IN THE INCOME TAX APPELLATE TRIBUNAL

AMRITSAR BENCH, AMRITSAR.

BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER

I.T.A. Nos.288 to 291/Asr/2015: A.Ys.: 2001-02 to 2004-05
I.T.A. Nos.292 to 294/Asr/2015: A.Ys.: 2006-07 to 2008-09
I.T.A. No.255/Asr/2015: A.Y.: 2008-09
I.T.A. No.470 to 471/Asr/2015: A.Ys.: 2009-10 to 2010-11
I.T.A. No.417/Asr/2015: A.Y.: 2010-11

Dy. Commissioner of Income Tax, Circle-1, Jammu. **(Appellant)**	**V**	M/s FIL Industries 7-Sheikh Bagh, Srinagar. [PAN: AAACF3272F] **(Respondent)**

Appellant by	**Sh. HitendraBhauraojiNinawe, CIT. DR**
Respondent by	**Sh. P. N. Arora,Adv.**

Date of hearing	**15.12.2022**
Date of Pronouncement	**24.02.2023**

ORDER

Per, Bench:

The batch of appeals and Cross appeal of the revenue and assessee were filed against the order of the ld. Commissioner of Income Tax

(Appeals),Jammu, [in brevity the 'CIT (A)']for A.Ys. 2001-02 to 2010-11. Order passed u/s 250 (6) of the Income Tax Act 1961, [in brevity the Act].The impugned orders were emanated from the order of the ld. Dy.Commissioner of Income Tax, Circle-1, Jammu,(in brevity the AO) order passed u/s 143(3) of the Act. In the outset we advert that all the appeals are under the same factual backdrop and in the same issue related to jurisdiction of section 80IB& 80HHC of the Act and disallowance of expenses which are adjudicated herein below. With the consent of both the parties the ITA No. 293/Asr/2015 and 417/Asr/2015 are taken as lead case for revenue &assessee respectively.

ITA No.293/Asr/2015

2. The revenue has taken the following grounds:

> *"1. Whether the Commissioner of Income Tax (Appeals), Jammu was right in law to allow deduction u/s 80IB of the Income Tax Act, 1961 on Central Excise Duty refund by relying upon the judgement of the Hon'ble High Court of J&K, in the case of M/s Shree Balaji Alloys & others & ignoring the ratio of the law on the issue as laid down in the case of Ponni Sugar & Sawhney Steel and Press Works Ltd.*

2. Whether the Commissioner of Income Tax (Appeals), Jammu committed an error in law in not following the law as laid down by the Hon'ble Supreme Court in the case of Ponni Sugar & Sawhney Steel and Press Works Ltd, wherein similar receipts were held to be revenue in nature as the same had been made after the industries had been set up and not for purpose of setting up of the industries.

3. Whether in law, the Commissioner of Income Tax (Appeal), Jammu was right in not appreciating and applying the purpose test as laid down by the judgements of the Hon'ble Supreme Court, in the case of assessee, as the money received by the assessee on account of Central Excise was not supposed to be spent in a particular manner or for the purpose of substantial expansion of the industry.

4. Whether the Commissioner of Income Tax (Appeals), Jammu was right in law in deleting the addition made on account of bank charges as during the course of assessment proceedings on verification of bank details, it was established that bank charges were mainly for the bank guarantees taken by the assessee for the satisfactory performance of the contract with M/s FHEL.

5. Whether the Commissioner of Income Tax (Appeals), Jammu was right in law in allowing the relief on account of depreciation u/s 32 of the I.T. Act, 1961 as expenditure made on account of construction material i.e. mezzanine floors in C.S. stores and erection material and construction material in Tetra Division relates to building and not to the Plant and machinery.

6. The appellant craves to amend or add any one or more grounds of appeal."

ITA No. 417/Asr/2015

3. The assessee has also raised the following grounds:

"1. That the learned Commissioner of Income Tax (Appeals) has erred in sustaining the partial disallowance on account of depreciation claimed in respect of Capital Subsidy amounting to Rs. 23, 16, 393/- and such disallowance is entirely misconceived and is incorrect and has arbitrarily been made.

1.1 That while doing so, the learned Commissioner of Income Tax (Appeals) has failed to appreciate the basic fact that capital subsidy received is not equivalent to investment and thus, invocation of provisions of explanation 10 to section 43(1) in unwarranted and not

proper, as the said subsidy so provided is only to promote setting up of cold storages and is not a reimbursement to meet the cost of asset acquired by the appellant company, as has been wrongly alleged by learned AO and learned CIT (A) and thus, the disallowance so made should have been deleted.

1.2 *That the learned Commissioner of Income Tax (Appeals) has further erred in sustaining the aforesaid disallowance purely on assumptions, presumptions, surmises and conjectures and without any evidence or material to the contrary, and hence the addition made is unsustainable and liable to be deleted.*

2. *That the learned Commissioner of Income Tax (Appeals) has erred in sustaining the disallowance of a sum of Rs. 11, 26, 386/- on account of other expenses being debited in the Profit & Loss Account and such disallowance is entirely misconceived, incorrect and has arbitrarily been made.*

2.1 *That the learned Commissioner of Income Tax (Appeals) has further erred in sustaining the aforesaid disallowance purely on assumptions, presumptions, surmises and conjectures and without any evidence or material to the contrary, and hence the addition made is unsustainable and liable to be deleted.*

3. *That the learned Commissioner of Income Tax (Appeals) has erred in setting - aside the issue of disallowance of a sum of Rs.10, 14, 174/- on account of deduction claimed under section 80IB (11 A) of the Act with respect to CA stores unit at Srinagar to the file of learned assessing officer, whereas after going through the evidences and having accepted that the appellant company has fulfilled the requisite conditions as envisaged under the Act, the said issue should have been decided by learned CIT (A) itself and thus, the set -aside to the file of AO is misconceived and incorrect in law.*

3.1 *That the learned Commissioner of Income Tax (Appeals) has further failed to appreciate the fact that similar issue was decided by Hon'ble Tribunal, Amritsar in favor of assessee - appellant, wherein the said issue was set - aside to the file of learned assessing officer to verify and allow the said deduction to the assessee - appellant and as such, the order passed by learned CIT (A) setting - aside the said deduction to the file of AO is in complete violation of the order of Hon'ble Tribunal and as such, the deduction under section 80 IB (11 A) of the Act, should be allowed.*

4. *That the learned Commissioner of Income Tax (Appeals) has erred in law and on fact in sustaining a disallowance of a claim of deduction of a sum of Rs. 91,014/- claimed under section 80IB of the Act for F&B division by the assessee - appellant.*

4.1 That the learned Commissioner of Income Tax (Appeals) has further erred in disallowing the said claim of loss purely on assumptions, presumptions, surmises and conjectures and without any evidence or material to the contrary, and hence the disallowance so made is unsustainable and liable to be deleted.

5. That the learned Commissioner of Income Tax (Appeals) has erred in law and on facts in sustaining the disallowance on account of expenditure claimed as prior period expenses amounting to Rs. 4, 35, 404/-, which disallowance is entirely misconceived, incorrect and has arbitrarily been made.

6. That the learned Commissioner of Income Tax (Appeals) has grossly erred in passing the impugned order against assessee - appellant without providing any fair and proper and meaningful opportunity of being heard, thereby violating the principles of natural justice and thus such an order of assessment is vitiated both on fact and in law."

4. Brief fact of the case is that forassessment years 2001-02 to 2010-11, except AY 2005-06 the revenue and assessee has filed an appeal before us. A chart is reinserted for understanding the better fact of the case. The said chart is inserted below: -

			REVENUE			ASSESSEE
SL NO	ITA	ASST YR	ISSUE AGITATED			ISSUE AGITATED
			SECTION 80IB	SECTION 80HHC	EXPENDITURE	EXPENDITURE
1	288-ASR-2015	2001-02	YES			
2	289-ASR-2015	2002-03	YES			
3	290-ASR-2015	2003-04	YES	YES		
4	291-ASR-2015	2004-05	YES			
5	292-ASR-2015	2006-07	YES		YES	
6	293-ASR-2015	2007-08	YES		YES	
7	294-ASR-2015	2008-09	YES			
8	255-ASR-2015	2008-09				YES
9	470-ASR-2015	2009-10	YES			
10	471-ASR-2015	2010-11	YES			
11	417-ASR-2015	2010-11	YES		YES	

The assessee is a company and is engaged in business of manufacturing and trading of pesticides, juices and construction. The assessee has various business divisions. The brief description of the various divisions of the assessee is as under:

i) Crop Protection Division -

This division has three units (unit-1, unit-2 and unit-3) at Jammu. These three units are in the business of manufacturing of pesticides and other agro-chemical products. All three units are capable of manufacturing any of the pesticide product i.e. the product manufactured are not unit specific.

ii) Food and beverage division –

This division is manufacturing juices and has its setup at Srinagar

iii) Consumer Division – This unit is a 100% export-oriented unit for the manufacture of juice concentrates and is located at Srinagar.

iv) Warehousing Division: - This unit has controlled atmosphere stores in Srinagar for the purpose of storing and preserving the fruits in controlled atmospheric conditions temperature.

v) **Engineering Division: -** This division is involved in the construction of controlled atmosphere stores for M/s Concor on contract basis.

vi) **Electronic Division: -** This division is involved in trading of electronic hardware items.

In computation of income the assessee has claimed deduction u/s 80IB of theAct for Rs.6,61,35,694/-. Various issues are involved for claim of 80IB. The issue was already adjudicated by the ITAT, Amritsar Bench in 415/Asr/2009 for A.Y. 2005-06 order dated 27.06.2012. The issues are mostly decided by the Coordinate Benches. The revenue has challenged the same order of the ITAT before the Hon'ble High Court of Jammu &Kashmirbut the appeal was withdrawn. The copy of the judgment of Hon'ble High Court is annexed in **APB page no. 151**. Another issue related to depreciation on capital subsidy which were challenged by the assessee, the depreciation u/s 32 on building, plant and machinery which was added back by the ld. AO. Bank charges on bank guarantee was also added back by the ld. AO in the assessment. The aforesaid assessment order was challenged before the ld. CIT(A) by the assessee itself. The ld. CIT(A) in his order adjudicated the grievance against 80IB in relation to Central Excise Refund in favour of assessee, the depreciation u/s 32 in plant and machinery, allowability of

expenses on bank charges on bank guarantee, maintenance of two units u/s 80IB all the issues are adjudicated in favour of the assessee. So, the revenue has challenged this ground before the bench. The depreciation on capital subsidy section 43(1) Explanation-10 was upheldthe order of the ld. AO by the ld. CIT(A). The assessee has challenged the issue before the bench by a cross appeal. Being aggrieved on the order of the appellate authorityboth the parties has challenged the appeal order before us.

5. The ld. counsel for the assessee argued and submitted the paper books which are kept in the record. On the other hand, the revenue had submitted a written submission with the orders of the Coordinate Bench before the ITAT which are kept in the record.

6. The ld. CIT DR vehemently argued and invited our attention to the issues related to 80IB. The ld. CIT DR placed the order of the **Coordinate Bench in ITA 415/Asr/2009, AY-2005-06 date of order 27/06/2012**The grievance of the revenue is that the assessee has received the Central Excise Refund which is accepted as nature of "capital receipt" but similar receipts were held to be revenue in nature as the same had been made after the industries had been set up and not for purpose of setting up of the industries.. The ld. CIT DR has pressed this issue and mentioned the relevant para no. 16 of order of ITAT Coordinate Bench which is reproduced as below:

"16. We have heard the rival contentions and perused the facts of the case. We are of the considered view that the issue stands covered by the decision of the Hon'ble Jurisdictional High Court of Jammu & Kashmir, in the case of Shree Balaji Allows v. CIT and Another (2011) 333 ITR 335 (J&K) where it has been held that the Excise Duty Refund is to be treated as 'capital receipt' and not liable to be taxed. Respectfully following the said judgment of Hon'ble J & K High Court, refund of excise duty of Rs.4,66,88,681/- is held to be as 'capital receipt'. This ground of the assessee is allowed accordingly."

6.1 The ld. CIT DR further invited our attention in the assessment order and the observation of the ld.AO is as follows:

"On a similar issue, the Hon'ble ITAT, Amritsar Bench, Amritsar in its order dated 26th Nov 2009 in the case of Shree Balaji Alloys v ITO in ITA No. 255(ASR)/2009 has held Central Excise duty refund to be a revenue receipt and 'not derived' from Industrial undertaking. While delivering the said judgement, the Hon'ble ITAT, Amritsar Bench, Amritsar has held that the expression "derived from" has been judicially defined by the Hon'ble Supreme Court in the case of Liberty India, having regard to the text and context of the statutory provisions of section 80IB of the text and context of the statutory provisions of section 80IB of the Income tax Act, . The Hon'ble ITAT has further observed that the expression "derived from"cannot embrace incidental income such as Excise Duty Refund and

Interest subsidy, as the same don't have first degree nexus with the ' operational profit' derived from the industrial undertaking itself.

5.3.7. In view of the above discussion, the income of Rs.4,91,16,530/- attributable to all the units on account of accrual of Excise duty refund to the assessee cannot be considered for the computation of deduction u/s 80 IB of the I. T. Act, 1961as it is not derived from Industrial undertaking. Therefore, the assessee is not eligible for deduction u/s 80IB(4) of the Income Tax Act, 1961 on profit attributable to Central Excise Duty Refund. Accordingly, deduction is to be recomputed by excluding the above amounts accrued to the assessee on account of excise duty refunds and income is recomputed accordingly. There is no bifurcation for the component of excise duty refund for Unit 1, 2 and 3. The assessee has claimed consolidated excise duty refund on account of Unit 1, 2 and 3.

Similarly, the other receipts which are not. in the nature of income derived from Industrial Undertaking are not eligible for deduction u/s. 80IB of the I.T.Act.

However, since the claim of assessee for deduction u/s 80IB has been already disallowed vide para -5 as above, this amount of Rs. 4,91,16,530/- on account excise duty refund is not considered separately for computation of deduction eligible to the assessee u/s 80IB of I. T. Act, as not derived from the Industrial Undertaking.

I am satisfied that the assessee has furnished inaccurate particulars of income and has claimed wrong deduction u/s 80IB of the I.T. Act, 1961 to the above extent. Penalty proceedings u/s 271(1) (c) of the I.T. Act, 1961 are, therefore, initiated on this issue."

7. The ld. counsel for assessee filed the paper book which is kept in the record. The ld. Counsel also accepted the fact that the refund from Central Excise is a "capital receipt" and it is no question of tax in the hands of the assessee.

8. We heard the rival submission and perused the documents available in the record. The grievance of the AO related to Capital Subsidy/Central Excise Subsidy is that particular subsidy is a "capital receipt". It cannot be the part of the total income and also not be the part for calculation of deduction u/s 80IB of the Act. As the part of "capital receipt" is "it is not deriving from industrial undertaking", and not the part of the profit. We respectfully relied on the observation of the Hon'ble Supreme Court in the case of ***CIT vs. Ponni Sugars and Chemicals Ltd. reported in 306 ITR 392.***The relevant paragraph is extracted as below:-

> ***"6.*** *One more aspect needs to be mentioned. In Sahney Steel & Press Works Ltd.'s case (supra) this Court found that the assessee was free to use the money in its business entirely as it liked. It was not obliged to spend the money for a particular purpose. In the case of Seaham Harbour Dock Co. (supra) assessee was obliged to spend the money for extension of its docks. This aspect is very important. In the present*

case also, receipt of the subsidy was capital in nature as the assessee was obliged to utilize the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/expansion of existing business."

That a perusal of the grounds of appeal so raised by Revenue would make it amply clear that all the said grounds are identically worded and thus, it is apparent that the Revenue also believes that the aforesaid issue is common in all the 9 appeals. Thus, for the sake of brevity,**ITA No. 293/Asr/2015** is taken as the lead case and it is directed that the orders to be applied *mutatis mutandis* for all the remaining appeals by Revenue.

That the learned CIT (A) at pages 62 and 63 of his order has given a categoricalfinding that

"The jurisdictional high court in the case ofShree Balaji Alloys vs CIT 333 ITR 334 (J&K) has held that excise refund and interest subsidy received by assessee in pursuance to the incentives announced and sanctioned vide Government of India, Ministry of Commerce and Industry (Department of Industrial Policy and Promotion) Office Memorandum No. I (13) 2000- NER dated 14.06.2002 and Central Ercise Notification No. 56 and 57 dated 14. I l, 2002 and other Notifications issued on the subject, pertaining to the Industrial policy introduced in the State of Jammu and Kashmir, is capital receipt and, thus, not liable to tax under the provisions ofthe Act".

The Revenue, in the grounds of appeal so raised before Hon'ble ITAT have only stated that the ld CIT (A) has ignored the ratio so laid down by Hon'ble Apex Court in the cases of Ponni Sugar and Sawhney Steel and Press Works Ltd. We respectfully relied on the judgment of Hon'ble jurisdictional high court, as in

Shree Balaji Alloys vs CIT reported in 333 ITR 335, Hon'ble jurisdictional high court have duly considered and followed the law laid down in the aforesaidApex Court judgments, which has in turn been followed by ld. CIT(A). But in factual matrix the capital subsidy as capital receipt cannot be the part of the calculation of deduction U/s 80IB of the Act.

8.1. In our considered view the appeal of the **revenue in Ground No-1 is allowed** and **Ground No-2 is dismissed**.

9. Further, the ld. AO in his order observed that the subsidy of Central Excise which is reproduced here as below:

7. **Excise Duty Refund and Deduction U/S. 80IB of the Income tax, Act, 1961**

During the year under consideration as discussed above, the assessee has claimed deduction u/s 80IB of Income Tax Act of Rs.1,87,89,108/- in respect of Unit-II and for Rs. 4,73,46,586/- in respect of Unit-III. During the year under consideration, the assessee has received total Excise duty refund of Rs. 4,91,16,530/- in respect of all the Units and has claimed deduction u/s 80IB of the Income Tax Act 1961 on the income corresponding to the accrual of the said refund. There is no bifurcation for the component of excise duty refund for Unit 1, 2 and 3. The assessee has claimed consolidated excise duty refund on account of Unit 1, 2 and 3.

During the course of assessment proceedings, the assessee was through its counsel asked to explain and show cause as to why deduction u/s 80IB claimed on excise duty refund may not be withdrawn as the same are not derived from Industrial undertaking.

5.2. In response to the said show-cause, the assessee furnished reply through its counsel Sh. Mushtaq Ahmad. This relevant part of the said letters regarding Excise Duty Refund is reproduced as under for reference:- ***Excise Duty Refund as income derived from industrial Undertaking***

Excise duty refund has been granted to the industrial undertakings established in Jammu and Kashmir. The said incentive has been granted as an Industrial Assistance. Medium scale Industries are necessarily to be registered with Ministry of Commerce, Government of India Department of Secretariat for Industrial Assistance. The incentive that are required to be granted are granted once the industrial undertaking is established and any incentive that is being provides is being provided in accordance with the industrial assistance scheme provided for by the Government. Excise Duty Refund is also an aid and assistance to the promotion of Industrial Harmony in the Industrially Backward states. The word Industrial is an essential element with regard to the entitlement for this particular benefit in industrially backward states and industrial assistance. Thus the excise duty refund granted to the industries in Industrially backward states certainly an industrial incentive, thus income derived from Industrial undertaking which can be certainly differentiated from Duty draw back and other businesses incentives as such types of incentives are granted irrespective of thefact whether the business is an industry or not. I may also rely upon following citation of Honorable High Court of Delhi.

Commissioner of Income Tax Vs. Dharam Pal Prem Chand Ltd. 2009 221 CTR Delhi.

I hope this information suffices and look forward to the completion of assessment at the earliest and oblige.

5.3. The contention of the assessee that no benefit accrues to the assessee on account of refund of Central Excise Duty is not factually correct and therefore not acceptable. However, before discussing the reasons for rejecting assessee's claim ,it would be appropriate to elaborate the background under which the refunds are being given to the assessee by the Central Excise Department:-

5.3.1. **Notification, Circulars of the Central Excise Department and accounting entries:**

(a) Office Memorandum No 1 (13)/2000-NER dated 14 Th June 2002:

This was issued by the Ministry of Commerce & Industry, Department of Industrial Policy & Promotion in respect of new industrial policy and other concessions for the state of Jammu & Kashmir is reproduced as under:

NEW INDUSTRIAL POLICY AND OTHER CONCESSIONS FOR THE STATE OF JAMMU & KASHMIR*

No.1 (13)/2000-NER

Government of India, Ministry of Commerce & Industry,(Department of Industrial Policy & Promotion) New Delhi, dated 14th June, 2002

OFFICE MEMORANDUM

Subject. New Industrial Policy and other concessions for the state of Jammu & Kashmir.

The Government of Jammu & Kashmir has requested for a special package for development of Industries in the state on the lines for the North East

Industrial policy notified by the Central Government vide Ministry of Industry's OM No.EA/1/2/96-IPD dated 24th December 1997.

Discussions on Strategy and Action Plan for Development of Industries and generation of employment in the State of Jammu & Kashmir were held with the various related Ministries on the issues inter-alia: infrastructure development, financial concessions and easy market access.

2. Keeping in view the fact that the state of Jammu & Kashmir lags behind in industrial development, a need has been felt for structured interventionist strategies to accelerate industrial development of the state and boost investor confidence. The new

initiatives would provide the required incentives as well as an enabling environment for industrial development, improve availability of capital and increase market access to provide a fillip to the private investment in the state.

3. The matter has been carefully considered by the Government and it has been decided to provide the following package of incentives for the state of Jammu & Kashmir:-

3.1 **Fiscal incentives to new industrial units and substantial expansion of existing units**:

i) New Industrial units and existing industrial units on their substantial expansion as defined, set up in growth centre, industrial infrastructure development centers (IIDCs) and other location like Industrial estates, parks, export processing zones, commercial estates, etc. as notified by the Central Government are entitled to 100% (hundred percent) excise duty exemption for a period of 10 years from the date of commencement commercial production.

ii) All new industries in the notified location would be eligible for capital investment subsidy @ 15% of their investment in plant and machinery, subject to a ceiling of Rs. 30 lakhs. The existing units will be entitled to this subsidy on substantial expansion, as defined.

iii) An interest subsidy of 3% on the working capital loan would be provided to all new industrial Units in notified locations for a period of 10 years after commencement of commercial production. This benefit would also be extended to existing units in notified locations on expansion, as defined, as well as to Annexure-II Thrust Industries.

iv) The insurance premium to the extent of hundred percent on capital investment for a period of 10 years would be extended by the Central

Government to all new units and to existing units on Substantial expansion, as defined.

v) The present income tax exemption would continue as per the existing dispensation applicable to Jammu & Kashmir. The State Government may consider extending Sales Tax exemption to the units which avail of concessions under this policy.

3.2 **Development of Industrial Infrastructure:**

The financing pattern of integrated infrastructure Development (IID) centers will change from 2:3 between Government of India and SIDBI to 4:1 and the GOI funds would be in the nature of a grant, so as to provide the required infrastructural support.

3.3 **Other Incentives.**

i) **Design-cum-Resource Centre for Footwear & Leather Industry**: Leather goods and shoes as well as items of fur are being manufactured in the Small Scale Industry/Tiny sector traditionally in Srinagar and Jammu. The Central Government would make an initial contribution of Rs. 1.00 crore as grant for setting up a Design/Resource Centre and National Leather Development Programme (NLDP) would provide assistance for machinery, training and salaries of professionals. Under the National Leather Development Programme, exclusive assistance would be provided to market finished leather products of the artisans of the State in the form of buyers-seller meets and exhibitions.

ii) Ministry of Textiles will extend their package of assistance e as applicable to the North Eastern Region to the State of Jammu & Kashmir on same terms and conditions.

3.4 Setting up of Jammu & Kashmir Development Finance Corporation

i) Jammu & Kashmir Development Finance Corporation (JKDFC) shall be set up by the Central Government with a one time provision of Rs. 50 crore on the lines of North East Development Financial Corporation. This Corporation shall provide term loan, working capital and other Infrastructural support in the State of Jammu & Kashmir in the lines of NEDFI in the North East.

ii) JKDFC would be designated as the Nodal Agency for routing the subsidies/incentives under various schemes notified under this policy.

3.5 The above concessions/subsidies shall be available to all new units/existing industrial units on their substantial expansion, in the notified industrial areas by the Central Government (Annexure_I) and thrust industries (Annexure II) irrespective of location.

Explanation :

i) The eligible areas for above concessions and thrust industries are as identified in Annexure - I & II respectively.

ii) The notification regarding definition of substantial expansion of the existing units shall be issued separately.

3.6 **Ineligible industries under the policy:**

Cigarettes/cigars of tobacco, manufactured tobacco and substitutes, distillation/brewing of alcoholic drinks and manufacture of branded soft drinks and its concentrates are excluded for the purpose of concessions under this policy.

4. Government reserves the right to modify any part of the policy in public interest.

5. The Ministry of Finance, Department of Revenue are requested to amend Act/rules/notifications, etc., and issued necessary instructions for giving effect to these decisions.

Sd/-

(S. Jagadeesan)

Joint Secretary to the Govt of India

(b) Notifications by The Central Excise Department:

Consequently, The Central Excise Department formulated scheme to give effect to the said Memorandum of dated 14th June 2002 and issued Notification No 57 & 57 on 14th November 2002. Relevant extracts of these Notifications are reproduced as under:

(i) Notification No. 56/2002-C.E., dated 14-11-2002:

"In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of

the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than goods specified in Annexure I appended hereto, and cleared from a unit located in the Industrial Growth Centre, Industrial Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate, or Scheme Area, as the case may be, specified in Annexure - II appended hereto, **from so much of the duty of excise or additional duty of excise, as the case may be, leviable thereon under any of the said Acts as is equivalent to the amount of duty paid by the manufacturer of goods, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules,2002.**

2. The exemption contained in this notification shall be given effect to in the following manner, namely:

(a) The manufacturer shall submit a statement of the duty paid, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2002, to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, by the 7th day of the next month in which the duty has been paid.

(b) The Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, after such

verification, as may be deemed necessary, shall refund the amount of duty paid, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2002, during the month under consideration to the manufacturer by the 15th day of the next month.

(ख) If there is likely to be any delay in the verification, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall refund the amount on provisional basis by the 15th day of the next month to the month under consideration, and thereafter may adjust the amount of refund by such amount as may be necessary in the subsequent refunds admissible to the manufacturer.

3. The exemption contained in this notification shall apply only to the following kind of units namely:-

(a) New industrial units which have commenced their commercial production on or after the 14th day of June 2002.

(b) Industrial units existing before the 14th day of June 2002, but which have undertaken substantial expansion by way of increase in installed capacity by not less than twenty five per cent on or after 14th day of June 2002.

4. The exemption contained in this notification shall apply to any of thesaid units for a period not exceeding ten years from the date of

publication of this notification in the Official Gazette or from the date of commencement of commercial production whichever is later.

Notification No. 57/2003-C.E. (N.T.), dated 25-6-2003.

In exercise of the powers conferred by section 37 of the Central Excise Act, 1944 (1 of 1944), the Central Government hereby makes the following rules to amend the CENVAT Credit Rules, 2002, namely:-

1. (1) These rules may be called the CENVAT Credit (Sixteenth Amendment) Rules, 2003.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the CENVAT Credit Rules, 2002, -

(a) in rule 3 , in sub-rule (3), for the third proviso, the following proviso shall be substituted, namely :-

"Provided also that the CENVAT credit of the duty paid on the inputs used in the manufacture of final products cleared after availing of the exemption under the notifications No. 39/2001-Central Excise, dated the 31st July, 2001 [G.S.R. 565(E), dated the 31st July, 2001], No. 56/2002-Central Excise, dated the 14th November, 2002 [G.S.R. 764(E), dated the 14th November, 2002], No. 57/2002-Central Excise, dated 14th November, 2002 [G.S.R. 765(E), dated the 14th November,

2002] and No. 56/2003-Central Excise, dated the 25th June, 2003 [G.S.R. 513(E), dated the 25th June, 2003] shall respectively be utilized only for payment of duty on final products, in respect of which exemption under the said notifications No. 39/2001-Central Excise, dated the 31st July, 2001, No. 56/2002-Central Excise, dated the 14th November, 2002, No. 57/2002-Central Excise, dated 14th November, 2002 and No. 56/2003-Central Excise, dated the 25th June, 2003, is availed."

(b) for rule 10, the following rule shall be substituted, namely :-

"**RULE 10.** Special dispensation in respect of inputs manufactured in factories located in specified areas of North East region, Kutch district of Gujarat, State of Jammu and Kashmir and State of Sikkim- Notwithstanding anything contained in these rules, where a manufacturer has cleared any inputs or capital goods, in terms of notifications of the Government of India in the Ministry of Finance (Department of Revenue) No. 32/99-Central Excise, dated the 8th July, 1999 [G.S.R. 508(E), dated the 8th July, 1999] or No. 33/99-Central Excise, dated the 8th July, 1999 [G.S.R. 509(E), dated the 8th July, 1999] or No. 39/2001-Central Excise, dated the 31st July, 2001 [G.S.R. 565(E), dated the 31st July, 2001] or notification of the Government of India in the erstwhile Ministry of Finance and Company Affairs No. 56/2002-Central Excise, dated the 14th November, 2002 [G.S.R. 764(E), dated 14th November, 2002] or notification No. 57/2002-Central Excise, dated the 14th November, 2002 [GSR 765(E), dated the 14th November, 2002] or notification of the Government of India in the Ministry of Finance (Department of

Revenue) No. 56/2003-Central Excise, dated 25th June, 2003 [G.S.R. 513(E), dated the 25th June, 2003], the CENVAT credit on such inputs or capital goods shall be admissible as if no portion of the duty paid on such inputs or capital goods was exempted under any of the said notifications.".

10. The revenue has agitated the ground -3 as the money received by the assessee on account of central excise was not supposed to be spent in particular manner or for the purpose of substantial expansion of the industry. The nature of subsidy is elaborately discussed by the ld. AO. But ld. CIT-DR was no able to bring any proper fact before the bench. The issue is first agitated before the bench. The ld. Counsel for assessee argued that the ground has no justification.

In the result, the **Ground no-3 of revenue is dismissed**.

ITA No. 294/Asr/2015 Claim of 80IB for Two Units.

11. The ld. CIT DR relied on the order of the ld. AO. The issue is well settled in the Coordinate Bench of ITAT, Amritsar in**ITA No.415/Asr/2009** date of pronouncement 27/06/2012 the relevant paras 13 to 13.1are inserted as below:

"13. As regards the inquiries made during the assessment proceedings especially with Central Excise

Authorities with regard to the reply dated 24.12.2007 of the Central Excise Division, Jammu that there is only unit registered with Central Excise Department. The said Department has confirmed that there were expansions carried out. In this regard, we are of the view that inspite of such reply, the fact does not in any manner detract from the claim that independent undertaking was not set up by the assessee, 52 since neither the AO nor the ld. counsel for the Revenue has brought on record that as per Central Excise Act, separate registration is required, if the assessee is manufacturing a different products at the same place, when they have different undertaking. In the case of J & K Synthetic Limited; reported in (1991) 52 E.L.T. 116 (Trib) relied upon by the Ld. AR (supra), it was held that if two units falls within one premises then only one consolidated license for the manufacture of goods has to be obtained as the object behind the grant of consolidated license is that any person manufacturing different excisable goods within one factory area is entitled to obtain one license instead of different licenses for different commodities. The Ld. counsel for the Revenue, Mr. Girish Dave, has referred to the adjudication order of Central Excise, dated 09.03.2004, where as per that order appellant was to refund excise duty under Notification No.56 of

2002 of Central Excise Act. This notification does not in any manner show that the undertaking set up by the appellant was not independent undertaking. Therefore, this will not lead to any inference that the undertaking set up was not an independent undertaking. As regards the reply of letter dated 27.12.2007, it has specifically been mentioned that there is only one unit in the name of M/s. FIL Industries Limited and assessment is done as one unit only. If there had been three units then separate assessment for each unit needs to be done. 53 Yes, each unit should be separately registered with Commercial Tax Department and yes, separate TIN should be different for each Unit. The above reply was in pursuance to the letter from the A.O. dated 24.12.2007 wherein it was inquired and was asked specific question to explain what would have been the position if the assessee had three different units registered and running from the same place where assessment in all the three units were made as one unit. From the perusal of the questionnaire and the reply, it is evident that if the assessee had three different units registered with Commercial Tax Department, it is only then three separate assessments for each unit were required to be done. However, when one unit is registered, there is no justification of

three assessments are required to be made. From the perusal of record, we are of the view that nothing has been brought on record by the AO or by the Ld. CIT(A) or by the ld. counsel for the Revenue to show that the assessee was required separate registration for claiming deduction under section 80IB of the Act. 13.1 Section 6-A of the Jammu & Kashmir Sales Tax Act, 1962 provides for provisional registration of the business of any person who intends to establish a business in the State of Jammu & Kashmir for the purpose of manufacturing or producing goods. Under this Act, registration is required 54 of the business and not of the each of the separate undertaking at the same place of the assessee. As regards reply of the Inspectors of Factories and Boilers, the same cannot help the Revenue. As regards the Insecticides Act, 1968 and Insecticides Rules, 1971, under Rule 9(2) if manufacturing activities are carried out at more than one place, only then separate registration is required whereas the assessee is carrying out manufacturing only from the same premises as different units. Now the question arises whether any requirement under different provisions of different Acts can be a pre-condition to allow deduction u/s 80IB of the Act, especially when the assessee had fulfilled all the requirements of section 80IB of the Act. We are

convinced with the arguments made by the ld. counsel for the assessee, Mr. C.S. Aggarwal, Advocate that section 80IB(3) of the Act read with Explanation (g) to section 80IB(14) of the Act, which specifically provides for fulfilment of condition u/s 11B of Industries (Development and Regulation) Act, 1951. Under section 80IB(3) read with Explanation (g) to section 80IB(14), if read show that deduction can only be claimed if the assessee is a small scale industrial undertaking under section 11B of the Industries (Development and Regulation) Act, 1951. Thus, under section 80IB(3) of the Act, there is specific pre condition whereas there is no such pre-condition in section 80IB(4) of the Act, if read with section 80IB(2) of 55 the Act. In view of our findings hereinabove, we find that there is no requirement for the assessee to obtain separate registration for each of the three industrial undertakings, having established new industrial undertaking by way of fresh investment of building and plant & machinery and therefore, it cannot be held that undertakings are not eligible to claim deduction u/s 80IB of the Act. We rely upon the decision of Hon'ble Gujarat High Court in the case of CIT Vs. Saurashtra Cement and Chemicals Industries Limited reported in 123 ITR 669 in this regard. Also, we rely upon the decisions of various courts of law

i.e.i) CIT vs. Paul Brothers 216 ITR 548 (Bombay) ii) G.B. Bros and Konda Rajagopala Chetty vs. ITO 262 ITR 774 (AP) iii) CIT vs. Bhilai Engineering Corporation (P) ltd. 133 ITR 687 (MP) iv) ITO vs. Laxmi Packers (2007) 14 SOT 303 that once deduction has been allowed in the initial assessment year, it cannot be re-examined in the succeeding assessment years. As regards the initiation of proceedings u/s 147 of the Act, it was stated when Unit-2 was set up in assessment year 2000-01, no such proceedings were initiated and the proceedings for the assessment year 2001-01 had attained finality, though it cannot be reopened on period of limitation as argued by the ld. counsel for the assessee under section 149 of the Act. As regards the 56 principles laid down by the various courts of law, the issue is with regard to formation of industrial undertaking has been examined in the initial assessment year and once the claim has been allowed especially under assessment u/s 143(3), the same cannot be denied in the succeeding assessment year without first recording of any adverse finding of the year of formation. There is no citation referred by the Ld. counsel for the Revenue to take a different view on the matter. Accordingly, we uphold the claim of the assessee u/s 80IB of the Act, which is in accordance with law."

12. We consider the order of both the revenue authorities and followed the observation of the Coordinate Bench. In our considered view, in this point, **the appeal of the revenue is dismissed.**

Claiming Depreciation u/s 32 in Building, Plant and Machinery.

13. The ld. CIT DR placed that the assessee had charged depreciation on the building, plant and machinery head @ 25%, which the rate of depreciation will be @ 10%. So the 15% was disallowed by the ld. AO. The relevant para of the assessment order page 84 to 85 is extracted as below:

"On the perusal of the details filed for additions to plant and machinery in respect of Kohinoor International Agro Products (C.A. Stores), Srinagar last year as per assessment order of 2006-07, it was found that expenditure on account of material for Mezzanine floors had been included in the grouping plant and machinery. However, since such expenditure is related to buildings, depreciation @ prescribed for building only was allowed.

Depreciation on the above has been claimed @ 25.%. Depreciation would be available on the above @ of 10% Hence, excess depreciation of Rs. 5,29,265/- is disallowed and is added to the total income of the asssessee.

Depreciation disallowable is worked out as follows:

Gross Block (adjusted from above) = *35,28,437/-*

Dep @ 12.5% claimed = *8,82,109/-*

Depreciation allowable = *3,52,843/-*

Excess Depreciation Added back =Rs. 5,29,265/-

Similarly, from the details of additions of Plant & Machinery - Indigenous filed in respect of Kohinoor International Agro Products- Tetra Division, Srinagar, from the order of Assessment year 2006-07 it is seen that expenses on account of erection material and construction materials as follows had been included in the Plant & Machinery and depreciation has been claimed @ prescribed for Plant and Machinery. However, expenses on account of erection and construction material relating to fixed assets qualify for depreciation @ prescribed for buildings, i.e. 10%. Depreciation had been claimed @ 25% treating the above as part of Plant & Machinery. Depreciation is to be allowed 10% . In view of the above, the excess depreciation claim of Rs. 13,62,898/- is disallowed and is added to the total income of the assessee.

Based on the above depreciation allowable is worked out as follows:

Gross Block (adjusted from above) = *90,85,994/-*

Dep @ 25% claimed = *22,71,498/-*

Depreciation allowable @ 10% = 9,08,600/-

Excess Depreciation Added back =Rs. 13,62,898/-

Total excess depreciation claimed as above is disallowed on account of C.A. Stores, Srinagar and Kohinoor International Agro Products Tetra Division, Srinagar works out to (Rs. . 5,29,265 /- + Rs. 13,62,898/- i.e. Rs. 18,92,163/-. I am satisfied that the assessee has furnished inaccurate particulars of income on this account. Penalty proceedings u/s 271(1) (c) of the I.T. Act, 1961 are, therefore, initiated on this issue."

14. The ld. counsel for the assessee further argued and relied on the order of the ld. CIT(A) the relevant paragraph 15 of the CIT(A) order is extracted as below:

"15 ISSUE 8: DISALLOWANCEOFDEPRECIATIONOFRS.18,92,163/- ANDRS. 3,10,253/- U/S 32 OF THE ACT. (ASSESSMENT YEAR 2007-08 & 08-09)

15.1 The Hon'ble Tribunal vide its order dated 27.6.2012 has deleted the identical disallowance of depreciation, wherein it has been held as under:

"22 We have heard the rival contentions and perused the facts of the case. This is not under dispute that the construction material in respect of CS Stores was utilized for construction of mezzanine floors which is, in

fact, is a part of plant and machinery. Similarly, it has not been disputed that the erection material and construction material in Tetra Division was for the addition to the plant and not to the building. The AO has gone with the assumption and the nature of the expenditure since the expenditure is on the construction material and erection material and therefore, it has to be treated as part of building. Once the said expenditure is part of the plant and machinery, which is not under dispute, such expenditure necessarily has to be part of plant and machinery and depreciation as claimed has to be allowed. Therefore, in the facts and circumstances, the order of the learned CIT(A) is reversed and the AO is directed to allow the claim raised by the assessee. Thus, ground no. 9 of the assessee is allowed.

15.2 Following the above order for Assessment Year 2005-06 and, since thedisallowances made are based on the finding made in the order of assessment for A.Y. 2005-06, the same are deleted and thus grounds raised are allowed."

15. We heard the rival submission and considered the documentavailable in the record. The ld. AO had calculated the depreciation considering the nature of assets. The issue was already covered by the order of assessee's own case in ITAT-Amritsar Bench, **ITA No-415/Asr/2009 date of pronouncement 27/06/2012** in paragraph no 22. We relied on the order of coordinate bench &upheld the order of the ld. CIT(A).

15.1. In the result, **appeal of the revenue in ground no-5 is dismissed**.

Bank Charges on Bank Guarantee

16. The ld. CIT DR argued and relied on the order of the ld. AO that the ld.AO has not considered the bank charges for bank guarantee which has no nexus of the business accordingly the addition was made.

17. The ld. counsel for the assessee vehemently argued and relied on the order of the ld. CIT(A) para 12 pages 71 to 77 is reproduced as under:

"12 ISSUE 5: DISALLOWANCE OF RS. 38,31,384/- ON ACCOUNT OFBANK GUARANTEE CHARGES HELD TO BE NOT RELATED TO THE APPELLANT COMPANY FOR THE YEAR UNDER CONSIDERATION (ASSESSMENT YEAR 2007-08)

12.1 During the instant year, the assessee has claimed an expenditure on account of bank guarantee charges of the following sums:-

Sr. No.	*Amount (Rs.)*	*Period*

1.	*20,48,857*	*23.5.2006 to 20.2.2007*
2.	*6,59,360*	*5.3.2007 to 15.5.2007*
3.	*51,08,513*	*25.4.2006 to 21.1.2010*

Appeal No. 26/10 & 157/09-10 in the case of M/S. FIL Industries Ltd. 7. Sheikh Baah, Srinagar for the assessment year 2007-08 and 2008-09 against the order of the AO u/s. 143(3) of the Income tax Act, dated 30/12/2009 and 13/12/2010.

12.2 On the above facts, the AO noted that performance bank guarantee for which, expenditure of Rs. 51,08,513/- has been incurred relates to financial year 2006-07 to financial year 2009-10. He therefore, held that out of amount of Rs. 51,08,513/-, only a sum of Rs. 12,77,128/- is allowed as relatable to the year under consideration and balance amount of Rs. 31,31,384/- is disallowed as not relatable to the year under consideration. The appellant has contended that there is no concept of deferred revenue expenditure and once the expenditure has been incurred, the said expenditure is allowable as deduction. In the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Citi Financial Consumer Finance Ltd. 335 ITR 29. The facts were that in the assessment year 2001-02, the assessee company claimed an expenditure of Rs. 3.95 crores on account of advertisement and publicity expenses as revenue expenditure. The Assessing Officer was of the view that expenditure could not be termed

expenditure relevant exclusively for the period of twelve months under consideration during the assessment year 2001-02. Such expenditure had a bearing on a period of five years and therefore, assessee could not claim the benefit in the year in which, expenditure was incurred. He accordingly, allowed l/5th of the expenditure and the balance was disallowed. Furthermore, the Assessing Officer also noticed that assessee had been financing hire-purchase of vehicles and homes etc. and the periods of such financing not less than one yearupto five years. He noticed that on such transaction during the selling expenses, stamping fees and commission paid to selling agents, could not be treated as expenditure related to the year in which, the transaction took place as the period of financing was more than one year and on this basis, the Assessing Officer took the view that expenditure could not be termed as having chargeable in which, they were incurred. He therefore allowed l/3rd expenditure and balance was disallowed. The Tribunal on appeal, however, allowed the above claim which was further upheld by the Hon'ble High Court by observing as under:

\"10. The aforesaid facts would demonstrate that the ingredients of section 37 of the Act stand satisfied. Therefore, normally the expenditure is to be allowed as businessexpenditure in the year in question in which the same is incurred. In this backdrop, wehave to consider the arguments of the Revenue predicated on the so-called enduring benefit which the expenditure on account of advertisement and publicity confers. This argument is based on the judgment of the apex court in Madras Industrial Investment Corporation Ltd. [1997] 225 ITR 802 (SC). In that case, the Supreme Court had referred to this "matching concept". It was held that ordinarily revenue expenditure incurred wholly or

exclusively for the purpose of business, can be applied in the year in which it is incurred. However, the facts may justify spreading the expenditure and claiming it over a period of ensuing years, where allowing the entire expenditure in one year could give a very distorted picture of the profits of a particular year. One such instance was issuing debentures at discount. The Supreme Court was of the opinion that though in such cases the assessee had incurred the liability to pay the discount in the year of issue of debentures, the payment is to secure the benefit over a number of years. There was a continuing benefit to the assessee of the company over the entire period and, therefore, the liability was to be spread over the period of debentures.

11. We are unable to persuade ourselves by the aforesaid submission of the learned counsel for the Revenue. An identical argument was taken by the Revenue in IFCI (supra). Explaining the ratio of the Supreme Court in Madras Industrial Investment Corporation Ltd. [1997] 225 ITR 802 (SC), the argument of the Revenue was rejected in the following manner :

"The judgments on which reliance is placed by the learned counsel for the Revenue would be of no avail in the instant case. The learned counsel for the Revenue had strongly argued that matching concept is to be applied, as per which part of the expenditure had to be deferred and claimed in the subsequent years and, therefore, approach of the Assessing Officer was correct. However, this argument overlooks that even in Madras Industrial Investment Corporation Ltd. [1997] 225 ITR 802 (SC), on which the reliance was placed by Ms. Bansal, the general principle stated was that ordinarily revenue expenditure incurred wholly and exclusively for the purpose of business can be allowed in the year in

which it is incurred. Some exceptional cases can justify spreading the expenditure and claiming it over a period of ensuing years. It is important to note that in that judgment, it was the assessee who wanted spreading the expenditure over a period of time as was justifying such spread. It was a case of issuing debentures at discount; whereas the .assessee had actually incurred the liability to pay the discount in the year of issue of debentures itself. The court found that the assessee could still be allowed to spread the said expenditure over the entire period of five years, at the end of which the debentures were to be redeemed. By raising the money collected under the said debentures, the assessee could utilize the said amount and secure the benefit over a number of years. This is discernible from the following passage in that judgment on which reliance was placed by the learned counsel for the Revenue herself:

'The Tribunal, however, held that since the entire liability to pay the discount had been incurred in the accounting year in question, the assessee was entitled to deduct the entire amount of Rs. 3,00,000 in that accounting year. This conclusion does not appear to be justified looking to the nature of the liability. It is true that the liability has been incurred in the accounting year. But the liability is a continuing liability which stretches over a period of 12 years. It is, therefore, a liability spread over a period of 12 years. Ordinarily, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety in the year in which it is incurred. It cannot be spread over a number of years even if the assessee has written it off in his books over a period of years. However, the facts may justify an assessee who has

incurred expenditure in a particular year to spread and claim it over a period of ensuing years. In fact, allowing the entire expenditure in one year might give a very distorted picture of the profits of a particular year. Thus in the case of Hindustan Aluminium Corporation Ltd. v. CIT [1983] 144 ITR 474 (Cal), the Calcutta High Court upheld the claim of the assessee to spread out a lump sum payment to secure technical assistance and training over a number of years and allowed a proportionate deduction in the accounting year in question.

Issuing debentures at a discount is another such instance where, although the assessee has incurred the liability to pay the discount in the year of issue of debentures, the payment is to secure a benefit over a number of years. There is a continuing benefit to the business of the company over the entire period. The liability should, therefore, be spread over the period of the debentures.'

Thus, the first thing which is to be noticed is that though the entire expenditure was incurred in that year, it was the assessee who wanted the spread over. The court was conscious of the principle that normally revenue expenditure is to be allowed in the same year in which it is incurred, but at the instance of the assessee, who wanted spreading over, the court agreed to allow the assessee that benefit when it was found that there was a continuing benefit to the business of the company over the entire period."

12. This court, thus, explained in no uncertain terms that the normal rule accepted by the Supreme Court in the said judgment was that the expenditure is to be allowed in the year in which it was incurred. Only at the instance of the assessee who wanted to spread over, the court had agreed to allow the assessee

the benefit after finding that there was a continuing benefit to the company over the entire period. The ratio of this judgment was thus summarized in the following manner:

"What follows from the above is that normally the ordinary rule is to be applied, namely, revenue expenditure incurred in a particular year is to be allowed in that year. Thus, if the assessee claims that expenditure in that year, the Income-tax Department cannot deny the same. However, in those cases where the assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of matching concept is satisfied, which up to now has been restricted to the cases of debentures."

12.3 Likewise, recently, the Apex Court in the case of Taparia Tools Ltd. Civil Appeal Nos 6366-6368 of 2003 in a judgment dated 23.3.2015 has held as under: -

"18 What follows from the above is that normally the ordinary rule is to be applied, namely, revenue expenditure incurred in a particular year is to be allowed in that year. Thus, if the assessee claims that expenditure in that year, the IT Department cannot deny the same. However, in those cases where the assessee himself wants to spread the expenditure over a period of ensuring years, it can be allowed only if the principle of 'Matching Concept' is satisfied, which upto now has been restricted to the cases of debentures.

19 In the instant case, as noticed above, the assessee did not want spread over of this expenditure over a period of five years as in the return filed by it, it had claimed the entire interest paid upfront as deductible expenditure in the same year. In such a situation, when this course of action was permissible in law to the assessee as it was in consonance with the provisions of the Act which permit the assessee co claim the expenditure in the year in which it was incurred, merely because a different treatment was given in the books of accounts cannot be a factor which would deprive the assessee from claiming the entire expenditure as a deduction. It has been repeatedly by this court that entries in the books of accounts are not determinative or conclusive and the matter is to be examined on the touchstone of provisions contained in the Act [See-Kedamath Jute Manufacturing Co. Ltd. s. Commissioner of Income Tax Central, Calcutta, Tuticorin Alkali Chemicals & Fertlilizers Ltd., Madras vs. Commissioner of Income Tax, Madras, Sutlej Cotton Mills Ltd. vs. Commissioner of Income Tax, Calcutta and United Commercial Bank, Calcutta vs. Commissioner of Income Tax, WB-III, Calcutta]

20 At the most, an inference can be drawn that by showing this expenditure in a spread over manner in the books of accounts, the assessee had initially intended to make such an option. However, it abandoned the same before reaching the crucial stage, in as much as, in the income tax return filed by the assessee, it chose to claim the entire expenditure in the year in which it was spent/paid by invoking he provisions of section 36(l)(iii) of the Act. Once a return in that manner was filed, the AO was bound to carry out the assessment by applying the provisions of that Act and not to go beyond the said return. There is no

estoppels against the Statute and the Act enables and entities the assessee to claim the entire expenditure in the manner it is claimed."

12.4 From the above judgment, it is crystal clear that expenditure is to be treated as revenue allowable fully in the year in which, it is incurred and no part of the expenditure can be deferred or claimed in the subsequent years. In view of the above judgment, the claim of expenditure is held to be eligible for deduction and disallowance made of Rs. 38,31,384/- is deleted.

The ground raised is thus allowed."

18. In our considered view that the ld. CIT(A) has taken a correct view in relation to the bank guarantee charges paid on bank amount of Rs.38,31,384/-. We are not intervening in the order of the ld. CIT(A) and accordingly **ground No-4 of the revenue is dismissed.**

ITA No. 417/Asr/2015-Ground-1, 1.1 & 1.2. Disallowance on account of depreciation claimed in respect of Capital Subsidy

19. The ld. counsel vehemently argued and relied on the submission. We consider the assessee's submission of the relevant pages 4 to 9 are reproduced as under:

"1.7 It is submitted that perusal of the aforesaid explanation would show that where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee. It is submitted that proviso to section 43(1) of the Act provides that where such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee. It is thus evident that burden is on the department to establish that capital investment subsidy received by the appellant company is relatable to the cost of the asset acquired by the assessee. In other words, the learned Assessing Officer is obliged to establish that cost of an asset acquired by the assessee has been met directly or indirectly by the NABARD. It is submitted that in arriving at the above conclusion, the learned Assessing Officer has in no manner whatsoever established that cost of an asset acquired by the assessee has been met directly or indirectly by the capital subsidy received by the appellant company. It is submitted that copy of the scheme has placed at page 317 to 322 of Paper Book II for AY 2009-10. It will be seen that the said scheme is for promotion of setting up of cold stores in the country to reduce post harvest losses. It will be further seen that subsidy so provided is only to promote setting up of the cold storages and is not a reimbursement or agreement to meet the cost of the asset acquired

by the appellant company. This fact would be evident from clause (iv) of the Scheme which provides that assessee would be entitled to 25% of the back ended capital investment subsidy scheme. It will be seen that such subsidy is given irrespective of the actual cost incurred by the appellant company. In other words, subsidy so released has no connection with the actual cost incurred by the appellant company. It is submitted that even as per the sanction letter as available, the assessee has been sanctioned subsidy of Rs. 4.00.00.000/- in the new store and Rs, 10.00.000/- in the old store which is equivalent to Rs, 4.10,00,000/- out of which, Rs, 1.54.42,626/- was released in the instant year. However, total investment by the appellant company as would be evident from the financial statement is Rs. 64.24 crores at the close of the year. It may be added here that the total aggregate investment before depreciation for the cold storage is as under:

Sr. No.	***Particulars***	***Amount (pages of Paper***	***Subsidy received (pages of Paper Book)***
i)	*Old storage*	*5,75,87,552/- (139)*	*10,00,000/- (Received in the AY 2009-10)*
ii)	*New Storage*	*58,48,50,242/- (145)*	*20000000/- (Received in the AY 2009-10) 1,54,42,626/- (Receipt in the instant*

1.8 It may be thus, evident that such subsidy cannot be said to be an amount which has been received directly or indirectly to meet the cost of the assets acquired by the appellant company. It is a mere "incentive" received provided

by the Central Government for promotion of setting up of the cold storage in the country to avoid losses in post harvest season. It is submitted that the Hon'ble Jammu & Kashmir High Court, examining the nature of subsidy after considering the judgment of the Apex Court in the case of Sahney Steel Works Ltd. vs. CIT reported in 228 ITR 255 and CIT vs. Ponni Sugars and Chemicals Ltd. reported in 306 ITR 392 held that such subsidies are capital receipt. It is submitted that the Hon'ble Apex Court in the case of CIT vs. Ponni Sugars and Chemicals Ltd. has held as under:

"16. One more aspect needs to be mentioned. In Sahney Steel & Press Works Ltd.'s case (supra) this Court found that the assessee was free to use the money in its business entirely as it liked. It was not obliged to spend the money for a particular purpose. In the case of Seaham Harbour Dock Co. (supra) assessee was obliged to spend the money for extension of its docks. This aspect is very important. In the present case also, receipt of the subsidy was capital in nature as the assessee was obliged to utilize the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/expansion of existing business.

17. Applying the above tests to the facts of the present case and keeping in mind the object behind the payment of the incentive subsidy we are satisfied that such payment received by the assessee under the Scheme was not in the course of a trade but was of capital nature. Accordingly, the first question is answered in favour of the assessee and against the Department."

1.9 It is submitted that the Hon'ble Apex Court has laid down the purpose test and if the purpose of the subsidy is not to meet the cost of the assets acquired by the assessee company, the purpose is to encourage the setting up of the cold storage by the appellant company. It is submitted that it has already established even by figures that actual cost incurred by the assessee has no connection with the subsidy received. In fact, amount of actual cost is never provided to the sanctioning authority for granting subsidy. It may be added here that all what has been provided to the sanctioning authority is only project cost and not the actual cost incurred by the appellant company. It is thus evident from the sanction letter and application furnished by the appellant company. A copy of the sanctioning letter and application letter placed at page 419 to 432 of of Paper Book. -II for AY 2009-10. In other words, the submission is that disallowance of depreciation of Rs. 23,16,393/- on the basis of invoking explanation 10 to section 43(1) of the Act is highly unjustified and uncalled for. Reliance is also placed on the following judicial pronouncements:

i) 65 SOT 58 (Kofi DCIT vs. Rasoi Ltd.

I. Section 43(1), read with section 32 of the Income-tax Act, 1961 - Actual cost (Subsidy) - Assessment year 2007-08 - Whether in order to invoke Explanation 10, it is necessary to show that subsidy was directly or indirectly used for acquiring an asset - Held, yes - Whether relatable subsidy to an asset can be reduced from its cost only if it is found that cost of acquiring that asset was directly or indirectly met out of subsidy - Held, yes - Whether likewise in proviso to Explanation 10, it is necessary to show that subsidy has been directly or indirectly used to acquire an asset but it is not possible to exactly quantify

amount directly or indirectly used for acquiring asset - Held, yes - Assessee company received subsidy from Government of West Bengal as encouragement for setting up of industrial projects - Maximum limit of subsidy was restricted with reference to value of fixed asset but no part of subsidy was intended to subsidize cost of any fixed asset - Whether amount of subsidy could not be deducted from actual cost, as same was not relatable to acquire asset directly or indirectly and, resultantly, allowable depreciation could not be reduced - Held, yes [Paras 7 and 8] [In favour of assessee]

ii) 52 taxmann.com 16 (Del) Asst. CIT vs. Richa Industries Ltd.

Section 43(1), read with section 32, of the Income-tax Act, 1961 - Actual cost (Subsidy) - Assessment year 2008-09 - Whether Explanation 10 to section 43(1), would suggest that actual receipt of subsidy was a condition precedent forinvoking such provisions - Held, yes - Whether where amount of subsidy had actually been received by assessee in next financial year, actual cost of plant and machinery could not be reduced during year under appeal thereby reducing claim of depreciation - Held, yes - Whether, however, Assessing Officer was to be directed to give effect of subsidy in subsequent year - Held, yes [Para 5][In favour of assessee]

iii) 119 TTJ 976 (Visak) Sasisri Extractions Limited vs. Asst, CIT

A careful perusal of scheme-in-question showed that it was intended to accelerate industrial development of the State and the incentive was given for

setting-up of industries in the State and for the purpose of determining the amount of subsidy to be given, cost of eligible investment was taken as the basis, though it was not specifically intended to subsidise the cost of the capital. Under the circumstances, the incentive in the form of subsidy could not be considered as a payment directly or indirectly to meet any portion of the actual cost and, thus, it fell outside the ken of the Explanation 10 to section 43(1). Therefore, for the purpose of computing depreciation allowable to the assessee. the subsidy amount could not be reduced from the cost of the capital asset. IPara 12]

iv) 55 taxmann.com 33(Kol) Birla Corporation Ltd. vs. DC1T

Section 43(1), read with Explanation 10 of the Income-tax Act, 1961 - Actual cost (Subsidy) - Assessment year 2007-08 - Assessee was engaged in business of production of cement, received sales tax subsidy under a scheme of Government -Whether sales tax incentive was capital in nature as very scheme under which subsidy was received was for incurring expenditure for installation of plant and machinery and for fixed capital investment - Held, yes - Whether further, said subsidy receipt should not be reduced from actual cost of fixed assets for computing depreciation - Held, yes [Paras 7 and 9] [In favour of assessee]

v)I.T.A No. 679/Kol/2013 dated 27.02.2015 Universal Cables Ltd. vs. PC1T

In view of the above facts and circumstances of the case and legal position explained by Hon'ble Supreme Court in the case of P. J. Chemicals Ltd. (supra), we are of the view that subsidy receipt should not be reduced from the actual

cost of fixed assets for computing depreciation under the provisions of the Act. Accordingly, this issue of revenue's appeal is dismissed and that of the assessee is allowed.

1.10 It is thus prayed that in nutshell, no disallowance is warranted in respect of the subsidy received of Rs. 1,54,42,626/- of the C.A. Store New. The purpose of the subsidy was only to setting up the project and not to meet the cost of the asset.

1.11 It is thus, prayed that disallowance so sustained by learned CIT (A) may kindly be deleted."

20. The ld. CIT DR vehemently argued and relied on the order of the ld. CIT(A). We respectfully relied on the judicial observation on application of depreciation in capital subsidy. In our considered view, this capital subsidy of the assessee is not interfering in the 'actual cost' of the assets. The assessee received this capital subsidy from NABARD. Here, we are intervening in the order of the ld. CIT(A).The addition amount of Rs. 23,16,393/- is quashed. Accordingly, the appeal of the **assessee in Ground No. 1 to 1.2 are allowed**.

ITA 417/Asr/2015- Ground-2& 2.1. Disallowance of other expenses: -

21. The ld. Counsel placed that 10% was disallowed of total expenses amount to Rs. 1,12,63,866/- which is working out to Rs. 11,26,386/- on Travelling expenses in Foreign & Inland and Vehicle running and maintenance. The ld. AO had made ad hoc disallowance.

21.1. The ld. CIT-DR argued and relied on order of revenue authority.

21.2. The disallowance was made without finding any specific lacuna. The ld. CIT(A) in his order page-81 & 82 has upheld the addition without mentioning any specific discrepancy. The ld. CIT(A) without verifying the same pass the order only on basis of observation of the ld. AO. The ld. CIT(A) is equally fallacious since the expenses are extremely useful for furtherance and growth of any business, leave aside the assessee's business. No worthwhile argument has been advanced by the ld. CIT-DR as to why he has treated this expense as bogus. The addition amount to Rs. 11,26,386/- is dismissed. The ground of the assessee is allowed.

21.3. In the result **the appeal of the asseessee, ground no. 2 to 2.1 are allowed**

ITA 417/Asr/2015- Ground-3&3.1 and Ground 4 &4.1:-

22. The ld. Counsel argued that ground Nos. 3 to 3.1 with regards to deduction under section 80 IB of the Act of sum of Rs. 10,14,174/- with respect to CA stores and Ground Nos. 4 to 4.1 is with regards to claim of deduction under section 80 IB with respect to F&B division.

22.1 The ld. Counsel argued that ld. CIT (A) at pages 85 to 91 of his order, in principal agreed to the claim of deductions so claimed by the assessee - appellant, however, gave a finding that since AO has not made disallowance with regards to the same in order of assessment, as such, no relief can be claimed. However, a look at the ld. AO's order at page 5, would make it amply clear that adverse observations have been made by learned AO, and once learned CIT (A) in principle agreed to allow the said claim, the said observations so recorded by learned AO should have also been expunged. It is prayed accordingly from Hon'ble ITAT to direct learned AO to expunge the said observations. It is further, submitted that the said finding of ld. CIT (A) is also factually incorrect, whereas, the deduction so made by learned AO under section 80 IB of a sum of Rs. 2,11,80,352/-, includes the aforesaid figures of Rs. 10,14,174/- and Rs. 91,014/-.

22.2. We heard the rival submission & observed the documents. There is factual difference in both the orders of the revenue. The ld. CIT-DR only relied on the orders of the revenue. We remit back the matter to the ld. CIT(A) and adjudicate the issue considering the submission of assessee.

22.3. In the result **the appeal of the assessee ground no 3 & 3.1 and 4 & 4.1 are allowed for statistical purpose**.

ITA 417/Asr/2015- Ground-5regards to disallowance on account of prior period expenditure: -

23. the ld. Counsel argued that Ground Nos. 5 is with regards to disallowance on account of prior period expenditure of a sum of Rs. 4, 45, 404/-.It is most respectfully submitted that ld. AO at page 10 and 11 of the order held that, the expenditure so claimed pertains to AY 2009-10 and as such, the same cannot be claimed in the instant assessment year following principles of accrual. The same has also been upheld by ld. CIT (A). In this regard, it is most humbly submitted that the said expenditure has never been claimed by assessee - appellant in the past and furthermore, the said liability was crystallized during the impugned assessment year and as such, the same should have been allowed in the instant assessment year. Furthermore, since

the tax rates for both AY 2009-10 and 2010-11 are similar, as such, there is no loss to Revenue whether it is allowable in AY 2009-10 or 2010-11.

23.1. We heard the rival submission & observed the documents. Since the genuineness of transaction is not in dispute and as such, the prior period expenditure is accepted. The service tax payable amount to Rs. 4,35,404/- for FY 2008-09. The claim is taken in impugned assessment year. The payment is related to actual payment. The ld. CIT-DR has not made any objection in this issue. We find that revenue has wrongly added the prior period expenditure, service tax We dismiss the addition of the assessee.

23.2. In the result **the appeal of the assessee ground no 5is allowed**.

ITA No. 290/Asr/2015

24. The revenue has challenged the order of the ld. CIT(A) for accepting the Claim of assessee U/s 80HHC of the Act. The ld. CIT-DR has relied on the order ofthe ld. AO.

24.1. The ld. Counsel relied on the order of the ld. CIT(A) which is reproduce as below: -

"13. ISSUE 5 DISALLOWANCE OF CLAIM OF DEDUCTION U/S 80HHC OF THE ACT

A.Y.	*Ground No.*	*Amount (Rs.)*

2003-04	*4*	*36,54,798*

13.1 The facts as emerging from record are that assessee company had declared net profit of Rs. 76,68,765/- in respect of meat export division. The profit and loss account of the aforesaid division is placed at pages 85A to 85F of Paper Book. The meat export division is engaged in export of meat. It is not disputed that no activity of purchase and sale of meat for the purpose of export is from any of the Units at Jammu. Even the AO in the remand reports dated 23.8.2011 and 20.2.2015 has not rebutted written submissions of the appellant. As such, there remains no justification to sustain the disallowance u/s 80HHC of the Act. Therefore, the same is deleted and the ground raised is thus allowed."

24.2. We heard the rival submission and considered the order of revenue. The order of the ld. CIT(A) is explanatory& in remand report also in favour of assessee. We upheld the order of the ld. CIT(A). So, the ground of revenue in this issue is dismissed.

In the result the appeal of **the revenue inground no. 5 of ITA No. 290/Asr/2015 is dismissed**.

ITA No. 255/Asr/2015

25. In the appeal of the assessee, the following grounds are raised: -

"Grounds

1. *The learned Commissioner of Income Tax (Appeals) has grossly erred both on facts and in law, in confirming the order of assessment framed under section 143(3) framed by the Additional Commissioner of Income Tax, Range-3, Srinagar.*

2. *That the learned Commissioner of Income Tax (Appeals) has erred in sustaining the partial disallowance of expenditure incurred when he has failed to appreciate that, the aggregate expenditure incurred of Rs. 5, 30, 421/- was on account of Directors Foreign Travelling expenses, which expenditure had been incurred by the assesseein the course of his business and was thus allowable deduction. The findings that the assessee has failed to establish the purpose of visit and that it had not been incurred for the purpose of business is entirely misconceived and is incorrect and has arbitrarily been made.*

2.1 *That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that the disallowance made was pre-meditates as no opportunity whatsoever was granted to the assessee company before making the said disallowance and as such, the disallowance so made should have been deleted.*

3. *That the learned Commissioner of Income Tax (Appeals) has erred in sustaining the disallowance of expenditure incurred when he has failed to appreciate that, the aggregate expenditure incurred of Rs. 3, 32, 740/- was on account of sales promotion and was incurred by the assessee in the course of his business and was thus allowable deduction. The findings that the said expenditure does not pertain to instant assessment year is entirely misconceived and is incorrect and has arbitrarily been made.*

3.1 *That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that the disallowance made was pre-meditates as no opportunity whatsoever was granted to the assessee company before making the said disallowance and as such, the disallowance so made should have been deleted.*

4. *That the learned Commissioner of Income Tax (Appeals) has further erred both in law and on facts in sustaining a disallowance of a sum of Rs. 1, 75, 000/- under section 40(a)(ia) of the Act on account of advertisement expenses.*

4.1 That the learned Commissioner of Income has further failed to appreciate the basic fact that no disallowance is warranted of the expenditure incurred to the extent of expenditure paid u/s 40(a)(ia) of the Act, and as the entire sum of interest stood "paid" during the year thus, there was no sum remaining to be "payable" at the end of the financial year 2007-08 relevant to instant assessment year 2008-09 and as such, no disallowance is called for and the disallowance sos sustained deserves to be deleted.

5. That the learned Commissioner of Income Tax (Appeals) has grossly erred in passing the impugned order against assessee - appellant without providing any fair and proper and meaningful opportunity of being heard, thereby violating the principles of natural justice and thus such an order of assessment is vitiated both on fact and in law."

25.1. In this appeal the assessee has taken 5 grounds of appeal. From Ground no-1 to 3.1 were already adjudicated in favour of assessee. The Ground no. 2 & 2.1 of ITA No. 417/Asr/2015 is *mutatis mutandis* applicable for ITA 255/Asr/2015. Related ground no 4 to 4.1 the assessee claimed that applicability of section 40(a)(ia) only on payable amount not in paid amount. We relied on the CBDT Circular No-10/DV/2013 dated 15/12/2013. The statutory provision amply clarified that the 'payable' include the amount 'paid during the previous year'.

25.2. We heard the rival submission & relied on the order of revenue. Theld. CIT(A) is correct view to upheld the addition U/s 40(a)(ia).

The section will be applicable in both paid & payable. We confirmed the addition. Ground No 5 of the appeal is general in nature.

25.3. In the result **appeal of the assessee ground no 4 to 4.1 are dismissed**.

26. In the appeals of revenue & asseessee are adjudicated ITA No.293/Asr/2015 and 417/Asr/2015 as lead case which are mutatis mutandis applicable to all other cases.

27. In the result, the appeals of the revenue and assessee are partly allowed.

Order pronounced in the open court on 24.02.2023

Sd/-	**Sd/-**
(Dr. M. L. Meena)	**(ANIKESH BANERJEE)**
Accountant Member	**Judicial Member**

AKV
Copy of the order forwarded to:

(1)The Appellant
(2) The Respondent
(3) The CIT
(4) The CIT (Appeals)
(5) The DR, I.T.A.T.

True Copy