IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "H", MUMBAI
BEFORE SHRI SHAMIM YAHYA (ACCOUNTANT MEMBER) AND SHRI PAWAN SINGH (JUDICIAL MEMBER)
ITA No. 5378/Mum/2010 (Assessment Year: 2006-07)

Hindustan Petroleum Corporation Ltd., 17, Jamashedji Tata Road, Mumbai-400 020 **PAN: AAACH1118B**	v/s	The Addl.CIT, Range-1(1), Mumbai
APPELLANT		**RESPONDENT**

ITA No. 5702& 5705 /Mum/2010 (Assessment Year : 2006-07)

The Addl.CIT, Range-1(1), Mumbai	vs	Hindustan Petroleum Corporation Ltd,17, Jamashedji Tata Road, Mumbai-400 020 **PAN: AAACH1118B**
APPELLANT		**RESPONDENT**

Assessee by	Shri PJ Pardiwalla & Ms. Aarti Sathe
Revenue by	Shri B Sriniwas, CIT-DR
Date of hearing	05-08-2019
Date of pronouncement	09-10-2019

O R D E R

Per Pawan Singh, Judicial Member:

1. These are cross appeals filed by the assessee and the revenue. The appeals arise out of the order of the ld. Commissioner of Income-tax (Appeals)-I, Mumbai for the Assessment Year 2006-07.

2. The assessee, in its appeal (ITA No.5378/M/2010) has raised the following grounds of appeal:

"1. Disallowance of Expenditure incurred on *Facilities put* up but ownership lying with others/statutory authorities - Rs. 5,76,06,910/-

The CIT (A) erred in confirming the disallowance made by Respondent of the Deduction of Rs.5,76,06,910/- claimed u/s 37(1) of the Income Tax Act 1961 as revenue expenditure, being amount of expenditure incurred on facilities put up but ownership lying with other authorities, by erroneously treating the expenditure as capital expenditure just because the same has been capitalised in the books of accounts and merely because his predecessors have confirmed the disallowance $_v$ from A. Y. 2003-04 till A.Y. 2005-06, and ignoring the factual and legal position as submitted by Appellants during appeal proceedings vide Appeal petition, Written Submissions made vide letter dt. 25.03.2010 and the decisions of Supreme ' Court/High Court which are binding on him.

2. Additions of Notional amount u/s 14A towards expenditure to earn tax free income - Rs. 13,24,00,000/-

The CIT(A) erred* in confirming the Additions of Notional amount u/s 14A made by the Respondent, towards expenditure to earn tax free income, calculated as per Rule 8D, without considering Appellant's submissions made vide Appeal petition and written submissions dt. 25.03.2010, ignoring the factual position as submitted stating that, Investments made in Joint Venture companies are in fact strategic vestment made during 1986 to 1996 out of surplus funds and not out of borrowings and that there is no direct expenditure incurred to earn the Impugned Tax Free Income.

The CIT(A) also erred in not considering the certificate dt. 14,09.2009 by the Tax auditors issued and submitted by Appellants to the Respondent vide Letter dt. 29.10.2009, without prejudice to original grounds, quantifying all the related expenses under Management and Administrative/Operating cost, totaling to Rs. 59.34 Lakhs, which at best, could notionally be attributable to the earning of the tax free dividend

3. Establishment expenses charged to Capital Work in Progress Rs. 21,04,70,2147-

Appellants submit that on the facts and in the circumstances of the case and on a true and proper interpretation of the provisions of Section 37 (1) of the Income Tax Act, 1961, the Respondent erred in confirming the disallowance of Rs. 21,04,70,214/- being amount of expenditure incurred on Salary, Dearness allowance, Postage, Travel and other expenses for various

modernization and upgradation projects in Appellants' existing line of business.

The CIT(A) erred in confirming the disallowance made by Respondent merely by following the predecessors' orders and on the ground that the expenditure has been capitalized in the books of account of the Appellants, assuming that the income from the projects on which the expenditure have been incurred has not been disclosed till now and disregarding the contentions and submissions made by the Appellants vide their Appeal petition and written submission dt. 25.03,10, during appeal proceedings.

4. Provision towards Post Retirement Medical Benefit - Rs. 4,28,00,000/-:

CIT(A) erred in confirming the disallowance made by the Respondent towards the claim of Provision for Post retirement medical benefits, by merely following the predecessors decision holding that it represents future liability and hence a contingent liability, disregarding Appellants contentions/submissions vide Appeal petition and Written Submissions dt. 25.03.2010 during Appeal proceedings to the effect that, the subject provision has been made based on actuarial valuation as on 31.3.05 and 31.3.06 and working out the Company's liability for present and retired employees, post their retirement, considering various factors like NPV, motality rate, remaining service, past experience in the Corporation etc.

Appellants had also referred to the decision of Supreme Court in the case of Bharat Earth Movers Ltd (112 Taxmann 61), wherein it has been held that the liability on the assessee is a certainty and hence an accrued liability during the subject previous year.

5. Deduction towards Provision for leave encashment - Rs. 12,88,66,150/-

Appellants submit that on the facts and in the circumstances of the case and on a true and proper interpretation of the provisions of Section 43B of Income Tax Act, 1961, the Respondent erred in disallowing the impugned legitimate deduction on technical ground that the claim has been lodged during Assessment proceedings and without filing the revised return u/s. 139(5) of the Income Tax Act, 1961.

CIT(A) erred in confirming the above disallowance disregarding Appellants contentions/submissions based on facts and legal positions,

submitted vide Appeal petition and written submission dt, 25.03.2010, mentioning that the claim lodged on the basis of Calcutta High Court decision in case of Exide Industries Ltd and Another Vs. Union of India and other (292 ITR 383) has now been stayed by the Supreme Court and hence the ground is dismissed pending final decision of Supreme Court on constitutional validity of the amendment made to section 43B(f).

6.Profit on Sale of Oil Bonds of Rs. 4,77,50,000/-

Appellants submit that on the facts and in the circumstances of the case, \T Respondent erred in not considering the Appellants claim to offer the Profit on Sale V f of Oil Bonds as Revenue Profit (i.e. @ 30%) instead of Capital Gains (i.e. @ 20%), and rejected on the ground that Oil bonds are like any other Bond and has been treated as capital assets in the books of accounts. The gain or loss on sale has to be treated u/s 45. The CIT(A) also erred in upholding the same.

Appellants refer to and rely upon the following decisions in support of their contentions:-

- Patnaik & Co.Ltd vs CIT(Orissa) 161 ITR 365 (SC)
- CIT vs Gannon Dunkerley & Co. Ltd 119 ITR 595 (Bom)

> CIT vs. Industry and Commerce Enterprise 118 ITR 606 (Orissa)

> CIT vs. BMS 119 ITR 321 (MAD)

> CIT vs. Dhandayuthanpani 123 ITR 709 (MAD)

7. Deduction for feasibility study expenses - Rs. 45,03,5807-

Appellants submit that on the facts and in the circumstances of the case and a true and proper interpretation of the provisions of Section 37(1) of income Tax Act, 1961, the CIT(A) erred in disallowing the Additional claim lodged during Appellate proceedings, on the ground that "only the Tribunal has the power to entertain the new ground and this power cannot be resumed to be available to CIT (A)" as per the decision of Supreme Court in e case of Goetz India Ltd. Vs. CIT (284 ITR 323).

Appellants submit that as per the decision of Supreme Court in the case of Goetz India Ltd. Vs. CIT, wherever the assessee makes mistakes/has omitted to lodge legitimate claim, the Appellate Authority (be it first Appellate Authority or second Appellate Authority i.e. Tribunal) has wide powers to entertain even the new ground not urged before lower authority.

Appellants refer to and rely upon the following decisions: Case Laws on allow/ability of additional claim by ITAT:

a) National Thermal Power Corporation Ltd. Vs. CIT (229 ITR 383) (SC)

b) Goetz India Ltd. Vs. CIT (284 ITR 323)

Case Laws on Merits of the Claim:

a) CIT vs. Jyoti Electric Motors Ltd (255 ITR 345) (Gujarat High Court)

b) India Cements Ltd Vs. CIT (60 ITR 52) (SC)

c) Hindustan Milk Food Manufacturers Ltd Vs. CIT (179 ITR 302)(P&H HC)"

3. The revenue in its cross appeal has raised the following grounds of appeal:

1. Whether on the facts and the circumstances of the case, and in law the ld. CIT(A) erred in directing to allow the claim of deduction u/s.80IB in respect of VREP-II unit.

1.1. The ld. Ld. CIT(A) has further overlooked the fact that the VREP-II unit is nothing but extension of the old undertaking.

2. The Ld. CIT(A) has further erred in directing to allow the claim of deduction u/s./80IB in respect of Silvassa new Blending Plant.

2.1 The Ld. CIT(A) has further overlooked the fact that the assessee was not engaged in manufacturing or production of articles.

3. The Ld. CIT(A) has further erred in directing to allow interest u/s. 244A on payment of self assessment tax.

4. The Ld. CIT (A) has further erred in directing to allow interest from 1st day of April of the assessment year overlooking the fact that the delay in filing TDS certificates is attributable to the assessee.

4. The brief facts of the case are that the assessee is a public sector company, filed its return of income on 27-11-2006 declaring total income at Nil and book profit computed u/s 115JB at Rs.245,80,571/-, for the assessment year 2006-07. Subsequently, on 04-10-2007, the

assessee filed a revised return of income revising the income to Nil and income u/s 115JB to Rs.177,33,02,827/-. The assessing officer, in his assessment order passed u/s 143(3) dated 29-12-2008, determined total income under the normal provisions of the Act at Rs.133,33,41,110/- by making various disallowances / additions. On appeal, the ld. CIT(A) the assessee was allowed relief on the claim of deductions u/s 80IB in respect of Silvasa Unit and VREP-II Unit and confirmed various additions / disallowances. Aggrieved by the action of the Ld. CIT(A), the assessee as well as the revenue have filed appeal before the Tribunal.

ITA No.5378/Mum/2010 by assessee

5. We have heard the submissions of learned authorised representative (ld.AR) for the assessee and the learned departmental representative (DR) for revenue. We have also perused the orders of authorities below and gone through the precedents relied upon before us.

6. Ground No. 1 relates to disallowance of expenditure on facilities put up by assessee by ownership vests with other statutory authorities. The Ld.AR appearing for the assessee submitted that during the relevant period the assessee incurred expenses on railway siding which is essential for loading, transportation and unloading of petrol / diesel / LPG wagons which are essential for carrying on the business of the

assessee and the ownership vests with the railway authorities. But since the expenditure was incurred for the smooth running of the business of the assessee, the expenditure is inevitably is a business expenditure. The AO while making the disallowance by following the order of AY 2003-04 to AY 2005-06, wherein it was held the expenditure is capital in nature. The ld CIT(A) confirmed the action of the AO. The Ld.AR further submitted that the issue is squarely covered by the decision of the Tribunal for the assessment years 2003-04 to 2004-05 (copy of which is placed in the paper book), vide order dated 23-11-2016. The Ld. DR, on the other hand, relied upon the orders of authorities below.

7. We have considered the rival contentions and also perused the material placed before us. Perusal of the record shows that the AO while making the disallowance by following the order of AY 2003-04 to AY 2005-06, wherein it was held the expenditure is capital in nature. The ld CIT(A) confirmed the action of the AO. We find that in assessee's own case for AYs 2003-04 to 2004-05 in ITA Nos.2736/Mum/2007, 649/Mum/2009; 1186/Mum/2009 and 699/Mum/2009, vide order dated 23-11-2016, wherein the Tribunal, by following the decision of Gauhati High Court in CIT v/s Bongaigaon Refinery & Petrochemicals P. Ltd, decided identical issue in favour of the assessee. We also find

that the Tribunal in ITA No.649/Mum/2009 for AY 2004-05 has decided the issue in favour of the assessee by following its own decision for AY 2003-04 in ITA No.2736/Mum/2007. The relevant part of the order of Tribunal in AY 2003-04 in ITA No. 2736/Mum/2009 is extracted below:

> 14. We have considered the rival contentions of the parties and perused the material available on record. The Hon'ble Guwahati High Court in CIT vs. Bongaigon Refinery & Petro Chemicals P. Ltd. (222 ITR 208) while dealing with almost on similar grounds base on similar facts held that expenditure as incurred on construction of Railway Track and siding is revenue expenditure and not a Capital expenditure. Thus, respectfully following the decision of Hon'ble Gujarat High Court, this ground of appeal is allowed in favour of assessee.

Therefore, consistent with the earlier decision of the Tribunal, we decide the issue in favour of the assessee and against the revenue. The assessing officer is directed to allow the expenditure, as claimed. Ground 1 of the assessee is accepted.

8. Ground 2 relates to disallowance u/s 14A, the Ld.AR of the assessee submitted that during the year the assessee received dividend from two companies, i.e. MRPL & HINCOL. The assessee had sufficient profits in the respective years when investments were made. In this connection, the assessee has placed a chart showing details of investments and the funds availability with the assessee. Further, relying upon the judgement of Hon' ble Supreme Court in the case of

CIT v/s Essar Teleholdings Ltd (2018) 90 taxmann.com 2 (SC), wherein it was held that Rule 8D is prospective in operation and cannot be applied to any assessment year prior to AY 2008-09, the Ld.AR of the assessee insisted that Rule 8D is not applicable to the present case as the assessment year involved is AY 2006-07. The Ld.AR of the assessee further relied upon the order of the Tribunal for AYs 2003-04 to 2005-06 in ITA Nos.2736/Mum/2007, 649/Mum/2009; 1186/Mum/2009 and 699/Mum/2009, vide order dated 23-11-2016 has decided the issue in favour of the assessee. The ld AR for the assessee submits that in ld CIT(A) in AY 2006-07 by following the order of AY 2007-08 restricted the disallowance as per tax Auditors certificate for the purpose of disallowance under MAT. The ld AR for the assessee also submitted that ld CIT(A) in AY 2010-11 by following the order of his predecessor for AY 2011-12 & 2012-13 allowed the relief to the assessee and restricted the disallowance as per the tax Auditors certificate. It was prayed that the disallowance may be restricted to the disallowance made on the basis of tax Auditor's certificate. The Ld. DR, on the other hand, relied upon the orders of the lower authorities.

9. We have considered the rival submissions and perused the authorities cited before us. We have noted that during the year the assessee received dividend from two Joint Venture Companies , i.e. MRPL &

HINCOL of Rs.30,42,41,018/-. The assessee made suo moto disallowance of Rs. 53.70 lakhs on the basis of tax Auditor certificate. The AO invoked the provisions of Rule 8D and made disallowance of Rs. 13.24 Crore. It is an admitted position under the law that the provisions of Rule 8D is not applicable for the year under consideration. Further, we have seen that in assessee's own case for AY 2003-04 the Tribunal on similar set of facts passed the following order:

> 10. We have considered the rival contention of the parties and gone through the orders of authorities below. The Hon'ble jurisdictional High Court in CIT vs. Central Bank of India reported in 264 ITR 0522 (Bom). Held that the deduction u/s 80M has to be calculated with reference to the amount of interest computed in accordance with the provisions of the Act after deducting interest on money borrowed for earning such income and not with reference to full amount of dividend received by the assessee, the Hon'ble Court further held that there is no scope for any estimate of expenditure being made and further no scope of Notional Expenditure on pro-rata basis for disallowance unless the fact of particular case so warranted. Hence, considering the decision of Hon'ble jurisdictional High Court and the fact that assessee has invested Rs. 4.72 Crore out of surplus fund and the investment was made during the FYs- 1995-96, 1996-97 and 1999-2000. The assessee has made no expenses in relation to dividend income. Neither the AO nor the ld. CIT(A) brought on record the actual expenditure, if any incurred by assessee in relation to dividend income. The assessee is claiming throughout that the amount of investment was out of surplus available with them, thus, considering the peculiarity of the case, the disallowance made by AO and sustained by ld. CIT(A) are deleted.

In the result, this ground of appeal raised by assessee is allowed.

10. Considering the decision of Tribunal in AY 2003-04 and the facts that ld CIT(A) order dated 09.03.2016 in AY 2010-11, wherein the order of CIT(A) for AY 2011-12 & 2012-13 was followed and disallowance of section 14A was restricted as per the tax Auditors certificate, we direct the AO to verify the fact if the disallowance under section 14A was restricted as per tax Auditors certificate in AY 2010-11 to 201213 and restrict the disallowance to Rs. 53.70 lakhs. In the result this ground of appeal is allowed.

11. Ground No. 3 relates to establishment expenses. The ld AR for the assessee submits that the expenses are in the nature of salary, dearness allowances, postage, Bank charges, stationary etc in relation to employee of project department who monitors various projects in the existing line business. Though it was charges to work in progress in Books, it is allowable as business expenditure. The AO disallowed by following the order for AY 2003-04 to 2005-06 taking view that once particular treatment is given in the books of account it shall be binding unless it is proved to be erroneous or contrary to the concept of the legal position. The ld AR for the assessee submits that Tribunal in assessee's own case allowed similar relief to the assessee in AY 2003-4 to 2005-06 dated

23.11.2016. On the other hand the ld. DR for the revenue supported the view taken by the lower authorities.

12. We have considered the rival submissions of the parties and have gone through the order of the lower authorities. We have seen that in assessee's own case for AY 2003-04 to 2005-06 on similar set of facts passed the following order:

> 18. We have considered the rival contention of the parties and gone through the order of authorities below. We have seen that AO has treated the Administrative Expenses incurred on Engineering Project and the ld. CIT(A) while considering this ground of appeal concurred with the finding of AO.
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> 19. The Hon'ble Supreme Court in Tuticorin alkali Chemicals and Fertilizers Ltd. vs. CIT (227 ITR 172(SC) held that when the question is whether a receipt of money is taxable or not, or whether certain deduction from receipt are permissible in law or not. The question has to be decided according to the principle of law and not in accordance with the Accounting practice. The Hon'ble Apex Court held that Accounting Practices cannot be override section 56 or any other provisions of the Act. The assessee incurred expenses on various personnel/ employee in the project for supervision and monitoring the various project and marketing allocation and refineries which is certainly allowable as business expenditure u/s 37(1) of the Act. Expenses were made on account of salary, Dearness Allowance (DA), Conveyance Expenses, postal charges, bank charges, rent for housing accommodation, Motorcar etc. which is certain of revenue expenditure. Thus, the Ground No.8 raised by the assessee is allowed.

13. Considering the facts that on similar set of facts the Tribunal allowed the similar relief to the assessee, therefore, respectfully

following the same, we find that this ground of appeal is covered in favour of the assessee and against the revenue. In the result this ground of appeal is allowed in favour of the assessee.

14. Ground No. 4 relates to provision toward post retirement medical benefits. The ld. AR for the assessee submits that the accrual of expenditure in books is based on Actuarial valuation reports and in terms of accounting standard -15 (AS-15). The assessee claimed the amount on the basis of incremental liability between two years. As on 31.03.2006 it was Rs. 23.56 Crore and on 31.03.2005 it was Rs. 19.28 Crore, thus the difference was Rs. 4.28 Crore. The AO disallowed it by taking view that it is an uncertain liability and contingent. The ld CIT(A) confirmed it with similar view. The ld AR for the assessee submits that this ground of appeal is covered in favour of the assessee by the decision of Tribunal in AY 1997-98 in ITA No. 1294/Mum/2001 dated 26.09.2012, order dated 25.06.2014 for AY 1996-97, dated 16.01.2013 for AY 2000-01, 2001-02 & 2002-03 and order dated 23.11.2016 for AY 2003-04 to AY 2005-06. On the contrary the ld. DR for the revenue supported the order of the lower authorities.

15. We have considered the rival submission of the parties have seen the order of the lower authorities. We have noted that this is

recurring issue from the AY 1996-97 onwards and on identical grounds of appeal, the Tribunal in AY 2003-04 in ITA No.2736/Mum/2007, vide order dated 23.11.2016, by following the orders of the earlier years passed the following order:

> 6.We have considered the rival contention of the parties and gone through the order of authorities below and the order passed by the Co-ordinate Bench in assessee's own case, we find that similar issue had come up consideration before this Tribunal in AY 1997-98 and again in AYs 2000-01, 2001-02 and 2002-03 and the Co-ordinate Bench vide order dated 16.01.2013 in ITA Nos. 8575, 8576 & 5885/Mum/2004 for AYs 2000-01, 2001-02 and 2002-03 respectively made the following order:
>
> > *"9. We have heard the arguments of the two sides and perused the impugned orders and the material placed before us. The post retirement medical benefit is a provision, which has become a must for all the concerns, specially where there are health hazards. It is because of these reasons, the Government has notified that post retirement medical benefit be allowed. We have seen from the papers appended in the APE that a service contract is worded in such a way that these benefits are integral part of the contracts and the liability gets attached, the moment a service contract is signed; inducting a new employee. The argument of Senior Counsel is, therefore, well founded. We shall also, refer to the case of Bharat Earth Movers Ltd. vs CIT reported in 245 ITR 428, wherein the Hon'ble Supreme Court has held that leave encashment is not a contingent liability. Taking the same cue, that post retirement medical benefit is also a liability which gets attached to the company the moment, the service contract is signed, we hold that the revenue authorities erred in disallowing the provision under this head. Having held so in principle, neither we have been able to gather the year wise breakup of the Actuarial valuation made by the Actuary as un 31.03.1997, nor the Senior Counsel, was able to apprise us on the valuation, pertaining to the year under consideration.*
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> *10. Taking into account the above reason, we deem it fit to restore the issue to the file of the AO, who shall call for the year wise valuation and then allow the claim accordingly. We, therefore, set aside the order of the CIT(A) on this issue and direct the AO to allow the claim of provision after verification of the Actuary's report pertaining to the current year."*

Therefore, respectfully following the order of earlier years, we set-aside the matter to the file of AO to verify the Actuarial Valuation Report and then allowed the claims of assessee in accordance with the order dated 16.01.2013.

In the result, this ground of appeal is allowed for statistical purpose."

16. Considering the aforesaid persistent decisions of Tribunal in all AYs and respectfully following the order of earlier years, we set-aside the matter to the file of AO to verify the Actuarial Valuation Report and then allowed the claims of assessee in accordance with the order dated 16.01.2013. In the result, this ground of appeal is allowed for statistical purpose.

17. Ground No. 5 relates to deduction of leave encashment under section 43B. The ld. AR for the assessee submits that this expenditure was claimed during the assessment proceedings. The basis of deduction was the decision of Kolkata High Court in Exide Industries (254 ITR 428), wherein the provision of section 43B (f) was stuck down being arbitrary and unconscionable. The AO disallowed it by taking view that the claim was made after expiry of period of limitation for filing revised return under section 139(5). The Ld. DR relied upon the order of lower authorities.

18. We have considered the rival submissions of the parties have seen the order of the lower authorities. We have noted that this is

recurring issue from the AY 1996-97 onwards and on identical grounds of appeal, the Tribunal in AY 2003-04 in ITA No.2736/Mum/2007, vide order dated 23.11.2016, by following the orders of the earlier years passed the following order:-

> *"45. Ground No.6 relates with the deduction on Leave Encashment u/s 43B of the Act. Ld. AR of assessee argued that the lower authorities has not considered the claim of the assessee holding that the claim was filed without filing the revise return of income. On the other hand ld DR for Revenue supported the order of authorities below.*
> *46. We have considered the rival contention of the parties and gone through the orders of authorities below. We have seen that claim of the assessee was not considered by the lower authorities for the regions that it was claimed without filing the revise return of income. The Hon'ble Apex Court in Goetz India Ltd versus CIT to 84 ITR 322 held that whenever the assessee makes a mistake or omitted to lodge a legitimate claim , the appellate authority be it first appellate authority or the second appellate authority, has vide power to entertain the new grounds of appeal. Respectfully following the decision of Hon'ble Apex Court which has a binding precedent by virtue of Article 141 of the Constitution of India, we admits the grounds of appeal raised by the assessee and restore this ground of appeal to the file of AO to reconsider it afresh and pass order in accordance with law. Thus, this ground of appeal is allowed for statistical purpose."*

19. Considering the aforesaid persistent decisions of Tribunal in all AYs and respectfully following the orders of earlier years, we set-aside the matter to the file of AO to reconsider it afresh, and pass order in accordance with direction in earlier years. Thus, this ground of appeal is allowed for statistical purpose. In the result, this ground of appeal is allowed for statistical purpose.

20. Ground No. 6 relates to treatment of profit on sale of oil bonds. The Ld. AR of the assessee submits that during 2000s, Govt of India was compensating the loss incurred in sale of Controlled Petroleum

Products (at below the Market Price) through issuance of oil bonds, i.e. instead of cash settlement it was done through issuance of bonds. To that extent of bonds received, income would be credited & investment account would be debited. The issue involved is treatment of profits made on sale of oil bonds. Oil bonds having face value of Rs.850 cr. were sold at Rs.854.77 cr. In return of income, profit on sale of oil bond was inadvertently treated as capital receipt. However, during assessment proceedings, profit on sale of oil bonds was offered as business income. The AO disallowed it on the ground that oil bonds are like any other bonds and has to be treated as capital asset. The Ld. CIT(A) upheld the action of the AO.

21. The Ld.AR of the assessee further submitted that the oil bonds have been issued by Ministry of Finance, Govt. of India in lieu of cash payments towards compensation for under recovery by oil companies in four sensitive products, i.e. LPG, SKO, MS & HSD and the resulting gain / loss on sale of oil bonds was to improve liquidity position. The assessee has always shown the said receipts in its trade account. There was no investment made by assessee to acquire these bonds; hence, the same are not capital asset as envisaged in section 2(47) of the Act. The Ld.AR further submitted

that re-assessment notice was issued to HPCL giving reasons that there has been omission in assessing it as capital gain and therefore, he has proposed to assess as business income. The Ld.AR of the assessee submits that the issue stands covered in favour of the assessee by the following decisions:-

1. Patnaik & Co Ltd vs CIT 161 ITR 365(SC)
2. CIT vs Gujarat State Fertilizers & Chemicals Ltd (2018) 409 ITR (Guj)
3. DCM Shriram Consolidated Ltd ITA No.1836/Del/2012 ord. dt 20-05-2015

22. The Ld. DR, on the other hand, relied upon the orders of authorities below.

23. We have considered the rival submissions and perused the material placed before us. We find that the Hon'ble Supreme Court in the case of Patnaik & Co Ltd v/s CIT (supra) has considered an almost identical issue. In that case, the facts were that the assessee dealt in automobiles and also sold spare motor parts. For the assessment year 1963-64 the assessee claimed a loss of Rs.53,650/- sustained by it on disposing of its subscriptions to the Orissa Government floated Loan 1972. It claimed that the loss suffered by it was revenue loss and, therefore, deductible against the profits for future years. The Income Tax Officer and the Appellate Commissioner of income Tax negatived the claim of the assessee.

But on second appeal, the Appellate Tribunal accepted the contention that the subscription to the Government loan was conducive to its business and that the loss arose in the course of the business, and that therefore, the assessee was entitled to a deduction of the loss claimed by it. But the High Court on a reference to it at the instance of the revenue held that the loss was a capital loss. The High Court was of the view that the factual substratum of the case had been misconceived by the Appellate Tribunal and that it was, therefore, entitled to re-examine the evidence and arrive at its own findings of fact. Under these facts and circumstances the Hon'ble Apex Court held that the Appellate Tribunal found that having regard to the sequence of events and the close proximity of the investment with the receipt of Government orders the conclusion was inescapable that the investment was made in order to further the sales of the assessee and boost its business. In the circumstances, the Appellate Tribunal held that the investment was made by way of commercial expediency for the purpose of carrying on the assessee's business and that therefore, the loss suffered by the assessee on the sale of the investment must be regarded as a revenue loss.

24. Further, the Delhi Benches of the Tribunal in DCM Shriram Consolidated Ltd (supra), has decided an almost identical issue and held in favour of the assessee by observing as under:-

> "11. On careful consideration of above rival submissions of both the sides and careful perusal of the relevant material placed before us, we note that the Department has not agitated the issue of loss on sale of investments/fertilizer's bonds suffered by the assessee during the year under consideration, but the main controversy revolves on the issue of loss recorded by the assessee on diminution of the fertilizer's bonds in the hand at the end of the year which was shown as other current assets (trade) under the head "current assets, loans and advances". The ld. AR has also drawn our attention towards order of ITAT Mumbai, 'D' Bench in the case of Reliance Industries Ltd. Vs. CIT (2014)-TIOL-160-ITAT-MUM and submitted that it is a well accepted principle that the assessee is entitled to adjust the actual cost of imported assets as acquired in foreign currency on account of fluctuation in the rate of exchange at each of the relevant balance sheet dates then in the same manner loss on fertilizer's bonds given to the assessee by the Government of India under compulsion which were received by the assessee unwillingly under commercial expediency then the loss arising on account of fluctuation in the market rate of bonds at the end of year can be considered as ascertain losses and allowable as a business expenditure. In this order ITAT Mumbai held as under: "8. We have carefully considered the order of ld. Commissioner of Income Tax and the submissions of ld. Representatives of the parties. We have also carefully considered the cases cited before us (supra). It is relevant to state that in the case of Woodward Governor India (P.) Ltd. (supra), the Hon'ble Apex Court observed and held that the assessee debited to its profit and loss account certain unrealized loss due to foreign exchange fluctuation in foreign currency transactions towards revenue items as on the last day of the accounting year. The A.O. held that the liability as on the last

date of the previous year was not an ascertained but a contingent liability. Resultantly, the same was added back to the total income. The CIT(A) echoed the assessment order. However, the Tribunal held that the claim of the assessee for deduction of unrealized loss due to foreign exchange fluctuation as on the last date of the previous year was deductible. The said order of the Tribunal was upheld by the Hon'ble High Court. On further appeal by the department, the Hon'ble Supreme Court held that the loss suffered by the assessee is on revenue account towards foreign exchange difference as on the date of balance sheet and is an item of expenditure deductible u/s 37(1). It further observed than an enterprise has to report outstanding liability relating to import of raw material using closing rate of foreign exchange and any difference, loss or gain, arising on conversion of said liability at closing rate should be recognized in profit and loss account for reporting period. From the judgment of the Hon'ble Supreme Court it can be clearly deduced that unrealized loss due to foreign exchange fluctuation in foreign I.T.A. No.7223/Mum/2011 currency transactions on revenue item as on the last date of the accounting year is deductible.

9. ITAT, in the case of Kotak Mahindra Investment Ltd. (supra) also considered a similar issue. In the said case the assessee- company was engaged in the business of granting of loans and advances against shares and securities also traded in derivative segment by entering into future and option contract. Some of the future contracts could not be squared up at the end of the financial year. The assessee booked the expected loss in such contracts on MTM basis. The assessee thus claimed a loss as calculated on MTM basis claiming that he was following this practice consistently. That it was also as per recognized Accounting Standard. AO rejected the claim on the ground that the derivative contracts were not stock in trade as there was no cost of acquisition. He finally held that the loss on account of "MTM" basis was thus a notional loss and was contingent in nature and could not be allowed to be set off against taxable income. On appeal, the ld. CIT(A) allowed the same by agreeing with the contention of the assessee that such loss on such valuation

which is called "MTM" has to be allowed even though it may appear to be a notional loss. The Tribunal while confirming order of ld. CIT(A) and allowing the said loss placed reliance on the decision of Hon'ble Apex Court in the case of Woodward Governor India (P.) Ltd. (supra) and also the decision of Tribunal in the case of Edelweiss Capital Ltd V/s ITO in ITA No.5324/Mum/2007 (AY- 2004-05) dated 10.11.2010 and the decision in the case of Ramesh Kumar Damani V/s Addl.CIT in ITA No.1443/Mum/2009 (AY- 2006-07)dated 26.11.2010. Copies of which are placed in the compilation of case laws at pages 76 to 84 and pages 85 to 90 respectively.

10. We also observe that similar issue was considered by Hon'ble Apex Court in the case of ONGC Ltd (supra). The assessee a public sector undertaking was engaged in the capital intensive exploration and production of petroleum products for which it had to heavily depend on foreign loans to cover its expenses, both capital and revenue and for payment to non-resident contractors in foreign currency for various services rendered. The assessee made three types of foreign exchange borrowings i.e.(i) on revenue account; (ii) on capital account, and (iii) for general purposes. Some of the loans became repayable in the relevant accounting year and the date of payment of some loans fell after the end of the relevant accounting year. The assessee revalued its foreign exchange loans in foreign exchange on revenue account, on capital account and for general purposes outstanding as on 31-3-1991, and claimed the differences I.T.A. No.7223/Mum/2011 between their respective amounts in Indian currency as on 31-3-1990 and 31-3-1991 as revenue loss under section 37(1) in respect of loans used in revenue account. The assessee also treated the similar difference in foreign exchange as an increased liability u/s 43A. The AO allowed the deduction claimed u/s 37(1), taking into consideration the increased foreign exchange liability and repaid in the accounting year for the purpose of depreciation. He did not however, allow the claim for foreign exchange loss on loans both in relation to capital as well as revenue account which were outstanding on the last day of accounting

year. On appeal, the CIT(A) affirmed the view of AO in relation to deduction u/s 37 of the interest on loans outstanding on the last day of the accounting year but allowed the benefit of increased liability for computation u/s 43A in relation to loss outstanding on the last day of the accounting year. Hence, the assessee as well as department took the matter in appeal to the Appellate Tribunal. The Tribunal held that the loss claimed by the assessee on revenue account was allowable u/s 37(1) and also rejected the appeal of the department and held that the assessee was entitled to adjust actual cost on imported assets acquired in foreign currency on account of fluctuation in the rate of exchange in terms of section 43A. On appeal by the department, the Hon'ble High Court reversed the decision of the Tribunal on both the issues. On further appeal to the Apex Court, the decision of the High Court was reversed and it was held that (a) that the loss claimed by the assessee on account of fluctuation in the rate of foreign exchange as on the date of the balance-sheet was allowable as an expenditure u/s 37(1), and (b) that the assessee was entitled to adjust the actual cost of imported assets acquired in foreign currency on account of fluctuation in the rate of exchange at each of the relevant balance sheet dates, pending actual payment of the liability u/s 43A, prior to its amendment by Finance Act, 2002.

11. In view of above decisions, it is clear that the loss due to foreign exchange fluctuation in foreign currency transactions in derivatives has to be considered on the last date of accounting year and it is deductible u/s 37(1) of the Act. Therefore, in allowing the said claim of the assessee by AO, the action of the AO is in consonance with the decisions of the Hon'ble Apex Court and also the view taken by the Tribunal in the cases cited hereinabove (supra). Hence, the view taken by AO to allow loss of Rs.43.78 crores while making assessment u/s 143(3) on account of derivative contract outstanding is not an erroneous view taken by AO, nor the action of AO is prejudicial to the interest of revenue. Hence, the order of Commissioner of Income Tax u/s 263 of the Act to hold that the action of AO is erroneous to the extent the loss

considered as I.T.A. No.7223/Mum/2011 allowable on account of derivative contracts outstanding as on the date of balance sheet i.e. 31.3.2008 is neither justified nor in accordance with law. Hence, we quash the said order of ld. Commissioner of Income Tax by allowing the grounds of appeal taken by the assessee."

25. In view of the aforesaid discussions, we find that the facts of the present case are similar; therefore, applying the ratio of judgement of the Hon'ble Apex Court in Patnaik & Co Ltd Vs CIT (supra), we decide the issue in favour of the assessee and against the revenue. Ground 6 of the appeal of the assessee succeeds.

26. Ground No.7 relates to deduction for feasibility study expenses. The ld.AR of the assessee submits that the assessee claimed expenditure of Rs. 19,80,000/- for detailed feasibility study for yield and energy improvement in CDU-II / VDU at Vizag Refinery and Rs.25,23,580 for pre-feasibility study for LPG-Carvern Project. The ld AR for the assessee submits that this ground of appeal was raised as additional ground of appeal before ld CIT(A). The ld. CIT(A) held that the power to entertain new /additional ground of appeal is available before the Tribunal and not CIT(A). The Ld.AR of the assessee was fair enough in submitting that in AY 2003-04, the Tribunal by following its own order for AY 2001-02 has decided the issue against the assessee. The Ld.AR further submitted

that though the tribunal decided the issue against the assessee, but there the assessee raised the issue for the first time before the Tribunal, so not being on record, the Tribunal held that it could not entertain any new ground. However, during the year under consideration the assessee raised additional ground of appeal before ld CIT(A) hence, for the year under consideration deserve to be considered in different manner. In support of his submissions the Ld.AR of the assessee relied upon the judgment of Hon'ble Bombay High Court in the case of Prithvi Brokers & Shareholders Ltd (349 ITR 336)(SC) for the proposition that assessee is entitled to raise additional grounds before the appellate authority. On the other hand the ld. DR, on the other hand, relied upon the order of lower authorities.

27. We have considered the rival submissions and perused the material available on record. We have noted that the assessee raised the additional ground of appeal before the ld. CIT(A), which was not allowed by him by taking view that only Tribunal is entitled to admit the additional ground of appeal. In our view the decision of ld CIT(A) was not in consonance with the decision of Hon'ble Bombay High Court in Pruthwi Broker and shareholder (supra), therefore, we admit the additional ground of appeal raised by the

assessee. We are in principal accepting that the claim of the feasibility study expenses is allowable expenses. However, keeping in view that the assessee has raised this issue for the first appellate stage, therefore, we deem it appropriate to restore this issue to the file of AO to verify the expenses and allow in accordance with law. Needless to order that before passing the order the AO shall grant opportunity to the assessee to file relevant evidences to substantiate its claim. In the result this ground of appeal is allowed for statistical purpose.

28. In the result the appeal of the assessee is partly allowed.

ITA No. 5705/Mum/2010 by Revenue (AY 2006-07)

29. Ground 1 relates to deduction u/s 80IB pertaining to VREP-II Unit. The brief facts are that during AY 2001-02, refinery expansion at Visakh from 4.5 MMTPA to 7.5 MMTPA was commissioned, which was named as VREP-II. Deduction u/s 80IB (9) was allowed till A.Y. 2005-06. The AO, for the first time denied the deduction on the ground that VREP-II is nothing but extension of the old undertaking. According to the AO, VREP-II and Visakh Refinery should be two physically separate plants capable of refining and producing petroleum products independently and separate from each other. The assessing officer further observed that the Factories

Act, Central Excise Act, Sales-tax Act, Indian Explosives Act do not recognize VREP-II as separate unit. Additional capacity of VREP-II is treated at par with that of new refinery. VREP-II is only an expansion of old undertaking in its own term as required u/s 80IB(1). Legislature did not intent to cover expansion and had it been intended, the wording would have been similar to that of section 80-IC. On appeal the ld. CIT(A) accepted the claim of the assessee. The ld CIT(A) while allowing relief to the assessee held that CBDT has accepted & notified all substantial expansion of refinery of PSU Oil companies vide notification No.66 of 2008 dated 30-05-2008. The assessee was allowed the claim consistently till AY 2005-06. The VREP-II was running as independent unit, capable of processing of crude oil independently even if the old unit was non-functional. The Ld.AR further submitted that the issue is covered in favour of the assessee by the decision of Tribunal for the assessment year 2005-06 in ITA No.699/Mum/2009 order dated 23-11-2016. On the other hand the ld. DR for the revenue supported the order of the AO.

30. We have considered the rival submissions and perused the material placed before us. We find that the in assessee's own case for the assessment year 2005-06 in ITA No.699/Mum/2009 vide order

dated 23-11-2016 has considered similar issue in assessee' s favour by observing as under:-

52. We have considered the rival contention of the parties and perused the order of authorities below. We have noticed that the AO not disputed the market price of cost of processing VGO in all refinery units. However the same was considered to be below the crude oil price and was not accepted by AO. The AO further observed that assessee is required to include at least cost of processing crude oil to VGO in computing the price of inter-unit transfer. The AO further concluded that the assessee was required to submit average processing cost in CDU and the same works out to be Rs. 36.24/MT. The AO accordingly took Rs. 14400.79/mt as the transfer price of MT VGO. And inter-unit transfer was calculated at Rs. 1204.19 crore reducing the net profit of the VERP II of Rs 664,51,07,775/-. The ld CIT(A) while considering this ground of appeal concluded as under:

"10.6 I have carefully considered the submission of ld AR and gone through the facts brought before me. As I filed, the AO has mentioned the market price in his order and has not disputed the same. Since the market price is lower than the value adopted by the appellant there is no reduction of cost resulting in inflation of the profit of the eligible unit and thereby a claim of deduction under section 80I. In fact by adopting the value which is substantially higher than the market price, the appellant has increased its cost, reduced the profits of eligible unit and thereby has claimed a lesser reduction under section 80 IA then what could have been calculated if market price of the product was adopted. In such a scenario there was no region for the AO to disturb the calculation made by the appellant. He has increased the value only marginally from 14.365 p.m. to 14.479 p.m. own estimate basis which cannot be accepted under the circumstances.

10.7. Taking into consideration the entirety of the facts and circumstances of the appellant's case and the relevant provision of the Income Tax Act, I find no reason to support the action of AO. Accordingly he is directed to accept the appellant's claim of profit

from the VERP II for the purpose of deduction under section 80 IB. This ground of appeal is allowed.

53. We have seen that the ld Commissioner (Appeals) granted the relief after considering the entire fact related with the claim of assessee. We do not find any reason to differ with the finding of learned Commissioner (Appeals). Thus this ground of appeal is dismissed.

31. Considering the decision of the Tribunal, we find that this ground of appeal is covered in favour of the assessee. No variance in facts for the year under consideration is brought to our notice. Therefore, consistent with the earlier decision of the Tribunal, we direct the assessing officer to allow is deduction of section 80IB in respect of VREP-II unit to the assessee. In the result this ground of appeal raised by revenue is dismissed.

32. Ground No. 2 relates to deduction u/s 80IB in respect of Silvassa Lube Blending Plant. The Ld.AR for the assessee submitted that the refinery produces Base Oil known as Lube Oil Base Stock (LOBS). The Base stock is then blended with additives to make various finished lubricants and greases. HPCL has set up a Lube Blending Plant at Silvasa (backward area) in A.Y. 2000-01. The assessing officer has denied the claim u/s 80-IB(4) for the first time in AY 2006-07 on the ground that activity at the Blending Plant does not tantamount to manufacture. The Ld.CIT(A) held that the assessee has set up a state of the art, highly technically advanced

Lube Blending Plant of 6-TMT capacity. Each of the lubricant / grease requires blending of additives at specified %age and each type of finished lubricant has different chemical properties. The process of manufacturing lubricants from Lube Oil base stock is considered as manufacturing activity under Central Excise Act by placing reliance on the judgement of Supreme Court in Oracle Software Ltd. The Ld.AR of the assessee placed his reliance on the following judgements:-

1. Vinbros & Co Ltd. v/s ITO 110 ITD185
2. Oracle Software Ltd. SLP (c) 4719/2008
3. Ester Lube-Technologies v/s ITO ITA No.14/Mum/2012

33. On the other hand the ld DR for the revenue supported the order of the AO.

34. We have considered the rival submissions and perused the material placed before us. We have also deliberated on the various case law relied by the ld. AR for the assessee. In the return of income the assessee claimed deduction of 80IB(4) of Rs. 6.30 Crore. The AO asked the assessee to justify its eligibility u/s 80IB(4). The assessee filed its reply dated 3.12.2008. In the reply the assessee stated that the assessee owned two refineries at Mumbai and Vishakhapatnam. In the process of refining of crude and manufacturing of various petroleum product at the refinery, one of the by product

manufactured is Reduced Crude Oil (RCO). This RCO is further processed to manufacture Lube Oil Base Stock (LOBS), as well as Asphalt. Asphalt id further processed at the refinery. The LOBS product at Lubes refinery, is only a base oil and an input for production of Lubricants and Greases manufactured at Blending plants. The LOBS (finished goods) manufactured at Lubes refinery is one of the input raw material and the additives procured indigenously or imported are transported to various lube blending plants like Silvassa, Budge Budge Mazgaon, Ramnagar etc. The assessee further stated that each lubricant / grease type require blending of additives at specified percentage and each type lube finished or manufactured products have different chemical properties. Thus, the process of manufacturing lubricants, as per specified formulas to meet market demand and is not a simple mixing but it is a complete manufacturing activity by itself to produce various lubricants. The reply / explanation furnished by the assessee was not accepted by the assessing officer. The AO disallow the deduction u/s 80IB(4) by taking view that no manufacturing or production of articles are done by assessee in terms of section 80IB(2)(iii) of the Act. Before, ld CIT(A) the assessee explained that the assessee is manufacturing the distinct

product which different from the raw material used by the assessee. The assessee also explained the facts as submitted to the AO. The ld CIT(A) allowed relief to the assessee by holding that the assessee is manufacturing lubricants from Lube Oil base stock, which is considered as manufacturing activity under Central Excise Act. We have noted that the end product manufactured by assessee as explain hereinabove is quite distinct and is a commercially different article than the major input rectified, which is fit for consumption / use for commercial use. That the changes made in input result in a new and different article is recognized in the trade as such. Hence, the assessee, in the instant case, satisfied the requirement, that it manufactured or produced an article or thing for the purpose of section 80-IB. Thus, we affirm the order passed by ld CIT(A). In the result the appeal of the revenue is dismissed.

35. Ground No.3 relates interest u/s 244A on payment of self assessment tax. The ld.AR submits that the assessee paid self assessment tax of Rs.100 crores on 29-04-2006. Originally, the assessing officer granted interest on the self assessment tax paid. However, subsequently, vide order u/s 154 dated 09-09-2008 the interest on self assessment tax paid was withdrawn. The Ld.CIT(A) allowed the interest by following his own order dated 23-03-2010,

which was based on CBDT circular No.549 dated 31-10-1989. On the other hand the ld. DR for the revenue relied upon the order of AO.

36. We have considered the rival submissions and perused the material available on record. We have seen that the ld CIT(A) has directed the AO to follow the CBDT Circular No. No.549 dated 31-10-1989. The Hon'ble Bombay High Court in Stockholding Corporation of India Ltd Vs CIT [2015] 53 taxmann.com 106 Bom held that tax paid on self assessment would fall under section 244A(1)(b), i.e. a residuary clause covering refunds of amount not falling under section 244A(1), therefore, interest is payable on refund on excess amount paid on self assessment tax. Considering the decision of Jurisdictional High Court we do not find any infirmity in the order passed bt ld CIT(A), which we affirm. In the result this ground of appeal raised by the revenue is also dismissed.

37. Ground 4 relates to directions to CIT(A) to allow interest from 1st April of the assessment year overlooking the fact that the delay in filing TDS certificates was attributable to the assessee. The Ld.AR for the assessee submits that subsequent to filing of return of income, assessee submitted the following further TDS certificates:-

i. vide letter dated 12-04-2007 – Rs.26,59,058/-
ii. vide letter dated 14-11-2007 – Rs.37,40,686/-

38. The assessing officer, while issuing refund the assessing officer considered the TDS on the quantum of above certificates from the date of submission of TDS certificates only, instead of 01-04-2006. The Ld. CIT(A), relying upon section 244A(1)(a) decided the issue in favour of the assessee. The Ld.AR placed his reliance on Kotak Mahindra Fin Ltd v/s DCIT 93 TTJ Mum 500.

39. On the other hand the ld. DR for the revenue submits that the delay in filing TDS certificate was attributable to the assessee, the assessing officer was right in restricting the interest u/s 244A from the date of filing of TDS certificates.

40. We have considered the rival submissions and perused the material placed before us. We have noted that the assessee claimed the AO while issuing refund granted interest from the date of submissions of TDS instead of 01.04.2006. It was claimed that the TDS amount is also to be treated as advance tax as paid u/s 199. The ld CIT(A) after considering the submissions agreed with the contention of the assessee. The ld CIT(A) while directing the AO has clearly held that section244(1)(a) clearly prescribed the calculation of interest on advance tax and TDS from 1st day of the April of the assessment year. No contrary fact is brought to our notice to take the other

view. In the result we affirm the order of ld CIT(A) id affirmed and the ground of appeal raised by the revenue is dismissed.

ITA No. 5702/Mum/2010 by revenue (AY 2006-07)

41. This appeal by revenue against the order of ld CIT(A) dated 23.02.2009, which in turn arises on the order dated 09.09.2008 passed by AO, wherein the AO rectified/ suo moto withdrawn interest granted u/s 244A. The revenue, in its appeal, has raised the following grounds of appeal:-

> "1"Whether on the facts and the circumstances of the case, and in law the CIT(A) erred in directing to allow interest u/s. 244A also on the amount of refund of tax arising out of self assessment tax paid."

42. We have noted that the revenue has raised the same issue/grounds of appeal in its Cross appeal ITA No. 5705/Mum/2010, which we have dismissed by affirming the order of ld CIT(A). Hence, the ground of appeal raised in the present appeal needs no specific adjudication and accordingly dismisses.

43. In the result, appeal of the assessee is partly allowed and both the appeals of the revenue are dismissed.

Order pronounced in the open court on 09-10-2019.

Sd/- Sd/-

(Shamim Yahya)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 09th October, 2019

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Asstt. Registrar, ITAT, Mumbai