

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "D": NEW DELHI]
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER

AND

DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

(Through Video Conferencing)

ITA. No. 167/Del/2009

ITA. No. 413/Del/2010

AND ITA. Nos. 2280 & 4185/Del/2011.

(Assessment Years: 2003-04, 2006-07, 2007-08 & 2008-09)

M/s. Jindal Steel & Power Limited, Jindal Centre, 12-Bhikaji Cama Place, New Delhi – 110 066. PAN: AAACJ7097D	Vs.	Addl. CIT, Hisar Range, Hisar, Haryana.
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AND

ITA. No. 220/Del/2009

ITA. No. 341/Del/2010

AND ITA. Nos. 2230 & 4067/Del/2011.

(Assessment Years: 2003-04, 2006-07, 2007-08 & 2008-09)

ACIT, Hisar.	Vs.	M/s. Jindal Steel & Power Ltd., Jindal Centre, 12-Bhikaji Cama Place,
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		New Delhi – 110 066. PAN: AAACJ7097D
(Appellants)		(Respondents)

Assessee by :	Shri Salil Kapoor, Advocate Shri Sumit Lalchandani, Advocate Ms. Ananya Kapoor, Adv.
Department by:	Shri S. Najmi, [CIT] – D.R.
Date of Hearing :	02/09/2021
Date of pronouncement :	01/12/2021

ORDER

PER AMIT SHUKLA, J. M.:

These eight cross appeals, four by the assessee and four by the Revenue are filed for assessment years 2003-04, 2006-07, 2007-08 and 2008-09. These were heard together and are being disposed of, for the sake of convenience, by this common order.

2. First, we take up assessee's and Revenue's appeal for Assessment Year 2003-04 bearing ITA Nos.167/Del./2009 & 220/Del/2009 respectively.

ITA No.167/Del./2009 (AY 2003-04)

FILED BY THE ASSESSEE

3. Aforesaid appeal has been filed by the assessee against the impugned order dated 11.11.2018 passed by the Id. CIT

(Appeals), Rohtak of the Income-tax Act, 1961 (for short 'the Act') for the quantum of assessment passed under section 143(3) of the Income-tax Act, 1961 (for short 'the Act') for the Assessment Year 2003-04.

4. In the grounds of appeal, the assessee has taken the following grounds:-

"1. That the Commissioner of Income Tax (Appeals) erred on facts and in law in not adjudicating on the claim for exemption of sales tax, entry tax and electricity duty subsidy amounting to Rs. 11,10,63,938 in the absence of previous such claim in the original or a revised return without appreciating the fact that the subject claim is legal in nature and has universal application in earlier as well as in the succeeding years.

2. That the Commissioner of Income Tax (Appeals) erred on facts and in law in upholding the action of the assessing officer in partly disallowing expenditure incurred on aircraft, to the extent of Rs.1,10,607 alleging that the same was expended for non-business purposes.

3. That the Commissioner of Income Tax (Appeals) erred on facts and in law in setting aside the issue regarding disallowance of commission amounting to Rs.6,55,809, paid to Ganesh Rolling Mills Ltd., without appreciating that complete evidence was placed on record before the assessing officer during assessment proceedings.

3.1 That the Commissioner of Income Tax (Appeals) erred on facts and in law in directing the assessing officer to allow the above commission expenditure only if the assessee produces satisfactory identity of the payee,

services rendered and legitimate business need, without appreciating that complete evidence to this effect was filed before the assessing officer/ CIT(A).

4. That the Commissioner of Income-tax (Appeals) erred on facts and in law in upholding the action of the assessing officer in charging interest under section 234B of the Act. “

Additional Grounds:

Section 80HHC

“That on the facts and circumstances of the case and in law the assessing officer may kindly be directed to allow deduction of Rs. 34,90,377, instead of Rs. 17,45,188 as claimed in the original return of income, while computing ‘book profits’ in terms of clause (iv) of Explanation 1 to section 115JB of the Act.

1. That on the facts and circumstances of the case and in law the assessing officer erred in restricting the deduction of export profits allowable in terms of clause (iv) of Explanation 1 to section 115JB of the Act to the extent specified in section 80HHC even while computing ‘book profits’

1.1 That the assessing officer failed to appreciate that the entire export profits are allowable as deduction while computing ‘book profits’ under section 115JB and the same are not required to be restricted to the extent specified in sub section (1B) of the section 80HHC of the Act.

That the assessing officer failed to appreciate that the entire export profits are allowable as deduction while computing ‘book profits’ under section 115JB and the same are not

required to be restricted to the extent specified in sub section (1B) of the section 80HHC of the Act.

Deduction of Additional Coal Levy :

That on the facts and circumstances of the case and in law, additional coal levy relatable to year under consideration amounting to Rs.62,42,42,420 paid on account of extraction of coal pursuant to the order(s) of the Hon'ble Supreme Court, be directed to be allowed as business deduction.”

GROUND NO.1

5. Insofar as, issue raised in ground no.1, ld. counsel for the assessee stated following facts and background of the case as culled out from the records :-

5.1 The assessee from the year 2000 onwards had setup new industrial units entailing an investment exceeding Rs.1,000 crores at Raigarh, which is a backward and tribal area of the then State of Madhya Pradesh. The said units included, *inter-alia*, the following:

- 1.5 lac Ton capacity Rotary Kiln for manufacturing sponge iron setup in 2000-01;
- Captive Power Plant.
- 5 lac Ton capacity Universal Beam/ Rail Mill setup in financial year 2003-04.

The then Government of Madhya Pradesh, vide notifications dated 24.4.2000, exempted the assessee from payment of Central Sales tax and Entry tax involving investment of Rs.1000 crores or more and from payment of Electricity duty vide notification dated 29.07.2000. Under the

aforementioned scheme, the assessee availed exemption on account of sales tax, entry tax and electricity duty aggregating to Rs.11,10,63,938. The said incentives/subsidies were claimed as capital receipts by the assessee before the CIT(A) by filing application for admission of additional ground. Though the additional ground was admitted, the CIT(A), however, did not adjudicate the claim on merit relying on the decision of the Supreme Court in the case of **Goetze (India) v. CIT: 284 ITR 323**, observing that the issue does not arise out of the assessment order.

6. Ld. counsel submitted that the aforesaid action of the CIT (A) in not adjudicating and allowing the additional claim of the assessee is untenable and bad in law for the following reasons:

6.1 At the outset, he drew our attention to the Hon'ble Supreme Court decision in the case of Goetze India Limited (supra) which has been relied upon CIT(A). In that case, the assessee had, in the course of assessment proceedings, sought to claim a deduction through a letter addressed to the assessing officer. The assessing officer disallowed the said deduction on the ground that there was no provision under the Act to make amendment in the return of income at the assessment stage through an application without revising the return. The decision of the assessing officer was confirmed by the Tribunal and the Delhi High Court. On further appeal, the decision of the High Court was affirmed by the Supreme Court.

6.2 The Supreme Court, however, made it clear that the decision in Goetze India Limited (supra) was restricted to the power of assessing authority to entertain a claim for deduction otherwise than by a revised return and the same, did not impinge on the power of the Tribunal under Section 254 of the Act to permit a new claim. Further, the Supreme Court also held that the decision in the case of National Thermal Power Company Ltd. v CIT: 229 ITR 383 dealing with powers of appellate authority to admit new claims did not relate to the power of the assessing authority to entertain a claim otherwise than by way of revised return. The relevant extract of the decision of the Supreme Court in this regard is as under:

“The decision in question is that the power of the Tribunal under section 254 of the Income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. **However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income Tax Appellate Tribunal under section 254 of the Income-tax Act, 1961. There shall be no order as to costs.**”

6.3 Further, without prejudice to the aforesaid, he submitted that, alternatively, the aforesaid claim made by the assessee may be adjudicated on merits, by treating the

same as a fresh claim made before this Hon'ble Bench of the Tribunal during the appeal proceedings.

6.4. Reliance, in this regard, was placed by the Ld. Counsel on the following decisions wherein the Courts and various Benches of the Tribunal have consistently held that there is no bar/ prohibition on the authority of an authority (other than the assessing officer) to consider fresh claim(s) made by the assessee:

- CIT v. Jai Parabolic Springs Ltd.: 306 ITR 42 (Del. HC)
- CIT v. Sam Global Securities Ltd: 360 ITR 682 (Del)
- CIT v. Sain Processing & Wvg. Mills (P) Ltd.: 325 ITR 565 (Del)
- CIT v. Ramco International: 332 ITR 306 (P&H)
- CIT v. Pruthvi Brokers and Shareholders (P) Ltd.: 208 Taxman 498 (Bom.)
- CIT v. Arvind Mills LTD: ITA No. 1407 of 2011 (Guj.)
- CIT v. Aspentech India Pvt. Ltd.: ITA No. 1233/ 2011 (Del. HC)
- JCIT v. Hero Honda Finlease Ltd.: 115 TTJ 752 (Del. ITAT) (Third Member)
- Aishwarya Rai v. DCIT: ITA No. 1159/Mum/04: (Mum ITAT)
- Oman International Bank SAOG vs ACIT: ITA No.1981/Mum/2001

6.5 Ld. counsel further pointed out that the aforesaid issue is squarely covered by the decision of the Delhi Bench of the Tribunal in assessee's own case for assessment year 2004-05 in ITA No. 3319/ Del/ 2008 wherein the Tribunal admitted and considered similar claim of the assessee on

merit. Further, Delhi Bench of the Tribunal in assessee's own case for assessment years 2002-03 and 2005-06 in ITA Nos.368 and 168/ Del/ 2009 also admitted and considered the similar claim on merits.

6.6. In view of the aforesaid, ld. counsel prayed that the Tribunal may admit and adjudicate the aforesaid claim of the assessee on merits.

6.7 Ld. DR on the other hand objected for admission of this ground; however, he submitted that this issue is covered against the assessee by the Tribunal in assessee's own case by the Tribunal in earlier years.

7. After considering the aforesaid submissions and on perusal of the material placed on record, we agree with the contentions of the ld. counsel for the assessee that, since this claim was made during the assessment proceedings and it is a purely a legal claim which goes to the very taxability of the subsidy receipt, therefore, the same is admitted in view of the principles laid down in the aforesaid judgments as cited by the ld. counsel before us. Accordingly, we admit the same and in the succeeding paragraphs, the matter is adjudicated.

8. As regards merits of exemption of Rs.11,10,63,938/- on account of sales-tax, entry tax and electricity duty in respect of industrial unit at Raigarh, Madhya Pradesh, it has been submitted that it is a capital receipt not liable to tax and should, therefore, be directed to be excluded from the total income of the assessee for the assessment year

under consideration. The assessee has giving the following accounting treatment in respect of aforesaid incentives/subsidies :-

“Sales Tax

General Treatment: - Collected and credited to liability account & then paid and squared off in the same account.

For Exempted Units: - Total amt. in respect of Sales (including Sales Tax amt.) is credited to Sales Account.

Entry Tax

General Treatment: - Paid and debited to expenses in the raw material and stores consumption.

For Exempted Units: - No separate Accounting Entry was passed in respect of Exempt Entry Tax.

Electricity Duty

General Treatment: - Paid and charged off to revenue in power & fuel account.

For Exempted Units: - No separate Accounting Entry was passed in respect of Exempt Entry Tax.”

9. The purpose of grant of subsidy/incentive has been brought on record before us in the tabulation form to demonstrate that intention of State Government of Madhya Pradesh behind providing incentives to integrated steel plants and other mega industries was to promote industrialization of backward areas, development of state, generation of employment, objects in larger public interest:

Date/ Period	Particulars	Remarks
03.06.1993	<p>Government of Madhya Pradesh issued Notification No. A-3-14-92-ST-V(50) granting exemption of sales tax under State Act and Central Act to Rs.1000 crore plus integrated Steel Plants.</p> <p>The notification was issued to attract fresh mega investments in steel plants in the State of Madhya Pradesh for industrialization, development of State and generation of employment as evident from the conditions laid down in the notification for claiming exemption.</p>	<p>It is, at the outset, clarified that it is not at all the case of the assessee that incentives/subsidies availed by it are covered under the said notification.</p> <p>The assessee seeks to refer to and rely upon this notification to emphasize that endeavor of the State Government of Madhya Pradesh behind providing tax incentive had always been promotion of industrialization in the State and generation of employment.</p>
06.05.1994	<p>Industrial Policy and Action Plan, 1994 was announced by the Government of Madhya Pradesh.</p> <p>The Policy proposed various incentives (including tax incentives) for setting up industries in the State of Madhya Pradesh with special motive of regional development, acceleration of industrial development, generation of employment, encourage backward classes and women for entrepreneurship, etc. wherein objectives of the Policy are expressly set out.</p> <p>The Policy broadly defined the action plan and the use of</p>	

tax as instrument for achieving the purpose of the policy.

The relevant extracts of the Scheme are as follows:

In **para 2** of the Scheme, it is clearly stated that the Industrial Policy shall use **taxation as an instrument for increasing employment generation and developing synergistic linkages** between different sectors. The relevant para is reproduced hereunder:

*“The Industrial Policy and Action Plan, 1994 takes into account the rapid economic changes taking place at the national and international levels. In the context of economic liberalization, it is becoming increasingly necessary to reduce the regulatory role of administration. The facilitatory role of the administration will need to be strengthened. **The document delineates, among others, measures to strengthen the physical and human infrastructure base, as well as, promotional measures, including facilities and concessions. It spells out the use of taxation as an instrument for increasing employment generation and developing synergistic linkages between different sectors**”.* (emphasis supplied)

In the **same para**, the principal objectives of the Policy have been spelt out, which primarily includes a balanced regional development, accelerating the pace of industrial development in the State, creating more direct and indirect employment opportunities, etc.. The said para reads as under:

“The Policy and Action Plan, 1994 lays special emphasis on responsive administration. It outlines

measures to make administration a more result oriented responsive instrument for industrial development.

- i) Place Madhya Pradesh among the ranks of the industrially developed States.*
- ii) Ensure balanced regional development by giving additional facilities in "No Industry" Development Blocks.*
- iii) Accelerate the pace of industrial development in the State through greater utilization of the State's human and natural resources.*
- iv) Create more direct and indirect employment opportunities*
- v) Encourage entrepreneurship among members of Scheduled Castes, Scheduled Tribes, Other Backward Classes and those below the poverty line.*
- vi) Encourage Women entrepreneurship.*
- vii) Create special opportunities for the accelerated development of rural industries.*
- viii) Create new opportunities for the development of the small sector."*
- ix) Create new opportunities to attract new investments in the large and medium sector.*
- x) Facilitate synergistic linkages between small scale units and large & medium enterprises.*
- xi) Encourage hi-technology based industries.*
- xii) Creation of special facilities, 100% Export Oriented Units.*
- xiii) Encourage investment by Non-Resident Indians.*
- xiv) Encourage the establishment of industries in*

the “thrust Sector” and formation of special schemes.

- xv) Encourage private sector participation in infrastructure development.*
- xvi) Encourage Cooperative sector for industrial development.*
- xvii) Facilitate commercial activity, so that commerce can become a vibrant factor in promoting industrial growth.*
- xviii) Ensure simplification of administrative procedures with a view to transparency and speedy disposal.*
- xix) Create transparency in administrative procedures for continuing interaction with entrepreneurs.”*

In **para 5.6** of the Scheme, the maximum amount of benefit based on capital investment in fixed assets has been spelt out on the basis of categories of the districts in which the unit is set up.

Para 5.26 provides that special packages of concession will be prepared to attract mega investments.

In para **5.27**, **specific reference has been made to the incentives for establishment of integrated steel plant with capital investment of more than Rs.1,000 crore**, which reads as under:

“5.27.A special incentive scheme will be prepared for all types of new units with an investment of Rs. five hundred crore or more. Concessions, on the lines of the special incentive scheme for the establishment of integrated steel plants with capital investment of more than Rs. one thousand crore, excluding state capital investment subsidy, and

with modified conditions of land allotment, etc. will be provided as incentives under this scheme.”

Paragraphs 7.1, 7.8 and 7.20 of the Scheme read as under:

“7.1 The importance of the small scale sector in the country's export effort, its role in balanced regional development and in providing employment opportunities is well established. It will be the endeavour of the State Government to make this sector more dynamic. The problem of sickness will be dealt with on priority. Tax incentive schemes will help develop synergistic linkages between units in this sector and those in the medium and large sector and contribute towards developing ancillarisation based on close and sustained mutual interest. Such linkages will also contribute to employment generation.

.....

7.8 There is a potential for synergistic linkages between the tiny, small medium and large sectors. Medium and large industries can act as centres around which tiny and small scale units can develop. In turn, the tiny and small sector can strengthen the functioning of large and medium industries by catering to their needs of raw materials and intermediate goods. Large and medium industries can also benefit from the upgradation of skills in the tiny and small sector. Synergy from such linkages will contribute to industrial development in a measure far greater, than the sum of their individual efforts. The State Government will encourage the developing and

	<p><i>strengthening of such linkages.</i></p> <p>.....</p> <p><i>7.20 A target for establishing four hundred new large and medium enterprises has been set for the next five years.”</i></p> <p>Again the assessee seeks to refer to and rely upon this notification to emphasize that endeavor of the State Government of Madhya Pradesh behind providing tax incentive had always been promotion of industrialization in the State and generation of employment.</p> <p>It may also be clarified that the aforesaid policy was initially in force for a period of 5 years. Thereafter, the operation of the Policy was extended by a period of four years till 2003 [refer Preface to the subsequent Industrial Promotion Policy-2004]</p>	
06.10.1994	<p>Pursuant to Industrial Policy and Action Plan, 1994, Government of Madhya Pradesh issued Notification No. A-3-24-94-ST-V (108) granting exemption of sales tax under State Act and Central Act to Rs.1000 crore plus integrated Steel Plants.</p> <p>In the aforesaid notification, Raigarh has been notified as ‘Category B’ area (Backward Area) entitled to higher exemption.</p>	<p>Though the case of the assessee is not covered by this notification, the same is placed on record to point out that exemption from sales tax had earlier been granted for setting up new industrial units in the backward areas, which include Raigarh area where investment entailing investment of more than Rs.1,000 crores was made by the appellant.</p> <p>This notification also</p>

		supports the contention of the assessee that incentives were granted by the State Government to promote industrialization, create employment and development of the backward area of Raigarh under the Industrial Policy and Action Plan, 1994.
06.11.1997	Notification No. A31295STV(96) was issued by the government of Madhya Pradesh granting exemption from Entry Tax and Central Sales Tax Act with certain conditions linked to capital investments in different areas of the State.	This again shows that the intention of the State Government was to promote and incentivize industrialization of the backward areas of the State.
July, 1998 to Nov, 1999	Various letters were written by the assessee to the then Chief Minister of Madhya Pradesh and senior officials of Madhya Pradesh State Industrial Development Corporation for formulating special incentive package for the appellant for setting up of Mini Blast Furnace, Steel	Considering the long term intention/ motive of the State Government relating to industrialization as expressed in the Industrial Policy and Action Plan, 1994 , the assessee applied for creation of a special incentive package for the

04.07.1998	Melting Shops and Captive Power Plant involving aggregate investment of more than Rs.1000 crore in backward areas of MP, as under:	assessee to enable it to set up integrated steel plant in Raigarh district of Madhya Pradesh.
09.04.1999	<ul style="list-style-type: none"> • Letter dated 04.07.1998 by the assessee to then Chief Minister requesting for devising a suitable incentive package for proposed mega investment by the assessee. The said request was made since the earlier incentive schemes were no longer applicable; 	These documents forms part of records of the Department/ assessing officer in as much as the same was relied upon by the CIT while passing order under section 263 of the Act for A.Y 2008-09 and the assessing officer while order consequential to the order of the CIT prior to making the impugned assessment order.
08.06.1999	<ul style="list-style-type: none"> • Letter dated 09.04.1999 sent by the assessee to the Government of Madhya Pradesh along with suggestions of incentive packages, with a request for its implantation in Industrial Policy of Government of Madhya Pradesh; 	
12.10.1999		
Nov, 1999	<ul style="list-style-type: none"> • Letter dated 08.06.1999 to Madhya Pradesh State Industrial Development 	

	<p>Corporation submitting circular issued by Government of West Bengal in support of assessee's suggestion for implementation of incentives;</p> <ul style="list-style-type: none"> • Letter dated 12.10.1999 to the Chief Minister for approval of incentive package. • Letters dated 1.11.99 and 26.11.99 to the State Government for relaxation of certain conditions of the existing notification dated 7.11.97. 	
<p>Dec' 1999 to April 2000</p>	<p>Request for formulation of special incentive package was considered by the Department of Commerce and Industry and the Council of Ministers of Government of Madhya Pradesh.</p> <p>On perusal of the inter-departmental communications placed on record, it is patently clear that incentives/ subsidy</p>	<p>These are the most important documents which clearly lays down the purpose of grant of incentives to the assessee.</p> <p>Since the industrial units proposed to be set up by the assessee were not covered by earlier notifications, the appellant made repeated requests to the</p>

23.12.1999	<p>were granted to the assessee for industrialization of the under-developed areas of the State, employment generation, objects in larger public interest.</p>	<p>Government for considering and notifying the special incentives to incentivize huge investment in the backward areas.</p>
03.02.2000	<p>Specific reference may be made to the following:</p> <ul style="list-style-type: none"> • Abstract prepared by Department of Commerce and Industry, Government of Madhya Pradesh for the Council of Ministers, recommending incentives for mega investment by the assessee. 	<p>The request of the assessee was internally debated by the Government of Madhya Pradesh and finally the Council of Ministers in the meeting held on 03.02.2000 considered and approved the incentives to be given to the assessee.</p>
14.02.2000	<p>It is pertinent to note that in the aforesaid abstract, the Department recommended the incentives, considering that investment would result in establishment of supporting businesses, employment</p>	<p>Pursuant to the aforesaid decision, directions were given to the concerned departments to draft suitable notifications for implementation of the decision.</p>
16.2.2000	<p>employment</p>	<p>Later, specific notifications were issued on 24.04.2000 and 29.07.2000 in respect of sales tax, entry tax and electricity duty.</p> <p>The aforesaid</p>

<p>& 25.02.2000</p> <p>24.04.2000</p>	<p>generation and development of the backward districts;</p> <ul style="list-style-type: none"> • Order issued by the Council of Ministers for preparation of specific package based on the decision taken for allowing incentives, inter alia, to the assessee. • Internal communication by Principal Secretary, Government of MP to Commercial Tax, intimating decision taken vide order dated 03.02.2000 along with copy of the said order. • Letter by Department of Commerce and Industry to Commercial Tax Commissioner for preparing notification to give effect to the decision taken by the Council of Ministers on 03.02.2000 • Letter by Commercial and Industry Department to 	<p>documents/ correspondences establishes, beyond any doubt, that the purpose of granting incentive/ subsidy to the assessee was to achieve achievement industrialization and consequent development of the under-developed areas of the State, for employment generation, for development of ancillary industries/ business, etc., which are objects in larger public interest.</p> <p>It is also pertinent to note that these documents have not been considered by the Tribunal in the assessment years 2002-03, 2004-05 and 2005-06.</p>
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	<p>Controller, Printing Pages, Bhopal for publication of notifications Nos. 40, 41 and 42 dated 24.4.2000 along with copies of the notifications required to be published:</p> <ul style="list-style-type: none"> - Notification No.40 for exemption from sales tax. - Notification Nos.41 and 42 for exemption from entry tax <ul style="list-style-type: none"> • Draft undated notification to be issued for publication for granting exemption from electricity duty <p>Preamble of the aforesaid draft notification clearly states that incentive has been granted to the assessee to encourage new industrial units by the appellant in public interest.</p>	
24.04.2000	Notification No. A3-9/2000/S.T-V (40) granting	

	exemption to the assessee from Central Sales Tax Act, 1956 (Sales Tax exemption)	
24.04.2000	Notification No. A3-9/2000/S.T-V (41) granting exemption to the assessee from Entry Tax	
17.05.2000	Letter by Managing Director of the assessee to the Chief Minister expressing gratitude for granting incentives to the proposed investment of more than Rs.1000 crores in District Raigarh	The assessee indicated that the implementation of the Project would result in development of the tribal and backward area and provide employment to thousands of youth.
10.07.2000	Letter by the assessee to the District Trade and Industry Centre, Raigarh intimating the actions taken and the progress of the fresh investment	The assessee informed that: (a) Assessee has acquired land for installation of plant II and installation work of plant and building is under construction; (b) Assessee has arranged financing of Rs.150 crores in the form of loans from banks, Rs.100 crores in the form of corporate loan/preference shares and the appellant would be

		approaching the financial institutions for balance requirements of loans.
29.07.2000	Notification No.5328/F-13/55/2000 granting exemption to the assessee from Electricity Duty.	
02.05.2002	Letter dated 02.05.2002 issued by Department of Commerce and Industry, Government of Chhattisgarh approving the incentive/subsidies granted vide notifications dated 24.04.2000 issued by the earlier Government of Madhya Pradesh.	
17.05.2002	Letter by the assessee to the Secretary Energy, Chhattisgarh requesting for grant of exemption from electricity duty to 110MW Power Plant for a period of 15 years against 10 years allowed by the earlier Government of Madhya Pradesh vide notification dated 29.07.2000.	
25.06.2002	Notification issued by Government of Chhattisgarh	

	for granting electricity duty exemption to power plants involving investment of more than 100 crores for a period of 15 years.	
Year 2000 to 2004	During this period, investment of more than Rs.1000 crores was made by the appellant in the Raigarh District (Unit-II).	In compliance to the conditions specified in the notification, the assessee made investment of more than Rs.1000 crores.

10. Thus, it has been submitted before us that the incentive/ subsidy was granted to the assessee to advance the larger public interest of ensuring development in the backward/ tribal areas of the then State of Madhya Pradesh and also to create employment opportunities. The purpose/ object of grant of subsidy for setting up of the new integrated steel plant by the assessee, was in larger public interest for development of the region/ State. Thus, applying the “purpose test”, it was stated that it is clear that incentive/ subsidy availed by the appellant, is clearly in the nature of a capital receipt, not liable to tax.

11. Further, it was pointed out that in order to appreciate the facts, certain additional evidences have been furnished which was obtained by the assessee by way of RTI application in July 2014, which were in the form of letters/documents/notifications etc. which are already available with the AO and also in the public domain.

Further, similar evidences have been filed before the Tribunal during the appellate proceedings for AY 2008-09 in the appeal u/s 263 and 143/263 of the Act which were admitted and considered by the Tribunal while adjudicating the appeal in ITA Nos.3283/Del/2013 & 3128/Del/2014.

12. Since these additional evidences which are already on the record and in the public domain and also relevant for adjudicating the issues, as incorporated in the aforesaid table, therefore same are admitted.

13. From the perusal of the aforesaid documents, it is evident that the assessee was granted incentive/ subsidy on fulfilling the criteria of setting up new industrial undertaking by investing more than Rs.1,000 crores. Since the purpose of incentive/ subsidy was to promote industrialization and create employment opportunities and not supplement trading receipts of the newly set up units, subsidy received by the assessee was thus claimed to be in the nature of a capital receipt, not liable to tax. It has been submitted that the thrust of the Scheme, was to fund incentivize setting up of the industrial unit in the notified backward areas of the State for industrial development of the backward districts as well as generation of employment, apart from receiving greater revenues by way of taxes, royalty, etc., for overall growth and development of the State. The Scheme was linked to the overall investment in fixed capital assets inasmuch as minimum investment of Rs.1,000 crores in fixed capital assets was a condition precedent to eligibility under the Scheme. The sales-tax/

entry tax/ electricity duty incentive was envisaged to encourage the setting up of industries in backward area and not for supplementing business receipts. It is submitted that the incentives received under the scheme by way of exemption from payment of certain taxes or duty was just a mode adopted to disburse the subsidy by the State Government.

14. Our attention in this regard was also invited to section 8(5) of the Central Sales Tax Act, 1956, and section 10 of the Entry Tax Act, 1976, which empowers the State Governments to exempt sales tax and entry tax respectively for encouraging establishment of industries in the State.

15. Similarly, section 3B of the Madhya Pradesh Electricity Duty Act, 1949, empowers the State Government to exempt electricity duty in certain cases in order to encourage establishment of any particular industry or class of industries in the State.

16. On the basis of the aforesaid, following specific notifications were issued by the State Government specifically exempting the assessee from sales tax, entry tax and electricity duty in the public interest:

- **Notification dated 24th April, 2000 was issued in respect of Sales Tax under section 8(5) of the Central Sales Tax Act, 1956;**
- **Notification dated 24th April, 2000 was issued in respect of Entry Tax under section 10 of the Entry Tax Act, 1976;**

- **Notification dated 29th July, 2000 was issued in respect of Electricity Duty under section 3B of the Madhya Pradesh Electricity Duty Act, 1949.**

17. We have considered the scheme and the objective of the subsidy. In the case of taxation of incentives/subsidy, what all needs to be examined is purpose test and the objects for which the said segments were notified by the State Government. Here, in this case, as noted from the incentive schemes, it was given to various industries for setting up necessary infrastructure in the backward areas of the State and not for enhancing the profitability of the eligible unit. Incentive received under the scheme by way of exemption from payment of certain taxes or duties was just a mode adopted to disburse the incentives by the State Government. The taxation of incentive/subsidy is determined by the purpose for which the subsidy is granted and not the form, mode or manner in which the subsidy received or disbursed. Way back, Hon'ble Supreme Court in the case of **V.S.S.V. Meenakshi Achi reported in 60 ITR 253** held that the character of the subsidy in the hands of the recipient is to be determined having regard to the purpose for which the subsidy has been given.

18. The aforesaid principle has been reiterated by the Supreme Court in the case of **Sahney Steel and Press Works Ltd. and Others v. CIT reported in 228 ITR 253** wherein the Court held that the character of a subsidy in

the hands of the recipient, whether revenue or capital, is to be determined having regard to the purpose for which the subsidy is given. It was further held that if the purpose of the subsidy is to help the assessee to set up its business or complete a project, the subsidy is to be treated as having been received for capital purposes, whereas, if the subsidy is given to the assessee for assisting him in carrying out the business operations and is given only after and conditional upon commencement of production, such subsidy is to be treated as assistance for the purpose of the trade and would constitute revenue receipt.

19. The taxability of the receipt given by way of subsidy essentially boils down to the purpose for which, the subsidy is granted. If the grant of subsidy is for meeting the capital expenditure for achieving a national objective, the same would be in the nature of capital receipt not liable to tax. On the other hand, if the subsidy is granted to supplement trading receipts/profits, the subsidy is taxable as revenue receipt.

20. Here in this case, the incentives were given in order to encourage the establishment of new industrial units in the private sector to result in development of rural economy and backward areas of the State and creation of employment opportunities. All the Notifications issued by the State Government for different reimbursements/ remissions, are pursuant to the Policy and are in furtherance of the avowed objectives of the State Government in issuing the Policy. Appreciating the objectives of the Policy discussed above,

the subsidy being made available to the new units, are clearly in the nature of capital receipt not liable to tax under the Act. The manner in which the concession is given is not material. Even if any concession/ rebate is given in respect of revenue items, the intent of the concession/rebate being the development of the rural economy and upliftment of backward areas, the same would, in our view, be in the nature of capital receipt not liable to tax.

21. It is pertinent to note that, a similar issue has been considered by the **Special Bench of the Tribunal in the case of DCIT v. Reliance Industries Limited reported in 88 ITD 273 (Mum)**. In that case, the assessee Patalganga unit was eligible for the incentives announced by the Government of Maharashtra under its Scheme of year 1979, wherein the assessee was exempt from liability for payment of sales tax for a period of 5 years. The assessee claimed the sales tax exemption amount as capital receipt not liable to tax. The aforesaid claim was rejected both by the assessing officer and the CIT (Appeals) on the following grounds:

- Under the scheme announced by the State Govt., the assessee was not required to charge any sales tax from its customers and to pay any purchase tax on its purchases.
- No amount of subsidy either in cash or in kind had been given by the Government.
- In the invoices, the assessee did not charge any amount separately under the head “sales tax”. Under

the scheme, at no point of time, was the assessee required to pay any sales tax to the Government, and

- The assessee did not maintain any separate sales tax account, any separate incentive account nor had shown any amount as outstanding liability under the head.

The Special Bench of the Tribunal, relying on the principles laid down by Supreme Court in the case of **Sahney Steel & Press Works Ltd.** (supra) came to the conclusion that since the incentives were given for bringing about addition to necessary infrastructure in processing/developing the backward area, the same would be in the nature of capital receipt not liable to tax.

22. The issue before the Hon'ble Supreme Court in the case of **Ponni Sugars & Chemicals Ltd vs. CIT reported in 306 ITR 392** was with regard to the taxability of incentives bestowed to new / expanded sugar factories under the Sampat Incentive Scheme by way of (a) additional price realization by reason of enhancement of free sale sugar quota and (b) excise duty rebate.

23. The assessee claimed the said incentives to be in the nature of capital receipt not chargeable to tax. The Revenue, however, contended that such receipts were revenue receipts for the reason that the incentives were given in the form of price differential and duty differential, such price related incentive would normally be presumed to be revenue in nature. The assessee, on the other hand, contended that

the character of the incentive had to be decided on the basis of the purpose test, i.e., the character of the receipt had to be determined, with respect to the purpose for which the subsidy was given and the mechanism for computing such incentives is totally irrelevant. The Court, agreeing with the contention of the assessee, held that the incentive was in the nature of capital receipt, not liable for tax.

24. Before us, reliance was also placed on the decision of Hon'ble Jammu & Kashmir High Court in the case of **M/s Shree Balaji Alloys vs. CIT: 198 Taxman 122 (J&K)**, wherein excise refund and interest subsidy received by industrial units in pursuance of incentives announced in terms of new industrial policy for accelerated industrial development in State of Jammu and Kashmir, for creation of such industrial atmosphere and environment, employment generation was held to be capital receipts. The relevant observations of the Court are as under:

“24. A close reading the Office Memorandum and the amendment introduced thereto with para No. 3 appearing in the Central Excise Notification Nos. 56 and 57 of 11-11-2002, thus, makes it amply clear that the acceleration of development of industries in the State was contemplated with the object of generation of employment in the State of Jammu and Kashmir and the generation of employment, so contemplated, was not only casual or temporary; but was on the other hand, of permanent nature.

25. Considered thus, the paramount consideration of the Central Government in providing the incentives to the New Industrial Units and Substantial Expansion of the existing

units, was the generation of employment through acceleration of industrial development, to deal with the social problem of unemployment in the State, additionally creating opportunities for self-employment, hence a purpose in Public Interest.

26. In this view of the matter, the incentives provided to the Industrial units, in terms of the New Industrial Policy, for accelerated Industrial development in the State, for creation of such industrial atmosphere and environment, which would provide additional Permanent source of Employment to the unemployed in the State of Jammu and Kashmir, were in fact, in the nature of creation of New Assets of Industrial Atmosphere and Environment, having the potential of employment generation to achieve a social object. Such incentives, designed to achieve Public Purpose, cannot, by any stretch of reasoning, be construed as production or operational incentives for the benefit of assessee alone.

27. Thus, looking to the purpose of eradication of the social problem of unemployment in the State by acceleration of the industrial development and removing backwardness of the area that lagged behind in Industrial development, which is certainly a purpose in the Public Interest, the incentives provided by the Office Memorandum and statutory notifications issued in this behalf, to the appellants-assesseees, cannot be construed as mere Production and Trade Incentives, as held by the Tribunal.

28. Making of additional provision in the Scheme that incentives would become available to the industrial units, entitled thereto, from the date of commencement of the

commercial production, and that these were not required for creation of New Assets cannot be viewed in isolation, to treat the incentives as production incentives, as held by the Tribunal, for the measure so taken, appears to have been intended to ensure that the incentives were made available only to the bona fide Industrial Units so that larger Public Interest of dealing with unemployment in the State, as intended, in terms of the Office Memorandum, was achieved.

29. The other factors, which had weighed with the Tribunal in determining the incentives as Production Incentives may not be decisive to determine the character of the incentive subsidies, when it is found, as demonstrated in the Office Memorandum, amendment introduced thereto and the statutory notification too that the incentives were provided with the object of creating avenues for Perpetual Employment, to eradicate the social problem of unemployment in the State by accelerated industrial development.

30. For all what has been said above, the finding of the Tribunal on the first issue that the Excise Duty Refund, Interest Subsidy and Insurance Subsidy were Production Incentives, hence revenue Receipt, cannot be sustained, being against the law laid down by Hon'ble Supreme Court of India in Sahney Steel & Press Works Ltd.'s case (supra) and Ponni Sugars & Chemicals Ltd.'s case (supra).

31. The finding of the Tribunal that the incentives were Revenue Receipt is, accordingly, set aside holding the incentives to be Capital Receipt in the hands of the assesseees."

25. Most pertinently, appeal filed by the Revenue against the order of the Hon'ble High Court, vide order dated **19.04.2016**, has been dismissed by the **Hon'ble Supreme Court in Civil Appeal No. 10061 of 2011.**

26. In view of the aforesaid legal position and since all the Notifications issued by the State Government for different reimbursements/ remissions, pursuant to the Scheme and in furtherance of the avowed objectives of the State Government in issuing the Scheme, the incentive/ benefit/ subsidy being made available, it has been stated that, it is clearly in the nature of capital receipt not liable to tax under the Act. Even if any concession/rebate is given in respect of revenue items, the intent of the concession/rebate being the development of the rural economy and upliftment of backward areas, the same would still be in the nature of capital receipt not liable to tax.

27. Before us, it has been pointed out that the aforesaid issue of treatment of subsidy as capital or revenue receipt has been decided against the assessee by the ITAT in assessee's own case for AY 2004-05 in ITA No.3319/Del/2008. The said decision has been followed in the AYs 2002-03 & 2005-06 in ITA Nos.368/Del/2009 & 168/Del/2009 respectively vide consolidated order dated 06.03.2014. He further pointed out that for the aforesaid assessment years, the ITAT order was in challenge before the Hon'ble jurisdictional High Court of Punjab & Haryana wherein the Hon'ble High Court has admitted the assessee's

appeal. However, it has been submitted that the said decision of the Tribunal is contrary to the binding judicial precedent of the recent decision of Hon'ble Apex Court in the case of **Balaji Alloys** (supra) and therefore, cannot be regarded as binding precedent or act as a res judicata.

28. It has been pointed out that the Tribunal, in the aforesaid order has agreed with the principal contention of the assessee that incentives/ subsidy were granted for industrialization, increase in employment opportunities and better utilization of human and state resources. Still, however, the Tribunal proceeded to erroneously conclude the subsidy/ incentive received by the assessee to be in the nature of revenue receipt, on, inter alia, the following grounds:-

- The Tribunal totally misconstrued the decision of the apex Court in the case of Sahney Steel (supra) and held the on similar facts subsidy/ incentive was held to be revenue receipt by the apex Court;
- The Tribunal got swayed by the fact that there was no stipulation in the Scheme/ Policy for utilization of subsidy/ incentives for repayment of outstanding loans;
- The Tribunal concluded that the decision of the Special Bench of the Tribunal in the case of Reliance Industries (supra) was not binding since the Supreme Court had remitted the matter back to the Bombay High Court;

- In para 49 the Tribunal observed that “taxation of subsidy under Income-tax Act cannot be intended to be used for achieving state objectives.

29. The reasoning given by the Tribunal has been rebutted in detail before us.

30. Since we have already observed that the incentives/subsidies granted for the assessee is a capital receipt not to be taxed. However, we are unable to reach to the same conclusion as given by the Tribunal in assessee’s own case for the reason that now there are catena of judgments of Hon’ble High Courts and Hon’ble Supreme Court wherein similar issue has been decided in favour of the assessee.

31. First of all, the decision of **Sawhney Steel** (supra) has been misconstrued for the reasons that In para 49, the Tribunal agreed with the assessee’s contention that the object of the industrial policy was to industrialize the State and utilize the human resources with an aim to increase employment for better utilization of human and State resources and also agreed that the industrial policy used taxation as an instrument for increasing employment and developing scenario linkages between different sectors.

32. The Tribunal, however, concluded despite accepting that the purpose behind disbursement of subsidy was, inter alia, industrialization of the State and generation of new employment opportunities, that the subsidy received was taxable revenue receipt, proceeding on an erroneous premise that on identical facts, the apex Court in **Sahney**

Steel (supra) held similar subsidy/ incentive to be revenue receipt.

33. In fact, in the case of **Sahney Steels** (supra), the Court rejected the claim of the assessee that subsidy was granted to encourage setting up of new industries which is evident from the following observation so the Hon'ble Apex Court :-

“That contention of assessee that subsidies were of capital nature and were given for the purpose of stimulating the setting up and expansion of industries in the State cannot be upheld because of the subsidy scheme itself as no financial assistance was granted to the assessee had set up its industry and commenced production and various incentives were given for the limited period of five years.”

34. On the aforesaid basis, the Court, in Sahney Steel's case, after rejecting, on facts, the claim of the assessee that subsidy was granted for setting up of new industry, concluded that the subsidy received was taxable revenue receipt.

35. This is also evident from the following observations of the Hon'ble Apex Court in the case of **Ponni Sugar** (supra) wherein the Court observed that in Sahney Steel's case (supra), the incentive was, on facts of that case, held to be revenue receipt:

“14. In our view, the controversy in hand can be resolved if we apply the test laid down in the judgment of this Court in the case of Sahney Steel and Press Works Ltd.(supra). In that case, on behalf of the assessee, it was contended that the subsidy given was up to 10% of the capital investment calculated on the basis of the quantum of investment in capital and, therefore, receipt of

*such subsidy was on capital account and not on revenue account. It was also urged in that case that subsidy granted on the basis of refund of sales tax on raw materials, machinery and finished goods were also of capital nature as the object of granting refund of sales tax was that the assessee could set up new business or expand his existing business. **The contention of the assessee in that case was dismissed by the Tribunal and, therefore, the assessee had come to this Court by way of a special leave petition. It was held by this Court on the facts of that case and on the basis of the analyses of the Scheme therein that the subsidy given was on revenue account because it was given by way of assistance in carrying on of trade or business. On the facts of that case, it was held that the subsidy given was to meet recurring expenses. It was not for acquiring the capital asset. It was not to meet part of the cost. It was not granted for production of or brining into existence any new asset.** ”*

36. Insofar as, the decision of Ponni Sugar (supra) as noted by the Tribunal, while deciding the appeal of the assessee, first of all, in the case of Ponni Sugar, Hon'ble Apex Court did not hold that the subsidy received by the assessee to be a capital receipt solely on the ground that the amount received was to be utilized for repayment of loan. The fact that there was an obligation to utilize the subsidy for repayment of loan was referred to as an additional factor in support of the conclusion that the subsidy received was in the nature of capital receipt not liable to tax, on application of “the purpose test”, i.e. the purpose for which subsidy is given. This is clearly evident from the discussion

on the said issue on pages 399 to 401 of the judgment (306 ITR 392).

37. On perusal of the aforesaid, it will be noticed that in para 14, the Supreme Court, first considered the principles laid down by the Supreme Court in the case of Sahney Steel (supra). Thereafter, the Supreme Court discussed the decision of House of Lords in para 15 and subsequently, in para 16 referred to the fact that in the facts of that case there was also an obligation on the assessee to utilize the money for repayment of loan. The ultimate conclusion, however, is contained in para 17 wherein the Court held that applying the above facts, i.e. the purpose test, to the facts of that case the subsidy received was of capital nature.

38. In Ponni Sugar's case (supra), an additional obligation was cast on the assessee to first utilize the subsidy/incentive for repayment of term loans, **if any**, merely as a matter of policy of the Government. It will be further appreciated that quantum and/or the entitlement to receive subsidy was not dependent upon the assessee availing loan from the bank/financial institutions. Even if the assessee had set up the sugar factory/ expanded the existing factory out of internal accruals, without availing any loans, such an assessee was still entitled to the subsidy. That this fact by itself proves that the condition/ stipulation to first utilize the subsidy/incentive for repayment of the term loans was included by the Government merely for some regulatory purpose and was not formulated as a basis for granting subsidy/incentive. Such subsidy/incentive, as stated

earlier, was also given to an assessee not availing any loan from the banks/financial institutions and in case of both the persons whether availing loans or not, the nature of subsidy, it will be appreciated would remain the same. The stipulation/regulation to utilize the incentive/subsidy for repayment of loan in the scheme, considered by the Supreme Court in *Ponni Sugar* (supra), does not mean that subsidy/ incentive under only those schemes, where such stipulation is there would qualify as capital receipt, and not in any other case.

39. Thus, the decision of the Tribunal is contrary to the decision of Hon'ble Supreme Court in case of **Ponni Sugar** (supra). Apart from that, Hon'ble Jammu & Kashmir High Court in the case of **Shree Balajee Alloys** (supra) rejected the identical contention of the Revenue that there is no embargo on the utilization of subsidy, the amount received is in the nature of revenue receipt. Hon'ble Court held that the said factor is irrelevant or immaterial criteria to determine the nature of subsidy in the hands of the assessee.

40. Hon'ble Apex Court has already dismissed the appeal filed by the Revenue against the said judgment of Hon'ble Jammu & Kashmir High Court.

41. Further, Hon'ble Apex Court in the latest judgment in the case of **CIT vs. Chaphalkar Brothers in Civil Appeals Nos. 6513-6514 Of 2012, judgement dated 7.12.2017** wherein Hon'ble Apex Court has upheld the judgment of

Hon'ble Bombay High Court in case of **CIT vs. Chaphalkar Brothers 351 ITR 309** wherein it has been held that the purpose for which the subsidy was given was the relevant factor and if the object of subsidy was to enable the assessee to set up new unit, then the receipt of the subsidy would be on capital account. The Hon'ble Court observed that, once the object of the subsidy was to industrialize the state and to generate employment in the state, (like the case here), the fact that the subsidy took particular form and the fact that it was granted only after the commencement of production would make no difference. These judgments in the case of Chaphalkar Brothers and the decision of Hon'ble Apex Court in the case of Balaji Alloys (supra) has been rendered subsequent to the decision of the Tribunal in AY 2004-05, therefore, the Tribunal did not give the benefit of these judgments.

42. In the case of Chaphalkar Brothers (supra), the Hon'ble Court has held that subsidy is not meant for repaying the loan taken for construction of multiplex could not be a ground to hold that the subsidy receipt was on revenue account.

43. Accordingly, we hold that the subsidy received by the assessee is a capital receipt not allowable for taxable. Accordingly, the ground raised by the assessee is allowed.

GROUND NO.2

44. The next issue relates to upholding the action of the assessing officer in partly disallowing expenditure incurred

on aircraft, to the extent of Rs.1,10,607 and the same was expended for non-business purposes.

45. The assessee has claimed the expenditure incurred on journeys undertaken for business purposes by the aircraft during the year under consideration, however, AO has disallowed Rs.1,10,607/- on ad hoc basis for non-business purpose. This action has been confirmed by the ld. CIT (A) also.

46. After considering the relevant findings of the impugned orders and perusal of the details of expenditure incurred on air journeys, we find that that all the journeys were related to the business of the assessee and the assessing officer disallowed the expenditure incurred on an ad-hoc basis, by randomly picking some of the journeys made and holding that they were not made for business purposes without bringing on record any iota of evidence to substantiate that the journeys were for non-business purposes.

47. It is also pointed out before us that this issue stands decided in favour of the assessee in assessee's own case in ITA Nos.3257/Del/2005 & 3485/Del/2005 for AY 2001-02 wherein the Tribunal has held that expenditure relatable to trips to meet the customers and/or prospective customers are directed to be allowed. Since it is purely an ad hoc addition, therefore, we direct to disallow the addition and the ground is accordingly allowed.

GROUND NO.3 & 4

48. Insofar as the issue with regard to commission amounting to Rs.6,55,809/- paid to M/s. Shree Ganesh Steel Rolling Mills Pvt. Ltd., Hisar.

49. It is seen that the AO disallowed the aforesaid claim of the assessee on the ground that the assessee was unable to adduce evidence of services having been rendered by the said party. The assessing officer allegedly made certain ex-parte enquires at the back of the assessee, which were not at all confronted to the assessee before making the impugned disallowance. Similar disallowance was also made in the assessment for the assessment year 2004-05, i.e. the immediately succeeding assessment year.

50. The above disallowance was challenged before the CIT(A), Rohtak in separate appeals for the assessment years 2003-04 and 2004-05. In the order dated 18.08.2008 passed by the CIT(A) for the assessment year 2004-05, it was held that existence of the M/s. Shree Ganesh Steel Rolling Mills Pvt. Ltd., prima facie, cannot be disputed. However, since the assessing officer had referred to certain enquiries which were not confronted to the assessee, the CIT(A) directed the assessing officer to conduct further enquiries on the said issue, observing as under:

“.....

On a perusal of the additional evidence it has been found that the existence of M/s Shri Ganesh Rolling Mills, prima facie, cannot be disputed. However, since the AO has conducted physical enquiries, the nature and results of

which have not been confronted to the assessee, the AO is directed to further conduct enquiries on this issue for which the assessee is being directed to co-operate in the proceedings; in case the AO is satisfied as to the existing of the concern that he should allow the commission claim of the assessee after examining whether the three conditions i.e. identity of the recipient, the services rendered by the recipient of the commission and the legitimate business needs of the assessee as to the services from the recipient of the commission are fulfilled. The ground of appeal is allowed for statistical purpose.”

51. Following the aforesaid order for the assessment year 2004-05, the CIT(A) restored the assessment for the assessment year 2003-04 with similar directions.

52. In the set aside proceedings, the assessing officer, without judicially appreciating the facts of the case and without following the directions of the CIT(A), once again disallowed claim of the assessee

53. On further appeal, the CIT(A) vide order dated 03.11.2010 deleted the disallowance. The relevant observations of the CIT(A) are reproduced as under:

“5. I have considered the issue and the submissions made by the A.R. From the assessment order dated 2.11.2009, it is clear that the AO has not conducted any enquiries as directed by the CIT(Appeals). Without abiding by the directions of CIT(Appeals), the AO simple repeated the disallowance made earlier without making any enquiries on the evidence furnished by the assessee. Further, disallowance of Rs. 6.00 lacs out of the claim of Rs.

6,55,809/- on the ground that the genuineness of the existence of the company at the given address is in doubt is beyond comprehension. Therefore, the disallowance made by the AO is directed to be deleted and the grounds of appeal are allowed.

6. In the result, the appeal is allowed.”

54. In view of relief being allowed to the assessee in the second round, it is respectfully submitted that the present grounds of appeal challenging the disallowance of commission of Rs.6,00,000 is rendered infructuous, hence dismissed.

GROUND NO.4

55. Ground No.4 qua levy of interest u/s 234B of the Act needs no specific finding being consequential in nature.

56. Insofar as additional ground under section 80HHC taken by the assessee is as under :-

“That on the facts and circumstances of the case and in law the assessing officer may kindly be directed to allow deduction of Rs. 34,90,377, instead of Rs. 17,45,188 as claimed in the original return of income, while computing ‘book profits’ in terms of clause (iv) of Explanation 1 to section 115JB of the Act.

1. That on the facts and circumstances of the case and in law the assessing officer erred in restricting the deduction of export profits allowable in terms of clause (iv) of Explanation 1 to section 115JB of the Act to the extent specified in section 80HHC even while computing ‘book profits’

1.1 That the assessing officer failed to appreciate that the entire export profits are allowable as deduction while computing 'book profits' under section 115JB and the same are not required to be restricted to the extent specified in sub section (1B) of the section 80HHC of the Act.

That the assessing officer failed to appreciate that the entire export profits are allowable as deduction while computing 'book profits' under section 115JB and the same are not required to be restricted to the extent specified in sub section (1B) of the section 80HHC of the Act. “

57. The facts in brief are that the assessee filed return of income declaring Nil income under the normal provisions of the Act, after claiming deductions under section 80IA and 80IB of the Act. Tax was however, paid by the assessee on deemed income of Rs.1,78,94,70,272 in accordance with the provisions of section 115JB of the Act. In the return of income, the assessee claimed deduction under section 80HHC to the extent specified in sub-section (1B) of that section, in respect of export profits allowable while computing “book profits” in terms of clause (iv) of Explanation 1 to section 115JB of the Act, which has been allowed to the assessee by the assessing vide order dated 30.03.2006. Thus, deduction of export profits was restricted to 50% of the eligible profits as per sub-section (1B) of section 80HHC of the Act. It has been submitted that in the decision of the Supreme Court in the decision of **Ajanta Pharma Ltd. v. CIT: 327 ITR 305**, the Court held that provisions of section 115JB of the Act is a self-contained

code and consequently “book profit” under that section has to be computed on the basis of net profit as shown in the audited financial statements, subject to various upward and downward adjustments as required to be made in terms of various clauses given in Explanation 1 to section 80HHC, for the purpose of computing income under the normal provisions of the Act, deduction of export profits is restricted to the extent specified therein, the said restriction is, however, not applicable for the purpose of computing “book profits”.

58. In view of the aforesaid decision, the assessee has raised an additional ground on the legal issue before us.

59. Since it is a purely legal ground, therefore, the same is being admitted.

60. On merits, we find that now in the light of the decision of Hon’ble Supreme Court in the case of Ajanta Pharma Ltd. (supra), the assessee is eligible for deduction of 100% export profits as computed under section 80HHC while computing book profits in terms of clause (iv) of Explanation to section 115JB of the Act. Further, the aforesaid issue is squarely covered in favour of the assessee by the other decision of the Tribunal in the assessee’s own case for the assessment year 2004-05 in ITA No. 3319/Del/2008. Accordingly, this additional ground raised by the assessee is allowed.

61. Insofar as, the issue relating to additional coal levy, the facts in brief are that the assessee had been allotted coal mines at Raigarh, M.P. in the year 1996 by the Government

of India, coal extracted wherefrom is used for captive consumption. The assessee was regularly paying royalty @ 14% on value of coal extracted from the coal mines in accordance with the applicable provisions of Coal Mines and Minerals (Development and Regulations) Act, 1957 ("CMM Act").

62. The Hon'ble Supreme Court had vide order dated 25.08.2014 and order dated 24.09.2014, directed various allottees of the coal block, including the assessee, to pay an amount of Rs.295 per metric ton of coal extracted as an additional levy in order to compensate the exchequer based on the assessment Report on Performance Audit of Allocation of Coal Blocks and Augmentation of Coal Production (Ministry of Coal), issued by Comptroller and Auditor General of India ("CAG").

63. Pursuant to the order of the Hon'ble apex Court, the assessee paid Rs.2000 crore (approx.) under protest during the financial year 2014-15. The assessee also filed review petition before the Hon'ble Supreme Court, which was dismissed vide order dated 28.01.2016.

64. The aforesaid amount of additional coal levy paid by the assessee includes an amount of Rs.62,42,42,420 relating to coal extracted during the previous year relevant to assessment year 2003-04. Complete bifurcation of levy of coal quantified year wise based on the extraction done during various years is tabulated as under:-

(Amount in Rs.)

Financial Year	Total Paid	Charged-off to PL Account in FY 2014-15 and claimed deduction	Paid under protest
1998-1999	10,825,025	6,007,380	4,817,645
1999-2000	230,294,700	146,705,565	83,589,135
2000-2001	417,714,100	233,759,180	183,954,920
2001-2002	457,005,740	254,967,910	202,037,830
2002-2003	624,242,420	276,879,330	347,363,090
2003-2004	727,535,195	291,221,640	436,313,555
2004-2005	874,632,225	323,575,175	551,057,050
2005-2006	1,566,461,210	546,142,055	1,020,319,155
2006-2007	1,760,740,835	657,209,260	1,103,531,575
2007-2008	1,768,322,335	590,656,670	1,177,665,665
2008-2009	1,769,454,250	644,569,985	1,124,884,265
2009-2010	1,769,660,455	649,829,245	1,119,831,210
2010-2011	1,769,584,935	654,161,320	1,115,423,615
2011-2012	1,769,442,155	697,265,245	1,072,176,910
2012-2013	1,769,831,260	685,123,340	1,084,707,920
2013-2014	1,769,796,450	688,381,910	1,081,414,540
2014-2015 (upto Sept 24)	842,802,315	342,605,625	500,196,690
2014-2015 (Sept 25-Mar 15)	924,000,000	388,600,000	535,400,000
Total	20,822,345,605	8,077,660,835	12,744,684,770

65. On perusal of the aforesaid, it is seen that levy of Rs.62,42,42,420 relates to the year under consideration. In fairness, it was clarified that the said amount of Rs.62,42,42,420 has been claimed as deduction by the assessee in the return of income for assessment year 2015-16. It has been submitted that since levy of Rs.62,42,42,420 related to the coal extracted/ mined by the assessee during the relevant year, the said levy is directly linked to the business of the assessee for the year under consideration, and hence allowable as business deduction for the year under consideration.

66. Further, it has been stated that under mercantile system of account, deduction of any expenditure is allowable in the year to which the expenditure relates, as has been held in the following decision:

- **Perfect Equipments v. DCIT: 85 ITD 50 (Ahd.)**:- In that case, debit notes for commission issued by selling agent was received by assessee in assessment year 1991-92 but deduction was claimed in assessment year 1992-93. The assessing officer disallowed that claim without considering alternative contention of assessee that claim may otherwise be allowed for assessment year 1991-92. In these facts, the Tribunal held that the expenditure was allowable for assessment year 1991-92, i.e., the year to which it pertains.

- **ITO v. Panchvati Developers: 173 Taxman 26 (Mum)(Mag.)**:- Assessee was a builder and developer. During relevant assessment year, it had debited certain amount towards advertisement expense and claimed deduction of same. Facts revealed that said advertisement expense was for two upcoming projects of assessee which was held to be capitalized. The Tribunal was, however, pleased to direct the assessing office to allow the claim of such expenditure in the year in which the projects were completed.
- Delhi Bench of the Tribunal in the case of **CIT vs. HMA Udyog Ltd. (ITA No. 2230/Del/1999)**, following the order in the case of Perfect Equipments (supra), held that the expenditure is to be allowed in the year to which it pertains.
- Reference may also be made to the decision of the Hon'ble Supreme Court in the case of **Rama Bai v. CIT: 54 Taxman 496** wherein the, considering the accrual/ mercantile system, their Lordships held that interest on enhanced compensation for land compulsorily acquired under the Land Acquisition Act, 1894 could not be taken to have accrued on the date of the order of the Court granting enhanced compensation but has to be taken as having accrued year after year from the date of delivery of possession of lands till the date of such order.

67. After considering the submissions and perusal of the material placed on record, we find that additional coal levy relating to assessment year is clearly allowable as business deduction and it is not the case of the assessee that deduction of the same amount should be allowed in two different assessment years. However, we direct the AO to verify that, in case, the assessee has taken the deduction and the amount claimed in the return of income for AY 2015-16 of a sum of Rs.62,42,42,420/-, the said claim should be withdrawn and the same is allowable deduction in the year under consideration. The assessee is also directed to file an application before the AO to claim the same.

68. In the result, the appeal of the assessee for assessment year 2003-04 is partly allowed.

ITA No.220/Del./2009 (AY 2003-04)

FILED BY THE REVENUE

69. Now, we have Revenue's appeal wherein the following grounds of appeal were raised :-

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in allowing deduction u/s 80-IA at Rs.112,76,27,767/- as against at Rs 65,93,67,681/- allowed by the AO.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in allowing depreciating of Rs.1,60,52,491/- under section 32 of Income-tax, Act

against Rs.1,59,10,047/- straight line method adopted by the AO.

3. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in allowing depreciating of Rs.2,36,30,757/-under section 32 of Income-tax, Act against Rs.49,81,364/- straight line method adopted by the AO on 220 KV Transmission line.

4. On the facts and in the circumstances of the case, the ld. CIT(A) has erred in allowing the appeal w.r.t. addition made on account of forfeited shares application which was treated as income from other sources of Rs.1,00,00,000/-.

5. On the facts and in the circumstances of the case, the ld. CIT(A) has erred in allowing the appeal w.r.t. disallowance of interest expenditure of Rs.78,70,148/-.

GROUND NO.1

70. The facts in brief are that During the relevant previous year, the assessee claimed deduction under section 80IA of the Act amounting to Rs.112,76,27,767, in respect of profits of the power generating units located at Raigarh. The assessing officer has reduced the aforesaid deduction to Rs.65,93,67,681 by holding that the rate at which power was supplied by assessee to State Electricity Board, i.e., Rs.2.32 per unit, was the market rate of power for the purposes of computation of deduction under section 80IA of the Act in terms of sub-section (8) of that section instead of the price of Rs.3.29/3.72 per unit adopted by the assessee as under:

Rs.3.29 per unit : rate adopted for Raipur unit

Rs.3.72 per unit : rate adopted from other captive units.

70.1 The CIT(A), however, considering the submissions of the assessee, deleted the aforesaid disallowance of deduction under section 80IA of the Act made by the assessing officer pursuant to which Department is in appeal before us.

In this regard, it has been submitted that order of the CIT(A) is liable to be upheld for the following reasons:

71. The aforesaid power generating undertakings were set up by the assessee on a stand-alone basis and were capable of being operated independently. The power undertakings were set up to meet the power requirements of the manufacturing units looking at the scarcity of power, in order to ensure uninterrupted and un-fluctuated power supply, which was crucial for attaining operational efficiency. The power generated from the said undertakings was mainly consumed for captive purposes in the manufacturing operations of the assessee at Raigarh. The surplus electricity generated was sold to the State Electricity Boards at the price fixed by the State Electricity Boards ('SEB's').

72. Since the aforesaid Power undertakings, undisputedly, satisfied all the conditions laid down for claiming tax holiday under section 80-IA of the Act, during the year under consideration, the assessee claimed 100% deduction

in respect of the profits derived from the said units. Such deduction was claimed on the basis of separate profit and loss accounts prepared for the said units. In the separate profit and loss accounts, the inter-division transfer of power from the captive power plants was made and recorded at the price at which power was sold by the SEB's to the manufacturing units owned by the assessee, being the fair market value of the power.

73. Deduction under section 80IA of the Act, is available with reference to the profits derived from the eligible undertakings. The said section provides that in case of an assessee having multiple units, the profits derived by the eligible units has to be computed as if the eligible unit(s) were separate and distinct entity, dealing with the other unit owned by the assessee at arm's length.

74. In the case of assessee, since part of the power produced was captively consumed by the manufacturing units owned by the assessee, the rate of transfer of the power was accordingly recorded at the market rate i.e., the rate at which the electricity is supplied by the SEB's to the industrial consumers. Accordingly, sale of power to other units was recorded at Rs.3.29/3.72 per unit. The transfers were not recorded at the rate at which the surplus electricity was sold by the assessee to the SEB, i.e. Rs.2.32 per unit on the ground that the price of Rs.2.32 was the price determined and dictated by the SEB and thus, could not be treated as the 'market value' of power.

75. Thus, deduction allowable to the assessee under section 80-IA of the Act was computed by taking the price charged by the SEB to the industrial consumers including the assessee and not at Rs.2.32 per unit, being the price at which power was sold to SEB.

76. Thus, the assessing officer grossly erred in interpreting the provisions of section 80IA of the Act, in holding that, the rate at which assessee was bound to supply electricity to SEB, i.e. @ Rs.2.32 per unit, was the market rate of power in terms of the provisions of the said section, without appreciating that said rate being imposed upon assessee by SEB cannot be said to be the market rate of electricity, in accordance with normal demand and supply conditions prevailing in the market. Further, the price charged by SEB from various industrial consumers, i.e. @ Rs.3.29/3.72 per unit, being levied without any restrictions/ conditions, could reasonably be said to be the true reflective of the market price of electricity for the following reasons:

77. The sub-section (8) of section 80-IA of the Act clearly mandates that the price at which goods are to be transferred from one business of the assessee to another business should correspond to the market value of such goods for computing the profits of the eligible business. The expression 'market value' has been defined in Explanation to sub-section (8) to section 80-IA of the Act, as the price which such goods would ordinarily fetch when sold in the open market.

78. It was further submitted before us that in order to determine the market price of any goods or services, open market conditions must exist, i.e., there is willingness on the part of the buyer to purchase and the seller to sell the goods. In such a situation, the price determined by the market forces of demand and supply is the market price of such goods. However, in case of any transaction of purchase and sale taking place on account of certain obligation on the part of the either side, effecting the determination of the price of the goods, such a price cannot be said to be the market price thereof. The expression 'open market' necessarily refer to free trade market conditions.

79. Further, under the provisions of the Indian Electricity Act, 1948, generation and distribution of power is the monopoly of the State. Producers of power are not allowed to sell the same in the open market; the power produced can be captively consumed or fed in the State grid, subject to agreement with the State Electricity Board. Generation and distribution of electricity being the monopoly of the State, the producers of power were therefore not allowed to sell the same in the open market. Thus the assessee was not in the position to bargain the rate at which the power would have been otherwise sold to the State Electricity Board; on the contrary, the assessee was obliged to sell the surplus power to the State Electricity Board at the price mandated by the said Board.

80. In the present case, in terms of the Power Purchase Agreement entered into by the company with SEB the power

generated by the captive plants was required to be consumed by the manufacturing units of the assessee. The company was restricted to sell the power to other consumers, which stipulates that the surplus electricity generated by the captive power plant shall be fed into the transmission system of Grid. In terms of the wheeling agreement entered into by the company with MPEB/CSEB, where the units consumed by the company are less than units wheeled/fed into the transmission system of the Board, the excess is to be treated as deemed sale to the MPEB by the company at the stipulated rate.

81. The rate of purchase of power is a rate determined and dictated by the Power Purchase agreement as a condition precedent for sale of power to the State Electricity Board, the only purchaser of the excess power generated. In case such rate was not accepted by the company, the Power Purchase agreement was not forthcoming. The said rate, it will be kindly appreciated, is not the rate at which the power is available in the open market. This is neither the rate at which electricity is sold by MPEB to the ultimate consumer and/or to the assessee.

82. The power is supplied by SEB to the assessee and other industrial users at the industrial rate of Rs.3.29/3.72 per unit (as stated above). As against this, purchase rate of power was fixed at Rs. 2.32 per unit.

83. The rate fixed by the SEB, cannot, thus, be treated as the market price of power. The market price, as noted

above, is the price determined by the market forces prevalent in the open market. The open market requires willing buyers and purchasers ready to trade at a price determined by the market forces. As against this, in the instant case, the price is determined and dictated by the Power Purchase agreement. The Power Purchase Agreement is entered into in terms of section 43 of the Electricity (Supply) Act, 1948. Section 43A further lays down the terms, conditions and tariff for sale of electricity by the power generating companies like the assessee. Sub-section (2) of section 43A provides that the tariff for sale of electricity to the Board shall be determined in accordance with certain specified norms and factors determined by the Central Government.

84. The assessee has been obliged to sell the excess power to SEB at such rate determined and intimated by the Board in accordance with the aforesaid requirements, if the company were to enter into agreement for sale of excess power generated by the power plants. The market forces of demand and supply do not determine such a price since the price is determined on the basis of specified norms and factors. Power is, on the other hand, sold by SEB to the assessee at a much higher rate, which, in our respectful submission must be considered as the basis for determining the transfer price of power for computing the profits of the captive power plants. That is the only price at which supply of electricity is transacted between a willing buyer and a willing seller. The rate prescribed by the SEB is a price

imposed upon the assessee as a condition precedent to sell excess power to the only purchaser, i.e. SEB. It is the price at which power is supplied to the SEB under compulsion. The same cannot be regarded as indicative of free market price. To put it differently, it is the price at which, the assessee without any option was to sell excess power generated under duress/compulsion.

85. It was thus submitted by the assessee that Rs.2.32 cannot, by any stretch of imagination be treated/considered as the price of power in the open market.

86. It has been further submitted that the Tribunal in assessee's own case for the AYs 2000-01 & 2004-05 in ITA Nos.3663/ Del/ 2005 and 3319/ Del/ 2008 respectively has decided the issue in favour of the assessee and appeal filed by the Revenue against the said decision has been dismissed by the Hon'ble jurisdictional High Court vide orders dated 02.09.2008 in ITA nos. 544/ 2006 and 53/ 2008 respectively. Further, the Tribunal in AYs 2002-03 & 2005-06 in ITA Nos.608/Del/2009 and 221/Del/2009 respectively vide consolidated order dated 06.03.2014 also decided this issue in favour of the assessee.

87. Accordingly, respectfully following the aforesaid precedent, and the discussion made above, we agree with the submissions of the assessee and hold that inter-division of transfer of power from the captive power plants be made at Rs.3.29/3.72 per unit being the price at which power is sold by the State Electricity Boards to the assessee since the

said price was the fair market value of power and hence, in conformity with the provisions of sub-section (8) of section 80-IA of the Act. Accordingly, the order of the Id. CIT (A) is confirmed and the ground raised by the Revenue is dismissed.

GROUND NO.2 & 3

88. Facts in brief are that in the return of income for relevant assessment year, the assessee had claimed depreciation of on the assets of the power generating undertaking, viz. Turbine and 220KV transmission lines, at the rates specified in Appendix 1 read with Rule 5(1) of the Income Tax Rules, 1962 ('the Rules'). The depreciation was claimed on the written down value of the assets. The assessing officer, however, allowed the depreciation of Straight Line Method (SLM). Details are as under:

(figure in Rs.)

Depreciation on	As per the assessee ('WDV' Method)	As per the assessing officer (SLM Method)	Disallowance made by the assessing officer
Turbines	1,60,52,419	1,59,10,047	1,42,372
220 KV Transmission lines	2,36,30,757	49,81,364	1,86,49,393

The depreciation was claimed on the written down value of the assets in view of the position in law, which is stated as under.

89. In terms of clause (i) of sub-section (1) of section 32 of the Act, an undertaking engaged in generation of power is entitled to depreciation on straight line basis at the rates prescribed in Appendix 1A to the Rules. This is, however, subject to the caveat introduced by Rule 5 of the Rules, which read as under:

“5.Depreciation.

(1) Subject to the provisions of sub-rule (2), the allowance under clause (ii) of sub-section(1) of section 32 in respect of depreciation of any block of assets shall be calculated at the percentages specified in the second column of the Table in Appendix I to these rules on the written down value of such block of assets as are used for the purposes of the business or profession of the assessee at any time during the previous year.

(1A) The allowance under clause (i) of sub-section(1) of section 32 of the Act in respect of depreciation of assets acquired on or after 1st day of April, 1997 shall be calculated at the percentage specified in the second column of the Table in Appendix IA of these rules on the actual cost thereof to the assessee as are used for the purpose of the business of the assessee at any time during the previous year:

Provided that the aggregate depreciation allowed in respect of any asset for different assessment years shall not exceed the actual cost of the said asset:

Provided further that the undertaking specified in clause (i) of sub-section(1) of section 32 of the Act may, instead of

the depreciation specified in Appendix IA, at its option, be allowed depreciation under sub-rule(1) read with Appendix I, if such option is exercised before the due date for furnishing the return of income under sub-section(1) of section 139 of the Act,

(a) for the assessment year 1998-99, in the case of an undertaking which began to generate power prior to 1st day of April, 1997; and

(b) for the assessment year relevant to the previous year in which it begins to generate power, in case of any other undertaking:

Provided also that any such option once exercised shall be final and shall apply to all subsequent assessment years.”

90. Thus, depreciation under section 32(1)(i) of the Act, is allowed in the prescribed manner on the fixed assets of an undertaking engaged in generation or generation and distribution of power. The mode of allowance of depreciation is prescribed in sub-rule (1A) of Rule 5 of the Rules. The said sub-rule provides that depreciation under section 32(1)(i) of the Act shall be calculated at the rate/ percentage specified in Appendix (1A) of the Rules on the actual cost of the assets. Second proviso to sub-rule (1A) provides that the undertaking may instead of claiming depreciation under sub-rule (1A), claim depreciation under sub-rule (1) read with Appendix 1 to the Rules. Third proviso to sub-rule (1A) further provides that once the assessee exercises the option of claiming depreciation under sub-rule (1), the assessee would, in the subsequent years, be bound by the said option. In that case, the assessee would be bound to claim

depreciation in all the subsequent years in accordance with sub-rule (1) of Rule 5 of the Rules. The assessee has to exercise the option of claiming depreciation under sub-rule (1) and not sub-rule (1A) in the first year.

91. The power generating undertaking of the assessee commenced operations in the previous year relevant to the assessment year 1999-00. In the assessment year 1999-00, the first year of the operation of the undertaking, the assessee exercised the option of not claiming depreciation at the rates specified in Appendix 1A. In the return of income for the said year, depreciation was calculated and claimed in accordance with sub-rule (1) of Rule 5 of the Rules at the rates specified in Appendix (1). The same was, impliedly, allowed in the said year. The assessee, having once opted out of sub-rule (1A) of Rule 5 of the Rules, continued to claim depreciation in accordance with sub-rule (1) thereof. Consequently, in the assessment years 2000-01 onwards, including the year under consideration, the assessee has been consistently claiming depreciation on the fixed assets of the power generating undertaking at the rates specified in Appendix (1) in accordance with Rule 5(1) of the Rules. It is as mandated by the Rules that once option is exercised in the initial assessment year, the assessee is irrevocably bound by the same.

92. Similarly, the assessee had installed 220KV Transmission Line in the previous year relevant to assessment year under consideration and being the initial operational year, the assessee in the return of income had

claimed depreciation on the basis of Written Down value at the rates as prescribed in Rule 5(1) of the Income Tax Rules. Since the assessee, as stated above, claimed depreciation on fixed assets of the power generating unit/undertaking in accordance with Rule 5(1), in the initial assessment year the assessee thereby exercised the option available under second proviso to Rule 5(1A) of the Rules and was hence bound to claim depreciation in the succeeding years on the same basis as well. Accordingly, in the subsequent years, including the year under consideration, the assessee continued to claim depreciation in accordance with Rule 5(1) read with Appendix 1 of the Rules. It was thus respectfully submitted that the assessee has no choice in the matter and was obliged in law to claim depreciation on the basis opted for earlier and accepted by the Revenue.

93. Even otherwise, we notice that the mode of exercising option in terms of second proviso to Rule 5(1A) of the Rules is not specified. In terms of the said proviso, the assessee has to exercise the option and there is no requirement to file any declaration in any specified format. In the absence of any formal proforma/ method / mode of exercising the option and to opt out of sub-rule (1A) of Rule 5, if the assessee, in the return of income computed and claimed depreciation under sub-rule (1), the conduct of the assessee itself would, in our respectful submission, tantamount to exercise of the option.

94. In the present case the assessee is bound by the option exercised in the initial assessment year and has, in

any case, to claim depreciation only as per sub-rule (1) of Rule 5 of the Rules and there is no choice/ discretion or option left to the assessee to have claimed depreciation on any basis, other than on which depreciation was claimed in the initial year. Thus, the assessee is legally eligible/ entitled to claim depreciation under Rule 5(1) of the Rules since the option of claiming the depreciation under the said sub-rule was availed in the first year of the power generating undertaking.

95. Thus, it was submitted that the assessing officer erred in denying depreciation under sub-rule (1) of Rule 5 of the Rules as per WDV method.

96. The aforesaid issue otherwise, is now covered in favor of the assessee by the decision of the **Delhi Bench of the Tribunal in the case of the assessee for the assessment year 2000-2001 in ITA No.3663/Del/2005.**

97. To the same effect are the decisions of the **Delhi Bench of the Tribunal in assessee's own case for assessment years 2001-02 and 2004-05, in Additional CIT v. Jindal Steel & Power Limited reported in 16 SOT 509 and ACIT v. Jindal Steel & Power Limited reported in ITA No. 3319/ Del/ 2008.**

98. Similarly, it has been held by the **Delhi bench in assessee's own case for assessment years 2002-03 and 2005-06 in ITA Nos. 608 and 221/ Del/2009.**

99. The appeals preferred by Revenue against the decisions of the Delhi Tribunal in assessee's case for

assessment years 2000-01 and 2001-02 have been dismissed by the **Hon'ble jurisdictional Punjab & Haryana High Court vide orders dated 02.09.2008 in ITA nos. 544/ 2006 and 53/ 2008 respectively.**

100. Thus, In view of the aforesaid decision of the Tribunal and the facts as discussed above, we hold that the assessee is eligible to claim depreciation as per Rule 5(1) and not Rule 5(1A) of the Income-tax Rules, 1962, therefore, the AO is directed to allow the depreciation as per WDV of impugned assets as opposed to straight line method adopted in the assessment order. Accordingly, grounds no.2 & 3 taken by the Revenue are dismissed.

GROUND NO.4

101. Brief facts are that the assessee forfeited Rs.1,00,00,000 received in respect of 20 lacs preference shares of Rs.100 each allotted to Oswal Agro Mills Ltd. with a paid-up capital of Rs.5 each. The assessee credited the said receipt in the capital reserve account as per the provisions of the Companies Act, 1956. The assessing officer, treating the said receipt as revenue in nature, taxed the same under the head 'Income from other sources'. The assessing officer observed that at the time of receipt of preference share application money, the same is capital receipt but legal ownership and the character of the money had been changed after forfeiture of shares and hence made an addition of Rs.1,00,00,000. The CIT(A) deleted the

aforesaid addition following the decision of the **Delhi Bench of the Tribunal** in the case of **Impsat Pvt. Ltd. vs. ITO reported in 91 ITD 354** which held that receipt of share application money did not connote income.

102. Reliance in this regard was placed on the following decisions wherein it has been held that forfeiture of application money is capital receipt not liable to tax:

- DCIT v. CNB Finwiz : 159 TTJ 146 (Del.)
- DCIT v. Brijlaxmi Leasing and Finance Ltd.: 309 ITR 211 (Ahd. ITAT)
- Asiatic Oxygen Ltd. v. DCITL: 49 ITD 355 (Cal. ITAT)
- Sunita Gupta Share Brokers Limited v. ACIT: ITA No. 4188/Del/2010 (Delhi) (ITAT)
- Deepak Fertilisers and Petrochemicals Corpn. Ltd. vs DCIT: 304 ITR 167 (Mum. ITAT)
- Prism Cement Limited v. JCIT: 285 ITR 43 (Mum. ITAT)

102. Hon'ble Bombay High Court in the case of **Vodafone India Services Pvt. Ltd. v. ACIT reported in 368 ITR 1** has also held that money received on account of share capital is capital in nature not chargeable to tax.

103. In view of the aforesaid judgments, we do not find any infirmity in the order passed by the ld. CIT (A) in deleting the said addition holding that money received on account of shares is capital in nature and accordingly, the same is confirmed. Consequently, ground no.4 is determined against the Revenue.

GROUND NO.5

104. Facts in brief are Under the scheme of restructuring, Raigarh and Raipur divisions of M/s. Jindal Strips Limited were demerged into the assessee company with effect from 2.4.1998. As a consequence of taking over the assets and liabilities of, inter alia, the Raipur Division, loan of Rs.576.33 advanced by Jindal Strips Ltd to Jindal Holdings Ltd. devolved upon the assessee company. The loan advanced was originally interest bearing and provision for interest receivable was made by the assessee company during the financial year 1999-2000. Due to the adverse financial position of the debtor company, the assessee stopped accruing interest.

105. In the year under appeal, the assessing officer disallowed proportionate interest expenditure amounting to Rs.78,70,148 out of the total interest expenditure of Rs.6,912.63 lacs debited to profit and loss holding that the assessee had diverted interest bearing funds as interest free advances to its connected concern. The assessing officer held that interest income should have been accrued and offered to tax by the appellant and observed that (i) M/s Jindal Holding Ltd. is a revenue generating company having substantial holdings, (ii) the assessee had honored the interest payments in respect of the debentures which also devolved upon the assessee pursuant to restructuring, and (iii) the assessee has itself charged interest on the said loan outstanding in the financial year 1999-2000. On appeal, the CIT(A) deleted the disallowance.

106. After considering the relevant finding given in the impugned orders, we find that the grounds given by the assessing officer for disallowance of interest are not tenable for the following reasons:

1. Jindal Holding Limited is not a related company in terms of section 40A(2)(b) of the Act;

2. The assessee had not divested interest bearing funds to Jindal Holding Limited free of interest inasmuch as: (i) the amount had originally been advanced by Jindal Strips Limited and not the assessee; and (ii) loan was interest bearing and interest was also recognized upto financial year 1999-2000;

3. Jindal Holdings Ltd. had, as a matter of fact, huge accumulated losses and had no effective source to service the interest payment. This is evident from the following:

- On perusal of the audited financial statements of M/s Jindal Holdings Limited for the year ended 31st March, 2001, 31st March, 2002, 31st March, 2003 and 31st March, 2004, it will be kindly noticed that the said concern had incurred huge losses of Rs.186.67 lacs, Rs.206.08 lacs, Rs.77.63 lacs and Rs.298.70 lacs respectively. The said concern, therefore, was consistently in losses;
- Accumulated losses of M/s Jindal Holdings Limited as on 31st March, 2001, 31st March, 2002, 31st March, 2003 and 31st March, 2004 were to the tune

of Rs.1,025.49 lacs, Rs.1241.57 lacs, Rs.1319.20 lacs and Rs.1617.90 lacs respectively;

- Reserve and surplus of the said company of Rs.5699.12 lacs comprised of Share Premium Account only, which is an amount received on capital account;
- There was no effective source of income of M/s Jindal Holdings Limited in order to enable it to service interest payment.

Further, as a consequence of assessee not having charged any interest on the principal amount, the assessee was able to recover part of the principal amount from Jindal Holding Limited in March, 2005 and March, 2006, which was otherwise doubtful of recovery.

107. In the aforesaid circumstances, the disallowance of interest was clearly not justified. Further, Accounting Standard AS-9 on Effect of Uncertainties on Revenue Recognition, wherein it has been stated that where there is uncertainty regarding ultimate collection of, inter alia, interest, it may be appropriate to recognize revenue only when it is reasonably certain that ultimately collection will be made.

108. Taxation of the aforesaid amount is, contrary to the settled principle of taxation of real income and not any notional/ hypothetical income, as has been held in the following cases:

- In **Godhra Electricity Co. Ltd. v. CIT: 225 ITR 746 (SC)**, the assessee, an electricity supply company, unilaterally enhanced the rates of electricity, which was later approved by the Supreme Court. The assessee was, however, directed not to recover the enhanced rates by the Government. In those facts, the Supreme Court held that taxation of additional tariff, which could not ultimately be recovered, would result in taxation of hypothetical income.
- In **CIT v. Excel Industries: 358 ITR 295 (SC)**, apex Court laid down three tests to determine accrual, viz., (a) whether the income accrued to the assessee is real or hypothetical; (b) whether **there is a corresponding liability of the other party to pay the amount to the assessee**; and, (c) **the probability or improbability of realization of the income by the assessee considered from a realistic and practical point of view.**

Further, since the recovery of principal itself was doubtful, the assessee had not accrued any interest on illusory basis.

109. That apart, we find that no interest was accrued by the appellant on the aforesaid loans for immediately two preceding years and the said stand was accepted by the Department.

110. Since there being no change either in facts or in law in this regard, as compared to the earlier years, the position

accepted by the Department has to be followed even as per the principle of consistency.

111. In view of the aforesaid settled legal position, there could be no accrual of notional / imputed interest on the given facts and circumstances of the case, and, therefore, disallowance of interest paid to the extent of such notional / imputed interest was rightly been deleted by the CIT(A). Consequently, ground no.5 is determined against the Revenue.

112. In the result, the appeal filed by the Revenue for AY 2003-04 is dismissed.

ITA NO.413/DEL/2010 (AY 2006-07)

FILED BY THE ASSESSEE

113. In the grounds of appeal, the following grounds raised by the assessee :-

“1. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in holding the subsidy of Rs. 76,80,01,382 being a capital receipt as trading receipt.

2. That the Commissioner of Income Tax (Appeals) , Rohtak has grossly erred on facts and in the circumstances of the case and in law in concluding that the subsidy received by the assessee company us an assistance in carrying on its trade or business and hence it is revenue receipt.

3. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in not accepting the decision of the Special

Bench of ITAT in the case of DCIT v. Reliance Industries Ltd. (2005) 273 ITR AT 16/88 ITD 273, whose facts are identical to that of the assessee company.

4. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in not allowing the subsidy amounting to Rs. 76,80,01,382/- as capital receipt for the reason that the benefit of the subsidy part became operative only at the time of commencement of the production, therefore revenue receipt in defiance of the decision of the Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals Ltd. v. CIT (2008) 174 Taxman 87 in which it was held that the point of the time when the subsidy is paid is not relevant.

5. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in disallowing a sum of Rs. 5,65,575/- out of the expenditure on running and maintenance of aircrafts for alleged non business use.

6. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in confirming disallowance of proportionate value of discount of Rs. 5,04,78,902/- on stock options offered under Stock Option Scheme (ESOS) to the employees as an employee compensation measure.

7. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in upholding the action of the assessing officer in charging interest under section 234B of the Act. “

Additional Ground

That on the facts and circumstances of the case and in law the assessing officer may kindly be directed to allow

deduction of Rs. 18,68,15,848 while computing 'book profits' in terms of clause (iv) of Explanation 1 to section 115JB of the Income Tax Act, 1961 ('the Act').

Additional Ground

Deduction of Additional Coal Levy

That on the facts and circumstances of the case and in law, additional coal levy relatable to year under consideration amounting to Rs.156,64,61,210 paid on account of extraction of coal pursuant to the order(s) of the Hon'ble Supreme Court, be directed to be allowed as business deduction."

GROUNDS NO.1, 2, 3 & 4

114. Since we have already decided this issue in assessee's own case for AY 2003-04 in ground no.1, respectfully following the same, grounds no.1 to 4 taken by the assessee are allowed.

GROUND NO.5

115. This issue is also decided by us in assessee's own case for AY 2003-04 in ground no.2 and respectfully following the same, ground no.2 taken by the assessee is allowed.

GROUND NO.6

116. Facts in brief are that the assessee during the relevant previous year incurred expenditure amounting to Rs.5,04,78,902/- in respect of grant given to the employees under ESOP plan/ scheme. The assessee had announced Employees Stock Option Schemes ('ESOS') – 2005 & 2006,

which were framed in accordance with the mandatory SEBI guidelines. Under the Scheme, as part of the employee compensation measure, an option was granted to the employees to purchase the shares of the assessee-company after the completion of the vesting period at a price less than the prevailing market price on the date of grant of option. The aforesaid expenditure, representing difference between fair market value on date of grant of underlying securities and exercise price thereof paid by the employees, was claimed as deduction as ESOP expenditure amortized equally over the vesting period. The details of such expenditure, which were duly submitted before the assessing officer/ CIT(A).

117. After considering the aforesaid facts and after hearing both the parties, we find that now the issue whether expenditure incurred in order to compensate employees in lieu of services rendered in the form of ESOP now stands covered by the decision of Hon'ble Delhi High Court in the case of **CIT vs. Lemon Tree Hotels Limited in ITA 107/2015 dated 18.08.2015** and the decision of Special Bench of ITAT in the case of **Biocon Limited reported in 144 ITD 21**. This decision of the Tribunal has been affirmed by the Hon'ble Karnataka High Court vide order dated 11.11.2020 holding that employees' discount represents consideration of services rendered by the employees and hence it is a deductible business expenditure. There is no dispute that here in this case, it is an ascertainable liability since employees incurred obligation over the distinct period,

notwithstanding the fact that exact amount as quantified at the time of exercising the options. Thus, following the aforesaid judgments, ESOP expenses are allowed and consequently, ground no.6 is determined in favour of the assessee.

GROUND NO.7

118. Ground No.7 qua levy of interest u/s 234B of the Act needs no specific finding being consequential in nature.

ADDITIONAL GROUNDS IN RESPECT OF SECTION 80HHC

119. This ground is not pressed by the ld. counsel for the assessee at the time of hearing, hence the same is dismissed as not pressed.

ADDITIONAL GROUNDS IN RESPECT OF DEDUCTION OF ADDITIONAL COAL LEVY

120. The aforesaid additional grounds have also been decided by us in the assessee's appeal for AY 2003-04 above and following the same, these additional grounds are determined in favour of the assessee.

121. In the result, the appeal filed by the assessee for AY 2006-07 is partly allowed.

ITA NO.341/DEL/2010 (AY 2006-07)
FILED BY THE REVENUE

122. In the grounds of appeal, the Revenue has taken the following grounds of appeal :-

“1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in restricting the claim of deduction made u/s 80IA of the Act, 1961] from Rs.3,65,71,39,107/- to Rs.2,53,05,43,080/- by following his earlier order, without appreciating the additional facts and arguments brought on record by the AO for the first time in the assessment order, which is a subject matter of appeal.

1(a) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in holding that electricity rates charged by Chhattisgarh State Electricity Board from consumers constituted market price for the assessee also, when the later is not incurring any infrastructural expenditure on account of electricity transmission and distribution and had also not incurred any establishment cost in supplying power to its associates concerns or using the same for captive consumption.

2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in treating the capital expenditure of Rs.2,68,33,219/- and Rs.2,49,42,090/- made on construction of Hospital and School, as admissible u/s 37 of the Income Tax Act, 1961 without appreciating the legal position that the capital expenditure is specifically excluded from the purview of section 37 and the MOU between the assessee and its employees cannot convert capital expenditure in revenue expenditure.

2(a) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in treating the expenditure made on Hospital and School as revenue Expenditure by relying the various judgments cited in the appellate order, without appreciating the facts that the said expenditure

had resulted in creation of capital assets owned by the assessee.

3. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in deleting the addition of Rs.9,91,30,721/- made by the AO by reducing the value of subsidy from the cost of assets for allowing depreciation.

3(a) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in appreciating the provision of Explanation 10 to section 43(1) of the Income Tax Act; wherein "actual cost" means the actual cost of the assets 10 the assessee, reduced by that portion of the cost thereof, if any, a has been met directly or indirectly by any other person or authority.

4. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in deleting the disallowance of Rs.1,08,33,316/- made by the AO on account of depreciation by applying the Straight Line Method, without appreciating the provisions of section 32(1)(i) and Appendix 1 A of Income Tax Rules, 1962.

5. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 6.89 crore made by the AO on account of capital expenditure on acquisition of aircraft.”

GROUND NO.1 & 1(a)

123. Since we have already decided this issue in Revenue's case for AY 2003-04 in ground no.1, respectfully

following the same, grounds no.1 & 1(a) taken by the Revenue are dismissed.

GROUND NO.2 & 2(a)

124. Facts in brief are that during the relevant previous year the assessee incurred expenditure of Rs.2,68,33,219 and Rs.2,49,42,909 relating to construction of Hospital and School Auditorium respectively in the district of Raigarh, in terms of understanding entered into with the Society owning the same, for the benefits of its employees and their children and also as part of its corporate social responsibility initiatives.

125. The assessing officer disallowed the aforesaid expenditure holding the same to be capital in nature. On appeal, the CIT(A) held that such expense was related to employee welfare and is accordingly allowed under section 37(1) of the Act.

126. The assessee, is carrying on the business/ manufacturing activities in the backward and small city of Raigarh in the State of Chhattisgarh. Further such small town is not equipped with other necessary facilities that may be necessary to meet the regular/basic needs of the residents of that city including employees of the assessee company. The city of Raigarh also did not have any good school or hospital. The assessee was therefore, also finding it difficult to attract qualified employees/ technicians since they were not willing to transfer to a small station not equipped with even basic necessities like good school and

hospital. That apart, the functioning of a big industry like that of the assessee causes several inconveniences to the residents of such city, as well as creates environmental hazards due to pollution or otherwise. In order to meet the aforesaid cumulative objectives, the assessee constructed hospital and school auditorium owned by Jindal Educational and Welfare Society (JEWS), a charitable institution in the city of Raigarh. The construction of hospital and school auditorium facilitated imparting of medical, health-care and education facilities to the employees of the assessee company, who were given preferential and concessional offer to use such facilities. The assessee had entered into Memorandum of Understanding (MOU) with the hospital as well as school owned by the charitable institution for special concession towards provision of medical facilities to the employees/ facilities of the assessee company.

127. Further vide resolution dated 26.05.2005 jointly signed by the assessee and Collector of Raigarh, committed itself towards further development of Raigarh city through time bound action plan for development of infrastructure. As part of that commitment also, during the relevant previous year the assessee constructed school auditorium.

128. The aforesaid initiative taken by the assessee to construct school auditorium as well as hospital also resulted in adding to the reputation/ goodwill of the company inasmuch as such expenditure helps the company in maintaining good relations with the local people of the

State, which helps in smooth hassle free functioning of operations as well as sourcing good people from the local city.

129. In support of the aforesaid contentions, the assessee placed on record the following details/documents:-

(a) Memorandum of Understanding ('MOU') entered into between the assessee and JEWS.

130. On perusal of the MOU, it was pointed out that the MOU was entered into by the assessee to provide fundamental and basic necessities like good schooling and hospital facilities to its employees. In the MOU, it was agreed by JEWS to give preferential treatment to the employees of the assessee like quota in admission for children of the assessee's employees, concession in tuition fee and other fees charged by the school and also fees charged by hospital, priority services to the employees of the assessee, etc, in lieu of assessee giving financial assistance;

(b) Fee structure of O.P. Jindal School, Raigarh during the session 2005-06 to 2009-10 along with a list of students of employees of the assessee and other students during the financial year 2005-06. On perusal of the same, it will be kindly noticed that substantial concession in fees is given to the employees of the assessee vis-à-vis the other students;

- (c) A graph showing growth in strength of the school and its composition into students of the employees of the assessee vis-a-vis other students.
- (d) Certain photographs showing usage of school auditorium for various meetings by the assessee;
- (e) Patient Admission report for the year 2008 depicting treatment of employees of the assessee and other persons.

131. On perusal of the same, it was pointed out that a large number of employees use the services of the hospital run by JEWS. On perusal of the aforesaid details/documents, it can be gauged that substantial benefits flowed to the employees of the assessee as a result of the assessee incurring expenditure on construction of school and hospital run by JEWS. The aforesaid documents clearly support the contention of the assessee that expenditure incurred by the assessee was nothing but employee welfare expenditure resulting in direct benefits to the employees.

132. Apart from benefits derived by the employees of the assessee, the expenditure incurred resulted in earning of substantial reputation and goodwill and maintaining good relations with the local people, which ultimately resulted in smooth and hassle free functioning of the operations of the assessee as well as sourcing of good people from the area.

133. In view of the above submissions and facts it was pleaded that, the impugned expenditure incurred towards construction of hospital as well as auditorium, to impart

benefit to its employees as well as part of corporate social responsibility initiatives was wholly and exclusively for the purpose of business of the assessee and was an allowable deduction under section 37 of the Act.

134. Ld. DR on the other hand relied upon the order of the Assessing Officer and submitted that such an expenditure is nothing related to assessee's business and if at all then it is capital expenditure.

135. From the perusal of the aforesaid facts and on going through the order of the ld. CIT (A), we find that the expenses incurred are related to employees' welfare and for the purpose of employees and hence to be reckoned as expenditure incurred for the purpose of business. The assessee is carrying on the business/manufacturing activities in the backward and small city of Raigarh in the State of Chhattisgarh which does not have the requisite facilities and infrastructure to meet the regular/basic needs of the residents of that city including employees of the assessee company. The city of Raigarh also did not have any good school or hospital. Therefore, in order to attract qualified employees/technicians to work in such situation, the assessee is providing these facilities and created this infrastructure. Thus, it is for the benefit of the employees as well as part of corporate social responsibility, therefore, the same is to be reckoned as wholly and exclusively for the purpose of business and an allowable deduction. Accordingly, the order of the ld. CIT(A) is confirmed and the ground is dismissed.

GROUND NO.3 & 3(a)

136. Facts in brief are that the assessing officer has, in the assessment order, while holding the impugned subsidy as revenue receipt, simultaneously reduced the same from cost of fixed assets, while applying provisions of Explanation 10 to section 43(1) of the Act resulting in double taxation of same amount of subsidy.

137. It has been submitted by the assessee that even assuming, without admitting, that the subsidy received is a revenue receipt, the action of the assessing officer in reducing such subsidy from cost of fixed assets by applying the provisions of Explanation 10 to section 43(1) of the Act is patently erroneous as the same resulted in double taxation of the very same amount, viz., (i) by bringing the amount received to tax as income; and (ii) by reducing the claim of depreciation on account of reduction of the very same amount from the cost of the depreciable assets. Ld. Counsel submitted that the assessing officer, , cannot blow hot and cold in the same breath and, therefore, the action of the assessing officer in making reduction of the amount of subsidy from the cost of fixed assets was not called for and accordingly rightly reversed by the CIT(A).

138. Further, if its to be held that the subsidy received is in the nature of capital receipt, even then, provisions of Explanation 10 to section 43(1) of the Act are not applicable, for the following reasons:

- *Explanation 10 to section 43(1) of the Act, only applies in a case where any portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government/ State Government/ any other authority/ any other person in the form of subsidy or grant or reimbursement, etc. The said Explanation 10 reads as under:*

“.....

Explanation 10.-Where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee:

Provided that where such subsidy or grant or reimbursement is of such nature that it can not be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee.

.....”

139. On perusal of the aforesaid, it is patently clear that only in a situation where subsidy received by the assessee is intended to meet the cost of an asset acquired by the assessee; such subsidy is required to be adjusted

against the actual cost of the asset for the purposes of section 28 to 41 of the Act.

140. It was submitted that the provisions of aforesaid Explanation are attracted where the purpose behind the grant of subsidy by the Government is to meet the cost of asset, i.e. incentivize an assessee to purchase an asset or to make capital investment and not otherwise. On the other hand, if the purposes of the subsidy are to achieve the larger object of public interest, like, industrialization of the backward state, employment generation, etc., such subsidy is not required to be reduced from the cost of assets in terms of Explanation 10 to section 43(1) of the Act.

141. Ld. DR supported the order of the Assessing Officer and pointed out that the nature and manner in which subsidy was received is nothing but for acquisition of assets.

142. After considering the aforesaid facts as well as order of the AO and ld. CIT (A), we find that if the purpose of subsidy was for industrialization of the backward state, employment generation, etc. and is in the form of capital nature, such subsidy is not required to reduced from the cost of asset u/s 10 to section 43(1) of the Act. Hon'ble Supreme Court in the case of **CIT v. P.J. Chemicals Ltd. reported in 210 ITR 830** has observed that in that case, the assessee had received a capital subsidy, which was claimed as capital receipt, not exigible to income-tax. In the assessment proceedings, the assessing officer held that such subsidy is liable to be reduced form the cost of assets,

in terms of the provisions of section 43(1) of the Act. The appeal preferred by the appellant before the Commissioner of Income-tax (Appeals) was dismissed. The Tribunal, however, allowed the assessee's claim. The Hon'ble High Court decided the matter in favour of the Revenue. On further appeal preferred by the assessee, the Hon'ble Supreme Court reversed the decision of the Hon'ble High Court and decided the issue in favour of the assessee. The relevant observations of the Supreme Court are as under:

“.....

The question in the present context is not whether if a portion of the cost is met directly or indirectly by any other person or authority, it should be deducted or not. Quite obviously, the plain meaning of the section is that it shall be. But the real question is as to the character and nature of a subsidy whether it was really intended to subsidise the cost of the capital or was intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost which is the basis for determining the subsidy being only a measure adopted under the scheme to quantify the financial aid. The contention is that it is not a payment, directly or indirectly, to meet any portion of the "actual cost" but intended as an incentive to entrepreneurs, its quantification determined at a percentage of the fixed capital cost.

.....

The Government subsidy, it is not unreasonable to say, is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as or geared to a percentage of such cost. If that be so, it does

not partake of the character of a payment intended either directly or indirectly to meet the "actual cost". We should prefer the reasoning of the majority of the High Courts to the one found acceptable by the High Court of Punjab and Haryana.” (emphasis supplied)

143. Though the aforesaid decision was rendered prior to the insertion of Explanation 10 in section 41(1), however, same principle would apply in the present case as subsidy was granted to the assessee to incentivize the industries in the backward areas to provide employment and such subsidy was not granted directly or indirectly for compensating the fixed assets, therefore, the same cannot be adjusted against the cost of assets. Accordingly, the order of the Id. CIT (A) is confirmed and grounds no.3 & 3(a) are determined against the Revenue.

GROUND NO.4

144. Since we have already decided this issue in Revenue's case for AY 2003-04 in ground no.3, respectfully following the same, ground no.4 taken by the Revenue are dismissed.

GROUND NO.5

145. Facts in brief are that during the previous year 2004-05, the assessee had taken an aircraft on lease from GE Capital Services India ('GE'). In accordance with Accounting Standard 19 (AS-19) on 'Leases' issued by the Institute of Chartered Accountants of India ('ICAI'), the said lease qualified as finance lease for the purpose of

accounting treatment. AS-19 on Leases provides that in case of “finance lease”, lessee has to capitalize the leased asset at an amount equal to the present value of future lease payments and a corresponding amount is recognized as a liability. Accordingly, out of total lease rental of Rs.7,94,22,735, Rs.1,04,47,179 was charged to the P&L account and the balance amount of Rs.6,89,75,556 was adjusted against the outstanding liability towards value of the aircraft. In the return of income, total lease rental amounting to Rs.7,94,22,735 was claimed as an admissible deduction under section 37(1) of the Act. Further, no depreciation was claimed on cost of aircraft under the provisions of the Act.

146. The assessing officer held that the aforesaid expenditure of lease rent of Rs.6,89,75,556 was towards cost of the aircraft and accordingly, disallowed the same. The action of the assessing officer in making the disallowance of Rs.6,89,75,556 out of total lease payments made during the year has been challenged on the following reasoning before us :-

- AS-19 on accounting for “Leases” issued by the ICAI is only applicable for accounting the lease transaction in the books of accounts. It is a settled law that treatment in the books of accounts is not determinative of liability towards income-tax for the purpose of the Act. The liability under the Act is governed by provisions of the Act and is not dependent on the treatment followed for the same in the books of accounts.

Reliance in this regard was placed on following decisions:

- Sutej Cotton Mills Ltd. v. CIT: 116 ITR 1 (SC)
- Kedarnath Jute Mfg. Co. Ltd. v. CIT: 82 ITR 363 (SC)
- AS-19 on accounting for leases classifies lease transactions for accounting purposes as under:
 - (i) Finance Lease
 - (ii) Operating Lease

Finance Lease, in AS-19, is described as a lease that transfers substantially all the risks and rewards in respect of ownership of an asset; title may or may not be transferred under such lease. An operating lease, on the other hand, is described as a lease other than a finance lease.

- The aforesaid Accounting Standard provides that under the finance lease, the lessee should recognize the asset in its books and should charge depreciation on the same. In the case of operating lease, the Accounting Standard provides that the lessee should recognize the lease payments as an expense in the profit and loss account and the lessor should recognize the asset given on lease and charge depreciation in respect of the same.

147. Thus it has been submitted that the aforesaid distinction between finance lease and operating lease is not recognized under the Act.

148. We are in tandem with the said submissions as under the provisions of the Act, depreciation is admissible

under section 32 of the Act only to the ‘owner’ of the asset. Lease charges paid for the use of the asset, without acquiring any ownership rights in the same, are allowable as revenue expenditure under section 37 of the Act. **Circular No.2 of 2001 dated 9.2.2001: 247 ITR (St.) 53** issued by the Central Board of Direct Taxes (‘CBDT’), wherein it has been clarified that the aforesaid accounting standard issued by ICAI creating distinction between finance lease and operating lease will have no implications under the provisions of the Act. The relevant excerpt of the said Circular are reproduced herein below:

“Under the Income-tax Act, in all leasing transactions, the owner of the asset is entitled to the depreciation if the same is used in the business, under section 32 of the Income-tax. The ownership of the asset is determined by the terms of the contract between the lessor and the lessee..... ..”

“It has come to the notice of the Board that the New Accounting Standard on ‘Leases’ issued by the Institute of Chartered Accountants of India require capitalization of the asset by the lessees in financial lease transaction. By itself, the accounting standard will have no implication on the allowance of depreciation on assets under the Act.”

149. The legal position that emerges from the aforesaid is that Accounting Standard 19 issued by ICAI, by itself, has no implication on the allowance of depreciation on assets

under the provisions of the Act. The owner, i.e. the lessor, is ordinarily eligible to claim depreciation under section 32 of the Act, while the lessee can claim expense on account of lease rental payments comprising of principal as well as interest amount.

150. The aforesaid legal position finds support from the decision of the **Supreme Court** in the case of **ICDS Ltd. vs. CIT: 350 ITR 527**, wherein the Court held that the lessor is the owner of the leased property in case of finance lease and entitled to depreciation in respect of the same.

151. In the present case, the agreement entered into between the appellant and GE, the lessor and owner of the aircraft, is, undoubtedly a lease agreement. During the lease period, the ownership in the aircraft vests with lessor. The assessee only has an option to purchase the aircraft after the expiry of the lease period from lessor. Further, the said option is conditional upon the lessee/ assessee not defaulting in any of the lease payments. In case there is a default in making any of the lease payments the clause granting purchase option cannot be exercised and ownership in the asset shall remain with the lessor. In fact the lessee/ assessee would be required to return back the equipments to the lessor, in case the lessee defaults in making any of the lease rent payment.

152. In view of the aforesaid, we hold that the assessing officer erred in making addition of Rs.6,89,75,556.

153. Apart from that, it has been brought on record that since beginning of the lease agreement, i.e. assessment year 2005-06 onwards, the assessee had claiming deduction of lease rent and the same has been allowed in the assessments completed for assessment year 2005-06, 2007-08 and 2008-09 under section 143(3) of the Act by the Assessing Officer. Since there being no change either in facts or in law in this regard, as compared to the earlier and subsequent years, the position accepted by the Department needs to be followed even on the principal of consistency.

154. Thus, in the present case also if the claim of lease rent has been allowed in the earlier and the subsequent year, but the same has been disallowed in the year under consideration, will lead to an absurd and anomalous situation, hence same is allowed.

155. In the result, the appeal filed by the Revenue for assessment year 2006-07 is dismissed.

ITA NO.2280/DEL/2011 (AY 2007-08)

FILED BY THE ASSESSEE

156. In the grounds of appeal, the following grounds raised by the assessee :-

“1. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in holding the subsidy of Rs.932,188,629/- being a capital receipt as trading receipt.

2. That the Commissioner of Income Tax (Appeals) , Rohtak has grossly erred on facts and in the circumstances of the

case and in law in holding the capital subsidy amounting to Rs.932,188,629/- as revenue receipt for the reason that benefit of the subsidy part became operative only at the time of commencement of the production, in defiance of the settled law that the point of time when the subsidy is paid is irrelevant.

3. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in not adjudicating the inter-connected additional ground in respect of exemption of capital subsidy of Rs.11,55,71,730/- on account of exemption from entry tax in respect of New Industrial Unit No.III.

4. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in disallowing a sum of Rs.2,49,722/- out of the expenditure on running and maintenance of aircrafts for alleged personal use of aircraft.

5. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in confirming disallowance of proportionate value of discount of Rs.5,04,78,902/- on stock options offered under Stock Option Scheme (ESOS) as employee compensation measure.”

GROUND NO.1, 2 & 3

157. Since we have already decided this issue in assessee's own case for AY 2003-04 in ground no.1, respectfully following the same, grounds no.1 to 3 taken by the assessee are allowed.

GROUND NO.4

158. This issue is already decided by us in assessee's own case for AY 2003-04 in ground no.2 and respectfully following the same, ground no.4 taken by the assessee is allowed.

GROUND NO.5

159. This issue has also been decided by us in assessee's own case for AY 2006-07 in ground no.6 and respectfully following the same, ground no.5 taken by the assessee is allowed.

160. In the result, the appeal filed by the assessee for AY 2007-08 is allowed.

ITA NO.2230/DEL/2011 (AY 2007-08)**FILED BY THE REVENUE**

161. In the grounds of appeal, the Revenue has taken the following grounds of appeal :-

“1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in restricting the claim of deduction made u/s 80IA of the Act, 1961 from Rs.4148995760/- to Rs.2698347031 by following his earlier order, without appreciating the additional facts and arguments brought on record by the AO for the first time in the assessment order, which is a subject matter of appeal.

1(a) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in holding that electricity rates charged by Chhattisgarh State Electricity Board from consumers constituted market price for the assessee also, when the later is not incurring any infrastructural expenditure on account of electricity transmission and distribution and had also not incurred any establishment cost in supplying power to its associates concerns or using the same for captive consumption.

2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in deleting the disallowance of Rs.12345347/- made by the AO on account of depreciation by applying the Straight Line Method, without appreciating the provisions of section 32(1)(i) and Appendix 1A of the Income-tax Rules, 1962.

3. Whether On the facts and in the circumstances of the case, the Ld. CIT(A) has was right in treating the capital expenditure of Rs.99404674/- made on construction of Auditorium, Hospital, School etc. as admissible u/s 37 of the Income-tax Act, 1961 without appreciating the legal position that the capital expenditure is specifically excluded from the purview of section 37 and the MOU between the assessee and its employees cannot convert capital expenditure to revenue expenditure.”

GROUND NO.1 & 1(a)

161. Since we have already decided this issue in Revenue's case for AY 2003-04 in ground no.1, respectfully

following the same, grounds no.1 & 1(a) taken by the Revenue are dismissed.

GROUND NO.2

162. We have already decided this issue in Revenue's case for AY 2003-04 in ground no.3, respectfully following the same, ground no.2 taken by the Revenue are dismissed.

GROUND NO.3

163. This issue has already been decided by us in Revenue's case for AY 2006-07 in grounds no.2 & 2(a), respectfully following the same, ground no.2 taken by the Revenue are dismissed.

164. In the result, the appeal filed by the Revenue for AY 2007-08 is dismissed.

ITA NO.4185/DEL/2011 (AY 2008-09)

FILED BY THE ASSESSEE

165. The following grounds of appeal taken by the assessee:-

“1. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in holding the subsidy of Rs.48,39,36,937/- being in the character of a

capital receipt as a revenue receipt following year order for AY 2007-08.

2. That the Commissioner of Income Tax (Appeals) , Rohtak has grossly erred on facts and in the circumstances of the case and in law in holding the capital subsidy (entry tax and electricity duty exemption) amounting to Rs.48,39,36,937/- as revenue receipt for the reason that benefit of such subsidy became operative only at the time of commencement of the production, in defiance of the settled law that the point of time when the subsidy is paid is irrelevant.

3. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in not holding the capital subsidy of Rs.16,44,47,689/- adjudicating the inter-connected additional ground on account of exemption from entry tax in respect of New Industrial Unit No.III as a revenue receipt.

4. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in disallowing a sum of Rs.7,82,241/- out of the expenditure on running and maintenance of aircrafts for alleged personal use of aircraft.

5. That the Commissioner of Income Tax (Appeals), Rohtak has grossly erred on facts and in the circumstances of the case and in law in confirming disallowance of proportionate value of discount of Rs.12,79,24,400/- on stock options being offered under Stock Option Scheme (ESOS) as a part of employee compensation.”

GROUNDS NO.1, 2 & 3

166. Since we have already decided this issue in assessee's own case for AY 2003-04 in ground no.1, respectfully following the same, grounds no.1 to 3 taken by the assessee are allowed.

GROUND NO.4

167. This issue is already decided by us in assessee's own case for AY 2003-04 in ground no.2 and respectfully following the same, ground no.4 taken by the assessee is allowed.

GROUND NO.5

168. This issue has also been decided by us in assessee's own case for AY 2006-07 in ground no.6 and respectfully following the same, ground no.5 taken by the assessee is allowed.

169. In the result, the appeal filed by the assessee for AY 2008-09 is allowed.

ITA NO.4067/DEL/2011 (AY 2008-09)**FILED BY THE REVENUE**

170. In the grounds of appeal, the Revenue has taken the following grounds of appeal :-

“1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in allowing the claim of deduction made u/s 80IA of the Act, 1961 from to Rs.4,28,94,98,566/- as against the deduction of Rs.2,23,80,25,060/- given by the AO by following his earlier

order, without appreciating the additional facts and arguments brought on record by the AO for the first time in the assessment order, which is a subject matter of appeal.

1(a) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in holding that electricity rates charged by Chhattisgarh State Electricity Board from consumers constituted market price for the assessee also, when the later is not incurring any infrastructural expenditure on account of electricity transmission and distribution and had also not incurred any establishment cost in supplying power to its associates concerns or using the same for captive consumption.

2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in deleting the disallowance of Rs.1,36,30,573/- made by the AO on account of depreciation by applying the Straight Line Method, without appreciating the provisions of section 32(1)(i) and Appendix 1A of the Income-tax Rules, 1962.

3. Whether On the facts and in the circumstances of the case, the Ld. CIT(A) has was right in treating the capital expenditure of Rs.4,23,55,995/- made on construction of Auditorium, Hospital, School etc. as admissible u/s 37 of the Income-tax Act, 1961 without appreciating the legal position that the capital expenditure is specifically excluded from the purview of section 37 and the MOU between the assessee and its employees cannot convert capital expenditure to revenue expenditure.”

GROUND NO.1 & 1(a)

171. Since we have already decided this issue in Revenue's case for AY 2003-04 in ground no.1, respectfully

following the same, grounds no.1 & 1(a) taken by the Revenue are dismissed.

GROUND NO.2

172. We have already decided this issue in Revenue's case for AY 2003-04 in ground no.3, respectfully following the same, ground no.2 taken by the Revenue are dismissed.

GROUND NO.3

173. This issue has already been decided by us in Revenue's case for AY 2006-07 in grounds no.2 & 2(a), respectfully following the same, ground no.2 taken by the Revenue are dismissed.

174. In the result, the appeal filed by the Revenue for the Assessment Year 2008-09 is dismissed.

175. To sum up, the appeals filed by the assessee for AYs 2003-04 & 2006-07 are partly allowed & the appeals for AYs 2007-08 & 2008-08 are allowed and the appeals filed by the Revenue for AYs 2003-04, 2006-07, 2007-08 & 2008-08 are dismissed.

Order pronounced in open court on this 1ST day of December, 2021.

**SD/-
(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER**

**SD/-
(AMIT SHUKLA)
JUDICIAL MEMBER**

Dated the 1ST day of December, 2021

TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A, Rohtak .
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.