

**THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI K BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President),
and Sandeep S Karhail (Judicial Member)]**

ITA No. 5883/Mum/2012
Assessment year: 2005-06

Ambuja Cement LimitedAppellant
(formerly Known as Gujarat Ambuja Cements Ltd.)
Elegant Business Park, MIDC Cross Road B, Andheri (E)
Mumbai 400 059 [PAN: AAACG0569P]

Vs.

**Additional Commissioner of Income Tax
Large Tax Payer Unit, Mumbai**Respondent

ITA No. 5927/Mum/2012
Assessment year: 2005-06

**Assistant Commissioner of Income Tax
Large Tax Payer Unit, Mumbai**Appellant

Vs.

Ambuja Cement LimitedRespondent
(formerly Known as Gujarat Ambuja Cements Ltd.)
Elegant Business Park, MIDC, Cross Road B, Andheri (E)
Mumbai 400 059 Mumbai 400 021 [PAN: AAACG0569P]

Appearances by:

Yogesh Thar along with **Chitanya D. Joshi**, for the appellant
Jasdeep Singh and Jagdish Jangid, for the respondent

Date of concluding the hearing : 12/10/2022
Date of pronouncing the order : 31/10/2022

O R D E R

Per Pramod Kumar VP

1. These cross appeals are directed against the order dated 31st July 2012 passed by the learned CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2005-06.
2. We will first take up the appeal filed by the assessee.
3. In ground no. 1, the assessee has raised the following grievance:

That on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) [here-in-after referred to as Ld. CIT (Appeals)] was not justified and grossly erred in confirming the action of the A.O. in denying the claim of exclusion of Sales Tax Incentive availed in respect of units situated in the state of Himachal Pradesh and Rajasthan aggregating to Rs. 39,36,21,956/-, being capital in nature, in computing total income under the normal provisions of the Act.

4. In a connected ground of appeal number 1 in revenue's appeal, which we will take up along with the above ground of appeal, the Assessing Officer has raised the following grievance:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing sales tax incentives received by the Maratha unit in Maharashtra, Ropar Unit in Punjab and Bhatinda Unit in Punjab, amounting to Rs. 13,05,71,276 (the correct figure, however, is Rs 130,57,12,796) as a capital Receipt.

5. The relevant material facts, so far as necessary for adjudication of these grievances, are as follows. The assessee before us is a company engaged in the business of manufacturing of cement and generation of electricity. The assessee has set up its plants in different parts of the country, and as the location of some of these plants was in backward areas, the assessee had received certain sales tax concessions from the respective State Governments. These concessions were in the nature of exemptions and remissions etc, and were granted under specific schemes announced, under the industrial policies, from time to time. During the relevant previous year, the assessee received amounts aggregating to Rs 169,93,34,752, but all these receipts were treated as tax exempt on account of being in the nature of capital receipts. When income tax return filed by the assessee was subjected to the scrutiny assessment proceedings, the Assessing Officer noticed that the assessee had a lodged a claim for exclusion of Rs 169.93 crores, being sales tax exemption/incentives received by it, as capital receipt, and hence not liable to tax. The Assessing Officer declined this claim, primarily on the basis of certain observations in the judgments in the cases of Tamilnadu Sugar Corporation Ltd Vs CIT [(2001) 251 ITR 843 (Mad)], CIT Vs Rajaram Maize Products [(2001) 251 ITR 427 (SC)], CIT Vs S Kumars Tyre Manufacturing Co [(2004) 266 ITR 325 (MP)], and CIT Vs Abhishek Industries Ltd [(2006) 286 ITR 1 (P&H)]. The entire amount of Rs 1169.93 crores was added to income of the assessee. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) took note of the fact that these amounts pertained to five different units under four schemes- namely Maharashtra's Dispersal of Industries Package Scheme of Incentives 1993 (Maratha Unit), Punjab's Industrial Incentives Code under the Industrial Policy, 1996 (Ropar and Bhatinda Units), Rajasthan's Sales Tax New Incentives Scheme for Industries, 1989 (Rabriyawas Unit), and Exemptions/ Concessions to Industries Excise & Taxation Department Notification No EXN C(9)2/9- dated 31-1-2-1994 (Himachal Unit). He discussed these schemes in quite a bit of detail- to the extent wordings of the preamble of the schemes are concerned, and concluded that while the amounts aggregating to Rs 130,57,12,796, in respect of Punjab and Maharashtra Schemes, are indeed capital receipts in nature, and exempt from tax as such, the amounts aggregating to Rs 39,36,21,956 are revenue in nature, and to that extent the Assessing Officer was justified in including the same in taxable income. None of the parties is satisfied. While the assessee is aggrieved of the amount of Rs 39,36,21,956 being included in his taxable income, the Assessing Officer is aggrieved of the learned CIT(A)'s granting relief of Rs 130,57,12,796. Both parties are in appeal before us.

6. We have heard the rival contentions, perused the material on record, and duly considered the facts of the case in the light of the applicable legal position.

7. We find that the learned CT(A) has, in his elaborate analysis, primarily followed the Special Bench decision in the case of **DCIT Vs Reliance Industries Ltd [(2004) 88 ITD SB 273 (Mum)]**. Upon analysis of this decision, he has noted that ‘for deciding the nature of subsidy, whether capital or revenue, what should be seen and examined is the purpose for which the subsidy has been given, and not the timing of the subsidy or the manner in which it has been given to the industry’, as is also held by Hon’ble Supreme Court in the case of **CIT Vs Ponnii Sugar and Chemicals Ltd [(2008) 306 ITR 392 (SC)]**. A large number of judicial precedents have been cited in this context. Learned CIT(A) has then held that so far as the object and purpose for which the subsidy is given, only the subsidy schemes of the Maharashtra and Punjab State specifically state that the subsidies in question are for achieving dispersal of industries outside Mumbai, to attract them to the underdeveloped and developing areas of the State, and to promote the growth of the industry in the State, in the preamble to the scheme. It is on this basis that he has held that so far as the subsidies given by the Maharashtra and Punjab States are concerned, these are required to be treated as capital in nature, whereas, the subsidies received from the State Governments of Himachal Pradesh and Rajasthan, in the absence of specific mention to the effect in the preambles of the subsidy schemes that these subsidies are required to be held to be revenue in nature. However, in our considered view, the approach of discerning the purpose of the subsidy, solely from the specific words used in the preamble of the scheme and without examining the overall scheme of the Act- which is admittedly to promote the growth of industry, is incorrect and superficial. The subsidies so received can be said to be revenue in nature unless these subsidies are for augmenting the profits of the assessee, and that is not even the case of the revenue. The CIT(A) is simply swayed by the wording of the preamble of the scheme- something clearly impermissible. These subsidy schemes are materially similar in nature, and there are, by now, a number of decisions of the coordinate benches, as also Hon’ble Courts above, dealing with these schemes. It is also important to bear in mind the fact that the subsidies received by the assessee are in the nature of sales tax subsidies, and dealing with sales tax subsidies, Hon’ble Gujarat High Court, in the case of **CIT Vs Nirma Ltd [(2017) 397 ITR 49 (Guj)]**, has observed as follows:

7. So far as second issued as to Whether the Appellate Tribunal was right in law and on facts in upholding the decision of the CIT (A) and in directing the Assessing Officer to consider the Sales-tax exemption benefit of Rs. 5,45,81,171/- as capital receipts is concerned, Mr.Mehta contended that in view of the decision of the Calcutta and Punjab High Court, the Tribunal has committed an error in reversing the view taken by CIT (Appeals) so far as Tax Appeal No.226 of 2010 is concerned, wherein the CIT (A), after discussing the evidence has held in favour of the department. In this regard, he has relied upon the decision of High Court of Bombay in the case of *CIT v. Reliance Industries Ltd.* [2010] 8 taxmann.com 218/[2011] 339 ITR 632, wherein it is held that object of subsidy being to set up new units in backward area is a capital receipt and another decision of High Court of Calcutta in the case of *CIT v. Chhindwara Fuels* [2001] 114 Taxman 707/[2000] 245 ITR 9, wherein it is held that subsidy in the form of refund of sales-tax received after commencement of production cannot be treated as capital receipt.

8. On the other hand, Mr. Soparkar, learned counsel appearing for the respondent contended that so far as Tax Appeal No.226 of 2010 is concerned, after discussing the

evidence on record, the Tribunal has followed earlier decision and discussed the issue in detail in para 54 and 55 of its decision, which reads as under:—

"54. Per contra, the learned D.R. Supported the orders passed by the Assessing Officer and the learned CIT (A). Referring to the judgment in *Sahney Steel and Press Works Limited v. CIT* 228 ITR 253 (SC), he submitted that the impugned sales tax exemption increased the profits of the assessee by eliminating the expenses which the assessee would have had to incur later and therefore the impugned receipts were in the revenue field. He also referred to Explanation (10) to Section 43 (1) of the Income Tax Act inserted in with effect from 01/04/99 to emphasise that the action of the assessee in not reducing the cost of assets by the amount of subsidy for working out the Written Down Value was indicative of the fact that the impugned receipts were not in the nature of capital receipts.

55. We have heard both the parties and considered their rival submissions. Perusal of the scheme extending the aforesaid incentives to "prestigious" units announced by Government of Gujarat on 26/07/91 makes it amply clear that the scheme was announced to attract investment in core sector industry having potential, to spur industrial growth in ancillary, tertiary and secondary sector of the economy. The other scheme announced by the Government of Gujarat as Capital Investment Incentive Scheme on 11th September 1995 was intended to attract investments to generate greater employment in less industrially developed areas of Gujarat and also to secure balanced development of industries in Gujarat through dispersal of industries in the most backward area and backward areas. It is thus clear that the object of both the scheme was to ensure development of backward areas or for development of core sector industries in the State or for generating the employment. Perusal of both the schemes shows that the incentives extended to the eligible units were, *inter alia*, through exemption from payment of Sales Tax. Thus, the object of both the schemes was to attract capital investment to ensure development of backward areas and the modality or mechanism chosen to attract such investment was, *inter alia*, through exemption from payment of sales tax."

9. He further contended that in view of decisions of this Court in *CIT v. Birla VXL Ltd.* [2013] 32 taxmann.com 330/215 Taxman 117 (Guj.) and in *Dy. CIT v. Munjal Auto Industries Ltd.* [2013] 37 taxmann.com 115/218 taxman 135 (Guj.) the issue is squarely covered and the decisions which are sought to be relied upon by learned advocate for the appellant are not applicable in the facts of the present case. In the case of *Birla VXL Ltd.* (*supra*), this Court has observed as under:—

'12. It can thus be straightaway seen that the benefit, though computed in terms of the Sales Tax liability in the hands of the recipient, the same was not meant to give any benefit on day-to-day functioning of the business, or for making the industry more profitable. The principle aim of the scheme was to cover the capital outlay already made by the assessee in undertaking special modernization of its existing industry.

13. In a recent decision dated 28th January 2013 in Tax Appeal No. 450 of 2012 and connected appeals, we had an occasion to examine the nature of incentives received by the assessee from the State Government in the form of entertaining tax waiver for setting up multiplexes. In such context, we had in wake of the revenues contention that the receipt was revenue in nature, held and observed as under :

"From the provisions of the said scheme, it clearly emerges that the subsidy though computed in terms of sales tax deferment or waiver, in essence it was meant for

capital outlay expended by the assessee for set up of the unit in case of a new industrial unit and for expansion and diversification of an existing unit. As noted, such subsidy was available only to a new industrial unit or a unit undertaking expansion or diversification. Fixed capital investment has been defined as to include various investments in land under use, new construction, plant and machinery etc. The entitlement was related to percentage of fixed capital investment.

It is undoubtedly true that such subsidy was computed in terms of sales tax deferment and necessarily therefore, would accrue to an industry only once the commercial production commences. However, this by itself would not be either a sole or concluding factor. In case of *Sahney Steel and Press Works Ltd. and others v. Commissioner of Income-tax* reported in 228 ITR 253, the Apex Court held and observed that the character of the subsidy in the hands of the recipient whether revenue or capital will have to be determined, having regard to the purpose for which the subsidy is given. The source of fund is quite immaterial. If the purpose is to help the assessee to set up its business or complete a project the monies must be treated as having been received for capital purposes. But, if monies are given to the assessee for assisting him in carrying out the business operations and given after the satisfaction of the conditions of commencement of production, such subsidy must be treated as assistance for the purpose of the trade."

14. In the result, we do not find that the Tribunal has committed any error. No question of law, therefore, arises. Tax Appeals are therefore dismissed.'

10. In the case of *Munjal Auto Industries Ltd. (supra)*, this Court has observed as under:—

"7. From the provisions of the said scheme, it clearly emerges that the subsidy though computed in terms of sales tax deferment or waiver, in essence it was meant for capital outlay expended by the assessee for set up of the unit in case of a new industrial unit and for expansion and diversification of an existing unit. As noted, such subsidy was available only to a new industrial unit or a unit undertaking expansion or diversification. Fixed capital investment has been defined as to include various investments in land under use, new construction, plant and machinery etc. The entitlement was related to percentage of fixed capital investment.

8. It is undoubtedly true that such subsidy was computed in terms of sales tax deferment and necessarily therefore, would accrue to an industry only once the commercial production commences. However, this by itself would not be either a sole or concluding factor. In case of *Sahney Steel and Press Works Ltd. and others v. Commissioner of Income-tax* reported in 228 ITR 253, the Apex Court held and observed that the character of the subsidy in the hands of the recipient whether revenue or capital will have to be determined, having regard to the purpose for which the subsidy is given. The source of fund is quite immaterial. If the purpose is to help the assessee to set up its business or complete a project the monies must be treated as having been received for capital purposes. Such But if monies are given to the assessee for assisting him in carrying out the business operations and given after the satisfaction of the conditions of commencement of production, such subsidy must be treated as assistance for the purpose of the trade."

11. He also submitted that in view of above decisions, these appeals may not be entertained.

12. We have heard both the learned counsel and perused the record. We have also gone through the decisions cited before us. After considering the material on record, we are of

the view that the issues involved in these appeals are squarely covered by the decisions of this Court in *Birla VXL Ltd. (supra)* and in *Munjal Auto Industries Ltd. (supra)*. Therefore, the questions of law posed for our consideration in these appeals are answered in favour of the assessee and against the department. Accordingly, all these appeals are dismissed.

8. In the case of **JCIT Vs Grasim Industries Limited (ITA Nos 2155/Mum/2016 and Ors; order date 29th April 2022)**, a coordinate bench has dealt with these legal issues in considerable detail and observed as follows:

5.3.5. the dominant purpose for which the incentive scheme per se introduced by the respective State Governments was only for the purpose of setting up of industries in the respective areas for industrial development in State and also to accelerate development and absolutely not for augmenting the profits of the assessee. Effectively, the schemes of various State Governments envisaged the rapid industrialisation, growth and new employment generation in the respective areas which would in turn promote the growth of the State. Hence, it could be safely concluded that subsidy / incentive granted is only for setting up of the units based on the fixed percentage of the capital cost and not for running the business of the assessee. Moreover, even this subsidy which is determined based on sales tax assessment orders for 9 years, 6 years etc., are subject to maximum outer limit already fixed under the respective schemes. Though the quantification of the subsidy has been made post commencement of business, the measurement of subsidy is immaterial. In our considered opinion, none of the schemes contemplated to finance the assessee in the form of subsidy / incentive for meeting the working capital requirements of the assessee company post commencement of business. Hence, by applying the purpose test, apparently, the subsidy / incentive received in the instant case would only have to be construed as capital receipts not chargeable to income tax. In this regard, we find that ld. AR placed reliance on the decision of Hon'ble Supreme Court in the case of *Ponni Sugars and Chemicals Ltd.*, reported in 306 ITR 392, wherein the incentive conferred under that scheme were two fold. First, in the nature of higher free sale sugar quota and second, in allowing the manufacturer to collect Excise duty on sale price on the free sale sugar in excess of the normal quota, but to pay to the Government only the Excise duty payable on the price of levy sugar. The Hon'ble Supreme Court in para 14 of its decision had held that "*character of receipt of subsidy has to be determined with respect to the purpose for which the subsidy is given. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial.*" In fact, the Hon'ble Supreme Court while rendering this decision had duly considered its earlier decision in the case of *Sahney Steel and Press Works Ltd.*, reported in 228 ITR 253 and had absolutely no quarrel with that judgement. Rather, it concurred with the decision rendered in *Sahney Steel and Press Works Ltd.*, case. In this regard, it would be relevant to reproduce the operative portion of the decision of Hon'ble Supreme Court in the case of *Ponni Sugars and Chemicals Ltd.*, as under:-

14. The second case is Lincolnshire Sugar Co. Ltd. v. Smart 20 TC 643. In that case it was found that Lincolnshire Sugar Co. Ltd carried on the business of manufacturing sugar from home grown beet. The company was paid various sums under British Sugar Industry (Assistance) Act, 1931, out of monies provided by the Parliament. The question was whether these monies were to be taken into account as trade receipts or not. The object of the grant was that in the year 1981, in view of heavy fall in prices of sugar, sugar industries were in difficulty. The Government decided to give financial assistance to certain industries in respect of sugar manufactured by them from home-grown beet during the relevant period. Lord Macmillan held that—

"What to my mind is decisive is that these payments were made to the company in order that the money might be used in their business."

He further observed that:

"I think that they were supplementary trade receipts bestowed upon the company by the Government and proper to be taken into computation in arriving at the balance of the company's profits and gains for the year in which they were received."

15. In the case before us, the payments were made to assist the new industries at the commencement of business to carry on their business. The payments were nothing but supplementary trade receipts. It is true that the assessee could not use this money for distribution as dividend to its shareholders. But the assessee was free to use the money in its business entirely as it liked and was not obliged to spend the money for a particular purpose like extension of docks as in the Seaham Harbour Dock Co. 5 case (supra).

16. There is a Canadian case St. John Dry Dock & Ship Building Co. Ltd. v. Minister of National Revenue 4 DLR 1, which has close similarity to the case of Seaham Harbour Dock Co. 's case (supra). In that case it was held that where subsidies were given under statutory authority, the statutory purpose for which they are authorised is relevant and may even be decisive in determining whether it is taxable income in the hands of the recipient. In that case, it was pointed out after discussing the Seaham Harbour Dock Co. 's case (supra) as well as that of Lincolnshire Sugar Co. Ltd. 5 case (supra) that subsidy given by the Canadian Government to encourage construction of dry docks was 'an aid to the construction of dry dock and not an operational subsidy'.

17. This precisely is the question raised in this case. By no stretch of imagination can the subsidies whether by way of refund of sales tax or relief of electricity charges or water charges can be treated as an aid to setting up of the industry of the assessee. As we have seen earlier, the payments were to be made only if and when the assessee commenced its production. The said payments were made for a period of five years calculated from the date of commencement of production in the assessee's factory. The subsidies are operational subsidies and not capital subsidies.

5.3.6. Yet another decision was rendered by Hon'ble Supreme Court in the case of CIT vs. Chapalkar Brothers reported in 400 ITR 279 which held that where the object of respective subsidy schemes of State Government was to encourage development of multiple theatre complexes, incentives would be held to be capital in nature and not revenue receipts. The relevant operative portion of the judgment is reproduced hereunder:-

18. After discussing the judgment in Sahney Steel & Press Works Ltd.'s case (supra) this Court then held:

"The importance of the judgment of this Court in Sahney Steel case lies in the fact that it has discussed and analysed the entire case law and it has laid down the basic test to be applied in judging the character of a subsidy. The test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the Scheme with which we are concerned in this case is that the incentive must be utilised for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of

the Subsidy Scheme was to enable the assessee to run the business more profitably than the receipt is on revenue account. On the other hand, if the object of the assistance under the Subsidy Scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant."

19. *Sahney Steel was distinguished, in para 16 by then stating that this Court found that the assessee was free to use the money in its business entirely as it liked.*

20. *Finally, it was found that, applying the test of purpose, the Court was satisfied that the payment received by the assessee under the scheme was not in the nature of a helping hand to the trade but was capital in nature.*

21. *What is important from the ratio of this judgment is the fact that Sahney Steel was followed and the test laid down was the "purpose test". It was specifically held that the point of time at which the subsidy is paid is not relevant; the source of the subsidy is immaterial; the form of subsidy is equally immaterial.*

22. *Applying the aforesaid test contained in both Sahney Steel as well as Ponni Sugar, we are of the view that the object, as stated in the statement of objects and reasons, of the amendment ordinance was that since the average occupancy in cinema theatres has fallen considerably and hardly any new theatres have been started in the recent past, the concept of a Complete Family Entertainment Centre, more popularly known as Multiplex Theatre Complex, has emerged. These complexes offer various entertainment facilities for the entire family as a whole. It was noticed that these complexes are highly capital intensive and their gestation period is quite long and therefore, they need Government support in the form of incentives qua entertainment duty. It was also added that government with a view to commemorate the birth centenary of late Shri V. Shantaram decided to grant concession in entertainment duty to Multiplex Theatre Complexes to promote construction of new cinema houses in the State. The aforesaid object is clear and unequivocal. The object of the grant of the subsidy was in order that persons come forward to construct Multiplex Theatre Complexes, the idea being that exemption from entertainment duty for a period of three years and partial remission for a period of two years should go towards helping the industry to set up such highly capital intensive entertainment centers. This being the case, it is difficult to accept Mr. Narasimha's argument that it is only the immediate object and not the larger object which must be kept in mind in that the subsidy scheme kicks in only post construction, that is when cinema tickets are actually sold. We hasten to add that the object of the scheme is only one -there is no larger or immediate object. That the object is carried out in a particular manner is irrelevant, as has been held in both Ponni Sugar and Sahney Steel.*

23. *Mr. Ganesh, learned Senior Counsel, also sought to rely upon a judgment of the Jammu and Kashmir High Court in Shree Balaji Alloys v. CIT [\[2011\] 9 taxmann.com 255/198 Taxman 122/ 333 ITR 335](#). While considering the scheme of refund of excise duty and interest subsidy in that case, it was held that the scheme was capital in nature, despite the fact that the incentives were not available unless and until commercial production has started, and that the incentives in the form of excise duty or interest subsidy were not given to the assessee expressly for the purpose of purchasing capital assets or for the purpose of purchasing machinery.*

24. *After setting out both the Supreme Court judgments referred to hereinabove, the High Court found that the concessions were issued in order to achieve the twin objects of*

acceleration of industrial development in the State of Jammu and Kashmir and generation of employment in the said State. Thus considered, it was obvious that the incentives would have to be held capital and not revenue. Mr. Ganesh, learned Senior Counsel, pointed out that by an order dated 19.04.2016, this Court stated that the issue raised in those appeals was covered, inter alia, by the judgment in Ponni Sugars & Chemicals Ltd. case (supra) and the appeals were, therefore, dismissed.

25. We have no hesitation in holding that the finding of the Jammu and Kashmir High Court on the facts of the incentive subsidy contained in that case is absolutely correct. In that once the object of the subsidy was to industrialize the State and to generate employment in the State, the fact that the subsidy took a particular form and the fact that it was granted only after commencement of production would make no difference.

5.3.7. We further find that the Hon'ble Gujarat High Court in CIT vs. Munjal Auto Industries Ltd., in Tax Appeal No.450 with 451-453 of 2012 dated 28/01/2013 also had an occasion to consider the very same issue in dispute before us. In this case also, the Revenue had taken a specific argument that since subsidy would be received only once unit goes for production, subsidy would be revenue nature. The Hon'ble Gujarat High Court referred to the relevant subsidy scheme noted that concession was capped @125% of fixed capital investment and could be availed within 9 years. The Hon'ble Gujarat High Court after considering the decision of Hon'ble Supreme Court both in the case of Sahney Steel and Press Works Ltd., and Ponni Sugars and Chemicals referred to supra had held as under:-

"7. From the provisions of the said scheme, it clearly emerges that the subsidy though computed in terms of sales tax deferment or waiver, in essence it was meant for capital outlay expended by the assessee for set up of the unit in case of a new industrial unit and for expansion and diversification of an existing unit. As noted, such subsidy was available only to a new industrial unit or a unit undertaking expansion or diversification. Fixed capital investment has been defined as to include various investments in land under use, new construction, plant and machinery etc. The entitlement was related to percentage of fixed capital investment.

8. It is undoubtedly true that such subsidy was computed in terms of sales tax deferment and necessarily therefore, would accrue to an industry only once the commercial production commences. However, this by itself would not be either a sole or concluding factor. In case of Sahney Steel and Press Works Ltd. and others v. Commissioner of Income-tax reported in 228 ITR 253, the Apex Court held and observed that the character of the subsidy in the hands of the recipient whether revenue or capital will have to be determined, having regard to the purpose for which the subsidy is given. The source of fund is quite immaterial. If the purpose is to help the assessee to set up its business or complete a project the monies must be treated as having been received for capital purposes. Such But if monies are given to the assessee for assisting him in carrying out the business operations and given after the satisfaction of the conditions of commencement of production, such subsidy must be treated as assistance for the purpose of the trade.

9. Such decision was considered in case of Ponni Sugars and Chemicals Ltd.(supra) and the Apex Court held and observed as under :

"13. The main controversy arises in these cases because of the reason that the incentives were given through the mechanism of price differential and the duty differential. According to the Department, price and costs are essential items that are basic to the profit making process and

that any price related mechanism would normally be presumed to be revenue in nature. In other words, according to the Department, since incentives were given through price and duty differentials, the character of the impugned incentive in this case was revenue and not capital in nature. On the other hand, according to the assessee, what was relevant to decide the character of the incentive is the purpose test and not the mechanism of payment.

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 bringing into existence any new asset. The subsidies in that case were granted year after year only after setting up of the new industry and only after commencement of production and, therefore, such a subsidy could only be treated as assistance given for the purpose of carrying on the business of the assessee. Consequently, the contentions raised on behalf of the assessee on the facts of that case stood rejected and it was held that the subsidy received by Sahney Steel could not be regarded as anything but a revenue receipt. Accordingly the matter was decided against the assessee. The importance of the judgment of this Court in Sahney Steel case lies in the fact that it has discussed and analysed the entire case law and it has laid down the basic test to be applied in judging the character of a subsidy. That test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant.”

10. In a recent judgement dated 8.1.2013 in case of DCIT-Circle1(2)-Baroda v. Inox Leisure Ltd., we had an occasion to consider somewhat similar question in the backdrop of entertainment tax waiver scheme of State of Gujarat as well as State of Maharashtra. Even in such a case, the entertainment tax waiver which was granted in terms of sale of tickets was treated as capital in nature when it was found that same was relatable to the capital investment made by the assessee. It was held as under :

“10. From the above noted provisions of the scheme it can be clearly seen that the entire purpose of granting tax exemption was for giving the boost to the terrorism sector. This was to be achieved by attracting higher investment in areas with tourism potential. In order to achieve such purpose, exemption from various taxes as may be applicable was granted. It is true that the exemption was to be computed in terms of tax otherwise payable by the industry. However, the purpose of such exemption was to meet with the capital outlay already undertaken by the assessee. This clearly comes out from various provisions of the scheme. For example, the scheme was applicable only to the new project or to an existing project provided investment in fixed capital or capacity was increased at least by 50%. Thus, the very eligibility for seeking exemption was linked with new investment being made in fixed capital. Further though the scheme envisaged a certain period spanning for 5 to 10 years during which such exemption could be availed depending on the category of the unit, such exemption would cease the moment the total incentives touched 100% of the eligible capital investments. In other words, the upper limit of total incentive which the unit could receive from the State Government in the form of tax waiver would not exist 100% of the eligible capital investment regardless of the residue of the period of its exemption eligibility as per the scheme. From the combined reading of salient features of the scheme, we have no doubt in our mind that the incentive was being offered for recouping or covering a capital investment or outlay already made by the assessee.”

11. In the result we find no error in view of the Tribunal. Tax Appeals are dismissed.

5.3.7.1. It is pertinent to note that against this judgement, civil appeals were dismissed by the Hon'ble Supreme Court vide its order dated 08/05/2018 on the ground that the issue is already covered in the decision of Chapalkar Brothers referred to supra.

5.3.8. Before us, the Id. Special Counsel for the Revenue referred to various decisions of Hon'ble High Courts. But, all those decisions were rendered prior to the decision of Hon'ble Supreme Court referred to above. Hence, the decisions relied upon by the Id. Special Counsel for the Revenue would not advance the case of the Revenue.

5.3.9. It is pertinent to note that in each of the aforesaid decisions of Hon'ble Supreme Court, the Courts have been mindful of the fact that the subsidy has to be received after commencement of business and to be availed within 9, 10 & 12 years, as the case may be, and yet by applying purpose test, it was held that subsidy was on capital account.

5.4. Applicability of Special Bench decision of Mumbai Tribunal in the case of Reliance Industries reported in 88 ITD 273.

The Id. Special Counsel for the Revenue vehemently submitted that the decision of the Hon'ble Special Bench has been reversed by the Hon'ble Supreme Court by remitting the matter back to the Hon'ble Bombay High Court. First of all, it would be relevant to bring on record the crux of the decision of the Special Bench in the case of Reliance Industries Ltd. In case of Special Bench decision of Reliance Industries Ltd, the scheme dealt with sales tax exemption under the scheme of Government of Maharashtra, 1979. Further the said scheme was implemented by SICOM. The following question was referred by the Hon'ble President, Tribunal to the Special Bench:

“Whether, on the facts and in the circumstances of the case and in law the assessee company is justified in its claim that the sales-tax incentive allowed to it during the previous year in terms of the relevant Government order constitutes capital receipt and is not to be taken into account in the computation of total income?”

The Hon'ble Tribunal for Asst Years 1984-85 and 1985-86 had held the sales tax exemption to be capital in nature as the same was given for industrial development of the backward districts as well as generation of employment. However, the matter was referred to the Special Bench as it was alleged that the decision for AY 1985-86 was virtually overruled by subsequent decision of the Mumbai Tribunal in the case of Bajaj Auto Ltd (ITA No. 49 and 1101 of 1991).

The Special Bench held that the decision of Bajaj Auto has not overruled the decision of Hon'ble Mumbai Tribunal for AY 1985-86 on the following basis:

- i) There cannot be any question of overruling the decision of one Bench by another bench of equal strength as it would be contrary to the established norms of judicial system in the country.
- ii) Even on merits it cannot be said that the Tribunal has laid out more stress on the form of the scheme and not their substance as held in Bajaj Auto as the Tribunal in the order for AY 1985-86 has explained the difference between exemption schemes of Maharashtra and Andhra Pradesh in detail.
- iii) Reliance placed by Tribunal in Asst Year 1985-86 on the decision of Hon'ble Supreme Court in the case of Sahney Steel & Press Works Ltd. v. CIT (228 ITR 253) cannot be said to be erroneous. The Tribunal did recognise that the object with which subsidy is given is decisive as laid down by Hon'ble Supreme Court. If the scheme is for setting up or expansion of industry in a backward area, it will be capital, irrespective of the modality or source of fund. If the scheme is for assisting of carrying out of business operations, it is revenue. Hon'ble Supreme Court demonstrated the principle that the object of the subsidy must be given primary importance over the source of fund.

5.4.1. Ultimately the Special Bench after placing reliance on the decision of Hon'ble Supreme Court in Sahney Steel and Hon'ble Madras High Court in the case of CIT v. Ponni Sugars & Chemicals Ltd. Reported in 260 ITR 605 held that the decision of the Tribunal in Asst Year 1985-86 is correct and observed the following:

37....The observations of the Madras High Court lend support to the view that the purpose and object of the Scheme under which the subsidy is given is of more fundamental importance than the fact that the subsidy was received after the commencement of production or conditional upon it. Therefore, in our view and with respect, the Tribunal in the case of Reliance Industries Ltd. (supra) had correctly interpreted and understood the ratio of the judgment of the Supreme Court in Sahney Steel & Press Works Ltd.'s case (supra).

38. In this view of the matter, we answer the question referred to us in the affirmative.

5.4.2. The Id. AR vehemently submitted that the department did not challenge the decision of the Special Bench before the Hon'ble Bombay High Court. However, he fairly stated that there was a subsequent decision of the Division Bench of this Tribunal which followed the Special Bench and that Division Bench order was challenged by the Revenue before the Hon'ble Bombay High Court. The Hon'ble Bombay High Court while disposing of the said appeal did not reverse the decision of the Special Bench and accepted the same. When that appeal was further challenged by the Revenue before the Hon'ble Supreme Court, the Hon'ble Supreme Court remitted the matter back to the Hon'ble Bombay High Court.

Accordingly, he argued that the decision of Special Bench was never reversed by the Hon'ble Supreme Court as stated by the Id. Special Counsel for the Revenue and accordingly still is a good law and therefore a binding precedent on this Division Bench. In fact, in assessee's own case for A.Y.2001-02 in ITA No.778 of 2015 dated 18/12/2018 before the Hon'ble Jurisdictional High Court, wherein the question Nos. c & d was exactly on this point. For the sake of convenience, the question Nos. c & d raised by the Revenue before the Hon'ble Jurisdictional High Court is reproduced hereunder:-

“(c) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in restoring the issue of taxability of the sale tax exemption benefit of Rs.58 crores availed by the assessee to the file of the Assessing Officer for deciding afresh after considering the decision of the Special Bench of the ITAT in the case of [DCIT V. Reliance Industries Ltd.](#), 88 ITD 273, which has not been accepted by the Revenue?”

“(d) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in entertaining the additional ground without appreciating that the assessee had treated the amount of sales tax exemption benefit of Rs.58 crores as revenue receipt and had included this amount in the returned income and it had been taxed accordingly and the assessee did not raise this issue before the CIT(A) and the issue had attained finality?”

5.4.3. While disposing of the questions Nos. c & d, the Hon'ble Jurisdictional High Court categorically held that the decision of the Special Bench of Tribunal had not been reversed or stayed by any higher judicial forum and it holds good as on date. The relevant operative portion of the judgement of Hon'ble Jurisdictional High Court in this regard is reproduced as under:-

“3. We will first address the questions no. (c) and (d), which are different elements of the same issue. The respondent assessee had received a subsidy. It is undisputed that up to the level of Income Tax Appellate Tribunal, the assessee did not raise a contention that such subsidy was towards capital account and, therefore, not taxable. However, before the Tribunal such a contention was raised. The Tribunal by the impugned judgment relied upon its earlier judgment for the Assessment Year 1999-2000 in case of this very assessee and restored the issue back to the Assessing Officer. In the earlier order, the Tribunal had remanded the issue to the file of the Assessing Officer "to decide the issue afresh after considering the decision of Special Bench of the Tribunal in the case of Reliance Industries Ltd. (supra)". Thus, the Tribunal remanded the issue back to the Assessing Officer to be decided in the light of the Special Bench judgment in the case of Reliance Industries Ltd. The Revenue's grievance in this respect is two fold. It was contended that the issue was raised for the first time before the Tribunal and the same should not have been permitted. Secondly, the view of the Tribunal in case of Reliance Industries Ltd. was challenged before the High Court. The High Court in a judgment dated 15.04.2009 in Income Tax Appeal No. 1299 of 2008 had held that no question of law in this respect arises and thereby confirmed the judgment of the Tribunal. It was pointed out that against this judgment of the High Court, the Department had approached the Supreme Court and the Supreme Court had held that a question of law did arise. The Supreme Court framed a question and placed the matter back before the High Court. We are informed that this appeal is still pending.

4. On the other hand, learned Counsel for the assessee firstly contended that the Tribunal had merely remanded the issue back to the Assessing Officer. In earlier orders, the Revenue had approached the Court against the similar orders of the Tribunal. The High Court on two occasions, in the order dated 27.09.2016 and 22.11.2016 passed in Income Tax Appeal Nos.

475 of 2014 and 102 of 2014 respectively had not entertained the challenge of the Revenue. In any case, it was contended that the facts on record are available and the Tribunal has merely asked the Assessing Officer to take a decision on the assessee's contention.

5. As long as the material exists on record, a contention raised by the assessee for the first time before the Tribunal, cannot be barred. So much is clear from series of judgments of various Courts including of this Court in case of CIT Vs. Pruthvi Brokers and Shareholders P. Ltd. (2012) 349 ITR 336. It is not the case of the Revenue that the assessee in the context of its contention on the nature of the subsidy, desired to produce additional evidence. It is true that the judgment of this Court confirming the order of the Tribunal in case of Reliance Industries Ltd. has been partially reversed by the Supreme Court. A question of law has been framed and placed for consideration of the 4 of High Court. However, this does not mean that the judgment of the Tribunal as on today stands reversed or stayed. In any case, quite apart from the judgment in the case of Reliance Industries Ltd. of the Special Bench of the Tribunal, it is always been for the assessee to contend before the Assessing Officer by pointing out the relevant clauses of the subsidy that in law the subsidy cannot be treated to be towards revenue account. It would be equally open for the Revenue to oppose such a contention if so advised. The Assessing Officer and the Revenue authorities would have to take a decision in accordance with law. These questions, therefore, are not considered.”

(emphasis applied by us while placing reliance on the decision of Hon'ble Jurisdictional High Court)

5.4.4. Against this judgement on other issues, the Revenue preferred an SLP before the Hon'ble Supreme Court and the same was dismissed vide order dated 23/08/2019 in SLP (Civil) Diary No.22929/2019. In other words, the Revenue while preferring SLP before the Hon'ble Supreme Court did not even challenge this ground of subsidy and the decision of Special Bench of Tribunal in the case of Reliance Industries Ltd., Hence, the order of the Hon'ble Jurisdictional High Court in assessee's own case for A.Y.2001-02 had become final on the very same issue. Though the said decision has been rendered for subsequent assessment year as compared to the years under consideration before us, in view of identical facts and the same legal issue, and more especially, in order to address the fact of binding precedent of Special Bench decision in the case of Reliance Industries Ltd., this Bench deems it fit to place reliance on the said decision also of the Hon'ble Jurisdictional High Court. Accordingly, we categorically hold that the decision of the Special Bench still holds the field and is a good law. The entire contentions raised by the Id. Special Counsel for the Revenue in this regard are hereby dismissed.

5.4.5. Further, we find that the Co-ordinate Bench of Ahmedabad Tribunal in the case of ACIT vs. Genus Electrotech Ltd., reported in 72 taxmann.com 101 had an occasion to consider the fact of Special Bench decision in a more elaborate manner. The relevant operative portion is reproduced hereunder:-

“11. We find that so far as the Special Bench decision of this Tribunal in the case of Reliance Industries Ltd. (supra) is concerned, it still holds the field. All that has happened, as a result of Hon'ble Supreme Court's decision dated 9th September 2011, is that Hon'ble Bombay High Court has now admitted the question "whether, on the facts and circumstances of the case, the Hon'ble Tribunal was right in holding that sales tax exemption was a capital receipt" and will, in due course though, adjudicate on this legal issue. To that extent, Hon'ble Bombay High Court's order dated 15th April 2009, to the extent of declining to admit this question, stands reversed. However, the decision of the Special Bench still holds good as the same has not, and

at least not yet, even been examined by Hon'ble Bombay High Court. Mere admission of appeal against a decision, as is elementary, does not affect the binding nature of a judicial precedent. The Special Bench decision, in the case of Reliance Industries Ltd. (supra), was not reversed by Hon'ble Supreme Court, but was directed to be examined, on merits, by Hon'ble Bombay High Court. That is quite different from disapproving the special bench decision, but it appears that the coordinate bench was led to believe, and there could not have been any other reason for ignoring the special bench decision, that this Special Bench decision is reversed. That is patently incorrect, and when we pointed it out to the learned Commissioner (DR), he did not have much to say except to rely upon the coordinate bench decision which seems to have followed that approach. The coordinate bench, in the case of Jindal Steel & Power Ltd. (supra), did indeed travel much beyond its limited mandate in ignoring a binding judicial precedent simply because appeal against that special bench decision is now pending before Hon'ble Bombay High Court. When posed with a special bench decision and a division bench directly on the issue, though touching different chords, we have no difficulty in recognizing our limitations. The wisdom of a division bench, even if superior- as strenuously argued by the learned Commissioner, has to make way for the higher wisdom of a larger bench. It is this faith of judicial hierarchical system that is the strength of our functioning, and we must follow the same. We, therefore, regret our inability to follow the division bench in the case of Jindal Power, no matter how deeply we respect and admire the work of all our colleagues, and we would rather be guided by the special bench decision - which is exactly what another division bench, on the same set of facts as before us, did in the case of Ajanta Manufacturing Ltd. (supra). As for learned Commissioner (DR)'s suggestion that we should follow the jurisdictional High Court decision in the case off Colourman Dyechem Ltd. (supra), we find that Their Lordships, in this case, were dealing with an entirely different type of subsidy which was clearly dealing with an expansion situation. However, we would rather refrain from making any further detailed observations on this issue, as we are alive to the fact that Hon'ble jurisdictional High Court, in Tax Appeal No 358 of 2012, has admitted appeal against the decision of this Tribunal in Ajanta's Manufacturing Ltd. case (supra) and all these issues will now come up for consideration of Their Lordships. The fact that appeal is admitted does not, as we have stated earlier as well, does not affect the binding nature of the judicial precedents. There is no dispute before us that the scheme under which the sales tax and excise duty subsidy are given to this assessee are the same as in the case of Ajanta Manufacturing Ltd. (supra). All the material facts being the same, there is no reason to take any other view of the matter than the view so taken by the coordinate bench. We must, therefore, uphold the conclusions arrived at by the Commissioner (Appeals), which are in consonance with the Special Bench decision in the case of Reliance Industries Ltd. (supra) and coordinate bench decision in the case of Ajanta Manufacturing Ltd. (supra), and decline to interfere in the matter.”

(emphasis supplied by us)

5.4.6. In view of the above, no fault could be attributed on the ld. CIT(A) placing reliance on the decision of the Special Bench of the Tribunal and granting relief to the assessee in the instant case.

9. In the Special Bench decision in the case of Reliance Industries Ltd (supra), what came up for consideration was specifically the sales tax subsidy, and that decision, as we seen in the elaborate analysis of the coordinate bench- as extracted above still holds good in law. In the case of **CIT Vs Chaphalkar Brothers [(2018) 400 ITR 279 (SC)]**, Hon'ble Supreme Court has held that where the object of respective subsidy schemes of State Governments was to encourage the development of Multiple Theatre Complexes, incentives would be held to be capital in nature

and not revenue receipts, and, following the same logic, the sales tax subsidy schemes, which are admittedly to encourage industrial growth in the specific areas and the overall scheme in all the sales tax subsidy and exemption schemes unambiguously indicate so, are capital receipts in nature.

10. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee that the amount of Rs 39,36,21,956 added to the income of the assessee must stand deleted, and reject the grievance of the Assessing Officer against the grant of relief of Rs 130,57,12,796 by the CIT(A).

11. Ground no. 1 of the assessee is thus allowed and ground no. 1 of the revenue is thus dismissed.

12. In ground no. 2, the assessee has raised these two grievances:

2(a). That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified in confirming the disallowance of prior period expenditure debited to Profit and Loss Account of the instant year amounting to Rs. 5,12,019/-.

2(b). That on the facts and in the circumstances of the case and without prejudice to ground no. 2(a) taken here-in-above, the Ld. CIT(Appeals) was not justified and grossly erred in not giving directions to the A.O. to allow deduction for prior period expenditure in the year to which it pertains.

13. The short reason for which the impugned disallowance is made is that these expenses pertain to an earlier year and since the assessee is following the mercantile method of accounting, these expenses can only be allowed in the year to which they pertain. Aggrieved, the assessee carried the matter in appeal before the CIT(A) but without any success as the CIT(A) declined to interfere in the matter on the plea that there is no evidence to show that liability was crystallised during the relevant previous year. The assessee is not satisfied and is in further appeal before us.

14. Having heard the rival contentions and having peruse the material on record, we are of the considered view that the assessee deserves to succeed as for the three immediately preceding assessment years, i.e. the assessment years 2002-03,2003-04 and 2004-05, the coordinate benches, in assessee's own case, have decided the same issue in favour of the assessee. In any case, there is no dispute that the expenses are otherwise admissible in nature and have not been claimed or allowed as deduction in any other assessment year. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee, and direct the Assessing Officer to delete the impugned disallowance of Rs 5,12,019.

15. Ground no. 2 is thus allowed.

16. In ground no. 3, the assessee has raised the following grievance:

That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in not giving directions to exclude gain on account of foreign exchange rate fluctuation from the computation of total income irrespective of the stand taken by the A.O. in earlier years that the loss on foreign exchange rate fluctuation is notional and hence not allowable.

17. Learned counsel for the assessee fairly submits that the above issue is covered against the assessee by decisions of the coordinate benches in assessee's own cases for the two immediately preceding assessment years. He, however, submits that the assessee would like to keep the issue alive.

18. Respectfully following the views of the coordinate benches in assessee's own cases, we reject the plea of the assessee. The assessee, however, may pursue such remedies as he deemed appropriate before the Hon'ble Courts above.

19. Ground no. 3 is thus dismissed

20. In grounds nos. 4 and 5, the assessee has raised the following grievance:

4. That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and grossly erred in enhancing the assessment.

5(a) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and grossly erred in computing disallowance u/s 14A at Rs. 7,49,68,089/- without appreciating the fact that no expenditure has been incurred by the appellant for earning exempt income.

5(b). That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and grossly erred in computing disallowance u/s 14A at Rs. 7,49,68,089/- by applying a method akin to the method prescribed under Rule 8D without appreciating the fact that the same is not applicable to instant Assessment Year.

21. So far as this ground of appeal is concerned, it is sufficient to take note of the fact that while the Assessing Officer had made an adhoc disallowance, under section 14A, @ 2% in respect of expenses incurred on earning of the tax-exempt dividend by the assessee. Aggrieved, assessee carried the matter in appeal before the CIT(A). The CIT(A) made the enhancement of income and invoked rule 8D. The amount thus computed resulted in an enhancement of income by Rs 7,49,68,089. The assessee is aggrieved and is in appeal before us.

22. Having heard the rival contentions and having perused the material on record, we are of the considered view that disallowance @ 1% of tax-exempt income will meet the ends of justice for the reason that the period pertains to the pre-amendment law and rule 8D does not, therefore, has any application in the matter, and that, in accordance with a series of coordinate bench decisions, it has been consistently held so far as the pre-amendment period is concerned, a disallowance of 1% is reasonable- particularly when the assessee has made investments entirety

out of his own funds and when there are no borrowings costs involved. It is an undisputed position, on the facts of this case, that the assessee has made the investments entirely out of his own funds. The disallowance is thus restricted to 1% of the tax-exempt income. The assessee gets the relief accordingly.

23. Ground nos. 4 and 5 are thus allowed in the terms indicated above.

24. In ground no 6, the assessee has raised the following grievance:

6(a). That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified in confirming the decision of the A.O. in assessing Interest Income of Rs. 12,07,82,717/- and Truck Hire Charges of Rs. 2,19,000/- (Net) as income under the head "Income from Other Sources"

6(b). That on the facts and in the circumstances of the case and without prejudice to ground no. 6(a) taken here-in-above, necessary direction may please be given to the A.O. to allow deduction of expenditure incurred for earning the aforesaid income for the purpose of computing "income from other sources".

6(c). That on the facts and in the circumstances of the case, and without prejudice to ground no. 6(a) taken here-in-above, having held that Truck Hire Charges were to be assessed under the head "income from other sources", the Ld. CIT(Appeals) ought to have allowed depreciation on trucks.

25. Learned counsel, however, submits that the assessee does not wish to press this grievance, and these grounds of appeal, therefore, may be dismissed as not pressed. The prayer is accepted. The grounds of appeal are dismissed as not pressed.

26. Ground no. 6 is thus dismissed.

27. In ground no. 7, the assessee has raised the following grievance:

7(a). That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified in confirming disallowance of proportionate amount of premium on leasehold land of Rs. 34,06,164/- written off during the year.

7(b). That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) failed to appreciate the fact that the premium paid on Leasehold Land, essentially bears the character of rent paid in advance which does not entails acquisition of any asset.

29. Learned counsel for the assessee fairly submits that the above issue is covered against the assessee by decisions of the coordinate benches in assessee's own cases right from the assessment years 1998-99 onwards. He, however, submits that the assessee would like to keep the issue alive.

30. Respectfully following the views of the coordinate benches in assessee's own cases, we reject the plea of the assessee. The assessee, however, may pursue such remedies as he deemed appropriate before the Hon'ble Courts above.

31. Ground no. 7 is thus dismissed.

32. In ground no. 8, the assessee has raised the following grievance:

8(a). That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified in confirming addition of unutilized MODVAT credit as on last day of accounting year being 31st March 2005 as adjustment under section 145A disregarding the fact that the appellant himself has already carried out necessary adjustment u/s 145A which was duly certified by Tax Auditors and hence any further adjustment was not warranted.

8(b). That on the facts and in the circumstances of the case, and without prejudice to ground no. 8(a) taken here in above, even if adjustment u/s 145A in respect of unutilized MODVAT credit is carried out, deduction for the same is available to the appellant under provisions of Section 43B since the appellant had paid excise duty payable on closing stock of cement as on last day of accounting year before filing of return of income for Assessment Year 2005-06 by adjusting unutilized MODVAT credit and necessary proofs for payment of excise duty are on the records of A.O.

33. Learned representatives fairly agree that the above issue is covered in favour of the assessee by decisions of the coordinate benches in assessee's own cases from assessment years 1999-2000 to 2004-05. Copies of these decisions have been placed before us by the assessee. Learned Departmental Representative, however, relies upon the stand of the authorities below nevertheless.

34. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches in assessee's own case. Respectfully following the same, we uphold the plea of the assessee and direct the Assessing Officer to delete the impugned addition of Rs 6,17,08,694 on account of unutilized MODVAT credit (net of unadjusted MODVAT credit on the first day of the year). The assessee gets the relief accordingly.
Ground no. 8 is thus allowed.

35. In ground no. 9, the assessee has raised the following grievance:

9(a). That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in confirming the action of AO/TPO in rejecting the value of export of cement to its Associated Enterprise (AE), Ceylon Ambuja Cements Private Limited ('CACPL'), as recorded in the books of accounts, as the arm's length price and determining a new arm's length price.

- 9(b). That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in not directing the AO/TPO to make appropriate adjustments under Rule 10B to account, inter-alia, for difference in quality, quantity, make, grade and other relevant factors in order to make the data of other companies comparable to that of the appellant.**
- 9(c). That on the facts and in the circumstances of the case, without prejudice to Ground Nos. 9(a) & (b) taken here-in-above, the Ld. CIT (Appeals) was not justified and grossly erred in not directing the AO/TO to include royalty and dispatch money received and demurrage paid in the export proceeds since the same were inextricably linked with such export of cement.**
- 9(d). That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in not considering the lower profitability of the AE, CACPL for the purpose of benchmarking the export of cement.**

36. To adjudicate on these grievances, only a very few material facts need to be taken note of. During the relevant previous year, the assessee exported 3,19,848 MTs of cement to its associated enterprise in Sri Lanka, i.e. Ceylon Ambuja Cements Pvt Ltd. The assessee benchmarked this transaction, as at arm's length price, based on the price charged in exports it had made to an independent enterprise in Sri Lanka- namely Marine Cements Limited. The TPO, however, rejected this benchmarking as the relevant transactions with the independent enterprise took place spread over two years, and both of these years were the years immediately preceding the relevant previous year. The TPO, in substance, observed that under proviso to Rule 10B(4), data relating to two years before the relevant period could only be done in exceptional circumstances which are not shown to exist. The TPO then, on the basis of his inquiries, found out three instances of exports of cement by Indian companies to the Sri Lankan companies, and these transactions of cement exports were exports by Grasim Industries Ltd (4,250 MTs- at 34.95 US\$ per MT), Indian Cement Ltd (1,100 MTs- at US \$ 32 per MT) and Ultratech Cements Ltd (2,79,100 MTs- at US \$30.45 per MT) to Sri Lankan companies. Taking an arithmetic average of these three inputs for the application of Comparable Uncontrolled Price, which worked out to FOB price at US \$ 32.47, as against the FOB price of US \$ 30.28 charged by the assessee, the TPO computed the arm's length price adjustment at Rs 4,73,21,572. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee made elaborate arguments on various facets of the benchmarking so adopted by the TPO but none of these arguments impressed the CIT(A), and, after giving a small relief on the ground of a computational error, the CIT(A) upheld the action of the lower authorities. The assessee is not satisfied and is in further appeal before us.

37. We have heard the rival contentions, perused the material on record as also the facts of the case as also the applicable legal position.

38. One of the things which is clearly discernable even on a plain look at the undisputed facts of this case is that the only independent transaction, which was of relatively comparable volume, was exports of 2,79,100 MTs of cement by Ultratech Cements Ltd, as against the export of 3,19,848 MTs of cement exports by the assessee. As for the remaining two transactions, the

quantity of transactions is barely 4,250 and 1,100 MTs of cement exports- 13% and 3.4% of the transaction with which the sale prices are being compared. In this light, it may be useful to refer to the observations made by a coordinate bench of this Tribunal, speaking through one of us (*i.e. the Vice President*) and in the case of **Gulbrandson Chemicals Pvt Ltd Vs DCIT [(2019) 104 taxmann.com 253 (Ahd)]**, to the effect “**The variations in quantities between the AEs and the non-AEs cannot be ignored either. There is no dispute that there is huge variations in quantities sold to the AEs vis-à-vis the quantities sold to the non-AEs but the CIT(A) has rejected the plea on the basis that "there is no consistent pattern or correlation between the volume and sale prices" and that "there is no reference to any volume discount in the agreement". That is, again, a superficial approach. Whether there is a mention of the volume discount or not or whether there is always a direct relationship between the prices and volumes, the fact remains that transactions with such huge variations, as in this case, cannot be considered to be comparable transactions and that is the consistent approach in benchmarking analysis. The scale of transactions is an important economic factor affecting comparability**”. The views so expressed by the coordinate bench have been approved, after extensively reproducing the same, by Hon’ble Gujarat High Court in the judgment reported as **PCIT Vs Gulbrandsons Chemicals Pvt Ltd [(2020) 119 taxmann.com 52 (Guj)]**. What essentially follows, in our considered view, is that the sale instances of exports by these two cases of low-volume exports cannot be taken as valid comparable even for CUP analysis. Even a look at the data collected by the TPO shows the prices going down significantly at an increase of volume- from US\$ 34.95 to US\$ 30.45. In the present case, the entire volume of exports is around 3% of the tested party transaction in one case and around 13% in another. Once it is an accepted position that the relationship between the price and volume, when variations in the volume are significant- around 30 times in one case and around 8 times in another, a significant variation in price is inevitable, and, for this reason, alone, the independent transactions cease to be comparable. That leaves us with only one case, and that is the export of 2,79,100 MTs of cement by Ultratech Cements Ltd, and the FOB rate, going by the TPO, in this case, is US \$ 30.45. That is well within the permissible 5% range of the transaction value at US \$ 28.98, as 95% of the comparable transaction price in that case, which can be taken as a valid CUP, is US \$ 28.92 per MT - as against the transaction price of US\$ 28.98 per MT. Therefore, even going by the data gathered by the TPO, to the extent such data can meet our approval in the light of the observations above, the transaction entered into by the assessee for exports of cement to its AE in Sri Lanka was at an arm’s length price. We, therefore, uphold the plea of the assessee for this short reason alone and direct the Assessing Officer to delete the impugned ALP adjustment of Rs 4,73,21,572. The assessee gets the relief accordingly. As we have upheld the assessee's plea for the short reason as elaborated upon, we see no need to deal with other contentions raised before us.

39. Ground no. 9 is thus allowed.

40. In ground no. 10, the assessee has raised the following grievance:

10(a). That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in confirming the decision of the AO/TPO that interest paid by the appellant under Bare Boat Charter cum Demise

Arrangement entered with its Associated Enterprise, Ceylon Ambuja International Limited, Mauritius is not at arm's length.

10(b). That on the facts and in the circumstances of the case, Ld. CIT (Appeals) was not justified and grossly erred directing the AO/TPO to determine the arm's length rate of interest in respect of Bare Boat Charter cum Demise Arrangement at LIBOR plus 350 basis points based on the ceiling prescribed in respect of external commercial borrowings by Indian corporates for the purposes of capital account transactions under the RBI guidelines.

41. While dealing with this ground of appeal of the assessee, we also consider it appropriate to take up a connected ground of appeal of the Assessing Officer (i.e. ground no. 11) which is as follows:

"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the TPO/AO to apply LIBOR Plus 350 point as a benchmark for determining the ALP regarding payment of interest for purchase of ships under BBCD arrangement without appreciating the fact that LIBOR Plus 350 basis point is upper limit provided by the RBI circular for the purpose of ECB and assessee for the relevant year was having AA+ to AAA as credit rating."

42. So far as this grievance of the assessee is concerned, the relevant material facts are as follows. During the course of proceedings before the Transfer Pricing Officer, to whom the ascertainment of arm's length price of the international transactions entered into by the assessee with its AEs was referred, it was noticed that the assessee made payment of US\$ 1,93,800 towards instalment payments for two ships under BBCD (Bare Boat cum Charter Demise) arrangements for two vessels, namely MV Ambuja Bhawani and MV Ambuja Lakshmi, from its AE- namely Cement Ambuja International Limited, Mauritius (CAIL). These two vessels were self loading bulk cement carriers, and the entire arrangement was routed through, and duly approved by, the RBI. It was noted that under the terms of arrangement, the assessee company was to pay to CAIL ten half-yearly instalments of US\$ 7,69,500 for both of these vessels, and the implicit interest rate, under the arrangement, was 7.5% p.a. The TPO also noted that the CAIL had obtained loan of US \$ 7 million from the Bank of America, Taipei office, to part finance the vessels, and that interest rate on this financing by the CAIL was LIBOR plus 1.5% for first three years, and +1.55% for the rest of the two years. The TPO was of the view that the interest differential between the interest charged to the assessee and interest paid by the CAIL to Bank of America was mutually beneficial to the assessee as also the CAIL and should have been equally shared between the two. The total interest paid by the assessee, during the relevant previous year, was US \$ 1,93,800, whereas CAIL paid interest of US \$ 1,06,980 to the Bank of America. The difference of US \$ 86,820 was equally shared between the assessee and the CAIL, and, accordingly, an arm's length price adjustment of US \$ 43,40, which was computed as equal to Rs 18,93,544 was made. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without complete success. Learned CIT(A) held that the interest transaction between the assessee and the CAIL needs to be benchmarked, and based on an average interest rate of LIBOR (six months average) plus 3.5% for borrowings of more than 5 years- as per RBI statistics, the

CIT(A) adopted the ALP at six months LIBOR plus 3.5%. None of the parties is satisfied and both the parties are in appeal before us.

43. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

44. As learned CIT(A) has rightly noted, what needs to be benchmarked is the transaction between the assessee and its AE, and that transaction, in our considered view, is to be considered in a broader context- rather than as a simplistic borrowing transaction, which it is not. The assessee has taken the vessels under a BBCD arrangement and, while entering into this arrangement, the AE essentially has to factor in the financing arrangement. The consideration for the BBCD instalments is based on the cost of finance, as also the cost of vessels, to the AE, and, as such, there is no occasion for sharing the difference between the interest rate implicit in the BBCD arrangement and the cost of borrowing to the AE. While examining the rate of interest under the BBCD also, one has to bear in mind the fact that it cannot be compared with a borrowing arrangement simpliciter as are the transactions on which LIBOR plus rates apply. Learned Departmental Representative has not been able to show any justification for LIBOR plus 300 bps either, and his challenge primarily is even to this approach of benchmarking. There is thus no material before us to support the findings of the CIT(A) in any case, and the findings of the AO, as noted above and in our considered view, are unsustainable in law anyway. In any event, interest is only one part of the working in the computation of instalments, and one cannot consider the same on a standalone basis in the transaction. The benchmarking is to be done for the entire transaction and not a small and isolated transaction segment. The interest rate of 7.5% implicit in the BBCD arrangement is a part of the pricing and cannot be considered separately. In the case of Essar Shipping Limited Vs DCIT [(2009) 27 SOT 409 (Mum)], a coordinate bench of this Tribunal has taken note of the working showing interest rate @ 8%, which has remained unchallenged by the revenue. We have also noted that the payments under the BBCD arrangements were made with specific regulatory approval prescribed by the RBI, and there are coordinate bench decisions, such as in the case of ACIT Vs Dow Agrosiences India (P.) Ltd. [(2016) 76 taxmann.124 (Mum)], holding that when such regulatory approvals are duly obtained, that approval can also be viewed in support of the transaction price as an arm's length price. In any event, the total ALP adjustment is less than Rs 20 lakhs, and the relevant financial period is almost 20 years ago, it may not even be appropriate to even remit the matter for fresh consideration at the TPO stage. Keeping in all these factors, as also the entirety of the case, in mind, we deem it fit and proper to delete the impugned ALP adjustment of Rs 18,93,544. The assessee gets the relief accordingly.

45. Ground no. 10 of the assessee is thus allowed, and ground no. 11 of the revenue is thus dismissed.

46. In ground no. 11, the assessee has raised the following grievance:

That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and grossly erred in not accepting the stand of the appellant that business loss brought forward from amalgamating company erstwhile Ambuja Cements Rajasthan Limited, being current year's business loss from a different source,

should not be set off against business income as well as income from other sources for the current year since the appellant had opted for not setting off of the same.

47. Learned counsel, however, submits that the assessee does not wish to press this grievance, and these grounds of appeal, therefore, may be dismissed as not pressed. The prayer is accepted. The grounds of appeal are dismissed as not pressed.

48. Ground no. 11 is thus dismissed.

49. In grounds nos. 12 and 13, the assessee has raised the following grievances:

12. That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and grossly erred in not allowing exclusion of Sales Tax Incentive availed of Rs. 1,69,93,34,752/-, being capital in nature, in computing Book Profit u/s 115JB of the Act.

13. That on the facts and in the circumstances of the case, necessary directions may please be given to the A.O. to exclude of Sales Tax Incentive availed by the appellant amounting to Rs. 1,69,93,34,752/-, being capital in nature, in computing Book Profit u/s 115JB of the Act.

50. Learned representatives fairly agree that the above issues are now covered, in favour of the assessee, by Hon'ble Calcutta High Court's judgment in the case of PCIT Vs Ankit metal & Power Ltd [(2019) 416 ITR 591 (Cal)], by Hon'ble jurisdictional High Court's judgment in the case of CIT Vs Harinagar Sugar Mills Ltd [ITA No 1132 of 2014, dated 4th January 2017] and by a coordinate bench decision in the case of ACIT Vs JSW Steel Limited [(2019) 112 taxmann.com 55 (Mum)]. Learned Departmental Representative, however, relied upon the stand of the authorities below.

51. We find that a coordinate bench of this Tribunal, in JSW Ltd's case (supra), has inter alia, observed as follows:

47. We further noted that Hon'ble Kolkata High Court, in the case of *Pr. CIT v. Ankit Metal & Power Ltd.* [2019] 109 taxmann.com 93/266 Taxman 237 Ltd. had considered an identical issue and after considering the decision of Hon'ble Supreme Court in the case of *Apollo Tyres Ltd. (supra)* held that when a receipt is not in the character of income as defined under section 2(24) of the I.T. Act, 1961, then it cannot form part of the book profit u/s 115JB of the I.T. Act, 1961. The Hon'ble High court, further observed that sales tax subsidy received by the assessee is capital receipt and does not come within definition of income under section 2(24) of the I.T. Act, 1961 and when, a receipt is not a in the nature of income, it cannot form part of book profit u/s 115JB of the I.T. Act, 1961. The Court, further observed that the facts of case before the Hon'ble Supreme Court in the case of *Apollo Tyres Ltd. (supra)* were altogether difference, where the income in question was taxable, but was exempt under a specific provision of the Act, and as such it was to be included as a part of book profit, but where the receipt is not in the nature of

income at all, it cannot be included in book profit for the purpose of computation u/s 115JB of the I.T. Act, 1961.

48. We further noted that the ITAT special bench of Kolkata Tribunal, in the case of *Sutlej Cotton mills Ltd. v. Asstt. CIT* [1993] 45 ITD 22 (Cal.) (SB), held that a particular receipt, which is admittedly not an income cannot be brought to tax under the deeming provisions of section 115J of the Act, as it defies the basic intention behind introduction of provisions of section 115JB of the Act. The ITAT Jaipur bench, in case of *Shree Cement Ltd. (supra)* had considered an identical issue and held that incentives granted to the assessee is capital receipt and hence, cannot be part of book profit computed u/s 115JB of the Act. Similarly, the ITAT Kolkata Bench, in the case of *Sipca India (P.) Ltd. v. Dy. CIT* [2017] 80 taxmann.com 87 (Trib.) had considered an identical issue and held that when, subsidy in question is not in the nature of income, it cannot be regarded as income even for the purpose of book profit u/s 115JB of the Act, though credited in the profit and loss account and have to be excluded for arriving at the book profit u/s 115JB of the Act.

49. Insofar as, case laws relied upon by the department, we find that all those case laws have been either considered by the Tribunal or High Court and came to conclusion that in those cases the capital receipt is in the nature of income, but by a specific provision, the same has been exempted and hence, the came to the conclusion that, once particular receipt is routed through profit and loss account, then it should be part of book profit and cannot be excluded, while arriving at book profit u/s 115JB of the Act 1961.

50. In this view of the matter and considering the ratio of case laws discussed hereinabove, we are of the considered view that when a particular receipt is exempt from tax under the Income tax law, then the same cannot be considered for the purpose of computation of book profit u/s 115JB of the I.T. Act 1961. Hence, we direct the Ld. AO to exclude sales tax subsidy received by the assessee amounting to Rs. 36,15,49,828/- from book profits computed u/s 115JB of the I.T. Act, 1961.

52. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. Respectfully following the same, we uphold the plea of the assessee and direct the Assessing Officer to exclude the sales tax incentive subsidy for computing book profit under section 115 JB of the Act. The assessee gets the relief accordingly.

53. Ground nos. 12 and 13 are thus allowed in the terms indicated above.

54. In ground no. 14, the assessee has raised the following grievance:

That on the facts and in the circumstances of the case, on disposal of this appeal, material adjustments would be required in computing total income, deduction under chapter VIA, Book Profit, interest, carry forward and set off of losses and tax and necessary direction may be given to the A.O. on this front.

55. Learned representatives fairly agree that the relief so sought by the assessee is only a consequential relief and no specific adjudication is required on the same; suffice to direct the Assessing Officer to give consequential reliefs, as admissible.

56. Ground no. 14 is thus allowed in the terms indicated above.

57. No other issue was raised before so far as appeal of the assessee is concerned.

58. In the result, the appeal of the assessee is partly allowed in the terms indicated above.

59. We will now take up the appeal filed by the Assessing Officer.

60. So far as the first ground of appeal in the Assessing Officer's appeal, it has already been, earlier in this common order, adjudicated upon along with a connected ground of appeal of the assessee, and dismissed as such.

61. Ground no 1 is thus dismissed.

62. In ground no. 2, the Assessing Officer has raised the following grievance:

"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing various expenditure grouped under the nomenclature "Community Welfare Expenses" amounting to Rs. 43,13,013/- as a business expenditure."

63. This is a legacy issue and pertains to the expenditure incurred for community welfare as the factories of the assessee are concerned in backward areas and the expenditure is incurred for the smooth functioning of the business. Right from the assessment years 1988-89 to 1994-95, the coordinate benches have allowed appeal of the assessee on this point, and from the assessment years 1995-96 to 2004-05, in which the first appellate authority has deleted similar disallowance, the coordinate benches have rejected the grievances of the Assessing Officer, against the reliefs so granted by the CIT(A). Learned Departmental Representative does not dispute this position but relies upon the stand of the Assessing Officer nevertheless.

64. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches all along. Respectfully following the same, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.
Ground no. 2 is thus dismissed.

65. In ground no. 3, the Assessing Officer has raised the following grievance:

"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing temple expenses amounting to Rs. 8,56,283/- as a business expenditure."

66. Learned representative fairly agree that this issue also covered in favour of the assessee by decisions of co-ordinate bench an assessee own cases from assessment years 1995-96 to 2000-05, copies of these orders are placed before us in the paper book. It is also pointed out that

the appeal filed by the department against the order of the co-ordinate bench and before the Hon'ble High Court was not admitted for the assessment year 1989-90 and that no appeals were files for the assessment years 1991-92, 1992-93 & 1993-94. Learned Departmental Representative however, relied upon the stand of the Assessing Officer.

67. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches in assessee own cases for the preceding assessment years. Respectfully following the same, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.

68. Ground no. 3 is thus dismissed.

69. In ground no. 4, the Assessing Officer has raised the following grievance:

"On the facts and in the circumstances of the case and in law, the Id.CIT(A) erred in allowing Pooja/Function expenses amounting to Rs. 39,81,919/- as a business expenditure"

70. Learned representative fairly agree that this issue is also a legacy issue and is covered by decisions of the co-ordinate benches an assessee own cases for the assessment years 1988-89 to 1989-90 & 1997-98 to 2000-05. Copies of the orders passed by the co-ordinate benches were also placed before us. Learned Departmental Representative, however, relied upon the stand of the Assessing Officer.

71. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches in assessee own cases for the preceding assessment years. Respectfully following the same, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.

74. Ground no. 4 is thus dismissed.

75. In ground no. 5, the Assessing Officer has raised the following grievance:

"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing consultancy charges amounting to Rs.38,42,400/-as a revenue expenditure.

76. Learned representatives fairly agree that this issue is also a legacy issue and is covered by decisions of the co-ordinate benches an assessee own cases for the assessment years 1995-96 to 2000-05, copies of the orders passed by the co-ordinate benches were also placed before us. Learned Departmental Representative however relied upon the stand of the Assessing Officer.

77. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches in assessee own cases for the preceding assessment years. Respectfully following the same, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.

78. Ground no. 5 is thus dismissed.

79. In ground no. 6, the Assessing Officer has raised the following grievance:

"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing service charges amounting to Rs. 1,93,960/- as revenue expenditure."

80. Learned representative fairly agree that this issue is also a legacy issue and is covered by decisions of the co-ordinate benches an assessee own cases for the assessment years 1995-96 to 2000-05, copies of the orders passed by the co-ordinate benches were also placed before us. Learned Departmental Representative however relied upon the stand of the Assessing Officer.

81. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches in assessee own cases for the preceding assessment years. Respectfully following the same, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.

82. Ground no. 6 is thus dismissed.

83. In ground no. 7, the Assessing Officer has raised the following grievance:

"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing mines prospecting expenses amounting to Rs. 10,66,291/- as a revenue expenditure."

84. To adjudicate on this grievance, it is sufficient to take note of the fact that the expenditure in question is incurred on identifying the nature of deposits of limestone at various sites to plan mining operations, that the AO has made the addition even as he took note of the Tribunal decisions on the said issue, in favour of the assessee in its own cases, but added that the views of the Tribunal has not attained finality, and that the CIT(A) gave relief on the ground that as the Assessing Officer has not challenged the relief granted by the Tribunal, the matter has attained finality. No material has been brought before us to dislodge the findings of the learned CIT(A). In any event, even going by the observations of the Assessing Officer, the matter is squarely covered, in favour of the assessee, by decisions of the coordinate benches in assessee's own case. We, therefore, uphold the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

85. Ground no. 7 is thus dismissed.

86. In ground no. 8, the Assessing Officer has raised the following grievance:

"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing expenditure incurred on roads amounting to Rs. 82,95,819/-."

87. Learned representatives fairly agree that this issue is also a legacy issue and is covered by decisions of the co-ordinate benches an assessee's own cases for the assessment years 2001-02 & 2004-05; copies of the orders passed by the co-ordinate benches were also placed before us. Learned Departmental Representative, however relied upon the stand of the Assessing Officer.

88. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches in assessee's own cases for the preceding assessment years. Respectfully following the same, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.

89. Ground no. 8 is thus dismissed.

90. In ground no. 9, the Assessing Officer has raised the following grievance:

"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction U/s. 35 D of Income tax Act of Rs. 4,06,31,549/- being 1/5th of the expenditure incurred in A.Y. 2001-02 and 2002-03 on issue of FCCB."

91. Learned representatives fairly agree that this issue is also a legacy issue and is covered by decisions of the co-ordinate benches an assessee own cases for the assessment years 2002-03 & 2004-05; copies of the orders passed by the co-ordinate benches were also placed before us. Learned Departmental Representative however relied upon the stand of the Assessing Officer.

92. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches in assessee own cases for the preceding assessment years. Respectfully following the same, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.

93. Ground no. 9 is thus dismissed.

94. In ground no. 10, the Assessing Officer has raised the following grievance:

"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the entrance fees paid to club of Rs. 32,00,000/- as a revenue expenditure."

95. Learned representatives fairly agree that this issue is also a legacy issue and is covered by decisions of the co-ordinate benches an assessee own cases for the assessment years 1990-91 & 1995-96, copies of the orders passed by the co-ordinate benches were also placed before us. Learned Departmental Representative, however, relied upon the stand of the Assessing Officer.

96. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches in assessee own cases for the preceding assessment years. Respectfully following the same, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.

97. Ground no. 10 is thus dismissed.

98. So far as ground no. 11 of revenue's appeal is concerned, it has already been dealt with, and disposed of, while dealing with ground no. 10 in the assessee's appeal. We need not, therefore, take it up again.

99. Ground no. 11 is thus dismissed.

100. In ground no. 12, the Assessing Officer has raised the following grievance:

"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing expenses of Rs. 6,28,579/- incurred towards earning dividend income U/s. 14A and reduced from the amount of income exempt U/s.14A and reduced from the amount of income exempt u/s. 10(34)/10 (35) of Income tax Act in computing book profit U/s. 115JB of the Act.

101. Learned representatives fairly agree that this issue is also a legacy issue and is covered by decisions of the co-ordinate benches in assessee own cases for the assessment years 2001-02 to 2002-03; copies of the orders passed by the co-ordinate benches were also placed before us. Learned Departmental Representative however relied upon the stand of the Assessing Officer.

102. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches in assessee own cases for the preceding assessment years. Respectfully following the same, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.

103. Ground no. 12 is thus dismissed.

104. In the result, the appeal of the revenue is dismissed.

105. To sum up, while the appeal of the assessee is partly allowed, the appeal of the revenue is dismissed. Pronounced in the open court today on the 31st day of October, 2022

Sd/-
Sandeep S Karhail
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 31st October, 2022

Copies to:

<i>(1)</i>	<i>The appellant</i>	<i>(2)</i>	<i>The respondent</i>
<i>(3)</i>	<i>CIT</i>	<i>(4)</i>	<i>CIT(A)</i>
<i>(5)</i>	<i>DR</i>	<i>(6)</i>	<i>Guard File</i>

By order

*Assistant Registrar/ Sr. PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai*