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.6638/MUM/2018 (A.Y: 2008-09)

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 -LTU 29th Floor, Center-1 World Trade Centre, Cuffe Parade Mumbai-400005
(Appellant)		**(Respondent)**

ITA NO.268/MUM/2019 (A.Y: 2008-09)

Dy. CIT - LTU-1 29th Floor, Center-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 2008-09 arising from the Appellate Order dated 30th July, 2018 passed by the Ld.Commissioner of income Tax (Appeals) – 3 [hereinafter referred to as CIT(A)) whereby appeal filed by Assessee against the Assessment Order dated 26th December, 2011 passed under Section 143(3) of the Income Tax Act, 1961) hereinafter referred to as the Act) was partly allowed.

2. Further, the Ld. AR of the Assessee has vehemently relied upon decision of coordinate bench in the case of Ambuja Cement Limited, holding company of Assessee for A.Y.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. 268/MUM/2019 (REVENUE APPEAL)

3. First we take up, Revenue Appeal in ITA No. 268/Mum/2019 (common ground in assessee's appeal is also taken together).

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

> *"Whether, on the facts and in the circumstances of the case&in law, the Ld.CIT(A) erred in restricting the disallowance to Rs. 1,94,00,000/- made u/s. 14A r.w.r, 8D(2) of the I.T, Rules."*

5. On identical issue in Assessee's appeal, in the Ground No.1 & 2, following issue is raised:

> *"Ground No. 1: Disallowance of Rs. 1,94,00,000/- u/s. 14A of the Act:*
>
> *On the facts and in the circumstances of tire case and in law, the Commissioner of Income-tax(Appeals)-3 [hereinafter referred to as Ld. CIT (A)] was not justified and grossly erred in confirming the action of the Additional Commissioner of Income-tax (Large tax payer Unit) [hereinafter referred to as 'AO'] in adding back Rs. 1,94,00,000/- as notional expenses incurred towards earning exempt dividend income u/s 14A of the Income-tax Act, 1961 ('the Act') r.w.r 8D of the Income-tax Rules, 1962 ('the Rules'), without appreciating the fact that no expense, other than the amount offered by the appellant in the return of income, were actually incurred by the appellant for earning such income."*
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> *Ground No. 2:*
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> *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) was not justified and grossly erred in confirming the action of AO in applying Rule 8D and disallowing amounts representing pro-rata amounts related to expenses which has no direct and proximate nexus to exempt dividend income."*

6. The Assessing Officer has dealt with this issue at Para No 3 of his order. The relevant facts are that Assessee has shown exempt dividend income of ₹.42,96,57,033/- 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. The Assessing Officer computed disallowance under Rule 8D read with Section 14A at ₹.2.52 crore which comprises of proportionate interest disallowance at ₹.0.58 lacs under Rule 8D(2)(i) and other expenditure at ₹.1.94 crore under Rule 8D(2)(iii).

7. In appeal Ld.CIT(A) has discussed the above issue at Para No 4.4.1 & 4.4.2 of his order and held as under:

> *"4.4.1 In the course of the assessment proceedings, the appellant was requested to explain why Rule 8D should not be applied for computing the disallowance u/s 14A in view of its huge investments for earning exempt income. In its reply, the appellant stated that it had not incurred any expenditure which had direct and immediate nexus with the dividend income. The AO rejected the appellant's claim and invoked Rule 8D(2).*
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> *4.4.2 In my view, the only requirement for invoking the provisions of section 14A is non-satisfaction of the AO. There is no express provision in section 14A that*

the AO should record the reason for his non satisfaction, unlike in section 148. Therefore, I uphold invoking of section 14A.

4.4.3 In the assessment order the AO disallowed part of the interest expenditure under clause (ii) of Rule 8D(2). The appellant's contention in that it had sufficient interest free fund of its own for making the investments is correct. The total interest free capital of the appellant in the form of Share Capital and Reserves & Surplus far exceeded its total investments as is evident from the details furnished in the table below.

Particulars	***As on 31 March 2008*** *(Rs. in crores)*	***As on 31 March 2007*** *(Rs. In crores)*
Share Capital	*187.84*	*187.57*
Reserves & Surplus	*4310.88*	*3275.12*
Total Owned Capital	***4498.72***	***3462.69***
Total Investments	***667.18***	***344.51***
Investment in Subsidiaries	*172.32*	*34.87*
Strategic Investment	*25.60*	*-*
Investment in Bonds	*3.71*	*3.71*
Investment in Certificates of Deposit	*--*	*-*
Investment in Mutual Fund	*465.55*	*305.93*

4.4.4 Therefore, no disallowance of interest u/s. 14A read with rule 8D is warranted. Reliance in this regard is placed on the decision of the Hon'ble Bombay High Court in the case of CIT vs. HDFC Bank Ltd (366 ITR 529) (Bom)

4.4.5 The expenditure to be disallowed is reworked below (Rs. in crores):

under clause (i) of Rule 8D(2)	*0*
Under clause(ii) of Rule 8D(2)	*0*
Under clause(iii) of Rule 8D(2)	*1.9*
Total disallowance as per Rule 8D(2)	*1.9*

4.4.6 Thus total expenditure relatable to the exempt income comes to Rs. 1.94 crores. Considering the above facts, I restrict the addition made u/s 14A of the Act to Rs.1.94 crores. In the result ground No. 2 is partly allowed."

8. Both the Assessee and Department have filed appeal against the observation of Ld.CIT(A) referred supra. 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 AR has drawn our attention to Para No 4.4.3 of Ld.CIT(A) order wherein it is stated that Assessee has own funds in form of Share Capital & reserve to the tune of ₹.4498.72 crores as against investments made in shares for ₹.465.55 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.)*

9. The Ld.AR has alternatively also argued that disallowance u/s.14A should be restricted on investment which have actually yielded exempt income for which reliance was placed on decision of Hon'ble Delhi ITAT in the case of Vireet Investment Pvt. Ltd. [165 ITD 27]. The Ld. DR has relied upon the assessment order and contended that order of Assessing Officer may be restored.

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.

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

"Whether, on the facts and in the circumstances of the case & in law, the Ld. CIT(A) erred in deleting the addition of unutilized CENVAT Credit amounting to Rs.5,88,54,272/- even though section 45 of the Act makes it mandatory to make adjustment in computing total income as has been rightly done by the Assessing Officer?"

17. Similar issue was considered by us in the Department Appeal in Ground No 2 in AY 2005-06 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:—*
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> > *"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)*
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> *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.

18. Respectfully following the above decision in assessee case, we dismiss the ground raised by the revenue.

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

"Whether, on the facts and in the circumstances of the case& in law, the Id. CIT(A) right in deleting the addition made in respect of the DCSL Unit, Tikaria Unit and New Wadi Unit even though Hon'ble Supreme Court in the case of Sahani Steel & Press Works Limited Vs. CIT (228 ITR 253} held that refund of sales tax is a revenue receipt?"

20. On identical issue in Assessee's appeal, in the Ground No.5 & 6, following issue is raised:

"Ground No. 5: Addition of sales tax subsidy claimed as capital receipt - Rs. 47,37,44,762/-:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in confirming the action of AO in not excluding sales tax incentive availed by the appellant under various schemes of different states of Maharashtra (Chanda unit) and Jharkhand (Chaibasa unit), aggregating to Rs. 47,37,44,762/-, being capital in nature, in computing total income under the normal provisions of the Act."

"Ground No. 6:

On the facts and in the circumstances of the case and in law, the Ld. CIT (A) was not justified and grossly erred by disallowing Sales Tax Incentives by not following the order of the jurisdictional Bench of ITAT and Order of his precedent in the Appellant's own case without any reason recorded in the order."

21. Similar issue was considered by us in the Department Appeal Ground no 5 in AY 2005-06 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 Maharashtra's Dispersal of Industries Package Scheme of Incentives 1993 (Maratha Unit), Punjab's Industrial Incentives Code under the Industrial Policy, 1996 (Ropar and Bhatinda Units), Rajasthan's Sales Tax New Incentives Scheme for Industries, 1989 (Rabriyawas Unit), and Exemptions/ Concessions to Industries Excise & Taxation Department Notification No EXN C(9)2/9- dated 31-1-2-1994 (Himachal Unit). He discussed these schemes in quite a bit of detail-to the extent wordings of the preamble of the schemes are concerned, and concluded that while the amounts aggregating to Rs 130,57,12,796, in respect of Punjab and Maharashtra Schemes, are indeed capital receipts in nature, and exempt from tax as such, the amounts aggregating to Rs 39,36,21,956 are revenue in nature, and to that extent the Assessing Officer was justified in including the same in taxable income. None of the parties is satisfied. While the assessee is aggrieved of the amount of Rs 39,36,21,956 being included in his taxable income, the Assessing Officer is aggrieved of the learned CIT(A)'s granting relief of Rs 130,57,12,796. Both parties are in appeal before us.

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

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

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

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

> *"54. Per contra, the learned D.R. Supported the orders passed by the Assessing Officer and the learned CIT (A). Referring to the judgment in Sahney Steel and Press Works Limited v. CIT 228 ITR 253 (SC), he submitted that the impugned sales tax exemption increased the profits of the assessee by eliminating the expenses which the assessee would have had to incur later and therefore the impugned receipts were in the revenue field. He also referred to Explanation (10) to Section 43 (1) of the Income Tax Act inserted in with effect from 01/04/99 to emphasise that the action of the assessee in not reducing the cost of assets by the amount of subsidy for working out the Written Down Value was indicative of the fact that the impugned receipts were not in the nature of capital receipts.*
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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.*
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> *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 :*
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> *"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.*
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> *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-*
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> *"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:*
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> *"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).*
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> *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 assistancein carry ing on of trade or business. On the facts of that case, it was held that the subsidy given was to meet recurring expenses. It was not for acquiring the capital asset. It was not to meet part of the cost. It was not granted for production of or bringing into existence any new asset. The subsidies in that case were granted year after year only after setting up of the new industry and only after commencement of production and, therefore, such a subsidy could only be treated as assistance given for the purpose of

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

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

> *"10. From the above noted provisions of the scheme it can be clearly seen that the entire purpose of granting tax exemption was for giving the boost to the terrorism sector. This was to be achieved by attracting higher investment in areas with tourism potential. In order to achieve such purpose, exemption from various taxes as may be applicable was granted. It is true that the exemption was to be computed in terms of tax otherwise payable by the industry. However, the purpose of such exemption was to meet with the capital outlay already undertaken by the assessee. This clearly comes out from various provisions of the scheme. For example, the scheme was applicable only to the new project or to 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 Colourman Dyechem Ltd. (supra), we find that Their Lordships, in this case, were dealing with an entirely different type of subsidy which was clearly dealing with an expansion situation. However, we would rather refrain from making any further detailed*

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

(emphasis supplied by us)

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

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

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

9. In grounds nos. 12 and 13, the asessee 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.

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

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

"Whether, on the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in allowing the exclusion of Excise duty exemption availed by the assessee company aggregating to Rs. 242,40,07,612/- in computing total income under normal provisions of the Act as capital in nature, for its cement manufacturing units namely, Gagal Unit-1 & Gagal Unit-U located in the State of Himachal?"

Whether, on the facts and in the circumstances of the case and in law, CIT(A) erred in holding excise duty exemption as capital, especially //When the scheme under consideration, also provides for capital investment separately and in view of the decision of the Hon'ble Supreme Court in the case of M/s Siemens Pub. Communication Network Pvt Ltd, wherein, it has been held that unless, the grant in aid received by the assessee is utilized for acquisition of an asset, the same must be understood to be in nature of revenue receipt, except, by way of voluntary contribution received from parent company ?"

24. Similar issue was considered by us in Department Appeal for AY 2006-07 in Ground no 1 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.

25. Respectfully following the above decision in assessee case, we dismiss the ground raised by the revenue.

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

" Whether, on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the disallowance of interest paid to State Bank of India-Bahrain branch even though the assessee did not deduct tax at source?"

27. Similar issue was considered by us in the Department Appeal in Ground No 7 in AY 2005-06 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.

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

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

"Whether, on the facts and in the circumstances of the case & in law the Ld. CIT(A) erred in allowing the of claim of additional depreciation of Rs 112,93,47,544/- u/s 32(l)(iia) of the Act without appreciating the fact that additional depreciation is allowable only on "new machinery" be. the first year in which it is put to use?"

30. Similar issue was considered by us in the assessee appeal in Ground No 5 in AY 2007-08 and held as under:

"49. Considered the rival submissions and material placed on record. The brief facts of the case are that the assessee has claimed the additional depreciation on all the eligible assets acquired on or after 01-04-2005. However in the assessment order the Ld. AO has disallowed such additional depreciation on the assets acquired on or after 01-04-2005 but before 31-03-2006 for the reason that additional depreciation for the assessment year under consideration is allowable only on eligible assets acquired on or after 01-04-2006 meaning thereby the additional depreciation is allowed only for the assets acquired during the year under consideration and not on the assets acquired before the commencement of the year. The assessee has filed an appeal before CIT(A) against such assessment order. Subsequent to which the CIT(A) has decided the issue against the assessee. It is observed that identical issue was decided by coordinate bench of Mumbai in the case of holding company of the assessee being ***Ambuja Cement Limitedvide order dated 07.11.2022*** *in the ITA No. 6375 and 6405/Mum/2013 for A.Y. 2007-08 wherein it was held as under:*

"25. So far as this grievance is concerned, the proposition canvassed before is that "looking to the intent of the Act, the machinery acquired after 1-4-2005 but installed in the previous relevant to the assessment year to the assessment year 2007-08 should qualify for claim of depreciation". This aspect of the matter is no longer res integra. This issue is squarely covered by the judgment of the Hon'ble Gujarat High Court, in the case of PCIT Vs IDMS Ltd [(2017) 393 ITR 441 (Guj)]. The other aspect of the matter, and that is more relevant in the present context, is whether the additional depreciation is also to be granted in respect of the subsequent year. That aspect of the matter is covered by a coordinate bench decision in the case of DCIT Vs Gloster Jute Mills Limited [(2017) 88 taxmann.com 738 (Kol)], which has been subsequently followed by other benches- including Mumbai benches. The coordinate bench has inter alia observed as follows:

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

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

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

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

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

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

'Sec.32 Depreciation.

(1) In respect of depreciation of—

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

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

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

Section 32(1)(iia) of the Act was originally introduced by the finance (no.2) Act, 1980 w.e.f. 1-4-1981 reads thus (the sub-section existed upto 31-3-1988 and was deleted thereafter): "(iia) in the case of any new machinery or plant (other than ships and aircraft) which has been installed after the 31st day of March, 1980 but before the 1st day of April, 1985, a further sum equal to one-half of the amount admissible under clause (ii) (exclusive of extra allowance for double or multiple shift working of the machinery or plant and the extra allowance in respect of machinery or plant installed in any premises used as a hotel) in respect of the previous year in which such machinery or plant is installed or, if the machinery or plant is first put to use in the immediately succeeding previous year, then in respect of that previous year :" Sec.32(1)(iia) of the Act as reinserted by finance (No.2) Act, 2002 w.e.f. 1-4-2003, reads thus: '(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2002, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to fifteen per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii): Provided that such further deduction of fifteen per cent shall be allowed to—

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

"Subs. for "twenty-five per cent" by Finance (No. 2) Act, 2004, (w.e.f. 1-4-2005)." Sec.32(1)(iia) as substituted by Finance Act, 2005, (w.e.f. 1-4-2006) reads as follows: "(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing, a

further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii):"'

29. It can be seen from the provisions of Sec.32(1)(iia) as it existed from 1-4-1981 to 31-3-1988 and reinserted subsequently from 1-4-2003 that the benefit for claiming additional depreciation was restricted only to the initial assessment year. However the provisions of Sec.32(1)(iia) as substituted by the finance Act, 2005 w.e.f. 1-4- 2006, the benefit for claiming additional depreciation was not so restricted to only to the initial assessment year. From AY 1981-82 to 87-88, the claim for additional depreciation was restricted to previous year in which such machinery or plant is installed or, if the machinery or plant is first put to use in the immediately succeeding previous year. From AY 2003-04 till 2005-06, the claim for additional depreciation was restricted to previous year in which such undertaking begins to manufacture or produce any article or thing on or after the 1st day of April, 2002; or if any industrial undertaking existed before the 1st day of April, 2002, during any previous year in which it achieves the substantial expansion by way of increase in installed capacity by not less than ten per cent. From AY 2006-07, there is no restriction with regard to the year in which such additional depreciation should be allowed and also there is no restriction with regard to the additional depreciation being allowed only on the written down value and therefore the additional depreciation even in the second and subsequent years have to be allowed on the original cost of the Asset. These are evident from a plain reading and literal construction of the relevant statutory provisions.

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

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

provisions of sec. 32(1)(iia) have been amended. In so far as the language used in the provision in concerned one has to construe the language beneficially and in favour of the assessee as held by the Jurisdictional High Court in the case of Indian Jute There is little merit in the contention of the AO that the asset is not new in the second year. In my view for claiming additional depreciation the assessee has to acquire and install the plant & machinery after 31-03-2005 and the same should be new in the year of installation. There is no requirement that the assets should be new in the year of claim of additional depreciation. For the reasons aforesaid I am of the view that in terms of provisions of Section 32(1)(iia), additional depreciation is available in AY 2006-07 and subsequent years in respect of all new plant & machinery acquired and installed after 31-03-2005 subject to overall criteria that total depreciation does not exceed the actual cost. Hence Ground No. 4 is decided in favour of the Appellant."

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

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

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

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

50. We observe that in decision of ITAT Kolkata in the case of DCIT vs. Gloster Jute mills ltd. in ITA No. 1524/Kol/2013 dated 01.03.2017 has held that additional depreciation would be allowed in subsequent assessment years by observing that the condition imposed by the relevant provisions is that Plant and Machinery must be new at the time of installation to be eligible for additional depreciation u/ s 32(1)(iia) and not new in subsequent years. The expression "new machinery" is therefore to be construed as referring to the condition that at the time of acquisition or installation the machinery or plant should be new. Going by the legislative history of the relevant provision, ITAT held that the condition for allowing additional depreciation only in the initial assessment year ceased to exist as and from 01.04.2006.

However, subsequently in the Decision of ITAT Mumbai in the case of Everest Industries Ltd. vs. JCIT [2018] 90 taxmann.com 330. Such decision was also referred by Ld DR in her written submission. In this decision, the decision of ITAT Kolkata in the case of DCIT vs. Gloster Jute Mills Ltd. (supra) was distinguished and the case has been decided against the assessee on the ground that the Kolkatta bench of Tribunal has taken the view in favour of the assessee, on plain reading of the provisions of sec. 32(1)(iia) vis-àvis old provisions, by holding that the additional depreciation prescribed u/s 32(1)(iia) of the Act is allowable every year and further held that the Kolkata bench of Tribunal did not consider the third proviso inserted by Finance Act, 2015. Since the legislative intent in inserting sec.32(1)(iia) has been made clear by the third proviso inserted in sec. 32(1) by Finance Act 2015, hence ITAT Mumbai did not follow the view expressed by the Kolkatta bench of Tribunal in the case of Gloster Jute Mills (supra).

It is pertinent to refer to the Decision of Hon'ble ITAT Kolkata in the case of DCIT vs Graphite India Ltd. in ITA No. 472/Kol/2018 dated 22.11.2019 wherein both of the above decisions of ITAT Kolkata as well as ITAT Mumbai has been duly considered and has decided in the favour of the assessee. In this decision, decision of ITAT Mumbai in the case of Everest Industries Limited (supra), was referred in finding of CIT(A). The ITAT has followed Gloster Jute Mills Ltd. (supra) and has decided the issue in assessee's favour.

It is observed that coordinate bench in its later decision in the case of Ambuja Cement Limited(supra), holding company of assessee has allowed similar claim of depreciation. When coordinate bench of ITAT in its latest decision has decided issue in favour of assessee by holding that assessee is entitled for additional depreciation u/s 32(1)(iia), such later decision would prevail over the decision of Everst Industries Limited relied upon by Ld DR. As a result, since this aspect of the matter is no longer res integra, we see no reasons to take any other view of the matter than the view so taken by the coordinate bench in the group concern's case of the assessee. Respectfully following the same, we uphold the plea of the assessee and direct the Assessing Officer to allow depreciation u/s.32(1)(iia) of the Act. The assessee gets the relief accordingly. This ground of appeal is allowed.

31. Respectfully following the above decision in assessee case, we dismiss the ground raised by the revenue.

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

"Whether, on the facts and in the circumstances of the case & in law, the Id. CIT(A) erred in directing the AO. to allow deduction u/s. 80IA of the IT. Act, in respect of power-generating unit-TG3 located at Wadi?"

33. Similar issue was considered by us in the Department Appeal ground No 9 and in Assessee's Appeal ground No 3 in AY 2005-06 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.

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

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

"Whether, on the facts and in the circumstances of the case & in law the Id. CIT(A) erred in directing the assessing officer that auditor's fee and director's remuneration (indirect expenses) should not be apportioned for computing deduction u/s 80IA of the Act?"

36. On identical issue in Assessee's appeal, in the Ground Nos.7 to 10 following issue is raised:

Ground No. 7: Denial of claim of deduction u/s. 80IA in respect of Power Plant (TG2) at Wadi:
On the facts and circumstances of the case and in law, the Ld. CIT (A) was not justified and grossly erred in confirming the denial of claim of deduction u/s 80IA in respect of Power Plant namely TG2 at Wadi in the state of Karnataka.
Ground No. 8: Apportionment of indirect Head Office Expenses while computing deduction u/s. 80IA for TG2 unit:
On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in apportioning a part of the indirect Head Office expenses aggregating to Rs. 8,56,53,109/- and adjusting such allocated amount of Rs 60,72,265/- in computing Tax Holiday u/s 801A for

eligible Captive Power Plants, without establishing any nexus between the nature of expenses and such eligible units of the appellant.

Ground No. 9: Apportionment of indirect Head Office Expenses (including R&D expenses) while computing deduction u/s. 80IB and 80IC units:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in confirming the action of AO in apportioning a part of the indirect Head Office expenses aggregating to Rs. 10,90,85,705/-(including Rs. 2,34,32,596/- being R&D Expenses) and adjusting such allocated amount of Rs. 95,00,748 in computing Tax Holiday u/s 80IB for eligible Tikaria 2 unit and Rs. 1,03,70,526/- in computing Tax Holiday u/s 80IC for eligible Gagal 1 Cement Manufacturing Unit, without establishing any nexus between the nature of expenses and such eligible units of the appellant.

Ground No. 10: Apportionment of indirect Head Office Expenses (including R&D expenses) while computing deduction u/s. 80IB and 80IC units:

On the facts and in the circumstances of the case and in law, tire Ld. CIT(A) was not justified rather grossly erred in confirming the action of AO in apportioning Research & Development expenses incurred at Thane Technical Service Centre amounting to Rs. 2,34,32,596/- in computing Tax Holiday u/s 80IB and 80IC.

37. Similar issue was considered by us in the Department appeal in Ground No 10 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"

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

38. Respectfully following the above decision, we are dismissing the ground raised by the revenue and partly allow the grounds raised by the assessee.

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

"Whether, on the facts and in the circumstances of the case & in law, the Id. CIT(A) was right in holding the reference to the DVO invalid even though provision of section 55A under which reference was made clearly confer power upon the Assessing Officer to make a reference to Valuation Officer if AO is of the opinion that the fair market value of the assets exceeds the value of the asset as claim by the assessee?"

40. In appeal Ld.CIT (A) has discussed the above issue at Para No 11.4.1 to 11.4.6 of his order and held as under:

"14.4.1 I have considered the appellant's contention that the AO had no power to refer the valuation of 'Bhupendra Land' to the DVO. The relevant provision of section 55A under which the reference was made read as under(as applicable to at the time when reference was made):

55A. With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the Assessing Officer may refer the valuation of capital asset to a Valuation Officer—

(a) in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the Assessing Officer is of opinion that the value so claimed is less than its fair market value ;

(b) in any other case, if the Assessing Officer is of opinion—

(i) that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage of the value of the asset as so claimed or by more than such amount as may be prescribed in this behalf; or

(ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do,

and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clauses (ha) and (i) of sub-section (1) and sub-sections (3A) and (4) of section 23, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall with the necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.

Explanation.—In this section, "Valuation Officer " has the same meaning, as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957)."

14.4.2 From a plain of section 55A, I find that as per the provisions as was applicable to the AY 2008-09, reference may be made to the DVO only where the value shown is less that the FMV. The amended provisions which enable the AO to refer the DVO also in cases where the value declared is more than the FMV is effective from 01.07.2012. I, therefore, hold that the reference to the DVO is not valid. Accordingly, I allow ground of appeal no. 12."

41. Similar issue was considered by us in the assessee Appeal in Ground No 6 in AY 2007-08 and held as under:

58. Considered the rival submissions and material placed on record. It is observed that during the year under consideration assessee has sold the land and income from capital gain is shown in the revised computation of income after considering valuation report obtained for determining fair market value of land as on 1st April 1981. The AO has not found any material information which prove that such valuation is incorrect but only on presumption that such valuation is higher, he has referred the matter to DVO. The identical issue is discussed by Jurisdictional High Court in the case of CIT v. Puja Prints 360 ITR 697 wherein it is held as under:

7. We find that Section 55A(a) of the Act very clearly at the relevant time provided that a reference could be made to the Departmental Valuation Officer only when the value adopted by the assessee was less than the fair market value. In the present case, it is an undisputed position that the value adopted by the respondent-assessee of the property at Rs.35.99 lakhs was much more than the fair market value of Rs.6.68 lakhs even as determined by the Departmental Valuation Officer. In fact, the Assessing Officer referred the issue of valuation to the Departmental Valuation Officer only because in his view the valuation of the property as on 1981 as made by the respondent-assessee was higher than the fair

> *market value. In the aforesaid circumstances, the invocation of Section 55A(a) of the Act is not justified.*
>
> *8. The contention of the revenue that in view of the amendment to Section 55A(a) of the Act in 2012 by which the words "is less than the fair market value" is substituted by the words " "is at variance with its fair market value" is clarifactory and should be given retrospective effect. This submission is in face of the fact that the 2012 amendment was made effective only from 1 July 2012. The Parliament has not given retrospective effect to the amendment. Therefore, the law to be applied in the present case is Section 55A(a) of the Act as existing during the period relevant to the Assessment Year 2006-07. At the relevant time, very clearly reference could be made to Departmental Valuation Officer only if the value declared by the assessee is in the opinion of Assessing Officer less than its fair market value.*
>
> *9. The contention of the revenue that the reference to the Departmental Valuation Officer by the Assessing Officer is sustainable in view of Section 55A(a) (ii) of the Act is not acceptable. This is for the reason that Section 55A(b)of the Act very clearly states that it would apply in any other case i.e. a case not covered by Section 55A(a) of the Act. In this case, it is an undisputable position that the issue is covered by Section 55A(a) of the Act. Therefore, resort cannot be had to the residuary clause provided in Section 55A(b)(ii) of the Act. In view of the above, the CBDT Circular dated 25 November 1972 can have no application in the face of the clear position in law. This is so as the understanding of the statutory provisions by the revenue as found in Circular issued by the CBDT is not binding upon the assessee and it is open to an assessee to contend to the contrary.*
>
> *10. The contention of the revenue that the Assessing Officer is entitled to refer the issue of valuation of the property to the Departmental Valuation Officer in exercise of its power under Sections 131, 133(6) and 142(2) of the Act is entirely based upon the decision of the Guwahati High Court in Smt. Amiya Bala Paul (supra). However, the Apex Court in Smt. Amiya Bala Paul (supra) has reversed the decision of the Guwahati High Court and held that if the power to refer any dispute with regard to the valuation of the property was already available under Sections 131(1), 136(6) and 142(2) of the Act, there was no need to specifically empower the Assessing Officer to do so in circumstances specified under Section 55A of the Act. It further held that when a specific provision under which the reference can be made to the Departmental Valuation Officer is available, there is no occasion for the Assessing Officer to invoke the general powers of enquiry.*
>
> *In view of the above and particularly in view of clear provisions of law as existing during the period relevant to Assessment Year 2006-07, we are of the view that questions (a) and (b) do not raise any substantial question of law."*

59. During the course of appellate hearing, Ld. AR has referred various decisions of co-ordinate Bench of Mumbai ITAT wherein identical issue is decided in favour of the assessee. The Hon'ble Gujarat High Court in the case of CIT v. .Gauranginiben S. Shodhan Indl 367 ITR 238 has also held as under:

> *"15. Coming to the question of reference to DVO for ascertaining the fair market value as on 1.4.1981 also, we find that such reference was not competent. We have noticed that prior to the amendment in section 55A with effect from 1.7.2012 in a case, the value of the asset claimed by the assessee is in accordance with the estimate made by the Registered Valuer, if the Assessing Officer was of the opinion that the value so claimed was less than its fair market value as on 1.4.1981. It would not be the case of the Assessing Officer that the value of the asset shown*

as on 1.4.1981 was less than the fair market value. Such clause, therefore, as it stood at the relevant time, had no application to the valuation as on 1.4.1981. We are conscious that with effect from 1.7.2012, the expression now used in clause (a) of section 55A is "is at variance with its fair market value". The situation may, therefore, be different after 1.7.2012. We are, however, concerned with the period prior thereto. Clause (b) of section 55A is in two parts and permits a reference to DVO if the Assessing Officer is of the opinion that (i) the fair market value of the asset exceeds the value of the asset so claimed by the assessee by more than such percentage of the value of the asset so claimed or by more than such amount as may be prescribed in this behalf; or (ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do. Sub-clause(i) of clause (b) also for the same reasons recorded above, would have no bearing on the fair market value as on 1.4.1981. The Assessing Officer had not resorted to sub-clause(ii) of clause (b). In any case, clause (b) would apply where clause(a) does not apply since it starts with the expression "in any other case". In other words if assessee has relied upon a Registered Valuer's Report, Assessing Officer can proceed only under clause (a) and clause (b) would not be applicable.

16. In the present case, admittedly the assessee had relied on the estimate made by the Registered Valuer for the purpose of supporting its value of the asset. Any such situation would be governed by clause (a) of section 55A of the Act and the Assessing Officer could not have resorted to clause (b) thereof as held by the Division Bench of this Court in the case of HiabenJayantilal Shah v. ITO [2009] 310 ITR 31/181 Taxman 191 (Guj.)*. In the said decision, it was held and observed as under:—*

> *"10. Under clause(a) of sec. 55A of the Act under the Assessing Officer is entitled to make the reference to the Valuation Officer in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by the Registered Valuer, if the Assessing Officer is of the opinion that the value so claimed is less than the fair market value. In any other case, as provided under clause(b) of Sec. 55A of the Act, the Assessing Officer has to record an opinion that (i) the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage or by more than such an amount as may be prescribed; or (ii) having regard to the nature of the asset and other relevant circumstances, it is necessary to make such a reference."*

17. In the result, we see no reason to interfere. However, we have given our independent reasons and should not be seen to have confirmed the reasonings adopted by the Tribunal in the impugned judgment. Tax Appeal is dismissed."

60. It is observed that decisions referred hereinabove are identical on the facts and Ld. Dr has not referred any decisions directly contrary to decision of Hon'ble Jurisdictional High Court referred supra. The decisions referred by Ld. DR are in the context of different facts hence same cannot be relied upon. Considering the binding decisions of Hon'ble High Court referred supra, AO was not justified in considering fair market value of land based upon DVO's report obtained u/s 55A of the Act. This ground of appeal is accordingly allowed.

41.1 Respectfully following the above decision in assessee case, we dismiss the ground raised by the revenue.

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

"Whether, on the facts and in the circumstances of the case & in law the Id. CIT(A) was right in deleting the addition of provision for normal gratuity in computing book profit u/s 115JB of the Act?"

43. Similar issue was considered by us in the Department Appeal Ground No 12 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 assesee'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.

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

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

"Whether, on the facts and in the circumstances of the case & in law, the Id. CTT(A) was right in deleting the addition of provision for wealth tax in computing book profit u/s 115JB of the Act?"."

46. 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.

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

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

> *"Whether, on the facts and in the circumstances of the case & in law the Id. CIT(A) was right in deleting the addition of provision for VRS pertaining to earlier years in computing book profit u/s 115JB of the Act?"*

49. Similar issue was considered by us in the Department Appeal 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.*

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

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

> *"Whether, on the facts and in the circumstances of the case & in law the Id. CIT(A) was right in deleting the disallowance of interest made under rule 8D(ii) u/s 14A of the Income Tax Act, 1961."*

52. On identical issue in Assessee's appeal, in the Ground No.17, following issue is raised:

> ***Ground No. 17: Addition of Rs. 1,94,00,000/- being notional expenditure incurred to earn exempt income while computing book profits u/s. 115JB:***
>
> *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in confirming the action of AO in adding Rs. 1,94,00,000/- being notionally allocated expenditure allegedly incurred to earn dividend income in computing Book Profit u/s 115JB.*

53. Similar issue was considered by us in the Department Appeal in Ground No 21 in AY 2005-06 and held as under:

> *"135. Considered the rival submissions and material placed on record. The Assessing Officer has made disallowance u/s 14A while computing income as per normal provisions of the Act as well as book profit u/s 115JB of the Act. The disallowance made by Assessing Officer u/s 14A is already deleted in proceeding paras hence consequential adjustment made while computing book profit u/s 115JB cannot be made. On this issue, coordinate bench in the case of Ambuja Cement Limited in ITA NO ITA Nos. 1889 and 1241/Mum/2018, 2384, 2958, 3475 and 3843/Mum/2019 (AY 2010-11, 2011-12 and 2012-13) vide order dated 07/11/2022 held as under:*
>
> > *"25. Having heard the rival contentions and having perused the material on record, we are of the considered view that the assessee deserves to succeed in this plea for the reason that, eventually, there is no disallowance under section 14A on the facts of this case, and, in any event, the issue is covered, as regards the question of adjustment of book profits under section 15JB for the 14A disallowance, in favour of the assessee, by a special bench decision in the case of ACIT Vs Vireet Investments Pvt Ltd [(2017) 82 taxmann.com 415 (Del SB)]. The assessee gets relief on this point as well."*

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

54. In the result, appeal filed by department is dismissed.

ITA NO. 6638/MUM/2018 (ASSESSEE'S APPEAL)

55. We now take up the appeal filed by the Assessee in ITA No 6638/MUM/2018.

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

"Ground No. 3 Disallowance of club expenses amounting to Rs. 60,06,792/- On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified arid grossly erred in confirming the action of AO in disallowing Club Entrance Fee of Rs. 60,06,792/- as expenditure not incurred wholly and exclusively for the purpose of the business."

Ground No:4

"On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in disregarding and not following the order of the Hon'ble Income-tax Appellate Tribunal ('ITAT') in the Appellant's own case on the same issues in earlier years."

57. 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."

58. Respectfully following the above decision, we allow the ground raised by the assessee.

59. In the Ground No.11, assessee has raised the following grievance:

Without prejudice to Ground No. 8, 9 and 10;

Ground No. 11:

On the facts and in the circumstances of the case and without prejudice to above Grounds taken here-in-above, in the unlikely event if it is held that indirect Head Office expenses (and R&D expenses as the case may be) is required to be allocated, such allocation should be made on the basis of total cost of the respective eligible undertaking to the total cost of the appellant company instead of allocation on the basis of turnover made in the order u/s 143(3).

60. At the time of hearing, Ld AR has not pressed this ground, accordingly, the same is dismissed as not pressed.

61. In the Ground No.12, assessee has raised the following grievance:

Ground No. 12: Denial of deduction u/s. 80IA claimed in respect of Rail facility- Rs. 78,46,26,199:

On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified and grossly erred in confirming the action of AO in not allowing the claim of tax holiday u/s 80-IA on infrastructure facility, being Rail System, developed, operated and maintained by the appellant at various locations.

Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in plainly relying on the decision of Supreme Court in the case of Commissioner of Customs vs. Dilip Kumar in Civil Appeal No. 3327 of 2017, to draw adverse reference. The Ld. CIT(A) failed to appreciate that tire ratio of the judgment rather supports appellant's contention.

62. Similar issue was considered by us in the assessee's Appeal in Ground No 9 in AY 2007-08 and held as under:-

71. Considered the rival submissions and material placed on record. It is observed that assessee has claimed deduction u/s.80IA on rail system maintained at various units by declaring the same in notes forming part of revised return of income. The only dispute of Assessing Officer for not allowing such deduction is that necessary form 10CCB was not filed along with return of income and claim was not quantified in such return of income. Accordingly, Assessing Officer has denied claim of assessee for deduction u/s.80IA only on the ground that Form 10CCB is not filed along with return of income as per provisions of section 80IA (7). It is relevant to refer to provisions of Section 80IA(7) as was on statue in the year under consideration which reads as under:

"″[The deduction] under sub-section (1) from profits and gains derived from an 7[undertaking] shall not be admissible unless the accounts of the[undertaking] for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the Explanation below sub-section (2) of section 288, and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant."

72 It is an undisputed fact that claim for deduction u/s.80IA was made in notes to return of income but only Form 10CCB was filed only before Assessing Officer. It is observed that the conditions mentioned in above referred section 80IA (7) for furnishing Form 10CCB along with return of income is directory in nature as held by various High courts discussed in this para. Hon'ble Karnataka High Court in case of Sutures India (P.) Ltd. Reported in 125 taxmann.com 226 has held as under:

"Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings (Audit report) - Assessment year 2003-04 - Whether assessee-company could file audit report in Form no. 10CCB even at appellate stage so as to be eligible for deduction under section 80-IA - Held, yes [Paras 8 and 9] [In favour of assessee]"

73. Further, the Hon'ble Allahabad High Court in case of Fortuna Foundation Engineers & Consultants (P.) Ltd. Reported in 81 taxmann.com 189 has held as under:

> *"II. Section 80-IB of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings (Housing Project) - Assessment year 2005-06 - Whether where assessee, claiming deduction under section 80-IB(10), did not file audit report in Form 10CCB along with return of income but filed same before assessment was complete, assessee could not be made to suffer for it - Held, yes [Para 44] [In favour of assessee]"*

74. Hon'ble Karnataka High Court in the case of CIT v. ACE Multitaxes Systems Pvt. Ltd. 317 ITR 207, Bombay High Court in the case of CIT V. Shivanand Electronics 209 ITR 63, Uttrakhand High Court in the case of Sanjaykumar Bansal 219 Taxman 41 & Karnataka High Court in the case of Sutures India Pvt. Ltd. 125 Taxmann.com 226 has held that assessee company could file Form 10CCB even during assessment proceedings / appellate proceedings. Further, Hon'ble Madras High court in the case of CIT v. AKS Alloys (P.) Ltd [2012] 18 taxmann.com 25 has held that for claiming deduction under section 80-IB, audit report in Form 10CCB can be filed before assessment is completed, if same has not been filed along with return of income. It is relevant to refer to decision of Hon'ble Supreme Court in the case of CIT v. G. M. Knitting Industries Pvt. Ltd.[2016] 71 taxmann.com 35/ 376 ITR 456 which in turn has upheld the finding of Hon'ble Madras High court referred supra as well as Bombay High Court IT Appeal No. 2336 of 2010, dated 24-6-2011 held as under:

> *DEPRECIATION – ADDITIONAL DEPRECIATION – PLANT AND MACHINERY – CONDITION PRECEDENT – REPORT OF ACCOUNTANT TO BE FILED IN FORM 3AA – NOT FILED WITH RETURN BUT DURING ASSESSMENT PROCEEDINGS BEFORE ORDER PASSED – SUFFICIENT COMPLIANCE – ASSESSEE ENTITLED TO ADDITIONAL DEPRECIATION – INCOME-TAX ACT, 1961, s.32(1)(iia).*
>
> *INDUSTRIAL UNDERTAKING – SPECIAL DEDUCTION – CONDITION PRECEDENT – FILING OF AUDIT REPORT IN FORM 10CCB – SUFFICIENT COMPLIANCE IF REPORT BEFORE ASSESSMENT COMPLETED – INCOME-TAX ACT, 1961, s. 80-IB.*
>
> *Even if form 3AA (in which the report of an accountant is to be filed under rule 5A of the Income-tax Rules, 1962) for claiming additional depreciation under section 32(1)(iia) of the Income-Tax Act, 1961 was not filed along with the return of income but was filed during the assessment proceedings and before the final order of the assessment was made that would amount to sufficient compliance for grant of additional depreciation in terms of section 32(1)(iia) of the Act.*
>
> *On appeal against the decision of the High Court dismissing the Department's appeal from the order of the Tribunal holding that the assessee was entitled to claim deduction under section 80-IB where the audit report in form 10CCB in support of the claim was not filed with the return but before the assessment was completed:*
>
> *The Supreme Court dismissed the appeals.*

75. Considering the binding decision of various High Courts including Supreme Court, deduction u/s.80IA cannot be denied merely on the ground that Form 10CCB was filed during the course of assessment proceedings. It is observed that CIT(A) has denied such deduction on the ground that books of account for such unit was not audited before the due date of filing return of income but provisions of the Act as relevant in year under consideration nowhere states that such books of account of separate unit need to be audited before the filing of return of income. It is an undisputed fact that books of account

of assessee company was audited by chartered Accountant before the due date of filing of income which is apparent from Audited Annual Accounts as well as Tax Audit Report submitted along with return of income but Form 10CCB pertaining to separate books of account relating to undertaking eligible for such deduction was not obtained before the due date of filing return of income and was submitted during the course of assessment proceedings. It is observed that AO has not found books of account maintained by assessee to be incorrect. The AO has even not disputed the sales or direct expenditure pertaining to eligible project in entire assessment order. The AO has not disputed the quantum of eligible deduction in entire assessment order nor disputed the fact that whether assessee is entitled for such deduction u/s 80IA or not (except allocation of indirect expenditure at para 15.5 of assessment order) which clearly prove that profit derived from industrial undertaking and claimed as deduction based upon such Form 10CCB was correct. Considering these facts, the plea of Ld. DR that assessee has quantified claim after lapse of more than two years of due date of filing return of income cannot be accepted.

76. It is relevant to refer to decision of Hon'ble Pune ITAT in the case of B. G. Shrike Construction (supra) for A.Y. 2003-04, 2006-07 to 2008-09 dated 31st August, 2013 wherein it is held as under:

> *"15. On this aspect, the learned counsel for the assessee pointed out that in the return of income submitted in response to notice u/s 153A(1)(a) of the Act, assessee had enclosed a Note dated 14.09.2009, a copy of which has been placed in the Paper Book at page 1 to 2, putting-forth its claim for excluding income on account of retention money, but in the computation of income no specific claim was made because the quantification of the claim could not be made in the limited time period allowed to file a return in response to notice u/s 153A(1)(a) of the Act. In the course of the subsequent assessment proceedings, assessee quantified the claim for the respective assessment years and also filed copies of the agreements with the customers which contained the relevant clauses permitting retention of a portion of the contract value. It is pointed out that strictly speaking the judgement of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) is not applicable in the present case as no fresh claim was made in the assessment proceedings, but it is a case where a claim put-forth in the return of income was only quantified during assessment proceedings and thus the Assessing Officer ought to have entertained the impugned claim. Alternatively, it is contended that the CIT(A) enjoys plenary powers of the Assessing Officer, and following the judgment of the Hon'ble Supreme Court in the case of Jute Corporation of India Ltd. vs. CIT, (1991) 187 ITR 688, the claim should have been entertained by him as the complete facts were on record. In this context, the learned counsel referred to the decision of the Pune Bench of the Tribunal in the case of Jain Irrigation Systems Ltd. vide ITA No.1319/PN/2009 dated 30.01.2012 wherein the import of the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) has been explained on the basis of the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Jai Parabolic Springs Ltd., (2008) 306 ITR 42 (Del), in the following words :-*
>
> > *"5. We have carefully considered rival submissions. In our view, the plea of the assessee is well-reasoned, inasmuch as the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) does not impinge on the powers of the appellate authorities to entertain a fresh claim which was hitherto not preferred by the assessee in the return of income. In fact, the Hon'ble Delhi High Court in the case of CIT v. Jai Parabolic Springs Ltd. 306 ITR 42 (Del) supports the proposition that the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) was limited to the power of the Assessing Officer to entertain claim for deduction otherwise than by a revised*

> *return and does not put fetters on such powers of the appellate authorities."*

16. On the basis of aforesaid, it is sought to be made out that the claim of the assessee ought to have been entertained by the lower authorities and decided on its merits.

17. On the other hand, the learned Departmental Representative appearing for the Revenue has contended that the lower authorities were justified in not entertaining the impugned claim as it was a fresh claim made only during the assessment proceedings and not in the return of income.

18. We have carefully considered the rival submissions. The Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) opined that a fresh claim of the assessee can be entertained at the time of assessment only if it is made by way of a revised return of income; and, the aforesaid proposition has been invoked by the income-tax authorities in the present case to deny assessee's claim for exclusion of income on account of retention money, a claim which was made during the assessment proceedings.

19. Factually speaking, we find that in terms of a communication dated 14.09.2009 filed along with the return of income filed in response to notice issued u/s 153A(1)(a) of the Act, assessee inter-alia, stated as under :-

> *"The business of our company is to execute construction contracts. In respect of some of the contracts executed by the company there is a clause in the contract which entitles the customer to retain between 5% to 10% of contract value till the completion of defect liability period contained in the contract which is generally between 12 to 24 months after the completion of the construction. Inadvertently in the original return filed this amount was not excluded while computing the total income. In the short span of time allowed to us to file the return u/s. 153A, the exact quantification of the retention money could not be worked out. Hence, we will submit the details thereof later. But for the time being, we submit that the retention money in the various contracts is not taxable in view of the various decisions including the decisions cited below wherein it is held that the taxability of this amount is to be considered in the year in which this amount is due to the assessee from the contractee.*
>
> *(a) CIT v Associated Cables P. Ltd. (2006) 286 ITR 596 (Bom.)*
>
> *(b) DCIT v Spirax Marshall Ltd. (2007) 109 TTJ (Pune) 593*
>
> *(c) National Heavy Engg. Co. Op. Ltd. v DCIT (2007) 105 ITD 485 (Pune)*

Inadvertently, in the Original Return of Income this amount was not claimed as deduction. We request Your Honour to kindly grant us appropriate deduction while completing assessment. We shall submit the necessary details and quantification of claim during the course of assessment."

20. The aforesaid Note clearly depicts the claim of the assessee to the effect that the retention money in various contracts retained/deducted by the customers is not taxable; and, various case laws have also been cited, including that of the Hon'ble Jurisdictional High Court of Bombay in Associated Cables (P) Ltd. (supra) in support of the said proposition. Of course, the claim was not reflected in the

actual computation of income in the absence of its quantification. During the course of assessment proceedings, assessee not only quantified its claim year-wise but also explained the factual matrix of the claim based on the relevant clauses of the contracts with various contractees/customers, as is evident from copy of assessee's communication to the Assessing Officer placed in the Paper Book at pages 3-6. In this factual background, can it be said that the assessee made a fresh claim during the assessment proceedings so as to fall within the purview of the ratio laid down by the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra)? In our view, the fact situation in the present case is qualitatively different than that considered by the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra). Ostensibly, the assessee company made a claim for excluding income on account of retention money in the return of income itself, though the quantification was absent, and the actual quantification of such claim was made during the assessment proceedings; thus, substantively speaking it cannot be said that assessee made a new claim during assessment proceedings which was not made in the return of income. Considering the above fact situation, in our view, the CIT(A) erred in upholding the action of the Assessing Officer in refusing to entertain the impugned claim based on the judgement of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra).

21. In any case, the judgement of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) does not impinge on the powers of appellate authorities to entertain a fresh claim which was hitherto not preferred by the assessee in the return of income, as explained by the Hon'ble Delhi High Court in the case of Jai Parabolic Springs Ltd. (supra). Accordingly, there was no impediment for the CIT(A) to have entertained the impugned claim especially when the required facts to adjudicate the controversy were already on record.

22. Thus, considered in the aforesaid light, we find no justification for the Revenue to reject assessee's impugned claim for assessment years 2007-08 and 2008-09 on the ground that the claim was made by way of a letter during the course of assessments and not in the return of income.

23. The third objection which has been raised by the Revenue is in terms of a discussion made by the CIT(A) in para 3.6 of the impugned order. According to the CIT(A), if the claim for excluding retention money was entertained and allowed, it would result in the determination of total income at a figure below the income originally returned/assessed and thus the same was not permissible. This objection of the Revenue, in our view is no bar to entertain the aforesaid claim, keeping in mind the ratio of the judgement of the Hon'ble Supreme Court in the case of CIT vs. Shelly Products & Anr., (2003) 261 ITR 367 (SC) and also the judgement of the Hon'ble Gujarat High Court in the case of Gujarat Gas Co. Ltd. vs. CIT, 245 ITR 54 (Guj).

24. On the basis of the aforesaid discussion, in conclusion we hold that in so far as the assessment years 2007-08 and 2008-09 are concerned, the claim of the assessee for exclusion of income on account retention money withheld by contractees/customers has been wrongly rejected by the lower authorities.

77. It is observed that in above referred case, the fact was that assessee has made claim in notes to the return of income and claim was not reflected in actual quantum of income in absence of its quantification. Considering such facts, ITAT Bench has held that claim made in the notes to return form integral part of return of income and further observed that a claim made in notes to the return of income, though without any quantification of such claim will be considered as a valid claim in the return of income. the finding of ITAT

Bench was also upheld by Hon'ble Bombay High Court in 79 Taxman.com 306. The relevant finding of Hon'ble High Court is reproduced as under:

> *"7. On further appeal, the Tribunal by the impugned order held that although it is undisputed that the computation of income did not reflect the actual quantification of the amount of retention money held by the customers which cannot be subjected to tax, yet the note filed alongwith the return of income indicated the claim in principle (absent quantification). This quantification was explained during the assessment proceeding alongwith relevant clauses of each contract with its customers. Thus the impugned Order held that the decision of Goetze (India) Ltd. (supra) will not apply in the present facts as in this case the claim for deduction on account of retention money had been made alongwith the return of income, only the quantification of the amount was made during the assessment proceedings. Thus the impugned order of the Tribunal holds that on merits that the claim made for deduction of retention money as quantified during Assessment proceedings was to be allowed. In any event, the impugned order further proceeds to hold that even if the quantification made during the course of the assessment proceeding is considered to be a fresh claim and could not have been entertained by the Assessing Officer, there was no bar/impediment in raising the claim before the Appellate Authorities under the Act for consideration. Thus as the facts are already on record the same could have been considered by the Appellate Authorities. In that regard reliance was placed upon decision of Delhi High Court in CIT v. Jai Parabolic Springs Ltd.[2008] 306 ITR 42/172 Taxman 258. Thus allowed the respondent-assessee's appeal before it.*
>
> *8. The grievance of the Revenue before us is that the impugned order is unsustainable as it is a passed in the face of the Apex Court Order in Goetze (India) Ltd. (supra). It is submitted that the impugned order could not have held that the claim for deduction could be entertained by the Assessing Officer in the absence of the same finding a place either in return of income or in the revised return of income. It is further submitted that in view of the decision of the Apex Court in CIT v. Sun Engineering Works (P.) Ltd.[1992] 198 ITR 297/64 Taxman 442 a re-assessment consequent to re-opening of the assessment cannot lead to reduction of income which had been originally assessed to tax. In the above view, it is submitted that the impugned order of the Tribunal is not justified and admission of the appeal is warranted.*
>
> *9. For the purpose of the present appeal, the issue whether or not the claim of quantification made by the respondent before the Assessing Officer for the subject assessment years would be a fresh claim or not is academic. This in view of the fact that the impugned order has held that even if one accepts that the quantification of the amount of deduction made during the course of assessment proceedings is a fresh claim it is a settled position so far as this Court is concerned that it can be made before and could be considered by the Appellate Authorities. The right of an assessee to raise a fresh claim before the Appellate Authorities is no longer res-integra in view of the decision of this Court in CIT v. Pruthvi Brokers & Shareholders[2012] 349 ITR 336/208 Taxman 498/23 taxmann.com 23 (Bom.) wherein the reference has also been made amongst other decisions, to the decision of the Delhi High Court in Jai Parabolic Springs Ltd. (supra) wherein it has been held that there is no prohibition in the Tribunal to entertaining additional ground/claims which was not placed before the lower Authorities. In view of the above, we are not called upon to decide the applicability of the decision of Goetze (India) Ltd. (supra) in the present facts viz. whether or not claim for quantification was a fresh claim which is not made in the return of income or in the revised return of income.*

> *10. The reliance on the decision of the Apex Court in Sun Engineering Works (P.) Ltd. (supra) by the Revenue is misplaced. The above case dealt with re-opening of an assessment under Section 147 of the Act. It was in that context that the Apex Court observed that the Order passed under Section 147/148 and the Assessing Officer is primarily restricted to such income which has escaped assessment and does not permit reconsideration of issue which are concluded in the earlier assessment years in favour of the Revenue.*
>
> *11. In the present facts for the subject assessment years it is an undisputed position that the pending assessment before the Assessing Officer consequent to return filed under Section 139(1) of the Act for the subject Assessment years had abated. This was on account of the search and as provided in second proviso to Section 153A(1) of the Act. The consequence of notice under Section 153A(1) of the Act is that assessee is required to furnish fresh return of income for each of the six assessment years in regard to which a notice has been issued. It is this return which is filed consequent to the notice which would be subject of assessment by the Revenue for the first time in the case of abated assessment proceedings. Consequent to notice under Section 153A of the Act the earlier return filed for the purpose of assessment which is pending, would be treated as non est in law. Further, Section 153A(1) of the Act itself provides on filing of the return consequent to notice, the provision of the Act will apply to the return of income so filed. Consequently, the return filed under Section 153A(1) of the Act is a return furnished under Section 139 of the Act. Consequently, the respondent-assessee is being assessed in respect of abated assessment for the first time under the Act. Therefore the provisions of the Act which would be otherwise applicable in case of return filed in the regular course under Section 139(1) of the Act would also continue to apply in case of return filed under Section 153A of the Act and the case laws on the provision of the Act would equally apply.*
>
> *12. This Court in Pruthvi Brokers & Shareholders (supra) while dealing with a return of income filed under Section 139(1) of the Act has held that an assessee is entitled to raise a fresh claim before the Appellate Authorities, even if the same was not raised before the Assessing Officer at the time of filing return of income or by filing a revised return of income. This Court also placed reliance upon decision of the Apex Court in National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383 wherein while dealing with the powers of the Assessing Officer it had held that a claim not made in the return of income, the Court may lead to non entertainment of claim by the Assessing Officer. However, this restriction in the power of the Assessing Officer will not affect the power of the appellate Tribunal to entertain a fresh claim.*
>
> *13. In view of the fact that the issue stands concluded by the decision of this Court in Pruthvi Brokers & Shareholders (supra) the question as proposed does not give rise to any substantial question of law. Thus not entertained."*

78. So far as the observation of Ld. DR that Hon'ble High Court has not adjudicated the issue whether claim made in notes to return of income though without any quantification of such claim will considered to be valid claim made in return of income, it is observed that before Hon'ble High Court, Department has never raised the plea that quantification of claim was not made in return of income but only dispute was whether assessee can make claim which was not made in original return of income or not. The Hon'ble Bombay High Court has not turned out or dealt with the finding of ITAT Pune Bench referred supra which clearly indicate that they have in turn affirm the finding of ITAT Bench. It is observed that Hon'ble High Court has discussed the findings of ITAT Pune Bench including the issue of quantification in para 7 of its order as referred supra which clearly supports the argumentof

Ld.AR that its case is covered by Hon'ble Bombay High Court decision as relied upon by him.

79. During the course of appellate hearing, the Ld. DR has relied upon decision of Hon'ble Bombay High court in the case of EBR Enterprise supra and relied upon provisions of section 80A(5) of the Act. It is relevant to refer to para 2.1 of decision of Hon'ble High Court wherein it is categorically stated that assessee has not claimed deduction u/s.80IB (10) in the return of income nor in assessment proceeding u/s.143(3) of the Act. The Hon'ble High Court has also observed that such claim was made first time in revision application filed by assessee beyond normal period of limitation prescribed under the statute. The facts of assessee's case are clearly distinguishable as assessee has made such claim in notes forming parts of return of income whereas in the case before High Court claim was made in the revision petition filed u/s.264 of the Act. It is observed that while passing the assessment order or CIT(A)'s order, though AO/CIT(A) has not referred to provision of section 80A(5) of the Act, the Ld. DR has only raised this issue in her submission but such provision of the Act cannot be made applicable as in present case claim was made in notes forming part of return of income which is not denied by the lower authorities. The issue relating to filing of Form 10CCB or quantum of deduction is already discussed in preceding para hence no separate discussion is required.

80. It is observed that AO has not disputed the quantum of deduction u/s.80IA nor disputed whether assessee is eligible for deduction u/s.80IA on industrial undertaking relating to Rail Infrastructure facility, it is relevant to refer to decision of co-ordinate Bench in the case of Ambuja Cement Ltd. in ITA No. 1889 and 1241/Mum/2018,2384, 2958, 3475 and 3843/Mum/2019vide its order dated 07.11.2022 has held as under:

> *"87. So far as this grievance of the assessee is concerned, only a few material facts need to be taken note of. During the course of assessment proceedings, the Assessing Officer took note of the fact that the assessee has claimed deduction under section 80IA on rail system comprising of railway sidings, railway tracks, loading and unloading systems, at Ropar, Maratha, Sankrail, Farraka and Bhatapara units. He also the assessee's contention that these rail systems alongside the cement plants are to enable the transportation of raw material (i.e. coal etc) and finished goods (i.e. cement) to and from the cement plants of the assessee. The assessee's claim that the rail system meets all the requirements of Section 80IA(4) was also noted. The method adopted for computing the income was being excess of road freight and handling charges payable for transportation of goods by road to the nearest railhead, over the tariff payable for transportation of goods from railway siding to the rail head as per tariff notified by the Indian Railways. This claim, however, did not find favour with the assessee this time, even though the same stand of the assessee was accepted for three consecutive preceding assessment years. After elaborately discussing the things in detail, and extensively referring to investigations carried out in the case of Ultratech Cements Limited, the Assessing Officer concluded that (a) the so called rail system of the assessee company is simply a private rail siding, and is not any infrastructure of public utility; (b) the agreements entered into between the assessee company and the Indian Railways consisting of terms and conditions for private sidings, and could not be viewed as an agreement for building, operating and maintenance of a rail system; (c) the conditions stipulated under section 80IA have not been satisfied; (d) the actual operation of the rail system (i.e. running of the goods train) was being done by the Indian Railways and not the assessee company; (e) all the four cement plant sites were notified as independent booking stations and the freight was charged for the entire distance- including the distance from these private sidings to the railheads; (f) the notional profit computation is incorrect; and (g) the decisions of the Tribunal were not applicable as these critical facts were not placed before the Tribunal. The claim for deduction under section 80IA*

in respect of the rail system was rejected. Aggrieved, assessee carried the matter in appeal but without success. Learned CIT(A) reiterated the same arguments and upheld the stand of the Assessing Officer. The assessee is not satisfied and is in further appeal before us.

88. 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.

89. We find that the very case, on the basis of investigation in which the authorities below had decided the matter in favour of the assessee, came up before a coordinate bench of this Tribunal, and, in the said case, the matter was decided in favour of the assessee. In the said judgment, reported as Ultratech Cement Ltd Vs ACIT [(2017) 88 taxmann.com 907 (Mumbai)], the coordinate bench has held as follows:

> *9. During the course of assessment AO disallowed assessee's claim of deduction u/s.80IA in respect of profit of rail systems. The assessee made this claim on the ground that it had earned profit by operating its rail systems at Hirmi [Chhattisgarh], Tadipatri [AP], Arakkonam [Tamil Nadu] and Durgapur [West Bengal]. In the context, during the assessment proceedings it was explained that the assessee had inherited those rail systems [along with cement plants-Hirmi Cement Works, A P Cement Works, Arakkonam Cement Works & West Bengal Cement Works] out of demerger from L&T Ltd. at all those locations; that the rail systems were set-up by L&T Ltd. [and that way by the assessee company as it had inherited the cement plants from L&T Ltd. by way of demerger] to enable the transportation of raw material [coal etc] and finished goods [i.e. cements] at their cement plants through railway wagons, at all the said; four locations. It was explained that prior to putting up those rail systems, the assessee used to transfer the material from the cement plants [at all the four locations] to the nearest railway station and vice versa on road through trucks. Before the AO the claim of deduction was justified by assessee by taking the plea that the various conditions as prescribed u/s 80IA(4) was met with in as much as it had entered into an agreement with the government through department of Railways for developing, maintaining and operating the rail system [infrastructure facility]; and that in pursuance thereof it had developed the integrated rail system in between the plant and the nearest railway track [of Indian Railways] and running it [in between] for movement of the inward and outward material so as to enable it to transport the materials from its plants straightaway to the various destinations and vice versa at all those four locations; and that by way of such operation of rail systems, it has been able to save the expenses for loading [at those plants] into the trucks, road freight and expenses for unloading and loading the same at the site of nearest Indian railways and that resulted into the. profit of such rail systems.*
>
> *10. However, the AO noted that those agreements were for laying out private sidings and not for any rail system [as referred to in Explanation (a) to the clause (t) of sub-section (4) section 80IA in reference to the infrastructure facility] as claimed by the assessee that railway had laid down those [sidings] partly on the land belonging to the railways and partly belonging to the assessee company so as to facilitate the transportation of raw materials/cement bags through railway wagons [from / to their plant sites]. The AO also noted that the assessee [rather L&T Ltd.] had primarily requested the' railway department to extend the*

sidings [railway tracks] to the site of cement plants of the company so as to enable it to transport its goods [raw material & cement] from/to their plant sites itself [so that it could avoid transportation through the roads till the nearest railway station and loading and unloading etc]; that on such request the railway authorities conducted survey and laid down sidings and charged the assessee for laying out the railway track and other related infrastructure. The AO also noted that the wagons were actually run on those sidings by the railway authority and not by the assessee company. The AO also took note that railway authorities had posted its staff for weighing raw material/ cement bags loaded/unloaded by the assessee; and that all activities were directly or indirectly being carried out by the railway authorities and the assessee only reimbursed the expenses or charges levied by the railways in r/o siding maintenance etc. as per the agreement. The AO inferred that the so called "rail system" [of the assessee company] is not a self reliant, independent unit; and that it is providing services to the cement plants of the assessee company only. The AO also stated that railway department do not allow operation of the railways by any private enterprise and for that reason it [railway department] had formulated a Build-own-lease-transfer (BOLT) scheme whereby the private enterprises could set-up the necessary and crucial components of a railway system and provide that on lease to Indian Railways for maintenance and operation; and in the context referred to the CBDT circular No. 733, dated 03.01.1996 whereby the benefit of Sec. 80IA was also extended to such rail system constructed / developed by the private enterprises as per the said BOLT scheme. By that circular, the Board had also clarified that such concession would be available only to an infrastructure facility meant for development of rail systems and not to any other infrastructural facility including rolling stocks. The AO also observed that the assessee, had not given the said railway system or the crucial component thereof on lease to the railway department [had it been so, the profit by way of lease rent from such rail. system would have qualified for deduction u/s 80lA as per the concession given by the aforesaid circular]. Finally, the AO held that assessee was not eligible to claim the deduction u/s 80lA in r/o such rail systems and disallowed the claim accordingly.

11. In its appellate order CIT(A) noted that the issue has come up first in A.Y. 2004-05. In that year, the assessee had claimed deduction of Rs 15.63 crores in r/o rail system at Hirmi, Raipur District, Chattisgarh. In A.Ys. 2005- 06 & 2006-07, the assessee claimed deduction of Rs.16.30 crs. & Rs 20.95 crs. respectively in r/o that rail system at Hirmi. In A.Y. 2007- 08, the claim was made in r/o two more rail systems [one at Tadipatri in Andhra Pradesh & the other at Arakkonam in Tamil Nadu]. The total claim for that year amounted to Rs 52.38 crs. [Rs 21.09 crs. - Hirmi; Rs 25.56 crs. -Tadipatri & Rs 5.73 crs. -Arakkonam]. In A.Y. 2008-09, the claim extended to one more rail system at Durgapur [West Bengal] and the total claim amounted to Rs 61.56 crs. This claim for AY 2009-10 i.e. for the year under consideration had risen to 73.13 crs.

12. The rail systems at all these four locations viz. Hirmi, Tadipatri, Arakkonam & Durgapur are said to have commenced the operations in AY. 2000-01, AY. 1999-00, AY. 2001-02 ft AY. 2002-03 respectively [refer assessee's reply dated 06.01.2014] It was further observed by CIT(A) that the L&T Ltd. on whose request the private sidings were set up at all these four locations, never claimed any such deduction u/s 80IA(4). The deductions are being claimed by the assessee company

since AY. 2004-05, after the various cements plants were transferred to the assessee company [in the year 2003- 04] as per demerger scheme. In AY. 2004-05, claim was made [for the first time] in respect of such Rail System at Hirmi. Then in AY. 2007-08, it started claiming deduction in respect of rails systems at Tadipatri and Arakkonam and then in AY. 2008-09 for Durgapur also. From AY. 2009-10 and onwards the claim pertains to all the four units.

13. The CIT(A) further noted that in Ays. 2004-05 & 2005-06, the Hon'ble ITAT vide its order dated 20.08.2009 in ITA Nos. 7735 & 7736/Mum/2007 had decided this issue in the favour of assessee. Later that decision of the tribunal was followed by the ITAT in its [assessee] case in AY. 2006-07 [ITA No. 2604/M/09 order dated 31.5.2010] and in AYs 2007-08 & 2008-09 [ITA Nos. 8143/mum/2010 and 1813/Mum/2012, order dated 28.02.2014]. The relevant part of the Tribunal's decision in AY. 2004- 05 is reproduced hereunder:

> *"13. Regarding the issue in r/o deduction u/s 80lA on profit of Rail system at Hirmi, the AO rejected the claim on the ground that the rail system is not a profit centre but it is a cost centre and that the rail system is not an independent unit but it is 100% depending on the cement unit. Detailed submissions filed by the assessee which are reproduced in the assessment order was not found satisfactorily to the AO. Detailed submissions were again filed before the CIT(A). It was explained that the company had established a cement plant in Hirmi, The nearest available railway siding was at a distance of around 15 km. from the plant. To facilitate inward and outward movement of goods, the assessee developed infrastructure facility of rail system which was made operating in 1999. The assessee company duly entered into an agreement with the railways, which is a part of Government of India. It was submitted that there was option available u/s 80lA with the assessee to claim deduction for any of 10 consecutive years as its own choice. The assessee has opted for claiming the deduction from A.Y. 2004-05 on wards. It was submitted that the income offered for tax by the assessee includes income from rail system and that certificate of M/s Sharp & Tannan, CA in Form No. 10CCB certifying the correctness of the aforesaid claim was duly submitted to the AO.*
>
> *13.1. It was further submitted that the rail system is a profit centre. The rail system is engaged in business of providing transportation facility to the cement plant, profit of which is embedded in the profit of the assessee company as a whole. It was submitted that by developing this infrastructure facility, there has been saving in transportation cost and overall profits of the company have increased due to such savings. It was such that the mere fact that it does not raise an invoice from its railway unit to its cement unit cannot govern the tax implication of the profits delivered by the rail system. In support of its contention that treatment of a transaction in books of accounts cannot govern the tax statement reliance was placed on the decision of the Supreme Court in the case of Kadernath Jute Manufacturing Company Ltd. 82 ITR 362;*

in the case of Tutcorin Alali Chemicals Ltd. in 227 ITR 172; in the case of Godhra Electricity Company in 91 Taxman 91; in the case of Bokaro Steel Ltd in 263 ITR 315 and in the case of Sutlet Cotton Mills Ltd. in 116 ITR 1 and submitted that it would be totally incorrect to say that an assessee who raises internal invoices would be entitled to benefit of Sec 80IA and an assessee who does not raise internal invoices would not be entitled to such benefit.

13.2. The assessee further submitted that Sec. 80IA(8) itself contemplates a situation where goods or services are transferred by an eligible undertaking to non-eligible undertaking and vice versa. In such cases, deduction is to be allowed based on the market value of such goods or services. It was further submitted that the section itself envisages situation of captive consumption. Reliance was placed on the decision reported in 59 ITR 514 (Guj.) and 254 ITR 17 (Bom).

13.3. Further reliance was also placed on the decision of the Supreme Court in the case of Tata Iron & Steel Company Ltd. in 48 ITR 123 and stated that in that case, the assessee was engaged in the business of extraction of iron ore and manufacturing of iron and steel therefrom. The final product sold by the company was the finished iron and steel. Under some statute, a cess was leviable on the annual net profits derived from the mines. It was contended that since no iron ore extracted is sold to an outsider, no profits could be said to have been derived from the extracting activities. This argument was advanced based on the principle that a person cannot make profits out of himself, The Supreme Court negative this argument and held that despite captive consumption of iron ore certain profits can be regarded as having derived from the extraction activities. The Supreme Court ruled in favour of bifurcating the total profits into two activities viz. the extraction activity and the manufacturing activity. It was therefore submitted that in view of the above, it is not correct to say that the assessee does not earn any profits from its rail system merely because the rail system is used for the captive purposes of the cement plant.

13.4. It was further submitted that the Board Circular No. 733 dated 03.01.1996 states that deduction u/s 80lA is applicable to an infrastructure facility meant for development of rail system. It was contended that the AO has categorically stated in para 5.2.3 of his order that rail system was developed by L&T and was inherited by the assessee out of demerger. It was further submitted that in a demerger all the property of the undertaking is necessarily transferred by the demerged company to the resulting company, therefore it is immaterial whether the rail system was developed by L&T Ltd. or by the resulting company i.e. the assessee. Further it was submitted that the facility of rail system consists of all that is required to carry on the railway activity in an organized and systematic manner. The activity of rail system is real and substantial and it is carried on with said purpose viz transportation of goods from one place to another and

thereby augmenting profits of the company as a whole by saving transportation cost which it would have otherwise incurred. It was further submitted that the profits derived from the rail systems are clearly arising out of the business of developing operating and maintaining the rail system.

13.5. It was further submitted that substantial investment has been made in developing the railway system. There is an agreement with the railways for operating and maintaining the rail system. It employs required personnel directly or through the railway authorities and it bearing the salary cost relating thereto. It was submitted that the rail system is developed on the basis of entirely different technology and employs different equipment and machinery from those applied by the cement unit for cement production. It is was further submitted that the rail system is not formed by splitting up or reconstruction of a business already in existence or by the transfer to a new business of machinery previously used for any purpose. It was therefore argued that the rail system is not a part of the cement unit but is an, independent unit. It was further submitted' that the conditions specified in Sec. 8OIA(4)(i) in r/o an infrastructure facility are fully satisfied in the present case. The rail system is owned by the assessee company which is a company registered in India. The assessee has entered into an agreement with the Railways for operating and maintaining the new infrastructure facility. It has started operating and maintenance the infrastructure facility after 01.04.1995.

14. After considering the submission and perusing the material on record, the CIT(A) was satisfied with the explanation of the assessee and taking into consideration the various case laws held that the assessee is eligible for deduction us BOIA in rlo profits from rail system. Accordingly, the AO was directed to allow deduction u/s 80IA. Now the department is in appeal here before the Tribunal.

15. The Id. DR on the other hand placed reliance on the order of the AO and on the other hand the Id counsel of the assessee placed reliance on the order of the CIT(A). Attention of the Bench was drawn on para 5.2 of the order of the AO and then on the provision of Sec 8OIA clause 2 and sub- clauses 3&4. It was further explained that the assessee can avail benefit of deduction u/s 80IA in 10 years of his choice out of 15 years period. The provisions are very clear. Attention of the Bench was also drawn on the copy of the agreement placed at page .93 of the paper book. It was further submitted that all the conditions of Sec. 80IA have been fulfilled. Reliance was placed on the decision reported in 40 ITR 123. It was submitted that the ClT(A) has discussed the issue extensively and the findings of the ld. CIT(A) remained uncontroverted. Therefore the order of the CIT(A) is liable to be confirmed in this regard.

16. We have heard the rival submission and considered them carefully: We have also perused the various material placed on record on which our attention was drawn. After taking into consideration we find that the CIT(A) has dealt with the aspect in detail. Contention raised before the ClT(A) on behalf of the assessee were not found incorrect or false. Conditions of Sec. 80IA have been fulfilled by the assessee. Thereafter,

the CIT(A) came to the conclusion that the assessee is eligible for deduction u/s 80IA. The findings of the Id. CIT(A) are given in para 3.10 are as under :-

> *3.10 After perusal of the facts of the case, findings given by the AO and submissions made by the appellant, I find that the only issues in this case is whether the appellant is eligible for deduction u/s. 80IA in r/o profits derived from the rail system. There is no dispute that the appellant (i) is a company (if) has developed the rail system and (iii) it" has entered into an agreement for operation and maintenance of the rail system with the railways i.e the Government. Thus all the 3 conditions required to be fulfilled as per Sec. 80IA(4)(i) have been satisfied by the appellant. Moreover rail system is defined in explanation to sec. 80IA(4)(i) as an infrastructure facility. Further separate books of account are being maintained by the appellant. The mere fact that internal invoices are not raised does not mean that the rail system is not a profit centre. It is also found that all the doubts raised by the AO in the assessment order have been fully explained by the appellant the AO has himself stated in the assessment order that the rail system was developed by L&T Ltd which has been inherited by the appellant as a result of the demerger and Circular No. 733 dated 03.01.1996 categorically stated that benefit of sec. 80IA is applicable to development of rail system and there is no gain saying that fact that the appellant has developed the rail system and is operating and maintaining the same. After perusal of the facts as well as the judicial pronouncements quoted above it is therefore held that the appellant is eligible for deduction u/s 80IA in r/o profits from rail system. In view of the same, the AO is directed to allow deduction u/s 80IA of Rs. 15,64,33,576/-17. As stated above neither the findings of the Id CIT(A) could 'be controverted by the Id DR nor any other material was brought on record to establish otherwise. Therefore in view of the uncontroverted reasoning given by the Id. CIT(A) we confirm his order on this issue also."*

14. After having all the above observation, the CIT(A) noted that the issue of the allowability of the assessee's claim u/s 80IA(4) in respect of ' Rail Systems' as referred to by the assessee has been examined by him afresh from the point of view of the relevant provisions of the Act and the facts as to whether the 'Rail System' as referred to by the assessee could indeed be treated as the infrastructure facility for which deduction u/s 80lA is intended to by the legislature; and whether the assessee operated that rail system.

15. Replies and justification filed by assessee was not accepted by CIT(A) and he held that the rail system of the assessee do not fall within the definition of the infrastructure facility, as the same could not be treated as a facility of public utility. For this reason the assessee company was held to be not entitled for the deduction u/s.80IA in r/o the profit, from the operation of rail system. Reasons for the same was as under:-

16. The CIT(A) observed that the agreements under reference were not at all any agreements for developing, maintaining and operating any infrastructure facility to which benefit of exemption is intended to be given in Section 80IA. For this reason also the assessee company was held to be not entitled for deduction u/s.80IA in r/o the profit from the operation of rail system.

17. The CIT(A) also observed that L&T Ltd., who have developed the said rail system was also not eligible u/s.80IA on operations of those rail systems under the provisions that existed at the relevant time i.e., prior to 01/04/2002 when such infrastructure facility was said to have become operational.

18. The CIT(A) observed that the L&T Ltd., did not claim exemption on operation of those rail systems. Rather the assessee company has started claiming exemption from AY. 2004-05 after the ownership over the cement plants together with such rail systems were transferred to it following the demerger scheme in FY. 2003-04.

19. The CIT(A) further observed that the provision of railway track, signals, level crossings etc are the essential components of a rail system but that in itself would not give rise to any profit. For that movement of traffic [i.e. material] is to be made over those railway tracks. The profit would arise by charging the freight thereon.

20. The CIT(A) further observed that as per' the agreement, the railway track, signals, level crossings etc were laid out on the cost of L&T Ltd. The cost of maintenance was also to be borne by L&T Ltd. [and now by the assessee]. On that only expenses are incurred and there would be no profit element. Then the issue arises of running the wagons onto those tracks. As per the agreement, the assessee was not permitted to run the wagon onto those tracks.

21. As per CIT(A), it is not a case of running of railways [goods train] by L&T Ltd. or the assessee company on those private sidings and as such the assessee did not run any rail system onto those private sidings. Therefore, it cannot be said that the assessee company had operated any rail systems at all. Therefore the deduction u/s 80lA would not be available to it onto the profit, if any, from such rail systems.

22. The CIT(A) also observed that there is very limited profit on operation of such rail system and the claim made by assessee u/s.80IA is exorbitant.

23. In view of the above discussion, the CIT(A) concluded that assessee's claim of deduction u/s.80IA is not allowable. However, by observing that the Tribunal has allowed the claim of assessee in the Ays. 2004-05, 2006-07 to 2008-09, to follow the judicial discipline, he followed the order of Tribunal and allowed assessee's claim in the A.Y.2009-10. However, by stating that new facts have been brought on record in the A.Y. 2010-11, he declined claim of deduction u/s. 80IB(4).

24. With regard to the disallowance, deduction u/s. 80IA(4), Revenue is in appeal before us in the A.Y. 2009-10, whereas assessee is in appeal for the A.Y. 2010-11.

25. It was vehemently argued by learned AR that Revenue authorities have not considered the eligibility requirement u/s.80IA as brought by the Finance Act 2001 wherein Finance Act, 2001 has deleted the requirement of the assessee to transfer the infrastructure facility to the concern Government authorities within prescribed time. He contended that CIT(A) has wrongly applied the provisions of law as applicable prior to 01/04/2002 while considering the assessee's claim for deduction for the Ays.2009-10 and 2010-11 under consideration. Learned A.R threadbare taken us to the objections raised by the CIT(A) and the reply filed by the assessee controverting each and every objection of the CIT(A). Our attention was invited to the amended provisions of Section 80IA(4) which does not require infrastructure facility to be a public facility for allowing deduction u/s. 80IA. Our attention was also invited to the terms and conditions of the agreement entered between the assessee company and the railway department which contained conditions for construction of railway sidings, development of sidings, laying of tracks, signaling system and all the essential components of rail system. The terms of the agreement also provided for its operation and maintenance. He vehemently argued that the rail systems were developed in accordance with the agreements entered with the Indian Railways, wherein assessee was allowed to operate and maintain these sidings under supervision and as per the guidelines of Indian Railway. Our attention was invited to the various clauses particularly Class 2, 6, 7(a), 17 and 8(b) which stipulate for construction of railway sidings at the cost of the assessee. Construction work was awarded either to railway or third party contractors based on their expertise and the work was undertaken under the supervision of the Railways. Clause 6 is specifically provided for payment in advance to the railway administration, the total estimated cost of the work done by the party and thus by the railway administration. Clause 7(a) stipulate that assessee will provide and deliver at site the permanent way and other materials in accordance with the railway administration standard and specifications. Clause 17 stipulate that assessee shall provide labour for and bear the cost of all Operations on the siding. Clause 9(b) provides for maintenance and other charges for the operation of the sidings at assessee's cost and expense to the satisfaction of railway administration.'

26. Learned AR also argued that all the conditions of Section 80IA(4) was complied with for claiming deductions. Learned AR also invited our attention to the observation of CIT(A) with respect to the freight rate insofar as CIT(A) has wrongly considered the rate for quintals as against per Metric Ton adopted by assessee while computing eligible amount of deduction u/s.80IA (4). It was also contended by learned AR that assessee has started claiming deduction for rail system u/s.80IA only from A.Y.2004-05 since it has satisfied all the conditions as prescribed u/s.80IA (4).

27. With regard to disallowance u/s.14A on account of interest, our attention was invited to the profit earned by the undertaking during the year as well as interest free funds available with the assessee for making investment in tax free securities and it was contended that since investment was out of assessee's own interest free funds, in terms of decision of Jurisdictional High Court in case of CIT v. Reliance Utilities & Power Ltd. [2009] 178 Taxman 135/313 ITR 340 (Bom.) and CIT v. HDFC Bank Ltd., [2014] 49 taxmann.com 335/226 Taxman 132

(Mag.)/366 ITR 505 (Bom.), no disallowance of interest is warranted. With regard to the disallowance made under Rule 8D(2)(iii) he contended that assessee itself has offered the amount attributable for earning the exempt income, therefore, further disallowance made by Revenue authorities was not justified.

28. Learned AR also invited our attention to the order of the Tribunal in assessee's own case for Ays. 2004-05 to 2008-09, wherein Tribunal have after considering in detail allowed the assessee's claim u/s.80IA with regard to rail system. Sales Tax exemption as capital receipt was also decided by Tribunal in assessee's own case for the Ays. 2004-05 to 2008-09, relevant decision of the Tribunal was also filed before us.

29. Learned AR relied on following judicial pronouncements in support of the proposition that benefit allowed in earlier year cannot be denied in subsequent years.

1.	*RadhaSoami Satsang v. CIT [1992] 60 Taxman 248/193 ITR 321 (SC)*
2.	*CIT v. Western Outdoor Interactive (P) Ltd. [2012] 25 taxmann.com 340/210 Taxman 229 (Mag.)/349ITR 309 (Bom.)*
3.	*CIT v. Paul Brothers. [1995] 79 Taxman 378/216 ITR 548 (Bom.)*
4.	*CIT v. Macbrout Engineering (P.) Ltd. [2014] 52 taxmann.com 219 /[2015] 232 Taxman 406(Bombay)*
5.	*CIT v. Modi Industries Ltd. [2010] 8 taxmann.com 129/327 ITR 570 (Delhi)*
6.	*CIT v. Delhi Press Patra Prakashan Ltd. [2013] 34 taxmann.com 3/217 Taxman 288/355 ITR 14(Delhi)*
7.	*Saurashtra Cement & Chemical Industries Ltd. v. CIT [1979] 2 Taxman 22/[1980] 123 ITR 669(GUJARAT)*
8.	*Ace Multi Axes System Ltd. v. Dy. CIT [2015] 228 Taxman 98/[2014] 49 taxmann.com 168/367 ITR266 (Karnataka)*
9.	*ITO v. Smt. Urmila Bhandari [IT Appeal Nos.766, 2593 (Delhi) of 2013, dated 20-10-2014]*
10.	*Dy. CIT v. Selvel Advertising (P.) Ltd. [2015] 58 taxmann.com 196 (Kol.-Trib.)*
11.	*Century Enka Limited v. Dy. CIT [2015] 58 taxmann.com 318/154 ITD 426 (Kol.-Trib.)*
12.	*Janak Dehydration (P.) Ltd. v. Asstt. CIT [2011] 44 SOT 93 (Ahmedabad) (URO)*
13.	*U.P. State Bridge Corporation Ltd. v. Dy. CIT [2015] 62 taxmann.com 61/70 SOT 517 (Lucknow -Trib.)*
14.	*Asst. CIT v. Apex Packing Products (P.) Ltd. [IT Appeal Nos. 145 to 150 (PNJ) of 2013, dated 3-1-2014]*

30. On the other hand, it was vehemently argued by learned DR that rail system of the assessee company was simply the profit siding and not any infrastructure facility of public utility, therefore, revenue authorities have correctly declined claim of deduction u/s.80IA(4). She further contended that the agreement entered between assessee company and railway department contained the terms and conditions for construction of private siding which cannot be treated as any agreement for development operation and maintenance of any rail system. She further vehemently argued that assessee has not complied with various conditions given in Section 80IA to arrive at eligibility for deduction. She further invited our attention to the observation made by CIT(A) to the effect that the actual operation of rail system on to the private sidings between the serving railway station and plant premises was being done by the Indian Railways and not by the assessee Company, therefore, assessee was not entitled for 80 IA(4). She further alleged that profit computed by assessee for the rail system was very exorbitant and method adopted for computation was also not correct. Our attention was invited to the computation of profit as

per table 'F'of CIT(A)'s order. She further contended that when L&T Ltd., itself was not eligible for deduction u/s.80IA, how assessee company became eligible for the same after demerger and inherited the cement business i.e., cement plants together with the rail systems of the L&T Ltd., She placed reliance on the Circular No.733 dated 03/01/1996 which provided that BOLT scheme of Indian Railway shall be eligible for the benefit u/s.80IA.

31. With regard to sales tax exemption benefit being treated as capital receipt, she relied on the decision of Jammu and Kashmir High Court in the case of Shree Balaji Alloys v. CIT [2011] 198 Taxman 122/9 taxmann.com 255/333 ITR 335, Bombay High Court in case of CIT v. Chaphalkar Brothers [2013] 33 taxmann.com 431/215 Taxman 145 (Mag.)/351 ITR 309.

32. With regard to disallowance made u/s.14, she relied on the findings recorded by lower authorities.

33. We have considered rival contentions, carefully gone through the orders of the authorities below and materials placed before us. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the case.

34. Grievance of both the assessee and revenue revolves around assessee's eligibility for claim of deduction u/s.80IA (4) of the Income-tax Act. From the record we found that assessee UltraTech Cement Ltd. ('UTCL') has acquired the cement business of Larsen & Toubro Limited (L&T') along with the Rail systems at Hirmi, Tadipatri, Arrokonam and Durgapur in the FY. 2003-04. These Railway systems were developed on or after 01/04/1995 by the L&T. year wise details of the aforesaid rail systems are as follows:

Unit I Rail system Undertakings	**Year of Commencement of operations (A. Y.)**	**Initial year of claim (A.Y.)**
Rail system at Hirmi in the stateof Chhattisgarh	**2000-01**	**2004-05**
Rail system at Tadipatri in thestate of Andhra Pradesh	**1999-00**	**2007-08**
Rail system at Arakkonam in thestate of Tamil Nadu	**2001-02**	**2007-08**
Rail System at Durgapur in thestate of West Bengal	**2002-03**	**2008-09**

35. M/s. L&T had entered into agreements with the Railway authorities to develop, operate and Maintain the Rail systems which infact the company has done from initial day. This agreement with the Railway Authorities was not under the BOLT Scheme but infact the assessee was permitted to setup and even operate and maintain the rail system so developed in accordance with terms and conditions of the agreements under the supervision and as per guidelines of Indian Railways. Prior to putting up the rail systems, the assessee used to transfer the material from its plant

to the nearest Indian Railways station and vice versa through Road and used to incur road freight and loading & unloading charges at multiple stages. To save these costs and other incidental costs, the assessee decided to develop the rail infrastructure from its manufacturing setup till the nearest Indian Railway station. It is Indian Railways who either have the power to develop any railways in India or it can enter into any arrangement with any person for developing and for operating rail systems subject to prior approvals and conditions. Therefore, the assessee accordingly entered into agreement with the Rail authorities to develop, operate and maintain its rail systems. The agreement lays down various conditions to be complied with, before and during the development, maintaining and operating the rail systems. Such rail system can also be made available to any third party with the permission of the Indian Railway. For this purpose, the assessee approached to the Indian Railways for development of Rail systems which Indian railways has agreed to provide permission for laying down the railway sidings (including the rail line upto the nearest rail head) and accordingly the assessee had awarded the contract to the private parties for construction and to the Indian Railway approved agency for supervision and consultancy of the Rail system and had borne the entire cost of development including for incidental expenses paid to all the agencies. The clause in the agreement saying that railway administration is willing to lay the said sidings / construct the siding is meant for Railway administration's permission for allowing the assessee for developing the Rail system as per the norms and supervision of Indian Railways. The revenue authorities alleged that the Railway system have been developed to facilitate the transportation of goods for the assessee from and upto the factory premises, and therefore the Agreements entered into by the assessee with the Indian Railways cannot be regarded as required agreements between the Govt. and the assessee. In this respect the assessee submitted as under before the lower authorities.

(*a*)	as per section 80- IA(4)(i)(b) the agreement has to be entered with the Central Govt or a State Govt or a Local Authority or any other statutory body for (i) developing or (ii) Operating and Maintaining or (iii) Developing, Operating and Maintaining the infrastructure facility. Indian Railways is the statutory body under the Indian Railways Act.
(b)	The provision of Sec.80-IA (8) contemplates a situation where goods or services are transferred by an eligible undertaking and vice versa. Undoubtedly therefore, the section itself envisages situations of captive consumption.
(c)	Further as mentioned in clause 15 of the agreement, the rail systems developed by the appellant can be made available to any third party with the prior approval of the Indian Railways.

36. It was therefore contended that the agreements as entered into by the assessee with Indian Railways are as envisaged u/s 80- IA(4)(i) and in no case it can be inferred that they are not the required agreements under section 80-IA.

37. The Govt can also enter into any arrangement with any person for developing and for operating rail systems subject to prior approvals and conditions of the Indian Railways. M/s L&T has accordingly entered into agreement with the appropriate rail authorities to Develop, Operate and

Maintain its rail systems. M/s. L&T had awarded contract to the private parties for construction of rail sidings (including upto the nearest rail head) under the supervision of Indian Railways approved agency, and the entire cost for construction / development paid to the aforesaid agency and supervision charges paid to Indian Railways approved agency have been borne by the assessee, apart from all costs incurred for all the materials and incidental expenses. It was further explained in terms of clause 14, Wagons are hauled by the Railway Administration from the point marked 'X' or such other points as may be fixed upon by mutual consent of the applicants and railway administration in such manner as shall be determined in each case by the Railway administration. The assessee undertakes to shunt the wagons from such point to his premises and back with his own labour. However", no siding charges are charged by Indian Railways, since it is a private siding. The Clause 16 reads to mean that, charges such as Siding Charges are to be paid 'wherever leviable'. In assessee's case siding charges are not leviable.

38. The rail systems were developed by assessee under the agreements entered into with Indian Railways and assessee operates and maintains the same in accordance with terms and conditions of the Agreements, under the supervision and as per guidelines of Indian Railways. Relevant clauses of the agreements substantiating the same are asunder:-

(*a*)	Clause No. 2, Agreement to Construct Siding - Wherein it is mentioned that "the Railway administration will at the cost and the expenses of the applicant, in all respect, construct the railwaysidings " Further kindly be informed that, for construction of the siding under the supervision of the Railways, the contract for construction and supervision has been awarded by the applicant and the entire cost has been borne by the applicant.
(*b*)	Clause No. 6 - Payment by Applicant against the total estimated cost - wherein it is mentioned that, "The applicant will pay in advance to the railway administration the total estimated cost of thework consisting of the estimated costs of work done by the party and those by the railway administration "
(*c*)	Clause No. 7(a) - Permanent way materials - "The applicant will provide and deliver at site the permanent way and other materials (which includes Girders, Rails, Sleepers, fastenings, points, crossings, fencings, signals and overhead structures and any other things connected therewith for electric tractions and other machinery and equipments necessary for working of the sidings) in accordance with the Railway administration's standards and specifications. All charges incurred in laying and fitting the permanent way materials and all other equipments which may be provided shall entirely be borne by the applicant."
(*d*)	Clause No. 17 - Working of the Siding - wherein it is mentioned that " ... the applicant shall provide labour for and bear the cost of all Operations on the siding. The applicant shall be responsible for the strict compliance by himself and his employees and agents of all rules, regulations and standing orders made by the railway administration from time to time for the working of sidings and for all accidents, loss or damage that may be ensured or be caused by reasons of negligence or non- observance of such rules, regulations and orders
(e)	Clause No. 8(b) - Wherein it is mentioned that, \\ Maintenance and other Charges for the portion of the sidings - The applicant will at their own cost and expenses in all things and to the satisfaction of the railway administration and if required by the railway administration under its supervision maintains in good order and repair the said portion of the siding. Such charges as may be fixed by the railway for the supervision rendered shall be paid by the applicant.

39. These are other various clauses wherein it is evident that the Development, Operation and Maintenance is done by the assessee and the entire cost for the same is borne by the assessee.

40. From the record we also found that the assessee has duly submitted for all the rail systems, Form 10CCB, duly certified and audited by M/s. G.P Kapadia & Co., Chartered Accountants along with Balance Sheet, P&L account, Schedules forming part of Balance sheet and P&L Account.

41. However, the AO did not agree with assessee's contention and held that Rail systems developed by assessee is not eligible for claim of deduction u/s.80IA (4). Now, we deal precisely with the observation made by CIT(A) for declining Assessee's claim of deduction u/s.80IA.

42. With regard to CIT(A)'s observation as to whether rail systems developed by M/s. L&T were in accordance with the Build-Own-Lease-& Transfer (BOLT) scheme of the Indian Railways, we observe that L&T had entered into agreements with the railway authorities to develop, operate & maintain the rail systems, which in fact the company has done from the initial day. The assessee was permitted to setup and even operate & maintain the rail systems so developed. Further, regarding' Circular No. 733 dated 03-01-1996, we found that the Circular clarifies that tax holiday benefit u/s. 80-IA of the Act was also available to private enterprises which only built and leased out the rail system to the Indian Railways. In spite the absence of activities-'operate and maintain' the rail systems, such 'infrastructure facilities' were also declared as eligible to claim deduction under the said section. Further, the circular also states that rail systems developed other than under the BOLT scheme were also eligible for benefit u/s 80-IA. In case of the assessee, the clarification of benefits u/s. 80-IA being available to those rail systems who do not 'operate and maintain' the systems clearly establishes that, enterprises who in fact operate and maintain the rail systems were certainly eligible for tax holiday benefits. As the assessee has entered into agreements with the railway authorities to develop, operate & maintain the rail systems, which in fact the company has done from the initial day. There was indeed an 'infrastructure' facility eligible for deduction u/s 80lA. We also found that the Hon'ble ITAT in assessee's own case for AY. 2006-07, has categorically allowed the deduction u/s. 80-IA for its rail system after dealing with the Circular No. 733 dtd 3.1.1996.

43. The Rail systems of assessee at Hirmi, Tadipatri, Arakkonam and at Durgapur were developed under the Agreements entered into with Indian Railways and the assessee is allowed to Operate and Maintain in accordance with terms and conditions of the Agreements, under the supervision and as per guidelines of Indian Railways only. The copies of agreements between M/s L&T and Indian Railways for other rail systems i.e. at Tadipatri, Arakkonam and Durgapur are placed on record and we have carefully perused the relevant terms and conditions. The Indian Railways plays role in operations and maintenance of the Rail systems, traffic Management, etc. as mentioned under the various clauses of the Agreements entered into, and the entire cost of such operation and maintenance is borne by the assessee including for the Railway staff being deputed for the purpose.

44. From the record we found that M/s. L&T had entered into agreements with the Railway authorities to develop, Operate and Maintain the Rail systems which infact the company has done from initial day. This agreement with the Railway Authorities was not under the BOLT Scheme but infact the assessee was permitted to setup and even operate and maintain the rail system so developed in accordance with terms and conditions of the agreements under the supervision and as per guidelines

of Indian Railways. As per the relevant provisions of law during relevant period there is no requirement for Rail Infrastructure to be In BOLT scheme, to be eligible for claiming deduction under Section SO-lA (4)(i). Section 80-lA (4)(i) provides the following conditions to be complied with for claiming deductions;

(*i*)		......
(*a*)		it is owned by a company registered in India
(*b*)		it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (*i*) developing or (*ii*) operating and maintaining or (*iii*) developing, operating and maintaining a new infrastructure facility;
(*c*)		it has started or starts operating and maintaining the infrastructure facility on or after the 1st dayof April, 1995:

45. With regard to objection of revenue authorities on applicability of CBDT circular No.733 on BOLT schemes, systems developed under BOLT scheme are also eligible for 80-IA benefit, and in no way restricts the deduction u/s.80-IA to other rail systems. We found that the Hon'ble ITAT in assessee's own case for AY 2006-07, has categorically allowed the deduction u/s. 80-IA for its rail system after dealing with the Circular No. 733 dtd 3.1.1996.

46. Therefore the agreements as entered into by the assessee with Indian Railways are as envisaged u/s 80- IA(4)(i) and in no case it can be inferred that they are not the required agreements under section 80-IA.

47. We also found that no siding charges are levied by Indian Railways for the rail systems developed by the assessee. The assessee has developed, operates and maintains the rail systems. The systems are being operated by the assessee as permitted under the agreements entered into with Indian Railways and under the rules and regulations of Indian Railways from time to time. The entire cost was borne by the assessee and is appearing in the balance sheet of the assessee as placed on record. We have also verified the same and found it correct.

48. Contention of revenue authorities that Railways had constructed the rail system is not factually correct. In fact, M/s. L&T had entered into agreement with the appropriate rail authorities to Develop its rail systems. M/s. L&T had constructed the rail system by awarding contract to the private parties for construction of rail sidings (including upto the nearest rail head) under the supervision of Indian Railways approved agency, and the entire cost for construction/ development paid to the aforesaid agency and supervision charges paid to Indian Railways approved agency have been borne by the assessee, apart from all costs incurred for all the materials and incidental expenses.

49. From the record we found that the rail systems were developed under the agreements entered into with Indian Railways and assessee operates and maintains the same in accordance with terms and conditions of the Agreements, under the supervision and as per guidelines of Indian Railways. We have carefully gone through the relevant clauses of the agreements substantiating the same which reads as under:

(*a*)		ClauseNo.2,AgreementtoConstructSiding-Whereinitismentionedthat"theRailwayadministration will at the cost and the expenses of the applicant, in all respect, construct the railway sidings" Further kindly be informed that, for construction of the siding under the supervision of the Railways, the contract for construction and supervision has been awarded by the applicant and the entire cost has been borne by the applicant.
(*b*)		Clause No. 6 - Payment by Applicant against the total estimated cost -wherein it is mentioned that, "The applicant will pay in advance to the railway administration the total estimated cost of the work consisting of the estimated costs of work done by the party and those by the railway administration"
(c)		Clause No. 7(a) - Permanent way materials - "The applicant will provide and deliver at site the permanent way and other materials (which includes Girders, Rails, Sleepers, fastenings, points, crossings, fencings, signals and overhead structures and any other things connected therewith for electric tractions and other machinery and equipments necessary for working of the sidings) in accordance with the Railway administration's standards and specifications. All charges incurred in laying and fitting the permanent way materials and all other equipments which may be provided shall entirely be borne by the applicant."
(d)		Clause No. 17 - Working of the Siding - wherein it is mentioned that " ... the applicant shall provide labour for and bear the cost of all Operations on the siding. The applicant shall be responsible for the strict compliance by himself and his employees and agents of all rules, regulations and standing orders made by the railway administration from time to time for the working of sidings and for all accidents, loss or damage that may be ensured or be caused by reasons of negligence or non- observance of such rules, regulations and orders .... " Further, the appellant carries out all the operations for smooth movement of its goods, viz. Shunting of the Wagons, placing of the wagons at appropriate locations, Loading / Unloading of Wagons within the stipulated time and stipulated methods of Indian Railways through Wagon Loading Machines and Wagon Tipplers, Weighing of Wagons on Motion Weigh Bridges, Maintaining signa ling systems, Wagons, Couplings, Rake formation for dispatch, hauling of Wagons through its own locomotives, etc.
		Further, in Clause No. 14 - Traffic on Siding - it is mentioned that applicant undertakes to shunt the wagons from such point to his premises and back with his own labour and the railway administration would not be responsible for any delay, loss and damages caused in consequence of the failure of the applicant to arrange for such shunting. " Thus, the rail system is being operated by the appellant and the cost of above operations is borne by appellant.
(e)		Clause No. 8(b) - Wherein it is mentioned that, Maintenance and other Charges for the portion of the sidings - The applicant will at their own cost and expenses in all things and to the satisfaction of the railway administration and if required by the railway administration under its supervision maintains in good order and repair the said portion of the siding. Such charges as may be fixed by the railway for the supervision rendered shall be paid by the applicant.

There are other various clauses wherein it is evident that the Development, Operation and Maintenance is done by the appellant and the entire cost for the same is borne by the appellant.

50. The question of allowability of the deduction u/s. 80IA in respect of rail systems has been settled in earlier years by the Hon'ble ITAT in assessee's own case. The facts and the agreements were also placed before authorities in those years. Therefore, the claim based on same facts

needs to be allowed following the principle of Consistency in assessment proceedings. Even though the 'principles of res judicata' do not apply to income tax proceedings and each assessment year being a separate unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be appropriate to allow the position to be changed in a subsequent year.

The above principles have been accepted in the undernoted case:

♦		*H.A. Shah & Co v. CIT [1956] (30 ITR 618) (Bom.)*
♦		*Amalgamated Coalfields Ltd. v. Janapada Sabha AIR 1964 SC 1013*
♦		*Cruch of South India Trust Association v. Telugu Church Council [1996] 2 SCC 520*

51. From the record we also found that the overall profits of the company have increased due to such commercial benefits and the same should have been treated as the revenue of the rail systems, which is the Fair Market Value of the services provided by the undertaking as per the provisions of Sec. 80IA(8) and the assessee is entitled for benefit u/s 80IA accordingly. However, the basis adopted for calculating the revenue from rail system by the assessee has been conservatively considered as lower of the freight chargeable through Rail and Road freight saved. The rail freight being lower is considered after further discounting it by 50% based on the circular of Indian Railways for the freight chargeable upto the nearest railway station.

52. We also found that assessee has furnished all the information with regard to No. of Railway Engines / Locomotives and Railway Wagons owned by the assessee before the lower authorities which are as under:-

Rail Systems at	**No. of Engines/Locomotives**	**No. of Wagons**
Hirmi	2	49
Tadipatri	2	76
Arakkonam	1	30
Durgapur	2	30

53. Unit wise details of amount of claim of deduction u/s.80-IA on the profits of Rail System for AY. 04-05 to AY. 09-10 is as under:-

Rail Systems at	AY.04-05	AY.05-06	AY.06-07	AY.07-08	AY.08-09	AY.09-10
Hirmi	15.63	16.13	20.95	21.09	24.33	28.26
Tadipatri	--	--	--	25.56	25.22	31.03
Arakkonam	--	--	--	5.73	6.30	7.11

Rail Systems at	AY.04-05	AY.05-06	AY.06-07	AY.07-08	AY.08-09	AY.09-10
Durgapur	--	--	--	--	5.71	6.72

54. We have also verified the calculation of revenue from rail system, filed before the lower authorities and found that the basis adopted for calculating the revenue from rail system is, lower of the Freight chargeable through Road and Rail. The Rail Freight being lower is considered after discounting it further by 50% based on the Circular of Indian railways for the freight chargeable upto the nearest railway station. Freight Rates are considered as per the Freight Rate chart & Freight Circulars issued from time to time by Indian Railways, based on the classification of the goods transported. The Railway freight rates are uniformly charged to everyone by Indian Railways. The copies of Form 10CCB including the Profit and loss account, Balance sheet along with Schedules, giving- therein the basis for calculation of revenue has been submitted before the lower authorities and had been duly examined by us and found to be correct.

55. We also found that the loading and unloading of goods is being done by the integrated Rail system set up by the assessee and expenses which were incurred earlier for loading and unloading of materials at the plant as well as the nearest Indian Railway station have been avoided and saved and are considered as income of the rail system arising due to setting up of such integrated rail system. The assessee has already submitted for all the Rail Systems form 10CCB duly certified and audited by M/s. GP Kapadia & Co. Chartered Accountants, alongwith Balance Sheet, P&L Account, Schedules forming part of Balance sheet and P&L Account. We have also checked the amount eligible for deduction as furnished in form 10 CCB and found the same as correct.

56. With regard to CIT(A)'s observation in the A.Y.2010-11 at page 42 to the effect that the so called 'Rail System' of the assessee company are simply a private siding and not any infrastructure facility of Public Utility therefore the infrastructure of such private sidings should be treated as "Private Facility", we observe that Section 80IA(4) of the Income-tax Act, 1961 does not require the infrastructure facility to be a public facility for allowing deduction under section 80IA. The explanation to section 80IA(4) defines the term 'infrastructure facility' to mean a road including toll road, a bridge or a rail system without anything further. We observe that the CIT(A) has been referring to the pre-amended definition of the term 'infrastructure facility' which was applicable till AY. 2001-02. The assessee company began its claim of deduction from AY 2004-05 when the definition was simplified with no indication about 'public facility'. Thus CIT(A) was not correct while declining claim of deduction u/s.80IA(4) on this reasoning.

57. As per our considered view, even assuming that the requirement of public facility is to be fulfilled, it is worth noting that a section of public is also considered to be public. This principle has been laid down by the Hon'ble Supreme Court in the context of a Chamber of Commerce CIT v. Andhra Chamber of Commerce [1965] 55 ITR 722 wherein it was ruled that even though the Andhra Chamber of Commerce was established only to serve the traders and businessmen in the State of Andhra Pradesh, such traders and businessmen constituted a section of public and therefore the Chamber existed for a public charitable purpose. In the ultimate analysis of the facts in the case of assessee Company, the benefits of such siding

does ensure to the public in general - to the consumers of cement. Any benefit to the business even though it is first enjoyed by the particular trade or establishment eventually is for the general public good. It has to be noted that several industries may come up on both the sides of sidings from the interchange point till factory gate, if anyone of them wants to make use of railway sidings, it is permissible for the Railway Administration to entertain such request and by making use of the exiting siding, can extend or branch off and lay railway tracks to the industry which makes the request and lay siding accordingly. Thus, the railway siding from the point of interchange till factory gate of the assessee has immense potential, with enabling powers to the Railway Administration (which itself is a public department), to be developed into a facility that will ensure to the public at large. The railway sidings are always constructed for captive consumption. Thus, the provisions of section 80IA(4) cannot be read in the manner to make it redundant, when the legislature in all its wisdom intended to give benefit of tax holiday for construction of infrastructure facility in the form of railway which is meant for captive consumption.

58. We have carefully gone through the terms and conditions of the agreement entered by the assessee with the railway authority, a perusal of clause 19 of the Railway Siding agreement entered into by the assessee with the Railway authorities, clarifies that construction and operation of the railway siding was not merely for the purpose of the business of the assessee, but was with a long term perspective to create an infrastructure facility which could, at a future point of time and in case a need arise, potentially confer benefit to the public at large. The agreement with the Railway authorities, provided that the facility so created could be made available to others with the discretion and prior permission of the railway authorities thereby rendering the facility open for general public at large. Hence, such a facility is in fact a public utility.

59. With regard to CIT(A)s conclusion for the A.Y. 2010-11 at page 42, to the effect that the agreements entered between the assessee Company & Railway Department, contained the terms & conditions for construction of Private Sidings and that cannot be treated as any agreement for development, operation & maintenance of any Rail system, we observe that as per section 80- IA(4)(i)(b), an assessee has to enter into an agreement with the Central Government or a State Government or a Local Authority or any other statutory body for (i) developing or (ii) Operating and Maintaining or (iii) Developing, Operating and Maintaining the infrastructure facility. The Indian Railways, with whom the assessee has entered into an agreement, is the statutory body designated under the Indian Railways with whom the assessee has entered into an agreement, is the statutory body designated under the Indian Railways Act. We found that the agreement does not merely contain the terms and conditions of the construction of railway siding i.e. development of siding (laying of tracks, signal system and all the essential components of Rail Systems) but it also contains the terms and conditions relating to its operation and maintenance as well.

60. Our attention was also invited to letter No. 99/TC(FM)26/1/Pt-II (Sub-Liberalization of siding 'Rules) of the Railway Boar clarifying that the capital cost of new siding, maintenance cost, cost of Railway staff etc. will be borne by the enterprise only, which also supports our view.

61. As far as operations is concerned, we found that the assessee carries out all the following operations for smooth movement of its goods, viz.

shunting of the wagons, placing of the wagons at appropriate locations, loading/unloading of wagons within the stipulated time and stipulated methods of Indian Railways through Wagon Loading Machines and Wagon Tipplers, weighing of wagons on Motion Weigh Bridges, wagon couplings and de-couplings, rake formation for dispatch, hauling of wagons through its own locomotives within the factory premises, etc. Thus, the rail system is being operated by the assessee and the cost of above operations is borne by assessee.

62. With regard to CIT(A)'s conclusion at page 42 of A.Y. 2010-11 to the effect that various conditions given in Section were not met with, we observe as under:-

a. Section 80-IA (4)(i) provides the following conditions to be complied with for claiming deductions;

(i) any enterprise carrying on the business of (i) developing, (ii) maintaining and operating or (iii) developing, maintaining and operating any infrastructure facility which fulfils all the following conditions, namely :-

(*a*)		it is owned by a company registered in India
(*b*)		it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;
(*c*)		it has started or starts operating and maintaining the infrastructure facility on or after the 1st dayof April, 1995:

63. As per materials placed on record, all the railway systems are established and owned by the assessee which is a Company as defined under the Income-tax Act. This is an undisputed fact and there is no adverse remark by the AO or CIT(A) in this regard.

64. As per clause (b)of Section 80IA (4)(i) an agreement has to be entered with the Central Government or a State Government or a Local Authority or any other statutory body for (i) developing or (ii) Operating and maintaining or (iii) Developing, Operating and Maintaining the infrastructure facility. The Indian Railways, with whom the assessee has entered into an agreement, is the statutory body designated under the Indian Railways Act.

65. We also observe that the agreements entered into by the assessee are for the development, operation and maintenance of the Railway siding. Thus this fulfils the requirement in clause (b).

66. The last requirement as per clause (c) is regarding commencement of operation and maintenance of facility on or after 1st April, 1995. All the railway sidings were developed after April, 1995 as can be verified from the date of agreements entered into by the assessee with the Railway authorities; which are as under:-

Location	*Authority with which Agreement is entered*	*Date of agreement*
Hirmi	South Eastern Railway	March 2000

Location	*Authority with which Agreement is entered*	*Date of agreement*
Tadipatri	South central Railway	03-05-1999
Arakkonam	Southern Railway	08-01-2001
Durqapur	Eastern Railway	18-10-2002

67. This also is an undisputed fact and there is no adverse remark by the AO or CIT(A) in this regard. In view of above all the conditions specified in section 80IA(4) has been complied with by the assessee entitling it to claim the tax holiday.

68. With regard to CIT(A)'s observation that the actual operation of Rail System [i.e. running of goods train] onto the private sidings between the serving railway station and plant premises [upto interchange point! exchange yard], was being done by the Indian Railways and not by the assessee Company.

69. We found that the CIT(A) has equated "running of goods train" with the "operation of Rail System". This is the sole basis on which he has arrived at his conclusion that since the assessee is not running the goods train it is not operation of Rail System and hence not eligible for claiming deduction under section 80IA(4).

70. As per our considered view, the operation of Rail System is not simply running of goods train. Operation of Railway Systems comprises of various activities viz. shunting of the wagons, placing of the wagons at appropriate locations, loading/unloading of wagons within the stipulated time and stipulated methods of Indian Railways through Wagon Loading Machines and Wagon Tipplers, weighing of wagons on Motion Weigh Bridges, wagon couplings and de-couplings, rake formation for dispatch, hauling of wagons through its own locomotives within the factory premises, etc. Thus, the rail system is being operated by the assessee and the cost of above operations is borne by assessee.

71. With regard to allegation of the CIT(A) that the assessee has never claimed that it is hauling the wagons on the entire siding, we found that hauling of wagons is only one of the activity in the entire operation of the rail system. Under the Railways Act, 1989 nobody other than railway administration is allowed to haul wagons of the railway tracks. As per materials placed on record, all the activities relating to the operation of rail system except hauling of wagons till the interchange point, is done by the assessee and the entire cost for the same is borne by it.

72. From the record we also found that even the maintenance of the Rail system such as alignment of track & gauge maintenance, patching of ballast, maintenance of railway track sleepers, signalling points and railway gate crossing from private siding to connecting point of nearest railway station is done by the assessee.

73. Thus the operation of rail is not merely hauling of wagons but comprises of various activities all of which is carried on by the assessee Company.

74. With regard to CIT(A)'s observation that all the four cement plants [having private sidings] were notified as independent booking station and the freight was charged by the railway department for the entire distance including the portion of private sidings [upto interchange point / exchange yard], we observe that this is a fact which is undisputed by the assessee and nothing turns out of it.

75. CIT(A) also alleged that the notional profit computed for so called rail system has been very exorbitant and the method is also not correct. It need to be computed in the manner as explained in para 3.2.14 [with reference to table F] above. If that is done, there would hardly be any profit to those rail systems.

76. In this regard, we found that prior to setting up of railway siding, the assessee used to transport its goods through road to the nearest railway station. Only the few components of the cost of road transportation, which the cement division of the assessee was hitherto incurring for transportation of materials to and from the factory premises, is adopted as the basis of calculating the revenue of the railway undertaking. The revenue is, however, computed for the actual services rendered by the railway undertaking to the cement division.

77. After verifying the computation of income eligible for deduction u/s.80IA, as filed by assessee, we found that the CIT(A) has misunderstood the working of the revenue calculation and alleged that such working is ill-conceived as the actual transportation of materials on the siding is carried out by the railway authorities. Based on such misunderstanding, he further alleged that assessee has claimed deduction for notional profits whereas section 80lA allows deduction for profits derived from actual operations.

78. In this regard, we observe that the railway systems of the assessee has been rendering following services to the cement division:

♦		shunting of the wagons,
♦		placing of the wagons at appropriate locations,
♦		loading/unloading of wagons within the stipulated time and stipulated methods of Indian Railways through Wagon Loading Machines and Wagon Tipplers,
♦		weighing of wagons on Motion Weigh Bridges,
♦		wagon couplings and de-couplings,
♦		rake formation for dispatch,
♦		hauling of wagons through its own locomotives within the factory premises

79. All the aforesaid services are carried out by the railway system inside the factory premises. Further even the maintenance of the Rail system such as alignment of track & gauge maintenance, patching of ballast, maintenance of railway track sleepers, signaling points and railway gate crossing from private siding to connecting point of nearest railway station is done by the railway system. Thus, the revenue of the railway

undertaking is the sum aggregate of the above services rendered by it to the cement division. For the purpose of computation, the railway undertaking has adopted the minimum freight rate (further discounted at 50%) which the Indian railways charges for the transportation of these materials. Since this is the easiest available comparable, it has been adopted by assessee for calculating one of the component of its "revenue".

80. We further found that an amount towards loading and unloading charges is added to the above revenue for inward and outward movement of goods which is also carried out by the rail undertaking. The basis, for computing this component of revenue is the loading and unloading cost which the cement division was hitherto incurring during transportation through roadways. The question of reducing the freight payments to the Railways does not arise since this cost is incurred by the cement division and not by the railway undertaking.

81. In view of the above discussion, the explanation given by the CIT(A) and the tabular representation of the computation of revenue of rail system in Table F, has no relevance since it is merely based on his incorrect assumption.

82. Further, we found that observation of CIT(A) with respect to the freight rate is also not correct in so far as for comparison, he has considered the rate per quintal as against per Metric Ton adopted by the assessee which can be observed from the calculation submitted by assessee before the lower authorities. Without any evidence in hands, the CIT(A) has merely stated that crucial facts were not disclosed by the assessee without referring to any specific facts which were not disclosed. Perhaps he is indicating about the operations of railway siding being carried out by the railways and not by the assessee. However, as aforesaid, he is comparing the operation of railway siding with merely hauling of wagons. The operations of railway siding involves various activities other than the hauling of wagons. Mere haulage of wagons cannot be equated with operations of railway siding. We found that assessee has filed reports in Form 10CCB from M/s G.P.Kapadia& Co., Chartered Accountant. The CIT(A) himself has allowed the deduction in AY. 2009-10 based on the similar facts available on records but changed his decision merely based on the replies to questionnaire from various Railway Department.

83. The CIT(A) has also raised a query as to whether the L&T Ltd. which had developed said rail system was eligible for deduction u/s 80lA in respect of profit, if any, otherwise on operation & maintaining that system under the provisions that existed at the relevant time [prior to 01.04.2002] when such infrastructure facility is said to have become operational. As per our considered view one of condition for claiming deduction under the pre-amended section 80IA(4) (i.e. prior to AY 2002-03) stipulated that the assessee should enter into an agreement with the Government (Central or State) or other authorities mentioned therein for (i) developing, (ii) maintaining and operating or (iii) developing, maintaining and operating a new infrastructure facility. Further, the agreement should also provide for transfer of such infrastructure facility to such authorities within the period stipulated in the agreement. The Central Government realizing the need to encourage investment particularly in the area of surface transport, water supply, water treatment system, irrigation project, sanitation and sewerage system or solid waste management systems made certain amendments to the conditions for eligibility of claim u/s. 80lA through

Finance Act, 2001. Amongst others amendments, the Central Govt. removed the abovementioned condition and accordingly, the amended section 80IA(4) clause (b) stood as under from AY. 2002-03 onwards:

"(b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;"

84. Thus, the Finance Act, 2001 amongst other conditions, particularly deleted the requirement for an assessee to transfer the infrastructure facility to the concerned government authorities with prescribed time.

85. In this regard reliance can be placed on the decision of Gujarat High Court in case of Katira Construction Ltd. v. UOI [2013] 31 taxmann.com 250/214 Taxman 599/352 ITR 513, wherein Court held as under:-

> *"32. It is true that with effect from 1-4-2002 some significant changes were made in the said provisions. Three of these changes which are material were: (i) that sub-section (4) of section 80-IA now required the enterprise to carry on the business of developing or operating and maintaining or developing, operating and maintaining any infrastructure facility. This was in contrast to the previous requirement of all three conditions being cumulatively satisfied; (ii) that the explanation of the term 'infrastructure facility' was changed to besides others, a road including toll road instead of hitherto existing expression 'road', and (iii) that the requirement of transferring the infrastructural facilities developed by the enterprise to the Central or the State Government or the local authority within the time stipulated in the agreement was done away with.*
>
> *33. These changes, however, would not alter the situation vis-a-vis the impugned amendment. These legislative changes did enlarge the scope of the deduction and in a sense, made it available to certain assessees who would not have been, but for the changes eligible for such deduction "*

86. In terms of the above averments, after acquiring the cement business from L&T, the assessee started claiming deduction for Rail system u/s. 80-IA from Assessment year 2004-05 onwards since it satisfied all the conditions as prescribed u/s 80IA(4) as it stood during AY. 2004-05, viz:

(*a*)	It is owned by a company registered in India.
(*b*)	It has entered into an agreement with the Government for developing / operating / maintaining the infrastructure facility, and
(*c*)	It has started operating and maintaining the infrastructure facility on or after April, 1995.

87. Thus, under the amended conditions of the section 80-IA(4) i.e. post AY 2002-03, L&T as well as UTCL were eligible for claiming deduction u/s 80IA. As per section 80IA(2), the deduction is available at the option of the assessee, for any ten consecutive assessment years out of twenty years beginning from the year in which the undertaking or enterprise

develop and operate any infrastructure facility. The assessee has started claiming deduction post AY. 2004-05 and is within the period of available twenty years. Under section 80IB, u/s 80lC, 80ID and 80lE, the first year in which the production is started is taken as initial previous year whereas, after the amendment in provisions of section 80lA w.e.f. 01.04.2000 the initial assessment year is at the option of the assessee to avail the benefit.

88. In view of the amended provisions of Section 80-IA, the year in which the claim is first made i.e. initial assessment year, must apply for determination of eligibility of the claim. In respect of AY. 2004-05 onwards including assessment years 2009-10 and 2010-11, since the condition relating to transfer of such facility to Central Govt. was no longer a pre-requisite for eligibility of claim u/s 80- IA(4)(b), the assessee has correctly made the claim. 89. In view of the above, we can safely conclude that even if an assessee does not fulfil all the requisite conditions for availing the tax holiday benefit in the year in which the new infrastructure facility is set up or has commenced operation, but in a subsequent year, all the requisite conditions for availing such benefit are fulfilled, the assessee would be entitled to avail the tax holiday benefit in respect of such subsequent assessment year(s). For this purpose reliance is placed on the decision of the Hon'ble ITAT of Jaipur in the case of Asstt. CIT v. Shiv Agrevo Ltd. [2009] 34 SOT 1 (URO). In this case, the assessee-company, whose main object was extraction of seeds for obtaining edible oils and refining thereof, set up a new industrial undertaking for the extraction and refining of edible oil. It claimed to have temporarily commenced the activity on and from 1-1-1997 on a trial run; however, the systematic activity of refining commenced only in the previous year relating to the assessment year 1998-99. After the final completion of the project, the assessee-company applied directly for a permanent registration certificate of its status as a small scale industry (SSI) under section 11-B of the Industrial Development Regulation Act, 1951 (IRDA) to the prescribed authority, who granted the certificate dated 30-3-1998, which was a conclusive and final proof of such a status under the provisions of IRDA. The return of income filed earlier by the assessee for the assessment year 1999-2000 as subsequently revised, wherein a claim of deduction under section 80-IA was made. The Assessing Officer disallowed the claim of the assessee, on the ground that the assessee started production from the assessment year 1997-98 itself, the year in which the assessee was not a small scale industry, and, therefore, the assessee did not fulfil the condition of section 80-IA in the initial year. On appeal, the Commissioner (Appeals), allowed the assessee's claim under section 80-1A. On Revenues appeal, the ITAT held that for claiming deduction under section 80-IA, it has to be determined at end of relevant previous year that as to whether assessee is registered as SSI and there is no condition in Act that an industrial undertaking should fulfil all conditions as laid down under section 80-IA in very initial year itself and not thereafter.

90. Even as per fiction created by section 80IA(5), the eligible business is the only source of income and the deduction would be allowed from the initial assessment year or any subsequent assessment year. It nowhere defines as to what is the "initial assessment year". Prior to 1-4-2000, section 80IA(12) defined the "initial assessment year" for various types of eligible assessees. However, after the amendment by the Finance Act, 1999, the definition of "initial assessment year" has been specifically taken away. Now, when the assessee exercises the option of choosing the initial assessment year as culled out in section 80IA(2) from which it chooses its'

10 years of deduction out of 20 years, then only deduction u/s 80lA can be determined.

91. ITAT Chennai Bench have dealt with similar issue in case of Mohan Breweries & Distilleries Ltd. v. Asstt. CIT [2009] 116 ITD 241 which pertains to AY. 2004-05 (i.e., after the amendment of S. 80-IA by the Finance Act 1999), the Chennai Tribunal has held that the initial assessment year is the first year of claim and S. 80-IA itself becomes applicable only when the assessee makes the claim for the first time and not before that. Hon'ble Madras High Court has upheld the judgment of Chennai Tribunal and concurred with the view that Section does not mandate that first year of 10 consecutive assessment years should be always first year of set-up of enterprise. The High Court has held that as initial year is not defined in Section 80lA as compared to Section 80IB where it is specifically provided that the year of commencement of business will be the initial year for the purpose of claiming the deduction, the year of option has to be treated as initial assessment year for the purpose of Section 80IA.

92. It is pertinent to mention here that once the deduction for the very first is allowed then in subsequent year the deduction cannot be disallowed on the same ground. Hon'ble High Court decision in the case of Saurashtra Cement & Chemical Industries Ltd. (supra), has pointed out that once deduction is allowed in the first year, revenue has no power to deny the deduction in subsequent assessment years as provided under the Act.

93. Even the Supreme Court in case of Bajaj Tempo Ltd. v. CIT [1992] 62 Taxman 480 /196 ITR 188 held that a provision in the taxing statute for promoting growth and development is to be construed liberally and hence, even the restriction contained in such a provision has to be construed so as to advance the objective of the provision and not to frustrate it.

94. The CIT(A) has also raised an objection to the effect that since L&T was not eligible for deduction u/s.80IA on operation of those rail system, then whether the assessee company, which inherited the cement business [i.e. cement plants together with said rail system] of the L&T Ltd in the FY. 2003-04 on account of demerger, could be treated as eligible to the deduction under the aforesaid section in respect of profit, if any, of those rail system for the later years. In this regard we observe that assessee has inherited the cement business from L&T Ltd., in FY. 2003-04 on account of merger. Post merger it started claiming deduction for Rail system u/s. 80-IA from Assessment year 2004-05 onwards as it satisfied all the conditions as prescribed u/s 80IA(4). Section 80IA(12) provided that in the scheme of amalgamation or merger, the deduction is available to the amalgamated / resulting company. The relevant provision of sec. 80IA(12) reproduced hereunder:-"Where any undertaking of an Indian company which is entitled to the deduction under this section is transferred, before the expiry of the period specified in this section, to another Indian company in a scheme of amalgamation or demerger.

(*a*)	no deduction shall be admissible under this section to the amalgamating or the demerged company for the previous year in which the amalgamation or the demerger takes place; and
(*b*)	the provisions of this section shall, as far as may be, apply to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place.

95. Section 80IA(2) further provides that the deduction is available at the option of the assessee for any ten consecutive assessment years out of twenty years beginning from the year in which the undertaking or enterprise develop and operate any infrastructure facility. UTCL has started to claim deduction within the prescribed period of twenty years. The claim is thus legitimately made by assessee complying the requirements mentioned under section 80IA.

96. In view of the above discussion and respectfully following the order of the Tribunal in assessee's own case for the Ays. 2004-05 to 2008-09, we do not find any merit in the action of the Revenue authorities declining the claim of deduction u/s.80IA(4). Accordingly AO is directed to allow the deduction as claimed by the assessee with respect to its rail system. We direct accordingly.

90. Learned Departmental Representative does not dispute the fact that the issue before us is covered by this decision of the coordinate bench, though he places reliance on the stand of the authorities below, and seeks to justify the same. We have also noted that in three immediately preceding assessment years, the same stand of the assessee, which has been rejected now, was accepted during the scrutiny assessment proceedings. While it is indeed true that there is no res judicata in the income tax assessment proceedings, at the same time, following the principles of consistency duly recognized by Hon'ble Supreme Court in the case of Radhasoami Satsang Vs CIT [(1992) 193 ITR 321 (SC)], unless there is a change in the material facts, the issues which have been settled one way or other must to be disturbed. In this view of the matter, and respectfully following the coordinate bench in the case of Ultratech Cement Ltd (supra), we uphold the plea of the assessee. The Assessing Officer is, therefore, directed to delete the impugned disallowance in respect of claim of 80IA in respect of rail system. The assessee gets the relief accordingly.

81. In view of above discussion, claim of assessee is found to be correct and AO is directed to allow deduction u/s.80IA on Rail Infrastructure as quantified in form 10CCB subject to allocation of indirect expenditure as confirmed hereinabove.

82. Without prejudice to the above, the learned A.R. has also pointed out that the initial assessment year for all the four rail undertakings begin from A. Y. 2007-08. The learned A.R. has further pointed out that the undertaking can claim deduction u/s.80-IA for any 10 consecutive years out of the block of 20 years. Based on the same, year-wise commencement of operation as submitted during the course of hearing is reproduced hereunder in a tabular format:

Particulars	**Kymore**	**Tikaria**	**Wadi 1**	**Wadi 2**
Initial Assessment Year of claim	AY 2007-08	AY 2007-08	AY 2007-08	AY 2007-08
Date of Commencement of Operation	27/07/1998	21/06/2003	10/07/2003	01/08/2006
1st Assessment Year of Commencement	AY 1999-00	AY 2004-05	AY 2004-05	AY 2007-08
10th consecutive AYs from 1st Year of claim i.e. AY 2007-08	AY 2016-17	AY 2016-17	AY 2016-17	AY 2016-17

83. The learned A.R. has further pointed out that if deduction u/s.80-IA is denied in A.Y. 2007-08 and 2008-09 merely on technical ground, it will be entitled for deduction u/s. 80-IA for such units for two years subsequent to 10 consecutive years as mentioned in above referred chart. Thus, for these units assessee would be entitled to deduction u/s.80-IA for A.Ys. 2017-18 and 2018-19 which fall within the block of 10 consecutive years as mentioned in section 80-IA(4) of the Act. The learned A.R. has also pointed out that in A.Ys. 2017-18 and 2018-19 the assessee company has not claimed deduction u/s.80-IA since it had already opted A.Y. 2007-08 to be its initial assessment year for all the four undertakings referred to above. If such an approach of disallowance u/s.80-IA on technical ground is confirmed then the assessee would lose its right to claim deduction u/s.80-IA on these undertakings for A.Ys. 2017-18 and 2018-19 as such procedural compliances would not have been made by the assessee in these years as well. This would be against the spirit of the legal provisions which otherwise has been introduced to promote spirit in infrastructure projects. Thus, if disallowance u/s. 80-IA for A.Ys. 2007-08 and 2008-09 is confirmed then the benefit to the assessee would be confined only to 8 consecutive years instead of 10 consecutive years which is contrary to what is provided in the statute. Therefore, in the interest of justice, it is agreeable to the argument put forth by the learned A.R. that in the event any disallowance of deduction u/s.80-IA in respect of the aforesaid undertakings it should be entitled for the deduction for A.Ys. 2017-18 and 2018-19. The facts that the assessee has claimed deduction for 10 consecutive years is also not controverted by the Ld. DR. It is also a fact that the assessee had followed the case laws prevailing at that particular point in time in claiming the deduction for AY 2007-08 and AY 2008-09 and has not claimed deduction for AY 2017-18 and 2018-19. However, since disallowance u/s 80IA has already been allowed by us as discussed at length in foregoing paragraphs, this finding is academic in nature."

63. Respectfully following the above decision, we allow the ground raised by the assessee.

64. In the Ground No. 13, assessee has raised the following grievance:

Ground No. 13: Disallowance of claim of leave encashment of Rs. 6,98,40,495/-

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in confirming the action of AO in not allowing the claim of leave encashment amounting to Rs. 6,98,40,495/-on provision basis based on actuarial valuation in computing the total income.

65. The Assessing Officer has discussed this issue at Para No 15 of assessment order. The Assessing Officer has referred to provisions of section 43B (f) and observed that provision for leave encashment cannot be allowed as deduction.

66. In appeal, Ld.CIT (A) has discussed the above issue at Para No 16.4.1 & 16.4.2 of his order which held as under**:**

"16.4.1 The decision of the Hon'ble Calcutta High Court is not binding as it is not the jurisdictional High Court. Further, the order of the Hon'ble High Court has been stayed by the Supreme Court. Therefore, I proceed to decide the matter treating that provisions of Sec. 43B(f) continues to be part of the statute.

16.4.2 As per the provisions of Sec. 43B(f), deduction for leave encashment can be allowed only on payment basis. There is no ambiguity whatsoever in the provisions. Therefore, in principle the action of the AO is upheld. In the course of the appellate proceedings, the AR of the appellant submitted that the AO wrongly disallowed certain expenses in respect of which payments were made by invoking the provisions of Sec. 43B. Therefore, the AO is directed to allow deduction for leave encashment on payment basis in accordance with the provisions of Sec. 43B(f). This ground of appeal is treated as dismissed."

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.

68. In the Ground No.14, assessee has raised the following grievance:

Ground No. 14: Disallowance of Education Cess amounting to Rs. 17,22,99,030/-:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in confirming the action of AO in not allowing deduction for Education Cess levied on Income Tax and Dividend Distribution Tax aggregating to Rs. 17,22,99,030/- as allowable expenditure in computing the total income.

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

70. In the Ground No.15, assessee has raised the following grievance:

Ground No. 15: Addition of leave encashment provision of Rs. 6,98,40,495/- while computing book profits u/s. 115JB:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in confirming the action of AO in adding provision for leave encashment amounting to Rs. 6,98,40,495/-, duly supported by actuarial valuation report, in computing Book Profit u/s 115JB.

71. 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.

72. Respectfully following the above decision, we allow the ground raised by the assessee.

73. In the Ground No.16, assessee has raised the following grievance:

Ground No. 16: Non-exclusion of profit on sale fixed assets of Rs. 191,80,73,544/- while computing book profits u/s. 115JB:

On facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in confirming the action of AO in not excluding capital profits being profit on sale of fixed assets of Rs. 1,91,80,73,544/- respectively in the computation of book profits under Section 115JB.

74. Similar issue was considered by us in the Assessee's Appeal in Ground No 10 in AY 2006-07 and held as under:

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.

75. Respectfully following the above decision, we partly allow the ground raised by the assessee for statistical purpose.

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

77. To sum-up, appeal filed by the revenue is dismissed and appeal filed by the assessee is partly allowed.

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

Sd/-
(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

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

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum