

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

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND  
SHRI SANDEEP SINGH KARHAIL, HON'BLE JUDICIAL MEMBER**

**ITA NO.3490/MUM/2009 (A.Y: 2005-06)**

M/s. ACC Limited (Formerly known as The Associated Cement Companies Ltd.) Cement House, 121, M.K. Road Churchgate, Mumbai-400020  <b>PAN: AACT1507C</b> <b>(Appellant)</b>	v.	Addl. CIT – Range-1(1) Mumbai  <b>(Respondent)</b>
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**ITA NO.3786/MUM/2009 (A.Y: 2005-06)**

Dy. CIT - 1(1) Room No. 79, Aayakar Bhavan M.K. Road, Mumbai – 400020  <b>(Appellant)</b>	v.	M/s. ACC Limited (Formerly known as The Associated Cement Companies Ltd.) Cement House, 121, M.K. Road Churchgate, Mumbai-400020  <b>PAN: AACT1507C</b> <b>(Respondent)</b>
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<b>Assessee represented by</b>	<b>:</b>	<b>Shri Yogesh Thar &amp; Ms. Sukanya Jayaram</b>
<b>Department represented by</b>	<b>:</b>	<b>Smt. Shailja Rai</b>
<b>Date of Hearing</b>	<b>:</b>	<b>21.12.2022</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>28.02.2023</b>

## **ORDER**

### **PER S. RIFAUR RAHMAN (AM)**

**1.** These cross appeals are filed by the assessee and revenue against order of the Learned Commissioner of Income-tax (Appeals)-I, Mumbai [hereinafter "Ld.CIT(A)] dated 13.03.2009 for the A.Y. 2005-06.

The various grounds are raised in present cross appeals are taken up for adjudication together. To avoid repetition of facts and for the sake of convenience, the grounds of appeal having common facts and/or legal issues are taken up together. During the course of appellate proceedings, Assessee has filed paper books in support of its contention which is duly considered while adjudicating present appeal. Further, the Ld. AR of the Assessee has vehemently relied upon decision of coordinate bench in the case of Ambuja Cement Limited, holding company of Assessee for AY 2005-06 to 2012-13 and same are summarised herein below: -

<b>SR No</b>	<b>ITA No</b>	<b>Date of order</b>
1	5883/Mum/2012& 5927/Mum/2012 for AY. 2005-06	30/10/2022
2	2848/Mum/2013 and 2366/Mum/2013 for AY 2006-07	03/11/2022
3	6375/Mum/2013 & 6405/Mum/2013 for AY 2007-08	07/11/2022
4	2968/Mum/2015 & 3307/Mum/2015 for AY 2008-09, 1665/Mum/2019 & 2428/Mum/2019 for AY 2009-10	07/11/2022
5	2384/Mum/2019 for AY 2010-11, 3475/Mum/2018 for AY 2011-12 & 1241/Mum/2018 for AY 2012-13	07/11/2022
6	2384/Mum/2019 & 2958/Mum/2019 for AY 2010-11, 3843/Mum/2019 & 3475/Mum/2019 for AY 2011-12, 1241/Mum/2018 & 1889/Mum/2018 for 2012-13	07/11/2022

### **ITA 3786/MUM/2009 (REVENUE APPEAL)**

**2.** First we take up Revenue Appeal in ITA No. 3786/Mum/2009 (where ever applicable common ground in assessee's appeal is also taken up together).

**3.** In the Ground No.1, Department has raised the following grievance: -

“On the facts and the circumstances of the case and in law the CIT(A) erred in observing that there is no direct expenditure specifically incurred to earn the exempted income.”

**4.** On identical issue in Assessee’s appeal, in the Ground No.1, following issues are raised:

1(a). That on the facts and circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in continuing the disallowance u/s 14A on account of expenditure incurred to earn exempt dividend income, by applying the provision of Rule 8D.

1(b). That on the facts and in the circumstances of the case and without prejudice to the ground 1(a), the Ld. CIT (Appeals) was not justified rather grossly erred in computing the disallowance u/s 14A as per Rule 8D without appreciating the fact that Rule 8D is not applicable in the instant assessment year,

1(c) That on the facts and in the circumstances of the case and without prejudice to the ground 1(a) & 1(b), the Ld. CIT(Appeals) ought to have given directions to consider only those investments on which the Assessee has earned exempt income in computing disallowance u/s 14A as per Rule 8D.

**5.** The issues raised in both the appeals are relates to disallowance u/s.14A, hence both the grounds of appeal are adjudicated together.

**6.** The Assessing Officer has dealt with the issue at Para No. 4.1 to 4.3 of Assessment Order. The relevant facts are, Assessee has shown exempt dividend income of ₹.3,23,59,812/- in their Return of Income. The Assessing Officer has observed that Assessee company is having own funds as well as borrowed funds are utilised to make investments in shares for ₹.326.69 crores. He observed that the Assessee has claimed net interest expenditure of ₹.88.19 crores in P&L account. The Assessing Officer has worked out component of investment in equity out of borrowed capital as under:

$$\begin{array}{rcl} & \text{Borrowing} & \times & \text{Investments} \\ \text{Own funds + borrowings} & & & \\ = & \underline{1407.73} & \times & \underline{326.69} \\ & 1597.68+1407.72 & & \end{array}$$

= 153 crores

The Assessing Officer has applied average rate of interest @10% on above figure of ₹.153 crores and made disallowance at ₹.15.30 crores.

**7.** In appeal Ld.CIT(A) has discussed the above issue at Para No.5.4 and 5.5. of his order and held as under:

"5.4 I have carefully considered the submission Under Sec. 14A(1), no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not fall part of the total income under Income Tax Act. Under Section-14A(2), if the Assessing Officer is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to exempted income, he will determine the amount of expenditure incurred in relation to the exempted income, in accordance with the prescribed method. The prescribed method referred here is Rule 8D. There is no direct expenditure specifically incurred to earn the exempted income. Under Rule-8D(2)(ii), the interest expenditure which is not directly attributable to any particular income or receipt is to be computed.

5.5 I have carefully considered the Ld. AR's submission that sufficient interest free own funds are available and that the investments generating exempted dividend income is only 20% of the total own funds available. However, all sorts of funds have been put in the common basket and utilized for various business activities including those generating taxable income and those generating exempted income. So, the interest component attributable to the exempted income has to be worked out with reference to Rule-8D (ii). The Assessing Officer is, therefore, directed to remove the interest which is paid on loans which are specifically in respect of generating taxable income. Similarly, any interest directly attributable to the loan utilized for investment generating tax free dividend income should be separated. The rest part of the interest which cannot be specifically linked to any funds utilized for taxpaying or tax free income has to be considered under Rule-8D(ii) and the amount to be disallowed should be worked out as per the formula given under this sub rule. The Assessee should furnish all details for making the calculation. The disallowance of interest u/s. 14A is confirmed in this extent.

**8.** Against the above observation of Ld.CIT(A), both assessee and Revenue has filed cross appeals. During the course of hearing, Ld. AR of the Assessee has stated that Rule 8D is not applicable in current year hence disallowance u/s.14A cannot be made. For this proposition, reliance was placed on following decisions: -

- (i). Godrej & Boyce Mfg. Co. Ltd. v. CIT [(2010) 328 ITR 81 (Bombay HC)]
- (ii). PCIT v. Reliance Natural Resoruce Ltd. [(2019) 267 Taxman 644 (Bombay HC)]

**9.** The Ld.AR of the Assessee has also submitted that disallowance of interest is not warranted as it has sufficient interest free funds which exceeded investments made by it. The Ld.AR has drawn attention to Para No. 4.2 of assessment order wherein Assessing Officer himself has stated that Assessee has own funds in form of Share Capital & reserve to the tune of Rs 1597.68 crores as against investments made in shares for Rs 326.69 crore. Reliance was mainly placed on following decisions.

- (i). South Indian Bank Ltd. v. CIT [(2021) 438 ITR 1 (SC)]
- (ii). HDFC Bank v. DCIT [(2016) 383 ITR 529 (Bombay HC)]
- (iii). CIT v. HDFC Bank Ltd. (366 ITR 505) (Bom.)
- (iv). Reliance Utilities & Power Limited (313 ITR 340) (Bom.)

**10.** The Ld. DR has relied upon finding given in assessment order and heavily relied on the decision in the case of Williamson Financial Services Limited, (ITA No 154 to 156/Gau/2019), ITAT Gauhati Bench in which it was held that rule 8D is applicable retrospectively. Hence she contended that the observation of Assessing Officer is proper and prayed that order of Assessing Officer may be restored.

**11.** Considered the rival submissions and material placed on record. It is observed that Assessing Officer has not made disallowance u/s 14A applying rule 8D as it was not in statute in the year under consideration. The Assessing Officer has made proportionate disallowance of interest as per formula mentioned in Para No. 4.2 of Assessment Order. It is observed that Assessee has sufficient own funds in form of share capital and reserves and surplus in comparison with investment in shares made by it. On this issue, Hon'ble Supreme Court held in the case of South Indian Bank Ltd[2021] 130 taxmann.com 178 as under:

"Section 14A of the Income-tax Act, 1961 - Expenditure incurred in relation to exempt income not includible in total income (General) - Assessee-scheduled banks earned income from investments made in tax-free securities - Assessing Officer made proportionate disallowance of interest attributable to funds invested to earn tax free income under section 14A on grounds that separate accounts were not maintained for investment in tax-free securities - Whether since interest free own funds available with assessee exceeded their investments;

investments would be presumed to be made out of assessee's own funds and proportionate disallowance was not warranted under section 14A on ground that separate accounts were not maintained by assessee for investments and other expenditure incurred for earning tax-free income - Held, yes [Para 27] [In favour of assessee]

**12.** Hon'ble jurisdictional High Court in the case of PCIT *v.* Shapoorji Pallonji & Co Ltd [(2020) 117 taxmann.com 625(Mum)] inter alia, observed as under:

"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."

**13.** Respectfully following the binding decision of Hon'ble Supreme Court and Hon'ble Jurisdictional High Court referred *supra*, disallowance u/s 14A made by Assessing Officer is accordingly deleted. Thus, ground of appeal no. 1 in departmental appeal is dismissed and ground of appeal filed by Assessee is allowed.

**14.** In the Ground No 2, Department has raised the following grievance:

"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the addition of different unutilised CENVAT credit of ₹.16,93,37,435/- without appreciating the fact that the Assessing Officer has rightly made the said addition by invoking the provision of Sec. 145A of the Act."

**15.** The Assessing Officer has dealt with the issue at Para No. 5 to 5.3 of Assessment Order. The Assessing Officer has observed that Assessee has following exclusive method of accounting and unutilised CENVAT credit on closing stock of raw material and stores is ₹.16,93,37,435/- which is required to be added back to total income of assessee considering provisions of Section 145A of the Act.

**16.** In appeal Ld.CIT(A) has discussed the above issue at Para No. 6.4 and 6.5. of his order and held as under:

"6.4 I have carefully considered the submissions of the Ld. AR and gone through the relevant judicial decisions cited by the Ld. AR. Under Section-145A of the Act, the element of any tax, duty, cess or fee is to be adjusted against purchase, sale, inventory etc. The Assessee is following exclusive method which means the purchase is not debited along with the excise duty paid on the same. If the credit for such unutilized modvat is added to the inventory of the closing stock, it will be necessary to make additions of the excise duty to its purchases also. Ld. AR has pointed out that in the Tax Audit Report vide Annexure-B(ii), the auditors have duly certified that the net effect of deviation from the value prescribed u/s. 145A and the claims/disallowances connected thereto, is Nil. In such a case, there is no necessity for making addition to the value of the closing stock. The decision of the Hon'ble Supreme Court in the case of Indo Nippon Chemicals, 261 ITR 275 supports this position. Further, the decision of the ITAT, Mumbai in the case of Hawkins Cooker Ltd. in ITA No. 505/Mum/04 dated 08.08.2008 where the decision of Supreme Court has been considered has decided this matter in support of the Assessee. This issue has also been decided in favour of the Assessee by my Ld. Predecessors in earlier assessment years. Taking into account, the facts and circumstances, there is no justification of the Assessing Officer to make an addition to the closing stock which is deleted."

**17.** Aggrieved with the above observation of Ld.CIT(A), Revenue has raised the above ground in its appeal. During the course of appellate proceedings, Ld. AR of the assessee has relied upon finding of Ld.CIT(A) whereas DR has relied upon finding of Assessing Officer and contended that observation of Assessing Officer may be restored.

**18.** Considered the rival submissions and material placed on record. On this issue, Coordinate bench held in the case of Mahindra & Mahindra Ltd [2020] 113 taxmann.com 230 as under:

"4. We have carefully considered the rival submissions. We find that as rightly pointed out by the Id. Representative for the assessee, the Hon'ble

Bombay High Court in the case of Diamond Dye Chem Ltd. (supra) has already dealt with the issue whether addition on account of MODVAT credit is warranted or not. The Hon'ble High Court relying on the decision of the Hon'ble Supreme Court in the case of CIT v. Indo Nippon Chemicals Co. Ltd. [2003] 130 Taxman 179/261 ITR 275 held that the unutilised credit cannot be directly added to the income of the assessee. The relevant para of the said decision is reproduced hereunder:—

"5. We have considered the submissions. It is not disputed that the assessee was liable to excise duty. The assessee got credit in the excise duty already paid on the raw materials purchased by it and utilized in the manufacturing of excisable goods. The assessee was adopting the exclusive method i.e. valuing the raw materials on the purchase price minus (-) the Modvat credit. The same would be permissible. The Apex Court in the case of Indo Nippon Chemicals Co. Ltd. (supra) while affirming the order of High Court, has observed that the income was not generated to the extent of Modvat credit or unconsumed raw material. Merely because the Modvat credit was irreversible credit offered to manufacturers upon purchase of duty paid raw materials, that would not amount to income which was liable to be taxed under the Act. It is also held that whichever method of accounting is adopted, the net result would be the same.

6. Considering the above, the amount of the unutilized Cenvat credit could not have been directly added to the closing stock. The Tribunal has not committed any error." (underlined for emphasis by us)

It is evident from the above that irrespective of the method of accounting followed by the assessee, i.e. 'Inclusive method', wherein the taxes are included in the opening stock, purchases, etc. or the 'Exclusive method', the MODVAT credit does not have any impact on the profit of the assessee. Thus, following the ratio laid down by the Hon'ble Supreme Court in the case of Indo Nippon Chemicals Co. Ltd. (supra) and followed by the Hon'ble Bombay High Court in the case of Diamond Dye Chem Ltd. (supra), we set-aside the order of the CIT (A) and direct the Assessing Officer to delete the addition made on account of unutilised MODVAT credit. This Ground of appeal is accordingly allowed."

**19.** It is observed that on identical issue, Coordinate bench in Para No. 32 to 34 in the case of Ambuja Cement Limited in ITA No 5883/Mum/2012 & 5927/Mum/2012 (for A.Y. 2005-06) vide order dated 31/10/2022 has dismissed revenue's appeal. Respectfully following decisions of Coordinate as discussed herein above, the ground raised in Departmental Appeal is dismissed.

**20.** In the Ground No. 3, Department has raised the following grievance:

"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the disallowance of club entrance/subscription fee ₹.17,77,305/-.

**21.** The Assessing Officer has dealt with the issue at Para No. 6 to 6.2 of Assessment Order. The Assessing Officer has observed that assessee has incurred expenditure on club entrance/subscription fee for its director. The assessee has submitted before Assessing Officer that such expenditure was incurred on account of subscription to clubs for the purpose of promoting and fostering its business relationship and objective of the assessee was to enable its directors to meet various kinds of people in the clubs so that by such meeting they would develop business relationship. However, this claim was not found acceptable to Assessing Officer on the ground that such expenditure is capital expenditure as it provides enduring benefit by becoming entitled to enjoy the facilities of the club.

**22.** In appeal, Ld.CIT (A) has discussed the above issue at Para No. 7.3 of his order and held as under:

7.3 As I find the issue is squarely covered by the decision of the Bombay High Court in the case of Otis Elevator Co. Ltd. vs. CIT reported at 195 ITR 682. This issue has also been decided in favour of the Assessee by the ITAT and my predecessors in the earlier years. Following such decisions, the addition made by the Assessing Officer is deleted.

**23.** Aggrieved with the above observation of Ld.CIT(A), Revenue has filed this appeal. During the course of appellate proceedings, Ld. AR of the assessee has relied upon finding of Ld.CIT(A) and contended that identical issue is also decided in its favour in A.Y. 1987-88 to 1991-92 and also in A.Y. 2004-05, whereas Ld.DR has relied upon finding of Assessing Officer and contended that observation of Assessing Officer may be restored.

**24.** Considered the rival submissions and material placed on record. It is observed that identical issue has been decided in favour of assessee by Coordinate bench assessee's own case for A.Y. 2004-05 in ITA No 5259/Mum/2027 dated 27/05/2022 wherein it is held as under:

"3. We have heard the rival contentions and perused the material on record. We note that the Tribunal has decided identical issue in the favour of the Assessee in Assessee's own case in ITA No. 647/Mum/1997 (AY 1991-92), ITA

No. 2361/Mum/1995 (AY 1990- 91), ITA No. 288/Mum/1993 (AY 1989-90), ITA No. 968/Mum/1992 ITA. No. 5259 & 4895/Mum/2007 Assessment Year: 2004-05 (AY 1988-89), and ITA No. 43/Mum/1991 (AY 1987-88) by following the decision of the Hon'ble Bombay High Court in the case of Otis Elevator Co (I) Ltd. v. CIT (supra), and American International Banking Corporation v. CIT (supra). The relevant extract of the order of the Tribunal in ITA No. 43/Mum/1991 pertaining to AY 1987-88, followed in subsequent years, reads as under:

"8. Ground no. 2 relates to disallowance of payments to clubs.

The Assessing Officer made disallowance of Rs. 8,125/- representing payments made by the assessee to clubs. On appeal, it was contended that reimbursement of club fees to employees is an expenditure incurred by the assessee wholly and exclusively for the purpose of business and the expenditure is allowable as deduction u/s 37 of the Act. Reliance was placed on the decision reported in 13 ITD 550. The contention of the assessee was not acceptable to the CIT(A) who confirmed the disallowance observing that no attempt has been made to bifurcate the expenses between those relating to business of the assessee and those involving personal benefit to the employees.

We observe that the issue is covered in favour of the assessee by the decision of the jurisdictional High Court in Otis Elevator Co (I) Ltd. 195 ITR 682 (Bom) wherein their Lordships held that payment of club fees made to promote business interest is an allowable expenditure. Following the decision supra this ground is decided in favour of the assessee." (Emphasis Supplied)

4. Respectfully following the decision of the Hon'ble Bombay High Court and of the Tribunal in Assessee's own cases specified herein above, we decide this issue in favour of the Assessee. Accordingly, order of CIT(A) to delete the addition of INR 17,45,829/-, consisting of expenditure incurred on club entrance fee of INR 15,00,000/- and subscription fee of INR 2,45,829/-, is confirmed. Ground No. 1 of the Departmental Appeal is dismissed."

**25.** It is further observed that on identical issue, Coordinate bench in Para No. 94 to 96 in the case of Ambuja Cement Limited in ITA No 5883/Mum/2012 & 5927/Mum/2012 (for A.Y. 2005-06) vide order dated 31/10/2022 has dismissed revenue's appeal. Respectfully following the above said decisions as discussed herein above, this ground in Departmental Appeal is dismissed.

**26.** In the Ground No 4, Department has raised the following grievance:

"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the addition of ₹.1,50,42,422/- holding that the amount received on sale of TDR is a capital receipt.

**27.** During the course of appellate proceedings, Ld.AR of the assessee has admitted that it is capital receipt and Ld. DR has relied on the findings of Assessing Officer. Considering the above, addition made by Assessing Officer for ₹.1,50,42,422/- is sustained and this ground of appeal in departmental appeal is allowed.

**28.** In the Ground No 5, Department has raised the following grievance:

"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the addition made by the Assessing Officer on account of sales tax subsidy under the normal provisions and u/s.115JB of the Act, relying on the order of his predecessor without appreciating the new fact brought out by the Assessing Officer in the impugned assessment order."

**29.** The Assessing Officer has dealt with the issue at Para No. 6 to 6.2 of Assessment Order. The Assessing Officer has observed that assessee has claimed sales tax incentives for various units such as Tikaria (UP), Chanda (Maharashtra), New Wadi (Karnataka), Gagal (HP) and Sindri Jharkhand & Bihar for ₹.16,20,144/-. The Assessing Officer has examined different schemes under which incentive is granted to assessee and same was considered as revenue receipt by mainly relying upon decision of Hon'ble Supreme Court in the case of Sahney Steel and Press Works Ltd [228 ITR 253]. He has further observed that sales tax incentive given to assessee is for expansion of units and cannot be treated as capital receipt. Thus, Assessing Officer has treated above receipts as revenue receipts both while computing income as per normal provisions of the Act as well as while computing book profit u/s 115JB of the Act.

**30.** In appeal Ld.CIT (A) has discussed the above issue at Para No. 9.9 and 9.10 of his order and held as under:

9.9 I have carefully gone through the submissions. As has been brought to my notice, this issue has been decided by my predecessors for A.Ys. 2001-02, 2002-03, 2003-04 and 2004-05, following of the decision of the Mumbai ITAT Special Bench in the case of Reliance Industries (supra). Further, the ITAT, Mumbai in the Assessee's own case of 1996-97 & 1997-98 have decided this issue in favour of the Assessee. In view of this, I follow the judicial decisions

before me and allow this ground of appeal. The addition made by the Assessing Officer is deleted.

9.10 Similarly the Assessee's plea to exclude this subsidy from the book profit as made in the additional ground has been accepted by my predecessors in their order for the earlier years as mentioned above. The Ld. AR has also filed a copy of the ITAT's order in ITA No.3298 of 2001 dated 07.08.2008 in the Assessee's own case for A.Y. 1997-98 and pointed out that the ITAT has allowed the Assessee's appeal on the same issue. Following such decisions the Assessing Officer is directed to conclude the sales tax subsidy from the book point. The additional ground is allowed."

**31.** Against the observation of Ld.CIT(A), Revenue has filed further appeal. At the time of hearing, Ld. DR has mainly relied upon finding of Assessing Officer and contended that order of Assessing Officer may be restored. On the other hand, the Ld. AR has relied upon finding of Ld.CIT(A) and argued that each scheme of sales tax was considered by Ld.CIT(A) in appellate proceedings and issue is decided in assessee's favour. It was also explained that relevant decisions for various courts, each scheme was also provided during the course of appellate proceedings, The Ld.AR of the assessee has also referred to decision of Coordinate bench in its own case for A.Y. 2003-04 wherein identical issue was decided in favour of the assessee. The Ld. AR has also relied upon decision of coordinate bench in the case of Ambuja Cement Limited (referred supra) for A.Y. 2005-06 to 2011-12 wherein sales tax incentives received by assessee for various units set up in different states and availed different incentive schemes as capital receipts. The Ld. AR has also relied upon decisions of various ITAT as well as High court for various different schemes wherein sales tax incentives are treated as capital receipts.

**32.** Considered the rival submissions and material placed on record. On this issue, coordinate bench in the case of Ambuja Cement Limited in ITA No 5883/Mum/2012 & 5927/Mum/2012 (A.Y.2005-06) dated 31/10/2022 has held as under:

*"..... 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 CIT(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 Ponni Sugar and Chemicals Ltd* [(2008) 306 ITR 392 (SC)]. A large number of judicial precedents have been cited in this context. Learned CIT(A) has then held that so far as the object and purpose for which the subsidy is given, only the subsidy schemes of the Maharashtra and Punjab State specifically state that the subsidies in question are for achieving dispersal of industries outside Mumbai, to attract them to the underdeveloped and developing areas of the State, and to promote the growth of the industry in the State, in the preamble to the scheme. It is on this basis that he has held that so far as the subsidies given by the Maharashtra and Punjab States are concerned, these are required to be treated as capital in nature, whereas, the subsidies received from the State Governments of Himachal Pradesh and Rajasthan, in the absence of specific mention to the effect in the preambles of the subsidy schemes that these subsidies are required to be held to be revenue in nature. However, in our considered view, the approach of discerning the purpose of the subsidy, solely from the specific words used in the preamble of the scheme and without examining the overall scheme of the Act-

*which is admittedly to promote the growth of industry, is incorrect and superficial. The subsidies so received can be said to be revenue in nature unless these subsidies are for augmenting the profits of the assessee, and that is not even the case of the revenue. The CIT(A) is simply swayed by the wording of the preamble of the scheme- something clearly impermissible. These subsidy schemes are materially similar in nature, and there are, by now, a number of decisions of the coordinate benches, as also Hon'ble Courts above, dealing with these schemes. It is also important to bear in mind the fact that the subsidies received by the assessee are in the nature of sales tax subsidies, and dealing with sales tax subsidies, Hon'ble Gujarat High Court, in the case of CIT Vs Nirma Ltd [(2017) 397 ITR 49 (Guj)], has observed as follows:*

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

*8. On the other hand, Mr. Soparkar, learned counsel appearing for the respondent contended that so far as Tax Appeal No.226 of 2010 is concerned, after discussing the evidence on record, the Tribunal has followed earlier decision and discussed the issue in detail in para 54 and 55 of its decision, which reads as under:-*

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

*55. We have heard both the parties and considered their rival submissions. Perusal of the scheme extending the aforesaid incentives to "prestigious" units announced by Government of Gujarat on 26/07/91 makes it amply clear that the scheme was announced to attract investment in core sector industry having potential, to spur industrial growth in ancillary, tertiary and secondary sector of the economy. The other scheme announced by the Government of Gujarat as Capital Investment Incentive*

*Scheme on 11th September 1995 was intended to attract investments to generate greater employment in less industrially developed areas of Gujarat and also to secure balanced development of industries in Gujarat through dispersal of industries in the most backward area and backward areas. It is thus clear that the object of both the scheme was to ensure development of backward areas or for development of core sector industries in the State or for generating the employment. Perusal of both the schemes shows that the incentives extended to the eligible units were, inter alia, through exemption from payment of Sales Tax. Thus, the object of both the schemes was to attract capital investment to ensure development of backward areas and the modality or mechanism chosen to attract such investment was, inter alia, through exemption from payment of sales tax."*

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

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

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

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

*It is undoubtedly true that such subsidy was computed in terms of sales tax deferment and necessarily therefore, would accrue to an industry only once the commercial production commences. However, this by itself would not be either a sole or concluding factor. In case of *Sahney Steel and Press Works Ltd.* and others*

*v. Commissioner of Income-tax reported in 228 ITR 253, the Apex Court held and observed that the character of the subsidy in the hands of the recipient whether revenue or capital will have to be determined, having regard to the purpose for which the subsidy is given. The source of fund is quite immaterial. If the purpose is to help the assessee to set up its business or complete a project the monies must be treated as having been received for capital purposes. But, if monies are given to the assessee for assisting him in carrying out the business operations and given after the satisfaction of the conditions of commencement of production, such subsidy must be treated as assistance for the purpose of the trade."*

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

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

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

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

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

*12. We have heard both the learned counsel and perused the record. We have also gone through the decisions cited before us. After considering the material on record, we are of the view that the issues involved in these appeals are squarely covered by the decisions of this Court in Birla VXL Ltd. (supra) and in*

*Munjal Auto Industries Ltd. (supra). Therefore, the questions of law posed for our consideration in these appeals are answered in favour of the assessee and against the department. Accordingly, all these appeals are dismissed.*

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

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

*14. The second case is Lincolnshire Sugar Co. Ltd. v. Smart 20 TC 643. In that case it was found that Lincolnshire Sugar Co. Ltd carried on the business of manufacturing sugar from home grown beet. The company was paid various sums under British Sugar Industry (Assistance) Act, 1931, out of monies provided by the Parliament. The question was whether these monies were to be taken into account as trade receipts or not. The object of*

*the grant was that in the year 1981, in view of heavy fall in prices of sugar, sugar industries were in difficulty. The Government decided to give financial assistance to certain industries in respect of sugar manufactured by them from home-grown beet during the relevant period. Lord Macmillan held that-*

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

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

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

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

*17. This precisely is the question raised in this case. By no stretch of imagination can the subsidies whether by way of refund of sales tax or relief of electricity charges or water charges can be treated as an aid to setting up of the industry of the assessee. As we have seen earlier, the payments were to be made only if and when the assessee commenced its production. The said payments were trade 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 Ponnai Sugar, we are of the view that the object, as stated in the statement of objects and reasons, of the amendment ordinance was that since the average occupancy in cinema theatres has fallen considerably and hardly any new theatres have been started in the recent past, the concept of a Complete Family Entertainment Centre, more popularly known as Multiplex Theatre Complex, has emerged. These complexes offer various entertainment facilities for the entire family as a whole. It was noticed that these complexes are highly capital intensive and their gestation period is quite long and therefore, they need Government support in the form of incentives qua entertainment duty. It was also added that government with a view to commemorate the birth centenary of late Shri V. Shantaram decided to grant concession in entertainment duty to Multiplex Theatre Complexes to promote construction of new*

*cinema houses in the State. The aforesaid object is clear and unequivocal. The object of the grant of the subsidy was in order that persons come forward to construct Multiplex Theatre Complexes, the idea being that exemption from entertainment duty for a period of three years and partial remission for a period of two years should go towards helping the industry to set up such highly capital intensive entertainment centers. This being the case, it is difficult to accept Mr. Narasimha's argument that it is only the immediate object and not the larger object which must be kept in mind in that the subsidy scheme kicks in only post construction, that is when cinema tickets are actually sold. We hasten to add that the object of the scheme is only one -there is no larger or immediate object. That the object is carried out in a particular manner is irrelevant, as has been held in both Ponni Sugar and Sahney Steel.*

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

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

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

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

*Hon'ble Supreme Court both in the case of Sahney Steel and Press Works Ltd., and Ponni Sugars and Chemicals referred to supra had held as under:-*

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

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

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

*"13. The main controversy arises in these cases because of the reason that the incentives were given through the mechanism of price differential and the duty differential. According to the Department, price and costs are essential items that are basic to the profit making process and that any price related mechanism would normally be presumed to be revenue in nature. In other words, according to the Department, since incentives were given through price and duty differentials, the character of the impugned incentive in this case was revenue and not capital in nature. On the other hand, according to the assessee, what was relevant to decide the character of the incentive is the purpose test and not the mechanism of payment.*

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

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

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

*same was relatable to the capital investment made by the assessee. It was held as under :*

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

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

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

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

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

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

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

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

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

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

*i) There cannot be any question of overruling the decision of one Bench by another bench of equal strength as it would be contrary to the established norms of judicial system in the country.*

*ii) Even on merits it cannot be said that the Tribunal has laid out more stress on the form of the scheme and not their substance as held in Bajaj Auto as the Tribunal in the order for AY 1985-86 has explained the difference between exemption schemes of Maharashtra and Andhra Pradesh in detail.*

*iii) Reliance placed by Tribunal in Asst Year 1985-86 on the decision of Hon'ble Supreme Court in the case of Sahney Steel & Press Works Ltd. v. CIT (228 ITR 253) cannot be said to be erroneous. The Tribunal did recognise that the object with which subsidy is given is decisive as laid down by Hon'ble Supreme Court. If the scheme is for setting up or expansion of industry in a backward area, it will be capital, irrespective of the modality or source of fund. If the scheme is for assisting of carrying out of business operations, it is revenue. Hon'ble Supreme Court demonstrated the principle that the object of the subsidy must be given primary importance over the source of fund.*

5.4.1. Ultimately the Special Bench after placing reliance on the decision of Hon'ble Supreme Court in Sahney Steel and Hon'ble Madras High

Court in the case of CIT v. Ponni Sugars & Chemicals Ltd. Reported in 260 ITR 605 held that the decision of the Tribunal in Asst Year 1985-86 is correct and observed the following:

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

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

5.4.2. The Id. AR vehemently submitted that the department did not challenge the decision of the Special Bench before the Hon'ble Bombay High Court. However, he fairly stated that there was a subsequent decision of the Division Bench of this Tribunal which followed the Special Bench and that Division Bench order was challenged by the Revenue before the Hon'ble Bombay High Court. The Hon'ble Bombay High Court while disposing of the said appeal did not reverse the decision of the Special Bench and accepted the same. When that appeal was further challenged by the Revenue before the Hon'ble Supreme Court, the Hon'ble Supreme Court remitted the matter back to the Hon'ble Bombay High Court. Accordingly, he argued that the decision of Special Bench was never reversed by the Hon'ble Supreme Court as stated by the Id. Special Counsel for the Revenue and accordingly still is a good law and therefore a binding precedent on this Division Bench. In fact, in assessee's own case for A.Y.2001-02 in ITA No.778 of 2015 dated 18/12/2018 before the Hon'ble Jurisdictional High Court, wherein the question Nos. c & d was exactly on this point. For the sake of convenience, the question Nos. c & d raised by the Revenue before the Hon'ble Jurisdictional High Court is reproduced hereunder:-

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

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

5.4.3. While disposing of the questions Nos. c & d, the Hon'ble Jurisdictional High Court categorically held that the decision of the Special Bench of Tribunal had not been reversed or stayed by any higher

judicial forum and it holds good as on date. The relevant operative portion of the judgement of Hon'ble Jurisdictional High Court in this regard is reproduced as under:-

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

*4. On the other hand, learned Counsel for the assessee firstly contended that the Tribunal had merely remanded the issue back to the Assessing Officer. In earlier orders, the Revenue had approached the Court against the similar orders of the Tribunal. The High Court on two occasions, in the order dated 27.09.2016 and 22.11.2016 passed in Income Tax Appeal Nos. 475 of 2014 and 102 of 2014 respectively had not entertained the challenge of the Revenue. In any case, it was contended that the facts on record are available and the Tribunal has merely asked the Assessing Officer to take a decision on the assessee's contention.*

*5. As long as the material exists on record, a contention raised by the assessee for the first time before the Tribunal, cannot be barred. So much is clear from series of judgments of various Courts including of this Court in case of CIT Vs. Pruthvi Brokers and Shareholders P. Ltd. (2012) 349 ITR 336. It is not the case of the Revenue that the assessee in the context of its contention on the nature of the subsidy, desired to produce additional evidence. It is true that the judgment of this Court confirming the order of the Tribunal in case of Reliance Industries Ltd. has been partially reversed by the Supreme Court. A question of law has been framed and placed for consideration of the 4 of High*

*Court. However, this does not mean that the judgment of the Tribunal as on today stands reversed or stayed. In any case, quite apart from the judgment in the case of Reliance Industries Ltd. of the Special Bench of the Tribunal, it is always been for the assessee to contend before the Assessing Officer by pointing out the relevant clauses of the subsidy that in law the subsidy cannot be treated to be towards revenue account. It would be equally open for the Revenue to oppose such a contention if so advised. The Assessing Officer and the Revenue authorities would have to take a decision in accordance with law. These questions, therefore, are not considered."*

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

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

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

*"11. We find that so far as the Special Bench decision of this Tribunal in the case of Reliance Industries Ltd. (supra) is concerned, it still holds the field. All that has happened, as a result of Hon'ble Supreme Court's decision dated 9th September 2011, is that Hon'ble Bombay High Court has now admitted the question "whether, on the facts and circumstances of the case, the Hon'ble Tribunal was right in holding that sales tax exemption was a capital receipt" and will, in due course though, adjudicate on this legal issue. To that extent, Hon'ble Bombay High Court's order dated 15th April 2009, to the extent of declining to admit this question, stands reversed. However, the decision of the Special Bench still holds good as the same has not, and at least not yet, even been examined by Hon'ble Bombay High Court. Mere admission of appeal against a decision, as is elementary, does not affect the binding nature of a judicial precedent. The Special Bench decision, in the case of Reliance Industries Ltd. (supra), was not reversed by Hon'ble Supreme Court, but was directed to be examined, on merits, by*

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

*(emphasis supplied by us)*

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

9. In the Special Bench decision in the case of Reliance Industries Ltd (supra), what came up for consideration was specifically the sales tax subsidy, and that decision, as we seen in the elaborate analysis of the coordinate bench- as extracted above still holds good in law. In the case of CIT Vs Chaphalkar Brothers [(2018) 400 ITR 279 (SC)], Hon'ble Supreme Court has held that where the object of respective subsidy schemes of State Governments was to encourage the development of Multiple Theatre Complexes, incentives would be held to be capital in nature and not revenue receipts, and, following the same logic, the sales tax subsidy schemes, which are admittedly to encourage industrial growth in the specific areas and the overall scheme in all the sales tax subsidy and exemption schemes unambiguously indicate so, are capital receipts in nature.

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

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

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

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

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

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

47. We further noted that Hon'ble Kolkata High Court, in the case of Pr. CIT v. Ankit Metal & Power Ltd. [2019] 109 taxmann.com 93/266 Taxman 237 Ltd. had considered an identical issue and after considering the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) held

*that when a receipt is not in the character of income as defined under section 2(24) of the I.T. Act, 1961, then it cannot form part of the book profit u/s 115JB of the I.T. Act, 1961. The Hon'ble High court, further observed that sales tax subsidy received by the assessee is capital receipt and does not come within definition of income under section 2(24) of the I.T. Act, 1961 and when, a receipt is not a in the nature of income, it cannot form part of book profit u/s 115JB of the I.T. Act, 1961. The Court, further observed that the facts of case before the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) were altogether difference, where the income in question was taxable, but was exempt under a specific provision of the Act, and as such it was to be included as a part of book profit, but where the receipt is not in the nature of income at all, it cannot be included in book profit for the purpose of computation u/s 115JB of the I.T. Act, 1961.*

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

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

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

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

**33.** It is observed that coordinate bench has also decided similar issue in favour of Ambuja Cement Limited, holding company of assessee from A.Y. 2006-07 to 2011-12 as stated supra. It is observed that various observations made by Assessing Officer and arguments made by Ld. DR are already dealt with by various decisions referred supra hence there is no reason to deviate from the finding given by Coordinate Bench referred supra. Thus, sales tax incentives received by assessee are rightly considered as Capital Receipts by Ld.CIT(A) both for the purposes of normal tax as well for the purposes of computation u/s.115JB of the Act and be excluded while computing taxable income.

**34.** In the result, ground of appeal raised by the Departmental is dismissed.

**35.** In the Ground No 6, Department has raised the following grievance:

"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the addition made by the Assessing Officer by disallowing the provision of Director's retirement benefit of ₹.1,88,80,377/- treating the same as unascertained liability.

**36.** The Assessing Officer has dealt with the issue at Para No.11 to 11.3 of Assessment Order. The Assessing Officer has observed that appellant has made provision for Director's Retirement Benefit for ₹.1,88,80,377/- which was considered as provision for unascertained liability. The Assessing Officer has not accepted the plea of assessee that provision is based upon actuarial valuation and he made addition of such amount.

**37.** This issue is dealt by Ld.CIT(A) at Para No. 10.6 of his order as under:

*10.6 I have gone through the submissions of the Ld. AR and the assessment order. The facts of the Assessee's claim are covered by the decision of Supreme Court in the case of Bharat Earth Movers (supra). Further, the issue has been decided in favour of the Assessee by the ITAT, Mumbai in A.Y. 1990-91. The claim is also supported by the ITAT in the Assessee's own case for A.Y 1992-93. Following the said orders, the Assessing Officer is directed to allow the claim of deduction in respect of provision for Director's retirement benefit. The ground of appeal is allowed.*

**38.** Against the observation of Ld.CIT(A), Revenue has filed further appeal. During the course of appellate proceedings, Ld.DR has relied upon finding of Assessing Officer and contended that observation of Assessing Officer may be restored. On the other hand, Ld. AR of the assessee has relied upon finding of Ld.CIT(A) and contended that identical issue is also decided in its favour by the coordinate bench in A.Y. 1990-91 and in 2002-03 to A.Y. 2004-05.

**39.** Considered the rival submissions and material placed on record. It is observed that identical issue has been decided in favour of assessee by the coordinate bench in appellant's own case for A.Y. 2004-05 in ITA No 5259/Mum/2027 dated 27/05/2022 wherein it is held as under:

*"13.4. We note that the in the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the common order, dated 13.03.2019, passed in ITA No. 4242&4988/MU/2007 for the Assessment Year 2003-04 reads as under:*

*"59. On appraisal of the above said finding, we find that CIT(A) has decided the issue on the basis of the decision of the case titled as Bharat Earth Movers and Echjay Forgings P. Ltd. (supra). Furthermore, we noticed that the issue has been squarely covered by assessee's own case in ITA. No.4987/M/2007. The relevant finding has been given in para no. 19 which is hereby reproduced as under.:*

*"19. Deletion of addition in respect of provision for Director's Retirement Benefit in computing income under normal provisions of the Act of ₹.2,84,53,850/ is the subject matter of the next ground. During the assessment proceedings, the Assessing Officer found that the assessee had created provision for director's retirement benefit on the basis of actuarial valuation and it was added in computing total income.*

*Subsequently, exclusion was claimed before the FAA. As the similar addition was deleted in MAT computation, so, he allowed the claim made by the assessee.*

*19.1. Before us, the DR argued that the FAA allowed the claim that was not before the Assessing Officer. The DR contended*

*that provision made for Director's Retirement Benefit was made on the basis of actuarial valuation, that it represented a liability in praesenti that was to be discharged at future date. He referred to the case of Bharat Earth Movers (245 ITR 428). He also stated that similar claim was allowed by the Tribunal while deciding the appeal for the AY.1990-91.*

*19.2. We find that the issue of a certain business liability was deliberated upon and adjudicated by the Hon'ble Apex Court in the case of Bharat Earth Movers and it was held that if a business liability had definitely arisen in the accounting year and was capable of being estimated with reasonable certainty, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. Following the principle laid down by the Apex court in the above case and the decision of the Tribunal delivered for the AY.1990-91, we decide ground no.18 against the Assessing Officer."*

*60. In view of the said finding, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Since, the issue has duly been covered by assessee's own case for the A.Y. 2002-03 in ITA. No. 4987/M/2007, therefore, in the said circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue."*

*13.5. Applying the principles laid down by the Hon'ble Supreme Court in Bharat Earth Movers vs. CIT : (2000) 245 ITR 428 (SC), and respectfully following the decisions of the co-ordinate bench of the Tribunal in the case of the Assessee for the Assessment Year 1990- 91 (ITA No. 2361/Mum/1995), 2002-03 (ITA No. 3787/Mum/2007 & others), and 2003-04 (ITA No. 4988/Mum/2007), we confirm the order of CIT(A) of allowing deduction for INR 1,88,97,500/- holding the same to be a liability in praesenti to be discharged at future, capable of being estimated with reasonable certainty. Accordingly, Ground No 6 raised by the Revenue is dismissed."*

**40.** Respectfully following decision of Coordinate bench in assessee's own case as discussed herein above, this ground in Departmental Appeal is dismissed.

**41.** In the Ground No 7, Department has raised the following grievance:

"On the facts and in the circumstances of the case and in law the CIT(A) erred in deleting the addition of ₹.1,51,06,703/- in respect of interest payment made to SBI Bank- Bahrain Branch holding that provisions of Sec. 194A is not applicable and hence disallowance u/s.40(a) is not called for.

**42.** The Assessing Officer has dealt with the issue at Para No. 12 to 12.2 of Assessment Order. The Assessing Officer has observed that in original return of income, assessee company has made disallowance u/s 40 (a) for ₹.1,51,06,703/- in respect of interest payment made to SBI Bank-Bahrain branch as no TDS was deducted. However, in revised return of income, Assessee Company has not made any disallowance on the ground that State Bank of India being a Banking Company under the Banking Regulation Act, 1990, provision of Section 194A is not applicable. This contention of assessee is not found acceptable to Assessing Officer on the ground that SBI offshore banking unit Bahrain is agent for loan borrowed from SBI International(Mauritius) limited and if interest is paid to NRI, provisions of Section 195 is applicable. As assessee company has not deducted TDS on such payment, Assessing Officer made disallowance u/s 40(a) of the Act.

**43.** This issue is dealt by Ld.CIT(A) at Para No. 11.4 of his order as under:

*"11.4 I have carefully considered the submissions of the Ld. AR. The payment has been made to the Bahrain Branch of State Bank of India (SBI). This branch is part of SBI which is governed by the Banking Regulation Act. Section-194A(3)(iii)(a) of the Income Tax Act, 1962 provides exemption from the application of 194A(1) to any banking Company to which the Banking Regulation Act, 1949 applies. So payment of interest to the State Bank of India is exempted from the deduction of tax at source u/s. 194A(1). Since the provisions of Section-194A are not applicable to the transaction there cannot be any disallowance u/s. 40(a). Hence, the disallowance of deduction made u/s. 40(a) is cancelled and the ground of appeal is allowed."*

**44.** Against the above observation of Ld.CIT(A), Revenue has filed further appeal. During the course of appellate proceedings, Ld.DR has relied upon finding of Assessing Officer and contended that observation of Assessing Officer may be restored. On the other hand, Ld.AR has claimed that it is not required to deduct TDS as SBI Bahrain branch is branch of SBI which is a Banking Company hence provisions of Section 194A is not applicable. Ld. AR of the assessee has relied upon finding of Ld.CIT(A) and further relied upon decision of Coordinate bench in the case of Bajaj Eco Products Limited in ITA No 4609 & ORs of 2016 dated 08/06/2018 and Hyderabad ITAT in the case of Semantic Space Technologies Limited in ITA No 824 of 2010.

**45.** Considered the rival submissions and material placed on record. On this issue, the coordinate bench in the case of Bajaj Eco Tec Products Ltd, Mumbai in ITA No 4609, 4610 & 4611/Mum/2016 dated 08/06/2018 has held as under:-

*"14. There is no dispute with regard to the residential status of ICICI Bank Ltd., including its offshore branches at Singapore, Hongkong. The office of Jt. CIT(OSD)- 3(1), Mumbai has clarified vide its letter dated 24.01.2011 that ICICI Bank Ltd is an Indian resident company in terms of section 6(3)(iii) of the Act, and the global income of the ICICI Bank Ltd including the offshore branch is chargeable to tax in India and is assessed to tax in India. It is also undisputed fact that any payment made to a resident banking company does not come within the purview of TDS as per the provision of section 194A(3)(iii) of the Act. The only dispute is with regard to the residential status of lender of external commercial borrowings to the assessee and interest payment on such external commercial borrowings. The assessee claims that it has borrowed external commercial borrowings from Singapore branch and which is a main lender of the loan. Therefore, any interest payment to ICICI Bank Ltd., Singapore branch is not coming within the provisions of section 195 of the Act. No doubt, any payment made to a resident banking company is outside the purview of provision of section 195 of the Act. Similarly, any payment made to a non-resident including a banking company is coming within the provision of section 195 of the Act. The primary dispute is with regard to the residential status of payee in Singapore and the lender of external commercial borrowings. As per the letter of Jt. CIT(OSD)-3(1), Mumbai, the residential status of the ICICI Bank Ltd., has been clarified....."*

**46.** It is observed that Ld.CIT(A) in his order has given finding that Bahrain Branch of State Bank of India (SBI) is part of SBI which is governed by the Banking Regulation Act and this fact is not disputed by LD DR. Further it is also a settled position that a branch office is part of the entire SBI and not a separate legal entity. Payment to foreign branch of Indian entity tantamount to payment made to Indian company only. Accordingly, provisions of Section 195 are not applicable in respect of payments made to foreign branch of Indian Bank. Considering such fact and relying upon decision of Coordinate bench referred supra, we are inclined to accept the findings of Ld.CIT(A) for deleting the addition made by Assessing Officer. This ground of appeal in Departmental appeal is dismissed.

**47.** In the Ground No 8, Department has raised the following grievance:

*"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the disallowance of the cost of dismantling assets holding that the said expenditure is allowable as revenue expenditure."*

**48.** The Assessing Officer has dealt with the issue at Para No. 11 to 11.3 of Assessment Order. The Assessing Officer has observed that in original return of income, assessee has made disallowance of ₹.53,09,340/- in respect of cost of dismantling charges but in revised return of income, assessee has claimed such amount as deduction based upon decision of coordinate bench in its own case for A.Y. 1991-92 and 1992-93. However, the claim of assessee was not accepted by Assessing Officer on the ground that expenditure is capital expenditure and needs to be capitalised.

**49.** This issue is dealt by Ld.CIT(A) at Para No. 12.3 of his order as under:

"12.3 I have carefully considered the submissions. The expenditure has not been incurred for installation of a capital asset. It has been incurred for dismantling of a capital asset which is disposed off as scrap. The expenditure is not incurred to rebuild the new asset as understood by the Assessing Officer. The expenditure is for clearing the factory premises of scrap, so that it can be disposed off as such. The expenditure is incurred during the course of the business and cannot be disallowed as capital expenditure when the receipts from the sale of scrap are assessed as income. The ITAT, Mumbai have supported the Assessee in three earlier years when the issue came up. In view of this, the addition made by the Assessing Officer is deleted.

**50.** Against the observation of Ld.CIT(A), Revenue has filed further appeal. During the course of appellate proceedings, Ld.DR has relied upon finding of Assessing Officer and contended that observation of Assessing Officer may be restored. On the other hand, Ld. AR of the assessee has relied upon finding of Ld.CIT(A) and further relied upon decision of Coordinate bench in its own case for A.Y. 1991-92 to 1994-95 (ITA No 1105 of 1997 &Ors), ITA No 3783 of 2000 for A.Y. 1996-97 and ITA No 7594 of 2004 for A.Y. 1999-2000.

**51.** Considered the rival submissions and material placed on record. On identical issue claimed by the assessee is allowed by Coordinate bench in ITA No 7594 of 2004 dated 28/06/2012 (A.Y. 1999-2000) and held as under:

"12.1 The expenditure of ₹.7,95,594 was incurred for dismantling old and unserviceable assets in phased manner. By incurring expenditure no new assets of enduring nature was brought into existence and hence was claimed as revenue expenditure. AO disallowed the expenditure relying on the Tax Audit

Report. The same was upheld by the CIT (A) following the decision in the case of Lake Palace Hotels and Motels Pvt. Ltd vs. CIT (1995) 213 ITR 735 (Raj.). Similar issue in assessee's own case has been allowed by the ITAT Mumbai in the following appeals:

*a)AY91-92-ITANo.1105/Mum/97*

*b)AY92-93-ITANo.3961/Mum/97*

*c)AY96-97-ITANo.3783/Mum/00*

*d)AY97-98-ITANo.3298/M/01*

12.2 Respectfully following the decision in earlier years, which have not been challenged by the Revenue, we allow assessee's claim. We also hope that the Revenue will not make similar I disallowances in later years as it has accepted the decision of the ITAT in earlier years. Ground is considered allowed."

**52.** Respectfully considering decision of Coordinate bench in assessee's own case referred supra, disallowance made by Assessing Officer is deleted. This ground of appeal in Departmental appeal is dismissed.

**53.** In Ground No 9, Department has raised the following grievance:

"On the facts and the circumstances of the case and in law the CIT(A) erred in directing the Assessing Officer to allow deduction u/s.80IA in respect of TG-3 Power Plant.

**54.** On identical issue in Assessee's appeal, in the Ground No3, following issue is raised:

*"That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred in confirming the denial of deduction u/s 80IA in respect of Power Plant TG2 at Wadi in Karnataka.*

**55.** The relevant facts relating to above grounds are, Assessing Officer observed that assessee has purchased two old Captive Power Plant being TG- and TG-3 at Wadi Karnataka from Tata Power. The assessee has claimed deduction u/s 80IA at ₹.26,70,88,579/- and ₹.23,46,09,784/- respectively in two units. The Assessing Officer observed that benefit of deduction u/s 80IA is available for setting up new plant and Assessee has not set up plant but purchased such plant hence deduction u/s 80IA is not available. On this ground, Assessing Officer has denied deduction u/s 80IA on both the units.

**56.** This issue is dealt by Ld.CIT(A) at Para No. 15.9 to 15.12 of his order as under:

*15.9 I have carefully considered the submissions of the Ld.AR, gone through the relevant provisions of the Income-tax Act and various decisions cited. I have also gone through the assessment order particularly the AO's decision at page 25 para 16.4.*

*15.10 The deduction u/s. 80IA has been claimed in respect of two units ie. TG-2 and TG-3. So far as TG-2 is concerned, it was commissioned by the Assessee in the FY: 1995-96. From 1996-97 to 1998-99 the Assessee has not claimed any deduction u/s. 80IA as there was no profit from this unit. In AY:1999-2000 this plant made profit and the Assessee claimed deduction u/s. 80IA. However this deduction was not necessary as the total income became a loss. But the claim of deduction was made. Then in Jan,1999, it was sold to Tata Power. M/s. Tata Power has not availed deduction u/s. 80IA. The AO has mentioned that Tata Power was not eligible for deduction. The Assessee says that they have not claimed it. In September, 2004 the unit was re-purchased by the Assessee who has claimed deduction u/s. 80IA for AY:2005-06 which is presently under consideration.*

*15.11 Before going through the interpretation of the provisions it will be pertinent to examine the provisions of sec. 80IA. As per sec. 80IA(2) the deduction can be claimed by an assessee for any ten consecutive assessment years out of 15 years beginning from the year in which the undertaking or the enterprise commences its activities which is eligible for deduction. In this case, the Assessee has done power generation which is one of the eligible activities under this section. So the Assessee had the option of claiming the deduction u/s. 80IA for any ten consecutive assessment years within 15 years from AY: 1995-96. The Assessee claimed deduction in the year 1999-2000, so the claim should have continued for the next nine years in order to maintain the eligibility for such deduction. However in the Assessee's case deduction has not been claimed after 1999-2000 and is claimed again this year ie. 2005-06. As mentioned earlier, the Ld.AR of the Assessee has argued before me that the deduction u/s. 80IA is not given to the assessee but to a specific unit. He has cited the Board's Circular no. 13.12.1963 in this regard. Once this proposition is accepted that the deduction is allowed on income from a specific unit, whether such unit was in the possession of the original founder or with somebody else, will not be material. But it is imperative that deduction u/s. 80IA must be claimed in respect of the income from this unit consecutively for a period of 10 yrs from any point out of the span of 15 yrs from commencement of the business. It is admitted that when the unit was sold to M/s. Tata power and during the period when it was under their possession, no deduction u/s. 80IA has been claimed or allowed on the profits of this unit. The Assessee admits that such a claim was not made during the period after having claimed deduction u/s. 80IA in 1999-2000 such claim has been made again in AY: 2005-06, which to my mind, will not qualify as '10 consecutive assessment years' as mentioned u/s. 80IA(2). Under the circumstances, the claim of deduction u/s. 80IA does not appear to be allowable in respect of TG-2.*

*15.12 So far as TG-3 is concerned, the facts are different. In fact in his order the AO has not given any specific reason for disallowing the deduction against the unit TG-3. It appears that he has considered it to be an undertaking formed by previously used plant and machinery which is not eligible for deduction u/s. 80IA. However, the Assessee has not purchased or installed old machinery. It has purchased an entire unit as a going concern. This unit was constructed by*

*M/s. Tata Power and sold to the Assessee during this year. As per Board's Circular dtd. 13.12.68 which has been referred to by the Assessee, the benefit of sec. 84 attaches to the undertaking and not the owner thereof. The successor will be entitled to the benefit of the unexpired period provided that the undertaking is taken over as a running concern. Admittedly this circular was issued on sec.84 which was replaced by sec. 80J later. The Calcutta High Court in the case of P.K. Engg and Forging Pvt Ltd (supra) have held that both these sections are similar and sec. 84 was since omitted and replaced by 80J. Since the fields covered by both the sections are the same, the circular was applicable to sec. 80J also. The provisions of sec. 80IA is also applicable to profits and gains derived by an undertaking or an enterprise. So the spirit of the Board's circular will also be applicable to this section. If an undertaking is transferred as a going concern, the new owner can claim the deduction u/s. 80IA, if the claim otherwise comes under the provision of this section. Further, in the light of the judicial pronouncements cited earlier, the Assessee's case is not a case of splitting of an industrial undertaking. The generation unit as a whole has been sold to the Assessee. Since the deduction u/s. 80IA is allowable on the profits of this unit, the Assessee who has purchased the unit can claim such deduction, as the other conditions prescribed u/s. 80IA are fulfilled. In view of this, the AO is directed to allow deduction u/s.80IA in respect of TG-3. As has already been held earlier, no such deduction is allowable in case of TG-2. the AO is directed accordingly.*

**57.** Against the observation of Ld.CIT(A), Revenue has filed further appeal for allowing the deduction u/s 80IA claimed for TG-3 whereas Assessee has filed further appeal for denying the deduction u/s 80IA claimed for TG-2. During the course of appellate proceedings, the Ld. AR of the Assessee has contended that entire business is purchased as a going concern on slump sale basis, deduction under Section 80IA is available to it. The Ld. AR of the assessee has referred to provisions of Section 80-IA which states that if new undertaking is not setup by splitting up, or the reconstruction of a business already in existence and it is not formed by transfer to a new business or machinery or plant previously used for any purpose, deduction would be allowable. The Ld.AR has argued that assessee has acquired entire unit as a whole which means that company has not split any existing business for forming the said unit and purchase of power unit from the TPC doesn't amount to reconstruction as undertaking has been purchased from TPC which is altogether a distinct and separate entity. He has also referred to CBDT Circular F No 15/5/63-IT(A-1) dated 13<sup>th</sup> December 1963 which was in the context of Section 80J wherein it is stated that Section 84 attaches to the undertaking and not to the owner thereof and successor will be entitled to benefit for the unexpired period. In support of such contention Ld. AR has lied upon following decisions:

- (i). CIT vs Sonata Software Ltd 343 ITR 397 Bombay High Court
- (ii). CIT vs Heartland KG Information Limited 359 ITR 1, Madras High court
- (iii). ITO vs Hindustan Petroleum Corporation Ltd 25 TJ28.

**58.** Thus, Ld.AR has claimed that assessee is entitled for deduction u/s.80IA on both the units. So far as observation of Ld.CIT(A) that assessee is not entitled to deduction u/s 80IA for TG-2 as deduction u/s.80IA was first claimed in notes forming part of return of income for A.Y. 1999-2000 and same was not claimed in subsequent years and directly claimed in A.Y.2005-06. Ld AR of the assessee stated that assessee is entitled for deduction u/s 80IA for ten consecutive years out of block of fifteen years which does not mean that if assessee has not claimed deduction u/s 80IA in intervening period after claim made in initial year, it is not entitled for remaining period covered in block of ten years.

**59.** On the other hand, Ld. DR has relied upon the observation of assessing officer wherein it is stated that assessee has not set up any industrial undertaking but same has been formed by transfer of previously used plant and machinery on which deduction under Section 80IA is not available. She also submitted that TCS has not claimed the deduction and the same cannot be claimed in the hands of the assessee as it is not the new assets but used assets, as per the provisions the assessee cannot claim deduction in the second hand machineries. She prayed that the order of Assessing Officer may be sustained.

**60.** Considered the rival submissions and material placed on record. The Assessee has claimed deduction u/s 80IA on two units purchased from Tata Power Limited and such deduction is denied on the ground that assessee has not set up any undertaking and same has been formed by transfer of previously used plant & machinery. It is relevant to refer to provisions of Section 80IA which reads as under:

“3) This section applies to an undertaking referred to in [clause (ii) or] clause (iv) of sub-section (4)] which fulfils all the following conditions, namely:

- (i) *it is not formed by splitting up, or the reconstruction, of a business already in existence :*

*Provided that this condition shall not apply in respect of an 52[undertaking] which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such 52[undertaking] as is referred to in section 33B, in the circumstances and within the period specified in that section;*

- (ii) *it is not formed by the transfer to a new business of machinery or plant previously used for any purpose:"*

**61.** It is relevant to refer to Oxford dictionary, the term "split up" means to separate of end relationship. It is undisputed fact in present case that assessee has acquired both the units as a whole. It is not the case that assessee has set up two different power plant by purchasing only partial assets which were used by another assessee but entire undertaking itself is purchased as it is in year under consideration which clearly prove that assessee has not split any of its existing business for forming both the units. Hon'ble Bombay High court in CIT v. Gaekwar Foam & Rubber Co. Ltd. [1959] 35 ITR 662 explains that the concept of a reconstruction of a business implies that the original business is not to cease functioning and its identity is not lost. Reconstruction is of a business already in existence implies that there must be a continuation of the activities of business of the same industrial undertaking where the ownership of a business or undertaking changes hands that would not be regarded as reconstruction. This judgment has specifically been approved by the Supreme Court in Textile Machinery Corpn. Ltd. v. CIT [1997] 107 ITR 195. As regards the splitting up of a business, the relevant test is whether an undertaking is formed by splitting up of a business already in existence. Unless the formation of the undertaking takes place by the splitting up of a business already in existence, the negative prohibition would not be attracted. In the present case, the entire business of TG-2 and TG-3 power plant was transferred to the assessee. The undertaking of the assessee was not formed by the splitting up of the business. On this issue, Hon'ble Bombay High court in the case of CIT v. Sonata Software Ltd[2012] 21 taxmann.com 23 has held as under:-

*"Section 10A of the Income-tax Act, 1961 - Free trade zone - IOCL set up a software division in 1980s - IOCL made an application for setting up an undertaking in a Software Technology Park (STP) for which an approval was obtained on 30-9-1993 - Plant and machinery for said undertaking was imported in July, 1994 and first export was effected in October, 1994 - Thus, manufacturing activities, commenced in STP undertaking after stipulated date of 1-4-1994 as provided in section 10A - Subsequently, in October 1994 itself, IOCL transferred entire software division as a going concern on slump sale basis to assessee - It was apparent from records that ownership of business or undertaking changed hands and, thus, it could not be regarded as a case of reconstruction - It was also undisputed that entire business of software was transferred to assessee, and, thus, assessee-undertaking could not be said to be one formed by splitting up of business - Whether on facts, assessee had fulfilled conditions mentioned in section 10A(2) and, thus, its claim for exemption under section 10A was to be allowed - Held, yes [In favour of assessee]*

**62.** Further, in CIT v. Silical Metallurgic Ltd (324 ITR 29), the facts before Hon'ble Madras High Court were as follows: there were three units at different places being new industrial undertakings eligible for deduction under the applicable provisions. They belonged to different companies assessed separately. The companies were amalgamated into one and the amalgamated company continued to carry on the business of the undertakings. It claimed the deduction of tax holiday for all the eligible undertakings. The Assessing Officer disallowed the deduction on the ground that it did not set up the aforesaid units and there was no provision in the Act for granting the benefit of deduction to the amalgamated company. The Ld.CIT(A) and the Tribunal upheld the claim of the taxpayer. The Hon'ble Madras High Court confirmed the decision of the Tribunal and observed as follows:

*"A reading of the provision of sections 80HH and 80-I of the Act, it is clear that the same has been incorporated to encourage the new industrial undertaking on fulfilment of certain conditions mentioned therein. If the conditions mentioned in the sections are complied with by the assessee, the benefit extended by the provisions has to be granted to the assessee.*

*The amalgamation of one company with the other company cannot be regarded as a splitting up or reconstruction or by a transfer of a new business of the plant and machinery of the old business. With reference to the Companies Act, the amalgamation was also for the benefit of the two companies, i.e., amalgamating and amalgamated company and in the public interest and also in the interest of the shareholders. Viewed from any angle amalgamation cannot be regarded as a splitting up of the company for the purpose of negating the claim under the Income-tax Act, which has been statutorily conferred on the company, if such companies fulfil the conditions stipulated therein.*

*Hence, we are of the view that the order of the Tribunal granting the benefit of sections 80HH and 80-I to the assessee-company cannot be stated to be illegal*

*or against the statutory provisions. A similar view has been taken by the Bombay High Court in the case of CIT v. Dandeli Ferro Alloys P. Ltd. [1995] ITR 1, in which the Bombay High Court held that the facts on record clearly established that the amalgamated company was already incorporated and formed and had come into existence on March, 1973 and had become an industrial undertaking carrying on industrial and commercial activities on and from June 20, 1973, i.e., prior to the amalgamation of the amalgamating company with the amalgamated company, which had become effective from October 31, 1973. The amalgamated company was not formed by the splitting up, or the reconstruction, of a business already in existence. Therefore, the Tribunal was right in holding that the assessee company was entitled to relief under sections 80J and 80HH of the Act".*

**63.** The CBDT had also accepted the above legal position with regard to deduction under section 84 of Income Tax Act, 1922 (Section 80J of Income-tax Act, 1961), way back in 1963 and clarified the matter vide Letter: F No 15/5/63-IT (A-I), dated 13 December 1963, which reads as under:-

"The Board agree the benefit of section 84 attaches to the undertaking and not to the owner, thereof. The successor will be entitled to the benefit for the unexpired period of five years provided the undertaking is taken over as a running concern".

The Board set out two principles (prima facie, independent of one another or the later dependent on the primary and the first principle):

- i. The deduction attaches to the undertaking and not to the owner; and
- ii. A successor would be entitled to the deduction, for the residual period, if the undertaking is transferred as a running concern

**64.** The aforesaid Board Circular have been relied upon by various Courts and its applicability have been upheld. The Hon'ble Allahabad High Court in the case of Prisma Electronics [2015] 377 ITR 207 was concerned with deduction under section 80-IB on conversion of proprietorship concern into partnership firm. In this regard, it was held as under:

*"11. From a perusal of the aforesaid provision, it is clear that Section 84 is more or less the same as provided in Section 80-IB of the Act. The Central Board of Direct Taxes issued a circular F. No.15/5/63-IT(A-1) dated 13th December, 1963 indicating that the benefit of Section 84 is attached to the undertaking and not to the owner thereof and, consequently, the successor would be entitled to the benefit for the unexpired period of 5 years provided the undertaking is taken over as a running concern.*

*12. The same principle is applicable in the instant case. Admittedly, the undertaking was in existence since 2002. The proprietorship concern changed*

*into a partnership firm. The benefit under Section 80-IB of the Act is available to the partnership firm and the conditions imposed under Section 80-IB(2)(i) does not come in the way."*

**65.** Thus, the sanctity of the CBDT Circular has been upheld in the context of section 80IB, confirming that the tax holiday moves along with the undertaking and the ownership has no relevance. Similar decision is also rendered by Hon'ble Punjab & Haryana High Court in the case of Mega Packages [2011] 203 Taxman 236 while considering the eligibility of deduction under section 80-IC on conversion of proprietorship concern into a partnership firm and Hon'ble Madras High court in the case of Heartland KG Information Ltd 359 ITR 1.

**66.** Thus, the crux of all the above decisions clearly suggest that deduction u/s 80IA is available to undertaking and change in ownership does not mean that unit is established by split up or reconstruction of entire business. Considering ratio laid down by various courts as referred supra, assessee is entitled to deduction u/s 80IA on two units purchased from Tata Power Company Limited.

**67.** It is emanating from assessment order and order of Ld.CIT(A) that TG-2 started commercial production from 1<sup>st</sup> April 1995 and no deduction was claimed till A.Y. 1998-99 as such unit was incurring losses. The assessee was eligible for deduction u/s 80IA for such unit in A.Y. 1999-2000 but no deduction was claimed as there was no positive Gross Total Income of assessee but it is fact that assessee was eligible for deduction was mentioned in notes forming part of return of income. It is undisputed fact that Assessing Officer has not disputed such claim in assessment proceedings. Subsequently, such unit was transferred to Tata Power Company and was again re-purchased by assessee in current year and assessee has claimed deduction u/s 80IA. So far as observation of Ld.CIT(A) that assessee is not entitled for such deduction as 80IA was not claimed by undertaking during the period A.Y.2000-2001 to AY 2004-05, it is observed that Ld.CIT(A) himself has accepted that assessee can claim deduction u/s 80IA for consecutive 10 years out of block of 15 years from commencement of business which does not mean that if in block of

10 years, deduction u/s 80IA was not claimed for one or more reasons, such claim is lapsed for subsequent years. Further it is also a settled position that the deduction u/s 80IA is qua undertaking and not qua entity. Every undertaking will be entitled to avail deduction u/s 80IA for a period of 10 consecutive years from 15 years from the commencement of business. There is substance in the argument of Ld. AR of the assessee that Tata Power Company Limited might not have claimed for deduction u/s 80IA for various reasons and there is nothing on record to prove that said company was not entitled for deduction in respect of 80IA on such power plant. On the other hand, claim of deduction u/s 80IA made by assessee is emanating from notes forming part of return of income for A.Y. 1999-2000 and not disputed by Assessing Officer in assessment proceedings hence there is no reason for not allowing deduction u/s 80IA for TG-2 Wadi. The Hon'ble Bombay High court in the case of Simple Food Products (P.) Ltd. [2017] 84 taxmann.com 239 has held that if deduction u/s. 80-IB was granted for an initial assessment year, same could not be rejected for subsequent assessment years unless relief for initial year was withdrawn.

**68.** In view of holistic discussion made herein above, assessee is entitled to deduction u/s 80IA on TG-2 and TG-3, Wadi unit. Thus, related ground of appeal in departmental appeal is dismissed and ground of appeal in assessee's appeal is allowed.

**69.** In the Ground No 10, Department has raised the following grievance:

"On the facts and the circumstances of the case and in law the CIT(A) erred in directing the Assessing Officer to exclude the specific expense of cost audit fees and subscription to CMA in respect of Cement manufacturing units for the purpose of computing deduction u/s.80IA/ 80IB.

**70.** On identical issue in Assessee's appeal, in the Ground No. 4 following issue is raised: -

"4. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred in confirming the apportionment of the indirect Head Office expenses while computing deduction u/s.80IA/80IB.

**71.** The relevant facts as discussed in assessment order are that assessee has claimed deduction u/s 80IA with respect to its power plant at Kymore, Jamnul& Wadi and has not apportioned Head Office expenses at listed at Para No. 16.7 of assessment order on the ground that same does not have any direct nexus with such units. However, such explanation was not accepted by Assessing Officer and allocated such expenses on the basis of turnover of assessee company and turnover of respective power units.

**72.** This issue is dealt by Ld.CIT(A) at Para No. 16.4 of his order as under:

*"After careful consideration, I am not agreeable to the submissions of the Ld.AR. The head office of the company overlooks the operations of all its affiliated units and the expenses incurred at the head office is related to all affiliated units. So, in order to work out the profits from any particular unit, proportionate expense of the head office has to be taken into consideration, otherwise the profit and loss of the unit will give a very distorted picture. In view of this the AO is justified in considering proportionate head office expenditure for working out the profits of the power plant on which deduction u/s. 80IA has been claimed. However, from the details of the expenditure considered by the AO, the Ld.AR has pointed out that, the cost audit fee of ₹.1,54,280 and subscription to CMA - ₹.64,46,000 are in respect of cement manufacturing unit. Since these two items of expenditure are specifically incurred for cement manufacturing units the AO directed to exclude these two items out of the expenditure he has considered as mentioned at page 27 para 16.7 of the assessment order. The deduction should be reworked accordingly."*

**73.** Against the observation of Ld.CIT(A), both department and assessee has further filed appeal. The Ld.AR of the assessee has argued that as expenditure identified by Assessing Officer are not at all required to be incurred for such Power Unit eligible for deduction u/s 80IA, no allocation of such expenditure is required to be made. Reliance was placed mainly on following decisions:

- (i) DCW Ltd. v. Addl. CIT [(2010) 37 SOT 322 (Mumbai Tribunal)]
- (ii) Proctor & Gamble India Ltd. v. DCIT [ITA No.5466 of 1999 &Ors. (Mumbai Tribunal)]
- (iii) DCIT v. Reliance Infrastructure [ITA No.1704 of 2019 (Mumbai Tribunal)]

- (iv) DCIT v. Aditya Birla Nuvo Ltd. [(2016) 67 taxmann.com 380 (Mumbai Tribunal)] (Para 8)
- (v) Grasim Industries Ltd. v. DCIT [ITA No. 5628 of 2002 (Mumbai Tribunal)]

**74.** The Ld.AR of the assessee has also stated that department has not filed further appeal against decision in the case of Grasim Industries Limited ITA No.311 of 2015, ITA No.111 & 112 of 2015 dated January 09, 2018 dated January 09, 2018. On the other hand, Ld. DR has contended that deduction u/s 80IA requires the assessee to declare income derived from Industrial Undertaking hence all indirect expenditure deserves to be allocated to such eligible unit and order of Assessing Officer needs to be upheld.

**75.** Considered the rival submissions and material placed on record. We observe that the Assessing Officer has identified indirect expenditure incurred at Head Office i.e Statutory Audit fees, Audit for taxation matter, Director Fees, Cost Auditor expenses, Subscription to CME etc and observed that such expenditure are not allocated to eligible businesses and to that extent deduction u/s 80IA is claimed excess. Before Ld.CIT(A), assessee has claimed that cost audit fees and subscription to CMA are in respect of cement manufacturing unit hence no allocation of such expenditure is required to be made. To that extent, Ld.CIT(A) has accepted the plea of assessee and such fact is not controverted by Ld. DR hence finding given by Ld.CIT(A) to that extent is upheld. Further, on this issue, coordinate bench in the case of Ambuja Cement Limited, holding company of assessee in ITA Nos. 1889 and 1241/Mum/2018, 2384, 2958, 3475 and 3843/Mum/2019(for A.Y. 2010-11 to 2012-13) vide order dated 07/11/2022 has held as under:

*"108. We are unable to see any merits in the stand of the assessee that the head office expenses cannot be allocated to all the units, as deductions and allowance of eligible units are required to be taken into account while treating such units as profit centres, and computing the profits accordingly. The fiction of the eligible units being treated on a standalone basis does not require that the profits of the units are to be computed as if they are independent of each other, and once that fiction sets in, the expenses incurred by someone other than eligible unit, in the interest of the eligible unit, are to be taken into account while computing the profits of the eligible unit. Accordingly, the allocation of expenses, as the learned Assessing Officer rightly contends, must be done. The assessee has further*

*contended that HO expenses are not „derived from“ or „derived by“ the eligible undertakings, and, for this reasons, these expenses cannot be allocated to the eligible undertaking. We see no reasons to decline allocation of head office expenses to ensure that the profits of the eligible units are correctly worked out, on the basis of hypothetical independence embedded in the eligible units being treated on a standalone basis. To this extent, we reject the plea of the assessee. However, the basis of allocation as turnover is not really correct and reasonable, nor the relationship between the turnover and expenses always linear; the allocation would be more appropriate based on expenditure incurred by the units vis-à-vis overall expenditure. To this extent, we uphold the plea of the assessee.*

*109. In view of the above discussions, as also bearing in mind the entirety of the case, we reject the grievance of the assessee against allocation of HO expenses, but we permit the assessee's plea to the limited extent that the allocation of HO expenses should be done on the basis of expenditure incurred by the units vis-à-vis overall expenditure"*

**76.** Respectfully following decisions of coordinate bench referred supra, Assessing Officer is directed to allocate Head office expenses (other than auditor fees and CMA expenses) on the basis of expenditure incurred by the units vis-à-vis overall expenditure. Thus, related ground of appeal in departmental appeal is dismissed and ground of appeal in assessee's appeal is partly allowed as directed herein above.

**77.** In the Ground No 11, Department has raised the following grievance:

"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the addition for provisions for wealth tax while computing the book profit u/s.115JB of the Act."

**78.** The Assessing Office has dealt with this issue at Para No. 20 and 21 of his order and made addition for provisions for wealth tax while computing the book profit u/s.115JB of the Act relying upon reasons given in A.Y. 2003-04 and 2004-05. This issue is dealt with by Ld.CIT(A) at Para No. 20.7 of his order as under:

"20.7 I have carefully considered the submissions. As the Ld.AR has brought to my notice, this issue has been decided by my predecessor in AYs: 1990-2000, 2003-04 and 2004-05 in favour of the Assessee, my Ld.predecessor has decided the issue in favour of the Assessee following the decision of the Bombay High Court in the case of Echjay Forgings P Ltd and the Special Bench of ITAT in the case of CIT Vs Usha Martin Industries. Since the facts are the same I follow the decisions, and allow the ground of appeal. The recent decision of the Supreme Court in the case of CIT Vs HCL Comnet Systems & Services Ltd, 305 ITR 409 will also support the issue. My decision in the earlier ground also will be relevant in this regard."

**79.** Against the observation of Ld.CIT(A), department has filed this ground in this appeal. Before us, Ld. AR has relied upon appellate order passed in its own case for A.Y. 2002-03 to 2004-05 and contended that no such adjustment is required to be made. On the other hand, Ld. DR has relied upon finding given by Assessing Officer and argued that order of Assessing Officer may be restored.

**80.** Considered the rival submissions and material placed on record. On this issue, coordinate bench in assessee's own case for A.Y. 2004-05 in ITA No 5259/MUM/2007 dated 27/05/2022 has decided issue in its favour. The relevant finding is reproduced herein below:

*14.2.3. Revenue is in appeal, challenging the relief granted by CIT(A). We have heard the rival contentions and perused the record. While the Departmental Representative relied upon the assessment order, the Authorised Representative of the Assessee reiterated the submissions made before the lower authorities and relied upon the decision of the Tribunal in Assessee's own case for the Assessment Year 2002-03 and 2003-04 wherein the Tribunal had granted relief to the Assessee. 14.2.4. We note that the Hon'ble Bombay High Court has, in the case of CIT vs. Echjay Forgings (P) Ltd. (2001) 251 ITR 15 has held as under:*

*"4. The short point which arises for consideration in this appeal is, whether the Assessing Officer was right in disallowing claims for deduction in respect of the five items and ordering addition thereof to the net profit for the purposes of section 115J.*

*5. The addition of the five items to the net profit is, accordingly, discussed hereinbelow: (I) Addition of wealth-tax paid by the assessee to the net profit*

*6. Mr. Desai, the learned senior counsel for the department, fairly concedes that the net profit, as shown in the profit and loss account, will not be increased by the amount of wealth-tax paid because under clause (a) of the Explanation to section 115J(1A), what is contemplated is the amount of income-tax paid. Under the said clause, payment of wealth-tax is not contemplated. Therefore, the net profit shall not be increased by the amount of wealth-tax paid by the assessee." (Emphasis Supplied)*

*14.2.5. In the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the common order, dated 13.03.2019, passed in ITA No. 4242&4988/MUM/2007 for the Assessment Year 2003- 04 reads as under:*

*"44. Issue no. 15 is in connection with the deletion of addition in respect of provision of Wealth Tax in computing book profit u/s 115JB of the Act in sum of ₹.80,00,000/-. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.: -*

*"37.3 I have considered the submissions made on behalf of the appellant. Respectfully following the decision of the Hon'ble*

*Bombay High Court in the case of Echjay Forgings Ltd. (supra) and the Hon'ble Special Bench of Kolkata Tribunal in the case of Usha Martin Industries Ltd. (supra) as well as my own order in appeal no. CIT(A)-I/IT/232/04- 05 for AY 1998-99 stated herein above, the addition made by the Assessing Officer is deleted and this ground of appeal is allowed." . On appraisal of the said finding, we noticed that the claim of the assessee has been allowed in view of the decision of Bombay High Court in the case of CIT Vs. Echjay Forgings (P) Ltd. (2001) 251 ITR 15 (Bom) and JCIT Vs. Usha Martin Industries Ltd. (2007) 104 ITD 249 (Kolkata Tribunal) SB. We also noticed that the matter of controversy has been adjudicated by CIT(A) for the A.Y. 1998-99 also and against the said decision, the revenue is not in appeal. It is reiterated that the adjustment can only be made in view of Section 115JB of the Act which has been specified in Explanation to Section 115JB of the Act. In view of the said circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue." (Emphasis Supplied)*

*14.2.6. In view of the above, we confirm the order of CIT(A) and hold that provision for Wealth-Tax of INR 70,00,000/- is not required to be added back while computing Book Profits under Section 115JB of the Act. Accordingly, Ground No 8 raised by the Revenue is dismissed."*

**81.** Respectfully following the decision of coordinate bench referred supra, addition of provision for wealth tax made while computing book profit u/s 115JB is deleted. Accordingly, this ground of appeal in Departmental Appeal is dismissed.

**82.** In the Ground No 12, Department has raised the following grievance:

*"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the addition of provision for normal and additional gratuity while computing the book profit u/s.115JB of the Act.*

**83.** The Assessing Office has dealt with this issue at Para No. 23 of his order and observed that as assessee has not established that Gratuity provisions are made towards ascertained liabilities, same are added back while computing total income. This issue is dealt by Ld.CIT(A) at Para No. 22.6 of his order as under:

*"22.6 As the Ld.AR has brought to my notice that this issue has been decided by the ITAT, Mumbai in the case of the Assessee in AY: 1990-91 following the decision of the Bombay High Court in the case of Echjay Forgings P Ltd (surpa). Further my predecessors have decided the issue in favour of the Assessee in*

*AYs: 1998-99, 2003-04 and 2004-05. Since the issue is the same, I follow these decisions and allow the appeal."*

**84.** Against the observation of Ld.CIT(A), department has filed this ground in this appeal. Before us, Ld. AR has relied upon appellate order passed in its own case for A.Y. 2002-03 to 2004-05 and contended that no such adjustment is required to be made. On the other hand, Ld. DR has relied upon finding given by Assessing Officer and argued that order of Assessing Officer may be restored.

**85.** Considered the rival submissions and material placed on record. On this issue, coordinate bench in assessee's own case for A.Y. 2004-05 in ITA No 5259/MUM/2007 dated 27/05/2022 has decided this issue in its favour. The relevant finding is reproduced herein below:

*"14.3.3. Revenue is in appeal, challenging the decision of CIT(A) of deletion of INR 5,86,82,751/-. We have heard the rival contentions and perused the record. While the Departmental Representative relied upon the assessment order, the Authorised Representative of the Assessee reiterated the submissions made before the lower authorities and relied upon the decision of the Tribunal in Assessee's own case for the Assessment Year 1990-91, 2002-03 and 2003-04 wherein the tribunal had granted relief to the Assessee.*

*14.3.4. We note that in the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the common order, dated 13.03.2019, passed by the Tribunal in 4242&4988/MUM/2007 for the Assessment Year 2003-04 reads as under:*

*"46. Under this issue the revenue has challenged the allowance of claim of provision for additional gratuity in computing book profit u/s 115JB of the Act amounting to ₹.1,21,90,817/-. The proposition is the same which has been discussed above while deciding the issue no. 15. The finding of the CIT(A) in this regard is hereby reproduced as under.:*

*"38.2 I have considered the submission made on behalf of the appellant. Respectfully following the order of Hon'ble Tribunal for the A.Y. 1990-91 as well as my own orders for AY 1998-99 in appeal no. CIT(A)- I/IT/232/04-05 the addition made by the Assessing Officer is deleted and the ground stands allowed in favour of the appellant." 47. On appraisal of the said finding, we noticed that this issue has been covered by decision of Hon'ble ITAT in the assessee's own case for the A.Y. 1990-91 in ITA. No.2361/M/1995 & in the A.Y. 2002-03 in ITA. No.4987/M/2007. There is nothing on record to which it can be assumed that the order has been varied or changed in appellate proceeding. Since this issue has been duly adjudicated in favour of the assessee by above mentioned decision of the Hon'ble ITAT, we are of the view that the CIT(A) has decided the matter of controversy*

*judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue."*

*14.3.5. Respectfully following the decision of the co-ordinate Bench of the Tribunal in the case of the Assessee for the Assessment Year 1990- 91 (ITA No. 2361/Mum/1995), Assessment Year 2002-03 (ITA No. 4987/Mum/2007 & others) and Assessment Year 2003-04 (ITA No. ITA. No. 5259 & 4895/Mum/2007 Assessment Year: 2004-05 4242/Mum/2007), we confirm the order of CIT(A), and hold that provision for Normal/Additional Gratuity of INR 5,86,82,751/- is in the nature of provision for an ascertained liability and is, therefore, not required to be added back while computing Book Profits in terms of Clause (c) of Explanation 1 to Section 115JB(2) of the Act. Accordingly, Ground No. 9 raised by the Revenue is dismissed."*

**86.** Respectfully following decision of coordinate bench referred supra, addition of provision for gratuity made while computing book profit u/s 115JB is deleted. Accordingly, this ground of appeal in Departmental Appeal is dismissed.

**87.** In the Ground No 13, Department has raised the following grievance:

"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the addition of provision for leave encashment while computing the book profit u/s.115JB of the Act."

**88.** The Assessing Officer has dealt with this issue at Para No. 24 of his order and observed that provision for leave encashment made by assessee while computing book profit u/s 115JB was not allowed in assessment order of A.Y. 2004-05 hence such amount is added back while computing total income. This issue is dealt by Ld.CIT(A) at Para No. 23.6 of his order as under:

"23.6 I have carefully considered the submissions. The provision for leave encashment on the basis of actual valuation report cannot be treated as unascertained liability in view of the decision of the Supreme Court in the case of Bharat Earth Movers reported at 244 ITR 428. Further the Ld.AR has brought to my notice that the addition of provision for additional gratuity in computing book profit has been deleted by the IT AT, in the Assessee's own case for 1990-91, relying on the decision of the Bombay High Court in the case of Echjay Forgings Pvt Ltd, (supra). Further this issue has been decided by my predecessor in AYs:2003-04 and 2004-05 in favour of the Assessee. Following these decision the appeal is allowed. "

**89.** Considered the rival submissions and material placed on record. On this issue, coordinate bench in assessee's own case for A.Y. 2004-05 in ITA No

5259/MUM/2007 dated 27/05/2022 has decided this issue in its favour. The relevant finding is reproduced herein below:

"14.4.4. We have considered the rival contentions and perused the material on record. We note that the CIT(A) has granted relief to the Assessee by following the judgment of the Hon'ble Supreme Court in the case of Bharat Earth Movers (245 ITR 528), and the Hon'ble Bombay High Court in the case of CIT v. EchjayForgins (P) Ltd. (2001) 251 ITR 15. We do not find any infirmity in the order passed by the CIT(A) to the extent it holds that provision for Leave Encashment of INR 3,26,00,238/- is in the nature of provision for ascertained liability created on the basis of actuarial valuation and is, therefore, not required to be added back while computing Book Profits in terms of Clause (c) of Explanation 1 to Section 115JB(2) of the Act. Accordingly, order of CIT(A) on this issue is confirmed and Ground No. 10 raised by the Revenue is dismissed."

**90.** Respectfully following decision of coordinate bench referred supra, addition of provision for leave encashment made while computing book profit u/s 115JB is deleted. Accordingly, this ground of appeal in Departmental Appeal is dismissed.

**91.** In the Ground No 14, Department has raised the following grievance:

*"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the addition of provision for Director's retirement benefits while computing the book profit u/s.115JB of the Act."*

**92.** The Assessing Officer has dealt with this issue at Para No. 25 of his order and observed that assessee has not explained how provision for Director's retirement benefit made by assessee is towards ascertained liability hence while computing book profit u/s 115JB, same was added back to total income. This issue is dealt by Ld.CIT(A) at Para No. 23.6 of his order as under

*"24.5 I have carefully considered the submissions. The be treated as unascertained liability in view of the decision of the Supreme Court in the case of Bharat Earth Movers reported at 244 ITR 428. Further the Ld.AR has brought to my notice that the addition of provision for additional gratuity in computing book profit has been deleted by the ITAT, in the Assessee's own case for 1990-91, relying on the decision of the Bombay High Court in the case of Echjay Forgings Pvt Ltd, (supra). Further this issue has been decided by my predecessor in AYs:2003-04 and 2004-5 in favour of the Assessee. Following these decisions the appeal is allowed."*

**93.** Against the observation of Ld. CIT(A), department has filed appeal. Before us, Ld. AR has relied upon appellate order passed in its own case for A.Y. 2002-03 to 2004-05 and contended that no such adjustment is required to be made. The Ld. DR has relied upon finding given by Assessing Officer and argued that order of Assessing Officer may be restored.

**94.** Considered the rival submissions and material placed on record. On this issue, coordinate bench in assessee's own case for A.Y. 2004-05 in ITA No 5259/MUM/2007 dated 27/05/2022 has decided this issue in its favour. The relevant finding is reproduced herein below:

*"14.5.3. Revenue is in appeal, challenging the decision of CIT(A) of deletion of INR1,88,97,500/-. While dismissing Ground No. 6 above, we have concluded that Provision for Director's Retirement Benefit is not a provision for unascertained liability. We note that the CIT(A) has granted relief to the Assessee by following the judgment of the Hon'ble Supreme Court in the case of Bharat Earth Movers (245 ITR 528). Further, in the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the order, dated 13.03.2019, passed by the Tribunal in the case of the Assessee for the ITA. No. 5259 & 4895/Mum/2007 Assessment Year: 2004-05 Assessment Year 2003-04 (ITA No. 4242 & 4988/MUM/2007 reads as under:*

*32. Under this issue the revenue has challenged the deletion of addition in respect of provision for Director's Retirement Benefit in computing Book Profit U/s 115JB of The Act amounting to ₹.46,27,200/-. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.:*

*"26.5 On consideration of the submission made by the ARs of the appellant, I find that provision for director's retirement benefit cannot be considered as unascertained liability since the same has been calculated on the basis of actuarial valuation and is squarely covered by the decision of Hon'ble Apex Court in the case of Bharat Earth Movers (supra). Therefore, provision for director's retirement is an allowable deduction in computing profits and gains of business or profession. Further, in my view additions made in computing book profit u/s 115JB on the ground that the same has been added back in the computing total income under normal provisions of the Act is not tenable. Thus, respectfully following the decision of Mumbai High Court in the case of Echjay forgings Ltd. (Supra) and the decision of Hon'ble Tribunal in the appellant own case for AY 1990-91 as well as my own orders for AY 1998-99 and for AY 2002-03 as discussed herein above the addition made by the Assessing Officer is deleted and this ground of appeal is allowed."*

*33. Since the case of the assessee has duly been covered by the assessee's own case for the A.Y. 2002-03 in ITA. No. 4987/M/2007, for*

*the A.Y. 1990-91 in ITA. No. 2361/M/1995, therefore, in the said circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue.*

*14.5.4. In view of the above, we do not find any infirmity in the order passed by the CIT(A), and respectfully, following the decision of the co-ordinate bench of the Tribunal in the case of the Assessee for the Assessment Year 2003-04 (ITA No. 4988/Mum/2007), we confirm the order of CIT(A) on this issue. Accordingly, Ground No. 11 raised by the Revenue is dismissed."*

**95.** Respectfully following decision of coordinate bench referred supra, addition of provision for Director's retirement benefits made while computing book profit u/s 115JB is deleted. Accordingly, this ground of appeal in Departmental Appeal is dismissed.

**96.** In the Ground No 15, Department has raised the following grievance:

*"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the addition of provision for contingencies while computing the book profit u/s.115JB of the Act."*

**97.** The Assessing Office has dealt with this issue at Para No. 26 of his order and observed that assessee has not explained how provision for contingencies made by assessee is towards ascertained liability hence while computing book profit u/s 115JB, same was added back to total income. This issue is dealt by Ld. CIT(A) at Para No. 25.7 of his order as under:

"25.7 As the Ld.AR has pointed out this is a provision for diminution of the value of investment, and as such cannot be taken as a unascertained liability to be covered u/s. 115JB. This view is supported by the decision of the Special Bench of ITAT, Calcutta in the case of Usha Martin Industries and the recent decision of the Supreme Court in the case of CIT -vs.- M/s HCL Comnet systems & Services Ltd. (Civil Appeal No. 5800 of 2008) FurthertheLd.AR of the Assessee has brought to my notice that this issue has been decided in favour of the Assessee by my predecessors in AY: 2001-02,2002-03, 2003-04 & 2004-05. Since the issue is the same I follow these orders and allow this ground of appeal."

**98.** Against the observation of Ld. CIT(A), department has filed this ground in this appeal. Before us, Ld. AR fairly conceded that above issue is against assessee by the

decision of coordinate bench of ITAT in A.Y.2002-03 to 2004-05 and matter was set aside to file of Assessing Officer. The Ld.DR has relied upon finding given by Assessing Officer as well as finding of ITAT in earlier years and argued that order of Assessing Officer may be restored.

**99.** Considered the rival submissions and material placed on record. On this issue, coordinate bench in assessee's own case for A.Y. 2004-05 in ITA No 5259/MUM/2007 dated 27/05/2022 has set aside the matter to file of Assessing Officer. The relevant finding is reproduced herein below:

*"14.6.3. We have heard the rival contentions and perused the record. While the Departmental Representative relied upon the decision of the Tribunal in Assessee's own case for the Assessment Year 2003-04, the Authorised Representative of the Assessee reiterated the submissions made before the lower authorities before fairly conceding that the identical issue has been remanded to the to the file of the Assessing Officer by the Tribunal in Assessee's own case for the immediately preceding Assessment Year 2003-04.*

*14.6.4. During the pendency of the appeal before the Tribunal, clause (i) to Explanation 1 to Section 115JB(2) by the Finance Act, 2009, with retrospective effect from 01.04.2001 which provides that the amount set aside as provision for diminution in the value of any asset is required to be added back while computing Book Profits under Section 115JB of the Act. During the assessment proceedings, the Assessee had claimed that the Provision for Contingencies was made against the diminution in the value of the investment. In the immediately preceding Assessment Year 2003-04, while deciding the identical issue, the Tribunal in Assessee's own case in ITA No. 4242/MUM/2007 and ITA No. 4988/MUM/2007 held as under:*

*"53. Under this issue the revenue has challenged the allowance of the claim in connection with the provision for contingencies in computation of book profit u/s 115JB of the Act in sum of ₹.3,75,00,000/-. While arguing the case the Ld. Representative of the assessee has admitted that this fact that this issue has been covered against the assessee due to insertion of clause (i) to Explanation 1 to Section 115JB vide Finance No. 2 Act, 2009 w.e.f 01.04.2001 and also in accordance with law settled in the assessee's own case in ITA. No.4241/M/2007 dated 29.07.2015. Accordingly, we set aside the finding of the CIT(A) on this issue and restored the issue before the Assessing Officer to decide the issue afresh by giving an opportunity of being heard to the Assessee in accordance with law. Accordingly, we decide this issue in favour of the revenue against the assessee." (Emphasis Supplied)*

*14.6.5. Respectfully following the aforesaid decision of the Tribunal, we remand the issue back to the file of the Assessing Officer for fresh adjudication keeping in view the provisions of Clause (i) to Explanation 1 to Section 115JB(2) of the Act and after giving Assessee an opportunity of being heard. The order of CIT(A) on this issue is set aside with the aforesaid directions. Ground No. 12 raised by the Revenue is allowed"*

**100.** Respectfully following the decision of coordinate bench referred supra, we remand the issue back to the file of the Assessing Officer for fresh adjudication keeping in view the provisions of Clause (i) to Explanation 1 to Section 115JB(2) of the Act and after giving Assessee an opportunity of being heard. The order of Ld. CIT(A) on this issue is set aside with the aforesaid directions. This ground of appeal in Departmental Appeal is allowed.

**101.** In the Ground No 16, Department has raised the following grievance:

"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the addition of VRS pertaining to earlier years, capital expenditure debited & write down of value of assets while computing the book profit u/s.115JB of the Act."

**102.** The Assessing Officer has dealt with this issue at Para No. 27 of his order and observed that while passing the assessment order of earlier years, VRS expenses pertaining to earlier years, capital expenditure debited & write down of value of assets was added back while computing book profit u/s 115JB of the Act hence in current year, for identical reasons such expenses are added back to total income. This issue is dealt by Ld. CIT(A) at Para No. 26.8 of his order as under.

*"26.8 I have gone through the submission of the Ld. AR. The Ld. AR has brought to my notice that this issue has been decided by my predecessors in favour of the Assessee for AYS: 2002-03, 2003-04 & 2004-05, relying on the decision of the Supreme Court in the case of Apollo Tyres Ltd. And other decisions. Since the facts relating to the issue are the same, I follow the orders of my predecessor and decide the issue in favour of the Assessee. Accordingly, the addition made by the AO us deleted and the ground of appeal is allowed.*

.....

*27.10 I have carefully considered the submissions of the Ld.AR and gone through the assessment order. As has been held by the Supreme Court in the case of Apollo Tyres (supra), the AO has limited power of increasing or reducing book profit u/s.115JB and that he has to accept the authenticity of the accounts with reference to the provisions of the Companies' Act. Similar view has been expressed by the ITAT Mumbai in the case of Max Well Dyes and Chemicals (supra).The only adjustment to the book profit that the AO is entitled to do is as per the explanation to sec. 115JA. The disallowance of capital expenditure as done by the AO is not one of the items covered in this explanation. Under the circumstances, the AO is not entitled to do this adjustment which is deleted. As has been brought to notice by the Ld.AR this issue was the subject matter of the appeal before my predecessors in AYs: 1998-99, 2002-03, 2003-04 & 2004-05 and in all these years my predecessors have decided the appeal in favour of the Assessee. Since the facts are the same, the appeal is allowed on the same*

*grounds particularly because the AO has relied on the assessment orders of the earlier years for making the adjustment."*

**103.** Against the observation of Ld. CIT(A), department has filed this ground in this appeal. Before us, Ld. AR has stated that identical issue is decided in its favour by coordinate bench of ITAT in A.Y. 2002-03 to 2004-05. The Ld. DR has relied upon finding given by Assessing Officer and argued that order of Assessing Officer may be restored.

**104.** Considered the rival submissions and material placed on record. On this issue, coordinate bench in assessee's own case for A.Y. 2004-05 in ITA No 5259/MUM/2007 dated 27/05/2022 has decided this issue in favour of assessee. The relevant finding is reproduced herein below:

*"6.4. We have considered the rival contentions and perused the material on record. The CIT(A) has allowed the claim of the Assessee applying the principles laid down by the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT (supra), The accounts of the Assessee have been prepared in accordance with Parts II and III of Schedule VI to the Companies Act and the same has been duly certified by the statutory auditors, and therefore, in absence of any specific clause in Section 115JB(2) of the Act providing for increase of Book Profits by the amount of VRS expenses, no further adjustment is called for on this account. In the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee wherein the Tribunal has, vide common order, dated 13.03.2019, passed in ITA No. 4242/MUM/2007 & ITA No. 4988/MUM/2007 has held as under:*

*"34. Under this issue the revenue has challenged the deletion of addition made in respect of VRS expenditure pertaining to earlier years in computing Book Profit u/s 115JB of the Act in sum of ₹.18,69,64,996/-. The relevant finding has been given in CIT(A) in Para No. no. 27.4. On appraisal of the above said finding, we are of the view that the CIT(A) has allowed the claim of the assessee on the basis of decision of the case titled as Apollo Tyres Ltd. CIT (2002) 255 ITR 273 (SC). We also noticed that the issue has already been covered in favour of the assessee in the assessee's own case for the A.Y. 2002-03 in ITA. No.4987/M/2007. The facts are not distinguishable at this stage also. Taking into account all the facts and circumstances of the case, we are of the view that the CIT(A) has allowed the claim of the assessee rightly, hence, the finding of the CIT(A) is not liable to be disturbed at this stage. Accordingly, this issue is being decided in favour of the assessee against the revenue."*

*6.5. In view of the above, Ground No. 15 raised by the Revenue is dismissed"*

**105.** Respectfully following decision of coordinate bench referred supra, the addition made by Assessing Officer while computing book profit is deleted. This ground of appeal in departmental appeal is dismissed.

**106.** In the Ground No 17, Department has raised the following grievance:

"On the facts and the circumstances of the case and in law the CIT(A) erred in directing AO to exclude profit on sale of fixed assets while computing the book profit u/s.115JB of the Act."

**107.** On identical issue in Assessee's appeal, in the Ground No7, following issue is raised:

"That on the facts and in the circumstances of the case, The Ld. CIT (Appeals) was not justified and grossly erred in confirming the denial of claim of exclusion of profit on sale of investments of ₹.5,02,75,745/- in computing Book Profit u/s 115JB."

**108.** The Assessing Officer has dealt with this issue at Para No. 28 of his order. The Assessing Officer has observed that assessee has reduced book profit u/s 115JB by profit on sale of fixed assets and profit on sale of Investments. The Assessing Officer has referred to decision of Hon'ble Supreme court in the case of Apollo Tyres Limited [255 ITR 273] and observed that reduction claimed by the assessee does not come under any of the items stated in the explanation and he denied such deduction as claimed in return of income. This issue is dealt by Ld. CIT(A) at Para No. 28.6 and 28.7 of his order as under:

*28.6 I have considered the submissions of the Ld.AR and gone through the assessment order. So far as the profit on sale of fixed assets amounting ₹.13,64,84,104 is concerned, the Ld.AR has brought to my notice that the Assessing Officer allowed the deduction of this profit from the income as claimed by the appellant. He only refused to allow such deduction under sec. 115JB. This issue has been decided by my predecessors in favour of the appellant in AYS-2001-02 to 2004-05, following the decision of the ITAT, Mumbai in the case of **ITO -vs.- Frigsales (India) Ltd** (supra). Since the facts are the same, I follow the orders of my predecessor and allow the appeal.*

*28.7 So far as the profit on sale of investments of ₹.3,02,73,345 is concerned, the issue is decided against the appellant following my predecessors order on the same issue for the earlier years.*

**109.** Against the above observation of Ld. CIT(A), both assessee and Revenue has filed cross appeals. The Ld. AR has fairly conceded that similar issue is decided against assessee in A.Y. 2002-03 to 2004-05 by Coordinate bench. However, Ld. AR has relied upon following decisions in support of claim.

- (i) DCIT v. Gloster Jute Mills Ltd. [(2017) 185 TTJ 339 (Kolkata Tribunal)]
- (ii) Shivalik Ventures (P.) Ltd. v. DCIT [(2015) 70 SOT 92 (Mumbai Tribunal)]
- (iii) JSW Steel Ltd. v. ACIT [ITA No.923 of 2009 dated January 13, 2017 (Mumbai Tribunal)]
- (iv) Ambuja Cements Ltd [ITA No. 2384/Mum/2019 and ors.] (AY 2010-11) (Para 18-20; internal page 4-5)

**110.** The Ld. DR has relied upon finding given by Assessing Officer as well as finding of ITAT in earlier years and argued that order of Assessing Officer may be restored.

**111.** Considered the rival submissions and material placed on record. On this issue, coordinate bench in assessee's own case for A.Y. 2004-05 in ITA No 5259/MUM/2007 dated 27/05/2022 has decided issue in favour of assessee. The relevant finding is reproduced herein below:

*"19.1. During the relevant previous year the Assessee had credited to the Profit & Loss Account net profits on sale of fixed assets amounting to INR 10,98,70,597/-. In the original return of income, while computing book profit under Section 115JB of the Act, the Assessee omitted to exclude aforesaid profit on sale of fixed assets. However, in the revised return, while computing book profits under Section 115JB of the Act the same were excluded. In response to query raised during the course of assessment proceedings, the Assessee, vide letter dated 16.11.2006, filed detailed submission substantiating the claim. However, the Assessing Officer rejected the claim of the Assessee by placing reliance on the judgment of Hon'ble Bombay High Court in the case of CIT vs. Veekay Lal Investments Co. Pvt. Ltd. 249 ITR 597 (Bom)*

*19.2. Being aggrieved, the Assessee filed before CIT(A) on this issue.*

*19.4. We note that in the immediately preceding Assessment Year 2003-04, the Tribunal has decided this issue in favour of the Revenue, vide common order 13.03.2019 passed in ITA No. 4242/MUM/2007 and ITA No. 4988/MUM/2007, holding as under:*

*"52. Under this issue the revenue has challenged the deletion of the addition of profit on sale of fixed assets in computation of book profit u/s*

*115JB of the Act in sum of ₹.5,19,20,846/-. At the time of argument, the Ld. Representative of the assessee has disclosed this fact that this issue has been decided against the assessee in the ITA. No. 5259 & 4895/Mum/2007 Assessment Year: 2004-05 assessee's own case for the A.Y.2002-03 in ITA. No.4241/M/2007 dated 29.07.2015. Since this issue has been decided against the Assessee in the assessee's own case (supra), therefore, the finding of the CIT(A) on this issue is hereby ordered to be set aside and we allow the claim of the revenue for the addition of said amount while computing the book profit u/s 115JB of the Act. Accordingly, this issue is decided in favour of the revenue against the assessee."*

*19.5. Respectfully following the decision of the co-ordinate Bench of the Tribunal in Assessee's own case, we set aside the order of CIT(A) and restore the order of the Assessing Officer on this issue.*

*Accordingly, Ground No. 18 raised by the Revenue is allowed. "*

**112.** However, during the course of the hearing the Ld. AR also referred to the decision of Hon'ble Karnataka High Court in the case of Best Trading and Agencies Limited v. DCIT [119 Taxmann.com 129]. The finding of the said decision at Para No. 13 is reproduced hereunder for ready reference:

"....."

*13. section 115JB(5) of the Act reads as under:*

*"(5) Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee being a company, mentioned in this Section."*

*Thus, by virtue of sub-section (5) of section 115JB, the application of other provisions of the Act are open, except if specifically barred by the section itself. The indexed cost of acquisition is a claim allowed by section 48 of the Act to arrive at the income taxable under the income from capital gains. The difference between the sale consideration and indexed cost of acquisition represents the actual cost of the assessee, which is taxable as per section 45 of the Act at the rates provided under section 112 of the Act. There is no provision in the Act to prevent the assessee from claiming indexed cost of acquisition on the sale of asset in case, where the assessee is subjected to section 115JB of the Act. In any case, since, the indexed cost of acquisition is subjected to tax under a specific provision viz., section 112 of the Act, therefore, the provisions of section 115JB of the Act, which is a general provision cannot be made applicable to the case of the assessee. For yet another reason, the assessee has to be given the benefit of indexed cost of acquisition as considering the profits on sale of land without giving the benefit of indexed cost of acquisition results in taxing the income other than actual/real income. In other words, a mere book keeping entry cannot be treated as income.*

....."

**113.** On perusal of the aforesaid decision, it is evident that the assessee will be entitled to indexed cost of acquisition while computing capital gains u/s 115JB of the Act. It is also to be noted that in the immediately preceding year Coordinate Bench has held that long term capital gains credited in the books of accounts is taxable to which even the Ld. AR fairly conceded subject to the decisions as relied supra. However, he claimed that the indexed cost of acquisition does not form part of income computed u/s 115JB of the Act. Respectfully following the ratio laid down by Hon'ble Karnataka High Court, the Assessing Officer is directed to recompute taxable long term capital gains arising on transfer of fixed assets after giving the benefit of indexed cost of acquisition while computing taxable profits u/s 115JB of the Act. Thus, the related ground of appeal in Departmental Appeal as well as Assessee's appeal is partly allowed subject to the above directions.

**114.** In the Ground No 18, Department has raised the following grievance:

*"On the facts and the circumstances of the case and in law, the CIT(A) erred in directing the Assessing Officer to allow deduction u/s 80HHC computed on the basis of book profit u/s 115JB of the Act.*

**115.** The Assessing Officer has dealt with this issue at Para No. 29 of his order. The Assessing Officer has observed that assessee has claimed deduction u/s 80HHC on book profit in revised return of income. The assessee has relied upon decision of Hon'ble Pune ITAT in the case of Smruthi Organisers Limited wherein it is held that for computing book profit u/s 115JA, clause (viii) of the explanation being export profit to be claimed on the basis of book profits and not as per Section 80HHC. However, this contention of assessee was not accepted by Assessing Officer on the ground that zero deduction is eligible for deduction u/s.80HHC w.e.f 2005-06. This issue is dealt with by Ld. CIT(A) at Para No. 29.6 to 29.8 of order which reads as under:

*"The Ld. AR of the appellant submitted that, the above clarifications issued in the context of section 115JB, are equally important and applicable in the context of section 115J since the exclusion from Book Profit are more or less same u/s 115J, 115JA and 115JB. It was further submitted that Section 115JB is a self-contained code where by virtue of legal fiction tax on book profit is sought to be*

*levied. Section 115JB is an alternative mode of taxation where taxation is not on the basis of total income as computed under the Act but it is on the basis of the book profit computation. When in principle it is decided that book profit tax shall be levied on everything except certain activities/ it has to be ensured that profit from those activities ultimately are not taxed.*

*29.7 Reliance was placed on the decision of the Hon'ble Kerala High Court in the case of CIT -vs.- G. T. N. Textiles Ltd. (2001) 248 ITR 372 (Ker) has held that for computation of deduction u/s 80HHC for the purpose of computing book profit u/s 115J/ it is not the profit as computed under the Profit and Gains of Business and Profession that is to be applied but it is the profit as per books of accounts that is to be taken into consideration. The above judgement was followed by the Hon'ble Tribunal in the case of Starchik Specialities Ltd, -vs.- DCIT (2004) 90 ITD 34 (Hvd,). Further reliance was placed on the decisions of the Hon'ble Mumbai Tribunal in the case of DCIT -vs.- Govind Rubber (P) Ltd. (2004) 89 ITD 457 (Mum) and Hon'ble Rajasthan High Court in the case of CIT -vs.- Pesticides India Ltd. (2006) 283 ITR 304 (Rai). Recently, the above view was fortified in the case of Smruthi Organics Ltd, -vs.- DCIT (2006) 101 ITD 205 (Pune), wherein the Hon'ble Tribunal held that notwithstanding that the gross total income of the appellant is a loss, it is entitled to deduction u/s 80HHC on the basis of Book Profit in view of clause(vii) of explanation to section 115JA. Similar view has been expressed by the Special Bench of Hon'ble Mumbai ITAT in the case of M/s. Syncome Formulations (I) Ltd. – vs. DCIT in ITA No.2711/Mum/2003.*

*29.8 Ld.AR further brought to my notice that similar issue has been decided in favour of the appellant by the CIT (Appeals) from AYs. 2001-02 to 2004-05.”*

**116.** Against the above observation of Ld. CIT(A), department has filed further appeal. The Ld. AR has relied upon the finding of Ld.CIT(A) and contended that Section 115JB is an alternative mode of taxation where taxation is not on the basis of total income as computed under the Act but it is on the basis of the book profit computation. The Ld. AR has mainly relied upon following decisions in support of claim.

- (i). CIT v. Bhari Information Technology Systems (P.) Ltd. [(2012) 340 ITR 593 (SC)]
- (ii). DCIT v. Syncome Formulations (I) Ltd. [2007] 106 ITD 193 (Mumbai Tribunal) (SB)]
- (iii). Torrent Pharmaceuticals Limited [2022] ITA 1285/Ahd/2017

**117.** The Ld. DR has relied upon finding given by Assessing Officer and argued that order of Assessing Officer may be restored.

**118.** Considered the rival submissions and material placed on record. It is relevant to refer to provisions of Section 115JB on statute for year under consideration.

- "(iv) the amount of profits eligible for deduction under section 80HHC, computed under clause (a) or clause (b) or clause (c) of sub-section (3) or sub-section (3A), as the case may be, of that section, and subject to the conditions specified in that section; or*
- (v) the amount of profits eligible for deduction under section 80HHE computed under sub-section (3) or sub-section (3A), as the case may be, of that section, and subject to the conditions specified in that section; or*
- (vi) the amount of profits eligible for deduction under section 80HHF computed under sub-section (3) of that section, and subject to the conditions specified in that section; or"*

**119.** During the course of hearing the Ld. AR referred to identical decision of Ahmedabad ITAT in the case of Torrent Pharmaceuticals Limited for AY 2009-10. Relevant portion of the finding vide ITA No. 1285/Ahd/2017 is reproduced hereunder for ready reference:

*"95. Ground No. 5: The grievances raised by the assessee in this ground is that the learned CIT (A) erred not allowing the deduction of ₹. 79,58,97,799/- under the provision of MAT while calculating the book profit.*

*96. The assessee while calculating the book profit under the provisions of MAT under section 115JB of the Act has reduced the profit eligible for deduction under section 80HHC of the Act amounting to ₹ 79,58,97,799/- in pursuance to the clause (iv) of explanation 1 to section 115JB of the Act.*

*96.1. The assessee during the assessment proceedings further contended that the clause (iv) of explanation to section 115JB of the Act, authorizing the assessee to subtract the amount of profit eligible for deduction under section 80HHC of the Act while calculating the book profit, was omitted by the Finance Act 2011 with retrospective effect from 1-4-2005. As per the assessee this amendment was brought under the statute to nullify the effect of the judgment of Hon'ble Supreme Court in the case of Ajanta Pharma reported in 327 ITR 305. According to the assessee the Parliament is authorized to bring any amendment with retrospective effect but it can't do so to nullify the effect of order of the Hon'ble Supreme Court. In other words, the Parliament to nullify the effect of the Supreme Court judgment can bring the amendment but with prospective date. Accordingly such amendment was unconstitutional. The assessee also contended that at the time of filing the return of income the clause (iv) of explanation 1 to section 115JB of the Act was very much in force. The provisions of section 294 of the Act provides that the provisions specified under the statute as on 1st day of the assessment year shall be prevalent. As such, the clause (iv) of explanation 1 to section 115JB of the Act was very much in force as on the 1st day of the assessment year. Accordingly the assessee contended that it cannot be denied the benefit of the deduction provided under clause (iv) to section 115JB of the Act.*

96.2. However, the Assessing Officer disregarded the contention of the assessee by observing that the amendment by the Finance Act 2011 was brought under the statute with retrospective effect i.e. 1-4-2005 wherein the benefit given to the assessee under clause (iv) of explanation 1 of section 115JB of the Act was denied to the assessee. Accordingly, the AO did not allow the deduction of the amount of ₹ 79,58,97,799/- to the assessee while calculating the amount of profit under section 115JB of the Act.

97. Aggrieved assessee preferred an appeal to the learned CIT-A, who confirmed the order of the AO by observing as under:

*I have considered the assessment order, facts on the case and the submissions made by the appellant. The AO made the impugned addition since assessee has subtracted the profit eligible u/s.80HHC of ₹.79,58,97,799/- from its book profit. In view of the amendment brought into section 80HHC by the Finance Act, 2011 with effect from 1.4.2005, the said profit u/s.80HHC is not eligible for deduction from the book profit. In view of the same the AO's action is disallowing the same was correct and the same is upheld. Ground of appeal no.11 is dismissed.*

98. Being aggrieved by the order of the learned CIT-A, the assessee is in appeal before us.

99. The learned AR before us contended that the amendment brought under the statute with retrospective effect, denying the benefit to the assessee is unconstitutional, particularly, in the circumstances when such amendment was brought to nullify the judgment of the Hon'ble Supreme Court in the case of Ajanta Pharma reported in 327 ITR 305.

99.1 It was also contended by the learned AR that the assessee at the time of filing the return of income was very much entitled for the profit of the business eligible for deduction under section 80HHC of the Act to be reduced from the book profit. There was no possibility for the assessee to foresee at the time of filing the return of income that there will be some amendment with retrospective effect on a future date. Accordingly, the assessee contended that it cannot be deprived from the benefit which was available to it under the statute at the relevant point of time.

100. On the contrary, the learned DR vehemently supported the order of the authorities below.

101. We have heard the rival contentions of both the parties and perused the materials available on record. The controversy in the present case arises whether the assessee is entitled the benefit of reducing the profit of the business eligible for deduction under section 80HHC of the Act while computing the book profit under the provisions of section 115JB of the Act. Such benefit was available to the assessee in pursuance to the clause (iv) of explanation 1 to section 115JB of the Act which, before omission, reads as under:

(iv) the amount of profits eligible for deduction under section 80HHC, computed under clause (a) or clause (b) or clause (c) of sub-section (3) or sub-section (3A), as the case may be, of that section, and subject to the conditions specified in that section; or 101.1. The above benefit to the assessee was denied by the Finance Act 2011 with retrospective effect 01-04-2005. Admittedly, at the time of filing the return of income the assessee was entitled for the benefit as discussed above. But on a later date there was an amendment by the finance Act 2011 which denied the benefit to the assessee with retrospective effect.

*The Hon'ble Supreme Court in the case of Star India Pvt. Ltd vs. Commissioner of Central Excise reported in 280 ITR 321 has held that the benefit granted under the statute to the assessee cannot be withdrawn by way of retrospective amendment. The relevant extract of the Judgment reads as under:*

*It was clear from the language of the validation clause of section 148 of the Finance Act, 2002, that the liability was extended not by way of clarification but by way of amendment to the Finance Act with retrospective effect. It is well-established that while it is permissible for the Legislature to retrospectively legislate, such retrospectivity is normally not permissible to create an offence retrospectively. There were clear judgments, decrees or order of courts and Tribunals or other authorities which were required to be neutralized by the validation clause. It could only be assumed that the judgments, decrees or orders, etc., had, in fact, held that persons situate like the appellants were not liable as service providers. This is also clear from the Explanation to the validation section which says that no act or acts on the part of any person shall be punishable as an offence which would not have been so punishable if the section had not come into force. [Para 7] The liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect. [Para 8] 101.2. Undeniably, the Parliament is empowered to bring amendments under the statute that too retrospectively provided it is not detrimental to the assessee. In other words any amendment denying the benefit to the assessee cannot be brought under the statute with retrospective effect.*

*101.3. We also note that there will be certain classes of assessee who must have claimed the benefit of clause (iv) of explanation 1 to section 115 JB of the Act prior to the amendment by the Finance Act as discussed above. But, assuming their case have not been selected under scrutiny, then such benefit cannot be denied to them. On the contrary the assesseees who were subject to scrutiny assessment, if they are denied the benefit, there will be discrimination to them. It is for the reason that there will not be allowed the benefit granted under the statute but withdrawn by way of retrospective amendment. Thus, the impugned amendment will create disharmony among different taxpayers. In view of the above and after considering the facts in totality, we are of the view that the assessee cannot be deprived for the benefit granted to it under the statute by way of retrospective amendment in the given facts and circumstances. Hence, the ground of appeal of the assessee is allowed."*

**120.** During the course of the hearing the Ld. DR referred to the retrospective amendment brought to the statute and prayed that the findings of Assessing Officer may be restored. Considering the issues under consideration, respectfully following the aforesaid decision of coordinate bench in the case of Torrent Pharmaceuticals

Limited, the ground raised by the department is dismissed. This ground of appeal in Departmental Appeal is dismissed.

**121.** In the Ground No 19, Department has raised the following grievance:

*"On the facts and the circumstances of the case and in law the CIT(A) erred in directing the Assessing Officer to exclude Rs 33,10,349/- being amount withdrawn from share premium account while computing book profit u/s 115JB of the Act."*

**122.** The Assessing Office has dealt with this issue at Para No. 30 of his order and referred to decision of Hon'ble Supreme court in the case of Apollo Tyres Limited [255 ITR 273] and observed that reduction claimed by the assessee on account of withdrawal from share premium amount does not come under any of the items stated in the explanation and he denied such deduction as claimed in return of income. This issue is dealt by Ld. CIT(A) at Para No. 30.10 of his order as under:

*"30.10 I have considered the submissions. As the Ld.AR has pointed out the issue has been decided in the appellant's favour by the ITAT, Mumbai in the appellant's own case for AY:1990-91. Further my predecessors in AYs:1998-99, 1999-2000, 2003-04 and 2004-05 have decided the issue in favour of the appellant. Taking into account these orders, I also decide the issue in favour of the appellant."*

**123.** Against the observation of Ld. CIT(A), department has filed the ground in this appeal. Before us, Ld. AR relied upon finding of Ld.CIT(A) and argued that issue is in favour of assessee by decision of ITAT for A.Y. 2003-04 and 2004-05. On the other hand, Ld. DR has relied upon finding given by Assessing Officer and argued that order of Assessing Officer may be restored.

**124.** Considered the rival submissions and material placed on record. On this issue, coordinate bench in assessee's own case for A.Y. 2004-05 in ITA No 5259/MUM/2007 dated 27/05/2022 has decided this issue in favour of assessee. The relevant finding is reproduced herein below:

*"21.3. Now, the Revenue is in appeal before us against the above finding of the CIT(A) on this issue. We note that CIT(A) has granted relief to the Assessee*

*following decision of the Tribunal in the case of the Assessee in Assessment Year 1990-91 and 1998-99. Further, in the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the order, dated 13.03.2019, passed by the Tribunal in the case of the Assessee for the Assessment Year 2003-04 (ITA No. 4242 & 4988/MUM/2007 reads as under:*

*"50. Under this issue the revenue has challenged the deletion of addition made in respect of amount withdrawn from share premium account in computation of book profit u/s 115JB of the Act. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.: -*

*"40.3 I have considered the submissions made on behalf of the appellant. In my view write back of share premium account is an allowable deduction in view of clause (i) of Explanation to Section 115JB(2). Therefore, respectfully following the decision of the Hon'ble ITAT for A.Y. 1990- 91 as well as the orders of my predecessor for A.Y. 1997- 98 and A.Y. 1998-99 the addition made by the Assessing Officer of ₹.76,63,200/- is deleted. Hence this ground of appeal is allowed."*

*51. On appraisal of the above said finding, we noticed that the claim of the Revenue is in connection with the deletion of addition made in respect of amount withdrawn from share premium account in computation of book profit u/s 115JB of the Act. The claim was allowed in view of the decision of Hon'ble ITAT Mumbai in the assessee's own case for the A.Y.1990-91 in ITA. No. 5259 & 4895/Mum/2007. Further the matter has been adjudicated by Hon'ble ITAT in the assessee's own case for the A.Y. 1998-99 in ITA. No.6320/M/2003. Since the case of the assessee has squarely covered by decision of the Hon'ble ITAT in the assessee's own case, therefore, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue."  
(Emphasis Supplied)*

*21.4. In view of the above, we do not find any infirmity in the order passed by CIT(A). Accordingly, we confirm the order of CIT(A) holding that amount of INR 9,66,64,158/-, transferred from Share Premium Account to the profit & loss account was correctly reduced from Book Profits by the Assessee while computing book profit as per the provisions of Clause (i) of Explanation to Section 115JB(2) of the Act. Accordingly, Ground No. 20 raised by the Revenue is dismissed."*

**125.** Respectfully following decision of coordinate bench referred supra, we confirm the order of Ld. CIT(A) holding that amount transferred from Share Premium Account to the profit & loss account was correctly reduced from Book Profits by the Assessee while computing book profit as per the provisions of Clause (i) of Explanation to Section 115JB(2) of the Act. This ground of appeal in Departmental Appeal is dismissed.

**126.** In the Ground No 20 Department has raised the following grievance:

"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the addition of Rs 15 crore being debenture redemption reserve while computing book profit u/s 115JB of the Act."

**127.** The Assessing Office has dealt with this issue at Para No.31 of his order and observed that as per section 115JB of the Act, any amount carried to any reserve by whatever name called is to be added back and hence he made addition of ₹.15 crores being debenture redemption reserve while computing book profit u/s 115JB of the Act. This issue is dealt by Ld. CIT(A) at Para No.31.7 of his order as under:

*"I have considered the submission of the Ld. AR and gone through the assessment order. This issue was decided by my predecessor in the appellant's own case for AY: 2001-02 and 2002-03, following the decision of the Supreme Court in the case of National Bank Corporation and Vazir Sultan Tobacco Co. Ltd. – vs. CIT. the ITAT, Mumbai has also decided the issue in the appellant's favour in AY:1997-98 as mentioned by the Ld. AR. Since the facts are the same, I follow these orders and accordingly allow the appeal. The addition made by the Assessing Officer is deleted."*

**128.** Against the observation of Ld.CIT(A), department has filed appeal. Before us, Ld. AR relied upon finding of Ld. CIT(A) and argued that issue is in favour of assessee by decision of ITAT for AY 2002 - 03 [ITA No.4987/M/2007 &Ors.], AY 1999 - 00 [ITA No.7594/M/2004] and A.Y.1997-98 [ITA No.3298/M/2001]. On the other hand, Ld. DR has relied upon finding given by Assessing Officer and argued that order of Assessing Officer may be restored.

**129.** Considered the rival submissions and material placed on record. On this issue, coordinate bench in assessee's own case for A.Y. 2002-03 in ITA No 4987/M/2007 dated 29/07/2015 has decided issue in favour of assessee. The relevant finding is reproduced herein below:

*"5. Additional ground no.4 is about exclusion of amount transferred to debenture redemption reserved in computing group profit of provisions of section 115JB of ₹.50 crores.*

*5.1. During the course of hearing before us, representatives of both the sides agreed that identical issue had been decided in favour of the assessee, by the Tribunal while adjudicating the appeals for AY.s.1997-98(ITA/3298/Mum/01), 1998-99(ITA/639/M/03), 1999-00(ITA/7594/Mum/04), 2000-01(ITA/9570/Mum/04).*

*We find that the decision of the Tribunal for AY.1998-99 for exclusion debenture redemption reserved had not been challenged by the department before the Hon'ble High Court and thus the order has attained finality. It is also found that the Hon'ble Bombay High Court of Bombay had dismissed the departmental appeal with regard to the issue while deciding the appeal for AY 1999-00. Considering the above facts, we decide the last additional ground against the AO."*

**130.** It is matter of fact that department has not challenged the appellate order of A.Y. 1998-99 before Hon'ble High court and matter has attained finality. Hon'ble Bombay High court in the case of Raymond Limited [2012] 21 taxmann.com 60 has held that Amount set apart as a Debenture Redemption Reserve (DRR) is not a reserve within the meaning of Explanation (b) to section 115JA. Respectfully following decision of coordinate bench referred supra, we confirm the order of Ld.CIT(A) holding that amount transferred to Debenture Redemption Reserve cannot be added back while computing Book Profits. This ground of appeal in Departmental Appeal is dismissed.

**131.** In the Ground No 21 Department has raised the following grievance:

*"On the facts and the circumstances of the case and in law the CIT(A) erred in deleting the addition of Rs 15,30,00,000/- being expenditure incurred to earn dividend income while computing book profit u/s 115JB of the Act."*

**132.** The Assessing Office has dealt with this issue at Para No. 4 of his order. The Assessing Officer has observed that assessee has earned exempt dividend income in year under consideration and computed proportionate interest disallowance at ₹.15,30,00,000/- u/s. 14A and similar amount is added back while computing total income as well as book profit u/s 115JB of the Act. This issue is dealt by Ld.CIT(A) at Para No. 33.4 of his order as under:

*"31.4 I have carefully considered the submissions of the Ld.AR. The merits of disallowance u/s. 14A in the normal computation of income is different. The*

*amount so disallowed cannot be considered for computing book profit u/s. 115JB in view of the decision of the Supreme Court of India in the case of Appollo Tyres. The adjustment sought to be done by the AO is not one of the items provided under the explanation to sec. 115JB. Hence the addition made by the AO is deleted and the ground of appeal is allowed. As the Ld.AR has brought to my notice, this ground was allowed by my predecessors in AYs;1998-99 to 2002-03 and 2004-05. Facts being the same, I have followed such decisions."*

**133.** Against the observation of Ld.CIT(A), department has filed this appeal. The Ld. AR has contended that adhoc disallowance u/s 14A cannot be made while computing book profit u/s 115JB of the Act. The Ld.AR has mainly relied upon following decisions:

- (i) CIT v. Bengal Finance & Investments Pvt. Ltd. [ITA No.337 of 2013 (Bombay HC)]
- (ii) ACIT v. Vireet Investment (P.) Ltd [(2017) 165 ITD 27 (Delhi Tribunal) (SB)]

**134.** On the other hand, Ld. DR has relied upon finding given by Assessing Officer and argued that order of Assessing Officer may be restored.

**135.** Considered the rival submissions and material placed on record. The Assessing Officer has made disallowance u/s 14A while computing income as per normal provisions of the Act as well as book profit u/s 115JB of the Act. The disallowance made by Assessing Officer u/s 14A is already deleted in proceeding paras hence consequential adjustment made while computing book profit u/s 115JB cannot be made. On this issue, coordinate bench in the case of Ambuja Cement Limited in ITA NO ITA Nos. 1889 and 1241/Mum/2018, 2384, 2958, 3475 and 3843/Mum/2019 (AY 2010-11, 2011-12 and 2012-13) vide order dated 07/11/2022 held as under:

*"25. Having heard the rival contentions and having perused the material on record, we are of the considered view that the assessee deserves to succeed in this plea for the reason that, eventually, there is no disallowance under section 14A on the facts of this case, and, in any event, the issue is covered, as regards the question of adjustment of book profits under section 15JB for the 14A disallowance, 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."*

**136.** Considering such facts and decisions referred supra, it is held that disallowance u/s 14A cannot be made while computing book profit u/s.115JB of the Act. This ground of appeal in departmental appeal is dismissed.

**137.** Ground no. 22 is general in nature and is thus dismissed.

**138.** In the result, the appeal of the department is partly allowed as per the terms indicated above.

#### **ITA NO. 3490/MUM/2009 (ASSESSEE APPEAL)**

**139.** We now take up the appeal filed by the assessee in ITA No 3490/Mum/2009.

**140.** Ground no. 2 relates to addition of corporate tax paid at Saudi Arabia while computing income under normal provisions of the Act. The Ld. AR has not pressed this ground of appeal hence same is dismissed.

**141.** Ground no. 5 relates to short allowance of depreciation. The Ld.AR has not pressed this ground of appeal hence same is dismissed.

**142.** Ground no. 6 relates to setting off of unabsorbed depreciation of current year with short term capital gain of current previous year with short term capital gain of the current previous year instead of allowing deduction under chapter VIA against short term gain. The Ld. AR has not pressed this ground of appeal hence same is dismissed.

**143.** Ground no. 8 relates to addition of corporate tax paid at Saudi Arabia in computing book profit. The Ld. AR has not pressed this ground of appeal hence same is dismissed.

**144.** In the Ground No 9 Assessee has raised the following grievance:

*"That on the facts and in the circumstances of the case, the Ld. CIT erred in confirming the denial of claim of exclusion of Premium on Redemption of Foreign Convertible Bond of ₹.20,69,06,874/- in computing Book Profit u/s 115JB"*

**145.** The Assessing Office has dealt with this issue at Para No. 4 of his order. The Assessing Officer has observed that assessee has reduced its book profit by ₹.20,69,06,874/- as premium on Redemption of Foreign Currency Convertible Bonds adjusted against Share premium account. The Assessing Officer has referred to decision of Hon'ble Supreme court in the case of Apollo Tyres Limited [255 ITR 273] and observed that reduction claimed by the assessee does not come under any of the items stated in the explanation and he denied such deduction as claimed in return of income. This issue is dealt by Ld. CIT(A) at Para No. 32.6 of his order as under:

*"32.6 I have considered assessee's explanation. As per section 115JB every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II & III of Schedule VI to the Companies Act, 1956 (1 of 1956). Any increase or reduction has to be limited to explanation to the section 115JB of Income Tax. Hon'ble Supreme Court in the case of Apollo Tyre Ltd Vs CIT, 255 ITR 273 has clearly stated that 'If the statute mandates that income prepared in accordance with the Companies Act shall be deemed income for the purpose of section 115J of the Act, then it should be that income which is acceptable to the authorities under the Companies Act. The reduction claimed by assessee doesn't come under any of the items stated in the explanation. The claim of reduction of ₹.20,69,06,874 as premium on redemption of foreign currency convertible bond is accordingly not allowable. In view of this, the addition made by the Assessing Officer is confirmed and the ground of appeal is dismissed."*

**146.** The Ld. AR of the assessee has contended that assessee company has adjusted premium on redemption of FCCB against Securities Premium account. The same has been claimed as exclusion in revised return while computing book profit u/s 115JB on the ground that adjustment of premium on redemption of FCCB

against Share premium account is nothing but a construction debit to Profit & loss account with such premium and a corresponding constructive credit to Profit & loss account withdrawing Share premium. It was thus argued that constructive debit is admissible in computation of book profit whereas constructive credit is not income as withdrawn of amount from Share Premium amount is not liable for book profit u/s 115JB of the Act as held by Hon'ble ITAT in assessee's case. On the other hand, Ld.DR has argued that premium on redemption of FCCB is not claimed as deduction in Profit & loss account hence such amount cannot be separately claimed while computing book profit u/s 115JB of the Act.

**147.** Considered the rival submissions and material placed on record. It is undisputed fact that assessee company has adjusted premium on redemption of FCCB against Securities Premium account and no impact is given in Profit & loss account. In the audited annual accounts, instead of crediting withdrawal from Share premium account as income and instead of debiting Profit & loss account by premium on redemption of FCCB, assessee company has netted off both income and expenditure. Had the assessee company given impact to Profit & loss account, there would not have been any change in Profit shown in Audited Annual accounts. While computing book profit u/s 115JB of the Act, assessee has claimed deduction of Premium on Redemption of Foreign Convertible Bond of ₹.20,69,06,874/- but same has been denied by Assessing Officer only on the ground that such amount was not debited in Profit & loss account prepared under Companies Act, 1956. However, this observation of lower authorities is incorrect as accounting treatment adopted by assessee is according to Companies Act 1956. Section 78 of Companies Act, 1956 deals with share premium account and reads as follows:

*"Application of premiums received on issue of shares. 78. (1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called "the [securities] premium account"; and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the [securities] premium account were paid-up share capital of the company.*

*(2) The [securities] premium account may, notwithstanding anything in subsection (1), be applied by the company-*

*(a) in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares;*

*(b) in writing off the preliminary expenses of the company;*

*(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company; or*

*(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company.*

*(3) Where a company has, before the commencement of this Act, issued any shares at a premium, this section shall apply as if the shares had been issued after the commencement of this Act: Provided that any part of the premiums which has been so applied that it does not at the commencement of this Act form an identifiable part of the company's reserves within the meaning of Schedule VI, shall be disregarded in determining the sum to be included in the [securities] premium account."*

**148.** Further, bonds are treated as debentures as per section 2(12) of Companies Act, 1956 which defines debentures as follows:

*"(12) "debenture" includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not".*

**149.** It is observed that though as provided in sub-section (1) of section 78 of Companies Act, 1956, share premium account has to be given similar treatment as share capital and the same cannot be reduced except by due process of law for reduction of share capital, sub-section (2) carves out four exceptions to the same. Clause (d) of section 78(2) clearly provides that premium payable on redemption of debentures can be provided out of share premium account. As per section 2(12) of Companies Act 1956, debentures includes bonds. Thus, accounting treatment made by assessee is as per Companies Act, 1956, books of account are prepared as per prevailing accounting policies which suffices the requirement of Companies Act, 1956. Had assessee treated Premium on Redemption of Foreign Convertible Bond as revenue expenditure, Assessing Officer would have allowed such deduction while computing book profit u/s 115JB has no substance as present accounting treatment followed by assessee is as per provisions of Companies Act, 1956 only.

**150.** On this issue, Coordinate bench of ITAT in the case of 63 Moon Technologies Limited (Formerly Financial Technologies (India) Limited in ITA No 4775 & 4776/Mum/2016 dated 16/12/2021 has held as under:

*"18. The argument of revenue that the amount has not been debited in account is also not sustainable as the assessee has very much been debited in the account to the debit of share premium account. The Companies Act duly permits the same. Hence, the plea that amount is contingent and not debited is not correct, when revenue itself has accepted the debit in this regard of the amount to the share premium account. Revenue authorities cannot take a shifting stand that the amount is correctly accrued and debit to share premium account is correct, but the same is still a contingent amount. The assessee could have very well debited the amount to the profit and loss account, but it has chosen to debit the amount to share premium account in the books, which is also permitted as per Companies Act. No infraction of law in this regard was pointed out. Since revenue has accepted the debit of the premium to share premium account, it is clear that revenue has accepted that redemption premium amount has been accepted as accrued. Nevertheless the case law in this regard duly support the proposition. In this regard, we may refer to the decision of Hon'ble Bombay High Court in the case of S.M.Holding& Finance (P) Ltd. 264 ITR 370 as under:-*

*"Both the above appeals raised a common question of law and fact and, therefore, they are heard together and disposed of by this common judgment. Both the appeals have been preferred by the Department. They concern asst. yr. 1995-96 and 1996-97, respectively. For the sake of convenience, we reproduce herein the facts in IT Appeal No. 215 of 2001. The following question is referred for opinion of this Court:*

*"Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal has erred in deleting the addition of ₹ 54,75,000 made on account of 1/5th (1/10th) of premium on the redeemable debentures without considering the fact that no liability had accrued during the year under appeal and it was a contingent liability which was payable only after the expiry of 10 years and directed the AO to follow the decision of Supreme Court in the case of Madras Industrial Investment Corporation Ltd. v. CIT where facts of the case are different from those of Supreme Court's decision?"*

*Facts*

*2. During the assessment year in question, the assessee-company had issued zero interest unsecured redeemable convertible debentures of ₹ 100 each redeemable after 10 years at a premium of 100 per cent. These debentures are redeemable after 10 years from the date of allotment at a premium of 100 per cent. Assessee claimed before the AO a spread over, Assessee claimed that the premium payable by it was ₹ 5,47,50,000 after expiry of 10 years. However, the assesses claimed deduction of ₹ 54,75,000 per annum. The said amount was debited to the P&L a/c for the accounting year ending 31st March, 1995. In the annual report, a footnote was added that premium on zero interest*

*unsecured redeemable debentures of ₹ 100 each was redeemable after 10 years at a premium of 100 per cent. The AO disallowed the assessee's claim for deduction of ₹ 54,75,000. He added back that figure to the income of the assessee on the ground that the liability was not ascertainable during the accounting year ending 31st March, 1995. That, it was a contingent liability. This decision was confirmed by the CIT(A). However, the Tribunal overruled the case of the Department in view of the judgment of the Supreme Court in the case of Madras Industrial Investment Corporation Ltd. v. CIT . Being aggrieved, the Department has come by way of the appeal to this Court.*

#### *Arguments*

*3. None appears for respondent though served.*

*4. Mr. R.V. Desai, learned counsel appearing for the Department/appellant, submitted that the ratio of the judgment of the Supreme Court in the case of Madras Industrial Investment Corporation (supra) as also the judgment of this Court in the case of Tapatia Tools Ltd. v. Jt CIT (2003) 126 Taxman 544 (Bom) was not applicable as in this case the AO found alteration in the terms of issue of debentures during the life of the issued debentures. He submitted that originally the debentures were issued at 2 per cent. which was changed to 0 per cent during the life of issued debentures. That, originally the issued debenture was for 5 years which was changed to 10 years during the existence of the issued debentures. He submitted that in the case of Madras Industrial Investment Corporation (supra) as also in the case of Taparia Tools Ltd. (supra), there was no discretion vested in the assessee to alter the terms of the issued debentures during the subsistence of the issued debentures whereas in the present case the borrower had the discretion to change the terms of the issued convertible debentures. He, therefore, submitted that during the assessment year in question, there was no ascertainment of liability to the tune of ₹ 54,75,000 and, therefore, the AO was right in disallowing the claim for deduction.*

#### *Findings*

*5. We do not find any merit in the above arguments advanced on behalf of the Department. Firstly, we have gone through the records and proceedings (R & P). In the entire R & P, there is nothing to indicate alterations of terms and conditions during the subsistence of the issued convertible debentures during the assessment year in question. Secondly, in the annual reports of the company and also in the audit reports given by the auditors, it has been certified that zero interest unsecured redeemable convertible debentures of ₹ 100 each redeemable after 10 years at a premium of 100 per cent had been issued during the assessment year in question. There is no reason for us to discard this note of the auditor. Even in the assessment order, no reasons have been given by the AO for discarding this note of the auditors. Lastly, we may*

*point out that even assuming for the sake of argument that the borrower had a discretion to change the terms of the issued debentures, there is nothing in the record to show that during the assessment year in question the borrower had exercised such a discretion. In the absence of factual matrix; we have no option but to confirm the judgment of the Tribunal. In our view, the judgment of this Court in the case of Taparia Tools Ltd. v. Jt CIT (supra) is applicable to this case. In our view, the judgment of the Supreme Court in the case of Madras Industrial Investment Corporation v. CIT (supra) is also applicable.*

*Order In the circumstances, we answer the above quoted question in the affirmative i.e., in favour of the assessee and against the Department.*

*6. Accordingly, both the above appeals are disposed of with no order as to costs."*

*19. We note that in the above case Hon'ble Jurisdictional High Court has duly taken note of Hon'ble Supreme Court decision in the case of Madras Industrial Investment Corporation (supra) and Hon'ble Bombay High Court decision in the case of Taporia Tools Ltd. (supra) and had found no fault even on the ground that the borrower had the discretion to change the terms of the issued debentures. As there was nothing in the record to show that during the assessment year in question, the borrower had exercised such a discretion. In the present case also, there is nothing on record that the borrower had exercised any such discretion. In this view of the matter, the said case law is fully applicable on the facts of the case and the liability on account of debenture redemption premium is liable to be deducted from the income and cannot be treated as contingent liability. Furthermore Mumbai Tribunal in the case of Mahindra and Mahindra ITA No. 8597/Mum/2010heldas under:-*

*"Next ground of appeal is about disallowance of pro rata premium of ₹ 5.39 crores payable on redemption of 'Foreign Currency Convertible Bonds'(FCCB).As per the AO the bonds were convertible into shares and, therefore, could not be construed as a borrowing, that they increased capital base of the company and that the expenditure incurred was capital in nature.*

*The AR submitted that FCCB were a form of borrowing that they were shown in the balance- sheet under loans that premium payable on redemption was cost of borrowing, that option of conversion of bonds into shares was only with the bond holders, that conversion was a subsequent event which did not change the initial character of the bonds of a debt, that in the event of redemption payment of premium was mandatory, that premium being a cost of borrowing was allowable on time ,that premium was neither capital nor contingent in nature, that issue of FCCB had been held to be revenue in appellant is own case for the assessment year 1997-98 (ITA/7845/M/2004).DR supported the order of the AO."*

*20. From the above, it is clear that the amount of debenture redemption premium is accrued and liable to be deducted. Hence, in the background of aforesaid discussion and precedents, we set aside the orders of the authorities below, and decide the issue in favour of the assessee."*

**151.** On this issue, Ahmadabad Bench in the case of Sun Pharmaceutical Industries Ltd in ITA No 702/Ahd/2016, ITA No. 729/Ahd/2016 dated 08/04/2021 and Coordinate Bench in Mahindra & Mahindra Ltd. [ITA No. 586/Mum/2013] has treated premium paid on redemption of FCCB is eligible for deduction.

**152.** In view of above discussion, it is held that assessee is entitled for deduction of Premium on Redemption of Foreign Convertible Bond of ₹.20,69,06,874/- in computing Book Profit u/s 115JB. Thus, this ground of appeal is allowed.

**153.** In the result, appeal filed by assessee is partly allowed.

**154.** In the result, both the appeals of Department and Assessee are partly allowed as indicated herein above.

Order pronounced in the open court on 28<sup>th</sup> February, 2023

Sd/-  
**(SANDEEP SINGH KARHAIL)**  
**JUDICIAL MEMBER**

Mumbai / Dated 28/02/2023  
Giridhar, Sr.PS

**Copy of the Order forwarded to:**

1. The Assessee
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

Sd/-  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**