IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'C' NEW DELHI

BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
SHRI K.N. CHARY, JUDICIAL MEMBER
[Through Video Conferencing]

ITA No.99/Ahd./2014
Assessment Year: 2007-08
And
ITA No.100/Ahd./2014
Assessment Year: 2008-09
And
ITA No.1898/Ahd./2014
Assessment Year: 2009-10
And
ITA No.1899/Ahd./2014
Assessment Year: 2010-11
And
ITA No.701/Ahd./2015
Assessment Year: 2011-12
And
ITA No.2617/Ahd./2015
Assessment Year: 2012-13

DCIT/ACIT, Circle-4, Ahmedabad	**Vs.**	M/s. Genus Electrotech Ltd., 308, Devarc Complex, Opp. Big Bazar, S.G. Highway, Ahmedabad
		PAN :AABCH9645H
(Appellant)		**(Respondent)**

And
ITA No.2830/Ahd./2013
Assessment Year: 2007-08
And
ITA No.2831/Ahd./2013
Assessment Year: 2008-09
And
ITA No.1763/Ahd./2014
Assessment Year: 2009-10

And

ITA No.348/Ahd./2015
Assessment Year: 2011-12

And

ITA No.2461/Ahd./2015
Assessment Year: 2012-13

M/s. Genus Electrotech Ltd., 308, Devarc Complex, Opp. Big Bazar, S.G. Highway, Ahmedabad	**Vs.**	DCIT/ACIT, Circle-4, Ahmedabad
PAN :AABCH9645H		
(Appellant)		**(Respondent)**

Assessee by	Shri Neeraj Jain, Adv. Shri Ms. Smriti Sahay, CA
Department by	Ms. Sunita Singh, CIT(DR) Ms. Parul Singh, Sr. DR

Date of hearing	17.02.2021
Date of pronouncement	11.03.2021

ORDER

PER BENCH:

These cross appeals by the Revenue and the assessee are directed against different orders passed by the First Appellate Authority i.e. Learned Commissioner of Income-tax (Appeals) for different assessment years as tabulated below:

Appeal/Cross Objection Number	***First Appellate Authority***	***Date of order of First Appellate Authority***	***Appellant***	***Respondent***	***Assessment Year***
99/Ahd./2014	*CIT(Appeals)-VIII, Ahmedabad*	*28.10.2013*	*DCIT,Circle-4, Ahmedabad*	M/s. Genus Electrotech Ltd.,	*2007-08*
2830/Ahd./2014	*CIT(Appeals)-VIII, Ahmedabad*	*28.10.2013*	M/s. Genus Electrotech Ltd.,	*DCIT, Circle-4, Ahmedabad*	*2007-08*

100/Ahd./2014	*CIT(Appeals)-VIII, Ahmedabad*	*28.10.2013*	*DCIT,Circle-4, Ahmedabad*	M/s. Genus Electrotech Ltd.	*2008-09*
2831/Ahd./2013	*CIT(Appeals)-VIII, Ahmedabad*	*28.10.2013*	M/s. Genus Electrotech Ltd.	*DCIT, Circle-4, Ahmedabad*	*2008-09*
1898/Ahd./2014	*CIT (Appeals)-VIII, Ahmedabad*	*31.03.2014*	*DCIT,Circle-4, Ahmedabad*	M/s. Genus Electrotech Ltd.	*2009-10*
1763/Ahd./2014	*CIT(Appeals)-VIII, Ahmedabad*	*31.03.2014*	M/s. Genus Electrotech Ltd.	*ACIT, Circle-4, Ahmedabad*	*2009-10*
1899/Ahd./2014	*CIT(Appeals)-VIII, Ahmedabad*	*31.03.2014*	*DCIT,Circle-4, Ahmedabad*	M/s. Genus Electrotech Ltd.	*2010-11*
701/Ahd./2015	*CIT(Appeals)-2, Ahmedabad*	*12.12.2014*	*DCIT, Circle-2(1)(1), Ahmedabad*	M/s. Genus Electrotech Ltd.	*2011-12*
348/Ahd./2015	*CIT(Appeals)-2, Ahmedabad*	*12.12.2014*	M/s. Genus Electrotech Ltd.	*DCIT, Circle-4, Ahmedabad*	*2011-12*
2617/Ahd./2015	*CIT(Appeals)-2, Ahmedabad*	*05.06.2015*	*DCIT, Circle-2(1)(1), Ahmedabad*	M/s. Genus Electrotech Ltd.	*2012-13*
2461/Ahd./2015	*CIT(Appeals)-2, Ahmedabad*	*05.06.2015*	M/s. Genus Electrotech Ltd.	*DCIT, Circle-2(1)(1), Ahmedabad*	*2012-13*

2. As identical issue arising from same set of the facts and circumstances are involved in above appeals, therefore, same were heard together and disposed off by way of this consolidated order for sake of convenience.

ITA No. 99/Ahd./2014 (Revenue's Appeal)
ITA No. 2830/Ahd./2013 (Assessee's Appeal)

3. First, we take up the appeal of the Revenue (ITA No. 99/Ahd./14) and appeal of the assessee (ITA No.2830/Ahd./13) for assessment year 2007-08. The grounds raised by the Revenue are reproduced as under:

1. *The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.1,27,46,480/- made on account of treating the subsidy on sales-tax as revenue receipt as against claim of*

the assessee as capital subsidy, without v properly appreciating the facts of the case and the material brought on record.

2. *The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.7,90,94,513/- made on account of Central Excise Refund received, treating it as revenue receipt as against claim of the assessee as capital receipt, without properly appreciating the facts of the case and the material brought on record.*
3. *The Ld.CIT(A) has erred in law and on facts in deleting the addition made on account of disallowance of Rs.2,95,69,239/- and Rs.73,83,957/- being prior period expenses and trade discount respectively, without properly appreciating the facts of the case and the material brought on record.*
4. *On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.*
5. *It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent.*

3.1 Grounds raised by the assessee are reproduced as under:

1. *On the facts and circumstances of the case, Ld. CIT(A) erred, in confirming non-exclusion of Debt Redemption Fund of Rs.4.50 crore, from the book profit for the purpose of taxation u/s 115JB.*
2. *The appellant craves leave to add, to alter, to delete from or substantiate the above ground of appeal.*

4. Briefly stated facts of the case are that the assessee company was engaged in the business of the manufacturing of Television, Printed Circuit Board (PCB), Washing Machines etc., including Original Equipment Manufacturing (OEM) for LG Electronic Pvt. Ltd. The assessee filed return of income for the year under consideration on 24/10/2007, declaring loss of Rs. (-) 15,84,31,600/-, which was further revised to Rs. (-) 18,80,00,836/-. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under Income-tax Act, 1961 (in short 'the Act') were issued and complied with. The assessment under section 143(3) of the Act was completed on 29/12/2009 determining total income at ₹

5,54,93,353/-. On further appeal, the Ld. CIT(A) in the impugned order dated 28/10/2013 allowed the appeal partly. Aggrieved, both the Revenue and the assessee are in appeal before the Income-Tax Appellate Tribunal (in short 'the Tribunal') raising the respective grounds as above.

5. In ground No. 1, the Revenue has challenged addition of ₹ 12,74,46,480/- deleted by Ld. CIT(A) in respect of 'Sales Tax Subsidy', which was held as revenue receipt by the Assessing Officer. The ground No. 2 is in respect of addition of ₹ 7,90,94,513 deleted by the Learned CIT(A) in respect of 'Central Excise Subsidy', which was held as revenue by the Assessing Officer.

5.1 The facts in brief qua the issue in dispute are that assessee received subsidy of ₹ 12,74,46,480/- by way of sales tax exemption under the scheme of 'the Gujarat Government' for setting up of the unit in the district of Kutch. The assessee neither paid any amount of Sales Tax on purchase, nor charged any Sales Tax invoice from the customers. The assessee claimed that a 'notional subsidy' element is inbuilt in Sales revenue received from customers and therefore it was a subsidy received by it in respect of the Sales Tax. The assessee also received ₹ 7,90,94,513/- as Excise Duty benefit under Central Government Scheme. Under the scheme the assessee was to charge full duty on sales invoice, adjust the CENVAT credit available to it on purchase and was required to pay the balance amount through Personal Ledger Account (PLA). Subsequently, the balance amount paid through PLA was to be refunded by the Central Excise Department. The assessee claimed that Sales Tax Subsidy

and Central Excise Subsidy refund shown as income in the profit and loss account are capital receipt. The assessee relied on various decisions in support of its claim.

5.2 The Learned Assessing Officer rejected the claim of the assessee following the decision of Hon'ble Supreme Court in the case of **Sahney Steel and press works Ltd Vs CIT 228 ITR 253(SC)** and **CIT Vs Ponni Sugar and chemicals Ltd 306 ITR 392(SC)**. In view of the above decisions, the learned Assessing Officer concluded that sales tax incentive is a capital receipt observing as under:

> *"Applying the tests laid down in the two leading decisions of Hon'ble Supreme Court as discussed above following facts emerge in this case also*
>
> *i) The sales tax incentive given to the assessee is only after commencement of production and that too within specified date.*
>
> *ii) The assessee is under no stipulation to apply the amount of incentive towards repayment of capital cost [as was case in Ponni Sugar & Chemicals Ltd.] and is free to utilize it.*
>
> *iii) The nature of assistance was for the purpose of trade. It was given to the assessee for supplementing the profits.*
>
> *iv) In effect sales tax incentive reduced the cost resultantly profits of the assessee got enhanced and its goods by virtue of sales tax exemption got competitive advantage which was on revenue account.*
>
> *Therefore, the sales tax incentive received by the assessee clearly is on revenue account and not capital receipt as claimed by the assessee. Accordingly, the deduction claimed by assessee in respect of sales tax incentive of Rs. 12,74,46,680/- is disallowed and added back to the total income."*

5.3 Similarly, in respect of the Central Excise refund, the Assessing Officer concluded as under:

> *"In respect of Central Excise rebate refund, the position is clearly the same as :-*

i) The rebate/refund is available only after commencement of production and is available only for period of 5 years from date of commencement of commercial production.

ii) There is no stipulation regarding utilization of the money so received. The assessee is free to utilize the money as it feels to do so. Therefore, there is no stipulation of it being used only to repay capitaTcomThlFment: cost etc. Therefore, this subsidy is also in nature of revenue receipt satisfying tests laid down in already discussed decision of Hon'ble Supreme Court. Accordingly, an amount of Rs. 7,90,94,513/- is held to be revenue receipt and deduction of Rs.7,90,94,513/- is disallowed and addition is made to the total income."

[Addition of Rs.7,90,94,513/-]"

5.4 The Ld. CIT(A) following the finding of his predecessor in assessment year 2006-07, held both the receipt of sales tax incentive and Central Excise refund as capital receipt. The relevant finding of the Learned CIT(A) is reproduced as under:

"3.4 Decision:

I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. It is noted that the AO has held that the Sales Tax Incentive and the Central Excise rebate refund were revenue receipts and not the capital receipts as claimed by the appellant. It is noted from records and the submission of the appellant that the similar issue was also involved in A. Y. 2006-07. My predecessor while deciding the appeal for that year vide Appeal No. CIT(A)-VIII/447/Addl.CIT/R-l 2/11-12 dated 26/09/2012 has decided the issue. It is noted from his order that the issue has been dealt by him in detail. He has discussed all the judgements quoted by the AO as well as the appellant and has arrived at the decision after analysing all aspects of the subsidy received by the appellant on account of Sales Tax and Central Excise. He has given the decision in para-3.4 to 3.8 of his order. For the sake of clarity and convenience the relevant portion of the decision given by my predecessor in the above referred order are reproduced here under: -

"3.4. I have carefully considered the submission of the Learned Counsel and also considered the finding recorded by the Assessing Officer in the assessment order. The facts of the case are that the appellant had set up an Industrial Unit in Kutch district to avail the benefit ofNotification No. 39/2001-C.E. dated 31.07.2001 as

amended by Notification No. 55/2004-CE dated 09.11.2004 and received the Excise Duty incentive of Rs. of Rs.32135417/- and Sales Tax Incentive of Rs.43657867/- under the scheme of the Central Govt, formulated and Issued vide General Exemption No. 38 and Notification No. 39/2001-C.E. dated 31.07.2001 as amended by Notification No. 55/2004-CE dated 09.11.2004. While making the above disallowance, the AO has made the following observations:-

i. The sales tax incentive and Excise Duty incentive given to the assessee is only after commencement of production and that too within specified date.

ii. The assessee is under no stipulation to apply the amount of incentive towards repayment of capital cost (as was case in Ponni Sugar and Chemicals Ltd.) and is free to utilize it.

iii. The nature of assistance was for the purpose of trade. It was given to the assessee for supplementing the profits.

iv. In effect sales tax incentive and Excise Duty incentive reduce the cost resultantly profits of the assessee got enhanced and its goods by virtue of sales fax exemption got competitive advantage which was on revenue account.

The AO has further relied upon the decision of the Hon'ble SC in the case of Sawhney Steel and Press Works Ltd Vs CIT 228 ITR 253 (SC), the decision of the Hon'ble Supreme Court in the case of CIT Vs CIT Vs Dusad Industries, 162 ITR 784 and the decision of Hon'ble Supreme Court in the case of CIT Vs Ponni Sugar and Chemicals Ltd. 306 ITR 392. In view of the findings discussed above the AO held that the sales tax incentive and Excise Duty incentive received by the appellant was clearly on the revenue account and not a capital receipt as claimed by the appellant. In accordance with the above finding the AO disallowed the deduction of sales tax incentive of Rs.43657867/- and Excise Duty incentive of Rs. of Rs.32135417/- claimed by the appellant as capital receipt and made an addition of the above amount to the appellant's income.

3.5. The appellant has submitted that it is undisputed fact that incentive has been provided with the objective of creating new employment opportunities through new industries and to make live the industrial and economic environment of the Kutch region which was destroyed due to earthquake. The appellant has submitted that in fact the extract of Supreme Court's observation relied upon by the AO (supra) supports their case where the Hon'ble court has observed that it is the object for which subsidy/assistance is given which determines the nature of the incentive subsidy and the form or mechanism through which subsidy is given is irrelevant (para 14 of

Supreme Court's decision in the case of Ponny Sugar). The appellant has submitted that the facts of their case are almost similar to those of Ponny Sugar in the matter of purpose test and also in the matter of mechanism of granting incentive and in both cases incentive had to be computed and granted with reference to production/sale. The appellant has submitted that it is manifest that their case is fully supported by the decision in the case of 'Ponny Sugar' in view of the purpose test and the decision in the case of 'Sahney Steel' also supports the case, as the incentive has not been given for running the business more efficiently but for the larger purpose of industrialization which in fact prompted by humanitarian conditions. The appellant has brought to the notice of the judgement of Ahmedabad ITAT decision in the case of ACIT vs. Birla VXL Ltd (ITA/247-249/Rajkot 12011). While deciding this issue in favour of assessee, Hon'ble IT AT had referred the sales tax / excise incentives meant for earthquake ravaged Kutch District:-

> *'The assessee has its industrial unit with huge capital investment in the Kutch Region which was badly affected by the earthquake. The project of the assessee for putting up industrial unit in the earthquake affected area has been approved for the purpose of availing exemption under the relevant notifications for schemes of industrial development in the wake of earthquake. The schemes have been notified that the purpose of the Central government and Government of Gujarat by giving the incentives is to promote investment of capital and thereby for industrial development and to generate employment in the Kutch District which was affected by earthquake. Thus on application of the purpose test it is quite clear that the purpose of the incentive schemes is not to assist in the carrying on of the assessee's trade or business. The purpose is clearly for promoting capital investment and thereby industrial development in the earthquake affected district. The purpose is to generate employment in the said district."*

Further, the Honorable ITAT relied on the co-ordinate bench decision in case of Ajanta Manufacturing Ltd [ITA(793/RJT (2010] and observed that:

> *"17. The Hon'ble Supreme Court in the case of Sahney Steel and Ponny Sugar has laid down the principle that the character of the subsidy whether revenue or capital in the hands of the recipient will have to be determined by having regard to the purpose of which subsidy is given. Thus, the said decision though relied by the revenue, actually supports the case of the assessee."*

Reliance was also placed on the decision of the Mumbai Special Bench in the case of DCIT vs. Reliance Industries Ltd. reported in 88 ITD 273 (Mumbai)(SB). On consideration of the scheme of the Central Government, it was noticed that the scheme was formulated only for the Kutch district where the economic activities came to a standstill on account of the devastating earthquake in the State on 26th January 2001 to promote large scale investment in new Industrial units with a view to generate employment. The appellant has further submitted that there is no dispute w.r.t the fact that appellant had set up its unit in Kutch and availed Sales Tax / Excise Incentive as per incentive norms and it is requested to treat the incentive as capital receipts and delete the additions made in this regard.

3.6. The submission of the appellant is considered after careful study of the facts and case laws. The appellant's case is similar to the facts in the case of DCIT vs. Reliance Industries Ltd. 88 ITD 273 (Mum (SB) decided by Hon'ble Special Bench of Mumbai as relied on by the Learned Counsel. The Hon'ble Special Bench of Mumbai Tribunal had relied on the decision of the Hon'ble Madras High Court in the case of vs. Ponni Sugars & Chemicals Ltd. 260 ITR 605 (Mad). This decision was latter on affirmed by the Hon'ble Supreme Court in the case of CIT vs. Ponni Sugars & Chemicals Ltd. 306 ITR 392 (SC) by holding that the character of the receipts in the hands of the assessee have to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases one has to apply the purpose test. The point of time when the subsidy is paid is not relevant. The source is immaterial and the form of subsidy is also immaterial. It is evident from the scheme itself that the Sales Tax and Excise Duty incentives were not given to the appellant for assisting in carrying out the business operations. The purpose of this scheme was to attract the large scale investment to generate new employment. The scheme was formulated only for the Kutch district where the economic activities came to a standstill on account of the devastating earthquake in the State on 26th January 2001. In view of the above judicial decisions and particularly considering the purpose and object of the Excise Duty incentive scheme, it is held that the Sales Tax and Excise Duty incentives received by the appellant were in the nature of capital receipts and thus were not chargeable to tax.

3.7. On merits of the issue, I have carefully considered the submission of the learned counsel and also considered the findings of the Assessing Officer. The subsidy/sales tax incentive was available to the appellant for establishing the industrial unit in the Kutch district of Gujarat. The incentive scheme was formulated vide resolution Ni. INC-10200-903-1 dated 09/11/2001 of industries of Mines Department, Government of Gujarat. In the preamble itself, it was stated that "The economic activities in the district of Kutch came to a standstill on account of the devastating earthquake in the state

on 26th January 2001. New employment opportunities could be created. If new investment takes place, The Government is committed to attracting industries in the district to make the industrial and economic environment live. Government of India has announced excise duty exemption for new industries to promote large scale investment in the district alongwith which the State Government has also decided to announce the scheme of sales tax incentives. Since the scheme is aimed at making the economic environment of Kutch district live, it has been decided o confine the same only to Kutch district". The appellant company is availing the benefit of scheme by not paying sales tax on purchases, while on sales, company is collecting sales fax on sales made and the same is carried under the head direct income under the profit and loss account of the company. It is evident from the preamble of the scheme that the incentives were given to entrepreneurs to attract the large scale investment to generate new employment and for making the economic environment of Kutch district live. Thus, neither the incentives were given for meeting the cost of the investment nor were given for assisting the appellant in carrying out the business operations. Thus, the subsidy in the form of exemption from the liability to pay sales tax is on capital account and not on revenue account.

'3.8. The facts of the appellant's case are similar. It is evident from the scheme itself that the sales tax subsidy/incentives were not given to the appellant for assisting it in carrying out the business operations. The object of the subsidy was to encourage large scale investment by attracting entrepreneurs for setting up of industries in the notified area of Kutch district where the economic activities came to a standstill on account of the devastating earthquake in the State on 26th January 2011. The scheme was formulated and the incentives were given to entrepreneurs to attract the large scale investment to generate new employment and for making the economic environment of Kutch district of Gujarat before the specified date as per the scheme of incentive. The limit of the incentive was fixed. The appellant's case is covered by the decision of Hon'ble Special Bench of Mumbai Tribunal in the case of DCIT vs. Reliance Industries Ltd. 88 ITD 273 (Mum. (SB) as relied on by the learned Counsel. The Hon'ble Special Bench of Mumbai Tribunal had relied on the decision of the Hon'ble Madras High Court in the case of vs. Ponni Sugars & Chemicals ltd. 260 ITR 605 MAD). This decision was latter on affirmed by the Hon'ble Supreme Court in the case of CIT vs. Ponni Sugars & Chemicals ltd. 306 ITR 392 (SC) by holding that the character of the receipt in the hands of the appellant has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases one has to apply 'purpose test'. The point of time when the subsidy is paid is not relevant. The source is immaterial and the form of subsidy is also

immaterial. It is evident from the incentive scheme itself that the purpose of the scheme was to attract the large scale investment to generate new employment and for making the economic environment of Kutch district live. In view of the above judicial decisions and considering the facts of the case and also relying on the decision of the jurisdictional bench of ITAT in the case of AC/7 vs. Birla VXL Ltd (ITA1247-2491Rajkot /20! 1), I am of the considered opinion that the sales tax incentive of Rs.43657867 and Excise Duty incentive of Rs. of Rs.32135417/- received by the appellant were in the nature of capital receipts and thus were not chargeable to tax. The AO is directed to delete the above additions. The grounds of appeal are accordingly allowed."

It is clear from the above discussion that the issue of Sales tax incentive and Excise Duty incentive has been decided in favour of the appellant by the above referred order. As the facts are identical, respectfully following the judgement of my predecessor it is held that the Sales Tax and Excise Duty incentive are not of revenue nature and the same should be treated as capital receipts. Accordingly the additions made by the AO for assessment year 2007-08 and 2008-09 on account of Sales tax and Excise Duty incentive are directed to be deleted and appellant is entitled for deduction as the same have been held to be capital receipts.

The grounds of appeal are accordingly, allowed for both the assessment years."

6. At the outset, the learned Counsel of the assessee submitted that issue in dispute is covered in favour of the assessee by the order of the Tribunal in ITA No. 2826/Ahd./2012 for assessment year 2006-07. Whereas, the Learned DR relied on the order of the Assessing Officer and submitted that the in view of the purpose test, the subsidies received by the assessee are of revenue nature and thus additions need to be sustained.

7. We have heard rival submission of the parties on the issue in dispute. The issue involved is whether the sales tax incentive and Excise duty refund received by the assessee under the respective scheme of Gujarat Government and Central Government are in the nature of capital receipt or revenue

receipt. The assessee has taken benefit of these schemes in the preceding assessment year, 2006-07 and the Ld. CIT(A) has in present assessment year followed finding of his predecessor in the assessment year 2006-07. In the said assessment year, the Tribunal has held that receipt of Sales Tax incentive and Central Excise refund are in the nature of capital receipt. The relevant finding of the Tribunal (supra) is reproduced as under:

> *"11. We find that so far as the Special Bench decision of this Tribunal in the case of Reliance Industries (supra) is concerned, it still holds the field. All that has happened, as a result of Hon'ble Supreme Court's decision dated 9th September 2011, is that Hon'ble Bombay High Court has now admitted the question "whether, on the facts and circumstances of the case, the Hon'ble Tribunal was right in holding that sales tax exemption was a capital receipt" and will, in due course though, adjudicate on this legal issue. To that extent, Hon'ble Bombay High Court's order dated 15th April 2009, to the extent of declining to admit this question, stands reversed. However, the decision of the Special Bench still holds good as the same has not, and at least not yet, even been examined by Hon'ble Bombay High Court. Mere admission of appeal against a decision, as is elementary, does not affect the biding nature of a judicial precedent. The Special Bench decision, in the case of Reliance Industries Ltd (supra), was not reversed by Hon'ble Supreme Court, but was directed to be examined, on merits, by Hon'ble Bombay High Court. That is quite different from disapproving the special bench decision, but it appears that the coordinate bench was led to believe, and there could not have been any other reason for ignoring the special bench decision, that this Special Bench decision is reversed. That is patently incorrect, and when we pointed it out to the learned Commissioner (DR), he did not have much to say except to rely upon the coordinate bench decision which seems to have followed that approach. The coordinate bench, in the case of Jindal Steel (supra), did indeed travel much beyond its limited mandate in ignoring a binding judicial precedent simply because appeal against that special bench decision is now pending before Hon'ble Bombay High Court. When posed with a special bench decision and a division bench directly on the issue, though touching different chords, we have no difficulty in recognizing our limitations. The wisdom of a division bench, even if superior- as strenuously argued by the learned Commissioner, has to make way for the higher wisdom of a larger bench. It is this faith of judicial hierarchical system that is the strength of our functioning, and we must follow the same. We,*

therefore, regret our inability to follow the division bench in the case of Jindal Power, no matter how deeply we respect and admire the work of all our colleagues, and we would rather be guided by the special bench decision - which is exactly what another division bench, on the same set of facts as before us, did in the case of Ajanta Manufacturing Ltd (supra). As for learned Commissioner (DR)'s suggestion that we should follow the jurisdictional High Court decision in the case off Colourman Dyechem (supra), we find that Their Lordships, in this case, were dealing with an entirely different type of subsidy which was clearly dealing with an expansion situation. However, we would rather refrain from making any further detailed observations on this issue, as we are alive to the fact that Hon'ble jurisdictional High Court, in Tax Appeal No 358 of 2012, has admitted appeal against the decision of this Tribunal in Ajanta's case (supra) and all these issues will now come up for consideration of Their Lordships. The fact that appeal is admitted does not, as we have.sfated earlier as well, does not affect the binding nature of the \ judicial precedentsVrhere is no dispute before us that the scheme under which the sales tax and excise duty subsidy are given to this assesse are the same as in the case of Ajanta Manufacturing Ltd (supra). All the material facts being the same, there is no reason to take any other view of the matter than the view so taken by the coordinate bench. We must, therefore, uphold the conclusions arrived at by the Commissioner (Appeals), which are in consonance with the Special Bench decision in the case of Reliance Industries (supra) and coordinate bench decision in the case of Ajanta Manufacturing Ltd (supra), and decline to interfere in the matter.

12. The appeal of the Assessing Officer is thus dismissed.

13. That takes us to the appeal filed by the assessee."

7.1 As the issue involved before us is emanating from the schemes of the State and Central Government, which have been already considered by the Tribunal (supra) and therefore being identical issue-in-dispute, we uphold the order of the Ld. CIT(A) on the issue in dispute. The grounds No. 1 & 2 of the appeal of the Revenue are accordingly dismissed.

8. In ground No.3, the Revenue has challenged deletion of additions made on account of disallowance of ₹ 2,95,69,239/- and ₹ 73,83,957/- being prior period expenses and trade discount respectively.

8.1 The facts in brief qua the issue of prior period expenses of Rs. 2,95,69,239/- are that in the revised return filed for of the year under consideration, the assessee claimed amount of ₹ 2,95,69,239/- under the head 'prior period expenses' pertaining to assessment year 2006-07 as expenses incurred for the purpose of import of components. The assessee submitted that it had incurred said expenditure on import clearance of components of the 'LG' brand washing machine and had debited the said some to LG Electronics India Private Limited (in short 'LG') under a misrepresentation that those expenses were to be borne and reimbursed by the 'LG' and hence same was not claimed as expenses in the financial year relevant to assessment year 2006-07. This sum was disputed by the 'LG' and subsequently settled in financial year 2006-07 relevant to assessment year under consideration, as per which expenses were to be borne by the assessee only. This was not claimed by the assessee in the profit and loss account as same were supposed to be borne by the 'LG' only, till the time books of accounts had been finalized. As a claim settled in the succeeding year, the assessee had made a claim of this expenditure in the revised return of income filed. The Assessing Officer verified the above claim with 'LG' and found that said some was not reimbursed to the assessee in lieu of the debit note filed by the assessee. The 'LG' provided copy of the agreements wherein all incidental expenses related to imports were agreed to be borne by the assessee. Since the claim of the assessee was denied by the 'LG', which was based upon the agreements duly entered into by the assessee with 'LG', the Assessing Officer denied the claim of prior period expenses.

8.2 Before the Ld. CIT(A), the assessee submitted that the claim of expenses of custom duty on import of components of washing machines purchased on High Seas was finally settled through the letter of LG Electronics private limited dated 05/09/2006. The Learned CIT(A) observed that since the dispute was settled and the contractual liability was fastened and to the assessee in the financial year 2006-07, the issue should be examined in the assessment year relevant to financial year 2006-07. The Ld. CIT(A) further noted the correspondence of the assessee with the 'LG' and concluded that issue had been settled in the financial year relevant to the present assessment year only, therefore payment and genuineness thereof was not doubted. According to him the liability was crystallized in the current assessment year therefore it should be allowed in the year under consideration.

8.3 Before us, the learned DR submitted that assessee has not litigated the issue in any court of law which indicates that it was the liability of the assessee from the very beginning and therefore itshould have been claimed in the relevant assessment year 2006-07 and cannot be allowed in the year under consideration.

8.4 On the contrary, the Learned Counsel of the assessee relied on the order of the Ld. CIT(A) and also placed reliance on the decision of the Hon'ble Gujarat High Court in the case of **Saurashtra Cement and Chemical Industries Ltd. Vs. CIT [(1995) 213 ITR 0523 (HC. Guj.)]** and decision of the Delhi Tribunal in the case of **Dakshin Hayrana Bijli Vitran Nigam Ltd Vs. ACIT, [ITA No. 3412 & 3413/Del./2016 (HC. Del.)].** The Learned Counsel further submitted that it was not necessary to

always go into court for resolving the dispute and same can be settled otherwise than by court also.

8.5 We have heard rival submission of the parties on the issue in dispute. The assessee has made a high sea purchase of import consignment and the dispute was regarding payment of import duty. The assessee has initially paid the import duty under the impression that liability of the same lies with the 'LG', from whom it purchased the goods. But finally, it was settled between the parties and communicated to the assessee in the financial year relevant to the current assessment year that it was the responsibility of the assessee. In view of the facts, the liability crystallized in the financial year corresponding to the current assessment year and therefore it has rightly been allowed by the Ld. CIT(A) in assessment year under consideration.

8.6 We do not find any infirmity in the order of the Learned CIT(A) on the issue in dispute and accordingly, uphold the same.

9. The facts qua the issue of trade discount are that the assessee is Original Equipment Manufacturer (OEM) of LG Electronics Private Limited. The 'LG' supplies components for washing machines, TVs etc. to the assessee and the assessee sells final manufactured product to the 'LG' at mutually agreed price. During the year under consideration, the assessee sold final manufactured products, i.e., TV, Washing Machine etc. of ₹ 13,24,77,243/- to 'LG' and granted it discount of ₹ 73,60,112/-. This discount was adjusted with sales account, instead of debiting into the profit and loss account. The trade discount works out to 5.56% on sales.

9.1 The Learned Assessing Officer disallowed the claim of the trade discount on the ground that copy of the sale agreement does not contain any specific clause regarding trade discount. The Learned Assessing Officer further observed that no evidence of the negotiation of such trade discount and the manner in which the understanding for the discount was arrived at or details of correspondence/discussion regarding the issue of the trade discount was not filed by the assessee. According to the Assessing Officer the trade discount does not arise out of commercial expediency consideration. He observed that this is the first year in which the assessee resorted to trade discount, whereas in earlier years no such discounts were ever passed by the assessee to the LG Electronics private limited.

9.2 The Ld. CIT(A) however observed that the trade discount given by the assessee was not in doubt. The only difference was that in the year under consideration the assessee has debited the trade discount separately in the profit and loss account, instead of adjusting it in the sales account of LG. The Ld. CIT(A) concluded that claim of the assessee cannot be disallowed merely on the ground that all the activities of the assessee are controlled by the LG Electronics as the assessee has already submitted all relevant details to substantiate his stand.

9.3 Before us, the Learned DR relied on the order of the Assessing Officer and submitted that no evidence in respect of correspondence regarding trade discount was submitted by the assessee.

9.4 On the contrary, The Learned Counsel of the assessee submitted that it was clearly mentioned in the agreement that

price of components purchased from and finished goods sold to LG would mutually decided and this was nothing unusual in business practice. He submitted that the Assessing Officer has not found the discount to be not genuine. According to him, it has been granted exclusively necessarily for advancing business of the assessee in keeping relationship intact with the 'LG'. The learned Counsel submitted that invoices of the trade discount and confirmation letter thereof dated 17/12/2009 from 'LG' was filed before the Assessing Officer, but he ignored said confirmation from LG.

9.5 We have heard rival submission of the parties on the issue in dispute. Once a confirmation letter from the LG regarding the trade discount has been filed by the assessee, it is evident that the trade discount passed by the assessee is a genuine one. In our opinion it is not for the the Assessing Officer to decide, what is essential for running a business. It is the assessee who is to protect its business interest and for furtherance of the same if certain discount is granted to the principle company, it cannot be held to be unjustified. The trade discount has been given in earlier years and allowed by the AO in earlier years. In the year under consideration, the assessee has debited the discount separately in profit and loss account, instead of debiting in sales ledger account. This accounting entry cannot be a basis for rejection of expenditure of trade discount. In view of the facts and circumstances of the case, we do not find any error in the order of the Learned CIT(A) on the issue-in-dispute and accordingly, we uphold the same.

9.6 Accordingly, the ground No. 3 of the appeal of the Revenue is dismissed.

10. The grounds No. 4 & 5 of the appeal being general in nature are dismissed as infructuous. Hence, the appeal of Revenue is dismissed.

11. The assessee in its ground No. 1 of the appeal has challenged confirmation of non-exclusion of Debt redemption fund of ₹ 4.50 crores from the book profit for the purpose of taxation under section 115JB of the Act.

11.1 The facts in brief qua the issue in dispute are that the assessee while computing book profit under section 115JB of the Act claimed deduction from the book profit for an amount of ₹ 4.50 crores on account of 'debt redemption fund'. However, according to the Assessing Officer, this claim was erroneous and against the provision of the Act. According to him, once the profit before tax has to be considered, there is no provision for making any adjustment on account of such reserves. This is an appropriation for the purpose of creating reserve and is below the line adjustment, which is not falling under any of the category of adjustment provided in section 115JB of the Act. The Ld. CIT(A) also held that that redemption reserve is not in acertain liability and further it is on account of the appropriation of the profit, therefore he upheld the finding of the Assessing Officer.

11.2 Before us, the learned Counsel of the assessee submitted that issue in dispute is covered in the favour of the assessee by the decision of the Tribunal, Ahmedabad Bench for assessment year 2006-07. On the contrary, the Learned DR relied on the finding of the lower authorities.

11.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant metal on record. We find that Tribunal in ITA No. 2826/Ahd./12, adjudicated the identical issue in favour of the assessee. The relevant part of the decision of the Tribunal is reproduced as under:

> *"15 In ground no. 3, the short issue is that the learned CIT(A) erred in confirming non exclusion of debt redemption fund of Rs 2.50 crores from the book profit for the purpose of computing book profits under section 115JB.*
>
> *16. During the course of the scrutiny assessment proceedings, the adjustment for debt redemption fund, at Rs 2.50 crores, was declined with a short observation that 'debt redemption fund of Rs 2.50 crores is an appropriation for purpose of creating a reserve and is a below the line adjustment, it does not fall in any category of the adjustments provided under section 115JB". Learned CIT(A) confirmed the same on the same basis and rejected assessee's stand that it is covered by Hon'ble Bombay High Court's judgment in the case of CIT vs Raymonds Ltd [21 taxmann.com 80], It was held that the purpose of debt redemption reserve is creation of a reserve and is not a permissible adjustment. The assessee is aggrieved and is in appeal before us.*
>
> *17. Having heard the rival contentions and having perused the material on record, we find that the issue is indeed covered by the decision of Hon'ble Bombay High Court, in the case of CIT Vs Raymonds Ltd [(2012) 71 DTR 265 (Bom)] wherein Their Lordships have inter alia observed as follows:*
>
> > ***2. Re question (a): Section 115JA of the Income Tax Act, 1961 provides in subsection (2) that every assessee, being a company shall for the purpose of the section prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956. The explanation to the Section provides that for the purpose of the section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under subsection (2) as increased inter alia by "(b) the amounts carried to any reserves by whatever name called". Part III of Schedule VI to the Companies Act, 1956 provides inter alia in Clause 7(1)(b) that, "the expression "reserve" shall not include any amount written off or retained by way of providing for depreciation, renewals or diminution in value of assets or retained by way of providing for any known liability".***
> > ***3. The nature of a Debenture Redemption Reserve (DRR) has been considered by the judgment of the Supreme Court in National***

Rayon Corporation Ltd. Vs. Commissioner of Income Tax [(1997) 227 ITR 764]. The Supreme Court after adverting to the provisions of Clause 7 of Part III to Schedule VI of the Companies Act, 1956 held that "the basic principle is that an amount set apart to meet a known liability cannot be regarded as reserve". Where a company issues debentures, the liability to repay arises the moment the money is borrowed. By issuing debentures a company takes a loan against the security of its assets. Though the loan may not be repayable in the year of account, the obligation to repay is a present obligation. Hence any money set apart in the accounts of the company to redeem the debenture has to be treated as monies set apart to meet a known liability. Consequently, debentures have to be shown in the balance sheet of a company as a liability. Being monies set apart to meet a known liability, a Debenture Redemption Reserve cannot be regarded as a reserve for the purpose of Schedule VI to the Companies Act, 1956. In National Rayon Corporation, the Supreme Court followed its earlier decision in Vazir Sultan Tobacco Co. Ltd. Vs. CIT [[1981] 132 ITR 559], in holding that since the concept of reserve and of a provision is well known in commercial accountancy and is used in the Companies Act, 1956, while dealing with the preparation of balance sheets and profit and loss accounts the meaning of that concept would have to be gathered from the meaning attached in the Companies Act itself. The following observations of the Supreme Court are of significance:

"The debentures were nothing but secured loans. Merely because the debentures were not redeemable during the accounting period, the liability to redeem the debentures did not cease to exist. It was redeemable or repayable at a future date. But it was a known liability. In the form of balance-sheet prescribed by the Act in Schedule VI, the secured loans have to be shown under the heading "liabilities". Secured loans include (1) debentures, (2) loans and advances from banks, (3) loans and advances from subsidiaries, and (4) other loans and advances. The secured loans might not be immediately repayable, but the liability to repay these loans is an existing liability and has to be shown in the company's balance-sheet for the relevant year of account as a liability. Amounts set apart to pay these loans cannot be "reserve". The interpretation clause of the balance-sheet in Schedule VI of the Companies Act specifically lays down that reserves shall not include any amount written off or retained by way of providing for a known liability."

4. The mere fact that a Debenture Redemption Reserve is labeled as a reserve will not render it as a reserve in the true sense or meaning of that concept. An amount which is retained by way of providing for a known liability is not a reserve. Consequently, the Tribunal was correct in holding that the amount which was set apart as a Debenture Redemption Reserve is not a reserve within the meaning of Explanation (b) to Section 115JA of the Income Tax Act, 1961.

18. We, therefore, uphold the plea of the assessee, and direct the Assessing Officer to grant the relief accordingly."

11.4 Respectfully following the above decision of the Tribunal, we direct the Assessing Officer to allow the relief accordingly. The

ground No.1 of the appeal of the assessee is accordingly allowed. Hence, the appeal of Assessee is allowed.

ITA No. 100/Ahd./2014 (Revenue's Appeal)
ITA No. 2831/Ahd./2013 (Assessee's Appeal

12. Now, we take up the appeal of the Revenue (ITA No. 100/Ahd./2014) and the assessee (ITA No. 2831/Ahd./2013) for assessment year 2008-09. The grounds raised by the Revenue and assessee are reproduced as under:

13. Grounds of appeal of the Revenue:

1. *The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.1,27,46,480/- made on account of treating the subsidy on sales-tax as revenue receipt as against claim of the assessee as capital subsidy, without properly appreciating the facts of the case and the material brought on record.*

2. *The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.9,26,21,625/- made on account of Central Excise Refund received, treating it as revenue receipt as against claim of the assessee as capital receipt, without properly appreciating the facts of the case and the material brought on record.*

3. *On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.*

4. *It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent.*

13.1 Grounds of appeal of the assessee:

1. *On the facts and circumstances of the case, Ld. CIT(A) erred in confirming, non-exclusion of Debt Redemption Fund of Rs.7.50 crore, from the books profit for the purpose of taxation u/s 115JB.*
2. *The appellant craves leave to ad to, alter, to deleted from or substantiate the above ground of appeal.*

14. Briefly stated facts of the case are that the assessee filed return of income on 18/09/2008, declaring loss of ₹ 15,01,96,030/-. The return of income filed by the assessee was

selected for scrutiny and statutory notices were issued and complied with. The assessment under section 143(3) of the Act was completed on 27/12/2000 determining total income at ₹ 8,10,41,270/-. The Ld. CIT(A) allowed part relief to the assessee. Aggrieved, both the Revenue and the assessee are in appeal before the Tribunal.

14.1 In grounds No.1 and 2 of the appeal, the Revenue has raised the issue of deletion by the Learned CIT(A) of the addition in respect of sales tax subsidy of ₹ 1,27,46,480/- and Central Excise refund of ₹ 9,26,21,625/- held as capital subsidy by the Assessing Officer.

14.2 The grounds raised are identical to grounds No. 1 & 2 of the appeal of the Revenue for assessment year 2007-08. The Ld. CIT(A) has also decided both the assessment year in a common order. To have consistency in our decision, following our finding in assessment year 2007-08, both these grounds of the appeal of the Revenue are dismissed.

15. The grounds No. 3 & 4 of the appeal of the revenue being general in nature are dismissed as infructuous. Accordingly, the appeal of the Revenue is dismissed.

16. The ground No.1 raised in the appeal of the assessee for the year under consideration is identical to the ground raised in assessment year 2007-08. Learned CIT(A) has decided both the appeal by way of the combined order. To have consistency in our decision, following our finding in assessment year 2007-08, the ground No. 1 raised in the present appeal is allowed.

17. The ground No. 2 of the appeal of the assessee being general in nature is dismissed as infructuous. Accordingly, the appeal of Assessee is allowed.

ITA No. 1898/Del./2014 (Revenue's Appeal)
ITA No. 1763/Ahd./2014 (Assessee's Appeal)

18. Now, we take up the appeal of the Revenue (ITA No. 1898/Ahd/2014) and assessee (ITA No. 1763/Ahd/2014) for assessment year 2009-10.

19. The grounds raised by the Revenue and the assessee are reproduced as under:

19.1 Grounds of appeal of the Revenue:

1. *The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.11,51,04,944/- made on account of disallowance of deduction claimed by the assessee in respect of sales tax incentive treated as revenue receipts, without properly appreciating the facts of the case and the material brought on record.*
2. *The Ld.CIT(A) has erred in law and on facts in allowing the additional ground of the assessee thereby directing to allow the deduction claimed by the assessee in respect of excise duty incentive of Rs.8,50,85,955/- treating it as capital receipt, without properly appreciating the facts of the case and the material brought on record.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.*
4. *It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent.*

19.2 Grounds of appeal of the assessee:

1. *On the facts and circumstances of the case, Ld. CIT (A), erred in confirming the disallowance of the interest expenditure amounting to Rs. 14,68,306/- in proportion to advance against supply of paper given to sister concern.*

2. *On the facts and circumstances of the case, Ld. CIT (A), erred in confirming the disallowance of I the depreciation of Rs. 6,50,222/- on the portion of foreign fluctuation loss which had been debited in respective plant & machineries.*
3. *The appellant craves leave to add to, alter, to delete from or substantiate the above ground of appeal.*

20. Briefly stated facts of the case are that the assessee filed return of income on 27/09/2009, declaring loss of Rs.(-) 02,13,53,589/- . The return of income filed by the assessee was selected for scrutiny and statutory notices issued under the Act were complied with. The assessment under section 143(3) of the Act was completed on 09/12/2011 determining total income at ₹9,58,69,880/-. On further appeal, the Ld. CIT(A) allowed part relief to the assessee. Aggrieved, both the Revenue and the assessee are in appeal before the Tribunal raising the grounds as reproduced above.

21. The ground No. 1 & 2 of the appeal of the Revenue are identical to ground No. 1 & 2 of the appeal of the Revenue in assessment year 2007-08, wherein we have dismissed both the grounds No. 1 & 2. Following our finding in AY 2007-08, the ground No. 1 & 2 of the appeal of the year under consideration are also dismissed to have consistency in our decision.

22. The ground No. 3 & 4 of the appeal of the Revenue are general in nature and thus dismissed as infructuous. Accordingly, appeal of Revenue is dismissed.

23. In ground No. 1 of the appeal, the assessee has challenged confirmation of the disallowance of interest expenditure amounting to ₹ 14,68,306/- in proportion of advance to sister concern.

23.1 The facts qua the issue in dispute are that the assessee advanced a sum of ₹ 1,15,00,000/- to M/s Genus Paper Products Ltd. (i.e. a sister concern) again supply of the paper and the amount outstanding at the year end i.e. 31/03/2009 was of ₹ 1,22,35,888/-. According to the assessee, it had placed an order for purchase of Craft Papers for packaging from M/s Genus Paper Products Ltd. (GPPL) and as per the terms of the purchase order the assessee had to make hundred percent advance payment. The assessee had also sought quotations from other local suppliers , however, rates quoted by them was higher as compared to GPPL, so the assessee purchased from GPPL and saved Rs. 25 lakhs.

23.2 However, according to the Assessing Officer the assessee had advanced its borrowed funds for non-business purposes to sister concern and did not charge any interest on it and proportionate interest of ₹ 14,68,306/- was disallowed in terms of section 36(1)(iii) of the Act. The Ld. CIT(A) also upheld the disallowance observing that amount of advance given by it was disproportionate to the purchase regularly made by it from the sister concern. The Learned CIT(A) observed that advance had been given apparently for some other purpose and therefore the assessee failed to establish the business motive behind giving such advance.

23.3 Before us, the learned Counsel of the assessee submitted that advance given by the assessee to M/s GPPL was on account of commercial expediency. Due to hundred percent advance given lesser rate had been charged by the GPPL on such purchases which have resulted in overall saving of ₹ 25 lakh and and it was more beneficial to give advance and buy from GPPL. The said

advance resulted in substantial saving on account of purchase of paper, which is mainly used in the packaging unit. According to the learned Counsel the interest factor had been considered before making advance payment.

23.4 The Learned Counsel also submitted that assessee was having its own capital including reserve and surplus of ₹ 50 crores and more and the secured loans were utilized towards the respective projects and no borrowed funds have been utilized for advancing the sum to M/s GPPL for purchase.

23.5 The learned Counsel relied on the decision of the Hon'ble Supreme Court in the case of **SA builders Ltd Vs CIT 206 ITR 631(SC).** He also relied on the decision of the Hon'ble Bombay High Court in the case of **CIT Vs Reliance Utilities and Power Ltd. [(2009) 178 taxman 135 (Bom.)]** and decision of the Tribunal in the case of **M/s LMJ Business Centre (P) Ltd vs ITO (ITA No. 540 & 541/Kol./2012).**

23.6 The learned DR on the other hand relied on the order of the lower authorities and submitted that advances made were disproportionate to the purchases made. The Learned DR relied on the decision of the Hon'ble Punjab and Haryana High Court in the case of Abhishek Industries (268 ITR 01)

23.7 We have heard rival submission of the parties on the issue in dispute and perused the relevant metal on record.

23.8 The Hon'ble Punjab & Haryana High Court in the case of Abhishek Industries (supra) has held that loan from mixed funds of share capital/reserved loan is not sufficient to explain that loan/advance is from own fund. The relevant finding is reproduced as under:

> *"34. Respectfully disagreeing with the views expressed by Delhi High Court in Commissioner of Income Tax v. Tin Box Co. (supra) and Commissioner of Income Tax v. Orissa Cement Ltd. (supra); Allahabad High Court in Commissioner of Income-Tax v. Radico Khaitan Ltd. (supra) and Commissioner of Income- Tax v. Prem Heavy Engineering Works (P) Ltd. (supra); Calcutta High Court in Commissioner of Income Tax v. Britannia Industries Ltd. (supra) and Madhya Pradesh High Court in R.D. Joshi and Co. v. Commissioner of Income-tax (supra), we do not subscribe to the observation in the judgments to the effect that if the amount is advanced from a mixed account or share capital or sale proceeds or profits etc., the same would not be termed as diversion of borrowed capital or that the revenue had not been able to establish nexus of the funds advanced to the sister concerns with the borrowed funds. Once it is borne out from the record that the assessee had borrowed certain funds on which liability to pay tax is being incurred and on the other hand, certain amounts had been advanced to sister concerns or others without carrying any interest and without any business purpose, the interest to the extent the advance had been made without carrying any interest is to be disallowed under Section 36(l)(iii) of the Act. Such borrowings to that extent cannot possibly be held for the purpose of business but for supplementing the cash diverted without deriving any benefit out of it. Accordingly, the assessee will not be entitled to claim deduction of the interest on the borrowings to the extent those are diverted to sister concerns or other persons without interest.*

23.9 We find that the argument of availability of own funds has been taken before us for the first time. On perusal of the balance-sheet of the assessee as on 31/03/2009, we find that assessee was having its own capital of ₹ 57,67,86,521/-, including share capital and reserve and surplus, whereas the loan funds of ₹ 66,39,70,950/-consist mainly of term loan and vehicle loans et cetera which must have been utilized toward respective projects and vehicles . But, The assessee has also taken working capital loans of ₹ 22,40,39,624/- , and paid interest toward the same, and therefore in absence of complete fund flow during the year

under consideration, it cannot be said with certainty that borrowed funds have not been utilized for extending loan to related parties. However, as far as contention of the assessee of business expediency is concerned, we find that advance has been given in relation to purchase order of Craft papers to be utilized in packing of the products i.e. business of the assessee. The Ld. CIT(A) has held that the amount of advance given by the assessee was disproportionate to the purchases regularly made by the assessee from that concern, but no details are provided as how it was disproportionate to the purchases made by the assessee. The Learned CIT(A) on the basis of observation of the disproportionate advance presumed that advance was given for some other purposes. Learned DR also could not substantiate as how the advance given by the assessee was disproportionate to the purchases regularly made. The learned DR also failed to rebut the claim of the assessee of benefit of ₹ 25 lakh on purchases from the GPPL with facility of advance given, which is more than the amount of disallowance of interest. In the case of **SA Builders Ltd Vs CIT, 206 ITR 631(SC)**, the Hon'ble Supreme Court has held that if any advances given to sister concern is as a measure of commercial expediency, the interest on borrowed funds is to be allowed. Respectfully following the finding of the Hon'ble Supreme Court, the payment of the interest in the instant case deserve to be allowed being advance paid in the nature of commercial expediency. We hold accordingly. The ground No. 1 of the appeal of the assessee is allowed.

24. The ground No. 2 of the appeal of the assessee relates to confirming the disallowance of the depreciation of ₹ 6,50,222/- on

the portion of the foreign exchange fluctuation loss in respect of plant and machinery.

24.1 The facts in brief qua the issue in dispute are that during preceding year, the assessee had taken foreign currency loan for purchase of plant and machinery. On account of foreign currency fluctuation, the assessee incurred a notional loss of ₹ 86,69,532/- , which was debited to plant and machinery and depreciation of ₹ 6,50,222/-was claimed on the same. During assessment proceeding, vide letter dated 09/12/2011, the assessee claimed the said amount of depreciation for taxation but, the Assessing Officer disallowed the same. The Ld. CIT(A) also confirmed the disallowance in view of the admission by the assessee before the Assessing Officer and also in absence of any detailed explanation regarding the accounting treatment given by the assessee for the Foreign Exchange Fluctuation loss incurred.

24.2 Before us the Learned Counsel of the assessee submitted that there is no estoppels in law and if the depreciation is allowable in law, then assessee cannot be bind by its offer before the Assessing Officer. The Learned DR, on the other hand, relied on the order of the lower authorities.

24.3 We have heard rival submission of the parties on the issue in dispute. On perusal of Schedule -5 of the balance-sheet (i.e fixed assets schedule), available on page 25 of the Paper-book, we find a note below the chart which reads that under the head of plant and machinery against the FCNRB Term loan ₹ 86,69,632/- was capitalized following the notification of MCA dated 31/03/2009 relating to AS-II on Foreign Exchange Fluctuation and which would be written off in three equal installments i.e.

28,89,877 every year upto 31/03/2011. The assessee has also filed before us letter dated 24/06/2009 issued by the State Bank of India to the assessee giving reference of 'forward contract' entered into by the assessee in respect of foreign currency term loan, which has been rolled from time to time.

24.4 We find that as far as the provisions of the Income Tax Act are concerned, the effect of change in rate of the exchange of the currency in respect of purchase of capital asset has been specifically provided in section 43A of the Act. According to the said section any increase or decrease in liability towards repayment of all or any part of the money borrowed by the assessee in any foreign currency, specifically for the purpose of acquiring the asset, then irrespective of the method of accounting followed by the assessee, the actual cost of the asset has to be increased or decreased accordingly and the depreciation will then be allowable as per provisions of the Act. If the transaction of purchase of the asset is hedged, then effect of the same also needs to be taken into consideration as per the Explanation to the section 43A of the Act. Since no details of actual cost of the asset purchased and effect of foreign currency fluctuation has been provided by the assessee, either before the lower authorities or before us. There is no option with us, except restoring the matter back to the lower authorities. Therefore, in the interest of justice, we feel it appropriate to restore this issue to the file of the Assessing Officer to decide in accordance with law. In the result, the ground No. 2 of the appeal of the assessee, is allowed for statistical purposes.

25. The ground No. 3 of the appeal being general in nature, same is dismissed as infructuous. Accordingly, the appeal of the Assessee is allowed partly for statistical purposes.

ITA No. 1899/Ahd./2014 (Revenue's Appeal)

26. Now, we take up the appeal of the Department (ITA No. 1899/Ahd./2014) for assessment year 2010-11. The grounds raised by the Revenue are reproduced as under:

1. *The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.6,97,89,361/- made on account of disallowance of deduction claimed by the assessee in respect of sales tax incentive treated as revenue receipts, without properly appreciating the facts of the case and the material brought on record.*
2. *The Ld.CIT(A) has erred in law and on facts in allowing the additional ground of the assessee thereby directing to allow the deduction claimed by the assessee in respect of excise duty incentive of Rs.4,46,14,822/- treating it as capital receipt, without properly appreciating the facts of the case and the material brought on record.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.*
4. *It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent.*

27. Since both the grounds raised by the Department are identical to the grounds raised in assessment year 2007-08, therefore following our finding in assessment year 2007-08, both ground No. 1 & 2 of the present appeal are dismissed. Accordingly, the appeal of Revenue is dismissed.

ITA No. 701/Del./2015 (Revenue's Appeal)
ITA No. 348/Del./2015 (Assessee's Appeal)

28. Now, we take up the appeal of the Revenue (ITA No. 701/Ahd/2015) and appeal of the assessee (ITA No. 348/Del/2015) for assessment year 2011-12.

29. The grounds raised in the appeal of the Revenue are reproduced as under:

1. *The Ld. CIT (A) has erred in law and on facts in deleting the addition of Rs. 1,40,32,708/- made by AO on account of sales tax incentive.*
2. *The Ld. CIT (A) has erred in law and on facts in deleting sales tax incentive amounting of Rs. 1,40,32,708/- added by AO in computing the book profit u/s 115JB of the Act*
3. *On the facts and in the circumstances of the case, the Ld. CIT (A) ought to have upheld the order of the Assessing Officer.*
4. *It is, therefore, prayed that the order of the Ld. CIT (A) may be set aside and that of the Assessing Officer may be restored to the above extent.*

30. Identical grounds raised by the Revenue in assessment year 2007-08 have been dismissed, accordingly following our finding in assessment at 2007-08, the ground No. 1 & 2 of the appeal of the Revenue are dismissed. Accordingly, appeal of Revenue is dismissed.

31. The grounds raised by the assessee in its appeal are reproduced as under:

1. *On the facts and circumstances of the case, Ld. CIT (A) erred in confirming the addition made by AO u/s 36(1) (va) r.w. sec 2(24) (x) of Rs. 2, 37,861/- on account of employee's contribution to provident fund on the ground of payment after due date.*
2. *On the facts and circumstances of the case, Ld. CIT (A) grossly erred in confirming the action of AO in disallowing depreciation of Rs. 13,37,020/- on foreign exchange fluctuation loss which has been capitalized to plant and machinery.*
3. *On the facts and circumstances of the case, Ld. CIT (A) erred in confirming the action of AO in disallowing prior period expenses of Rs. 92,889/-.*
4. *On the facts and circumstances of the case, Ld. CIT (A) grossly erred in confirming the action of AO in adding back Rs 6,25,00,000/-to book profit on account of Debt Redemption Reserve .*
5. *The appellant craves leave to add to, alter, to delete from or substantiate the above grounds of*

32. The ground No. 1 of the appeal relates to disallowance of ₹ 2,37,861/- under section 36(1)(va) of the Act towards employees contribution to provident fund.

32.1 The Assessing Officer observed late payment of employee's contribution to the provident fund for the month of May, 2010 and December, 2010, totalling to ₹ 2,37,861/-. The Assessing Officer observed that the assessee was a custodian of collecting and depositing the employees contribution to the provident fund, however in view of the late payment same was disallowable in terms of section 36(1)(va) of the Act. The Assessing Officer also relied on the decision of the Hon'ble Gujarat High Court in the case of **CIT Vs GSRTC** (supra). The Ld. CIT(A) also upheld the disallowance observing as under:

> "4.3 Decisions:
>
> *I have carefully considered the facts of the case, the assessment order and the written submission of the appellant, it is noted that the issue of late deposit of employees' contribution is covered against the appellant by a recent judgement of Honourable Gujarat High Court, in the case of Gujarat State Road Transport Corporation, 41 Taxman.com 100, wherein it has been held that Section 43B which permits a deduction for payments made up to the due date for filing the ROI applies only to the employer's contribution to the provident fund etc. It does not apply to the employees' contribution. The employees' contribution received by the employer-assessee is deemed to be income in the assessee's hands u/s 2(24)(x) and if the assessee has not credited the said sum to the employees' account in the relevant fund or funds on or before the due date mentioned in Explanation to section 36(1)(va), the assessee shall not be entitled to deductions of such amount in computing the income referred to in section 28 of the Act. The Honourable Court has held that the argument that two views were possible was not acceptable because only one view was possible on a correct interpretation of the provision. The relevant extract from the judgement is quoted as under: -*

> *"Section 438, read with section 36(1)(va) of the Income-tax Act, 1961 - Business disallowance - Certain deductions to be allowed on actual payment (Employees contribution) - Whether where an employer has not credited sum received by it as employees' contribution to employees' account in relevant fund on or before due date as prescribed in Explanation to section 36(1)(va), assessee shall not be entitled to deduction of such amount though he deposits same before due date prescribed under section 43B i.e., prior to filing of return under section 139(1) - Held, yes - Assessee State transport corporation collected a sum being provident fund contribution from its employees - However, it had deposited lesser sum in provident fund account - Assessing Officer disallowed same under section 43B - However, Commissioner (Appeals) deleted disallowance on ground that employees contribution was deposited before filing return - Whether since assessee had not deposited said contribution in respective fund account on date as prescribed in Explanation to section 36(1)(va), disallowance made by Assessing Officer was just and proper - Held, yes [Para 8] [In favour of revenue]"*
>
> *Respectfully, following the judgement of jurisdictional High Court the disallowance made by the AO is upheld as it is the case of late deposit of employee's contribution.*
>
> *The ground of appeal is accordingly, dismissed."*

32.2 Before us, the learned Counsel of the assessee submitted that deduction for employees contribution is allowable on payment basis as per section 43B of the Act as held by the Hon'ble Delhi High Court in the case of **CIT Vs AIMIL Ltd., [(2010) 321 ITR 508 (HC Delhi)**. Whereas the Learned DR submitted that the Learned CIT(A) has correctly disallowed in terms of the jurisdictional High Court decision. She further submitted that even Hon'ble Delhi High Court in the case of CIT Vs. Bharat Hotels Ltd. (in ITA No. 271/2005) has held that employees' contribution is allowed, if paid before the due date provided in Provident Fund Act.

32.3 We have heard rival submission of the parties on the issue in dispute. We find that Ld. CIT(A) has followed the decision of the jurisdictional High Court in the case of the assessee, therefore we do not find any error in the finding of the Learned CIT (A) on the issue in dispute and accordingly, we uphold the same. The ground No. 1 of the appeal of the assessee is dismissed.

33. The ground No. 2 of the appeal of the assessee relates to disallowance of depreciation on Foreign Exchange Fluctuation. The claim of the assessee was disallowed by the Assessing Officer following his finding in earlier years, i.e., assessment year 2009-10 and 2010-11.

33.1 We find that identical issue of disallowance of depreciation on Foreign Exchange Fluctuation has been restored to the file of the Assessing Officer for deciding afresh in assessment year 2009-10, and, thus, following our finding in assessment year 2009-10, the issue-in-dispute in the year under consideration is also restored to the file of the Assessing Officer for deciding afresh in view of our direction in assessment year 2009-10. The ground of the appeal of the assessee is accordingly allowed for statistical purposes.

34. The ground No. 3 of the appeal of the assessee relates to disallowance of prior period expenses of ₹ 92, 889/-.

34.1 Before us, the Learned Counsel of the assessee submitted that the assessee did not want to press the ground due to smallness of the amount. Accordingly, the ground of the appeal of the assessee is dismissed as infructuous.

35. The ground No. 4 of the appeal relates to exclusion of the debt redemption reserve of ₹ 6,25,00,000/- MAT calculation.

35.1 According to the Assessing Officer, debt redemption adjustment appropriation is for the purpose of creating reserve and is below the line adjustment, which does not fall in any of the category of the adjustment provided in section 115JB of the Act. The Learned CIT(A) also upheld the disallowance following his finding in earlier years.

35.2 We have heard rival submission of the parties on the issue in dispute. This issue is identical to the issue raised in assessment year 2007-08, accordingly, following our finding in assessment year 2007-08, this ground of the appeal of the assessee is allowed. Accordingly, the appeal of Assessee is partly allowed for statistical purposes.

ITA No. 2617/Ahd./2015 (Revenue's Appeal)
ITA No. 2461/Ahd./2015 (Assessee's Appeal)

36. Now, we take up the appeal of the Revenue (ITA No. 2617/Ahd/2015) and appeal of the assessee (ITA No. 2641/Ahd/2015) for assessment year 2012-13. The grounds of appeal of the Revenue and assessee are reproduced as under:

36.1 Grounds of appeal of the Revenue:

1. *The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.2,83,98,056/- made on account of disallowance of deduction claimed in respect of sales tax incentive, without properly appreciating the facts of the case and the material brought on record.*
2. *The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.2,83,98,056/- in the Book Profit u/s 115JB on account of sales tax incentive disallowance made.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.*
4. *It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent.*

5. *The appellant craves leave to amend, alter or add a new ground, which ' may be necessary.*

36.2 Grounds of appeal of the assessee:

1. *On the facts and circumstances of the case, Ld. CIT (A) erred in confirming the addition made by AO on account of prior period expenses of Rs. 35,631/- .*
2. *On the facts and circumstances of the case, Ld. CIT (A) grossly erred in confirming the addition made by AO on account of interest income of Rs. 20,66,369/-*
3. *The Ld Assessing officer grossly erred in disallowing depreciation of Rs. 11,36,467/- on that part of the cost of Plant & Machinery which was capitalized on account of foreign exchange fluctuation loss.*
4. *On the facts and circumstances of the case, Ld. CIT (A) grossly erred in confirming the action of AO in adding back Rs 6,25,00,000/-to book profit on account of Debt Redemption Reserve .*
5. *The appellant craves leave to add to, alter, to delete from or substantiate the above grounds of appeal.*

36.3 Both the parties agreed that ground of 1 & 2 of the appeal of the Revenue are identical to the grounds raised in assessment year 2007-08, accordingly following our findings in assessment year 2007-08, the grounds of the appeal of the Revenue are dismissed. Hence, the appeal of Revenue is dismissed.

37. As far as ground No. 1 of the appeal of the assessee of prior period expenses of ₹ 35,631 is concerned, the learned Counsel of the assessee submitted that the assessee did not wish to press the ground in view of the smallness of the amount. Accordingly, this ground of the appeal is dismissed as infructuous.

38. The ground No. 2 of the appeal of the assessee relates to addition on account of the interest income of Rs. 20,66,369/-. The Assessing Officer has made an addition on account of the interest as not accounted in the books on the basis of the Form

No. 26AS and TDS reconciliation. The additional evidence submitted by the assessee were not admitted by the Learned CIT(A), and he upheld the disallowance.

38.1 Before us, both the parties agreed that the disposal of the issue need verification by the Assessing Officer. Both parties accordingly agreed to restore this issue back to the Assessing Officer for deciding afresh in the light of the evidences and documents furnished by the assessee. Accordingly, we set aside the finding of the Learned CIT(A) on the issue in dispute and restore this matter back to the file of the learned Assessing Officer for deciding afresh after providing adequate opportunity of being heard to the assessee. In the result, the ground no. 2 of the appeal of the assessee is allowed for statistical purposes.

40. In ground No. 3, the assessee has raised the issue of the disallowance of depreciation on Foreign Exchange Fluctuation amounting to be Rs.11,36,467/-.

40.1 Since identical ground raised in assessment year 2009-10 has been restored to the file of the Assessing Officer, accordingly this issue in the year under consideration is also restored to the file of the Assessing Officer for deciding afresh in the light of or direction in the assessment year 2009-10. This ground of the appeal of the assessee is accordingly allowed for statistical purposes.

41. The ground No. 4 of the appeal of the assessee relates to exclusion of the debt redemption reserve for MAT calculation.

41.1 The identical ground raised in the assessment year 2007-08 has been allowed, thus following our finding, the ground No. 4 of

the appeal of the assessee is allowed. Hence, the appeal of Assessee is partly allowed for statistical purposes.

42. In the result, the appeals of the Revenue and assessee are decided as under:

Appeal/Cross Objection Number	***Assessment Year***	***Filed by***	***Result of appeal***
99/Ahd./2014	*2007-08*	*Revenue*	*Dismissed*
2830/Ahd./2014	*2007-08*	*Assessee*	*Allowed*
100/Ahd./2014	*2008-09*	*Revenue*	*Dismissed*
2831/Ahd./2013	*2008-09*	*Assessee*	*Allowed*
1898/Ahd./2014	*2009-10*	*Revenue*	*Dismissed*
1763/Ahd./2014	*2009-10*	*Assessee*	*Allowed partly for Statistical purposes*
1899/Ahd./2014	*2010-11*	*Revenue*	*Dismissed*
701/Ahd./2015	*2011-12*	*Revenue*	*Dismissed*
348/Ahd./2015	*2011-12*	*Assessee*	*Partly allowed for statistical purposes*
2617/Ahd./2015	*2012-13*	*Revenue*	*Dismissed*
2461/Ahd./2015	*2012-13*	*Assessee*	*Partly allowed for statistical purposes.*

Order pronounced in the open court on 11th March, 2021

Sd/-	***Sd/-***
(K.N. CHARY)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 11th March, 2021.
RK/-(DTDS)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi