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.5655/MUM/2011 (A.Y: 2006-07)

M/s. ACC Limited (Formerly known as The Associated Cement Companies Ltd.) Cement House, 121, M.K. Road Churchgate, Mumbai-400020 **PAN: AAACT1507C**	*v.*	Addl. CIT -Range 1(1) Mumbai
(Appellant)		**(Respondent)**

ITA NO.417/MUM/2014 (A.Y: 2006-07)

M/s. ACC Limited (Formerly known as The Associated Cement Companies Ltd.) Cement House, 121, M.K. Road Churchgate, Mumbai-400020 **PAN: AAACT1507C**	*v.*	Asst. CIT-LTU Mumbai
(Appellant)		**(Respondent)**

ITA NO.5692/MUM/2011 (A.Y: 2006-07)

ACIT – LTU 28th Floor, Centre-1 World Trade Centre, Cuffe parade Mumbai - 400005	*v.*	M/s. ACC Limited (Formerly known as The Associated Cement Companies Ltd.) Cement House, 121, M.K. Road Churchgate, Mumbai-400020 **PAN: AAACT1507C**
(Appellant)		**(Respondent)**

Assessee represented by	**:**	**Shri Yogesh Thar & Ms. Sukanya Jayaram**
Department represented by	**:**	**Smt. Shailja Rai**
Date of Hearing	**:**	**21.12.2022**
Date of Pronouncement	**:**	**28.02.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. These are cross appeals pertaining to Assessment Year 2006-07 arising from the Appellate Order dated 6th April 2011 passed by the Ld. Commissioner of income Tax (Appeals) – 1 [hereinafter referred to as CIT(A)) whereby appeal filed by Assessee against the Assessment Order dated 30th December, 2008 passed u/s. 143(3) of the Income Tax Act, 1961) hereinafter referred to as the Act) was partly allowed. Further, on similar issue, there are cross appeals for very same assessment year arising from the order u/s 251 passed by CIT(A)-1, Mumbai whereby appeal filed by Assessee against the order giving effect to CIT(A)'s order dated 12/09/2011 was partly allowed.

2. The various grounds are raised in present cross appeals requiring adjudication which are taken up 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 hearing, Assessee has filed paper books in support of its contention which is duly considered while adjudicating present appeal. During the course of appellate hearing, 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:

SR No	ITA No	Date of order
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 NO. 5692/MUM/2011 (Revenue Appeal)

3. First we take up Revenue Appeal in ITA No. 5692/Mum/2011 (common ground in assessee's appeal is also taken up together).

4. In the Ground No.1, Department has raised the following grievance:

> *"On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of an amount of Rs7,41,62,393/- on account of differential unutilized MODVAT credit referable to closing stock of Rs.24,34,99,828/- by invoking the provisions of Section 145A of the Act.* "

5. 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 ₹.7,41,62,393/-(24,34,99,828 being MODVAT on closing stock less ₹.16,93,37,435 being MODVAT on opening stock) which is required to be added back to total income of assessee considering provisions of Section 145A of the Act.

6. In appeal Ld.CIT(A) has discussed the above issue at Para No. 6.2 and 6.3 of his order and held as under:

> *"6.2 In this regard, the AR of the appellant filed a detailed written submission in support of its contention. The A/R of the appellant submitted that adjustment in the value of the opening and the closing stock in isolation were contrary to the*

provisions of Sec. 145A, which required adjustment in the value of opening stock, purchases, sales and closing stock. Further my attention was drawn to the relevant annexure forming part of the Tax Audit Report where the tax auditors have, in their report issued u/s 44AB, certified the adjustments on all counts u/s 145A. The net effect of the said adjustments is Nil. Further, the A/R of the appellant submitted that the AO has not given any adverse finding on the tax audit report and particularly, on the adjustments made u/s 145A. It was submitted that, in the tax audit report, the tax auditors have duly adjusted the opening as well as closing inventory. However, they did not stop there. They have also incorporated other adjustments required u/s 145 A in purchases and sales and the net effect is Nil. Thus, the recasted Profit & Loss a/c as per provisions of Sec. 145A did not result in any modification in net profit. The AR of the appellant also relied on the judicial pronouncements -vs.- Berger Paints (India) Ltd. (No. 2) (2002) 254 ITR 503 (Cal), S. Kumars Ltd. -vs.- IGT I.T.A. no.2547/M/02, CIT vs. Indo Nippon Chemicals Ltd. (2003) 261 ITR 275 (SC) and Hawkins Cookers Ltd. -vs.- ITO (2008-TIOL-480-ITAT-Mum). The AR of the appellant further submitted that similar addition made by the AO has been deleted by my predecessor in AY 2001-02 to AY 2005-06.

6.3 I have considered the A.O.'s order as well as the appellant's AR submission. Having considered both, I find that similar issue was decided by my predecessor in favour of the appellant from A.Y.-2001-02 to 2005-06 in the appellant's own case. Thus, respectfully following the said order of my predecessor and also following the rule of consistency, the addition so made by the A.O. on this account is deleted. Thus, this ground of appeal is allowed in view of the aforesaid order of my predecessor referred as above."

7. Against the observation of Ld. CIT(A), Revenue has filed further appeal. During the course of appellate hearing, Ld. AR of the assessee has relied upon finding of Ld.CIT(A) whereas Ld. DR has relied upon finding of Assessing Officer and contended that observation of Assessing Officer may be restored.

8. Similar issue was considered by us in Department Appeal for AY 2005-06 in Ground no 2 and held as under:

"18.Considered the rival contentions 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 ld. 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.

9. Respectfully following the above decision, we dismiss the ground raised by the revenue.

10. 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 disallowance of club entrance/subscription fee Rs.17,77,305/-.

11. 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 appellant has claimed 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.

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

> *"7.3 I have considered the A.O.'s order as well as the appellant's A/R submission. Having considered both, I find that the similar issue has been decided my predecessor as well as the Hon'ble ITAT in the appellant own case for earlier years. Further my view also gets strength from the decision of Hon'ble Bombay High Court in the case of Otis Elevator Co. Ltd. Thus, respectfully following the decision of jurisdictional High Court as well as the decision of Mumbai ITAT in the appellant's own case and also taking note of decision of my predecessor, I sider it proper and appropriate to hold that the A.O. was not justified in making this addition, According the addition so made by the AO is deleted. This ground is thus allowed."*

13. Against the observation of Ld.CIT(A), Revenue has filed further appeal. During the course of appellate hearing, Ld. AR of the assessee has relied upon finding of 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 DR has relied upon finding of Assessing Officer and contended that observation of Assessing Officer may be restored.

14. Similar issue was considered by us in Department Appeal in Ground No 3 in AY 2005-06 and held as under:

> *"24.Considered the rival contentions 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."

15. Respectfully following the above decision, we dismiss the ground raised by the Revenue.

16. In the Ground No 3 & 16, Department has raised the following grievance:

> *"3. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition made of Rs. 1,51,85,22,523/ - by the Assessing Officer on account 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 facts brought out by the A. O in the impugned assessment order.*

> *16. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing the assessee's claim of sales tax subsidy amounting to Rs.1,51,85,22,523/- treating the same as capital receipt while computing the book profit u/s.115JB of the I. T. Act."*

17. The Assessing Officer has dealt with the issue at Para No. 7 to 7.12 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 DSCL(WB) for Rs 1,51,85,22,523/-. The Assessing Officer has examined different schemes under which incentive is granted to assessee and same was considered as revenue receipt 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 such 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.

18. In appeal Ld.CIT (A) has discussed the above issue at Para No. 8.10 of his order and held as under:

> *"I have considered the AO's order as well as the appellant's submission. Having considered both, I find merits in the argument of the appellant. It is seen that the issue raised thorough this ground of appeal is covered in favour of the appellant by the Hon'ble ITAT Mumbai in the appellant' own case in earlier AYs. i.e. 1996-97 & 1997-98. Further, I also find that my predecessors vide orders of earlier years from A.Y. 2001-02 to 2005-06 in the appellant's case have decided the issue in favour of the appellant. Hence considering the factual position of the case as well as respectfully following the Hon'ble ITAT Mumbai referred as above and also following the rule of consistency, I consider it proper and appropriate to hold that the Assessing Officer was not justified in denying the claim of sales tax incentive by appellant as capital receipt. Accordingly, this ground of appeal is allowed."*

19. Against the observation of CIT(A), Revenue has filed further appeal. The Ld.AR has relied upon finding of CIT(A) and argued that each scheme of sales tax was considered by CIT(A) in appellate proceedings and issue is decided in assessee's favour. The Ld.AR of the assessee has also referred to decision of Hon'ble ITAT in its own case for A.Y. 2003-04 wherein identical issue was decided in favour of it. 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. On the other hand, Ld. DR has mainly relied upon finding of Assessing Officer and contended that order of Assessing Officer may be restored.

20. Similar issues were considered by us in the AY 2005-06 in Ground No 5 of Department appeal and held as under:

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

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

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

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

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

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

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

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

"7. From the provisions of the said scheme, it clearly emerges that the subsidy though computed in terms of sales tax deferment or waiver, in essence it was meant for capital outlay expended by the assessee for set up of the unit in case of a new industrial unit

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

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

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

12. We have heard both the learned counsel and perused the record. We have also gone through the decisions cited before us. After considering the material on record, we are of the view that the issues involved in these appeals are squarely covered by the decisions of this Court in Birla VXL Ltd. (supra) and in Munjal Auto Industries Ltd. (supra). Therefore, the questions of law posed for our consideration in these appeals are answered in favour of the assessee and against the department. Accordingly, all these appeals are dismissed.

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

5.3.5. ……. the dominant purpose for which the incentive scheme per se introduced by the respective State Governments was only for the purpose of setting up of industries in the respective areas for industrial development in State and also to accelerate development and absolutely not for augmenting the profits of the assessee. Effectively, the schemes of various State Governments envisaged the rapid industrialisation, growth and new employment generation in the respective areas which would in turn promote the growth of the State. Hence, it could be safely concluded that subsidy / incentive granted is only for setting up of the units based on the fixed percentage of the capital cost and not for running the business of the assessee. Moreover, even this subsidy which is determined based on sales tax assessment orders for 9 years, 6 years etc., are subject to maximum outer limit already fixed under the respective schemes. Though the quantification of the subsidy has been made post commencement of business, the measurement of subsidy is immaterial. In our considered

opinion, none of the schemes contemplated to finance the assessee in the form of subsidy / incentive for meeting the working capital requirements of the assessee company post commencement of business. Hence, by applying the purpose test, apparently, the subsidy / incentive received in the instant case would only have to be construed as capital receipts not chargeable to income tax. In this regard, we find that ld. AR placed reliance on the decision of Hon'ble Supreme Court in the case of Ponni Sugars and Chemicals Ltd., reported in 306 ITR 392, wherein the incentive conferred under that scheme were two fold. First, in the nature of higher free sale sugar quota and second, in allowing the manufacturer to collect Excise duty on sale price on the free sale sugar in excess of the normal quota, but to pay to the Government only the Excise duty payable on the price of levy sugar. The Hon'ble Supreme Court in para 14 of its decision had held that "character of receipt of subsidy has to be determined with respect to the purpose for which the subsidy is given. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial." In fact, the Hon'ble Supreme Court while rendering this decision had duly considered its earlier decision in the case of Sahney Steel and Press Works Ltd., reported in 228 ITR 253 and had absolutely no quarrel with that judgement. Rather, it concurred with the decision rendered in Sahney Steel and Press Works Ltd., case. In this regard, it would be relevant to reproduce the operative portion of the decision of Hon'ble Supreme Court in the case of Ponni Sugars and Chemicals Ltd., as under:-

> *14. The second case is Lincolnshire Sugar Co. Ltd. v. Smart 20 TC 643. In that case it was found that Lincolnshire Sugar Co. Ltd carried on the business of manufacturing sugar from home grown beet. The company was paid various sums under British Sugar Industry (Assistance) Act, 1931, out of monies provided by the Parliament. The question was whether these monies were to be taken into account as trade receipts or not. The object of the grant was that in the year 1981, in view of heavy fall in prices of sugar, sugar industries were in difficulty. The Government decided to give financial assistance to certain industries in respect of sugar manufactured by them from home-grown beet during the relevant period. Lord Macmillan held that-*
>
> *"What to my mind is decisive is that these payments were made to the company in order that the money might be used in their business." He further observed that:*
>
> *"I think that they were supplementary trade receipts bestowed upon the company by the Government and proper to be taken into computation in arriving at the balance of the company's profits and gains for the year in which they were received."*
>
> *15. In the case before us, the payments were made to assist the new industries at the commencement of business to carry on their business. The payments were nothing but supplementary trade receipts. It is true that the assessee could not use this money for distribution as dividend to its shareholders. But the assessee was free to use the money in its business entirely as it liked and was not obliged to spend the money for a particular purpose like extension of docks as in the Seaham Harbour Dock Co. 5 case (supra).*

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

17. This precisely is the question raised in this case. By no stretch of imagination can the subsidies whether by way of refund of sales tax or relief of electricity charges or water charges can be treated as an aid to setting up of the industry of the assessee. As we have seen earlier, the payments were to be made only if and when the assessee commenced its production. The said payments were 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 the applied in judging the character of a subsidy. The test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the Scheme with which we are concerned in this case is that the incentive must be utilised for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the Subsidy Scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the Subsidy Scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant."

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

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

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

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

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

purchasing capital assets or for the purpose of purchasing machinery.

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

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

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

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

8. It is undoubtedly true that such subsidy was computed in terms of sales tax deferment and necessarily therefore, would accrue to an industry only once the commercial production commences. However, this by itself would not be either a sole or concluding factor. In case of Sahney Steel and Press Works Ltd. and others v. Commissioner of Income-tax reported in 228 ITR 253, the Apex Court held and observed that the character of the subsidy in the hands of the recipient whether revenue or capital will have to be determined, having regard to the purpose for which the subsidy

is given. The source of find 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-Circle 1(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 a existing project provided investment in fixed capital or capacity was increased atleast 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 ld. 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 ld. 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 ld. Special Counsel for the Revenue vehemently submitted that the decision of the Hon'ble Special Bench has been reversed by the Hon'ble Supreme Court by remitting the matter back to the Hon'ble Bombay High Court. First of all, it would be relevant to bring on record the crux of the decision of the Special Bench in the case of Reliance Industries Ltd. In case of Special Bench decision of Reliance Industries Ltd, the scheme dealt with sales tax exemption under the scheme of Government of Maharashtra, 1979. Further the said scheme was implemented by SICOM. The following question was referred by the Hon'ble President, Tribunal to the Special Bench:

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

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

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

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

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

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

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

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

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

5.4.2. The ld. AR vehemently submitted that the department did not challenge the decision of the Special Bench before the Hon'ble Bombay High Court. However, he fairly stated that there was a subsequent decision of the Division Bench of this Tribunal which followed the Special Bench and that Division Bench order was challenged by the Revenue before the Hon'ble Bombay High Court. The Hon'ble Bombay High Court while disposing of the said appeal did not reverse the decision of the Special Bench and accepted the same. When that appeal was further challenged by the Revenue before the Hon'ble Supreme Court, the Hon'ble Supreme Court remitted the matter back to the Hon'ble Bombay High Court. Accordingly, he argued that the decision of Special Bench was never

reversed by the Hon'ble Supreme Court as stated by the ld. Special Counsel for the Revenue and accordingly still is a good law and therefore a binding precedent on this Division Bench. In fact, in assessee's own case for A.Y.2001-02 in ITA No.778 of 2015 dated 18/12/2018 before the Hon'ble Jurisdictional High Court, wherein the question Nos. c & d was exactly on this point. For the sake of convenience, the question Nos. c & d raised by the Revenue before the Hon'ble Jurisdictional High Court is reproduced hereunder:-

> *"(c) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in restoring the issue of taxability of the sale tax exemption benefit of Rs.58 crores availed by the assessee to the file of the Assessing Officer for deciding afresh after considering the decision of the Special Bench of the ITAT in the case of DCIT V. Reliance Industries Ltd., 88 ITD 273, which has not been accepted by the Revenue?*
>
> *(d) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in entertaining the additional ground without appreciating that the assessee had treated the amount of sales tax exemption benefit of Rs.58 crores as revenue receipt and had included this amount in the returned income and it had been taxed accordingly and the assessee did not raise this issue before the CIT(A) and the issue had attained finality?"*

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

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

Department had approached the Supreme Court and the Supreme Court had held that a question of law did arise. The Supreme Court framed a question and placed the matter back before the High Court. We are informed that this appeal is still pending.

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

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

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

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

categorically hold that the decision of the Special Bench still holds the field and is a good law. The entire contentions raised by the ld. Special Counsel for the Revenue in this regard are hereby dismissed.

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

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

which was clearly dealing with an expansion situation. However, we would rather refrain from making any further detailed observations on this issue, as we are alive to the fact that Hon'ble jurisdictional High Court, in Tax Appeal No 358 of 2012, has admitted appeal against the decision of this Tribunal in Ajanta's Manufacturing Ltd. case (supra) and all these issues will now come up for consideration of Their Lordships. The fact that appeal is admitted does not, as we have stated earlier as well, does not affect the binding nature of the judicial precedents. There is no dispute before us that the scheme under which the sales tax and excise duty subsidy are given to this assessee are the same as in the case of Ajanta Manufacturing Ltd. (supra). All the material facts being the same, there is no reason to take any other view of the matter than the view so taken by the coordinate bench. We must, therefore, uphold the conclusions arrived at by the Commissioner (Appeals), which are in consonance with the Special Bench decision in the case of Reliance Industries Ltd. (supra) and coordinate bench decision in the case of Ajanta Manufacturing Ltd. (supra), and decline to interfere in the matter."

(emphasis supplied by us)

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

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

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

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

> *nature of income, it cannot be regarded as income even for the purpose of book profit u/s 115JB of the Act, though credited in the profit and loss account and have to be excluded for arriving at the book profit u/s 115JB of the Act.*
>
> *49. Insofar as, case laws relied upon by the department , we find that all those case laws have been either considered by the Tribunal or High Court and came to conclusion that in those cases the capital receipt is in the nature of income, but by a specific provision, the same has been exempted and hence, the came to the conclusion that, once particular receipt is routed through profit and loss account, then it should be part of book profit and cannot be excluded, while arriving at book profit u/s 115JB of the Act 1961.*
>
> *50. In this view of the matter and considering the ratio of case laws discussed hereinabove, we are of the considered view that when a particular receipt is exempt from tax under the Income tax law, then the same cannot be considered for the purpose of computation of book profit u/s 115JB of the I.T. Act 1961. Hence, we direct the Ld. AO to exclude sales tax subsidy received by the assessee amounting to Rs. 36,15,49,828/- from book profits computed u/s 115JB of the I.T. Act, 1961.*
>
> *52. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. Respectfully following the same, we uphold the plea of the assessee and direct the Assessing Officer to exclude the sales tax incentive subsidy for computing book profit under section 115 JB of the Act. The assessee gets the relief accordingly."*

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 AO 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).

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

21. Respectfully following the above decision, we dismiss the ground raised by the Revenue.

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

> *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the provision for additional gratuity amounting to Rs.3,20,98,901/- while computing income under normal provision of the Act."*

23. The Assessing Officer has dealt with the issue at Para No. 11.1 of Assessment Order. The Assessing Officer has observed that in original return of income, appellant has disallowed additional gratuity. However, in revised return of income, appellant has claimed such amount as deduction on the ground that Hon'ble ITAT in A.Y. 1990-91 has allowed such claim as deduction. However, this contention of appellant was not found acceptable to Assessing Officer on the ground that relief has been granted by ITAT on this issue is sub-judice hence such claim is not allowed. He made net disallowance of Rs 3,20,98,901/- while computing total income of appellant.

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

> *12.3 I have considered the A.O.'s order as well as the appellant's A/R submission. Having considered both, I find merits in the arguments of the appellant. I find that similar issue has been decided in favour of the appellant by the-Hon'ble ITAT as well as the by my predecessor in the appellant's own case. Thus, in view of the same, I am of the considered view to not to deviate from the orders of erstwhile CIT(A) as well as from the orders of Hon'ble ITAT, Mumbai. Hence considering all the factual position of the case, I consider it proper and appropriate to hold that the A.O. was not justified in making this disallowance. Thus, this ground of appeal is allowed.*

25. Against the observation of CIT(A), Revenue has filed further appeal. During the course of appellate hearing, Ld. AR of the assessee has relied upon finding of CIT(A) and contended that identical issue is also decided in its favour in A.Y. 2002-03 to 2004-05 as well as 1990-91 whereas Ld. DR has relied upon finding of Assessing Officer and contended that observation of Assessing Officer may be restored.

26. 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 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:

> *"23. Ground No. 22 : On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the assessee's claim of additional gratuity amounting to Rs. 86,82,751/-.*
>
> *23.1. During the relevant previous year, the appellant had made provision for additional gratuity of INR 86,82,751/-. While dismissing Ground No. 9 raised by*

the Revenue, we have, in paragraph 14.3.5 above, concluded that the provision for additional gratuity is a provision for ascertained liability. Further, the CIT(A) has granted relief to the Assessee by following decision of the Tribunal in the case of the Assessee for the Assessment Year 1990-91 (ITA No. 2361/Mum/95). In view of the aforesaid, we are not inclined to interfere the order of CIT(A) on this issue. Accordingly, Ground No. 22 raised by the Revenue is dismissed."

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

28. In the Ground No 5, 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 Rs.6,71,43,085/- 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.

29. The Assessing Officer has dealt with the issue at Para No. 13 to 13.3 of Assessment Order. The Assessing Officer has observed that Assessee Company has not made any disallowance u/s 40(a)(i) for interest on ECB Loan from State Bank of India, Bahrain 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.

30. This issue is dealt by CIT(A) at Para No. 14.4 of his order as under:

"14.4 I have considered the A.O.'s order as well as the appellant's A/R submission. Having considered both, I find that similar issue has been decided in favour of the appellant by my predecessor in A.Y.-05-06 in the appellant's own case. Hence considering the rule of consistency, I consider it proper and appropriate not to deviate from the order of erstwhile CIT(A). Accordingly this ground of appeal is allowed."

31. Against the observation of CIT(A), Revenue has filed further appeal. During the course of appellate hearing, assessee 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 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 whereas Ld. DR has relied upon finding of Assessing Officer and contended that observation of Assessing Officer may be restored.

32. Similar issue was considered by us in the department appeal for AY 2005-06 in Ground No 7 and held as under:

"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.

33. Respectfully following the above decision, we dismiss the ground raised by the Revenue.

34. 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 directing the Assessing Officer to allow deduction u/s.80IA in respect of TG-3 Power Plant.

35. On identical issue in Assessee's appeal, in the Ground No 5, 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.

36. The Assessing Officer has dealt with the issue at Para No.14.5 of Assessment Order. The Assessing Officer has relied upon assessment order of A.Y. 2005-06 and observed that assesse 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 Rs 59,49,20,689/- and ₹.61,99,12,756/- 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 pant 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.

37. This issue is dealt by CIT(A) at Para No.15.3 of his order as under:

"15.3 I have considered the A.O.'s order as well as appellant AR's submission. Having considered both, I find that the similar issue was decided by my predecessor in the appellant's own case in A,Yr. 2005-06 vide his Order No.CIT(A)-I/IT/232/07-08 dated 13.03.2009, I have taken note of the reasons given by my predecessor in his order as in para 15.9 to 15.12 of the order. Following the rule of consistency, I am in full agreement with my predecessor's Hence, I hold that the appellant company is not eligible for deduction u/s.80-1A in respect of TG 2 as

held in para 15.1 of the appellate order referred above. However, in respect of TG 3 on the similar analogy, I direct the A.O. to allow the deduction u/s.80-IA to the appellant as held by my predecessor in para 15.12 of the appellate order. With this observation, the appellant this ground of appeal is partly allowed."

38. Against the observation of CIT(A), Revenue has filed further appeal for deduction u/s 80IA claimed for TG-3 whereas Assessee has filed further appeal for deduction u/s 80IA claimed and denied for TG-2. Both Ld AR and DR have relied upon arguments as were made in appellate hearing for A.Y. 2005-06 in assessee's own case.

39. Similar issue was considered by us in the Department Appeal in Ground no 9 and held as under:

"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 negativing 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 1st 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."

40. Respectfully following the above decision, we dismiss the ground raised by the revenue.

41. In the Ground No 7, 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.

42. On identical issue in Assessee's appeal, in the Ground No. 6 & 7 following issue is raised:

"6. 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/80I/80IC.

7. That on the facts and in the circumstances of the case, and without prejudice to the Ground No. 6, taken here-in-above the Ld. CIT (Appeals) has grossly erred in not considering the additional ground in respect of inclusion of turnover of the respective tax holiday unit in arriving at the total turnover for quantifying proportionate amount of disallowance of Indirect Head Office expenses in computing deduction u/s 80IA/80IB/80IC"

43. The Assessing Officer has dealt with the issue at Para No. 14.6 to 14.9 of Assessment Order. The brief facts of the case 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. 14.8 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.

44. This issue is dealt by CIT(A) at Para No. 16.3 of his order as under:

*"16.3 I have considered the A.O.'s order as well as appellant AR*s submission. Having considered both, I find that similar issue was again decided by my predecessor in A.Yr.2005-06 vide his Appellate Order No.CIT(A)-I/IT/232/07-08 dated 13.03.2009 wherein he directed the A.O. to exclude the Cost Audit Fee and Subscription to CMA allocating the expenditure in relation to units for deduction u/s.80-IA of the Act. If that my predecessor CIT(A) has dealt with this issue in Ground No. 13 of the order from para 16.1 to 16.4 of the appellate order. Following the said decision of my predecessor and also in respect of rule of consistency, I direct the A.O. to accordingly exclude the Cost Audit Fee and Subscription to CMA in respect of cement manufacturing unit. Accordingly, the A.O. is directed to exclude this item out of expenditure as mentioned on page 41 of the assessment order at Serial No.4 and 11 of the deduction u/s. 80IA accordingly. Thus, the appellant this ground of appeal is partly allowed."*

45. Against the observation of CIT(A), both assessee and department has filed appeal. Both Ld AR and DR have relied upon arguments as were made in appellate hearing for A.Y. 2005-06 in assessee's own case.

46. Similar issues were considered by us in the Department Appeal Ground no 10 and Ground no 4 of Assessee's Appeal in AY 2005-06 and held as under:

"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"*

78. 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.

47. Respectfully following the above decision, we dismiss the ground raised by the Revenue.

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

> *8. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of provision for wealth tax of Rs.30,00,000/- while computing the book profit u/s.115JB of the Act."*

49. The Assessing Office has dealt with this issue at Para No.20.1 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 CIT(A) at Para No.19.2 of his order as under:

> *"19.2 I have considered the AO's order as well as the appellant's submission. Having considered both, I find that the similar issue has been decided by my predecessor CIT(A) in A.Y. 1998-99 in the Appellant's favour in its own case. Hence, taking note of this fact, I consider it proper and appropriate not to deviate from the aforesaid order of erstwhile CIT(A) and accordingly this ground is adjudicated accordingly."*

50. Against the observation of 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.

51. Similar issue was considered by us in the Department Appeal Ground no 11 in AY 2005-06 and held as under:

> *"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 Echjyay 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.

52. Respectfully following the above decision, we dismiss the ground raised by the revenue.

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

"1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of provision for normal and additional gratuity amounting to Rs.8,28,97,873/- while computing the book profit u/s. 115JB of the I. T. Act."

54. The Assessing Officer has dealt with this issue at Para No. 22.1 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 CIT(A) at Para No. 20.1 of his order as under:

"20.1 I have considered the A.O.'s order as well as the appellant's A/R submission. Having considered both, I find that the issue raised through this ground of appeal has been already decided in favour of the appellant by my predecessor in A.Y.2003-04 to 2005-06 in the appellant's own case. Hence considering the same, I consider it proper and appropriate not to deviate from the orders of erstwhile CIT(A) referred as above. Thus, this ground of appeal is accordingly adjudicated."

55. 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.

56. Similar issue was considered by us in the Ground No 12 of Department Appeal in AY 2005-06 and held as under:

"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.

57. Respectfully following the above decision, we dismiss the ground raised by the revenue.

58. 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 deleting the addition of provision for leave encashment amounting to Rs 8,87,31,096 while computing the book profit u/s.115JB of the Act."*

59. The Assessing Office has dealt with this issue at Para No. 23.1 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. 21.2 of his order as under:

> *"21.2 I have considered the A.O.'s order as well as the appellant's A/R submission. Having considered both, I find that the similar issue has been decided by my predecessor in A.Y.-2004- 05 & 2005-06 in favour of the appellant. Hence on the basis of reasoning given in the aforesaid orders, I consider it proper and appropriate not to deviate from the orders of erstwhile CIT(A) referred as above. Thus, this ground of appeal is accordingly adjudicated."*

60. 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.

61. Similar issue was considered by us in the Department Appeal in Ground No 13 in AY 2005-06 and held as under:

> *"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.

62. Respectfully following the above decision, we dismiss the ground raised by the Revenue.

63. 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 directing the AO to allow deduction u/s 80HHC computed on the basis of book profit u/s 115JB of the Act.

64. The Assessing Office has dealt with this issue at Para No.25.2 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 CIT(A) at Para No.23.2 of order which reads as under:

"23.2 I have considered the A.O.'s order as well as the appellant's A/R submission. Having considered both, I find that similar issue has been decided by my predecessor from A.Y.2001-02 to 2005-06 in favour of the appellant. Considering the same, I consider is proper and appropriate not to deviate from the order of erstwhile CIT(A) referred as above. Thus, this ground of appeal is accordingly adjudicated.

65. Against the above observation of CIT (A), department has filed further appeal. The Ld. AR has relied upon the finding of 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 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)]

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

67. Similar issue was considered by us in the Department Appeal in Ground No 18 in AY 2005-06 and held as under:

118. Considered the rival submissions and material placed on record. It is relevant to refer to provisions of Section 115JB on statue 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 assessees 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."

68. Respectfully following the above decision, we dismiss the ground raised by the Revenue.

69. 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 directing the AO to exclude Rs 13,00,000/- being amount withdrawn from share premium account while computing book profit u/s 115JB of the Act."

70. The Assessing Office has dealt with this issue at Para No. 26.1 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 CIT(A) at Para No. 24.2 of his order as under:

"24.2 I have considered the A.O.'s order as well as the appellant's A/R submissions. Further I have also taken note of earlier orders in the appellant's own case of Hon'ble ITAT as well as of my predecessor. Considering the same, I find that the issue has been decided in appellant's favour by the Hon'ble ITAT in AY 1990-91 and also by my predecessor in AYs 1998-99, 1999-00, 2003-04 to 2005-06, Respectfully following of the said orders, I consider it proper and appropriate not to deviate from the aforesaid orders referred above. Thus, this ground of appeal is accordingly adjudicated.

71. Against the observation of CIT(A), department has filed appeal. Before us, Ld. AR relied upon finding of CIT(A) and argued that issue is in favour of assessee by

decision of ITAT for A.Y. 2003-04 and 2004-05. The Ld. DR has relied upon finding given by Assessing Officer and argued that order of Assessing Officer may be restored.

72. Similar issue was considered by us in the Department Appeal in Ground No 19 in AY 2005-06 and held as under:

"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.

73. Respectfully following the above decision, we dismiss the ground raised by the Revenue.

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

"13. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of VRS expenditure amounting to Rs.6,31,06,178/- pertaining to earlier years, capital expenditure debited and write down of value of assets while computing the book profit u/s.115JB of the I.T. Act."

75. The Assessing Office has dealt with this issue at Para No. 27.1 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 CIT(A) at Para No.25.2 of his order as under.

"25.2 I have considered the A.O.'s order as well as the appellant's A/R submission. Having considered both, I find that similar issue has been decided by the order of ITAT and also by erstwhile CIT(A) from A.Y.-2002-03 to 2005-06 in the favour of the appellant. Thus, considering the same, I have no hesitation to hold that the A.O. was not justified in making this addition. Accordingly, this ground of appeal is accordingly adjudicated."

76. Against the observation of CIT(A), department has filed 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.

77. Similar issue was considered by us in the Department Appeal in Ground No 16 in AY 2005-06 and held as under:

> *"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.*

78. Respectfully following the above decision, we dismiss the ground raised by the Revenue.

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

> *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.24,97,91,716/- being capital expenditure debited to*

P & L A/c. comprising of Rs.24,06,31,716/- on account of written down value of assets and Rs.91,60,000/- on account of cost assets not owned by the company in computing the book profit u/s. 115JB of the I. T. Act. "

80. The Assessing Office has dealt with this issue at Para No. 27.1 of his order and observed that while passing the assessment order of 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 CIT(A) at Para No.26.4 of his order as under.

"26.4 I have considered the A.O.'s order as well as the appellant's A/R submission. Having considered both, I find that similar issue has been decided by my predecessor in favour of the appellant. Hence considering the same, I consider it proper and appropriate not to deviate from the orders of erstwhile CIT(A) and accordingly allow the claim of the appellant. This ground is thus allowed."

81. Against the observation of CIT(A), department has filed appeal. Before us, Ld. AR relied upon finding of CIT(A) and argued that issue is in favour of assessee by decision of Coordinate Bench for 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.

82. 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 the issue in favour of assessee. The relevant finding is reproduced herein below:

"17. Ground No. 16: On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition in respect of capital expenditure debited to P & L account of INR 14,16,56,815/- in computation of book profit u/s 115JB of the Act.

17.1. During the relevant previous year, the Assessee had debited INR 14,16,56,815/- to the Profit & loss account being capital expenditure. The Assessing Officer added back the aforesaid capital expenditure to Book Profits for the reason that the same has been added back while computing profits under normal provisions of the Act.

…….

17.4. We have heard the rival contentions and perused the record. 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 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:

> *"35. Under this issue the revenue has challenged the deletion of the addition made in respect of Capital expenditure debited to P&L Account in computing book profit u/s 115JB of the Act in sum of Rs.15,02,74,405/-. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.: -*
>
> > *"28.2 I have considered the submission made on behalf of the appellant. In my view additions made in computing total income under normal provisions of the Act has nothing to do with computation of book profit u/s 115JB and respectfully following the decisions of Hon'ble Apex Court in the case of Apollo Tyres Ltd.(supra), Max Well Dyes & Chemicals P. Ltd. (supra) as well as my own order for AY 1998-99 and 2002-03 in appeal no CIT(A)-I/IT/232/4-5 and CIT(A)-I/IT/7/5-6 respectively discussed herein above and for the reasons stated therein the addition made by the Assessing Officer is deleted. Hence the ground of appeal is allowed."*
>
> *36. On appraisal of the above said finding, we noticed that the CIT(A) has allowed the claim of the assessee on the basis of the decision of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. Vs. CIT (2002) 255 ITR 273 (SC). Moreover, we also noticed that the issue has been decided in favour of the assessee by the Hon'ble ITAT in the assessee's own case for the A.Y.2002-03 in ITA. No.4987/M/2007. No distinguishable material has been placed on record. Since the issue has been decided in favour of the assessee in the assessee's own case for the A.Y. 2002-03 (supra), 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."*

17.5. Applying the principles laid down by the Hon'ble Supreme Court in the Apollo Tyres Ltd. (supra) and respectfully following the decisions of the co-ordinate bench of the Tribunal in the case of the Assessee for the Assessment Year 2002-03 (ITA No. 4987/Mum/2007 & others) and Assessment Year 2003-04 (ITA No. 4988/Mum/2007), we confirm the order of CIT(A) holding that capital expenditure of INR 14,16,56,815/- debited to Profit & Loss Account is not required to be added back while computing book profits under Section 115JB of the Act. Accordingly, Ground No. 16 raised by the Revenue is dismissed."

83. Respectfully following decision of coordinate bench referred supra, we uphold finding of CIT(A) for deleting addition being capital expenditure debited to Profit & Loss account comprising of WDV of assets and on account of cost not owned by company in computing book profit. This ground of appeal in departmental appeal is thus, dismissed.

84. In the Ground No 15 Department has raised the following grievance:

> *"15. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.8,80,00,000/-being expenditure incurred to earn dividend income while computing the book profit u/s.115JB of the I. T. Act.""*

85. The Assessing Office has dealt with this issue at Para No. 4.3 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 ₹.8,80,00,000/- under Section 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 CIT(A) at Para No. 28.3 of his order as under:

> *"28.3 I have considered the AO's order as well as the appellant's A/R submissions. Having considered the same, I find that similar issue has been decided erstwhile CIT(A) in favour of the appellant in the appellant's own case. Hence, considering the same, I consist it proper and appropriate not to deviate the orders of erstwhile CIT(A) and accordingly allow the claim of the appellant. Thus, the AO has directed to delete the addition made of Rs.8,80,000/- in computing Book Profit. This ground is therefore allowed."*

86. Against the observation of CIT(A), department has filed 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)]

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

88. Similar issue was considered by us in Department Appeal in Ground No 20 in AY 2005-06 and held as under:

"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.

89. Respectfully following the above decision, we dismiss the ground raised by the Revenue.

90. Ground no. 17 and 18 is general in nature and is thus dismissed.

91. In the result, the appeal of the department is dismissed in the terms indicated above.

ITA NO. 5655/MUM/2011 (ASSESSEE APPEAL)

92. We now take up the appeal filed by the assessee in ITA No 5655/Mum/2011.

93. In the Ground No 1 & 13 Assessee has raised the following grievance:

"1. That on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) [here-in-after referred to as Ld. CIT(Appeals)] was not justified and grossly erred in confirming the action of the A.O. in denying the claim of exclusion of Excise Duty Exemption availed of Rs. 63,59,19,000/being capital in nature in computing total income under the normal provisions of the Act.

1.1 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in holding that the appellant is not entitled to Excise Duty Exemption in utter disregard of the fact that the entitlement of Excise Duty Exemption for substantial expansion has already been accepted by the Excise authorities.

13. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in not directing the A.O. to exclude excise duty exemption being capital in nature, in computing Book Profit u/s 115JB."

94. The Assessing Office has dealt with this issue at Para No. 8 to 8.4 of his order. The Assessing Officer observed that assessee has claimed exclusion of Excise duty exemption availed during the year which cannot be treated as capital receipt considering similar discussion made for Sales Tax exemption as discussed in assessment order. In appeal CIT (A) has discussed the above issue at Para No. 9.5 to 9.15. of his order and held as under:

"9.5. To examine the justification of claim of the appellant company, a close perusal of the office memorandum 1(10)/2001/NER dated 07.01.2003 was taken. Having perused the same, I find that it has been clearly mentioned in the said office memorandum that industries `eligible for such incentive will be environment friendly with potential for local employment and use of local resources. In para-3.1 of the said office memorandum, it has been mentioned that fiscal incentive to new units and existing units on their substantial expansion as defined. Even the exemption of excise duty for a period of 10 years outright granted from the date of commencement of commercial production. Thus, it is clear that the excise duty subsidy is provided with the intention of providing opportunity to local employment and use of local resources. Further to that, the subsidy in the form of 100% outright exemption is provided for a period of 10 years from the date of commencement of commercial production. Thus, meaning of the said scheme is that the excise duty exemption incentive, which the appellant has claimed as capital in nature will arise only to the appellant, if it commenced the production after substantial expansion as envisaged under the aforesaid memorandum dated 07/01/2003. Further to that this expansion of the existing unit must generate potential for local employment and use of local resources. Even the activities of the production of undertaking must be environment friendly. Hence in my considered view such receipts germinate to the appellant only after commercial production. Hence, it has direct relation to production of the undertaking. Thus, the same is revenue oriented.

9.6 Further to that, a close perusal of the Notification No.50/2003 Central Excise dated 10th June,2003 were taken, which stipulates the excise duty

exemption as notified by sub-section 1 of section 5(a) of Central Excise Act, 1944 read with sub-section 3 of Additional Duties of Excise(Goods of Special Importance) Act, 1957. In Notification, it is categorically mentioned that ""being satisfied that it is necessary in the public interest so to do$_t$ hereby exempts the goods Specified in the First Schedule and the Second Schedule to the Central Tariff Act, 1985 (5 of 986), *other than the goods specified in Annexure-I appended hereto, and cleared from a unit located in the Industrial Growth Centre or Industrial Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area, as the case may be, specified in Annexure-II appended hereto, from the whole of the duty of excise or additional duty of excise, as the case may be, leviable thereon under any of the said Acts.*

2. The exemption contained in this Notification shall apply to the following kinds of units, namely

(a) new industrial units which have commenced their commercial production on or after the 7th day of January, 2003;

(b) industrial units existing before the 7th day of January, 2003, but which have undertaken substantial expansion by way of increase in installed capacity by not less than twenty five per cent, on or after the 7th day of January, 2003.

The exemption contained in this Notification shall apply to any of the said units for a period not exceeding ten years from the date of publication of this notification in the Official Gazette or from the date of commencement of commercial production, whichever is later."

9.7 Thus, it is important to ascertain that whether the appellant's company expansion relates to any of the items enumerated in Annexure I which are under negative list and further to see that whether the unit is located as specified in Annexure II. The perusal of the details submitted by the appellant suggests that the expansion as claimed by appellant company was undertaken admittedly for enhancement of production of capacity of the following; -

	Before expansion as on 06.01.2003	**Addition on expansion**	**% of Increase**	**Remarks**
1. Production capacity **a) Production capacity of clinker** **b) Installed capacity of cement**	**2700 TPD** **9.84 LTPA**	**1800TPD** **10.16 LTPA**	**67%** **103%**	
2. Investment in plant and machinery	**16,190.50 lacs**	**10,983.72 lacs**	**68%**	**Details as per annexure-1(b)**
3. Connected land	**26,635 MW**	**4.10 MW**	**15%**	
4. Employment	**564 nos.**	**-**	**-**	

9.8 It is apparently evident that enhancement of production of capacity of clinker comes at Serial No. 12 of Annexure I of Notification No.50/2003 dated 10/6/2003, which is appearing negative list of Annexure I. Further to that, it is also important to take note of the fact that in the Annual Report of the appellant company for year ending 31.03.2004 it has been mentioned that on page 15 at Serial No,6 of the report that "During the year under review, your company has completed modernisation of Gagal Unit 1 including upgradation of pollution control equipment at a cost of Rs.49.46 crores".

9.9 This note in Annual report of the appellant company, which is for the shareholders/stakeholders of the appellant company clearly suggest that modernization of Gagal Unit I has completed as on 31/03/04 itself. Further in the Annual report for the year ending 31/03/05 at page-15 at Serial No.6 of Annual report mentions that "6.2 The project for augmentation of capacity of Gagal Unit I & Unit II are expected to commissioned during the course of the financial year 2005-06", In view of the aforesaid contrary Annual report of the appellant company a note was taken from Annual report of 2005-06, wherein serial no.5 of the report on page-29, it is mentioned as under "5.1 The project of augmentation of clinkering and cement grinding at Gagal Unit II was commissioned during the year under review. With this, the capacity of Gagal works stands increased to 4.4 MTPA.

9.10 The appellant also argued the Assistant Commissioner Central Excise has also allowed exemption to the appellant company but the perusal of the order of Assistant Commissioner Central Excise, which is appearing in paper book F , nowhere suggests that the expansion plan were carried out in the spirit of the notification no.50/2003 central excise dated 10/06/03. The ACIT central excise merely took note of the Director of Industries, Shimla letter, which was submitted to him by the appellant company. He is also taking note of a certificate from M.D. of the appellant company for commencement of production as on 03/05/05. Even I find that the appellant has challenged ACIT (Central Excise), Shimla show cause notice dated 23/06/06 through this letter dated 07/07/2006. The relevant portion of ACIT(Central Excise) order dated 11/09/07 is extracted as under:-

> *"REPLY TO THE LETTER CUM SHOW CAUSE NOTICE*
>
> *The Notice vide their letter dated 07/07/2006 submitted the reply to the letter cum show cause Notice dated 26/06/06, and stated that:-*
>
> *The notification No.50/2003-(Supra) does not cast any legal obligation on them to submit any of the list documents or called for. The contention that in absence of these documents we would not be eligible to the exemption granted under the said notification is not legally sustainable.*
>
> *ii) That the only requirement under notification No. 50/2003-(supra) is to file an option letter with the Assistant Commissioner of Central Excise which they have very diligently complied with vide their communication dated 07/03/05. The unit has also complied with all other legal formalities for carrying out substantial expansion, viz. obtaining permission from the Director of Industries, State of Himachal Pradesh, for carrying out substantial expansion and after carrying out substantial expansion ACC Gagal-I has from time to time kept the department informed regarding the commencement of trial production and subsequently the commencement of commercial production. Necessary certificates confirming that the expansion has been undertaken* have *also*

been obtained from the Director of Industries and District Industries Centre.

iii) Without prejudice to the aforesaid, they submit the various documents/records. The Director of Industries Government of Himachal Pradesh, Shimla who are the jurisdictional authorities concerning setting up or expansion of an industrial unit in Himachal Pradesh, have already confirmed and acknowledged that the expansion of the unit is complete."

It is nowhere assigning any verification of the actual expansion plan undertaken in the spirit of said notification.

9.11 In view of the aforesaid facts, I find that there was no targeted expansion of Gagal Unit I for increase in capacity of production of the appellant company was undertaken in compliance to office memorandum No.l(10)/2001/NER dated 07/01/2003 or in notification no,50/2003 central excise dated 10/06/03. The appellant company merely intended to enjoy the benefit of exemption declared by the Government of India without any specific carried out plan of such enhancement/expansion of production in accordance with such notification. This observation is made based on following observation recorded from the appellant's own submission made during appellate proceedings.

- *None of Annual report of the appellant company anywhere stated that the appellant company is intending to expand the capacity of production just to*
- *double than the existing capacity i.e.9.84 LTPA of install capacity of cement to 20 LTPA after expansion.*
- *Investment in plant and machinery claimed by the appellant prior to expansion was 161.90 crores and subsequently 261.09 crores but it is no where submitted that whether this investment is towards the targeted expansion in compliance to office memorandum No.l(10)/2001/NER dated 07/01/2003 and notification no.50/2003 central excise dated 10/06/03.*
- *It is surprised to note that the power requirement prior to expansion was of 26.63 MW, which after just making expansion as claimed the double requirement has been shown to 30.50 MW. Considering the claim of increase in capacity of production of Gagal Unit I, the proportionate increase in power capacity is absolutely does not commensurate with the increase in capacity of production as claimed by the appellant.*
- *The claimed increase/expansion in capacity of production of appellant is also in respect of clinker, which is appearing in the negative list as elaborated in Annexure I of the notification.*
- *The appellant company claims that the expansion was completed on 03/05/05 though no proof or evidence from any of the agency was furnished who might have carried out the expansion plan as stated by the appellant to suggest or establish that the commissioning of expansion of Gagal Unit I has taken place.*

- *The appellant company merely filed huge list of plant & machinery giving details as per Annexure 1(c) of part F of submission from page 2034 to 2052 stating the invoice number, date, supplier name and description of material. The perusal of the same suggest that a substantial number of invoices are of date prior to office memorandum No.l(10)/2001/NER dated 07/01/2003 & notification number 50/2003 central excise dated 10/06/03. The same are enumerated in Sr. No.l to 118 from page 2034 to 2037 & Serial number 121, 123, 213. This clearly establish that the investment which are claimed to be invested in compliance to notification no.50/2003 dated 10/06/03 is not correct, but basically same was in a normal course of upgradation plan of the plant which find place of mention in the Annual report of the appellant company of F.Y.-2003-04 as stated above.*

- *Even I find that the subsequent details of different invoices are purchased till may 2005 i.e.05/05/05 by serial no.548. In this regard, even I find that the machinery are of different variety of electric and electronic nature, which all require to be placed in order for put to use for production and definitely for all these activities of all assembling of these plant & machinery requires a concentrated effort from an agency. But the appellant company have not stated anything about the same.*

- *On the basis of submission made by the appellant company, I find that civil work was assigned to a company namely M/s Gannon Dunkerley co. Ltd. by letter dated 11/05/04 by the appellant company, wherein the letter of intent no.355/04 dated 10/05/04 was allotted by the appellant company. The work stated therein clearly suggest that the same is for augmentation of grinding and packing capacity for line 1 (Group I) and for augmentation of raw and finish grinding capacity for line group 2 (Group II). The details of the work executed was called for by this*

- *office and the submission made by Gannon Dunkerley Co. Ltd. suggest that work was carried out from F.Y.-04-05 to F. Y.-07-08, which is appearing from summary of R.A bills, which is total of Rs.54,60,66,49/-. This also established the fact that the appellant civil work was carried out up to F.Y.-07-08,*

- *Further to that, it is also taken on record that the appellant is claiming that the director of Industries of Himachal Pradesh, Shimla has approved the expansion plan vide letter dated 05/07/04 placed on page 148 of part A of the appellant submission. But the said letter merely mention of proposal of exemption, which was considered in its meeting held on 21/06/04. The same is extracted as under: -*

We have the pleasure to inform you that your proposal for substantial expansion for your existing cement plant from 9.84 LTPA to 20.00 LTPA of installed cement manufacturing capacity was considered by the State Level Single window clearance and monitoring authority in its 4th meeting held on 21/06/2004. The

expansion proposal was approved by the authority subject to the following conditions.

1. *You are required to obtain environmental related and other statutory clearances as may be required for expansion of the existing cement plant*

2. *You are to employ at least 80% or as prescribed from time to time of the total manpower employment from amongst the bonafide Himachalles.*

3. *The existing unit after expansion will not be entitled for any additional/ new benefits/incentives under the existing incentive rules 1999 of the state Govt.*

4. *The additional power can be made available by HPSEB at 132 KV."*

5. *In this regard following facts are needed to be taken on record.*

a) The application for expansion was made through letter dated 29/10/04 for approval of General Manager, Distt. Industrial Centre, Bilaspur (appearing on page 149 & 150 of paper book of part A) and another letter dated 23/11/05 from Director of industries, Himachal Pradesh, which merely says that proposal of undertaking has been taken on record. The letter of director of industries of 23/11/05 is appearing on page 166 of paper book of part A, which merely states of keeping the proposal for undertaking substantial expansion on record, but it is clear from the above stated facts in earlier para's that the appellant claim that expansion was completed on 03/05/05 itself is in doubt. In addition to this, the appellant's reference of sanction /6r approval of expansion plan by letter of director of industries dated 05/07/04 was made in following manner. The same is extracted as under:-

(b) In view of aforesaid approval as well as taking note of memorandum dated 07/01/03 of Government of India through with aforesaid expansion plan was announced have the purpose behind it to promote the existing industries, which are situated in the areas specified in Annexure II of the notification, which are environment friendly with potential for local employment and use of local resources. But whereas I find on the basis of appellant's own submission that the total number of employees on 07/12/05 were 568 and in F.Y.-05-06 to 07-08, the total employees gone down to 540 as per form I issued by General Manager Distt, Bilaspur appearing on page 139 of part A.

9.12 Taking note of all the above facts and observations noted on the basis of appellant's submission during the appellate proceedings, I find that the appellant company tried to have benefit of incentive declared by the Government of India by office memorandum dated 07/01/04 by F.No.I(10)/04 NER and also of notification No.50/2003 Central Excise dated 10/06/2003. On the basis of detailed discussion made in foregoing paras based on appellant's own submission, it is evident that the appellant company intends to have benefit of this notification in respect of Gagal Unit I of the appellant, which was taken on hand prior to Notification issued by the Government of India. Further to that, even for upgradation of the unit the basic purpose of generation of local employment was

not attained and increase of expansion of capacity of existing unit was not environment friendly as it includes the so called claimed expansion of clinker also, which is appearing in Annexure I of the notification no.50/2003 dated 10/06/03.

9.13 Further to that, even in my considered opinion, the appellant company is trying to get benefit of exemption on the basis of upgradation of the plant, which has already taken place in advance by the appellant company prior to Notification as the same has been mentioned in Annual Report of year-ending 31/03/2004 of the appellant on page 15 at Serial No.6 of the report. The appellant company intend to camouflage the already existing improvement of the plant to have the benefit of exemption, though the same was not at all intended to be targeted for achievement of the purpose as intended to in office memorandum dated 07/01/2003.

9.14 Further to that, even I find that purpose of incentive of exemption of Central Excise is production operation based only as the same is available to the appellant company only after the commencement of commercial production only. Thus, the crucial point is that such incentive of exemption of Central Excise of production incentive in the sense that the appellant would be entitled to such fiscal incentive only after it goes to commercial production. Hence, such receipt could be trade receipt or revenue receipt only following fundamental rule of purpose test as envisaged by the Apex Court in the case of Sahney Steel & Press Works Ltd. Vs. CIT (1997)228ITR 253 (SC) and CIT vs. Ponni Sugars & Chemicals Ltd, (2008) reported in 306 ITR 392 (SC). In the background of above stated facts of the receipt of exemption of Central Excise which arise to appellant company only subsequent to commencement of commercial production only, I am of the considered view that the appellant claim raised through this ground of appeal is or from the spirit of truth of the notification of Govt, of India as discussed earlier.

9.15 Hence, in my considered view, such receipt can only be held to be revenue receipt and by no stretch of imagination, the same is held as capital receipt. It is an admitted fact that appellant's plant was already in existence before incentive has been announced by the Government of India. Hence the appellant company will be entitled for incentive merely after carrying out for enhancement/ expansion of production capacity as envisaged in the office memorandum dated 07/01/2003 and Notification No.50/2003 dated 10/06/2003. In view of this fact, I am of the considered view that the receipt which has been claimed by appellant company as capital receipt is completely unfounded and untenable, even, on the basis of applicability of fundamental rules of purpose test also as laid down by the Hon'ble Apex Court in the aforesaid judicial pronouncements. The fact that the proposal expansion for enhancement of installed capacity did not generate further employment as it is evident from appellant's own submission as discussed above. Further the entire project was not environmental friendly. Moreover, the subsidy is apparently for revenue purposes i.e. generation of employment and utilization of local resources and not for capital creation the receipt thereof has to be treated as revenue following the decision of the Hon'ble Supreme Court in the case of Sahney Steels (supra). Further the appellant has also failed to adduce evidence of commencement of production and rather the evidence adduced are contradictory in nature. Hence, in my considered view, I consider it proper and appropriate to hold that the AO was justified in holding that such exemption and receipt in the appellant's hand is revenue in nature. Accordingly, the AO's action is confirmed. Thus this ground of appeal is dismissed."

95. The Assessee has preferred appeal against the finding of Ld.CIT(A) as discussed herein above. The Ld. AR of the assessee has argued that excise duty exemption is a capital receipt not chargeable to tax. Reliance was placed on following judicial precedents: -

(i) Shree Balaji Alloys J&K HC (333 ITR 335)

(ii) CIT v. Chaphalkar Bros [(2018) 400 ITR 279 (SC)]

(iii) DCIT v. Everest Industries Limited [ITA.No.554 of 2020 (Mumbai Tribunal)] –

(iv) Greenply Industries Limited v. ACIT [ITA No. 232 of 2019 (Guwahati Tribunal)]

96. The Ld.AR of the assessee has also referred to appellate order passed by CIT(A) in assessee's own case for A.Y. 2008-09 to 2012-13 wherein identical claim was allowed. On the other hand, Ld. DR has relied upon finding of Assessing Officer and CIT(A) in year under consideration. Further she relied on the ruling of AAR New Delhi (2007) 165 taxmann.com 627 and argued that finding of the authorities needs to be confirmed.

97. Considered the rival submissions and material placed on record. On this issue, coordinate bench in the case of Ambuja Cement Limited in ITA No 2428/Mum/2013&2366/Mum/2013(A.Y.2006-07) dated 31/10/2022 has held as under:

"17. So far as this grievance of the assessee is concerned, the relevant material facts are like this. During the course of assessment proceedings, the Assessing Officer noticed that the assessee has availed excise duty exemption, amounting to Rs 46,83,11,376, in respect of their Darlaghat Unit, HP, and it was claimed as a capital receipt in nature. It was also noted that in terms of general Exemption No, 51 (Notification No. 50/2003 dated 10th June 2003) the assessee is entitled to 100% excise duty exemption for a period of ten years in respect of its cement manufacturing plant at Darlaaghat. The assessee's submission was that this exemption was in response to the announcement made by the Hon'ble Prime Minister to the effect that tax and central excise concession are made to attract investments in the industrial sector for special category states, including Uttarakhand. The Assessing Officer noted that "though it is apparent from the excise notification that exemption is granted for only those units which are located in the backward areas and which have undertaken substantial expansion, however incentives are available only post production" and therefore he "finds no difference

in sales tax and excise exemption claimed". Following the stand taken for sales tax exemption etc, he held that the excise exemption receipts are also revenue in nature. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) also confirmed the stand of the Assessing Officer on the short ground that the exemption notification does not specifically state the object and purpose of the concession to be promotion of industry in the specified areas etc. The assessee is aggrieved, and is in appeal before us.

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

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

> *6. Having heard the learned Counsel for the parties on this question, we notice that, the Government of Gujarat Sales Tax Incentive Scheme was envisaged to promote large scale investments in the Kutch District since on account of devastating earth-quake, development of the district had suffered. The Scheme envisaged that, the same was confined only with the Kutch District. Similar, being the purpose and philosophy of the Government of India, while granting excise duty exemption, we may not separately take note of the back-ground thereof. In view of these facts, the question arises is - whether the Tribunal was justified in holding that Sales Tax and Excise duty exemption enjoyed by the assessee under the said subsidy scheme, was not taxable as revenue receipt. Such and similar issue has came up before different High Courts and Supreme Court on the numerous occasions. Reference to all those judgments would be un-necessary. However, the principle that has evolved is that, not the nomenclature of the subsidy or the fact that, the computation of the subsidy benefit is in terms of tax payable, would not be conclusive. What is to be examined in each case is the purpose for granting such subsidy. We may refer to the decision of the Supreme Court in case of CIT v. Chaphalkar Bro. [2017] 88 taxmann.com 178/[2018] 252 Taxman 360/400 ITR 279. It was a case arising out of judgment of this Court in which, the dispute between assessee and the Revenue was with respect*

to subsidy granted to the multiplex cinema operators in the form of entertainment tax waiver. The subsidy was granted in view of the fact that, industry was highly capital intensive. The Revenue argued that, the subsidy was revenue in nature. This Court after referring to several decisions of the Supreme Court including the case of CIT v. Ponni Sugars and Chemicals Ltd. [2008] 306 ITR 392/174 Taxman 87 and Sahney Steel and Press Works Ltd. v. CIT [1997] 94 Taxman 368/228 ITR 253 (SC) held that, subsidy had not been granted for construction but only after setting up of a new industry which was in the nature of assistance given for the purpose of carrying on business.

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

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

8. In the present appeal also, as noted, the subsidy was granted under schemes framed by the State and the Central Government, to be given to the assesses who set up new industry in Kutch District. The scheme

was envisaged to encourage investment which would in turn, provide fresh employment opportunity in the district which had suffered due to devastating earthquake. The computation of subsidy may be on the basis of sales tax or excise duty. Nevertheless, the purpose test would ensure that, the subsidy was capital in nature.

9. The second question raised by the Revenue is consequent of the first question, in which, the Revenue argues that, if the subsidy is treated as a capital in nature, the same must bring down assessee's costs of acquisition of plant and machinery. The assessee's claim of depreciation to that extent must shrink. Assessee argues that, the Tribunal correctly held that, the subsidy had not been given in relation to acquisition of plant or machinery and that, therefore, same cannot be adjusted towards cost of acquisition. 10. It is undoubted that, the subsidy had no relation to the assessee's acquisition of plant or machinery. It was to be granted to an industry which had set up the new industrial unit in the District of Kutch. In such back- ground, question - arises whether such subsidy would be adjustable towards assessee's costs of acquisition of capital assets. We may notice that, a similar question was considered by Division Bench of Gujarat High Court in case of CIT v. Grace Paper Industries (P.) Ltd. [1990] 183 ITR 591/52 Taxman 18. The Court noted that, the subsidy was granted by the Government for development of industries in back-ward areas. It was not part of the actual cost of plant or machinery. The Court, therefore, held that it could not have been deducted towards costs of acquisition. The Court held as under:—

> *"We have carefully considered the provisions relating to the grant of cash subsidy under the schemes framed by the Central Government and the State Government. The Central Government as well as the State Government noticed that areas specified as backward areas and tribal areas were undeveloped or under-developed. Entrepreneurs were not willing to set up industries in such undeveloped or under-developed areas. The industries were concentrating only in urban areas. In other words, rapid urbanization was taking place. So far as the State of Gujarat is concerned, there was rapid industrial growth in cities like Baroda, Ahmedabad and Surat resulting in strain on municipal services. Urbanization created several problems such as pollution, growth of slums etc. It was also necessary to have balanced growth of industry in different regions. However, as pointed out above, entrepreneurs were reluctant to set up industries in backward areas. These areas were identified as backward because there was un-development or underdevelopment of industries in these areas. It was, therefore, that the Government decided to give financial incentives to encourage and induce entrepreneurs to move to backward areas and establish industries there so that the region may develop and promote the welfare of the people living in that region. One of the incentives which the Government decided to grant was cash subsidy so that entrepreneurs could utilize such cash subsidy for any purpose connected with the establishment of industries in the backward areas. Once the decision to give cash subsidy was taken, the Government had to work out some method to determine the quantum of such subsidy. In*

other words, the question as to how the amount of cash subsidy should be determined had to be considered by the Government. The Government, in order to determine the amount of cash subsidy, decided to follow one of the recognized methods of working it out on the basis of the amount invested by an entrepreneurs in acquiring capital assets as cash subsidy. The scheme does not say as to in what manner the subsidy was granted is to be utilized. In other words, the entrepreneur to whom the subsidy was granted was free to utilize it in any manner he liked. It would, therefore, appear that quantification of subsidy on the basis of investment was a measure adopted by the Government for convenience to work out the subsidy. If subsidy could be utilized by the entrepreneur in any manner he liked, could it be said that it was granted for meeting the cost of the capital assets? In our opinion, taking an overall view of the various provisions of the scheme, it is difficult to hold that cash subsidy was granted to entrepreneur to meet the cost of the fixed assets or part thereof The cost of the fixed assets was merely adopted as a measure for working out subsidy. In fact, a careful examination of the scheme reveals that it is the value of the fixed assets and not its cost which is adopted as the basis for computing the amount of the subsidy. Emphasis on value and not the cost is evident from the fact that land and building already owned by an industrial unit, cost of tools, jigs, dies and moulds, transport charges, insurance premium, erection cost, value of second-hand machinery purchased by an industrial unit etc. were to be taken into account while computing the value of fixed assets for the purposes of subsidy. In other words, it was the value of the fixed assets which formed the basis for computation of subsidy to be granted under the scheme. Subsidy, in our opinion, did not meet the cost of the fixed assets directly or indirectly. Under the scheme of the Central Government or the scheme of the State Government, cash subsidy was quantified by determining the same at a specified percentage of the value/ cost of the fixed assets. Therefore, as observed above, the basis adopted for determining the cash subsidy with reference to the cost or value of fixed assets was only a measure for quantifying the subsidy and it could not be said that the subsidy was given for the specific purpose of meeting any portion of the cost of the fixed assets. The subsidy was granted to compensate the entrepreneur for the hardship and inconvenience which he might encounter while setting up industries in backward areas."

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

of the actual cost of acquisition of capital asset. It was held and observed as under:— '

> *In so far as question No.2 is concerned, this court finds that the same is squarely covered by the decision of the Supreme Court in CIT v. P. J. Chemicals Ltd., [1994] 210 ITR 830. In the said case, after review of the law on the point, the Supreme Court has held as under (head note):*
>
> *"Where Government subsidy is intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost, which is the basis for determining the subsidy, being only a measure adopted under the scheme to quantify the financial aid, is not a payment, directly or indirectly, to meet any portion of the 'actual cost The expression 'actual cost' in section 43(1) of the Income Tax Act, 1961, needs to be interpreted liberally. Such a subsidy does not partake of the incidents which attract the conditions for its deductibility from 'actual cost'. The amount of subsidy is not to be deducted from the 'actual cost' under section 43(1) for the purpose of calculation of depreciation etc."*
>
> *20. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee. The Assessing Office is, accordingly, directed to delete the impugned addition….*

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

44. Ground no. 3 is thus dismissed."

98. 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, Excise duty exemption received by assessee are capital receipts both for the purpose of computing income as per normal provision of the Act as well as book profit u/s 115JB of the Act and the addition made by Assessing Officer is deleted. In the result, related grounds in Assessee's Appeal are allowed.

99. In the Ground No 2 Assessee has raised the following grievance:

> *"2. That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in directing the AO to determine the direct and indirect expenditure for disallowance u/s 14A inspite of the fact that no such expenditure was incurred for earning the exempt income."*

100. The Assessing Office has dealt with this issue at Para No. 4 of his order. The relevant facts are that Assessee has shown exempt dividend income of ₹.26,04,97,698/- in Return of Income. The Assessing Officer has observed that while filing return of income, assessee has not made any suo moto disallowance for expenditure incurred for earning exempt income. He observed that Rule 8D has been framed according to provisions of Sub Section 2 & 3 of Section 14A of the Act and such Rule 8D has retrospective operation of law. The Assessing Officer has relied upon decision of Mumbai ITAT decision in the case of Daga Capital Management Pvt Limited in support of its claim. He computed disallowance under Rule 8D read with Section 14A at ₹.8.80 crore which comprises of proportionate interest disallowance at ₹ 6.90 crore and other expenditure at ₹ 1.90 crore. In appeal CIT (A) has discussed the above issue at Para No. 5.7. of his order and held as under:

> *"5.7 I have considered the A.O.'s order as well as the appellant's A/R submission. I have also taken note of the recent decision of jurisdictional High Court in the case of Godrej & Boyce Mfg. Co. Ltd v/s. DCIT [2010]. Taking note of these facts, I am of the considered view that Rule 8D is applicable only for A. Y.-08-09 onwards. In view of the same, the application of rule 8D cannot be upheld, in view of the jurisdictional High Court decision. However I find that in the same decision jurisdictional High court has also held that the A.O. should provide reasonable opportunity to the assessee while working out the disallowance on account of expenditure i.e, direct/indirect both incurred on account of exempt income, which are not forming part of total income. In view of the jurisdictional High Court decision, I consider it proper and appropriate to direct the A.O. to provide reasonable opportunity to the appellant and work out the total expenditure i.e. direct or indirect both in relation to exempt income and make the disallowance in accordance to the decision of jurisdictional High Court in the case of M/s Godrej & Boyce Mfg. Co. Ltd. With this observation, the appeal of the appellant is partly allowed."*

101. The Assessee has filed appeal against the observation of Ld.CIT(A) referred supra. During the course of appellate 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)]

102. The Ld.AR of the Assessee has also argued 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. 5.2 of CIT(A)'s wherein Assessing Officer it is stated that Assessee has own funds in form of Share Capital & reserve to the tune of ₹.2425.27 crores as against investments made in shares for ₹.476.67 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.)

103. The Ld.AR of the assessee has alternatively contended that in the case of Ambuja Cement Limited, Mumbai ITAT has considered disallowance u/s 14A @ 1% of exempt income as reasonable disallowance in ITA No 5883 & 5927 of 2012 for A.Y.2005-06.

104. The Ld. DR has relied upon finding given in assessment order and contended that order of Assessing Officer may be restored.

105. 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. Though Rule 8D is not applicable in year under consideration, it is fact on record that assessee has earned exempt (dividend) income and for earning such income, reasonable expenditure ought to have

been incurred. So far as proportionate interest disallowance u/s 14A is concerned, it is observed that Assessee has sufficient own funds in the form of share capital and reserves and surplus in comparison with investment in shares made by it. On this issue, Hon'ble Supreme Court in the case of South Indian Bank Ltd[2021] 130 taxmann.com 178 has held 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]*

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

> *"6. On thorough consideration we find that the principle of apportionment does not arise in this case as the jurisdictional facts have not been pleaded by the Revenue. In fact Tribunal while affirming the order of the first appellate authority noted that the first appellate authority had deleted the addition made by the assessing officer under section 14-A of the Act by observing that the interest-free fund available with the respondent - assessee was far in excess of the advance given. Tribunal further noted that the Revenue does not dispute the said finding and relying on the decision of this Court in CIT v. Reliance Utilities & Power Ltd. [2009] 178 Taxman 135/313 ITR 340, affirmed the deletion made by the first appellate authority.*
>
> *7. We have perused the decision of this Court in Reliance Utilities & Power Ltd. (supra) wherein it has been held that if there are funds available with the assessee, both, interest-free and overdraft and/ or loans taken, then a presumption would arise that investments would be out of the interest-free funds generated or available with the assessee if the interest-free funds were sufficient to meet the investments. In the facts of that case, it was noted that the said presumption was established considering the finding of fact returned by the first appellate authority as affirmed by the Tribunal which is identical in the present case.*
>
> *7.1 We also note that the said decision of this Court has been affirmed by the Supreme Court in CIT v. Reliance Industries Ltd. [2019] 102 taxmann.com 52/261 Taxman 165/410 ITR 466."*

107. 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 in connection with proportionate interest disallowance is deleted.

108. So far as disallowance of other administrative expenditure is considered, it is observed that coordinate bench in the case of Ambuja Cement Limited in ITA No 5883 & 5927 of 2012 for A.Y. 2005-06 has held as under:

> *"22. Having heard the rival contentions and having perused the material on record, we are of the considered view that disallowance @ 1% of tax-exempt income will meet the ends of justice for the reason that the period pertains to the pre-amendment law and rule 8D does not, therefore, has any application in the matter, and that, in accordance with a series of coordinate bench decisions, it has been consistently held so far as the pre-amendment period is concerned, a disallowance of 1% is reasonable- particularly when the assessee has made investments entirety out of his own funds and when there are no borrowings costs involved. It is an undisputed position, on the facts of this case, that the assessee has made the investments entirely out of his own funds. The disallowance is thus restricted to 1% of the tax-exempt income. The assessee gets the relief accordingly."*

109. Considering the finding given by Coordinate Bench, we direct the assessing officer to restrict the disallowance to 1% of the exempt income. The assessee gets the relief accordingly. This ground of appeal is partly allowed.

110. In the Ground No 3, Assessee has raised the following grievance:

> *"3. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in treating the ground taken for modification of depreciation following the order of earlier assessment years as infructuous."*

111. During the course of appellate hearing, Ld.AR has not pressed this ground of appeal hence same is dismissed.

112. In the Ground No 4, Assessee has raised the following grievance:

> ***"****4. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in confirming the action of the A.O.in treating the sale of Refractory Business as slump sale by invoking the provision of sec. 50B instead of item-wise sale."*

113. The Assessing Officer has dealt with this issue at Para No. 12 of his order. The operative part of assessment order is already reproduced in CIT(A)'s order wherein Assessing Officer has computed income from capital gain u/s 50B of the Act for sale of refractory business as against claim of assessee for item wise sale in return of income.

114. In appeal Ld.CIT (A) has discussed the above issue at Para No. 13.4 to 13.19 of his order and held as under:

> *"13.4 I have considered the AO's order as well as the appellant AR's submission. Having taken note of both, I find that the AO has given a detailed reasoning for denial of the appellant's claim. Even I find that the AO has taken note of the relevant provision of the Act i.e. Section 50B of the Income-tax Act and also the meaning defined as slump sale u/s. 2(42C) of the Income-tax Act. I find that the appellant company has more or less made similar submission before me as it was submitted before the AO. The appellant's claim is basically based upon the Valuation Report carried out by the Registered Valuer which was done on the request of the appellant company. But, I find after perusal of the sale agreement carried out between the appellant company and the purchaser i.e. M/S.ACE Refractories Ltd vide agreement dated 29.09.2005, mentioning that no cognizance was at all assigned to the Valuation Report while the sale value of the undertaking of refractory business of the appellant company. Even I find that in para 3.1 of Page 17 of the sale agreement, the total consideration mentioned of Rs.257 crores in lieu of the transfer of the business of refractories undertaking, nowhere in the entire sale agreement or anywhere is assigned the item-wise consideration of specific asset of the said business as claimed by. the appellant company. The said valuation was carried out by the appellant company for the sake of its own known purpose. Even I find that nowhere in the sale agreement dated 29.09.2005, the item-wise value of transfer of any asset has been mentioned. Even after perusal of the Annual Report of the appellant company for A.Yr. 2005-06, there is nowhere any specific assignment of any item of the said refractory business. The claim of value of technical know-how assigned by the appellant company is for self-serving purposes. It was nowhere earlier assigned in the balance-sheet of the undertaking of refractory business. It is also not a case that the appellant company has not sold any portion of the refractory business. The purpose behind getting the valuation done was entirely with the sole intention to get out of the taxability of the sale consideration as per relevant provision of the Act i.e. section 50B specifically brought on statute for taxing the capital gain arising in case of slump sale introduced by Finance Act, 1999 with effect from 01.04.2000. The appellant has taken the argument in its submission that section 50B is a beneficial provision but I find that the said provision was brought on statute to set right the litigation arising on account of taxability of sale of entire business undertaking prior to introduction of the said provision. Taking note of different judicial pronouncements of the Apex Court as well as different High Courts, considering judicial developments through different judicial pronouncements and taking note of actions of such transactions wherein the entire Parliament also defined the concept of slump sale in the provisions of section 2(42C) of the Act which is as under:-*

"Slump sale' means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales ".

13.5 To make further clarity of the provision for taxability, I also consider it appropriate to extract Section 50B of the Act which is as under:

"50B, (1) Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place:

Provided that any profits or gains arising from the transfer under the slump sale of any capital asset being one or more undertakings owned and held by the assessee for not more than thirty-six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets.

In relation to capital assets being an undertaking or division transferred by way of such sale, the "net worth" of the undertaking or the division, as the case may be, shall be deemed to be the cost of acquisition and the cost of improvement for the purposes of sections 48 and 49 and no regard shall be given to the provisions contained in the second proviso to section 48.

Every assessee, in the case of slump sale, shall furnish in the prescribed form alongwith the return of income, a report of an accountant as defined in the Explanation below sub-section (2) of section 288, indicating the computation of the net worth of the undertaking or division, as the case may be, and certifying that the net worth of the undertaking or division, as the case may be, has been correctly arrived at in accordance with the provisions of this section.

Explanation 1. - For the purposes of this section, "net worth" shall be the aggregate value of total assets of the undertaking or division as reduced by the value of liabilities of such undertaking or division as appearing in its books of account:

Provided that any change in the value of assets on account of revaluation of assets shall be ignored for the purposes of computing the net worth.

Explanation 2. - For computing the net worth, the aggregate value of total assets shall be-

(a) in the case of depreciable assets, the written down value of the block of assets determined in accordance with the provisions contained in sub-item (C) of item (I) of sub-clause (c) of clause (6) of section 43;

(b) in the case of capital assets in respect of which the whole of the expenditure has been allowed or is allowable as a deduction under section 35AD, nil; and

(c) in the case of other assets, the book value of such assets."

Hence, the Parliament considered it proper to define even the meaning of slump sale u/s.2(42C) and also introduce section 50B of the Act. I find that the AO has taken the meaning of the transaction of the appellant i.e. sale of business undertaking of refractory business in the right perspective as slump sale.

13.6 I find that the underlying philosophy has all along been that in a slump sale, the seller cannot withdraw any asset from the business sold, and the purchaser cannot reject any asset or liability comprised in the business. The slump sale envisages sale of entire business as a going concern at its realizable value without allocation of slump price to individual items of business and not as a part of a going concern. It is the essence of slump sale.

Further, to cover in the purview of Section 50B of the Act, the sale of business undertaking as a whole, must satisfy the following tests:

(i). The business has been sold as a whole and as a going concern at its realizable value.

(ii). The seller has not withdrawn any asset or liability from the business sold or the purchaser has not rejected any asset or liability comprised in the business.

(iii). The material on record do not indicate item-wise value of the assets transferred.

(iv). There is no material to infer severalty in the sale as in the case.

I find that the appellant company's sale transaction of refractory business vide Transfer Agreement dated 29.09.2005 completely covered as "Slump Sale" as per aforesaid standard parameters.

13.7 Nevertheless the concept of slump was and continues to be well known and judicially recognized concept. The concept of "slump sale", which was hitherto judicially recognized has not been codified and inserted in the form of clause (42C) in section 2 of the I.T. Act, What was earlier judge-made law is now a codified law. In Premier Automobiles Ltd. v. ITO 264ITR193 OM.), the Hon'ble Jurisdictional High Court has held at page 223 of the said Report thus: The concept of slump sale initially was evolved under judge-made law which has subsequently been recognized by the Legislature by inserting 2(42C)....." Thus, the definition of slump sale in section 2(42C) is nothing but codification of what was hitherto judicially hitherto judicially recognized. Section 2(42C) is nothing but declaration of the existing law of slump sale. As regards the taxability of gains from slump sale, the Hon'ble High Court has held at page 235 of the said Report as under:

"In this appeal, we were only required to consider whether the transaction was a slump sale and having come to the conclusion that there was a sale of business as a whole, we have to remand the matter back to the Assessing Officer to compute the quantum of capital gains. For that purpose, the Assessing Officer will have to decide the cost of the undertaking for the purposes of computing the capital gains that may arise on transfer. That, the Assessing Officer will also be required

to decide its value under section 5 of the Income-tax Act. Further, the Assessing Officer will be required to decide on what basis indexation should be allowed in computing the capital gains and the quantum thereof Lastly, the Assessing Officer will be required to decide the quantum of depreciation on the block of assets. It may also be mentioned that these parameters, which we have mentioned are not supplied. This shows that it has always been the law that profits and gains from slump sale are taxable. In the face of the aforesaid decision of the Hon'ble Jurisdictional High Court, the natural corollary is that the provisions of section 50B(1) declaring that any profit and gain arising from the slump sale would be chargeable to tax as capital gains, is merely declaratory of the law as it then existed The obvious question then is as to what was the necessity of enacting section 50B when it was merely declaratory of the existing law. The answer to this question lies in the provisions of subsection (2) and (3) of section 50B, which provide for the mechanism for the computation of cost of acquisition and the cost of improvement. In the absence of any statutory mode of computation of cost of acquisition/improvement, difficulties were being experienced in the computation of capital gains arising from the slump sale. At this stage, we may fruitfully refer to the heading of section 50B Which reads: "Special provision for computation of capital gains in case of slump sale" It is therefore quite evident that section 50B deals with computation of capital gain in cases of slump sale. While subsection (I) of section 50B declares the existing law and thus puts the same beyond the pale of any doubt, sub-section (2) and (3) thereof merely lay down the machinery for computation of capital gains from slump sale.

13.8 Valuer has made the valuation of intangible assets based on method best known to him alone and he has made specific clarification that "it is understood that values vary based on time and purpose. It is clearly understood that he will not be asked to appear before any agency or court with respect to this opinion, which makes the authenticity of the report questionable."

13.9 Further to that, I find that the appellant has referred to Annexure-52 i.e. Off the Agenda of dated 12th July, 2005 appearing on Page 1059 of the Paper Book of Part Relevant portion of the said Agenda also which I consider appropriate to extract is as under:

"ICICI Venture through their Advisors, M/s. ICICI Securities with whom the company has been having a direct dialogue for some time now is the only party which has submitted its fined binding offer for the Refractories Business. The salient elements of their offer are as under:

(i). The consideration for the business will be Rs.2570 million, i.e. the enterprise value being paid for the business.

(ii). ACC Refractories Business will be transferred as a going concern on an as is where is basis' as a slump sale or a slump sale with an item-wised/category break up (i.e. *land, plant & machinery, copyright, technical know-how etc.) in a manner, which minimizes transaction costs and*

provides maximum tax and other structural benefits to both ACC and ICICI Venture.

*(iii). ICICI Venture is at a level of preparedness where it is confident of completing the financial and accounting and legal due diligence, etc. and closing the transaction within a matter of 60 days from the date of acceptance of the offer," *

13.10 Further to that, the appellant also drawn my attention to the Board Note which appears on Page 1061 to 1063 of the Paper Book of Part 'C'. In the said Board Note, it has been clearly mentioned as Transaction Structuring and Tax and Duty Implication. The relevant portion from the Board Note is extracted herein below:-

"The *transaction would be a sale of ACCR undertaking on an "as is where is basis" with all its employees as a going concern.*

13.11 Thereafter, it is very important to take note of the Business Transfer Agreement of such slump sale which appears on Page 1075 to 1125 of the Paper Book. Taking note of this said agreement, I find that as per Article 2 of the said agreement sale and transfer of the refractory business has been defined and in that Para 2.1 is clearly defining the transaction wherein the sale of entire business undertaking has been taken note as transfer. Relevant portion of the same is extracted herein below as under:

"*2.1 Upon the terms and subject to the conditions set forth herein, as of the Effective Date, the Vendor agrees to sell, convey, assign and transfer the Refractor Business as a going concern on a slump sale basis to the Purchaser and the Purchaser agrees to purchase, acquire and accept from the Vendor as of the Date in the ordinary course of business) unto and to the use of Purchaser together with all deeds, documents, writings, vouchers and other evidence of Vendor's title exclusively relating to the Refractory Business and every part thereof for a lump sum consideration as set out in Article 3.1 hereto payable in the manner set out hereunder*"

Thereafter, as per Article 3 of the said Business Transfer Agreement, even the consideration for the transfer of the said business undertaking is mentioned and it also assigned a lump sum consideration i.e. Rs.257 crores. The relevant portion of para 3,1 is also extracted herein below as under: -

"3.7 In consideration of the sale and transfer of the Refractory Business, the purchaser has on the Effective Date paid to the Vendor, the purchase price being the amount of Rs.257,00,00,000 (Rupees Two Hundred and Fifty Seven Crores Only) less the amount of actual cash accruals accruing to the Refractory Business (as determined by the Closing Audit) which is exclusive of any value added stamp, transfer or registration taxes pertaining to the transfer of the Refractory Business, all of which are payable by the Purchaser (the "Purchase Price") "

13.13 Even taking note of the Business Transfer Agreement between ACC Ltd. and ACE Refractories Ltd., clearly suggests that the entire business of refractory was transferred to the Transferee. In the entire agreement, nowhere any value to any asset has been separately assigned for the entire consideration of Rs.257

crores. It has been mentioned that the transfer of business concern is stipulated and that is only the lump sum price determined between the Transferor and Transferee. Therefore, I find that taking note of the entire Business Transfer Agreement and its index and the schedules wherein the refractory business of the appellant company was transferred to the Transferee as a going concern, in my considered view, the transfer was only a slump sale. It cannot be given any other colour when the intention, purpose and the specific clauses of the agreement read it as a slump sale.

13.14 The appellant's act of getting the valuation done and trying to disclose the income arising on account of transfer of refractory business of the appellant company in its own way is nothing but an attempt to ensure lesser tax liability on account of the appellant that manipulating the provisions of the Act. In my considered view, when there is a complete provision for the taxability of any business transaction then, there is no necessity to draw or interpolate with the provision for the taxability of such transaction but it is the obligatory on the part of the assessing to ensure that he levied the tax correctly as per the stipulated provisions of section 50B read with section 2(42C) of the Act accordingly. Even if I find in Agenda item No.1 it was slump sale. i find that the subsequent version in para 2 i.e. "ACC Business will be item-wised/ category break up (i.e. land, plant & machinery, copyright, technical know-how etc.) in a manner, which minimizes transaction costs and provides maximum tax and other structural benefits to both AC and ICICI Venture." was intended to interpolate or putting appellant's own version for defining the transaction to ensure lesser tax liability when it was nowhere warranted at all. Any such act is to put own definition of the transaction when it is not necessitated in view of the amply explicit clear provision of section SOB r.w.s. 2(42C) of the Act which in my considered view is against the spirit of the provisions of the Income-tax Act. In my considered view when the provisions are amply clear then, there is no necessity to define otherwise than what has been stated by the legislation. I find that the Apex Court has clearly stated such version of defining the provision of law in the following case laws :

(1) The Hon'ble Supreme Court in the case of CIT vs N.C. Budhiraj& Co. reported in 204 ITR 412 held that the principle of adopting liberal interpretation which advances the purpose and object of beneficial provision cannot be carried to the extent of doing violence to the plain and simple language used in the enactment. Further, in the case of Seshayee Paper & Boards Ltd. vs. CTT reported in 233 ITR 167, the Hon'ble Madras High court has considered the observations of the Supreme Court in file case of K. P. Vergeese and held that when there is no absurdity and mischief in the provisions contained in the Act it is not possible for the court to interpret in a different way by substituting or rewriting the provision. Therefore, it is evident from the plain reading of the provisions of the section that the assessee does not fulfill the conditions laid down in the section itself and is not entitled to claim deduction only on that count.

(2) The Supreme Court in the case of Padmasundara Rao (Deed.) & Ors. Vs. State of Tamil Nadu & Ors. reported in 257 ITR 147 has observed that it is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The Court further observed that

while interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. The principles of casus omissus cannot be supplied by judicial interpretative process. Two principles of construction - one relating to casus omissus and the other in regard to reading the statute as a whole -appear to be well settled. Under the first principle a casus omissus cannot be supplied by the Court except Tirthe case of clear necessity and when reason for it is found in the four comers of the stature at the same time a casus omissus should not be readily inferred and for that purpose all of a stature or section must be construed together and every clause of section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole stature. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature.

Further the Supreme Court in the case of CIT Vs. Sodra Devi reported in 23 ITR 615 held that the normal rule of construction is that the intention of the legislature should be primarily gathered form the words which are used - It is only when the words used are ambiguous that they would stand to be examined and construed in the light of surrounding circumstances and constitutional principal and practice. Similar observations were made by the Supreme Court in the case of KeshavjiRavji& Others etc. Vs. CIT reported in 183 ITR 1 (Supreme Court). Further Supreme Court in the case of Smt. Tarulata Shyam& Ors Vs. CIT reported in 108 ITR 345 wherein it was observed that while interpreting the taxing statutes there is no scope for importing into the statue words which are not there. The intention of the legislature is primarily to be gathered horn the words used in the statute. Once the assessee comes within the letter of law, he must be taxed, however, great the hardship may appear to the judicial mind to be. Similar observation was made by the Hon'ble Supreme Court in the case of Federation of Andhra Pradesh Chambers of Commerce & Industry & Ors. etc. Vs. State of Andhra Pradesh & Ors. etc. reported in 247 ITR 36.

13.15 Even I find that Agenda Item No.1 and Board Note wherein Transaction Structuring and Tax and Duty Implications has been assigned are made by the appellant company which is for the self-serving purposes. It has no legal binding to the assessing authority for taxing such business transaction of sale of entire business undertaking with the agreement stated therein. The appellant has made these illustrations in the Board Note and Agenda Item No.1 with the sole intention to have benefit of lesser tax liability which has no sanctity of the provisions of law. Hence, in my considered view, the AO's action was completely justified and in accordance with the provisions of law. Further to that, . I also want to make this observation that the case laws relied upon by the appellant of Artex Manufacturing Co. of the Apex Court reported in 227 ITR 260(SC) and other decisions referred in the submission in support of its contention are delivered by the Apex Court prior to the enactment of the provisions of section 50B of the Act.

13.16 Further, I am of the considered view that once there is an explicit provision available on the statute for taxing such business transaction then, deriving any analogy or benefit from a decision of the Apex Court, which is

pronounced prior to the enactment of the said provision is not warranted at all, when the said provisions are amply clear and explicit. Hence, when there is no ambiguity in the provisions of law, then any interpolation or addition to the explicit provision is not permitted in the spirit of law as held by Hon'ble Apex Court as discussed above. Therefore, not find any necessity to derive any further help or any such help from judicial pronouncement.

13.17 Even I find that the appellant intends to argue that the appellant company has not furnished the net worth valuation as envisaged u/s.50B(3) of the Act On this basis, the appellant company claimed that the sale transaction is an item-wised asset. But in my considered view, this act of the appellant will not help the appellant company but it will amount to non-compliance by the appellant company on account of the clear cut provisions section 50B(3) of the Act. Virtually, the appellant should have furnished the net worth value, while filing its return of income as it was warranted under the provisions of law. Thus, non-compliance of the provisions of the Act will in no way help the appellant but it will be intended to hold that the appellant company has clearly violated the provisions of the law. Thus, non-compliance of such statutory provision will not at all help the appellant company in view of the explicit provision available on the statute in the form of Section 50B read with section 2(42C) of the Act.

13.18 Further to that, i would also like to take support from the following judicial pronouncements which support my view wherein it has been held that the rational construction to achieve the intention of the legislature is must:-

1. *C.W.S. (India) Ltd. vs. CIT (194) 118 CTR (SC) 118: (194) 208ITR 649 (SC).*

2. *K. Govindan & Sons vs. CIT(200) 164 CTR (SC) 490 : (2001) 247 ITR 192 (SC).*

3. *Dy. CIT vs. Shaw Wallace & Co. Ltd. (2001) 165 CTR (Cal) 489: (2001) 248 ITR 81 (Cal).*

13.19 In view of the aforesaid discussion of the appellant's submission as well as AO's order and also taking note of the various judicial pronouncements as illustrated above, I am of the considered view that the AO was completely justified in his action of taxing the income arising to the appellant on account of sale of refractory business undertaking of the appellant as slump sale. Accordingly, the AO's order is confirmed. Consequently, the appellant's appeal on this ground is dismissed.

115. Ld.DR brought to our notice that this issue is discussed by the Assessing Officer in Para No. 12 of the assessment order available on page 24 to 34 of the order and in para 13 of the CIT(A)s order available on page No. 29 to 55 of the order. Both the Assessing Officer & the Ld.CIT(A) have dealt with the assessee's submissions (both factual and legal) in great detail and after analysis of the provision of section 50B

brought on statute w.e.f. 01.04.2000; drawing the reference from clauses of the Business Transfer Agreement entered between the assessee and the purchaser i.e. M/S. ACE Refractories Ltd; and distinguishing the various case laws relied upon by the assessee, have come to the conclusion that the sale of the refractory business is not an itemized sale of various business assets but a slump sale u/ s. 50B of the Act.Ld.DR relied on the orders passed by the Assessing Officer and Ld.CIT(A).

116. Considered the rival submissions and material placed on record. It is observed that assessee has divested its refractory business for total consideration of ₹.257.47 crores to ACE refractories Limited. While filing return of income, the assessee has shown income on the basis of such sale treating the same as item-wise sale on the basis that assessee company got valuation done of individual assets of the undertaking by the approved valuer. Thus, sale consideration received which was referable to depreciable asset has been reduced from respective block of assets while computing depreciation and sale consideration referable to non-depreciable assets was considered in computing capital gain except for technical know how. The assessee has considered value assigned to technical know how as capital receipt relying on decision of Hon'ble Supreme Court in the case of B.C. Shrinivas Shetty 128 ITR 249. The assessee has offered sale consideration relating to Brand Name, Trade Mark, Patent and Goodwill to tax as there was no cost of acquisition of such assets. The break up of such consideration is referred by Assessing Officer at Para No. 12.1 of assessment order. Thus, assessee has offered capital gain of ₹ 19.20 crore in return of income.

117. While passing the assessment order, Assessing Officer has referred to Business Transfer Agreement(BTA) and observed that sale and transfer of the refractory business has been effected as going concern on slump sale basis. The purchaser too acquired and accepted the business as a going concern on slump sale basis. Considering such fact, Assessing Officer has referred to provisions of Section 50B of the Act and observed that as per BTA, sale was slump sale within the meaning of Section 2(42C) of the Act. While passing the assessment order, Assessing Officer has computed Capital gain u/s 50B of the Act as under:

Particulars	Amount	Amount
Full value of consideration		2,57,47,60,956
Less: Net worth of the undertaking		
Net Fixed Assets	24,31,64,634	
Capital work in progress	2,78,56,147	
Working Capital	55,58,29,633	
Long term liability	(1,96,13,710)	
Capital gain u/s 50B		**1,76,75,24,251**

118. As assessee has reduced block of asset by sale value attributable to depreciable assets and claimed lower depreciation, Assessing Officer has allowed higher depreciation of ₹12,50,71,313/- while computing total income. The addition made by Assessing Officer was upheld by Ld.CIT(A) for reasons stated supra.

119. The Assessee has filed appeal against above addition. During the course of appellate hearing, Ld AR has mainly referred to provisions of Section 50B of the Act and relied upon the decision of Hon'ble Supreme court in the case of CIT v. Artex Manufacturing Co 227 ITR 260 and argued that sale consideration had been arrived at by taking into consideration the value of various assets as assessed by the valuer and it is clear that the said transaction involved assigning values to the individual assets and liabilities hence such transaction of the assessee does not fall under the ambit of "Slump Sale". The Ld. AR has also referred to relevant submissions and documents filed before Assessing Officer and Ld.CIT(A) in support of his claim. On the other hand, Ld. DR has mainly relied upon finding given by lower authorities, brought to our notice various observations made by the lower authorities and contended that working of capital gain u/s 50B made by Assessing Officer needs to be upheld.

120. On the other hand, Ld. DR has also referred to relevant terms of BTA agreement and submitted that the section 50B is introduced in 1.4.2000, in this regard she relied on the decision of Hon'ble Kerala High court in the case of CIT Vs Accelerated Freeze Drying Pvt Limited 198 Taxman 18 in support of her claim. Further she brought to our notice Para No. 13 of the appellate order and relied on the findings of Ld.CIT(A). She also submitted that the case law relied by the Ld.AR are relating to Old provisions and before amendment, hence it may not be applicable.

121. Considered the rival submissions and material placed on record. On perusal of relevant facts on records, it is relevant to refer to Section 50B of the Act which is reproduced as under:-

> *"50B. Special provision for computation of capital gains in case of slump sale-*
>
> *(1) Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place:*
>
> *Provided that any profits or gains arising from the transfer under the slump sale of any capital asset being one or more undertakings owned and held by an assessee for not more than thirty-six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets.*
>
> *(2) In relation to capital assets being an undertaking or division transferred by way of such sale, the "net worth" of the undertaking or the division, as the case may be, shall be deemed to be the cost of acquisition and the cost of improvement for the purposes of sections 48 and 49 and no regard shall be given to the provisions contained in the second proviso to section 48.*
>
> *(3) Every assessee, in the case of slump sale, shall furnish in the prescribed form along with the return of income, a report of an accountant as defined in the Explanation below sub- section (2) of section 288, indicating the computation of the net worth of the undertaking or division, as the case may be, and certifying that the net worth of the undertaking or division, as the case may be, has been correctly arrived at in accordance with the provisions of this section.*
>
> *Explanation 1.--For the purposes of this section, "net worth" shall be the aggregate value of total assets of the undertaking or division as reduced by the value of liabilities of such undertaking or division as appearing in its books of account:*
>
> *Provided that any change in the value of assets on account of revaluation of assets shall be ignored for the purposes of computing the net worth.*
>
> *Explanation 2.--For computing the net worth, the aggregate value of total assets shall be,--*
>
> *(a) in the case of depreciable assets, the written down value of the block of assets determined in accordance with the provisions contained in sub-item (C) of item (i) of sub- clause (c) of clause (6) of section 43;*
>
> *(b) in the case of capital assets in respect of which the whole of the expenditure has been allowed or is allowable as a deduction under section 35AD, nil; and*
>
> *(c) in the case of other assets, the book value of such assets."*
>
> ***Further, Section 2 (42C)** of the Act defines "slump sale" means the transfer of one or more undertaking, by any means, for a lump sum consideration without values being assigned to the individual assets and liabilities in such transfer.*

Section 50B was introduced by virtue of the Finance Act, 1999 w.e.f. 1st April, 2000 to provide for special provisions for computation of capital gains in the case of slump sale. Prior to the insertion of the aforesaid Section, there was much debate as to whether capital gains arising out of slump sale of an undertaking were taxable under the provisions of the Act. The principal ground for excluding capital gains on a slump sale from the charge of tax was the absence of any machinery provisions for computing the cost of acquisition of the undertaking as in a slump sale only the lump sum consideration is fixed without assigning any values to separate assets constituting the undertaking.

122. Further, Section 2 (42C) of the Act defines "slump sale" means the transfer of one or more undertaking, by any means, for a lump sum consideration without values being assigned to the individual assets and liabilities in such transfer Section 50B was introduced by virtue of the Finance Act, 1999 w.e.f. 1st April, 2000 to provide for special provisions for computation of capital gains in the case of slump sale. Prior to the insertion of the aforesaid Section, there was much debate as to whether capital gains arising out of slump sale of an undertaking were taxable under the provisions of the Act. The principal ground for excluding capital gains on a slump sale from the charge of tax was the absence of any machinery provisions for computing the cost of acquisition of the undertaking as in a slump sale only the lump sum consideration is fixed without assigning any values to separate assets constituting the undertaking.

123. The provisions of section 50B are in consonance with the two decisions of the Hon'ble Supreme Court in the cases of CIT v. Artex Mfg. Co. [1997] 227 ITR 260/93 Taxman 357 and CIT v. Electric Control Gear Mfg. Co. [1997] 227 ITR 278/93 Taxman 384. In both these cases, one of the issues for consideration before the Supreme Court was whether the surplus received by the assessee on sale of the entire business as a going concern was taxable under section 41(2). In the first case, the Supreme Court held that since the price attributable to plant and machinery and dead stock which were transferred had been disclosed by the assessee during the course of assessment proceedings before the ITO, section 41(2) was applicable, but under this section the liability was limited to the amount of surplus to the extent of difference between the written down value and the actual cost. The Supreme Court further held that if the amount of surplus exceeded the difference between the written down value and the

actual cost, then the surplus amount to the extent of such excess will have to be treated as capital gains for the purpose of taxation. In the second case, in the agreement for sale of the entire business as a going concern, there was nothing to indicate the price attributable to assets like machinery, plant or building out of the sale consideration amount. Therefore, the Supreme Court held that provisions of section 41(2) were not applicable. It is for this reason that in the definition of 'slump sale' in the proposed new clause (*42C*), it has been provided that the sale should be for a lump sum consideration without values being assigned to individual assets and liabilities.

124. It is relevant to refer to decision of the Supreme Court in the cases of *CIT* v. *Artex Mfg. Co.* [1997] 227 ITR 260 wherein the gains were held to be taxable:

> *"Section 41(2), read with section 45, of the Income-tax Act, 1961 - Balancing charge - Assessment year 1967-68 - Assessee-firm sold its business as a going concern - Plant, machinery and dead-stocks were revalued by valuers and sale consideration was arrived at though there was no reference to value of plant, machinery and dead-stock in agreement to sell - Whether on facts section 41(2) was attracted - Held, yes - Whether surplus to extent of difference between written down value and actual cost had to be taxed under section 41(2) and remaining surplus, if any, had to be treated as capital gains - Held yes*
>
> *Section 45, read with section 41(2), of the Income-tax Act, 1961 - Capital gains - Chargeable as - Assessment year 1967-68 - Whether, where business is sold as a going concern valuing plant and machinery, etc., surplus arising over and above difference between written down value and actual cost has to be taxed under section 45 - Held, yes"*

125. The Hon'ble Supreme court at Para No. 12 of its order has observed that "Shri Ganesh, the learned counsel appearing for the assessee, has submitted that in the present case the value of the plant, machinery and dead-stock is not mentioned in the agreement and the agreement does not indicate the value attributable to the said items. It is no doubt true that in the agreement there is no reference to the value of the plant, machinery and dead-stock. But on the basis of the information that was furnished by the assessee before the ITO it became evident that the amount of ₹.11,50,400 had been arrived at by taking into consideration the value of the plant, machinery and dead-stock as assessed by the valuer at ₹.15,87,296. This is not a case

in which it cannot be said that the price attributed to the items transferred is not indicated and, hence, section 41(2) cannot be applied. We are, therefore, unable to agree with the view of the High Court that section 41(2) is not applicable. Question No. 2 referred to the High Court is, therefore, answered in the affirmative, i.e., in favour of the revenue and against the assessee."

126. With this back ground and considering provisions of Section 50B and Section 2(42C) as discussed herein above, it is observed that lower authorities have treated sale of refractory business as "slump sale" based upon BTA agreement executed with purchaser wherein total sale consideration is mentioned at ₹257 crore in lieu of transfer of business of refractories undertaking. It is observed that assessee got the valuation of all its assets and liabilities as on 30/06/2005 i.e before initiation of sale to determine the value of individual assets and value of assets were determined at ₹249.42 crore (nearly ₹ 250 crore). It is undisputed fact that in the board note, it is clearly mentioned that transaction would be item wise sale. The assessee has brought on record that sale of refractory business was preceded by bidding and assessee had declared a floor price of ₹.250 crore for the bidding purpose and such fact is mentioned in Board note and such price was based on values assigned to various assets as mentioned in valuation report. The lower Authorities have never doubted the genuineness of such valuation report determining value of each assets/liabilities. It is found that bind letter, the purchaser has mentioned that the transaction may be structured as a slump sale or slump sale with an item wise category wise break up. When entire transaction was approved in Shareholder meeting, it was never stated that assessee is selling the undertaking on "Slump Sale" basis which also supports the contention of assessee that provisions of Section 50B is not applicable to it. It is observed that both assessing officer and CIT(A) has applied provisions of Section 50B by simply relying upon relevant para of BTA wherein it is stated that " vendor agrees to sell, convey, assign and transfer the Refractory business as a going concern on a slump sale basis (para 2.1) but has completely ignored the relevant final bidding offer for the Refractory business as reproduced at Page No 51 of CIT(A)'s order wherein it is clearly mentioned that ACC Refractories business will be transferred as a going

concern on an " as it where is basis" as a slump sale or a slump sale with item wise/category wise break up (i.e., land, plant & machinery, copyright, technical know howetc) which clearly prove that sale of under taking was after assigning value to each assets/liabilities transferred by assessee. Taxability cannot be decided solely relying upon few words as mentioned in BTA but needs to be decided based upon all relevant facts/evidences which are material in nature. It is relevant to note that transfer of business as going concern is not material in present facts of the case but what is material is that assessee has assigned the value to each assets/liabilities of undertaking which is sold and such value is based upon valuation report already on record. Even Hon'ble Supreme court in the case of CIT v. Artex Mfg. Co(supra) has observed that even though agreement does not indicate the value attributable to the said items, it does not mean that sale of undertaking was on "Slump Sale basis"

127. During the course of appellate hearing, Ld.DR has relied upon following terms & conditions of BTA :

"2.5 It is hereby clarified that such separate deeds of conveyance and assignment and the other documents mentioned in Article 2.3 and 2.4 hereinabove are being executed for the purposes of compliance with the provisions of applicable laws for conveying and assigning the right title and interest of the Vendor in the Immovable Property and assigning/creating leave and licenses and for assigning the trade mark "Firecrete". ***The Parities here to confirm and agree that the Purchase price is payable by Purchaser to Vendor as the single Undivided slump sale consideration for the entire Refractory Business with no independent values being assigned to the various components of the Refractory Business****. However for the discharge of statutory tax liabilities namely stamp duty registration charges if applicable on the conveyance of Immovable Property, appropriate values may be assigned by the Parties to the same. Such indication of the value of the property in the respective deeds of conveyance, deeds of assignment and other Related Agreements shall not be deemed or construed as allocation of the slump sale consideration amounts as referred to in Article 3.1 hereinafter, by the Parties to the respective properties."* { Ref. Page 73 of assessee's paper book dt. 15.07.2022.}

128. It is observed that above referred clause was inserted for the purpose to avoid confusion between agreed consideration between two parties and value assigned at the time of execution of Separate conveyance deed/deed of assignments for immovable proprieties. The Ld.DR has only referred partial terms & conditions of such BTA as highlighted in above referred para but has completely ignored the later para wherein it is clarified that "Such indication of the value of the property in the respective deeds of conveyance, deeds of assignment and other Related Agreement shall not be deemed or constructed as allocation of slump sale consideration amount referred to in Article 3.1…." which means that when stamp duty is paid on various immovable property considering its value, such aggregate value cannot be considered as Sale of Undertaking as various assets/liabilities of undertaking transferred does not only include immovable properties but movable properties as well as other intangible assets and agreed consideration of all assets were at ₹.257 crore. It was submitted that this para was inserted for very specific purpose to avoid any dispute between seller and purchaser regarding agreed consideration of transfer of assets of undertaking. As held herein above, both buyer and seller were very well aware that transfer of undertaking was item wise sale and not on lumpsum basis. In the present case, assessee has valued each assets separately in valuation report and same was already on record of AO along with the fact that bid letter as well as Board note clearly states that transaction would be item wise sale and such facts cannot be ignored. Hon'ble Madras High court in the case of CIT v. Shiva Distilleries Ltd [2020] 116 taxmann.com 929 has held that "Where transfer price of undertaking was based on individual assets and liabilities, said sale would not qualify as 'Slump Sale' as per section 2(42C)". In the case of Sanmar Speciality Chemicals Limited [2020] 118 taxmann.com 78, similar view is rendered by Hon'ble Madras High court.

129. So far as observation of Ld.CIT(A) that valuation was carried out by assessee for its own purpose, it is observed that such valuation is never disputed by lower authorities. The fact that sale of undertaking was item wise sale was clearly mentioned in Board Note as well as Bid Letter as discussed herein above hence it cannot be held that valuation was only for individual purpose. It was not the case that valuation was

done after sale of undertaking or made by buyer of undertaking for allocating value of assets in its books of account after acquiring the undertaking but it was made by seller i.e assessee and that too before sale of items wise assets/liabilities of undertaking. The observation of Ld.CIT(A) that annual report of assessee company nowhere show any specific assignment of any item of the refractory business is not determinative considering the fact that sale of undertaking was on "slump sale basis" was never conveyed in Shareholder meet and on the contrary in Board Note, it was clearly mentioned that transaction would be an item wise sale.

130. We observe that in Article 4 of the BTA, it is specifically provided that "the vendor shall even after the effect date continue to retain and be responsible for various liabilities relating to the refractory business in the said articles" and in the definitions of "liabilities" as per BTA agreement, it has been specifically stated that few liabilities specifically mentioned in the agreement is excluded. Further in Part D of Schedule 1 of the BTA Agreement, list of the properties owned by the company which would be given to purchaser on leave and license basis is given. Thus, on holistic consideration of entire agreement, all the assets and liabilities of undertaking is not transferred entirely to purchaser which also make present sale transaction out of ambit of provisions of Section 50B of the Act. Hon'ble Kolkata ITAT in the case of DCIT v. Tongani Tea Co. Ltd [2015] 63 taxmann.com 149 has observed that "the assessee had listed out every item of movable property transferred to the buyer and value had been assigned to those movable assets. The assessee had not transferred the estate with all the assets and liabilities. All the financial assets available to the assessee up to the date of the transaction were not transferred as per the agreement but had been retained by the assessee. The assessee had assumed all the liabilities including the statutory liabilities till the date of transfer. Therefore, it could not be said that the transfer was a slump sale only for the reason that the tea estate was transferred to the buyer as a 'going concern". It is observed that the revenue carried the matter by way of an appeal before Hon'ble Calcutta High Court in ITA No. 203 of 2016, which was dismissed by judgment and order dated 29th June, 2018. Similar view is given by Hon'ble Cochin ITAT in the case of Harrisons Malayalam Ltd [2009] 32 SOT 497.

131. So far as reliance placed by Ld. DR on the decision of Hon'ble Kerala High court in the case of CIT v. Accelerated Freeze Drying Co. Ltd [198 Taxman 18], wherein assessee-company, engaged in seafood processing and export of products of its own factories, transferred one of its industrial units as a going concern during the relevant assessment year for certain consideration. The consideration agreed was the aggregate value for the land, building, machinery and all equipment's with liabilities specifically mentioned in the agreement entered into between the parties. The sale was in two parts; one sale deed executed and registered covered land and building, and for the purpose of payment of stamp duty and registration fee a valuation was separately made based on which stamp duty and registration fee were paid. The assessee initially treated the sale of the industrial unit as 'slump sale' and obtained auditor's report in Form No. 3EA prescribed under rule 6H of the Income-tax Rules, 1962, which is the requirement for the purpose of assessment of capital gains on 'slump sale' under section 50B(3). However, in the return filed, the assessee showed the transaction for assessment of capital gains as the sale of depreciable items under section 50 and contended that Form No. 3EA was furnished as a precaution. The Assessing Officer noticed that the sale was a 'slump sale' falling within the definition of section 2(42C) and, accordingly, made the assessment for capital gains as provided under section 50B. The Hon'ble Court observed that sale was of an industrial undertaking as a whole which included land, building, machinery, equipment, etc., as a going concern with all the assets and liabilities. It was found by Hon'ble Court that sale of the undertaking was a slump sale within the meaning of section 2(42C) assessable under section 50B and the assessee also rightly styled the transaction as 'slump sale' in the sale documents and even got the auditor's report prepared and filed along with return in terms of section 50B(3). However, in present case, as discussed herein above, sufficient evidences are placed on record to prove that transaction was item wise sale and valuation was obtained prior to date of sale of undertaking and both buyer and seller was very well aware that transfer was not slump sale but item wise sale as discussed supra. Considering such facts, ratio of decision relied upon by Ld. DR cannot be made applicable in present case.

132. Considering the facts discussed herein above, it is found that Assessing Officer has wrongly invoked provisions of Section 50B of the Act for computing Income from Capital gain on sale of undertaking in the year under consideration. The assessee has correctly treated transaction of sale as item wise sale in return of income and computed Income from capital gain as applicable to sale of Individual item of assets. Thus, addition made by Assessing Officer and sustained by Ld.CIT(A) cannot be upheld and related ground of appeal is allowed.

133. In the Ground No 8 Assessee has raised the following grievance:

> *"8. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals)was not justified and grossly erred in treating the ground claiming deduction u/s 80Ia in respect of Unit-Chanda, Tikkaria, Madukarai and Chaibasaas infructuous."*

134. During the course of appellate proceedings, Ld AR has not pressed this ground of appeal hence same is dismissed as not pressed.

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

> *"9. That on the facts and in the circumstances of the case, necessary direction may please be given to the A.O. to allow deduction in respect of Education Cess on Income Tax, Fringe Benefit Tax and Dividend Distribution tax in computing total income."*

136. During the course of appellate proceedings, Ld.AR has not pressed this ground of appeal hence same is dismissed as not pressed.

137. In the Ground No 10 and 11 Assessee has raised the following grievance: -

> *"10. 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 fixed assets of Rs. 1,83,49,29,359/- in computing Book Profit u/s 115JB."*
>
> *"11. 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 Rs. 1,18,47,64,879/- in computing Book Profit u/s 115JB."*

138. The Assessing Office has dealt with this issue at Para No. 24 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. 22.2 of his order as under: -

> *"I have considered the AO's order as well as the appellant's A/R submission. Having Considered both, I find that similar issue has been decided by my predecessor against the appellant in A.Y. 2002-03 & 2005-06. Hence in view of the reasoning given thereon, I consider it proper and appropriate not to deviate from the orders of erstwhile CIT(A) and accordingly this ground of appeal is dismissed."*

139. 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 the Coordinate Bench. However, Ld. AR has relied upon following decisions in support of the 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)

140. 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 upheld.

141. 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 Revenue. 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 Rs.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. "

142. However, during the course of the hearing the Ld. AR also referred to the decision of Hon'ble Karnataka HC 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.

……."

143. 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 IT Act. It is also to be noted that in the immediately preceding year i.e. AY 2004-05, 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. However, it was only during the current year as well as AY 2005-06 that the Ld. AR of the assessee referred to the decision of Hon'ble Karnataka High Court as relied and reproduced supra. Extensively relying on it 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 as well as investments after giving the benefit of indexed cost of acquisition (if applicable) while computing taxable profits u/s 115JB of the Act. Thus, Assessee's appeal is partly allowed for statistical purpose, subject to the directions herein above.

144. In the Ground No 12 Assessee has raised the following grievance:

"12. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in confirming the addition of corporate tax paid

at Saudi Arabia amounting to Rs.1,47,12,017/- in computing Book Profit u/s 115JB."

145. The Assessing Office has dealt with this issue at Para No. 28 of his order. The Assessing Officer has observed that assessee has paid a sum of ₹1,47,12,017/- as income tax on Overseas Project at Yanabu Saudi Arabia. Such amount was not increased while computing book profit u/s 115JB of the Act. Thus, Assessing Officer has referred provisions of Section 115JB of the Act and held that book profit is required to be increased by the income tax paid or payable, whether it is paid in India or Saudi Arabia and on this ground, he has increased book profit u/s 115JB of the Act. In appeal Ld.CIT (A) has discussed the above issue at Para No. 27.2 of his order and held as under:

"27.2 I have considered the AO's order as well as appellant AR's submission. Having considered both, I find that the issue raised in this-ground of appeal by the appeal is consistently decided against the appellant by my predecessor in the appellate order for A.Yr.2005-06. Taking note of the same and the reasons as given by my predecessor in the appellate order for A.Yr.2003-04 to 2005-06, I also hold that the appellant's claim raised through this ground of appeal is not justified relying on the decision of my predecessors and also role of consistency, I consider it proper and appropriate to dismiss this ground of appeal of the appellant."

146. Against the above observation of Ld.CIT (A), assessee has preferred appeal. During the course of appellate hearing, Ld.AR has argued that issue is covered in favour of assessee by decision of Hon'ble Bombay High court and Karnataka High court referred herein below:

(i) Wipro Limited v. DCIT [IT(TP)A No. 2556 of 2019 (Bangalore Tribunal)]

(ii) Reliance Infrastructure Ltd. V. CIT [(2016) 390 ITR 271 (Bom HC)]

(iii) Wipro Ltd. v. DCIT (382 ITR 179 (Karnataka)

(iv) Bank of India v. ACIT [ITA No.869 of 2018 dated March 04, 2021 (Mumbai Tribunal)]

147. On the other hand, Ld DR has argued that Assessing Officer was correct in making addition u/s 115JB of the Act and in support of her claim, she relied upon decision of AAR *v.* New Delhi Bank of India [165 Taxmann.com 627].

148. Considered the rival submissions and material placed on record. It is observed that identical facts have been discussed by Hon'ble Bombay High court in the case of Reliance Infrastructure Limited *v.* CIT [76 Taxmann.com 257 (2016)]and held as under:

> *II. Section 40(a)(ii) of the Income-tax Act, 1961 - Business disallowance - Taxes (Foreign tax) - Assessment year 1983-84 - Indian assessee executed projects in Saudi Arabia and paid taxes there - Whether since foreign tax was paid on a part of global income which had accrued or arisen in India, to extent of said tax, benefit of double taxation relief under section 91 would not be available; however, assessee would be entitled to a deduction in respect of tax so paid as an expenditure incurred to earn global income - Held, yes [Para 4][In favour of assessee]……..*
>
> ***4.*** *Regarding question (iii) :-*
>
> (*a*) The applicant assessee claimed that it should be allowed a deduction of the tax paid in Saudi Arabia, if it is held that the benefit of Section 91 of the Act is not available. This deduction is claimed only to the extent tax has been paid in Saudi Arabia on the income which has accrued/arisen in India. This claim was made on the basis of Real Income Theory.
>
> ……
>
> (*h*) Before dealing with the rival contentions, it would be useful to reproduce the statutory provision arising for our consideration to decide this issue.
>
> "Definitions
>
> 2. In this Act, unless the context otherwise requires, -
>
> (1) to (42)** ** *
>
> 43. "tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date [and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under Section 115WA]
>
> "Amounts not deductible
>
> 40. Notwithstanding anything to the contrary in Section 30 to the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession".
>
> (*a*) In the case of any assessee –

(i), (ia), (ib), (ic)** ** **

(*ii*) Any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits and gains.

[Explanation 1. - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under Section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.]

[Explanation 2. - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under Section 90A.]"

(*l*) We have considered the rival submissions. So far as the question relating to the Tribunal not following its order in the case of the applicant itself for A.Y. 1979-80, we find that there is a justification for the same. This is so as the decision of this Court in *S. Inder Singh Gill* (*supra*) was noted by the Tribunal on an identical issue while passing the order for the subject assessment year. Thus, the Tribunal had not erred in not following its order for A.Y. 1979-80. In fact, the decisions of this Court in *South East Asia Shipping Co.* (*supra*) and *Tata Sons Ltd.* (*supra*), which are being relied upon in preference to *Inder Singh Gill* (*supra*) cannot be accepted as both the orders being relied upon by the applicant was rendered not at the final hearing but on applications under Section 256(2) of the Act and at the stage of admission under Section 260A of the Act. This unlike the judgment rendered in a Reference by this Court in *S. Inder Singh Gill* (*supra*). Moreover, the decision in *South East Asia Shipping Co.* (*supra*) is not available in its entirety. Therefore, it would not be safe to rely upon it as all facts and on what consideration of law, it was rendered is not known. Similarly, the decision of this Court in *Tata Sons* (*supra*) being Income Tax Appeal No.209 of 2001 produced before us, dismissed the appeal of the Revenue by order dated 2nd April, 2004 by merely following its order dated 23rd March, 1993 rejecting the Revenue's application for Reference under Section 256(2) of the Act. Thus, it also cannot be relied upon to decide the controversy. Moreover, the order of this Court in *Tata Sons Ltd.* (*supra*) as produced before us for Assessment Year 1985-86 had not noticed the decision of this Court in *S. Inder Singh Gill* (*supra*) on a Reference. Therefore, it is rendered *per incuriam*.

(*j*) This Court in *S. Inder Singh Gill* (*supra*) was required to answer the question whether for the purpose of computing total world income of the assessee as defined in Section 2(15) of the I. T. Act, the income accruing in Uganda has to be reduced by the tax paid to the Uganda Government in respect of such income? The Court while answering the question in the negative observed that it is not aware of any commercial principle/practice which lays down that the tax paid by one on one's income is allowed as a deduction in determining the income for the purposes of taxation.

(*k*) It is axiomatic that income tax is a charge on the profits/ income. The payment of income tax is not a payment made/incurred to earn profits and gains of business. Therefore, it cannot be allowed an as expenditure to determine the profits of the business. Taxes such as Excise Duty, Customs Duty, Octroi etc., are incurred for the purpose of doing business and earning profits and/or gains from business or profession. Therefore, such expenditure is allowable as a deduction to determine the profits of the business. It is only after deducting all expenses incurred for the purpose of business from the total receipts that profits and/or gains of business/ profession are determined. It is this determined profits or gains of business/profession which are subject to tax as income tax under the Act. The main part of Section 40(a)(ii) of the Act does not allow deduction in computing the income i.e. profits and gains of business chargeable to tax to the extent, the tax is levied/ paid on the profits/ gains of business. Therefore, it was on the aforesaid general principle, universally accepted, that this Court answered the question posed to it in *S. Inder Singh Gill* (*supra*) in favour of the Revenue.

(*l*) We would have answered the question posed for our consideration by following the decision of this Court in *S. Inder Singh Gill* (*supra*). However, we notice that the decision of this Court in *S. Inder Singh Gill* (*supra*) was rendered under the Indian Income Tax Act, 1922 and not under the Act. We further note that just as Section 40(a)(ii) of the Act does not allow deduction on tax paid on profit and/or gain of business. The Indian Income Tax Act, 1922 Act also contains a similar provision in Section 10(4) thereof. However, the Indian Income Tax Act, 1922 contains no definition of "tax" as provided in Section 2(43) of the Act. Consequently, the tax paid on income/profits and gains of business/profession anywhere in the world would not be allowed as deduction for determining the profits/gains of the business under Section 10(4) of the Indian Income Tax Act, 1922. Therefore, on the state of the statutory provisions as found in the Indian Income Tax Act, 1922 the decision of this Court in *S. Inder Singh Gill* (*supra*) would be unexceptionable.

However, the ratio of the aforesaid decision in *S. Inder Singh Gill* (*supra*) cannot be applied to the present facts in view of the fact that the Act defines "tax" as income tax chargeable under the provisions of this Act. Thus, by definition, the tax

which is payable under the Act alone on the profits and gains of business are not allowed to be deducted notwithstanding Sections 30 to 38 of the Act.

(*m*) It therefore, follows that the tax which has been paid abroad would not be covered with in the meaning of Section 40(a) (ii) of the Act in view of the definition of the word 'tax' in Section 2(43) of the Act. To be covered by Section 40(a)(ii) of the Act, it has to be payable under the Act. We are conscious of the fact that Section 2 of the Act, while defining the various terms used in the Act, qualifies it by preceding the definition with the word "In this Act, unless the context otherwise requires" the meaning of the word 'tax' as found in Section 2(43) of the Act would apply wherever it occurs in the Act. It is not even urged by the Revenue that the context of Section 40(a)(ii) of the Act would require it to mean tax paid anywhere in the world and not only tax payable/ paid under the Act.

(*n*) However, to the extent tax is paid abroad, the Explanation to Section 40(a)(ii) of the Act provides/clarifies that whenever an Assessee is otherwise entitled to the benefit of double income tax relief under Sections 90 or 91 of the Act, then the tax paid abroad would be governed by Section 40(a)(ii) of the Act. The occasion to insert the Explanation to Section 40(a)(ii) of the Act arose as Assessee was claiming to be entitled to obtain necessary credit to the extent of the tax paid abroad under Sections 90 or 91 of the Act and also claim the benefit of tax paid abroad as expenditure on account of not being covered by Section 40(a)(ii) of the Act. This is evident from the Explanatory notes to the Finance Act, 2006 as recorded in Circular No.14 of 2006 dated 28th December, 2006 issued by the CBDT. The above circular inter alia, records the fact that some of the assessee who are eligible for credit against the tax payable in India on the global income to the extent the tax has been paid outside India under Sections 90 or 91 of the Act, were also claiming deduction of the tax paid abroad as it was not tax under the Act. In view of the above, Explanation inserted in 2006 to Section 40(a)(ii) of the Act, would require in the context thereof that the definition of the word "tax" under the Act to mean also the tax which is eligible to the benefit of Sections 90 and 91 of the Act. However, this departure from the meaning of the word "tax" as defined in the Act is only restricted to the above and gives no license to widen the meaning of the word "tax" as defined in the Act to include all taxes on income/profits paid abroad.

(*o*) Therefore, on the Explanation being inserted in Section 40(a)(ii) of the Act, the tax paid in Saudi Arabia on income which has accrued and/or arisen in India is not eligible to deduction under Section 91 of the Act. Therefore, not hit by Section 40(a)(ii) of the Act. Section 91 of the Act, itself excludes income which is deemed to accrue or arise in India. Thus, the benefit of the Explanation would now be available and on application of real income theory, the quantum of tax paid in Saudi Arabia, attributable to income arising or accruing in India

would be reduced for the purposes of computing the income on which tax is payable in India.

(*p*) It is not disputed before us that some part of the income on which the tax has been paid abroad is on the income accrued or arisen in India. Therefore, to the extent, the tax is paid abroad on income which has accrued and/or arisen in India, the benefit of Section 91 of the Act is not available. In such a case, an Assessee such as the applicant assessee is entitled to a deduction under Section 40(a)(ii) of the Act. This is so as it is a tax which has been paid abroad for the purpose of arriving global income on which the tax payable in India. Therefore, to the extent the payment of tax in Saudi Arabia on income which has arisen/accrued in India has to be considered in the nature of expenditure incurred or arisen to earn income and not hit by the provisions of Section 40(a)(ii) of the Act.

(*q*) The Explanation to Section 40(a)(ii) of the Act was inserted into the Act by Finance Act, 2006. However, the use of the words "for removal of doubts" it is hereby declared "...." in the Explanation inserted in Section 40(a)(ii) of the Act, makes it clear that it is declaratory in nature and would have retrospective effect. This is not even disputed by the Revenue before us as the issue of the nature of such declaratory statutes stands considered by the decision of the Supreme Court in *CIT* v. *Vatika Township (P) Ltd.* [2014] 367 ITR 466/227 Taxman 121/49 taxmann.com 249 and *CIT* v. *Gold Coin Health Foods (P.) Ltd.* [2008] 304 ITR 308/172 Taxman 386 (SC).

(*r*) In the above facts and circumstances, question (iii)(a) is answered in the negative i.e. against the Revenue and in favour of the applicant assessee. Question (iii)(b) is answered in the negative i.e. against the Revenue and in favour of the applicant assessee."

149. Hon'ble Karnataka High court in the case of WIPRO Limited [382 ITR 179] has also decided the similar issue in favour of assessee. The Ld.AR has also referred decision of coordinate bench in the case of Bank of India *v.* ACIT (supra) dated 04.03.2021 has also held that Assessee having earned profits/dividend on its operations in several countries, it will be allowed deductions in respect of taxes paid abroad, in respect of which no foreign tax credit was granted to assessee. Considering binding decisions of Jurisdictional High court and coordinate bench referred supra, claim of assessee is found to be as per provisions of law and this ground of appeal is accordingly allowed.

150. In the result, appeal of assessee is partly allowed.

ITA NO. 417/MUM/2014 (ASSESSEE APPEAL)

151. We now take up the appeal filed by the assessee in ITA No 417/Mum/2014.

152. In the Ground No.1, Assessee has raised the following grievance:

> *"1(a) That on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) [here-in-after referred to as Ld. CIT (Appels)] erred in computing direct and indirect expenditure for disallowance u/s.14A inspite of the fact that no such expenditure was incurred for earning the exempt income.*
>
> *1(b) That on the facts and in the circumstances of the case, and without prejudice to ground no.1(a), the Ld. CIT (A) erred in applying ratio of investment and total funds to the total interest expense considering the fact that interest expenses were incurred on borrowing used specific purposes.*
>
> *1(c). That on the facts and in the circumstances of the case, and without prejudice to ground no.1(a), the Ld. CIT (A) erred in considering ad-hoc amount of Rs.30,00,000/- as expenses of treasure Department for the purpose of computing disallowance u/s.14A.*

153. It is observed that identical issue is already decided partly in favour of assessee while dealing with Ground No 2 of Assessee appeal in ITA No 5655/Mum/2011 referred supra hence this ground of appeal does not require separate adjudication and same is dismissed.

154. In the Ground No 2, Assessee has raised the following grievance:

> *"That on the facts and in the circumstances of the case, Ld. CIT (Appels) was not justified and grossly erred in confirming the action of Assessing Officer in foreign currency, thereby violating the method prescribed in Section 91.*

155. It is observed that identical issue is already decided partly in favour of assessee while dealing with Ground No 4 of Assessee appeal in ITA No 5655/Mum/2011 referred supra hence this ground of appeal does not require separate adjudication and same is dismissed.

156. Ground no. 3 is general in nature and is thus dismissed.

157. To sum-up, Appeal filed by the revenue is dismissed and appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 28th February, 2023

Sd/-	Sd/-
(SANDEEP SINGH KARHAIL)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

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

Copy of the Order forwarded to:

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2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
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BY ORDER

(Asstt. Registrar)
ITAT, Mum

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.5655/MUM/2011 (A.Y: 2006-07)

M/s.ACC Limited (Formerly known as The Associated Cement Companies Ltd.) Cement House, 121, M.K. Road Churchgate, Mumbai-400020 **PAN: AAACT1507C**	*v.*	Addl. CIT -Range 1(1) Mumbai
(Appellant)		**(Respondent)**

ITA NO.3135/MUM/2019 (A.Y: 2009-10)

M/s. ACC Limited Cement House, 121, M.K. Road Churchgate, Mumbai-400020 **PAN: AAACT1507C**	*v.*	DCIT – LTU(1) 29th Floor, Centre – 1 World Trade Centre, Cuffe Parade Mumbai-400005
(Appellant)		**(Respondent)**

ITA NO.3137/MUM/2019 (A.Y: 2010-11)

M/s. ACC Ltd., Cement House, 121 M.K. Road, Churchgate Mumbai - 400020 **PAN: AAACT1507C**	*V.*	Deputy CIT (LTU) 29th Floor, Centre-1 World Trade Centre, Cuffe Parade Mumbai - 400005
(Appellant)		**(Respondent)**

CORRIGENDUM TO ORDER DATED 28.02.2023

PER S. RIFAUR RAHMAN (AM)

1. The above appeals were pronounced vide separate orders for each assessment year i.e. A.Y. 2006-07, 2009-10 & 2010-11 on 28.02.2023 and upon forwarding files and orders to the order section by the Senior Private Secretary on 08.03.2023, we observe certain mistake apparent on record, we are rectifying those mistake by passing this corrigendum suo motto as under: -

AY	Page No.	Remarks
2006-07		Additional ground on 43B liability not adjudicated.
2009-10	103	Para. No 94 - Provision for leave encashment allowed based on 115JB reference. Wrongly quoted order for AY 2004-05 instead of A.Y.2008-09 order and it's relevant reference.
2010-11	106-108	Para No. 95 & 96 - Ground no. 7 of Assessee's appeal related to education cess which was not pressed by Assessee, however wrongly adjudicated and partly allowed.
	119	Para. No 113 - Ground no 12 of Assessee's appeal related disallowance u/s 14A adjudicated by giving reference of exclusion of amount transfer to debenture redemption reserve.

ITA NO.5655/MUM/2011 (A.Y: 2006-07)

2. Assessee has raised additional ground for the A.Y.2006-07 which was not adjudicated on oversight, accordingly, we proceed to dispose of this ground by way of this corrigendum. In the additional ground the assessee has raised ground that outstanding BIS Marking fees of ₹.477,161/-, which was disallowed u/s 43B in A.Y.2005-06, it was prayed that this payment was made subsequently in the current assessment year and the assessee failed to claim the same in the return of Income. It was submitted that the assessee is entitled to raise the genuine and legal issue

before the appellate authorities in additional ground by relying on the decision of Hon'ble Bombay High Court in the case of CIT *v.* Pruthvi Brokers and Shareholders P Ltd [349 ITR 336]. On the other hand, Ld DR objected for the above proposition and the assessee could claim the same in the return of income and also not claimed by filing the revised return of income.

3. Considered the rival submissions and material placed on record. It was submitted that the assessee made the payment to BIS Marking in the current assessment year and the same is eligible to claim as business expenditure. After considering the submissions, we are inclined to remit this issue back to the file of Assessing Officer to verify the claim of the assessee and allow the same on the payment basis as per law. Therefore, this additional ground raised by the assessee is allowed for statistical purpose.

ITA NO.3135/MUM/2019 (A.Y: 2009-10)

4. At Para No. 94, we dealt with the issue of Leave Encashment allowance u/s 115JB, we observe that the similar issue was considered by us in the A.Y.2008-09 in Ground No 13 and instead of reproducing the decision, we have wrongly reproduced the findings given in the A.Y.2005-06. The more relevant facts for this ground is from Ground No.13 of A.Y. 2008-09. Therefore, we are hereby reproducing the above in the corrigendum for this Assessment Year as under:

> *"94. Similar issue was considered by us in the assessee appeal Ground No 13 in AY 2008-09 and held as under: -*

67. Considered the rival submissions and material placed on record. On perusal of relevant facts on record, it is observed that Hon'ble supreme court in the case of UOI v. Exide Industries Ltd. [425 ITR 1] has upheld constitutional validity of provision of section 43B(f) for provision for leave encashment liability and considering binding decision of Hon'ble Supreme Court claim cannot be allowed. However, if payment of such provision towards leave encashment is made in subsequent year, deduction may be allowed to assessee in such years if not allowed till date. Therefore, Assessing Officer is directed to verify and the same and allow the same as per our above directions. This ground of appeal is partly allowed.

95. Respectfully following the above decision, we partly allow the ground raised by the assessee."

ITA NO.3137/MUM/2019 (A.Y: 2010-11)

5. At Para Nos. 94, 95 & 96 we have adjudicated the ground raised by the assessee with regard to disallowance of education cess in Ground No.7 and partly allowed the ground raised by the assessee. However, on a perusal of the note sheet and chart submitted by the assessee, we observed that this ground was not pressed by the assessee. The same deserves to be dismissed. Accordingly, we are modifying the decision in the Para No. 96 in fact we are modifying the Para 95 and 96 as under:

"95 & 96. During the course of appellate proceedings, Ld.AR has not pressed this ground of appeal hence same is dismissed as not pressed."

6. At Para No. 112, 113 & 114 we have adjudicated the ground raised by the assessee with regard to disallowance u/s. 14A, however, inadvertently reliance was incorporated relating to Debenture redemption reserve issue, which is the mistake apparent in the Tribunal order. As there is mistake with respect to reference and extraction, we modify Para No. 113 & 114 of the Tribunal order in A.Y.2010-11 as under: -

"113. Similar issue was considered by us in the Assessee's Appeal in Ground No 1 in AY 2008-09 and held as under: -

"10. Considered the rival submissions and material placed on record. So far as proportionate interest disallowance u/s 14A is concerned, it is observed that Assessee has sufficient own funds in the form of share capital and reserves and surplus in comparison with investment in shares made by it. On this issue, Hon'ble Supreme Court in the case of South Indian Bank Ltd [2021] 130 taxmann.com 178 has held 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]

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

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

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

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

12. 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 in connection with proportionate interest disallowance deleted by the Ld.CIT(A) is sustained.

13 So far as disallowance of other administrative expenditure is considered, it is observed that Hon'ble Delhi ITAT in the case of Vireet Investment Pvt. Ltd. [165 ITD 27] has held as under:

> *"Section 14A of the Income-tax Act, 1961 read with rule 8D of the Income-tax Rules, 1962 - Expenditure incurred in relation to exempt income not includible in total income - Assessment year 2008-09 - Whether only those investments are to be considered for computing average value of investment which yielded exempt income during year - Held, yes [Para 11.16][Matter remanded]"*

14. The above referred decision has been followed by co-ordinate Bench in the case of DCIT v. Shree Global Tradef in Ltd. in ITA No. 1374/Mum/2022 dated 22nd December, 2022 has held as under:

> *"11. Having heard the rival submissions and perused the materials available on record. It is observed that the assessee has made a suo moto disallowance of Rs.1,263/- for which the assessee contends that the A.O. ought not to have applied Rule 8D on the ground that suo moto disallowance has been made by the assessee. The assessee further contends that without prejudice, the disallowance should be restricted only to the investments which have yielded an exempt income for the assessee during the impugned year. It is also pertinent to point out that since the assessee had not borrowed funds during the relevant year, no disallowance as per Rule 8D(2)(i) of the Income Tax Rules was warranted. It is also observed that the A.O. has recorded his satisfaction that the correctness of the assessee's claim of expenses of disallowance was not to the satisfaction of the A.O., thereby entitling the A.O. to invoke the provisions of Rule 8D and the decision of the Hon'ble Apex Court in the case of Maxopp Investment Ltd. (supra) holds good in the present case. We are also of the considered opinion that the ld. CIT(A) has rightly held that the assessee has not made bifurcation of the expenses claimed under 'other expenses' and in case of which the A.O. had to invoke Rule 8D of the Income Tax Rules. The suo moto disallowance of the assessee does not disentitle the A.O. from invoking the said provision. In this regard, we find justification in the order of the ld. CIT(A) in upholding the A.O.'s action in invoking the provision of Rule 8D(2)(ii) by rejecting the assessee's contention that suo moto disallowance by the assessee warrants no further disallowances. The assessee's alternate claim is that the disallowance u/s. 14A read with Rule 8D(2)(iii) should be restricted only to those investments on which exempt income was earned by the assessee during the impugned year, by placing reliance on the decision of Vireet Investments Pvt. Ltd. (supra). We also find justification in the order of the ld. CIT(A) in holding that the disallowance u/s. 14A read with Rule 8D(2)(iii) of the Act should be invoked for calculation of disallowance pertaining to only investment from which exempt income is earned by the assessee by placing reliance on the decision of the Special Bench of the Tribunal in the case of Vireet Investments Pvt. Ltd. (supra). We find no infirmity in the order of the ld. CIT(A).*

12. By respectfully following the above mentioned decisions, we uphold the order of the ld. CIT(A) in directing the A.O. to recompute the disallowance only to the investments which have yielded exempt income during the impugned year."

15. Considering the finding given by Coordinate Bench, the Assessing Officer is directed to re-work disallowance u/s.14A under rule 8D(2)(iii) on investment which has yielded exempt income and consider only those investments which yielded the exempt income. The assessee gets the relief accordingly. This ground of appeal is partly allowed."

114. Respectfully following the above decision, we partly allow the ground raised by the assessee."

7. The above corrigendum be read as part of the order dated 28.02.2022.

Corrigendum issued on 16th March, 2023.

Sd/-	**Sd/-**
(SANDEEP SINGH KARHAIL)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 16/03/2023
Giridhar, Sr.PS

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2. The Respondent.
3. The CIT(A), Mumbai.
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(Asstt. Registrar)
ITAT, Mum