IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.2116/Mum./2017

(Assessment Year : 2012–13)

M/s. JSW Steel Ltd.
JSW Centre, Bandra Kurla Complex
Bandra (East), Mumbai 400 051
PAN – AAACJ4323N

……. Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–8(3), Mumbai

.....Respondent

Assessee by : Shri Rishabh Shah a/w
Shri Gaurav Kabra
Revenue by : Dr. Yogesh Kumar

Date of Hearing – 29/03/2023	Date of Order – 04/05/2023

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has filed by the assessee challenging the impugned final assessment order dated 30/01/2017, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 ("*the Act*"), pursuant to the directions dated 29/12/2016 issued by the learned Dispute Resolution Panel-1 (WZ), Mumbai ("*learned DRP*"), under section 144C(5) of the Act for the assessment year 2012-13.

2. The brief facts of the case are: The assessee is one of the largest integrated steel companies in India and is the flagship company of the JSW

group. The assessee has steel production facilities in the states of Karnataka, Tamil Nadu, and Maharashtra in India. For the year under consideration, the assessee filed its return of income on 29/11/2012 declaring a total income of Rs.Nil after claiming deduction under section 80IA of the Act amounting to Rs.508,78,30,027. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) as well as section 142(1) of the Act were issued and served on the assessee. Pursuant to the reference by the Assessing Officer ("*AO*") under section 92CA(1) of the Act, the Transfer Pricing Officer ("*TPO*") proposed a total transfer pricing adjustment of Rs.45,48,80,196 vide order dated 29/01/2016 passed under section 92CA(3) of the Act. In conformity, the AO passed the draft assessment order dated 31/03/2016 under section 143(3) r/w section 144C(1) of the Act after making various additions/disallowances. While deciding assessee's objections against the addition/disallowances made by the TPO/AO, the learned DRP vide its directions dated 29/12/2016 granted partial relief to the assessee. In conformity with the directions issued by the learned DRP, the AO passed the impugned final assessment on 30/01/2017 under section 143(3) r/w section 144C(13) of the Act. Being aggrieved, the assessee has raised the following grounds:-

> *"1) The Hon'ble DRP has erred in confirming the action of Learned Assessing Officer in making an upward adjustment of Rs. 22,02,29,438/- on account of non-charging of arm's length guarantee fee to its AES, without considering the facts and circumstances of the case.*
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> *2) The Hon'ble DRP has erred in confirming the action of Learned Assessing Officer in making an upward adjustment of Rs. 23,46,50,758/- on account of short receipt of interest on loans to JSW Steel Holdings (USA) Inc., without considering the facts and circumstances of the case.*

3) The Hon'ble DRP has erred in not appreciating the fact that the claim of deduction u/s 801A was allowed to the appellant in earlier years.

4) The Hon'ble DRP has erred in confirming the action of Learned Assessing Officer in making an disallowance of Rs. 49,76,10,892/- u/s. 80IA of the Income Tax Act, 1961, as claimed by the assessee on account of rail systems, without considering the facts and circumstances of the case.

5) The Hon'ble DRP has erred in confirming the action of Learned Assessing Officer in making an disallowance of Rs. 54, 12,53,524/- u/s. 80IA of the Income Tax Act, 1961, as claimed by the assessee on account of water supply systems, without considering the facts and circumstances of the case.

6) The Hon'ble DRP has erred in confirming the action of Learned Assessing Officer in making an disallowance of Rs. 13,37,00,000/- u/s. 80IA of the Income Tax Act, 1961, as claimed by the assessee on account of sale of CER, without considering the facts and circumstances of the case.

7) Hon'ble DRP has erred in confirming the action of Learned Assessing Officer in making an disallowance of Rs. 13,37,00,000/- u/s. 80IA of the Income Tax Act, 1961, without appreciating the fact that even if the said deduction was disallowed in the past, the receipts from sale of CERS is a capital receipt not chargeable to tax.

8) The Hon'ble DRP has erred in confirming the action of Learned Assessing Officer in making an disallowance of Rs. 38,03,24,470/- u/s. 14A r.w. Rule 8D of the Income Tax Act, 1961, without considering the facts and circumstances of the case.

9) The Hon'ble DRP has also erred in confirming the addition of disallowance u/s 14A r.w. Rule 8D of Rs. 38,26,00,000/- to the amount of book profits calculated u/s Section 115JB, without considering the fact & circumstances of the case.

10) The Hon'ble DRP has erred in confirming the action of Learned Assessing Officer in making an addition of Rs. 12,67,68,491/- u/s. 41(1) of the Income Tax Act, 1961, on account of write off of Project creditors, without considering the facts and circumstances of the case.

11) The appellant craves leave to add, amend, alter or delete the said ground of appeal."

3. The issue arising in ground No. 1, raised in assessee's appeal, is pertaining to transfer pricing adjustment on account of guarantee commission.

4. We have considered the submissions of both sides and perused the material available on record. During the year under consideration, the

assessee entered into the following international transactions with its associated enterprises:-

Nature of international transaction	*Most appropriate method*	*Arm's Length Analysis*
Export of MS Slabs	*CUP*	*The AEs' landed cost i.e. CIF from third parties was considered for comparability purposes with the landed cost of slabs exported by JSWSL*
Receipt of Interest on Term Loans	*CUP*	*As sources of data on third party financing transactions have been identified and used to benchmark with the prices /rates of international transactions of JSWSL for the said year under consideration.*
Receipt of interest on credit period granted for export sales	*CUP*	*Comparables/data available with JSWSL were used to benchmark with the prices /rates of international transactions of JSWSL for the said year under consideration*
Provision of Guarantee	*Other Method*	*Under the 'Other Method the 'Interest Saved approach' was adopted as a suitable method of determining the arm's length nature of the guarantee fee payable by the overseas entities to JSWSL*
Sale of Fixed Assets	*Other Method*	*Under the 'Other Method the written down value of the fixed assets was considered representative of the fair market value of such assets*
Reimbursement of expenses	*CUP*	*The third party cost incurred by JSWSL and reimbursed is a CUP.*

5. As per the TP Study Report, during the financial years 2007-08 and 2008-09, the assessee had given guarantees to third-party lenders in order to enable the overseas subsidiaries to borrow funds. Some of these guarantees are given by the assessee, so as to enable the wholly-owned subsidiaries to avail credit facilities from these lenders mainly for making acquisitions in US, Chile, and Africa. Further, a small proportion of the guarantees were provided on behalf of the acquired companies for their working capital requirements.

During the financial year 2008-09, JSW Netherlands (i.e. associated enterprise) had entered into a loan agreement with Bank of India (Singapore Branch) for USD 100 million. This loan was availed by JSW Netherlands for making investments in the subsidiary JSW Panama Holding Corporation. In the financial year 2009-10, JSW Netherlands entered into a loan agreement with Standard Chartered Bank London for an amount of USD 100 million at an interest rate of LIBOR +325 basis points in order to refinance its existing loan with Bank of India (Singapore Branch). The loan extended by Standard Chartered Bank London to JSW Netherlands was guaranteed by the assessee up to USD 115 million. Similarly, JWS Holding USA was issued 3 loans by various banks in the financial year 2010-11. Further, one of these loans was refinanced during the financial year 2011-12 and all these loans were guaranteed by the assessee.

6. The assessee selected '*Other Method*' as the most appropriate method for benchmarking this international transaction of guarantee fee payable by the associated enterprises to the assessee. Under the '*Other Method*' applied by the assessee, the '*Interest Saved Approach*' was adopted as a suitable method for determining the arm's length nature of the guarantee fee payable by the overseas entities to the assessee. As per the '*Interest Saved Approach*', the guarantee fee is quantified by analysing the relative benefit conferred by the guarantee upon the borrower through the reduction in the lending rate achieved as a result of the guarantee. That is, the benefit conferred to the party receiving the guarantee is measured by how much the borrower's third-party interest rate was reduced as a result of the guarantee. Thus, the

'*Interest Saved Approach*' compares the difference between the actual rates at which JSW Netherlands or JSW Holding USA borrows compared to the notional rate at which it would be able to borrow, in the absence of the guarantee.

7. Further, based on the estimated creditworthiness of the borrower entities, a search for uncontrolled comparable unguaranteed loan arrangements in the same market was undertaken, having the same terms and conditions and creditworthiness. In order to analyse the comparable arrangements, the assessee relied on the Reuters' Dealscan Database, which provides a wide range of information in relation to loan transactions. In respect of guarantee fee analysis for JSW Netherlands, the assessee selected the following comparable loan arrangements from the aforesaid database:-

Sr. No.	*Company name*	*Country*	*Date*	*Tranche Maturity (yrs)*	*Base Rate*	*Margin (bps)*
1.	*Belo Corp*	*USA*	*16–Nov–09*	*3.1*	*LIB*	*525*
2.	*Ingles Markets Inc.*	*USA*	*12–May–09*	*3.0*	*LIB*	*300*
3.	*Regency Energy Partners*	*USA*	*26–Feb–09*	*2.8*	*LIB*	*400*
4.	*Ameristar Casinos*	*USA*	*10–Nov–09*	*2.8*	*LIB*	*325*
Mean (in bps)						*387.50*
Median (in bps)						*362.50*
Interest Post Guarantees (in bps)						*325.00*
Interest Saved (in bps)						*62.50*

8. Accordingly, the assessee came to the conclusion that JSW Netherlands would have had to borrow funds at an interest rate of around LIBOR +387.5 basis points on a standalone basis. However, the assessee's guarantee has resulted in JSW Netherlands borrowing funds at LIBOR +325 basis points, which indicates that the assessee's guarantee has reduced the actual cost of

borrowing to JSW Netherlands by 62.50 basis points. Thus, it was concluded that the maximum guarantee fee that can be charged by the assessee to JSW Netherlands is 62.50 basis points, which shall be considered to be at arm's length.

9. Similarly, in respect of JSW Holding USA, the assessee selected the following comparable unguaranteed loan arrangements from the aforesaid database:-

Sr. No.	*Company name*	*Country*	*Date*	*Tranche Maturity (yrs)*	*Base Rate*	*Margin (bps)*
1.	*Ameristar Casinos*	*USA*	*10–Nov–09*	*2.8*	*LIB*	*325*
2.	*Belo Corp*	*USA*	*16–Nov–09*	*3.1*	*LIB*	*525*
3.	*Dupont Fabros Technology LP*	*USA*	*6–May–10*	*3.0*	*LIB*	*450*
4.	*Frontier Communications Corp*	*USA*	*23–Mar–10*	*3.5*	*LIB*	*325*
5.	*Ingles Markets Inc.*		*12–May–09*	*3.0*	*LIB*	*300*
6.	*Lazard Group LLC*		*29–Apr–10*	*3.0*	*LIB*	*300*
7.	*Starwood Hotels & Resorts Worldwide Inc.*		*20–Apr–10*	*3.5*	*LIB*	*275*
Mean (in bps)						*357.14*
Median (in bps)						*325.00*
Interest Post Guarantees (in bps)						*325.00*
Interest Saved (in bps)						*32.14*

10. Accordingly, the assessee came to the conclusion that JSW Holding USA would have had to borrow funds at an interest rate of around LIBOR +357.14 basis points on a standalone basis. However, the assessee's guarantee has resulted in JSW Holding USA borrowing funds at LIBOR +325 basis points, which indicates that the assessee's guarantee has reduced the actual cost of borrowing to JSW Holding USA by 32.14 basis points. Thus, it was concluded that the maximum guarantee fee that can be charged by the assessee to JSW

Holding USA is 32.14 basis points, which shall be considered to be at arm's length.

11. Further, JSW Holding USA and Royal Bank of Scotland NV entered into a loan agreement of USD 50 million, at an interest rate of LIBOR +375 basis points, which was not guaranteed by the assessee. Since this unguaranteed loan shared the same characteristics as the guaranteed loans, the assessee's interest savings are as under:-

Sr. No.	*Amount of Facility availed by JSW Netherlands (USD)*	*Rate of interest*	*Rate of Interest without guarantee*	*Interest saving*
1.	*18,000,000* *Bank of America, USA*	*LIBOR plus 260 basis points*	*LIBOR plus 375 basis points*	*125 bps*
2.	*40,000,000* *Royal Bank of Scotland, (Singapore)*	*LIBOR plus 260 basis points*	*LIBOR plus 375 basis points*	*125 bps*
3.	*40,000,000 (refinance / extension of the above loan)*	*LIBOR plus 260 basis points*	*LIBOR plus 375 basis points*	*25 bps*

12. The TPO, during the assessment, noticed that in Form 3CEB the assessee has reported guarantee fee from AE only amounting to Rs.8.45 crores, however, the assessee has not made any suo moto adjustment on the basis of ALP guarantee commission determined as per without prejudice working of '*Interest Saving Approach*'. Accordingly, the TPO vide order dated 29/01/2016 passed under section 92CA(3) of the Act held that by doing so the assessee has clearly acknowledged that the guarantee fee receipts are not at arm's length. The TPO proceeded to benchmark the corporate guarantee by considering the rates for financial guarantee charged by the banks considering CUP as the most appropriate method. Since the guarantee fee rates charged by banks to Indian companies vary from 1.10% to 3% depending upon various

factors, the TPO held that the range of corporate guarantee fees for foreign-based transactions should conservatively be in the range of 1.5% to 3.5% and estimated the corporate guarantee fee to be 2% in the present case. Accordingly, the TPO made an upward adjustment of Rs.22,02,29,438 on account of non-charging of arm's length guarantee fee to the associated enterprises. The learned DRP rejected the objections filed by the assessee and held that corporate guarantee is an international transaction under section 92B of the Act. Further, the learned DRP upheld the guarantee commission rate of 2% applied by the TPO without taking into consideration the benchmarking of corporate guarantee transactions using the '*Interest Saved Approach*' by the assessee.

13. During the hearing before us, the learned Authorised Representative ("*learned AR*"), at the outset, did not wish to press the argument regarding corporate guarantee being not in the nature of international transaction under section 92B of the Act, as raised before the lower authorities. The learned AR submitted that the rates for financial guarantee charged by the banks cannot be applied in the case of corporate guarantee since the factors applicable for issuance of both are different. The learned AR by placing reliance upon the decision of the Hon'ble jurisdictional High Court in CIT vs Everest Kanto Cylinders Ltd, [2015] 378 ITR 57 (Bom.) submitted that since the guarantee fee as per '*Interest Saving Approach*' is in the range of 0.25% to 1.25%, the same is to be accepted for benchmarking this transaction. The learned AR agreed that the computation of the guarantee fee as provided in the TP Study Report was offered to be added by the assessee, however, no guarantee fee

was charged as the assessee was of the opinion that corporate guarantee doesn't fall within the ambit of international transaction as per section 92B of the Act.

14. We find that in Everest Kanto Cylinders Ltd (supra), the Hon'ble jurisdictional High Court categorically held that no comparison can be made between guarantees issued by commercial banks against a corporate guarantee issued by a holding company for the benefit of its associated enterprise, a subsidiary company, for computing arm's length price of guarantee commission. The relevant findings of the Hon'ble Court, in this regard, are as under:-

> *"10. …….In the matter of guarantee commission, the adjustment made by the TPO were based on instances restricted to the commercial banks providing guarantees and did not contemplate the issue of a Corporate Guarantee. No doubt these are contracts of guarantee, however, when they are Commercial banks that issue bank guarantees which are treated as the blood of commerce being easily encashable in the event of default, and if the bank guarantee had to be obtained from Commercial Banks, the higher commission could have been justified. In the present case, it is assessee company that is issuing Corporate Guarantee to the effect that if the subsidiary AE does not repay loan availed of it from ICICI, then in such event, the assessee would make good the amount and repay the loan. The considerations which applied for issuance of a Corporate guarantee are distinct and separate from that of bank guarantee and accordingly we are of the view that commission charged cannot be called in question, in the manner TPO has done. In our view the comparison is not as between like transactions but the comparisons are between guarantees issued by the commercial banks as against a Corporate Guarantee issued by holding company for the benefit of its AE, a subsidiary company."*

15. Therefore, in view of the aforesaid findings of the Hon'ble jurisdictional High Court, we find no merits in the TPO's benchmarking of this international transaction by applying the guarantee fee rates charged by banks to Indian customers. We further find that neither the TPO nor the learned DRP has examined the benchmarking on the basis of '*Interest Saving Approach*' as

adopted by the assessee in its TP Study Report. The TPO rejected the TP Study Report merely on the basis that no suo moto adjustment, on without prejudice working, was made by the assessee. Therefore, there is no examination of the '*Other Method*' being the '*Interest Saving Approach*' applied by the assessee as the most appropriate method for benchmarking this international transaction of guarantee fee payable by the associated enterprises to the assessee. Thus, in view of the above, we deem it appropriate to remand this issue to the file of TPO for *de novo* benchmarking of the international transaction pertaining to corporate guarantee after considering the benchmarking analysis as done by the assessee in its TP Study Report. As a result, ground No. 1 raised in assessee's appeal is allowed for statistical purposes.

16. The issue arising in ground No. 2, raised in assessee's appeal, is pertaining to transfer pricing adjustment on account of short receipt of interest on loans to JSW Holdings USA.

17. The brief facts of the case pertaining to this issue are: During the year under consideration, the term loans granted by the assessee to JSW Holding USA during the financial years prior to 2011-12 were amended, whereby the date of repayment was extended and interest rates were revised. Since these loan transactions were entered into in the previous years and date prior to 01/04/2011, the same was reported in the benchmarking during those previous years. Further such transaction was also reported in the current year since it continues to have effect during the course of this year. For benchmarking this international transaction, the assessee searched for the comparable uncontrolled transactions on the Reuter's Dealscan Database by

taking into consideration search criteria, such as credit rating of the borrower; location/region of the borrower; currency denomination; selection of time period; tenure/maturity; and other qualitative filters.

18. The TPO vide order passed under section 92CA(3) of the Act benchmarked this transaction by using the data available on the Bloomberg database on the basis that the Bloomberg database rates have been preferred over PLR-based rates as the latter is for the loan given in Indian Currencies for domestic transactions while Bloomberg database is providing LIBOR interest rates on loans based on geography location of both the lender and borrower, etc. Accordingly, the TPO by applying the fixed rate of interest from the Bloomberg database using Swap Manager arrived at ALP rate of LIBOR +395 basis points, i.e. 6.6184%, for the financial year 2009-10 and the ALP rate of LIBOR +376 basis points, i.e. 6.9843%, for the financial year 2010-11. Consequently, the TPO made an upward adjustment of Rs. 23,46,50,758 on account of short receipt of interest on loans to JSW Holding USA. The learned DRP vide its directions rejected the objections filed by the assessee against the aforesaid transfer pricing adjustment proposed by the TPO and held that the assessee has not submitted any details regarding the creditworthiness of the borrower AE to find out internal/external CUP for similar borrowings by unrelated parties. The learned DRP further held that the assessee has not submitted credit ratings of the borrower before receipt of the loan after considering the financial results of the AEs in this regard. Being aggrieved, the assessee is in appeal before us.

19. During the hearing, learned AR, by referring to the submissions made before the learned DRP, submitted that while carrying out the search on Reuter's Dealscan Database the creditworthiness of the borrower and characteristics of the financing facility were considered. The learned AR further submitted that the TPO arrived at a fixed rate of interest as against the floating interest rate as agreed between the assessee and associated enterprises. The learned AR also submitted that the benchmarking by considering the floating interest rates as per data available on Reuter's Dealscan Database was upheld by the coordinate bench of the Tribunal in case of sister concern in respect of a similar international transaction.

20. On the other hand, the learned DR by vehemently relying upon the orders passed by the lower authorities submitted that in the case of sister concern PLR was considered for computation of interest, while, in this case, LIBOR has been considered by the TPO for computing the arm's length rate of interest.

21. We have considered the rival submissions and perused the material available on record. We find from the TPO's order, in the case of the sister concern of the assessee i.e. JSW Energy Ltd, for the assessment year 2012-13, that in respect of a similar international transaction of receipt of interest on loan given to associated enterprises, the taxpayer charged the interest at the LIBOR rate. Alternatively, the taxpayer also benchmarked the loan transaction on the basis of external CUP by considering the data available on Reuter's Dealscan Database and considered LIBOR +243.88 basis points and LIBOR +163.8 basis points as the arm's length interest rate. The TPO rejected

the benchmarking analysis of the taxpayer by considering interest at the LIBOR rate and instead applied the rates based on the Bloomberg database on the basis that PLI based rate is for loans given in Indian currencies for domestic transactions, while the Bloomberg database is providing LIBOR interest rates on loans based on geographical location, tenure of the loan, security given, interest charged or received, etc. The TPO also held that the floating rate of interest would not be applicable and instead applied fixed rate of interest ascertained from Bloomberg using Swap Manager. The coordinate bench of the Tribunal vide its order in case of sister concern JSW Energy Ltd vs DCIT, in ITA No. 2316/Mum./2017, vide order dated 07/11/2019, for the assessment year 2012-13 rejected the benchmarking analysis conducted by the TPO by adopting rates available on the Bloomberg database and converting the same to a fixed rate of interest. The coordinate bench accepted the alternative transfer pricing analysis made by the taxpayer by applying data available on Reuter's Dealscan Database and considering LIBOR +243.18 basis points and LIBOR +163.8 basis points. The relevant findings of the coordinate bench, in the aforesaid decision, are as under:-

> *"3.7.4 Upon careful consideration, we find that the facts of this year are pari-materia with the facts of AY 2011-12. The loan transactions arise out of same contractual terms and conditions. We also find force in the submissions that learned TPO proceeded on the basis of wrong parameters as pointed out by the assessee before lower authorities, completely disregarding the contractual terms. It is settled position that the contractual terms agreed to between the parties could not be rewritten or obliterated and reclassification or substitution of the transaction was not permitted. Nothing on record rebut the facts that as per the terms of the contract, the borrower had agreed to pay the lender interest at rates equal to 3 months' LIBOR prevailing on the date of each interest payment up to 31/03/2012. The said fact has also been noted by Ld. DRP at para 2.29 of its directions. The only allegation is that the original agreement dated 26/07/2010 was not produced before Ld. DRP. However, the same would not make much difference since we have already confirmed the application of floating rates of interest for AY 2011-12 Since in AY 2011-12, we*

have upheld the working made by assessee, taking the same view, we upheld the workings made by the assessee during proceedings before learned TPO. Accordingly, we direct lower authorities to accept alternative TP adjustment of Rs.491.07 Lacs as worked out by the assessee during proceedings before Ld. TPO based on LIBOR + spread of 243.88 bps / 163.8 bps for AYS 2011-12 & 2012-13 respectively. The interest already charged by the assessee would be adjusted from the same and the net amount shall be the amount of TP adjustment for the impugned AY. Ground No.1 stand partly allowed."

22. Therefore, the coordinate bench of the Tribunal, in the aforesaid decision, upheld the alternative transfer pricing analysis by applying the data available on Reuter's Dealscan Database, which is the methodology adopted by the assessee, in the present case, for benchmarking the international transaction of receipt of interest on loans to JSW Holdings USA. Thus, respectfully following the aforesaid decision of the coordinate bench of the Tribunal in the case of assessee's sister concern, we direct the TPO/AO to delete the transfer pricing adjustment in respect of international transaction pertaining to interest received on loans given to JSW Holdings USA. As a result, ground No. 2 raised in assessee's appeal is allowed.

23. The issue arising in grounds no. 3-5, raised in assessee's appeal, is pertaining to disallowance under section 80IA of the Act on account of "*Rail Systems*" and "*Water Supply Systems*".

24. Having considered the submissions of both sides and perused the material available on record, we find that the assessee has been claiming deduction under section 80IA on profits from "*Rail System*" from the assessment year 2008-09 onwards, year after year, as under:-

Sl. No.	A.Y.	Amount of deduction claimed u/s 80IA on "rail systems"

1.	2008–09	13.74
2.	2009–10	13.84
3.	2010–11	26.27
4.	2011–12	32.94
5.	2012–13	49.76
6.	2013–14	58.87
7.	2014–15	69.75
8.	2015–16	87.62
TOTAL:		352.79

25. Similarly, the assessee has claimed deduction on profits from "*Water Supply System*" since the assessment year 2008-09 onwards, year after year, as under:-

Sl. No.	A.Y.	Amount of deduction claimed u/s 80IA on "rail systems"
1.	2008–09	23.61
2.	2009–10	20.75
3.	2010–11	30.29
4.	2011–12	46.60
5.	2012–13	54.13
6.	2013–14	37.37
7.	2014–15	29.14
8.	2015–16	30.14
TOTAL:		272.03

26. We find that while dealing with a similar issue of claim of deduction under section 80IA of the Act on profits from "*Rail Systems*" and "*Water Supply Systems*", the coordinate bench of the Tribunal in assessee's own case in JSW Steel Ltd. vs PCIT, in ITAs no. 4062, 4063, 4064 and 4086/Mum./

2017, vide order dated 30/11/2017, for the assessment years 2008-09 to 2011-12, observed as under:-

> *"38. Learned Counsel for the assessee also took us through the agreement entered into by the assessee in respect of the Railway Systemoperated 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,Hublidivision 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.UltratechCements 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.*
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> *39. We further find that revenue's 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:*
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> > *"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?....."*
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> *40. Thus as regards the very claim for the deduction u/s. 80IA of the Act Per se, the ITAT order can be treated as final in favour of the assesseeas the Hon'ble High Court refused to admit the question raised by the Revenue on the very applicability of the provisions of section 80IA of the Act for the Rail System.Therefore, respectively following the said decision we holdthat the assessee entitled for the deduction u/s. 80IA of the Act in respect of the railway system.*
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> *41. Similarly, in the case of water supply system assessee entered into agreement dated 01.06.2006 with the Government of Karnataka for laying and operating water supply system from Tungbhadra dam located at Hospet to its factory located at Sandur Taluk, Bellary, Karnataka which is around 42 km this goes to show that apparently Government of Karnataka has allowed the assessee company to lay the water pipe line and draw water from Tungabhadra*

dam. Permission was granted by Secretary of Government of Karnataka of Water Resources Department vide order dated 21-23.07.2004. The question is whether this water supply project is an infrastructure project within the meaning of the provisions of section 80IA of the Act as far as issue of eligibility of assessee company regarding the deduction u/s. 80IA (4) of the Act as per Explanation 2 clause (c) deduction can be allowed in respect of "a water supply project" as an infrastructure facility. In the case of CIT v.ABG heavy industries limited the Hon'ble Bombay High Court held as under:

> *"The object of section 80-IA was to provide an impetus to the growth of infrastructure in the nation. A sound infrastructure is a sine qua non for economic development. Absence of infrastructure poses significant barriers to growth and development. A model which relied exclusively on the provision of basic infrastructure by the State was found to be deficient. Section 80-lA was an instrument of legislative policy, conceived with a view to provide an impetus to private sector participation in infrastructural projects. Consistent with the legislative object of encouraging private sector participation in the development of infrastructure, section 80-IA was enacted."*

42. As could be observed from the decision of the Hon'ble Bombay High Court Section 80-lA was an instrument of legislative policy, conceived with a view to provide an impetus to private sector participation in infrastructural projects. We also find from the letter dated 04.03.2014 submitted to the Assessing Officer it was clearly stated that this facility is being operated and maintained by the assessee company. Therefore, it can be said that the assessee is operating and maintaining the infrastructure facility in the form of water supply project. Therefore, applying the same principles as was held in the case of Railway system we hold that the Water Supply Project operated and maintained by the assessee is an infrastructural facility and is eligible for deduction u/s. 80IA of the Act.

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."

27. Thus, from the above, it is evident that the coordinate bench of the Tribunal while deciding the assessee's appeal challenging the initiation of revision proceedings under section 263 of the Act, also rendered findings on the merits of the issue and held that the assessee is entitled to deduction under section 80IA of the Act in respect of "*Rail Systems*" and "*Water Supply Systems*". Therefore, respectfully following the aforesaid decision of the coordinate bench of the Tribunal rendered in assessee's own case in preceding assessment years, we direct the AO to allow the deduction to the assessee

under section 80IA of the Act on profits from "*Rail Systems*" and "*Water Supply Systems*". As a result, grounds no.3-5 raised in assessee's appeal are allowed.

28. The issue arising in grounds no.6-7, raised in assessee's appeal, is pertaining to the addition on account of the sale of Certified Emission Reductions ("*CERs*").

29. Having considered the submissions of both parties and perused the material available on record, we find that during the year the assessee claimed a deduction of Rs.13.37 crores under section 80IA of the Act on income from the sale of CERs. Alternatively, the assessee claimed the same to be in the nature of capital receipt. During the assessment proceedings, the assessee placed reliance upon the decision of the coordinate bench of the Tribunal in case of sister concern, however, since the said decision has been challenged before the higher judicial authorities by the Revenue, no relief was granted to the assessee. We find that the coordinate bench of the Tribunal in JSW Energy Ltd vs ACIT, in ITA No. 463/Mum./2014, for the assessment year 2008-09, vide order dated 31/07/2015 while deciding the taxability of receipt on sale of CERs held the same to be in the nature of capital receipt and thus not chargeable to tax. Since the relief was granted to the taxpayer on the alternative plea, the claim of deduction under section 80IA of the Act was treated as academic by the coordinate bench of the Tribunal. The relevant findings of the coordinate bench, in the aforesaid decision, are as under:-

> *"7. We have carefully considered the rival submissions. Factually speaking, the Certified Emission Reductions (CERS) which under common parlance is known*

as Carbon Credits, is one of the outcomes of the Kyoto Protocol, which is an international treaty in force since February 2005, for reduction in the emission of Green House Gases(GHG). The trading in CERS or Carbon trading is a transaction which involves sale of Carbon Credits by an entity which has obtained such credits to another entity, which is not able to achieve the prescribed reduction in the emission of Green House Gases on its own. The issue before us relates to the income earned by the assessee on sale of CERS or Carbon Credits. In the return of income, assessee considered such income as revenue in nature, and further treated it as an income derived from the eligible business of generation of power and claimed exemption u/s 80IA of the Act. The Assessing Officer accepted that the impugned income was a business income; but according to him, said income was not an income "derived from" the eligible business of generation of power, and the claim of exemption u/s 801A of the Act was denied. Before the CIT(A), assessee not only assailed the denial of exemption u/s 80IA of the Act but raised an alternate plea to the effect that the receipts on account of sale of CERS or the Carbon Credits was a capital receipt not chargeable to tax. The CIT(A) held that the said receipts accrued to the assessee in the course of carrying on its business and, therefore, the Assessing Officer was correct in considering it as receipts of business.

8. Before the CIT(A), assessee had pressed into service the decision of Hyderabad Bench of the Tribunal in the case of. My Home Power Ltd. Vs. DCIT, vide ITA No. 1114/Hyd/2004 holding that sale of Carbon Credits was a capital receipt not chargeable to tax. Notably, the decision of Hyderabad Bench of the Tribunal in the case of My Home Power Ltd. (supra), came up before the Hon'ble Andhra Pradesh High Court, wherein the following questions of law were raised:-

> *"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?"*

9. The Hon'ble High Court held as under:-

> *"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."*

10. As per the Hon'ble High Court, the income on sale of excess Carbon Credits was a capital receipt and not a business receipt/income. Notably, even in the case of assessee before the Hon'ble Andhra Pradesh High Court, assessee had earned income on sale of Carbon Credits in the course of carrying on the business of power generation, which is also the fact-position before us. The Hon'ble High Court has held that the income received on sale of excess Carbon Credits was a capital receipt not chargeable to tax. Quite clearly, the said Judgment supports the plea of assessee in the instant case that the receipts on sale of CERS is a capital receipt not chargeable to tax. Following the said Judgment we uphold the plea of the assessee.

11. In so far as the reliance placed by the Ld. DR on the decision of Cochin Bench of the Tribunal in the case of Apollo Tyres Ltd (supra) is concerned, ostensibly, the same does not help the case of Revenue, in view of the subsequent Judgment of Hon'ble Andhra Pradesh High Court in the case of My Home Power Ltd. (supra). In fact, the Cochin Bench of the Tribunal has analysed the situation and observed that the earning of Carbon Credits was in the course of carrying on the business and, therefore, such income was held to be in the nature of revenue receipt. The Hon'ble High Court, however approved the contrary proposition to the effect that the sale of Carbon Credits is not an offshoot of business but it is an offshoot of environmental concerns; and, therefore, it upheld the decision of Hyderabad Bench of the Tribunal holding such income as a capital receipt not chargeable to tax. We are pointing out the aforesaid for the reason that the logic adverted to by the Cochin Bench of the Tribunal has been specifically referred to by the Hon'ble Andhra Pradesh High Court, but the same did not find its favour. Therefore, we conclude by holding that the income received on sale of excess Carbon Credits is liable to be assessed as a capital receipt not chargeable to tax. We order accordingly. Thus, assessee succeeds on this aspect, and the Grounds of appeal Nos. 2 and 3 stand allowed.

12. The Ground of appeal no. 1 relating to claim of exemption u/s. 80IA of the Act on the income from sale of Carbon Credits is rendered academic in view of our decision on Ground of appeal no. 2. Thus, Ground of appeal no. 1 is dismissed as infructuous."

30. The learned DR could not show us any reason to deviate from the aforesaid decision rendered in case of assessee's sister concern and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the aforesaid order passed by the coordinate bench of the Tribunal, we uphold the alternative plea of the assessee and held that the income received on the sale of CERs is not liable to tax being in the nature of capital receipt. As a result ground no.7 raised in assessee's appeal is allowed.

While ground no.6 raised in assessee's appeal is rendered academic in view of the decision on ground no.7.

31. The issue arising in grounds no.8, raised in assessee's appeal, is pertaining to disallowance under section 14A read with Rule 8D of the Income Tax Rules, 1962.

32. The brief facts of the case pertaining to this issue are: During the Year, the assessee earned dividend income of Rs.8.67 crores. The assessee made suo moto disallowance of Rs.22,75,530 under section 14A of the Act while computing the income. During the assessment proceedings, the assessee was asked to show cause as to why disallowance should not be made under section 14 A r/w Rule 8D. In response thereto, the assessee submitted that the assessee has made strategic investments for the purpose of promoting and facilitating its business, and with the intention of acquiring and retaining controlling interest in the Companies whose shares were held by the assessee. The AO vide assessment order did not agree with the submissions of the assessee and proceeded to compute the disallowance of Rs.38,03,24,470 under section 14A as per Rule 8D of the Income Tax Rules, 1962, after considering the suo moto disallowance made by the assessee. The learned DRP rejected the objections filed by the assessee. Being aggrieved, the assessee is in appeal before us.

33. Having considered the submissions of both sides and perused the material available on record we find from the audited financial statement that the assessee has own funds of Rs.18,497.49 crores (comprising of share

capital of Rs.563.18 crores, and reserves & surplus of Rs.17,934.31 crores). While the amount of investment held by the assessee earning exempt income is only Rs.3,192.17 crores. We find that the Hon'ble Jurisdictional High Court in CIT vs HDFC Bank Ltd., [2014] 366 ITR 505 (Bom.) held that where assessee's own funds and other non–interest bearing funds were more than the investment in tax-free securities, no disallowance under section 14A of the Act can be made. We further find that the Hon'ble Supreme Court in South Indian Bank Ltd. vs CIT, [2021] 438 ITR 001 (SC) held that disallowance under section 14A of the Act would not be warranted where interest-free own funds exceed the investment in tax-free securities and in such a case the investment would be presumed to be made out of assessee's own funds. Therefore, respectfully following the law laid down by the Hon'ble Supreme Court and the Hon'ble jurisdictional High Court in cases cited supra, the AO is directed to delete the disallowance made under section 14A r/w Rule 8D(2)(ii).

34. Further, it is the claim of the assessee that only those investments which yielded exempt income during the year should be considered for computation of disallowance under section 14A of the Act. We find that this claim of the assessee is supported by the decision of the Special Bench of the Tribunal in the case of ACIT vs. Vireet Investment (P) Ltd. (2017) 165 ITD 27 (Delhi-Trib.), wherein it was held that only those investments are to be considered for computing average value of investments, which yield exempt income during the year. Accordingly, we direct the AO to only considered those investments for the purpose of computation of disallowance under section 14A read with Rule 8D(2)(iii) of the Rules, which yield exempt income during the year. As a

result, ground no.8 raised in assessee's appeal is allowed for statistical purpose.

35. The issue arising in ground no.9, raised in assessee's appeal, is pertaining to disallowance under section 14A for the purpose of computing the book profit under section 115JB of the Act.

36. Having considered the submissions of both sides and perused the material available on record, we find that Special Bench of Tribunal in ACIT vs Vireet Investment (P) Ltd.: [2017] 58 ITR(T) 313 (Delhi - Trib.) (SB) held that computation under clause (f) of Explanation 1 to section 115JB(2) is to be made without resorting to the computation as contemplated u/s 14A read with Rule 8D of the Income-tax Rules, 1962. Thus, respectfully following the aforesaid decision of the Special Bench of Tribunal cited supra, we direct the AO to compute the book profit under section 115JB of the Act, without resorting to computation under section 14A read with Rule 8D. Ground no.9 is decided accordingly.

37. The issue arising in ground no.10, raised in assessee's appeal, is pertaining to addition under section 41(1) of the Act on account of write off of project creditors.

38. The brief facts of the case pertaining to this issue are: During the year under consideration, the assessee claimed an amount of Rs.12,67,68,491 as provisions no longer required written back in respect of project creditors. The assessee vide submission stated that this amount is on account of waiver of principal amount of loan utilised for purchase of plant and machinery. The

assessee further submitted that the write-off is on capital account, not claimed as a deduction, and hence not covered by the provisions of section 41(1)/28(iv) of the Act. Thus, as per the assessee, the said amount is not taxable. The AO vide assessment order did not agree with the submissions of the assessee and held the amount of Rs.12,67,68,491 to be income under section 28(iv) of the Act. The relevant findings of the AO are as under:-

"11 Write Off of Project creditors of Rs. 12,67,68,491/–

11.1 It is seen that the assessee has during the year claimed an amount of Rs. 12,67,68,491/- as provision no longer required written back in respect of project creditors. The assessee has vide their submissions stated that this amount is on account of waiver of principal amount of loan utilised for purchase of plant and machinery. The assessee has further contended that the write off is on capital account, not claimed as deduction and hence not covered by the provisions of section 41(1)/28(iv) of the IT Act. Hence according to the assessee, the said amount is not taxable. The assessee has relied upon a series of cases in support of their claim.

11.2 The contention of the assessee have been considered vis a vis the provisions of law and in the light of the facts of the cases & principal amount of loan for purchase of plans and machinery is capitalized and form part of the actual cost of the asset. This in turn is claimed is claimed as deduction by way of depreciation in the Profit and Loss Account and written off in a phased manner at rates prescribed by the Income Tax Act. Thus, this amount that is capitalized is allowed to the assessee as depreciation in the Profit and loss account, thus reducing the assessee's liability to pay income tax.

11.3 The assessee in this case had taken the loan for purchase of assets. Thought the receipt of the loan was a capital receipt, the amount changes its character when the amount becomes: the assessee's money because of a contractual arrangement. The credit balances on losing its character of a liability is written back in the Profit & loss account requires to be taxed as income of the assessee u/s 28(iv) of the Income tax Act. Reliance in support of the above stand is placed on the ratio applied by the Bombay high court in the case of M/s Solid Containers Ltd vs DY. CIT. Spl. Range-1, Mumbai reported in 308 ITR 417. Reliance is: Iso placed on the ratio applied in the following cases:

1. T.V. Sundaram Iyengar & Sons 22. ITR 344 (SC)

2. CIT V Aries Advertising (P) Ltd 255 ITR 510 (Madras)

11.4 The amount of Rs. 12,67,68,491/- is added to the income of the assessee u/s 28(iv) of the Income tax Act."

The learned DRP rejected the objections filed by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

39. Having considered the submissions of both sides and perused the material available on record, we find that while deciding a similar issue the coordinate bench of the Tribunal in assessee's own case in ACIT vs JSW Steel Ltd., in ITA No. 930/Bang./2009, vide order dated 13/01/2017, for the assessment year 2004-05, observed as under:-

> *"29. We have heard the rival submissions made by the parties and also considered the relevant finding given in the impugned orders. First of all it is seen that Assessing Officer's case is that provisions of section 41(1) are applicable because the assessee has claimed depreciation in the earlier years on the loan taken. for acquisition or capital asset and for coming to this conclusion he has heavily relied upon the decision of Hon'ble Bombay High Court in the case of Nectar Beverages vs. DCIT (supra). This observation and finding of the Assessing Officer now stands negated by the judgment of Hon'ble Supreme Court in the case of Nectar Beverages vs. DCIT (supra) wherein the Apex Court has reversed the said decision of the Hon'ble Bombay High Court and observed that depreciation is neither a trading liability as referred to in section 41(1) nor the principal component of the borrowings for acquisition of a capital asset has not been allowed as an allowance or deduction in the earlier years and hence, any waiver thereof, does not constitute income under section 41(1). In any event an allowance of depreciation can in no way be related to waiver of a loan taken to purchase of the asset in question, since the transaction of borrowing of money for purchase of a capital asset and the transaction of purchase of capital asset are themselves two independent transactions. This has been held so by the Hon'ble Supreme Court in the case of CIT vs. Tata Iron and Steel Company Ltd. (1998) 281 ITR 385 wherein it has been observed that cost of an asset and cost of raising money for purchase of the asset are two different and independent- transactions. The relevant observation as appearing in the judgment reads as under:*
>
> > *"It is difficult to follow how the manner of repayment of loan can affect the cost of the assets acquired by the assessee. What is the actual cost must depend on the amount paid by the assessee to acquire the asset. The amount may have been borrowed by the assessee, but even if the assessee did not repay the loan it will not alter the cost of the asset. If the borrower defaults in repayment of a part of the loan, the cost of the asset will not change. What has to be borne in mind is that the cost of an asset and the cost of raising money for purchase of the asset are two different and independent transactions. Even if an asset is purchased with non-repayable subsidy received from the Government, the cost of the asset will be the price paid by the assessee for acquiring the asset..... The assessee may have raised the funds to purchase the asset by borrowing but what the assessee has paid for it, is the price of the asset. That price cannot change by any event subsequent to the acquisition of the asset. The manner or*

> *mode of repayment of the loan has nothing to do with the cost of asset acquired by the assessee for the purpose of his business."*

Explanation 10 to section 43(1) will also not apply here as pleaded by the Ld. CIT D.R. before us, because it is applicable only where there is a subsidy or grant of reimbursement which is not the case here. Even otherwise also section 43(1) is applicable only in the year of purchase of machinery and in the present case the purchase of capital asset was not in the assessment year 2004-05. Thus, we hold that firstly, section 41(1) does not apply to the facts of the present case as depreciation is neither a loss nor an expenditure as held by the Hon'ble Supreme Court in the case of Nectar Beverages Pvt. Ltd. (supra); and secondly, liability incurred by the assessee was utilized for the purchase of capital asset and therefore, under no circumstances it can be held to be a trading liability. Depreciation allowance has no connection with waiver of the capital loans in question and hence would not attract section 41(1). By way of additional grounds the Ld. D.R. has sought to contend that in view of the decision of Hon'ble Bombay High Court in the case of Solid Containers Ltd. 308 ITR 407 the waiver of a loan is to be reckoned as in the nature of trading liabilities and therefore, it is taxable under section 41(1). As discussed in detail in the earlier part of the order, here it is not the case of the Assessing Officer that the principal amount of loan taken by the assessee was for any trading account, albeit it was for the purchase of a capital asset which has never been allowed as a deduction. The loan taken for an acquisition of a capital asset does not constitute trading liabilities which has been allowed as a deduction in earlier years and any kind of waiver thereof would fall within the deeming fiction of section 41(1). We have already clarified that the amount which can be subjected to tax under section 41(1) can only be those amounts or receipts which have been allowed as deduction in the computation of income in the earlier years and if this primary condition is not satisfied, then there cannot be any addition under this section. In the case of Hon'ble Bombay High Court in Solid Containers (supra) the waiver of loan was taken for trading activity and the assessee has credited such a waiver to the profit & loss account and claimed it to be a capital receipt. Even in the case of Hon'ble Supreme Court to which Hon'ble Bombay High Court has relied upon in the case of CIT vs. TVS Iyengar & Sons M/s. JSW Steel Limited, (formerly known as Jindal Vijaynagar Steel Limited) Ltd, reported in 222 ITR 344, it was found that the loan/advance constituted a trading liability or was taken under trading account therefore, the ratio of the said decisions would not be applicable on the loan transaction which has been taken on capital account, even if it is for the business purpose. The Hon'ble Bombay High Court in a subsequent decision in the case of CIT vs. Softworks Computers Pvt. Ltd. Reported in 354 ITR 16, has held that loan taken for acquiring a capital asset when subsequently waived is not chargeable to tax. The relevant observation of the Hon'ble High Court wherein they had discussed the ratio of Solid Container Ltd. (supra) and the earlier decision of the Hon'ble Bombay High Court in the case of Mahindra & Mahindra is reproduced as under:

> *"7. We find that the decision of this court in the matter of Solid Containers Ltd. (supra) has also considered the earlier decision in the matter of Mahindra and Mahindra Ltd. (supra) and distinguished the same by holding that in that case the loan was given for purchase of capital assets unlike in the case of Solid Containers Ltd. (supra) where waiver was of a loan taken for trading activity and thus considered to be of a revenue nature. In the present case, the amount which was advanced as a loan to the respondent- assessee was for the purposes*

> *of relocating its office premises. The loan taken was utilized for the purposes of acquiring an office at Godrej Soap Complex, Vikroli, Mumbai. Therefore, the loan in the present fact was taken for acquisition of capital asset and not for the purposes of trading activity as in the case of Solid Containers Ltd. (supra). The present case is, therefore, covered in favour of the respondent-assessee by the decision of this court in the matter of Mahindra and Mahindra Ltd. (supra)."*

Therefore the plea raised by the Revenue through additional ground cannot be upheld and same is rejected.

30. Before us one more argument was taken by the Ld. CIT D.R. that provision of section 28(iv) would get attracted because the waiver of loan amounts to value of any benefit or perquisite, whether convertible into money or not, arising from business. First of all it is seen that it is neither the case of the Assessing Officer nor the case of the Ld. CIT(A) that the amount of waiver of lean is to be taxed under section 28(iv). The Hon'ble Bombay High Court in the case of Mahindra & Mahindra vs. CIT 260 ITR 180 501 held that a loan which is originally taken for capital expenditure, if waived, will not give rise to taxable income either under section 41(1) or under section 28(iv). The relevant observation and finding of the Hon'ble Bombay High Court reads as under:

> *"The income which can be taxed under Section 28(iv) must not only be referable to a benefit or perquisite, but it must be arising from business. Secondly, Section 28(t) does not apply to benefits in cash or money. Secondly, in this case we are concerned with the purchase consideration relating to capital asset. The toolings were in the nature of dies. The assessee was a manufacturer of heavy vehicles and jeeps. It required these dies for expansion. Therefore, the import was that of plant and machinery. The consideration paid was for such import. In the circumstances, Section 28(iv) is not attracted. In our case, the most fundamental fact which is required to be borne in mind is that there was no deduction given to the assessee in earlier years and, therefore, Rs.57,74,064 could not be included as income under Section 41(1) of the Act. Lastly, it is important to bear in mind that the tooling constituted capital asset and not stock-in-trade. Therefore, taking into account all the above facts, Section 41(1) of the Act is not applicable".*

Similar view has been taken by the other courts like Hon'ble Madras High Court in the case of Iskraeco Regent Ltd. vs. CIT (2011) 237 CTR 239 (Mad) and Hon'ble Delhi High Court in the case of CIT vs. Tosha International Ltd., (2009) 176 Taxman 187 (Dell. Thus, the plea taken by the Ld. CIT D.R. as well as in the grounds raised by the Revenue is rejected.

31. Accordingly, the appeal of the Revenue is dismissed.

40. The learned DR could not show us any reason to deviate from the aforesaid decision rendered in case of assessee's own case and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the aforesaid order passed by the coordinate bench of the Tribunal in assessee's own case cited supra, we direct the AO to delete the addition of

Rs.12,67,68,491. As a result ground no.10 raised in assessee's appeal is allowed.

41. In the result, the appeal by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 04/05/2023

Sd/-	**Sd/-**
AMARJIT SINGH	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 04/05/2023

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai