

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

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

ITA Nos.2968/Mum/2015 and 1665/Mum/2019
Assessment years: 2008-09 and 2009-10

Ambuja Cement Limited**Appellant**
(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 Nos. 3307/Mum/2015 and 2428/Mum/2019
Assessment years: 2008-09 and 2009-10

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

Vs.

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

Appearances by:

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

Date of concluding the hearing : 15/07/2022 and 12/10/2022
Date of pronouncing the order : 07/11/2022

O R D E R

Per Pramod Kumar VP

Assessment year 2008-09

1. These cross appeals are directed against the order dated 20th March, 2015 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 2008-09.

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. CIT (Appeals) was not justified and grossly erred in confirming the action of the A.O. in computing disallowance u/s 14A at Rs. 2,88,59,369/- without appreciating the fact that no expenditure has been incurred by the appellant for earning exempt income.”

4. In ground no. 4, the assessee has raised a connected grievance which we will take up with the above ground of appeal. The said ground is as follows:

“That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and grossly erred in confirming the addition of expenditure incurred in relation to earning exempt income in computing Book Profit u/s 115JB without appreciating the fact that no such expenditure had been debited to the Profit & Loss A/c in the relevant assessment year.”

5. So far as these grievances of the assessee are concerned, it is sufficient to take note of the fact that so far as this assessment year is concerned, it is the first assessment year post insertion of rule 8D and as is the settled legal position in this regard, rule 8 D is to be applied for computing the disallowance. To that extent, our decisions for the preceding assessment years will not hold good. However, since the assessee has not used any borrowed funds, no amount shall be disallowed under rule 8 D in respect of the interest. On this issue, Hon’ble jurisdictional High Court has, in the case of **PCIT Vs Shapoorji Pallonji & Co Ltd [(2020) 117 taxmann.com 625(Mum)]** has, inter alia, observed as follows:

6. On thorough consideration we find that the principle of apportionment does not arise in this case as the jurisdictional facts have not been pleaded by the Revenue. In fact Tribunal while affirming the order of the first appellate authority noted that the first appellate authority had deleted the addition made by the assessing officer under section 14-A of the Act by observing that the interest-free fund available with the respondent - assessee was far in excess of the advance given. Tribunal further noted that the Revenue does not dispute the said finding and relying on the decision of this Court in CIT v. Reliance Utilities & Power Ltd. [2009] 178 Taxman 135/313 ITR 340, affirmed the deletion made by the first appellate authority.

7. We have perused the decision of this Court in Reliance Utilities & Power Ltd. (supra) wherein it has been held that if there are funds available with the assessee, both, interest-free and overdraft and/ or loans taken, then a presumption would arise that investments would be out of the interest-free funds generated or available with the assessee if the interest-free funds were sufficient to meet the investments. In the facts of that case, it was noted that the said presumption was established considering the finding of fact returned by the first appellate authority as affirmed by the Tribunal which is identical in the present case.

7.1 We also note that the said decision of this Court has been affirmed by the Supreme Court in CIT v. Reliance Industries Ltd. [2019] 102 taxmann.com 52/261 Taxman 165/410 ITR 466.

6. Accordingly, while disallowance of the assessee is upheld in principle, the quantum shall stand reduced, upon verification of necessary facts, in the light of the above legal position. To this extent, this ground of appeal is allowed for statistical purposes. As regards the question of adjustment of book profits under section 15JB for the 14A disallowance, we find that this aspect of the matter stands concluded, in favour of the assessee, by a special bench decision in the case of **ACIT Vs Vireet Investments Pvt Ltd [(2017) 82 taxmann.com 415 (Del SB)]**. The assessee gets relief on this point as well.

7. Ground nos. 1 is thus allowed for statistical purposes, and ground no. 4 is thus allowed.

8. In ground no. 2, 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 allowing exclusion of Education Cess on Income Tax, Dividend Distribution Tax and Fringe Benefit Tax aggregating to Rs. 27,66,52,424/- in computing total income under the normal provisions of the Act.”

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

10. Ground no 2 is thus dismissed in the terms indicated above.

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

“That on the facts and circumstances of the case, the Ld. CIT(Appeals) was not justified and grossly erred in not allowing deduction of leave encashment claimed on provision basis amounting to Rs. 25,00,85,597/ -.”

12. Learned counsel for the assessee fairly submits that the issue now stands covered against the assessee, and deduction on a provision basis is indeed inadmissible. He, however, prays that

a direction may be given that the Assessing Officer at least allows it on a payment basis as and when the payments are actually made. Learned Departmental Representative does not oppose this prayer, though he adds that the deduction can only be allowed when it is otherwise admissible, and that aspect of the matter will have to be examined by the Assessing Officer. That is indeed the correct approach. While we dismiss the grievance of the assessee, we make it clear that the Assessing Officer will take a call, as and when the payment is actually made, on the admissibility of deduction in accordance with the law. Subject to this rider, grievance in grounds nos 3 is rejected.

13. Ground no 3 is dismissed.

14. We have already dealt with the ground no. 4, along with ground no. 1, and no further adjudication is required on this issue.

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

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

17. In ground no. 1, 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 excluding sales tax incentive availed by the assessee under various schemes of different states, aggregating to Rs. 3,34,42,10,472/- in computing its total income holding the incentives to be capital in nature".

18. This is an issue coming up time and again in the appeals in the case of the assessee, and, as learned representatives fairly agree, whatever we decide on the cross-appeals for the assessment years 2005-06, 2006-07 and 2007-08, which were heard along with these cross-appeals, will apply *mutatis mutandis here* as well. In our order for the assessment year 2006-07, while deciding the issue in favour of the assessee, we have *inter-alia* observed as follows:

5. This is a legacy issue. The Assessing Officer has simply followed the stand taken by him in the preceding assessment years. In appeal, learned CIT(A), on the same lines as his stand in the immediately preceding assessment year, analysed the schemes in detail and held, except for Rajasthan and Himachal Pradesh Government's sales tax subsidy scheme, all other schemes categorically state the object and purpose as promotion of industries and allied purposes. So far as Rajasthan and Himachal Pradesh Government Schemes are concerned, learned CIT(A) noted that the scheme does not specifically mention such objects and simply provide for the eligibility. In the absence of a specific mention of the purpose, the CIT(A) held that these subsidies are required to be treated as revenue receipts in nature. None of the parties is satisfied and both the parties are in appeal before us- the assessee is aggrieved of the receipts on account of HP and Rajasthan State Government sales tax subsidy schemes being treated as revenue in nature, and the Assessing Officer is aggrieved of the relief being granted by the CIT(A) in respect of other sales tax exemption and remissions being treated as capital receipts in nature.

6. Learned representatives fairly agree that materially identical issues have come up for our consideration in the assessment year 2005-06, and whatever we decide for the assessment year 2005-06 will follow *mutatis mutandis* in this assessment year as well.

7. Vide our order dated 31st October 2022, accepting the plea of the assessee and rejecting the plea of the revenue, we have held as follows:

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 mean 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 Id. AR placed reliance on the decision of Hon'ble Supreme Court in the case of Ponnai 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 Ponnai 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 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."

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 the 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 ld. 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 ld. 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 ld. 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.

8. We see no reasons to take any other view of the matter than the view taken by the coordinate bench in the assessee's own case for the immediately preceding assessment year. Respectfully following the same, we uphold the plea of the assessee and dismiss the grievance of the assessee. The relief granted by the CIT(A) in this regard also stands approved and confirmed.....

19. We see no reasons to take any other view of the matter than the view so taken in assessee's own cases. Respectfully following the same, we approve and confirm the relief granted by the CIT(A) and decline to interfere in the matter.

20. Ground no. 1 is thus dismissed

21. 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 Id. CITA) erred in treating the difference of the N. P. V. of the sales tax liability and the liability as not assessable to tax based on the decision of the jurisdictional High Court in CIT vs. Sulzer India Ltd. which decision has not been accepted by the Department”.

22. Heard the parties; perused the records.

23. A plain reading of the above ground of appeal clearly shows that, even going by the stand of the Assessing Officer, the issue is covered in favour of the assessee, by Hon’ble jurisdictional High Court judgment in the case of **CIT Vs Sulzer India Ltd [(2014) 369 ITR 717 (Bom)]** but yet the appeal has been filed because the revenue has challenged the correctness of the said judgment. That very approach is simply erroneous because it is only elementary in law that the mere pendency of the appeal, against a binding judicial precedent, in a higher judicial forum does not dilute, curtail or otherwise narrow down its binding nature. As long as the binding judicial precedent holds good in law, as it does unless it is upturned or reversed by a higher judicial forum, it binds the lower judicial forums. That apart, even otherwise, the view taken by the Hon’ble Bombay High Court in Sulzer’s case (supra) now stands approved and confirmed by the Hon’ble Supreme Court in the case of **CIT Vs Balakrishna Industries Limited [(2017) 88 taxmann.com 273 (SC)]** wherein Their Lordships have, *inter-alia*, observed as follows:

.....The main judgment is dated 05.12.2014 which was rendered in a batch of appeals with the leading case known as 'The CIT v. Sulzer India Ltd. [2015] 54 taxmann.com 161/229 Taxman 264/[2014] 369 ITR 717 (Bom.). It is this judgment which has been followed in other cases. Therefore, for the sake of convenience, we shall refer to the facts as noted in Sulzer India Ltd.'s case (supra).

4. The Assessee M/s. Sulzer India Ltd. filed return of income for the assessment year 2003-04 on 27th November, 2013, declaring total income at Rs. 10,59,76,986/-, claiming deduction under section 80HHC of the I.T. Act in the sum of Rs. 82,48,864/-.

5. During the assessment proceedings, the Assessing Officer observed that the Assessee had credited amount of Rs. 4,14,87,985/- to the capital reserve contending that the said amount was a remission of loan liability. The Assessee stated that under the Industrial Backward Area Scheme of the Government of Maharashtra, it was entitled to defer the Sales Tax liability for a period of 7 years under the Deferral Scheme of 1983 and for a period of 6 years under the Deferral Scheme of 1988. In response to a Notification issued by the Government of Maharashtra regarding premature repayment of deferral Sales Tax at Net Present Value (NPV), the Assessee made a repayment of Rs. 3,37,13,393/- against the total liability of Rs.

7,52,01,378/-. The Assessee remitted the balance amount of Rs. 4,14,87,985/- and credited the said amount to its capital reserve account. The Assessing Officer asked the Assessee to show cause as to why the said amount should not be taxed in the hands of the Assessee as a revenue receipt. Relying on Circulars of the Central Board of Direct Taxes being Nos. 496 and 674, the Assessee claimed that the deferral Sales Tax under the Deferral Scheme was required to be treated as actually paid for the purposes of section 43B of the I.T. Act. Further, the conversion of Sales Tax liability into loans would be taken as discharge of the liability of Sales Tax and, therefore, the deferral amount was in the form of a loan and not a trading receipt. On this basis, the Assessee contended that the remission of a loan cannot be treated as a revenue receipt and taxed as its income. The Assessing Officer rejected this claim and by holding that the Board's Circular is in the context of section 43B of the Income Tax Act and therefore not relevant for the present issue.

6. Against the aforesaid Assessment Order passed by the Assessing Officer, M/s. Sulzer India Ltd. (hereinafter referred to as 'assessee') preferred the appeal before the Commissioner of Income Tax (Appeals) who dismissed the same by sustaining the assessment. This was challenged by the assessee before the Tribunal. In view of the difference of opinion of the two coordinate Benches on this issue, a special Bench was constituted. The special Bench decided the case in favour of the assessee and allowed the appeal. As mentioned above, it is this judgment, which has been upheld by the High Court as well and in these circumstances, the Revenue is in appeal before us.

7. A glimpse of the facts taken note of, shows that the assessee herein had collected the sales tax in the sum of Rs. 7,52,01,378/-. As per the Scheme floated by the Government of Maharashtra, for those assesseees who set up their industries in the backward area, the sales tax liability was deferred for a period of 7 years and, thereafter, it can be paid over a period of 7 years under the Deferral Scheme of 1983 and over a period of 6 years under the Deferral Scheme of 1988. However, under the Scheme of 1988, the Government of Maharashtra promoted premature or payment of deferral sales tax at Net Present Value (NPV).

8. In the meantime, section 38 of the Sales Tax Act was amended which provides that where the NPV of deferred tax as may be prescribed was paid, the deferred tax was deemed to have been paid. Taking advantage of this Scheme, the assessee made repayment of Rs. 3,37,13,393/- against the total liability of Rs. 7,52,01,378/-. In this manner, the assessee could save a sum of Rs. 4,14,87,985/-. The issue is as to whether this amount, which the assessee could save, is to be treated as 'income' by applying the provisions of Section 41 of the Act. The Assessing Officer treated it as the revenue receipt and thereby income. Contention of the assessee is that it is a capital receipt, which is accepted by the High Court.

9. In a very detailed and exhaustive judgment rendered by the High Court, it has discussed the view taken by the Assessing Officer, which was confirmed by the

Commissioner of Income Tax (Appeals). Thereafter, the High Court noted in detail the manner in which the Tribunal has dealt with the issue. A perusal of the judgment would show that the High Court took into consideration the provisions of Section 41 of the Act and the conditions which are required to be satisfied for bringing a particular receipt as "income" within the ambit thereof and found that those conditions are not satisfied in the present case. The High Court also repelled the contention of the Revenue that the assessee obtained the benefit of reduction of sales tax liability under Section 43B of the Act as per the CBDT Circular No. 496 dated 25th September, 1987. The relevant portion of the discussion in this behalf reads as under:

"It is not possible to agree with Mr. Gupta. Because, premature payment of Sales Tax already collected but its remittance to the Government, as Mr. Gupta envisages, is not covered by this provision else the subsections and particularly section 43B(1) would have been worded accordingly. Therefore Section 43B has no application. Insofar as applicability of section 41(1)(a), there also the applicability is to be considered in the light of the liability. It is a loss, expenditure or trading liability. In this case, the scheme under which the Sales Tax liability was deferred enables the Assessee to remit the Sales Tax collected from the customers or consumers to the Government not immediately but as agreed after 7 to 12 years. If the amount is not to be immediately paid to the Government upon collection but can be remitted later on in terms of the Scheme, then, we are of the opinion that the exercise undertaken by the Government of Maharashtra in terms of the amendment made to the Bombay Sales Tax Act and noted above, may relieve the Assessee of his obligation, but that is not by way of obtaining remission. The worth of the amount which has to be remitted after 7 to 12 years has been determined prematurely. That has been done by find out its NPV. If that is the value of the money that the State Government would be entitled to receive after the end of 7 to 12 years, then, we do not see how ingredients of sub section (1) of section 41 can be said to be fulfilled. The obligation to remit to the Government the Sales Tax amount already recovered and collected from the customers is in no way wiped out or diluted. The obligation remains. All that has happened is an option is given to the Assessee to approach the SICOM and request it to consider the application of the Assessee of premature payment and discharge of the liability by finding out its NPV. If that was a permissible exercise and in terms of the settled law, then, we do not see how the Assessee can be said to have been benefited and as claimed by the Revenue. The argument of Mr. Gupta is not that the Assessee having paid Rs. 3.37 crores has obtained for himself anything in terms of section 41(1), but the Assessee is deemed to have received the sum of Rs. 4.14 crores, which is the difference between the original amount to be remitted with the payment made. Mr. Gupta terms this as deemed payment and by the State to the Assessee. We are unable to agree with him. The Tribunal has found that the first requirement of section 41(1) is that the allowance or deduction is made in respect of the loss, expenditure or a trading liability incurred by the Assessee and the other requirement is the Assessee has subsequently obtained any amount in respect of such loss and expenditure or

obtained a benefit in respect of such trading liability by way of a remission or cessation thereof. As rightly noted by the Tribunal, the Sales Tax collected by the Assessee during the relevant year amounting to Rs. 7,52,01,378/- was treated by the State Government as loan liability payable after 12 years in 6 annual/equal installments. Subsequently and pursuant to the amendment made to the 4th proviso to section 38 of the Bombay Sales Tax Act, 1959, the Assessee accepted the offer of SICOM, the implementing agency of the State Government, paid an amount of Rs. 3,37,13,393/- to SICOM, which, according to the Assessee, represented the NPV of the future sum as determined and prescribed by the SICOM. In other words, what the Assessee was required to pay after 12 years in 6 equal installments was paid by the Assessee prematurely in terms of the NPV of the same. That the State may have received a higher sum after the period of 12 years and in installments. However, the statutory arrangement and vide section 38, 4th proviso does not amount to remission or cessation of the Assessee's liability assuming the same to be a trading one. Rather that obtains a payment to the State prematurely and in terms of the correct value of the debt due to it. There is no evidence to show that there has been any remission or cessation of the liability by the State Government. We agree with the Tribunal that one of the requirement of section 41(1)(a) has not been fulfilled in the facts of the present case."

10. After hearing the counsel for the parties at length, we are of the view that the aforesaid approach of the High Court is without any blemish, inasmuch as all the requirements of Section 41(1) of the Act could not be fulfilled in this case.

24. In view of these discussions, as also bearing in mind the entirety of the case, we approve the conclusions arrived at by the learned CIT(A), and decline to interfere in the matter.

25. Ground no. 2 is thus dismissed.

26. 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 Id. CIT(A) erred in exclusion of excise duty incentive availed by the assessee, aggregating to Rs. 85,36,33,618/- in computing its total income by treating it as capital."

27. Learned representatives fairly agree that whatever we decide in the assessee's cross-appeals for the assessment year 2006-07, which was heard along with these appeals, will mutatis mutandis in this assessment year as well. Vide our order dated 31st October 2022, and dealing with the same issue on the admittedly same set of facts, we have decided this issue in favour of the assessee, and observed, *inter alia*, as follows:

17. So far as this grievance of the assessee is concerned, the relevant material facts are like this. During the course of assessment proceedings, the Assessing Officer noticed that the assessee has availed excise duty exemption, amounting to Rs 46,83,11,376, in respect of their Darlaghat Unit, HP, and it was claimed as a capital

receipt in nature. It was also noted that in terms of general Exemption No, 51 (Notification No. 50/2003 dated 10th June 2003) the assessee is entitled to 100% excise duty exemption for a period of ten years in respect of its cement manufacturing plant at Darlaaghat. The assessee's submission was that this exemption was in response to the announcement made by the Hon'ble Prime Minister to the effect that tax and central excise concession are made to attract investments in the industrial sector for special category states, including Uttarakhand. The Assessing Officer noted that "though it is apparent from the excise notification that exemption is granted for only those units which are located in the backward areas and which have undertaken substantial expansion, however incentives are available only post production" and therefore he "finds no difference in sales tax and excise exemption claimed". Following the stand taken for sales tax exemption etc, he held that the excise exemption receipts are also revenue in nature. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) also confirmed the stand of the Assessing Officer on the short ground that the exemption notification does not specifically state the object and purpose of the concession to be promotion of industry in the specified areas etc. The assessee is aggrieved, and is in appeal before us.

18. 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.

19. We have noted that the Assessing Officer himself states that he "finds no difference in sales tax and excise exemption claimed", and in the immediately preceding paragraphs in this order, we have held that sales tax exemption receipt is a capital receipt in nature. There cannot be any good reasons to take a different view of the matter in respect to excise exemptions. For this short reason alone, the impugned additions must stand deleted as the related receipts are required to be treated as capital receipts in nature. The observations in the context of the first ground of appeal will apply mutatis mutandis here as well. That apart, once the Assessing Officer himself also accepts that the object and purpose of the excise exemption scheme are to promote the industry is set up, or being subjected to substantial expansion, in the backward areas, it cannot be open to the revenue even to suggest that the object and purpose of the scheme are to promote industries in backward areas. The Assessing Officer had declined the relief on a technical ground about at what stage the receipts materialize, whether post-production or pre-production. That test, as is the settled legal position now, is no longer a relevant test. What is material is as to what is the purpose of the scheme in question, and a call about the object and purpose of the scheme is to be taken in a holistic manner and on the basis of the scheme on an overall basis. The approach adopted by the learned CIT(A) was not only legally incorrect but wholly superficial. The following observations by Hon'ble jurisdictional High Court, in the case of PCIT Vs Welspun Steel Limited [(2019) 103 taxmann.com 436 (Bom)] are relevant in this regard:

6. Having heard the learned Counsel for the parties on this question, we notice that, the Government of Gujarat Sales Tax Incentive Scheme was envisaged to promote large scale investments in the Kutch District since on account of devastating earth-quake, development of the district had suffered. The Scheme envisaged that, the same was confined only with the Kutch District. Similar, being the purpose and philosophy of the Government of India, while granting excise duty exemption, we may not separately take note of the back-ground thereof. In view of these facts, the question arises is - whether the Tribunal was justified in holding that Sales Tax and Excise duty exemption enjoyed by the assessee under the said subsidy scheme, was not taxable as revenue receipt. Such and similar issue has come up before different High Courts and Supreme Court on the numerous occasions. Reference to all those judgments would be un-necessary. However, the principle that has evolved is that, not the nomenclature of the subsidy or the fact that, the computation of the subsidy benefit is in terms of tax payable, would not be conclusive. What is to be examined in each case is the purpose for granting such subsidy. We may refer to the decision of the Supreme Court in case of CIT v. Chaphalkar Bro. [2017] 88 taxmann.com 178/[2018] 252 Taxman 360/400 ITR 279. It was a case arising out of judgment of this Court in which, the dispute between assessee and the Revenue was with respect to subsidy granted to the multiplex cinema operators in the form of entertainment tax waiver. The subsidy was granted in view of the fact that, industry was highly capital intensive. The Revenue argued that, the subsidy was revenue in nature. This Court after referring to several decisions of the Supreme Court including the case of CIT v. Ponni Sugars and Chemicals Ltd. [2008] 306 ITR 392/174 Taxman 87 and Sahney Steel and Press Works Ltd. v. CIT [1997] 94 Taxman 368/228 ITR 253 (SC) held that, subsidy had not been granted for construction but only after setting up of a new industry which was in the nature of assistance given for the purpose of carrying on business.

7. On further appeal by the Revenue, Supreme Court confirmed the decision of this Court. It was noted that, Maharashtra Government's subsidy was not in form of an exemption from payment of entertainment duty to multiplex theater complex. The scheme was introduced to start new cinema houses in the State. The Supreme Court observed that, in such circumstance, the purpose tests for grant of subsidy should be applied. It was concluded as under:—

"Applying the aforesaid test contained in both Sahney Steel as well as Ponni Sugars, 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. Those 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 centres. 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 Sugars and Sahney Steel*."

8. In the present appeal also, as noted, the subsidy was granted under schemes framed by the State and the Central Government, to be given to the assesses who set up new industry in Kutch District. The scheme was envisaged to encourage investment which would in turn, provide fresh employment opportunity in the district which had suffered due to devastating earthquake. The computation of subsidy may be on the basis of sales tax or excise duty. Nevertheless, the purpose test would ensure that, the subsidy was capital in nature.

9. The second question raised by the Revenue is consequent of the first question, in which, the Revenue argues that, if the subsidy is treated as a capital in nature, the same must bring down assessee's costs of acquisition of plant and machinery. The assessee's claim of depreciation to that extent must shrink. Assessee argues that, the Tribunal correctly held that, the subsidy had not been given in relation to acquisition of plant or machinery and that, therefore, same cannot be adjusted towards cost of acquisition.

10. It is undoubted that, the subsidy had no relation to the assessee's acquisition of plant or machinery. It was to be granted to an industry which had set up the new industrial unit in the District of Kutch. In such background, question - arises whether such subsidy would be adjustable towards assessee's costs of acquisition of capital assets. We may notice that, a similar question was considered by Division Bench of Gujarat High Court in case of *CIT v. Grace Paper Industries (P.) Ltd.* [1990] 183 ITR 591/52 Taxman 18.

The Court noted that, the subsidy was granted by the Government for development of industries in back-ward areas. It was not part of the actual cost of plant or machinery. The Court, therefore, held that it could not have been deducted towards costs of acquisition. The Court held as under:—

"We have carefully considered the provisions relating to the grant of cash subsidy under the schemes framed by the Central Government and the State Government. The Central Government as well as the State Government noticed that areas specified as backward areas and tribal areas were undeveloped or under-developed. Entrepreneurs were not willing to set up industries in such undeveloped or under-developed areas. The industries were concentrating only in urban areas. In other words, rapid urbanization was taking place. So far as the State of Gujarat is concerned, there was rapid industrial growth in cities like Baroda, Ahmedabad and Surat resulting in strain on municipal services. Urbanization created several problems such as pollution, growth of slums etc . It was also necessary to have balanced growth of industry in different regions. However, as pointed out above, entrepreneurs were reluctant to set up industries in backward areas. These areas were identified as backward because there was un-development or underdevelopment of industries in these areas. It was, therefore, that the Government decided to give financial incentives to encourage and induce entrepreneurs to move to backward areas and establish industries there so that the region may develop and promote the welfare of the people living in that region. One of the incentives which the Government decided to grant was cash subsidy so that entrepreneurs could utilize such cash subsidy for any purpose connected with the establishment of industries in the backward areas. Once the decision to give cash subsidy was taken, the Government had to work out some method to determine the quantum of such subsidy. In other words, the question as to how the amount of cash subsidy should be determined had to be considered by the Government. The Government, in order to determine the amount of cash subsidy, decided to follow one of the recognized methods of working it out on the basis of the amount invested by an entrepreneurs in acquiring capital assets as cash subsidy. The scheme does not say as to in what manner the subsidy was granted is to be utilized. In other words, the entrepreneur to whom the subsidy was granted was free to utilize it in any manner he liked. It would, therefore, appear that quantification of subsidy on the basis of investment was a measure adopted by the Government for convenience to work out the subsidy. If subsidy could be utilized by the entrepreneur in any manner he liked, could it be said that it was granted for meeting the cost of the capital assets? In our opinion, taking an overall view of the various provisions of the scheme, it is difficult to hold that cash subsidy was granted to entrepreneur to meet the cost of the fixed assets or part thereof The cost of the fixed assets was merely adopted as a measure for working out subsidy. In fact, a careful examination of the scheme reveals that it is the value of the fixed assets and not its cost which is

adopted as the basis for computing the amount of the subsidy. Emphasis on value and not the cost is evident from the fact that land and building already owned by an industrial unit, cost of tools, jigs, dies and moulds, transport charges, insurance premium, erection cost, value of second-hand machinery purchased by an industrial unit etc. were to be taken into account while computing the value of fixed assets for the purposes of subsidy. In other words, it was the value of the fixed assets which formed the basis for computation of subsidy to be granted under the scheme. Subsidy, in our opinion, did not meet the cost of the fixed assets directly or indirectly. Under the scheme of the Central Government or the scheme of the State Government, cash subsidy was quantified by determining the same at a specified percentage of the value/ cost of the fixed assets. Therefore, as observed above, the basis adopted for determining the cash subsidy with reference to the cost or value of fixed assets was only a measure for quantifying the subsidy and it could not be said that the subsidy was given for the specific purpose of meeting any portion of the cost of the fixed assets. The subsidy was granted to compensate the entrepreneur for the hardship and inconvenience which he might encounter while setting up industries in backward areas."

11. Similar issue came up for consideration again before the Gujarat High Court in *CIT v. Swastik Sanitary Works Ltd.* [2006] 286 ITR 544. It was a case in which, the Government subsidy was intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries. In such a case, specified percentage of the fixed capital cost, which was the basis for determining the subsidy, would be granted. The Court held that, such basis for determining the subsidy was only a measure adopted under the scheme to quantify the financial aid and it was not a payment, directly or indirectly to meet any portion of the actual cost of acquisition of capital asset. It was held and observed as under:—

'In so far as question No.2 is concerned, this court finds that the same is squarely covered by the decision of the Supreme Court in *CIT v. P. J. Chemicals Ltd.*, [1994] 210 ITR 830. In the said case, after review of the law on the point, the Supreme Court has held as under (head note):

"Where Government subsidy is intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost, which is the basis for determining the subsidy, being only a measure adopted under the scheme to quantify the financial aid, is not a payment, directly or indirectly, to meet any portion of the 'actual cost' The expression 'actual cost' in section 43(1) of the Income Tax Act,1961, needs to be interpreted liberally. Such a subsidy does not partake of the incidents which attract the conditions for its deductibility from 'actual cost'. The amount of subsidy is not to be deducted

from the 'actual cost' under section 43(1) for the purpose of calculation of depreciation etc."

20. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee. The Assessing Officer is, accordingly, directed to delete the impugned addition....

28. In view of the above discussions, as also bearing in mind the entirety of the case, we see no legally sustainable merits in the grievance of the Assessing Officer. The views expressed by the learned CIT(A), being in conformity with our decisions for the preceding assessment years, meet our approval. We, therefore, confirm and approve the relief granted by the CIT(A) and decline to interfere in the matter.

29. Ground no. 3 is thus dismissed.

30. 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 of Community Welfare Expenses to the tune of Rs. 2,24,00,224/-".

31. 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.

32. We see no reasons to take any other view of the matter than the view so taken by the coordinate benches all along. The same is the stand of the coordinate benches for the three immediately preceding assessment years as well. Respectfully following the decisions of the coordinate benches, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.

33. Ground no. 4 is thus dismissed

34. 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 Id. CIT(A) erred in allowing Temple expenses at Rs. 41,39,919/."

35. Learned representatives fairly agree that this issue is also covered in favour of the assessee by decisions of the 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 filed for the assessment years 1991-92, 1992-93 & 1993-94. Learned Departmental Representative, however, relied upon the stand of the Assessing Officer.

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

37. Ground no.5 is thus dismissed.

38. 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 Id. CIT(A) erred in allowing Pooja expenses at Rs. 70,80,509/-."

39. Learned representatives fairly agree that this issue is also a legacy issue and is covered by decisions of the co-ordinate benches in assessee's 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.

40. 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. The same is the stand of the coordinate benches for the three immediately preceding assessment years as well. Respectfully following the same, we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter.

41. Ground no. 6 is thus dismissed.

42. 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 Id. CIT(A) erred in allowing Mines Prospecting Expenses amounting to Rs. 85,18,084."

43. 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.

44. Ground no. 7 is thus dismissed.

45. 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 Id. CIT(A) erred in allowing additional depreciation u/s 32(1)(ia) on all the eligible assets acquired on or after 01.04.2005 instead of 01.04.2007 in disregard of the provisions of section 32(1)(ia) to the tune of Rs. 56,80,46,163/-."

46. Learned representatives submit that whatever we decide in respect of ground no. 6 on the assessee's appeal in the immediately preceding assessment year, which was also heard in this bunch of appeals, will apply *mutatis mutandis* in this appeal as well. There are, however, two aspects to this. In the last year, there was a mention about the assets acquired in one year and installed in the other year. That aspect is covered by the Hon'ble Gujarat High Court's judgment in the case of PCIT Vs IDMS Ltd [(2017) 393 ITR 441 (Guj)]. There is, however, another aspect, and that is with respect to additional depreciation being allowed in the subsequent year. That aspect of the matter is covered by a coordinate bench decision in the case of **DCIT Vs Gloster Jute Mills Limited [(2017) 88 taxmann.com 738 (Kol)]**, which has been subsequently followed by the other benches- including Mumbai benches. The coordinate bench has, inter-alia, observed as follows:

24. Ground No. 3 raised by the revenue reads as follows :-

"3. That on the facts and in the circumstances of the case, Ld. CIT(A) has erred in law by allowing assessee's claim of additional depreciation of plant and machinery on original cost in the year subsequent to the year of acquisition and installation and thereby has erred in deleting the addition of Rs.54,21,617/- without appreciating the fact that such additional depreciation is allowable on plant and machinery only in the year of acquisition and installation."

25. This ground of appeal relates to the claim of the Assessee for additional depreciation u/s.32(1)(ia) of the Act. The undisputed facts are that the original cost of the new machinery purchased and installed by the Assessee after 31-3-2005 but before 1-4-2006 in the 100% EOU and DTA unit Rs.29,77,470 and Rs.2,41,30,615. The WDV of these machineries as on 1-4-2006 was Rs.24,51,920/- and Rs.1,81,50,266/- respectively. The Assessee availed of additional depreciation @ 20% on the original cost of the machinery at Rs.5,95,494/- and Rs.48,26,123/- respectively in AY 2006-07. In AY 2007-08 also the Assessee claimed additional depreciation at 20% of the original cost viz., Rs.5,95,494 and Rs.48,26,123 respectively in all depreciation totaling Rs.54,21,617/-.

26. According to the AO, the deduction u/s.32(1)(ia) of the Act is granted only to "new" plant and machinery and once depreciation is granted in the 1st year in which the machinery is installed or put to use, the machinery ceases to be a new machinery and therefore additional depreciation cannot be allowed. The plea of the Assessee however was that Section 32(1)(ia) of the Act merely provides that further to the normal depreciation at the prescribed rates, an additional depreciation shall be allowed to the assessee at the rate of 20% on new plant and machinery acquired and installed after 31-03-2005. However, the period the period during which such additional depreciation shall be allowed is not specified in the Act. Thus, one may conclude that the allowance of additional depreciation shall not only be restricted to the initial year but continue to second and subsequent years.

27. The claim for additional depreciation was however rejected by the CIT(A) for the reason that additional depreciation is available only in respect of new plant and machinery acquired and installed after 31-03-2005. The word 'new' is not defined in the Act. According to the Shorter Oxford Dictionary the word 'new' means "not existing before; now made, or brought into existence, for the first time". The AO held that the assets on which additional depreciation was claimed by the assessee is neither "new" nor brought into existence in the hands of the assessee in the relevant previous year. It is already used in earlier years and is already depreciated and, therefore, old in the hands of the assessee in the previous year. He held that the qualification that the asset should be new was basic qualification for entitlement of additional depreciation as laid down in the provisions of Sec.32(1)(ia) of the Act and that conditions was not satisfied in the case of the Assessee. The AO accordingly disallowed the claim of the Assessee for additional depreciation.

28. Before we set out the conclusions of the CIT(A) on this issue, it would be worthwhile to examine the history of scheme of allowance by way of additional depreciation in the Act.

'Sec.32 Depreciation.

(1) In respect of depreciation of—

<i>(i)</i>	buildings, machinery, plant or furniture, being tangible assets;
<i>(ii)</i>	know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—

<i>(i)</i>	in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed;
<i>(ii)</i>	in the case of any block of assets, such percentage on the written down value

	thereof as may be prescribed:
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Section 32(1)(*ia*) of the Act was originally introduced by the finance (no.2) Act, 1980 w.e.f. 1-4-1981 reads thus (the sub-section existed upto 31-3-1988 and was deleted thereafter):

"(*ia*) in the case of any new machinery or plant (other than ships and aircraft) which has been installed after the 31st day of March, 1980 but before the 1st day of April, 1985, a further sum equal to one-half of the amount admissible under clause (ii) (exclusive of extra allowance for double or multiple shift working of the machinery or plant and the extra allowance in respect of machinery or plant installed in any premises used as a hotel) in respect of the previous year in which such machinery or plant is installed or, if the machinery or plant is first put to use in the immediately succeeding previous year, then in respect of that previous year :"

Sec.32(1)(*ia*) of the Act as reinserted by finance (No.2) Act, 2002 w.e.f. 1-4-2003, reads thus:

'(*ia*) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2002, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to fifteen per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii):

Provided that such further deduction of fifteen per cent shall be allowed to—

(A)	a new industrial undertaking during any previous year in which such undertaking begins to manufacture or produce any article or thing on or after the 1st day of April, 2002; or
(B)	any industrial undertaking existing before the 1st day of April, 2002, during any previous year in which it achieves the substantial expansion by way of increase in installed capacity by not less than *[ten per cent]:

"Subs. for "twenty-five per cent" by Finance (No. 2) Act, 2004, (w.e.f. 1-4-2005)."
 Sec.32(1)(*ia*) as substituted by Finance Act, 2005, (w.e.f. 1-4-2006) reads as follows:

"(*ia*) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii):"

29. It can be seen from the provisions of Sec.32(1)(*ia*) as it existed from 1-4-1981 to 31-3-1988 and reinserted subsequently from 1-4-2003 that the benefit for claiming additional depreciation was restricted only to the initial assessment year. However the provisions of Sec.32(1)(*ia*) as substituted by the finance Act, 2005 w.e.f. 1-4-

2006, the benefit for claiming additional depreciation was not so restricted to only to the intital assessment year. From AY 1981-82 to 87-88, the claim for additional depreciation was restricted to previous year in which such machinery or plant is installed or, if the machinery or plant is first put to use in the immediately succeeding previous year.

From AY 2003-04 till 2005-06, the claim for additional depreciation was restricted to previous year in which such undertaking begins to manufacture or produce any article or thing on or after the 1st day of April, 2002; or if any industrial undertaking existed before the 1st day of April, 2002, during any previous year in which it achieves the substantial expansion by way of increase in installed capacity by not less than ten per cent. From AY 2006-07, there is no restriction with regard to the year in which such additional depreciation should be allowed and also there is no restriction with regard to the additional depreciation being allowed only on the written down value and therefore the additional depreciation even in the second and subsequent years have to be allowed on the original cost of the Asset. These are evident from a plain reading and literal construction of the relevant statutory provisions.

30. The CIT(A) after considering the aforesaid scheme and history of the provisions of Sec.32(1)(iia) of the Act, deleted the addition made by AO observing as follows :—

"I have considered the submissions of the Ld. A/R and find substance in the contention of the Appellant. On a conjoint reading of the provisions of section 32(1)(iia) inserted by Finance (No. 2) Act, 1980 and reinserted by Finance Act, 2002 it is evident that the said sections specifically restricted the allowability of additional depreciation in the year of installation of P&M. However, in the section 32(1)(iia) amended vide Finance Act, 2005 Legislature had omitted the proviso wherein it was provided that such depreciation could be claimed only in the initial assessment year. This being a specific omission it could be construed that the intent of the Legislature was not to restrict the allowance of additional depreciation to the year in which the assets are installed but also in the second and subsequent years provided that the aggregate depreciation does not exceed the cost of the asset. It is settled law that a fiscal statute has to be interpreted the basis of the language used therein and not interpreted out of context the same as held by Apex Court in the case of Orissa State Warehousing Corporation, Mohammad Ali Khan and Madurai Mills Co. Ltd. (Referred to by the Appellant.)

Further, it is also imperative to state that Section 32(1)(iia) is a beneficial provision enacted with the view to provide benefit to the assessee. The same is also evident from the Explanatory Notes to the Finance Act, 2005 wherein it has been clarified that in order to encourage investment the provisions of sec. 32(1)(iia) have been amended. In so far as the language used in the provision in concerned one has to

construe the language beneficially and in favour of the assessee as held by the Jurisdictional High Court in the case of Indian JuteMill Association in 134 ITR 68.

There is little merit in the contention of the AO that the asset is not new in the second year.

In my view for claiming additional depreciation the assessee has to acquire and install the plant & machinery after 31-03-2005 and the same should be new in the year of installation. There is no requirement that the assets should be new in the year of claim of additional depreciation.

For the reasons aforesaid I am of the view that in terms of provisions of Section 32(1)(iia), additional depreciation is available in AY 2006-07 and subsequent years in respect of all new plant & machinery acquired and installed after 31-03-2005 subject to overall criteria that total depreciation does not exceed the actual cost. Hence Ground No. 4 is decided in favour of the Appellant."

31. Aggrieved by the order of CIT(A) the revenue has raised ground no.3 before the Tribunal. The ld. DR placed reliance on the order of the AO. The ld. Counsel for the assessee submitted that fiscal statute shall be interpreted on the basis of the language used therein and not de hors the same. It was argued that Clause (iia) to Sec. 32(1) was first introduced vide Finance (No. 2) Act, 1980 w.e.f. 01-04-81 and was applicable till AY 1987-88. The clause was subsequently re-introduced vide Finance Act, 2002 w.e.f. 01-04-03. On perusal of clause (iia) to Sec. 32(1) as existed during the aforesaid period, it could be seen that the legislature conferred the benefit of additional depreciation only in the first AY when the asset was installed and first put to use. However vide Finance Act, 2005, clause (iia) to Sec. 32(1) was amended w.e.f. 01-04-06 wherein the condition of claiming additional depreciation only in the initial AY was deleted. It was submitted that since the specific condition for claim of additional depreciation in one year has been done away with, it should be construed as the intention of the legislature to allow additional depreciation in subsequent years as well. Reliance was placed on the following decisions wherein it has been held that a fiscal statute shall have to be interpreted on the basis of the language used therein and not de hors the same. Even if there is a casus omissus, the defect can be remedied only by legislation and not by judicial interpretation :—

-	<i>Orissa State Warehousing Corpn. v. CIT</i> [1999] 103 Taxman 623/237 ITR 589 (SC)
-	<i>Prakash Nath Khanna v. CIT</i> [2004] 135 Taxman 327/266 ITR 1 (SC)
-	<i>Smt. Tarulata Shyam v. CIT</i> [1977] 108 ITR 345 (SC)
-	<i>Padmasundara Rao v. State of Tamil Nadu</i> [2002] 255 ITR 147 (SC)

Apart from the above, it was also pointed out that DTC Bill 2013 has proposed expressly that additional depreciation would be allowed in the FY in which the P&M is used for the first time and those provisions are not made with retrospective effect. It was argued that the legislature has consciously not restricted the allowance of additional depreciation on the original cost for AY 2006-07 till AY 2013-14 to one year only and therefore the additional depreciation should be allowed on the original cost of the asset for the second and subsequent years as well. It was submitted that the condition imposed by the relevant provisions was that Plant and Machinery must be new at the time of installation to be eligible for additional depreciation u/ s 32(1)(iia) and not new in subsequent years.

32. We have given very careful consideration to the rival submissions and are of the view that the provision of section 32(1)(iia) as amended w.e.f. 01-04-2006 by the Finance Act 2005, there is no restriction that the additional depreciation will be allowed only in one year or that it would be allowed only on the written down value. The law as it prevailed prior to the said amendment imposed such a condition that additional depreciation will be allowed only in the year of installation of machinery or plant or the year in which it is first put to use or the year in which the concerned undertaking begins to manufacture or produce any article or thing or achieves substantial expansion by way of increase in installed capacity by 25%. The only objection of the AO is that the provisions refer to "new machinery or plant" and therefore the machinery will cease to be a new machinery after the end of the first year in which it is installed or put to use. In our view this stand taken by the revenue is not supported by the language of statutory provision. The condition imposed by the relevant provisions is that Plant and Machinery must be new at the time of installation to be eligible for additional depreciation u/ s 32(1)(iia) and not new in subsequent years. The expression "new machinery" is therefore to be construed as referring to the condition that at the time of acquisition or installation the machinery or plant should be new. Going by the legislative history of the relevant provision, we are of the view that the condition for allowing additional depreciation only in the initial assessment year ceased to exist as and from 01-04-2006. The plain language of the section warrants such an interpretation. We therefore uphold the order of CIT(A) and dismiss ground No.3 raised by the revenue.

47. On both the aspects thus, the matter is covered, in favour of the assessee, by binding judicial precedents. Respectfully following the same, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

48. Ground no. 8 is thus dismissed.

49. 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 Id. CIT(A) erred in allowing the addition made by AO at Rs.9,07,21,098/- in respect of unutilized

CENVAT credit on last day of accounting year to the closing stock by invoking provisions of section 145A.”

50. Learned representatives fairly agree that this issue is covered, in favour of the assessee, by decisions of the coordinate benches in assessee's own cases for the assessment years 1999-2000 to 2004-05, even though the learned departmental representative rather dutifully relied upon the stand of the Assessing Officer. We see no reasons to take any other view of the matter than so taken by the coordinate benches, and, respectfully following the same, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

51. Ground no. 9 is thus dismissed

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

53. To sum up, while the appeal of the assessee is partly allowed, the appeal of the revenue is dismissed.

Assessment year 2009-10

54. These cross appeals are directed against the order dated 10th January 2019 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 2009-10.

55. We will first take up the appeal filed by the assessee.

56. In ground no. 1, the assessee has raised the following grievance:

On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax(Appeals)-7 [hereinafter referred to as Ld. CIT (A)] was not justified and grossly erred in confirming the action of the Additional Commissioner of Income-tax (Large Taxpayer Unit) [hereinafter referred to as 'AO'] in adding back Rs. 2,79,78,508 as notional expenses incurred towards earning exempt dividend income u/s 14A of the Income-tax Act, 1961 ('the Act') r.w.r 8D of the Income-tax Rules, 1962 ('the Rules').

57. So far as this grievance of the assessee is concerned, it is sufficient to take note of the fact that so far as this assessment year is concerned, it is an assessment year post insertion of rule 8D and as is the settled legal position in this regard, rule 8 D is to be applied for computing the disallowance. To that extent, our decisions for the preceding assessment years will not hold good. However, since the assessee has not used any borrowed funds, no amount shall be disallowed under rule 8 D in respect of the interest. On this issue, the Hon'ble jurisdictional High Court has, in the case of **PCIT Vs Shapoorji Pallonji & Co Ltd [(2020) 117 taxmann.com 625(Mum)]** has, *inter-alia*, observed as follows:

6. On thorough consideration we find that the principle of apportionment does not arise in this case as the jurisdictional facts have not been pleaded by the Revenue. In fact Tribunal while affirming the order of the first appellate authority noted that the first appellate authority had deleted the addition made by the assessing officer under section 14-A of the Act by observing that the interest-free fund available with the respondent - assessee was far in excess of the advance given. Tribunal further noted that the Revenue does not dispute the said finding and relying on the decision of this Court in CIT v. Reliance Utilities & Power Ltd. [2009] 178 Taxman 135/313 ITR 340, affirmed the deletion made by the first appellate authority

7. We have perused the decision of this Court in Reliance Utilities & Power Ltd. (supra) wherein it has been held that if there are funds available with the assessee, both, interest-free and overdraft and/ or loans taken, then a presumption would arise that investments would be out of the interest-free funds generated or available with the assessee if the interest-free funds were sufficient to meet the investments. In the facts of that case, it was noted that the said presumption was established considering the finding of fact returned by the first appellate authority as affirmed by the Tribunal which is identical in the present case.

7.1 We also note that the said decision of this Court has been affirmed by the Supreme Court in CIT v. Reliance Industries Ltd. [2019] 102 taxmann.com 52/261 Taxman 165/410 ITR 466.

58. Accordingly, while disallowance of the assessee is upheld in principle, the quantum shall stand reduced, upon verification of necessary facts, in the light of the above legal position. To this extent, this ground of appeal is allowed for statistical purposes.

59. Ground no. 1 is thus allowed for statistical purposes

60. In ground no. 2, the assessee has raised the following grievance:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in confirming the action of AO in not allowing deduction for Education Cess levied on Income Tax, Dividend Distribution Tax and Fringe Benefit Tax aggregating to Rs. 17,50,71,281/- as allowable expenditure in computing the total income under the normal provisions of the Act.”

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

62. Ground no 2 is thus dismissed in the terms indicated above.

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

“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in confirming the action of AO in not allowing the claim of leave encashment amounting to Rs. 8,09,63,884/-on provision basis based on actuarial valuation in computing the total income. . The Ld CIT(A) failed to record any cogent reason and concluded against the appellant merely because of stay on operation of judgment in case of Bharat Earth Movers Vs CIT (2000) 245 IT 428(SC).”

64. An identical grievance of the assessee has been considered by us, earlier in this consolidated order, in paragraphs 11,12 and 13. The same observations will apply mutatis mutandis in this assessment year as well. We have no reasons to take any other view of the matter in this assessment year. We, therefore, reject the grievance of the assessee with the same rider and subject to the same observations.

65. Ground no. 3 is thus dismissed.

66. In ground no. 4, the assessee has raised the following grievance:

“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in confirming the action of AO in not allowing the claim of expenditure incurred on capital jobs abandoned & written off in the books of accounts amounting to Rs. 5,06,92,076/-.”

67. So far as this ground of appeal is concerned, the Assessing Officer has disallowed this claim by observing that **“In the tax audit report, the auditor has held that the expenses of Rs 5,06,92,076 debited to P&L account in nature. These expenses were claimed as capital expenditure in the original return filed by the assessee. However, in the revised return, these expenses of Rs 5,04,10,349 have been claimed as revenue expenses. The assessee has not offered any explanation for the same. Hence these expenses are held to be capital in nature and hereby added back to the total income of the assessee”**. Aggrieved, the assessee took the matter in appeal before the CIT(A) and gave a detailed explanation but without success. Learned CIT(A) dismissed the plea of the assessee and observed that **“I have considered the assessment order and the written submissions made by the appellant. Having considered the same, I find that the expenditure claimed by the assessee is purely capital in nature and therefore the same cannot be debited to P&L account. No material has been submitted by the assessee before the AO or during the appellate proceedings to prove that these expenses are on account of accidental business loss. Therefore, I do not see any reasons to interfere with the order of the AO”** The assessee is aggrieved and is in further appeal before us.

68. 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.

69. While we have taken note of the plea of the authorities below that the assessee did not produce any details before any of the authorities below, para 14.2 of the order of the CIT(A)

shows otherwise. A plain look at this paragraph, which is reproduced below for ready reference, does show that while the Assessing Officer did not ask for any clarification before making the disallowance, all the necessary details were submitted before the CIT(A). These extracts from the CIT(A)'s order are as follows:

14.2 Appellant's submissions made during the course of the appellate proceedings

During the course of the appellate proceedings, the appellant, vide its aforesaid submissions, has made the submissions in this regard, as under:

"Claim for expenditure incurred on capital jobs abandoned & written off (Rs.5,04,10,349/-)

A. Brief Facts of the case

1.0 During the year under consideration, the appellant in the profit & loss account, has written off expenditure incurred on capital projects abandoned aggregating to Rs. 5,04,10,349/-. The aforesaid expenditure has been incurred for setting up of new project at Barh in Bihar and Marwa Mundwa in Rajasthan. Since the project has been abandoned, the expenditure incurred for setting up of the aforesaid projects has been written off in the profit & loss account under the head 'Capital Projects written off. In clause 17(a) [Details of Capital Expenditure debited to the Profit & Loss Account] of the revised tax audit report, it has been stated that expenditure incurred on capital projects at Barh and Marwa Mundwa amounting to Rs. 1,29,98,121/ and Rs 3,74,12,228 respectively which has been written off in the books of accounts is an incidental business loss and hence an allowable deduction. Details of expenditure written off in books is enclosed as Annexure - 114 (Refer Page Nos. 2150 of the W/S).

2.0 In the revised return of income, the appellant has claimed the said expenses as allowable deduction on the premise that the expenses incurred on the said projects /assets written off in the accounts is an incidental business loss in view of the decision of CIT -vs.- Graphite India Ltd (1996) 221 ITR 420 (Cal), Hindustan Aluminum Corporation Ltd -vs.- CIT (1986) 159 ITR 673 (Cal) and Asiatic Oxygen Limited -vs.- CIT (1991) 190 ITR 328 (Cal.)

B. Contention of the A.O

1.0 The AO in the order u/s 143(3) disallowed the claim of the appellant without raising any query on the contention that the same is capital in nature.

C. Submission

- 1.0 In this regard, reference can be drawn to provisions of section 37(1) which reads as under:**
- "37. General.**
- (1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession."**
- 1.1 On bare perusal of the aforesaid provision it is clear for claiming deduction under the above provision the expenditure must satisfy the following test:**
- a. It should not be in the nature of expenditure described in section 30 to 36 b.**
 - b. It should not be in the nature of capital or personal expenditure.**
 - c. It must be expended wholly and exclusively for the purpose of the business.**
- 1.2 In the present case, as the expenditure incurred by the appellant do not fall in any of the negative conditions laid down for not allowing the claim, therefore the expenditure incurred by the assessee is an allowable expenditure u/s 37(1) of the Act.**
- 1.3 Reliance in this regard is placed on the decision in the case of Excel Industries Limited -vs.- DCIT (2004) 86 TTI 840 (Mum). In the said case, the assessee had claimed certain expenses incurred on two new projects. These expenses were capitalized in the books of accounts in the earlier years and shown as capital work-in-progress. During the year under appeal, these projects were abandoned and the project expenses were written off in the books of accounts as the projects were found to be commercially unviable. The question before the Hon'ble Tribunal was whether the amount written off is allowable as business loss in the year in which the same is written off in the books of accounts. It was held that since the concerned projects were undertaken in the course of existing business and was not a different or new business; the expenses written off as the project was abandoned represents revenue loss.**
- 1.4 Reliance is further placed on the decision in the case of Binani Cement Ltd. - vs.- CIT (2015) 380 IT 0116 (Cal) wherein the Hon'ble Calcutta High Court held that expenditure incurred for construction/acquisition of new facility subsequently abandoned at the work-in progress stage was allowable**

deduction as the same has been incurred wholly or exclusively for the purpose of assessee's business.

- 1.5 Reliance is further placed in case of Indo Rama Synthetics (1) Ltd. -VS.-CIT (2011) 333 IT 18 (Del). In the said case, the assessee is in the business of manufacture of yarn and polyester. The assessee incurred expenditure for expansion of existing business of the assessee. The project was abandoned and expenditure in nature of salary, wages, repairs, maintenance, design and engineering fee, etc. incurred on the proposed unit was allowed as revenue expenditure. Copy of decision is enclosed as Annexure -30(Refer Page Nos. 705-745 of the W/S). Further the Departmental SLP against the said order of High Court has been dismissed by the Hon'ble Apex Court which is reported in CIT -vs.- Indo Rama Synthetics (1) Ltd (2010) 328 ITR 9 (SC).
- 1.6 Similarly in the case of CIT -vs.- Graphite India Ltd. (1996) 221 ITR 420 (Cal) it has been held that expenditure incurred for payment of fee for a project report which project did not materialize is allowable as revenue expenditure.
- 1.7 Reference is also drawn to the case of ITO -vs.- Excel Productions (1992) 44 TTI 201 (Coch). The assessee is in the business of production and exhibition of cinematographic films. The assessee incurred expenditure in relation to production of a film. The production of the film was abandoned and expenditure incurred not only during the current year but also in respect of cost incurred in earlier years was allowed as a trading loss.
- 1.8 Reliance is placed in the case of CIT -vs.- Priya Village Roadshows Ltd. (2011) 332 ITR 594 (Del) wherein the High Court held as under

"The expenditure was incurred in respect of same business which is already carried on by the assessee. Two projects which were undertaken were for the expansion of same business, namely, one for taking over Savitri Cinema for conversion into multiplex and operation and management thereof and other for conversion of Priya Cinema into four-screen multiplex. Payments were made to the consultants for preparing feasibility reports in respect of both the projects. However, ultimately projects were not found to be financially and technically viable and were shelved. Thus, we find that no new asset came into existence, which was the basis adopted by the AO for treating the expenditure as capital expenditure but wrongly.
- 1.9 Reliance is also placed in case of Lawkim Ltd -vs.- ICIT (2004) 23 CCH 0749 (Mumbai)(ITAT)wherein the assessee was a producer of electric motor for various electronic appliances. Assessee made payment for development of new type of bypass motors to be used in wet and dry vacuum cleaners. Later on the project was abandoned. The expenditure incurred did not bring any

ensuring advantage to the assessee. Therefore, there was no basis of coming to the conclusion to the effect that the expenditure was in the nature of capital expenditure. The Hon'ble ITAT held that expenditure incurred for development of new motor was in nature of expansion of existing business which was later on abandoned so, the expenditure could not be said to be capital in nature.

1.10 In the case of Gujarat Green Revolution Co. Ltd. -vs.- ACIT (2013) 37 CCH 0095 (Ahd)(ITAT) the assessee proposed to set up Aqua Agro Project which was admittedly expansion of existing project. The assessee incurred expenses for preliminary survey and other technical matters. The assessee did not proceed with the proposed project and claimed the entire expenditure as revenue expenditure. The A.O. contended that the expenditure that was incurred on abandoned project was of capital in nature and hence disallowed the claim of the assessee. The Hon'ble ITAT held that the proposed new project had inextricable linkage with the existing business of the assessee and it was also the fact that no new asset has come to be created by incurring of said expenditure. Therefore, the expenditure cannot be considered to be of capital nature and hence the claim of assessee is allowed as revenue expenditure.

1.12 Reliance is placed on the decision in the case of Excel Industries Ltd -vs.- DCIT (2002) 21 CCH 315 (Mum-Tri) wherein the tribunal held loss incurred on account of project abandoned which was actually extension of existing business is a revenue loss and thus an allowable deduction.

D. Prayer

1.0 In view of the aforesaid submissions, the appellant humbly prays before your good self to kindly give necessary direction to the A.O. to allow expenditure incurred or capital jobs abandoned & written off being revenue in nature.

70. The assessee has categorically submitted that the assessee had abandoned its projects at Barh, Bihar (Rs 1,29,98,121) and at Marwa Mandwa, Rajasthan (Rs 3,74,12,228). Learned CIT(A) had no questions on the same or anything to show that these expenses were not incurred on the abandoned project; all he has observed, on this point, is that the assessee has failed to “**prove that these expenses are on account of accidental business loss**”. Once it is not in dispute that the expenses are on the abandoned projects, which is what the CIT(A) has not even down doubted, the clear legal position is that these expenses are to be allowed as a deduction in the computation of business income. In the case of **Binani Cement Ltd Vs CIT [(2015) 60 taxmann.com 384 (Cal)]**, Hon'ble Calcutta High Court has observed as follows:

.....The following question of law was framed when the appeal was admitted:

"Whether the Tribunal substantially erred in law in disallowing the expenditure allegedly incurred by the assessee for preparation of the feasibility study report and capital-work-in-

progress in the earlier years, but written off during the previous year corresponding to the asst. yr. 2002-03 since the proposed project was abandoned?"

3. Mr. Bajoria, learned senior advocate, appearing for the appellant submitted that the question is partly covered by the decision in *CIT v. Graphite India Ltd.* [1996] 221 ITR 420 (Cal.). The relevant question referred by the Tribunal to this Court in that case was whether in the facts and circumstances of that case, the Tribunal was justified in holding that the expenditure incurred for the assessee's proposed petro-chemical project was revenue expenditure and to be allowed as a deduction? This Court in answering the question, held as follows:

"So far as question No. 4 is concerned, the Tribunal recorded the finding that the assessee spent an amount of Rs. 56,665 as project expenditure. The expenditure represented fees paid to Engineering India Ltd. in connection with the petrochemical project report. The amount was paid by the assessee in order to explore the possibility of setting up of a petro-chemical project which could provide a captive plant for manufacture of raw material at the assessee's own factory which would help the assessee in getting continuous supply of raw material even during periods of acute shortage. In fact, the project did not materialise. The ITO as well as the CIT(A), therefore, held that the expenditure was capital in nature. However, the Tribunal found that the expenditure did not result in bringing into existence any capital asset of enduring in nature. The Tribunal further found that the decision of the Calcutta High Court in the case of *Hindustan Aluminium Corporation Ltd. v. CIT* (1986) 55 CTR (Cal.) 237: (1986) 159 ITR 673 (Cal) was applicable and following that decision held that the expenditure was allowable as incurred wholly and exclusively for the purpose of the assessee's business. Therefore, the Tribunal deleted the disallowance. The case relied upon by the Tribunal was subsequently followed in the case of *Asiatic Oxygen Ltd. v. CIT* (1991) 190 ITR 328 (Cal). This Court in the said case reiterated the view taken in *Hindustan Aluminium Corporation Ltd.'s case (supra)*.

According to us, question No. 4 in this reference stands concluded by the aforementioned two decisions. We, accordingly, answer question No. 4 in the affirmative and in favour of the assessee and against the Revenue."

4. Mr. Bajoria further relied on two decisions of the Supreme Court being respectively the decision in *CIT v. A. Gajapathy Naidu* [1964] 53 ITR 114 and *CIT v. Swadeshi Cotton & Flour Mills (P.) Ltd.* [1964] 53 ITR 134 (SC). In *A. Gajapathy Naidu (supra)* on the question of power of the ITO to relate back an income the apex Court was of the following view:

"When an ITO proceeds to include a particular income in the assessment, he should ask himself, *inter alia*, two questions, namely : (i) what is the system of accountancy adopted by the assessee, and (ii) if it is the mercantile system, subject to the deeming provisions, when has the right to receive accrued? If he comes to the conclusion that such a right accrued or arose to the assessee in a particular accounting year, he should include the said income in the assessment of the succeeding assessment year. No power is conferred on the ITO under the Act to relate back an income that accrued or arose in a subsequent year to another earlier year, on the ground that that income arose out of an earlier transaction. Nor is the question of reopening of accounts relevant in the matter of ascertaining when a particular income accrued or arose."

5. In *Swadeshi Cotton & Flour Mills (P.) Ltd. (supra)* on a similar question the said Court held :

"The system of reopening of accounts does not fit in with the scheme of the IT Act. As far as receipts are concerned there can be no reopening of accounts, and the position is the same in respect of expenses".

6. Mr. R.N. Bandopadhyay, learned advocate appearing on behalf of the Revenue relying upon the decision in *Delhi Tourism & TDC Ltd. v. CIT* [2006] 285 ITR 114/155 Taxman 10 (Delhi) submitted that the expenditure was rightly disallowed by the learned Tribunal as it was made and related to earlier years.

7. We accept Mr. Bajoria's submission regarding the expenditure made for construction/acquisition of new facility subsequently abandoned at the work-in-progress stage was allowable as incurred wholly or exclusively for the purpose of assessee's business as covered by the decision in *Graphite India Ltd. (supra)*. The issue whether such expenditure could be allowed in the relevant assessment year is however yet to be resolved.

8. The CIT(A) in his order had found as follows :

"The company claimed as allowable the expenditure on this abandoned project. While it was found to be unviable, the expenditure on it was for the purpose of business. It was not claimed or allowed earlier as business expenditure because it was of capital nature entitled to depreciation after completion and on commencement of its use for business. But since that stage is not reached-no asset having come into existence-the capital-work-in-progress had to be written off as such."

9. There was no challenge to such finding on facts before the learned Tribunal or even before us.

10. The decision in *Delhi Tourism & TDC Ltd. (supra)* is distinguishable on facts in as much as in that case the Delhi High Court had held that the electricity charges for power consumed was a known expenditure and the assessee, on the basis of average, could make a provision for that expenditure in every year of assessment even if no bill was received in a particular year of assessment.

11. Following the judgment in the case of A. Gajapathi Naidu (supra) the question to be asked is when did the expenditure claimed by way of deduction arise? There would have been no occasion to claim the deduction if the work-in-progress had completed its course. Because the project was abandoned the work-in-progress did not proceed any further. The decision to abandon the project was the cause for claiming the deduction. The decision was taken in the relevant year. It can therefore be safely concluded that the expenditure arose in the relevant year.

71. As mentioned in the extracts from the CIT(A)'s order, reproduced a short while ago, there are several other precedents to the same effect, and it is thus an undisputed position that the expenses in relation to abandoned projects are to allowed as deduction in computation of taxable business income. As for the objections taken by the Assessing Officer, we see no substance in these objections either. The views expressed by the tax auditor on what constitutes capital expenditure cannot dilute, curtail or override the views expressed by the Hon'ble Courts above.

What an auditor holds is his accounting perspective, and it has no effect on the legal position. Similarly, just because a claim is made in the revised return, the admissibility of the claim cannot be declined for that reason alone. Nothing turns on these factors, and the Assessing Officer was thus clearly in error, as was the CIT(A).

72. 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 expenses incurred on these abandoned projects. The assessee gets the relief accordingly.

73. Ground no. 4 is thus allowed.

74. In ground no. 5, the assessee has raised the following grievance:

“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in confirming the action of AO in adding Rs. 2,79,78,508/- being notionally allocated expenditure which is alleged to be incurred to earn dividend income in computing Book Profit u/s 115JB of the Act.”

75. Learned representatives fairly agree that this issue is covered, in favour of the assessee, by the Special Bench decision of the Tribunal in the case of **ACIT Vs Vireet Investments Pvt Ltd [(2017) 82 taxmann.com 415 (Del SB)]**, and that has been consistently followed in assessee's own case for the immediately preceding four assessment years. Respectfully following the views of the Special Bench and the views of the coordinate benches in assessee's own cases, we uphold the plea of the assessee, and direct the Assessing Officer to delete the impugned disallowance in the computation of book profits under section 115JB. The assessee gets the relief accordingly.

76. Ground no. 5 is thus allowed

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

“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in confirming the action of AO in not granting the benefit of tax rate of 5% as per Article 10 of India-Mauritius treaty for determining the tax rate on dividend declared.”

78. As this issue has been raised for the first time before us, and none of the authorities below had any occasion to deal with the same, while we admit the claim of the assessee for examination on merits, we deem it fit and proper to remit the matter to the file of the Assessing Officer for consideration.

79. Ground no. 6 is thus allowed for statistical purposes in the terms indicated above.

80. In the result, the assessee's appeal is partly allowed in the terms indicated above.

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

82. In ground no. 1, the Assessing Officer has raised the following grievance:

"Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in allowing the appeal of the assessee and holding the sales tax incentives as capital in nature?"

83. While dealing with the same grievance of the Assessing Officer, for the immediately preceding assessment year and in paragraphs 17 to 20 of this order, we have decided this issue in favour of the assessee. We see no reasons to take a different view of the matter for the present year. For the detailed reasons so set out earlier in this order, while dealing with the immediately preceding assessment year, we uphold the relief granted by the CIT(A) on this point and decline to interfere in the matter.

84. Ground no. 1 is thus dismissed.

85. In ground no. 2 and 3, the Assessing Officer has raised the following grievance:

"Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in allowing the appeal of the assessee and holding that incentive quantified on payment of net present value of the deferred sales tax liability in respect of Darlaghat Unit as capital in nature?"

"Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right allowing the appeal of the assessee and holding that gain arising out of pre-payment of deferred sales tax liability as capital receipt?"

86. While dealing with the same grievance of the Assessing Officer, for the immediately preceding assessment year and in paragraphs 21 to 25 of this order, we have decided this issue in favour of the assessee. The issue in both these grounds is exactly the same, though dealing with different facets of the same issue. All these issues are comprehensively decided by Hon'ble Courts above in favour of the assessee, and, based on these decisions, these issues are decided in favour of the assessee by the Tribunal in several immediately preceding assessment years. We see no reasons to take a different view of the matter for the present year. For the detailed reasons so set out earlier in this order, while dealing with the immediately preceding assessment year, we uphold the relief granted by the CIT(A) on this point and decline to interfere in the matter.

87. Ground no. 2 and 3 are thus dismissed.

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

"Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in allowing the appeal of the assessee and holding excise duty exemption availed by the assessee as capital receipt?"

89. This is also a recurring issue. Earlier in this order, dealing with the immediately preceding assessment year, this issue has been discussed in detail in paragraphs 26 to 29 and decided in favour of the assessee. Respectfully following the views so taken in the immediately preceding assessment year, we uphold the order of the CIT(A) on this issue as well, and decline to interfere in the matter.

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

"Whether, on the facts and in the circumstances of the disallowance of Community Welfare Expenses?"

91. 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 the 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.

92. 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.

93. Ground no. 5 is thus dismissed

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

"Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in allowing the additional depreciation on all the eligible assets acquired before 01.04.2008?"

95. This is also a recurring issue. Earlier in this order, dealing with the immediately preceding assessment year, this issue has been discussed in detail in paragraphs 45 to 47 and decided in favour of the assessee in principle. Respectfully following the views so taken in the immediately preceding assessment year, and subject to the same observations, we uphold the order of the CIT(A) on this issue as well, and decline to interfere in the matter.

96. Ground no. 6 is thus dismissed.

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

"Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in deleting the addition in respect of unutilized CENVAT credit?"

98. Learned representatives fairly agree that this issue is covered, in favour of the assessee, by decisions of the coordinate benches in assessee's own cases for the assessment years 1999-2000 to 2004-05, even though the learned departmental representative rather dutifully relied upon the stand of the Assessing Officer. We see no reasons to take any other view of the matter than so taken by the coordinate benches, and, respectfully following the same, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

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

"Whether, on the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in allowing the pre-operative expenses amounting to Rs. 39,82,07,328/- whereas the assessee itself claimed these expenses as capital expenses in the books of accounts adding it to capital work in progress/fixed assets?"

100. During the assessment proceedings, the Assessing Officer noted that the assessee has made this claim only by way of a revised return and that no such claim was originally made by the assessee. It was also noted that the books maintained under the Companies Act also show these expenses as capital expenses, which in an indicative, even if not conclusive, evidence of the expenses being in the nature of capital expenses. The judicial precedents relied upon by the assessee in support of the claim were noted, and left at that, and it was observed that "the assessee is a big company assisted by a battery of lawyers and chartered accountants, but in its original return of income no deduction on account of these expenses was claimed which amounts to an admission that these expenses are not revenue expenses in nature" and that "this shows that lodging this claim is only an afterthought of the assessee, with no substantial basis". The Assessing Officer also observed that "some of the above expenses are for setting up the business, and not the expansion of the existing ones" though he did not specifically point out any such expenses. The Assessing Office thus proceeded to disallow the entire amount of pre-operative expenses. Aggrieved, assessee carried the matter in appeal before the CIT(A) who, after taking note of the detailed submissions, held that the expenses, being in the nature of expenses incurred for the expansion of existing business, cannot be disallowed. Accordingly, the disallowance was deleted. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

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

102. The short grievance raised before us by the Assessing Officer is whether, even when the expenditure is shown in the books of accounts, it can be treated as revenue in nature. That question, in our considered view, stands concluded in favour of the assessee. In the case of CIT Vs Havells India Ltd (ITA Nos 55 and 57 of 2012; judgment dated 21 May 2012), Hon'ble Delhi High Court has, in this context, observed, speaking through Hon'ble Justice Easwar, that "The fact that in the books of account the assessee had capitalised the expenses does not prevent the assessee from claiming them as revenue expenses since the question of allowance of expenses has to be considered in the light of the legal position and the accounting treatment

cannot be conclusive". The limited grievance raised by the Assessing Officer is thus devoid of any legally sustained merits, and we reject the same. In any event, even on merits, the well reasoned order of the learned CIT(A), in our considered view, does not merit any interference. We approve the conclusions arrived at by the learned CIT(A) on this point and decline to interfere in the matter.

103. Ground no. 8 is thus dismissed.

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

"Whether, on the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in allowing the exclusion of sales tax incentive and excise duty exemption while computing the Book profit u/s 115JB of the Act, whereas the same are in the nature of revenue incentive?"

105. 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.

106. 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.

107. 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.

108. Ground no. 9 is thus dismissed.

109. In the result, the appeal of the revenue is thus dismissed.

110. 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 07th day of November, 2022

Sd/-
Sandeep SKarhail
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 07th November, 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*