**IN THE INCOME TAX APPELLATE TRIBUNAL**
**MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND**
**SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

## ITA No. 2965/MUM/2015
## Assessment Year: 2002-03

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| Tata Chemicals Ltd.<br>Bombay House,<br>24 Homi Mody Street,<br>Fort, Mumbai-400001 | Vs. | Deputy Commissioner of Income Tax-2(3)(1), 5th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020 |
| **PAN No. AAACT4059M**<br>**Appellant** | | **Respondent** |

## ITA No. 3383/MUM/2015
## Assessment Year: 2002-03

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|---|---|---|
| Deputy Commissioner of Income Tax-2(3)(1), 5th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020 | Vs. | Tata Chemicals Ltd.<br>Bombay House,<br>24 Homi Mody Street,<br>Fort, Mumbai-400001 |
| **Appellant** | | **PAN No. AAACT4059M**<br>**Respondent** |

Assessee by : Mr. Nitesh Joshi, AR
Revenue by : Mr. Choudhary Arun Kumar Singh,

Date of Hearing : 25/01/2019
Date of pronouncement: 22/04/2019

ORDER

PER N.K. PRADHAN, AM

The captioned cross appeals- one by the assessee and one by the Revenue – are directed against the order of the Commissioner of Income

Tax (Appeals)-6, Mumbai [ in short 'CIT(A)'] and arise out of the assessment completed u/s 143(3) of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to dispose them off by this consolidated order for the sake of convenience. We begin with the appeal filed by the assessee.

**ITA No. 2965/MUM/2015**
**Assessment Year: 2002-03**

2. The 1st ground of appeal

> The Ld. CIT(A) erred in directing the Assessing Officer (AO) to disallow the amount of expenditure held to be relatable to dividend income, while determining the book profits chargeable to tax u/s 115JB of the Act.

2.1 The assessee-company has claimed exemption in respect of dividend and income from units of mutual funds amounting to Rs.37,44,11,630/-. This amount was reduced while determining the book profit u/s 115JB(2) Explanation 1 clause (ii) of the Act. The AO added back an amount of Rs. 14,48,00,000/- towards expenses for earning of exempt income u/s 115JB, by resorting to the provisions of section 14A. Before us AO, the assessee submitted that :

> "Company has not incurred any expenses for earning dividend income. Surplus funds time to time are invested in shares, securities, units etc. of reputed companies. All the investments are out of the company's surplus taxed income. This can be verified from the huge reserves of the company."

However, the AO was not convinced with the above explanation of the assessee for the reason that investments have been made out of a common pool of funds and considering the nature, quantum of

transactions, it is not possible to identify the exact source of investment and it is not possible to prove that investments have been made out of the capital and reserves. The AO further observed that the common pool of funds is source of all outgoings including investments, advances, fixed assets and other current assets and is destination of all incoming funds from loans and advances, capital and retained earnings in the nature of reserves. Then referring to the decision in *Rajasthan State Warehousing Corporation v. CIT* (159 CTR 132), *Tata Unisys Ltd*. (47 TTJ 8). *CIT v. Magan Lal Chhagan Lal Pvt. Ltd.* (236 ITR 456), *CIT v. United General Trust Pvt. Ltd.* (200 ITR 488) and *K Somasundaram & Brothers v. CIT* 238 ITR 939 (Mad), the AO disallowed an amount of Rs.14.49 crores u/s 14A as interest expense towards investment in shares and securities, income from which is exempt from tax.

2.2 In appeal, the Ld. CIT(A) directed the AO to verify whether own funds were utilized for making the investments or otherwise. If the assessee used its own funds, then no disallowance of interest is to be made.

2.3 Before us, the Ld. counsel of the assessee submits that the company has huge own funds aggregating to Rs.2596.58 crores. Against this, borrowings, both for capital expenditure and for working capital is just Rs.1,060.71 crores. The cross block is of Rs.2,859.89 crores, much more than borrowed capital, whereas the investment portfolio is just Rs.555.68 crores. The borrowings including that for working capital have come down from Rs.1,146.27 crore to Rs.1,060.71 crores. There is an all round reduction in the loans i.e. secured loans, unsecured loans or terms loans

and short term loans in comparison to previous year. The investments have marginally increased from Rs.428.22 crores to Rs.555.68 crores. It is further stated that effective from 01.04.2000, Sabras Investment & Trading Co. Ltd. amalgamated with the assessee-company. On amalgamation, Tata Chemicals Ltd. received investments of Rs.181.34 crores (worth more than Rs.200 crores) and no liabilities. The total investments as at 31.03.2002 of Rs.555.68 crores comprise of investments to the tune of Rs.181.34 crores on account of amalgamation of Sabras Investments with the assessee-company. On amalgamation, there was no surplus which is represented by investments. As such, there is no allocation of expenses which can be made to such investments. The total profit on sale of investments in the last 20 years is to the tune of Rs.417.61 crores which has been deployed in investments in shares. Hence, there can be no question of allocation of expenses towards investment income. Thus it is stated that the entire fresh investments are financed out of the own funds of the assessee-company and not out of borrowings.

The Ld. counsel further submits that on identical facts in AY 1992-93 (and followed in AY 1993-94 and AY 1994-95), the Tribunal has decided the issue in favour of the assessee and held that there is no scope for allocation of interest expenses towards investment income. It is also submitted that the department's reference to High Court on the issue and SLP to Supreme Court has been rejected.

2.4 On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

2.5 We have heard the rival submissions and perused the relevant materials on record. The reasons for decisions are given below.

A perusal of the audited accounts of the assessee-company clearly indicates that the company has its own funds aggregating to Rs.2596.58 crores, more than the borrowed capital of Rs.1,060.71 crore, whereas the investment portfolio is just Rs.555.68 crores. We further find that on identical facts in AY 1992-93, the Tribunal has decided the issue in favour of the assessee and held that there is no scope for allocation of interest expenses towards investment income. Also in AY 1993-94 and AY 1994-95, in assessee's own case on similar facts, the Tribunal held that no interest is to be allocated towards investment income. The department's reference to the High Court on the issue and SLP to Supreme Court has been rejected.

Facts being identical, we follow the above orders of the Co-ordinate Bench in assessee's own case and allow the 1st ground of appeal.

3. <u>The 2nd ground of appeal</u>

The Ld. CIT(A) erred in upholding the disallowance of Rs.31,40,536 in respect of Contribution to Tatachem DAV public School.

3.1 While finalizing the assessment, the AO disallowed an amount of Rs.31,40,536/- paid to Tatachem DAV Public School. The AO noted that similar disallowance made in AYs 1994-95 and 1995-96 were deleted by the Ld. CIT(A) and in department's appeal to ITAT in AYs 1992-93, 1993-94 and 1994-95, the issue was decided in favour of the assessee. However, following the stand of the revenue, the AO made a similar

disallowance of Rs.31,40,536/- towards expenses towards Tatachem DAV Public School.

3.2 In appeal, the Ld. CIT(A) confirmed the above disallowance made by the AO on the reason that the expenditure has been made to a third organization and hence cannot be allowed u/s 37 of the Act as there is no business purpose for the same.

3.3 Before us, the Ld. counsel submits that similar issue has been decided in favour of the assessee-company in AYs 1992-93 to 2001-02, wherein the orders of AY 1992-93 have been confirmed in appeal by the High Court. It is stated that the Department's SLP to Supreme Court does not contain this ground. Further, it is stated that payment to Tatachem DAV School has been specifically considered in AY 1996-97, 1997-98 and 2000-01 as reflected in the CIT(A)'s order for the said years.

3.4 On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

3.5 We have heard the rival submissions and perused the relevant materials on record. Facts being identical, we follow the order of the Co-ordinate Bench for the AYs 1992-93 to 2001-02 and allow the 2nd ground of appeal.

4. <u>The 3rd ground of appeal</u>

The Ld. CIT(A) erred in upholding the disallowance of in respect of Prior Period Expenses at Rs.74,66,381.

4.1 During the course of the assessment proceedings, the assessee, in respect of prior period expenses, submitted before the AO that though these expenses pertained to earlier years but liability to it crystallized during the year and therefore is charged in the books under a separate account head titled "prior period expenses" and this practice is followed by it for the past several years. Also it was explained to the AO that while finalizing the tax audit report, the tax auditors examined all these items and enclosed details along with tax audit report.

However, the AO was not convinced with the above explanation of the assessee and disallowed such prior period items and added the same to the total income.

4.2 In appeal, the Ld. CIT(A) observed that the assessee-company is following the mercantile system of accounts, under which it is supposed to have debited the expenses on accrual basis in the year in which they have accrued. From the details filed before him, the Ld. CIT(A) noted that most of these expenses have accrued in earlier years. Therefore, he confirmed the disallowance of Rs.74,66,381/- made by the AO.

4.3 Before us, the Ld. counsel of the assessee submits that the company had a turnover of Rs.1,516 crores and expenses of Rs.1,301 crores. The returned income of the assessee-company was Rs.160,73,70,148/ -. It is thus stated that such volume itself establishes that the expenses of Rs.74,66,381/- is miniscule. It is further submitted that the delay in booking of the expenses was due to the late receipt of bills or events occurring during the year, for which the liability had crystallized after the balance sheet. Thus it is stated that the liability for the items crystallized

during the year under reference and the expenses were incurred to earn income which was accounted and offered for tax during the current year. In this regard reliance is placed by him on the decision in *CIT v. Mahanagar Gas Ltd*. (2014) 42 taxmann.com 40 (Bom).

The Ld. counsel further submits that similar issue has been decided in favour of the assessee in assessee's own case in AY 1986-87 (ITA No. 4564/M/03), AY 1993-94 (ITA No. 2706/M/2000), AY 1996-97 (ITA No. 6496/M/2004) and AY 1997-98 (ITA No. 7035/M/2004).

4.4 On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

4.5 We have heard the rival submissions and perused the relevant materials on record. A perusal of the accounts clearly indicates that the delay in booking of the expenses was due to the late receipt of bills or events occurring during the year, for which the liability had crystallized after the balance sheet date. Further, we find that each of the above expenses were incurred to earn income, which was accounted and offered for tax during the current year. Similar issue arose before the Tribunal in assessee's own case for AY 1986-87 (ITA No. 4564/M/03), AY 1993-94 (ITA No. 2706/M/2000), AY 1996-97 (ITA No. 6496/M/04) and AY 1997-98 (ITA No. 7035/M/04). We find that the above issue has been decided in favour of the assessee by the Tribunal in the aforesaid orders. Therefore, facts being identical, we follow the said orders of the Co-ordinate Bench in assessee's own case and allow the 3rd ground of appeal.

5. The 4th ground of appeal

The Ld. CIT(A) erred upholding the disallowance of expenses debited to Profit & Loss Account in respect of the following:

a Plant &. Machinery including equipment Rs.8,215
b Hoarding at Factory Gate Rs.90,000
c L&T Cancellation of construction contract Rs.1,62,25,000
d N M Raiji for Due diligence study Rs.5,08,200
e ING Bank- Paradeep Phosphates Rs.31,41,657
f SBI Capital and Bank of America Rs.16,50,000
g Interior work at Love Dale Rs.66,000
h Engg. Fees for Cement Grinding Unit Rs.66,69,101
i Plantation Irrigation drainage system Rs.41,50,756

5.1 During the course of hearing, the Ld. counsel submits that the assessee would not like to press the disallowance of expenses of Rs.8,215/- and Rs.90,000/- because of smallness of amount and as depreciation has been allowed. Therefore, we turn to the other additions/disallowances made by the AO.

During the course of assessment proceedings, the assessee filed factual information in relation to the above expenses before the AO. However, the AO was not convinced with the said explanation as these expenses were capital in nature and thus not allowable u/s 37(1) of the Act. In this regard, the AO relied on the decision in *Triveni Engineering Works Ltd.* 232 ITR 639 (Del) and *Hasmira Industries* 230 ITR 927 (SC).

5.2 In appeal, the Ld. CIT(A) confirmed the above disallowances made by the AO. In respect of the disallowance of Rs.1,62,25,000/- (payment to L&T as compensation towards cancellation of construction contract), the

Ld. CIT(A) held that "such expenditure incurred by it for a new project which was in the nature of capital expenditure remains such, and by claiming it in a subsequent year as revenue expenditure, the assessee cannot convert what was capital expenditure into revenue expenditure".

In respect of disallowance of Rs.5,08,200/- (payment to M/s N.M. Raiji & Co. towards due diligence for Paradeep Phosphates and NFL Projects) and disallowance of Rs.31,41,657/- (payment to ING Bank towards Paradeep Phosphates Projects), the Ld. CIT(A) held that the expenditure was incurred by the assessee for making an investment in Paradeep Phosphates Ltd. which is a different company. Further, it is held by him that the expenditure is capital in nature even if the said project is abandoned.

In respect of disallowance of Rs.16,15,000/- (payment to SBI Capital and Bank of America towards fees for NFL Project), the Ld. CIT(A) on the basis of the above reasons confirmed the disallowance made by the AO.

In respect of the disallowance of Rs.66,000/- (paid to Alpana Gonekar towards interior work done at Lovedale), the Ld. CIT(A) confirmed it as the expenditure was incurred on interior design and needs to be capitalized to furniture and fixtures and depreciation allowed for the same.

In respect of the disallowance of Rs.66,69,101/- (Engineering Fees for Cement Grinding Unit), the Ld. CIT(A) held that the expenditure incurred on acquiring designs and drawings is a depreciable expenditure

u/s 32 of the Act, being intangible assets. However, he directed the AO to allow depreciation as per Rules.

Finally in respect of disallowance of Rs.41,50,756/- (towards plantation, irrigation, drainage system etc.), the Ld. CIT(A) held the expenditure incurred on irrigation system and drainage as capital in nature. However, he held that the depreciation is allowable. In respect of expenditure on tree plantation, the Ld. CIT(A) held it as agricultural expenditure and therefore, no depreciation is allowable.

5.3 Before us, the Ld. counsel of the assessee submits that the tax auditors in clause 17(a) of the tax audit report disclosed an amount of Rs.3,52,96,426/- being expenditure of capital in nature debited to the profit and loss account. On this issue, the AO asked the assessee to justify why such expenses should not be disallowed. In response to it, the assessee-company had filed detailed submissions before the AO.

In respect of expenses of Rs.1,62,25,000/-, the Ld. counsel submits that during year under reference, M/s L&T was awarded a contract for expansion of the assessee's existing cement facilities. However, considering the change in market scenario, the proposal of expansion was dropped and the contract was cancelled. In terms of agreement, L&T asked for compensation for cancellation of contract and a sum of Rs.1,62,25,000/- was paid to them. It is stated that the payment to L&T was made for expansion in existing line of business. However, due to change in market conditions, the contract was cancelled and the assessee-company had to pay compensation towards cancellation. It is thus argued that the cancellation of contract was purely for business reasons, hence

the same should be allowed as revenue expenses u/s 37(1) of the Act. In this regard reliance is placed by him on the decision in *Ideal Cellular* (2014) 47 taxmann.com 341 (Mum).

Regarding, the expenses of Rs.5,08,200/- the Ld. counsel submits that during the year under reference, Government of India invited various industrial houses and corporations to offer a bid for Paradeep Phosphates and National Fertilizers Ltd. (both Government of India Companies). A sum of Rs.5,08,200/- was paid to M/s N.M. Raiji & Co. for carrying out due diligence i.e. study of financial records of these two companies and submit report to Board. It is explained that financial study from public records of these two companies is in no way connected with the actual acquisition of these companies; the payment was for obtaining a report or financial health and hence the same is allowable as deductible revenue expenses.

As regards the expenses of Rs.31,41,657/- the Ld. counsel submits that during the year under consideration, the above amount was paid to ING Bank for working out final viability and financial tie-up for Paradeep Phosphates. The project was finally not awarded to the assessee-company as its offer was below the bid price. Apart from this, the payment was only towards financial arrangement. Thus it is stated that the above expenditure is deductible u/s 36(1)(iii) of the Act.

The above submission was reiterated by the Ld. counsel in respect of payment of Rs.1,15,000/- to SBI Capital Market and Rs.15,00,000/- to Bank of America towards fees for NFL Project.

As regards the expense of Rs.66,000/- it is stated by the Ld. counsel that the above payment was made towards interior designing of MD's office at Lovedale and no new capital asset was created, hence, the same is claimed as allowable expense u/s 37(1).

As regards the expenses of Rs.66,69,101/-, it is stated by the Ld. counsel that the amount was spent towards basic engineering fees for expansion in Cement Division and making certain technological changes. However, since it required very heavy capital investment, the project was ultimately dropped. The design and drawings were received by the assessee-company in a book form, which can be utilized at any later date. It is stated that the design and drawing represents some technical information which keeps on changing, hence the same should be allowed as revenue expenses.

Finally, in respect of expenses of Rs.41,50,756/- the Ld. counsel submits that as per the directions of Pollution Control Board, the appellant company was required to grow trees all around its Cement Plant. The expenses were incurred towards growing of plantations, making drainage system for watering those trees. By growing the trees around the Cement Plant, the assessee-company did not acquire any capital asset as this is only for Pollution Control, therefore the same is allowable as revenue expenses u/s 37(1) of the Act.

5.4 On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

5.5 We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

It is found that during the year under consideration, M/s L&T was awarded a contract for expansion of the assessee's existing Cement facilities. The proposal of expansion was dropped and the contract was cancelled. In terms of agreement, L&T asked for compensation for cancellation of contract and a sum of Rs.1,62,25,000/- was paid to them. The payment to L&T was made for expansion in existing line of business. However, due to change in market conditions, the contract was cancelled and the assessee-company had to pay compensation towards cancellation. In view of the above factual scenario, the cancellation of contract was for business reasons. Therefore, we hold that the same is allowable as revenue expenses u/s 37(1) of the Act.

In respect of the expenses of Rs.5,08,200/-, it is found that a sum of Rs.5,08,200/- was paid by the assessee-company to M/s N.M. Raiji & Co. for carrying out due diligence i.e. of financial records of Paradeep Phosphates and National Fertilizers Ltd. (both Government of India Companies). It is no way connected with the acquisition of these companies. Hence, we hold the above as allowable as business expense u/s 37(1) of the Act.

As regards the expenses of Rs.31,41,657/-, we find that during the year under consideration, the above amount was paid to ING Bank for working out final viability and financial tie-up for Paradeep Phosphates. The project was finally not awarded to the assessee-company, as its offer was below the bid price. Also it is found that the payment was only

towards financial arrangement. Thus it is deductible u/s 36(1)(iii) of the Act. Similar is the payment of Rs.1,15,000/- to SBI Capital Market and Rs.15,00,000/- to Bank of America towards fees for NFL Project and thus allowable as revenue expenses.

As regards the expense of Rs.66,000/-, it is seen that the same was paid towards interior designing of MD's office at Lovedale. No new capital was created. Hence, we hold the same as allowable expense u/s 37(1) of the Act.

As regards the expense of Rs.66,69,101/-, it was spent towards basic engineering fees for expansion in Cement Division and making certain technological changes. The project was ultimately dropped since it required heavy capital investment. Also it is seen that the design and drawing were received by the assessee-company in a book form. We agree with the contentions of the Ld. counsel that design and drawing represents some technical information which keeps on changing. Hence, we hold the above expenses as allowable u/s 37(1) of the Act.

Finally, regarding expenses of Rs.41,50,756/- it is found that as per the directions of the Pollution Control Board, the assessee-company was required to grow trees all around its Cement Plant. The expenses were incurred towards growing of plantations, making drainage system for watering those trees. Definitely by growing the trees around the Cement Plant, the assessee-company did not acquire any capital asset. As this is only for Pollution Control, we hold it as allowable u/s 37(1) of the Act.

Thus the 4th ground of appeal is allowed.

6. The 5th ground of appeal

The Ld. CIT(A) erred in referring back the working of disallowance u/s 14A at Rs.20,40,05,255.

6.1 During the course of assessment proceedings, the AO noticed that the assessee has claimed deduction of dividend income and income from units of mutual funds amounting to Rs.37,44,11,630/- as exempt u/s 10(33) of the Act. The AO asked the assessee to quantify and explain why the interest expenses relatable to such investments should not be disallowed u/s 14A of the Act. In response to it, the assessee *vide* its reply dated 10.11.2004 explained that its main business is manufacturing and sale of chemicals, cement, detergent and urea. It was explained that the surplus funds are invested in shares and other securities and at no stage, borrowed funds are diverted for investment in shares. However, the AO was not convinced with the above explanation of the assessee and calculated the interest cost allocable with the above investments at Rs.14.49 crores (3.87% interest cost to capital employed).

6.2 In appeal, the Ld. CIT(A) set aside the disallowance of interest and directed the AO to workout disallowance in respect of indirect expenses on the basis of the CIT(A)'s directions for AY 2000-01, viz. 5% of salary of CFO, Deputy CFO, Head Treasury and Salary of other employees of Treasury plus 10% overheads thereon as on AY 2000-01.

6.3 As noted earlier at para 2.5, the assessee's own funds during the impugned assessment year is much more than the investment. Thus the disallowance of interest expenses u/s 14A does not arise.

Before us, the Ld. counsel submits that the assessee-company accepts the disallowance of Rs.5,98,950/- u/s 14A as determined by the Ld. CIT(A) as reasonable and does not press the above ground of appeal.

Considering the above, the 5th ground of appeal is partly allowed.

7. The 6th ground of appeal

The Ld. CIT(A) erred in directing to consider certain interest income as disallowable while determining the deduction u/s 80HHC at Rs.8,48,98,112.

7.1 In the computation of income, the assessee has claimed deduction of Rs.1,81,52,293/- u/s 8HHC. The AO observed that in the profit and loss account, the assessee has shown own income of Rs.85,87,811/-, interest income of Rs.9,17,03,291/- and miscellaneous income of Rs.4,85,04,178/-

The issue is the computation of total turnover while working out the deduction u/s 80HHC. The AO has included excise duty, sales tax, scrap and store sales to the total turnover.

7.2 In appeal before the Ld. CIT(A), the assessee submits that in view of the decision of the Bombay High Court in the case of *Surdarshan Chemicals* 245 ITR 769, these incomes do not form part of total turnover. The Ld. CIT(A), referring to the decision of the Supreme Court in *Laxmi Machine Works* 290 ITR 667 (SC), directed the AO to exclude excise duty and sales tax from the total turnover while computing deduction u/s 80HHC of the Act.

7.3 Before us, the Ld. counsel of the assessee submits that netting off should be allowed in view of the decision in *ACG Associated Capsules* 343 ITR 89 (SC) and *Topman Exports* 342 ITR 49 (SC).

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

7.4 We have heard the rival submissions and perused the relevant materials on record. In the case of *ACG Associated Capsules* (supra), it has been clarified that "Ninety percent of not gross rent or gross interest but only net interest or net rent, which has been included in profits of business of assessee as computed under the head 'Profits and Gains of Business or Profession', is to be deducted under clause (1) of Explanation (baa) to section 80HHC for determining profits of business."

In view of the above position of law, we set aside the order of the Ld. CIT(A) on the above issue and restore the matter to the file of the AO to re-compute the deduction u/s 80HHC by following the above decision in *ACG Associated Capsules* (supra). Thus the 6th ground appeal is allowed for statistical purposes.

8. <u>The 7th ground of appeal</u>

> The Ld. CIT(A) erred in upholding the disallowance Rs.2,53,92,853 in respect of Machinery Hire Charges without appreciating that the same were allowable on the matching concept for use asset used for the purpose of business.

8.1 While filing the return of income, an amount of Rs.2,58,92,853/- being the provision for lease deposit towards machinery was disallowed by the assessee and added back in the computation of income. However,

during the course of assessment proceedings, the same was claimed as an allowable revenue expenditure u/s 37(1) of the Act. While finalizing the assessment order, the AO observed that this claim of write off of provision for lease deposit is not allowable as per the provisions of section 37(1) as the above referred lease deposit is capital in nature.

8.2 In appeal, the CIT(A) followed the order of his predecessor-in-office for AYs 2003-04 and 2004-05 and confirmed the disallowance made by the AO.

8.3 In appeal, the Ld. counsel submits that in the financial year 1994-95, the assessee entered into sale and lease back agreements with L&T, Bajaj Auto and HDFC Ltd. The lease agreements provided for certain lease deposits and annual rent. For the year under reference i.e. financial year 2001-02 (AY 2002-03), the rent has come down to a token amount but the lease deposit continued to remain with the lessors. It was agreed between the assessee-company and the lessors that this deposit is to be written off and adjusted against future lease rentals. Accordingly, the deposit amount of Rs.38.12 crores was decided to be amortized in the books. During the year under reference, an amount of Rs.2,58,92,853/- was amortized and provided towards leased deposits. While filing the return of income, the provision for lease deposit was disallowed and added back to income. It is the claim of the assessee that the above amount of Rs.2,58,92,853/- be allowed as revenue expenditure.

The Ld. counsel submits that in the instant case the amount of Rs.2,58,92,853/- is related to machinery hire charges. The primary lease of DG Set starts in AY 1995-96 for a period of years. Secondary lease is

with lease rent of nominal amount of Rs.1,000/-. Since, DG Set continued to be used, rent was debited to the profit and loss account and amortized towards deposit lying with the lessor on principle of matching concept and hence allowable as business expenditure.

It is found that before the Ld. CIT(A), the assessee had relied on the decision in 120 ITR 440, 134 ITR 21 and 135 ITR 200.

8.4 On the other hand, the Ld. DR submits that the above claim of write off of provision for lease deposit is not allowable as per the provisions of section 37(1) of the Act as the lease deposit is capital in nature. Thus the Ld. DR supports the order passed by the CIT(A).

8.5 We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.

We refer here to the case laws cited by the assessee before the Ld. CIT(A). In the case of *CIT v. Ishar Dass Tilak Chand* (1979) 120 ITR 440 (P&H), the assessee-firm derived income from selling country liquor as licensed contractor. Annual license fee was payable in specified equal installments. Prescribed percentage was payable in lump sum as security deposit adjustable against license fee arrear or penalty levied for breach of conditions for license. The Government forfeited security deposit against arrears of license fee. The AO added the forfeited amount in assessable income. The Tribunal allowed security deposit adjusted as revenue expenditure in same manner as payment of license fee. The Tribunal also held that forfeiture was not by way of penalty for breach of any term of license. The Hon'ble High Court held that (i) There is no

material on record to show that the forfeiture order was not merely a direction for adjustment of the security amount against the arrears of license fee. The Revenue did not suggest before the Tribunal that the failure to pay any installment of license fee entailed a criminal penalty, nor pointed out that there was any other breach of condition of license or any excise law to support its plea that the said forfeiture resulted from a violation of law disentitling the assessee's claim for deduction of the amount as a business expenditure, (ii) The finding given by the Tribunal that the security deposits was adjusted towards the arrears of license fee and the same was not a forfeiture by way of penalty for the breach of any term of the license etc., was a finding of fact and no question of law arose.

In *Thackers H.P. & Co. v. CIT* (1982) 134 ITR 21 (MP), the assessee-firm, carrying on the business of purchase and sale of tendu leaves, entered into a contract with Orissa Forest Corporation Ltd. for the purchase of tendu leaves and in connection there with, deposited a certain sum as security with the Corporation. As the contract was not fulfilled, the Corporation forfeited the security. For the AY 1974-75, the assessee claimed the security money so forfeited, as a business loss, which was disallowed by the AO. On appeal, the first appellate authority allowed the assessee's claim. On further appeal, the Tribunal restored the order of the AO, holding that the impugned security deposit was in the nature of capital expenditure for commencing the venture and, therefore, could not be deducted as a business loss. On appeal by the assessee, the Hon'ble High Court held that :

> "It is well settled that the forfeiture of a security deposit under a contract is a business loss and not a capital loss. The security amount deposited under a contract is not for obtaining the contract but for the due performance of its items. Moreover, in the instant case, it was obvious that the contract with the corporation was not a new business started by the assessee but was only a venture in the course of business which the assessee was already carrying on and, therefore, it could in no sense be held that the deposit of security was made for acquiring a business. Accordingly, the loss resulting from the forfeiture of security money was a revenue loss."

In *CIT v. Textool Co. Ltd.* (1982) 135 ITR 200 (Mad), the assessee imported certain items necessary for its manufacturing business under licensing scheme, requiring the assessee to deposit advance premium representing full amount of value of licensed imports with Indian Cotton Mills Federation, with stipulation that if assessee did not utilize full import entitlement, Federation would forfeit premium to the extent of resultant short fall. Owing to business exigencies, the assessee could not fully utilize import entitlements and Federation forfeited part of premium which it wrote off as revenue loss. On appeal by the revenue, the Hon'ble High Court held that:

> "when the assessee claims a business loss, the main question to be considered is whether the loss is incidental to the business. Having regard to the facts and findings recorded by it, the Tribunal was correct in coming to the conclusion that the deduction claimed by the assessee in writing off the forfeited amounts was in the course and incidental to the assessee's business. Accordingly, the impugned amounts were deductible from the total income of the assessee".

In the instant case, in the financial year 1994-95, the assessee entered into sale and lease back agreements with L&T, Bajaj Auto and

HDFC Ltd. The lease agreements provided for certain lease deposit and annual rent. During the year under reference, an amount of Rs.2,58,92,853/- was amortized and provided towards lease deposit. We find that on the basis of above facts, the present case is distinguishable from the above case laws relied on by the Ld. counsel.

We are of the considered view that the amount paid as consideration for obtaining the lease is for the acquisition of a capital asset which enables the lessee to carry on its business. It is a capital expenditure. It cannot be split up into the number of years of the duration of the lease in order to claim a proportionate fraction as revenue expenditure each year. The acquisition is of exclusive right or privilege over the lease, it a strong point that the consideration paid is on capital account. Receipts and payments in connection with acquiring or disposing of lease are usually on capital account.

In view of the above, we uphold the order of the Ld. CIT(A) and dismiss the 7th ground of appeal.

9. <u>The 8th ground of appeal</u>

> The Ld. CIT(A) erred in upholding the treatment of sale of assets as a slump Sale and subjecting the same to Tax as a Short Term Capital Gain.

9.1 During the year under reference, various assets of the detergent division of the assessee-company were sold to M/s Jyothi Laboratories for a lump sum consideration of Rs.3.75 crores. While filing the return of income, the total sale consideration of Rs.3632077/- (net of expenses - Rs.11,73,923/-) received on sale of various assets of detergent division

was allocated to various assets in the ratio of their original costs and reduced from the WDV of the respective block of assets in the income tax depreciation schedule. During the course of assessment proceedings, the AO requested the assessee to furnish an explanation as to why sale of detergent division should not be treated as a slump sale as also to furnish the computation of capital gains u/s 50B treating the sale of the detergent division as slump sale. The assessee filed a reply before the AO which has been extracted at para 19.1 (page 26-27) of the assessment order. However, the AO was not convinced with the said reply of the assessee for the reason that though the assessee has sold its detergent division for a lump sum consideration of Rs.3.75 crores to Jyothi Laboratories, no values have been assigned to the individual assets in such sales nor is a valuer's certificate submitted. Observing that the major assets of the detergent division have been sold for a lump sum consideration, the AO held the sale of detergent division as a slump sale u/s 2(42C) of the Act.

Further, the AO asked the assessee to furnish a working of capital gains u/s 50B treating the sale of detergent division as a slump sale. The assessee *vide* letter dated 30.12.2004 submitted, without prejudice to its claim that sale of detergent division is not a slump sale. Thereafter, the AO held the professional fees incurred in connection with the sale of detergent division of Rs.8,68,923/- as allowable to be reduced from the sale consideration of Rs.3.75 crores and accordingly worked out the claim u/s 50B of the Act. Further, holding that once the sale of detergent division is treated as a slump sale, the AO withdrew the capital loss on sale of lease hold land (forming part of sale of assets of detergent division) of Rs.59,24,561/-. Finally, the AO held that the reduction in

depreciation of Rs.69,18,105/-, which the assessee himself has made in its return of income, (by reducing the sale proceeds of assets of detergent division treating them as itemized sale) would be restored and the assessee would be entitled to additional depreciation of Rs.69,18,105/-.

9.2 In appeal, the Ld. CIT(A) observed that in the sale agreement dated 19.11.2001 between the assessee and Jyothi Laboratories, the assessee has sold its detergent manufacturing facility at Pitampura Industrial Estate in Madhya Pradesh for a lump sum consideration of Rs.3.75 crore, however, in the said agreement there is no bifurcation of the sale consideration amongst the individual assets. Therefore, the Ld. CIT(A) confirmed the order of the AO and held that the sale constitutes a slump sale within the meaning of section 2(42C) and hence section 50A is clearly attracted.

9.3 In appeal, the Ld. counsel submits that sale of individual assets for lump sum consideration cannot be treated as a slump sale. Further, it is stated by him that such itemized sale is essentially different from sale of an entire going concern (including all assets and liabilities). The Ld. counsel argues that since the basic condition of transfer of undertaking for treating the sale as a slump sale is not satisfied, the provisions of section 2(42C) are not applicable.

Regarding the disallowance of long term capital loss of Rs.59,24,561/- on sale of right in lease hold land, the Ld. counsel submits that while filing the return of income, it was claimed as a capital loss. In the instant case, the assessee acquired the rights to use the lease hold land in financial year 1991-92. In section 45 of the Act, it is stipulated that

the following two conditions for a transaction to the chargeable under the head 'capital gains' are to be fulfilled:

(i) there must be a capital asset and

(ii) such capital asset must be transferred

The Ld. counsel thus submits that the right in lease hold land in the present case is a capital asset and sale of such right in the lease hold land for a consideration amounts to transfer. Therefore, it is argued by him that the transfer of such right would be liable to capital gains/loss. Further, reliance is placed by him on the decision in *Mahindra Sintered Products Ltd.* 95 ITD 380 (Mum), *Asea Brown Boveri* 14 SOT 18 (Mum), *Harrisons Malayalam Ltd*. 32 SOT 497 (Coch) and *Kampli Co-op. Sugar Factory Ltd*. 70 TTJ 874.

9.4 On the other hand, the Ld. DR submits that in the instant case pursuant to the sale agreement dated 19.11.2001 between the assessee and Jyothi Laboratories Ltd., the assessee has sold its detergent manufacturing facility at Pitampura Industrial Estate in Madhya Pradesh for a lump sum consideration of Rs.3.75 crores. In the said agreement, there is no bifurcation of the sale consideration amongst the individual assets. Thus it is stated by him that the sale constitutes a slump sale within the meaning of section 2(42C) and hence section 50B is attracted.

Further, the Ld. DR supports the order passed by the AO withdrawing the capital loss of Rs.59,24,561/- on sale of lease hold land, forming part of sale of assets of detergent divisions.

9.5 We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

During the year under consideration, various assets of the detergent division of the appellant-company were sold to M/s Jyothi Laboratories for a lump sum consideration of Rs.3.75 crores. It is further found that while filing the return of income, the total sale consideration of Rs.3632077/- (net of expenses - Rs.11,73,923/-) received on sale of various assets of detergent division of was allocated to various assets in the ratio of their original cost and reduced from the WDV of the respective block of assets in the Income tax depreciation schedule.

In *Mahindra Sintered Products Ltd*. (supra), it is held that where price had been fixed before hand in respect of identifiable assets of undertaking and no liability was transferred to buyer, transfer of undertaking would not constitute a slump sale.

In *Kampli Co-op. Sugar Factory Ltd*. (supra), it is held that "sale of assets of factory excluding investment and deposits while retaining the liabilities was not a slump sale and long term and short term capital gains had to be computed separately by allocating the lump sum consideration over depreciable and non-depreciable assets; consideration attributable to land will give rise to long term capital gains while consideration attributable to depreciable assets will give rise to deemed short term capital gains u/s 50(2).'

Having perused the documents, we find that in the instant case the sale of individual assets for a lump sum consideration cannot be treated

as a slump sale. The fact remains that such itemized sale is essentially different from sale of an entire going concern (including all assets and liabilities). As the basic conditions for transfer of undertaking for treating the sale as a slump sale is not satisfied, we hold that the provisions of section 2(42C) are not applicable in the present case.

Regarding the claim of the assessee of loss on sale of right in lease hold land of detergent division as capital loss, we find that the assessee has acquired the right to use the lease hold land in the financial year 1991-92. In the instant case the conditions stipulated in section 45 of the Act so as to bring a transaction chargeable under the head 'capital gains' are fulfilled and therefore, the gains/loss arising on transfer of such right would be liable to capital gains. Accordingly, the assessee has rightly claimed the loss of Rs.59,24,561/- on sale of right in the lease hold land as a capital loss.

In view of the above findings, we allow the 8th ground of appeal.

10. In the result, the appeal filed by the assessee is partly allowed.

Then, we turn to the appeals filed by the Revenue.

**ITA No. 3383/MUM/2015**
**Assessment Year: 2002-03**

11. The 1st ground of appeal

> On the facts and circumstances of the ease and in law the Ld. CIT(A) erred in deleting the disallowance made u/s 49A(9) of Rs.46,87,552/- being payments made to various institutions ignoring the fact that these expenses were not

wholly and exclusively incurred for the business purpose and does not directly relate to the business activity of the assessee.

11.1 During the course of assessment proceedings, the AO observed that the assessee has made contributions to various societies/trusts, which fall within the purview of section 40A(9) of the Act. Though the department's appeal to ITAT in AYs 1992-93, 1993-94 and 1994-95 were allowed in favour of the assessee, the AO following the stand of the revenue made a disallowance of Rs.78,68,088/-.

In appeal, the Ld. CIT(A), by following the order of the Tribunal and CIT(A), deleted the following additions :

| **Particulars** | **Amount Rs.** |
|---|---|
| Tata Sports Club | 3,00,000/- |
| Nutan Bal Shikshan Sangh, Mithapur | 19,00,000/- |
| Kindergarten Primary School, Mithapur | 10,75,000 |
| Mithapur/Kamdar/Indica Sports Club Mithapur | 85,944 |
| Tata Chem Sports and Cultural Club | 67,255 |
| Flag Day Collection | 1,103 |
| Fort Medical Society | 12,04,750 |
| Thatachem Co-operative Credit Society | 53,500 |

11.2 The Ld. DR supports the order passed by the AO. On the other hand, the Ld. counsel of the assessee submits that on similar facts, similar additions made by the AO in earlier assessment years have been deleted either by the CIT(A) or by the Tribunal.

11.3 We have heard the rival submissions and perused the relevant materials on record.

As per the decisions filed by the Ld. counsel, we find that the above issues have been decided by the ITAT in favour of the assessee in assessee's own case for earlier assessment year. In the case of Tata Sports Club, similar issue has been decided by the Tribunal in favour of the assessee in AY 1995-96 (ITA No. 3082/M/02, dated 26.07.2006) and AY 1996-97 (ITA No. 6496/M/04, dated 17.08.2007). In case of Nutan Bal Sikshan Sangh and Kindergarten Primary School and Mithapur/Kamgar Club, Mithapur, in AY 1992-93 (ITA No. 4442/M/96, dated 04.02.2000), in case of Tata Chem Sports & Cultural Club, Babrala in AY 1995-96 (ITA No. 3082/M/02, dated 26.07.2006), AY 1996-97 (ITA No. 6496/M/04, dated 17.08.2007), AY 1992-93 (ITA No. 4442/M/96, dated 04.02.2000), in case of Flag Day Collection in AY 1992-93 (ITA No. 4442/M/96, dated 04.02.2000), in case of Fort Medical Society in AY 1995-96 (ITA No. 3082/M/2002, dated 26.07.2006), in AY 1996-97 (ITA No. 6496/M/04, dated 17.08.2007) and in case of Tata Chem Co-op. Credit Society in AY 1995-96 (ITA No. 3082/M/02, dated 26.07.2006), in AY 1996-97 (ITA No. 6496/M/04, dated 17.08.2007), AY 1992-93 (ITA No. 4442/M/96, dated 04.02.2000), similar issues have been decided by the Tribunal in favour of the assessee.

Facts being similar, we uphold the order of the Ld. CIT(A) and dismiss the 1st ground of appeal.

12. The 2nd ground of appeal

> On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing share issue expenses and preliminary expenses of Rs.6,74,584/- which are capital in nature and needs to be governed by Sec.35D.

12.1 The AO has disallowed preliminary expenses and share issue expenses totaling to Rs.6,74,584/- on the ground that these are capital in nature. In respect of preliminary expenses claimed u/s 35D, the AO held that the conditions of section 35D are not satisfied.

In appeal, the Ld. CIT(A) following the order of his predecessor-in-office for AY 1996-97 to AY 2004-05, deleted the disallowance of Rs.6,74,584/- made by the AO.

12.2 During the course of hearing, the Ld. DR supports the order passed by the AO, whereas the Ld. counsel relies on the order passed by the Ld. CIT(A).

12.3 We have heard the rival submissions and perused the relevant materials on record. It is found that these expenses pertained to Babrala Fertilizer Division, which commenced production effective from 20.12.1994 and for the first time claim was made in the AY 1995-96. The total expenses incurred on initial share issue and preliminary expenses in year 1990-91 were of Rs.67,45,825/- and were treated as miscellaneous expenses and shown under separate head of balance sheet. When the project commenced production on December 1994, deduction @ 1/10th

was claimed. The cost of Fertilizer project was more than Rs.1,400/- crore and this amount of Rs.65,00,000/- is less than 0.10%. This claim was allowed in the very first year i.e. AY 1995-96.

Similar issue has been decided in favour of the assessee by the Tribunal in assessee's own case in AY 1997-98 (ITA No. 7035/M/04, dated 17.05.2017), AY 1998-99 (ITA No. 7036/M/04, dated 21.06.2017), AY 1999-00 (ITA No. 5153/M/11, dated 21.06.2017), AY 2000-01 (ITA No. 5446/M/14, dated 21.06.2017) and AY 2001-02 (ITA No. 6366/M/14, dated 15.09.2017).

In view of the above facts and the decision in earlier years, we uphold the order of the Ld. CIT(A) and dismiss the 2nd ground of appeal.

13. The 3rd ground of appeal

> On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the additions of Rs.3,39,29,363/- for subscription of brand equity treating it as business expenditure ignoring the fact that it is a capital expenditure and the ratio of ITAT's decision in the case of M/s Rallies India Ltd. for AY 2004-05 does not apply to the case.

13.1 The tax auditors in their tax audit report i.e. clause 17(a) have mentioned that subscription paid for brand equity is not considered as capital expenditure. The AO observed that an amount of Rs.3,39,29,363/- has been debited on account of subscription to brand equity and the said expenditure was incurred as per the agreement with Tata Sons Ltd. for use of Tata Logo by the assessee. The AO, however, held that the assessee was a Tata Group Company since 1939 and has its own reputation and

logo. Therefore, holding that the assessee did not need any separate Tata logo, the AO treated the payment to the holding company as for non-business consideration and made a disallowance for Rs.3,39,29,363/-.

In appeal, the Ld. CIT(A) following the order of the Tribunal in assessee's own subsidiary i.e. Rallies India Ltd. allowed the appeal filed by the assessee.

13.2 The Ld. DR relies on the order of the AO whereas the Ld. counsel relies on the order of the Ld. CIT(A).

13.3 We have heard the rival submissions and perused the relevant materials on record. Similar issue has been decided in favour of the assessee in assessee's own case in AY 2000-01 (ITA No. 5446/M/2014, dated 21.06.2017) and AY 2001-02 (ITA No. 6366/M/2014, dated 15.09.2017) by the Tribunal. Also in the case of subsidiary company i.e. *Rallis (India) Ltd*. (supra), similar issue has been decided in favour of the assessee by the Tribunal in ITA No. 5257/M/2008 *vide* order dated 30.08.2001. Following the same, being on similar facts, we uphold the order of the Ld. CIT(A) and dismiss the 3rd ground of appeal.

14. To sum up, the appeal filed by the assessee is partly allowed whereas the appeal filed by the revenue is dismissed.

**Order pronounced in the open Court 22/04/2019.**

| | |
|---|---|
| Sd/- | Sd/- |
| (C.N. PRASAD) | (N.K. PRADHAN) |
| JUDICIAL MEMBER | ACCOUNTANT MEMBER |

Mumbai;
Dated: 22/04/2019

*Rahul Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

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

BY ORDER,

//True Copy//

(Sr. Private Secretary)
**ITAT, Mumbai**