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.3137/MUM/2019(A.Y: 2010-11)
ITA.No. 3138/MUM/2019 (A.Y. 2010-11)

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

ITA.No. 3177/MUM/2019 (A.Y. 2010-11)

DCIT (LTU)-1 29th Floor, Centre No.1 World Trade Centre, Cuffe Parade Mumbai - 400005	*V.*	M/s. ACC Ltd., Cement House, 121 M.K. Road, Churchgate Mumbai - 400020 **PAN: AAACT1507C**
(Appellant)		**(Respondent)**

Assessee represented by	**:**	**Shri Yogesh Thar** **Shri Chaitanya Joshi** **Ms. SukanyaJayaram**
Department represented by	**:**	**Smt. Shailja Rai**
Date of Hearing	**:**	**09.01.2023**
Date of Pronouncement	**:**	**28.02.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

ITA.No. 3138/MUM/2019 (Appeal Relating to re-assessment)

1. This appeal is pertaining to Assessment Year 2010-11 arising from the appellate order dated 30th January, 2019 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 28th December, 2016 passed under Section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as the Act) was partly allowed. Aggrieved assessee is in appeal before us.

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

> *"Ground No. 1: Reassessment order is unjustified, erroneous and in utter disregard of the express provisions of the Act:*
>
> *a) On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals)-3 [hereinafter referred to as Ld. CIT (A)] erred in confirming the action of the Deputy Commissioner of Income-tax (Large tax payer Unit) [hereinafter referred to as 'AO'] in initiating the reassessment proceedings u/s 147/148 of the Act.*
>
> *b) The Appellant prays that the reassessment order of the AO be set-aside as bad-in-law."*

3. The Assessee has challenged reassessment notice issued by Assessing Officer u/s 148 of the Act. The Ld.CIT(A) has discussed the issue at Para No 4.3 of his order as under:

> *"4.3 I have considered the AO's contentions, submissions of the appellant and case laws relied upon by the appellant. The AO reopened the assessment by issue of notice u/s.148 after recording the reasons for reopening and after taking necessary administrative approval u/s. 151 of the I.T. Act 1961 vide No. CIT(LTU)/Reopening/2015-16 dated 29.02.2016. Notice u/s 148 of the I.T Act, 1961 was issued on 08.03.2016. In response to the same, the assessee submitted that the revised return of income filed on 21.04.2016 be considered as filed in response to the notice u/s.148. In this letter, he sought for the reasons for reopening the assessment which were provided to the assessee by the AO vide letter dated 07.09.2016. The objections of the assessee were also rejected by the AO by letter dated 11.11.2016.*

I find that reopening of the assessment under section 147 of the Act was done/properly following the due process of law and there is no infirmity or illegality in reopening the assessment and the notice issued u/s.148 for the year under consideration is perfectly legal and valid. Therefore, ground No. 2 is dismissed."

4. The Assessee has challenged the above finding. During the course of appellate proceedings, Ld. AR has referred to chart containing summary of his argument for above referred ground as well as written submission filed before Bench and lower authorities. The Ld.AR has submitted that reassessment notice is issued beyond four years from end of relevant assessment years and where the assessee has disclosed fully and truly all material facts, reopening beyond four years is bad-in-law. Reliance was placed mainly on following decisions:

(i). Calcutta Discount Co. Ltd. v. ITO [(1961) 41 ITR 191] (Supreme Court)
(ii). Mangalore Refinery and Petrochemicals Ltd. v. DCIT (2022) 137 taxmann.com 452 (Bombay)
(iii). Runwal Realty (P.) Ltd. v. DCIT (107 taxmann.com 284) (Bombay)
(iv). PCIT v. Punjab and Sind Bank (108 taxmann.com 351) (Delhi High Court)
(v). [SLP dismissed by Supreme Court in (108 taxmann.com 352)]
(vi). Hindustan Lever v. R.B. Wadkar (268 ITR 332) (Bombay High Court)
(vii). Business India v. JCIT (370 ITR 154) (Bombay High Court)
(viii). Bombay Stock Exchange v. DDIT (365 ITR 160) (Bombay High Court)
(ix). Panchratna CHS v. AO (376 ITR 404) (Bombay High Court

5. The Ld. AR has also referred to original assessment order passed in the case of assessee wherein both the issue relating to reassessment notice was discussed hence he contended that reassessment notice is purely based upon change of opinion and such notice deserves to be quashed. The Ld.AR in the written submission has referred to various replies filed during original assessment proceedings in support of its claim that relevant issue which is subject matter of present reassessment notice was discussed and Assessing Officer has applied his mind and passed assessment order. The AR has placed reliance on following decisions:

a. CIT vs. Kelvinator of India Limited [(2010) 320 ITR 561 (SC)]
b. ITO v. Techspan India (P.) Ltd. [(2018) 92 taxmann.com 361 (SC)]
c. PCIT v. Century Textiles & Industries Ltd. [(2018) 99 taxmann.com 205 (Bombay HC)]SLP dismissed in [(2018) 259 Taxman 360]"
d. Marico Ltd. v. ACIT [(2020) 425 ITR 177 (Bombay HC)]
e. GKN Sinter Metals Ltd. v. ACIT [(2015) 371 ITR 255 (Bombay HC)]
f. Aroni Commercials Ltd. v. DCIT [(2017) 393 ITR 673 (Bombay HC)]

6. The Ld AR has also stated that in absence of no 'new' tangible material, reopening is bad-in-law for which he relied upon following decisions:

(i) Plus Paper Food Pac Ltd. v. ITO [2015] 374 ITR 485 (Bombay)
(ii) CIT v. Amitabh Bachchan [2013] 349 ITR 76 (Bombay)
(iii) Asian Paints Ltd. v. DCIT (2009) (308 ITR 195) (Bombay)
(iv) Kalpataru Ltd. v. DCIT [2021] 439 ITR 284 (Bombay)
(v) Ananta Landmark (P.) Ltd. v. DCIT [2021] 439 ITR 168 (Bombay)

7. In addition to above, Ld. AR has also stated that when the subject matter is in appeal, reassessment notice cannot be issued, reassessment notice is based upon borrowed satisfaction and reopening for examining another aspect/facet of same issue/claim already examined during original assessment, is not permissible.

8. On the other hand, Ld.DR supported and justified the initiation of the re-assessment proceedings by the Assessing Officer by relying on decisions of Supreme Court and Hon'ble High Court in support of the action of the Assessing Officer. Ld.DR relied on various decisions in support of her argument and she relied on the case of Pushpadevi M. Jatia v. M.L. Wadhavan, Addl. Secretary Government of India [1987 AIR 1748], HDFC v. ACIT [2015] 54 taxmann 336 (Bombay), Pr.CIT v. Sun Pharmaceutical industries ltd. [2017] 79 taxmann 61 (SC). Further, she brought to our notice Page No. 12 and 13 of the Assessment Order further, she submitted that the decision of the ACC of Hon'ble Delhi High Court is applicable to this assessment year also and she very much relied on the ratio of the Hon'ble Delhi High Court.

9. Considered the rival submissions and material placed on record. It is observed that original assessment order u/s 143(3) of the Act was passed on 21/03/2014. The Assessing Officer has issued reassessment notice on 08/03/2016 i.e. beyond four years from end of relevant assessment year. The reasons recorded by Assessing Officer as reproduced at Page No 1 to 6 is reproduced herein below for sake of clarity:

> *"In this case, scrutiny assessment was completed on 16.03.2015 for A.Y. 2011-12 and re-assessment proceedings for AY 2009-10 was completed on 31.3.2015 wherein deduction u/s 80-IA(4) for development of private rail sidings claimed by assessee was disallowed.*

2. During scrutiny proceedings for A.Y. 2011-12, a number of queries were raised and the issue was discussed extensively with the assessee company, after which it is specifically admitted by the assessee company and placed on record that:

(a) At all of the "plant sites" on the portion of railway sidings the wagons are hauled inward and outward exclusively by Indian Railways, up to the gate of "Plant". However, at "Maratha" Plant the Indian Railway hauled wagons right up to inside the factory premises of the assessee company.

(b) The locomotives, wherever are held by the assessee are only used inside the "manufacturing plant" for the purpose of shunting and limited movement of wagons for unloading them with the help of "Tipplers". Since "Tippler" is fixed and cannot move, hence for unloading of wagons by tippler, the wagons have to be brought one by one in front of the tippler by moving them on the tracks within the "Plant".

(c) The wagons held by the assessee company are not used at all, except in circumstances of shortage of wagons supply by the Railway department. In such situation when railway department is unable to provide wagons, the "a" uses his own wagons for sending (outward movement) the finished material / and or receiving the raw material (inward movement).

(d) At every "Plant" the manpower is nominated by the Indian Railways who looks after day to day signalling and other functions related to Indian Rail movements on these tracks (sidings). Though the manpower is nominated by Railways, but the expenses pertaining to their salaries, etc., are to be borne by the assessee company as per the agreement signed with Indian Railway. For the freight purpose also, the Railway Freight receipts are issued to the assessee company by these manpower nominated by "Indian Railways" within the plant premises only.

(e) The layout plans of tracks have been obtained in respect of each plant and are placed on record.

2.1 In view of the emergence of fresh facts (and information provided from the office of CIT (5), Mumbai, as was discussed subsequently in the order for A.Y. 2011-12), the issue of allowability of the assessee's claim [u/ s 80IA(4) in respect of ' Rail Systems' was examined afresh at the time of scrutiny proceedings for A.Y. 2011-12, as new facts and the information had been so far not placed before the earlier A. O's. Also it was examined in view of the relevant provisions of the Act, whether the 'Rail System' as referred to by the assessee could indeed be treated as the Infrastructure Facility for which deduction u /s 80-1 A is intended to by the legislature; whether the assessee operated that rail system; and whether that could be treated as public facility.

2.2 The basic plea taken by the assessee company all along these years for claiming the deduction has been that it had developed "rail systems" and earn income by operating & maintaining those rail systems. An impression was given as if they are running rail system onto such private sidings in between the nearest railway track [of Railway department] and their plant site. However, the actual fact is that transportation of goods is being done by the Railway department through their goods train [carrying the set of wagons, known as full rack] from originating station [for inward movement] to right up to the plant sites and right from plant sites to destination [for outward movement] and those goods train runs on the entire distance [including the portion on private sidings]. As such the

railway department charges freight for the entire distance [including the length for the movement on such private sidings].

Thus, there is no doubt that transportation over the private sidings was done through goods train run by the railway department and not by the assessee company. It was also noted that as per the agreement, the loaded wagons were handed over (by railway department) to the assessee at the interchange point/ exchange yard, which are located at the Gate of "Factory Plant" from that point onward those wagons could be rolled over ahead onto the track [completely within the premises of plant] of the assessee company and for that assessee use it's own diesel locomotive, but only for the limited use of unloading of those loaded wagons through its bulk handling system called Tipplers and then to bring those back after re- loading [with finished goods] again for outward movement and roll back to the interchange point again so that required number of wagons [generally full rack] could be made ready for being shunted with railway engine [at scheduled time]. That limited activity of movement of wagons [completely within the plant premises] otherwise also cannot be considered as operation of a rail system [an infrastructure facility in the nature of public facility] for which benefit is intended to be given in sec 80IA.

2.3 I would like to mention here that getting acceptance by the assessee [that goods train was run/ operated over the private siding by the railway department] was not easy. For that in the course of assessment proceedings for A.Y. 2011-12, various relevant queries were raised to bring on record the crucial facts onto the operation of rail system. The assessee's representatives were asked to clearly state the actual point onto their private sidings up to which the goods train was carried/ hauled up by the railway department and wagons were handed over to the assessee. The reference was made to the various clauses of the agreement which itself was titled as "Private Siding Agreement In Clause 14 of those agreements, reference was made to a specified / designated point on the sidings up to which wagons were to be hauled up by the railways. The assessee was asked to furnish the lay out plan of their sidings and locate that point thereon. As would be expected, one end of the siding [called take off point]

Order u/s 143(3) r.w.s. 147 of the I.T. Act, 1961. is connected to the rail system of Indian railways onto the track of nearby serving station and the other end reaches up to & within the plant premises [to fulfil the object of transportation from/ to the very plant itself] . After much deliberations and discussion, finally assessee admitted that the said point was within the plant premise and was known as 'interchange point' up to which goods train were carried by railway department. The track extends beyond the interchange point within the plant premise to enable the loading/ unloading of wagons through its bulk handling system called tipplers. The other end of siding within the plant premise is also known as buffer end of siding. It was also admitted that beyond the interchange point located at the gate of factory premise (or within), the assessee rolled wagons within the plant premises through its own locomotives at certain locations.

2.4 During the Assessment proceedings of A.Y. 2011-12, the replies filed by the assessee were considered in the light of legal provisions enumerated in the Act, and the key findings arrived at, thereon, were noted as below:

(I) The said infrastructure facility [so called its rail system] was simply a private railway sidings and not a facility of public utility and therefore do not fall within the definition of infrastructure facility for which exemption is intended in sec 80IA. For that reason alone, the assessee company was not entitled for deduction u/s 80IA.

(II) The agreements under reference contained the various terms & conditions whereby railway department had agreed for laying out private siding for the purpose of transportation of goods of the applicant from/upto their plant sites and (those) 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.

(III) The railway wagons are actually being run by the railway department from and upto the plant site for which railway department has also charged freight. Thus, it is not a case of running of rail system [i.e. movement of goods train] by the assessee company on those private sidings and as such they did not operate 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 80IA would not be available to it onto the profit, if any, from such rail systems.

2.5 It is also pertinent to mention here that the detailed investigations were made by the CIT(A) -5, Mumbai, on the same issue of deduction u/s 80IA(4) of the Act, while finalizing the appeal in the case of M/s Ultra Tech cement Ltd for the A.Y. 2010-11. The Learned CIT(A) made extensive inquiries from almost every Zone of the Railway department in order to examine the claim of the assessee on the identical issue, and drew conclusion that such an activity does not qualify for the deduction u/s 80IA.

2.6 The AO at the time of scrutiny proceedings for A.Y. 2011-12 has (in view of the elaborate investigations made by the learned CIT(A)-5, Mumbai on the identical issue, and the material/evidences gathered and placed on record in the form of correspondence letters from Railway Authorities, and also in view of the facts noticed by himself viz a viz the relevant provisions of Act,) established that the assessee's claim of deduction as regards to profit, if any, on such self claimed "rail system" [rather private sidings] made u/s 801 A was patently wrong and as such, it is not eligible for any benefit of deduction u/s 801 A, with in the meanings of legal provisions of the Income Tax Act, 1961.

2.7 Without prejudice to the above the AO at the time of scrutiny proceedings for A.Y. 2011-12 also established that, otherwise too, the assessee's claim is based on ill conceived notion of savings by saying that by such operation they are able to save the expense for loading [at plant sites] into the trucks road freight and expenses for unloading & loading the same at the railway yard of serving station [of Indian Railways] and that resulted into the profit of such rail system. The saving in freight has been estimated exorbitantly. The profits of the undertaking would be negligible if viewed and calculated as per the legal provisions laid down under the Act. The same has been discussed elaborately in the assessment order of A. Y.2011-12 and established the actual saving will be negligible as against claimed by the assessee of Rs. 57,352,663/-.

2.8 Similar claim of the assessee was disallowed by the AO by reopening the case for AY 2009-10 and order U/s 143(3) r.w.s 147 Dated 31 March 2015 was passed to disallow the false claim of the assessee under Section 80IA(4), as the letters from Railway authorities and their view point were not available for consideration to the earlier AO's in the proceeding for the earlier years. However, the same were very crucial and as such fresh material to the facts of the case has come on record.

2.9. The assessee has wrongly claimed the deduction u/s 801 A(4) the A.Y. 2010-11 to the extent of Rs.94,94,83,706/-, 95,18,34,499/-. In light of the above,

I have reasons to believe, the assessee company claimed excess deduction u/s 80IA(4) to that extent.

3. Further, It has been seen from the records that, the assessee company claims deductions u/s 80IA(4) in respect to its various Captive Power Plants (CPP's). The company incurs expenses on consumption of raw material and other services in direct relation to these Captive Power Plants. The perusal of book entries in respect of expenditure shows that the assessee is booking net of such expenses in P & L account i.e. without on account of excise/Cenvat/Service Tax etc. which is included in these expense invoices. So the net of material/service expense is debited to P & L account and the component of statutory duties/taxes is separately credited directly to "Cenvat Receivable account", without passing them through P & L account.

3.1. As per legal provisions of section 80IA(5) the eligible unit has to be looked upon/viewed as standalone unit in computing the eligible deduction U/s 80IA, and all the business expenses including (cess and duties) incurred by these units have to be set-off or reduced from the relevant year business turnover of the respective unit. It is a mandatory provision of the Act for allowing the deduction u/s 80IA and accordingly all the direct expenses related to these units have to be reduced in order to arrive at correct and true profits of the units eligible for deduction u/s 80IA.

3.2. In order to obtain the quantum of excess deduction claimed by the assessee company, notice(s) u/s 133(6) was issued (with prior approval of CIT(LTU), Mumbai) calling for the information of such CENVAT element as is attributable to the consumption of raw material and other services in direct relation to these captive Power Plants (CPP's). In response the assessee vide its letter dated 15.05.2015 submitted the details of CENVAT credit available for the relevant assessment year. The working of CENVAT credit available as per assessee is 2,69,91,957/ In the light of the above, I have reasons to believe, the assessee company has claimed excess deduction u/s 80IA(4) to that extent.

4. As there is a failure on part of assessee to disclose fully and truly all material facts necessary for its assessment during the year under consideration, I have reasons to believe that income chargeable to tax has escaped assessment for this assessment year i.e. A.Y. 2010-11, coming within the meaning of section 147 of the Income Tax Act, 1961.

5.. In view of the same, notice u/s 148 is issued after approval of CIT-LTU, vide letter No. CIT/LTU/Reopening/2015-16 dated 29.02.2016"

10. On perusal of reasons recorded, it is apparent that reassessment notice has been issued by Assessing Officer mainly on two grounds i.e. one issue being alleged escapement on account of claim of deduction u/s80IA for railway infrastructure and the second being quantification of profits from railway infrastructure. The Second issue being alleged escapement on account of CENVAT element attributable to consumption of raw material and other services in relation to Captive Power Plants (CPP). It is an undisputed fact that reassessment notice has been issued for beyond four years from

end of Assessment Year. During the course of original Assessment proceedings, Assessing Officer had issued notice u/s. 142(1) of the Act, dated 26th June, 2013 which is placed at paper book page 125 wherein following details were called for. The relevant points asked by the AO are as under:

> *"4. Explain whether all conditions have been fulfilled regarding your claim of deduction u/s. 80-IA of the IT Act for Tikaria, Kaymore, Wadi-I and Wadi-II Rail System. Furnish unit-wise details of receipts, income."*
>
> *"17. Explain allowability of unutilized CENVAT credit"*

11. It is observed that Assessee has filed replies queries vide letter dated 13th December, 2013 which is placed at paper book Page No. 139 and 18th March, 2014 which was placed at paper book Page No. 188. On perusal of such replied filed during the course of Assessment proceedings, it is found that Assessee has explained its claim for deduction under Section 80-IA on rail project as well as quantification issue was also discussed in such submission. Based upon written submission filed before Assessing Officer along with copies of agreement with Railway Administration, Assessing Officer has in principle held that Assessee is eligible for deduction under Section 80-IA on rail system. However, the Assessing Officer has allocated certain expenditure to units eligible for such deduction u/s 80-IA and made additions out of total claim for deduction made in return of income. The relevant part of original Assessment Order is reproduced herein below:

> *"13. Tax Holiday u/s. 80-IA in respect of Rail System being an infrastructure Facility*
>
> *13.1 In its return of income, the assessee has claimed deduction u/s.80IA on Rail System comprising of Railway sidings, Railway tracks, loading and unloading systems etc. maintained at Kymore, Tikaria, Wadi-I and Wadi-II units as under:-*

Sl. No.	Name of the Unit	State	Amount of Deduction (in Rs.)
1.	Kymore	Madhya Pradesh	34,48,44,037
2.	Tikaria	Uttar Pradesh	3,20,72,486
3.	Wadi-I	Karnataka	23,70,30,875
4.	Wadi-II	Karnataka	33,78,87,101
		Total:-	**95,18,34,499**

> *13.2 Vide questionnaire dated 26.06.2013, the assessee was asked to explain why deduction u/s. 80-IA would be allowed on Rail System. In response, the*

assessee vide letter dated 13.12.2013, 15.01.2014 and 18.03.2014 has submitted that the assessee is eligible for claiming deduction u/s. 80IA(4)(i) on infrastructure facility for a period of 10 consecutive Assessment Years out of initial 20 Assessment Years. The said infrastructure facility includes Rail System.

13.3 It was further submitted that the assessee has duly fulfilled all the conditions as specified in Section-80-IA(4) for claiming deduction. Further, the assessee submitted that the term 'Rail System' has not been defined in I.T. Act, hence, reference needs to be drawn from the definition given in the other statutes. Section-2(31) of the Railways Act, 1989 defines Railways as 'to include – lines of rail, sidings, fixed plant and machinery, rolling stocks' etc. Thus, Railway sidings, tracks, loading and unloading system etc. taken together constitutes 'Rail System' as envisaged in I.T. Act. On the basis of the above, Railway Siding, Railway Track, Loading and Unloading System, Wagon Tripler etc. being 'Rail System' fails within the definition of 'infrastructure facility' as per Section-80-IA.

13.4 The assessee had duly filled the certificate along with audited Profit & Loss Account and Balance Sheet quantifying and claiming deduction u/s. 80-IA in respect of Profits and Gains derived from developing, operating and maintaining Rail System at Kymore, Tikaria, Wadi-I and Wadi-II Units being "Infrastructure Facility" as defined in Explanation to Section-80-IA(4)(i). The Company had commenced operations of the aforesaid Railway Sidings as detailed below:-

Sl. No.	**Name of the Unit**	**State**	**Date of Commencement**
1.	Kymore	Madhya Pradesh	27.07.1998
2.	Tikaria	Uttar Pradesh	21.06.2003
3.	Wadi-I	Karnataka	10.07.2003
4.	Wadi-II	Karnataka	01.08.2006
"Being the date of agreement			

13.5 On careful examination of quantification with reference to details/documentation, it is seen that the assessee has not allocated Head Office Expenses while quantifying the deduction available u/s.80-IA. In view of discussions made in Para-10.5 & 10.6 above indirect expenses are apportioned to the Rail System.

Accordingly, considering the disallowance made in the order, the computation of deduction u/s. 80-IA on Rail Systems is modified as under:-

Unit	**Income**	**Direct Expenses (excl. Book Depreciation)**	**Indirect expenses apportioned**	**Depreciation & other adjustment as per I.T. Act**	**Eligible Deduction**
	(A)	**(B)**	**(C)**	**(D)**	**[A-(B+C+D)]**
Kymore	36,19,89,511	1,57,97,595	8,92,049	12,40,632	34,40,59,235
Tikaria	4,16,98,121	31,25,544	1,02,757	65,00,091	3,19,69,729
Wadi-I	24,47,04,759	70,16,906	6,03,025	6,56,978	23,64,27,850
Wadi-II	34,90,69,051	88,76,188	8,60,210	23,05,761	33,70,28,892

13.6 Subject to the above discussion, claim of deduction u/s. 8-IA on Rail System is accordingly allowed in this year."

12. So far as issue of CENVAAT credit is concerned, Assessee has filed written submission before Assessing Officer and even AO has made partial addition on account of unutilised CENVAT credit while passing Assessment Order. The relevant operative part of Assessment Order is reproduced herein below:

> *"4. Unutilized CENVAT Credit*
>
> *4.1 In Annexure-4 relating to Clause-12(b) of Form-3CD, the Tax Auditor has reported details of deviation, if any, from the method of valuation prescribed u/s. 145A and the effect thereof on the Profit and Loss Account. In the said Annexure, the Tax Auditor has mentioned that there is no Impact on the profit of the year after application of the provisions of Section-145A. In the said Annexure, CENVAT element on the opening stock of Raw Materials, stores and spares is Rs.13,55,25,004/- and that of on closing stock is shown at Rs.5,10,51,276/-. During the course of assessment proceedings, the assessee was asked to explain as to why unutilized CENVAT credit referable to closing stock should not be added back u/s. 145A of the I.T. Act.*
>
> *4.2 The assessee vide letter dated 13.11.2013 filed their detailed submissions, stating that no such adjustment of CENVAT is envisaged as per provisions of Section-145A. Assessee further stated that CENVAT is nothing but excise duty paid on input which remains unutilized at the end of financial year and is available for utilization on manufacture of excisable product in the next financial year. The said credit is not related to the closing stock of finished goods.*
>
> *4.3 Assessee further contended that the Apex Court in the case of CIT vs. Indo Nippon Chemical Ltd. reported in 261 ITR 275 and Calcutta High Court in the case of CIT vs. Berger Paints (India) Ltd. reported in 254 ITR 503 has held that CENVAT is not a matter of adjustment to closing stock for the purpose of Section-145A and hence same need not be added to the closing stock. Assessee also stated that in the decision in Hawkins Cookers Ltd. vs. ITO (2008) 14 DTR 206 (Mum), the Mumbai ITAT held that for purposes of Section-145A, where an assessee follows the procedure laid down by the ICAI and the Tax Auditor also reports in Clause-12(b) of Form-3CD of the Tax Audit Report that no adjustment is required to be made on account Section-145A. It has been further held that the decision of entire balance in CENVAT account is not proper because the nature of this account is personal account, an item of assets side of the Balance Sheet always having a debit balance.*
>
> *4.4 Without prejudice to the above submission, it was further submitted that in the unlikely event if adjustment u/s. 145A in respect of unutilized CENVAT credit is carried out, deduction for the same is available to the assessee under provisions of Section-43B, since the assessee had paid excise duty payable on closing stock of cement as on last day of the accounting year before filing return of income for Assessment Year-2010-11 by adjusting unutilized CENVAT credit.*
>
> *4.5 The assessee further submitted that irrespective of the fact whether unutilized CENVAT credit is included in closing stock or not, deduction towards unutilized CENVAT credit included in closing stock on 31.03.2009 of Rs. 13,55,25,004/- to be allowed as a deduction being part of opening stock of the current year, which has been disallowed in the assessment of A.Y. - 2009-10.*

4.6 The submissions made by the assessee have been considered. However, the same are not acceptable. Similar disallowance was also made in the order u/s. 143(3) for earlier years. Since, there is no change in the facts of the case, following the reasoning given in the assessment order for earlier years, CENVAT element of Rs.5,10,51,276/- referable to closing stock of raw materials etc. is being added back in computing total income of the assessee. However, deduction is granted for unutilized CENVAT as on 01.04.2009 of Rs.13,55,25,004/-, disallowed in A.Y. – 2009-10. Accordingly, net CENVAT adjustment of Rs. 8,44,73,728/- [Rs. 5,10,51,276 – Rs.13,55,25,004/-] is adjusted in computing total income of the assessee."

13. It is thus observed that while passing the original Assessment Order Assessing Officer has critically examined both the issues involved in present reassessment notice. Even on perusal of reasons recorded before issuing notice under Section 148 of the Act, it is apparent that Assessing Officer has nowhere mentioned that there is any failure on the part of Assessee to disclose material facts relating to issues involved herein above. So far as issue of alleged escapement for deduction under Section 80-IA, entire issue is based upon Ld.CIT (Appeal's) findings in the case of Ultratech Cement for AY 2010-11. Thus, the reasons recorded are based upon borrowed satisfaction and not upon independent application of mind by Assessing Officer. During the course of Appellate hearing, Ld. AR has drawn attention to the fact that finding of CIT(A) in the case of Ultratech Cement was already reversed by coordinate bench of ITAT [2017] 88 taxmann.com 907. These facts, as discussed herein above, clearly prove that entire reassessment notice has been issued based upon material already on record of Assessing Officer, considered while passing while original Assessment Order and same are merely change of opinion on the part of subsequent Assessing Officer. The Assessee Company has made full disclosure of relevant facts while filing the return of income, such claims are accepted by Department in earlier years, relevant submissions were also filed in support of such claim before Assessing Officer in original Assessment proceedings, Assessing Officer has accepted or partially denied such claim by way of express finding in Assessment Order which clearly prove that there is no failure on the part of Assessee Company to disclose material facts hence reassessment notice issued based upon material already available on record of Assessing Officer is nothing but change of opinion which is bad in law since inception.

Hon'ble Supreme Court in the case of M/s. TechSpan India Private Ltd. 92 taxman.com 361 [2018], held as under:

> *"Reassessment proceedings initiated merely to review the same subject matter of original assessment proceedings amounts to assessing the same set of facts already available with the department which is mere change of opinion on the part of the assessing officer. Hence the reassessment proceedings are void and bad in law. The relevant para of the said decision is reproduced as under:*
>
> *".....The language of Section 147 makes it clear that the assessing officer certainly has the power to re-assess any income which escaped assessment for any assessment year subject to the provisions of Sections 148 to 153. However, the use of this power is conditional upon the fact that the assessing officer has some reason to believe that the income has escaped assessment. The use of the words 'reason to believe' in Section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such re-assessment proceedings merely on his change of opinion on the basis of same facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature. The said provision was incorporated in the scheme of the IT Act so as to empower the Assessing Authorities to re-assess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge; and the said fact would have material bearing on the outcome of the relevant assessment order.*
>
> *9. Section 147 of the IT Act does not allow the re-assessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to re-assess and not the power to review.*
>
> *10. To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The word change of opinion implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.*
>
> *12. Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings.*
>
> *13. The fact in controversy in this case is with regard to the deduction under Section 10A of the IT Act which was allegedly allowed in excess. The show cause*

notice dated 10.02.2005 reflects the ground for re-assessment in the present case, that is, the deduction allowed in excess under Section 10A and, therefore, the income has escaped assessment to the tune of Rs. 57,36,811. In the order in question dated 17.08.2005, the reason purportedly given for rejecting the objections was that the assessee was not maintaining any separate books of accounts for the two categories, i.e., software development and human resource development, on which it has declared income separately. However, a bare perusal of notice dated 09.03.2004 which was issued in the original assessment proceedings under Section 143 makes it clear that the point on which the re-assessment proceedings were initiated, was well considered in the original proceedings. In fact, the very basis of issuing the show cause notice dated 09.03.2004 was that the assessee was not maintaining any separate books of account for the said two categories and the details filed do not reveal proportional allocation of common expenses be made to these categories. Even the said show cause notice suggested how proportional allocation should be done. All these things leads to an unavoidable conclusion that the question as to how and to what extent deduction should be allowed under Section 10A of the IT Act was well considered in the original assessment proceedings itself. Hence, initiation of the re-assessment proceedings under Section 147 by issuing a notice under Section 148 merely because of the fact that now the Assessing Officer is of the view that the deduction under Section 10A was allowed in excess, was based on nothing but a change of opinion on the same facts and circumstances which were already in his knowledge even during the original assessment proceedings."

14. Hon'ble Supreme Court in the case of ACIT *v.* Ceat Limited 146 Taxmann.com 108 has dismissed SLP filed by department against High Court's ruling that where revenue had miserably failed to point out any facts or material which had not been disclosed by assessee during original assessment and entire basis for re-opening after expiry of four years from end of relevant assessment year was due to mistake of Assessing Officer that resulted in under assessment, reopening of assessment being on change of opinion, was impermissible in law.

15. The Hon'ble Bombay High Court in the case of Gemstar Construction (P.) Ltd. *v.* Union of India [2022] 135 taxmann.com 220 has held as under:

"6. *It is settled law that the Assessment Officer has no power to review an assessment which has been concluded. The Assessing Officer, before he passed the assessment order, had in his possession all primary facts necessary for assessment and then he made the original assessment. When the primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer is not entitled on change of opinion to commence proceedings for reassessment. Where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to reopen the assessment based on the very same material with a view to take another view. Ajanta Landmark (P.) Ltd. v. Dy. CIT [2021] 131 taxmann.com 52/283 Taxman 462/439 ITR 168 (Bom.)*

7. In our view, this is not a case where the assessment is sought to be reopened on the reasonable belief that income had escaped the assessment on account. This is a case wherein the assessment is sought to be reopened on account of change of opinion of the Assessing Officer about the manner of computation of deduction under section 80IB(10) of the Act. In a case where the notice to reopen the assessment was founded entirely on the assessment records and the entire basis for reopening the assessment was the disclosure which has been made by the assessee in the course of the assessment proceedings a Division Bench of this Court in 3iInfotechLtd. v. Asstt. CIT [2010] 192 Taxman 137/329 ITR 257 held that it cannot be postulated that the condition precedent to the reopening of an assessment has been fulfilled.

8. We are satisfied that not only material facts were disclosed to the petitioner truly and fully, but they were carefully scrutinized and figures of income as well as deduction were viewed carefully by the Assessing Officer. In the circumstances, the petition is allowed in terms of prayer clause (a), which reads under :—

> "(a) That this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under article 226 of the Constitution of India calling for the records of the case leading to the issue of the notice under section 148 of the Act, dated 12th December 2007 being Exhibit 'D' hereto and after going through the same and examining the question of legality thereof to quash, cancel and set aside the impugned notice dated 12th December, 2007 being Exh. 'D' hereto."

9. Petition disposed accordingly with no order as to costs."

16. Hon'ble Supreme Court in case of L&T Ltd. *v.* PCIT [2020] 113 taxmann.com 48 has held as under:

"Assessing Officer initiated reassessment proceedings in case of assessee - Tribunal noted that notice seeking to reopen assessment had been issued beyond four years from end of relevant assessment year and, there was no failure on part of assessee to disclose fully and truly all material facts at time of assessment - Tribunal thus taking a view that reassessment proceedings had been initiated merely on basis of change of opinion, set aside same - High Court upheld Tribunal's order - Whether, on facts, SLP failed against order of High Court was to be dismissed - Held [Para 2] [In favour of assessee]"

17. Hon'ble Supreme Court in case of MSEB Holding Co. Ltd. *v* DCIT [2020] 113 taxmann.com 163 has held as under:

"In return of income for assessment year 2011-12, assessee claimed certain amount as interest income earned on fixed deposits and offered same to tax as part of its business income - Assessing Officer disallowed claim of assessee on ground that it did not carry out any business during year and passed assessment

order under section 143(3) on 30-3-2014 - Subsequently, Assessing Officer had issued a reopening notice dated 26-3-2018 against assessee on ground that interest income was required to be taxed as income from other sources - High Court by impugned order held that since impugned notice was issued beyond period of four years from end of assessment year 2011-12 and there had been a complete disclosure of all material facts on part of assessee during regular assessment proceedings under section 143(3), impugned notice was clearly hit by first proviso to section 147 and deserved to be set aside - Whether Special leave petition filed against impugned order was to be dismissed on ground of low tax effect - Held, yes [Paras 4, 5 and 6] [In favour of assessee]"

18. It is relevant to refer to decision of Hon'ble Supreme Court in case of Parashuram Pottery Works Co. Ltd*. v.* Income-tax Officer [1977] 106 ITR 1 which reads as under:

".....The words "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year" postulate a duty on the assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assessing authority has to draw inference as regards certain other facts; and ultimately from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable: See Calcutta Discount Co. v. Income-tax Officer [1961] ***41 ITR 191****, 201 (SC). As further observed in that case:*

> *"Does the duty, however, extend beyond the full and truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative, Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else—far less the assessee—to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences—whether of facts or law—he would draw from the primary facts."*

Keeping in view the principles enunciated above, we may deal with the contention advanced on behalf of the appellant that the present is not a case in which action could be taken under section 147(a) of the Act of 1961. This contention has been controverted by the learned counsel for the respondent who has canvassed for the correctness of the view taken by the High Court in the judgment under appeal.....

> *It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of*

> *calculating and realising that price should familiarise themselves with the relevant provisions and become well-versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. So far as the income-tax assessment orders are concerned, they cannot be reopened on the score of income escaping assessment under section 147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. As already mentioned, this cannot be said in the present case. The appeal is consequently allowed, the judgment of the High Court is set aside and the impugned notices are quashed. The parties in the circumstances shall bear their own costs throughout.*
>
> *Appeal allowed"*

19. It is relevant to refer to decision of Hon'ble Bombay High court in the case of Mangalore Refinery and Petrochemicals Ltd. *v.* Deputy Commissioner of Income-tax [2022] 137 taxmann.com 452 wherein it is held as under:

> *"Section 37(1), read with section 147, of the Income-tax Act, 1961 - Business expenditure - Allowability of (Reassessment) - Assessment year 2006-07 - Whether once it becomes evident that Assessing Officer had raised query and reply thereto was furnished by assessee, endeavour on part of revenue to reopen assessment is fraught with two infirmities, namely, it cannot be said that income escaped assessment on account of failure to make a true and full disclosure of material facts (in cases where proviso operates) and reassessment would then fall in realm of mere change of opinion on basis of very same material, which is legally impermissible - Held, yes - After period of four years from completion of assessment, reassessment proceedings were initiated on ground that 'leased assets repurchase expenses' were claimed as revenue expenses, though same were capital in nature and, thus, required to be disallowed - During course of scrutiny assessment, Assessing Officer had made specific query as regards leased assets repurchase expenses and solicited explanation and documents and in compliance thereto, assessee furnished requisite information and documents - Whether, on facts, impugned notice under section 148 was required to be quashed and set aside - Held, yes [Paras 11-17] [In favour of assessee]"*

20. The Hon'ble Gujarat High Court in the case of QX KPO Services (P.) Ltd Vs DCIT [2018] 94 taxmann.com 467 has held that reassessment for examining another aspect/facet of same issue/claim already examined during original assessment is not permissible. The headnote of said decision is reproduced herein below:

"Section 10B, read with section 148, of the Income-tax Act, 1961 - Export oriented undertaking (Reassessment) - Assessment year 2011-12 - Assessee filed its return of income after claiming deduction under section 10B - During scrutiny assessment, Assessing Officer had raised several queries asking assessee about its claim of deduction under section 10B - Assessee replied to such queries in detail, upon which Assessing Officer passed an assessment order under section 143(3) allowing said claim of deduction - After four years, Assessing Officer issued reassessment notice against assessee on two grounds; firstly, no deduction under section 10B could be allowed to assessee as it had not filed its return on or before due date specified under 139; secondly, there was no proof on record that there was ratification from Board of Approval for EOU scheme that assessee was hundred percent EOU - There was no failure on part of assessee in disclosing truly and fully all material facts necessary for its assessment - Whether since Assessing Officer, in original assessment had thoroughly scrutinized claim of deduction under section 10B and allowed same, he could not reopen assessment to examine another facet of said claim - Held, yes [Para 10] [In favour of assessee]

21. The SLP filed by the Department is also dismissed by Hon'ble Supreme Court in 259 Taxman 317. It is observed that in recent decision coordinate bench in the case DCIT *v.* Grasim Industries Limited ITA No. 7609/Mum/2019 vide order dated 10/01/2023 has held as under:

"9. Considering the submissions made by the respective sides and record of this case, it appears that the petitioner had filed its return of income on 30th November 2011 declaring total income at Rs. 10,52,887/=, after claiming deduction of Rs. 56,96,695/= under Section 10B of the Act. Thereafter, the Assessing Officer issued a notice dated 4th September 2013 calling upon the petitioner to furnish various details; including details pertaining to deduction under Section 10B *of the Act. It appears from the record that on 19th September 2013, the petitioner furnished required details to the respondent explaining the claim of deduction under* Section 10B *of the Act [as at Annexure "E" collectively]. The Assessing Officer then was convinced with the explanation given by the petitioner claiming deduction under* Section 10B *of the Act and accepted the return for the year under consideration by making no disallowance in respect of the claim of deduction under* Section 10B *of the Act, while framing assessment ITA No.7609/Mum/2019 and other appeals M/s. Grasim Industries Limited (Successor to Aditya Birla Nuvo Ltd) under* Section 143 *[3] of the Act, by his Order dated 6th January 2014. It also appears from the decision rendered by this Court dated 14th June 2016 passed in Tax Appeal No. 439 of 2016 that for the Assessment Year 2008-2009, deduction under* Section 10B *of the Act was claimed by the petitioner, which was denied earlier. CIT [A] also disallowed the deduction claimed by the petitioner. In second appeal before the ITAT, the claim made by the petitioner under* Section 10B *of the Act was allowed by an Order dated 4th November 2015. Against this order, the Revenue preferred Tax Appeal No. 439 of 2016 and this Court was pleased to dismiss the above said Appeal by an Order dated 14th June 2016 for A.Y 2008-2009 and confirmed the deduction under* Section 10B *of the Act.*

10. From the letter dated 19th September 2013, while furnishing the explanation in support of the claim of deduction under Section 10B *of the Act, it cannot be stated that there was any failure on the part of the petitioner in disclosing truly and fully all material facts necessary for its assessment for the year under*

consideration. The then Assessing Officer, at the time of original assessment as such had scrutinized the claim of deduction under Section 10B of the Act and did not chose to make any disallowance against the claim of deduction under Section 10B of the Act. It is the settled legal position that when a particular claim has been scrutinized by the Assessing Officer at the time of original assessment, as such, the Assessing Officer cannot reopen such assessed case in order to examine another facet of the same claim.

11. In light of the facts that the very basis for reopening no longer survives, the assumption of jurisdiction under Section 147 of the Act by the Assessing Officer of issuing notice under Section 148 of the Act is without the authority of law and cannot be sustained.

3.8. It is also pertinent to note that against this order of the Hon'ble Gujarat High Court, Special Leave Petition (SLP) preferred by the Revenue was dismissed by the Hon'ble Supreme Court which is reported in 99 taxmann.com 301 vide order dated 02/11/2018. Respectfully following this decision, reopening made in the instant case deserves to be quashed on this count also."

22. In view of above referred judicial pronouncements as well as facts of the case, it is apparent that reassessment notice issued by Assessing Officer on two grounds as discussed herein above, are based upon facts already on record of Assessing Officer and Assessing Officer has not pointed out that there was any failure on the part of Assessee to disclose material facts. The entire reassessment notice issued by Assessing Officer is unstainable in the eyes of law and same is quashed. The consequential addition in Assessment Order does not survive and same are deleted. This ground of appeal is accordingly allowed.

23. Before parting with this ground of appeal, it is observed that in proceedings paras we have already held that reassessment notice itself is bad in law and additions made in reassessment order does not survive for reasons stated herein above, grounds of appeal raised on merits does not require separate adjudication. However, issues involved in present appeal are also found in other assessment years appeal heard by this bench, hence considering such facts, other grounds of appeal as raised by assessee are also discussed on merits in subsequent paras.

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

"Without Prejudice to Ground No. 1:

Ground No, 2: Disallowance of claim made for Rail System u/s 80-IA of the Act amounting to Rs. 95,18,34,499/-:

a) On facts and circumstances of the case and in law, the CIT(A) erred in confirming the action of the AO in denying the deduction claimed by the Appellant u/s. 801A of the Act in respect of Rail System.

b) The Appellant prays that the AO be directed to allow the deduction u/s. 801A towards rail system to the Appellant as claimed."

25. At the time of hearing, Without prejudice to the above, Ld.DR submitted a written submission and it is reproduced below:

"As mentioned during the course of hearing, the issue arose in the assessee's case for the first time A.Y- 2011-12, which in-turn was based on the finding or the CIT(A)-5, Mumbai in case of M/S. Ultratech Cements Ltd. for the AY. 10-11, it is pertinent to mention that the decision disallowing the claim of deduction u/ s. of the Act in the case of M/S.Ultratech Cements Ltd was reversed by the Hon'ble ITAT-F Bench, Mumbai vide Its order dated 05/04/2017. The copy of the order was filed before your Honours during the course of hearing on 22/09/2022. The Authorised Representative of the appellant company after placing reliance on the above order of the Hon'ble ITAT contended that the disallowance made in its case on the basis of the CIT(A)'s order in the case of M/s.Ultratech Cements Ltd. for the A.Y. 2010-11, should accordingly be deleted.

The undersigned however contended that the ITAT decision in the case of Ultra Tech Cement Ltd. failed to appreciate that one of the conditions for claiming the deduction u/ s. 80IA(4) of the Act is that the infrastructure facility should be a public facility.

Attention of the Hon'ble Bench was drawn to page 52 of the assessment order dated 16/03/2015 passed in the assessee's case for AY.2011-12 ,wherein findings of the CIT(A)-5, Mumbai in the case of UltratechCement Ltd. was reproduced by the assessing officer.

In the reproduced extract, the CIT(A)-5, Mumbai has referred to the letter dated 24/09/2014 of CCM, Southern Railways, whereby it is communicated that the private siding are to be treated as an infrastructure of "Private Facility" The fact that the Railway Sidings were in the nature of private facility and not public facility, as contemplated in the provisions of the Act, was one of the primary reasons for the disallowance of the deduction u/ s. 801A(4) of the Act.

Reference in this regard is also made to para 56 of the ITAT's order rendered in the case of Ultratech Cement Ltd., which is reproduced hereunder for ready reference:

> *56. With regard to CIT(A)S observation 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 raj/ 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",

It is submitted that the use of the phrase or any other public facility of a similar nature..." after the words 'a road, bridge, airport, port, inland waterways and inland ports, rail system" while defining 'infrastructure facility' in the pre-amended provisions, leaves no doubt that the infrastructure facilities specifically mentioned therein have necessarily to be public facilities. On comparing the language of the pre-amended and the post-- amended meaning Of the term ('infrastructure facility", it is amply clear that what has changed is in-fact the power of the CBDT any other public facility as infrastructure facility for the purpose of section 80IA(4) of the Act. The intention of the legislature cannot be Interpreted in a manner so as to come to the conclusion that the requirement of the infrastructure facility to be in the nature of public utility is no more necessary for claiming deduction u/ s.80IA(4)of the Act.

To support the contention, reliance is placed on the Explanatory notes to the Finance Act, 2001 (copy of which was submitted during the course of hearing) and also to Gujarat High Court's decision in the case of Katira Construction Ltd. vs UOI (352 ITR relevant extract of which is reproduced in para No, 85 of the ITATs order in the case of Ultratech Cement Ltd.), which deal with the significant changes made in the provisions of Section 80IA(4) with effect from 01.04.2002. For the sake of ready reference the relevant part of the order is reproduced hereunder: -

85. In this regard reliance can be placed on the decision of Gujarat High Court in case of Katira Construction Ltd. v. 1/01 [20131 31 taxmann.com250 /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

None of the above references have observed that the changes so brought wef 01.04.2002, also include doing away with the primary eligibility criteria of the infrastructure facility being in the nature of a public facility for the purpose of section 80IA(4) of the Act.

It may be mentioned that on perusal of the facts, as emanating from the CIT(A)'s order and the ITAT's order in the case of Ultratech Cement Ltd., it can be safely assumed that the agreement between Ultratech Cement Ltd. and the Railway authorities and that between ACC LTD and the Railway authorities arc similarly worded.

The ITAT, in para 58 of its order after making reference to Railway Sidings agreement entered into by Ultratech Cement Ltd. with the Railway authorities came to the conclusion that the Railway Sidings of Ultratech Cement Ltd were not merely for its own business but had the potential to confer benefit to the public at large and hence, the facility was in fact a public utility.

Therefore, reference is made to clause 19 of the Agreement entered into by M/S ACC Ltd. with the Railway authorities, available on page 32 of the assessee's paper book dated 04/08/2022. On perusal of clause 19 of the agreement it is seen that whether right to sidings by any person or persons other than assessee company is only upon payment by such person or persons to the assessee company. It is further seen that the use of the siding or any extension or part thereof by the Railway Administration or by other persons shall be so conducted in such manner and to such extent as to interfere as little possible with the free use of the siding by the ACC Ltd. whose traffic shall have precedence.

Thus the mere fact that the railway siding of M/s. ACC Ltd were not freely available to the public, it cannot be by any stretch of imagination beconsidered as public utility as it fails on both the specific qualities viz. 'non excludability' and 'non-rivalry' which make a facility or a good public in nature.

26. However, Similar issue was considered by us in the assessee Appeal in Ground No 3 in AY 2009-10 and held as under:

"30.Considered the rival submissions and material placed on record. It is observed that entire controversy of allowability of deduction u/s 80IA(4) on Rail Infrastructure facility was raised based upon CIT(A)'s order in the case of Ultratech Cement Limited as referred in assessment order. This fact is also mentioned by Ld DR in its written submission. The Ld. DR has also stated that on perusal of facts as emanating from the CIT(A)'s order and the ITAT's order in the case of Ultratech Cement Limited, it can be safely assumed that the agreement between Ultratech Cement Limited and the Railway Authorities and that between assessee and the Rail Authorities are similarly worded. 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/2019 vide its order dated 07.11.2022 has decided issue in favour of assessee after considering coordinate bench in the case of Ultratech Limited which in turn has reversed the finding of CIT(A) in its case which is relied upon by AO of assessee in assessment order:

"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 assesse'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 rais 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.16.30crs. & 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/Mum12012, 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 TutcorinAlali 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
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
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.

31. It is relevant to refer to decision of Kolkata ITAT in the case of RASHMI METALIKS LTD in ITA No 813 to 816/Kol/2017 dated 02/05/2018 wherein it is held as under:

"38. Learned Counsel for the assessee also took us through the agreement entered into by' the assessee in respect of the Railway System operated by it and pointed out that the clauses in the agreement are exactly identical and it is a standard agreement and since the facts and circumstances being similar the issue of deduction u/s. 80IA in respect of Railway system should be allowed in favour of the assessee. On a perusal of the agreement dated 16.01.2007 entered with South Western Railway, '. Hubli division for railway system we find clauses in the agreement are exactly identical to the agreement entered into by M/s.Ultratech Cements Limited for the railway siding in its premises. On analyzing the agreement and clauses thereon and the provisions of the Act it has been 'held by the Coordinate Bench in the case of M/s. Ultratech Cements Limited (supra) that the Railway System operated by the assessee is an infrastructure facility and entitled for the deduction u/s. 80IA of the Act .

39. We further find that revenues appeal against the decision of Hon 'ble ITAT in the case of M/s. Ultratech Cement Ltd. for A. Y. 2006-07 in ITA.No.6070 of 2010, has been admitted by Hon'ble Bombay High Court vide order dated 02.04.2014 on limited issue of as to whether railway siding can be treated as profit Centre or cost Centre for the purpose of determination of eligible profit. As regards revenue's ground of. appeal against very availability of deduction u/s. 80IA in respect of railway siding the Hon 'ble High Court rejected the same holding as under:

"After hearing the counsel at some length and perusing with their assistance the order passed by the Commissioner of Income Tax (Appeals) and the income Tax Appellate Tribunal, we are of the opinion that though the appeal deserves admission but it should not be on the question of law as framed at Page 5 of the paper book. That questions the very applicability of the provision. From the findings of the Commissioner of Income Tax (Appeals), the only question which can be raised as substantial question of law and arising from the discussion on this point is whether the respondent assessee is eligible for deduction u/s. 80IA of the Income Tax Act by urging that the Rail system is not a profit Centre but a cost saving Exercise undertaken in terms of subsection (4) of section 80IA*? ....."*

40. Thus as regards the claim for the deduction u/s. 80JA of the Act Per se, the ITAT order can be treated as final in favour of the assessee as the Hon 'ble High Court refused to admit the question raised by the Revenue on the very applicability of the provisions of section 80JA *of the Act for the Rail System. Therefore/ respectively following the said decision we hold that the assessee entitled for the deduction u/s. 80JA of the Act in respect of the railway system .*

43. Thus, in view of what is discussed above, we hold that the assessee is entitled for deduction u/s. 80IA in respect of the Railway System and water Supply project and therefore we set-aside the orders of the Ld-

PCIT passed u/s 263 of the Act for the Assessment Years 2008-09 to 2011-12.

44. In the result, appeals of the assessee are allowed."

40. The judgment of the Hon'ble Bombay High Court in the case of M/s. Ultra Tech Cement Ltd in ITA No.6070 of 2010 has confirmed the order of the ITAT. The Hon'ble Madras High Court in the case of M/s Tamilnadu Petro Products Ltd. Vs ACIT 338 ITR 643 allowed deduction u/s 80IA of the Act where the facility was one of captive consumption. Thus even if the facility was for captive use, deduction u/s 80IA(4) cannot be denied. Thus applying the proposition of law laid down in all these case laws, in the facts of the case we hold that, on merits the assessee is entitled to claim deduction u/s 80IA of the Act. Hence we find the orders of the ld. Pr.CIT passed u/s 263 not sustainable on facts as well as in law. Thus we hold that the order of the AO in all the four assessment years 2009-10 to 2012-13, are not erroneous or prejudicial to the interest of the revenue warranting revision by the ld. Pr. CIT u/s 263 of the Act. Hence, we cancel the orders passed by the ld. Pr. CIT u/s 263 of the Act and allow all these four appeals of the assessee.

41. In the result all the appeals by the assessee are allowed.

32. The above decision is also confirmed by Hon'ble Calcultta High court in 444 ITR 75.

33. In view of above discussion and following decisions referred supra, claim of assessee is found to be correct and Assessing Officer is directed to allow deduction u/s.80IA on Rail Infrastructure. This ground of appeal is allowed."

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

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

"Without Prejudice to Ground No. 1:

Ground No. 3: Disallowance of proportionate CENVAT credit availed for units eligible for deduction u/s 80-IA (Rs. 2,58,46,780/:

a) 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 the AO in treating CENVAT credit availed on inputs and capital goods used in the undertakings eligible for deduction u/s 80IA as cost of the eligible undertakings.

b) The Appellant therefore prays that the action of CIT(A) and AO be set-aside."

29. Similar issue was considered by us in the assessee Appeal in Ground No 4 in AY 2009-10 and held as under:

"38.Considered the rival submissions and material placed on record. 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/2019 vide its order dated 07.11.2022 has decided issue in favour of assessee:

> *"102. We find that Section 80IA(5), which has been heavily relied upon by the assessee, provides that " notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made". All that this provision does is that it provides for the profits of the eligible unit being treated on a standalone basis, but then in case the Assessing Officer makes an adjustment for the payment which has earned the CENVAT credit, he must also make an adjustment for the corresponding CENVAT credit availed by any other unit of the assessee – other than the eligible unit. If the captive power unit makes a payment of X amount, and in turn, it generates a CENVAT credit of X amount, which is availed by another unit, say Ropar Cement Manufacturing Unit, the hypothetical independence embedded in the profit computation on a standalone basis requires that the Ropar Cement Manufacturing Unit must reimburse the captive power unit for such a CENVAT credit. It cannot be open to the assessee to provide for the expenses which have earned the CENVAT credits, but not to account for the CENVAT credits and the benefits accruing form the same. In any event, the fiction envisages under section 80IA(5) is to enable computation of profits on a standalone basis, rather than to increase the scope of profits itself and allocate notional expenditure to the eligible units. When the eligible units are other units are treated as independent of each other, and the profit computations are on a standalone basis, the eligible unit must get the corresponding credit for the CENVAT credits availed by the other units. Viewed thus, not accounting for the CENVAT credit does not, in our considered view, vitiate the profits of the eligible undertaking, as long as all such credits are fully availed by the other units as is the undisputed position anyway. What the assessee has done is that the expenses are debited net of the CENVAT credit availed. To this extent, we see no infirmity in the stand of the assessee. 103. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee, and direct the Assessing Officer to delete the impugned adjustment on account of CENVAT in the profits of the eligible units. The assessee gets the relief accordingly."*

39. It is observed that facts of assessee's case are identical with facts of decisions referred supra. Considering decision of Coordinate Bench referred supra, addition made by Assessing Officer is thus deleted and this ground of appeal is allowed."

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

31. In the result, appeal filed by the assessee is allowed.

ITA NO. 3177/MUM/2019 (Revenue Appeal)
ITA NO. 3137/MUM/2019 (Assessee Appeal)

32. These are cross appeals pertaining to Assessment Year 2010-11 arising from the appellate order dated 29th January, 2019 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 21st March, 2014 under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act) was partly allowed.

33. First we take up, Revenue Appeal in ITA No. 3177/Mum/2019(common ground in assessee's appeal is also taken together).

34. 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.5.59 Crores made u/s. 14A r.w.r. 8D(2) of the I.T. Rules, in view of the Mumbai ITAT's decision in the case of ACIT vs Citicorp Finance (India) Ltd[108 ITD 457] [MUM]?"*

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

> *"Ground No. 1: Disallowance u/s 14A of the Income-tax Act, 1961 ('the Act' attributed for earning dividend income (Rs. 539.50,000/-)*
>
> *a) On the facts and in the circumstances of the 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. 5,59,50,000/- as notional expenses incurred towards earning exempt dividend income u/s 14A of the Act r.w.r 8D of the Income-tax Rules, 1962 ('the Rules').*
>
> *b) The Appellant prays that the addition u/s. 14A rwr 8D be deleted."*

36. Similar issue was considered by us in the Department Appeal in Ground No 1 in AY 2008-09 and held as under:

> *10. Considered the rival submissions and material placed on record. So far as proportionate interest disallowance u/s 14A is concerned, it is observed that Assessee has sufficient own funds in the form of share capital and reserves and surplus in comparison with investment*

in shares made by it. On this issue, Hon'ble Supreme Court in the case of South Indian Bank Ltd[2021] 130 taxmann.com 178 has held as under:

> *"Section 14A of the Income-tax Act, 1961 - Expenditure incurred in relation to exempt income not includible in total income (General) - Assessee-scheduled banks earned income from investments made in tax-free securities - Assessing Officer made proportionate disallowance of interest attributable to funds invested to earn tax free income under section 14A on grounds that separate accounts were not maintained for investment in tax-free securities - Whether since interest free own funds available with assessee exceeded their investments; investments would be presumed to be made out of assessee's own funds and proportionate disallowance was not warranted under section 14A on ground that separate accounts were not maintained by assessee for investments and other expenditure incurred for earning tax-free income - Held, yes [Para 27] [In favour of assessee]*

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

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

12. Respectfully following the binding decision of Hon'ble Supreme Court and Hon'ble Jurisdictional High Court referred supra, disallowance u/s 14A made by Assessing Officer in connection with proportionate interest disallowance deleted by the Ld.CIT(A) is sustained.

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

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

14. The above referred decision has been followed by co-ordinate Bench in the case of DCIT v. Shree Global Tradefin 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. The assessee gets the relief accordingly. This ground of appeal is partly allowed."

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

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

> *"Whether, on the facts and in the circumstances of the case & in law, Id. CIT(A) erred in deleting the addition of unutilized CENVAT Credit amounting to Rs.8,44,73,728/-?"*

39. 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 230as 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.

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

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

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

42. 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.*
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> *8. On the other hand, Mr. Soparkar, learned counsel appearing for the respondent contended that so far as Tax Appeal No.226 of 2010 is*

concerned, after discussing the evidence on record, the Tribunal has followed earlier decision and discussed the issue in detail in para 54 and 55 of its decision, which reads as under:-

> *"54. Per contra, the learned D.R. Supported the orders passed by the Assessing Officer and the learned CIT (A). Referring to the judgment in Sahney Steel and Press Works Limited v. CIT 228 ITR 253 (SC), he submitted that the impugned sales tax exemption increased the profits of the assessee by eliminating the expenses which the assessee would have had to incur later and therefore the impugned receipts were in the revenue field. He also referred to Explanation (10) to Section 43 (1) of the Income Tax Act inserted in with effect from 01/04/99 to emphasise that the action of the assessee in not reducing the cost of assets by the amount of subsidy for working out the Written Down Value was indicative of the fact that the impugned receipts were not in the nature of capital receipts.*
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> *55. We have heard both the parties and considered their rival submissions. Perusal of the scheme extending the aforesaid incentives to "prestigious" units announced by Government of Gujarat on 26/07/91 makes it amply clear that the scheme was announced to attract investment in core sector industry having potential, to spur industrial growth in ancillary, tertiary and secondary sector of the economy. The other scheme announced by the Government of Gujarat as Capital Investment Incentive Scheme on 11th September 1995 was intended to attract investments to generate greater employment in less industrially developed areas of Gujarat and also to secure balanced development of industries in Gujarat through dispersal of industries in the most backward area and backward areas. It is thus clear that the object of both the scheme was to ensure development of backward areas or for development of core sector industries in the State or for generating the employment. Perusal of both the schemes shows that the incentives extended to the eligible units were, inter alia, through exemption from payment of Sales Tax. Thus, the object of both the schemes was to attract capital investment to ensure development of backward areas and the modality or mechanism chosen to attract such investment was, inter alia, through exemption from payment of sales tax."*

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

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

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

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

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

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

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

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

8. It is undoubtedly true that such subsidy was computed in terms of sales tax deferment and necessarily therefore, would accrue to

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

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

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

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

5.3.5. ……. the dominant purpose for which the incentive scheme per se introduced by the respective State Governments was only for the purpose of setting up of industries in the respective areas for industrial development in State and also to accelerate development and absolutely not for augmenting the profits of the assessee. Effectively, the schemes of various State Governments envisaged the rapid industrialisation, growth and new employment generation in the respective areas which would in turn promote the growth of the State. Hence, it could be safely concluded that subsidy / incentive granted is only for setting up of the units based on the fixed percentage of the capital cost and not for running the business of the assessee. Moreover, even this subsidy which is determined based on sales tax assessment orders for 9 years, 6 years etc., are subject to maximum outer limit already fixed under the respective schemes. Though the quantification of the subsidy has been made post commencement of business, the measurement of subsidy is immaterial. In our considered opinion, none of the schemes contemplated to finance the assessee in the form of subsidy / incentive for meeting the working capital requirements of the assessee company post commencement of business. Hence, by applying the purpose test, apparently, the subsidy / incentive received in the instant case would only have to be construed as capital receipts not chargeable to income tax. In this regard, we find that ld. AR placed reliance on the decision of Hon'ble Supreme Court in the case of Ponni Sugars and Chemicals Ltd., reported in 306 ITR 392, wherein the incentive conferred under that scheme were two fold. First, in the nature of higher

free sale sugar quota and second, in allowing the manufacturer to collect Excise duty on sale price on the free sale sugar in excess of the normal quota, but to pay to the Government only the Excise duty payable on the price of levy sugar. The Hon'ble Supreme Court in para 14 of its decision had held that "character of receipt of subsidy has to be determined with respect to the purpose for which the subsidy is given. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial." In fact, the Hon'ble Supreme Court while rendering this decision had duly considered its earlier decision in the case of Sahney Steel and Press Works Ltd., reported in 228 ITR 253 and had absolutely no quarrel with that judgement. Rather, it concurred with the decision rendered in Sahney Steel and Press Works Ltd., case. In this regard, it would be relevant to reproduce the operative portion of the decision of Hon'ble Supreme Court in the case of Ponni Sugars and Chemicals Ltd., as under:-

> *14. The second case is Lincolnshire Sugar Co. Ltd. v. Smart 20 TC 643. In that case it was found that Lincolnshire Sugar Co. Ltd carried on the business of manufacturing sugar from home grown beet. The company was paid various sums under British Sugar Industry (Assistance) Act, 1931, out of monies provided by the Parliament. The question was whether these monies were to be taken into account as trade receipts or not. The object of the grant was that in the year 1981, in view of heavy fall in prices of sugar, sugar industries were in difficulty. The Government decided to give financial assistance to certain industries in respect of sugar manufactured by them from home-grown beet during the relevant period. Lord Macmillan held that-*
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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."*
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> *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 ColourmanDyechem Ltd. (supra), we find that Their Lordships, in this case, were dealing with an entirely different type of subsidy which was clearly dealing with an expansion situation. However, we would rather refrain from making any further detailed observations on this issue, as we are alive to the fact that Hon'ble jurisdictional High Court, in Tax Appeal No 358 of 2012, has admitted appeal against the decision of this Tribunal in Ajanta's Manufacturing Ltd. case (supra) and all these issues will now come up for consideration of Their Lordships. The fact that appeal is admitted does not, as we have stated earlier as well, does not affect the binding nature of the judicial precedents. There is no dispute before us that the scheme under which the sales tax and excise duty subsidy are given to this assessee are the same as in the case of Ajanta Manufacturing Ltd. (supra). All the material

facts being the same, there is no reason to take any other view of the matter than the view so taken by the coordinate bench. We must, therefore, uphold the conclusions arrived at by the Commissioner (Appeals), which are in consonance with the Special Bench decision in the case of Reliance Industries Ltd. (supra) and coordinate bench decision in the case of Ajanta Manufacturing Ltd. (supra), and decline to interfere in the matter."

(emphasis supplied by us)

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

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

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

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

43. Respectfully following the above decision, we dismiss the ground raised by the Revenue and allow the ground raised by the Assessee.

44. 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.175,50,60,880/- 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-II located in the State of Himachal whereas the same is in the nature of revenue incentive, especially when the scheme under consideration, also provides for capital investment subsidy 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?"

45. 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 230as 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.

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

47. In the Ground No.5, 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 deleting the disallowance of Rs. 76,11,16,088/- being pre-operative expenses, when in its books of accounts, the assessee itself had claimed the expenses as capital expenses and added them to its capital-work-in progress/fixed assets and there is no provision in Income- tax Act permitting the allowance of such expenses?"*

48. Similar issue was considered by us in the Department Appeal in Ground No 8 in AY 2009-10 and held as under:

> *"73 . Considered the rival submissions and material placed on record. It is observed that identical issue was decided by coordinate bench of Mumbai ITAT in the case of holding company of the assessee being Ambuja Cement Limited vide order dated 07.11.2022 in the ITA No. 3307/Mum/2015 and 2428/Mum/2019 for A.Y. 2009-10 wherein it was held as under:*
>
> > *"99. In ground no.8, the Assessing Officer has raised the following grievance: "Whether, on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in allowing the pre-operative expenses amounting to Rs. 39,82,07,328/- whereas the assessee itself claimed these expenses as capital expenses in the books of accounts adding it to capital work in progress/fixed assets?"*
> >
> > *100. During the assessment proceedings, the Assessing Officer noted that the assesee has made this claim only by way of a revised return and that no such claim was originally made by the assessee. It was also noted that the books maintained under the Companies Act also show these expenses as capital expenses, which in an indicative, even if not conclusive, evidence of the expenses being in the nature of capital expenses. The judicial precedents relied upon by the assessee in support of the claim were noted, and left at that, and it was observed that "the assessee is a big company assisted by a battery of lawyers and chartered accountants, but in its original return of income no deduction on account of these expenses uisclaimed which amounts to an admission that these expenses are not revenue expenses in nature" and that "this shows that lodging this claim is only an afterthought of the assessee, with no substantial basis". The Assessing Officer also observed that "some of the above expenses are for setting up the business, and not the expansion of the existing ones" though he did not specifically point out any such expenses. The Assessing Office thus proceeded to disallow the entire amount of pre-operative expenses. Aggrieved, assessee carried the matter in appeal before the CIT(A) who, after taking note of the detailed submissions, held that the expenses, being in the nature of expenses incurred for the expansion of existing business, cannot be disallowed. Accordingly, the disallowance was deleted. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.*
> >
> > *101. We have heard the rival submissions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position.*
> >
> > *102. The short grievance raised before us by the Assessing Officer is whether, even when the expenditure is shown in the books of accounts, it can be treated*

as revenue in nature. That question, in our considered view, stands concluded in favour of the assessee. In the case of CIT Vs Havells India Ltd (ITA Nos 55 and 57 of 2012; judgment dated 21 May 2012), Hon'ble Delhi High Court has, in this context, observed, speaking through Hon'ble Justice Easwar, that "The fact that in the books of account the assessee had capitalised the expenses does not prevent the assessee from claiming them as revenue expenses since the question of allowance of expenses has to be considered in the light of the legal position and the accounting treatment cannot be conclusive". The limited grievance raised by the Assessing Officer is thus devoid of any legally sustained merits, and we reject the same. In any event, even on merits, the well reasoned order of the learned CIT(A), in our considered view, does not merit any interference. We approve the conclusions arrived at by the learned CIT(A) on this point and decline to interfere in the matter.

103. Ground no. 8 is thus dismissed."

74. It is observed that facts in assessee's case are similar to facts discussed by coordinate bench referred supra and considering such fact addition made by Assessing Officer is deleted. This ground of appeal is dismissed.

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

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

"Whether, on the facts and in the circumstances of the case & in law, Id. CIT(A) erred in allowing the of claim of additional depreciation of Rs. 155,77,10,174/- u/s 32(l)(iia) of the Act without appreciating the fact that additional depreciation is allowable only on "new machinery" i.e. the first year in which it is put to use?"

51. 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 Limited vide 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 totalingRs.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 intital assessment year. From AY 1981-82 to 87-88, the claim for additional depreciation was restricted to previous year in which such machinery or plant is installed or, if the machinery or plant is first put to use in the immediately succeeding previous year. From AY 2003-04 till 2005-06, the claim for additional depreciation was restricted to previous year in which such undertaking begins to manufacture or produce any article or thing on or after the 1st day of April, 2002; or if any industrial undertaking existed before the 1st day of April, 2002, during any previous year in which it achieves the substantial expansion by way of increase in installed capacity by not less than ten per cent. From AY 2006-07, there is no restriction with regard to the year in which such additional depreciation should be allowed and also there is no restriction with regard to the additional depreciation being allowed only on the written down value and therefore the additional depreciation even in the second and subsequent years have to be allowed on the original cost of the Asset. These are evident from a plain reading and literal construction of the relevant statutory provisions.

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

> *"I have considered the submissions of the Ld. A/R and find substance in the contention of the Appellant. On a conjoint reading of the provisions of section 32(1)(iia) inserted by Finance (No. 2) Act, 1980 and reinserted by Finance Act, 2002 it is evident that the said sections specifically restricted the allowability of additional depreciation in the year of installation of P&M. However, in the section 32(1)(iia) amended vide Finance Act, 2005 Legislature had omitted the proviso wherein it was provided that such depreciation could be*

claimed only in the initial assessment year. This being a specific omission it could be construed that the intent of the Legislature was not to restrict the allowance of additional depreciation to the year in which the assets are installed but also in the second and subsequent years provided that the aggregate depreciation does not exceed the cost of the asset. It is settled law that a fiscal statute has to be interpreted the basis of the language used therein and not interpreted out of context the same as held by Apex Court in the case of Orissa State Warehousing Corporation, Mohammad Ali Khan and Madurai Mills Co. Ltd. (Referred to by the Appellant.) Further, it is also imperative to state that Section 32(1)(iia) is a beneficial provision enacted with the view to provide benefit to the assessee. The same is also evident from the Explanatory Notes to the Finance Act, 2005 wherein it has been clarified that in order to encourage investment the provisions of sec. 32(1)(iia) have been amended. In so far as the language used in the provision in concerned one has to construe the language beneficially and in favour of the assessee as held by the Jurisdictional High Court in the case of Indian 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. TarulataShyam 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."

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

53. 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 A.O. to allow deduction u/s. 80IA of the I.T. Act, in respect of power-generating unit-TG3 located at Wadi?"

54. On identical issue in Assessee's appeal, in the Ground No.3, following issue is raised:

"Ground No. 3 : Denial of claim of deduction u/s 80-IA with respect of Wadi Power Plant TG 2 (Rs. 49,32,41.899 /-):

a) On the facts and circumstances of the case and in law, the Ld. CIT (A) was not justified and grossly erred in confirming the action of AO in denying the claim of Appellant in relation to deduction u/s 80IA in respect of Power Plant namely TG2 at Wadi in the state of Karnataka.

b) The Appellant prays that claim of the Appellant in relation to deduction u/s.80IA be allowed."

55. 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."

56. Respectfully following the above decision, we dismiss the ground raised by the revenue and allow the ground raised by the assessee.

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

"Whether, on the facts and in the circumstances of the case & in law, Id. CIT(A) erred in deleting the addition of wealth tax provision in computing Book Profit u/s. 115JB of the Act (Rs. 1,34,00,000/-)?"

58. 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."

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

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

"Whether, on the facts and in the circumstances of the case & in law, Id. CIT(A) erred in deleting the addition of interest expenses to earn dividend income in computing Book Profit u/s. 115JB of the Act (Rs.5.595 Crores)?"

61. On identical issue in Assessee's appeal, in the Ground No.12, following issue is raised:

"Without prejudice to Ground No. 1,

Ground No. 12: Disallowance u/s 14A in respect of exempt income (Rs 5,59,50,000/-):

a) 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 adding Rs

5,59,50,000/- being notionally allocated expenditure allegedly incurred to earn dividend income in computing Book Profit u/ s 115JB.

b) The Appellant prays that the AO be directed to exclude the amount of disallowance made u/s. 14A while computing book profits u/s. 115JB."

62. 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."

63. Respectfully following the above decision, we dismiss the ground raised by the revenue and allow the ground raised by the Assessee.

64. In the result, appeal filed by the Revenue is dismissed.

ITA.NO. 3137/MUM/2019 (ASSESSEE APPEAL)

65. Now we take up, Assessee Appeal in ITA No. 3137/Mum/2019.

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

"Ground No. 2: Disallowance of Club Entrance Fee (Rs 5,00.000/-}*

a) 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 disallowing Club Entrance Fee of Rs. 5,00,000/- as expenditure not incurred wholly and exclusively for the purpose of the business.

b) 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 issue in earlier years."

c) The Appellant prays that the AO be directed to allow the claim of the Appellant.

67. 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."

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

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

"Ground No. 4 : Disallowance of proportionate Head Office expenditure and Research & Development expenditure while computing deduction u/s 80IA/80IB/80IC

(a) On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in apportioning a part of the indirect Head Office expenses aggregating to Rs. 18,06,75,661/- and adjusting such allocated amount of Rs. 1,26,98,280/- in computing Tax Holiday u/s 80IA for eligible Captive Power Plants, without establishing any nexus between the nature of expenses and such eligible units of the appellant.

(b) Without prejudice to the above, on the facts and in the circumstances of the case, 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. 21,33,60,210/- (including Rs 3,26,84,549/- being R&D Expenses) and adjusting such allocated amount of Rs 1,60,08,086/- in computing Tax holiday u/ s 80IB for eligible Tikaria Unit and Rs. 1,80,84,404/— 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.

(c) Without prejudice to the Ground 7 (b), that on the facts and in the circumstances of the case, the 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. 3,26,84,549/- in computing Tax Holiday u/s 80IC.

(d) On the facts and in the circumstances of the case and without prejudice to Ground Nos. 7(a), 7(b) and 7(c) 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)."

70. Similar issue was considered by us in the assessee Appeal in Ground No 4 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."

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

72. In the Ground No.5, Assessee has raised the following grievance:

> *"Ground No, 5 : Long term capital gain on sale of Porbandar Land*
>
> *(a) 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 relying on the report of the DVO in the valuation of Porbandar land disregarding the fact that reference made to the DVO in the instant case is against the provisions of section 55A and hence the same is bad in law.*
>
> *(b) Without prejudice to 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 confirming the action of the AO in relying on the report of the DVO which was received after the completion of assessment.*
>
> *(c) Without prejudice to 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 confirming the action of the AO in relying on the valuation report of the DVO which is based on arbitrary rates and unreasonable assumptions.*
>
> *(d) The Appellant prays that the reduction in capital loss of Rs 26,81,63,920/- be deleted.*

73. The Assessing Officer has discussed this issue at Para No 14 of assessment order. The Assessing Officer has observed that assessee company had two stretches of land in Porbandar, Gujarat. In the year, 1956, these lands were transferred to the assessee for industrial use, one under conditional grant and another one under conditional lease for 99 years, both with restriction on transfer. The said lands have been reposed by the Government of Gujarat. The issue was settled by the Gujarat High court deciding the matters against the assessee vide order dated 15/12/2009. Based upon the same, assessee has treated the sale value of land at Rs Nil and after considering indexed cost of acquisition based upon valuation as on 01/04/1981, assessee has claimed Long Term capital loss at Rs 26,81,63,920. The written submission filed before Assessing Officer is reproduced at Page No 24 and 25 of assessment order. The Assessing Officer has referred to provisions of Section 2(47) of the Act and observed that transaction of assessee does not fall within the definition of "Transfer" under the Income Tax Act. He has observed that land was allotted to

assessee subject to fulfilment of certain conditions including use of land for manufacture of cement, re-possession of land by State Government is in the nature of penalty and cannot be held as transfer. In alternate contention, Assessing Officer has observed that as DVO has determined fair market value of land at lower than value adopted by assessee, he determined long term capital loss for Conditional leased land at ₹.1,15,11,880/- and loss of ₹.7,91,83,280/- for conditional grant land as against loss of ₹.1,66,27,920/- and ₹.25,15,36,000/- shown by assessee in return of income.

74. In appeal Ld.CIT (A) has discussed the above issue at Para No 14 of his order and held as under:

> *"I have considered the appellant's contention that the AO had no power to refer the valuation of 'Porbandar 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)."

From the details submitted by the assessee during the course of assessment proceedings, the AO felt that the fair market value of the property as on 01-04-1981, as estimated by the Registered valuer was on a higher side. With a view to determining the FMV of the said property as on 01-04-1981, the AO made a reference to the valuation to the DVO concerned. The action of AO is upheld. Accordingly, I dismiss ground of appeal no.11."

75. The Assessee has filed appeal against above referred order. The Ld.AR has argued that as land is repossessed by Government of Gujarat, rights are transferred in favour of Government which tantamount to "transfer" of land. During the course of appellate hearing, Ld. AR has argued that prior to 1st July, 2012, for the purpose of valuation u/s.55 of the Act, reference cannot be made if value of asset given by assessee was more than market price. The Ld. AR has mainly relied upon following decisions:

(i) CIT v. Puja Prints [2014] 360 ITR 697 (Bombay)
(ii) CIT v. DaulatMota (ITA No. 1031 of 2008) (Bombay HC)
(iii) Ms. Rubab M. Kazerani v. JCIT (2004) 91 ITD 429 (Mum.)
(iv) ITO v. Smt. Lalitaben B. Kapadia (2008) 115 TTJ 938 (Mum)
(v) Peninsula Land Ltd. v. DCIT [IT APPEAL NOS. 3440 AND 3696 (MUM.) OF 2009]

76. The Ld. AR has also relied upon following decisions wherein it is held that amendment brought by Finance Act 2012 is not prospective in nature.

(i) CIT v. Puja Prints [2014] 360 ITR 697 (Bombay)
(ii) Relevant extracts from explanatory memorandum to Finance Act, 2012
(iii) Virendra Natwarlal Jariwala v. DCIT [2021] 191 ITD 555 (Surat-Trib.)

(iv) Ranchodbhai C. Patel v. ITO [2021] 186 ITD 523 (Surat-Trib.)

77. During the course of appellate hearing, the Ld. DR has relied upon finding given by lower authorities and further submitted that the long term capital loss was claimed by the assessee on two stretches of land at Porbandar, which were granted /leased to the assessee in the year 1956 for industrial use by the State Govt. of Gujarat. However, the said lands were repossessed by the Gujarat Govt. as the assessee was found to have violated the conditions, on which the land was granted / leased to the assessee. Furthermore, the issue also stands settled by the Gujarat High Court

decision dated 15.122009, against the assessee. The copy of the said order is enclosed at pages 70 to 86 of the assessee's paper book filed on 16.092022. The AO was of the opinion that the repossession of land by the state Govt. cannot be treated as transfer and furthermore, in the absence of any compensation being paid to the assessee, the Long Term Capital loss of Rs. 26.81 cr. claimed by the assessee was disallowed by the AO. It may also be noted that during the course of assessment proceedings, a reference u/s. 55A of the IT Act, 1961 was made to the DVO for determining the FMV of the land as on 01.04.1981. The report of the DVO was received during the pendency of assessment proceedings and as against total FMV of Rs. 4.24 cr. computed by the assessee, the FMV computed by the DVO stood at Rs. 1.43 cr. Accordingly, the AO, after adopting the FMV as provided by the DVO, recomputed the Long Term Capital Loss at Rs. 9.06 cr. as against 26.81 cr., returned by the assessee on a without prejudice basis. It may be mentioned that a written submission on the validity of the reference made to the DVO u/s. 55A of the IT Act in A.Ys. 2006-07 to 2010-11 is already made by the undersigned separately. Discussed underneath is the submission specific to the issues involved in A.Y. 2010-11.

78. Facts of the case as emanating from perusal of the Hon'ble Gujarat High Court's order dated 15.122009 are that :The lands were granted to the assessee as new tenure land i.e. unalinated land and restricted land meaning thereby said lands cannot be transferred / sold without the prior permission of the Collector (refer para 3.3 of the order on page 75 of the assessee's paper book).Similarly, certain land was leased to the assessee only for the purpose of cement industry and on certain terms and conditions, more particularly, with the condition that the same cannot be transferred without prior permission of the Collector. The lands in question were not being used for the purpose, for which it was leased / granted i.e. manufacturing of cement was totally stopped since last 5 years. Land admeasuring of 35 acres was transferred by the assessee in favour of Fraser Investment Ltd. (subsequently named as I-IMP Cement Ltd.).The said HMP Cement Ltd. also stopped manufacturing of cement since long.

79. As there were various violations and breach of conditions, show cause notice was issued by the Collector Porbandar for forfeiting / resuming the land in state Govt. The subsequent order dated 24.012002 of the Collector Porbandar, directing resumption of land to the State Govt. was confirmed by the Secretary Appeal, Revenue Dept. State of Gujarat, vide order dated 13.022003. Before the Court, it was argued by the assessee that only possession was transferred to HMP Cement Ltd. and only agreement of sale was entered into by MOU between ACC Ltd. and HMP Cement Ltd. and, as such, there was no transfer. It is further seen that not only land was transferred in favour of HMP Cement Ltd. on consideration and further that though only some lease hold rights were transferred in favour of HMP Cement Ltd., most of the land has been sold in court auction as per the order passed by the DRT in proceedings under BIFR initiated against HMP Cement Ltd. In view of the above facts, the Hon'ble High Court upheld the repossession of land by the State of Gujarat. The purpose of highlighting the above facts is to pose certain questions for the consideration of the Hon'ble Bench:-

> *1. What is the year of transfer of the land under consideration?- Is it F.Y. 2009-10 or any earlier previous year.*
>
> *2. What would be the cost of acquisition in the hands of ACC Ltd, considering the facts that the assessee, ACC Ltd. has already received certain consideration from I-IMP Cement Ltd. in earlier years.*
>
> *3. What is the quantum of capital loss, if any, suffered by the assessee and whether the same can be claimed in the year under consideration.*

80. The above questions go at the core of the issue for determining the assessee's claim for LTCL and also its quantification. Reliance in this regard is placed on the Hon'ble Delhi High Court's decision in the case of CIT-II Vs. Jansampark Advertising & Marketing (P) Ltd. (2015) 56 taxmann.com 286 (Delhi), wherein the question 'whether however as two appellate authorities, viz. Commissioner (Appeals) and Tribunal, are also forums for fact-finding, in the event of AO failing to discharge his functions properly, obligation to conduct proper inquiry on facts would naturally shift

to door or said appellate authorities and they having noticed want of proper inquiry, cannot close chapter simply by allowing appeal and deleting additions made' was answer in affirmative in favour of the revenue.

81. With reference to reliance placed by the Ld. AR on the decision of Puja Prints (supra), Ld. DR has argued that in view of decision of Hon'ble Supreme Court in the case of Pushpadevi M. Jatia V. M. L. Wadhawn 1987 AIR 1748, if evidence is relevant, the Court is not concerned with the method by which it was obtained. She also relied upon decision of Hon'ble Supreme Court in the case of Pooran Mal V. Director of Inspection 93 ITR 505 wherein it is held that even if reference made by Assessing Officer is considered not valid, the valuation report can always be used in the Income Tax proceedings for the purpose of the Act.

82. Further, Ld. DR has filed written submission dated 13/01/2023 before Hon'ble Bench wherein she has referred to order of Hon'ble Gujarat High court passed in assessee's own case which relates to re-possession of land by Government and contended that lands in question were not being used for the purpose for which it was leased/granted, land admeasuring 35 acres was transferred by the assessee in favour of Fraser Investments Limited in earlier years, Based upon such facts, she has contended that matter was to remanded back to Assessing Officer for recording back specific finding relating to year of sale, year of capital gain, what would be cost of acquisition in the hands of assessee as certain part of land was transferred and consideration was received from HMP Cement limited in earlier years. The Ld. DR has relied upon decision of Hon'ble Delhi High court in the case of CIT *v.* Janasmpark Advertising & Marketing 56 Taxman.com 286.

83. In the rejoinder, the Ld AR has contended that entire facts relating to re-possession of land was on file of Assessing Officer and he has made addition based upon such facts hence there was no need for setting aside the matter to file of Assessing Officer for new facts. As Assessing Officer has conducted necessary inquiries and fact finding relevant to the taxation of the impugned capital gains, there is no

question of failure on the part of the Assessing Officer and consequently therefore, the Ld. CIT(A) or this Hon'ble Tribunal is not required to conduct any such 'fact finding' for deciding the issue at hand. Further, Ld. DR cannot improvise the case which has not been made out by the lower authorities. This is a well settled judicial principle. The Ld AR has stated that the Tribunal has no power of enhancement as laid down by the Hon Supreme Court in MCorp Global (P.) Ltd. *v.* CIT (2009) (309 ITR 434)(SC)(copy filed at the Bar on). In the said decision, the Hon'ble Supreme Court has categorically held that the Tribunal cannot take back the benefit granted to the assessee by the AO. This has been held so at para 6 of the said decision, following the earlier decision of the Hon Supreme Court in Hukumchand Mills *v.* CIT (63 ITR 232)(SC).

84. Considered the rival submissions and material placed on record. It is observed that the dispute under this ground relates to transfer of Porbandar land comprising of two land parcels, one acquired by the Assessee under a long term lease and the other acquired under conditional grant, both from the Government of Gujarat, sometime in 1956/1957. During the year under consideration, the said plots were repossessed by the Government of Gujarat for alleged non-compliance with certain terms of the original allotment. The Assessee had challenged the said action of repossession of its plots by the Gujarat Government by filing writ petitions before the Hon Gujarat High Court which came to be decided against the Assessee in current year. It is undisputed fact that assessee was holding long term lease from Government hence it has become de facto owner of the land. As assessee company was having rights in the land though same was subject to fulfilment of certain conditions, such rights were extinguished in current year as land leased to assessee were re-possessed by the Government in view of order of Hon'ble Gujarat High court which is nothing but extinguishment of rights as per Section 2(47) of the Act. It is observed that assessee company had used the land for manufacturing purpose for certain years but same was not carried out since few years hence Collector, Porbandar has passed the order for re-possessing such land which was in dispute before Hon'ble High court. Thus, repossession of land by the State Government cannot be terms as penalty as observed by AO but rights in

lands are repossessed by the Government of Gujarat. As Hon'ble Gujarat High court has passed the order for obtaining back such possession of land from assessee company in year under consideration, assessee company has rightly computed Long Term Capital gain/loss in year under consideration. Thus, argument of AO that assessee was not absolute owner of land and re-possession of land by State of Gujarat is not transfer u/s 2(47) of the Act cannot be accepted.

85. So far as issue raised by the Ld.DR that part of the land held by assessee were sold in earlier years to HMP Cement Limited and taxability of long term loss considering such facts, it is observed that order of Hon'ble Gujarat High court regarding re-possession of land is rendered in year under consideration hence as stated supra, assessee has rightly computed income from capital gain in year under consideration. It is relevant to refer to relevant para of said Judgement of Hon'ble High court as referred in Paper book filed by assessee as under:

> *".....Petitioner No.1 – Associated Cement Company Ltd. Was granted land bearing Survey No.59 admeasuring 2 acres 5 gunthas; Survey No.60/3 admeasuring 120 acres 6 gunthas (in all total 122 acres and 11 gunthas) situated at Porbandar on lease for a period of 99 years by the order of Collector, Porbandar dated 22.05.1956 for cement industry on certain terms and conditions (subject matter of Special Civil Application No.1972 of 2003). That pursuant to the order dated 22.05.1956, lease agreement was entered into on 16.06.1956 and further modified amended agreement came to be executed on 18.01.1963. That said lands were granted as new tenure land i.e. unalienated land and restricted land meaning thereby said lands cannot be transferred, sold without prior permission of the Collector.*
>
> *3.1. Similarly, certain other parcel of land admeasuring 100 acres and 1 guntha situated at village – Chayya Taluka – Porbander (subject matter of Special Civil Application No.1975 of 2003) were granted to the petitioners on lease for a period of 99 years by order dated 03.01.1956 only for the purpose of cement industry and on certain terms and conditions more particularly with condition that same cannot be transferred without prior permission of the Collector. Lease agreement was entered into on 15.03.1982 along with certain terms and conditions inclusive of not to transfer aforesaid lands in question without prior permission of the State Government / Collector. 4. As lands in question were not used for the purpose for which it was leased / granted i.e. manufacturing of cement was totally stopped since last 5 years and that it was found that land admeasuring approximately 35 acres was transferred in favour of Fraser Investment Limited (subsequently named as HMP Cement Limited) without prior permission of the Collector and that said HMP Cement Limited also stopped manufacturing of cement since long and as it was found that there is breach of conditions of order / lease agreement, a show cause notice was issued by the Collector, Porbander calling upon petitioner no.1 as to why lands in question should not be forfeited / resumed*

in the State Government. Petitioner no.1 replied to the same and after considering reply and submissions made by the petitioners, by impugned order dated 24.01.2002 Collector, Porbander directed to resume lands in question to the State Government and forfeiting the same i.e. of the lands (Subject matter of both the Special Civil

Applications)…….

8. It is not in dispute and cannot be disputed that all the lands in question were leased in favour of the petitioner for a period of 99 years for cement industry with certain terms and conditions inclusive of condition that same cannot be transferred without prior permission of the Collector. By MOU executed in 1989 approximately 35 acres of land came to be transferred in favour of HMP Cement Limited for consideration. It is the contention on behalf of the petitioner that there was no sale deed in favour of Fraser Investment Limited (HMP Cement Limited) and only possession was transferred by aforesaid MOU and at the most it can be said to be agreement to sell, therefore, there is no transfer as per provisions of Transfer of Properties Act and there is no breach of conditions / agreement / lease is concerned, same cannot be accepted. On considering MOU executed between petitioner no.1 and Fraser Investment Limited (HMP Cement Limited), it appears that entire land with plants and machinery came to be transferred and that too for consideration. Thus as per MOU entered into between the parties there was transfer in favour of HMP Cement Limited and therefore, both the authorities below have rightly held that there is breach of terms and conditions or order / lease of the lands in question. It is also required to be noted that it is not disputed by the learned Advocate for the petitioner that lands in question were granted / leased for Cement industry and admittedly even lands in question were possessed by petitioner no.1, same was not used for manufacturing of cement and activity of manufacturing cement was totally stopped. Even after transfer of land in question in favour of HMP Cement Limited, after some time HMP Cement Limited also stopped using aforesaid land for manufacturing of cement and manufacturing of cement came to be totally stopped. Thus it was found that the purpose for which land in question was granted / leased is not fulfilled. Under the circumstances both the authorities below have rightly passed order to forfeit and resume the land in question.

9. It is not disputed that approximately 35 acres of land was in occupation and possession of HMP Cement Limited. At this stage it is to be noted that even subsequently HMP Cement Limited approached BIFR and even bankers who advanced loan to said HMP Cement Limited and creditors approached DRT and in Court auction most of the land in question came to be sold. It prima facie appears that as such HMP Cement Limited was not owner of the land in question and only leasehold rights were transferred, how land in occupation and possession of HMP Cement Limited could have been sold in proceedings before the DRT as if HMP Cement Limited was owner. Be that as it may. The fact remains that there are concurrent finding given by both the authorities below with respect to breach of terms and conditions of lease / grant of land in question and when impugned orders are passed after giving opportunity to the petitioner after following principles of natural justice, same are not required to be interfered with by this Court in exercise of powers under Article 226 and 227 of the Constitution of India.

10. Now so far as contention of the petitioner with respect to land bearing survey no.59 and 60/3 total 122 acres and 11 gunthas of land situated at Porbander, same was granted / allotted / leased in favour of the petitioner on payment of full consideration of Rs.3,97,823.87 paise, therefore, no action could have been taken by the Collector is concerned, it is to be noted that by order dated 13.08.1993

passed by Collector, Junagadh, said lands were given as unalienated land and as new tenure restricted land and said land could not have been transferred without prior permission of the Collector, still land in question have been transferred in favour of HMP Cement Limited without prior permission of the Collector. Therefore, there is breach of condition of order dated 17.08.1993 also. Even otherwise, in the facts and circumstances of the case, more particularly when since last many years land in question were not used for manufacturing of cement i.e. for the purpose for which it was leased / granted, lands were transferred in favour of HMP Cement Limited without prior permission of the Collector, it cannot be said that both the authorities below have committed any error in passing impugned orders.

11. In view of above and for the reasons stated above, there is no substance in both the petitions, which deserve to be dismissed and accordingly they are dismissed. Rule discharged. Ad interim relief granted earlier stands vacated forthwith. No costs."

86. On perusal of above referred order, it is apparent that by MOU executed in 1989 approximately 35 acres of land came to be transferred in favour of HMP Cement Limited for consideration. Further, Hon'ble High court has observed that on considering MOU executed between petitioner no.1 and Fraser Investment Limited (HMP Cement Limited), it appears that entire land with plants and machinery came to be transferred and that too for consideration. These facts prove that certain part of land originally leased to assessee were transferred to HMP Cement Limited for consideration which must have been received in 1989 as MOU was executed in such year. The Copy of such MOU, quantum of consideration received towards such MOU is not on record. Whether such MOU was legal or not or whether assessee company was legally capable of transferring such part of land to other party or not is not subject matter of present appeal as legal issue was already before Hon'ble High court as referred supra. It is emanating from the order of Hon'ble High court that approximately 35 acres of land came to be transferred in favour of HMP Cement in earlier years hence to that extent of land assessee is not entitled to long term capital loss as he was not having ownership of land to that extent in year under consideration. Considering such facts, AO is directed to re-compute income from long term loss after excluding long term capital loss pertaining to 35 acres of land as was transferred to HMP as referred supra.

87. So far as issue of applicability of Section 55A and DVO's report obtained by AO, it is observed that 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 then 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."

88. 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. ShodhanIndl 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."

89. 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, Assessing Officer was not justified in considering fair market value of land based upon DVO's report obtained u/s 55A of the Act.

90. Considering above observation and discussion, Assessing Officer is directed to recomputed long term capital loss in the case of assessee. This ground of appeal is accordingly allowed for statistical purpose.

91. In the Ground No.6, Assessee has raised the following grievance:

Ground No. 6 : Disallowance of provision for Leave Encashment (Rs. 3,67,03,0077-

(a) On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified rather grossly erred in confirming the action of AO in not allowing the claim of leave encashment amounting to Rs. 3,67,03,007/ -

(b) The Appellant prays that the AO be directed to allow the claim of the Appellant.

92. Similar issue was considered by us in the assessee Appeal in Ground No 13 in AY 2008-09 and held as under:

"67. Considered the rival submissions and material placed on record. On perusal of relevant facts on record, it is observed that Hon'ble supreme court in the case of UOI v. Exide Industries Ltd. [425 ITR 1] has upheld constitutional validity of provision of section 43B(f) for provision for leave encashment liability and considering binding decision of Hon'ble Supreme Court claim cannot be

allowed. However, if payment of such provision towards leave encashment is made in subsequent year, deduction may be allowed to assessee in such years if not allowed till date. Therefore, Assessing Officer is directed to verify and the same and allow the same as per our above directions. This ground of appeal is partly allowed."

93. Respectfully following the above decision, we partly allow the ground raised by the Assessee.

94. In the Ground No.7, Assessee has raised the following grievance:

"Ground No. 7: Disallowance of claim of Education Cess (Rs.21.17,06,797/-):

(a) On the facts and circumstances of the case, the Ld. CIT(A) was 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. 21,17,06,797/- as allowable expenditure in computing the total income.

(b) The Appellant prays that the disallowance of education cess be deleted."

95. Similar issue was considered by us in the assessee Appeal in Ground No 9 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.

96. Respectfully following the above said decision, we partly allow the ground for statistical purpose.

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

"Without prejudice to Ground No. 6

Ground No. 8: Addition of provision for Leave Encashment ofRs. 3,67,03,007/- in the Computation of Book Profit under the provision of Sec. 115JB

a) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the AO in not excluding the provision for leave encashment while computing book profits u/ s. 115JB.

b) The Appellant prays that the AO be directed to exclude the provision for leave encashment while computing book profits u/ s. 115JB."

98. 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.

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

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

Ground No. 9 : Non exclusion of Sales Tax Incentive & Excise Duty Incentive in the computation of Book profit u/s 115JB (Rs. 73.48,92,089/- & Rs. 175,50,60,850/- respectively)

(a) On the facts and in the circumstances of the case, the Ld. CIT(A) erred in confirming the action of AO in denying the appellant's claim of exclusion of Sales Tax Incentive and Excise Duty Exemption benefits availed/received during the year under consideration amounting to Rs. 73,48,92,089/- and Rs. 175,50,60,880/- respectively, being capital in nature, in computing Book Profit u/s 115JB.

(b) The Appellant prays that the amount of sales tax and excise duty incentive be excluded while computing book profits u/s. 115JB of the Act.

101. Similar issue was considered by us in the assessee Appeal in Ground No 13 in AY 2006-07 and held as under:

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

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

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

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

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

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

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

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

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

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

basis of sales tax or excise duty. Nevertheless, the purpose test would ensure that, the subsidy was capital in nature.

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

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

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

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

In so far as question No.2 is concerned, this court finds that the same is squarely covered by the decision of the Supreme

Court in CIT v. P. J. Chemicals Ltd., [1994] 210 ITR 830. In the said case, after review of the law on the point, the Supreme Court has held as under (head note):

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

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

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

44. Ground no. 3 is thus dismissed."

98. It is observed that coordinate bench has also decided similar issue in favour of Ambuja Cement Limited, holding company of assessee from A.Y. 2006-07 to 2011-12 as stated supra. It is observed that various observations made by Assessing Officer and arguments made by Ld DR are already dealt with by various decisions referred supra hence there is no reason to deviate from the finding given by Coordinate Bench referred supra. Thus, Excise duty exemption received by assessee are capital receipts both for the purpose of computing income as per normal provision of the Act as well as book profit u/s 115JB of the Act and the addition made by Assessing Officer is deleted. In the result, related grounds in Assessee's Appeal are allowed."

102. Respectfully following the above decision, we allow the ground raised by the Assessee.

103. In the Ground No.10, Assessee has raised the following grievance:

"Ground No. 10: Non-exclusion of Capital Profit of Rs. 6,00,96,830/-

a) 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 denying the appellant's

claim for exclusion of profit on sale of fixed assets (net) of Rs. 6,00,96,930/- being capital profit in computing Book Profit u/s 115JB.

b) The Appellant prays that the AO be directed to exclude the amount of capital profit while computing book profits u/s. 115JB."

104. Similar issue was considered by us in the assessee Appeal in Ground No 7 in AY 2005-06 and held as under:

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

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

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

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

> *"52. Under this issue the revenue has challenged the deletion of the addition of profit on sale of fixed assets in computation of book profit u/s 115JB of the Act in sum of ₹.5,19,20,846/-. At the time of argument, the Ld. Representative of the assessee has disclosed this fact that this issue has been decided against the assessee in the ITA. No. 5259 & 4895/Mum/2007 Assessment Year: 2004-05 assessee□s own case for the A.Y.2002-03 in ITA. No.4241/M/2007 dated 29.07.2015. Since this issue has been decided against the Assessee in the assessee's own case (supra), therefore, the finding of the CIT(A) on this issue is hereby ordered to be set aside and we allow the claim of the revenue for the addition of said amount while computing the book profit u/s 115JB of the Act. Accordingly, this issue is decided in favour of the revenue against the assessee."*

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

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

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

"……..

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

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

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

……."

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

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

106. In the Ground No.11, Assessee has raised the following grievance:

"Ground No. 11: Addition of provision for Interest on Income Tax (Rs. 45,88,00,000/-):

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 adding Rs. 45,88,00,000/- being provision for interest on income tax in computing Book Profit u/s 115JB."

107. The Assessing Officer has discussed this issue at Para No 22 of assessment order. The assessee has made provision for ₹.45.88 crores in Profit & Loss Account out of which ₹.23.16 crores represent interest u/s.244A of the Act and ₹.22.72 crores represent for interest u/s.234D of the Act. The above referred amount was claimed as expenditure on the ground that such interest is not "Income Tax" but provision against interest from refund made on scientific basis. However, this contention of the assessee was not accepted by Assessing Officer on the ground that explanation 2 to Section 115JB requires amount of Income Tax including interest charge under the Act to be added while computing Book Profit.

108. In appeal Ld.CIT (A) has discussed the above issue at Para No 21.3 of his order and held as under:

"21.3 I find that the provision made by the appellant is an unascertained liability. Therefore, it is clearly covered by clause (c) of explanation 1 of section 115JB. Even if it is assumed that it is an ascertained liability, it would fall under clause (a) of explanation 1. Therefore, the Assessing Officer has rightly added the provision in the computation of book profit under section 115 JB. I also find that for AY 2012-13, CIT(A)-3, Mumbai has decided the similar issue in appellant's own case. I am in agreement with the view of my predecessor and followed the same. Accordingly, I dismiss ground of appeal No. 18."

109. The Assessee has preferred appeal against such order. During the course of hearing the Ld. AR has conceded the ground relating to interest u/s.234D vis-a-vis adjustment while computing Book Profit u/s.115JB of the Act in view of decision of Coordinate Bench in the case of Ambuja Cement Ltd. [140 Taxman.com 347]. So far as adjustment for interest u/s.244A of the Act while computing Book Profit, Ld. AR has stated that provision was made based upon past records / trend of receipt of Income Tax refund from Tax Department and subsequent withdrawal thereof based upon orders u/s.143(3) of the Act. The Ld. AR has stated that such provision does not fall within the definition of Income Tax as per Explanation 2 to Section 115JB of the Act. The Ld. AR has also provided working of interest income received v. provision

made against such interest on a scientific basis. On the other hand, the Ld. DR has relied upon orders of lower authorities and argued that any provision of Income Tax including interest need to be added while computing Book Profit u/s.115JB of the Act

110. Considered the rival submissions and material placed on record. It is observed that assessee has made provision for interest u/s.244A and interest u/s.234D in Profit & Loss account but such provision was not added back while computing Book Profit us/.115JB of the Act. So far as provisions for interest u/s.234D is concerned, the Ld. AR has not pressed such issue based upon co-ordinate Bench decision in the case of Ambuja Cement Ltd., hence this issue doesn't require separate adjudication and action of AO to that extent is upheld.

111. So far as provisions of interest u/s.244A is concerned, assessee has debited its Profit & Loss account with estimated amount of interest u/s.244A which would be withdrawn based upon past assessment orders passed in its case. The assessee has claimed that such provision is on a scientific basis. It is observed that explanation 2 to Section 115JB clearly provides that amount of Income Tax would be subject to upwards adjustment while computing Book Profit. Such Explanation also provides that any interest charged under the Act would be subject to positive adjustment. Though, in assessee's case, interest u/s.244A charged to Profit & Loss account is not recovered by Assessing Officer by passing any order but same is provided based upon past experience based upon assessment orders / appellate orders in case of assessee hence such interest provided in the books of account in actual sense partakes the character of interest as provided in explanation 2 to section 115JB of the act. If assessee would have actually paid amount received u/s.244A to Assessing Officer on account of additions made in assessment order and such interest if would have been debited to P&L account, such interest would have been disallowed while computing Book Profit hence on this analogy also provision of interest deserves to be added back while computing Book Profit u/s.115JB of the Act. It is observed that if in later years such amount is actually required to be paid to Assessing Officer, assessee would adjust such interest payable directly to provision of interest appearing in balance sheet and

in that scenario also such interest u/s.244A would not have been subject to Book Profit u/s.115JB of the Act which is contrary to the provision of the Act. On this ground also the claim of assessee fails and adjustment made by Assessing Officer is also upheld. This ground of appeal is dismissed.

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

> *"Without prejudice to Ground No.1,*
>
> *Ground No. 12: Disallowance u/s 14A in respect of exempt income (Rs 5,59,50,000/-)*
>
> *a) 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 adding Rs 5,59,50,000/- being notionally allocated expenditure allegedly incurred to earn dividend income in computing Book Profit u/ s 115JB."*
>
> *b) The Appellant prays that the AO be directed to exclude the amount of disallowance made u/s. 14A while computing book profits u/s. 115JB."*

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

> *"129. Considered the rival submissions and material placed on record. On this issue, coordinate bench in assessee's own case for A.Y. 2002-03 in ITA No 4987/M/2007 dated 29/07/2015 has decided issue in favour of assessee. The relevant finding is reproduced herein below:*
>
> > *"5. Additional ground no.4 is about exclusion of amount transferred to debenture redemption reserved in computing group profit of provisions of section 115JB of ₹.50 crores.*
> >
> > *5.1. During the course of hearing before us, representatives of both the sides agreed that identical issue had been decided in favour of the assessee, by the Tribunal while adjudicating the appeals for AY.s.1997-98(ITA/3298/Mum/01),1998-99(ITA/639/M/03),1999-00 (ITA/7594/Mum/04),2000-01(ITA/9570/Mum/04).*
> >
> > *We find that the decision of the Tribunal for AY.1998-99 for exclusion debenture redemption reserved had not been challenged by the department before the Hon'ble High Court and thus the order has attained finality. It is also found that the Hon'ble Bombay High Court of Bombay had dismissed the departmental appeal with regard to the issue while deciding the appeal for AY 1999-00. Considering the above facts we decide the last additional ground against the AO."*
>
> *130 It is matter of fact that department has not challenged the appellate order of A.Y. 1998-99 before Hon'ble High court and matter has attained finality. Hon'ble Bombay High court in the case of Raymond Limited [2012] 21 taxmann.com 60 has held that Amount*

set apart as a Debenture Redemption Reserve (DRR) is not a reserve within the meaning of Explanation (b) to section 115JA. Respectfully following decision of coordinate bench referred supra, we confirm the order of Ld.CIT(A) holding that amount transferred to Debenture Redemption Reserve cannot be added back while computing Book Profits. This ground of appeal in Departmental Appeal is dismissed.

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

115. In the Ground No. 13 & 14, Assessee has raised the following grievance:

***"Ground No. 13**: Non-adjudicating additional ground regarding claim u/s. 43B:*

a) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not adjudicating the additional ground filed by the Appellant regarding the claim of VAT paid u/ s. 43B by the date of filing of return of income.

b) The Appellant prays that the CIT(A) be directed to adjudicate the said additional ground on merits

Without prejudice to Ground No 13,

***Ground No. 14**: Allowability of VAT paid of Rs, 9,91,66,694/- u/s. 43B:*

a) On the facts and circumstances of the case and in law, the Ld. AO ought to have allowed the claim of the Appellant regarding the amount of VAT paid before the due date of filing of Return of Income for the year under consideration."

116. Similar issue was considered by us in the assessee Appeal in Ground No 13 & 14 in AY 2009-10 and held as under:

"106 Considered the rival submissions and material placed on record. It is observed that Assessee has filed additional ground before Ld. CIT(A) and claimed that VAT payment paid before due date of filing of return of income should be allowed but Ld.CIT(A) has not adjudicated this ground of appeal. It is observed that assessee has taken additional ground of appeal before Ld.CIT(A) as referred supra and such additional ground being legal in nature deserves to be admitted in view of binding decision of Jurisdictional High Court in the case of CIT v. Pruthvi Brokers and Share Holders Pvt. Ltd. [349 ITR 336/ 208 Taxman 498]. The said decision is reproduced hereinbelow:

"*long line of authorities establish clearly that an assessee is entitled to raise additional grounds not merely in terms of legal submissions, but also additional claims not made in the return filed by it. [Para 10]*

From a consideration of decision of the Supreme Court rendered in the case of Jute Corpn. of India Ltd. v. CIT [1991] 187 ITR 688/[1990] 53 Taxman 85, it is clear that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before

them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. They have the jurisdiction to entertain the new claim. They may choose not to exercise their jurisdiction in a given case is another matter. [Para 11]

Further the observation of the Supreme Court in the case of Jute Corpn. of India Ltd. (supra) to the effect 'if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made….' or 'that the ground became available on account of change of circumstances or law,' does not curtail the ambit of the jurisdiction of the appellate authorities stipulated earlier. They do not restrict the new/additional grounds that may be taken by the assessee before the appellate authorities to those that were not available when the return was filed or even when the assessment order was made. The appellate authorities, therefore, have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The first part viz., 'if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made….' clearly relate to cases where the ground was available when the return was filed and the assessment order was made but 'could not have been raised' at this stage. The words are 'could not have been raised' and not 'were not in existence'. Grounds which were not in existence when the return was filed or when the assessment order was made fall within the second category viz., where 'the ground became available on account of change of circumstances or law.' [Paras 12 and 13]

It is indeed a question of exercise of discretion whether or not to allow an assessee to raise a claim which was not raised when the return was filed or the assessment order was made. As held by the Supreme Court in the case of Jute Corpn. India Ltd. (supra) there may be several factors justifying the raising of a new plea in appeal and each case must be considered on its own facts. However, such cases include those, where the ground though available when the return was filed or the assessment order was made, was not taken or raised for reasons which the appellate authorities may consider valid. In other words, the jurisdiction of the appellate authorities to consider a fresh or new ground or claim is not restricted to cases where such a ground did not exist when the return was filed and the assessment order was made. [Para 15]

In the instant case, the Commissioner (Appeals) and the Tribunal have held the omission to claim the deduction of Rs. 40 lakhs to be inadvertent. Both the appellate authorities held, after considering all the facts, that the assessee had inadvertently claimed a deduction of Rs. 20 lakhs paid after the end of the year in question. There is no reason to interfere with this finding. There is less reason to interfere with the exercise of discretion by the appellate authorities in permitting the assessee to raise this claim. The assessee is entitled to the deduction in law is admitted and, in any event, clearly established. In the circumstances, the assessee ought not be prejudiced. [Para 18]

The orders of the Commissioner (Appeals) and the Tribunal clearly indicate that they had exercised their jurisdiction to consider the additional claim, as they were entitled to in view of the various judgments on the issue, including the judgment of the Supreme Court in the case of National Thermal Power Corpn. Ltd. v. CIT [1998] 229 ITR 383. [Para 19]

Both the appellate authorities have themselves considered the additional claim and allowed it. They have not remanded the matter to the Assessing Officer to consider the same. Both the orders expressly direct the Assessing Officer to allow the deduction of Rs. 40 lakhs under section 43B. The Assessing Officer is, therefore, now only to compute the assessee's tax liability which he must do in accordance with the orders allowing the assessee a deduction of Rs. 40 lakhs under section 43B. [Para 20]

The conclusion that the error in not claiming the deduction in the return of income was inadvertent cannot be faulted for more than one reason. It is a finding of fact which cannot be termed perverse. There is nothing on record that militates against the finding. The revenue has not suggested much less established that the omission was deliberate, mala fide or even otherwise. The inference that the omission was inadvertent is, therefore, irresistible. [Para 21]

Therefore, the appeal of the revenue was liable to be dismissed. [Para 26]".

107. So far as the merits of the case is concerned, it is observed that assessee has claimed deduction of VAT payment as per provision of section 43B of the Act. The issue requires verification at the end of the Assessing Officer hence, this ground of appeal is allowed for statistical purpose.

117. Respectfully following the above decision, we allow the ground for statistical purpose.

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

119. To sum-up, appeals filed by the assessee are partly allowed and appeal filed by the Revenue is dismissed.

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

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

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

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

(Asstt. Registrar)
ITAT, Mum

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

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

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

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

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

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

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

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

CORRIGENDUM TO ORDER DATED 28.02.2023

PER S. RIFAUR RAHMAN (AM)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. At Para No. 112, 113 & 114 we have adjudicated the ground raised by the assessee with regard to disallowance u/s. 14A, however, inadvertently reliance was incorporated relating to Debenture redemption reserve issue, which is the mistake apparent in the Tribunal order. As

there is mistake with respect to reference and extraction, we modify Para No. 113 & 114 of the Tribunal order in A.Y.2010-11 as under: -

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

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

"Section 14A of the Income-tax Act, 1961 - Expenditure incurred in relation to exempt income not includible in total income (General) - Assessee-scheduled banks earned income from investments made in tax-free securities - Assessing Officer made proportionate disallowance of interest attributable to funds invested to earn tax free income under section 14A on grounds that separate accounts were not maintained for investment in tax-free securities - Whether since interest free own funds available with assessee exceeded their investments; investments would be presumed to be made out of assessee's own funds and proportionate disallowance was not warranted under section 14A on ground that separate accounts were not maintained by assessee for investments and other expenditure incurred for earning tax-free income - Held, yes [Para 27] [In favour of assessee]

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

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

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

authority as affirmed by the Tribunal which is identical in the present case.

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

12. Respectfully following the binding decision of Hon'ble Supreme Court and Hon'ble Jurisdictional High Court referred supra, disallowance u/s 14A made by Assessing Officer in connection with proportionate interest disallowance deleted by the Ld.CIT(A) is sustained.

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

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

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

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

(supra). We also find justification in the order of the ld. CIT(A) in holding that the disallowance u/s. 14A read with Rule 8D(2)(iii) of the Act should be invoked for calculation of disallowance pertaining to only investment from which exempt income is earned by the assessee by placing reliance on the decision of the Special Bench of the Tribunal in the case of Vireet Investments Pvt. Ltd. (supra). We find no infirmity in the order of the ld. CIT(A).

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

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

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

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

Corrigendum issued on 16th March, 2023.

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

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

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(Asstt. Registrar)
ITAT, Mum