of its order as under:-

41. The AO also disallowed on the ground that no claim for depreciation at special rates for assets claimed by assessee as allowed under Section 32(1)(i) of the Act for undertaking engaged in generation and distribution of power. The AO noted that the assessee has charged depreciation as per the rates in Appendix 1 on the written down value of various assets, whereas according to him, the assessee should have adopted the rates of depreciation in Appendix 1A both for the rate of

depreciation and the method i.e. straight-line method of depreciation. But the facts are that the assessee has adopted the rates of depreciation mentioned in Appendix-1 and charged depreciation on the basis of Written Down Value Method and not under Appendix-1A and SLM method. The assessee has for the first time claimed deduction under Section 80-IA of the Act for the AY 2003-04 at its power generation undertakings at Sandila and computed the W.D.V. in respect of the assets of the eligible undertaking by adopting Appendix-1. The Act and the Rules there under have not prescribed any specific format in which the assessee should state the option that is adopted for the purpose of charging depreciation while computing the eligible profits under Section 80IA. In the absence of any such specific form of exercising option, the method adopted by the assessee for charging depreciation while computing the eligible profits is justified. The reliance placed by the assessee on the case of Jindal Steel and Power Ltd vs. ACIT (2007) 106 TTJ 943, wherein it was held that:

> *"As per second proviso to rule 5(1A), the assessee may instead of the depreciation specified in Appendix 1A on his option be allowed depreciation under sub-rule (1) r/w Appendix I, i.e. on WDV basis if such option was exercised by the assessee before the due date for furnishing the return of income under s. 139(1). It is seen that no particular format or procedure has been laid down in second proviso in relation to disclosure of exercise of option by an assessee."*

25. The Tribunal has also discussed about the necessity of obtaining separate permission from Central/State Government/Local authority in paragraph 38 of the order as under:-

38. Regarding AO's contention that no separate permission was obtained from Central /State Government/Local Authority for carrying on eligible business, it was argued that as per the provisions of Section 80IA of the Act, there is a mandatory requirement for obtaining approval of Central Government/ Statutory Authority only for those undertakings which fall under clause (i) of Section 80IA(4) of the Act i.e. any enterprise carrying on the business of developing, operating and/or maintaining any infrastructure facility. The assessee claimed deduction of eligible business being generation of power which falls under clause (iv) of Section 80IA(4) of the Act for which there is no requirement in this section for power generation undertakings to obtain any permission from Central Government. Further though sub-clause (4) of Rule 18BBB of the Income Tax Rules, 1962 prescribes submission of copy of the agreement, approval or permission, as the case may be, to carry on the activity signed by the Central Government or the State Government or the local authority for carrying on the eligible business, this rule

mandates that certificate has to be furnished only where permission should be necessary. The assessee argued that there is no specific approval required for carrying on business of generation of steam power and cooling power and hence it is incorrect for the AO to contend that it did not obtain the requisite permissions. In fact the AO not been able to state what permission was necessary because in fact no such permission was required for undertakings generating steam power and cooling power. The assessee relied on a judgement of Hon'ble Allahabad High Court in the case of CIT vs Hanuman Rice Mills (275 ITR 79), wherein it was held that "Following the decision in CIT v. Sultan and Sons Rice Mill [2005] 272 ITR 181 (All.), it was to be held in the instant case that the Tribunal was legally correct in allowing the assessee's claim under sections 80J and 80HH. These provisions do not require that the industrial undertaking should be registered under the Factories Act, 1948 to qualify for the deductions under the said provisions."

26. Thus, the Tribunal has rejected the various reasoning given by the AO to hold that there was no separate undertaking. In paragraph 33 of the order, it was observed that as per the provisions of sec. 80IA(4), there is no requirement of having an independent undertaking for generation of power alone. In paragraph 34, the Tribunal has referred to Factory Inspector's certificate in respect of cooling power and steam power undertakings established at Sandila and of Chiplun. Accordingly it was observed that these undertaking are separate and distinct from yeast manufacturing unit. In paragraph 69, the Tribunal has held that even the power unit is established as part of existing industrial establishment and the newly established unit itself is an integrated independent unit in which new plant and machinery is put up and that why these is capable of production are classified as newly established undertaking in the given facts and circumstances of the case. Accordingly, following the decision rendered by the co-ordinate bench in the assessee's own case, we hold that the power generation units should be considered as an integrated independent unit and there is no requirement that they should be established as separate undertaking.

27. The next objection of the AO was that the assessee has formed the undertaking by transfer of Plant and Machinery previously used for other

business to Power generation business. The Tribunal has discussed this issue in paragraph 45 of its order as under:-

> *45. Further the AO was of the view that the undertaking was formed by transfer of plant and machinery previously used for other business to a power business. But according to CIT(A), although, the equipment has been installed from FY 1996-97 onwards till FY 2002-03, the assessee had not claimed deduction u/s 80IA of the Act and the deduction has been claimed in current year AY 2003-04 treating the year of commencement as AY 1997-98 and current year as one of the ten years for which deduction is available. It cannot, therefore, be said that old machinery used for any other business earlier has been used to form the new undertaking. A new cooling tower was installed in FY 1996-97 at the assessee's Cooling Power generation undertaking at Sandila for Rs.11,66,810. The percentage of new assets in this undertaking is 96% which is much more than the statutorily prescribed limit of 80%. This undertaking commenced production on 22.3.1997. A new cooling tower was installed in FY 2002-03 at the assessee's Cooling Power generation undertaking at Chiplun for Rs.9,77,640. The percentage of new assets in this undertaking is 97.11% which is much more than the statutorily prescribed limit of 80%. This undertaking commenced production on 2.8.2002. A perusal of Section 80IA of the Act would show that deduction can be claimed for any 10 consecutive years out of 15 years commencing in the AY in which the power generation activity begins. In this regard the assessee relied on Hon'ble Delhi High Court the case of Praveen Soni vs CIT (2011) 241 CTR 542. Cooling Power generation undertaking at Sandila commenced in AY 1997-98 and assessee exercised its option and claimed deduction u/s 80IA of the Act from AY 2003-04 onwards. Similarly, the Cooling Power generation undertaking at Chiplun commenced in AY 2003-04 and the assessee exercised its option and claimed deduction u/s 80IA from AY 2004-05 onwards. At the assessee's Steam Power generation undertaking at Sandila was set up in FY 1999- 2000 at a cost of Rs.84 Lacs and commencement of production of steam power was 31.01.2000 with percentage of new assets at 98.38% and therefore was well above the 80% statutory limit. Similarly, the assessee's Steam Power generation undertaking at Chiplun was set up in FY 2000-01 at a cost of Rs. 59.25 Lacs and commencement of production of steam power was 01.03.2001. The percentage of new assets was 96.39% and therefore was well above the 80% statutory limit.*

The Tribunal has accepted the fact that the new machineries used in the Power generation business was well above the prescribed limit of 80%. Since

the Tribunal has already given its finding on this factual aspect, following the same, we reject the contentions of Ld D.R on this issue.

28. The next objection of the AO was that the steam power and refrigeration power were not tradable goods and further the assessee has used them for captive consumption and hence profit should not be estimated. The Tribunal has discussed about the eligibility to claim deduction when the products were consumed by the assessee itself, i.e., in case of captive consumption of goods in paragraph 24 to 29 of its order as under:-

> *24. The learned Counsel also explained the Generation of Steam Power from Biogas by stating that the effluent (thick black liquid) generated in the process of manufacturing yeast is collected in lagoons where there is no oxygen and it is pumped into Anaerobic biogas digesters. The assessee's produces biogas in a methane digester where complex microbial mixtures are required to produce methane gas from the effluent. The numbers and type of bacteria in the anaerobic digester depend upon the composition of the effluent and the operating conditions of the digester. Methane gas is produced by a chemical reaction from the effluent by a process of anaerobic digestion which is used as a raw material to fuel specialized boilers in order to produce steam which again is a form of Power. In the boiler water is added and the boiler is heated through biogas to produce Steam Power. The Steam Power generated is sold to yeast manufacturing unit where it is captively consumed. The biogas so produced contains hydrogen sulphide which is removed by passing it through a scrubber in a sulphur removal plant which includes a reactor. Biogas is then transported through pipe lines to boilers where biogas is fired in the boiler to produce steam power. Steam power is then sold and transported through insulated pipelines to the yeast factory. The generation of steam power at the assessee's Steam Power generation undertaking at Sandila began on 31.01. 2000 and the generation of steam power at the assessee's Steam Power generation undertaking at Chiplun began on 01.03.2001.*
>
> *25. The assessee has separate plant and machinery for its Steam Power generation undertakings which are distinct and separate from the yeast manufacturing factories. The labour used at the steam power generation undertakings is also separate. In this regard the assessee relied on Factory Inspector's certificate dated 08.11.2006. Accordingly the assessee claimed deduction u/s 80IA of the Act for the profits derived from aforesaid undertaking engaged in generation of steam power. The initial year of claim for the assessee's Steam Power*

generation undertaking at Sandila was AY 2003-04 and the initial year of claim for the assessee's Steam Power generation undertaking at Chiplun was AY 2004-05. He also relied on Government of India, Ministry of Non-Conventional Energy Sources, vide Notification No: F No: 2/1/2005-UICA dated 25.07.2005 encouraged entrepreneurs by providing financial assistance to set up plant for energy/power generation from industrial and commercial waste and effluent. One of the objects of this notification is that production of biogas (source of renewable energy) from industrial waste and also power generation from biogas. By this notification, Government of India has clarified that biogas is a source of power and hence the contention of AO is totally wrong and without any scientific basis. Biogas is indeed a source of power. Therefore, the assessee is producing steam power from biogas and has rightly claimed deduction u/s 80IA of the Act. A copy of Government of India's Notification F.No.2/2/2005-UICA dated 25th July, 2005 is enclosed at Pages No 138 to 142 of the Continuation No 2 of assessee Paper Book No III. The biogas so produced contains hydrogen sulphide which is removed by passing it through a scrubber in a sulphur removal plant which includes a reactor and then transported through pipe lines to the boiler plant where biogas is fired in boilers to produce steam power. Steam power is then sold and transported through insulated pipelines to the yeast factory where it is captively consumed. For the AYs 2005-06, 2006-07, 2007-08 & 2008-09, Steam Power generation undertaking at Chiplun and Sandila produced steam power valued, the details of which are given by the assessee and can be verified by the AO. The production of steam power at assessee's Steam Power generation undertaking at Sandila began on 31.01. 2000 and at Chiplun began on 01.03. 2001.

26. The assessee relied on Patent No: JP2005152851 on Power Generation method using Biogas and Biogas Power Generation system, (Copy enclosed at Page No 143 to 157 of the Continuation No 2 of Paper Book No III), wherein the biogas generating system and method of power generation using biogas has been described. This patent is very much relevant and supports the assessee's contention that biogas is a source of power which is used for the generation of steam power. The assessee relied on United States America Patent No. 5423247 on Environmental Steam Energy Storage. A part of the invention is reproduced below:

> *"This invention relates to an environmental Steam Energy storage method and device which is able to transfer heat originating in heated water in a container for use for many purposes e.g. to transfer such heat to food products in the water or to beverages dissolved in the water, in an efficient manner and at atmospheric pressure. This invention also relates to such a method and device which is able to transfer heat originating in an empty container*

directly to a water containing food products, in a highly efficient manner and at atmospheric pressure. The present invention further relates to methods and devices to provide an environmental steam energy storage zone to transfer hot steam either firstly, into a heated container containing water or food, including dried vegetables or beverages dissolved in water; or, secondly, into a heated container containing vegetables or animal products, which contain molecular water therein." (Copy enclosed at Page No 158 to 169 of the Continuation No 2 of Paper Book No III)

27. The learned Counsel relied on the order of Delhi Bench of the ITAT in the case of SIAL SBEC Bio Energy Ltd. vs. DCIT (2004) 83 TTJ 866 on the issue of meaning the word power and that steam is a form of energy. He also relied on the case of West Coast Paper Mills Ltd 100 TTJ 833 for the proposition that deduction under Section 80-IA of the Act can be given for generation of steam power which is used for captive consumption. Further, the Mumbai Bench of the ITAT in the case of West Coast Paper Mills Ltd. vs. Jt. CIT (2006) 100 TTJ 833 held that the deduction provided in Section 80-IA are available to an assessee who generates power and consumes the power itself. The only condition that needs to be satisfied for the provisions of Section 80-IA of the Act to be attracted is that the undertaking must generate power. In that case the assessee generated power using two Diesel Generator Sets and it was held that the assessing authority was bound to grant a deduction to the assessee on the profits attributable to the generation of power from the two Diesel Generator Sets. Relying on judgements of the Apex Court and the Bombay High Court, as well as looking to the intention of the legislature (as construed from the memorandum explain the provisions of the Finance Bill, 1993) to encourage and incentive the generation of power, the ITAT has held that generation of power for captive consumption makes the assessee entitled to claim a deduction under Section 80-IA of the Act. The Hon'ble Madras High Court in case of Tamilnadu Petro Products Ltd. vs. ACIT (2011) 238 CTR 454 held that:

"5. The Division Bench also relied upon the decision of the Hon'ble Supreme Court in CIT v. Tanfac Industries Ltd., S.L.P. (C) No. 18537 of 2009 reported in [2009] 319 ITR (St.) 8 wherein, while applying Section 80IA of the Income-tax Act, the Hon'ble Supreme Court took a view that the value of steam used for captive consumption by the assessee was entitled to be deducted under Section 80 IA of the Act. On behalf of the Revenue, reliance was placed upon the circular of the Central Board of Direct Taxes dated October 3, 2001, and contended that the assessee was not entitled for the deduction. After making a detailed reference to the

contents of the said circular, the Division Bench has stated as under in paragraph 13 of the judgment:

"13. A perusal of the above said circular would clearly show that it is also in favour of the assessee. The said circular is very specific that in a case of captive power unit the provision of law is also the same as in the case of the undertaking which generates and distributes the power to any other concern. Further, it is a well-established principle of law that a circular can only be made in consonance with the provisions of the enactment and the same cannot be derogatory to the purport sought to be achieved. Hence, we are of the opinion that the circular relied upon by the learned counsel for the Revenue is in fact in favour of the assessee and, therefore, the said contention also cannot be accepted.

6. Mr. K. Subramanian, learned standing counsel for the respondent, would, however, contend that the expression "derived from" should be given restricted meaning in which event the claim of the appellant cannot be countenanced. According to the learned standing counsel, since the business of the appellant is manufacture of petro products and generation of electricity is not its business, it cannot be held that whatever profit earned, even notional profit, by virtue of captive consumption, cannot be construed as profit earned from and out of the income derived from the business undertaking."

7. In our considered opinion, the said contention can have no application to the case on hand. In as much as we dealt with the issue in the light of S.80IA and in particular sub-section (4) of the said section which provides for the benefit even in respect of electricity generation plant established by the assessee and the income derived from such enterprise of the assessee, it will have to be held that the assessee fully complied with the requirements prescribed under S. 80-IA in order to avail of the benefits provided therein. Therefore, the contention based on the interpretation of the expression "derived from" can have no application to the case where the provisions of S. 80-IA get attracted." (emphasis supplied) provides for the benefit even in respect of electricity generation plant established by the assessee and the income derived from such enterprise of the assessee, it will have to be held that the assessee fully complied with the requirements prescribed under S. 80-IA in order to avail of the benefits provided therein. Therefore, the contention based on the interpretation of the expression "derived from" can have no application to the case where the provisions of S. 80-IA get attracted."(emphasis supplied)

28. A similar view was taken by the Hon'ble Madras High Court in case of CIT vs. TANFAC Industries Ltd in Tax Case (A) No.1773 of 2008 regarding the eligibility to claim a deduction u/s 80IA of the Act for the sale of steam to its sister concern. This judgment was upheld by the Hon'ble Supreme Court (2010) 319 ITR (St) 8. The Hon'ble Madras High Court in the Tax case (Appeal) Nos. 68 to 70 of 2010 of CIT vs. Thiagarajar Mills Ltd. it was held that:

> *"9. Therefore, there is no difficulty in holding that captive consumption of the power generated by the assessee from its own power plant would enable the respondent/assessee to derived profit and gains by working out the cost of such consumption of power in as much as the assessee is able to save to that extent which would certainly be covered by Section 80-IA(1). When such will be the outcome out of own consumption of the power generated and gained by the assessee by setting of its own power plant, we do not find any lack of merit in the claim of the respondent/Assessee when it claimed by relying upon Section 80-IA(1) of the Income Tax Act by way of deduction of the value of such units of power consumed by its own plant by way of profits and gains for the relevant assessment years.*
>
> *10. Hence the contention of the learned counsel for the Revenue has no legal basis. It is a well settled principal of law that court while interpreting the provision will have to see the object of the enactment and its provisions. Hence, we are of the opinion that the interpretation sought to be made by the Revenue would be fact frustrate the vary purpose for which for which the benefit is provided in the said provision and therefore the same cannot be countenanced.*
>
> *11. In this context, we find that a decision of the Hon'ble the Supreme Court in CIT v. TANFAC INDUSTRIES LTD. S.L.P. (C) No.18537 OF 2009 reported in 319 ITR (Statutes),8, fully support the stand of the assessee. That was also a case where while applying Section 80-IA of the Income Tax Act, the Hon'ble the Supreme Court took the view that the value of steam used for captive consumption by the assessee was entitled to be deducted under Section 80-IA of the Act.*
>
> *12. The learned counsel for the Revenue has also submitted that as per the Circular of the Central Board of Direct Taxes dated 03.10.2001 the assessee is not entitled to the deductions. In order to appreciate the above said contention, the relevant portions of the said Circular is extracted here under:-*

"2. I am directed to say that the Board examined the above matter and are of the view that if an undertaking, which is set up in any part of India for the generation or generation and distribution of power, 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, 2006, will be eligible for the benefit of deduction u/s 80-IA. In case of a captive power unit, the provisions of law is also the same.

13.There may be a case where a captive power plant is set up by an undertaking which is different from the undertaking making use of the power generated. As long as the two undertakings are distinct and separate and there is an element of commercial profit and gains by the power generating undertaking from the Industrial user, the provisions of the Act with reference to the benefit of deduction under Section 80-IA to such said undertaking, would be available, within the frame work of law and subject to the following:-

i) The tax holiday provisions under Section 80-IA came into effect from the date such an undertaking begins to generate power. In a captive power plant, the date of generation may require determination by the Assessing Officer with reference to initial date on which such captive power plant starts generation.

ii) Where a captive power plant is merely hived off as a separate entity and not sold to a third party, owing to the close connection between the power generating undertaking and its industrial user undertaking, the transactions would require examination at the level of Assessing Officer to ensure that they are at arms' length and that the provisions sub-section (8) of Section 80-IA are not attracted adversely.

iii) Any grant of deduction under Section 80-IA of the Income Tax Act, 1961 should not be taken to legitimate something not permissible under the provisions of the Electricity Supply Act and related laws of various states and union.

iv) Where an undertaking generating captive power for the exclusive use of another industrial undertaking claims the benefit of deduction under Section 80-IA, the industrial user undertaking will not be eligible for claiming similar deduction in respect of the aforesaid power generating plant. Further, the user undertaking should also not debit

the expenditure incurred by the captive power generating undertaking in its own profit and loss a/c."

13. A perusal of the above said Circular would clearly show that it is also in favour of the assessee. The said Circular is very specific that in a case of Captive power unit the provision of law is also the same as in the case of the undertaking which generates and distribute the power to any other concern. Further, it is a well established principle of law that a Circular can only be made in consonance with the provisions of the enactment and the same cannot be derogatory to the purport sought to be achieved. Hence we are of the opinion that the Circular relied upon by the learned counsel for the Revenue is in fact in favour the assessee and therefore the said contention also cannot be accepted." (emphasis supplied)

In the case of Prabhu Spinning Mills Pvt. Ltd. vs. DCIT (2012) 31 CCH 277 the ITAT held that:

"18. In so far as the second issue regarding captive consumption is concerned, it is, admittedly, covered by the decision of the Hon'ble Madras High Court rendered in the case of CIT vs Thiagarajar Mills Ltd in Tax Case (Appeal) Nos. 68 to 70 of 2010, in favour of the assesse. Paragraphs 8 to 11 of the decision are reproduced herein below: The contention that only whatever power generated from the sale to an outsider or the Electricity Board and the profit or gain derived by such sale alone can be taken as profit or gains derived by the assessee as mentioned in Section 80-IA(1) of the Income-tax Act, has been rejected by the Tribunal in the order impugned. In our considered view, the Tribunal was well justified in having rejected such a stand of the tax Act, we are also convinced that what are all to be satisfied in order to be eligible for the deduction as provided under sub-section (1) of section 80-IA the assessee should have set up and an undertaking or an enterprise and from and out of such an undertaking or an enterprise set up, any profit or gain is derived, falling under sub-section covered by sub-section(4) of section 80-IA of the Income-tax Act such profit or gain derived by the assessee can be deducted in its entirety for a period of 10 years starting from the date of functioning of the set up. The contention that profit or gain can be claimed by the assessee only if such profit or gain is derived by the sale of its product or power generated to an outsider cannot be the manner in which the provisions contained in section 80-IA91 can be interpreted. The expression 'derived' used in the said section 80-IA in

the beginning as well as in the last part of sub-section(4) makes it abundantly clear that such profit or gain could be obtained by one's own consumption of the outcome of any such undertaking or business enterprise as referred to in sub-section(4) of section 80-IA. The dictionary meaning of the expression 'derive' in the New Oxford Dictionary of English states "obtaining something from a specified source." In section 80-IA(1) also no restriction has been imposed as regards the deriving of profit or gain in order to state that such profit or gain derived only through an outside source alone would make eligible for the benefits provided in the said section.

19. Therefore, there is no difficulty in holding that captive consumption of the power generated by the assessee from its own power plant would enable the respondent/ assessee to drive profit and gains by working out the cost of such consumption of power inasmuch as the assessee is able to save to that extent which would certainly be covered by section 80-IA(1). When such will be the outcome out of own consumption of the power generated and gained by the assessee by setting up its own power plant, we do not find any lack of merit in the claim of the respondent/ assessee when it claimed by relying upon section 80-IA(1) of the Income-tax Act by way of deduction of the value of such units of power consumed by its own plant by way of profit and gains for the relevant assessment years."

West Coast Paper Mills Ltd. vs ACIT [2014] 33 ITR (T) 560 (Mumbai - Trib.) - wherein ITAT, Mumbai held as under:

"The assessee's claim under section 80-IA, with regard to unit No. 6 is that it has installed a power unit in the form of chemical recovery boiler for the generation of steam. This steam is used firstly, to rotate the turbine which generates electrical power for the assessee which is used in the paper manufacturing process and secondly, for drying of the pulp. For the first use, the steam so generated by the chemical recovery boiler has a high temperature and pressure which is then transferred through the inlet to run the turbines. This transforms to electrical energy which is supplied to paper division for running of the machines. The second use of steam is independently using it for evaporating the moisture from the paper product or for drying pulp by the assessee. On these facts, whether it can be held that the said undertaking on a standalone basis has been set-up for generation of power or not within the meaning of section 80-

IA(4)(iv). The relevant clause (iv)(a) of section 80-IA(4), reads as under :

(a) is set up in any part of India for the generation and distribution if it begins to generate power at any time during the period beginning on the first day of April 1993 and ending on 31st day of March 2006."

21. Thus, the statute contemplates "generation of power" or "generation and distribution of power". The moot question before us is, whether the steam generated by the assessee, which rotates the turbine for running of machines used for its manufacturing process and also steam alone, is a form of power or not. The case of the learned Commissioner (Appeals) is that the meaning of power as contemplated in the statute is generation of electricity alone, whereas the case of learned counsel before us is that the power is a form of energy which can be electrical, mechanical, thermal or any other form of energy. The Income-tax Act, 1961, does not define the word "power". The New Oxford Dictionary of English defines the word "power" as "energy" that is produced by mechanical, electrical or other means which is used for operating device. Otherwise also, generation of steam is a kind of energy which can be converted into mechanical or electrical energy from which power is generated. To say that the generation of power is only restricted to generation of electricity alone, is too narrow a view. The term "power" encompasses a whole range of energy generated in various forms to run machines, devices, etc."

29. The Mumbai Bench of the Tribunal relying on the decisions in the case of SIAL SBEC Bioenergy Ltd. vs. DCIT (2004) 83 TTJ (Del) 866 held that generation/ production of steam is also a form of power and the unit of the assessee which is an undertaking set-up for generation of steam for its manufacturing process (i.e. for captive consumption) can be said to be for generation of power."

29. The question as to whether the goods should be capable of being traded or not was discussed by the Tribunal in paragraph 44 and 46 to 49 of its order as under:-

44. Insofar as the findings of the AO that the Cooling Power and Steam Power undertakings are part of the yeast manufacturing activity of the assessee is incorrect. In the case of Sirpur Paper Mills Ltd.(supra), a similar objection was raised by the Revenue as in that case the steam generated was used in the paper making process. Ground No 6 of the Revenue's Appeal in the Sirpur Paper Mills case was that the steam is

directly used in the paper making process and hence the steam producing facility cannot be treated as a separate or independent undertaking. It was held by the Hon'ble Hyderabad Bench of the Tribunal that,

> *"Ultimately the determinative factor would be whether the undertaking is producing a different article or thing or not whether for sale to outsiders or for captive consumption. The steam generated by the two units may be useful in the paper manufacturing process. But even then the question to be asked is whether it is a product which is capable of being sold to outsiders. The answer to this question has to be in the affirmative. The assessee itself may not have sold it to any outsider but the same is capable of being sold to any State Electricity Board or for that matter to any electricity generating unit. In fact, we see no reason why the same cannot be sold to anyone, though the assessee itself may have sold it to an outsider. It has used the entire steam generated either in the papermaking process or has transferred it to the turbine unit to generate electricity. If electricity used for captive consumption can be eligible for deduction, we see no reasons as to why steam which is also a form of power cannot be eligible for such deduction. Thus there is absolutely not force in the contention of the Revenue merely on the basis of its own appreciation about the maintenance of books of account that no separate undertaking exists. The aforesaid discussion rules out objection No 5 as well as Objection No 6 raised by the Revenue."*

From the above facts and discussion, it is clear that the very scheme of 80-IA of the Act as also referred and discussed in a catena of judgments was to encourage captively generation of power. There is no bar in the Section on an assessee to produce power at his power division and sell it to its his own manufacturing unit i.e. captive consumption……

46. The next objection of the AO was that unlike electric power, refrigeration power and steam power cannot be transmitted or traded and assessee had not been able to show any instance of trading in the above two forms of energy. Even if cooling power by way of chilled water is transported it will be transported in the form of water and not energy and hence what is traded is water not power. The assessee explained that the eligible business is defined in sub-section (4). As per sub section (4)(iv)(a) the following business is eligible for deduction u/s 80IA of the Act:

> *"an undertaking which is set up in any part of India for the 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."*

47. The assessee claimed that it generates Cooling Power and Steam Power which are captively consumed. Further, instead of doing the same work by employing electrical power has chosen to generate and sell cooling power and steam power for captive consumption for the production of yeast. Hon'ble Gujarat High Court in CIT vs. Ahmedabad Mfg. & Calico Printing Co. Ltd. [1986] 162 ITR 760, held that the assessee would be entitled for deduction under section 80-I of the Act irrespective of the fact whether the product is sold in the open market or is used for consumption in its other plant or units; such product should be taken at market price for the purpose of allowing deduction under section 80-I. The assessee also relied the decision of Jaipur ITAT in the case of Maharaja Shree Umaid Mills Ltd. 120 TTJ 711 (Jaipur) wherein it was held as under:-

> *"There is little room for any doubt that scientifically in general parlance, 'production of steam', and 'generation of steam' or for that matter, 'production of electricity' and 'generation of electricity', shall have the same meaning whichever of the two be the item under consideration. In this regard, the assessee had also referred to the definition of word 'generate' under section 2(29) of the Electricity Act, 2003 as per which 'generate' means to produce electricity from a generating station for the purpose of giving supply to any premises or enabling a supplier to be so given. The Assessing Officer had tried to point out the intention of the Legislature by referring to section 80-IA(4)(iv)(b) to infer that its intention is to provide benefit to the generation of electricity only, since in the sub-clause (b) transmission and distribution lines are mentioned which could be of electricity only. However, the submission of the assessee in this regard was appropriate that sub-clauses (a), (b) and (c) of section 80-IA(4)(iv) provide for deduction in the cases of three types of undertakings, viz., the first which is engaged in generation or generation and distribution of power; the second, which starts transmission or distribution lines; and the third, which undertakes substantial renovation and modernization of the existing network of transmission or distribution lines. All these three clauses deal with the three different categories of the undertakings. These three types of undertakings referred to in the said sub-clauses (a), (b) and (c) are different and independent of each other. Thus, while dealing with one sub-clause, inference need not and cannot be drawn from the other sub-clause.*
>
> *On a perusal of those provisions, the plea of the assessee was correct that its case fell in sub-clause*
>
> *(a) itself and the legislative intent inferred by the Assessing Officer with reference to sub-clause (b) was superfluous, just like*

there are transmission or distribution lines for electricity there are transmission and distribution lines for steam too. Therefore, there was no basis whatsoever for drawing distinction between the two or a room for any confusion between the two propositions. 'Power' and 'energy' are synonymous, which can be in several types and forms, be it heat, which is steam or mechanical or electrical, wind or be it thermal. If the intent of the Legislature remains to restore the application of the benefit of deduction under section 80-IA to generation of electricity only, it would have been specifically so worded by using the connotation 'electrical power' only rather than the connotation 'power' omnibus. Thus, there is no doubt that like electricity, steam is also a form of power. In the aforesaid circumstances, the decision arrived at by the Commissioner (Appeals) that the assessee was in the business of generation of power and that the steam so generated by the industrial undertaking and receipt from the business of industrial undertaking was within the meaning of section 80-IA was correct.

In the result, the revenue's appeal was to be dismissed."

48. In view of the above, it was explained that Section 80IA(8) of the Act provides that in case of captive consumption, the market value of the goods and services should be adopted for the purpose of calculation. The computation of the profit of the eligible unit was done taking the market value of the product. For this assessee relied on ITAT, Chennai Bench in the case of Sri Velayudhaswamy Spinning Mills Pvt Ltd vs. DCIT [12 ITR(T) 353] wherein it is held that :

Whether expression 'market value' used in section 80-IA(8) means value determined by market forces - Held, yes - Whether, in instant case, market forces would come into picture only when assessee bought power from State Electricity Board like any other consumer - Held, yes - Whether since price paid by assessee was Rs. 3.50 per unit, it had to be taken into account while computing amount of eligible profit available for deduction under section 80-IA - Held, Yes"

49. The assessee relied on following decisions wherein it was held that Captive consumption power generated is eligible for deduction u/s 80-IA;

i) CIT vs. TANFAC Industries Limited Tax Case No.1773 of 2008 wherein it was held by Hon'ble Madras High Court that Steam generated and consumed captively would be eligible for deduction u/s 80IA. This judgment was upheld by the Hon'ble Supreme Court as reported in (2010) 319 ITR (St) 8.

ii) In the case of West Coast Paper Mills Ltd. vs. ACIT (2014) 52 Taxmann.com 268the ITAT held that:

> *"As the Assessing Officer put it if the assessee has not realized any revenue by selling the power to outsiders, can the assessee be held to be entitled for deduction under section 80IA of the Act? The Assessing Officer was of the view that it is only an inter-division transfer and there was no revenue realized by it and consequently there was no derivation of profit or income in the business of industrial undertaking. The questions raised by the Assessing Officer have all been answered by the Supreme Court in the case of Orient Paper Mills Ltd., 176 ITR 110 SC*
>
> *ITAT allowed deduction u/s 80IA for power generated and consumed captively.*

III) CIT vs. Thiagarajar Mills Ltd. Tax Case (Appeal) Nos. 68 to 70 of 2010 Madras High Court held:

"9.Therefore, there is no difficulty in holding that captive consumption of the power generated by the assessee from its own power plant would enable the respondent/assessee to derived profit and gains by working out the cost of such consumption of power in as much as the assessee is able to save to that extent which would certainly be covered by Section 80-IA(1). When such will be the outcome out of own consumption of the power generated and gained by the assessee by setting of its own power plant, we do not find any lack of merit in the claim of the respondent/Assessee when it claimed by relying upon Section 80-IA(1) of the Income Tax Act by way of deduction of the value of such units of power consumed by its own plant by way of profits and gains for the relevant assessment years.

12. The learned counsel for the Revenue has also submitted that as per the Circular of the Central Board of Direct Taxes dated 03.10.2001 the assessee is not entitled to the deductions. In order to appreciate the above said contention, the relevant portions of the said Circular is extracted here under:-

"2. I am directed to say that the Board examined the above matter and are of the view that if an undertaking, which is set up in any part of India for the generation or generation and distribution of power, 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, 2006, will be eligible for the benefit of deduction

u/s 80-IA. In case of a captive power unit, the provisions of law is also the same.

3.There may be a case where a captive power plant is set up by an undertaking which is different from the undertaking making use of the power generated. As long as the two undertakings are distinct and separate and there is an element of commercial profit and gains by the power generating undertaking from the Industrial user, the provisions of the Act with reference to the benefit of deduction under Section 80-IA to such said undertaking, would be available, within the frame work of law and subject to the following:-

i) The tax holiday provisions under Section 80-IA came into effect from the date such an undertaking begins to generate power. In a captive power plant, the date of generation may require determination by the Assessing Officer with reference to initial date on which such captive power plant starts generation.

ii) Where a captive power plant is merely hived off as a separate entity and not sold to a third party, owing to the close connection between the power generating undertaking and its industrial user undertaking, the transactions would require examination at the level of Assessing Officer to ensure that they are at arms' length and that the provisions sub-section (8) of Section 80-IA are not attracted adversely.

iii) Any grant of deduction under Section 80-IA of the Income Tax Act, 1961 should not be taken to legitimate something not permissible under the provisions of the Electricity Supply Act and related laws of various states and union.

Where an undertaking generating captive power for the exclusive use of another industrial undertaking claims the benefit of deduction under Section 80-IA, the industrial user undertaking will not be eligible for claiming similar deduction in respect of the aforesaid power generating plant. Further, the user undertaking should also not debit the expenditure ITA Nos. 1634-1637&1777 - 1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) incurred by the captive power generating undertaking in its own profit and loss a/c."

A perusal of the above said Circular would clearly show that it is also in favour of the assessee. The said Circular is very specific that in a case of Captive power unit the provision of law is also the same as in the case of the undertaking which generates and distribute the power to any other concern. Further, it is a well

established principle of law that a Circular can only be made in consonance with the provisions of the enactment and the same cannot be derogatory to the purport sought to be achieved. Hence we are of the opinion that the Circular relied upon by the learned counsel for the Revenue is in fact in favour the assessee and therefore the said contention also cannot be accepted."

In case of DCW Ltd. vs. ACIT (2010) 132 TTJ (Mumbai) 442 - it was held that:

"Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings - Assessment year 2003-04 - Assessee claimed deduction under section 80-IA from its captive power plant unit - Assessing Officer allowed assessee's claim - On appeal, Commissioner (Appeals) reduced amount of deduction for following reasons: firstly, assessee had taken into account electricity tax levied by State Government while working out market price of electricity for purpose of section 80-IA(8), secondly, certain amount of indirect expenses was to be allocated to C.P.P. unit for calculating eligible profit under section 80-IAand, thirdly, income from sale of sludge and sale of steam was not eligible for deduction under section 80-IA - Whether price charged by assessee while transferring manufactured electricity from C.P.P. unit to its other unit including electricity tax levied by State Electricity Board was price ordinarily prevailing in open market, and, therefore, Commissioner(Appeals) was not justified in disallowing assessee's claim on said ground - Held, yes - Whether as regards second ground, incomes and expenditures which were not directly relatable to industrial unit had to be ignored and, therefore, Commissioner (Appeals) was not justified in allocating indirect expenses not directly relatable to industrial unit of assessee for purpose of computation of its income for deduction under section 80-IA - Held, yes - Whether as regards third ground, sale of sludge did not amount to income derived from industrial undertaking and, therefore, it was not eligible for deduction under section 80-IA - Held, yes -Whether, however, in view of fact that steam produced by assessee from eligible unit was a by-product and income from sale of steam was income derived from industrial undertaking, it was eligible for deduction under section 80-IA - Held, Yes"

In the case of Prabhu Spinning Mills Pvt. Ltd. vs. DCIT reported in (2012) 31 CCH 277 the ITAT held that: "18. In so far as the second issue regarding captive consumption is concerned, it is, admittedly, covered by the decision of the Hon'ble Madras High Court rendered in the case of CIT vs Thiagarajar Mills Ltd in Tax Case (Appeal) Nos. 68 to 70 of 2010, in favour of the assessee.

Paragraphs 8 to 11 of the decision are reproduced herein below: The contention that only whatever power generated from the sale to an outsider or the Electricity Board and the profit or gain derived by such sale alone can be taken as profit or gains derived by the assessee as mentioned in Section 80-IA(1) of the Income-tax Act, has been rejected by the Tribunal in the order impugned. In our considered view, the Tribunal was well justified in having rejected such a stand of the tax Act, we are also convinced that what are all to be satisfied in order to be eligible for the deduction as provided under sub-section (1) of section 80-IA the assessee should have set up and an undertaking or an enterprise and from and out of such an undertaking or an enterprise set up, any profit or gain is derived, falling under sub-section covered by sub-section(4) of section 80-IA of the Income-tax Act such profit or gain derived by the assessee can be deducted in its entirety for a period of 10 years starting from the date of functioning of the set up. The contention that profit or gain can be claimed by the assessee only if such profit or gain is derived by the sale of its product or power generated to an outsider cannot be the manner in which the provisions contained in section 80-IA91 can be interpreted. The expression 'derived' used in the said section 80-IA in the beginning as well as in the last part of sub-section(4) makes it abundantly clear that such profit or gain could be obtained by one's own consumption of the outcome of any such undertaking or business enterprise as referred to in sub-section(4) of section 80-IA. The dictionary meaning of the expression 'derive' in the New Oxford Dictionary of English states "obtaining something from a specified source." In section 80- IA(1) also no restriction has been imposed as regards the deriving of profit or gain in order to state that such profit or gain derived only through an outside source alone would make eligible for the benefits provided in the said section.

19. Therefore, there is no difficulty in holding that captive consumption of the power generated by the assessee from its own power plant would enable the respondent/assessee to drive profit and gains by working out the cost of such consumption of power inasmuch as the assessee is able to save to that extent which would certainly be covered by section 80-IA(1). When such will be the outcome out of own consumption of the power generated and gained by the assessee by setting up its own power plant, we do not find any lack of merit in the claim of the respondent/ assessee when it claimed by relying upon section 80-IA(1) of the Income-tax Act by way of deduction of the value of such units of power consumed by its own plant by way of profit and gains for the relevant assessment years."

30. It can be noticed that the co-ordinate bench of Tribunal has addressed all the reasons given by the assessing officer for rejecting the claim and has finally held that the assessee is eligible to claim deduction u/s 80IA(4)(a) of the Act in respect of profits arising from generation of steam and refrigeration power. Consistent with the view taken by the Tribunal and as can be noticed that the same has been taken by drawing support from various other decisions of Tribunal and High Courts, we hold that the assessee is eligible to claim deduction u/s 80IA(4) of the Act in respect of profit arising from transfer of steam power and refrigeration power for captive consumption.

31. The next issue relating to deduction u/s 80IA(4) of the Act, which is contested in the appeals of the assessee, relates to the quantum of deduction. We have noticed that the ld CIT(A) has modified the methodology of computing profit arising from power generation activities, by adopting different conversion factor and the same has resulted in reduction of quantum of deduction. Identical reduction was made in AY 2005-06 to 2008-09 and the Tribunal has discussed about the same in paragraph 50 to 66 of its order as under:-

> *50. The next issue in the appeals of assessee is as regards to the quantum of deduction claimed by assessee and restricted by the CIT(A). The assessee explained that it has submitted certificates from a Chartered Accountant in Form 10CCB as required under sub-section 7 of 80IA for Cooling Power generation and Steam Power generation undertakings at Chiplun and Sandila respectively along with the return of income. It was claimed that copies of Form 10CCB for AY 2005-06 to AY 2008-09 along with Profit and Loss and Balance sheet of each eligible undertaking is enclosed as part of assessee Paper book No I at Pages no 195 to 473 as follows:*

AY	*Cooling Power Chiplun*	*Steam Power Chiplun*	*Cooling Power Sandila*	*Ammonia Absorption Recovery Plant Sandila (Refrigeration power)*	*Steam Power Sandila*
2005-06	*Pg 195 to 201*	*Pg 202 to 208*	*Pg 209 to 215*	*Pg 216 to 222*	*Pg 223 to 229*
2006-07	*Pg 288 to 294*	*Pg 295 to 301*	*Pg 302 to 308*	*Pg 309 to 315*	*Pg 316 to 322*

2007-08	*Pg 376 to 382*	*Pg 390 to 396*	*Pg 383 to 389*	-	*Pg 397 to 403*
2008-09	*Pg 446 to 451*	*Pg 459 to 466*	*Pg 452 to 458*	-	*Pg 467 to 473*

51. The assessee explained the brief facts relating to Deduction Claimed For Generation of Cooling Power that the cost of generating cooling power has been arrived at based on actual cost records maintained and duly audited. Further for office and administrative expenses, these are based on the salary of one administrative staff each for its Cooling power generation undertakings at Chiplun and Sandila. The cost of each undertaking is recorded location wise in the audited financial statement enclosed along with Form 10CCB as above. As regards the quantum of units produced, the Cooling Power is measured in Tonnes of Refrigeration (TR). Based on the actual Cooling Power Generation the assessee records the Tonnes of refrigeration in the logbook which was not disputed either by the AO or the CIT(A).

52. In view of the above it was explained that as per Section 80IA(8) of the Act, where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date. Since Cooling Power which is generated by the assessee at its undertakings Chiplun and Sandila is captively consumed by the yeast manufacturing factories and is not sold to any outsider, the assessee in order to arrive at the market value of such goods taken the electricity rate of Maharashtra State Electricity Board and U.P. State Electricity Board as a base and has assigned the notional value of sales. The notional sales value which was lower than rate of electricity as per electricity bill when converted from TR to kw of electricity as shown as under: -

> *Power is a measure of the Work done divided by the Time taken to do the Work. Thus, when a 'Joule' is the unit of Work, and an 'Hour' is the unit of Time, the unit of Power is Joule/ Hour or Watt.*
>
> *Power = Work/Time = Joule/Hour = Watt*

One Ton of Refrigeration (TR) is equal to 11376 Kilo Joules/hour, which is equal to 3025 Kilocalories/hour, which is equal to 3.516 Kilo Watts of Power.

This is a standard rate of conversion of TR to Kw and the same can also be observed from the various research sites as submitted in Annexure 3

Refrigeration Tonnes to kilowatts (kW) conversion calculator from RapidTables.com, where it clearly show that 1 Refrigeration Tonne = 3.5168525 kW (rounded off to 3.52 kW). The Appellant has enclosed RapidTables.com at Page Nos 349 to 352 of Continuation No. 2 of Paper Book No. III which evidences the fact that 1 Tonne of Refrigeration [1TR] = 3.517 kilowatts (kW) of electric power.

53. Thereafter, the assessee applied the rate of Rs.8.17, Rs.8.17, Rs.8.17, Rs. 8.99 respectively per TR for the A.Y. 2005-06, 2006-07, 2007-08, 2008-09 which was lower than rate of electricity as per electricity bill for the Cooling Power generation undertaking at Sandila and the rate of Rs.4.92, Rs.8.17, Rs.8.17, Rs. 8.99 respectively per TR for the A.Y. 2005-06, 2006-07, 2007-08, 2008-09 which was also lower than rate of electricity as per electricity bill for the Cooling Power generation undertaking at Chiplun. The same are as under:-

Cooling Power Generation Undertaking at Sandila

AY	*Price Per Unit of Kw as per U.P. Electricity Board*	*Rate per TR at conversion rate of 1 TR = 3.517 Kw*	*Rate per TR adopted by the Appellant in the computation of deduction Section 80IA in the return*
2005-06	*Rs.3.61*	*3.61X 3.517=Rs.12.69*	*Rs.8.17*
2006-07	*Rs.3.62*	*3.62X3.517=Rs.12.73*	*Rs.8.93*
2007-08	*Rs.3.92*	*3.92X3.517=Rs.13.78*	*Rs.8.17*
2008-09	*Rs.3.76*	*3.76X3.517=Rs.13.22*	*Rs.8.99*

Cooling Power Generation Undertaking at Chiplun

AY	*Price Per Unit of Kw as per Maharashtra State*	*Rate per TR at conversion rate of 1 TR = 3.517 Kw*	*Rate per TR adopted by the Appellant in the computation of deduction under Section 80IA in the*

	Electricity Board		*return*
2005-06	*Rs.3.61*	*3.61X3.517=Rs.12.69*	*Rs.8.17*
2006-07	*Rs.3.62*	*3.62X3.517=Rs.12.73*	*Rs.8.17*
2007-08	*Rs.4.49*	*4.49X3.517=Rs.15.79*	*Rs.8.17*
2008-09	*Rs.4.52*	*4.52X3.517=Rs.15.89*	*Rs.8.99*

54. Thereafter, the assessee arrived at the net profit of the Cooling Power generation undertakings after deducting from sales price as above, the expenses directly incurred and the common expenses on a pro-rata basis and claimed the deduction for each undertaking as follows:

AY	*Cooling Power Chiplun*	*Cooling Power Sandila*	*Ammonia Absorption Recovery Plant Sandila (Refrigeration power)*
2005-06	*Rs.2,03,91,161*	*Rs.9,46,24,471*	*Rs.18,17,877*
2006-07	*Rs.4,43,61,550*	*Rs.9,39,65,151*	*Rs.16,47,348*
2007-08	*Rs.3,84,19,573*	*Rs.9,74,90,930*	-
2008-09	*Rs.4,54,17,690*	*Rs.12,42,10,859*	-

The assessee claimed that valuation per TR done by them is less than the State Electricity Board prices. Therefore, the deduction claimed by assessee u/s 80-IA of the Act for generation of cooling power be allowed. But the AO did not allow the claim for deduction under Section 80IA of the Act and he has in Paras 7.25 to 7.29 of assessment order for AY 2005-06 held without prejudice, that if at any appellate stage the assessee is entitled to deduction u/s 80IA of the Act, deduction should be computed by adopting the net profit rate of consolidated business. The AO did not accept the computation prepared by the assessee on the basis of notional sale and by allocating certain expenses from the accounts and held that profit from production of such energy should be computed at best at net profit rate of consolidated business (including manufacture of yeast) which was 2.75%, 14.97%, 23.13%, 26.41% in AY 2005-06, 2006-07, 2007-08, 2008-09 respectively. Aggrieved, assessee preferred appeal before CIT(A).

55. The CIT(A) in appeal accepted the claim of the assessee and allowed the deduction u/s 80IA for Cooling Power generation undertaking at Sandila. However CIT(A) reduced the quantum of deduction on the

ground that in his opinion the rate of conversion of 1 Tonne of Refrigeration equal to 3.52 kW of electricity as adopted by the assessee is much on the higher side and instead the rate of 1 Tonne of Refrigeration equal to 1.02 kW of electricity being rate applicable for modern chilling plant as per an article by one Henry Manczyk, which has been relied by CIT(A). The CIT(A) followed AY 2003-04 and held the conversion value of 1 Tonne of Refrigeration (TR) at 3.52 kW of electric power is on the higher side which has ultimately resulted in higher figure of profit. He referred to an article "Refrigeration Chiller Performance Analysis at Various loads" by Henry Manczyk, Director of Facilities Management, Lau Chester, NY dated April 2003, wherein he stated as per this analysis a modern chilling plant could produce 1 tonne of refrigeration for an average of 1.02 KW of electrical energy. The CIT(A) by adopting 1.02 KW as the rate of conversion rate instead of 3.52 kW adopted by the assessee, converted the tonnage of refrigeration power to electric power in kilowatts (KW) and thereafter applied a rate of Rs 4.63 per KW (being the state Electricity Board's price of electricity at the relevant time) and he computed the profit of the undertaking to which he added the expenses as claimed by the assessee and arrived at the sales value of the undertaking. He held the profit so computed of Rs 2,80,04,904 as being eligible for deduction under Section 80IA instead of deduction claimed by assessee of Rs 3,85,17,595/- for AY 2003-04.

56. The assessee before CIT(A) argued that the data used as above, applies in case where air is not a refrigerant. However in the present case, the refrigerant is air. Conversion Calculator from Rapid Tables.com is applicable, where it clearly show that 1 Tonne of Refrigeration [TR] = 3.5168525 kW (rounded off to 3.52 kW). This is Standard formula for converting 1 TR to KW. Therefore the comparison and reliance on the data in the said article by CIT(A) is totally misplaced. Further the conversion rate of 1 Refrigeration Tonne = 3.5168525 kW is a standard conversion of refrigeration tonnes and is universally recognized as such. This is also evident from report obtained by the assessee from M/s Engineering Services. copy enclosed at Page Nos 73 to 79 of the Continuation No 2 of Paper Book No III. The mathematical derivation of the formula for converting 1 Tonne of Refrigeration i.e. 1 TR = 3.5168525 KW is at Page No 79 of the Continuation No 2 of Paper Book No III. Further copies of websites wherein the conversion formula 1 Refrigeration Tonne = 3.5168525 kW is affirmed is enclosed as Annexure 3 to the note filed during the course of hearing before us. Further, assessee contended that reliance placed by CIT(A) on the article "Refrigeration Chiller Performance Analysis at Various loads" by Henry Manczyk is not available in public domain and hence it cannot be relied on. Further as can be observed from the table below at the conversion rate as per standard rate of 1 TR = 3.516 Kw the rate per TR as arrived

at by the assessee is lower than the price at which the State Electricity Boards have sold electricity:

Cooling Power Generation Undertakings At Sandila

AY	*Price Per Unit of Kw as per UP Electricity Board*	*Rate per TR at conversion rate of 1 TR = 3.517 Kw*	*Rate per TR adopted by the Appellant in the computation of deduction under Section 80IA in the return*
2005-06	*Rs.3.61*	*3.61X3.517=12.69*	*Rs.8.17*
2006-07	*Rs.3.62*	*3.62X3.517=12.73*	*Rs.8.93*
2007-08	*Rs.3.92*	*3.92X3.517=13.78*	*Rs.8.17*
2008-09	*Rs.3.76*	*3.76X3.517=13.22*	*Rs.8.99*

Cooling Power Generation Undertakings At Chiplun

AY	*Price Per Unit of Kw as per Maharashtra State Electricity Board*	*Rate per TR at conversion rate of 1 TR = 3.517 Kw*	*Rate per TR adopted by the Appellant in the computation of deduction under Section 80IA in the return*
2005-06	*Rs.3.61*	*3.61X3.517=12.69*	*Rs.8.17*
2006-07	*Rs.3.62*	*3.62X3.517=12.73*	*Rs.8.17*
2007-08	*Rs.4.49*	*4.49X3.517=15.79*	*Rs.8.17*
2008-09	*Rs.4.52*	*4.52X3.517=15.89*	*Rs.8.99*

57. The assessee also placed reliance on the order in the case of Sirpur Paper Mills Ltd. ITA Nos. 425/Hyd/01, 547/Hyd/06, 545/Hyd/06, 963/Hyd/06 vide order dated 18.05.2007, wherein it was held that each unit of steam should be valued at the same price at which the Andhra Pradesh State Electricity Board sold electricity and that the State Electricity Board rates are the true representative of the market rate.

58. The next Deduction claimed for Cooling Power Produced from Ammonia Absorption Recovery Plant (AARP) undertaking at Sandila for the first time in AY 2004-05 and thereafter for AY 2005-06 and AY 2006-07. CIT(A) in Para 32 of appellate order for AY 2004-05 allowed

the claim of deduction of the assessee under Section 80IA of the Act for Cooling Power generated from AARP undertaking. Further in Para 33 he has discussed the quantum of this claim wherein he held that per unit cost of Rs.15.71 should be restricted to average power cost during the year in Sandila Unit of Rs.5.32. Therefore, CIT(A) reduced the claim from Rs.23,31,945 to a loss of Rs. 10,44,728. He held that since net result is negative figure or a loss no deduction would be available.

59. The assessee before us claimed that for the AARP unit the CIT(A) has considered the conversion rate of 1 TR = 1.02kw by relying on article "Refrigeration Chiller Performance Analysis at Various loads" by Henry Manczyk . The assessee claimed that as the rate claimed of Rs.15.71 is higher than the price at which the U.P. State Electricity Boards have sold electricity which is based on conversion rate of ITR = 3.517 Kw which comes to Rs.12.69 and Rs.12.73 per Tonne of Refrigeration respectively for AY 2005-06 and AY 2006-07 respectively. Hence, the claim be restricted per TR based on Electricity Board's rate which comes to Rs Rs.12.69 and Rs.12.73 per Tonne of Refrigeration at the conversion rate of 1 Tonne of refrigeration - 3.516 Kw for AY 2005-06 and AY 2006-07 respectively being lower than the price claimed by the assessee of Rs 15.71 per TR.

60. The next claim of deduction is for generation of Steam Power and for this it was claimed that the cost of generating steam power has been arrived at based on actual cost records maintained and which were duly audited. For office and administrative expenses, the assessee allocated this based on the salary of one administrative staff at each of its steam power generation undertakings at Sandila and Chiplun. The cost of each undertaking is recorded in the location wise in the audited financial statement enclosed along with Form 10CCB. As regards the quantum of units produced, that is based on the meter recording the assessee records the Kilograms of steam generated in the logbook, disputed neither by the AO nor the CIT(A). As per Section 80IA(8) of the Act, where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date. Since Steam which is generated at Chiplun and Sandila by the assessee at its Steam Power generation undertakings is captively consumed by the yeast manufacturing factories, the assessee in order to arrive at the market value of such

goods taken the electricity rates of Maharashtra State Electricity Board and U.P. State Electricity Board as a base and has assigned the notional value of sales as under. For a few years the notional sales value was lower than price of electricity from state electricity boards as shown below. Further 1 Kg of steam is equivalent to 1 KW of electric power and computed as under:-.

Steam Power Generation Undertaking At Sandila

AY	*Price Per Unit of Kw as per UP Electricity Board*	*Rate per Unit adopted by the Appellant in the computation of deduction under Section 80IA in the return*
2005-06	*Rs.3.61*	*Rs.2.11*
2006-07	*Rs.3.62*	*Rs.2.11*
2007-08	*Rs.3.92*	*Rs.5.71*
2008-09	*Rs.3.76*	*Rs.5.71*

Steam Power Generation Undertaking At Chiplun Unit

AY	*Price Per Unit of Kw as per Maharashtra State Electricity Board*	*Rate per Unit adopted by the Appellant in the computation of deduction under Section 80IA in the return*
2005-06	*Rs.3.61*	*Rs.0.82*
2006-07	*Rs.3.62*	*Rs.1.08*
2007-08	*Rs.4.49*	*Rs.4.34*
2008-09	*Rs.4.52*	*Rs.5.71*

61. Thereafter, the assessee arrived at the net profit of the steam power generation undertakings after deducting from sales price as above the expenses directly incurred and the common expenses on a pro-rata basis and claimed the deduction for each undertaking as follows:

AY	*Steam Power Chiplun*	*Steam Power Sandila*
2005-06	*14,58,745*	*1,15,90,174*
2006-07	*47,21,189*	*1,55,35,607*
2007-08	*33,54,683*	*3,57,59,313*
2008-09	*67,90,153*	*77,70,175*

62. But the AO did not accept the computation prepared on the basis of notional sale and by allocating certain expenses from accounts and held that:

(i) The computation prepared by the Appellant on the basis of notional sale and by allocating certain expenses from considered accounts, some by process of identification as relating to the undertakings and some on an estimate basis. No scientific basis has been provided for these estimates.

(ii) profit from production of such energy should be computed at best at net profit rate of consolidated business (including manufacture of yeast) was 2.75%, 14.97%, 23.13%, 26.41% in AY 2005-06, 2006-07, 2007-08, 2008-09.

63. The CIT(A) followed AY 2003-04 in respect of profits from eligible business being generation of steam power adopting cost of producing steam by conventional boiler. He further held that the assessee has adopted new method of producing steam by using biogas and thereby achieved significant savings by way of cost and that the cost of steam by using a conventional boiler would not seem justified. Thereafter, he held that there is no data furnished either by AO or assessee for the price of steam produced by alternate methods. CIT(A) held that the notional receipts from steam in the profit and loss account should be reduced by 25% to make it appropriate and in AY 2003-04 the CIT(A) computed the deduction under Section 80IA for the steam power generating undertaking at Sandila as follows:

Sales receipt - Rs 87,67,180 Less 25% = Rs 65,75,385
Expenses - Rs 29,64,619
Profit - Rs 36,10,766
Deduction u/s 80 IA - Rs 36,10,766/-

Aggrieved, assessee preferred appeal before Tribunal.

64. The assessee claimed that they have valued each unit (kg) of steam power produced at their undertaking at Sandila at Rs.2.21, Rs.2.11, Rs.5.71, Rs.5.71 for the AYs 2005-06, 2006-07, 2007-08, 2008- 09 respectively and valued each unit (kg) of Steam Power produced at their undertaking at Chiplun Rs.0.82, Rs.1.08, Rs.4.34, Rs.5.71 for the AYs 2005-06, 2006-07, 2007-08, 2008-09 respectively. It was argued that a similar objection was taken in the case of Sirpur Paper Mills Ltd. ITA Nos. 425/Hyd/01, 547/Hyd/06, 545/Hyd/06, 963/Hyd/06 vide order dated 18.05.2007 in which case that assessee was also generating steam which was captively consumed in its paper manufacturing factory. Tribunal's Hyderabad Bench in Para Nos 20 to 26 which is on Page 244 to 247 of the Paper book held that the true representative of

the market price can only be the price of A.P. State Electricity Board (APSEB) because they are the major producers of electricity in the country and also since the assessee itself purchases electricity from APSEB. In view of the above, the assessee argued that that at the most the claim of the assessee can be restricted to the rates at which the State Electricity Board sold electricity to the assessee but the arbitrary reduction of 25% of the sales revenue without pointing out any discrepancy or defect in audited profit & loss account and without stating why the electricity rate as per State Electricity Board cannot be considered is not appropriate and that too when for a few years the assessee has adopted a price less than the State Electricity Board prices.

65. The reliance placed by assessee on the order of ITAT, Chennai Bench in the case of Sri Velayudhaswamy Spinning Mills (P.) Ltd vs DCIT [12 ITR(AT) 353] held that -

> *"Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings – Assessment year 2007-08- Assessee was a textile manufacturing company - It was having an independent windmill undertaking eligible for deduction under section 80-IA - Electricity generated by windmill was collected by State Electricity Board from generation point of assessee and later on it was released to assessee whenever required - State Electricity Board took over electricity generated by assessee at rate of Rs. 2.70 per unit - On other hand, State Electricity Board charged a rate of Rs. 3.50 per unit when power was supplied to industrial units including assessee - Assessee-company claimed deduction under section 80-IA adopting market rate of energy produced at rate of Rs. 3.50 per unit - Assessing Officer took a view that assessee had delivered power to State Electricity Board at rate of Rs. 2.70 per unit, therefore, same should be taken as market price generated by assessee - To that extent quantum of eligible profit of assessee had come down - Whether expression 'market value' used in section 80-IA(8) means value determined by market forces - Held, yes - Whether, in instant case, market forces would come into picture only when assessee bought power from State Electricity Board like any other consumer - Held, yes - Whether since price paid by assessee was Rs. 3.50 per unit, it had to be taken into account while computing amount of eligible profit available for deduction under section 80-IA - Held, yes [In favour of assessee]."*

Further, Hon'ble Supreme Court in the case of Thiru Arooran Sugars Ltd vs. CIT (227 ITR 432) held:

"Section 2(1A) of the Income-tax Act, 1961, read with rule 7(2) of the Income-tax Rules, 1962 - Agricultural income - Assessment years 1962-63 to 1967-68 - Whether formula contained in clause (b) of rule 7(2) will apply only in cases where agricultural produce is not ordinarily sold in market in its raw state or after any process applied to it to make it marketable - Held, yes - Whether in order to apply rule 7(2)(a), existence of an open market where buyers and sellers come together to do business is an essential pre-requisite - Held, no - Whether where there is no such open market an estimate of market price will have to be done on a hypothetical basis - Held, yes - Assessee-sugar manufacturer cultivated sugarcane and also purchased sugarcane from other individual cultivators presumably from door steps of cultivators - Whether, on facts clause (a) to Rule 7(2) applied and price paid by assessee to cultivators should be I taken as market price and non-agricultural income had to be arrived at accordingly - Held, yes"

66. Further, assessee also relied on the following judicial decisions wherein it was held that each unit of power should be valued at the same price at which the State Electricity Board sold electricity:

(i) West Coast Paper Mills Ltd. vs. ACIT 33 ITR (T) 560 (Mumbai - Trib.).

Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings (Eligible activity/ Steam generation) - Assessment year 2005-06 - Whether generation of steam is also a form of power and assessee would be eligible to claim deduction under section 80-IA with regard to its unit set up for generation of steam for its manufacturing process - Held, yes [Para 23] [In favour of assessee] Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings (Computation of deduction) -

Assessment years 2002-03 to 2005-06 - Whether transfer of price as contemplated in section 80-IA(8)has to be seen having regard to arm's length condition, i.e., what would be price under uncontrolled transactions in open market - Held, yes

- Whether while computing deduction under section 80-IA market value of supply of electricity by power unit of assessee to paper division of assessee had to be taken at same price at which paper unit had to purchase electricity directly from State Electricity Board - Held, yes - Whether if taxes and duties were part of price at which power/electricity was supplied by State Electricity Board to paper division, then same price was indicator of market value which was fetchable in open market and there was no reason to

exclude element of tax and duty from market price of electricity - Held, yes [Para 32] [In favour of assessee]

(ii) Judgement of Hon'ble High Court of Chhattisgarh in the case of CIT vs. Godawari Power & Ispat Ltd (223 Taxman 234) wherein it was held that:

Where assessee had established a Captive Power Plant in State of Chhattisgarh to supply electricity to its steel division, for the purpose of Section 80-IA deduction market value of power supplied by assessee to steel division should be computed considering rate of power charged by Chhattisgarh State Electricity Board for supply of electricity to industrial consumers

(iii) Judgement of Hon'ble Madras High Court in the case of CIT vs Cethar Ltd (228 Taxman 139), wherein it is held as under:-

"In Thiagrarajar Mills Ltd. T.C. (A) Nos. 68 to 70 of 2013, dated 7-6-2010, this Court, held that there is no difficulty in holding that captive consumption of the power generated by the assessee from its own power plant would enable the assessee to derive profits and gains by working out the cost of such consumption of power inasmuch as the assessee is able to save to that extent which would certainly be covered by section 80-IA(1). When such will be the outcome out of own consumption of the power generated and gained by the assessee by setting up its own power plant, there is no lack of merit in claim of the assessee when it claimed by relying upon section 80-IA(1) by way of deduction of the value of such units of power consumed by its own plant by way of profits and gains for the relevant assessment years. [Para 4]"

32. The Tribunal has rendered its decision on this issue in paragraph 70 of its order as under:-

70. In regard to quantum of deduction, the assessee has to take the electricity rate of Maharashtra State Electricity Board and U.P. State Electricity Board as a base for computing the rates. The notional sale value is to be converted from TR to KW, the conversion of the Tons of Refrigeration to Kilowatts being the unit of measurement for electric power, it should be taken at 1 Refrigeration Tonne =3.5168525 KW (rounded off to 3.51 KW). However the details can be verified by the AO at the time of giving effect to this order. Accordingly, this inter-connected issue for claim of deduction under section 80IA of the Act is allowed in favour of assessee. This issue of assessee's appeals is allowed and that of the Revenue's is dismissed.

Accordingly, consistent with the view taken by the co-ordinate bench, we set aside the orders passed by Ld CIT(A) on this issue in all the years under consideration and direct the AO to compute profit and deduction as discussed by the co-ordinate bench.

33. All the issues contested by both the parties with regard to the deduction u/s 80IA are decided in terms of our discussions made supra.

34. In AY 2009-10, the assessee is contesting the decision of Ld CIT(A) in upholding the view of the AO for reduction of subsidy received from Government towards power generation units from the cost of assets for the purpose of claiming depreciation. The facts relating thereto and the decision taken by Ld CIT(A) are extracted below from the order passed by Ld CIT(A) in AY 2009-10:-

> *8.0 Ground No.3 pertains to the disallowance of depreciation of Rs.8,21,250/- on grant given by the Government. The assessee received an amount of Rs.54,75,000/-from the Government and the same was shown under the head 'Deferred Income'. During the assessment proceedings, the assessee was asked to explain the allowability of subsidy in the assets and was also asked to explain as to why the subsidy amount should not be reduced from the cost of the assets for the purpose of arriving at the claim of depreciation, which is to be reduced by 15% of Rs.54,75,000/- i.e. at Rs.8,21,250/-. The assessee explained the definition of actual cost defined in section 43(1) of the Act and submitted that the subsidy is not related to the assets acquired and therefore, cannot be reduced from the total cost and the subsidy was given for encouraging the production of power from waste and effluents.*
> *8.1 The A.O did not accept the submission of the assessee on the ground that the subsidy given by the Government was in capital nature and the subsidy granted by the Government was for upgradation of business activities only and not to meet the revenue expenses of normal course of business activities. The A.O, relying on the Explanation 10 to section 43 of the Act, held that the amount of Rs.54,75,000/- needs to be reduced from the fixed assets and accordingly, the depreciation claimed by the assessee at Rs.8,21,250/- was accordingly disallowed.*
>
> *9.0 During the appeal proceedings, Ld. A.R. of the appellant filed written submissions. It is submitted that the subsidy is not related to any particular assets and is given for encouraging production of power from waste and effluents. The grant received is a capital receipt and was not given to supplement trade receipt. The appellant, relying on the*

decisions in the case of CIT vs. P.J. Chemicals (210 ITR 830) Stated that the subsidy is not deductible from actual cost. Further, it also relied on the decision in the case of Sadichha Chitra vs. CIT (189 ITR 774) (Bombay) stating that the grant received by the appellant is not taxable as revenue receipt but is a capital receipt.

Decision:

10.0 I have carefully examined the facts of the case, the stand taken by the A.O in the assessment order, the grounds of appeal and the written submissions filed by the appellant during the hearing proceedings.

10.1 The treatment to be given for the subsidy received from the Government is covered under the provisions of Explanation 10 to section 43(1) of the Act and the same is reproduced as under:

> *"[Explanation 10.—Where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee:*
>
> ***Provided** that where such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee.]"*

10.2 The provisions of the law is very clear that if the cost of an asset is met directly or indirectly by subsidy, then, so much of the cost as relatable to that subsidy shall not be included in the actual cost. It is also made clear that where such subsidy is of such
nature that it cannot be directly relatable to the asset acquired, in that situation, the proviso under Explanation 10 of section 43(1) of the Act is applicable.

10.3 The decision of Hon'ble Supreme Court in the case of CIT vs. P.J. Chemicals (210 ITR 830) is not applicable in view of the amendment in the Act by inserting Explanation 10 to section 43(1) of the Act by Finance Act, 1998 with effect from 01.04.1999. The Supreme Court did not have occasion to examine the new provision in the case of P.J. Chemicals. As far as the decision in the case of Sadichha Chitra vs. CIT (189 ITR 774) of Hon'ble Bombay High Court, the said decision is not applicable to the

facts of the appellant's case as the subsidy received has not been held as revenue receipt in the case of the appellant. Therefore, the addition of Rs.8,21,250/- being the depreciation worked out on the subsidy amount of Rs.54,75,000/- as added to the total income of the appellant by the A.O is hereby confirmed.

35. The contention of the Ld A.R is that the subsidy was granted under the Accelerated Programme for the recovery of energy/power generation from industrial and commercial wastes and effluents for implementation as notified by the Ministry of Non-conventional Energy Sources. The Ld A.R submitted that the object of the scheme was to encourage the recovery of energy/power generation out of non-conventional sources such as bio-gas etc and not to subsidies the cost of machineries. Accordingly the Ld A.R contended that Explanation 10 to sec.43(1) is not applicable to the instant case. The Ld A.R placed reliance on the following case law in this regard:-

(a) CIT Vs. P J Chemicals (210 ITR 830)(SC)
(b) CIT Vs. Rasoi Ltd (2011)(335 ITR 438)(Cal)
(c) ACIT Vs. Harinagar Sugar Mills Ltd (ITA No.772/Mum/2012)
(d) M/s Sasisri Extractions Ltd (122 ITD 428)(Visakha) and other decisions.

36. The Ld D.R submitted that the scheme itself has been framed to provide financial assistance for setting up of projects for recovery of energy from industrial wastes and incentives. Further it is specifically provided that it is a capital subsidy given for installation of bio-gas generation project. In this regard, the Ld D.R invited our attention to pages 414 to 419 of the paper book, wherein the documents relating to the scheme as well as correspondences are placed. Accordingly, the Ld D.R submitted that the Ld CIT(A) was justified in upholding the order of assessing officer in reducing the subsidy from the cost of assets.

37. We have heard rival submissions and perused the record. Page 414 of the paper book contains the details of scheme and it is stated therein that the scheme provides for central financial assistance for setting up of projects for recovery of energy from industrial wastes. Hence the object of the scheme, in

the instant case, is to subsidize the setting up of power plants. In the cases relied upon by Ld A.R, we notice that the object of scheme is different and it was not for subsidizing the cost of assets. For example the subsidy was given to promote industrialization of backward areas and the quantum of subsidy was decided on the basis of quantum of investments made, meaning thereby, the subsidy was not given to subsidize the cost of assets. In the instant case, the documents placed in page no.419 makes it very clear. The caption under the "subject" clearly states as "the sanction of capital subsidy and service charges for installation of ….biogas generation project …from yeast industry liquid waste…". Since the subsidy was given for the purpose of installation of power project, in our view, the same should be construed as given to subsidise the setting up of power plants, which means, it should go to reduce the cost of asset in terms of Explanation 10 to sec. 43(1) of the Act. Accordingly we uphold the order passed by Ld CIT(A) on this issue.

38. In assessment year 2011-12, the revenue is aggrieved by the decision of Ld CIT(A) in directing the AO to verify the correctness of disallowance made by the assessee u/s 43B and disallow correct amount. The assessee disallowed a sum of Rs.115.30 lakhs relating to Provision for gratutity for directors, u/s 43B of the Act. Later the assessee claimed that the correct amount to be disallowed was only Rs.58.38 lakhs and not the above said amount of Rs.115.30 lakhs. Since the AO took the view that the assessee could make this kind of revised claims only by filing return of income, he did not entertain the plea of the assessee. The Ld CIT(A), by following the decision rendered by Hon'ble Bombay High Court in the case of Pruthvi Brokers & Shareholders P Ltd (349 ITR 336) admitted the claim of the assessee and accordingly directed the AO to verify the claim of the assessee and allow the same, if found to be correct. The revenue is aggrieved by the said decision of Ld CIT(A).

39. We have heard the parties on this issue. We notice that the Ld CIT(A) has entertained the additional claim of the assessee by following the decision rendered by the jurisdictional High Court in the case of Pruthvi Brokers &

Shareholders P Ltd (supra) and has only restored the issue to the file of AO for examining the claim. If the action of Ld CIT(A) in restoring the matter to the file of the AO is considered to be beyond his power, then we may regularize the same by admitting the additional claim of the assessee. Since the additional claim requires examination at the end of the AO, we restore the same to the file of the AO for examining the claim of the assessee.

40. In the result the appeal of the assessee for AY 2009-10 is partly allowed. The other appeals of the assessee are allowed. The appeals of the revenue are dismissed.

Order has been pronounced in the Court on 16.05.2018.

Sd/-	Sd/-
(PAWAN SINGH)	(B.R.BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 16/05/2018

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

Senior Private Secretary
ITAT, Mumbai

PS