

**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. 3139/MUM/2019 (A.Y. 2011-12)

M/s. ACC Ltd., Cement House, 121 M.K. Road, Churchgate Mumbai - 400020 PAN: AA ACT1507C	V.	Deputy CIT (LTU) 29 th Floor, Centre-1 World Trade Centre, Cuffe Parade Mumbai - 400005
(Appellant)		(Respondent)

ITA.No. 3178/MUM/2019 (A.Y. 2011-12)

DCIT (LTU)-1 29 th 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: AA ACT1507C
(Appellant)		(Respondent)

Assessee represented by	:	Shri Yogesh Thar, Shri Chaitanya Joshi & Ms. Sukanya Jayaram
Department represented by	:	Smt. Shailja Rai
Date of Hearing	:	09.01.2023
Date of Pronouncement	:	28.02.2023

ORDER

PER S. RIFAUH RAHMAN (AM)

1. These are cross appeals pertaining to Assessment Year 2011-12 arising from the Appellate Order dated 29th January, 2019 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 16th March, 2015 passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act) was partly allowed. Aggrieved both Assessee and Revenue are in appeal before us.

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

"Whether, on the facts and in the circumstances of the case & in law, Ld. CIT(A) erred in restricting the disallowance to Rs. 5.04 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 1TD 457] [MUM]?"

3. 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. 5,24,00,000/-)

(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. 5,24,00,000/- 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."

4. 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 Trade 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 Id. 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 Id. 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 Id. 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 Id. CIT(A).

12. By respectfully following the above mentioned decisions, we uphold the order of the Id. 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."

5. Respectfully following the above said decision, we partly allow the ground raised by the assessee and revenue.

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

"2. 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.3,26,62,487/-?"

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

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

"4. We have carefully considered the rival submissions. We find that as rightly pointed out by the Id. Representative for the assessee, the Hon'ble Bombay High Court in the case of Diamond Dye Chem Ltd. (supra) has already dealt with the issue whether addition on account of MODVAT credit is warranted or not. The Hon'ble High Court relying on the decision of the Hon'ble Supreme Court in the case of CIT v. Indo Nippon Chemicals Co. Ltd. [2003] 130 Taxman 179/261 ITR 275 held that the unutilised credit cannot be directly added to the income of the assessee. The relevant para of the said decision is reproduced hereunder:—

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

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

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

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

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

9. 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?"

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

Ground No. 3: Denial of claim of exclusion of Sales tax Incentive as Capital Receipt of Rs. 3,18,24,957/-:

On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the action of AO in making addition of Rs.3,18,24,957/ - on account of sales- tax subsidy received by the Appellant from the Government of Orissa under Orissa Industrial Policy, 2007 (wrongly referred to as Bihar scheme while adjudicating on the issue) treating the same as revenue receipt.

The Appellant prays that subsidy received by the Appellant from the Government of Orissa be held as capital receipt, not chargeable to tax.

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

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

"..... The relevant material facts, so far as necessary for adjudication of these grievances, are as follows. The assessee before us is a company engaged in the business of manufacturing of cement and generation of electricity. The assessee has set up its plants in different parts of the country, and as the location of some of these plants was in backward areas, the assessee had received certain sales tax concessions from the respective State Governments. These concessions were in the nature of exemptions and remissions etc, and were granted under specific schemes announced, under the industrial policies, from time to time. During the relevant previous year, the assessee received amounts aggregating to Rs 169,93,34,752, but all these receipts were treated as tax exempt on account of being in the nature of capital receipts. When income tax return filed by the assessee was subjected to the scrutiny assessment proceedings, the Assessing Officer noticed that the assessee had a lodged a claim for exclusion of Rs 169.93 crores, being sales tax exemption/incentives received by it, as capital receipt, and hence not liable to tax. The Assessing Officer declined this claim, primarily on the basis of certain observations in the judgments in the cases of Tamilnadu Sugar Corporation Ltd Vs CIT [(2001) 251 ITR 843 (Mad)], CIT Vs Rajaram Maize Products [(2001) 251 ITR 427 (SC)], CIT Vs S Kumars Tyre Manufacturing Co [(2004) 266 ITR 325 (MP)], and CIT Vs Abhishek Industries Ltd [(2006) 286 ITR 1 (P&H)]. The entire amount of Rs 1169.93 crores was added to income of the assessee. Aggrieved, assssee carried the matter in appeal before the CIT(A).

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

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

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

7. So far as second issued as to Whether the Appellate Tribunal was right in law and on facts in upholding the decision of the CIT (A) and in directing the Assessing Officer to consider the Sales-tax exemption benefit of Rs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.3.5. the dominant purpose for which the incentive scheme per se introduced by the respective State Governments was only for the purpose of setting up of industries in the respective areas for industrial development in State and also to accelerate development and absolutely not for augmenting the profits of the assessee. Effectively, the schemes of various State Governments envisaged the rapid industrialisation, growth and new employment generation in the respective areas which would in turn promote the growth of the State. Hence, it could be safely concluded that subsidy / incentive granted is only for setting up of the units based on the fixed percentage of the capital cost and not for running the business

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

14. The second case is *Lincolnshire Sugar Co. Ltd. v. Smart* 20 TC 643. In that case it was found that *Lincolnshire Sugar Co. Ltd* carried on the business of manufacturing sugar from home grown beet. The company was paid various sums under *British Sugar Industry (Assistance) Act, 1931*, out of monies provided by the Parliament. The question was whether these monies were to be taken into account as trade receipts or not. The object of the grant was that in the year 1981, in view of heavy fall in prices of sugar, sugar industries were in difficulty. The Government decided to give financial assistance to certain industries in respect of sugar manufactured by them from home-grown beet during the relevant period. Lord Macmillan held that-

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

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

15. In the case before us, the payments were made to assist the new industries at the commencement of business to carry on their business. The payments were nothing but supplementary trade receipts. It is true that the assessee could not use this money for distribution as dividend to its shareholders. But the assessee was

free to use the money in its business entirely as it liked and was not obliged to spend the money for a particular purpose like extension of docks as in the Seaham Harbour Dock Co. 5 case (supra).

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

17. This precisely is the question raised in this case. By no stretch of imagination can the subsidies whether by way of refund of sales tax or relief of electricity charges or water charges can be treated as an aid to setting up of the industry of the assessee. As we have seen earlier, the payments were to be made only if and when the assessee commenced its production. The said payments were made for a period of five years calculated from the date of commencement of production in the assessee's factory. The subsidies are operational subsidies and not capital subsidies.

5.3.6. Yet another decision was rendered by Hon'ble Supreme Court in the case of *CIT vs. Chapalkar Brothers* reported in 400 ITR 279 which held that where the object of respective subsidy schemes of State Government was to encourage development of multiple theatre complexes, incentives would be held to be capital in nature and not revenue receipts. The relevant operative portion of the judgment is reproduced hereunder:-

18. After discussing the judgment in *Sahney Steel & Press Works Ltd. 's case (supra)* this Court then held:

"The importance of the judgment of this Court in *Sahney Steel case* lies in the fact that it has discussed and analysed the entire case law and it has laid down the basic test to be applied in judging the character of a subsidy. The test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the Scheme with which we are concerned in this case is that the incentive must be utilised for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the Subsidy Scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the Subsidy Scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the

incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant."

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

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

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

22. Applying the aforesaid test contained in both Sahney Steel as well as 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 fund is quite immaterial. If the purpose is to help the assessee to set up its business or complete a project

the monies must be treated as having been received for capital purposes. Such But if monies are given to the assessee for assisting him in carrying out the business operations and given after the satisfaction of the conditions of commencement of production, such subsidy must be treated as assistance for the purpose of the trade.

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

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

*14. In our view, the controversy in hand can be resolved if we apply the test laid down in the judgment of this Court in the case of *Sahney Steel and Press Works Ltd. (supra)*. In that case, on behalf of the assessee, it was contended that the subsidy given was up to 10% of the capital investment calculated on the basis of the quantum of investment in capital and, therefore, receipt of such subsidy was on capital account and not on revenue account. It was also urged in that case that subsidy granted on the basis of refund of sales tax on raw materials, machinery and finished goods were also of capital nature as the object of granting refund of sales tax was that the assessee could set up new business or expand his existing business. The contention of the assessee in that case was dismissed by the Tribunal and, therefore, the assessee had come to this Court by way of a special leave petition. It was held by this Court on the facts of that case and on the basis of the analyses of the Scheme therein that the subsidy given was on revenue account because it was given by way of assistance in carrying on of trade or business. On the facts of that case, it was held that the subsidy given was to meet recurring expenses. It was not for acquiring the capital asset. It was not to meet part of the cost. It was not granted for production of or bringing into existence any new asset. The subsidies in that case were granted year after year only after setting up of the new industry and only after commencement of production and, therefore, such a subsidy could only be treated as assistance given for the purpose of carrying on the business of the assessee. Consequently, the contentions raised on behalf of the assessee on the facts of that case stood rejected and it was held that the subsidy received by *Sahney Steel* could not be regarded as anything but a revenue receipt. Accordingly the matter was decided against the assessee. The importance of the judgment of this Court in *Sahney Steel* case lies in the fact that it has discussed and analysed the entire case law and it has laid down the basic test to be applied in judging*

the character of a subsidy. That test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant."

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

"10. From the above noted provisions of the scheme it can be clearly seen that the entire purpose of granting tax exemption was for giving the boost to the terrorism sector. This was to be achieved by attracting higher investment in areas with tourism potential. In order to achieve such purpose, exemption from various taxes as may be applicable was granted. It is true that the exemption was to be computed in terms of tax otherwise payable by the industry. However, the purpose of such exemption was to meet with the capital outlay already undertaken by the assessee. This clearly comes out from various provisions of the scheme. For example, the scheme was applicable only to the new project or to 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 Id. Special Counsel for the Revenue referred to various decisions of Hon'ble High Courts. But, all those decisions were rendered prior to the decision of Hon'ble Supreme Court referred to above. Hence, the decisions relied upon by the Id. Special Counsel for the Revenue would not advance the case of the Revenue.

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

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

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

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

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

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

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

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

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

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

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

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

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

d raised by the Revenue before the Hon'ble Jurisdictional High Court is reproduced hereunder:-

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

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

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

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

4. On the other hand, learned Counsel for the assessee firstly contended that the Tribunal had merely remanded the issue back to the Assessing Officer. In earlier orders, the Revenue had

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

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

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

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

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

"11. We find that so far as the Special Bench decision of this Tribunal in the case of Reliance Industries Ltd. (supra) is concerned, it still holds the field. All that has happened, as a result of Hon'ble Supreme Court's decision dated 9th September 2011, is that Hon'ble Bombay High Court has now admitted the question "whether, on the facts and circumstances of the case, the Hon'ble Tribunal was right in holding that sales tax exemption was a capital receipt" and will, in due course though, adjudicate on this legal issue. To that extent, Hon'ble Bombay High Court's order dated 15th April 2009, to the extent of declining to admit this question, stands reversed. However, the decision of the Special Bench still holds good as the same has not, and at least not yet, even been examined by Hon'ble Bombay High Court. Mere admission of appeal against a decision, as is elementary, does not affect the binding nature of a judicial precedent. The Special Bench decision, in the case of Reliance Industries Ltd. (supra), was not reversed by Hon'ble Supreme Court, but was directed to be examined, on merits, by Hon'ble Bombay High Court. That is quite different from disapproving the special bench decision, but it appears that the coordinate bench was led to believe, and there could not have been any other reason for ignoring the special bench decision, that this Special Bench decision is reversed. That is patently incorrect, and when we pointed it out to the learned Commissioner (DR), he did not have much to say except to rely upon the coordinate bench decision which seems to have followed that approach. The coordinate bench, in the case of Jindal Steel & Power Ltd. (supra), did indeed travel much beyond its limited mandate in ignoring a binding judicial precedent simply because appeal against that special bench decision is now pending before Hon'ble Bombay High Court. When posed with a special bench decision and a division bench directly on the issue, though touching different chords, we have no difficulty in recognizing our limitations. The wisdom of a division bench, even if superior- as strenuously argued by the learned Commissioner, has to make way for the higher wisdom of a larger bench. It is this faith of judicial hierarchical system that is the strength of our functioning, and we must follow the same. We, therefore, regret our inability to follow the division bench in the case of Jindal Power, no matter how deeply we respect and admire the work of all our colleagues, and we would rather be guided by the special bench decision - which is exactly what another division bench, on the same set of facts as before us, did in the case of Ajanta Manufacturing Ltd. (supra). As for learned Commissioner (DR)'s suggestion that we should follow the jurisdictional High Court decision in the case off 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 Id. CIT(A) placing reliance on the decision of the Special Bench of the Tribunal and granting relief to the assessee in the instant case.

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

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

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

12. That on the facts and in the circumstances of the case, the Id. 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 Sutej 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."

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

13. 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 Ld.CIT(A) erred in allowing the exclusion of Excise duty exemption availed by the assessee company aggregating to Rs.203,93,06,448/- in computing total income under normal provisions of the Act as capital in nature, for its cement manufacturing units namely, Gagaj Unit-1 & Gagaj 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 ?"

14. Similar issue was considered by us in Department Appeal for AY 2006-07 in Ground no 1 and held as under:

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

"4. We have carefully considered the rival submissions. We find that as rightly pointed out by the Id. Representative for the assessee, the Hon'ble Bombay High Court in the case of Diamond Dye Chem Ltd. (supra) has already dealt with the issue whether addition on account of MODVAT credit is warranted or not. The Hon'ble High Court relying on the decision of the Hon'ble Supreme Court in the case of CIT v. Indo Nippon Chemicals Co. Ltd. [2003] 130 Taxman 179/261 ITR 275 held that the unutilised credit cannot be directly added to the income of the assessee. The relevant para of the said decision is reproduced hereunder:—

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

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

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

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

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

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

"5. *"Whether, on the facts and in the circumstances of the case & in law the Id. CIT(A) erred in deleting the disallowance of Rs.42,43,04,173/- being preoperative 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?"*

17. 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 Id. 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 assessee 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 was claimed 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.

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

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

"6. "Whether, on the facts and in the circumstances of the case & in law, Ld. CIT(A) erred in allowing the of claim of additional depreciation of Rs. 2,53,46,82,159/- u/s 32(1)(ia) 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?"

20. 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 totaling Rs.54,21,617/-.

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

27. The claim for additional depreciation was however rejected by the CIT(A) for the reason that additional depreciation is available only in respect of new plant and machinery acquired and installed after 31-03-2005. The word 'new' is not defined in the Act. According to the Shorter Oxford Dictionary the word 'new' means "not existing before; now made, or brought into existence, for the first time". The AO held that the assets on which additional depreciation was claimed by the assessee is neither "new" nor brought into existence in the hands of the assessee in the relevant previous year. It is already used in earlier years and is already

depreciated and, therefore, old in the hands of the assessee in the previous year. He held that the qualification that the asset should be new was basic qualification for entitlement of additional depreciation as laid down in the provisions of Sec.32(1)(iia) of the Act and that conditions was not satisfied in the case of the Assessee. The AO accordingly disallowed the claim of the Assessee for additional depreciation.

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

'Sec.32 Depreciation.

(1) In respect of depreciation of—

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

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

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

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

(A)	a new industrial undertaking during any previous year in which such undertaking begins to manufacture or produce any article or thing on or after the 1st day of April, 2002; or
-----	--

(B)	any industrial undertaking existing before the 1st day of April, 2002, during any previous year in which it achieves the substantial expansion by way of increase in installed capacity by not less than *[ten per cent]:
-----	--

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

29. It can be seen from the provisions of Sec.32(1)(iia) as it existed from 1-4-1981 to 31-3-1988 and reinserted subsequently from 1-4-2003 that the benefit for claiming additional depreciation was restricted only to the initial assessment year. However the provisions of Sec.32(1)(iia) as substituted by the finance Act, 2005 w.e.f. 1-4- 2006, the benefit for claiming additional depreciation was not so restricted to only to the 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 Id. DR placed reliance on the order of the AO. The Id. 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-à-vis 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."

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

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

"7. "Whether, on the facts and in the circumstances of the case & in law, 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?"

23. 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 negating the claim under the Income-tax Act, which has been statutorily conferred on the company, if such companies fulfil the conditions stipulated therein.

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

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

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

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

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

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

"11. From a perusal of the aforesaid provision, it is clear that Section 84 is more or less the same as provided in Section 80-IB of the Act. The Central Board of

Direct Taxes issued a circular F. No.15/5/63-IT(A-1) dated 13th December, 1963 indicating that the benefit of Section 84 is attached to the undertaking and not to the owner thereof and, consequently, the successor would be entitled to the benefit for the unexpired period of 5 years provided the undertaking is taken over as a running concern.

12. The same principle is applicable in the instant case. Admittedly, the undertaking was in existence since 2002. The proprietorship concern changed into a partnership firm. The benefit under Section 80-IB of the Act is available to the partnership firm and the conditions imposed under Section 80-IB(2)(i) does not come in the way."

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

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

67. It is emanating from assessment order and order of Ld.CIT(A) that TG-2 started commercial production from 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 as 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.

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

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

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

26. Similar issue was considered by us in the Department appeal in Ground No 10 in AY 2005-06 and held as under:

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

"108. We are unable to see any merits in the stand of the assessee that the head office expenses cannot be allocated to all the units, as deductions and allowance of eligible units are required to be taken into account while treating such units as profit centres, and computing the profits accordingly. The fiction of the eligible units being treated on a standalone basis does not require that the profits of the units are to be computed as if they are independent of each other, and once that fiction sets in, the expenses incurred by someone other than eligible unit, in the interest of the eligible unit, are to be taken into account while computing the profits of the eligible unit. Accordingly, the allocation of expenses, as the learned Assessing Officer rightly contends, must be done. The assessee has further contended that HO expenses are not „derived from“ or „derived by“ the eligible undertakings, and, for this reasons, these expenses cannot be allocated to the eligible undertaking. We see no reasons to decline allocation of head office expenses to ensure that the profits of the eligible units are correctly worked out, on the basis of hypothetical independence embedded in the eligible units being treated on a standalone basis. To this extent, we reject the plea of the assessee. However, the basis of allocation as turnover is not really correct and reasonable, nor the relationship between the turnover and expenses always linear; the allocation would be more appropriate based on expenditure incurred by the units vis-à-vis overall expenditure. To this extent, we uphold the plea of the assessee.

109. In view of the above discussions, as also bearing in mind the entirety of the case, we reject the grievance of the assessee against allocation of HO expenses, but we permit the assessee's plea to the limited extent that the allocation of HO

expenses should be done on the basis of expenditure incurred by the units vis-à-vis overall expenditure"

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

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

27. 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 provision for normal gratuity in computing Book Profit u/s 115JB (Rs. 6,36,82,038/-)?"

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

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

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

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

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

"38.2 I have considered the submission made on behalf of the appellant. Respectfully following the order of Hon'ble Tribunal for the A.Y. 1990-91 as well as my own orders for AY 1998-99 in appeal no. CIT(A)- I/IT/232/04-05 the addition made by the Assessing Officer is deleted and the ground stands allowed in

favour of the appellant." 47. On appraisal of the said finding, we noticed that this issue has been covered by decision of Hon'ble ITAT in the assessee's own case for the A.Y. 1990-91 in ITA. No.2361/M/1995 & in the A.Y. 2002-03 in ITA. No.4987/M/2007. There is nothing on record to which it can be assumed that the order has been varied or changed in appellate proceeding. Since this issue has been duly adjudicated in favour of the assessee by above mentioned decision of the Hon'ble ITAT, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue."

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

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

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

30. In the Ground No.10, 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.44,37,500/-)?"

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

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

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

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

33. In the Ground No.11, 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. 5.04 Crores-)"

34. 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."

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

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

ITA.NO. 3139/MUM/2019 (ASSESSEE APPEAL)

37. We now take up the appeal filed by the assessee in ITA No 3139/Mum/2019.

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

Ground No. 2: Disallowance of Club Entrance Fees amounting to Rs.5,73,571/-

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. 5,73,571/- 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.

39. 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."

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

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

"Ground No. 4: Denial of claim of proceeds received from sale of voluntary emission receipts (Rs. 49,16,847/-):

a. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of AO in taxing the sales proceeds of Voluntary Emission Receipts (VER's) of Rs. 49,16,847/- as revenue receipts.

b. The Appellant prays that the addition on account of proceeds received from sale of voluntary emission be deleted."

42. The Assessing Officer has discussed this issue at Para No 16 of his order. The Assessing Officer has observed that generation of tradeable CER's is very much in the normal course of manufacturing activities of the units and accordingly are of revenue receipts. On this ground, Assessing Officer has treated the receipts from CER's for ₹.49,16,847/- as revenue receipt.

43. This issue is dealt by Ld.CIT(A) at Para No 11.3 of his order as under:

11.3 I have considered the contentions of the appellant. There are divergent views given by the Courts in this case. However, the AO held that generation of tradable VER's is a result of normal course of manufacturing activities of units of the appellant and accordingly are revenue receipts. Also, AO held that the decision of M/s My Home Power Ltd is still under litigation and has not reached finality. Moreover, the said case was in relation to qualification of sale receipts of VER's for deduction u/s 80IA and hence is distinguishable from the current case. In view of the same, I confirm the addition made by the AO. In result, ground of appeal No. 7 is dismissed.

44. The Assessee has filed appeal against the above order. During the course of appellate hearing, Id AR of the assessee has argued that receipts from sale of VER/ CER is capital receipt for which he has mainly relied upon following decisions:

- (i) *PCIT v. M/s. Dodson Lindblom Hydro Power Pvt. Ltd (ITA No. 1820 of 2016) (Bombay High Court)*
- (ii) *CIT v. Ambika Cotton Mills Ltd. (433 ITR 193) (Madras High Court)*
- (iii) *CIT v. My Home Power Ltd (46 taxmann.com 314) (Andhra Pradesh High Court)*
- (iv) *CIT v. SubhashKabini Power Corporation Ltd [2016] 385 ITR 592 (Karnataka)*
- (v) *DCIT v. Aditya Birla Nuvo Ltd (67 taxmann.com 380) (Mumbai - Trib.) –*
- (vi) *Essel Mining & Industries Limited v. DCIT (ITA No. 602 of 2021) (Mumbai Tribunal)*

45. On the other hand, Ld DR has relied upon decision of Ahmedabad ITAT bench in the case of Kalpataru Transmission Limited and argued that decision of Hon'ble Hyderabad ITAT in the case of My Home Power Limited v. DCIT confirmed by Andhra Pradesh High court is not applicable to assessee's case.

46. Ld.DR with regard to denial of claim of proceeds received from sale of Voluntary Emission Receipts (VERs) submitted as under: -

The issue is discussed in para 16.1 to para 16.4 on pages 74 to 77 of the Assessment order and para 11.1 and 11.3 (Page 31 and 32) of the CIT(A)'s order. The same may kindly be referred to. As per the facts available on record,

The Company had commissioned a 9MW wind power project in Tamil Nadu wherein the project is registered under the CDM project for voluntary emissions reduction with UNFCCC. The company produces energy/electricity in form of renewable energy thereby reducing carbon emission and thus receives VER certificates on such reduction in carbon emission. UNFCCC had issued 44,295 VERs as voluntary carbon units under the voluntary carbon standard (VCS) 2007.1 and were sold for a consideration of Rs. 49,16,847/- net of transaction fees. During the year under consideration, the company has credited to the Profit and Loss account ₹.49,16,847/- on account of sale of Voluntary Emissions Receipts (VERs)

The submission of the assessee before the AO and the CIT(A) were summarized in para 11.2 of the CIT(A)'s order which is reproduced hereunder for ready reference.

- (i). VERS in the nature of Carbon credit are "an entitlement" received to improve world atmosphere and environment reducing carbon, heat and gas emissions. Entitlements earned are capital receipts.
- (ii). The amount received for carbon credits have no element of profit or gain.
- (iii). Carbon credit is not an offshoot of business but an offshoot of environment concerns. No asset is generated in the course of business but it is generated due to environmental concerns.
- (iv). Since the Carbon Credits received represents accretion of capital with no element of profit, hence the same is not liable to tax. The appellant relies on the following judicial pronouncements:
 - a. My Home Power Ltd. V DCIT (2013) (21 ITR 186) (HYD.ITAT) confirmed by Andhra Pradesh High Court (2014) (365 ITR 82)
 - b. Sri Velayudhaswamy Spinning Mills P.Ltd. v DCIT (2013) [27 ITR (Trib.) 1061 (Chennai ITAT)
 - c. Ambika Cotton Mills Ltd. vs DCIT (2013) I.T.A No.1836/MdsP012 (Chennai)
 - d. M/S Shree Cement Ltd.- vs The ACIT (ITA No. 504/JPP012) (Jaipur)

From perusal of the submissions filed before the lower authority as well as the arguments made by the Ld.AR before the Hon'ble Bench on 09.01.2023, it is observed that the assessee has relied primarily on the decision of the Hon Hyderabad Tribunal in the case of My Home Power Ltd., vs DCIT which was not only confirmed by the Andhra Pradesh High Court but was also followed in subsequent decisions of various Tribunals and High Courts while deciding the nature of receipts on sale of VERs.

However, the undersigned placed reliance on the decision of JCIT vs Kalpataru Power Transmission (ITA Nos. 1462 & 1463/Ahd/2016) decided on 10th May 2019 by the Hon ITAT 'C' Bench Ahmedabad. Attention of the Bench was drawn to para 18 of the ITAT's Order wherein the ITAT acknowledged the fact "that there is a series of decisions of this Tribunal, starting with the decision in the case of My Home Power Ltd vs DCIT [(2013) 63 SOT 227 (Hyd), on this issue and all but one of these decisions are in favour of the assessee".

After culling out the reasoning which prevailed upon the Hyderabad ITAT to decide the matter in favour of the assessee in para 18, the Ahmedabad ITAT in para 19 of its order observed as under:

"19. In all other decisions on the same lines, as cited before us, there is a reference to the aforesaid observations of the Tribunal and there is hardly any independent analysis of the factual situation. The same reasoning has been adopted by the coordinate benches." (emphasis supplied)

For detailed reasons as discussed in para 20 and 21, the Ahmedabad Tribunal came to the conclusion that various "crucial facts were not brought to the notice of the Hyderabad Bench and therefore, the Hyderabad Bench could not deal with the peculiarities of different types of carbon credits, identify the kind of carbon credit that is examined with respect to the taxability issues and was thus lead to proceed on certain assumptions which seem to be incorrect".

Though the copy of the order in the case of JCIT vs Kalpataru Power Transmission was submitted before the Bench during the course of hearing, for the sake of ready reference relevant paras are reproduced hereunder:-

21. On our perusal of the material on record, it appears to us that the case before us is not even a case of sale of carbon credits under the international emission trading (IET). It appears to be a case for generation of carbon credit mechanism through the clean development mechanism (CDM) wherein the project generating the carbon credits is sponsored by an entity in the jurisdiction which has emission reduction commitments under the Kyoto protocol. Learned Commissioner (Appeals) has, while referring to the decision of the coordinate bench in the case of My Home Power Ltd (supra), has not examined the nature of these carbon credits and whether these carbon credits, if found to be under the CDM, will be at par with the carbon credits under the IET as was apparently the case in that judicial precedent. In any case, there is no categorical finding about the nature of CERs in the case of My Home Power (supra) though it has proceeded that generation of CERs was not the offshoot of business which cannot be the case when the project itself is set up under CDM, under the sponsorship of foreign entity, specifically for the purpose of generating the CERs. When the very reason for set up is generation of CERs, it cannot be said that CERs are not offshoot of business.

22. Clearly, therefore, the My Home Power decision will not hold good in the case of CERs under the CDM.

23. One of the glaring peculiarity of the carbon credits under the CDM is the sponsorship arrangement by the foreign entity and the fact that very setting up of the project is predominantly for the purpose of transferring resultant CERs to the foreign entity. The impact of this peculiarity on the nature of receipt is not at all examined. The coordinate benches have also proceeded on the basis that all carbon credits are to be given uniform treatment by treating them capital receipts' which are not incidental to carrying on the business. This assumption cannot in any case hold good for carbon credits under the CDM since in these cases the unit generating these credits are set up for the predominate purpose of generating emission reductions through making modifications in the working mechanism.

It is reiterated that in the assessee's case as well, the VERs were received by the assessee under the Clean Development Mechanism (CDM). Hence the

decision of My Home Power Ltd. V DCIT (2013) (21 ITR 186) (HYD.ITAT) confirmed by Andhra Pradesh High Court (2014) (365 ITR 82) is not applicable to assessee's case and the same are taxable as revenue receipts in view of the decision of the Ahmedabad ITAT as discussed.

Reliance is also placed on the following decisions of the Apex Court:

"As held in the case of KTMTM Abdul Kayoom vs CIT 1962 SUPP(1) SCR 518

"21.each case depends on its own facts and the close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive".

The Hon'ble Apex Court in Megh Singh vs State of Punjab (AIR 2003 SC 3184) has held that "Circumstantial flexibility, one additional or different fact may make a world of difference between conclusion in two cases or between two accused in the same case. Each case depends on its own facts and a close similarity between one case and another is not enough because a single significant detail may alter the entire aspect."

One of the arguments made by the assessee before the Hon'ble Bench was with reference to the tax on income of carbon credits u/s 115BBG which was inserted by the Finance Act, 2017 w.e.f 01.04.2018 and it was argued that since the tax has been introduced from AN. 2018-19, the profit on sale of VERs could not be brought to tax during the year under consideration.

In this regard, it is submitted that section 115BBG only provides for the concessional rate at which the income generated from the sale of VERs/Carbon Credits are to be taxed i.e. only at the rate of 10% instead of 30%. It nowhere leads to an interpretation that prior to the insertion of section 115BBG any profit on sale of VERs was to be considered as non-taxable."

47. Considered the rival submissions and material placed on record. The Assessee produces energy/electricity in the form of renewable energy thereby reducing carbon emission and thus receives Voluntary Emission Receipts Certificates ('VERs') for reduction in carbon emission. The Assessee has been issued 44,295 VERs as voluntary carbon units under the Voluntary Carbon Standard (VCS) 2007.1, which the assessee sold for a consideration of Rs. 49,16,847/- and the same amount was credited to the Profit and Loss Account and treated as capital receipt. The AO treated the receipts from sale of VER's as revenue receipt on the premise that they are generated out of Assessee's manufacturing unit. The Ld. CIT(A) has upheld the said addition merely on the ground that the decision of the Hyderabad Tribunal bench in the case of My Home Power Ltd. (63 SOT 227) (THyd) is under litigation and has not attained finality.

48. It is also relevant to note here that, the Ld.CIT(A) has observed that the decision of the Hyderabad Tribunal bench in My Home Power was in relation to qualification of sale receipts of VER's for deduction u/s 80IA and hence is distinguishable from the current case. It is relevant to refer to finding of Hon'ble High court [2014] 46 taxmann.com 314 which reads as under:

"This appeal is sought to be preferred and admitted against the judgment and order of the learned Tribunal, dt.2.11.2012, on the following substantial questions of law:

1. Whether, in the facts and circumstances of the case and in law, ITAT is correct in holding that sale of Carbon Credits is to be considered as Capital Receipt and not liable for tax under any head of income under Income Tax Act, 1961?

2. Whether, in the facts and circumstances of the case and in law, ITAT is correct in holding that there is no cost of acquisition or cost of production to get entitlement for the Carbon Credits, without appreciating that generation of Carbon Credits is intricately linked to the machinery and processes employed in the production process by the assessee?"

2. Sri J.V. Prasad, learned Counsel appearing for the appellant - Revenue submits that the consideration received on account of sale of Carbon Credits should be treated to be business income as the sale has been made in connection with the business.

3. We have considered the aforesaid submission and we are unable to accept the same, as the learned Tribunal has factually found that "Carbon Credit is not an offshoot of business but an offshoot of environmental concerns. No asset is generated in the course of business but it is generated due to environmental concerns." We agree with this factual analysis as the assessee is carrying on the business of power generation. The Carbon Credit is not even directly linked with power generation. On the sale of excess Carbon Credits the income was received and hence as correctly held by the Tribunal it is capital receipt and it cannot be business receipt or income. In the circumstances, we do not find any element of law in this appeal.

9. The appeal is accordingly dismissed. There will be no order as to costs."

49. On perusal of the above decision, it is observed that the High Court has decided on the matter in question irrespective of the facts that same is allowable as deduction u/s 80IA or not.

50. It is also relevant to note here that the Assessee has relied on various case laws wherein carbon credits received under CDM are treated as capital receipts and

not as revenue receipts chargeable to tax. The AR, amongst others, has relied on decision of the Madras High Court in the case of S.P. Spinning Mills (P.) Ltd. v. ACIT ([2021](433 ITR 61)(Mad.), decision of the Madras High Court in Pr. CIT v. Sanmar Ltd. Chemplast [TCA No. 14 of 2022, dated 12-1-2022]. The relevant finding of Hon'ble High court [2022] 142 taxmann.com 515 is reproduced herein below:

"1. Whether on the facts and circumstances of the case and in law, the Tribunal is legally correct in holding that the sale of Carbon Emission Reduction (CER) also known as Carbon Credits is to be considered as capital receipt and not liable to tax?"

2. Heard the learned counsel appearing for both sides, who jointly submitted that the issue raised in this appeal has already been decided in favour of the assessee, by a decision of this court in S.P. Spinning Mills (P.) Ltd. v. Asstt. CIT [2021] 124 taxmann.com 596/433 ITR 61 (Mad), the relevant passage of which is profitably, extracted below:

'28. Insofar as substantial question of law no. 4 is concerned, it deals with carbon credit. The question, as to the manner in which carbon credit receipt has to be treated, has been considered by several High Courts and it has been held that the receipt should be treated as a capital receipt. In this regard, it would be beneficial to refer to the decision in the case of CIT v. SubhashKabini Power Corporation Ltd., [(2016) 385 ITR 0592 (Karn.)]. In the said decision, the Karnataka High Court approved the view taken by the ITAT, Hyderabad Bench, which decision was upheld by the High Court of Andhra Pradesh in the case of CIT v. My Home Power Ltd. [(2014) 365 ITR 0082 (AP)], which was subsequently followed by the ITAT, Chennai and Jaipur Benches. The operative portion of the judgment reads as follows:-

"11. The decision has been upheld by the Hon'ble Andhra Pradesh High Court. This decision has been subsequently followed by the ITAT Chennai and Jaipur Benches. There is no decision either from the Hon'ble Supreme Court or from the Hon'ble jurisdictional High Court. These decisions indicate that sale of carbon credit would result capital receipt which is not taxable. When we confronted the learned DR with regard to this position, it was contended that the position as on the day when the assessment order was passed, is to be seen and on that day these orders were not available. Therefore, the assessee cannot claim the benefit of these orders. However, we do not concur with this proposition of the learned CIT, because the Full Bench of the Hon'ble Punjab & Haryana High Court in the case of ArunaLuthra reported in 254 ITR 76 has held that a Court decide a dispute between the parties. The case can involve decision on facts. It can also involve a decision on point of law. Both may have bearing on the ultimate result of the case. When a Court interprets a provision, it decides as to what is the meaning and effect of the words used by the Legislature, it is the declaration regarding the statute. In other words the judgment declares as to what the legislature had said at the time of promulgation of the law, the declaration is....., this was the law, this is the

law, this is how the provision shall be construed. Therefore, he cannot plead that the view taken by the Tribunal and upheld by the Hon'ble Andhra Pradesh High Court could be considered as if applicable from the date of the decision. In the decision only the position of the law as to how receipts from sale of carbon credits are to be treated, has been explained. One of the argument raised by the DR was that at this stage, the additional ground ought not to be permitted to be raised. It is pertinent to mention here that basically, it is not a separate ground, it is a limb of arguments, which is affecting the ultimate tax liability of the assessee. The Hon'ble Supreme Court in the case of NTPC Ltd. (supra) has held that the Tribunal had jurisdiction to examine a question of law which arose from the fact as found by the Income-tax authorities and having a bearing on the tax liability of the assessee. As far as the nature of the receipt from sale of carbon credit is concerned, it is available from the assessment stage. It is not disputed even by the learned Commissioner, the dispute is, whether it has been derived from the eligible industrial undertaking for qualifying the grant of deduction u/s 80-IA. The learned Commissioner felt that this receipt has not been derived from the industrial undertaking which will be eligible for grant of deduction u/s 80-IA and the Assessing Officer committed an error in including the receipt in the eligible profit. Those facts are already on the record. It is to be seen, whether the receipt is of capital nature or of a revenue nature. Even in case the order of the CIT is upheld, then, in law, it will affect the computation of income, ultimately because the receipt will not be taxable, it will not come under the ambit of computation of income. Simultaneously it will be excluded from the deduction u/s 80-IA as well as of the total income. The result will remain as it is. It is a revenue neutral case. Therefore, in view of the ratio laid down by the Hon'ble jurisdictional High Court in the case of Gopala Gowda (supra), the second condition for taking action u/s 263 does not exist. The assessment order is not prejudicial to the interests of the Revenue. In view of the above discussion, we allow the appeal of the assessee and quash the impugned order of the learned CIT passed u/s 263 of the Income-tax Act."

3. The aforesaid shows that, so far as the question as to whether, the income by sale of carbon credit could be termed as capital receipt or profit, is concerned, the Tribunal has considered the decision of the Hyderabad Bench and it has further taken note of the fact that decision of the Tribunal of Hyderabad Bench was carried before the Andhra Pradesh High Court and the said decision was not interfered with. The Tribunal, in its decision has also referred to the decision of the Apex Court with regard to power under section 263 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") of the revisional authority.

4. In our view, the principal question, which may arise is, as to whether by sale of carbon credit capital receipt is generated or a profit out of the business activity of the assessee. More or less, in a similar case, the Apex Court had an occasion to consider such an issue in the case of Commissioner of Income-tax v. Maheshwari Devi Jute Mills Ltd. [(1965) 57 ITR 36 (SC)], wherein the question came up for consideration before

the Apex Court as to whether by sale of loom-hours, the amount received could be termed as capital receipt or the income out of business. In the said decision, the Apex Court held that the amount received out of sale of loom-hours can be termed as capital receipt and not income out of business.

5. Subsequently, in a later decision of the Apex Court, a question came up for consideration in the case of M/s. Empire Jute Co. Ltd. v. Commissioner of Income-tax [(1980) 4 SCC 25] the question which arose before the Apex Court was, if loom-hours are purchased by the manufacturing mills, whether it can be termed as capital expenditure or revenue expenditure. In the said decision, the earlier decision of the Apex Court in the case of Maheswari Devi Jute Mills (supra) was also relied upon by the Revenue and after considering the same, the Apex Court at paragraph Nos. 4 and 5 observed thus:

"4. Now an expenditure incurred by an assessee can qualify for deduction under section 10(2)(xv) only if it is incurred wholly and exclusively for the purpose of his business, but even if it fulfils this requirement, it is not enough; it must further be of revenue as distinguished from capital nature. Here in the present case it was not contended on behalf of the Revenue that the sum of Rs. 2,03,255 was not laid out wholly and exclusively for the purpose of the assessee's business but the only argument was and this argument found favour with the High Court, that it represented capital expenditure and was hence not deductible under section 10(2)(xv). The sole question which therefore arises for determination in the appeal is whether the sum of Rs. 2,03,255 paid by the assessee represented capital expenditure or revenue expenditure. We shall have to examine this question on principle but before we do so, we must refer to the decision of this Court in Maheshwari Devi Jute Mills case since that is the decision which weighed heavily with the High Court, in fact, compelled it to negative the claim of the assessee and hold the expenditure to be on capital account. That was a converse case where the question was whether an amount received by the assessee for sale of loom hours was in the nature of capital receipt or revenue receipt. The view taken by this Court was that it was in the nature of capital receipt and hence not taxable. It was contended on behalf of the Revenue, relying on this decision, that just as the amount realised for sale of loom hours was held to be capital receipt, so also the amount paid for purchase of loom hours must be held to be of capital nature. But this argument suffers from a double fallacy.

5. In the first place it is not a universally true proposition that what may be capital receipt in the hands of the payee must necessarily be capital expenditure in relation to the payer. The fact that a certain payment constitutes income or capital receipt in the hands of the recipient is not material in determining whether the payment is revenue or capital disbursement qua the payer. It was felicitously pointed out by Macnaghten, J. in Racecourse Betting Control Board v. Wild that a "payment may be a revenue payment from the point of view of the payer and a capital payment from the point of

view of the receiver and vice versa". Therefore, the decision in Maheshwari Devi Jute Mills case cannot be regarded as an authority for the proposition that payment made by an assessee for purchase of loom hours would be capital expenditure. Whether it is capital expenditure or revenue expenditure would have to be determined having regard to the nature of the transaction and other relevant factors."

Thereafter, the Apex Court while considering the test to find out as to whether a particular expenditure can be termed as capital or revenue expenditure observed at paragraph Nos. 8 and 9 as under:

*"8. The decided cases have, from time to time, evolved various tests for distinguishing between capital and revenue expenditure but no test is paramount or conclusive. There is no all embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred. But a few tests formulated by the courts may be referred to as they might help to arrive at a correct decision of the controversy between the parties. One celebrated test is that laid down by Lord Cave, L.C., in *Atherion v. British Insulated and Halsby Cables Ltd.* where the learned law Lord stated:*

When an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

*This test, as the parenthetical clause shows, must yield where there are special circumstances leading to a contrary conclusion and, as pointed out by Lord Radcliffe in *Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd.*, it would be misleading to suppose that in all cases, securing a benefit for the business would be prima facie capital expenditure "so long as the benefit is not so transitory as to have no endurance at all". There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, nonetheless, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature, acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is therefore not*

a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. But even if this test were applied in the present case, it does not yield a conclusion in favour of the Revenue. Here, by purchase of loom hours no new asset has been created. There is no addition to or expansion of the profit-making apparatus of the assessee. The income-earning machine remains what it was prior to the purchase of loom hours. The assessee is merely enabled to operate the profit-making structure for a longer number of hours. And this advantage is clearly not of an enduring nature. It is limited in its duration to six months and, moreover, the additional working hours per week transferred to the assessee have to be utilised during the week and cannot be carried forward to the next week. It is, therefore, not possible to say that any advantage of enduring benefit in the capital field was acquired by the assessee in purchasing loom hours and the test of enduring benefit cannot help the Revenue.

9. Another test which is often applied is the one based on distinction between fixed and circulating capital. This test was applied by Lord Haldane in the leading case of John Smith & Son v. Moore where the learned law Lord drew the distinction between fixed capital and circulating capital in words which have almost acquired the status of a definition.

He said:

Fixed capital (is) what the owner turns to profit by keeping it in his own possession; circulating capital (is) what he makes profit of by parting with it and letting it change masters.

Now so long as the expenditure in question can be clearly referred to the acquisition of an asset which falls within one or the other of these two categories, such a test would be a critical one.

But this test also sometimes break down because there are many forms of expenditure which do not fall easily within these two categories and not infrequently, as pointed out by Lord Radcliffe in Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd., the line of demarcation is difficult to draw and leads to subtle distinctions between profit that is made "out of" assets and profit that is made "upon" assets or "with" assets. Moreover, there may be cases where expenditure, though referable to or in connection with fixed capital, is nevertheless allowable as revenue expenditure. An illustrative example would be of expenditure incurred in preserving or maintaining capital assets. This test is therefore clearly not one of universal application. But even if we were to apply this test, it would not be possible to characterise the amount paid for purchase of loom hours as capital expenditure, because acquisition of additional loom hours does not add at all to the fixed capital of the assessee. The permanent structure of which the income is to be the produce or fruit remains the same; it is not enlarged. We are not sure whether loom hours can be regarded as part of circulating capital like labour, raw material, power etc., but it is clear beyond doubt that they are not part of fixed capital and hence even the application of this test does not compel the conclusion that the payment for purchase of loom hours was in the nature of capital expenditure."

After making the aforesaid observation, at paragraph No. 10, the Apex Court, on the basis of the facts of the said case concluded as under: "Similarly, if payment has to be made for securing additional power every week, such payment would also be part of the cost of operating the profit-making structure and hence in the nature of revenue expenditure, even though the effect of acquiring additional power would be to augment the productivity of the profit-making structure. On the same analogy payment made for purchase of loom hours which would enable the assessee to operate the profit-making structure for a longer number of hours than those permitted under the working time agreement would also be part of the cost of performing the income earning operations and hence revenue in character."

Accordingly, the payment made for purchase of loom hours by Jute Mill Company was held to be Revenue expenditure.

6. At this stage, we may also refer to the decision of the Andhra Pradesh High Court, which has been relied upon by the Tribunal in the impugned order. More or less, identical question was raised and the Andhra Pradesh High Court in the case of Commissioner of Income Tax-IV v. My Home Power Ltd. [(2014) 46 taxmann.com 314 (Andhra Pradesh), at paragraph No. 3 observed thus:

"3. We have considered the aforesaid submission and we are unable to accept the same, as the learned Tribunal has factually found that "Carbon Credit is not an offshoot of business but an offshoot of environmental concerns. No asset is generated in the course of business but it is generated due to environmental concerns.

"We agree with this factual analysis as the assessee is carrying on the business of power generation. The Carbon Credit is not even directly linked with power generation. On the sale of excess Carbon Credits the income was received and hence as correctly held by the Tribunal it is capital receipt and it cannot be business receipt or income. In the circumstances, we do not find any element of law in this appeal."

The aforesaid shows that the Andhra Pradesh High Court has confirmed the view of the Tribunal that Carbon Credit is not an offshoot of business, but an offshoot of environmental concerns. No asset is generated in the course of business, but it is generated due to environmental concerns. It was also found that the carbon credit is not even directly linked with the power generation and the income is received by sale of the excess carbon credits. It was found that the Tribunal has rightly held that it is capital receipt and not business income.

7. As such, in our view, when the issue is already covered by the decision of the Andhra Pradesh High Court, wherein the view taken by the Tribunal of Hyderabad Bench has been followed in the present case, one may say that no substantial question of law would arise for consideration."

29. The Hon'ble Division Bench of this Court in the case of PCIT v. Arun Textiles (P.) Ltd. [T.C.A.No.606 of 2016, dated 29-8-2016], after referring to the decision in My Home Power Ltd., (supra), dismissed the appeal filed by the Revenue and confirmed the order passed by the ITAT

holding that sale of carbon credits has to be considered as capital receipt and accordingly, it is not taxable.

30. The argument of Ms. V. Pushpa, learned Senior Standing Counsel is by referring to the substantial questions of law framed by the assessee and it is submitted that if the receipts from sale of carbon credit has to be treated as a capital receipt, then the assessee could not have claimed it as a deduction under section 80-IA of the Act and if the substantial question of law as framed by the assessee is to be answered, it should be answered against the assessee.

31. In our considered view, there is a slightly different approach that needs to be adopted, as this Court exercises power under section 260A of the Act, while deciding the substantial question of law. The assessee is required to place all materials before the Assessing Officer and make a full and true disclosure of their entire financial. If any query is raised by the Assessing Officer, the assessee is bound to answer. Thereafter, it is the Assessing Officer, who has to apply the law and complete the assessment. It has been held that it is not for the assessee to assist the Assessing Officer to complete the assessment in a particular manner or to supply a draft assessment order to the Assessing Officer. At this juncture, it is beneficial to refer to the decision in the case of CIT v. India Express (Madurai) (P.) Ltd., [(1983) 104 ITR 705 (Mad.)]. The reference to the High Court was to decide the scope of the appellate jurisdiction of the Income-tax Tribunal.

32. The Hon'ble Division Bench refers to three decisions of the Hon'ble Supreme Court in the case of Hukumchand Mills Ltd. v. CIT [(1967) 63 ITR 232 (SC)]; CIT v. Mahalakshmi Textile Mills Ltd., [(1967) 66 ITR 710]; and CIT v. Nelliappan [(1967) 66 ITR 722 (SC)] wherein, the observations made by the Hon'ble Supreme Court were referred to, which are quoted hereunder:-

"In hearing an appeal, the Tribunal may give leave to the assessee to urge grounds not set forth in the memorandum of appeal, and in deciding the appeal the Tribunal is not restricted to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal. The Tribunal was, therefore, competent to allow the assessee to raise the contention relating to the cash credits which was not made the subject-matter of a ground in the memorandum of appeal. It cannot be said that in accepting the contention of the assessee that the cash credits represented income from the business withheld from the books, the Tribunal made out a new case inconsistent with the assessee's own plea. In any event, the Tribunal is not precluded from adjusting the tax liability of the assessee in the light of its findings merely because the findings are inconsistent with the case pleaded by the assessee."

33. In Mahalakshmi Textile Mill's case, it was held as hereunder:- "Under sub-s. (4) of s. 33 of the Indian Income-tax Act, 1922, the Appellate Tribunal is competent to pass such orders on the appeal "as it thinks fit". There is nothing in the Income-tax Act which restricts the Tribunal to the determination of questions raised before the departmental authorities. All questions whether of law or of fact which relate to the assessment of the assessee may be raised before the Tribunal. If for

reasons recorded by the departmental authorities in rejecting a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him."

34. After referring to the above decisions, it was pointed out that the Appellate Tribunal is competent to pass such orders on the appeal, as it thinks fit and it would be the duty of the Tribunal to decide all questions on fact and law before it, even though it was not raised by the departmental authorities. After referring to the powers of the Tribunal and that of this Court and the Hon'ble Supreme Court, it was pointed out that based on the cardinal principle, which has been incorporated as a veritable constitutional provision, that no tax can be levied or collected save under authority of law.

35. It was further pointed out that the task of an Appellate Authority under the taxing statute, especially a non-departmental authority like the Tribunal, is to address its mind to the factual and legal basis of an assessment for the purpose of properly adjusting the taxpayer's liability to make it accord with the legal provisions governing his assessment. Since be-all and end-all of the statutory provisions, especially those relating to the administration and management of income tax is to ascertain the taxpayer's liability correctly to the last pie, if it were possible, the various provisions relating to Appeal, Second Appeal, Reference and the like can hardly be equated to a lis or dispute as arises between two parties in a civil litigation.

36. It was further pointed out that although the income-tax statute makes the Department or its officers figure as parties in the appeal proceedings, they are not in the strict sense what are called by American writers as parties to adversary proceedings. This is so because, the very object of the appeal is not to decide a point raised as a dispute, but any point which goes into the adjustment of the taxpayer's liability. In that sense, a view prevails, even in England, that the authorities sitting in an appeal in tax case, cannot be regarded as deciding a lis, but they are only engaged in an administrative act of adjusting the taxpayer's liability.

37. Further, it was pointed out that under our fiscal jurisprudence, we may regard the Appellate Authorities as exercising quasi-judicial functions in the same sense, as a tax officer does. But, even so, the proceedings before them lack the basic elements of adversary proceedings. It, therefore, follows that the discussion and the scope of the appellate jurisdiction of the Tribunal and the other authorities under the tax code cannot be pursued by drawing a parallel to civil litigation with particular reference to appeal from decrees, and the like. Further, it was pointed out that in the case of Mahalakshmi Textile Mills Ltd., the Hon'ble Supreme Court observed that the Tribunal is not precluded from "adjusting the tax liabilities" of the assessee in the light of its findings merely because, the findings are inconsistent with the case pleaded by the assessee. The decision of the Hon'ble Full Bench of this Court in the case of State of Tamil Nadu v. Arulmurugan & Co. [(1982) 51 STC 381] was referred to wherein, it was held that the Appellate Authorities perform precisely the same functions, as the assessing authority. The above decision and the findings rendered are a clear answer to the arguments raised before us by the Revenue contending that substantial

question of law no. 4, as framed has to be decided against the assessee. We, thus, have no hesitation to hold that the Tribunal failed to exercise its power in a proper prospective as a final fact finding authority and examining as to whether there is any adjustment required to be made in the assessee's tax liability qua the various decisions of the Court, which have held that receipt on account of sale of carbon credit is capital in nature.

38. In the instant case, the assessee while preferring appeal before the CIT(A), has specifically raised a contention that the receipts from sale of carbon credit is a capital receipt and cannot be included in the taxable income. Though this ground raised by the assessee before the CIT(A) has been recorded in the order, the CIT(A) did not take a decision on the same. Similar ground was raised by the assessee before the Tribunal, which was not considered by the Tribunal, though the Tribunal refers to all the decisions relied on by the assessee, but would pin the assessee to his claim made under section 80-IA of the Act and accordingly, negatives it. This finding of the Tribunal is wholly erroneous and perverse. The Tribunal was expected to apply the law and take a decision in the matter and if the CIT(A) or the Assessing Officer had failed to apply the law, then the Tribunal was bound to apply the law. This is so because, in the light of the decisions referred above, the receipt by way of sale of carbon credit has been held to be capital receipt. Therefore, it is of a little consequence as to the claim made by the assessee under section 80-IA of the Act or in other words, the question of taking a decision as to whether the deduction is admissible under section 80-IA of the Act is a non-issue. If the receipt from the sale of carbon credit is a capital receipt, then it will go out of the purview of the gross total income as defined under section 80B(5) of the Act, which expression is found in section 80-IA of the Act. Thus, if the receipts by sale of carbon credit will not fall within the definition of total income, the same cannot be included under section 80-IA of the Act. Therefore, even if the assessee has made such a claim, that cannot be a reason for the Tribunal to non-suit the assessee.

39. One more important factor to be noted is that section 115BBG of the Act was introduced by Finance Act, 2017 with effect from 1-4-2018, prior to which, there was no such provision and Mr. V.S. Jayakumar, learned counsel for the assessee would submit that the assessee were under utter confusion as to under which provision of the Act, they should make a claim for deduction and having left with no other option, had been making the claim under section 80-IA of the Act and merely because the assessee due to uncertainty in the legal position, had made a claim under section 80-IA of the Act that cannot be a reason to deny a benefit granted in favour of the assessee. The submission, made by Mr. V.S. Jayakumar, learned counsel for the appellant, in this regard, is well found and accepted.

40. For the above reasons, substantial question of law no. 4 is answered in favour of the assessee.'

3. Following the above decision, this tax case appeal stands dismissed and the substantial question of law is answered against the Revenue. No costs.

51. It is also relevant to refer to decision of Jurisdictional High court in the case of PCIT v. Dodson Lindblom Hydro Power Pvt. Ltd dated 27/02/2019 in INCOME TAX APPEAL NO.1820 OF 2016 wherein it is held as under:

"(i) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT, is correct in holding that sale of carbon credit is to be considered as Capital Receipt and not liable for tax under any head of income under Income Tax Act, 1961?"

"(ii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT, is correct in holding that there is no cost of acquisition or cost of production to get entitlement for the Carbon Credits, without appreciating that generation of Carbon Credits is intricately linked to the machinery and processes employed in the production process by the assessee?"

4 Though two questions are framed, singular issue is whether the receipts of the Assessee arising out of sale of carbon credit is to be considered as capital receipt and therefore not liable to tax. This issue is considered by the several High Courts starting from the judgment of Andhra Pradesh High Court in the case of Commissioner of Income Tax v/s. My Home Power Ltd reported in (2014) 365 ITR 82 (AP) holding the receipts to be capital in nature. This was further elaborated by the Division Bench of Karnataka High Court in the case of Commissioner of Income Tax v/s. SubhashKabini Power Corporation Ltd. reported in (2016) 385 ITR 592 (Karn) and followed by Igc 2 of 3 (16) itxa-1820.16ors.doc Allahabad High Court and Rajasthan High Court, (Allahabad High Court decision is in the case of Principal Commissioner of Income Tax v/s. L Sugar Factory Pvt. Ltd reported in (2017) 392 ITR 568 (All)). 5 In view of such consistent view of the different High Courts in the country, we see no reason to take a different stand. No question of law arises in these Appeals. Hence not entertained. The Income Tax Appeals are dismissed.

52. It is observed that identical issue has been decided in favour of assessee by Hon'ble Bombay High court referred supra. The decision of Jurisdictional High court is binding upon coordinate benches of same Jurisdiction. It is observed that other High courts have also decided similar issue in favour of assessee. The decision of Ahmedabad Bench is not binding on this jurisdiction and in our view, considering binding decisions of Hon'ble High Courts referred supra, sale proceeds from CERs is treated as capital receipts and accordingly, this ground of appeal raised by the assessee is accordingly allowed.

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

"Ground No. 5: Reduction in deduction u/s 80-IA on power generating undertakings due to modification in "Market Value" of electricity generated (Rs. 97,77,77,609/-):

a. On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the action of AO in reducing the claim for deduction u/s 80-IA on captive power generating units by an amount of Rs. 97,77,77,609/- by modifying the basis adopted by the Appellant for determining the 'market value' of power captively consumed.

b. The CIT(A) was not justified and grossly erred in not following the binding judicial precedents without providing any cogent reasons;

c. The Appellant prays that the AO be directed to allow deduction u/s. 80IA as claimed by the Appellant."

54. The Assessing Officer has discussed this issue at Para No. 10.23 of assessment order. The Assessee company has claimed deduction u/s 80IA with reference to various power generating units mainly used for captive power consumption. The Assessing Officer has prepared tabular chart showing market value of such goods on transfer at Page No 37 of assessment order. On perusal of such table, it is apparent that assessee has considered 6.30 per unit at which the units generated by it were sold to Tata Power Trading Company Limited. The Assessing Officer at Para No. 10.28 of his order has observed that assessee before it claimed that notional market value of the electricity generated by CPP shall be the same as what the manufacturing unit would have paid electricity to the State Government or other party if CPP would not be in existence. The Assessing Officer has referred to provisions of Section 80IA(8) of the Act and observed that basic notion of the assessee company of calculating saving of its manufacturing unit on account of power supply by CPP on the basis of rate of electricity which would have been charged by Electricity Board is incorrect and what is required to calculate the sale price which the undertaking would have fetched if its electricity gets sold in open market. Based upon the same, AO has worked out average value of electricity sold by CPP based upon available price of trading transactions in electricity undertaken by two Government appointed undertaking being PTC and TPTCL and such working is made at Page No 40 and 41 of assessment order. The Assessing Officer has compared the market value of power considered by assessee for the purpose of Section 80IA and market value computed by him and to the extent of such difference, deduction u/s 80IA claimed by the assessee was reduced.

55. In appeal Ld.CIT (A) has discussed the above issue at Para No 15.3 of his order and held as under:

"15.3 I have considered the rival submissions. I find that the provisions of sec. 80A(6) recognises existence of different market value from the point of view of a producer of goods and services and from the point of view of consumer of goods and services. Sec. 80IA(8) did not recognise the existence of more than one market value. Therefore, the appellant's claim that (i) the provisions of section 80A(6) and Sec. 80IA(8) are pari -materia in respect of determination of market value of electricity transferred from eligible unit to other units & (ii) the method of determination of transfer price on the basis of cost at which CMU procured power from SEB still holds good even after insertion of Sec. 80A(6) are not correct.

Section 80A(6) reads as under:

"80A(6) Notwithstanding anything to the contrary contained in section 10A or section 10AA or section 10B or section 10BA or in any provisions of this Chapter under the heading "C—Deductions in respect of certain incomes", where any goods or services held for the purposes of the undertaking or unit or enterprise or eligible business are transferred to any other business carried on by the assessee or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the undertaking or unit or enterprise or eligible business and, the consideration, if any, for such transfer as recorded in the accounts of the undertaking or unit or enterprise or eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of any deduction under this Chapter, the profits and gains of such undertaking or unit or enterprise or eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date.

Explanation.—For the purposes of this sub-section, the expression "market value", —

in relation to any goods or services sold or supplied, means the price that such goods or services would fetch if these were sold by the undertaking or unit or enterprise or eligible business in the open market, subject to statutory or regulatory restrictions, if any;

in relation to any goods or services acquired, means the price that such goods or services would cost if these were acquired by the undertaking or unit or enterprise or eligible business from the open market, subject to statutory or regulatory restrictions, if any.

The dispute is whether the market value means the market value at which the power grid purchases power or the market value at which a consumer purchases power. The answer to this question is provided by explanation to section 80A(6). Where the goods or services are sold by the eligible unit, the market price would mean the value at which such goods or services can be sold in the open market.

Normally, cost of electricity consumed by the end user has three components they are generation costs, transmission costs and distribution costs. The rate (R1) at which the electricity is sold by the power Plant (generator of power) to the transmission company is lower than the rate(R2) at which the transmission

company sells the power to the distribution company. Again, R2 is lower than the rate (R3) at which the distribution company sells the power to the consumer. Therefore, there are three market rates, viz, R1, R2&R3 where R1 is lowest and R3 is highest.

The question arises is which of the three rates is to be adopted in this case. One possible view is that since the seller (CPU) is a generator power, the market value is to be taken as R1. In case the seller is a transmission company, the market rate for power sold would be R2. For a distribution company, the market rate for power sold would be R3. Therefore, for determining the profit from the CPU, which generates power, the market value of power would be R1, i.e., the rate at which power plant filled power to the transmission companies.

It may be emphasised here that the market value in this case is to be determined with reference to the CPU and not with reference to the rate at which actual consumer buys power from the electricity board or any other supplier. Further, the subsection (6) of section 80IA starts with a non- obstante clause by virtue of which overrides section 80IA(8). 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. Therefore, I dismiss ground of appeal number 11."

56. The Assessee has filed appeal against the above order. During the course of appellate hearing, Ld AR has mainly relied upon submissions filed before lower authorities and relied upon following decisions:

- (i) *Ambuja Cements Ltd [ITA No. 3475/Mum/2019 and ors.] (AY 2011-12) (Para 80-85; internal page 47-50)*
- (ii) *CIT v. Reliance Industries Ltd [2020] 421 ITR 686 (Bombay)*
- (iii) *CIT v. Godawari Power & Ispat Ltd. [(2014) 223 Taxman 234 (Chattisgarh HC)]*
- (iv) *PCIT v. Gujarat Alkalies & Chemicals Ltd. [(2017) 395 ITR 247 (Gujarat HC)]*
- (v) *West Coast Paper Mills Ltd. v. JCIT (2006) 100 TTJ 833 (Mumbai Trib.) –*
- (vi) *Eveready Spinning Mills (P.) Ltd. v. ACIT (50 SOT 8) (Chennai) (URO)*
- (vi) *ACIT vs. Godavari Power & Ispat LTD (2011) 133 ITD 502 (Bilaspur)*
- (vii) *BalrampurChini Mills Ltd (ITA 1672/Kol/2019) (Kolkata ITAT)*

57. During the course of appellate hearing, Ld AR has filed revised working of the turnover of the eligible CPP units by adopting rate which the assessee's Cement Manufacturing Unit (CMM) would have paid to purchase the power from the State Electricity Board (SEB) which means Average Annual Landed Cost (AALC) of power

purchased from SEB at each location. This method has been followed by assessee while claiming deduction u/s 80IA in return of income for A.Y. 2011-12 hence there was no need for submitting revised working in such year.

58. The Ld DR has mainly relied upon observations made by lower authorities. She has mainly relied upon provision of Section 80IA(6) of the Act and contended that since the CPP of the assessee have supplied power to the assessee's CMU, the market value to be adopted for quantification of the turnover of the CPP should be in relating to goods or service sold or supplied. The Ld.DR has thus stated that ratio laid down by various courts as relied upon by assessee cannot be made applicable and distinguishable to the facts of this case.

59. Ld.DR with regard to Reduction in deduction u/s 80-IA on power generating undertakings due to modification in "Market Value" of electricity generated, submitted as under: -

The issue is discussed in para 10.23 to para 10.34 of the assessment order and para 15 (Page 42 to 47) of the CIT(A)'s order. The same may kindly be referred to. It is pertinent to mention that the facts of the case and the reasoning given by the AO as well as the CIT(A) for making / upholding the disallowance was discussed in quite length by the undersigned during the course of hearing on 09.01.2023.

Briefly stated, the point of dispute between the assessee and the department is regarding the market value to be adopted for quantifying the turnover of the assessee's captive power plants (henceforth referred to as CPPs) spread across India for computing the eligible deduction u/ s 80IA of the Act.

The assessee after placing reliance on various decisions including that of the Hon'ble Bombay High Court in the case of CIT vs Reliance Industries Ltd.[2020] 421 ITR 686 (Bombay) contended that the issue regarding which rate is to be adopted as the market value — i.e. whether the rate at which the CPPs sell the power generated by them to the SEBs / Power Trading Corporations (PTCs) or the rate which the assessee's Cement Manufacturing Units(henceforth referred to as CMUs) would have paid to purchase the power from the SEBs, is no more res judicata and that the latter rate is to be taken as the market value for the purpose of quantifying the turnover of the assessee's CPPs.

Furthermore, the assessee also filed before the Bench a revised working of the turnover of the eligible CPPs units by adopting the latter rate as against the original working adopted by the assessee wherein it has adopted the rate at which power was sold by one of its CPPs to the SEBs/ PICS. However, it is to be noted that no underlying details are filed by the assessee as to how the rate at which SEB sells the electricity to its CMUs is arrived at by the assessee. The copy of the

alternative working for market values of electricity generated filed by the Ld.DR on 9.01.2023 is also enclosed herewith for ready reference as Enclosure-I

Perusal of the assessment order shows that for computing the turnover of the CPPs, the AO adopted the rate at which the CPP sold the power generated by them to the SEBs/ PTCs. The same was considered to be the market value in view of the explanation to subsection 6 of section 80A of the Income Tax Act, 1961. The sub section (6) of 80A was brought on statute by the Finance Act of 2009 'With retrospective effect from 01.04.2009 and hence is applicable to the AN. under consideration. It is pertinent to mention that section 80A(6) is a non-obstante clause.

For the sake of ready reference, sub section 6 of section 80A along with its explanation is reproduced hereunder:

(6) Notwithstanding anything to the contrary contained in section 10A or section 10AA or section 10B or section 10BA or in any provisions of this Chapter under the heading "C. —Deductions in respect of certain incomes", where any goods or services held for the purposes of the undertaking or unit or enterprise or eligible business are transferred to any other business carried on by the assessee or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the undertaking or unit or enterprise or eligible business and, the consideration, if any, for such transfer as recorded in the accounts of the undertaking or unit or enterprise or eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of any deduction under this Chapter, the profits and gains of such undertaking or unit or enterprise or eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date.

Explanation. —For the purposes of this sub-section, the expression "market value",

- (i). in relation to any goods or services sold or supplied, means the price that such goods or services would fetch if these were sold by the undertaking or unit or enterprise or eligible business in the open market, subject to statutory or regulatory restrictions, if any;*
- (ii). in relation to any goods or services acquired, means the price that such goods or services would cost if these were acquired by the undertaking or unit or enterprise or eligible business from the open market, subject to statutory or regulatory restrictions, if any;]*
- (iii). in relation to any goods or services sold, supplied or acquired means the arm's length price as defined in clause (ii) of section 92F of such goods or services, if it is a specified domestic transaction referred to in section 92BA.*

As can be seen, the Act provides for three meaning of the expression "market value". The first meaning of market value is in relation to goods or services sold or supplied.

The second meaning of the expression market value is in relation to any goods or services acquired.

The third meaning was inserted by the Finance Act, 2012 w.e.f.01.04.2013 and hence does not merit any discussion for the year under consideration.

Since the CPPs of the assessee have supplied power to the assessee's CMUs, the market value to be adopted for quantifying the turnover of the CPPs should be, as per clause (i) of the -Explanation.

Interestingly, the Assessee itself has adopted the first meaning for computing its turnover i.e. the rate of Rs 6.30 per unit at which the units generated by it were sold to Tata Power Trading Company Limited. The AO had however, after giving his reasons in detail as to why the rate adopted by the Assessee cannot be applied for the entire output of the CPPs, which are spread across various states and further after considering the small sample size of the sales made by the assessee to Tata Power Trading Company Limited, by one of its units at Kymore in Madhya Pradesh, that too only over a short period of three months, worked out the turnover of the CPPs after adopting the average rate at which the power was purchased by the two players in the power sector, the Tata Power Trading Company Limited and the Tata Power Trading Corporation Limited, the working is available on page 40 the assessment order.

while computing the net output of the CPPs, the AO has excluded the transmission loss which was considered by the assessee. It is pertinent to mention that during the course of hearing before the Bench, the Ld. AR of the assessee conceded the ground on the exclusion of the units lost in transmission for the purpose of computing the turnover of the CPPs.

However, to support its revised working, filed for the first time only during the course of hearing on 09.01 2023, the AR relied on various case laws, mentioned in the summary chart mentioned by him. During the course of hearing, reliance was predominantly placed on the Bombay High Court's decision in the case of CIT vs Reliance Industries Ltd. [2020] 421 ITR 686 (Bombay)

The list of the cases relied upon by the AR is as under:

	Citation	CIT(DR's) Remarks	Reference to the Index of the Legal Paper book filed by CIT(DR) on 09.01.2023
a)	CIT vs Reliance Industries Ltd. 120201 ITR 686 (Bombay)	The A.Y. is not ascertainable from the High Court's order. However, the decision places reliance on the decision at Sr.No. (b) and (c). Moreover, SLP filed against the High Court order by the Revenue is granted by the Supreme Court of India	Serial No. 1 and 2 of the Paper Book.
b)	CIT vs Godawari Power & Ispat Ltd. [(2014) 223 Taxmann 234 (Chattisgarh HC)]	Pertains to A.Y. 2004-05 to 2006-07	Serial No. 3 of the Paper Book.
c)	PCIT vs Gujarat Alkalies & Chemicals Ltd. (2017) 395 ITR 247 (Gujarat HC)	A.Y. is not ascertainable. However, it is observed that there is no discussion regarding sub section (6)	Serial No. 4 of the Paper Book.

	Citation	CIT(DR's) Remarks	Reference to the Index of the Legal Paper book filed by CIT(DR) on 09.01.2023
		of section 80A of the I.T.Act.	
d)	West Coast Paper Mills Ltd. v JCIT (2006) 100 TTJ 833 (Mumbai Trib.	Pertains to Asst.Year 1999-2000	Sr.No. 5 of the Paper book
e)	Eveready Spinning Mills (P) Ltd.v. ACIT (50 SOT 8 Chennai URO	Pertains to AN. 2007-08	Sr.No.7 of the Paper book
f)	BalrarnpurChini Mills Ltd. (ITA.No. 1672/KOL/2019) (Kolkata ITAT)	Pertains to A.Y. 2016-17 and deals with the amendment brought to section 80IA (8) w.e.f. 1.04.2013, hence not applicable to AY 2011-12.	
g)	Ambuja Cements Ltd. [ITA.No. No. 3475/Mum/:2019 and ors.] (A.Y. 2011-12)	The issue is discussed in Para 80-85, internal page 47-50. Perusal of the order shows that the issue is decided in favour of the assessee by placing reliance on Bombay High Court's decisions mentioned at Sr.No. a .	The Relevant pages of the order are enclosed herewith for ready reference.(Enclosure)

All the case laws are perused and it is observed that all the cases relied upon by the AR are pertaining to A. Ys prior to A. Y. 2009-10, ie. when the provisions of sub-section 6 of section 80 A was not on statute.

Even in cases, wherein the AY involved happens to be post 2009-10, for example Mumbai ITAT's decision dated 29/11/2022 passed in the case of ACIT US Century Textiles and Industries Ltd. [ITA No. 1886/Mum/2022 for AY 2010-11 (copy of the decision was filed by the Ld. AR on 09.01.2023 during the course of hearing), the issue is decided in favour of the assessee by placing reliance on such decisions, wherein the Court had no opportunity to consider the provisions of section 80A(6) of the Act and its explanation.

Reference is also made to para 6 of the ITAT's order passed in the case of ACIT Century Textiles and Industries Ltd, which is reproduced hereunder for ready reference, which mentions that the Ld.DR could not point out any change in facts or law is a sis that of the earlier years

"6. We note that on this issue the LCIT(A) has decided in favour of the assesses by following the decision of the Tribunal in A.Y 2006-0) by order dt.14.06.2017 and deleted Rs 292,15,38/- which was disallowed by AO. We note that the Tribunal in A.Y. 2007-08 to AY. 2009-10 (supra) has allowed assessee appeal regarding this issue. Since the Ld.DR could not point out any change in facts or law vis a vis that of the earlier years as decided by the Tribunal in assessee's case as noted (supra), we are inclined to uphold the impugned action of the LA CIT(A)" (emphasis supplied)

Unfortunately, the Ld.AR in the said case, also failed in his duty to bring to the notion of the Hon'ble Bench the change in law. For identical reasons, the

reliance placed by the Ld. AR on the ITAT's decision in the case of its holding company, Ambuja Cements is also not applicable to the facts of the case and is not a good reliance.

Hence, the case laws do not act as precedent for deciding the issue for the year under consideration. It is therefore, requested that the issue may be decided by the Hon'ble Bench after taking into consideration the amendment brought into the Act w.e.f. 01.04.2009 as considered by the Assessing Officer as well as the CITIA) for computing the turnover of the CPPs, by adopting the rate as worked out by the AO in the Assessment order."

60. Considered the rival submissions and material placed on record. The Assessee has a power generating unit and cement manufacturing units. The power generated by the power generating units, were captively consumed by the cement manufacturing units of the assessee. The Assessee has claimed deduction u/s 80IA for the market value of the power generated. During the course of assessment proceedings as well as in appellate proceedings, Ld AR has submitted that the deduction u/s.80IA for power unit is required to be determined on the basis of the cost of power considering the rate at which the State Electricity Board ('SEB') charges the power to the ultimate consumer being respective CMU. In support of the said contention, the Assessee has relied upon certain caselaws including those of the jurisdictional Tribunal and High Court, including, the decision of the coordinate bench in case of Reliance Industries (ITA 4361/M/12, order dated 12/04/2017), which was later approved by the Hon'ble Jurisdictional High Court [2020] 421 ITR 686 (Bombay).

61. It is important to note here that the case of Reliance Industries (supra) pertains to AY 2009-10 along with other preceding assessment years. Accordingly, it has to be considered that the judicial authorities have taken into consideration all the relevant amendments, including 80IA(6). Further, it is relevant to reproduce the relevant portion of the decision from coordinate bench Order, wherein the ITAT has held as under:

"17. The assessee had claimed the deduction u/s.80IA on power generation undertaking by adopting price which the industrial consumers paid during the year under consideration for electricity purchased from State Power Distribution Agency. However, the Assessing Officer has restricted the claim of deduction u/s.80IA to Rs.34,23,45,990/- by taking 16% return on capital base as per the parameters prescribed by the Regulatory Authorities i.e. State Electricity Board for procuring the electricity.

18. By the impugned Order CIT(A) allowed assessee's claim of deduction u/s.80IA after having its observation at pages 6.3 of its appellate order. Precise observation is as under:-

"6.3 I have considered the facts of the case and submissions of the appellant as against the observation / findings of the AO in his order. The contentions raised by the appellant in respect of the ground of appeal are being discussed and decided as under:-

i. This issue also appeared in the assessee's reopened assessment for the A.Y.2006-07. On the identical set of facts, the Ld. CIT(A) in the office while deciding the appellant's case for A.Y.2006-07 has reached the decision as under: "I have considered the facts of the case, the reasons given by the Assessing Officer for restricting 'the deduction claimed by the assessee u/s 80IA in respect of its power generating undertakings and the' submissions of the assessee, in my opinion the question which is required, to be answered in respect of the ground of appeal taken by the assessee is whether the action of the AO of restricting the deduction is correct in the present facts and circumstances of the case. To answer the question, it would be pertinent to refer to Sec. 80IA(8) of the Act since the said section is relevant in the present case Sec. 80IA(8)reads as follows:

"Where any goods (or services) held for the 'purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods (or services) held for the purpose of any other business carried on by the assessee or where any goods (or services) held for the purpose of any other business carried on by the assessee are transferred to the eligible business and, in either case the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods (or services) as on' the date of the transfer, then for the purposes of the deduction under this' section, the profits and gains of such eligible business shall be computed as if the transfer, in either case had been made at the market value of such goods (or services) as on that date.

Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.

(Explanation - For the purposes of this sub-section; "market value ", in relation: to any goods 'or services, 'means the price that such goods or services would ordinarily fetch in the open market.)

A perusal of the said section reveals that where transfer of any goods or services by the eligible business to any other business carried on by the assessee is not recorded in the books of accounts of the eligible business at the market value of such goods or services as on date of the transfer, then for "the purposes of the deduction, the profits and gains

of such eligible business is required to be computed as if the transfer has been made at the market value of such goods or services as on that date. As per the Explanation, 'market value' in relation to the goods would mean the price that such-goods would ordinarily fetch in the open market. The proviso to sub-section(8) of section 80IA would come into operation only' when in the opinion of the Assessing Officer; the computation of profits and gains of the eligible business in the manner provided in the main sub-section presents exceptional difficulty. It is, therefore, clear that the Assessing Officer, in order to invoke the proviso, must form an opinion based on the material on record that the computation in the manner provided presented exceptional difficulties. If he does not form an opinion, he cannot invoke the proviso to determine the profits & gains of the eligible business. It would, therefore, be required to be seen whether the AO has found based on any material on record, and has brought any evidence or material on record, that the transfer of the goods by the eligible business, i.e. the power generating units, has not been recorded at the market value of such goods. It will also be required to be seen whether the AO has formed any opinion which would justify the invoking of the proviso to Sec, 80IA(B), because it is the proviso that the AO has invoked to work out the deduction available to the assessee u/s. 80IA.

Perusal of the facts on record show that the assessee had disclosed that it has sold/transferred electricity to related concerns and, that the said transfer had been done at the fair market value of the goods. In the earlier 'assessment years in the regular assessments, the basis of taking the market value of the goods had been accepted by the Assessing Officer. I find that the Assessing Officer has assumed the power u/s. 80IA(B) without bringing any material on record to show that the price recorded in the books by the eligible business did not correspond to the market value of the goods as on the date of the transfer. It is important to note that for giving a finding that a particular value did not correspond to the market value, the market value has to be found out. Hence, the section pre-supposes that there is another value attached to the said goods which would represent the market value of the goods. I find that there is nothing brought on record to show as to how the price recorded in the Books does not correspond to the market value of goods, when sold in the open market, especially in the light of the reasons given by the 'assessee that such price corresponded to the market value of the goods.

I find that the Assessing Officer has rejected the value recorded by the eligible business by merely holding that the market value cannot be the purchase value of electricity but the price of the electricity which the assessee can fetch in the open market. There being no open market for electricity during the period under review, the regulatory bodies fixed the price of electricity. He has further held that the tariff fixed for sale by the State. Power Distribution Agency for industrial consumers could not be called as market price as the regulatory fixes the tariff considering the wheeling charges, transmission loss due to leakage, past losses of the distribution agency, etc. In my opinion, the findings of the AO cannot be taken to be correct. Even though there may be 110 open market for the goods, an open market has to be presumed in respect of the goods in question in view of the categorical condition laid down in the provisions itself and the law laid down in this regard by the different Hon'ble Courts of the land and which have/been relied" upon by the assessee in its submissions. The Assessing Officer has not brought any

material to show that the price charged was not in consonance with the market value. The AO has also not suggested, leave alone computed as to what the market value of the goods should be. While the assessee has given detailed reasons as to why the price of the goods recorded by it corresponds to till! market value, the Assessing Officer has not given any specific findings to hold as to why such price does not correspond to the market value of the goods and as to what was the market value of such goods. The assessee has contended that the 'rate 'charged to the end user by the State Electricity Board would provide the 'most appropriate basis to arrive at the market value. Since, the eligible unit is, in effect, transferring the goods to another business which is the end consumer, the cost to the end consumer, is required to be considered and not the tariff at which the 'Independent Power Producers' sell to the: 'State Distribution Agency', which in turn sells to the State Electricity Board for further sale to the end users i.e. consumers, at a rate higher than the rate at which the 'State Distribution Agency had procured the electricity, at. 'Another important aspect which is required to be considered is' that the: rate at which the 'Independent Power Producers' sell to the; State -Distribution Agency' under the Electricity Act, 1948 is a regulated rate which is determined ,on the basis' of the normative parameters 'determined by the Government of India under its Notification No, 251 (E) 'dated 30.03.1992. The normative parameters have been fixed by the Government, which is required to be followed by all, and no deviation in fixing the tariff is allowed Hence, even here, the rate cannot be taken to be the "price that such goods would ordinarily fetch in the open 'market" as this is the regulated rate fixed by the Government. It is also seen that the Assessing Officer has taken 16% return on capital base to work out the profits of the eligible business of the assessee eligible for deduction u/s, 80IA of the IT.Act, 1961. 16% return on capital base in Notification No. 251(E) dt .. 30/3/1992 is only an exercise for fixation, of tariff. It is 'one 'of the parameters 'out of many which is required to be taken into consideration for fixing the tariff in relation' to the' rate at which the Independent Power 'Producers sell their power to the - State Distribution Agency. Hence, 16% return on capital base 'alone' would not be relevant while computing the profits of the eligible business under the Act.

To sum up under Sec. 80IA(8), the following conditions are required to be satisfied:-

- a) Any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee.*
- b) The' consideration if any for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods or services as on the. date of transfer,*
- c) It is only when condition (b).is satisfied then the Revenue gets a right to determine profits and gains of such eligible business at the market value of such-goods or services. as on the date of its transfer.*

The Assessing Officer had considered the rate' charged by the State Distribution Agency as the market value of the goods 'transferred by the eligible business in the original assessment of the assessee, There is nothing on record to show as to how the value of the goods adopted/taken by the assessee do not correspond to the market value of such goods especially in light of the reasons given by the assessee.

The Assessing Officer has also not expressed any opinion as to how the computation of profits and gains of the business tn. The manner provided in the main sub-section' presented exceptional difficulties. Hence, proviso to Sec. 80IA could not have been invoked by him. It is also clear that the parameter 'relating to 16% of capital base js only an exercise for fixation of tariff and is only one of the many parameters taken into consideration for fixing the tariff under' the Old Electricity Act of 1948, This parameter is for working 'out the' tariff for sale to Distribution agencies and not for sale to the end' consumers and not for computing the profits and gains of the eligible business. In' view of the aforesaid reasons, the order of the AO of working out the profits eligible for deduction on the basis of 16% return on 'capital base cannot be upheld.

As regards the submission relating to Sec, 80A(6), I find that same submissions were made by the assessee before the Assessing Officer during the course of the re-assessment proceedings. I find that the AO has not controverted the submissions of the assessee. I am also of the opinion that since the said Sec, 80(6) has been specifically made retrospective from a specific date i.e. w.e.f.01.04.2009, the same would apply only with respect to the A.Y. 2009-10 onwards and would not apply to the A.Y. 2006-07 in question. This is also clear from the fact that the Explanation 10 Sec. 80IB(10) was inserted by the Finance (No.2) ct, 2009 and was made operational w.r.e.f 01/04/2001 while sec. 80A(6) was also inserted by the Finance (No.2) Act, 2009 and was made operational w.r.e.f 01/04/2009. Further, as per the explanation to Sec. 80IA(6), the market value means the price that such goods or services would fetch if these were sold by the undertaking or unit or 'enterprise or eligible business in the open market, subject to statutory or regulatory restrictions, if any. In the present case, the AO has not brought any material on record to show that the goods supplied by the undertaking were at a price higher than what it was required to supply as a result of any statutory or regulatory restrictions or as to what should have been the rate at which it was required to supply the goods as a result of any statutory or regulatory restrictions.

In the case of Reliance Infrastructure Ltd (Supra) Hon'ble jurisdictional Mumbai, Tribunal has held that the price that the unit paid to TPC for purchase of power would be the best basis for working out the profits of the business of generation of power even after the order MERC. In this case, the assessee, other than using power generated from its own captive generating units, was also purchasing power from TPC.

In the case of Jindal Steel & Power Ltd. reported in 16 SOT 509 (Del), Hon 'ble Tribunal has held as follows

"Sec: 43A of the Electricity (Supply)Act,1948, lays down rules and conditions for determining the tariff for sale of electricity by a generating company to the State Electricity Boards. A perusal of the same reveals that the tariff is determined on the basis of various parameters contained therein: From the aforesaid, it is evident that on one hand it is only upon granting of specific' consent that a private person call set up a power generating unit having 'restrictions on the use of power generated and at the same time the tariff at which a power generating unit can supply power to the Electricity Board is also liable to 'be determined in accordance with the statutory requirements. In this context it can be safely deduced that determination of tariff between

the assessee and the Board can be said to be an exercise between a buyer and seller neither in a competitive environment and nor in the ordinary course of trade and business. It is an environment where one of the players has the compulsive legislative mandate not only in the realm of enforcing buying but also to set the' buying tariff in terms of scenario cannot be, equated with a situation where the price is determined in the normal course of trade and competition. Therefore, the price determined as per the Power Purchase Agreement cannot be equated with market value as understood in common parlance. There is no reason for not holding so for the purposes of. Section 80IA-(8) also, The price at which the power is supplied by the assessee to the Board is determined entirely by the Board in terms of the statutory regulations. Such a price cannot be equated with the market value as understood for the purposes of s.80-IA(8) The price recorded by the assessee Rs. 3.72 per unit can be considered to be the market value-for the purposes of s. 80- IA(8). This is for the reason that the assessee as an industrial consumer is also buying power from the Board and the Board supplies such power at the rate of Rs.3.72 per unit to its- consumers. This is the price at which the consumers are able to procure the power. Thus, under the given circumstances, it would be in the fitness of things to hold that the consideration recorded by the assessee's undertaking generating electric power for transfer power for captive "consumption at' the rate of Rs. 3.72 per unit corresponds to the market value of power. The AO is directed to allow relief to the assessee under s. '80IA as claimed:"

It is pertinent to note that the assessee is not supplying electricity to the State Electricity Board or to any other power distribution agency.

In the case of West Coast Paper Mills Ltd. reported in 1000 TTJ 833 (Mum), the Hon'ble Tribunal has held as follows:

"Having held that the assessee is entitled for the deduction available under s. 80-IA,' the next question is what should be the price attributable to the power generated and consumed by the assessee, The answer to the question is readily available in sub.s(8) of s.80-IA, which reads as below:

80-IA(8)

Where any goods held for the purpose of eligible profits are' transferred to any other business carried on by the assessee, or where any goods held for the purposes of any 'other business'. carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods as on the date of transfer, then for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer in either case, had been made at the market value of such goods as'on that date".

The above concept of transfer pricing is also apparent in r. 7 of I T Rules, 1962 provided for determining the income from agricultural produces consumed by the agriculturist-assessee in his business as raw material. The rule provides that in the case' of income which is partially agricultural income and partially income chargeable as business income in determining that part which is chargeable to income-tax, the market value of any agricultural produce which has been raised by the assessee

and utilized as a raw material in such business shall be deducted at the prevalent market value. This principle has been considered and upheld by the Supreme Court in the case of ThiruArooran Sugars Ltd. Vs. CIT (1997) -142 CTR (SC) 9; (1997) 227 ITR 432 (SC). Therefore, we direct the assessing authority to work out the profits on the basis of the price of the power generated' by the assessee' at the average of the annual landed cost of electricity 'purchased by the assessee from Karnataka State Electricity Board during the impugned previous year. It may be determined on the basis of 'payment details available from the bills issued by the Karnataka state Electricity Board, during the year under consideration."

During the course of the appellate proceedings, the assessee has submitted that the sale price of electricity by the captive generating units varies from Rs. 4.55 per KWH to, Rs. 4.52 per KWH and for the sake of uniformity, the same had been taken at the average rate of Rs. 4.54 per KWH for computing the claim u/s. 80IA for the power generating units. The working had been done based on the price of electricity charges by Dakshin 'Gujarat .Vij company, a state owned company which was the only supplier of electricity other than the captive power plants. In views of the decisions of Hon'ble Tribunals as discussed above, the Assessing Officer will examine whether the submission of the assessee with respect to the rate taken is correct. If it is found that the rate charged by the suppliers is lower than the rate adopted for sale by the captive power generating units of the assessee, such rate would be taken by the Assessing Officer for computing the profits of 'the' eligible-business, eligible for deduction u/s. 80IA. However, if the 'rate charged. by the suppliers is the same as the rate adopted for sale' by the 'captive power generating units of the assessee, such rate' adopted should be accepted for' the purpose of working out the deduction u/s. 80IA.

Subject to the above, this ground of appeal filed by the assessee is allowed. The facts of the case are similar and issue involved is identical. Accordingly, in view of the facts of the case and keeping in view the principles of judicial consistency, it -Is directed that. the Assessing Officer will examine correctness of the-rate taken (Rs. 4.799 per unit) and if it is found that the rate charged by the suppliers is lower than the rate adopted for sale by the captive power generating units of the assessee, such rate would be taken by the Assessing Officer for computing the profits of the eligible business, eligible for deduction u/s. 80IA. However, if the rate charged by the suppliers is the same as the rate adopted for sale by the captive power generating units of the assessee, such rate adopted should be accepted for the purpose of working out the deduction u/s.80-IA. Subject to the above, this ground or-appeal filed by the assessee is allowed.

19. *We found that exactly similar issue has been considered by the Tribunal in assessee's own case for the assessment year 2006-07 therein issue has been decided in favour of the assessee. As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal in assessee's own case, we do not find any infirmity in the order of CIT(A) for allowing assessee's claim of deduction u/s. 80IA with reference to power generating undertaking and the power so generated being used mainly for captive consumption.*

20. *Learned DR has relied on the decision of Calcutta High Court in the case of ITC Ltd., (2015) 64 Taxman.com 214 and contended that distributing expenditure not actually incurred by the assessee increases its profits. Such profit cannot be said to be derived from industrial undertaking, therefore, to this extent deduction u/s.80IA cannot be allowed.*

21. *In the course of the hearing, the Revenue has relied on the decision of Calcutta High Court in Commissioner of Income tax, Kolkata-III v. M/s. ITC Ltd. (ITA 426 of 2006) for the proposition that the market price determined u/s 80IA of the Act ought not to be determined at the rate at which electricity was supplied to the assesses for its consumption other than for Captive Power plant. According to the Revenue, this decision was therefore in favour of the Revenue and ought to be followed in preference to the decision of the Tribunal referred to earlier in the assessee's own case.*

22. *We had gone through the decision of the Calcutta High court in M/s.ITC Ltd. and found that it has no connection to the facts of the assessee's case for following reasons:*

23. *First, the judgement of the Calcutta High Court was considering the provisions relating to the Electricity Act as they stood prior to the Electricity Act, 2003 as it was dealing with A Y 2002-03. No doubt, the Calcutta High Court has referred to Section 61&62 of the Electricity Act, 2003, but that is only in context of discussion relating to the rates fixed by Tariff Regulation Commission for sale of electricity by generating companies. The decision therefore cannot hold the field for A Y 2007-08, 2008-09 and 2009-10 as these Assessment years are years after the Electricity Act came into force on 10.06.2003.*

24. *It is therefore necessary to see what is the effect of the Electricity Act 2003 and its impact on and regulation of tariffs. The Preamble to The Electricity Act 2003 states as follows:*

"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto".

25. *A look at the Statement of Objects and Reasons annexed to the bill, para 4 would indicate that the Act seeks to encourage private sector participation in generating, transmission and distribution of electricity and promoting competition and providing for newer concepts like power trading and open access. A copy of the statement of Objects and reasons is annexed herewith. Para 4(i) of the Objects and Reasons is particularly important and it reads as under:*

"Generation is being delicensed and captive generation is being freely permitted. Hydro projects would, however, need approval of the State Government and clearance from the Central Electricity Authority which would go into the issues of dam safety and optimal utilisation of water resources. (Emphasis supplied).

26. Reference is invited to this para to show that captive generation is being freely promoted. With this background, it is necessary to see what is the scope and impact of the Electricity Act 2003.

27. Section 12 provides that no person shall transmit electricity or distribute electricity or undertake trading in electricity unless he is authorised to do so by a licence issued u/s 14 or he is exempt under section 13.

28. It is quite clear that under section 12, a licence is not required for generation of electricity and this is made clear by section 7 which reads as follows:

"PART III- GENERATION OF ELECTRICITY

Section 7. (Generating company and requirement for setting up of generating station):

Any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of section 73.

Section 8(Hydro Electric generation)"

Notwithstanding anything contained in section 7, any generating company intending to set-up a hydro-generating station shall prepare and submit to the Authority for its concurrence, a scheme estimated to involve a capital expenditure exceeding such sum, as may be fixed by the Central Government, from time to time, by notification.

29. It is only hydro-electric electricity generation which is regulated u/s 8. In the case of the assessee, the generation is for captive consumption and therefore section 9 is material and it reads as under:

"Section 9. (Captive generation):

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company. Provided further [that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under subsection (2) of section 42.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission."

(Emphasis Supplied)

30. *Section 9 is a non-obstante clause and permits any person to construct, maintain or operate a Captive Generation plant and dedicated transmissions lines. A bare perusal of section 9(1) would indicate that there is no restriction whatsoever on a person in respect of Captive Generation plant. It is neither required to obtain a licence under section 7 or under section 12 as a generating company if it consumes power within itself. In other words, a Captive Generation Plant does not need to apply for licence under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of section 73.*

31. *The reason for excluding a Captive Generation plant from any of the technical standards for construction of electricity plants relating to connectivity with the grid, is because a person can, without a licence, construct, maintain and operate a Captive Generation plant and use dedicated transmission lines. His generating, transmitting and consuming power within his own jurisdiction neither needs access nor seeks to use the grid and therefore such a Captive Generation Plant is not cabined and cribbed by any regulatory mechanism under the Electricity Act 2003.*

32. *If however, the Captive Generation Plant seeks to supply electricity to any outsider through the grid, the proviso requires that the supply of electricity shall be regulated in the same manner as a generating station of a generating company. The word 'grid' is defined in section 2(32) of the Act as under:*

(32) "grid" means the high voltage backbone system of inter-connected transmission lines, sub-stations and generating plants;

33. *Thereafter the proviso makes it clear that it is only when the Captive Generation Plant sells to an outsider through the high voltage backbone system of interconnection transmission, that the full vigour and rigour of regulation under the Electricity Act, 2003 will be attracted. The 2nd proviso makes it clear that although no license is required when a Captive Generation plant supplies electricity to a consumer, the rules and regulations of the Act made u/s 42(2) would apply for the sale of electricity by a Captive Generation plant to a consumer other than himself.*

34. *This fact makes it clear that the provisions of section 42(2) apply only to a Captive Generation plant in respect of sales made or electricity consumed by a third party. This distinction is very significant in as much as there is no regulation of intra department consumption by any person generating electricity. In other words, for a person generating electricity and consuming it there is no obligation and no duty to either obtain a licence to set up a plant or transmit electricity which is self-consumed.*

35. *The Calcutta High Court in page 11 has held "the rate at which electricity was purchased from Andhra State Electricity Board by the paper unit of the assessee can by no means be the market rate at which the power plant of the assessee could have sold its production in the open market. In the open market the buyer would obviously be a distribution company or a company engaged in generation and distribution. Therefore, the rate which is sold to any such company can only be the market rate contemplated by the section". In other words, according to the Calcutta High Court, the regulated selling price by a third party*

to the assessee cannot form the selling price by a Captive Generation plant. Whilst this is the absolutely correct and true, it is wholly irrelevant in context of Electricity Act, 2003. Inasmuch as under the Electricity Act 2003, when the Captive Generation plant notionally sells electricity to itself, there is no regulation in respect of market price. In this connection, the decision of Supreme Court in the case of *ThiruArooran Sugars Ltd. v. CIT (1997) 227 ITR 432* is material. In that case, the assessee company was a manufacturer of sugar which purchased sugarcane from the market for crushing. It also had its own cane fields where it cultivated sugarcane, which was entirely consumed by its factory. Since the profit made by the assessee from the sale of sugar arose out of agricultural activities as well as manufacturing activities, the income earned by the assessee was required to be divided into two parts. No tax was leviable on agricultural income, but the profit generated from non-agricultural activities was leviable to be taxed under the Act. Therefore the agricultural income had to be determined and for that market value of the sugarcane consumed in its factory had to be determined. The relevant rule 7 of the Income-tax Rules, 1962 read as follows:

"Income which is partially agricultural and partially from business - (1) In the case of income which is partially agricultural income as defined in section 2 and partially income chargeable to income-tax under the head 'profits and gains of business', in determining that part which is chargeable to income-tax the market value of any agricultural produce which has been raised by the assessee or received by him as rent-in-kind and which has been utilised as a raw material in such business or the sale receipts of which are included in the accounts of the business shall be deducted, and no further deduction shall be made in respect of any expenditure incurred by the assessee as a cultivator or receiver of rent-in-kind.

"(2) For the purpose of sub-rule (1) 'market value' shall be deemed to be

(a) where agricultural produce is ordinarily sold in the market in its raw state, or after application to it of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render it fit to be taken to market, the value calculated according to the average price at which it has been so sold during the relevant previous year;

(b) where agricultural produce is not ordinarily sold in the market in its raw state or after application to it of any process aforesaid, the aggregate of-

(i) the expenses of cultivation;

(ii) the land revenue or rent paid for the area in which it was grown; and

(iii) such amount as the Assessing Officer finds, having regard to all the circumstances in each case, to represent a reasonable profit. "

36. The revenue argued that Rule 7(2)(a) ought to be followed and according to the assessee, Rule 7(2)(b) was the correct rule to be followed. The Supreme Court rejected the argument of the assessee that Rule 7(2)(b) ought to be followed. It held at page 438 as follows:

"We are unable to uphold this argument. 'Market' in the context of rule 7 does not mean an open market where buyers and sellers get together

for the purpose of purchase and sale of goods. The assessee-company regularly, year after year, in the ordinary course of business bought sugarcane from registered and unregistered ryots. Whether the purchase was at a price controlled by the Sugarcane Control Order or not is quite immaterial. There was a price at which sugarcane could ordinarily be purchased by the assessee for the purpose of its own business. The price paid by the assessee was the market price. It is by now well-settled that market does not have to be one open place of business where buyer and seller congregate (Emphasis Supplied).

37. According to the Supreme Court, it is not necessary that there must be an actual market where buyers and consumers congregate to purchase and sell Goods. Where there is no such open market, an estimate of the market price will have to be done on an estimated hypothetical basis. It stated at page 440, para (f) of 227 ITR 432.

The principle that value of a property will be the price which it will fetch if sold in the open market is a well-known method of valuation which has been adopted in a large number of statutes in England and also in India. It is well-settled that existence of an open market is not a pre-condition for application of this principle. There may or may not be an actual market where buyers and sellers congregate to purchase and sell goods. Where there is no such open market, an estimate of the market price will have to be done on a hypothetical basis.

38. The Supreme Court also referred to its decision in the case of Ahmed G. H Ariff v. CWT [1970] 761TR 471 (SC), in the following words:

In the case of Ahmed G.H. Ariff v. CWT [1970] 761 ITR 471, explaining the phrase 'if sold in the open market' in section 7(1) of the Wealth-tax Act, it was observed by Grover, J., speaking for the Court that the phrase did not contemplate actual sale or the actual state of the market, but only enjoined that it should be assumed that there was an open market and the property could be sold in such a market and, on that basis, the value had to be found out. It was a hypothetical case which was contemplated and the tax officer must assume that there was an open market in which the asset could be sold. In view of the aforesaid, it is very difficult to uphold the contention of Mr. Nariman that in order to find out the market price there has to be an actual market where there will be 'a concourse of buyers and sellers'.

39. Having discussed these principles, it laid down the following criteria for determining the price at which the sugar cane was said to have been sold to the manufacturing unit of the assessee. It noted that the assessee company actually bought sugarcane from a large number of growers, year after year in the ordinary course of business. The price at which it buys the sugarcane must be the market price and if the price was controlled, the controlled price will be taken as the market price, because it is at this price that a willing buyer and a willing seller are expected to transact business. Applying, this principle of the facts of the assessee's case, there is only a single buyer for the electricity generated by the Captive Generation Power which is the assessee himself. Just as in ThiruArooran Sugars Ltd. v. CIT, the sugarcane produced by ThiruArooran Sugars categorically confirms that there was only a single buyer viz. manufacturing unit of ThiruArooran Sugars, the Supreme Court there stated that because manufacturing unit also bought from other growers, the price at which they obtain sugar cane should be adopted as market price. Applying this principle to the facts of the assessee's case, the assessee also buys electricity from other supplier viz Gujarat Electricity Board

(GEB). It is not relevant whether that price was controlled or not. If the price at which the GEB supplied as controlled then that would be the market price vis-a-vis the assessee. Accordingly, the price charged by GEB should be adopted as market price. Therefore, the decision of Supreme Court in Thriurooran Sugars completely covers the situation of the assessee.

40. The Supreme Court at page 441 has stated as under:

"These are the principles universally applied to find out the price at which the goods are ordinarily sold in the open market. For determination of market value, there is no pre-requisite that an open market where buyers and sellers congregate to buy and sell goods must exist. In the instant case, the assessee-company actually bought sugarcane from a large number of growers year after year in the ordinary course of business. The price at which it buys sugarcane must/be taken to be the market price. If the price is controlled by Sugarcane Control Order, the controlled price will be taken as the market price because it is at this price that a willing buyer and a willing seller are expected to transact business. As Lord Denning pointed out, it does not make any difference to this position that the assessee was the only buyer in the region where its factory was located".

41. The Calcutta High Court has however stated at page 11:

"But in the case before us the electricity generated by the assessee could not be sold to anyone other than a distribution company or a company which is engaged both in generation and distribution."

42. In our case, the entire consumption is by the assessee itself and the assessee is not obliged to sell to only a distribution company or a company which is engaged in generation and distribution. This is made clear from the 2nd proviso to section 9(1) of the Electricity Act, 2003 which reads as follows:

"Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42. "

43. Therefore, the decision of the Calcutta High Court is distinguishable as in that case in the period before the introduction of the Electricity Act, 2003 a captive generating plant would sell electricity only to a generating or distribution and generating company whereas in the case of the assessee after the enactment of the Electricity Act, 2003 the Assessee would sell to "any licensee" and is not restricted to selling electricity only to a distribution company or a generating and distribution company.

44. It was in these circumstances and for these reasons that the Calcutta High Court concluded that the purchase price would be different from the selling price of electricity on account of wheeling and distribution of losses. The Calcutta High Court concluded at page 12 as under:

"The rate at which electricity can be supplied to a consumer by the distribution licensee and the rate at which the generating companies can sell electricity to the distribution licensee are governed respectively by Sections 61 and 62 of the Electricity Act 2003. There is tariff regulatory commission which fixes both the rates for sale and purchase of electricity

by the distribution licensee. There are provisions in Section 62 so that the generating companies can recover expected revenue on the basis of the tariff fixed by the commission. There are similarly provisions in Section 61 so that the distribution licensee can derive reasonable return. There is thus an in-built mechanism to ensure permissible profit both to the generating companies and the distribution licensees "

45. *This conclusion is indisputable as applicable to licenced generating companies selling in the market but has no application to a 'captive generating plant' as much as there is no tariff fixed by Tariff Regulation Commission for self consumption. Therefore, the open market for sale of electricity by a licenced generating company and the open market which must be assumed for consumption of electricity by the generating producer itself are two different markets and the market price for self consumption and the market price for sale by the licenced generating companies to outsiders are two different prices. The Electricity Act, 2003 contemplates determination of market price only in respect of licenced generating companies willing to distribute or transmit power to a distribution licensees or to a consumer and it is only those generating companies which are regulated under section 42(2). The self consumption of electricity by a Captive Power Plant is not regulated under Electricity Act, 2003. In the decision of Supreme Court InThiruArooran Sugars also, it is quite clear that self consumption of sugarcane was not regulated and given that circumstance, the Supreme Court held that because the manufacturing unit was purchasing sugar from other growers that price ought to be adopted as market price. Similarly in the case of the assessee, in respect of the electricity produced by Captive Power Plant for consumption, there is no regulation for pricing the price charged by GEB ought to be adopted as market price. The market is therefore hypothetical open market exactly as was contemplated in Rule 7(2)(a) referred to in ThriuArooran Sugars.*

46. *We further observe that the Calcutta High Court had referred to section 62 of the Electricity Act 2003, whereby generating companies can recover expected revenue on the basis of tariff fixed by the commission. The provisions of section 62 of the Electricity Act 2003 reads as follows:*

62 (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for –

(a) Supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) Transmission of electricity;

(c) Wheeling of electricity;

(d) Retail sale of electricity

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate commission may, for

promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

47. *On perusal of the above, it can be observed that section 62 of the Electricity Act 2003 authorizes commission to determine tariff for*

(1) Generating company supplying to distribution licensee,

(2) Transmission of Electricity

(3) Wheeling of electricity

(4) Retail sales of electricity.

48. *Thus captive power plant and its users are not covered under the four categories mentioned in section 62(1) above. Hence for supply of power by a captive power plant to the captive users or to open access consumers, it is not required to get the tariff approved by the commission as stated in section 86(1)(a) of the Electricity Act, 2003.*

49. *Therefore, the decision of the Calcutta High Court cannot be applied to the acts of the assessee in as much as it was delivered in respect of A Y 2002-03 for which the Electricity Act 2003 did not apply and also for the reason that the Honourable Court has not considered the provisions of sections 8, 9, 42 and 2(g) of the Electricity Act, 2003. Further the provisions of section 62 of the Electricity Act, 2003 referred to by the Honourable Court are not applicable to the fact of the assessee's case.*

50. *The Calcutta High Court has dissented from the decision of three different High Court as follows:*

1. The decision of Chattisgarh High Court Bilaspur Bench in the case of ACIT v. Godavari Power & Ispat Ltd. - 223 Taxman 234.

2. CIT v. Kanoria Chemicals and Industries Ltd 35 taxmann.com (Cal).

3. CIT v. Graphite India Ltd ITA No 733 of 2008 (Cal).

4. Madras High Court decision referred to in page 12 (Citation not available).

51. *Under these circumstances following two principles involved here.*

1. Where there is a conflict of views between High Court, Tribunal may choose to follow what in its opinion is the correct view.

2. When there is a conflict of opinion between two or more High courts, opinion of jurisdictional High Court, which is in favour of the assessee ought to be followed.

52. *If neither of the above two principles are followed, there is a decision of assessee in its own case for the earlier year on identical facts and that ought to be followed.*

53. *Further there are several decision of Tribunal which have taken the same view, In cases with similar facts viz:-.*

1. *ACIT, Raipur v. Godavari Power & Ispat Ltd - 133 ITD 502 (Dilaspur ITAT)*
2. *Eveready Spinning Mills (P) Ltd v. ACIT, Circle-1, Tirupur - 17 Taxmann 254 (AY 2007-08) Chennai ITAT.*
3. *Assam Carbon Products Ltd v. ACIT - 100 TT J 224 (IT AT Kolkatta)*
4. *West Coast Paper Mills Ltd V. JCIT -100 TTJ 833 (Mum) Mumbai ITAT*
5. *Addl. CIT v. Jindal Steel & Power Ltd - 16 SOT 509 (ITAT Delhi).*
6. *Shree Cement Ltd v. The Addl. CIT Jaipur-ITA NO.503/JP/2012 (Jaipur ITAT)*

54. *In any view of the matter, several decision of the Tribunal listed below have taken a view consistent with a view taken by Tribunal in assessee's own case for A Y 2006-07. In the circumstances, except in the case of Calcutta High Court in M/s. ITC Ltd, there are four judgements of other High Court in assessee's favour and six judgements of Tribunal in assessee favour and no contrary decision of Tribunal. In the circumstance, the appropriate course of action to follow would be the decision of Supreme Court in the case of ThiruAroovan Sugar Mills and the decisions of Calcutta High Court which are earlier in point of time and decision of Chattisgarh and Madras High Court and various benches of Tribunals and assessee's own case for the earlier year.*

55. *Furthermore the Supreme Court has endorsed the view that where there is a conflict between two High Courts the view in favour of the assessee must be adopted. There are several decision which have taken the same view, in cases with similar facts viz:-.*

1. *CIT v. Vegetable Products Ltd - 88 ITR 192 (SC)*
2. *Pradeep J Mehta v. CIT Ahmedabad - 169 Taxman 454 (SC)*
3. *CIT v. Naga Hills Tea Co. Ltd - 89 ITR 236 (SC)*

In view of the above discussion, the Calcutta High Court can have no application to the assessee's case.

56. *In view of the above, we respectfully follow the order of the Tribunal in assessee's own case and confirm the order of CIT(A)."*

62. It is observed that above decision was upheld by Hon'ble Bombay High court in 421 ITR 686 and observed as under:

"Question (c) pertains to the dispute between the department and the assessee regarding the rate at which the electricity generated by one unit of the assessee-company and provided to the another be valued. The assessee contended that such valuation should be at the rate at which the electricity distribution companies are allowed to supply electricity to the consumers. The revenue on the other hand argues that the appropriate rate should be the rate at which the electricity is purchased by the distribution companies from the electricity generating companies.

5. *This controversy arose in the background of the fact that the assessee had set up a captive power generating unit and claimed deduction under Section 80IA of*

the Income Tax Act, 1961 ("the Act" for short) in respect of the profits arising out of such activity. Obviously, therefore the attempt on the part of the assessee was to claim larger profit under the unit which was eligible for such deduction as against this, attempt of the revenue would be see that the ineligible unit shows greater profit.

6. The Tribunal in the impugned judgment extracted extensively from the order of CIT (Appeals) and independent reasons for confirming the same. In such order CIT (Appeals) had placed reliance on an earlier judgment of the Tribunal in case of Reliance Infrastructure Ltd. v. Addl. CIT [2011] 9 taxmann.com 186 (Mum. - Trib.). Learned counsel for the assessee had placed on record a copy of the judgment of the Tribunal in case of Reliance Infrastructure limited. In such judgment an identical issue came up for consideration. The Tribunal by detailed judgment had held and observed as under:—

"44. In the given facts and circumstances of the case, we are of the view that the profits of the business of generation of power worked out by the Assessee on the basis of the price that it paid to TPC for purchase of power continues to be the best basis even after the order of MERC and therefore the same has to be accepted as was done in the past and as approved by the ITAT in Assessee's case. We therefore dismiss ground No.4 of the revenue."

7. Counsel for the assessee pointed out that the judgment of the Tribunal in case of Reliance Infrastructure Ltd. (supra) was carried in appeal by the revenue before the High Court in Income Tax Appeal No.2180 of 2011, such appeal was dismissed making following observations:—

"6. As far as question (d), namely, the claim relating to purchase price from Tata Power Company is concerned and that was for the deduction under Section 80IA, the ITAT in paragraph 21 onwards has noted the factual findings and also referred to the order of the Maharashtra Electricity Regulatory Authority (for short "MERC"). Paragraph 36 set outs as to how the claim arose. The claim has been considered in the light of Section 80IA and particularly proviso and explanation thereto. The Tribunal eventually held that till the Assessment Year 2005-2006, the Revenue considered the rate at which the power was purchased by the Assessee from Tata Power Company as market value. There is nothing brought on record as to how the rate determined by the MERC is the true market value. The Assessee gave explanation that the rates determined by the MERC do not reflect the correct market rate. The finding is that the mode of computation and deduction under Section 80IA requires no deviation from the past. The findings of fact and to be found in paragraphs 42 to 50 also reflect that the very issue came up for consideration for the Assessment Year 2003-2004. For the reasons assigned by the ITAT and finding that the attempt is to seek reappraisal and reappraisal of the factual data that we come to a conclusion that even question (d) as framed is not a substantial question of law."

8. Thus, the issue at hand had been examined by this Court on earlier occasion and the view of the Tribunal under similar circumstances was approved.

9. Additionally, we also notice that similar issue came up for consideration before Chhattisgarh High Court in case of CIT v. Godawari Power &Ispat Ltd. [2014] 42 taxmann.com 551/223 Taxman 234, in which the Court held and observed as under:

"31. The market value of the power supplied to the Steel-Division should be computed considering the rate of power to a consumer in the open market and it should not be compared with the rate of power when it is sold to a supplier as this is not the rate for which a consumer or the Steel-Division could have purchased power in the open market. The rate of power to a supplier is not the market rate to a consumer in the open market.

32. In our opinion, the AO committed an illegality in computing the market value by taking into account the rate charged to a supplier: it should have been compared with the market value of power supplied to a consumer."

10. Gujarat High Court in case of Pr. CIT v. Gujarat Alkalies & Chemicals Ltd. [2017] 395 ITR 247/88 taxmann.com 722 also had occasion to examine such an issue. It referred to earlier order in case of Asstt. CIT v. Pragati Glass Works (P.) Ltd. [Tax Appeal No. 1646 of 2010, dated 30-1-2012] in which following observations were made:—

"7. To our mind, Tribunal has committed no error. Assessing Officer and CIT (Appeals) while adopting Rs. 4.51 per unit as the value of electricity generated by eligible unit of assessee and supplied through its non eligible unit only worked out cost of such electricity generation. In fact CIT (Appeals) in terms recorded that Rs. 4.51 was computed as the reasonable value of the electricity generated by eligible unit of assessee. This amount included Rs. 4.17 per unit which was the cost of electricity generation and Rs. 0.34 per unit which was duty paid by the assessee to GEB for such power generation. Thus the sum of Rs. 4.51 per unit only represented the cost of electricity generation to the assessee. In Section 80IA(8) of the Act what is required to be ascertained is the market value of the goods transferred by the eligible business, when such transfer is by eligible business to another non eligible business of the same assessee and the consideration recorded in the accounts of the eligible business does not correspond to market value of such goods. Term "Market Value" is further explained in explanation to said subsection to mean in relation to any goods or services, price that such goods or services will ordinarily fetch in the open market. To our mind sum of Rs. 4.51 per unit of electricity only represented cost of electricity generation to the assessee and not the market value thereof. It is not in dispute that the GEB charged Rs. 5 per unit for supplying electricity to other industries including non eligible unit of the assessee itself. Tribunal therefore, while adopting the said base figure and excluding excise duty therefrom to work out Rs. 4.90 as the market value of the electricity generated by the assessee, to our mind, committed no error. It can be easily seen that if the assessee were to supply such electricity or was allowed to do so in the open market, surely it would not fetch Rs. 4.51 per unit but Rs. 5 per unit as was being charged by GEB. Since the excise duty component thereof would not be retained by the assessee, Tribunal reduced the said figure by the nature of excise duty and came to the figure of Rs. 4.90 to ascertain the market value of electricity generated by the eligible unit and supplied to non eligible business of the assessee. No error was committed by the Tribunal. No question of law therefore, arises. Tax Appeal is dismissed."

11. Judgment of Calcutta High Court in case of CIT v. ITC Ltd. [2016] 236 Taxman 612/[2015] 64 taxmann.com 214 was also brought to our notice in which the said High Court has taken a different stand. However, since the issue has already been

examined by this Court earlier and in view of the decisions of the Chhattisgarh and Gujarat High Court, we see no reason to entertain this question."

63. Further, coordinate bench in the case of Reliance Industries Ltd v. ACIT has allowed the case for AY 2016-17 [2022] 143 taxmann.com 194 has allowed similar case by relying on coordinate bench of the Tribunal vide order dated 08/03/2022 in AY 2014-15 and 2015-16, and has held that the view of the authorities below that the definition of the market value shall change for the purpose of domestic transfer pricing regimen is not at all sustainable. Thus, coordinate bench of ITAT as well as Jurisdictional High court has considered all relevant aspects of 80IA and allowed the similar claim of assessee by holding that market value of electricity needs to be taken at rate which manufacturing unit of assessee is buying electricity at different state.

64. It is observed that similar issue has recently been decided by co-ordinate bench in a group concern of the Assessee, being, Ambuja Cements Limited vide ITA No. 3843/Mum/2019 and 1889/Mum/2018 for AY 2011-12 and AY 2012-13. While deciding the case, the Co-ordinate bench has relied on the decision of Mumbai ITAT in case of West Coast Paper Mills Ltd. vs JCIT (2006) 100 TTJ 833 (Mum) and decision of Bombay High Court in case of Reliance Industries Ltd (Supra). While deciding the matter the Co-ordinate bench has held that the issue as to which market value of the power is to be taken into account in the computation of power for deduction under section 80IA, i.e. the market value to the end consumer or market value in the power trading companies, is no longer res integra. The Co-ordinate bench has concluded that the price to the consumer, and not the intra-power companies trading price which must be taken into account.

65. It is relevant to refer to recent decision of Calcutta ITAT in the case of DCIT v. Dhunseri Ventures Ltd [2022] 144 taxmann.com 110 wherein it is held as under:

"II. Section 92C, read with section 92BA, of the Income-tax Act, 1961, read with rule 10B of the Income-tax Rules, 1962 - Transfer pricing - Computation of arm's length price (Method for determination of - CUP method) - Assessment year 2015-16 - Assessee had two Captive Power Plants (CPPs) or eligible units generating electricity which were consumed captively by other non-eligible units for carrying out manufacturing - Non-eligible units had also consumed power by purchasing

same from State Electricity Board (SEB) - Assessee had determined ALP of said specified domestic transactions at rate ranging from Rs. 7.66 per unit to Rs. 7.87 per unit which was Average Annual Landed Cost (AALC) at which non-eligible unit procured power from SEB - Thus, assessee followed internal CUP for benchmarking specified domestic transactions of transfer of power from SEB by taking non-eligible units as tested party in TP Study Report and, accordingly, ALP of power captively consumed had been benchmarked at ALC of power purchased by tested party from SEB - Assessee had also duly reported these transactions in audited report in Form 3CEB - However, TPO opined that average rate of Rs. 3.47 per unit calculated on basis of sale data of power by independent CPPs/IPPs as determined by various tariff orders would be ALP of domestic specified transactions and, accordingly, made an upward adjustment - It was noted that CPPs benchmarked transactions with non-eligible units at a rate at which power was supplied by SEB to non-eligible units and, therefore, was prevailing rate at which power had been supplied by SEB to other parties/factories located in same geographical areas/location - Further, both CPPs as well as SEB supplied/sold power during year and, thus, there was no timing difference as well, therefore, transactions of purchase of power by non-eligible units from SEB fulfil internal CUP parameters vis product comparability and similar market conditions and, thus, ALC paid by non-eligible units to SEB was held to represent internal comparable ALP - Whether, on facts, Commissioner (Appeals) had rightly held that ALC at which power was procured by non-eligible units from SEB was most appropriate ALP to benchmark said specified domestic transactions - Held, yes [Paras 9.5 and 9.6] [In favour of assessee] "

66. Though above decisions deal with benchmarking of domestic transfer price case, ratio would be directly applicable on present case. It is observed that Delhi ITAT in the case of Nectar Life science limited 138 taxmann.com 557 has held that where consideration paid for purchase of electricity from State Power Corporation represents the market rate on which any industry undertaking or consumer would be getting electricity, then such market rate should be applied as CUP for benchmarking transaction of sale of electricity.

67. It is observed that based upon ratio laid down by various courts as discussed herein above, Ld AR has submitted revised working of 80IA for year under consideration (in A.Y. 2011-12, assessee itself has considered such rates while claiming deduction hence no separate working was filed). This contention was also raised before Assessing Officer in assessment proceedings as discussed herein above hence such working cannot be held to be new working as observed by Ld DR when such working is based upon finding of Coordinate Bench referred supra. It is observed that while computing the output of the CPP, the Assessing Officer has excluded the transmission loss which was considered by assessee in their calculations but during

the course of hearing before bench, the Ld AR of the assessee conceded the ground on the exclusion of the units lost in transmission for the purpose of computing the turnover of CPP. It is observed that Ld AR has filed details regarding rate to be taken based upon decisions referred supra, such working was not available with the file of Assessing Officer hence on this limited purpose of verification for the year under consideration, the Assessing Officer is directed to verify the working as submitted by Ld AR before us and directed to consider the market value of power sold by CPP units at the Electricity rate at which CMM units at different location is purchasing electricity from SEBs as held/discussed by various courts including decision of coordinate bench in the case of Reliance Industries Limited and Ambuja Cement Limited referred supra. Accordingly, this ground of appeal is allowed for statistical purpose.

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

Ground No. 6: Disallowance u/s 80-IA on Rail System (Rs. 1,26,17,49,139/-:

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. 80IA of the Act in respect of Rail System,

b) The Appellant prays that the AO be directed to allow the deduction u/s. 80IA towards rail system to the Appellant as claimed.

69. 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 assessee's claim that the rail system meets all the requirements of Section 80IA(4) was also noted. The method adopted for computing the income was being excess of road freight and handling charges payable for transportation of goods by road to the nearest railhead, over the tariff payable for transportation of goods from railway siding to the rail head as per tariff notified by the Indian Railways. This claim, however, did not find favour with the assessee this time, even though the same stand of the assessee was accepted for three consecutive preceding assessment years. After elaborately discussing the things in detail, and extensively referring to investigations carried out in the case of Ultratech Cements Limited, the Assessing Officer concluded that (a) the so called rail system of the assessee company is simply a private rail siding, and is not any infrastructure of public utility; (b) the agreements entered into between the assessee company and the Indian Railways consisting of terms and conditions for private sidings, and could not be viewed as an agreement for building, operating and maintenance of a rail system; (c) the conditions stipulated under section 80IA have not been satisfied; (d) the actual operation of the rail system (i.e. running of the goods train) was being done by the Indian Railways and not the assessee company; (e) all the four cement plant sites were notified as independent booking stations and the freight was charged for the entire distance- including the distance from these private sidings to the railheads; (f) the notional profit computation is incorrect; and (g) the decisions of the Tribunal were not applicable as these critical facts were not placed before the Tribunal. The claim for deduction under section 80IA in respect of the rail system was rejected. Aggrieved, assessee carried the matter in appeal but without success. Learned CIT(A) reiterated the same arguments and upheld the stand of the Assessing Officer. The assessee is not satisfied and is in further appeal before us.

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

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

9. During the course of assessment AO disallowed assessee's claim of deduction u/s.80IA in respect of profit of rail systems. The assessee made this claim on the ground that it had earned profit by operating its rail systems at Hirni [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-Hirni 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 80IA as per the concession given by the aforesaid circular]. Finally, the AO held that assessee was not eligible to claim the deduction u/s 80IA 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 80IA 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 80IA 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 onwards. 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 Sulet 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 80IA 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. 80IA(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 r/o 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 80IA 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 CIT(A) has discussed the issue extensively and the findings of the Id. 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 CIT(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 80IA 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 80IA 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.)/349 ITR 309 (Bom.)
3.	CIT v. Paul Brothers. [1995] 79 Taxman 378/216 ITR 548 (Bom.)
4.	CIT v. Macbrouit 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 ITR 266 (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.	Asstt. 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 state of 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 80IA. 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 80-IA (4)(i). Section 80-IA (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 day of 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)	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 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 signalling systems, Wagons, Couplings, Rake formation for dispatch, hauling of Wagons through its own locomotives, etc.

	<p>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. "</p> <p>Thus, the rail system is being operated by the appellant and the cost of above operations is borne by appellant.</p>
(e)	<p>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.</p>

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:

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

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 Tippers, 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 day of 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:-

<i>Location</i>	<i>Authority with which Agreement is entered</i>	<i>Date of agreement</i>
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 Tiplers, 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 80IA 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 Tiplers,
◆	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 80IA 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. 80IA 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 80IC, 80ID and 80IE, the first year in which the production is started is taken as initial previous year whereas, after the amendment in provisions of section 80IA 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 assesseees. 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 80IA 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 80IA 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 Id. Pr. CIT u/s 263 of the Act. Hence, we cancel the orders passed by the Id. 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 Calcutta 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."

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

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

Ground No. 7: Disallowance of proportionate CENVAT credit availed for units eligible for deduction u/s 80IA (Rs. 14.07.93.544/- for CPPs & Rs. 2,25,63,693/- for Rail systems):

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.

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

72. 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 from the same. In any event, the fiction envisaged 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.”

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

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

"Ground No. 8: Disallowance of proportionate Head Office expenditure while computing deduction u/s 80IA/80IC:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified in apportioning a part of the indirect Head Office expenses aggregating to Rs. 308,00,38,931/- and adjusting such allocated amount of Rs. 17,50,23,268/- 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.

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. 312,93,72,524/ - (including Rs 4,93,33,594/- being R&D Expenses) and adjusting such allocated amount of Rs 25,24,48,200/- 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, 4,93,33/594/- 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)."

75. 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.”

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

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

"Ground No:9: Long Term Capital Gain (LTCG) on Sale of Air Pollution Control (APC)Business (Rs. 10.00,00.000/-):

a) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified rather grossly erred in confirming the action of AO in disregarding the LTCG offered by the Appellant arising on account of sale of Air Pollution Control business and considering the same as a slump sale within the meaning of Sec SOB of the Act.

b) The Appellant prays that the AO be directed to consider the LTCG offered by the Appellant in the return of income in respect of sale of APC.”

Without prejudice to Ground No, 9;

Ground No:10: Taxing Long Term Capital Gain on Sale of Air Pollution Control of APCTBusiness (Rs. 10.00,00.000/-) at 30% instead of 20%:

a) On the facts and in the circumstances of the case and in law, even if capital gain is required to be computed on transfer of Air Pollution Control systems, the same ought to have been charged to tax at the rate applicable for Long Term Capital gain i.e. @ 20% and not at the normal rate of tax i.e. 30%.

b) The Appellant prays that in case it is held that the proceeds from sale of APC are to be taxed, the AO be directed to compute the tax at 20%.”

78. The Assessing Officer has dealt with this issue at Para No.13.3 of his order wherein it has been observed that during the year the Assessee has entered into Business Transfer Agreement (BTA) to transfer its “Air Pollution Control Division” for a lumpsum consideration of ₹.10 crores however the Assessee has computed the capital gain on transfer of goodwill, non-compete covenant and other asset for a consideration of ₹.2.5 crores respectively. The other items transferred i.e. technical know how and design and drawings being internally generated are not liable to capital

gain tax since their cost of acquisition is indeterminable which is also supported by various judicial rulings. However, the Assessing Officer has observed that such transfer is covered within the ambit of slump sale and entire consideration of ₹.10 crores are charged to capital gain tax as per section 50B r.w.s 2(42C) of the Act.

79. In appeal Ld.CIT (A) has discussed the above issue at Para No 19.3 of his order and held as under:

"19.3 I have carefully perused the agreement submitted and the contention of the appellant. The AO disallowed long term capital gain on sale of Air Pollution Control business and treated the transaction as slump sale within the meaning of Sec 50B and hence the AO considered the entire amount of Rs. 10 crores for computation of capital gains tax. I agree with the AO. Therefore, the ground of appeal no. 15 is dismissed."

80. Considered the rival submissions and material placed on record. It is observed that assessee has divested its Air Pollution Control business for total consideration of ₹.10 crores to GEA Process Engineering (India) Private Limited. While filing return of income, the assessee has shown income on the basis of such sale treating the same as item-wise sale except for technical knowhow and design and drawings. The assessee has considered value assigned to technical knowhow and design and drawings as capital receipt relying on decision of Hon'ble Supreme Court in the case of B.C. Shrinivas Shetty 128 ITR 249. Thus, assessee has offered capital gain of ₹.2.5 crore in return of income.

81. While passing the assessment order, Assessing Officer has referred to Business Transfer Agreement (BTA) and observed that the Assessee company was having a specified division known as Air Pollution Control Division working over the issue of measures of controlling the Air Pollution and for this division qualified teams of technical experts were employed who were constantly working and developing measures for improving and efficient ways to tackle the problem of pollution. The Assessing Officer treated sale and transfer of the Air Pollution Control business on slump sale basis since it also included the transfer of technical manpower and other persons. Considering such fact, Assessing Officer has referred to provisions of Section

50B of the Act and observed that as per BTA, sale was slump sale within the meaning of Section 2(42C) of the Act. While passing the assessment order, Assessing Officer has added the whole consideration of ₹.10 crores to the total income of the Assessee. The addition made by Assessing Officer was upheld by CIT(A) for reasons stated supra.

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

83. On perusal of relevant facts on records, it is relevant to refer to Section 50B of the Act which is reproduced as under:-

"50B. Special provision for computation of capital gains in case of slump sale-

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

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

(2) In relation to capital assets being an undertaking or division transferred by way of such sale, the "net worth" of the undertaking or the division, as the case may be, shall be deemed to be the cost of acquisition and the cost of improvement for

the purposes of sections 48 and 49 and no regard shall be given to the provisions contained in the second proviso to section 48.

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

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

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

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

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

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

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

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

85. The provisions of section 50B are in consonance with the two decisions of the Hon'ble Supreme Court in the cases of CIT v. Artex Mfg. Co. [1997] 227 ITR 260/93 Taxman 357 and CIT v. Electric Control Gear Mfg. Co. [1997] 227 ITR 278/93 Taxman

384. In both these cases, one of the issues for consideration before the Supreme Court was whether the surplus received by the assessee on sale of the entire business as a going concern was taxable under section 41(2). In the first case, the Supreme Court held that since the price attributable to plant and machinery and dead stock which were transferred had been disclosed by the assessee during the course of assessment proceedings before the ITO, section 41(2) was applicable, but under this section the liability was limited to the amount of surplus to the extent of difference between the written down value and the actual cost. The Supreme Court further held that if the amount of surplus exceeded the difference between the written down value and the actual cost, then the surplus amount to the extent of such excess will have to be treated as capital gains for the purpose of taxation. In the second case, in the agreement for sale of the entire business as a going concern, there was nothing to indicate the price attributable to assets like machinery, plant or building out of the sale consideration amount. Therefore, the Supreme Court held that provisions of section 41(2) were not applicable. It is for this reason that in the definition of 'slump sale' in the proposed new clause (42C), it has been provided that the sale should be for a lump sum consideration without values being assigned to individual assets and liabilities.

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

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

Section 45, read with section 41(2), of the Income-tax Act, 1961 - Capital gains - Chargeable as - Assessment year 1967-68 - Whether, where business is sold as a going concern valuing plant and machinery, etc., surplus arising over and above difference between written down value and actual cost has to be taxed under section 45 - Held, yes"

87. The Hon'ble Supreme court at Para No 12 of its order has observed that "Shri Ganesh, the learned counsel appearing for the assessee, has submitted that in the present case the value of the plant, machinery and dead-stock is not mentioned in the agreement and the agreement does not indicate the value attributable to the said items. It is no doubt true that in the agreement there is no reference to the value of the plant, machinery and dead-stock. But on the basis of the information that was furnished by the assessee before the ITO it became evident that the amount of ₹.11,50,400 had been arrived at by taking into consideration the value of the plant, machinery and dead-stock as assessed by the valuer at ₹.15,87,296. This is not a case in which it cannot be said that the price attributed to the items transferred is not indicated and, hence, section 41(2) cannot be applied. We are, therefore, unable to agree with the view of the High Court that section 41(2) is not applicable. Question No. 2 referred to the High Court is, therefore, answered in the affirmative, i.e., in favour of the revenue and against the assessee."

88. With this back ground and considering provisions of Section 50B and Section 2(42C) as discussed herein above, it is observed that lower authorities have treated sale of refractory business as "slump sale" based upon BTA agreement executed with purchaser wherein total sale consideration is mentioned at Rs 10 crore in lieu of transfer of business of refractories undertaking. It is undisputed fact that in the board note, it is clearly mentioned that transaction would be item wise sale. It is relevant to note that transfer of business for a lumpsum consideration including transfer of manpower is not material in present facts of the case but what is material is that assessee has assigned the value to each assets/liabilities of undertaking which is sold and such value is based upon valuation report already on record. Even Hon'ble Supreme court in the case of *CIT v. Artex Mfg. Co(supra)* has observed that *even though agreement does not indicate the value attributable to the said items, it does not mean that sale of undertaking was on "Slump Sale basis"*

89. In the present case, assessee has valued each assets separately in agreement itself and same was already on record of Assessing Officer hence the transaction would

be item wise sale and such facts cannot be ignored. Hon'ble Madras High court in the case of CIT v. Shiva Distilleries Ltd [2020] 116 taxmann.com 929 has held that "*Where transfer price of undertaking was based on individual assets and liabilities, said sale would not qualify as 'Slump Sale' as per section 2(42C)*". In the case of Sanmar Speciality Chemicals Limited [2020] 118 taxmann.com 78, similar view is rendered by Hon'ble Madras High court.

90. In the definitions of "liabilities" as per BTA agreement, it has been specifically stated that few liabilities specifically mentioned in the agreement is excluded. Thus, on holistic consideration of entire agreement, all the assets and liabilities of undertaking is not transferred entirely to purchaser which also make present sale transaction out of ambit of provisions of Section 50B of the Act. Hon'ble Kolkata ITAT in the case of DCIT Vs Tongani Tea Co. Ltd [2015] 63 taxmann.com 149 [2015] 63 taxmann.com 149 has observed that "*the assessee had listed out every item of movable property transferred to the buyer and value had been assigned to those movable assets. The assessee had not transferred the estate with all the assets and liabilities. All the financial assets available to the assessee up to the date of the transaction were not transferred as per the agreement but had been retained by the assessee. The assessee had assumed all the liabilities including the statutory liabilities till the date of transfer. Therefore, it could not be said that the transfer was a slump sale only for the reason that the tea estate was transferred to the buyer as a 'going concern'*". It is observed that the revenue carried the matter by way of an appeal before Hon'ble Calcutta High Court in ITA No. 203 of 2016, which was dismissed by judgment and order dated 29th June, 2018. Similar view is given by Cochin ITAT Bench in the case of Harrisons Malayalam Ltd[2009] 32 SOT 497.

91. Considering the facts discussed herein above, it is found that Assessing Officer has wrongly invoked provisions of Section 50B of the Act for computing Income from Capital gain on sale of a divisions without transfer of other related business assets and liabilities of undertaking in the year under consideration. The assessee has correctly treated transaction of sale as item wise sale in return of income and computed Income

from capital gain as applicable to sale of Individual item of assets. Thus, addition made by Assessing Officer and sustained by Ld.CIT(A) cannot be upheld and related ground of appeal is allowed.

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

Ground No. 11: Denial of claim for deduction of Leave Encashment on provision basis (Rs. 17,56,03,359/-):

On the facts and in the circumstances of the case and in law, the Ld, CIT(A) was not justified and grossly erred in confirming the action of AO in not allowing the claim of leave encashment amounting to Rs. 17,56,03,359/-.

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

93. 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."

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

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

"Ground No. 12: Disallowance of claim of Education Cess (Rs.12,77,60309/-)

a) On the facts and circumstances of the case and in law, the Ld. CIT(A) 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. 12,77,60,509/- as allowable expenditure in computing the total income.

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

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

97. In the Ground No.13, Assessee has raised the following grievance:

"In the Ground No.13, Assessee has raised the following grievance:

Ground No. 13: Denial of claim for assets under construction written off as allowable expenditure (Rs. 29,15,02,666/-)

a) *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified rather grossly erred in confirming the action of AO in disallowing loss arising on write off of under construction assets amounting to Rs. 29,15,02,666/- in computing total income.*

b) *The Appellant prays that the said disallowance be deleted.*

98. The Assessing Officer has discussed this issue at Para No 28 of assessment order. The Assessing Officer observed that Assessee company has written off ₹.29,15,02,666/- mainly on coal washery and phosphor Gypsum Plant at Bargarh and Kymore unit. The Assessing Officer observed that nature of expenditure incurred by Assessee clearly shows that such expenditure is capital expenditure. The Assessing Officer has rejected the decision relied upon by Assessee on the ground that if expenses on construction of building or installation of machine is incurred by Assessee either for the purpose of setting up a new business or expansion of same business and later on realised that such assets are not viable to be used for the business purpose, expenditure written off cannot be allowed as deduction u/s.37 of the Act nor qualifies for any relief of depreciation. On this ground Assessing Officer had made disallowance of expenditure written off in Books of Accounts and claimed as revenue expenditure.

99. In appeal Ld.CIT (A) has discussed the above issue at Para No 22.3 of his order and held as under:

"22.3 I have considered the rival contentions. The appellant itself treated the expenditure as capital expenditure and asset as capital work in progress. Just because the appellant abandoned the project, the character of the expenditure and the asset cannot change. The appellant has relied on the decision of the Delhi High Court in the case of CIT vs. Priya Village Roadshows Ltd. (2010) 228 CTR

271 (Del), In that case, the abandoned project was in the same line of business. The appellant has not been able to do that the expenses were for setting up a new unit of the appellant's cement business. Therefore, I am unable to come to the conclusion that the aforementioned decision is applicable to the appellant's case. 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. I, therefore, dismiss the ground of appeal number 16."

100. The Assessee has filed an appeal against above order. During the course of appellate hearing, Ld. AR has argued that Capital Work in progress (CWIP) is in respect of projects forming part of existing business and when the project is abandon, such expenditure is allowable revenue expenditure. The Ld. AR has relied upon the ratio of following decisions:

- (i) *CIT v. Idea Cellular Ltd. [2016] 76 taxmann.com 77 (Bombay HC)*
- (ii) *Pr. CIT v. Rediff.com India Ltd. [2022] 441 ITR 195 (Bombay HC)*
- (iii) *CIT v. South India Corporation Ltd (423 ITR 158) (Kerala HC)*
- (iv) *Binani Cement Ltd v. CIT (380 ITR 116) (Calcutta HC)*
- (v) *Excel Industries Ltd. v. DCIT [(2004) 86 TTJ 840 (Mum)]*

101. On the other hand, Ld. DR has mainly relied upon finding of lower authorities. The Ld. DR has referred to paper book Page No. 743 wherein details of construction written off is submitted by Assessee which were found to be capital in nature. With regards to various decisions relied upon by Ld. AR, she submitted that primary reason for allowing expenditure in such cases were that expenditure were basically revenue in nature. Hence, she submitted that such expenditure should not be allowed.

102. Ld.DR with regard to Denial of claim for Assets under construction written off as allowable expenditure submitted as under: -

"The issue is discussed in para 18.1 to para 18 5 of the assessment order (Page 75 to 791 and para 22.1 to 22.3 (Page 63 to 65) of the CITA's order. The same may kindly be referred to. It is pertinent to mention that the facts of the case and the reasoning given by the AD as well as the CITIA) for making / upholding the disallowance was discussed in detail by the undersigned during the course of hearing

Briefly stated, during the year under consideration, the assessee wrote off an amount of Rs.29.14 crores which was included in capital work in progress and the

said amount was claimed as deduction in the computation of Total income bring loss incidental to the business of the company. In para 18.3 of the assessment order the AC) has given an categorical finding that on perusal of the nature of expenses incurred by the assessee company there is no doubt about the fact that the expenses claimed by the assessee are capital in nature Hence the same were disallowed u/s 37 of the Act.

The details of the assets under construction written off is available on Page 743 of the assessee's paper book, the copy of which is enclosed for ready reference as Enclosure-3. Perusal of the details substantiate that the expenses are capital in nature

However, the assessee placed reliance on the following decision of the various High Court

- i) CIT Idea Cellular Ltd. [2016] 76 taxmann.com 77 (Bombay HC
- ii) Pr. CIT Rediff.com India Ltd. (2022) 441 ITR 195 (Bombay High Court.
- iii) CIT South India Corporation Ltd. (423 ITR 158) (Kerala

Perusal of all the case laws relied upon by the assessee shows that for deciding the issues in favour of the assessee, the High Courts in all the three cases relied upon by the Ld. AR, followed the decision of the High Court of Jharkhand in the case of Tata Robins Fraser Ltd. (2012) 211 Taxman 257 which in turn relied on the decision of Indo Rana Synthetics (D Ltd. v. CTT [2009] 185 Taxman 277 (Delhi).

Attention of the Hon'ble Bench was also drawn to the facts of the case decided by the Delhi High Court in Indo Rama Synthetics (1) Ltd. v. CIT (2009) 185 Taxa 277 (Delhi), wherein the expenses written off were in the nature of salary, wages, repairs, maintenance, design and engineering fee and other expenses of administrative nature and the Court held that undoubtedly, in normal course, these expenses would be treated as revenue expenditure.

Further, it was also brought to the notice of the Hon'ble Members that the nature of expenses which were before the Hon'ble High Court of Jharkhand were as under:

- (i) Architectural fees in respect of the abandoned project ₹.2,57,335/-
- (ii) Old Capital work in progress abandoned Rs. 46,379/-
- (iii) Cost of damaged cabinets Rs 12.776/- (Ref. may be made to para 12 of the order)

Further the Court in para 15 of its order holds that

15. Substantially this is also a question of fact where an expenditure incurred by the assessee was of the revenue in nature or it was a capital expenditure. However, in view of the fact that question has been framed and we have narrated the facts of the case Including the break-up of the expenditure which includes the fee of Rs.2,57,335/- paid to the Architect and some expenses of Rs 46,379/- incurred on old capital work in progress which was abandoned and cost of damaged cabinets and that too, amounting to Rs 12,776/-, total expenditure including all three of the heads is Rs 3,16,490/-. It is not in dispute that the project could not be accomplished because of the reason that the place where it has to be undertaken had a poor quality of soil and all the construction already damaged.

The other articles bought by the assessee also got damaged and, therefore, in that fact situation, the Tribunal was fully justified in holding that such expenditure which may be pre-operational expenditure for a project can be treated to be a revenue expenditure actually and not a capital expenditure."

Thus, the primary reason for allowing the expenditure in the cases under reference was that the expenditure incurred were basically revenue in nature.

However, as already mentioned before, the details of the assets under construction written off, submitted by the assessee, are undoubtedly capital in nature and therefore cannot be allowed as deduction even if one looks at the facts of the decisions in the case of Tata Robins Fraser Ltd. (2012) 211 Taxman 257 and Indo Rama Synthetics (1) Ltd. p. CIT [2009] 185 Taxman 277 (Delhi), which have been followed by the various courts in deciding the issue in favour of the assesseees.

Reliance is once again placed on the following decisions of the Apex Court:

"As held in the case of KTMTM Abdul Kayoom v. CIT 1962 SUPP (1) SCR 518 21. each case depends on its own facts and the close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive".

The Hon'ble Apex Court in Megh Singh us State of Punjab (AIR 2003 BC 3184) has held that "Circumstantial flexibility, one additional or different fact ay make a world of difference between conclusion in two cases or between two accused in the same case. Each case depends on its own facts and a close similarity between one case and another is not enough because a single significant detail may alter the entire aspect."

Hence it is submitted that in view of the above discussion, the disallowance made by the AO and upheld by the CIT(A), on all the three issues under consideration should be sustained by the Hon'ble Bench as well."

103. Considered the rival submissions and material placed on record. It is observed that the Assessee has written off capital working progress in respect of projects abandoned during the year. On perusal of such expenditure written off as forming part of paper book, it is found that Assessee is having cement manufacturing unit at Bargarh and Kymore units. The Assessee has incurred various expenditure for construction of coal washery and Phosphor Gypsum Plant. It is found that both the lower authorities have denied such claim only after considering nomenclature of such expenditure whereas the fact is that both the construction is integral part of any cement industries. It is observed that Phosphor Gypsum can be used in the production of port land cement to control the hydration reaction rate of cement. Without gypsum

cement clinker can condense immediately by mixing with water and release the heat. These facts prove that such plants are integral part of cement manufacturing activity and cannot be considered as new business activity. Similarly, a coal washery can help the supply of clean washed coal for recommended quality to the cement plant so as to avoid disadvantages associated with inferior quality of coal. Each cement industries usually establish such plants which is integral part of cement manufacturing activity. Thus, any abandonment of these project cannot be held to be expenditure incurred for new business but it is only forming part of existing cement business. It is observed that Ld. DR has also argued that in the cases relied by Ld AR in which only revenue expenditure pertaining to abandoned project are allowed. In our considered view, capital work in progress consists of both revenue as well as capital expenditures. Whereas fact is that entire expenditure relating to abandoned project is allowable as revenue expenditure as held by various courts, few of them are discussed herein below.

104. The Hon'ble Bombay High court in the case of CIT v. Idea Cellular Ltd. [2016] 76 taxmann.com 77 has held as under:

"5. During the assessment proceedings, the assessing officer noted that the assessee claimed as a revenue expenditure a sum of Rs.3,94,75,619/- being the amount written off by the assessee in respect of expenses incurred on projects originally set up to put up cell sites, but later abandoned. These expenses were disallowed by the assessing officer as that was spent by the assessee on sites to bring into existence a new asset and new source of income and therefore, such expenditure was in the nature of capital expenditure.

6. Aggrieved by this order/disallowance, an appeal was preferred before the first appellate authority by the assessee. That also came to be dismissed and the Commissioner of Income Tax (Appeals) agreed with the assessing officer. Thereafter, the tribunal was approached and Mr. Malhotra would submit that in reversing the concurrent views, the tribunal committed an error of law, which is apparent on the face of the record. It is the tribunal's finding, which is perverse to say the least. It is the stand of the assessee, which was culled out from a letter addressed by the assessee itself. Once that letter and other record was analysed to arrive at the eventual conclusion, then, the tribunal should not have interfered with it. The interference by the tribunal raises substantial questions of law.

7. On the other hand, Mr. Mistri learned senior counsel appearing for the assessee supported the view of the tribunal. It is submitted by him that the expenditure in question was incurred for setting up/construction of cell towers, which was abandoned due to unavoidable circumstances. The site was not found suitable. Therefore, the expenditure incurred for the purpose of existing business of the assessee came to be written off. The assessee is a cell company and providing

cellular services even today. When it decides to erect new towers, it incurs expenses. Until such stage, as the site is declared unsuitable for the operation, these expenses have to be incurred and have been shown as such in the accounts. Mr. Mistri would submit that, therefore, the treatment in the account could not be faulted. He would submit that the tribunal has rightly come to the conclusion that the concurrent orders are not in accordance with law. He would submit that all that the tribunal has gone by and applied are the settled tests and they are also to be found in the case of *CIT v. Tata Robins Fraser Ltd.* [2012] 211 Taxman 257/26 taxmann.com 15 (Jharkhand).

8. Mr. Mistri would, therefore, submit that the appeal be dismissed.

9. We have carefully perused the memo of the appeal. We have also perused the order of the assessing officer and that of the first appellate authority. Mr. Malhotra has elaborately taken us through these orders to submit that the assessing officer found from the record itself and particularly from a document, namely, a letter or response from the assessee that the purpose of the expenditure cannot be said to be other than bringing up a capital asset into existence. The fact that later on the site was not chosen for hoisting the tower is immaterial. However, we find that the tribunal applied the correct test. The tribunal found that there is no dispute that the expenditure in question was incurred for the purpose of construction of a cellular tower, but the project was then abandoned due to the reason that the site was not suitable. The reasons assigned by the assessing officer and the first appellate authority are unsustainable, according to the tribunal for the simple reason that cellular towers were being erected for the purpose of assessee's own business of providing cellular services to the customers. The towers are meant for the business of providing cellular services. It is by utilising these towers that such services are provided. It is not an independent source of income. It is only to make the cellular services provided more efficient, convenient and profitable. When the towers are not exclusively meant for leasing out to third parties for earning the revenue, but used for transmission of telephone signals of assessee's own cellular services, then, it cannot be said that the towers, which are used for the assessee's own business, are new source of income. A cellular tower can be a new independent source of income, if it is erected exclusively for leasing out to the other operators. However, on facts, this was not the position and the tribunal, therefore, rightly concluded that in series of decisions, the High Courts and the Hon'ble Supreme Court of India has laid down the principle that if an expenditure is incurred for doing the business in a more convenient and profitable manner and has not resulted in bringing any new asset into existence, then, such expenditure is allowable business expenditure. In the present case, no new business was set up, but towers in addition to which were already set up were proposed at site, which project was later on abandoned.

10. We do not find that the tribunal has committed any perversity or applied incorrect principles to the given facts and circumstances. When the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that questions (a) and (b), as pressed, are substantial questions of law. The appeal is devoid of merits and it is dismissed. There would be no order as to costs.

105. The Hon'ble Calcutta High court in the case of *Binani Cement Ltd.* [2015] 60 taxmann.com 384, head note of which reads as under:

Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of (Expenditure on construction of new facility written off) - Assessment year 2002-03 - Assessee company, in earlier year, incurred certain expenditure for construction/acquisition of new facility - However, said construction/acquisition was abandoned at work-in-progress stage only - Whether since decision to abandon project was taken in relevant year for purpose of business, it could be concluded that writing off of said expenditure by assessee arose in relevant year only and, hence, would be an allowable expenditure - Held, yes [Para 11] [In favour of assessee]

106. The Hon'ble Kerala High court in the case of CIT v. South India Corporation Ltd. [2020] 121 taxmann.com 84 has held as under:

5. The learned counsel appearing for the respondent places reliance on the judgment of the Honourable Supreme Court Alembic Chemical Works Co. Ltd. v. CIT [1989] 43 Taxman 312/177 ITR 377 to support the contention that the assessee was engaged in related activities and had merely attempted an expansion of its activities, which resulted in the expenditure. The venture though not new, did not take off since the Government of India abandoned the project. It is also specifically argued that no question of law arises, since the issue of a related business has been dealt with by the Tribunal and held on facts in favour of the assessee.

6. We see from the order of the Tribunal that it had found that the assessee had been engaged in the activity of construction of building, berths etc. for Chennai Container Private Limited in the Madras Port Trust. The assessee was carrying on the business of clearing and forwarding, handling port services, cargo handling, steamer agents etc. and had also made constructions as herein above stated in the Madras Port Trust. The Tribunal found that the assessee had already entered the line of business of constructions in the Ports and hence, submission of a tender for the Vaizag Port was not in the nature of venturing into a new line of business.

7. In Alembic Chemical Works Co. Ltd. (supra) a pharmaceutical Company had obtained technical know-how from abroad for increasing yield of penicillin in its existing plant, the know-how being utilised for expansion of the existing business. The Supreme Court found that there cannot be a single criterion determinative as to whether a particular outlay is capital or revenue. It was held; the expenditure being 'once for all' is inconclusive to find it as spend for capital and the test of 'enduring benefit' may break down in many instances. " What is relevant is the purpose of the outlay and its intended object and effect, considered in a common-sense way having regard to the business realities"(sic-para 14). The Honourable Supreme Court held expense incurred for acquisition of technical know-how for achieving higher production of penicillin was a business expenditure and not in the nature of a capital expenditure especially when the assessee was engaged in the business of manufacture and sale of drugs.

We reiterate the finding of the Tribunal, which noted that the assessee was engaged in Port related activities and had also carried out constructions in Ports and the submission of tender for a BOT project for the Vaizag Port was a related activity. The project did not take off and as held by the Supreme Court on the facts in this case there was no enduring benefit obtained by the assessee. It broke down when the Government of India cancelled the tender. We do not find any question of law arising, since the facts have been gone into by the Tribunal and held in favour of the assessee. We, hence, find that the Revenue is liable to fail in

the appeal and we reject the appeal refusing to answer the question of law upholding the order of the Tribunal on facts. No order as to costs.

107. It is observed that in aforesaid decisions also CWIP has been claimed as revenue expenditure and amount written off is not pertaining to revenue expenditure but same pertains to amended project which includes capital expenditure. Considering the detailed discussion made hereinabove and relying upon the ratios laid down by various courts, write off of CWIP expenditure pertaining to above referred projects which are part of existing business activity hence such expenditure is allowable expenditure. The addition made by Assessing Officer is thus deleted and related ground of appeal is allowed.

108. In the Ground No.14, Assessee has raised the following grievance:

"Ground No. 14: Addition of Rs. 17,56,03,359/- in respect of leave encashment on provision basis while computing book profits u/s. 115JB of the Act:

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."

109. 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.

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

111. In the Ground No.15, Assessee has raised the following grievance:

"Ground No. 15: Non exclusion of Sales Tax Incentive (Rs. 14,67,23,982/-, Excise Duty Incentive (Rs. 2,03,93,06,448/- and Voluntary Emission Receipts (Rs. 49,16,847) in computing Book profit u/s 115JB:

a) *On the facts and in the circumstances of the case and in law, the 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 amounting to Rs. 14,67,23,982/- and Rs. 203,93,06,448/- respectively, as the same being capital in nature, while computing Book Profit u/s 115JB.*

b) *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was erred in not considering the appellant's claim of exclusion of Voluntary Remission Receipts availed/received during the year under consideration amounting to Rs. 49,16,847/- respectively, being capital in nature, in computing Book Profit u/s 115JB.*

c) *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."*

112. This issue is similar to Ground No. 13 of grounds of appeal raised by the assessee for the A.Y. 2008-09 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y. 2011-12. This issue is settled in favour of the Assessee and we order accordingly in favour of the Assessee in this year also.

113. In the Ground No.16, Assessee has raised the following grievance:

"Ground No. 16: Addition of Rs. 59,97,00,000/- in respect of provision for Interest on Income tax while computing book profits u/s. 115JB of the Act:

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 adding Rs. 59,97,00,000/- being provision for interest on income tax in computing Book Profit u/s 115JB.*

b) *The Appellant prays that the AO be directed to exclude provision for interest on income tax while computing book profits u/ s. 115JB."*

114. Similar issue was considered by us in the assessee Appeal in Ground No 11 in AY 2010-11 and held as under:

"108. 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 u/s.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."

115. Respectfully following the above said decision, we dismiss the ground raised by the Assessee.

116. In the Ground No.17, Assessee has raised the following grievance:

"Without prejudice to Ground No. 1;

Ground No. 17: Disallowance u/s 14A in respect of exempt income amounting to Rs.5,24,00,000/- while computing book profits u/s. 115JB of the Act:

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 adding Rs. 5,24,00,000/- 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."

117. Similar issue was considered by us in the Departmental 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.

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

119. In the result, appeal filed by assessee is partly allowed and appeal filed by the revenue is dismissed.

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

Sd/-
(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

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

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum