IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI

BEFORE SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER) AND SHRI PAVAN KUMAR GADALE (JUDICIAL MEMBER)

ITA No. 1714/MUM/2020
Assessment Year: 2013-14

Deputy Commissioner of Income Tax CC-7(1), Room No. 653, Aayakar Bhavan, M.K. Road, Mumbai-400020.	**Vs.**	M/s Saf Yeast Co. Pvt. Ltd., 419, Swastik Chambers, Chembur, Mumbai-400071.
		PAN No. AADCS 9080 J
Appellant		**Respondent**

ITA No. 1800/MUM/2020
Assessment Year: 2013-14

M/s Saf Yeast Co. Pvt. Ltd., 419, Swastik Chambers, Chembur, Mumbai-400071.	**Vs.**	Deputy Commissioner of Income Tax CC-7(1), Room No. 653, Aayakar Bhavan, M.K. Road, Mumbai-400020.
PAN No. AADCS 9080 J		
Appellant		**Respondent**

ITA No. 1799/MUM/2020
Assessment Year: 2014-15

M/s Saf Yeast Co. Pvt. Ltd., 419, Swastik Chambers, Chembur, Mumbai-400071.	**Vs.**	Deputy Commissioner of Income Tax CC-7(1), Room No. 653, Aayakar Bhavan, M.K. Road, Mumbai-400020.
PAN No. AADCS 9080 J		
Appellant		**Respondent**

Assessee by	:	Mr. Tanzil Padvekar, AR
Revenue by	:	Mr. Hemant Chimanlal Leuwa, DR
Date of Hearing	:	15/09/2021
Date of pronouncement	:	25/10/2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

The captioned appeals filed by the Revenue and assessee are directed against the respective orders passed by the CIT(A)-49, Thane dated 09.03.2020 for AYs 2013-14 & 2014-15. As the issue involved in the captioned appeals are inextricably interlinked or in fact interwoven and having common issue, the same are therefore being taken up and disposed off by way of a consolidated order.

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2. Brief facts of the case are that the assessee manufactures Baker's Yeast at its factories situated at Sandila and Chiplun. The main raw material is sugar cane molasses and other raw materials are urea, phosphoric acid, caustic soda, soda ash, vitamins, antifoaming agent, emulsifier, magnesium sulphate, water etc. Bakers Yeast manufactured by the assessee is sold in three forms (a) Fresh Yeast, (b) Active Dry Yeast and (c) Instant Dry Yeast. Fresh yeast is highly perishable and needs to be stored under continuous refrigeration. Fresh yeast is transported in refrigerated trucks. Instant Dry yeast can be stored at room temperature and is mainly used by bakers in areas that are not easily accessible by road and where refrigerated storage facilities are not available. Temperature is very important for production and survival of the yeast. During the process of

production, the assessee requires both heat and cooling power. For this purpose, the assessee also generates Steam Power from Biogas Boilers and Cooling Power from Cooling Towers set up at its power generation undertakings at Sandila and Chiplun. Assessee claimed commencement of production of Steam Power, Cooling Power from Cooling Tower and Cooling power from Ammonia Absorption Refrigeration plant at Sandila as on 31.01.2000, 22.03.1997 and 28.02.2002 respectively. Similarly, commencement of production was claimed of Steam Power and Cooling Power from Cooling Towers as on 01.03.2001 and 02.08.2002 respectively.

4. It is submitted before us that the Assessing Officer rejected the claim of the assessee u/s 80IA of the Act with the observation that generation of steam is not a form of power eligible for deduction, no separate undertaking was set up for production of instant dry seized and it is manufactured in an undertaking which already existing prior to 01.10.1994 and according to AO, the undertaking is established by stipulating the old existing business for the purpose of section 80IA of the Act. It is brought to our notice that the reasons for disallowing the claim of deduction u/s 80IA are materially same which was raised in earlier assessment year by the respective Assessing Officers. The assessee also relied on the same arguments to support the claim of deduction u/s 80IA. It is submitted that the Ld. CIT(A) in the current assessment year relying on the orders of respective CIT(A) in the earlier assessment years and allowed the same. It is also brought to our notice that in the earlier assessment years the Co-ordinate bench of this Tribunal consistently allowed the claim of the assessee u/s 80IA of the Act and the assessee has filed the respective orders before us (ITA Nos. 1634, 1635, 1636 & 1637/M/2014 for and ITA Nos. 1777, 1778, 1779

& 1780/M/2014 for assessment years 2005-06 to 2008-09). Similarly, the assessee also filed copy of Co-ordinate Bench decision for assessment years 2009-10 to 2012-13.

After considering the submissions of both the counsels and orders filed before us. We noticed that the Co-ordinate Bench in earlier assessment years have allowed the claim of the assessee u/s 80IA(4)(iv) with the following observations :

> *"33. In the provisions of Section 80IA(4)(iv) of the Act, there is no requirement that assessee should have an independent undertaking for the generation of power alone. More over in this case, the issue before Hon'ble Madras High Court was in the context of whether that assessee was engaged in the manufacture of lathes, grinders and other heavy machinery and that there was no manufacturing or production of articles or things before 31.5.1958 and hence whether a benefit would be available under Section 84 of the Act. It was held that the benefit of erstwhile Section 84 of the Act could be claimed as from the material available on record and it was established by the assessee that actual production started after 01.04.1958. The said decision relied on by the AO is inapplicable.*
>
> *34. The assessee submitted Factory Inspector's Certificate in respect of Cooling Power and Steam Power undertakings at Sandila and of Cooling Power generation and Steam Power generation undertakings at Chiplun and that these power generation undertakings are separate and distinct from the yeast manufacturing unit. The power produced in these power generation undertakings are used for captive consumption in the yeast manufacturing unit. The assessee has separate plant and machinery for its Steam Power generation undertaking and Cooling Power generation undertakings which is distinct and separate from the yeast manufacturing unit. In this regard the assessee relied on Factory Inspector's certificates dated 08.11.2006, a copy of which is*

enclosed. Further this fact has also been appreciated by the AO who in the last few paras of the remand report stated as under:

> *"The Assessee has submitted the copy of factory inspector's certificate in respect of cooling power plant and biogas power plant. The certificate revels that the cooling power plant and biogas power plant is separate from Fresh Baker Yeast and Instant Dry Yeast."*

The assessee submitted separate and duly audited Profit and Loss accounts giving the revenues and expenses from such power generation undertakings at Sandila and Chiplun and also furnished Balance Sheets which give details of assets and liabilities of each power generation undertaking. These details are available at pages no 195 to 473 of the assessee Paper book No I. It has been held that if new a industrial unit is established as a part of an existing industrial establishment and if the newly established unit is itself an integrated independent unit in which new plant and machinery is put up and that by these is capable of production of goods independently, the said unit could be classified as newly established undertaking.

35. The assessee has separate plant and machinery, separate labour for each of its power generation undertakings. In the assessee's case, the three elements of systematic activity, employment of labour and equipment and production of goods are present and, therefore, the Cooling Power and Steam Power generation undertakings have been setup for generation of power. The CIT(A) has correctly held so in the assessee's case. Hon'ble Supreme Court in the case of Textile Machinery Corpn. Ltd. vs. CIT [1977] 107 ITR 195 held that in order to be entitled to the benefit under Section 15C of the Act, the following facts have to be established by the assessee, subject always to time-schedule in the Section:

> *1. Investment of substantial fresh capital in the industrial undertaking set up,*
>
> *2. Employment of requisite labour therein,*

3. Manufacture or production of articles in the said undertaking,

4. Earning of profits clearly attributable to the said new undertaking, and

5. *Above all, a separate and distinct identity of the industrial unit set up*.

36. Similarly, Hon'ble Gujarat High Court in the case of Gujarat Alkalies & Chemicals Ltd vs CIT (350 ITR 94) while relying on the judgement of Textile Machinery Corpn. Ltd. vs. CIT [1977] 107 ITR 195 further held that so far as the fifth test is concerned i.e. a separate and distinct identity, only because to a certain extent the new undertaking is dependent on the existing unit, will not deprive the new undertaking the status of a separate and distinct identity. It all depends on the nature of the technology and the mechanism of production. In CIT vs. Chanda Diesels 216 ITR 639 (BOM), Hon'ble Bombay High Court examined the meaning of 'Industrial Undertaking' in the context of a claim of section 80HH of the Act and held that if a new industrial unit is established as a part of an existing industrial establishment and if the newly established unit is itself an integrated independent unit in which new plant and machinery is put up and that by these is capable of production of goods independently, the said unit could be classified as a newly established industrial undertaking for the purpose of deduction under Section 80HH. Hon'ble Madras High Court in another case CWT vs P. Devasahayam 236 ITR 885, interpreted an industrial undertaking as an undertaking engaged in the business of generation or distribution of electricity or any other form of power.

37. The AO has taken an objection that the power generation unit is a part of a larger undertaking and assessee's power generation undertakings are not independent unit with a distinct name, address or product and that in various documents filed before various Government authorities, the name and address of the factory is that of "Saf Yeast Co.Pvt. Ltd." and the product manufactured is stated to be yeast. There is no need nor is there any statutory obligation to have a different name and the address obviously has to be the same as the assessee's power generation undertakings are situated in the same premises as the yeast producing factory. The Mumbai Bench of ITAT in the case of West

Coast Paper Mills, 100 TTJ 833 observed that Section 80IA of the Act does not speak of the consumption of power and there is no fetter against using the power generated for self consumption. The Bench was of the view that the assessee was eligible for deduction for power generated by the two DG sets, which was used for captive consumption. In taking this view, the Tribunal relied on the decision of the Supreme Court in Textile Machinery Corporation Ltd. vs. CIT regarding exemption under section 15C of the 1922 Act and the Bombay High Court decision in CIT vs Sahney Steel & Press Works (1989) 177 ITR 354.

38. Regarding AO's contention that no separate permission was obtained from Central /State Government/Local Authority for carrying on eligible business, it was argued that as per the provisions of Section 80IA of the Act, there is a mandatory requirement for obtaining approval of Central Government/ Statutory Authority only for those undertakings which fall under clause (i) of Section 80IA(4) of the Act i.e. any enterprise carrying on the business of developing, operating and/or maintaining any infrastructure facility. The assessee claimed deduction of eligible business being generation of power which falls under clause (iv) of Section 80IA(4) of the Act for which there is no requirement in this section for power generation undertakings to obtain any permission from Central Government. Further though sub-clause (4) of Rule 18BBB of the Income Tax Rules, 1962 prescribes submission of copy of the agreement, approval or permission, as the case may be, to carry on the activity signed by the Central Government or the State Government or the local authority for carrying on the eligible business, this rule mandates that certificate has to be furnished only where permission should be necessary. The assessee argued that there is no specific approval required for carrying on business of generation of steam power and cooling power and hence it is incorrect for the AO to contend that it did not obtain the requisite permissions. In fact the AO not been able to state what permission was necessary because in fact no such permission was required for undertakings generating steam power and cooling power. The assessee relied on a judgement of Hon'ble Allahabad High Court in the case of CIT vs Hanuman Rice Mills (275 ITR 79), wherein it was held that "Following the decision in CIT v. Sultan and Sons Rice Mill [2005] 272 ITR 181 (All.), it was to be held in the instant case that the

Tribunal was legally correct in allowing the assessee's claim under sections 80J and 80HH. These provisions do not require that the industrial undertaking should be registered under the Factories Act, 1948 to qualify for the deductions under the said provisions."

39. The assessee's contention that the AO erred in taking the recourse to accounting standards (AS) for segment reporting. There is no requirement in the entire Section of 80-IA of the Act for reporting of a separate segment in the Accounts. Accounting Standards are prescribed under the Companies Act. Income tax authorities cannot derive adverse inference merely since the assessee took a view that segment reporting is only required for the manufacture of yeast. Further, the Cooling Power and Steam Power generated by the assessee are captive consumption and hence no separate segment disclosure is required. Further as per the provisions of the Act, for granting a deduction u/s 80IA of the Act only a separate P/ L account and B/S is to be prepared and report from a Chartered Accountant as per Form No 10CCB is also required to be filed and same have been duly filed. The assessee relied on the judgement of the Hon'ble Supreme Court in the case of CIT vs Bongaigaon Refinery and Petrochemical Ltd (349 ITR 352). In this case the AO while framing assessment, under Section 143(3) allowed deduction u/s 80HH and 80I of the Act after examining and being satisfied with the unit-wise profit & loss statement filed by that Assessee. The CIT u/s 263 passed an order holding that the assessee was statutorily obliged to maintain Segregated Accounts for each of the three units unit-wise for claiming deduction under Sections 80HH and 80I of the Act, whereas the assessee had maintained Consolidated Accounts. Against the order of CIT, the matter came by way of appeal to the ITAT, which came to the conclusion that there was no statutory requirement under Section 80HH(5) / 80I(7) of the Act to maintain unit-wise accounts. However, the Tribunal observed that, to put an end to litigation, Bongaigaon Refinery and Petrochemicals Ltd should submit unit-wise audited accounts and claim deduction under Sections 80HH and 80I of the Act. Against the said decision that assessee appealed to the High Court which set aside the order of the Tribunal. An appeal was filed by the department before the Supreme Court. The Supreme Court held that neither Section 80HH nor Section 80I of the Act statutorily obliged the

assessee to maintain its accounts unit-wise and that it was open to maintain its accounts in a consolidated form and that unit-wise net profits could be prepared by the Auditors from the Consolidated Books of Accounts and on that basis compute deduction under Section 80HH / 80I of the Act. The judgement squarely applies to the assessee's case."

5. Since the Co-ordinate Bench has addressed the same issue raised by the Assessing Officer in the current assessment year. We deem it fit and appropriate to sustain the findings of the Ld. CIT(A) and accordingly ground Nos. 1, 2 & 3 raised by the Revenue are dismissed.

6. With regard to Ground No. 4, the relevant facts are the Assessing Officer observed during the assessment proceedings from tax audit report that the disallowance u/s 43B ₹1,27,63,330/- is added in computation of income and this is on account of liability incurred during the previous year but not paid on or before due date of filing return of income. It is submitted before AO that as per Clause 21(1)(a) of the tax audit report pre-existing liability on the first day of the previous year and was not allowed in the assessment of any preceding year and paid during the year is allowable. The assessee has paid bonus *ex-gratia* of ₹34,52,000/- which is allowable during the year. After considering the submissions of the assessee, the Assessing Officer observed that the assessee can claim the relief of ₹34,52,000/-only by filing the revised return of Income. Since the assessee has not filed revised return of income the same cannot be entertained at this stage.

7. Aggrieved with the above order the assessee preferred an appeal before the Ld. CIT(A) and before Ld. CIT(A), the assessee submitted that the bona fide claim can be entertained on the stage of appellate proceedings as per the Apex Court decision in the case of Goetze (India) Limited v. CIT 284 ITR 323 (SC). After

considering the submissions of the assessee, the Ld. CIT(A) observed that AO has not considered the claim for the reason that no revised return was filed to make this claim and hence the same was not allowable. Further, the Ld. CIT(A) observed that it is evident that the claim of the assessee is not a fresh claim but a revised claim and he has also considered the judicial pronouncement relied by the assessee and in view of above discussions, he is of the considered view that claim of the assessee required consideration in impugned assessment order. Accordingly, he allowed the deduction claimed by the assessee.

8. Aggrieved, the Revenue is in appeal before us and after considering the submissions of both the counsels, in our considered view, the claim of the assessee is legitimate claim and such revised claim can be entertained by the first appellate authority and accordingly Ld. CIT(A) has allowed the claim of the assessee by relying on decision of Hon'ble Supreme Court and the claim of the assessee is legitimate. Therefore, we do not see any reason to interfere with the findings of the Ld. CIT(A). Accordingly, ground raised by the Revenue is dismissed.

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9. Considering the brief facts extracted in Revenue's appeal above, the assessee has claimed deduction u/s 80IA and Ld. CIT(A) considered and allowed the claim of the assessee. However, he has not entertained the quantum deduction u/s 80IA claimed by the assessee. The relevant findings of the Assessing Officer are extracted below:

"Quantum of deduction u/s. 80IA:

Having come to the conclusion that the assesses is not entitled to any deduction u/s.80IA, I would now consider the manner in which the deduction had been computed by the assesses. This is without prejudice to the said conclusion and would come into play if at any appellate stage, it is held that the assessee is entitled to deduction u/s.80IA

Assuming without admitting that the assessee had the power generation undertaking i.e. cooling tower for refrigeration power, bio gas boiler plant of steam power and ammonia absorption recovery plant and that the profit and gains of these undertaking are eligible for deduction /s. 80IA it is seen that the profit derived by them as computed by been maintained for these undertakings. The P&L account and balance sheet of the under taking have been prepared on the basis of notation sale and by allocating certain expenses from consolidated accounts, some by the process of identification as relating to the undertaking and some or an estimate basis no scientific basis had been provided for these estimates.

As already noted the so-called refrigeration energy, steam energy and ammonia produced by these undertaking have been consumed entirely by the other business of the assessee. According to sub- section (8) of section 80IA, therefore the profit and gains of the eligible business are required to be computed on the basis of the price, the refrigeration energy and steam energy would ordinarily fetch in the open market. The assesses was, therefore required to furnish instance of sale of refrigeration energy and steam energy and should have computed the profit on such sale, which has not been done. According to the assessee, as compared to the rates charged by the U.P. State Electricity Board for electricity supplied by it the rate charged for the refrigeration energy is on the lower side.

Sub-section (8) of section 801A defines market value of eligible goods as the price that such goods would ordinarily fetch in the open market. A comparison with the market price of some other goods is not contemplated by the assessee. Comparison of the price of the refrigeration energy with electric energy is therefore of no relevance. Considering net profit percentage declared in consolidated profit & loss account of deduction u/s. 80IA works out as follows:

Accounting Year	*Cooling power (Chiplun)*	*Steam power (Chiplun)*	*Cooling power (Sandila)*	*Total*	*Net Profit as per P&L a/c on yeast mfg activity*
2012-13					
Net profit	*83.88%*	*94.44%*	*71.94%*		*24.69%*
Sales	*76309068*	*83380220*	*33276408*		
Deduction claimed	*64024311*	*78722746*	*22860956*	*165608013*	
Deduction allowable	*18840709*	*20586576*	*8215945*	*47643230*	

Under the above circumstances, the net profit will have to be computed by applying the proviso to sub-section (8) of section 80IA which stipulates that if the computation of the profit and gains in the manner specified in the sub-section present exceptional difficulties, the assessing officer may compute such profit and gains on ach reasonable basis as he may deem fit. I find that the net profit on cost as disclosed by the consolidated P & L account of the assessee is 24.69%. I feel it would be reasonable to compute the net profit of the power plant at this rate. Thus, even if the assessee is held to be eligible for the deduction u/s.801A in respect of the power plant, the allowable deduction will be Rs. 4,76,43,230/- as against the assessee's claim of Rs.16,56,08,013/-."

10. Aggrieved with the above order, the assessee preferred an appeal before the Ld. CIT(A) and after considering the submission of the assessee by relying on order passed by his predecessor for assessment year 2012-13, he has directed the Assessing Officer to re-compute the deduction following the principles laid down for the assessment year 2012-13. Accordingly, it was directed to verify the computation submitted by the assessee and directed to re-compute the deductions available to the assessee.

11. Aggrieved, the assessee is in appeal before us, raising following the grounds of appeal:

1. *On the facts and the circumstances of the case and in law the CIT(A) erred in passing an order dated 04.02.2020 under Section 250 of the Income Tax Act 1961, by failing to appreciate the orders of the Hon'ble Tribunal decided in favour of the Appellant for AY*

2005-06 to AY 2008-09 and for AY 2009-10 to AY 2012-13. Hence, there is gross violation of judicial discipline as the orders passed by the Hon' ble Tribunal are binding on the lower authorities.

2. *On the facts and in the circumstances of the case and in law the CIT(A) erred by passing an order under Section 250 of the Income Tax Act, 1961 by following the order of his predecessor, when, such order was set aside and appeals of the Assesee were allowed by the Hon'ble Income Tax Appellate Tribunal for AY 2005-06 to AY 2008-09 and for AY 2009-10 to AY 2012-13. A copy of the Hon ble Tribunal's order for AY 2005-06 to AY 2008-09 was submitted on 12.02.2018 along with written submission. The Hon'ble Tribunal's order for AY 2009-10 to AY 2012-13 was submitted to CIT(A) on 21.01.2020.*
3. *On the facts and in the circumstances of the case and in law the CIT(A) erred in passing the order under Section 250 of the Income Tax Act, 1961 by failing to treat the Appellant's appeal as a covered issue in Appellant's own case vide orders passed by the Hon'ble Tribunal for AY 2005-06 to AY 2008-09 and for AY 2009-10 to AY 2012-13*

12. At the time of hearing, it is brought to our notice that the Co-ordinate Bench has considered exactly similar issue to re-compute the deduction u/s 80IA and gave relief to the assessee. The Ld. AR submitted that the lower authorities are not following the directions of the Tribunal, which is binding.

13. After considering the submissions of both the parties, we noticed that the Co-ordinate Bench in fact considered the similar issue in assessment year 2005-06 to 2008-09 in ITA Nos. 1634, 1635, 1636 & 1637/M/2014 and ITA Nos. 1777, 1778, 1779 & 1780/M/2014 for assessment years 2005-06 to 2008-09. For the sake of clarity, it is reproduced below :

"67. We have heard rival contentions and gone through facts and circumstances of the case. We find that in the assessment orders the AO has stated that the assessee has reported net profit rates for the Assessment Years 2005-06, 2006-07, 2007-08, 2008-09 respectively for manufacturing of yeast @2.75%, 14.97%, 23.13%, 26.41% and that this

should be the basis for calculating profits of power generation undertakings. The net profit rates of the assessee's yeast manufacturing business includes the manufacture and sale of yeast and inter-alia, has all expenses such as excise duty, labour, other direct expenses such as cost of raw materials etc. included in it. There is no basis for including all these expenses and the sales revenue on sale of yeast for working out the net profit ratio for power generation undertakings are distinctly different from yeast manufacturing factories. The scheme of Section 80-IA of the Act itself provides for working out the profit on power generation undertaking as a separate industrial undertaking as a stand-alone business dehors any other business. Therefore, there is absolutely no logic in applying the Net Profit rate of the assessee's yeast manufacturing business to the business of generating cooling power and steam power. We have gone through the provision of Section 80IA(5) of the Act, which reads as under:-

> *"(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."*

68. Perusal of the above provision shows that for purposes of calculating the deduction under Section 80-IA of the Act, the profits of the eligible business must be worked out as it were the only source of an assessee's income. Therefore, the the AO by applying the net profit percentage of the assessee's yeast manufacturing business for arriving at profits u/s 80-IA in respect of Cooling Power and Steam Power generation undertakings is contrary to Section 80IA(5) of the Act and is therefore baseless and deserves to be set aside. When the assessee has submitted the audited statements duly

supported by various records of the power generation undertakings, the same should be taken as correct, subject of course to the verification of the facts. None of these facts have been disputed by the AO.

69. In view of the above discussion and facts of the case, case laws cited of courts, we finally held as under: -

(i) That the assessee has generated steam power from bio-gas,

(ii) Generation of cooling power from cooling towers and

(iii) Cooling Power from Ammonia Absorption Refrigeration Plant

These are entitled for deduction under section 80IA of the Act at their plants at Sandila and Chiplun for the AY 2005-06 to 2008-09. We agree with the findings of CIT(A) on the above reasoning recorded. Even, the assessee's power unit is established as part of existing industrial establishment and the newly established unit itself is an integrated independent unit in which new plant and machinery is put up and that why these is capable of production are classified as newly established undertaking in the given facts and circumstances of the case.

70. In regard to quantum of deduction, the assessee has to take the electricity rate of Maharashtra State Electricity Board and U.P. State Electricity Board as a base for computing the rates. The notional sale value is to be converted from TR to KW, the conversion of the Tons of Refrigeration to Kilowatts being the unit of measurement for electric power, it should be taken at 1 Refrigeration Tonne =3.5168525 KW (rounded off to 3.51 KW). However the details can be verified by the AO at the time of giving effect to this order. Accordingly, this inter-connected issue for claim of deduction under section 80IA of the Act is allowed in favour of assessee. This issue of assessee's appeals is allowed and that of the Revenue's is dismissed."

14. Since the issue is already addressed by the Co-ordinate Bench, accordingly, we direct the Assessing Officer to follow the above directions and

re-compute the deduction u/s 80IA of the Act. Therefore, the claim made by the assessee is accordingly allowed.

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15. Aggrieved, the assessee is in appeal before us, following the grounds of appeal:

1. *On the facts and in the circumstances of the case and in law the CIT(A) erred in disallowing club expenses amounting to Rs.1,02,051/- when such expenses were wholly and exclusively for the Appellant's business.*
2. *On the facts and in the circumstances of the case and in law the CIT(A) erred in assuming that "the Auditor has flagged the club expenses as being personal in nature', whereas a perusal of the audit report suggests that the expenses were incurred as business expense.*
3. *On the facts and in the circumstances of the case and in law the CIT(A) erred in not considering a legal question and very important submission made by the Appellant during the course of Appellate proceedings, on 'limited scrutiny', when such question is about jurisdiction and goes to the root of this scrutiny assessment.*

16. Brief facts, relating to the above grounds of appeal are, at the time of assessment, the Assessing Officer observed from the note forming the part of the audit report that the assessee has debited ₹1,02,051/- in the profit and loss account as expenditure incurred in the clubs. The AO observed that the expenditure on clubs is on personal entertainment, accordingly, he was of the view that no personal expense to be debited in the profit and loss account within the meaning of section 37(1) of the Act. Therefore, he disallowed expenditure of club membership at ₹1,02,051/-.

17. Aggrieved with the above order, the assessee preferred an appeal before the Ld. CIT(A) and submitted the detailed submissions in this regard, it is reproduced below:

1. The Appellant is in the business of manufacturing bakers yeast.

2. The Appellant conducts meeting with its clients at clubs to discuss the business prospects and improve business relations with its vendor and customers. The Appellant has two manufacturing units, one at Chiplun in Maharashtra and other at Sandila in Uttar Pradesh and branches all over India.

3. The expenditure incurred at club represents expenses incurred for utilizing club services / facilities when lunch, dinner, etc.takes place with the vendor / customers. The expenses incurred for furtherance of business. The Appellant relies on following decision:

A. British Bank of Middle East 004 SOT 0122 Mumbai ITAT.

B. Pricewaterhouse Coopers Put Ltd 2016 Tax Pub 2743 Kolkata ITAT.

Copies of decision enclosed.

4. The details of expenses incurred at club have been reported in clause 21(a) of the Tax Audit report wherein the Tax Auditor has certified that the expenses aggregating to Rs.1,02,051/- have been incurred by the Appellant towards cost of services at club and membership fees of the club. The breakup of expenses incurred at club as per Tax Audit Report is as under:

Name of the club	*Subscription (Rs.)*	*Cost of club services (Rs.)*
United Services Club	*Nil*	*18,419/-*
The Bombay Gymkhana Ltd.	*5,400/-*	*75,453/-*
Cricket Club of India Ltd.	*Nil*	*2,579/-*
Cosmopolitian Club	*Nil*	*200/-*
Total	*5,400/-*	*96,651/-*

5. The Appellant submits that the disclosure made in the Tax Audit Report is a mere disclosure required in the report issued under section 44AB.

6. The Appellant further submits that clause 21(a) of the Tax Audit report (refer page of the compilation) requires the Tax Auditor to also report the expenses which are personal in nature as well as expenses incurred are club being cost of club services, entrance fees, club facilities, etc. It is only if the expenses incurred at the club are found by the Tax Auditor not for the purpose of the business, the expenses are required to be disclosed as personal expenses by the Tax Auditor in clause 21(a) under the heading "Personal Expenditure" and the same are then required to be disallowed under section 37(1).

7. The Tax Auditor has not disclosed any expenses incurred for utilizing club services as personal expenses itself indicate that the expenses are not personal expenses.

8. This indicates that the expenses incurred at club are wholly and exclusively for the purpose of the business and thus the disallowance made by the Assessing Officer should be deleted."

18. After considering the submissions of the assessee, the Ld. CIT(A) dismissed the appeal of the assessee with the following observations :

"6.4 As to club expenses, it is noteworthy that whether a particular expenditure is to be allowed as "revenue" expenditure in the hands of the assessee will depend upon the facts of each individual case and no straitjacket formula can be adopted for deciding the issue. In the case of the assessee, the Auditor has flagged the club expenses as being personal in nature. The assessee did not furnish any evidence even before me that the Club expenses were in respect of business events/meetings and that the same has to be taken as incurred for furtherance of business of the assessee. In the case of British Bank of Middle East 004 SOT 0122 Mumbai ITAT, the club expenses were considered as allowable in view of the facts that the assessee was an international bank and the expenses were held as business expenses. In the case of Pricewaterhouse

Coopers Pvt Ltd 2016 Tax Pub 2743 Kolkata ITAT, club expenses were held as allowable since assessee was an internationally reputed consultancy company having clients and business across the globe.it was accordingly held for the purpose of furtherance of business of the assessee. However, in the case in hand the assessee is in the business of manufacturing bakers yeast and the assessee failed to establish how such club expenses were imperative for furtherance of it's business. Rather, there is strong circumstantial evidence to believe that the expenditures were personal in nature. I am, therefore, of the considered view that the club expenses in the case of the assessee have no nexus with the business of the assessee and in the given facts and circumstances of the case the same cannot be held as having been spent for furtherance of business. I am, therefore, of the considered view that the club expenses in the case of the assessee could not be held as allowable expenses. In this connection, I place reliance on the order of Hon'ble Hyderabad Tribunal in the case of K.L. Hytech Secure Print Ltd. vs JCIT reported in 61 taxmann.com 449, wherein the club expenses were not found as allowable in the hands of the company. In the given facts of the case, I do not find any infirmity in the order of the Assessing Officer on this account. The Ground No. 1 is accordingly dismissed.

19. Aggrieved with the above order, the assessee is in appeal before us and submitted is as under :

"The Appellant is a leading manufacturer of Baker's Yeast in India with a turnover of more than 220 crores. The Appellant has to conduct meetings with their clients and business associates. Clubs are a platform to meet people. These visits help maintain old contacts and make new ones for the benefit of the company's business. By visiting clubs chances of making new contacts improve. With new contacts it gives an opportunity to have more interactions which is beneficial for the business of the company. The Appellant has been claiming club expenses from 1986 onwards which has been allowed in all the previous years and in the subsequent year as well. The Appellant submits that A.Y.2014-15 (Current Assessment Years) is the first year where this disallowance has been made.

The Ld. CIT(A) in impugned order at para 6.4 wrongly and falsely held that Auditor has flagged the club expenses to be personal in natures whereas on contrary the Auditor has held it to be business expenditure. The relevant extract of the Audit Report is reproduced in picture form :

	(b)	Details of contributions received from employees for various funds as referred to in section 38(1)(va):			Annexure – 5	
	Serial No.	Nature of fund	Sums received from employees	Due date for payment	The actual amount paid	The actual date of payment to the concerned authorities
21	(a)	Please furnish the details of amounts debited to the profit and loss account, being in the nature of capital, personal, advertisement expenditure etc				
		Capital expenditure			Nil	
		Personal expenditure			Nil (Refer note no.6)	
		Advertisement expenditure in any souvenir, brochure, tract, pamphlet or the like, published by a political party			Nil	
		Expenditure incurred at clubs being entrance fees and subscription			Annexure-6	
		Expenditure incurred as clubs being cost for club services and facilities used;			Annexure-6	
		Expenditure by way of penalty or fine for violation of any law for the time being in force;			Nil	
		Expenditure by way of any other penalty or fine not covered above;			Nil	
		Expenditure incurred for any purpose which is an offence or which is prohibited by law;			Nil	
	(b)	Amounts inadmissible under section 40(a):			Not applicable	
		(i) as payment to non-resident referred to in sub-clause (i)			-do-	
		(A) Details of payment on which tax is not deducted:			-do-	
		(I) date of payment				
		(II) amount of payment				
		(III) nature of payment				
		(IV) name and address of the payee				
		(B) Details of payment on which tax has been deducted but has not been paid during the previous			-do-	

SHARP & TANNAN CHARTERED ACCOUNTANTS RAVINDRA ANNEXE, MUMBAI-20

Available at page No. 8 of the Audit report submitted.

SAF YEAST COMPANY PRIVATE LIMITED

Notes forming part of Form No.3CD for the assessment year 2014-15
(Previous year ended 31st march, 2014)

(b) The depreciation on computer, a new block of assets, introduced during the financial year 1998-'99 has been computed only for the additions made from 1998-'99, since the WDV of the computers added in the preceding years is not readily ascertainable. Further, the assessee has been advised that the new depreciation rates for computers applies only to additions made on or after 1st April, 1998. In view of the foregoing, we are unable to express any opinion as regards the possible effect thereof on the depreciation claimed by the assessee under Section 32(1) of the Income Tax Act, 1961. Since 01.04.1998 the assessee has been showing computers as a separate block, and therefore the WDV of computers added since 01.04.1998 are fully ascertainable.

(c) The reporting requirements under the above clauses are based on the books of account and other records verified and the information and explanations given by the assessee.

6. **Refer Clause 21 (a) :**
The expenditure incurred on begefits and perquisites granted to employees are as per terms and conditions of employment and they are also as per generally accepted business practices, are not considered as personal expenses.

7. **Refer Clause 23:**
Particulars of expenditure in respect of which payment has been or is to be made to persons specified in Section 40A (2) (b) of the Income Tax Act, 1961 are given on the basis of list of persons covered by this Section as given by the assessee.

8. **Refer Clause 26 B:**
Taxes, duties and other sums outstanding at the year end and paid in the subsequent year, on or before the due date and upto the date of this report have been considered under this Clause.

9. **Refer Clause 31 (a) and (b):**
It is assumed that customers advances, security deposits from customers, suppliers dues, current accounts etc. repaid in normal course of business are not to be considered under this Clause.

Available at page No. 18 of the Audit report

The Auditor has held as not a personal expenditure

The Appellant also relies on the decision of the Co-ordinate Bench in the case of Dy. Commissioner of Income Tax vs. M/s. Deloitte Touche Tohmatsu (ITA no.3017/Mum/2016) wherein Hon'ble ITAT held that expenditure incurred towards club and hotel membership fees is an allowable expense under Section 37(1) of the Income Tax

Act. Hon'ble ITAT in the case of ISGEC Heavy Engineering Ltd. V/s. The DCIT/ITA NO. 798/Chd/2019 held as under with regard to Club expenses:

> *"13. In the present case also the Assessee has incurred the expenses on account of club membership fees for the employees and to entertain customers, so, these were business expenses under section 37(1) of the Act. We therefore by following the ratio laid down by the Hon'ble Apex Court in the aforesaid referred to case, delete the disallowance made by the A.O. and sustained by the Ld. CIT(A)."*

Further the Apex Court in Commissioner of Income Tax V/s. United Glass Mfg. Co. Ltd. [2012] 28 taxmann.com 429 (SC) as held as under:

"(ii) Whether club membership fee for employees incurred by the Assessee is a business expense and liable to be deducted under Section 37(1) of the Income Tax Act, 1961?"

3.3 As far as Question No.1 is concerned, the issue is answered in favour of the Assessee in the Order passed today in civil appeal arising out S.L.P. (C) No.20791 of 2009. As far as Question No.2 is concerned, we find that a series of judgements have been passed by High Courts holding that club membership fees for employees incurred by the Assessee is business expense under Section 37 of the Income Tax Act. We also find that none of the decisions have been challenged in this Court. Even otherwise, we are of the view that it is a pure business expense.

The Appellant also relies on following judgements which were submitted in the paper book on 09/09/2021.

M/s ISGEC Heavy Engineering Ltd. V/s. The DCIT, ITA NO. 798/Chd/2019, Commissioner of Income Tax V/s. United Glass Mfg. Co. Ltd. 2012 28 taxmann.com 429 (SC) [12-09-2012] & Commissioner of Income-tax V/s. Sundaram Industries Ltd. 240"

20. On the other hand, the Ld. DR submitted that the Ld. CIT(A) has considered the submission made by the assessee and gave clear finding. Accordingly, he relies on the findings of lower authorities.

21. Considered the rival submissions and material on record. We notice that the AO disallowed the expenses incurred by the employees of the assessee in the clubs. It is normal practice to allow the employees to use the facilities in the club and also it is part of the business to entertain the visitors as part of business promotion. The Courts have held that club membership fees for employees incurred by the assessee is business expenses allowable u/s 37 of the Act. Therefore, we are in agreement with the above propositions and accordingly, we set aside the order passed by the Ld. CIT(A) and direct the AO to allow the club membership fees claimed by the assessee.

Accordingly, ground No. 1 & 2 raised by the assessee is allowed. Ground No. 3 is dismissed as not pressed.

22. In the net result, the appeal filed by the Revenue in AY 2013-14 is dismissed and appeal filed by the assessee in AY 2013-14 is allowed. The appeal filed by the assessee in AY 2014-15 is partly allowed.

Order pronounced in the open Court on 25/10/2021.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(S. RIFAUR RAHMAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 25/10/2021
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

6. Guard file.

BY ORDER,

//True Copy//

(Dy./Assistant Registrar)
ITAT, Mumbai