IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "H", MUMBAI

BEFORE SHRI PRAMOD KUMAR (VP) AND SHRI RAM LAL NEGI (JM)

ITA No. 4946/MUM/2011
Assessment Year: 2007-08

Hindustan Petroleum Corporation Limited, 17, Jamshedji Tata Road, Mumbai - 400020 PAN: AAACH1118B	**Vs.**	The Addl. Commissioner of Income Tax, Range 1 (1), Mumbai
(Appellant)		**(Respondent)**

&

ITA No.5537/MUM/2011
Assessment Year: 2007-08

The ACIT-1(1), Room No. 579, Aayakar Bhavan, Mumbai – 20	**Vs.**	M/s Hindustan Petroleum Corporation Limited, 17, Jamshedji Tata Road, Mumbai - 400020 PAN: AAACH1118B
(Appellant)		**(Respondent)**

Assessee by : Shri P.J. Pardiwala &
Ms. Aarti Sathe (ARs)

Revenue by : Shri B. Srinivas (CIT DR)

Date of Hearing: 09/12/2019
Date of Pronouncement: 06/03/2020

O R D E R

PER RAM LAL NEGI, JM

These are the cross appeals filed by the assessee and the revenue against the order dated 28.03.2011 passed by the Commissioner of Income Tax (Appeals)-I (for short 'the CIT (A)'), Mumbai, for the assessment year 2007-08, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against the assessment order passed by the AO u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

ITA No. 4946/MUM/2011 (Assessment Year: 2007-08)

Brief facts of the case are that the assessee, a Public Sector Undertaking, engaged in the business of refining and marketing of various petroleum products, filed its return of income for the assessment year under consideration declaring total income at Rs. 111,60,078,183/- under the normal provisions of the Act. The return was processed u/s 143 (1) of the Act and the AO passed assessment order determining the total income of the assessee at Rs. 1966,49,96,120/- under the normal provisions of the Act after making various additions and disallowances. In the first appeal, the Ld. CIT (A) partly allowed the appeal filed by the assessee against the assessment order. Still aggrieved, the assessee is in appeal before the Tribunal.

2. The assessee has challenged the impugned order passed by the Ld. CIT (A) by raising the following effective grounds:

1. ***"Disallowance of Expenditure incurred on facilities put up but ownership lying with others/statutory authorities – Rs. 8,20,74,865/-.***

   Appellant 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, 1961, CIT (A) erred in confirming the disallowance of Rs. 8,20,74,865/- being expenditure incurred on putting up facilities such as Railway Siding, the ownership of which lie with others/statutory authorities.

   The respondent has erroneously treated the expenditure as 'capital expenditure' merely because the same has been capitalized in the books of accounts and merely because his predecessors have confirmed the disallowance from A.Y. 2003-04 till A.Y. 2005-06. Further, in the Respondent's Order, not only the Revenue Expenditure was disallowed, but the Appellant's claim for depreciation on the Capital Expenditure too has been denied, without citing any reason as to why depreciation too cannot be allowed.

   During the Assessment and as well during Appeal proceedings before CIT (A), the appellant referred to and relied upon few judgments and CIT (A) erred in ignoring the Appellant's

submissions and confirmed the disallowance of the AO by citing his Order of earlier year on the same issue.

2. ***Disallowance of Establishment expenses charged to Capital Work in Progress R. 31,22,94,793/-.***

Appellant 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, 1961, CIT (A) erred in confirming the disallowance of Rs. 31,22,94,793/- being amount of expenditure incurred on Salary, Dearness allowance, Postage, Travel and other expenses for various modernization and upgradation projects in Appellant's existing line of business.

The CIT (A) erred in confirming the said disallowance made by the AO merely by following his order of the earlier year which was on the ground that the expenditure has been capitalized in the books of account of the Appellants. CIT (A) erred in disregarding the contentions and submissions made by the Appellants vide their Appeal petition and written submission during appeal proceedings, citing therein few of the judgments, which we continue to rely upon before the Honorable Tribunal.

3. ***Disallowance of Provision for Post -Retirement Medical Benefit Rs. 59,00,000/-:***

CIT(A) erred in confirming the disallowance made by the AO towards Appellant's claim of deduction towards 'Post-retirement medical benefits' that has been provided in their Books, by merely following the predecessors decision holding that it represents future liability and hence a contingent liability. CIT(A) disregarded Appellants contentions/submissions made vide Appeal petition and Written Submissions to the effect that the subject provision has been made based on actuarial valuation as on 31.3.07 and such liability based on actuarial valuation is permitted as expenditure as held in by Supreme Court in the case of BEML (112 Taxman 61) It is pertinent to note that such actuarial valuation is arrived at following a statistical model considering various factors like NPV, mortality rate, remaining service in the Corporation etc. and therefore is an ascertained liability.

4. Disallowance of Provision for leave encashment – Rs. 28,30, 00, 000/-:

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 confirming the disallowance of the AO, of legitimate business expenditure, merely by following his Order of the earlier year in Appellant's case. In the earlier year, the respondent has denied the deduction on the ground that although the Calcutta High Court has struck down the constitutional validity of the provisions of 43B(f) in case of Exide Industries Lid and Another Vs. Union of India and other (292 TTR 383), it has now been stayed by the Supreme Court. Whereas, the liability towards leave encashment has been valued actuarially and it is funded too by effecting payment to LIC of India. Therefore, provisions of section 43B(f) are met and appellant is entitled for a deduction.

5. Treatment of Loss on Sale of Oil Bonds as Capital Loss – Rs. 20,02,40, 600/-:

CIT(A) erred in confirming the treatment given by AO of treating the loss on sale of Oil Bonds as a Capital Loss, ignoring the factual position as explained by the Appellants during the Appeal proceedings, vide their Appeal petition and written submissions.

CIT(A) failed to appreciate that:

a) Appellant had not purchased these bonds for any enduring return and rather were allotted to them by Ministry of Petroleum and Natural Gas/Ministry of Finance in lieu of cash to compensate the under recovery suffered by the Appellant in their business.

b) In the pricing and compensation mechanism that is put in place by the Government of India, the bonds allotted from time to time and these were offered as income in the year of allotment and therefore it is only natural that the resulting gain/ loss on actual sale of Oil Bonds is to be treated as a revenue gain/loss.

6. Disallowance of 'Premium on Forward Exchange Contract' incurred for repayment of External Commercial Borrowings("ECB") taken for financing project cost:

CIT(A) erred in confirming the disallowance made by the AO under the provisions of Section 43A of the Act against Appellant's claim of deduction u/s 37(1) of the Act, being a

business expenditure. Although CIT (A) allowed the Appellants claim that the provisions of 43A is not attracted to the extent of Assets acquired within India, he erred in confirming that the expenditure as 'capital' in nature and therefore erred in allowing only depreciation to be claimed.

The factors to be considered in order to find out if an expenditure on account of fluctuation in the foreign current rates is deductible as stated by his Lordship S.H. Kapadia in the case between CIT Vs. Woodward Governor India (P) Ltd. are:

i. Whether the system of accounting followed by the assessee is the mercantile system, which brings in the debits of the amount of expenditure for which a legal liability has been incurred even before it is actually disbursed and credits, what is due, immediately it becomes due even before it is actually received;

ii. whether the same system is Mowed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide.

iii whether the assesses has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it;

iv whether the assessee has been consistent and definite in making entries in the account Cooks in respect of losses and gains;

v. whether the method adopted by the assessee for making entries in the books

both in respect of losses and gains is as per nationally accepted accounting standards.

VI. whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation.

It is pertinent to note that consistent with Accounting Standard 11 issued by the ICAI and in terms of paragraph 36 of the said AS, the premium incurred on Forward Exchange Contract is booked as a 'Revenue Expenditure' and therefore to be allowed as a permissible deduction under 37(1) of the Act.

The Appellant craves leave to rely on the Information and explanation given to CIT(A) and to the Respondent during the Appeal/Assessment proceedings and the averments made in grounds 1 to 6. The Appellant also craves leave to make further submissions at the time of hearing. The Appellant also craves

reave to add to, alter, amend or modify the abovementioned grounds. For the detailed averments made in grounds l to 6, the appellant prays that the impugned Order be quashed as misconceived and unwarranted".

2. Vide ground No. 1 the assessee has challenged the action of the Ld. CIT (A) in confirming the disallowance of Rs. 8,20,74,865/- being expenditure incurred on putting up facilities such as Railway Siding, the ownership of which lie with others/ statutory authority. The Ld. counsel for the assessee pointed out that this ground of appeal is identical to the Ground No. 1 of the assessee's appeal pertaining to the AY 2006-07 raised by the assessee before the Tribunal in appeal ITA No. 5378/Mum/2010. The Ld. counsel further pointed out that the "H" Bench of the Mumbai Tribunal has decided the identical issue in favour of the assessee vide order dated 09.10.2019. Since, this issue has been decided in favour of the assessee, the findings of the Ld. CIT (A) is erroneous and liable to be set aside.

3. On the other hand, the Ld. Departmental Representative (DR) admitted that the ITAT has decided the identical issue in favour of the assessee in assessee's own case for the AY 2006-07. The Ld. DR however, relied on the findings of the Ld. CIT (A).

4. We have perused the material on record in the light of the rival submissions of the parties including the order passed by the coordinate Bench in assessee's own case for the AY 2006-07 relied upon by the assessee. As pointed out by the Ld. counsel, the coordinate Bench has decided the identical issue in favour of the assessee holding as under:-

"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."

5. As pointed out by the Ld. counsel this issue is covered by the decision of the coordinate Bench in assessee's own case for the assessment year 2006-07. The coordinate Bench has decided the identical issue in favour of the assessee in assessee's own cases pertaining to the earlier years. Hence, respectfully

following the decision of the coordinate Bench we set aside the findings of the Ld. CIT(A) and allow this ground of appeal of the assessee.

6. Vide Ground No. 2, the assessee has challenged the action of the Ld. CIT (A) in confirming the disallowance of Rs. 31,22,94,793/- being amount to expenditure incurred on salary, dearness allowance, postage, travel and other expenses for various modernization and up-gradation of projects in appellants existing line of business. The Ld. counsel for the assessee pointed out that this issue is identical to Ground No. 3 of the assessee's appeal, ITA No. 5378/Mum/2010 for the AY 2006-07 decided by the Mumbai Tribunal. The Ld. counsel further submitted that since the Tribunal has decided this issue in favour of the assessee, the findings of the Ld. CIT (A) are liable to be set aside.

7. On the other hand, the Ld. DR did not controvert the fact that the Tribunal has decided the identical issue in favour of the assessee in assessee's appeal aforesaid, however, supported the order passed by the Ld. CIT (A).

8. We have perused the material on record in the light of the submission made by the Ld. counsel. As pointed out by the Ld. counsel, this issue is covered by the decision of the coordinate Bench in assessee's own case for the AY 2006-07 aforesaid. The findings of the coordinate Bench read as under:-

> *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:*
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> *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. 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.

9. This issue is covered by the decision of the coordinate Bench in assessee's own case for the assessment year 2006-07. The coordinate Bench has decided the identical issue in favour of the assessee by following the decision of the coordinate Benches in assessee's own cases pertaining to the earlier years. Hence, respectfully following the decision of the coordinate Bench, we set aside the findings of the Ld. CIT(A) and allow this ground of appeal of the assessee.

10. Vide Ground No. 3, the assessee has challenged the action of the Ld. CIT (A) in confirming the disallowance of Rs. 59,00,000/- being assessee claim of deduction towards Post-retirement medical benefits. The Ld. counsel for the assessee pointed out that this issue is identical to Ground No. 4 of the assessee's appeal, ITA No. 5378/Mum/2010 for the AY 2006-07 decided by the Mumbai Tribunal. Since, the Tribunal has set aside the identical issue to the file of AO in assessee's appeal pertaining to the AY 2006-07 aforesaid, this ground may be decided accordingly.

11. The Ld. DR admitted the fact that the ITAT has dealt with the identical issue in assessee's case and set aside the issue to the file of AO for determining the same afresh, however, supported the order passed by the Ld. CIT (A).

12. We have perused the material on record including the order passed by the coordinate Bench. The coordinate Bench has decided the identical issue in assessee's appeal pertaining to the AY 2006-07 holding as under:-

> *"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:*
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> > *6.We have considered the rival contention of the parties and gone through the order of authorities below and the order passed by the Coordinate 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:*
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> > *"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.*

> *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."*
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> *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."*

13. The coordinate Bench has dealt with the identical issue in assessee's own case for the assessment year 2006-07 and the Bench has set aside the issue to the file of AO for deciding afresh by following the decision of the coordinate Benches in assessee's own cases pertaining to the earlier years. Hence, respectfully following the decision of the coordinate Bench, we set aside the matter to the file of AO to verify the Actuarial Valuation Report and allow the claims of the assessee in accordance with the order dated 16.01.2013. Accordingly, we allow this ground of appeal for statistical purposes.

14. Vide Ground No. 4, the assessee has challenged the action of the Ld. CIT (A) in confirming the disallowance of Rs. 28,30,00,000/- being provision for Leave Encashment. The Ld. counsel for the assessee pointed out that this issue is identical to Ground No. 5 of the assessee's appeal, ITA No. 5378/Mum/2010 for the AY 2006-07 decided by the Mumbai Tribunal. Since, the Tribunal has set aside the identical issue to the file of the AO for reconsider and decide the same afresh in assessee's appeal pertaining to the AY 2006-07 aforesaid, this issue may be decided accordingly..

15. The Ld. DR admitted the fact stated by the assessee, however, supported the order passed by the Ld. CIT (A).

16. We have perused the material on record including the order passed by the coordinate Bench. The coordinate Bench has decided the identical issue in assessee's appeal pertaining to the AY 2006-07 holding as under:-

> *"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:-*
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> > *"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.*
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> > *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.*

17. As pointed out by the Ld. counsel, the coordinate Bench has set aside the identical issue to the file of the AO to reconsider the same in assessee's own case for the assessment year 2006-07. Hence, respectfully following the decision of the coordinate Bench, we set aside the matter to the file of AO to verify the Actuarial Valuation Report and allow the claims of the assessee in accordance with the order dated 16.01.2013. Accordingly, we allow this ground of appeal for statistical purposes.

18. Vide Ground No. 5, the assessee has challenged the action of the Ld. CIT (A) in treating the loss on sale of oil bonds as a capital loss amounting to Rs. 20,02,40,600/-. The Ld. counsel for the assessee pointed out that this issue is identical to Ground No. 6 of the assessee's appeal, ITA No. 5378/Mum/2010 for the AY 2006-07 decided by the Mumbai Tribunal. Since, the Tribunal has decided the identical issue in favour of the assessee in assessee's appeal pertaining to the AY 2006-07 aforesaid, the findings of the Ld. CIT (A) are liable to be set aside.

19. The Ld. DR admitted the fact that this issue is covered in favour of the assessee by the decision of the ITAT aforesaid, however, supported the order passed by the Ld. CIT (A).

20. We have perused the material on record including the order passed by the coordinate Bench. The coordinate Bench has decided the identical issue in assessee's appeal pertaining to the AY 2006-07 holding as under:-

> *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-ITATMUM 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".

21. Since, the coordinate Bench has decided the identical issue in favour of the assessee in assessee's own case for the assessment year 2006-07 and since there is no change in the facts of the case, we respectfully following the decision of the coordinate Bench we set aside the findings of the Ld. CIT(A) and allow this ground of appeal in favour of the assessee.

22. Vide Ground No. 6, the assessee has challenged the action of the Ld. CIT (A) in confirming the disallowance made by the AO under the provisions of section 43 of the Act against assessee's claim of deduction u/s 37(1) of the Act. The assessee had amortized an amount of Rs. 33,97,71,941/- in P& L account, which was part of premium on forward exchange contracts booked for the purposes of external commercial borrowings (ECB) taken for the purpose of meeting the cost of various projects under taken by the assessee, which had been amortized over the duration of the forward exchange contracts. The AO disallowed the same. In the first appeal, the Ld. CIT(A) partly allowed this ground of appeal holding that the provisions of section 43A apply where assets are procured outside India.

23. The Ld. counsel submitted before us that as per the Accounting Standard11 issued by the ICAL and in terms of paragraph 36 of the said AS, the premium incurred on Forward Exchange Contract is booked as a revenue expenditure therefore allowable deduction u/s 37 of the Act. The Ld. counsel placing reliance on the judgment of the Hon'ble Supreme court in the case of Woodward Governor India (P) Ltd. submitted that the Ld CIT(A) has though held that the provisions of section 43(A) are not attracted to the extent of assets acquired within India, however, erred in confirming that since the

expenditure is capital in nature therefore, the assessee is entitled for depreciation only.

24 On the other hand, the Ld. DR supporting the order passed by the Ld. CIT(A) submitted that there is no infirmity in the order to interfere with.

We have perused the material on record including the order relied upon by the Ld counsel for the assessee. The Ld CIT(A) has partly allowed this ground of appeal holding as under:

> *" 15.4…….. However, I direct the AO to verify the authenticity and correctness of this claim made before me, while giving effect to this order. In view of this discussion, I consider it proper and appropriate to hold that the entire sum should be capitalized treating the same as capital in nature. But however, the AO should allow depreciation on such assets, which has been procured from ECB loan in accordance to the provision of section 36(2) of the Act, while capitalizing the sum of Rs. 33.98 crores. The AO should ensure that the depreciation on such capitalized amount is allowed once the appellant company put such asset in use. The AO should also allow the depreciation on assets, which have been procured outside India, where provision of section 43A will apply to the appellant only for the year, when loan is repaid. Thus, this ground of appeal is partly allowed with above observation subject to verification of facts, while giving effect to this order by the AO."*

25. The Ld. CIT(A) has partly allowed this ground of appeal by holding that provisions of section 43A are not attracted to the extent of assets acquired by the assessee within India, however, the grievance of the assessee is that the Ld CIT(A) has only allowed the depreciation on the expenditure treating the same as capital. The counsel has further pointed out that since as per the AS 11FEC is booked as revenue expenditure, the same is permissible deduction u/s 37(1) of the Act. Hence, in view of the facts and the circumstances we set aside this issue to the file of AO for deciding the issue afresh in the light of the submissions made before us after affording a reasonable opportunity of being heard to the assessee. Hence, we allow this ground of appeal of the assessee for statistical purposes.

ITA No. 5537/MUM/2011 (Assessment Year: 2007-08)

The revenue has preferred the present appeal by raising the following effective grounds:

1. *"Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in directing to allow addition of de-capitalized assets and thereby allowed depreciation of Rs. 3,29,87,815/- as disallowed by the Assessing Officer.*
2. *Whether on the facts and in the circumstances of the case and in law, the Ld .CIT (A) is right in restoring the issue of disallowance of Rs. 21,30,55,096/- U/s 14A as per rule 8D to the Assessing Officer's file and directing that disallowance to be as per immediate preceding year in the light of observation of jurisdictional High Court in the case of Godrej Boyce Mfg. Co. Ltd. vs. DCIT 234 ITR 1 (Bom.) as the decision of Hon'ble Bombay High Court is not accepted by the Department?*
3. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in directing to allow the claim of deduction u/s 10B in respect of VREP-II Unit."*

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

3.2 The Ld. CIT (A) has further erred in directing to allow the claim of deduction u/s 80IB (4) in respect of Silvassa new Blending Plant.

2. Vide ground No 1 the revenue has challenged the action of the Ld. CIT(A) in directing the AO to allow addition of de-capitalized assets and thereby allowing depreciation of Rs. 3,29,87,815/- The assessee de-capitalized certain assets in the assessment year 2007-08 and capitalized in the assessment year 2009-10 based on advice from statutory auditors. During assessment proceedings, the assessee made claim for reduction in Book depreciation which was disallowed by the AO on the ground that net profit is maintained as per P & L. However, reduction in tax depreciation claim was accepted. In the first appeal, the Ld. CIT(A) decided the issue in favour of the assessee holding as under:

> *"5.4 I have considered the AO's orders as well as the appellant's A/R submission made during the appellate proceedings on this account. Even in the appellate proceedings,*

the A/R of the appellant argued that the tax liability has been arose in a normal tax provision and the appellant's return of income was not governed under MAT provision in the present Assessment year. The A/R of the appellant categorically stated that income of the appellant company was assessed u/s 143 (3) and u/s 115JB of the IT Act, 1961. In addition to this, he also stated that A.O. was not justified in his action in accepting part portion of the revised submission of computation of income, which resulted due to de-capitalization carried out by the appellant on advice of statutory auditors. The A.O. accepted 1% of revised computation of income, which resulted more tax liability due to lesser claim of depreciation but on the same the downward revision in book depreciation, which resulted in lower tax and lower profit collection was not accepted by the AO. In my considered view, the A.O. was not justified, as the appellant suo-moto made necessary amendment in claim of depreciation as well as book depreciation. The A.O. cannot accept that portion, which suit the department in more collection of tax due to lesser claim of depreciation and deny corresponding claim of depreciation in reduction of book depreciation, which necessarily the appellant's has to do. In view of this discussion, I consider it proper and appropriate to hold that the A.O. was not justified in his action. Accordingly, I direct the A.O. to accept the necessary revision in book depreciation as claimed by the appellant. Accordingly this ground of appeal is allowed."

3. The Ld. DR relying on the assessment order passed by the AO submitted that the Ld. CIT (A) has wrongly directed the AO to accept the revision in book depreciation as claimed by the assessee.

4. On the other hand, the Ld. counsel for the assessee relying on the findings of the Ld. CIT (A) submitted that since the action of the Ld. CIT (A) is in accordance with the settled principles of law, there is no infirmity in the order of the Ld. CIT (A) to interfere with. Accordingly, the Ld. counsel contended that there is no merit in the appeal.

5. We have gone through the material on record in the light of the rival submissions of the parties. The Ld. CIT(A) has decided this ground of appeal in favour of the assessee holding that the A.O. cannot accept that portion, which suits the department in more collection of tax due to lesser claim of depreciation and deny corresponding claim of depreciation in reduction of book

depreciation, which necessarily the appellant's has to do. We do not find any reason to interfere with the findings of the Ld. CIT(A) as the same is based on the settled principles of law and as per the evidence. Hence, we uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

6. Vide ground No.2 the revenue has challenged the action of the Ld. CIT(A) restoring the issue of disallowance u/s 14A of the Act for recomputed the disallowance holding that the provisions of Rule 8D of the Income Tax Rules cannot be applied retrospectively. The Ld. counsel relying on the order of the Ld. CIT(A) submitted that since the findings are in accordance with the settled law, there is no infirmity in the order of the Ld. CIT(A).

7. On the other hand the Ld. DR supported the assessment order passed by the AO.

8. We have perused the material on record in the light of the submissions made by the Ld. counsel. As pointed out by the Ld. counsel for the assessee, the CIT(A) has rightly restored the issue to the file of AO for making the disallowance as per law without applying Rule 8D. As per the settled law, the provisions of Rule 8D cannot be applied retrospectively. Hence we find merit in the contention of the Ld. counsel. Since, the findings of the Ld. CIT(A) are in accordance with the settled law, we uphold the order passed by the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

9. Vide ground No 3.1 the revenue has challenged the action of the Ld. CIT(A) in allowing deduction u/s 80IB in respect of VREP –II unit. During AY 2001-02 refinery expansion at Visakh from 4.5 MMTPA to 7.5 MMTPA was commissioned. Accordingly, deduction u/s 80IB(9) was allowed till AY 2005-06. However, the AO denied the same in the assessment year under consideration on the ground that VREP-II is only an extension of the old undertaking. In the first appeal the Ld. CIT(A) allowed the same.

10. The Ld. counsel submitted before us that this issue is covered in favour of the assessee in assessee's own cases for the assessment years 2005-06 and 2006-07. The Ld counsel further submitted that since the order of the Ld.

CIT(A) is in accordance with the findings of the Tribunal, there is no merit in the revenue's appeal.

11. On the other the Ld. DR supported the assessment order however, admitted that this issue covered in favour of the assessee by the order of the Tribunal in assessee's own case.

12. As pointed out by the Ld. counsel, this issue is covered in favour of the assessee as the coordinate Bench has already directed the AO to allow the deduction of section 80IB in respect of VREP –II unit to the assessee. The findings of the Coordinate Bench are as under:

> *"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."*

13. We notice that the Coordinate Bench has decided the identical issue in favour of the assessee in appeal filed by the revenue ITA No. 5705/MUM/2010 in assessee's case pertaining to the assessment year 2006-07. Since the findings of the Ld. CIT(A) are in accordance with the decision of the coordinate Bench, we do not find any reason to interfere with the order of the Ld. CIT(A). Hence, we uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

14. Vide ground No. 3.2 the revenue has challenged the action of the Ld. CIT(A) in allowing deduction u/s 80IB of the Act in respect of Silvasa New Blending Plant. In the year the assessee set up a lube Blending Plant at Silvasa. The AO denied the claim of the assessee u/s 80 IB(4) for the first time in AY 2006-07 on the ground that the activity at the blending Plant does not come within the ambit of manufacturing. In the first appeal, the Ld. CIT(A) set aside the findings of the AO and allowed this ground of appeal.

15. The Ld. counsel pointed out that this issue is covered in favour of the assessee by the order of the Tribunal rendered in revenue's appeal ITA No. 5705/MUM/2010 in assessee's case for the assessment year 2006-07. The Ld. counsel further submitted that since the findings of the Ld. CIT(A) are in accordance with the findings of the ITAT there is no merit in the appeal of the revenue.

16. The Ld. DR admitted that this issue is covered in favour of the assessee by the order of the Tribunal in assessee's case pertaining to the AY 2006-07. However, the Ld DR relied on the findings of the AO.

17. As pointed out by the Ld. counsel, the coordinate Bench has decided the identical issue in favour of the assessee by holding as under:

> *"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."

18. Since this issue is covered by the order dtd. 09.10.2019 of the coordinate Bench rendered in revenue's appeal in assessee's own case pertaining to the

assessment year 2006-07 discussed above and since the findings of the Ld. CIT(A) are in accordance with the decision of the coordinate Bench, we do not find any reason to interfere with the impugned order. Hence, respectfully following the decision of the coordinate Bench aforesaid, we uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

In the result, assessee's appeal is partly allowed and the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 6th March, 2020.

Sd/-	*Sd/-*
(PRAMOD KUMAR)	(RAM LAL NEGI)
VICE PRESIDENT	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 06/03/2020

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**