IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI S.RIFAUR RAHMAN (ACCOUNTANT MEMBER)
AND
SHRI AMARJIT SINGH (JUDICIAL MEMBER)

I.T.A No.6908/Mum/2012 - A.Y. 2001-02
I.T.A No.2117/Mum/2013 - A.Y. 2002-03

Larsen & Toubro Limited Taxation Department, L&T House N.M. Marg, Ballard Estate Mumbai-400 001 **PAN : AAACL0140P**	vs	Deputy Commissioner of Income-tax, Range-2(2), Mumbai
APPELLANT		**RESPONDENT**

I.T.A No.6878 /Mum/2012 - A.Y. 2001-02
I.T.A No.2284/Mum/2013 - A.Y. 2002-03

Deputy Commissioner of Income-tax, Range-2(2), Mumbai	vs	Larsen & Toubro Limited Taxation Department, L&T House N.M. Marg, Ballard Estate Mumbai-400 001 **PAN : AAACL0140P**
APPELLANT		**RESPONDENT**

Assessee represented by	Shri J.D. Mistry, Sr.Advocate
Department represented by	Smt. Shailaja Rai,(CIT DR)

Date of hearing	13/01/2022
Date of pronouncement	29/04/2022

O R D E R

Per: S.Rifaur Rahman (AM):

These cross appeals filed by the assessee and Revenue arise out of the independent orders of the Learned Commissioner of Income-tax (Appeals) for the assessment years 2001-02 and 2002-03.

2. Various grounds are raised in the cross appeals; they are dealt with in seriatim, below.

ITA No.6908/Mum/2001

3. The first ground in this appeal pertains to disallowance of Rs.4,86,03,144/- being commission paid to certain parties during the year. The Assessing Officer as well as the Ld.CIT(A) based their respective action on the basis of their earlier year's order.

4. Upon hearing the parties, we find that this issue stands decided against the assessee by the co-ordinate bench of this Tribunal for the assessment year 2000-01, by holding as under:-

> *"5. After hearing both the parties and perusing the material available on record, we observe that in this case the Coordinate Bench in assessee's own case in A.Y 1988-89 has decided the issue in favour of the assessee in ITA No. 2423/Mum/1992 vide order dated 27.07.2004 whereas, the issue has been decided against the assessee in all subsequent years commencing from AY 1994-95 to 1999-00. Since all the assessment years right from AY 1994-95 to 1999- 00 the issue is decided against the assessee, we, therefore, respectfully following the decisions of the Coordinate Benches from AY 1994-to 1999-00 uphold the order of CIT(A) on this issue by dismissing the ground raised by the assessee."*

5. The facts and circumstances are stated to be identical. Therefore, consistent with the earlier orders of the co-ordinate bench of this Tribunal, we dismiss the ground raised by the assessee.

6. Ground 2 pertains to disallowance of Rs.3,00,00,000/- towards non compete fees treated as revenue in nature and charged to tax.

7. Brief facts relating to this ground are that the Assessing Officer, during the course of assessment proceedings asked the assessee to submit justification for claim of non compete fees. Vide letter dated 12/02/2004, assessee submitted as under:

> *"During the previous year relevant to the assessment year under reference we have received an amount of Rs. 3 crores from Sharp Business Systems (India) Ltd. in pursuance of co-operation agreement entered into by us with M/s Sharp Corporation of Japan on March 27, 2000. We submit that earlier we had entered into a joint venture agreement with M/s Sharp Corporation, Japan for the purposes of setting up a joint venture company in India with the object of importing, marketing, selling and servicing in India certain electronic office products and other equipments.*
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> *As per the above referred co-operation agreement we received a payment of Rs. 3 crores from the joint venture company in consideration for not setting up or undertaking or even 'assisting in setting up of any business in India of selling, marketing and trading of electronic office products (i.e. not competing with the business of the joint venture company) for a period of 7 years from the date of the joint venture agreement. We enclose a copy of the co-operation agreement at Annexure 7.1.*
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> *The said non-compete fees received by us has been credited to our Profit & Loss account in "Schedule L " under the head "Miscellaneous Income ". However, as the same is in the nature of a capital receipt we have not offered it for tax in our computation of income. In support of our claim that non-compete fees is not liable to income-tax, our submissions are as under:*
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> *The receipt of Rs. 3 crores by us as non-compete fees is a capital receipt in our hands. It is in pursuance of the co-operation agreement entered into by us which puts a restriction on us to indulge ourselves in any business*

which is in competition with the business of the joint venture company. It is a well settled law that whenever anything is received as compensation upon termination or breach of a (fading contract in the normal course of business, the same is taxable as a revenue receipt. , But where the receipt is on account of giving up the source of income then the same has to be treated as a capital receipt not liable to be taxed In our case what has been received is a consideration for giving up the right to use the profit generating apparatus of one of the businesses of the company.

It is pertinent to note that vide para (c) and (f) of Clause III of our Memorandum of Association we are authorised to carry on the business of manufacturing, marketing, selling and servicing of the products in respect of which we have entered into the Joint Venture agreement with M/s Sharp Corporation, Japan. We enclose the relevant pages of the Memorandum of Association as Annexure 7.2. By virtue of the cooperation agreement entered into by us we have agreed to abstain ourselves from indulging into any such activity. Therefore, the receipt ofRs.3 croresfor restricting ourselves from entering into any competitive business, which otherwise we are authorised to, is nothing but a capital receipt in our hands and liable to be taxed.

To support our view we rely on the decision of the Supreme Court in Kettlewell Bullen & Co, Ltd. v. CIT (53 ITR 261). The assessee in that case was carrying on the business of managing agencies of 6 companies. On termination of one of its agencies, the assessee received a compensation for loss of profits. The observations of the court are reproduced hereunder:

> *"On an analysis of these cases which fall on two sides of the dividing line, a satisfactory measure of consistency in principle is disclosed. Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income: termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue: where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt. "*

Similar observations were made by the Apex Court in the case of Gillanders Arbuthnol & Co. Ltd. v, CIT (53 ITR 283).

We submit that vide the object clause of our Memorandum of Association we are authorised to cany on the business which will result in direct competition with the business of the joint venture company.

We further rely on following judicial pronouncements to support our view:

i) Oberoi Hotels Pvt. Ltd. v. CIT (236 ITR 903) (Supreme Court): The assessee in this case was engaged in the business of maintaining and operating hotels. It had entered into an agreement to operate a hotel in Singapore on payment of a management fee for a period of 10 years with an option to ask for renewal for another 10 years apart from an option for pre-emptive purchase in case the owner intended to transfer the property pending the agreement. Later the agreement was cancelled and the assessee for a consideration of Rs. 30 lakhs forgone its right of pre-emptive purchase. The Supreme Court while deciding upon the matter held that the contract for management for hotel was not a trading contract, but a capital asset by itself and the compensation received for its breach could only be considered as having the character of a capital receipt.

ii) CIT v. Best & Co. (P) Ltd (60 ITR 11) (Supreme Court): The court observed as follows:

> *"This Court in Gillanders Arbuthnot & Co. Ltd v. CIT (53ITR 283) (SC): TC 13R. 1253 accepted the said principle and held that the compensation paid for agreeing to refrain from carrying on competitive business in the commodities in respect of the agency terminated or for loss of goodwill was prima facie of the nature of a capital receipt. "*

iii) Saroj Kumar Poddar v. JCIT (77 ITD 326) (Annexure 7.3): The Hon'ble Calcutta Tribunal opined as follows:

> *"A capital receipt may be of various natures. When a capital asset is transferred, the receipt arising thereby is of the nature of capital receipt. Such receipt would, however, be taxable by way of being capital gains from transfer of capital assets. When there is a loss of the capital structure of a particular assessee or drying up of a source of income, any compensation received by the assessee for such loss would also have to be treated as capital receipt. At the same time again, another type of capital receipt would be constituted by receipts arising out of restrictive covenants as in the present case. All the decisions with regard to this type of receipt go to hold that such a receipt cannot be*

treated as revenue receipt or even as a casual receipt and hence, cannot be subjected to tax. "

iv) We also place reliance on the judgnent of the Madras High Court in the case of CIT v. Saraswathi Publicities (132 ITR 207) wherein it was held that \ compensation for agreeing to refrain from carrying on competitive business constituted capital receipt not liable to income-tax,

We also wish to invite your goodself's kind reference to the amendment made in section 28 of the I. T. Act, whereby subjection clause (va) has been inserted which provides for taxing the receipts in the nature of non-compete fees and exclusivity rights. The said amendment has been brought by the Finance Act, 2002 w.e.f. 01.04.2003. Accordingly, the same will not be applicable to us during the assessment year under consideration. In this connection we refer to the Memorandum explaining the provisions in the Finance Bill, 2002 which specifically provides that the amendment will take effect from Ist April, 2003, and will, accordingly, apply in relation to assessment year 2003-04 and subsequent years.

In view of the above judicial precedents and provisions of the law and the facts of our case, we submit that the non-compete fees received by us is in the nature of capital \ receipt and not liable to be taxed. "

8. After considering the submissions of the assessee, Assessing Officer observed that assessee and Sharp Corporation, Japan have entered into a joint venture contract on 27/03/2000 and on the same date, the contracting parties entered into Cooperation Agreement. In the joint venture contract, the above parties have agreed to entered into cooperation agreement in respect of the products. This clearly signifies that non compete clause was part of the original joint venture agreement. The parties have entered in Cooperation Agreement for the sake of accounting convenience. In this regard, Assessing Officer reproduced the terms an covenants of the Cooperation Agreement in the assessment order. For the sake of convenience, we reproduce the same below:-

"(i) L&T has represented that for a period of seven (7) years from the date of the Joint Venture Contract it shall not set up nor undertake nor assist in setting up or undertaking any business in India of selling, marketing and trading of electronic office products. However, the restriction contained herein shall not extent to such non-competing business as the electrical, information technology, software development and telecommunication businesses of L & T and its subsidiary and associate companies.
(ii) In consideration of the aforesaid representation, the parties have agreed to cause the JVCO to pay L&T a lump sum of Indian Rupees 30 Million.
(iii) This payment shall be effected by JVCO to L & T at the time of commencement of business by the JVCO."

9. From the above, Assessing Officer observed that from the wording of clause (i) of the Cooperation Agreement, it becomes abundantly clear that the restriction for non competing business design cover the business pertaining to electrical products, information technology, software development and telecommunications. Further, he observed that even the subsidiary and associate companies are also exempt from restrictive clause of the Cooperation Agreement. From the above facts of the case, he noticed that L&T Ltd is not actively involved in marketing, selling and servicing electronic products in India whereas business of such nature are being carried out by the associate companies, further, the subsidiaries are associate companies are not restricted to carry out the business which are directly competing with the business model of the joint venture. He observed that this is a major lacunae in the Cooperation Agreement which points out that in reality, the substance of the transaction is fair from what is visible in the legal form of the transactions. He further observed that Sharp Corporation, Japan, being a new entrant in the Indian market especially in the products specified in the joint venture agreement, wanted

to utilized wide-spread network of L&T Ltd and, therefore, it had to pay for utilisation of such infrastructure which was readily available with the assessee company, by relying on following case laws:-

i) Rajabahadur Kamakhya Narayan Singh V/s. CIT (77 ITR 53 (SC)

ii) Sunil Siddharthbhai V/s. CIT (1985) 156 ITR 509 (SC)

iii) CIT V/s.Durgaprasad More (1971) 82 ITR 540 (SC)

iv) Juggilal Kamalapat V/s CIT 73 ITR 702 (SC)

(v) Sumati Dayal V/s CIT 214 ITR 801 (SC)

And he treated the non compete fees as revenue receipt and added to the income of the assessee. Further, he observed that assessee has mainly relied upon the ratios in the case of Oberoi Hotels Co (I) Ltd 236 ITR 903 (SC) & Kettlewell Bullen & Co Ltd vs CIT 53 ITR 261 (SC) and further observed that the facts in those cases are distinguishable to the facts of assessee's case and assessee further submitted that sub section clause (va) to section 28 has been inserted with effect from 01-04-2003 and accordingly from A.Y. 2003-04, the receipts in the nature of non compete fees, an exclusivity to tax, will be taxable.

10. Aggrieved, assessee preferred appeal before Ld.CIT(A) and before CIT(A), it made similar submissions made before the Assessing officer. Ld.CIT(A) dismissed the grounds raised by the assessee by sustaining the additions made by the Assessing Officer.

11. Aggrieved, the assessee is in appeal before us.

12. The Ld.AR of the assessee brought to our notice findings of the Assessing Officer and Ld.CIT(A) in their respective orders. In this regard, he submitted that assessee has entered into joint venture with Sharp Corporation, Japan to manufacture electronic items. He submitted that during this assessment year assessee has received an amount of Rs.3 crores from Sharp Corporation Business Systems India Ltd in pursuance of cooperation agreement entered into by the assessee with Sharp Corporation, Japan. Earlier, assessee had entered into a joint venture agreement for the purpose of setting up a joint venture in India with the object of importing, marketing, selling service in India certain electronic and other equipments. As per the above referred Cooperation Agreement, assessee has received a payment from the joint venture company in consideration for not setting up or undertaking or even assisting in setting up of any business in India of selling, marketing and trading of electronic office products. This is in order to not to compete with the business of the joint venture company for a period of 7 years from the date of joint venture agreement. The receipt of Rs.3 crores by the assessee for non compete fees is a capital receipt in pursuance to Cooperation Agreement entered by the assessee which puts a restriction on the assessee to indulge in any business which results in competition with the business of the joint venture company. It is a well settled law that where the receipt is on account of giving up the source of income, then the same has to be treated as capital receipts, not liable to tax. In the present case, what has been received is a consideration for giving up the right to use the profit generating apparatus

of one of the businesses of the assessee company. Further, he submitted that vide para (c) and (f) of clause 3 of the Memorandum of Association, the assessee is authorised to carry on the business of marketing, selling and servicing of the product in respect of which, the assessee had entered into the joint venture agreement with Sharp Corporation, Japan. In this regard, he relied upon the following case laws :-

1. Guffick Chem Pvt Ltd 332 ITR 602 (SC)
2. Kettlewell Bullen & Co Ltd 53 ITR 261 (SC)
3. Oberoi Hotels Pvt Ltd 236 ITR 903 (SC)
4. Best & Co (P) Ltd 60 ITR 11 (SC)

12. The Ld.AR brought to our notice that Sharp Corporation Systems vs CIT-3, (2012) 27 taxmann.com 50 (Del), in which the Hon'ble High Court has treated the non compete fees paid as capital expenditure.

13. On the other hand, the Ld.DR brought to our notice findings of the lower authorities and submitted that relies on the findings of the lower authorities. He further relied on the submissions filed on 27/07/2021.

1. Blue Star Ltd (2006) 8 SOT 6 (Mum)(URO)
2. Blue Star Ltd (2007) 13 SOT 25 (Mum)(URO)
3. Blue Star Ltd vs CIT (1995) 79 Taxman 281 (Bom)
4. Lyka Labs Ltd vs ACIT (2015) 60 taxmann.com 76 (Mumbai Trib)
5. DCIT vs Bayer (India) Ltd (ITAT, Mum) 7 ITR (Trib) 381
6. IIT Corporate Services Ltd vs DCIT 4 ITR (Trib) 147
7. CIT vs. Al-Kabeer Exports Ltd (2010) 193 Taxman 56 (Bom)

14. Considered the rival submissions and material placed on record. We observe that assessee has entered into joint venture with Sharp Corporation, Japan for the purpose of setting up a joint venture company in India (which is an independent company). With the object of marketing, selling and servicing in India certain electronic office products and other equipments. Apart from entering into joint venture agreement, assessee also entered into a Cooperation Agreement in order to avoid competing with the business of joint venture company, which assessee and Sharp Corporation, Japan were interested to develop in India. It is a common interest for both the partners, so that the joint venture company, which has set up in India should not suffer the competition from any of the companies associated with the assessee or assessee itself. It is clear from the record that it is in the interest of the assessee not to venture into the operations of the new joint venture company. In order to avoid any loss, which assessee may suffer due to non compete, the joint venture partner agreed to compensate the same. It is nowhere connected with the day to day running of the assessee company as perceived by the tax authorities that it is a compensation for the loss incurred by the assessee. Therefore, we are not in agreement with the tax authorities that it is compensation for allowing the facilities or widespread network in marketing or selling the products of the joint venture.and it is only a non compete fees paid by the joint venture partner to restrict the assessee not to curtail the development of the new joint venture company. Therefore, we are inclined to allow the

claim of the assessee and we observe that Hon'ble Supreme Court in the case of Guffick Chem Pvt Ltd (supra), has held as under:-

> *"7. Two questions arose for determination, namely, whether the amounts received by the appellant for loss of agency was in normal course of business and therefore whether they constituted revenue receipt? The second question which arose before this Court was whether the amount received by the assessee (compensation) on the condition not to carry on a competitive business was in the nature of capital receipt? It was held that the compensation received by the assessee for loss of agency was a revenue receipt whereas compensation received for refraining from carrying on competitive business was a capital receipt. This dichotomy has not been appreciated by the High Court in its impugned judgment. The High Court has misinterpreted the judgment of this Court in Gillanders' case (supra). In the present case, the Department has not impugned the genuineness of the transaction. In the present case, we are of the view that the High Court has erred in interfering with the concurrent findings of fact recorded by the CIT(A) and the Tribunal.*
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> *One more aspect needs to be highlighted. Payment received as non-competition fee under a negative covenant was always treated as a capital receipt till the assessment year 2003-04. It is only vide Finance Act, 2002 with effect from 1.4.2003 that the said capital receipt is now made taxable [See: Section 28(va)]. The Finance Act, 2002 itself indicates that during the relevant assessment year compensation received by the assessee under non- competition agreement was a capital receipt, not taxable under the 1961 Act. It became taxable only with effect from 1.4.2003. It is well settled that a liability cannot be created retrospectively. In the present case, compensation received under Non-Competition Agreement became taxable as a capital receipt and not as a revenue receipt by specific legislative mandate vide Section 28(va) and that too with effect from 1.4.2003. Hence, the said Section 28(va) is amendatory and not clarificatory. Lastly, in Commissioner of Income-Tax, Nagpur v. Rai Bahadur Jairam Valji reported in 35 ITR 148 it was held by this Court that if a contract is entered into in the ordinary course of business, any compensation received for its termination (loss of agency) would be a revenue receipt. In the present case, both CIT (A) as well as the Tribunal, came totheconclusion that the agreement entered into by the assessee with Ranbaxy led to loss of source of business; that payment was received*

under the negative covenant and therefore the receipt of `50 lakhs by the assessee from Ranbaxy was in the nature of capital receipt. In fact, in order to put an end to the litigation, Parliament stepped in to specifically tax such receipts under non-competition agreement with effect from 1.4.2003.

8. For the above reasons, we set aside the impugned judgment of the Karnataka High Court dated 29.10.2009 and restore the order of the Tribunal. Consequently, the civil appeal filed by the assessee is allowed with no order as to the costs."

15. Respectfully following the above decision, we allow the ground raised by the assessee.

16. Ground 3 pertains to addition under section 40A(9) being contribution to Utmal Employees Welfare Fund (Rs.1,00,000/-).

17. Upon hearing the parties, we find that this issue also stands decided against the Revenue by the co-ordinate bench of this Tribunal for the assessment year 2000-01, by holding as under:-

"8. After hearing both the parties and perusing the material available on record, we find that the issue is squarely coved in favour of the assessee by the decision of the Coordinate Bench of the Tribunal in assessee's own case for the A.Y 1994-95 to 1997-98 and 1999-2000. Since the facts are materially same, therefore, we are inclined to set aside the order of CIT(A) on this issue and direct the A.O to allow the deduction of Rs. 1,00,000/- towards contribution to Utmal Employees Welfare Fund. Accordingly the ground No. 2 raised by the assessee is allowed."

18. The facts and circumstances are stated to be identical. Therefore, consistent with the earlier orders of the co-ordinate bench of this Tribunal, we allow the ground raised by the assessee.

19. The ground No.4 pertains to expenditure in relation to oil exploration u/s 42 of the Act.

20. After hearing the parties, we find that this issue also stands covered stands decided against the assessee by the co-ordinate bench of this Tribunal for the assessment year 2000-01, by holding as under:-

> *"14. After hearing both the parties and perusing the language of section 42(1)(b) of the Act, we observe that the language of section 42(1)(b) provides that deduction of any expenditure incurred by the assessee, whether before or after such commercial production in respect of drilling or exploration activities or services or in respect of physical assets used in connection with business except the assets on which depreciation is admissible under section 32 of the Act. After carefully analyzing the provisions, we observe that in the section that the expenditure on acquiring asset is to be allowed when such expenditure is incurred on acquisition of asset which is used in business of the assessee. In the present case the assessee incurred Rs. 54,72,697/- on acquisition of asset which was used for the purpose of business in the assessment year 2001-02. The Ld. 11 CIT(A) has opined that the term 'used' in the language of the section denotes actual usage and not ready to use, which in our opinion is correct. In this case, we observed that the section does specify the use of the said assets which has to be the year in which the asset is used for the purpose of business. Accordingly, we inclined to uphold the order ld. CIT(A) on this issue by dismissing the ground no. 3 raised by the assessee. Needless to say that this deduction is to be allowed in the year in which the asset is put to use i.e AY 2001-02. Accordingly the Ground No. 3 is dismissed."*

21. The facts and circumstances are stated to be identical. Therefore, consistent with the earlier orders of the co-ordinate bench of this Tribunal, we dismiss the ground raised by the assessee.

22. Ground 5 pertains to disallowance of expenditure on computer software.

"16. After hearing the rival parties and perusing the material on record, we observe that the issue is squarely coved in favour of the assessee by the decision of Coordinate Bench in assessee's own case in ITA No. 6257/Mum/2011 A.Y 1999-2000 and others vide order dated 28.03.2018, wherein, the coordinate Bench vide para 8.4 of the order has allowed the appeal of the assessee by observing and holding as under:

8.4 We have heard the rival submissions, and perused the relevant materials on record. In Raychem RPG Ltd. (supra), it is held that where enterprise resource planning (ERP) package software facilitated assessee's trading operations or enabling management to conduct assessee's business more efficiently or more profitably but it was not in nature of profit-making apparatus, software expenditure was allowable as revenue expenditure. In CIT v. Amway India Enterprises (2012) 346 ITR 341 (Delhi), it has been held that the purchase of software is a revenue expenditure. In CIT v. Asahi India Safety Glass Ltd. (2012) 346 ITR 329(Delhi), it is held that the extent of expenditure cannot be a decisive factor in determining its nature and 14 treatment in books of account not conclusive. The Hon'ble High Court held that the software expenses were not to create new asset or a new source of income but to upgrade the system and thus the software expenditure is revenue expenditure. Facts being identical, we follow the ratio laid down in the above decisions and hold that the expenditure incurred by the assessee on computer software is revenue in nature. Thus the 7thand 8th grounds of appeal are allowed.

19. Since, the facts before us are materially same, therefore, we are inclined to set aside the order of CIT(A) on this issue by following the coordinate bench decision and direct the AO to allow this expenditure to the assessee. Ground no. 4 is allowed and the AO is directed accordingly."

23. The facts and circumstances are stated to be identical. Therefore, consistent with the earlier orders of the co-ordinate bench of this Tribunal, we allow the ground raised by the assessee.

24. Ground 6 in assessee's appeal pertains to disallowance under section 14A of Rs.11,13,00,000/- solely on account of interest.

25. Upon hearing the parties, we find the identical ground has been decided by the co-ordinate bench of this Tribunal in assessment year 200-01 and the Tribunal allowed the ground raised by the assessee, by observing as under:-

> *"22. After hearing both the parties and perusing the material on record we find that the issue is squarely covered in favour of the assessee by the decision of the Coordinate Bench in assessee's own case for the A.Y 1999-00 in ITA No. 6257/Mum/2011 vide order dated 28.03.2018, wherein, vide para No. 10 the Bench has allowed the appeal of the assessee. For the sake of convenience and ready reference, the said para 10.4 is reproduced as under:*
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> > *10.4 We have heard the rival submissions and perused the relevant materials on record. It is found, as recorded at page 28 of the assessment order dated 20.03.2002 by the AO, that the total own funds of the assessee was Rs.3706.19 crores whereas the investment in taxfree bonds was Rs.22.92 crores and investment in shares and mutual funds was Rs.449.67 crores during the relevant period. In HDFC Bank Ltd. v. DCIT [2016] 67 taxmann.com 42 (Bom), the Hon'ble Bombay High Court referring to the decision in CIT v. HDFC Bank Ltd. [2014] 366 ITR 505 (Bom) and CIT v. Reliance Utilities & Power Ltd. [2009] 313 ITR 340 (Bom) held as under :*
> >
> > > *"15. It is clear that for the first time in the case of HDFC Bank Ltd. (supra) that this Court took a view*

that the presumption which has been laid down in Reliance Utilities & Power Ltd. (supra) with regard to investment in tax free securities coming out of assessee's own funds in case the same are in excess of the investments made in the securities (notwithstanding the fact that the assessee concerned may also have taken some funds on interest) applies, when applying Section 14A of the Act. Thus, the decision of this Court in HDFC Bank Ltd. (supra) for the first time on 23rd July, 2014 has settled the issue by holding that the test of presumption as held by this Court in Reliance Utilities and Power Ltd. (supra) while considering Section 36(1)(iii) of the Act would apply while considering the application of Section 14A of the Act. The aforesaid decision of this Court in HDFC Bank Ltd. (supra) on the above issue has also been accepted by the Revenue in as much as even though they have filed an appeal to the Supreme Court against that order on the other issue therein viz. broken period interest, no appeal has been preferred by the Revenue on the issue of invoking the principles laid down in Reliance Utilities & Power Ltd. (supra) in its application to Section 14A of the Act."

23. Since the facts before us are materially same, we therefore respectfully following the decision of Coordinate Bench delete the disallowance of Rs.9,92,34,000/-u/s 14A towards interest. Accordingly, the ground no.5 raised by the assessee is allowed."

26. The facts and circumstances are stated to be identical. Therefore, consistent with the earlier orders of the co-ordinate bench of this Tribunal, we allow the ground raised by the assessee.

27. Ground 7 pertains to treatment of extinguishment of sales-tax deferred loan liability as revenue receipt (Rs.50,17,98,460/-).

28. This ground also covered by the decision of the co-ordinate bench for assessment year 2000-01. The co-ordinate bench, after deliberating upon the issue in detail has come to the following conclusions:-

> *"37. After hearing both the parties and perusing the material available on record, the undisputed facts coming out are that the sales tax was collected by the assessee from the customers under Sales Tax deferral Incentive Scheme. As per the said scheme the payment of said sale tax was to be deferred for specified number of years subject to the fulfillment of certain special conditions as specified in the scheme. Such deferment of sale tax was to be treated as loan to the assessee by sales tax department to be paid after a specified number of years. During the year the assessee deferred the sales tax amounting to Rs. 71. crores which the assessee has assigned to another company at a net present value of Rs. 19.73 crores. In other words, the assessee has paid an amount of Rs. 19.73 crores in assignment in consideration for taking over the said obligation for repaying for Rs. 71.34 crores on future date to another company. The differential amount of Rs.51.61 Crores was credited to the P&L account, however while computing the income the assessee, the same was reduced in the computation of income by treating the same as capital receipt not chargeable to tax. According to the A.O., the said liability has ceased to exist in the books of the assessee as the same was taken over by another entity. In coming to this conclusion, the A.O relied on the decision of CIT vs. Sunderam Iyengar & Sons Ltd. (supra). wherein the assessee used to receive deposits in the course of its trading transaction on sale of Coca Cola in glass bottles of, etc. which are refundable on return of the said bottles. wherein the order of the Supreme Court has held that liability needs to be treated as income of the assessee u/s 41(1) of the Act. The ld. CIT(A) in the appellate proceeding affirmed the order of AO by holding that the said takeover of deferred sales tax liability to be paid in future is taxable u/s 28(iv) of the Act, by relying on the decision of CIT(A) Vs. Sundaram Iyangar & Sons Ltd., (supra) and also the decision of the Jurisdiction High Court in the case of Solid Container Ltd., Vs. DCIT (supra). In this case, we note that the A.O made addition u/s 41(1) of the Act, while in the appellate*

proceeding, ld. CIT(A) upheld the said addition u/s 28(iv) of the Act and not u/s 41(1) of the Act. The arguments of the Ld. counsel before us are that the said assignment of sales tax liability by the assessee is neither income u/s 41(1) of the Act nor benefit or perqs 28(iv) of the Act. In defense of his arguments the Ld. CIT(A) relied on the decision of Cable Corporation of India Ltd., Vs. DCIT(supra). In the present case, we find that provisions of Sec. 41(1) of the Act are not applicable as the necessary conditions as envisaged in the said section are not fulfilled namely the assessee has (i) not obtained any amount in respect of loss or expenditure; (ii) nor any benefit in respect of trading liability by way of remission or cessation. The first 36 condition of obtaining an amount is obviously not applicable as the assessee has paid an amount for discharge of a future liability while the issue as to the applicability of the second condition of obtaining a 'benefit' is now settled by the decision of the Apex Court in the case of CIT vs. Balkrishna Industries Ltd. 88 taxmann.com 273 (SC) wherein the Supreme Court has affirmed the decision of the Hon'ble Bombay High Court in the case of CIT vs. Sulzer India Ltd., 369 ITR 717(Bom) holding that when an assessee discharges the present value of future obligation, it would not be a case of any 'benefit' accruing to the assessee, as the assessee has discharged the full liability at the present value. Therefore, as there is no 'benefit' obtained by or accruing to the assessee, the question of applicability of section 41(1) of the Act does not arise. In both the Supreme Court and the High Court decisions were concerned with pre-payment of salestax liability at net present value to the Sales-tax Department, but the same principle would equally be applicable to the present case of assignment of the sales-tax deferred loan liability at the net present value.We find merits in the case of the assessee that the provisions of section 41(1) of the Act are not applicable, as there is no remission or cessation of 37 the liability. The remission or cessation of liability contemplates a discharge or partial discharge of a liability coupled with no obligation to discharge the balance liability and thus, it would not cover the facts of the present case, where the Appellant has assigned its obligation, although at the present value. The liability has been discharged by the Appellant by making an immediate payment at the present value and therefore it cannot be said that there is a remission or cessation of the liability.Further there is no remission or cessation of

the liability for the reason that the assignment of the liability is to a third party whereas qua the Sales-Tax Department the assessee continues to be liable to pay the said amount and thus as for as the Sales-Tax Department is concerned, there is no remission or cessation of a liability. The case of the assessee finds support from the decision of the Apex Court in CIT vs. S.I. Group India Ltd., (Supra) wherein the Apex Court held that when the Sales-tax Department has not accepted the pre-payment, it cannot be a case of cessation or remission of a liability. In the present case also, the assignment has not been accepted by the Sales-tax Department and, therefore, there is no question of cessation or remission of the liability.Besides the 38 deemed loan from the Sales-tax Department is not a loss or expenditure or a trading liability and, therefore, the provision of section 41(1) of the Act is not applicable. The sales-tax originally collected by the assessee was an expenditure which has been allowed to the assessee by treating it as a deemed loan. Once the said amount has been treated as a loan, it loses its characteristic of sale-tax liability. Such deemed loan is not a loss or expenditure or a trading liability and, hence, does not come within the ambit of section 41(1) of the Act. 38. Similarly the difference of Rs. 51.61 Crores arising out of assignment of sales tax liability of Rs.71.34 Crores to be paid in future date at its present value of Rs. 19.73 Crores has not resulted in any benefit or perquisites and thus not covered by the provisions of section 28(iv) of the Act as section 28(iv) proposes to tax 'benefit' or 'perquisite' arising from business of the assessee. In the present case the pre-payment of a deferred sales-tax loan liability at the net present value, does not result in any 'benefit' to the assessee. Besides the case of the assessee is squarely covered by the decision of the coordinate bench in Cable Corporation of India Ltd. 39 vs. Deputy Commissioner of Income-tax(supra) wherein on identical facts, the Tribunal has concluded that the assignment of such liability, at the net present value, cannot be charged to tax either under section 41(1) of the Act or under section 28(iv) of the Act.The provisions of section 28(iv) of the Act are not applicable to the facts of the present case as monetary benefit is not covered by the said section. Section 28(iv) of the Act uses the phrase - 'whether convertible into money or not', which would mean that cash benefits are not covered by the said section. This issue is covered in favour of the assessee by the decision of the

Apex Court in the case of CIT vs. Mahindra & Mahindra Ltd.93 taxmann.com 32(SC) wherein the Apex Court has held that waiver of loan is a monetary benefit and, hence, it does not come within the ambit of section 28(iv) of the Act. Therefore, the amount of Rs.51,60,87,976/- is to be regarded as capital receipt which is not chargeable to tax. 39. We have also perused the decision relied upon by the revenue to support the orders of the authorities below but find that the same are distinguishable on facts or reversed or not a good law 40 in view of the subsequent decisions.In the case of CIT vs. Sunderam Iyengar & Sons Ltd. (supra), the assessee used to receive deposits in the course of its trading transaction on sale of Coca Cola in glass bottles of, etc. which are refundable on return of the said bottles. During the relevant year, such deposits outstanding for a number of years were transferred by the assessee to the Profit & Loss Account as no longer payable to the said customers. On these facts, the Apex Court held that the amount was received by the assessee in the course of trading transaction and the same is chargeable to tax as trading receipts when the said amount becomes the assessee's own money. The Apex Court further held that because of the trading transaction, the assessee has become richer to the extent of the amount transferred to Profit & Loss Account and, hence, the amount so transferred is to be treated as income of the assessee. In the present facts are distinguishable and, therefore, the decision of the Apex Court is not applicable as the Supreme Court was neither concerned with section 28(iv) or section 41(1) of the Act, but with the issue of whether the amount received by an assessee in the course of a trading transaction, should be treated as income of the assessee or not. In the present case, the 41 allegation of the Assessing Officer and the Commissioner of Income-tax (Appeals) is that the provision of section 41(1) or section 28(iv) of the Act is applicable which issue is not there before the Hon'ble Supreme Court. Further, the Supreme Court has held that the amount is treated as income of the assessee as the assessee had become richer by the amount which is transferred to the Profit & Loss Account. In the present case, the assessee has discharged its complete obligation by paying the net present value of the obligation and, therefore, there is no question of the assessee either becoming richer or poorer on such transaction.The Apex Court in the cases of Balkrishna Industries Ltd. (supra) and Mahindra &

Mahindra Ltd. (supra) has specifically dealt with the provisions of section 41(1) and section 28(iv) of the Act and, therefore, the said decisions are applicable to the case of the Appellant. So far as the decision in Solid Containers Ltd. v DCIT (supra) is concerned, the counsel of the assessee submitted that the finding in this decision by the Bombay High Court is contrary to the decision of the Apex Court in Mahindra & Mahindra Ltd. (supra) and, therefore, the said decision is no longer good law. The finding by the High Court that the provision of section 28(iv) of the 42 Act is applicable to a waiver of loan is contrary to the decision of Mahindra & Mahindra Ltd. (supra) wherein the Apex Court has held that waiver of loan being a monetary benefit is not covered under section 28(iv) of the Act. Even for applicability of section 41(1) of the Act, the Apex Court has held that waiver of loan amounts to cessation of a liability other than a trading liability, for which no deduction has been claimed in earlier years and, therefore, does not come within the ambit of section 41(1) of the Act. Thus the decision of the Bombay High Court in Solid Containers Ltd.(supra) which had taken a contrary view, is no longer good law. Further the decision of Solid Containers Ltd.(supra) is further not applicable to the present case as in the present case, the Appellant has discharged the full liability at net present value which cannot be said to be a case of either waiver or cessation of the liability, which was the fact before the High Court. The decision in the case of CIT vs. Ramaniyam Homes Pvt. Ltd.,(supra) relied upon by the ld DR has been reversed by the Apex Court by the common judgment dated 24th April 2018 in Mahindra & Mahindra Ltd.(supra).Therefore, the reliance on the decision of the Madras High Court by the Revenue is wholly misplaced and completely 43 unjustified. The facts in the case of CIT vs. Aries Advertising Pvt. Ltd.(supra) are altogether different vis a vis the facts in the present case as in the case before the High Court, there was actual write off credit balance (trading liabilities) and, accordingly, the High Court held that the assessee therein had received a benefit in respect of a trading liability which came within the ambit of section 41(1) of the Act whereas in the present case, there is no question of any benefit being received by the Appellant as the appellant has discharged the net present value of a future liability not can the present case be said to be of remission or cession of the liability. Therefore, this decision is clearly inapplicable to the facts of the present case. In the

case of CIT vs. ICC India Pvt. Ltd. (supra), the Hon'ble High Court has held that share application amount was a capital receipt and was never received towards trading purpose and, therefore, the question of applicability of section 41(1) does not arise. The High Court has, therefore, dismissed the appeal of the Revenue. Although the High Court has noted that if the loan was received for trading purposes, the provision of section 41(1) of the Act may be applicable; however, as the fact in the present case was not a case of receipt of loan towards 44 the trading purposes, the High Court has not considered whether other conditions of section 41(1) are fulfilled or not. In the case of Indian Seamless Steels & Alloys Ltd. vs. ITO (supra). The Tribunal in paragraph 16 of the order has noted that the assessee therein has transferred its deferral sales-tax loan to third party for a consideration which is higher than the amount payable to the Sales-tax Deptt. The Tribunal has further noted that the assessee therein has sold its 'sales-tax incentive' and what it has received is not sales-tax benefit but sale consideration on transfer of its entitlement and such sale consideration is a benefit directly arising from business and is, therefore, revenue receipt. In the present case of the Appellant, the Appellant has, in fact, paid a consideration to the other Company for taking over its obligation, which amount is lesser than the amount payable to the Sales-tax Department. The facts in this case are different is further clear from the reliance by the Tribunal on decision of Sun & Sand Hotels Pvt. Ltd. vs. DCIT (ITA No.7125/MUM/2007) wherein also it was a case of transfer of sales-tax entitlement for a consideration which was held as revenue receipt. Therefore, the Appellant submits that the said decision is clearly inapplicable on the facts of the present case. Even otherwise, the Appellant submits that the decision of the Tribunal being contrary to the decisions in Balkrishna Industries Ltd. (supra) and Mahindra & Mahindra Ltd. (supra), is not applicable to the Appellant. In view of these facts and decisions as discussed above we are inclined to set aside the order of CIT(A) on this issue by holding that Rs. 51.61 Crores is a capital in nature. The AO is directed accordingly. The ground of the assessee is allowed."

29. The facts and circumstances are stated to be identical. Therefore, consistent with the earlier orders of the co-ordinate bench of this Tribunal, we allow the ground raised by the assessee.

30. Ground 8 pertains to deduction under section 80HHC. This ground has sub grounds (a) to (e)

31. This ground alongwith its sub grounds (a) to (e) is covered by the decision of the co-ordinate bench for assessment year 2000-01. The co-ordinate bench vide paragraphs 45 to 49 of order dated 29/10/2020 in ITA No. 3076/Mum/2012 has restored the issue to the file of the assessing officer. Consistent with the earlier decision of the Tribunal for assessment year 2000-01, we restore all these issues to the file of the assessing officer and direct him to follow the direction as has been issued by the co-ordinate for the assessment year 2000-01.

32. Ground 9 pertains to re-computation of deduction under section 80IA by applying lower market value to 'power' generated by Captive power plant while determining profit of Captive Power Plant.

33. We find that this issue has been deliberated and decided by the co-ordinate bench of this Tribunal for A.Y. 2000-01 in ITA No.3076/Mum/2012 and the Tribunal, vide order dated 29/10/2020 dealt with the issue as under:-

> *"45. The facts are that the Assessing Officer has held that deduction under section 801A o! the Act for the captive power plant has to be allowed by taking the rate at which the Gujarat Electricity Board purchases the electricity from the consumers which was at Rs.2.95 per*

unit as opposed to the rate at which the Gujarat Electricity Board supplies electricity to the consumers which was at the rate of Rs. 3.35, on the basis of which the Appellant had claimed the deduction.

46. The Commissioner of Income-tax (Appeals) confirmed the assessment order by holding that correct rate to be applied for computing deduction under section 801A of the Act ***is*** *the rate at which the Electricity Board purchases the. electricity and not the rate at which the Electricity Board sells the electricity.*

47. The Appellant submits that the issue is now settled by the decision of the jurisdictional High Court in the case of CIT vs. Reliance Industries Ltd, 102 taxmann.com 372 in favour of the Appellant. In the said case, on identical facts, Court has held that deduction under section 80IA of the Act is to be computed at the rate at which the electricity is supplied to the consumers and not the rate at which the board purchases the electricity. The Appellant further submits that similar view has been taken by the Chhattisgarh High Court in the cases of Godavari Poower & lspat Ltd. 42 taxmann.com 551 and the madras High Court in Tamil Nadu Petrol Products Ltd., 13 taxmann.com 139. Therefore, the Appellant submits that the decision of the lower authority is liable to be reversed on this issue. The Appellant submits that the Department has relied on the decision in the case of CIT vs. ITC Ltd., 286 ITR 400 (Cal) to hold that the working done by the Assessing Officer is the correct working for computing deduction under section 801A of the Act. The Appellant submits that the decision of the Calcutta High Court has been considered by the jurisdictional High Court in the case of Reliance Industries Ltd. (supra) and has not been followed by the jurisdictional High Court and, therefore, in the present case, the Tribunal to follow a decision of the jurisdictional High Court and not another High Court. Hence, the Appellant submits decision of the Calcutta High Court is not applicable when the view taken by the jurisdictional High Court is contrary to the view taken by the Calcutta High Court. The Id DR on the other hand relied heavily on the orders of authorities below.

48. After hearing the rival parties and perusing the records before us including the decisions referred to by both the sides, we observe that the issue is covered by the jurisdictional high court decision in the case of C1T vs. Reliance Industries Ltd., (supra) in favour of the assessee wherein on identical facts, the High Court has held that deduction under section 801A of the Act is to be computed at the rate at which the electricity is supplied to the consumers and not the rate at which the board purchases the electricity. Similar view has been taken by the Chhattisgarh High Court in the cases of Godavari Power & Ispat Ltd.,(supra) and the madras High

Court in Tamil Nadu Petrol Products Ltd.(supra). The revenue relied on the decision of Calcutta High Court in the case of CIT vs. ITC Ltd., which is against the assessee but the same has been considered by the jurisdictional High Court in the case of Reliance Industries Ltd. (supra) and has not been followed. Since the issue is covered by the decision Bombay high Court, we are inclined to set aside the order of CIT(A) on by allowing the ground raised by the assessee. The AO is directed accordingly."

34. The facts and circumstances are stated to be identical. Therefore, consistent with the decision of the co-ordinate bench of this Tribunal, we allow the ground raised by the assessee. The Assessing Officer is directed to follow the jurisdictional High Court judgement in the case of Reliance Industries Ltd (supra).

35. Ground 10 of the assessee pertains to rejection of claim for deduction under section 80IA in respect of Captive Power Generating (DG) Units.

36. We have heard the parties on this issue. The Ld.AR submitted that the issue covered by the order of the Tribunal for A.Ys 1999-2000 & 2000-01. We find that the Tribunal in its order for A.Y. 2000-01 at paragraphs 49 to 52 has decided the issue in favour of the assessee. The findings of the co-ordinate bench are as under:-

"49. The issue raised in 9th ground of appeal is against the order of ld. CIT(A) confirming the rejection of claim of the 53 appellant for deduction u/s 80-IA in respect of its Captive power Generating (DG) units.

50. The facts in brief are that the assessee had set up Captive Power Generating (DG) Units at its cement plants in Gujarat, Andhra Pradesh and Madhya Pradesh. DG units constitute separate undertaking and the appellant claimed deduction u/s 80IA in respect of profits generated by these DG units. The AO relied on order by his predecessor and stated that the claim of assessee for

deduction u/s 80IA for Captive Power Generating (DG) units was not accepted. Thus following the order in previous year, it was held that profits in respect of DG units cannot be held as profits earned from an undertaking engaged in the business of generation of power and hence the assessee is not entitled to claim deduction in respect of the DG sets.

51. In the appellate proceedings, the ld. CIT(A) agreed with the findings of AO and concluded that there was no reason to deviate from the findings of AO. Also ld. CIT(A) relied on the order by his predecessor wherein he had rejected similar claim of the appellant in respect of Captive Power Generating (DG) unit for AY 1999-2000.

52. After hearing the counsel of the assessee and departmental representative of the revenue and perusing 54 the facts of the assessee case in the light of coordinate bench decision in AY 1999-00 in assessee's own case , we observe that the issue before us is completely covered by the said decision vide para 12.2 in favour of the assessee. We are ,therefore , inclined to set aside the order of CIT(A) on this issue by allowing the ground no.9. The AO is directed accordingly."

37. Consistent with the earlier decision of the co-ordinate bench, we allow ground 10 of the assessee.

38. Ground 11 pertains to disallowance under section 14A for the purpose of computing book profit under section 115JB.

39. Upon hearing the parties, we find that this issue is identical to the ground raised for A.Y. 2000-01, which has been dealt with by the co-ordinate bench of this Tribunal, as under:-

"53. The assessee has challenged vide ground no.10 the order of CIT(A) wherein the ld. CIT(A) has confirmed the adjustments/additions for the purpose of computing book profit u/s 115JA of the Act as made by the /AO on account of (i) Disallowance u/s 14A(ii) Reduction of deduction u/s 80IA relating to profits of power generation operation from captive power plants (iii) Disallowance u/s 80-IA relating to profits of power generation

operation through DG Sets and (iv)Disallowance of deduction of tax paid u/s 115-O on distributed profits. 54. The facts are that the assessee computed book profits u/s 115JA of the Act after considering relevant adjustments for profits derived by Captive Power Plants, profits derived by DG units, profits eligible for deduction u/s 80HHC. No adjustment was done for u/s 14A since there was no expenditure attributable to exempt income. The Assessing Officer disallowed a sum of Rs.9,92,34,000 /- under section 55 14A by treating the same as expenditure incurred for earning tax free income arrived at in a notional manner after assuming that the investment in tax free bonds and shares/units of mutual funds were made partly out of borrowed fund. The AO has also made adjustments for the same amount while calculating book profits u/s 115JA. The assessee, in terms of the provisions of Section 115JA of the Act and in particular Clause IV of the Explanation u/s 115JA, had reduced from its book profits an amount being the profits derived by an undertaking of the assessee from the business of generation and distribution of Power. In computing the book profits under section 115JA, the AO did not allow the deduction of profits derived from operation of power generation through Captive Power Generating (DG) units. Similarly in terms of the provisions of Section 115JA of the Act and in particular Clause IV of the Explanation u/s 115JA, the appellant had reduced from its book profits an amount being the profits derived by an undertaking of the assessee from the business of Power generation. The Power so generated from the captive power plant units was used captively in the Cement business of the appellant. In computing profits u/s 115JA, AO allowed the deduction of profits derived from generation of power from its Captive Power Plants after re-computing the profits by adopting lower market rate of power generate. This resulted in 56 reduction in the profits from power generation units. During the course of assessment proceedings, the appellant claimed before the Assessing Officer that the tax payable under section 115-O of the Act on distribution of dividend has to be reduced while computing the book profits. The Assessing Officer, however, did not discuss the aforesaid claim in the assessment order passed by him. 55. In the appellate proceedings ld CIT(A) dismissed the appeal of the assessee on these adjustments by the AO by observing and holding as under:-

"a) Disallowance u/s 14A : The appellant has relied on the arguments put forth in connection with the addition made u/s 14A of the Act. The action of the AO in ground no.17 has already been affirmed. As such, there is no scope for interference in the matter in view of specific provision for making such adjustment in section 115JA with regard to exempted income. The addition made is upheld.

b)On the profits derived from DG sets not allowed as reduction from book profit u/s 80-IA and reduction of deduction u/s 80 IA relating to profits of power generation operation from captive power plants, the ld. CIT(A) held that since appellant has relied on the arguments put forth in earlier ground on this matter and the action of AO has already been confirmed as such, there is no scope for interference in the matter in view of the provision for making such adjustment in section 115JA. Similar claim of appellant had not be entertained for AY 1999-2000 on identical facts of the case, following the same, the addition made was upheld.

c) On the Disallowance of Deduction of tax paid u/s 115-O ld. CIT(A) held that, the appellant itself added back the said amount of tax payable under section 115-O of the Act on distribution of dividend to the book profit. It neither in the original or any revised return changed its own stand. In such a situation, in view of the decision of Hon'ble Apex Court 57 in Goetze India Ltd. (supra), such claim cannot be entertained and the ground in this regard is, therefore, dismissed."

56. After hearing rival contentions and perusing the material on records, we find that the issue is covered by the decision of the coordinate bench decision in assessee's own case in AY 1999-00. The issue of adjustments made under section 14A of the Act will not survive as we have deleted the addition under section 14A in our decision in ground no. 7 (supra). Moreover the issue is also covered by the decision of the coordinate bench in AY 19999-00 vide para 12.1. Similarly the issue of profits derived from DG sets not allowed as reduction from book profit u/s 80-IA is covered in favour of the assessee by the same decision of the coordinate bench in AY 1999-00 vide para no. 12.2. Therefore the adjustments on account of disallowance under section 14A and profits derived from DG sets not

> *allowed as reduction from book profit u/s 80-IA are allowed in favor of the assessee. The third adjustment on account of disallowance of Deduction of tax paid u/s 115-O while computing book profit is covered against the assessee by the order of the coordinate bench for AY 1999-00 vide para 12.3. Accordingly the issue is decided against the assessee. The ground is partly allowed."*

40. Consistent with the earlier decision of this Tribunal, we partly allow the ground raised by the assessee. The Assessing Officer is directed to follow the decision of this Tribunal for Assessment Year 2000-01.

41. That takes us to the additional grounds raised by the assessee.

42. The first additional ground raised by the assessee pertains to deduction 80HHC under section 115JA need to be computed on the basis of profit as per P&L instead of business income computed as per normal provisions of the Act.

43. We find that this issue also stands decided by the Tribunal for the A.Y. 2000-01, in the following manner:-

> *"60. After hearing both the parties and carefully examining the records before us, we find that the issue is arising out of the records before the authorities below and does not require any verification of facts or details. We are therefore admitting the same and restoring to the file of the AO to examine and decide as per facts and law. The additional ground is allowed for statistical purpose."*

44. Consistent with the earlier order of the Tribunal, we restore this issue to the file of the Assessing Officer to examine and decide as per facts and law. This additional ground is treated as allowed.

45. The second additional ground raised by the assessee pertains to reduction in depreciation of Rs.8,27,76,558/- arising on account of AO's action to disregard transfer of Bangalore undertaking as 'slump sale' by the AO in AY 1998-99.

46. Upon hearing the parties we find that this additional ground is also covered by the earlier decision of the co-ordinate bench of this Tribunal. The co-ordinate bench, held as under :

> *"65. After hearing the parties and perusing the decision of the tribunal in AY 1998-99 has granted relief to the assessee by treating the transfer of Bangalore undertaking as a 'slump sale'. Hence, the consequential reduction in Depreciation by the Department in all subsequent years needs to be eliminated. We are therefore directing the AO accept the depreciation as calculated by the assessee. The additional ground is allowed."*

47. Consistent with the earlier decision of this Tribunal, we allow the additional ground 2 raised by the assessee and direct the assessing officer to accept the depreciation as calculated by the assessee.

ITA No.6878/Mum/2012

48. The Revenue has raised four effective grounds of appeal, in this appeal, all of which are squarely covered by the earlier decisions of the Tribunal from assessment years (1994-95 to 1997-98;1994-95 to 1999-2000; 1994-95 to 2000-01)

49. The first ground in this appeal pertains to disallowance of expenditure relating to club membership. We find that this issue is

squarely covered by the decision of the co-ordinate bench in assessee's own case for A.Y. 1997-98 in ITA Nos.2891/M/2001 & 4299/M/2001 and the Tribunal vide order dated 08/10/2013 held as under:-

> *"Ground no.1 relates to the club* membership expenses at Rs.69,70,827/-. This issue has been considered by the Assessing Officer at para 8 on page 5 of his order. The CrT(A) has considered this grievance of the assessee at para 5 on page 3 of order. Similar issue was considered by the Tribunal in assessee's own case in ITA No.2863/Mum/2000 at para 36 & 37 on page 12 and 13 of its order, wherein the Tribunal has followed its earlier decision in the assessee's own case in FTA Nos. 4265 & 4892/Mum/98. As no distinguishing facts have been brought on record before us, respectfully following the decision of the Tribunal in the assessee's own case/ we do any justifiable reason to interfere with the findings of the dT(A). Ground is accordingly dismissed."*

Consistent with the above order of the co-ordinate bench, we dismiss the ground raised by the Revenue.

50. Ground 2 pertains to addition on account of value of excise duty not to be included while working out value of goods manufactured.

51. This ground is covered by the earlier order of the co-ordinate bench for assessment year 1997-98 in ITA No.2891/Mum/2001 & 4299/M/2001 vide order dated 18/10/2013. The Tribunal, while dismissing the ground of the Revenue, has held as under:-

> *"11. Ground no.2 relates to the deletion of the addition made on account of unutilized MODVAT credit. TTiis issue has been discussed by the Assessing Officer at para 10 page 6 of his order and the same has been considered by the CTT(A) at para 6 on page 3 of his order. Similar issue has been decided by the Tribunal in favour of the assessee in its own case in ITA No.2863/Murn/2000 at para 41 page 14 of its order, wherein the Tribunal has followed its own order in the case of the assessee for A.Y. 1994-95. Facts and issues being identical, following the decision of the Tribunal in assessee's own case, we confirm the findings of the GT(A). Ground 2 is accordingly dismissed*."

Consistent with the earlier orders of the co-ordinate bench of this Tribunal, we dismiss the ground 2 raised by the Revenue.

52. Ground 3 pertaining to expenditure relating to power lines is also covered in favour of the assessee by the Tribunal of the Tribunal for the assessment year 1997-98 in ITA No.2891/Mum/2001 & 4299/M/2001 vide order dated 18/10/2013. The Tribunal, while dismissing the ground of the Revenue, has held as under:-

> *"19. Ground no.10 with its sub ground relates to the deletion of the addition of Rs.12,27,07,980/- on account of contribution for laying power line at Kovaya and Tadpatri Cement Plants. This issue has been discussed by the Assessing Officer at para 24 on page 19 of his order. The CTT(A) deleted the addition vide para 21 on page 14 of his order. Similar findings of the CIT(A) was confirmed by the Tribunal in ITA.tJo.2863/Mum/2000 in assessee's own case at para 49 to 51 on page 16 of its order, wherein the Tribunal has followed its earlier decisions in ITA No.4265 4892/Mum/98. Facts and circumstances being identical, respectfully following the decision of the Tribunal in the assessee's own case, ground no.10 with its sub ground is dismissed."*

53. Consistent with the above order of the Tribunal, we dismiss the ground raised by the Revenue. Ground 3 fails.

54. Ground 4 in Revenue's appeal pertains to expenses on setting up of new cement plants amounting to Rs.2,47,46,113/-.

55. After hearing the parties, we find that the issue has already been decided by the Tribunal in assessment year 2000-01 in favour of the assessee by observing as under:-

> *"71. After perusing the records before us and hearing the rival contentions , we find that issue is settled in favour of the assessee by the decisions of the coordinate benches in assessee own case*

right from AY 1994-95 to 1999-00 which were upheld by the Hon'ble High Court. SLP filed by the Revenue on this issue were also dismissed by the Hon'ble Supreme Court for the AY 1997- 98, AY 1996-97 and AY 1995-96 order date 14-08-2018 a copy of filed at Page no. 198 and 199 of case law paper 64 book. In view of these facts, we are inclined to dismiss the ground no. 2 of the revenue appeal."

56. Consistent with the earlier order of the Tribunal, we dismiss ground 4 of the Revenue.

ITA No.2117/Mum/2013 - A.Y. 2002-03 (Assessee's appeal)

57. The first ground in this appeal is identical to ground 1 of A.Y. 2001-02. Therefore, for the reasons mentioned therein shall apply mutatis mutandis here. Ground 1 of the assessee fails.

58. Ground 2 pertaining to contribution to Utmal Employees Welfare Fund is covered in favour of the assessee by the decision of the co-ordinate bench of this Tribunal for assessment year 2000-01. Facts and circumstances stated to be identical in this year also. Further, this issue is identical to ground 2 of appeal for A.Y. 2001-02,which we have already decided elsewhere in this order. Therefore, the reasons mentioned therein shall apply mutatis mutandis here. Ground 2 of the assessee succeeds.

59. Ground 3 pertains to disallowance of expenditure on computer software IDEAS Solutions Package, Back up Management, LOTUS Notes, Unicenter TNG, PRO Engineering, CAADS 5.1 and CATI V5 treating it to be capital in nature. This ground is akin to ground 5 of assessee's appeal for A.Y. 2001-02 which we have decided in favour of the assessee by following

the co-ordinate bench decision for AY 2000-01. Therefore, consistent with the earlier decision of this Tribunal, we allow ground 3 of the assessee.

60. Ground 4 pertains to Reduction in depreciation claim of Rs.6,51,46,084/- arising on account of refusal to treat the Transfer of Bangalore undertaking as slump sale by the AO.

61. After hearing the parties, we find that this issue is akin to additional ground 2 of the assessee raised for A.Y. 2001-02, which we have decided in favour of the assessee. Consistent with the same, we direct the assessing officer to accept the depreciation as calculated by the assessee. This ground succeeds.

62. Ground 5 pertains to disallowance under section 14A of Rs.9,37,00,000/- solely on account of interest. This is akin to ground 6 of assessee's appeal for A.Y.2001-02, which we have already allowed. Therefore, for the reasons stated therein, we allow this ground of the assessee.

63. Ground 6 pertains to treatment of extinguishment of sales tax deferred loan liability as revenue receipt (Rs.40,07,32,147/-). This ground is akin to ground 7 of appeal for A.Y. 2001-02.

64. We have already taken a decision in favour of the assessee against this ground for A.Y. 2001-02. Therefore, for the reasons appended therein, we allow this ground raised by the assessee.

65. Ground 7 alongwith its sub grounds (a) to (c) pertains to deduction under section 80HHC. This ground is similar to ground 8 coupled with its sub grounds (a) to (c).

66. We have already taken a decision on these grounds for A.Y. 2001-02. Therefore, for the reasons appended therein, we restore this ground to the file of the assessing officer. The assessing officer is directed to follow the direction issued by us for A.Y. 2001-02. This ground is allowed for statistical purpose.

67. Ground 9 pertain to re-computation of deduction under section 80IA by applying lower market value to 'power' generated by Captive power plant while determining profit of Captive Power Plant. This ground is akin to ground 9 of assessee's appeal for A.Y. 2001-02, which we have decided in favour of the assesse. Therefore, consistent with the same, we allow ground 9 of the assessee for A.Y. 2002-03 also.

68. Ground 10 pertains to rejection of claim for deduction under section 80IA in respect of Captive Power Generating (DG) units. This ground is akin to ground 10 in assessee's appeal for A.Y. 2001-02, which we have already decided in favour of the assessee by following the decision of the co-ordinate bench for A.Y. 2000-01. Therefore, for the reasons stated therein, we allow this ground of the assessee.

69. Ground 11 pertains to disallowance under section 14A for the purpose of computing book profit under section 115JB. This ground is identical to ground 11 of assessee's appeal for A.Y. 2001-02. Therefore, consistent with the earlier decision of this Tribunal, we partly allow the ground raised by the assessee. The Assessing Officer is directed to follow the decision of this Tribunal for Assessment Year 2000-01.

70 That takes us to additional grounds raised by the assessee.

71. The first additional ground pertains to deduction under section 80HHC under section 115JA needs to be computed on the basis of profit as per P&L instead of business income computed as per normal provisions of the Act. This additional ground is identical to first additional ground raised by the assessee for A.Y. 2001-02 and we have already restored the issue to the file of the Assessing Officer to decide the issue in line with the directions issued by the co-ordinate bench of this Tribunal for A.Y. 2000-01. Consistent with the same, we restore the issue to the file of the Assessing Officer to decide the issue in accordance with facts and law.

72. The second additional ground raised by the assessee pertains to deduction under section 80HHE under section 115JA needs to be computed on the basis of profit as per P&L instead of business income computed as per normal provisions of the Act.

73. The Ld.DR before us relied upon the orders of the lower authorities whereas the Ld. Senior Counsel for the assessee relied upon the judgement of the Hon'ble Supreme Court in the cases Ajanta Pharma vs CIT 327 ITR 305 (SC) and CIT vs Bhari Information Technology Systems Pvt Ltd 340 ITR 593 (SC) for the proposition that section 115JA is a self contained code and applied notwithstanding any provision in the Act. Section 115JB is the successor section to section 115JA. Section115JB continues to remain a self contained code. And that if the dichotomy between "eligibility" of profits and "deductibility" of profits was not kept in mind section 115JB would cease to be a self contained code.

74. We find that the Hon'ble Supreme Court in the case of Ajanta Pharma vs CIT (supra) held that the Appellate Tribunal was right in holding that 100 per cent of the export profits earned by the assessee as computed under section 80HHC(3) was eligible for reduction under clause (iv) of the Explanation to section 115JB. We also find that the above ratio laid down by the Hon'ble Apex Court squarely applies to the case on hand. Therefore, we allow the additional ground 2 raised by the assessee.

ITA No. 2284/Mum/2013 (Revenue's Appeal AY 2002-03)

75. Ground 1 in this appeal is general in nature and does not require adjudication, therefore it is dismissed.

76. Ground 2 in this appeal pertains to expenditure relating to club membership. Identical ground has been decided by us in assessment year 2001-02 which has been dismissed. Therefore, for the reasons stated therein, ground 2 of the Revenue is dismissed.

77. Ground 3 in revenue's appeal pertains to amount provided in valuing work-in-progress. This issue is identical to ground decided by the Tribunal in ITA 4265/M/98 & 4892/M/2000 for A.Y. 1994-95 wherein the Tribunal held as under:-

> *"54. This ground raised by the assessee is directed against the disallowance of amount provided in valuing work-in-progress of construction contracts- From the perusal of records, we find that similar issue raised by 'the Revenue in its appeal in ITA No. 1806/Mum/199S relating to Assessment Year 1990-91 in assessee's*

own case, wherein the Tribunal following the decisions of the Tribunal .in assessee's own case relating to Assessment Years 1988-89 & 1989-90, observed that the Tribunal has made specific finding in the earlier years that the valuation of work-in-progress relating to incomplete contracts has been made by the assessee company in a consistent manner following the accepted principles of accounting and decided the issue in favour of the assessee. Respectfully following the decision of the co-ordinate bench in assesse's own case, we set aside the impugned orders of the authorities below and allow the ground of appeal raised by the assessee."

78. Consistent with the earlier order of the co-ordinate bench of this Tribunal, we dismiss the ground taken by the Revenue.

79. Ground 4 pertains to expenses on setting up a new cement plant (Rs.2,73,04,166/-). Upon hearing the parties, we find that identical issue crept in for A.Y. 1994-95 and the co-ordinate bench of this Tribunal, vide order in ITA 4265/M/98 & 4892/M/2000 decided the issue in favour of the assessee. For clarity we reproduce the finding of the Tribunal below:-

"16. As regards ground no.9, it is observed that the issue raised herein relating to assessee's claim for deduction on account of expenditure of Rs. 17,04 ,98,906/- incurred on setting up of new cement plan is similar to the one involved in earlier years which has already been decided by the Tribunal in assessee's favour vide its order dated 31.10.2007 (supra) by recording the following observations in para 19.4.

"9.4 The fourth ground is against the order of the CIT(A)allowing the expenditure of Rs.2, 05,58, 677/- made on account of expenses incurred on setting up of new cement plant. The assessee itself has capitalized various items of capital expenditure incurred by it in setting up the new cement plant. The expenditure under dispute related to various expense of revenue nature like establishment charges, overheads, etc. The assessee is already in the business of manufacturing cement. Therefore, this running and revenue expenses incurred by the assessee in the -course of carrying on of the business need to be treated as revenue expenses, and therefore, the CIT(A) is justified

in accepting the claim of the assessee and deleting the disallowance made by the Assessing Authority. For the assessment year 1982-83, the very same issue was considered by the Tribunal as the issue was decided in favour of the assessee. In view of the matter, the ground is rejected."

17. The claim of the assessee as made before the authorities below was that the very nature of expenditure in question incurred during the year under consideration on setting up of new cement plan was revenue and the same was accepted by the learned C1T(A) after necessary verification. At the time of hearing before us, the learned D.R. has not been able to rebut or controvert this factual position. We therefore, find no justifiable reason to interfere with the impugned order of the learned CIT(A) on this issue and respectfully following the order of the Tribunal dated 31."'l0.2007 (supra) in assessee's own case giving relief on the similar issue, we uphold the same. Ground no.9 is accordingly dismissed."

80. Consistent with the earlier decision of the co-ordinate bench of this Tribunal, we dismiss the ground raised by the Revenue.

81. In the result, appeals filed by the assessee are partly allowed and the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 29th April, 2022.

Sd/-	sd/-
(AMARJIT SINGH)	(S.RIFAUR RAHMAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 29th April, 2022
Pavanan

<u>प्रतिलिपि अग्रेषित</u>Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai