

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH 'A', CHANDIGARH**

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA Nos.555,405,556,557,558 & 559/Chd/2017

Assessment Years: 2007-08 to 2008-09 & 2010-11 to 2013-14

Asst. CIT,
Circle-3,
Ludhiana

Vs. M/s Mrs. Bectors Food Specialities Ltd.
BXXXIII/324, G.T. Road(west),
Ludhiana

PAN No. AABCM9495K

**C.O. No.26,27,28,29,30 & 31/Chd/2017
(In ITA Nos.555,405,556,557,558 & 559/Chd/2017)**

Assessment Years: 2007-08 to 2008-09 & 2010-11 to 2013-14

M/s Mrs. Bectors Food Specialities Ltd.
BXXXIII/324, G.T. Road(west),
Ludhiana

Vs. Asst. CIT
Circle-3,
Ludhiana

(Appellant)

(Respondent)

Assessee By : Sh. Subhash Aggarwal
Revenue By : Smt. Chandrakanta

Date of hearing : 20/02/2018
Date of Pronouncement : 21/05/2018

ORDER

PER BENCH:

All the above appeals have been filed by the Revenue and Cross Objection filed by the Assessee against the order of the Ld. CIT(A)-1, Ludhiana.

2. Year wise grounds of the appeal alongwith grounds of the cross objections are reproduced hereunder:

Grounds of ITA No. 555/Chd/2017 for A.Y. 2007-08 is as follows:

1. Whether upon facts and circumstances of the case in law, the Ld. CIT(A) is justified in restricting the addition from Rs. 36,02,230/- to Rs. 5,31,145/- thereby deleting the disallowance of Rs. 30,71,085/- made by invoking the provisions of section 14A of the Income-tax Act, 1961, by simply relying on the submissions of the assessee and not by giving any independent findings?

2. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs. 29,43,718/- u/s 80IC of Income Tax Act, 1961 on job work charges by simply relying solely on the submissions of the assessee and not by giving any independent findings?

3. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs. 16,05,289/- u/s 80IC of the Income-tax Act, 1961 in lieu of indirect benefit received by assessee from the parent company M/s.

Cremica Agro Foods Ltd., by simply relying solely on the submissions of the assessee and not by giving any independent findings?

4. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in allowing deduction of Rs. 17,32,506/- u/s 80IS by holding the assessee's NOIDA Unit to be Small Industrial Unit by simply relying solely on the submissions of the assessee and not by giving any independent findings?

Grounds of C.O. No. 27/Chd/2017 for A.Y. 2007-08 is as follows:

1. That the learned CIT(A)-1, Ludhiana, has erred in confirming the disallowance of Rs. 5,31,145/- u/s 14A being 10% of the dividend income of Rs. 53,11,447/-.

2. That it has been ignored that no expenditure was incurred by the appellant in earning the exempt income and even otherwise the disallowance of 10% of the exempt income is far too excessive.

3. That the confirmation is disallowance is against the law and facts of the case.

Grounds of ITA No. 405/Chd/2017 for A.Y. 2008-09 is as follows:

1. Whether upon facts and circumstances of the case in law, the Ld. CIT(A) is justified in deleting the disallowance made on account of Foreign Travel Expenses when the onus of the assessee to prove the business purpose has not been discharged?

2. Whether upon facts and circumstances of the case in law, the Ld. CIT(A) is justified in deleting the disallowance made u/s 14A of Income Tax Act, 1961 read with Rule 8D(iii) of Income Tax Rules, 1962?

3. Whether upon facts and circumstance of the case, the Ld. CIT(A) was justified in allowing deduction u/s 80IB by holding the assessee's NOIDA unit to be Small Scale Industrial Unit by simply relying solely on the submissions of the assessee and not by giving any independent findings?

Grounds of C.O. No. 26/Chd/2017 for A.Y. 2008-09 is as follows:

1. That the learned CIT (A) - 1, Ludhiana, has erred in confirming disallowance of Rs. 7,58,447 u/s 14A/Rule 8D(2)(iii) of the Income Tax Act.

2. That the confirmation of disallowance is against the law and facts of the case.

Grounds of ITA No. 556/Chd/2017 for A.Y. 2010-11 is as follows:

1. Whether upon facts and circumstances of the case in law, the Ld. CIT(A) is justified in deleting the addition of Rs. 13,37,809/- on account of disallowance of interest u/s 36(l)(iii) of the I.T. Act, 1961 on investment in purchase of land out of borrowed funds without appreciating the facts that the purchase land was not put to use for business and provisions by simply solely on the submissions of the assessee and not by giving any independent findings?

2. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs. 36,64,978/- u/s 80IC of the I.T. Act, 1961 on job work charges by simply relying solely on the submissions of the assessee and not by giving any independent findings?

3. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs. 10,04,438/- u/s 80IC of the Income-tax Act, 1961 in lieu of indirect benefit received by the assessee from the parent company M/s.

Cremica Agro Foods Ltd., by simply relying solely on the submissions of the assessee and not by giving any independent findings?

4. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs. 9,33,974/- out of Foreign Travelling expenses without appreciating the facts that expenditure by Directors on foreign tours for personal use of cannot be ruled out by simply relying solely on the submissions of the assessee and not by giving any independent findings?

Grounds of C.O. No. 28/Chd/2017 for A.Y. 2010-11 is as follows:

1. That the learned CIT(A)-1, Ludhiana, has erred in confirming the order of the AO in respect of sale tax subsidy by wrongly treating the same as part of income of the appellant ignoring the facts that the said amount of Rs. 61,59,656/- was in nature of capital receipt not liable to tax.

2. That the Ld. CIT(A) has erred in not following the judgment of the Hon'ble jurisdictional Tribunal which was binding on him.

3. That the Ld. CIT(A) has erred in confirming the order of the AO in upholding the disallowance made u/s 14A amounting to Rs. 1,51,728/- in assessment made u/s 115JB of the Income Tax Act.

Grounds of ITA No. 557/Chd/2017 for A.Y. 2011-12 is as follows:

1. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs. 14,76,483/- u/s 80IC of Income Tax Act, 1961 on job work charges by simply relying solely on the submissions of the assessee and not by giving any independent findings.?

2. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs. 17,10,872/- u/s 80IC of the Income-tax Act, 1961 in lieu of indirect benefits received by assessee from the parent company M/s. Crcmica Agro Foods Ltd., by simply relying solely on the submissions of the assessee and not by giving any independent findings?

3. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs. 5,90,103/- out. of Foreign Travelling expenses without appreciating the, facts that expenditure by Directors on foreign tours for personal use of cannot be ruled out by simply relying solely on the submissions of the assessee and not by giving any independent findings?

Grounds of C.O. No. 29/Chd/2017 for A.Y. 2011-12 is as follows:

1. That the learned CIT(A)-1, Ludhiana, has erred in confirming the order of the AO in respect of sale tax subsidy by wrongly treating the same as part of income of the appellant ignoring the facts that the said amount of Rs. 64,18,438/- was in nature of capital receipt not liable to tax.

2. That the Ld. CIT(A) has erred in not following the judgment of the Hon'ble jurisdictional Tribunal which was binding on him.

Grounds of ITA No. 558/Chd/2017 for A.Y. 2012-13 is as follows:

1. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs. 31,43,168/- u/s 80IC of Income Tax Act, 1961 on job work charges by simply relying solely on the submissions of the assessee and not by giving any independent findings.?

2. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs. 38,07,925/- u/s 80IC of the Income-tax

Act, 1961 in lieu of indirect benefits received by assessee from the parent company M/s. Cremica Agro Foods Ltd., by simply relying solely on the submissions of the assessee and not by giving any independent findings?

3. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs. 4,78,302/- on account of bad debts without appreciating the facts that no efforts were made to recover the same by simply relying solely on the submissions of the assessee and not by giving any independent findings?

Grounds of ITA C.O.No. 30/Chd/2017 for A.Y. 2012-13 is as follows:

1. *That the learned CIT(A)-1, Ludhiana, has erred in confirming the order of the AO in respect of sale tax subsidy by wrongly treating the same as part of income of the appellant ignoring the facts that the said amount of Rs. 57,17,950/- was in nature of capital receipt not liable to tax.*

2. *That the Ld. CIT(A) has erred in not following the judgment of the Hon'ble jurisdictional Tribunal which was binding on him.*

Grounds of ITA No. 559/Chd/2017 for A.Y. 2013-14 is as follows:

1. *Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs. 42,16,898/- u/s 80IC of Income Tax Act, 1961 on job work charges by simply relying solely on the submissions of the assessee and not by giving any independent findings.?*

2. *Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs. 43,44,775/- u/s 80IC of the Income-tax Act, 1961 in lieu of indirect benefits received by assessee from the parent company M/s. Cremica Agro Foods Ltd., by simply relying solely on the submissions of the assessee and not by giving any independent findings?*

3. *Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs. 99,032/- on account of bad debts without appreciating the facts that no efforts were made to recover the same by simply relying solely on the submissions of the assessee and not by giving any independent findings?*

Grounds of C.O. No. 31/Chd/2017 for A.Y. 2013-14 is as follows:

1. *That the learned CIT(A)-1, Ludhiana, has erred in confirming the order of the AO in respect of sale tax subsidy by wrongly treating the same as part of income of the appellant ignoring the facts that the said amount of Rs. 37,05,588/- was in nature of capital receipt not liable to tax.*

2. *That the Ld. CIT(A) has erred in not following the judgment of the Hon'ble jurisdictional Tribunal which was binding on him.*

3. Issue of Foreign Travelling Expenses:

A.Y. 2008-09 Ground No. 1 of Revenue's appeal

A.Y. 2010-11: Ground No. 4 of Revenue's appeal

A.Y 2011-12: Ground No. 3 of Revenue's appeal

3.1 During the course of assessment proceeding the Assessing Officer has noted the assessee has claimed expenses pertaining to foreign travel by the Directors and employees of the company. The A.O has disallowed 10% of the

expenses as the personal site seeing expenses cannot be ruled out. The disallowance made is on adhoc basis.

3.2 The Ld. CIT(A) deleted the addition on the grounds that the assessee had furnished before the Assessing Officer the copy of account of expenditure incurred during the year on account of foreign travelling of directors and employees of the assessee company.

3.3 The Ld. DR supported the order of the Assessing Officer.

3.4 The Ld. AR has contended that the directors and staff of the company undertook foreign tours for the purpose of exploring markets in the foreign countries. The Assessing Officer has failed to point out any expenditure of personal/non business nature and has made the disallowance of 10% out of the said expenses on estimated basis. Reliance has been placed by the AR on the decision of the Hon'ble ITAT Chandigarh Bench in the case of DCIT Vs. Rico Auto Industries Ltd. in ITA No. 689/13 vide order dt. 26/09/2013 wherein the Hon'ble ITAT has deleted the addition on the similar grounds.

Given the facts and circumstances, the said disallowance is held to be unjustified and is hereby ordered to be deleted. Since the order of the Ld. CIT(A) is based on the order of the Coordinate Bench of ITAT involving similar grounds, we decline to interfere in the order of the Ld. CIT(A).

3.5 Appeal of the Revenue on this ground is dismissed.

4. Issue of Disallowance of Bad Debts:

A.Y. 2012-13: Ground No. 3 of Revenue's appeal

A.Y. 2013-14: Ground No. 3 of Revenue's appeal

4.1 The Assessing Officer has disallowed bad debts of Rs. 4.78 Lacs(for the A.Y. 2012-13) claimed by the assessee on account of transactions with the distributors who in turn supply products of the assessee to the retailers. The retailers made claim against the distributors pertaining to the damaged stock. On settlement of the suits filed by the distributor, the amount was ultimately settled at Rs. 4.78 Lacs which the assessee written off permanently as bad debts. Ld. CIT(A) considered the facts of the case and allowed the claim made by the Assessing Officer as the assessee company has permanently written off the amount.

4.2 Since the action of the Ld. CIT(A) is in consonance with the provisions under section 36(1)(vii) and section 36(2) of the Income Tax Act,1961, and since

it is written off as irrecoverable in the taxpayer's books of accounts, we decline to interfere in the order of the Ld. CIT(A).

For the A.Y. 2013-14, the bad debts claimed by the assessee are on account of publicity charges not recovered from customers. The Assessing Officer disallowed the claim only on the basis that no efforts were made by the assessee to recover the amounts.

4.3 As per the judgment of Hon'ble Supreme Court in the case of TRF Ltd. Vs. CIT, bad debts need not be proven to be irrecoverable. It is sufficient if the same are written off. Since the issue is squarely covered by the provisions under section 36(1)(vii) and section 36(2) of the Income Tax Act, 1961, and since it is written off as irrecoverable, we decline to interfere in the order of the Ld. CIT(A).

4.4 This ground of appeal of the Revenue is dismissed.

5. Issue of Disallowance under section 36(1)(iii) on purchase of Land

A.Y. 2010-11: Ground No. 1 of the Revenue's appeal

5.1 The assessee has purchased land from HSIDC and paid amount out of the capital available to the assessee. The Assessing Officer has disallowed interest under section 36(1)(iii) of Rs. 13.37 Lacs out of the interest payments as the assessee has raised secured and unsecured loans to the tune of Rs. 99.80 Crores and paid interest of Rs. 9.56 Crores. The Assessing Officer opined that the investment in land cannot be regarded for the purpose of business or profession. Ld. CIT(A) after considering the matter found that the assessee has got Rs. 112.18 Crores of own funds and held that no disallowance is called for as the assessee has got sufficient own funds.

5.2 We have gone through the facts on record and find that the assessee has got sufficient funds as per the balance sheet as on year ending 2010. The share capital is of Rs. 2.57 Crores and the reserves and surplus are to the tune of Rs. 115.35 Crores. Hence, placing reliance on the decision of the Hon'ble jurisdictional High Court in the case of Bright Enterprises Private Ltd. ITA number 224 of 2013 dated 24/07/2015, and judgment in the case of a CIT Vs. Omax bikes limited ITA number 1085/2013 A.Y. 2008-09 dt. 24/07/2015, Hero Cycles Vs. CIT ITA NO. 314 & 493/2013 A.Y. 2009-10 dt. 16/02/2016 wherein it has been held that if sufficient interest free funds are available the presumption is that the advances have been made out of such funds and no disallowance of interest

under section 36(1)(iii) is called for, we hereby decline to interfere in the order of the Ld. CIT(A).

5.3 As a result this ground of appeal of the Revenue is dismissed.

6. Issue of disallowance of Section 80IC on indirect benefits

A.Y. 2007-08: Ground No. 3 of the Revenue's appeal (Cremica)

A.Y. 2010-11: Ground No. 3 of the Revenue's appeal (Cremica)

A.Y. 2011-12: Ground No. 2 of the Revenue's appeal (Cremica)

A.Y. 2012-13: Ground No. 2 of the Revenue's appeal (Cremica)

A.Y. 2013-14: Ground No. 2 of the Revenue's appeal (Cremica)

6.1 The relevant portion of the Assessment Order pertaining to disallowance is as under:

The assessee is running a unit at Tahliwal claiming exemption u/s 80IC of the Income Tax Act, 1961 established by M/s Cremica Agro Foods Limited in a industrial growth centre in the state of Himachal Pradesh as per section 80IC(2)(ii). M/s. Cremica Agro Foods Ltd. had taken the land on lease from Himachal Pradesh Government for establishing its unit in Himachal Pradesh. The funds and technical know how has been provided by the management since it was already running the similar business at Phillaur. The brand names, products, quantities, packing, sizes/ quantities of the saleable units of the products are the same, as per the discussions with the assessee during the assessment proceedings. The Tahliwal Unit has not paid any expenses for know how, goodwill, trade name, establishing expenses in the market for its products as it got a readymade market generated by Phillaur Units in the last 12 to 15 years, no patent rights expenses given to Phillaur Unit etc. All the Profits of Tahliwal Unit could not have been earned by a newly established independent group without having experience, expertise, market share, goodwill, trade name, know how etc. Therefore, as per Provisions of Section 80IA (8)&(10), 10% of the Profits earned by Tahliwal Unit are considered to be an indirect benefits derived from the parent unit i.e. Phillaur. It may not be out of place to mention that the group has struggled for twelve years to come at this level in the market through Phillaur Unit and had earned very small amount of profits as compared to Tahliwal Unit at present.

The assessee has submitted his reply on the issue as follows:-

"Regarding estimated amount of disallowance @ 10% of deduction u/s 80IC in respect of Tahliwal Unit on account some alleged indirect benefits derived from Phillaur Unit by Tahliwal Unit by applying provisions of sub section 8 & 10 to section 801 A. In this regard " it is submitted that no such benefits have been derived by Tahliwal Unit. Moreover the provisions of sub section 8 & 10 to section 801A are not applicable in these circumstances as these provisions refer to transfer of goods and service. While in the instant case there is no such transfer of any goods or service and no business has been transacted between the eligible Unit and other Unit of the assessee company which resulted in excess profit to the eligible unit. Unless until any specific benefit is pointed out and expressed in monetary terms, no addition can be made on the basis of conjectures and surmises."

I have duly considered the reply of the assessee. It is observed that the exempted unit is using all the services, reputation, goodwill, experience, depots facilities, sharing of staff for sales and distribution, network of established non-exempted units etc. Therefore, the provisions of sub-section 8 & 10 of Section 80IA r.w.s. 14A of Income Tax Act, 1961 are applicable in the case of the assessee. The Assessing Officer during the assessment proceedings of assessment year 2006-07 has

observed on this issue in the case of M/s. Cremica Agro Foods Ltd. , which is relevant this year also as follows:-

"8. The assessee is running a unit at Tahliwal claiming exemption u/s 80IC of the Income Tax Act, 1961 being established in a industrial growth centre in the state of Himachal Pradesh as per section 80IC(2)(ii). The assessee has taken the land on lease from Himachal Pradesh Government for establishing its unit in Himachal Pradesh. The funds and technical know how has been provided by the management since it was already running the similar business at Phillaur. The brand names, products, quantities, packing, sizes/quantities of the saleable units of the products are the same, as per the discussions with the assessee during the assessment proceedings. The Tahliwal Unit has not paid any expenses for know how, goodwill, trade name, establishing expenses in the market for its products as it got a readymade market generated by Phillaur Units in the last 12 to 15 years, no patent rights expenses given to Phillaur Unit etc. All the Profits of Tahliwal Unit could not have been earned by a newly established independent group without having experience, expertise, market share, goodwill, trade name, know how etc. Therefore, as per Provisions of Section 80IA (8)&(10), 10% of the Profits earned by Tahliwal Unit are considered to be an indirect benefits derived from the parent unit i.e. Phillaur. It may not be out of place to mention that the group has struggled for twelve years to come at this level in the market through Phillaur Unit and had earned very small amount of profits as compared to Tahliwal at present. Therefore, 10% of the net profits claimed to be exempted by assessee for Tahliwal Unit will be determined to be the benefits pertaining to Phillaur Unit who is running the similar business. An amount of Rs. 12,16,332/- taken @ 10% of the amount claimed to be exempted (Rs. 1,21,63,320/-) u/s 80IC as per Audit report will be added in the business income of the assessee for taxation purposes."

In the facts and circumstances of the case and as held in the last assessment year in the case of M/s. Cremica Agro Foods Ltd., Ludhiana on this issue 10% of the net profits (claimed to be exempted by assessee) of Tahliwal Unit will be determined to be the benefits pertaining to Phillaur Unit which is running the similar business. An amount of Rs.16,05,289/- taken @ 10% of the amount claimed to be exempted (Rs.1,60,52,899/-) u/s 80IC will be added in the business income of the assessee for taxation purposes.

6.2 The Ld. CIT(A) has deleted the addition based on the decision taken in the case of the assessee for the A.Y. 2006-07 in the Appeal no.03/ROT/IT/CIT(A)-I/LDH/2016-17 dated 26.10.2016 by holding as under:-

"I have considered the facts of the case, the basis of the additions made by the Assessing Officer and the arguments of the AR. The AO has reworked the claim under section 80IC between the Tahliwal unit and the Phillaur unit on estimated basis without bringing any evidence on record to show whether there has been any transaction between the two units. The appellant has made the allocation of all common expenses on turnover basis and the AO has failed to mention any expense which has not been considered in the said exercise. Thus, the reducing of the eligible profits to the extent of 10% by the AO without any sound basis is unwarranted and is hereby ordered to be deleted.

Further, the basic process is carried out by the appellant is the same whether the production is done for itself or job work. The Hon'ble Punjab and Haryana High Court in the case of CIT vs Impel Forge and Allied industries Ltd 326ITR 27 has held that the assessee is at liberty to manufacture for itself or others which makes no difference for the purpose of deduction under section 80IB of the act. Similar view was taken by the Hon'ble Delhi High Court in the case of CIT vs Northern Aromatics Ltd (2005) 196 CTR (Delhi) 479. In view of the same, the reduction in the claim made by the appellant under section 80IC on this account deserves to be deleted. These grounds of appeal are allowed".

6.3 The matter has further travelled to the Tribunal in the A.Y. 2006-07 which stands adjudicated in the favour of the assessee. For the sake of brevity the relevant portion of the order of the ITAT in the case of the assessee in ITA No. 39 & 40/CHD/2017 dt. 08/12/2017 in the case of M/s. Cremica Agro Foods Pvt. Ltd. for the A.Y. 2006-07.

28. Ground No.4 raised by the Revenue reads as under:

"4.Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance Rs.12,16,332/- made by the A.O. on deduction u/s 80IC claimed by the assessee on Tahliwal Unit without giving any reasons and by simply stating that the A.O. is highly unjustified in denying deduction u/s 80IC to the assessee on the basis of some notional expenses such as knowhow, goodwill, trade name etc. where the A.O. has very clearly held that the provisions of the section 80IA (8) and (10) read with section 80IC are applicable to the assessee's Tahliwal Unit only?"

29. The above ground is with respect to the deduction claimed u/s 80IC amounting to Rs.1,21,63,320/- in respect of Tahliwal unit which has been reduced by the Assessing Officer by 10% of the amount of net profits for the reason that the assessee is manufacturing biscuits on its own account as well as doing job work for ITC Limited at Tahliwal , H.P. and further it is also manufacturing biscuits at Phillaur unit , which is not eligible for any deduction of its profits. The Assessing Officer has held that since same business is being done at Phillaur unit , Tahliwal unit has derived benefits by way of knowhow, goodwill, trade name, etc. of Phillaur Unit and held that 10% of the profits earned by the Tahliwal unit were indirect benefits derived from the Phillaur Unit as per the provisions of section 80IA(8) & (10) of the Act .The Assessing Officer reduced the same from the deduction claimed u/s 80IC of the Act amounting to Rs.12,16,332/- 30. Before the Ld.CIT(Appeals) the assessee contended that it had specified all conditions laid down u/s 80IC(2) (a) (i i) of the Act and had rightly claimed the deduction, while the Assessing Officer had wrongly interpreted the provisions of sub-section (8) & (10) of section 80IA of the Act since these sub-sections referred to transfer of goods and services to any other business or to any other person while in the case of the assessee there was no transfer of goods or service to any other business or to any other person. It was pointed out that the assessee had already allocated the common expenses incurred to various units on the basis of turnover and, therefore, the denial of deduction to the extent of 10% of the profits on the basis of some notional expenses such as knowhow, goodwill , trade name, etc. was highly unjustified.

31. The Ld.CIT(Appeals) after considering assessee's submissions held the deduction of eligible profits by the Assessing Officer as unwarranted deleting the same by holding that the entire exercise of the Assessing Officer was done on estimate basis without bringing any evidence on record to show whether there was any transaction between the two units. The Ld.CIT(Appeals) held that the assessee having allocated all common expenses on turnover basis and the Assessing Officer have not pointed out as to which expenses had not been considered, this allocation of notional expenses by the Assessing Officer was unjustified and unwarranted. Relevant findings of the Ld.CIT(Appeals) at para 3.2 are as under:

"3.2 I have considered the facts of the case, the basis of the additions made by the Assessing Officer and the arguments of the AR. The AO has reworked the claim under section 80IC between the Tahliwal unit and the Phillaur unit on estimated basis without bringing any evidence on record to show whether there has been any transaction between the two units. The appellant has made the allocation of all common expenses on turnover basis and the AO has failed to mention any expense which has not been considered in the said exercise. Thus, the reducing of the eligible profits to the extent of 10% by the AO without any sound basis is unwarranted and is hereby ordered to be deleted.

32. Before us, the Ld. DR relied upon the order of the Assessing Officer while the Ld. counsel for assessee reiterated the content ion made before the Ld.CIT(Appeals) and relied upon the order of the Ld.CIT(Appeals) .

33. We find no infirmity in the order of the Ld.CIT(Appeals) . Undeniably, the reduction of profits to the extent of 10% has been done by the Assessing Officer on estimate basis without demonstrating by way of evidence whether any expenses on account of knowhow, goodwill, trade name, etc. had been incurred by the Phillaur unit with respect to Tahliwal unit . The same has not been demonstrated even before us. Further as rightly held by the Ld.CIT(A) , the provisions of section 80IA (8) and 80IA (10) cannot be invoked in the present case in the absence of any transaction between the two units. The Ld. DR has not pointed out any infirmity in the order of the Ld.CIT(Appeals) . We, therefore, uphold the order of the Ld.CIT(Appeals) in deleting the reduction of profits of the Tahliwal unit by 10% of the profits amounting to Rs.16,16,332/- . The ground of appeal No.4 raised by the Revenue is, therefore, dismissed.

6.4 As the matter stands adjudicated, following the ratio laid down which is squarely applicable to the appeals before us, the grounds raised by the Revenue on this issue are hereby dismissed.

7. Issue of disallowance of Section 80IC on Job Work:-

A.Y. 2007-08: Ground No. 2 of the Revenue's appeal

A.Y. 2010-11: Ground No. 2 of the Revenue's appeal

A.Y. 2011-12: Ground No. 1 of the Revenue's appeal

A.Y. 2012-13: Ground No. 1 of the Revenue's appeal

A.Y. 2013-14: Ground No. 1 of the Revenue's appeal

7.1 The relevant portion of the Assessment Order pertaining to disallowance on job work is as under:

During the assessment proceedings vide order sheet entry dated 27.11.09 the assessee was asked why proportionate deduction u/s 80IC on Tahliwal Unit may not be disallowed for the job work done to M/s ITC Limited as per the observations in the assessment order for A.Y. 2006-07 in the case of M/s Cremica Agro Food Ltd., Ludhiana. The assessee vide letter 4.12.09 stated as under:-

"Regarding disallowance of deduction u/s 80IC in Tahliwal Unit on job work done for ITC limited in the assessment year 2006-07 it is submitted that since the facts of the case are similar, you are requested to please refer to our reply dated 11th December, 2008 and 17th December, 2008 filed during the assessment proceedings of Cremica Agro Foods Ltd. (AY 2006-07)."

Further the assessee vide letter dated 18.12.2009 submitted as under:-

Regarding disallowance of deduction u/s 80IC on Tahliwal unit on income earned from job charges of ITC Limited in the assessment year 2006-07, we submit that we have correctly claimed the deduction U/S 80IC of the Income Tax Act, 1961 on income earned from job charges.

Reliance is placed on the following case laws:

ACIT Vs. Biotech Medicals P Ltd. (2009) 170 Taxman 3 (2009) 310 ITR 47 (AT)	Sec SOIB - Job Work/Conversion charges received by an industrial undertaking -
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(Hyd) (2009) 121 TTJ 858	entitled to 80IB. Profit on sale of scrap and interest on delayed payment have direct nexus with manufacturing activity.
CIT Vs. Northern Aromatics Ltd. (2005) 196 CTR 479 (Del) Warren Laboratories VS. DCIT (2005) 3 SOT 638 (Mum - Trib)	Sec-80IA - Assessee engaged in job work - eligible for deduction u/s 801 A.
ITO, Ludhiana V/s Impel Forge P Ltd. (2008) 36 ITRep 454 (Chd) med in(2009) 183 Taxman 38 (P&H)	S.80-IB - Deduction allowable to a manufacturing unit who does the job work involving the same processes for others. Section-80 IB-assessee is at liberty to do manufacturing for itself or for others, which makes no difference for purpose of deduction u/s 80-IB. Allowable on job work.

In view of above submissions we have correctly claimed deduction U/S 801C on the profits earned on job work."

The assessee is doing job work for M/s ITC Ltd. at Tahliwal. The assessee has provided the copy of agreement between M/s ITC Ltd., Kolkatta and M/s Cremica Agro Foods Ltd. dated 14th June, 2004. On the perusal of the agreement it is clear that the assessee is providing labour, electricity etc. while the quality supervision during the manufacturing and packing process is done by the employees of M/s ITC Ltd. M/s ITC Limited has provided the plant and machinery required for manufacturing of biscuits, packing etc. M/s ITC Limited is also providing raw material and itself incurring the expenditure for the transportation of raw material and finished products. No separate record as per assessee is being maintained for labour or electricity expenses or any job work expenses incurred by the assessee. The cost of all items on the job work to be performed by the assessee has already been carried out in the agreement as per Annexure B. The know-how including recipe, technology, process information etc. has been provided. The machines are owned by M/s. ITC Ltd. and has been given on hire as per a separate machine hiring agreement to M/s. Mrs. Bector Food Specialities Ltd. Clause 2.1 of Article 2 of the agreement provides that certain machinery and equipments for ITC Ltd. is lying will be hired out by ITC Ltd. under a separate machine agreement. The assessee has provided certain utilities and assets as per Annexure F of the agreement. However, these are being used commonly and M/s ITC Ltd. has contributed 50% for the same/Therefore, all the machinery is provided M/s ITC Ltd. to the assessee. As per the agreement M/s ITC Ltd. is ying to the assessee for electricity and light diesel & oil (LDO) charges per kg of the production.

The assessee has received a sum of Rs.7,60,06,474/- as job charges from M/s ITC Limited during the year.

The Assessing Officer during the assessment proceedings of assessment year 2006-07 has observed on this issue in the case of M/s. Cremica Agro Foods Ltd. , which is relevant this year also as follows:-

"9. The assessee is doing job work for M/s ITC at Tahliwal. The assessee has provided the copy of agreement between M/s ITC Ltd., Kolkatta and M/s Cremica Agro Foods Ltd. dated 14th June, 2004. The know-how has been provided by M/s ITC to the assessee and it further provides that the machinery provided by it will be used only for the manufacturing and packing the products of M/s ITC Ltd. The details of the machinery have also been provided in the agreement as Schedule 2 and Annexure F. On the perusal of the agreement it is cleared that the assessee is providing labour, electricity etc. while the quality supervision during the manufacturing and packing process is done by the employees of M/s ITC Ltd. M/s ITC is providing raw material and itself incurring the expenditure for the transportation of raw material and finished products. No separate record as per assessee is being maintained for labour or electricity expenses. The assessee has received Rs.6,21,91,396/- as job charges.

10. The income u/s 80IC is exempted only which is derived by an undertaking from the business of manufacturing or producing any article or thing not prohibited by thirteenth schedule of the Income Tax Act, 1961. The nature of income of job charges cannot be treated to have been derived by the undertaking by manufacturing or producing any article or thing by providing only the labour and electricity. Therefore the proportionate income derived from the job work cannot be claimed as exempted u/s 80IC. Since the assessee has not maintain separate accounts for various expenses incurred on the job work done by it, the income earned from this activity cannot be determined accurately. However, to compute the exempted income and non exempted income u/s 80IC, I adopt the method to calculate it on proportionate basis i.e. Job charges received divided by total sales multiplied by the profits. The depreciation on the machinery provided by M/s ITC has also not been claimed by the assessee, although, it has paid nominal lease charges @ Rs. 12,000/- per annum. The amount to be disallowed is as follows: -

Job charges	Rs. 6,21,91,396/-
Total sales	Rs. 46,23,23,692/-
Gross profits (80IC)	Rs. 1,21,63,320/-

Amount not exempted = $62191396 / 462323692 \times 12163320 = 16,36,199/-$.

11. Therefore, an amount of Rs. 16,36,199/- is treated as not exempted u/s 80IC derived from Tahlival unit (Una) and will be added that to the income of the assessee. The deductions for depreciation will not be allowed since the machinery of the assessee has not been used.

12. As per form No 10CCB the units has started its activity on 05.10.2004 and the initial assessment year is 2005-06. The Tahlival units has just commenced its operation and has earned profit of Rs. 1,21,63,320/- the net profit ratio is four times hire them the net profit of Phillaur units all those the gross profit ratio are almost the same. It shows that the assessee has planed the units in such a way that is earned more profit than Phillaur units since the income is exempted from income tax."

The income u/s 80IC is exempted only which is derived by an undertaking from the business of manufacturing or producing any article or thing not prohibited by thirteenth schedule of the Income Tax Act, 1961. It has been held by the Hon'ble Supreme Court in CIT vs. Sterling Foods (237 ITR 579) that the expression 'profits and gains derived from' have been used deliberately by the legislature as the intention was to cover only those receipts which accrued due to actual conduct of the business. Had the intention of legislature been to cover receipts from other sources as well, then instead of using the words, ' profits and gains derived from', the expression attributable to which has wider import, would have been used.

Further, to avail of the benefit of deduction provisions, the assessee has to establish that the profits and gains are derived from its industrial undertaking and it is not sufficient that a commercial connection was established between profits earned and the industrial undertaking. The industrial undertaking itself has to be the source of the profit. When the industrial undertaking is engaged in manufacturing then the profit earned from the manufacturing alone qualify for the deduction 80IB.

The nature of income of job charges cannot be treated to have been derived by the undertaking by manufacturing or producing any article or thing by providing only the labour and electricity. Therefore, the proportionate income derived from the job work cannot be claimed as exempted u/s 80IC. Since the assessee has not maintained separate accounts for various expenses incurred on the job work done by it, the income earned from this activity cannot be determined accurately. However, to compute the exempted income and non exempted income u/s 80IC, I adopt the method to calculate it on proportionate basis i.e.

Job charges received divided by total sales multiplied by the profits. The depreciation on the machinery provided by M/s ITC has also not been claimed by the assessee. The amount to be disallowed comes to Rs. 29,43,718/-, the details of same are as follows:-

Sales	Rs.33,84,77,491/-
Job charges	Rs. 7,60,06,474/-
Total (sales + job charges)	Rs.41,44,83,965/-
Net profits (80IC)	Rs. 1,60,52,899/-

Amount not exempted = $7,60,06,474 / 41,44,83,965 \times 1,60,52,899 = 29,43,718/-$
 Therefore, an amount of Rs.29,43,718/- is treated as not exempted u/s 80IC derived from Tahilwal (Una) and will be added that to the income of the assessee.

7.2 The Ld. CIT(A) deleted the addition following the earlier year's order.

7.3 The matter has further travelled to the Tribunal in the A.Y. 2006-07 which stands adjudicated in the favour of the assessee. For the sake of brevity the relevant portion of the order of the ITAT in the case of the assessee in ITA No. 39 & 40/CHD/2017 dt. 08/12/2017 in the case of M/s. Cremica Agro Foods Pvt. Ltd. for the A.Y. 2006-07.

34. Ground of appeal N.5 raised by the Revenue reads as under:

"5. "Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs.16,36,199/- made by the A.O. on deduction u/s 80IC on job work charges by simply relying on the submissions of the assessee and not by giving any independent findings?"

35. The above ground of appeal is regarding disallowance of deduction of proportionate profits of Rs.16,36,199/- on the job charges earned by the assessee from ITC Limited at the Tahliwal Unit . The assessee had received job charges of Rs.6,21,91,396/- from ITC Limited for the manufacture of biscuits. The Assessing Officer held that the assessee is not entitled to deduction u/s 80IC of the Act on the profits derived from the same which was computed on proportionate basis at Rs.16,36,199/- .

36. Before the Ld.CIT(Appeals) , the assessee relied upon on a number of case laws in support of its contention that even vis-à-vis profits derived from job work charges the assessee is entitled u/s 80IC of the Act . The Ld.CIT(Appeals) relying upon the decision of the Hon'ble jurisdictional High Court in the case of CIT Vs. Impel Forge & Allied Industries Ltd. , 326 ITR 27 and the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Northern Aromatics Ltd. (2005) 196 CTR 479 held that the assessee was entitled to claim deduction on profits earned on account of job work undertaken by it holding as under:

Further, the basic process is carried out by the appellant is the same whether the production is done for itself or job work. The Hon'ble Punjab and Haryana High Court in the case of CIT vs Impel Forge and Allied industries Ltd 326 ITR 27 has held that the assessee is at liberty to manufacture for itself or others which makes no difference for the purpose of deduction under section 80IB of the act. Similar view was taken by the Hon'ble Delhi High Court in the case of CIT vs Northern Aromatics Ltd (2005) 196 CTR (Delhi) 479. In view of the same, the reduction in the claim made by the appellant under section 80IC on this account deserves to be deleted. These grounds of appeal are allowed."

37. Before us, the Ld. DR did not point out any infirmity in the order of the Ld.CIT(Appeals) , nor did he bring to our notice any contrary decision of the jurisdictional High Court as opposed to that relied upon by the Ld.CIT(Appeals) while adjudicating the issue. In view of the same, we uphold the order of the Ld.CIT(Appeals) in deleting the reduction in the claim made by the assessee on account of job work charges amounting to Rs.16,36,199/- The ground of appeal No.5 raised by the Revenue is, therefore, dismissed.

38. Ground No.6 raised by the Revenue reads as under:

"6. "Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs.15 Lakh made on account of disallowance out of claim of interest u/s 36(l)(iii) of the Income-tax Act, 1961 simply relying on the submissions of the assessee ignoring the facts that the assessee could not provide the copies of accounts of various persons covered u/s 40A(2)(b) of the Income-tax Act, 1961 despite being given ample opportunity to do so?"

7.4 As the matter stands adjudicated, following the ratio laid down which is squarely applicable to the appeals before us, the grounds raised by the Revenue on this issue are hereby dismissed.

8. Issue of disallowance of Section 80IB on NOIDA Unit (SSI):-

A.Y. 2007-08: Ground No. 4 of the Revenue's appeal

A.Y. 2008-09: Ground No. 3 of the Revenue's appeal

A.Y. 2011-12: Ground No. 1 of the Revenue's appeal

8.1 During the assessment proceedings vide order sheet entry dated 27.11.09 the assessee was asked to justify the claim u/s 80IB amounting to Rs. 17,32,506/- taking into consideration various observations mentioned in the assessment order of A.Y. 2006-07 in the assessee's own case and in the case of M/s Cremica Agro Foods Limited.

8.2 The assessee vide letter 18.12.09 stated as under:-

"In the case of Cremica Agro Foods limited for assessment year 2006-07, the claim of 80IB has been disallowed by the Assessing officer on following grounds:-

1. *Considering manufacturing of Buns as Negative item under schedule eleventh of the Act.*
2. *Inclusion of certain assets as a part of Plant & Machinery while computing the total eligible value of Plant & Machinery for SSI Limit.*
3. *By Wrongly referring circular no S. O 2(E) dated 1st January 1993.*

Reply to Para-1 The Item no.6 of Eleventh Schedule of The Income Tax Act, 1961 makes mention of "Confectionery and Chocolates". The Word Confectionery as per Webster's Dictionary means "a candy"_ sweets and other confections collectively while the Word Bun which is purely a bakery item is defined as "a small, soft, slightly sweetened roll, often with raisins, a soft bread roll". As such A.O's interpretation was misconceived. Then again as per proviso to section 80 IB (2) (iii), Schedule XI is not applicable to the SSI units. Reply to Para-2. It is submitted that Central Government introduced MICRO, Small and Medium Enterprises Development Act in 2006, according to which the investment criteria for small scale industrial undertaking stands increased to Rs.500 lacs. The amount of total

investment in plant and machinery in Noida Unit during the year under reference is far below the prescribed limit of Rs.500 lacs. Reply to Para-3 It is humbly submitted that the circulars referred in preceding year are not relevant in our case.

However the company has fulfilled all the conditions laid down in section 80IB of The Income Tax Act, 1961."

8.3 The Assessing Officer in the assessment order for A.Y. 2006-07 has observed on the issue of allowance of deduction u/s 80IB for Noida Unit which has been purchased by the assessee during the year. The facts are same and the observations of the Assessing Officer are relevant and reproduced as follows:-

"3. As per the information submitted by the assessee during the assessment proceedings and submissions, it is running four separate industrial units i.e. one at Noida, one at Tahliwal, two at Phillaur. The Noida Unit is manufacturing buns basically for Mc Donald, the Tahliwal Unit is manufacturing biscuits and is also doing job work for M/s ITC by manufacturing the biscuits on the Plant & Machinery supplied by M/s ITC, one Unit at Phillaur is manufacturing biscuits and all the biscuits supplied in Afghanistan under World Food Programme were manufactured in it, the other units at Phillaur is manufacturing the namkeen products.

4. The Unit at Noida has been started since 7th December, 2001 and its first assessment year for claim u/s 80IB was 2002-03. It is working basically for M/s Mc Donalds by making buns and processing of LETTUCE LEAVES. The unit has been establish as a part of the same management i.e. M/s Cremica Agro Foods Ltd.

5. The assessee is claiming deduction u/s 80IB for Noida Unit. The said unit is recognised as small scale industry as per the order of Ministry of Commerce and Industry (Department of Industrial Policy and Promotion) issued vide S.O. 1288(E) dated 24th December, 1999 read with S.O. 857(E) dated 10th December, 1997. The S.O. 857(E) provides that no small scale industrial undertaking shall be subsidiary of, or owned or controlled by any other industrial undertaking.

The explanation 'C says that for the purposes of this note the expression "controlled by any other industrial undertaking" means as under: -

"i. where two or more industrial undertakings are set up by the same person as a proprietor, each of such industrial undertaking shall be considered to be controlled by other industrial undertaking or undertakings,

ii. where two or more industrial undertakings are set up as partnership firms under the Indian Partnership Act, 1932 (1 of 1932) and one or more partners are common partner or partners in such firms, each such undertakings shall be considered to be controlled by the other undertaking or undertakings,"

The S.O. 2(E) dated 1st January, 1993 has also defined the expression controlled by any other industrial undertaking" means as under: -

"i. where two or more industrial undertakings are set up by the same person as a proprietor, each of such industrial undertaking shall be considered to be controlled by other industrial undertaking or undertakings,

ii. where two or more industrial undertakings are set up as partnership firms under the Indian Partnership Act, 1932 (1 of 1932) and one or more partners are common partner or partners in such firms, each such undertakings shall be considered to be controlled by the other undertaking or undertakings;

iii. where industrial undertakings are set up by companies under the Companies Act, 1956(1 of 1956), an industrial undertaking shall be considered to be controlled by other industrial undertaking if,-

(a) the equity holding by other industrial undertaking in it exceeds 24% of its total equity or

(b) the management control of an undertaking is passed on to the other industrial undertaking by way of the Managing Director of the first mentioned undertaking being also the Managing Director or Directors in the other industrial undertaking or the majority of Directors of the Board of the first mentioned undertaking being the equity holders in the other industrial undertaking in terms of the provisions of (a) and (b) of sub-clause (iv);

(iv) the extent of equity participation by other industrial undertaking or undertakings in the undertaking or undertakings in the undertaking as per sub-clause (Hi) above shall be worked out as follows: -

(a) the equity participation by other industrial undertaking shall include both foreign and domestic equity;

(b) equity participation by other industrial undertaking shall mean total equity held in an industrial undertaking, by other industrial undertaking or undertakings. Whether small scale or otherwise, put together as well as the equity held by persons who are Directors in any other industrial undertaking or undertakings;

(c) equity held by a person, having special technical qualification and experience, appointed a Director in a small scale industrial undertaking, to the extent of qualification shares, if so provided in the Articles of Association, shall not be counted in computing the equity held by other industrial undertaking or undertakings even if the person concerned is a Director in other industrial undertaking or undertakings; (v) where an industrial undertaking is a subsidiary of, or is owned or controlled by any other industrial undertaking or undertakings in terms of sub-clause(i), sub clause(ii), or sub clause(iii), and if the total investment in fixed assets in plant and machinery of the first mentioned industrial undertakings and the other industrial undertaking or undertakings clubbed together exceeds the limit of investment specified in paragraph I or II of this Table, as the case may be, none of these industrial undertakings shall be considered to be a small scale or ancillary industrial undertaking."

6. In this case, the same management is running four industrial units at different places and the Written down Value of Plant & Machinery amounts to Rs. 8,50,84,132/- in addition to other misc. plant and machinery i.e. generator, water chilling plant, transformer, misc. fixed assets, misc. equipments, cooling conveyor, electric control panel, electric equipment, totalling to Rs.7,44,92,704/- which is much higher than the limits prescribed by the Notification issued by the Competent Authority for granting approval to an Industrial undertaking as Small Scale Industries. Therefore, as per the Provisions of Industries (Development and Regulation) Act, 1951 and the notifications discussed above. The assessee does not fall under the category of a small scale industry to get the benefits u/s 801B of Income Tax Act, 1961. The definition of Small Scale industry undertaking as also been given u/s 801B(14)(g) which states that an industrial undertaking on the last day of the previous year must be regarded as Small Scale Industry undertaking u/s 11(b) of the industries (Development and Regulations) Act, 1951. The assessee has not provided this certificate during the current assessment year.

6.1 The depreciation chart prepared by the assessee for Noida Unit shows the following plant and machinery under the head "fixed assets": -

Sr. No.	Particulars of assets	Balance as on 31 st March 2006
1	Crates and Moulds	39,38,644/-

2	Generator	1,86,916/-
3	Misc. Fixed Assets	18,65,078/-
4	Plant & Machinery	55,96,008/-
5	Transformer	1,47,859/-
6	Water Chilling Plant	3,62,554/-
7	Plant & Machinery (Lettuce plant)	1,04,611/-
8	Water Chilling Plant (Lettuce Plant)	3,29,200/-
	TOTAL	12530870/-

6.2 The total cost of plant and machinery amounts to Rs. 1,19,05,190/-: The assessee vide order sheet entry dated 26th December, 2008 was asked as follows:

"16. The total cost of Plant & Machinery on the following Plant & Machinery is Rs. 1,19,05,190/-:-

Generator, Lab equipment, Misc. fixed assets, Plant & Machinery Transformer, Trolleys, Water Chilling Plant, Weighing scale, Plant & Machinery (Lettuce Plant), Water Chilling Plant (Lettuce), Weighing scales(Lettuce Plant), Machinery under installations.

The total cost & Plant & Machinery as on date i.e. 26.12.2008 may also be given, if not possible then upto 30.09.2008/31.03.2008. The Building cost and under construction is Rs. 1,68,93,581/- which shows that it is a big Industry and out of the preview of the small scale industry. Explain why deduction u/s 80IB may not be disallowed?"

6.3 The assessee vide its reply dated 29th December, 2008 replied that the list of Plant and Machinery of Noida Plant to be considered for the purpose of SSI is enclosed. The details of the Machinery have been taken from the details submitted by the assessee. The assessee has shown the value at Rs. 55,96,008/- only while it has ignored the value of Crates and Moulds, generator, misc. fixed assets, transformer, trolleys, water chilling plant, Plant and machinery (Lettuce Plant), Water Chilling Plant(Lettuce Plant) etc. The Total value of total fixed assets has been worked out amounting to Rs. 4,69,92,552/- The classification of the assessee is not accepted as other equipments to be accounted for the purposes of valuing to come under small scale industry has been deliberately ignored. The assessee has also taken plant and machinery on lease from M/s Cremica Industries Pvt. Ltd. (Bread Manufacturer) and a sister concern of the assessee. It is paying 7.5 paise per bun for providing necessary machinery and know how during the year. The assessee has not given the details of the total plant and machinery given by M/s Cremica Industries Pvt. Ltd. and the cost of the same to it since the value of lease machinery has also to be accounted in the total cost for the limit of Rs. 1 Crore. The Total value of fixed assets has been worked out amounting to Rs. 4,69,92,552/- of the group.

7. The small scale industries as per section 80IB(2)(iii) should not produce any article or thing specified in the list in the Eleventh Schedule of the Act. As per list, six of the Eleventh Schedule it prohibits manufacturing of confectionary and chocolates. The manufacturing of buns is part of confectionary items. Therefore, the assessee cannot be given the benefit u/s 80IB. Since it is manufacturing an item listed in the Eleventh Schedule of the Income Tax Act, 1961. Therefore, in the above facts and circumstances as discussed in para 3 to 7, the claim of the assessee amounting to Rs. 39,14,380/- claimed as deduction u/s 80IB on Noida Unit is disallowed."

Therefore, on the same facts and circumstances and legal issues the deduction amounting to Rs. 17,32,506/- claimed u/s 80IB is disallowed and added back to the taxable income of the assessee.

8.4 The Ld. CIT(A) deleted the addition based on the order of his predecessor.

8.5 The matter has further travelled to the Tribunal in the A.Y. 2006-07 which stands adjudicated in the favour of the assessee. For the sake of brevity the relevant portion of the order of the ITAT in the case of the assessee in ITA No. 39 & 40/CHD/2017 dt. 08/12/2017 in the case of M/s. Cremica Agro Foods Pvt. Ltd. for the A.Y. 2006-07.

As pointed out above, the eligibility criteria for claiming deduction u/s 80IB as an SSI unit is that it should be regarded as an SSI undertaking u/s 11B of the IDR Act, 1951. Admittedly, the assessee has been issued such a certificate by the Directorate of Industries and which is valid for the impugned year also. The said fact has not been controverted by the Revenue. Therefore, having been issued such a certificate by the concerned Ministry itself, it is obvious that the assessee fulfills all the conditions required under the said Act to qualify as an SSI undertaking. The Revenue, therefore, could not have brushed aside the certificate issued by the concerned Ministry and examined whether the assessee actually qualified as such under the IDR Act, 1951. Even otherwise, we find that it has been established beyond doubt that the assessee fulfills the eligibility criteria of investments in plant and machinery being below the specified limit of Rs.1 crore as required under the IDR Act, 1951. As rightly pointed out by the Ld. counsel for assessee, not all assets qualify as plant and machinery, therefore, after excluding those assets specifically pointed out by the circular of the Ministry of Industries in S.O.857(E), the investment in plant and machinery amounted to only Rs.55,96,008/- . The Revenue has neither controverted the content ion of the Ld. Counsel for assessee that not all assets qualified as plant and machinery, nor has disputed the detail of qualifying assets filed before us. Therefore, for all purposes, the investments in plant and machinery of the Noida undertaking is well within the specified limit of Rs.1 crore to qualify as an SSI undertaking. Further, the Ld. counsel for assessee has also demonstrated that as per the applicable circular of the Ministry of Commerce clubbing of investments of undertakings of the assessee is not required. This fact has also not been controverted by the Revenue. Therefore, we find no merit in the content ion of the Revenue that for the purpose of determining quantum of investments in plant and machinery by the assessee undertaking, investments by all undertakings owned by the assessee are to be considered. For the aforesaid reasons, we hold that the Ld.CIT(Appeals) has rightly held the assessee to qualify as an SSI undertaking as per section 11B of the IDR Act, 1951.

23. *The next content ion of the Revenue for denying deduction u/s 80IB of the Act is that manufacturing of buns undertaken by the Noida unit is part of confectionery item which is a prohibited item for manufacture by SSI units claiming deduction u/s 80IB, as per Schedule XI of Income Tax Act, 1961.*

24. *On this issue, the Ld. counsel for assessee reiterated the content ion made before the Ld.CIT(Appeals) that the word "confectionery" as per the Webster's dictionary means "a candy" sweets and other confections collectively, while the word "bun" which is purely a bakery item is defined as "a small, soft, slightly sweetened roll, often with raisins, a soft bread roll". The Ld. counsel for assessee stated that interpretation of the Assessing Officer, therefore, is misconceived. It was further brought to our notice that the bread and buns fall in product code No.20-21 which were items reserved for exclusive manufacture by micro and small enterprise sector. It was pointed out that SSI certificate issued to the assessee clearly mention the manufacture of bread, buns, etc.*

25. *We have heard both the parties. We concur with the Ld. counsel for assessee that the assessee is not manufacturing a confectionery item which is prohibited as per 11th Schedule of the Income Tax Act. The meaning of word "confectionery" and "buns" as per Webster's dictionary coupled with the fact as pointed out by the Ld. counsel for assessee that the breads and buns fall under the items which are reserved exclusively for manufacture by micro and small enterprise and which fact have not been controverted by the Revenue*

adequately proves the assessee's case as rightly held by the Ld.CIT(Appeals) . We, therefore, hold that the breads and buns do not qualify as confectionery items and are thus not prohibited to be manufactured by SSI units as per the 11th Schedule of the Act .

26. In view of the above, we unhesitatingly hold that the assessee is an SSI unit as defined u/s 80IB(14(g) of the Act and is not manufacturing a prohibited item specified in the 11th Schedule of the Act and thus qualifies for deduction of its profits u/s 80IB of the Act as rightly held by the Ld.CIT(Appeals) .

8.6 As the matter stands adjudicated, following the ratio laid down which is squarely applicable to the appeals before us, the grounds raised by the Revenue on this issue are hereby dismissed.

9. Issue of disallowance Under Section 14A

A.Y. 2007-08: Ground No. 1 of the Revenue's appeal

A.Y. 2008-09: Ground No. 2 of the Revenue's appeal

A.Y. 2008-09: Ground No. 1 of the Cross Objection

A.Y. 2010-11: Ground No. 3 of the Assessee's appeal (115JB)

9.1 The facts pertaining to the assessment year 2007-08 are as under:

The ITAT, Division Bench, Chandigarh vide its consolidated order in ITA No. 1063/Chd/2011 (Departments appeal) & ITA No. 297/Chd/2014(assessee's appeal) dated 14.10.2015 restored back all the issues in both of the appeals to the file of learned CIT(A) for afresh adjudication after allowing reasonable opportunity of being heard to the appellant.

4. In view of the order of the Honorable ITAT, Division Bench, Chandigarh in ITA No. 1063/Chd/2011 (Departments appeal) & ITA No. 297/Chd/2014(assessee's appeal) dated 14.10.2015, the issues with regard to additions of Rs.36,02,230/- made by the Assessing Officer on account of disallowance of expenses by invoking provisions of section 14A of the Act as the assessee company has earned exempt dividend income, to be decided afresh.

In view of the directions of the Honorable, IT AT, Division Bench, Chandigarh dated 14.10.2015, the issues restored back to the file of learned CIT(A) decided afresh.

The assessee company had challenged the action of the Assessing Officer in making an addition of Rs.36,02,230/- on account of disallowance of expenses by invoking provisions of section 14A of the Act as the assessee company has earned exempt dividend income not forming part of total income of the assessee company.

9.2 Before the Ld.CIT(A) the assessee submitted as under:

The AO had disallowed a sum of Rs. 29,90,386/- u/s 14A /Rule 8D by taking the interest element of Rs. 2,19,62,710/- and further made the disallowance @ 0.5% on average investments amounting to Rs. 6,11,844/-.

The total disallowance made was Rs. 36,02,230/-.

The Ld. CIT(A) vide order dated 08.08.2011 had deleted the disallowance made u/s 14A / Rule 8D by following the judgment of Hon 'ble Bombay High Court in the

case of *Godrej & Boyce Manufacturing Co. Ltd vs. DCIT 328 ITR 81 (Bom)* which had held that rule 8D was not applicable in the assessment year 2007-08. Now the Hon 'ble Tribunal has set aside the issue again with the direction to decide the same afresh keeping in view the observations of the Hon 'ble Bombay High Court in the case of *Godrej Boyce*.

i) That all the investments in mutual funds amounting to Rs. 76.12 Crores were made out of own funds. During the year the appellant had received a sum of Rs.72 Crores from M/s Goldman Sachs (Mauritius) to whom 3,60,000 shares of the face value of Rs. 50 each were issued at a premium of Rs. 1950 per share. The total availability of funds was a sum of Rs. 102,27,93,580/- which was far above the investment in the mutual funds.

ii) That rule 8D was not applicable during the assessment year 2007-08.

iii) That the appellant earned dividend income of Rs. 53,11,447/- on which the AO had disallowed Rs. 36,02,230/- u/s 14A / Rule 8D. The appellant had not incurred any expenditure to earn the exempt income and the AO has not recorded any satisfaction that the appellant had incurred any expenditure which calls for disallowance. Reliance is placed on the case law attached separately.

iv) That without prejudice no disallowance is called for, the disallowance if any has to be on reasonable basis. The Hon 'ble jurisdictional High Court in the case of *CIT vs. Vardhman Textiles Ltd (P&H)* has held a sum of Rs. 1,00,000/- on dividend income of Rs. 31,21,953/- as a reasonable expenditure for making disallowance u/s 14A of the Income Tax Act, 1961. "

9.3 Ld.CTA) found that the impugned addition by invoking provisions of section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 as the assessee company has made investment in shares/mutual funds from which he has earned dividend income which will not form part of the taxable income of the assessee company. The Ld. CIT(A) held that Rule 8D cannot be applied to the instant case, for this year as Rule 8D cannot be applied retrospectively.

9.4 Since it cannot be said that the assessee has not incurred any expenses for earning dividend income which is exempt from tax, the Ld. CIT(A) held that the Assessing Officer is satisfied in disallowing the expenses. However since Rule 8D cannot be applied in the case of the company the Ld. CIT(A) has restricted the disallowance to 10% of the dividend income earned of Rs. 53,11,447/-.

9.5 Before us the Ld. AR in addition to the argument taken before the Ld. CIT(A), argued that the Hon'ble High Court has held a sum of Rs. 1,00,000/- as reasonable expenditure for earning dividend income of Rs. 31.21 Lacs.

9.6 The Ld. DR relied on the assessment order

9.7 We have gone through the facts of the case and agree with the decision of the Ld. CIT(A) that Rule 8D cannot be applied for the year 2007-08. However it cannot be said that the assessee has not incurred any expenditure in respect of

any exempt income. The total investment made by the company or to the tune of Rs. 76.12 crores and the dividend earned is Rs. 53.11 Crores. The assessee has got own funds for these investments which have been received in the form of share capital from M/s Goldman Sachs (Mauritius) to whom 360000 shares have been allotted. Keeping in view the peculiar facts and circumstances of the case a reasonable estimate of the expenses needs to be determined as Rule 8D cannot be invoked. We find that Ld. CIT(A) has reasonably estimated the disallowance keeping in view the entire facts and circumstances of the case. Hence we decline to interfere in the order of the Ld. CIT(A).

9.8 As a result the grounds of the Revenue as well as the assessee stands dismissed.

9.9 Regarding the assessment year 2008-09 the Ld. CIT(A) has rightly deleted the addition made by the Assessing Officer under Rule 8D(2)(i)&(ii). The Ld. CIT(A) has deleted the addition of Rs. 38,82,025/- out of the addition made by the Assessing Officer of Rs. 46,40,472/-. The Ld. CIT(A) has confirmed an amount of Rs. 7.58 Lacs under Rule 8D(3)i.e; half percent of the average value of the investment.

9.10 The Ld. DR submitted the following arguments:

Arguments of Department on disallowance of expenditure u/s 14 A rw rule 8 D:

1. S. 14A has been amended by introduction of sub section (2) and (3) and rule 8D w.e.f. A.Y. 2008-09. The amended provision of 14A states that if the AO is not satisfied with the correctness of assessee's claim in respect of expenditure in relation to exempt income or where an assessee claims that no expenditure has been incurred in relation to exempt income, then rule 8D(2) is mandatory and shall be invoked to determine such expenditure relatable to earning exempt income. Rule 8D(2)(ii) pertains to determination of interest expenditure in case of mixed funds. Rule 8D(2)(ii) leaves no scope for presumption as a mathematical formula has been prescribed.

2. Various courts have held that amendments to S 14A and insertion of rule 8D are prospective. Thus the judicial interpretation S 14A for A.Ys prior to A.Y. 2008-09 has no relevance while determining the disallowance u/s 14A rw rule 8D for A.Y. 2008-09 onwards. Reliance is place on following decision.

Hon'ble Punjab & Haryana High Court decision in the case of Punjab Tractors Ltd vs CIT ITA No. 458 of 2015 dated 03/02/2017 for A.Y. 2008-09.

The relevant extract of the decision is as under:

"2. The appeal is admitted on the following substantial questions of law framed by us:-

i) Whether the Assessing Officer had recorded satisfaction that the appellant- assessee's claim was incorrect?

- ii) Whether the Income Tax Appellate Tribunal had erred in upholding the application of Rule 8D of the income Tax Rules, 1962?
- iii) Whether the Tribunal erred in applying the provisions of Rule 8D(2)(ii) to the interest paid as opposed to the net interest earned by the appellant?

Regarding Questions (i) and (ii) the decision of Hon'ble court is as under:

40. The Assessing Officer on not being satisfied with the correctness of the claim by the assessee in respect of the expenditure incurred to earn exempt income ought to have applied Rule 8D which he did not. Instead he made an estimate on the basis that he considered to be reasonable. This he was not entitled to do. Where an Assessing Officer is not satisfied with correctness of the claim of the assessee, in this regard, he is bound by the provisions of sub section (2) of Section 14A to follow the prescribed method which at the relevant time was Rule 8D.

41. Questions (i) and (ii) are, therefore, answered in favour of the Revenue.

Regarding Questions (Hi) the decision of Hon'ble court is as under:

46. We leave the question as to whether such a presumption is valid and if valid whether it arises in this case open. The Assessing Officer must determine the same after taking all the provisions of law and the precedents into consideration.

47. If the Assessing Officer justifiably is not satisfied with the correctness of the assessee's claim regarding the expenditure, he must resort to Rule 8D entirely for the determination of the expenditure incurred with respect to the exempt income for the purpose of section 14A. For instance, if the assessee claims that he has not incurred any interest expenditure but has incurred administrative expenses or vice-versa and the Assessing Officer disagrees with either claim, Rule 8D cannot be applied only in respect of any particular clause of sub-rule (2) of Rule 8D. He must then determine the amount of expenditure incurred in relation to exempt income in accordance with Rule 8D.

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49. In the circumstances, questions (i) and (ii) are answered in favour of the respondent-revenue. It is agreed that the computation under Rule 8D shall be carried out in the first instance by the Assessing Officer. Needless to add that the parties are always at liberty to question the same in accordance with law.

Question (iii) is answered as per the clarification furnished by us above."

Hon'ble Punjab and Haryana High Court decision in the case of Avon Cycles Ltd vs CIT, in ITA No. 227 of 2013 dated 20/08/2014 for A.Y. 2008-09

In this case the Hon'ble High Court upheld the disallowance of interest expenditure computed as per rule 8D(2)(ii) for mixed funds. The Hon'ble High Court distinguished the decision of Bombay High Court in case of Reliance utilities (313 ITR 340) and Punjab & Haryana High Court in case of Hero Cycles (323 ITR 528) for the proposition that when interest free funds are available with the assessee then it will be presumed that such funds have been invested in various investment. The relevant extract of the judgement is as under:

"Learned counsel for the appellant refers to Bombay High Court judgement reported as Commissioner of Income Tax Vs. Reliance Utilities and Power Ltd. (2209) 313 ITR 340 as well as a Division Bench judgement of this Court in Commissioner of Income Tax Vs. Hero Cycles Ltd. (2010) 323 ITR 518, to contend that in view of the balance-sheet produced by the assessee, shall be presumed that the funds available with the assessee were sufficient to meet the investments out of its own funds and that borrowed funds were not utilized for investment. Therefore, interest, if any, paid on borrowed funds cannot be disallowed in terms of Section 14A .

In Reliance Utilities and Power Ltd. case (supra), the Revenue was in appeal before the Bombay High Court against an orders passed by the Income Tax Appellate Tribunal, where negating the argument of the Revenue that share holders funds to the tune of over Rs. 172 crores was utilized for the purpose of fixed assets in terms of the balance-sheet. It was found that a clear finding of fact was recorded that assessee had interest free funds of its own which had been generated in the year in question , which has been invested for earning exempt income."

Similarly, in Hero cycles Ltd. Case (supra), again the Revenue was in appeal. The Court has noticed that the Tribunal has held that the expenditure on interest was set off against the income from interest and the investment in the share and funds were out of the dividend proceeds. In view of finding of fact, disallowance under Section 14A of the Act was not found to be sustainable. The Court observed that as to whether any expenditure incurred was to be disallowed is a question of fact. It was held to the following effect: "In view of the finding reproduced above, it is clear that the expenditure on interest was set off against the income from interest and the investment in the share and funds were out of the dividend proceeds. In view of this finding of fact, disallowance under Section 14A was not sustainable. Whether, in a given situation, any expenditure was incurred which was to be disallowed, it is a question of fact"

In the present case, after examining the balance-sheet of the assessee, a finding of fact has been recorded that the funds utilized by the assessee being mixed funds, therefore, the interest paid by the assessee is also an interest on the investments made. Such being a finding of fact, we do not find that any substantial question of law arises for consideration of this court."

It is being argued that the decision of Avon Cycle is not relevant as Hon'ble Punjab & Haryana High Court in later judgement in the case of CIT vs Max India 110, ITA No. 186 of 2013 dated 06/09/2016 has upheld the principle of presumption in case of mixed fund. In this regard it is submitted decision of Max India pertaining to A.Y. 2002-03 and is hence not applicable to the present facts.

Hon'ble ITAT Chandigarh decision in the case of Munjal Sales Corporation vs ACIT in ITA No. 274/Chd/2015 dated 07/07/2015 for A.Y. 2009-10.

Hon'ble ITAT has held that the amendment to S 14A and rule 8D is prospective and that judgements rendered for AYs prior to AY 2008-09 will not be applicable in every situation. Hon'ble ITAT also upheld the disallowance made u/s 14A rw rule 8D and dismissed the appeal of assessee. The relevant extract of the decision is as under:

"9. From the above it emerges that decisions of Hon'ble Punjab & Haryana High Court in the case of CIT vs Hero Cycles Ltd., 323ITR 518(P&H) and CIT Vs. Winsome Textile Industries Ltd. in 319 ITR 203 (P&H) were found to be distinguishable because these decisions were rendered for assessment year 2004-05 and further there were certain findings of facts which may not be applicable in every situation. Secondly, to solve problem of quantum of interest to be disallowed and expenditure from common pool of interest and expenditure, Rule 8D has been introduced so that reasonable disallowance is made. In the above findings, the theory of proportionate disallowance as confirmed by Hon'ble Punjab & Haryana High Court in the case of CIT-1 vs Punjab Station Industrial Development Corporation Ltd in Income Tax Appeal No. 565 of 2006 vide order dated 18.7.2011 has been discussed in above noted pasras. Justification of Rule 8D as given by Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Co. Ltd Vs. DCIT 328 ITR 81 (Bom.) has also been discussed. In conclusion it can be said that Rule 8D is applicable from assessment year 2008-9 and, therefore, issue arising in this appeal have to be discussed on the premise that Rule 8D was applicable.

13. From the above it becomes clear that Hon'ble Court has confirmed that once there are mixed funds, Rule 8D has to be resorted. The same principle would apply in the case of expenditure incurred in earning exempt income."

(iv) Hon'ble Delhi High Court decision in the case of India bulls Financial services Ltd vs DCIT, ITA No. 470 of 2016 dated 21/11/2016.

The relevant extract is reproduced as under:

"7. Undoubtedly, the language of Section 14A presupposes that the AO has to adduce some reasons if he is not satisfied with the amount offered by way of disallowance by the assessee. At the same time Section 14A (2) as indeed Rule 8D(i) leave the AO equally with no choice in the matter inasmuch as the statute in both these provisions mandates that the particular methodology enacted should be followed. In other words, the AO is under a mandate to apply the formulae as it were under Rule 8D because of Section 14A(2). If in a given case, therefore, the AO is confronted with a figure which, prima facie, is not in accord with what should approximately be the figure on a fair working out of the provisions, he is but bound to reject it. In such circumstances the AO ordinarily would express his opinion by rejecting the disallowance offered and then proceed to work out the methodology enacted."

4 The case laws relied upon by the assessee is distinguishable on facts and is discussed as under:

- Max India Ltd pertains to A.Y. 2002-03 which is prior to introduction of Rule 8D and amendment to S.14A.
- In Kapsons associates no exempt income was earned by the assessee.
- Bright enterprise pertains to disallowance of interest expenditure u/s 36(1)(iii). In this section no mathematical formula has been prescribed and hence the presumption comes into place. While, Rule 8D(2)(ii) pertains to determination of interest expenditure

in case of mixed funds. Rule 8D(2)(ii) leaves no scope for presumption as a mathematical formula has been prescribed.

- Rakesh Gupta deals with disallowance of interest expenditure u/s 36(1)(iii).
- Honble ITAT decisions quoted by assessee have not considered the decision of Honble P/H HC in Avon Cycles and Punjab Tractor.

5. In view of the above submissions it is prayed that the disallowance made u/s 14A by the AO may kindly be upheld.

9.11 Ld. AR reiterated the arguments taken before the Ld. CIT(A) , he relied on the judgment of Cheminvest Ltd.

9.12 We have gone through the submissions of the Ld. DR and Ld. AR. While the DR's argument mainly deal with the issues of recording of satisfaction, applicability of Rule 8D, Rule 8D(2), disallowance of interest on mixed funds, retrospectivity or prospectivity of Rule 8D. Similarly the Ld. AR arguments in Cheminvest(supra) and the other case laws quoted during arguments also do not deal with Rule 8D (2)(iii){which stands omitted w.e.f 02/06/2016. The Ld. CIT(A) relied on M/s GlaxoSmithKline Consumer healthcare Ltd., Vs. DCIT in ITA No. 290/CHD/2014 for A.Y. 2008-09 wherein it is held as under:

"The second aspect of the issue is disallowance under Rule 8D(iii) of Income Tax Rules on account of administrative expenses. Admittedly, the assessee is not maintaining separate accounts in respect of its investment activity and in view thereof the provisions of Rule 8D of Income Tax Rules are squarely applicable and disallowance is to be computed in accordance with the said provisions of Rule 8D of Income Tax Rules for working out disallowance under [section 14A](#) of the Act. Accordingly, we uphold the order of the Assessing Officer in this regard. However, the assessee is entitled to the set off of the amount surrendered at Rs.6,06,977/-. In view thereof, ground Nos.8 to 8.4 raised by the assessee are partly allowed."

And also the decision in the case of Dhampur Sugar Mills Vs. CIT (All) in ITA No. 131/2014 wherein it was held that half percent of average investment is justified on account of disallowance under Rule 8D(2)(iii) on account of other expenses. Since the decision of the Ld. CIT(A) is based on the orders of the ITAT and the Hon'ble High Court, we decline to interfere in the order of the Ld. CIT(A).

9.13 As a result this ground of appeal of the Revenue and that of the assessee stands dismissed.

9.14 For the A.Y. 2010-11 the assessee has taken the grounds that the disallowance made under Section 14A cannot be considered in determination of tax under section 115JB.

9.15 This matter has been dealt by the special Bench of ITAT, Delhi Bench in the case of ACIT VS. Vireet Investments Pvt. Ltd. in ITA no. 502/Del/2012 and C.O. No. 68/Del/2014. It was held by the special bench placing the reliance on the decision of Hon'ble Delhi High Court in the case of Pr. CIT V. Bhushan Steel Ltd.: ITA No.593/2015 wherein it upheld the decision of the Tribunal in holding that disallowance under section 14A read with Rule 8D cannot be added while computing book profits as per section 115JB as Explanation to that section does not specifically mentions section 14A of the Income Tax Act, 1961.

9.16 Following the judgment of the Vireet Investments Pvt. Ltd(supra)we hereby direct that the disallowance made be deleted.

9.17 As a result this ground of appeal of the Assessee is allowed.

10. Issue of Sales Tax Subsidy

A.Y. 2008-09: Ground No. 2 of the Assessee's appeal (Additional Ground) – Transport Subsidy

A.Y. 2010-11: Ground No. 1 of the Assessee's appeal

A.Y. 2011-12: Ground No. 1 of the Assessee's appeal

A.Y. 2012-13: Ground No. 1 of the Assessee's appeal

A.Y. 2013-14: Ground No. 1 of the Assessee's appeal

10.1 The additional ground filed by the Assessee for the year 2008-09 is hereby admitted based on the ratio in the case of NTPC Vs. CIT 229 ITR 383 (Supreme Court).

10.2 The moot issue pertains to treatment of the sale tax subsidy as revenue receipt or capital receipt .

10.3 The assessee is the manufacturer of Biscuits at Phillaur and Tahliwal units, sauces, syrups and spreads at Phillaur unit, Bread and Buns at Noida and Mumbai units and Namkeen at Karnal unit. The assessee received Sale Tax incentive from the Himachal Government for Tahliwal Unit. The said incentive was received as per Himachal Government's notification of Excise and Taxation Department dated 24.08.2005. As per the notification the appellant was to pay 65% of the Sale Tax collected and the balance of 35% was to be treated as the subsidy. The assessee has also received transport subsidy for the year 2008-09 from Government of Himachal Pradesh.

10.4 The Ld. AR relied on various case laws and argued that the transport subsidy should be treated as capital subsidy.

10.5 Ld. DR argued that since the matter has not been adjudicated by the Revenue earlier and being a new ground admitted by the Tribunal for the first time the issue should be remanded back to the file of the Ld. CIT(A).

Further, we find that regarding the treatment of transport subsidy Hon'ble Supreme Court in the case of CIT Vs. Meghalaya Steels Ltd. (itatonline.org) held that it is not correct that assistance by way of subsidies which are reimbursed on the incurring of costs relatable to a business, are under the head "income from other sources", which is a residuary head of income that can be availed only if income does not fall under any of the other four heads of income. Section 28(iii)(b) specifically states that income from cash assistance, by whatever name called, received or receivable by any person against exports under any scheme of the Government of India, will be income chargeable to income tax under the head "profits and gains of business or profession". If cash assistance received or receivable against exports schemes are included as being income under the head "profits and gains of business or profession", it is obvious that subsidies which go to reimbursement of cost in the production of goods of a particular

business would also have to be included under the head "profits and gains of business or profession", and not under the head "income from other sources".

10.6 The issue of transport subsidy is hereby remanded back to the file of the Ld. CIT(A) to adjudicate the matter in the light of the decisions and guidelines issued by the Hon'ble Supreme Court.

10.7 Regarding the sale tax subsidy, the Ld. AR of the assessee company has submitted before the Ld. CIT(A) that the Honorable ITAT, Division Bench, Chandigarh has decided the issue in favour of the assessee company vide its consolidated order in ITA No. 392/Chd./2007 [A.Y. 2001-02], ITA No. 592/Chd/2007 [A.Y. 2003-04], ITA No. 824/Chd/2007 [A.Y. 2004-05], ITA No. 773/Chd/2012 [A.Y. 2006-07], ITA No. 283/Chd/2014 [A.Y. 2007-08], ITA No. 911/Chd/2013 [A.Y. 2010-11] in the case of M/s Vardhman Acrylic Limited, Chandigarh Road, Ludhiana, in ITA No. 897/Chd/2006 [A.Y. 2003-04], ITA No. 341/Chd/2007 [A.Y. 2004-05], ITA No. 756/Chd/2011[A.Y. 2008-09] in the case of M/s steel Strips Wheels Limited and in ITA 896/Chd/2006 [A.Y. 2003-04] in the case of M/s Indian Acrylic Limited dated .10.2015 and the appeal of the assessee company on the issue with regard to treatment of sales tax subsidy should be allowed in its favour.

10.8 Ld. CIT(A) held that he has considered all the decisions of Honorable ITAT mentioned above by the Ld. AR as well as the decision of Honorable Punjab & Haryana High Court in ITA No. 374 of 2005 dated 21.08.2006 in the case of M/s Abhishek Industries Limited wherein similar issue was involved.

Ld. CIT(A) after going through the judgments held that the issue with regard to treatment of sales tax subsidy stands decided by the Honorable Punjab & Haryana High Court in favour of the Department vide its order in ITA No. 374 of 2005 [A.Y. 1998-99] in the case of M/s Abhishek Industries Limited and confirmed the action of Assessing Officer treating sales tax subsidy received by the assessee company as revenue receipt as against the capital receipt considered by the assessee company.

10.9 Before us, the Ld. AR submitted various judgments which have been dealt hereunder.

In the case of Vardhman Acrylic Ltd. in ITA No. 911/CHD/2013 wherein the Tribunal held that the sales tax subsidy received by the assessee is capital in

nature on comparison of scheme of Government of Gujarat and West Bengal Incentive Scheme 1999. The analysis of the Tribunal is as under:

Now, the only issue to be decided by us is whether the amount of Rs.5,47,60,997/- received by the assessee from the Government of Gujarat as sales tax Subsidy is capital or revenue in nature. The learned counsel for the assessee at the very outset mentioned that these were a bunch of appeals before the Hon'ble Punjab & Haryana High Court together with the appeal of the assessee, out of which there was a case of Bhushan Limited, which was also similarly restored to the file of the Tribunal to decide the same afresh. The order of the Chandigarh Bench of the I.T.A.T. in the case of Bhushan Limited in ITA No.744/Chd/2006 & Others dated 16.6.2015 has been delivered, whereby after deliberating the issue on the nature of sales tax subsidy, the same has been held to be revenue in nature.

6. The learned D.R. did not controvert the said submissions made by the learned counsel for the assessee.

7. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. We have carefully perused the order of I.T.A.T. in the case of Bhushan Limited (supra) and come to a conclusion that this is one of the cases which was before the Hon'ble High Court on the same issue of sales tax subsidy. However, the only difference in the facts of the case of Bhushan Limited (supra) and the current assessee is that in the case of Bhushan Limited (supra), the sales tax subsidy was received from the Government of West Bengal under "West Bengal Incentive Scheme 1999", while in the case of the assessee in question, the subsidy has been received from the Government of Gujarat under the "New Incentive Policy-Capital investment Incentive to Premier/Prestigious Unit Scheme 1995-2000". Therefore, in order to compare the policies of two different States, we have very carefully gone through the schemes of both the Governments produced before us. Since as per the directions of the Hon'ble High Court, we have to judge the nature and purpose of the sales tax subsidy received by the assessee. We see that the scheme of the Gujarat Government has aimed to trigger off accelerated industrial development and economic growth. For this purpose, to provide special package to certain types of industries, the scheme was formulated. To be eligible to get the benefit of this scheme mainly the criteria has been laid down with regard to the fixed capital investment, project related infrastructural investment, social infrastructural investment and common and public purpose infrastructure. All these requirements are towards capital investments. Further a closer look at the clause relating to ineligible investment shows that short term investment or investment of revenue nature are not eligible for this scheme. A certificate of being declared as Permanent Prestigious Unit has been given to the assessee dated 18.5.2002, whereby the details of investment of the project and employment are given. We have also gone through the scheme of the Bengal Government which was in question before the Chandigarh Bench of the I.T.A.T. in the case of Bhushan Limited (supra). Though both the schemes of Gujarat Government and West Bengal Government are not verbatim, the sum and substance of both the schemes are same. As directed by the Hon'ble High Court on the basis of judgment in the case of Ponny Sugars & Chemicals Ltd. (supra), the nature of the sales tax subsidy is to be decided on the basis of character of the receipt in the hands of the assessee. We see that the sales tax subsidy received by the assessee is capital in nature and is not subjected to tax. In arriving at this conclusion, we are guided by the order of the I.T.A.T. in the case of Bhushan Limited (supra), in which the Coordinate Bench of the I.T.A.T. in the same set of facts and circumstances has held as under:

"24. The Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals Ltd. (supra) considering its earlier decision in the case of Sahney Steels & Press Works Ltd.(supra) directed that the test is that the character of the receipt in the hands of assessee has to be determined with respect to the purpose for which subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which subsidy is paid, is not relevant. The source is immaterial. The form of subsidy is immaterial.

25. Considering the facts of the case and the West Bengal Incentive Scheme, 1999 in the light of the judgement of the Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals Ltd. (supra), it is clear that the unit of assessee was set

up as per scheme formulated by Government of West Bengal and assessee has been allowed remission of sales tax for 12 years upto 100% of gross fixed capital investment/asset of the approved project. The incentive scheme was available for location of the unit. No incentive is available to units located in group 'A'. The unit of assessee is located in group 'B' (Hooghly). The subsidy would help the growth of industry and not to supplement profit. Subsidy is determined with reference to the fixed capital investment/asset and not profit. No working capital is considered in the scheme. The Id. DR says that the subsidy is given for 12 years after production and as such it is revenue in nature. The arguments of Id. DR cannot be accepted in view of the above facts because the scheme is made to encourage the promotion of industries/setting up in the State of West Bengal. The incentives are provided to approved projects only. The purpose of giving subsidy is thus, to promote and set up industries in State of West Bengal. The eligibility certificate was issued before commencement of production, therefore subsidy based on fixed capital investment. The time of 12 years after commencement of the production is not relevant. The source of subsidy out of sales tax is immaterial. The form of subsidy is also not relevant. The object/purpose of assistance under the subsidy scheme was to enable the assessee to set up new unit in State of West Bengal. Therefore, the receipt of the sales tax subsidy in the hands of assessee was capital in nature. The decisions relied on by Id. DR would not support the case of the revenue. The decision cited by Id. counsel for the assessee clearly support the submission of Id. counsel for the assessee that the sales tax subsidy received by the assessee are capital in nature. We may also note here that the same scheme under West Bengal Incentive Scheme, 1999 under reference was subject matter of consideration before ITAT Kolkatta Bench in the case of Keventer Agro Ltd. (supra) and the Tribunal also decided the issue in favour of the assessee holding that the West Bengal Incentive Scheme, 1999 categorically encourage the promotion of industries in the State of West Bengal. 26. Considering the facts and circumstances of the case in the light of decision of the Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals Ltd. (supra) and considering the above discussion, we are of the view that sales tax subsidy received by the assessee is capital receipt in nature and are not subjected to tax. The additions made by the Assessing Officer on account of receipt of sales tax subsidy are accordingly deleted in all the assessment years in appeals. The issue remanded to the Tribunal is thus, decided in favour of the assessee and against the revenue in all the appeals under reference."

8. Respectfully following the order of the Coordinate Bench of the Tribunal, we hereby hold that the sales tax subsidy received by the assessee is capital in nature and, therefore, not taxable.

9. The appeal of the assessee is allowed.

Further in the case of Mahavir Spinning Mills Ltd. in ITA No. 344/CHD/2009 wherein the Tribunal held similarly and treated the sale tax subsidy as capital in nature. In the case of Siya Ram Garg (HUF) Hon'ble Punjab & Haryana High Court held that the subsidy given for setting up of industrial unit in backward area was to be determined with reference to capital investment and distinguished Abhishek Industries Ltd. The excerpts of the judgment are as under:

The assessee is engaged in manufacture of yarn. It received subsidy of Rs. 12,16,090 from Haryana Government and claimed to be exempt from tax on the ground that the same was capital receipt. The AO disallowed the claim of the assessee by holding that subsidy was granted on 27th Jan., 1995 while operations of the assessee commenced on 16th Nov., 1994. Reliance has been placed on judgment of the Hon'ble Supreme Court in Sahney Steel & Press Works Ltd. v. CLT (1997) 142 CTR (SO 261 : (1997) 228 ITR 253 (SO and judgment of this Court in CIT v.

Abhishek Industries Ltd. (2006) 205 CTR (P&H) 304 : (2006) 286 ITR 1 (P&H). The CIT(A) allowed the appeal of the assessee holding that the subsidy was for setting up of industrial unit in backward area of Haryana and same has to be treated as capital receipt. The Tribunal affirmed the said view as follows :

"7. Having heard the parties and having perused the material on record, we find that the subsidy in question has indeed been given for setting up an agro based industrial unit in a backward area in the State of Haryana. The subsidy is determined with regard to capital investment. In Ponni Sugars & Chemicals (supra) relied upon by the Department, it has been held that the test to determine as to whether incentive subsidy received by the sugar mills was a capital receipt or a revenue receipt, is that the character of the receipt in the hands of the assessee is to be determined with respect to the purpose for which the subsidy is given; that the point of time at which the subsidy is paid, the source of the subsidy and even the form thereof are immaterial; that the main eligibility condition is that the incentive must be utilized; that if the object of the subsidy was to enable the assessee to set up a new unit, the subsidy was capital in nature.

8. Ponni Sugars & Chemicals (supra), therefore, aids the assessee rather than the Department. Admittedly, the subsidy granted to the present assessee has been granted for setting up of agro based industrial unit in a backward area in the State of Haryana. This fact situation is squarely covered by Ponni Sugars & Chemicals (supra).

9. Apropos Sahney Steel & Press Works Ltd. v. CIT (supra) and CIT v. Rajaram Maize Products (supra), these decisions also do not take anything away from the case of the assessee, as has been observed by the learned CIT(A) in as much as therein, the issue was as to what is a revenue subsidy which is taxable. It was held, inter alia, that subsidy granted for setting up of industry is not of revenue nature. That being so, there is no force in the allegation of the Department that the learned CIT(A) ignored Sahney Steel & Press Works Ltd. v. CIT (supra) and CIT v. Rajaram Maize Products (supra)."

3. We have heard learned counsel for the appellant.

it is clear from the findings recorded by the CIT(A), as affirmed by the Tribunal that the subsidy as given for setting up of industrial unit in backward area of Haryana and was to be determined with reference to capital investment. In such a situation, the plea of the assessee was supported by the view taken by the Hon'ble Supreme Court in CIT v. Ponni Sugars & Chemicals Ltd. (2008) 219 CTR (SC) 105 : (2008) 13 DTR (SO 1 : (2008) 306 ITR 392 CSC) which has been followed by the Tribunal and the view taken in Sahney Steel & Press Works Ltd. (supra) and Abhishek Industries Ltd. (supra) was distinguishable.

Further in the case of Industrial Organic and Pharmaceuticals Ltd. the High Court of Punjab & Haryana in ITA No. 420 of 2007 held that the subsidy received for establishing new factory is capital subsidy.

In the case of Talbros Engineering Ltd. 386 ITR 154 the Hon'ble Jurisdictional High Court has held that the sale tax subsidy received partakes the nature of capital as it is given for development encouraging the industries to set up their units in rural areas and for compensating for the hardship in setting up such industries in remote rural areas. The relevant portion of the judgment is as under:

The assessee received a subsidy of sales tax amounting to Rs. 21,68,938/- which was claimed as a capital receipt not chargeable to tax. On being asked as to why the subsidy be not treated as revenue receipt, the assessee stated that it was given as per the scheme of the State Government for encouraging the

industries to set up their units in rural areas and for compensating for the hardship in setting up such industries in remote rural areas. The Assessing Officer treated this amount as revenue by relying upon judgment of the Apex Court in *Sahney Steel & Press Works Ltd. v. CIT* [1997] 228 ITR 253/94 Taxman 368. The CIT(A) treated this amount as capital receipt holding that if the purpose of the subsidy was to help the assessee to set up its business or complete a project, the amounts must be treated to have been received for capital purpose. The Tribunal after considering the matter upheld the deletion made by the CIT(A) observing that if some subsidy is given for encouraging the industries, for setting up units in the remote or rural areas etc. then such subsidy assumes the character of a capital receipt. If subsidy is given for enabling an assessee to run its business more profitably, then it would amount to an operational subsidy chargeable to tax.

10.10 Against the argument of the Ld. AR the Ld. DR relied on the order of the Assessing Officer.

The Assessing Officer has quoted the following excerpts from the scheme :

"We are entitled for Sales Tax incentive from. State Government in respect of setting up a new unit in the State of Himachal Pradesh at Tahliwal, District Una. As per Industrial policy of Himachal Pradesh there was deferment of general Sales Tax for the period of eight years. In August 2005, a notification was released by Government of Himachal Pradesh, Excise & Taxation Department that units availing deferment can avail option, according to which person on depositing 65% of tax liability, would have been deemed to be paid off entire tax liability. So Company in 2005 opted for this option under said notification, the copy of this notification is enclosed."

iii) The assessee was again issued show cause vide Note Sheet Entry dated 15.03.2013 wherein the assessee was given an opportunity to substantiate its claim of Sales Tax Incentive as a Capital Receipt. The assessee has submitted its reply to the same vide submission dated 18.03.2013. wherein the assessee has repeated the reply as submitted by it on 27.02.2013 and quoted at Para i) above.

3.2 The above replies of the assessee have been duly considered. Also "**Rules Regarding Grant of Incentives, Concessions and Facilities to Industrial Units in Himachal Pradesh, 2004**" and the Notification of the Government of Himachal Pradesh, Excise & Taxation Department have been called for and studied. The relevant parts of the same are as under:-

i) "As per the "**Rules Regarding Grant of Incentives, Concessions and Facilities to Industrial Units in Himachal Pradesh, 2004**", which have come into effect from the 31st December, 2004, relevant extracts in relation to the sales tax concession is as under:-

10.1 The following Sales Tax incentive would be provided subject to their fulfilling the eligibility conditions a laid down elsewhere under these rules-

1) Sales Tax incentive, that is, exemption from payment of C.S.T/G.S.T for 10 years from the date of their commencement of production in the Tax free Zone (now classified as category 'C areas under these Rules) shall be continued, as provided for under the 1999 incentive Rules. This incentive will be admissible to New Industrial Units and or existing Industrial units as on 07.01.2003(for the purpose of this incentive only) which undertake substantial expansion after 07.01.2003. This incentive will be available to all eligible units listed in the negative List(Annexure-III) also. In other words, no negative list will be applicable in Tax Free Zones for the purpose of this incentive.

2) Village Industry, as defined under these Rules, set up in the State, falling within the definition of Khadi and Village Industries Board and which are so notified by the State Government in consultation with the Department of Excise and Taxation will be exempted from the payment of Sales Tax, as was the position prior to 10.03.1999. this incentive however, will not be available to such units

manufacturing products which are listed in Annexure-iii(Negative List) of these Rules.

3) i) Except for Industries listed in the Negative List (Annexure-111 of these Rules). New Industrial Units set up after the appointed day as specified under these Rules shall be entitled to the incentive of deferment of 100% General Sales Tax for a period of 8 years in category 'B' areas and for a period of 5 years for such units in category 'A' areas.

11. INCENTIVES TO SSI UNIT(S) SET UP SPECIAL CATEGORY OF ENTERPRENUERS FOR SETTING UP OF MICRO AND SSI UNITS. Special Category Entrepreneurs as defined under these Rules, setting up SSI units, will be entitled to the following additional concessions/facilities which will be over and above the concessions and facilities admissible elsewhere in these Rules, unless otherwise specified:

a) For such entrepreneurs 90% subsidy shall be given on the preparation of feasibility reports subject to a maximum of Rs. 25,000/- in each case.

b) 100% subsidy shall be provided to such entrepreneurs for the carriage and installation costs of the machinery.

c) 10% special investment subsidy on fixed assets subject to a ceiling of Rs. 1,00,000/- per unit shall be allowed to such entrepreneurs out of State funds for establishment of Tiny units.

d) SSSBES, Tiny units and units with fixed Capital investment limit of Rs. 25 Lakhs falling under the category of "specified category of activity" set up by such category of entrepreneurs availing term loans from Financial Institutions as defined will be entitled to 5% interest subsidy on the term loan subject to a ceiling of rs. 50,000/-per year for 3 years only. The interest subsidy will not be admissible on defaulted installment due to the financial institution and the period of default will be counted for determining the ceiling of 3 years. Interest subsidy will be admissible for the ttst 3 years of the original payment schedule finalized by the financial Institution at the time of sanctioning of loan."

ii)"GOVERNMENT OF HIMACHAL PRADESH EXCISE AND TAXATION DEPARTMENT No. EXN-F(2)2/2004Shimla-I 71002 the 24th August, 2005

In exercise of powers conferred by sub-section(5) of section 62 of the Himachal Pradesh Value Added Tax Act, 2005(Act No. 12 of 2005) (hereinafter in this notification referred to as the "said Act") the Governor, Himachal Pradesh is pleased to direct that any dealer-

i) Who manufactures and sells goods and who immediately before the commencement of the said Act, was enjoying the benefit of any incentive of sale tax leviable on the sale of manufactured goods under the Himachal Pradesh General Sales tax Act, 1968) (hereinafter in this notification referred to as the 'repealed Act') in accordance with the notifications issued under section 42 or 42-A of the repealed Act, and

ii) ' Who would have continued to be eligible for such incentive on the date of commencement

Option etc. by Industrial units relating to deferment of tax only(i) A dealer (Industrial unit) availing the facility of making deferred payment of tax, may either continue to avail such facility for the unexpired period or opt, by making an application in Form VAT (D and E)-V to pay 65% of the tax liability for any tax period of a financial year accordingly the return and upon making such payment, he shall be deemed to have paid the tax due from him according such return. The option once exercised shall be final."

3.3 From the details as gathered and gone through it is seen that the "Sales Tax Incentive" as provided by the Government of Himachal Pradesh to the assessee is in the nature of Income and Revenue Receipt. The claim of the assessee that the said Incentive is in the nature of Capital Receipt is not acceptable. The "Rules Regarding Grant of Incentives, Concessions and Facilities to Industrial Units in Himachal Pradesh, 2004", as quoted above clearly mention the said benefit

being granted by the Himachal Pradesh Government to be in the nature of Incentive. Important points which emerge from the Analyses of the said Rules are:-

a) The Sales Tax Incentives are available to the Industry for a period of 10 years from the date of production. It is to be noted that the said Incentive is not a one time Grant/Subsidy but spread over a long time of 10 years.

b) The Rules nowhere specify that the said Sales Tax Incentive is for the purpose of Establishment of any Capital Asset like Building, Plant or Machinery. The Sales Tax Incentive is not a fixed amount of Grant or Subsidy given by the Government of Himachal Pradesh but is in direct proportion to the volume of Sales made in the said year.

c) Further to substantiate the point that the Sales Tax Incentive is not in the nature of Subsidy or Grant, again reference is made to the "Rules Regarding Grant of Incentives, Concessions and Facilities to Industrial Units in Himachal Pradesh, 2004", as quoted above. Para 11 of the said Rules as quoted above clearly specified the Subsidies which are provided by the Government of Himachal Pradesh. The said subsidies are - 90% subsidy shall be given on the preparation of feasibility reports subject to a maximum of Rs. 25,000/- in each case, 100% subsidy shall be provided to such entrepreneurs for the carriage and installation costs of the machinery, 10% special investment subsidy on fixed assets subject to a ceiling of Rs. 1,00,000/- per unit shall be allowed to such entrepreneurs out of State funds for establishment of Tiny units etc. Thus it is seen that the said Subsidies are in the nature of Capital Receipt and a one time benefit Granted to the Industrial Units.

d) The Sales Tax Incentive was available to the assessee after it started its production. The Subsidy was given as help not for the setting up of the Industries which was already commenced production. Therefore, the Incentive cannot be treated as an aid to the setting up of Industry of the assessee and the incentive is in the nature of Operational Subsidy and not Capital Subsidy.

e) There is no other document or material on which reliance is placed by the assessee to substantiate its contention that Sales Tax Incentive of the kind in consideration should be treated as Capital Receipt and not Revenue Receipt. The assessee has not referred to any other document or policy of the State Government to show that the kind of Subsidy under consideration was given to the assessee for creation of Capital Assets as an aid to setting up of the Unit.

10.11 We have heard arguments of both the parties and perused the material available on record.

10.12 In the case of Meghalaya Steels (supra) the Hon'ble Supreme Court held that the subsidies received by the assessee should be treated as "profits and gains of business or profession", and not under the head "income from other sources". Thus the sales tax subsidy would be treated as Revenue subsidy.

The major principle laid down by the Hon'ble Supreme Court is that if the subsidy is given for setting up of units and encouraging industrialization in remote places, it assumes the character of capital receipt. In case the subsidy is given to run the business profitably it would be operational subsidy chargeable to tax. The present case of the assessee the nature of the subsidy has to be determined by the scheme of subsidy. The Hon'ble Supreme Court in the case of M/s Ponni

Sugars And Chemicals Ltd. held that the controversy of determining the subsidy as Revenue or Capital can be resolved by applying the test laid down on the judgment of M/s Sahney Steel & Press works Ltd. In that case it was held by the Hon'ble Court on the facts of that case and on the basis of the analyses of the Scheme therein that the subsidy given was on revenue account because it was given by way of assistance in carrying on of trade or business. On the facts of that case, it was held that the subsidy given was to meet recurring expenses. It was not for acquiring the capital asset. It was not to meet part of the cost. It was not granted for production of or bringing into existence any new asset. The subsidies in that case were granted year after year only after setting up of the new industry and only after commencement of production and, therefore, such a subsidy could only be treated as assistance given for the purpose of carrying on the business of the assessee.

Hon'ble Court also held that test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the scheme with which one should be concerned is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units or running of the business profitably. On this aspect there is no dispute. If the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant.

In the case of Seaham Harbour Dock Co. quoted by the Hon'ble Supreme Court the assessee was obliged to spend the money for extension of its docks. This aspect is very important. In that case the receipt of the subsidy was capital in nature as the assessee was obliged to utilize the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/expansion of

existing business. Whereas in the instant case there is no such obligation to spend the subsidy to a specific capital purpose.

Hon'ble Courts have also held that subsidies were of capital nature and were given for the purpose of stimulating setting up and expansion of industries in the State cannot be upheld because of the subsidy scheme itself. It is only when the assessee had set up its industry and commenced production that various incentives were given for the limited period. The endeavor of the State was to provide the newly set up industries a helping hand to enable them to be viable and competitive. Sales tax refund and the relief on account of water rate, land revenue as well as electricity charges were all intended to enable the assessee to run the business more profitably. The basic principle to be applied for determination as to whether a subsidy payment is in the nature of capital or revenue has been stated by viscount Simon in *Ostime v. Pontypridd and Rhondda Joint Water board* 28 T.C.262 in the following words:

"The first proposition is that, subject to the exception hereafter mentioned, payments in the nature of a subsidy from public funds made to an undertaker's trade or business are trading receipts, that is, are to be brought into account in arriving at the balance of profits or gains".

It was also held by the Division Bench of the Calcutta High Court in the case of *Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Income Tax*, 191 ITR 518 which examined a scheme of refund of sales tax framed by Andhra Pradesh Government to assist newly set up industries. There the assessee had set up a cement plant. The Calcutta High Court held that receipt of the incentives from the State Government was incidental to carrying on the business of the assessee. Such subsidies were received year after year by refund of sales tax. The benefit was received in course of carrying on the assessee's business. It was a benefit incidental to its business. The subsidy was not intended to be contribution towards capital outlay of the industry. Therefore, it was held that the subsidy received by the assessee in that case could not be regarded as anything but a revenue receipt.

In the case of *Sadichha Chitra . V. Commissioner of Income Tax*, 189 ITR 774. In that case, was noted that in a given case subsidy may be granted with the object of supplementing trade receipts and profits of the recipient. In another

case, the scheme of subsidy may have been formulated by the authority to assist the assessee in acquiring a capital asset or for the growth of the industry generally in public interest without any objective of supplementing trade receipts or recoupment of revenue expenditure already incurred by the assessee.

10.13 Keeping in view the various decisions cited above wherein major guidelines have been framed by the Hon'ble Courts and since the nature of the capital subsidy and revenue subsidy is to be determined by going through the entire scheme of the Government, for determination of purpose test and to examine the whether the issue would be covered under the scheme to assist creation of capital asset or an operational subsidy post installation, the matter is being remanded back to the file of the Ld. CIT(A) to adjudicate afresh keeping in view the judgments and the nature of the scheme and adjudicate the issue by a speaking order in accordance with law.

11. As a result, Appeal of the Revenue and Cross Objection of the Assessee are partly allowed for statistical purposes.

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER
Dated : 21/05/2018
AG

Sd/-
(B.R.R.KUMAR)
ACCOUNTANT MEMBER

Copy to: The Appellant, The Respondent, The CIT, The CIT(A), The DR