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

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.3439/Mum./2005
(Assessment Year : 2004–05)

Grasim Industries Ltd.
(Corporate Finance Division)
A–2, Aditya Birla Centre .... Appellant
S.K. Ahire Marg, Worli
Mumbai 400 030 PAN – AAACG4464B

v/s

Dy. Commissioner of Income Tax .... Respondent
Circle–6(3), Mumbai

ITA no.4337/Mum./2005
(Assessment Year : 2004–05)

Dy. Commissioner of Income Tax .... Appellant
Circle–6(3), Mumbai

v/s

Grasim Industries Ltd.
Century Bhavan, 3rd Floor .... Respondent
Dr. A.B. Road, Worli
Mumbai 400 025 PAN – AAACG4464B

Assessee by : Shri J.D. Mistri a/w
Shri Madhur Agrawal
Revenue by : Dr. Kishore Dhule

Date of Hearing – 15/06/2023 | Date of Order – 23/06/2023

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present cross appeals have been filed challenging the impugned order dated 29/03/2005, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*)

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by the learned Commissioner of Income Tax (Appeals)–XXVI, Mumbai, [*"learned CIT(A)"*], for the assessment year 2004–05.

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2. The brief facts of the case pertaining to the issue, as emanating from the record, are: For the year under consideration, the assessee filed its return of income on 29/10/2004, declaring a total income of Rs.779,79,64,364. The assessee filed its revised return of income on 21/12/2004, declaring a total income of Rs.767,94,11,530. In the revised return of income, the assessee claimed a deduction under section 80IA of the Act of Rs.11,85,52,834, in respect of the profits of the Rail System. The return of income filed by the assessee was selected for scrutiny and statutory notices under section 143(2) as well as under section 142(1) of the Act were issued and served on the assessee. The assessee is engaged in the production and sales of Chemicals, Cement, and Textiles, and the production of Sponge Iron, and Viscose Staple Fibre. The Assessing Officer ("*AO*"), vide order dated 28/01/2005, passed under section 143(3) of the Act, assessed the total income of the assessee at Rs.812,27,65,519, after making certain additions/disallowances to the income declared by the assessee. The learned CIT(A), vide impugned order granted partial relief to the assessee. Being aggrieved, both, the assessee as well as the Revenue, are in appeal before us.

3. The assessee, in its appeal, has raised the following grounds:–

*"1. **Disallowance under section 43B:***

1.1 The CIT (A) erred in not allowing the amounts paid or written back during the previous year amounting to Rs. 1,09,91,739/-, which had already been disallowed in the past under clause (b), (c), (d) and (e) of section 43B, consistent with the Department's stand.

1.2 The CIT (A) ought to have held that in the event the Department's stand is accepted by the ITAT in earlier years, then deduction of amounts paid or written back during the year amounting to Rs. 1,09,91,739/-should be allowed in the previous year.

*2. **Disallowance of Club membership fees***

The CIT (A) erred in not allowing club membership fees of Rs. 4,72,350/- paid to Otters Club as deduction.

*3. **Interest received from Income Tax Department:***

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3.1 The CIT (A) erred in upholding the action of the AO in taxing interest of Rs.33,55,89.539/- allowed by the Department.

3.2 The CIT (A) failed to appreciate that no income can be taxed until the entitlement is absolute or irretrievable. The CIT (A) ought to have held that interest allowed by the Department is not to be taxed till the matters are finally decided and till the appellant is absolutely entitled to such interest.

*4. **Deduction under section 80 HHC***

4.1 The CIT (A) erred in not directing the AO to allow deduction under section 80 HHC, as claimed by the appellant.

4.2 The CIT (A) ought to have held that amount of interest received cannot be reduced from profit of the business for the purpose of calculating deduction u/s. 80 HHC.

4.3 Without prejudice to the above, the CIT (A) failed to appreciate that interest paid during the previous year amounting to Rs. 153,88,30,430/- was much higher than the amount of interest received amounting to Rs. 55,11,82,222/- resulting in net interest paid and therefore amount of interest received during the previous year ought to have been set off against interest paid.

4.4 The CIT (A) ought to have held that rent Rs. 1,09,34,050/- should not be reduced from the profit of the business, while calculating allowable deduction under section 80HHC.

4.5 The CIT (A) ought to have held that miscellaneous receipts Rs. 11,24,95,218/- should not be reduced from the profit of the business, while calculating allowable deduction under section 80HHC.

4.6 The CIT(A) failed to appreciate that interest, rent and miscellaneous receipts were operational income and were incidental to business.

4.7 The CIT (A) erred in not following the decisions of the Jurisdictional High Court in the cases of Bangalore Clothing Co. (260 ITR 371) and Alfa Laval India Ltd. (133 Taxman 740).

4.8 The CIT(A) erred in holding that profits from sale of DEPB credits Rs. 5.82,12,856/- are not income directly derived from exports business and erred in directing the AO to reduce 90% of DEPB credits from profits of business.

4.9 The CIT (A) ought to have held that DEPB credit is derived from exports business and shouldn't be reduced from business profits for the purpose of calculation of deduction allowable u/s. 80 HHC.

*5. **Appropriation of Head Office expenses***

5.1 The CIT(A) erred in confirming the AO's action in apportioning Head Office expenses and reducing the amount of allowable deduction u/s. 80–0.

5.2 The CIT(A) failed to appreciate that Head Office expenses cannot be reduced from receipts while computing allowable deduction u/s. 80–O.

5.3 Without prejudice to the above, the CIT(A) failed to appreciate that even if head office expenses are to be reduced from gross receipts for computing allowable deduction u/s. 80 O, such expenses can only be a certain percentage of the

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gross receipts eligible for deduction u/s. 80 O and not the total turnover of the division.

6. ***Miscellaneous Receipts***

6.1 *The CIT(A) erred in holding that miscellaneous receipts of Rs. 97,25,622/- (Rs.10,10,73,313/- less Rs.9.13,47,691/-) are rightly excluded from business profits.*

6.2 *The CIT(A) ought to have held that miscellaneous receipts i.e. interest receipts, exchange rate differences, export incentives, profits on sale of DEPB, slug sales etc. are income derived from the business of the undertaking and should not be reduced from profits while computing deduction u/s. 80 IA.*

7. *Sales tax exemption*

7.1 *The CIT (A) erred in upholding the action of the AO in treating sales tax exemption benefit of Rs. 117.45 crores as revenue receipt.*

7.2 *The CIT (A) failed to appreciate the assessee's contention that the object of grant of incentive is to promote setting up of industries in backward areas and therefore the subsidy is capital in nature.*

8. *The appellant prays for the cost of this appeal in view of section 254 (2B) of the I.T. Act."*

4. The issue arising in ground no.1, raised in assessee's appeal, is pertaining to the amount paid or written back during the year under consideration which has already been disallowed in the earlier years under section 43B of the Act.

5. Similar to the arguments made in the appeal for the assessment year 2003–04, the learned Sr. Counsel, appearing for the assessee, submitted that this ground is in respect of the alternate claim of the assessee to allow deduction under section 43B (c), (d) and (e) of the Act in respect of liability disallowed in earlier years, which are paid/written back in the year under consideration. The learned Sr. Counsel further submitted that the claim of the assessee under section 43B of the Act has been allowed by the Tribunal in earlier years and, therefore, this ground now is rendered infructuous.

6. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 13/06/2023, passed in assessee's own case in Grasim Industries Ltd. v/s DCIT, in ITA No.4745/Mum./2004 and ITA No.5978/Mum./2004, for the assessment year 2003–04, dismissed similar issue while following the decision rendered in assessee's own case in preceding years. The relevant findings of the coordinate bench, in the aforesaid decision, are reproduced below:–

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"6. We find that a similar issue came up for consideration before the coordinate bench of the Tribunal in assessee's own case in Grasim Industries Ltd. v/s ACIT, in ITA no.4753/Mum./ 2004 and ITA no.5584/Mum./2004, for the assessment year 2002-03, wherein the coordinate bench, while dismissing the similar issue, following the earlier decision rendered in assessee's own case, observed as under:-

> *"6. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 4083/Mum./2003 dated 22.10.2014 held as under: -*
>
> > *"2. Rival contentions have been heard and perused the record. The assessee is engaged in manufacturing and sale various products. During the course of scrutiny assessment, the A.O. disallowed assessee's claim of deduction u/s 43-8 of the Act in respect of liabilities disallowed in earlier years which are paid/written back in the current year. The A.O. found that in the computation of income an amount of Rs. 10.85 crores has been considered as disallowance u/s 43-8 (a) of the Act by the assessee itself. However, an amount of Rs. 1.31 crores was not considered as disallowance u/s 43-8 of the Act falling under clause (b) to (d). The contention of the assessee was that the amount of Rs. 1.31 crores which falls under clauses (b) to (d) of section 43-B of the Act which are not payable as on 31-3-2001 cannot be covered by the provisions of section 43-B of the Act. However, the A.O. did not agree with this explanation and made the disallowance. The Id. CIT(A) by his impugned order, confirmed the order of the A.O. and the assessee is in appeal before us.*
> >
> > *3. At the outset, the Id. Counsel for the assessee contended that the issue is covered by the decision of the Tribunal in earlier years i.e assessment years 1993-94 to 1998-99 and 2000-01 in assessee's own case, copy of which was placed on record. We find that similar issue was considered by the Tribunal in A.Y. 2000-01 vide order dated 9-10-2013 wherein the ground taken by the assessee was dismissed as the same has become infructuous. It was found by Tribunal that it is an alternative plea which relates to A.Y. 1993-94 decided by the Tribunal in assessee's favour. The appeal filed by the Department has been dismissed by the Tribunal vide order dated 20-12-2001. As the facts and circumstances during the year under consideration are para materia wherein appeal of department in earlier year was dismissed by the Tribunal, therefore, ground taken by assessee for disallowance during the year has become infructuous. The view taken by the Tribunal in A.Y. 2000-01 is respectfully followed, ground of the assessee becomes otiose and is accordingly dismissed."*
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> *7. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in A.Y. 2000-01 is respectfully followed, ground raised by the assessee is accordingly dismissed."*

7. Thus, respectfully following the aforesaid decision, ground no.1, raised in assessee's appeal is dismissed."

7. Thus, respectfully following the aforesaid decision, ground no.1, raised in assessee's appeal is dismissed.

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8. The issue arising in ground no.2, raised in assessee's appeal is pertaining to the disallowance on account of Club Membership fees.

9. The brief facts of the case pertaining to the issue, as emanating from the record, are: During the year under consideration, the assessee paid club membership fees of Rs.7,70,244, towards Club Membership fees to various Clubs. During the assessment proceedings, on a perusal of the details, it was observed that the amount of Rs.4,72,350, is paid to Otters Club for obtaining Life Membership. Accordingly, the assessee was asked as to why this payment should not be treated as capital expenditure. In response thereto, the assessee submitted that the payments have been made to the club for enrolling senior officials as members for the purpose of promoting the business of the assessee company. It was further submitted that such members meet various kind of people because of which they developed business relationships benefiting the assessee company. The assessee also submitted that in commercial work, the contact with right persons is vital for efficient business organization and, therefore, the expenditure should be allowed as business expenditure. The AO, vide order passed under section 143(3) of the Act, did not agree with the submissions of the assessee and held that the payments made for obtaining membership is not allowable expenditure and the payments made towards annual renewal fees and expenditure incurred at Clubs for the business purpose is allowable expenditure, but not the payment made for obtaining membership. The AO further held that by such payment, the assessee got the right to use the facilities of the Club which is the advantage of enduring nature. Accordingly, the AO disallowed the payment towards Club Membership fees of Rs.4,72,350. The AO further accepted the alternative contention of the assessee and allowed depreciation considering it as intangible asset.

10. The learned CIT(A), vide impugned order, granted partial relief to the assessee and directed the A.O. to disallow only the entrance fees as capital in nature and allow all other expenditures as revenue expenditure. Being aggrieved, the assessee is in appeal before us.

11. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 13/06/2023, passed in assessee's own case for the assessment year 2003–04 cited supra, while deciding similar issue in favour of the assessee by following the decision rendered in the preceding year, observed as under:–

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> *"11. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 14/12/2021, passed in assessee's own case for the assessment year 2002-03 cited supra, by following the decision rendered in the preceding year, observed as under:-*
>
> > *"12. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 1993-94. While deciding the issue in favour of the assessee the Coordinate Bench of the Tribunal in ITA.No. 2944/Mum/1997 dated 31.01.2005 held as under: -*
> >
> > > **15. Ground No. 4 raised only in the assessment year 199-34 only reads as under:-*
> > >
> > > > *"On the facts and circumstances of the case and in law, the learned CIT(A) has erred in deleting the sum of Rs.6,183/- incurred in the Diners Club and Rs.17,350/- incurred in the Taj Hotel Membership fees for S.V. Birla disallowed by Assessing Officer on the reasoning that early hearing same is business expenditure.*
> > >
> > > *16. We have heard both the parties, we find that he aforesaid issue raised in the assessment year 1993-94 is covered in favour of the assessee by the decision of the jurisdictional High Court in Otis Elevator CO. (India) Ltd., v. CIT 195 ITR 682 (Bom.). Respectfully following the same, we dismiss the ground raised by the department."*
> >
> > *13. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in ay 1993-94 is respectfully followed, accordingly, ground raised by the assessee is allowed."*
>
> *12. The learned Departmental Representative ("learned DR") could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case and no change in the facts and law was alleged in the relevant assessment year. Therefore, respectfully following the judicial precedent in assessee's own case cited supra, we uphold the plea of the assessee and allow the Club Membership fees paid by the assessee."*

12. In the present appeal, the learned Departmental Representative (*"learned DR"*) could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case. This issue is recurring in nature and has been decided in faovur of the assessee in the preceding years. Therefore, respectfully following the judicial precedent rendered in assessee's own case cited supra, ground no.2, raised in assessee's appeal is allowed. Further, the depreciation already granted by the AO is directed to be withdrawn in view of our aforesaid findings.

13. The issue arising in ground no.3, raised in assessee's appeal, is pertaining to the taxability of interest received from the Income Tax Department.

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14. The brief facts of the case pertaining to the issue, as emanating from the record, are: The assessee, during the appellate proceedings before the learned CIT(A), submitted that since the receipt of interest on refund has not reached the stage of finality as the Department has not accepted the decision of the learned CIT(A) and has preferred further appeal before the Tribunal, at this stage, the interest on refund should not be taxed. The learned CIT(A), vide impugned order, dismissed the ground raised by the assessee and held that there is nothing in the Act to wait for such taxation till the matter reaches the stage of finality. Being aggrieved, the assessee is in appeal before us.

15. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 13/06/2023, passed in assessee's own case for the assessment year 2003–04 cited supra, while deciding similar issue in favour of the assessee by following the decision rendered in the preceding year, observed as under:–

> *"15. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 14/12/2021, passed in assessee's own case for the assessment year 2002–03 cited supra, by following the decision rendered in the preceding year, observed as under:–*
>
> > *"15. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02. While deciding the issue in favour of the assessee the Coordinate Bench of the Tribunal in ITA.No. 4083/Mum/2003 dated 22.10.2014 held as under: -*
> >
> > > *"7. The assessee is also aggrieved for taxing of interest received from Income Tax Department amounting to Rs. 13,64,09,609/-. We find that similar issue has been dealt with by the Tribunal in A.Y. 1993-94 in ITA No. 1523/Mum/1997 vide para 62 as under;-*
> > >
> > > > *"We have heard the parties and considered the rival submissions. These refunds have been granted to the assessee in the year under consideration and therefore they would partake the character of income of the assessee. If however, any refund has been found to be not refundable to the assessee and consequently the interest granted is withdrawn the same would not partake the character of income. We accordingly direct the Assessing Officer to reduce from the taxability of the aforesaid interest granted to the assessee, the amount which has been withdrawn subsequently. We direct accordingly."*
> > >
> > > *8. It was argued by the Id. A.R. that benefit of interest so allowed by the department was subsequently withdrawn as a result of the appellate orders should be given to the assessee and the interest subsequently withdrawn should not be taxed and for this, reliance was placed on the decision of the Tribunal in the case of Avada Trading Co. (P.) Ltd. vs. ACIT (2006) 100 ITD 131.*

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> *9. We have considered the rival contentions. As far as the taxability of interest amounting to Rs. 13,64,09,609/- is concerned, granted alongwith interest. However, if in the subsequent year refund of interest is withdrawn, then the same should be reduced from the total income of the assessee. Accordingly, we direct the A.O. to tax interest income in terms of the order of the tribunal for A.Y. 1993-94 as reproduced above, keeping in view our above observation"*

> *16. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal is respectfully followed, we order accordingly."*

16. Therefore, in view of the above, ground no.3, raised in assessee's appeal is allowed with similar directions, as rendered by the coordinate bench in the preceding assessment years.

17. The issue arising in ground no.4.1 is general in nature, hence, require no separate adjudication.

18. The issue arising in grounds no.4.2 and 4.3, raised in assessee's appeal, is pertaining to the reduction of interest income while calculating deduction under section 80HHC of the Act.

19. The brief facts of the case pertaining to the issue, as emanating from the record, are: During the year under consideration, the assessee claimed deduction under section 80HHC of the Act of Rs.7,92,04,911, and furnished Form no.10CCAC, along with the return of income. From the perusal of the working, it was observed that the assessee has not reduced the interest income of Rs.21,55,92,683 while computing the profit of the business for the purpose of deduction under section 80HHC of the Act. Accordingly, the assessee was asked to show cause as to why 90% of the above receipt be not reduced from the profit of the business for the purpose of deduction under section 80HHC of the Act. In response thereto, the assessee submitted that the interest paid during the previous year is Rs.153.88 crore, and, therefore, only net interest should be reduced from business profit. The AO, vide order passed under section 143(3) of the Act, did not agree with the submissions of the assessee and held that only gross interest is to be reduced for the purpose of section 80HHC of the Act.

20. The learned CIT(A), vide impugned order, dismissed the ground taken by the assessee. Being aggrieved, the assessee is in appeal before us.

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21. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 13/06/2023, passed in assessee's own case for the assessment year 2003–04 cited supra, while deciding similar issue in favour of the assessee by following the decision rendered in the preceding year, observed as under:–

> *"21. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 14/12/2021, passed in assessee's own case for the assessment year 2002–03 cited supra, by following the decision rendered in the preceding year, observed as under:–*
>
> > *"18. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02 in favour of the assessee. While deciding the issue in favour of the assessee the Coordinate Bench of the Tribunal in ITA.No. 4083/Mum/2003 dated 22.10.2014 held as under: -*
> >
> > > *"14. The next grievance of the assessee relates to allowing deduction u/s 80HHC of the Act with respect to interest income. The issue under consideration is squarely covered by the decision of Hon'ble Supreme Court in the case of ACG Associated Capsules Pvt. Ltd., 343 ITR 89(SC) wherein it was held that net interest income is to be excluded from the eligible profit for computing deduction u/s 80HHC rather than gross interest.*
> > >
> > > *15. An identical issue raised as additional grounds for the assessment year 1996-97 and 97-98 was considered and decided by this Tribunal in assessee's own case in paras 30 & 30.1 as under:*
> > >
> > > > *"30 As regards the additional ground no.1 pertaining to deduction u/s 80HH on gross interest the Sr Id counsel for the assessee has submitted that this issue has been decided by the Hon'ble Supreme Court in the case of ACG Associated Capsules vs CIT vide decision dated 8.2.2012; therefore, the deduction u/s 80HH should be allowed on the gross interest received.*
> > > >
> > > > *30.1 Since this ground has been raised by the assessee first time in view of the decision of the Hon'ble Supreme Court; therefore, it requires verification and examination at the level of the AO. Accordingly, we remit this issue to the record of the AO to consider and decide the same as per law after considering the contention of the assessee and after giving reasonable opportunity of being heard to the assessee.*
> > >
> > > *16. In view of the decision of honourable Supreme Court in case of ACG Associated Capsules reported in 67 DTR (SC) 205, the Explanation to section 80 HHC to be applied on net interest and not on gross interest. Accordingly, we direct the AO to apply clause (baa) in respect of interest receipt by following the decision of honourable Supreme Court (supra). We accordingly direct the A.O. to exclude the excess of interest income over interest expenditure from the eligible profit of the company while computing deduction u/s 80HHC of the Act.*

> *19. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in A.Y. 2001-02 is respectfully followed, we order accordingly."*

> *22. We also find that in the preceding assessment years, the coordinate bench, followed the decision of the Hon'ble Supreme Court in ACG Associate Capsule Pvt. Ltd. v/s CIT, [2012] 343 ITR 89 (SC), wherein it was held that for computation of profit of business for the purpose of deduction under section 80HHC of the Act, only 90% of net interest or net rental income is to be reduced under clause (1) of Explanation (baa) to section 80HHC of the Act. The learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case and no change in the facts and law was alleged in the relevant assessment year. Since in the present case, it is an accepted fact that interest paid during the year is Rs.168.41 crore, while interest received is Rs.39.33 crore, therefore, respectfully following the judicial precedence in assessee's own case cited supra, we uphold the plea of the assessee and allow grounds no.4.2 and 4.3, raised in assessee's appeal."*

22. In the present case, it is not disputed that interest paid by the assessee during the year is Rs.153.88 crore, while interest received by the assessee is Rs.21.56 crore. Therefore, respectfully following the judicial precedent rendered in assessee's own case cited supra, we uphold the plea of the assessee and allow the ground no. 4.2 and 4.3, raised in assessee's appeal.

23. The issue arising in grounds no.4.4, raised in assessee's appeal, is pertaining to the reduction of rental income while calculating deduction under section 80HHC of the Act.

24. The brief facts of the case pertaining to the issue, as emanating from the record, are: The AO, vide assessment order passed under section 143(3) of the Act, reduced 90% of the rental income credited to the Profit & Loss Account for computing the profit of business for the purpose of deduction under section 80HHC of the Act.

25. The learned CIT(A), vide impugned order, dismissed the ground raised by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

25. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 13/06/2023, passed in assessee's own case for the assessment year 2003–04 cited supra, while deciding similar issue in favour of the assessee by following the decision rendered in the preceding year, observed as under:–

> *"26. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 14/12/2021, passed in assessee's own case for the assessment year 2002–03 cited supra, by following the decision rendered in the preceding year, observed as under:–*

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> *"21. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02 in favour of the assessee. While deciding, the issue in favour of the assessee the Coordinate Bench of the Tribunal in ITA.No. 4083/Mum/2003 dated 22.10.2014 held as under: -*
>
> > *"17. On the same proposition, the net rent expenditure and net commission expenditure is required to be reduced from eligible profit rather than the gross rent and gross commission for the computation of deduction u/s 80HHC of the Act. We direct accordingly."*
>
> *22. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in A.Y. 2001-02 is respectfully followed, we order accordingly."*

> *27. On a perusal of the audited financial statements, forming part of the paper book, we find that during the year, the assessee paid rent of Rs.8.12 crore, while it received rental income of Rs.1.93 crore. Therefore, following the judicial precedents in assessee's own case cited supra, we uphold the plea of the assessee and allow ground no.4.4, raised in assessee's appeal."*

26. In the present case, upon perusal of the audited financial statements forming part of the paper book on Pages–75–76, we find that the assessee paid total rent of Rs.8.39 crore, while it received a total rental income of Rs.5.55 crore. Therefore, following the aforesaid decision rendered in assessee's own case, we uphold the plea of the assessee and allow ground no.4.4, raised in assessee's appeal.

27. The issue arising in grounds no.4.5, 4.6, and 4.7, raised in assessee's appeal is pertaining to the reduction of miscellaneous receipts from the profits of business while calculating the deduction under section 80HHC of the Act.

28. The brief facts of the case pertaining to the issue, as emanating from the record, are: During the assessment proceedings, the assessee submitted that the miscellaneous receipts of Rs.11,24,95,218, should not be reduced from the profit of the business for computing deduction under section 80HHC of the Act.

29. The AO, vide assessment order, passed under section 143(3) of the Act, did not agree with the submissions of the assessee and reduced 90% of the miscellaneous receipts of Rs.11,24,95,218, to the Profit & Loss Account for the purpose of computation of deduction under section 80HHC of the Act.

30. The learned CIT(A), vide impugned order, dismissed the ground raised by the assessee ss on this issue. Being aggrieved, the assessee is in appeal before us.

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31. Having considered the submissions of both sides and perused the material available on record, we find that a similar issue came up for consideration before the coordinate bench of the Tribunal, and the Tribunal, vide order dated 13/06/2023, passed in assessee's own case for the assessment year 2003–04 cited supra, restored the issue to the file of the AO for *de novo* adjudication with certain directions. The relevant findings of the coordinate bench, in the aforesaid decision, are reproduced below:

> *33. "We have considered the submissions of both sides and perused the material available on record. From the perusal of the audited financial statements, forming part of the paper book, we find that during the year, the assessee received miscellaneous receipts of Rs.11.48 crore. The details of these receipts as provided on Page–41 of the paper book, are as under:-*

Statement of Misc. Receipts		
Sr. no.	*Units*	*Amount (Rs.)*
1.	*CFD*	*10,52,686*
2.	*SFD Nagda*	*17,88,183*
3.	*SFD – Mavoor*	*1,46,511*
4.	*Pulp – Mavoor*	*10,297*
5.	*Grasilene*	*9,62,379*
6.	*BC*	*35,60,754*
7.	*Pulp – Harihar*	*36,018*
8.	*Chemical – Nagda*	*51,68,205*
9.	*Membrane*	*27,76,339*
10.	*CSA*	*2,814*
11.	*Textile Divn – BTM*	*31,05,371*
12.	*V. Woollen*	*0*
13.	*BTM – Bhiwani*	*33,61,022*
14.	*Power Divn – Bhiwani*	*10,776*
15.	*Elegant*	*11,31,001*
16.	*Vikram Cement*	*2,85,91,311*
17.	*Aditya Cement*	*85,42,247*
18.	*Grasim Cement*	*11,80,249*
19.	*Rajashree Cement*	*3,45,675*
20.	*Cement South*	*47,05,613*
21.	*Dharani Cement*	*1,76,495*
22.	*BGU*	*8,42,171*
23.	*Cement Marketing – East*	*70,42,133*

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24.	*Cement Marketing – West*	*30,75,557*
25.	*Cement Marketing – North*	*4,20,958*
26.	*Cement Marketing – South*	*13,50,989*
27.	*RMC*	*24,04,935*
28.	*Birla White*	*2,08,14,549*
29.	*E&DD*	*645*
30.	*Vikram Ispat*	*62,99,422*
31.	*V. Shipping (MBC)*	*3,47,652*
32.	*BIMC*	*55,01,471*
		11,47,54,428

34. It is the claim of the assessee that these receipts are in relation to operations carried out by the assessee and, therefore, should not be excluded while computing deduction under section 80HHC of the Act. In the Chart filed during the course of the hearing, the assessee provided the following details of these receipts:-

Statement of Misc. Receipts		
Sr. no.	*Units*	*Amount (Rs.)*
1.	*Rebate on sales tax*	*1.69 crore*
2.	*Refund of Mineral Area Development Cess*	*2.83 crore*
3.	*Sundry balances written back*	*52.36 lakh*
4.	*Scrap sales*	*18.56 lakh*
5.	*Sale of empty cement bag, plastic barrel, scrap barrel, waste oil*	*23.37 lakh*
6.	*Insurance claim and recovery*	*Rs.28.02 lakh*
7.	*Deposit forfeited*	*Rs.19.01 lakh*
8.	*Discount*	*Rs.20.84 lakh*
9.	*Recovery of water charges*	*17.25 lakh*
10.	*Freight Recovery*	*11.31 lakh*
11.	*Liquidated damages*	*37.51 lakh*
12.	*Recovery of packing charges*	*1.02 crore*
13.	*Other misc. expenses*	*4.66 crore*
14.	*Net misc. expenses incurred* *Misc. expenses* *Misc. income of*	*Rs.58.86 crore* *Rs.70.34 crore* *Rs.11.48 crore*

35. In respect of rebate on sales tax and refund of Mineral Area Development Cess, the assessee has placed reliance upon the decision of the Hon'ble Jurisdictional High Court in Alfa Laval India Ltd. v/s DCIT, [2003] 133 Taxman 740 (Bom.), wherein the Hon'ble Court held that interest income received from customers as well as sales tax

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set off cannot be excluded from business profit while calculating deduction under section 80HHC of the Act. Further, in respect of sundry balances written back, the assessee has placed reliance upon the decision of the coordinate bench of the Tribunal in DCIT v/s Gharda Chemicals Ltd., [2016] 71 taxmann.com 56 (Mumbai-Trib.), wherein the coordinate bench, inter-alia, held that registration charges written back cannot be excluded from the profit of the business for the purpose of computing deduction under section 80 HHC of the Act. Similarly, in respect of scrap sales and sale of empty cement bag, plastic barrel, scrap barrel, waste oil, the assessee has placed reliance upon the decision of the Hon'ble Madras High Court in CIT v/s TTK LIG Ltd., 2018 (11) TMI 53, wherein the Hon'ble High Court held that sale of scrap is derived from operation activity of the undertaking and therefore cannot be excluded from business profit while calculating deduction under section 80HHC of the Act. Further, in respect of insurance claim and recovery, the assessee has placed reliance upon the decision of the Hon'ble Jurisdictional High Court in CIT v/s Pfizer Ltd, [2011] 320 ITR 62 (Bom.), wherein the Hon'ble jurisdictional High Court held that contract of insurance is a contract of indemnity and the indemnification stand on the same footing as the income that would have been realised by the assessee of the sale of the stock in trade. Accordingly, the Hon'ble Court held that the insurance claim on account of the stock in trade does not constitute an independent income or receipt of the nature similar to brokerage, commission, interest, rent, or charges and thus would not be subjected to deduction of 90% under clause (1) of Explanation (baa).

36. As is evident from the record, in the present case, the lower authorities did not examine each and every item of miscellaneous receipt as mentioned on page 41 of the paper book and the AO straightaway proceeded to reduce 90% of miscellaneous receipts amounting to Rs. 11,47,54,429, from the profit while computing deduction under section 80HHC of the Act. During the hearing, these receipts have been categorised in various categories as noted above, however, it is evident that the Revenue has not examined the relation of such receipts with the business of the assessee. In this regard, it is pertinent to note that in CIT v/s Bangalore Clothing Co., [2003] 127 Taxman 637 (Bom.), the Hon'ble Jurisdictional High Court held that the AO has to ascertain whether the receipts were part of operational income and for that the Department will have to consider the Memorandum and Articles of Association of the company, nature of the business, nature of the activity and such other tests. The Hon'ble Court further held that just looking at the nomenclature without any further enquiry into the nature of the business, Explanation (baa) cannot be invoked, since the nomenclature may not be accurate. The relevant findings of the Hon'ble Jurisdictional High Court, in the aforesaid decision, are as under:-

> *"8. We do not find any merit in the argument advanced on behalf of the Department. In this case, we are concerned with profits from business of exports of goods manufactured by the assessee. Therefore, the export profits were required to be computed in the ratio of export turnover to total turnover as contemplated by the above formula. Explanation (baa) was introduced into the Act by Finance (No. 2) Act, 1991 with effect from 1-4-1992. Under the Circular of CBDT bearing No. 621 dated 19-12-1991, it has been stated that the above formula gave distorted figure of export profits when receipts like interest, commission etc. which do not have element of turnover are included by the assessee in profit and loss account. Therefore, Explanation (baa) came to be introduced. Under that Explanation, profits of business, for the purposes of section 80HHC, does not include receipts which do not have element of turnover like rent, commission, interest etc. However, as some expenditure might be incurred in earning such incomes an ad hoc 10% deduction from such incomes is provided to account for those expenses. However, the learned counsel for the Department cannot invoke Explanation (baa) in every matter involving receipts by way of brokerage, commission, interest, rent, labour charges etc. These items of income have got to be seen in the context of the business activity of the assessee. To give an example, in the case of a manufacturing Company which undertakes exports, receipt of interest or commission may not be*

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Operational Income because they do not have the element of turnover and consequently Explanation (baa) will apply. However, that will not be the case if the assessee is carrying on the business of Financing because in the case of Financing, the interest income which accrues to the assessee will have the element of turnover and in such a case, receipts like interest, will not attract Explanation (baa). The point which we would like to make, therefore, is that in every matter the Assessing Officer will have to ascertain whether receipt of interest, commission, labour charges etc. were a part of Operational Income. We cannot lay down any standard test for deciding what would constitute Operational Income. Broadly, the Department will have to consider the Memorandum and Articles of the Association of the Company, the nature of the business, the nature of the activity and such other tests. The Department will also have to ascertain as to what is the dominant business of the Company and whether receipts like interest, commission, etc. accrues as a part of the main business activity or whether they accrue out of incidental business. In the case of K.K. Doshi & Co. (supra), the assessee had received Rs. 19.60 lakhs as service charges. It was held that the service charges of Rs. 19.60 lakhs did not have the element of turnover because the charges were received for a seasonal activity which was not an integral part of the manufacturing activity. Therefore, the test to be applied in all such matters is, whether interest, service charges, commission accrues out of the main business activity of the Company and whether they were Operational Income. The case of K.K. Doshi & Co. (supra) shows that service charges of Rs. 19.60 lakhs did not represent Operational Income and, therefore, it came within Explanation (baa). However, we find that the Department just looks at the nomenclature of the receipt and if it finds that the nomenclature is rent, interest, commission then without any further inquiry into the nature of business, the Department invokes Explanation (baa) which is not the purpose and the object of that Explanation. In the present case, the receipt in question is labour charges. However, this nomenclature may not be accurate. In the present case, the assessee is a manufacturer and exporter of garments. In the present case, the Tribunal has recorded a finding of fact which is not challenged, namely, that there was no difference between the activities relating to export business carried on by the assessee and the processes carried on for manufacturing garments for others under job-work contracts. The Tribunal has further found, on facts, that the activity of labour job involved use of machinery, labour and material which were also forming part of the activity of manufacturing garments for its own sales. The Tribunal further found that there was no difference between manufacturing of garments for the assessee's own sales and manufacturing of garments for others on labour job basis. These are findings of fact. They have not been challenged in the Memo of Appeal. The Memo of Appeal proceeds only on the basis that because the receipt is by way of labour charges, Explanation (baa) stood attracted. As stated above, each case will have to be examined by the Assessing Officer. As stated above, in each case of receipt of labour charges, rent, interest, commission etc. the Assessing Officer will have to ascertain whether the element of turnover existed. In the present case, the Tribunal has found, on facts, that there was an element of job-work turnover and therefore, the Tribunal concluded on the facts of this case that the receipt of labour charges was not in the nature of brokerage, commission, rent, interest or charges as mentioned in Explanation (baa) to section 80HHC. Further, the assessee received Rs. 66,35,083 as processing charges. This can be seen from profit and loss account. The Company is engaged in manufacture and sale of garments, both domestically and by way of exports. The processing charges earned was by using the entire undertaking of the Company which also manufactured garments for domestic sales and export sales and which processing charges were earned by incurring expenditure of the factory like wages, electricity charges etc. debited in profit and loss account. That, the income of Rs. 66,35,083 was only an income from business and the expenditure for earning this income is included in several items of expenditure debited in profit and loss account. In the circumstances, we do not wish to interfere with

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the finding of fact recorded by the Tribunal. As stated above, if the receipt of labour charges (job-work charges), interest, commission etc. accrues by way of operating income then it falls outside Explanation (baa). In the present case, the receipt accrued from manufacturing activity. The Tribunal has found that job processing activity was linked to the manufacturing activity of the assessee. In the circumstances, on facts, the judgments cited by the Department do not apply to this case. Lastly, we may point out that, in this case, there is no challenge to the findings of facts recorded by the Tribunal in relation to the processing activity forming part of the manufacturing activity of the assessee."

37. Therefore, in view of the above, before applying the ratio laid down by the aforesaid decisions, relied upon by the assessee, it is relevant to examine each and every receipt under the broad head of 'Miscellaneous Receipts' in light of the decision of the Hon'ble Jurisdictional High Court in Bangalore Clothing Co. (supra) and for this purpose, we remand this issue to the file of the AO for de novo adjudication. We further direct that if upon examination it is found that the receipt is having an element of turnover or arises out of the business operation of the assessee then the same cannot be excluded from the profit of the business for the purpose of computing deduction under section 80HHC of the Act. During the hearing, the learned Sr. Counsel also submitted that the net miscellaneous expenses incurred by the assessee is Rs. 70.34 crore, while miscellaneous income is Rs. 11.48 crore and therefore applying the ratio laid down by the Hon'ble Supreme Court in ACG Associated Capsules Pvt. Ltd. (supra), only the net amount can be added. As noted above, under the broad head 'Miscellaneous Receipt' the assessee has received income of varied nature. Therefore, we deem it appropriate to remand this aspect also to the file of the AO for de novo adjudication after necessary examination. If upon examination it is found that the miscellaneous expenses incurred by the assessee are of a similar nature as business income earned, then relief be granted to the assessee in light of the decision in ACG Associated Capsules Pvt. Ltd. (supra). As a result, grounds No. 4.5, 4.6, and 4.7 raised in assessee's appeal are allowed for statistical purposes."

32. We further find that in the year under consideration, the assessee received miscellaneous receipts of Rs.11.25 crore, details of which are provided on Page–133 of the paper book as follows:–

STATEMENT OF MISCELLANEOUS RECEIPTS

Sl. No.	*Particulars*	*Amount (Rs.)*
1.	*Excess demurrage received*	*78,730*
2.	*Common corporate income*	*314,060*
3.	*Miscellaneous income*	*31,179,691*
4.	*Printing, repairing & quarter maintenance charges realised from employee*	*29,164*
5.	*Service charges realised / rent recovered from shops*	*755,259*
6.	*Realisation from workers*	*13,604*
7.	*Realisation on account of kalian mandap / guest house*	*199,295*
8.	*Miscellaneous sales e.g., mango, cartidges, firewood, coal, material, etc.*	*2,271,906*

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9.	Hire charges	4,352,755
10.	Realised from M/s. Birla Corp. Ltd.	2,594,504
11.	Subsidy	5,270,697
12.	Terene cloth transit insurance	3,390,023
13.	Recovery against new telephone connection	5,000
14.	Recovery against application tender from parties	591,286
15.	Recovery of Terence yarn	873,418
16.	Sundry balances written off (net)	3,056,859
17.	Debit note for rejection	13,728
18.	Issue of identity cards, cycle tokens & Gate passes to employees	18
19.	Amount received towards plane landing charges	4,000
20.	Earnest money forfeited	25,000
21.	Liquidated damages	5,960,247
22.	Commission on recurring deposit–post office	58,006
23.	Cost of packing of durable tonner	(829,388)
24.	Toner rent & maintenance	(333,447)
25.	Recovered towards vehicle charges	79,104
26.	Commission on Savings CTD Scheme	7,118
27.	Toners Hydraulic testing & paint recovery	442,350
28.	Rebate on franking machine	1,600
29.	State environment award from MP Housinf & Environment Dept.	75,000
30.	Provision written back	19,80,595
31.	Deposit forfeited	909,167
32.	Commission received against export	3,468
33.	Commission on sale	205,325
34.	Refund of duty / cess	75,000
35.	Compensation / receipts / recovery from contractors / transporters	263,042
36.	Stores due / notice pay / F&F–staff	178,078
37.	Recovery of water & electricity charges	266,805
38.	Despatch claim for loading	1,216,112
39.	Scrap sales	39,47,033
40.	Penalty income	6,41,902
41.	Receipts against non–compliance / failure	17,225
42.	Interest recd. In petty cash books	2,328
43.	Rebate on sale tax / tax refund	30,560,105
44.	Recovery from chargeable issues	166,928

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45.	*Credit given by bank*	*115,000*
46.	*Railway claim received*	*63,124*
47.	*Excess claim refunded by railway*	*22,714*
48.	*Bad debts recovered*	*7,492,838*
49.	*Recovery against damaged properties/ cement*	*539,781*
50.	*Gain on forex cover*	*846,551*
51.	*Royalty*	*1,719,759*
52.	*Rate diff/ Addl. Consumption*	*689,075*
53.	*W.C. Premium refund*	*90,779*
	Total	*112,495,221*

33. During the hearing, the assessee provided the following details of these receipts:–

	Particulars	*Amount*
1.	*Subsidy*	*Rs.52.74 lakh*
2.	*Scrap sales*	*Rs.39.47 lakh*
3.	*Sundry balances written back*	*Rs.30.57 lakh*
4.	*Provision written back*	*Rs.19.81 lakh*
5.	*Liquidated damages*	*Rs.59.60 lakh*
6.	*Deposit forfeited*	*Rs.9.09 lakh*
7.	*Hire charges*	*Rs.43.53 lakh*
8.	*Bad debts recovered*	*Rs.74.93 lakh*
9.	*Other miscellaneous income*	*Rs.4.89 crore*
10.	*Net miscellaneous expenses incurred*	*Rs.49.67 crore*
11.	*Paid*	*Rs.60.92 crore*
12.	*Received*	*Rs.11.25 crore*

34. In respect of each of the aforesaid receipts, the assessee has placed reliance upon judicial pronouncements, wherein it has been held that the same would not be subjected to a deduction of 90% under clause (1) of Explanation (baa) to section 80HHC of the Act. As is evident from the record, in the present case also, the lower authorities did not examine each and every item of miscellaneous receipts as mentioned on Page–133 of the paper book and the AO straight away proceeded to reduce 90% of the miscellaneous receipts amounting to Rs.11.25 crore from the profit while calculating the deduction under section 80HHC of the Act. Therefore, respectfully following the decision of the coordinate bench rendered in assessee's own case for the assessment year 2003–04 cited supra, we restore this issue to the file of

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the AO for *de novo* adjudication with similar directions as rendered in the preceding year. As regards the plea of the assessee claiming netting–off of miscellaneous income, we restore this issue also to the file of the AO for *de novo* adjudication after necessary examination in the light of the directions rendered in the preceding year by the coordinate bench in similar facts and circumstances. As a result, ground no.4.5, 4.6, and 4.7, raised in assessee's appeal are allowed for statistical purposes.

35. The issue arising in grounds no.4.8 and 4.9, raised in assessee's appeal is pertaining to the reduction of 90% of the profit on sale of DEPB credits from the profit of the business for calculation of deduction under section 80HHC of the Act.

36. The learned CIT(A), vide impugned order, held that the profit from the sale of DEPB credits is not income directly derived from export business and accordingly, upheld the action of the AO. The learned CIT(A), however, directed the AO to reduce only 90% of such income for calculating the deduction under section 80HHC of the Act. Being aggrieved, the assessee is in appeal before us.

37. Having considered the submissions of both sides and perused the material available on record, we find that the Hon'ble Supreme Court in Topman Exports v/s CIT, [2012] 342 ITR 49 (SC) held that profit on transfer of DEPB is covered under clause (iiid) of section 28 and 90% of such profit on transfer of DEPB certificate will get excluded from "*profits of the business*", while calculating the deduction under section 80HHC of the Act. Since the learned CIT(A) has already directed the AO to reduce only 90% of such income for calculating the deduction under section 80HHC of the Act, therefore, in view of the aforesaid decision we find no infirmity in the aforesaid direction of the learned CIT(A). Accordingly, grounds no.4.8 and 4.9 raised in assessee's appeal are decided in light of the decision of the Hon'ble Supreme Court.

38. The issue arising in grounds no.5.1 and 5.2, raised in assessee's appeal is pertaining to allocation of Head Office expenses and reducing the same from deduction under section 80–O of the Act.

39. The brief facts of the case pertaining to the issue, as emanating from the record, are: During the year under consideration, the assessee has claimed a deduction of Rs.2,38,533, under section 80–O of the Act. The total turnover of the ED&D unit for the previous year was Rs.27.15 crore. Therefore, the AO, vide assessment order passed under section 143(3) of the Act, allocated the Head Office

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expenses of Rs.7,05,900 (being 0.26% of the turnover) against the royalty income of Rs.23,85,325, and computed the deduction under section 80–O of the Act to Rs.Nil (10% of Rs.23,85,325 minus Rs.7,05,900).

40. The learned CIT(A), vide impugned order, dismissed the ground raised by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

41. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 13/06/2023, passed in assessee's own case for the assessment year 2003–04 cited supra, while deciding similar issue in favour of the assessee by following the decision rendered in the preceding year, observed as under:–

> *"43. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal in assessee's own case in Grasim Industries Ltd. (supra), vide order dated 14/12/2021, for the assessment year 2002-03, decided the similar issue in favour of the assessee, following the decision rendered in preceding years, by observing as under:-*
>
> > *"27. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y.2001-02 in favour of the assessee. While deciding the issue in favour of the assessee the Coordinate Bench of the Tribunal in ITA.No. 4083/Mum/2003 dated 22.10.2014 held as under: -*
> >
> > > *"25. The assessee has taken additional ground with regard to appropriation of HO expenses in computing deduction u/s 80-O of the Act amounting to Rs. 3,18,000/-.*
> > >
> > > *26. The issue has been decided in favour of the assessee by the Tribunal for the assessment years 1996-97, 1997-98, 1994-95 & 1995-96. It was further brought to our notice that no appeal has been filed by the Department against the decision of the Tribunal for allowing appropriation of HO expenses in computing deduction u/s 80-O of the Act.*
> > >
> > > *27. For the assessment year 1996-97 and 1997-98, this Tribunal has considered and decided an identical issue in para 15.2 to 15.4 as under.*
> > >
> > > *"15.2 We have heard the Sr ld Counsel for the assessee as well as the ld DR and considered the relevant material on record. A similar issue has been considered and decided by the Tribunal in assessee's own case for the AY 1995-96 in paras 29.1 & 29.2 as under:*
> > >
> > > *29.1 On a similar issue the Tribunal in assessee's own case in AY 1994-95(supra) in paragraphs 25 to 25.2 has held as follows:-*
> > >
> > > *'25. In grounds of appeal No. 32 to 35, the assessee has challenged the order of the CIT(A) in allocating head office expenses and thereby reducing the quantum of deduction available to the assessee under the following provisions:*

Section	*Rs.*
8OHH	*14,20,000*
801	*5,54,600*
80M	*7,50,000*
80-0	*3,50,000*
	30,74,600

25.1 Facts of the case, in brief, are that the AO estimated the expenses and allocated head office expense to the various units which had claimed benefits u/s. 8OHH,801, 80M and 80-0 of the Act. Since the nexus between the head office and the individual units cannot be denied and since the assessee did not give details so as to give better allocation of these expenses to various units, the CIT(A) upheld the action of the AO. Aggrieved with such order of the CIT(A), the assessee is in appeal before us.

25.2 After hearing both the sides, we find the AO has only allocated the expenses but no income was allocated. We find the co-ordinate Bench of the Tribunal in the case of M/s. Procter & Gamble India Ltd. Vs. DCIT, vide ITA No. 5466/Mum/99 order dated 27th November, 2006 for the A.Y. 1990-91 has held that head office expense allocated to the units are not to be taken into consideration for computing the income of the assessee eligible for deduction u/s. 801 and also u/s 8OHH. Similarly we find the Bangalore bench of the ITAT in the case of Wipro GE Medical Systems Ltd. Vs. DCIT reported in 81 TTJ 455 has held that there is no need for allocation of any expenses when the expenses are directly connected with periods. Following the decision of the coordinate bench of the Tribunal and the decision of the Bangalore Bench of the Tribunal, we are of the considered opinion that there is no necessity for allocating the head office expenses to the units claiming deduction u/s. 8OHH, 801, 80M and 80-0. The order of the CIT(A) on this issue is accordingly set aside and the grounds raised by the assessee are allowed.

29.2 Respectfully following the aforesaid decision of the Tribunal, these grounds, namely 27 to 30 A, are allowed".

Respectfully following the earlier order of the Tribunal, we decide this issue in favour of the assessee."

28. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in A.Y. 2001-02 is respectfully followed, we order accordingly."

44. The learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case and no change in facts and law was alleged in the relevant assessment year. Therefore, respectfully following the judicial precedent in assessee's own case cited supra, we uphold the plea of the assessee and allow grounds no.5.1 and 5.2 raised in assessee's appeal."

42. In the present appeal, the learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case. This issue is recurring in nature and has been decided in faovur of the assessee in the preceding years. Therefore, respectfully following the judicial precedent rendered in assessee's own case cited supra, grounds no.5.1 and 5.2 raised in assessee's appeal are allowed.

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43. Insofar as ground no.5.3 is concerned, keeping in view our aforesaid decision in respect of grounds no.5.1 and 5.2, the issue arising in ground no.5.3, raised in assessee's appeal becomes infructuous and hence, kept open.

44. The issue arising in grounds no. 6.1 and 6.2, raised in assessee's appeal, is pertaining to the exclusion of miscellaneous receipts from business profits while computing deduction under section 80-IA of the Act.

45. The brief facts of the case pertaining to this issue, as emanating from the record, are: The AO, vide assessment order passed under section 143(3) of the Act, held that the miscellaneous receipts are not derived from industrial undertaking and thus, the assessee is not entitled to deduction under section 80-IA of the Act on such receipts.

46. The learned CIT(A), vide impugned order, noted that the AO has not discussed this issue in the assessment order and has also not given the reason for excluding the miscellaneous receipts from the profit of eligible business for computing deduction under section 80-IA of the Act. The learned CIT(A) noted that under the miscellaneous receipts, the assessee has shown the income out of interest receipts, access provision written back, prior period adjustments, rent, miscellaneous receipts, job charges, exchange rate difference, export incentives, profit on the sale of DEPB license, notice pay, sludge sales, etc. Accordingly, the learned CIT(A) held that the AO is supposed to examine the nature of each item of miscellaneous receipts included by the assessee in the profit of the eligible unit and exclude only those receipts which do not directly emerge from running of the undertaking. The learned CIT(A), vide impugned order, examined the nature of the job charges received by the assessee and held the same to be profit directly derived from the undertaking. Further, the learned CIT(A) noted that the excess provision written back was actually the result of the expenses already allowed as deduction in the earlier years but now written back as income during the year and therefore has a direct nexus with the industrial undertaking. Accordingly, the learned CIT(A) directed the AO to include receipts from job charges and excess provisions written back as business profit for the purpose of computing the deduction under section 80-IA of the Act. The other receipts were held to be rightly excluded from the business profit by the learned CIT(A) and to that extent, the AO's findings were upheld. Being aggrieved, the assessee is in appeal before us.

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47. During the hearing, the learned Sr. Counsel, by referring to the details of miscellaneous receipts forming part of the paper book on page 135, submitted that the learned CIT(A) only examined the receipts from job charges and excess provision written back and found the same to be having direct nexus with the industrial undertaking, therefore includable in the business profit for purpose of computing deduction under section 80-IA of the Act. The learned Sr. Counsel by referring to the decision of the coordinate bench of the Tribunal in assessee's own case for the assessment year 2002-03 submitted that the gain arising from the sale of machinery was held to be eligible for deduction under section 80-IA of the Act. Since the receipts forming part of the miscellaneous receipts are of a similar nature, therefore the same should be considered for computing the deduction under section 80IA of the Act.

48. On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

49. We have considered the submissions of both sides and perused the material available on record. In the year under consideration, the assessee included miscellaneous receipts of Rs.10,10,73,313 for the purpose of computation of deduction under section 80 IA of the Act. As per the details of miscellaneous receipts, provided on page 135 of the paper book, these receipts include interest, excess/short provision, prior period adjustments, rent, miscellaneous receipts, job charges, exchange rate difference, export incentive, profit on the sale of DEPB license, notice pay and sludge sales. As per the assessee, all these receipts are directly connected with and derived from the eligible business, and therefore, should be considered for computation of deduction under section 80-IA of the Act. As is evident from the record, the learned CIT(A) only examined the receipts from job charges and excess provisions written back and considered the same to be business profits for computing deduction under section 80-IA of the Act. While, the other receipts, as noted above, under the broad category of '*miscellaneous receipts*' were not examined by any of the lower authorities to determine whether they are derived by the undertaking or the enterprise from the eligible business, as per the provisions of section 80-IA of the Act. Therefore, in view of the above, we deem it appropriate to restore this issue to the file of the AO for *de novo* adjudication as per law, after examining each and every receipt under the category of '*miscellaneous receipts',* which were excluded from the business profits by the learned CIT(A) for computing the deduction under section 80 IA of the Act. Thus, to this extent, the impugned order on this issue is set aside. Accordingly,

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grounds No. 6.1 and 6.2 raised in assessee's appeal are allowed for statistical purposes.

50. The issue arising in grounds No. 7.1 and 7.2, raised in assessee's appeal, is pertaining to the taxability of sales tax exemption received by the assessee.

51. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee availed sales tax exemption benefit of Rs. 117.45 crore, which is already included in the gross sales and profit offered for tax. The assessee claimed the sales tax exemption to be the capital receipt and thus excluded the same from profit while computing the taxable business profits. In this regard, the assessee made the following submissions during the assessment proceedings:-

> *"1. The assessee company is inter alia engaged in manufacture of Fibre, Pulp, Chemicals, Fabric, Yarn, Cement and Sponge Iron. The assessee has interest in diverse business. The Company started with a fabric plant in 1950 and today has emerged as one of the largest public company with turnover exceeding Rs.6100 crores. The Company has achieved all round growth by putting up new plants and expanding*
>
> *existing plants. 2. The manufacturing Units are located in various parts of the country details of which has been filed with the return of income and a*
>
> *copy is attached for your ready reference.*
>
> *3. You will kindly observe that many of the manufacturing Units are located in backward/notified area and the State Government of the respective States have granted subsidy by way of exemption of sales tax payment on sale of finished goods and purchase of raw inaterial and other inputs for promoting setting-up of industries in backward/notified area. Huge capital investment is needed for development of backward / notified areas and since the State Government cannot give subsidy in cash due to recourse constraints, subsidy has been granted by allowing the assessee to retain the sales tax payable to the State Government.*
>
> *4. A note stating brief description of the various schemes is attached and a copy of the Schemes and eligibility certificates is also enclosed.*
>
> *A perusal of the Scheme and the purpose for which it was framed by the State shows that the incentive was given for bringing about necessary infrastructure in processing / developing the backward / notified area and thus the incentive is in the capital field and therefore cannot be taxed as revenue receipt. The incentive is based on the amount of investment in fixed assets. It is to induce or motivate the businessman to move and take a risk.*
>
> *5. The assessee company is liable to pay sales tax on sale of finished goods and purchase of raw material and other inputs as per the applicable sales tax law of the State. However, in accordance with the Scheme, the assessee has been allowed to retain the same subsidy. The assessee is required to file returns with the concerned authorities, which work out the notional liability of sales tax and complete the assessment. In the books, the total amounts of sale proceeds are credited to profit and loss account, which includes notional liability of sales tax. The amount of notional sales*

tax liability should have been reduced from the revenue receipts as it is embedded in such receipts, though having character of subsidy. We submit that books of account are not sacrosanct and if true nature of the receipt or payment is different then the same has to be evaluated on the basis of substance of the transaction and in accordance with the law applicable to such transaction.

6. The Hon'ble Supreme Court, in the case of Sahney Steel (228 ITR 253) has held that the decision would depend upon the salient features of the Scheme. If it is given as a general assistance to the assessee to carry on his business or trade, it would be a trading receipt, but if the object of the subsidy, irrespective of its source, is to enable the assessee to acquire new plant and machinery for future expansion of its manufacturing capacity in a backward area, the entire subsidy must be held to be a capital receipt.

Further the Supreme Court in the case of P J Chemicals (210 ITR 830) has held that the incentive granted at the prescribed percentage of fixed capital investment in backward districts was an incentive to encourage entrepreneurs to move to the backward areas was an incentive to encourage entrepreneurs to move to the backwards areas to establish industries and was not a payment to meet any portion of the actual cost of fixed assets u/s 43(1) of the Act.

7. The assessee company submits that the amount of sales tax subsidy received during the previous year Rs. 117.84 crores is capital in nature and should be excluded profits while computing taxable income.

(a)	*Aditya Cement and Bhatinda Grinding Unit (North Zone)*	*27.71*
(b)	*South Cement and Grasim Cement (East and South Zone)*	*55.18*
(c)	*Vikram Ispat, Salav*	*33.62*
(d)	*Elegant Spinners*	*0.52*
(e)	*Vikram Woollens*	*0.14*
(f)	*Birla While GRC, Savli*	*0.28*
		117.45

8. Amount of sales tax subsidy for the previous year are as per return filed by the assessee company with the respective state/sales tax authorities and may change on completion of assessment."

52. The AO, vide assessment order passed under section 143(3) of the Act, held that the State Governments have not given any amount of subsidy either in cash or in-kind to the assessee. It was further held that the object of the government is to grant sales tax exemption to increase sales and not the capital investment in the state. It was further held that under the scheme, the assessee is not required to pay the amount of sales tax and there cannot be any question of receiving the subsidy. Therefore, the AO rejected the claim of the assessee and held that the sales tax exemption received by the assessee is revenue in nature and therefore is part of the taxable profit of the business.

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53. The learned CIT(A), vide impugned order, dismissed the ground raised by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

54. We have considered the submissions of both sides and perused the material available on record. As per the assessee, the object for the grant of the incentive by the State Governments is to promote setting up industries in the backward/notified areas and therefore, the subsidy is capital in nature. In the year under consideration, the assessee received sales tax subsidiary under the following schemes:-

- *Packet Scheme of Incentive, 1988 dated 01/10/1988 by State of Maharashtra*
- *Sales Tax New Incentive Scheme for Industries 1989, Rajasthan*
- *Sales Tax Exemption Scheme (Madhya Pradesh Industrial Policy & Action Plan, 1994)*
- *Sales Tax Waiver Scheme (Package of Fiscal Incentives offered by Government of Tamil Nadu to Industries)*
- *Punjab Industrial Incentive Code under the Industrial Policy, 1996*
- *Haryana Valued Added Tax Act, 2003*
- *Sales Tax Exemption Scheme (M.P. Vanijyikar Adhiniyam, 1994)*
- *Sales Tax Incentive Scheme (Incentives offered by Government of Gujarat under the New Incentive Policy-Capital Investment Incentive (General) Scheme-1995-2000)*

55. We find that the taxability of sales tax exemption received under the schemes of the State of Maharashtra, Haryana, Rajasthan, and Madhya Pradesh came up for consideration before the coordinate bench of the Tribunal in assessee’s own case in JCIT v/s Grasim industries Ltd, in ITA No. 2155/Mum/2016 etc., for the assessment years 1996-97 to 2000-01. The coordinate bench vide order dated 29/04/2022 decided a similar issue in respect of these schemes in favour of the assessee and held that the subsidy/incentive received by the assessee is in the nature of capital receipt and not chargeable to tax. We find that after analysing each sales tax subsidy scheme, the coordinate bench held that the only purpose of these schemes is for setting up 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. The relevant findings of the coordinate bench, in the aforesaid decision, in this regard are as under:-

> *“5.3.5. From the perusal of the aforesaid schemes together with its objects and preamble, we find that 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.*

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

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

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> *16. There is a Canadian case St. John Dry Dock & Ship Building Co. Ltd. v. Minister of National Revenue 4 DLR 1, which has close similarity to the case of Seaham Harbour Dock Co. 's case (supra). In that case it was held that where subsidies were given under statutory authority, the statutory purpose for which they are authorised is relevant and may even be decisive in determining whether it is taxable income in the hands of the recipient. In that case, it was pointed out after discussing the Seaham Harbour Dock Co. 's case (supra)as well as that of Lincolnshire Sugar Co. Ltd. 5 case (supra)that subsidy given by the Canadian Government to encourage construction of dry docks was 'an aid to the construction of dry dock and not an operational subsidy'.*
>
> *17. This precisely is the question raised in this case. By no stretch of imagination can the subsidies whether by way of refund of sales tax or relief of electricity charges or water charges can be treated as an aid to setting up of the industry of the assessee. As we have seen earlier, the payments were to be made only if and when the assessee commenced its production. The said payments were trade for a period of five years calculated from the date of commencement of production in the assessee's factory. The subsidies are operational subsidies and not capital subsidies."*

56. Thus, respectfully following the aforesaid decision, rendered in assessee's own case, we are of the considered view that the sales tax exemption received by the assessee, in the year under consideration, under the similar schemes of the State of Maharashtra, Haryana, Rajasthan, and Madhya Pradesh are in the nature of capital receipts and therefore not taxable in the hands of the assessee.

57. As regards the Sales Tax Waiver Scheme (Package of Fiscal Incentives offered by the Government of Tamil Nadu to Industries), forming part of the paper book from pages 289-334, we find that the objective of the scheme was for fostering the pace of industrialisation and to enhance the competitiveness of Tamil Nadu for attracting a large share of industrial projects. Accordingly, the Government of Tamil Nadu introduced the aforesaid scheme which includes capital subsidies and sales tax concessions. From page No. 294 of the paper book, we find that as per the said scheme the State Government has provided a set of waivers and deferrals which can be availed by the investor setting up a mega-investment. It is further provided that the concession is available to industries set up anywhere regardless of its location. In this regard, the assessee has also placed on record the eligibility certificate issued under the aforesaid scheme granted to the assessee's unit located at Reddipalayam Village for the manufacture of cement. Therefore, upon perusal of the aforesaid documents we are of the considered view that the sales tax exemption scheme floated by the Government of Tamil Nadu is of the nature similar to the schemes considered by the coordinate bench in the earlier years, and thus, sales tax exemption received under this scheme is in the nature of capital receipt.

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58. Similarly, as regards the Sales Tax Incentive Scheme (Incentives offered by the Government of Gujarat under the New Incentive Policy-Capital Investment Incentive (General) Scheme-1995-2000), forming part of the paper book from pages 553-575, we find that the said scheme was to accelerate the development of the backward areas of the State and to create large-scale employment opportunities. Further, under the said scheme, it was also stressed that the need is to increase the total flow of investment to the industrial sector with the proper development of infrastructure and human resources to sustain long-term growth and achieve sustainable development. From the perusal of the eligibility certificate issued under the aforesaid scheme, forming part of the paper book on page 577, we find that the same also mentions the total investment in fixed assets by the assessee. Therefore, in view of the above, we find that the sales tax exemption scheme of the Government of Gujarat is of the nature similar to the schemes considered by the coordinate bench in the earlier years, and thus, sales tax exemption received under this scheme is in the nature of capital receipt.

59. As regards the Punjab Industrial Incentive Code under the Industrial Policy, 1996, forming part of the paper book from pages 481-490, we find that the said scheme was formulated with a view to promote growth of the industry in the State and for that purpose it provides various incentives for new industrial units that come into production or undertake expansion on or after 01/04/1996. We find that in the scheme, inter-alia, the capital subsidy is provided to the new large and medium units set up in the notified area as mentioned in Annexure-I of the scheme. We find that under the said scheme certificate of eligibility was also issued to the assessee in respect of Vikram Bathinda Cement Grinding Unit. Thus, the dominant purpose for which this incentive scheme was introduced is also for setting up the industry in the notified area to promote industrial growth in the State. Therefore, we are of the considered view that the sales tax exemption received by the assessee under the scheme is also in the nature of capital receipt. Therefore, in view of the above, the sales tax exemptions received by the assessee under all the schemes of various State Governments, as noted above, are in the nature of capital receipt, and thus, are not taxable in the hands of the assessee. Accordingly, grounds no.7.1 and 7.2 raised in assessee's appeal are allowed.

60. Ground No. 8 raised in assessee's appeal seeking the cost of this appeal was not pressed during the hearing. Therefore, the same is dismissed as not pressed.

61. Vide application dated 03/07/2006, the assessee sought admission of the following additional grounds of appeal:-

> *"1. The learned CIT (A) ought to have held that the sum of Rs.3,50,30,912/- being royalty was an allowable deduction when computing the assessee's income chargeable to tax and could not be disallowed by applying section 43B of the Act.*
>
> *2. The learned CIT (A) ought to have held that the sum of Rs.2,25,11,447/- being interest on royalty was an allowable deduction when computing the assessee's income chargeable to tax and could not be disallowed under section 43B of the Act."*

62. Since, the issue raised by way of additional ground is a legal issue, which can be decided on the basis of material available on record, we are of the view that the same can be admitted for consideration and adjudication in view of the ratio laid down by the Hon'ble Supreme Court in NTPC Ltd vs CIT: [1998] 229 ITR 383 (SC). We find that the coordinate bench of the Tribunal in assessee's own case for the assessment year 2003-04, vide order dated 13/06/2023 cited supra decided a similar issue in favour of the assessee following the decision rendered in preceding years. The relevant findings of the coordinate bench, in the aforesaid decision, are as under:-

> *"57 Since, the issue raised by way of additional ground is a legal issue, which can be decided on the basis of material available on record, we are of the view that the same can be admitted for consideration and adjudication in view of the ratio laid down by the Hon'ble Supreme Court in NTPC Ltd vs CIT: [1998] 229 ITR 383 (SC). Having heard the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal in assessee's own case in Grasim Industries Ltd (supra), vide order dated 14/12/2021, for the assessment year 2002-03, decided the similar issue in favour of the assessee, following the decision rendered in preceding years, by observing as under:-*
>
>> *"40. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02 in favour of the assessee. While deciding the issue in favour of the assessee the Coordinate Bench of the Tribunal in ITA.No. 4083/Mum/2003 dated 22.10.2014 held as under: -*
>>
>>> *"The next grievance relates to the disallowance of royalty and interest on royalty u/s 43B of the Act treating it as tax. The issue is now settled by various orders of the Tribunal in assessee's own case for assessment years 1995-96 to 2000-01. A similar issue was considered by the Tribunal in the assessee's own case in A.Y. 1999-2000 in ITA No.5631/M/2002, wherein we find that the Tribunal has followed its earlier order in the assessee's own case in ITA No. 5630/Mum/02 for A.Y. 1998-99. In the absence of any contradictory facts brought on record by the Revenue, following the aforementioned decision, we decide this issue in favour of the assessee. Additional ground No. 2 is accordingly allowed."*
>>
>> *41. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in A.Y. 2001-02 is respectfully followed, we order accordingly."*

> *58. The learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case and no change in facts and law was alleged in the relevant assessment year. Therefore, respectfully following the judicial precedent in assessee's own case cited supra, we uphold the plea of the assessee and allow aforesaid additional grounds raised by the assessee vide application dated 03/07/2006."*

63. In the absence of any allegation of change in facts and law in the present case, we find no reason to deviate from the view so taken by the coordinate bench in the preceding years. Therefore, respectfully following the judicial precedent in assessee's own case cited supra, we uphold the plea of the assessee and allow the aforesaid additional grounds raised by the assessee vide application dated 03/07/2006.

64. The assessee, vide another application dated 23/01/2013, raised the following additional grounds of appeal:-

> *"1. The learned CIT(A) ought to have held that the sum of Rs.1,16,24,021, being dividend received from Alexandria Carbon Black Company, a company incorporated and registered in Egypt (U.A.R.) was not taxable in India."*

65. The issue arising in the aforesaid additional ground of appeal is pertaining to the taxability of dividend received from Egyptian company. Since, the issue raised by way of additional ground is a legal issue, which can be decided on the basis of material available on record, we are of the view that the same can be admitted for consideration and adjudication in view of the ratio laid down by the Hon'ble Supreme Court in NTPC Ltd. (supra). During the year under consideration, the assessee received Rs.1,16,24,021 as a dividend from M/s Alexandria Carbon Black Company S.A.E., a company incorporated and registered under the laws of Egypt (U.A.R.). It is the plea of the assessee that the aforesaid dividend received from the Egyptian company is not taxable in India. We find that a similar issue came up for consideration before the coordinate bench of the Tribunal in assessee's own case in assessment year 2003-04. Vide order dated 13/06/2023 cited supra, the coordinate bench observed as under:-

> *"65. Having considered the submissions of both sides, we find that as per Article 11(2) of the India- UAR (Egypt) DTAA, dividends paid by a company which is a resident of the UAR (Egypt) to a resident of India may be taxed in the UAR (Egypt). As noted above, it is the plea of the assessee that prior to amendment by Finance Act 2003, w.e.f. 01/04/2004, to section 90 of the Act, the term "may be taxed" means that only the source country has the right to tax the income earned in such country and the resident country does not have any taxing rights. Therefore, the dividend received by the assessee from the Egyptian company, in the present case, is only taxable in Egypt. We find that while examining the issue of applicability of the aforesaid amendment vide*

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Finance Act, 2003 to section 90 of the Act, and the aforesaid Notification issued under the said section, the coordinate bench of the Tribunal in Essar Oil Ltd v/s ACIT, [2013] 42 taxmann.com 21 (Mum-Trib.), observed as under:-

> *"88 We summarise our conclusion as under:—*
>
> *(i) …..*
>
> *(ii) The notification dated 28th August 2008, reflects a particular intent and objective of the Government of India, as understood during the course of negotiations leading to formalization of treaty. Therefore, such a notification has to be reckoned as clarificatory in nature and hence interpretation given by Govt. of India through this notification will be effective from 1st April 2004, i.e., from the date when provision of section 90(3) was brought in the statute, giving a Legal frame work for clarifying the intent of one of the negotiating parties;"*

66. The coordinate bench of the Tribunal also noted the legal position as it existed prior to the aforesaid amendment as under:-

"57A. If we analyse all the judgments as have been referred to above, it is evident that:—

- *Firstly, in R.M. Muthaiah (supra), the expression "may be taxed" has not been expressly dealt with, however, in the context of Article-6(1), wherein similar phraseology has been used, the High Court has given its decision that once it has been taxed in the foreign country, the same cannot be taxed in India. Thus, this decision in a way interprets the phrase "may be treated" to mean that source country has a right to tax to the exclusion of resident state;*

- *Secondly, in S.R.M. Firm (supra), the High Court has in a very clear terms, has interpreted the expression "may be taxed" to mean that once the income is taxable in other contracting State that is country of source then country of resident i.e., India is precluded from including the same income in India;*
- *Thirdly, the Hon'ble Supreme Court in Azadi Bachao Andolan (supra), has approved the reasoning of R.M. Muthaiah (supra) in an entirely different context, therefore, it cannot be held that the Hon'ble Supreme Court has carved out any express law on the phraseology of "may be taxed";*
- *Fourthly, in P.V.A.L. Kulandagan Chettiar (supra's) the Hon'ble Supreme Court has specifically refrained from giving any such interpretation of "may be taxed" and affirmed the decision of High Court on a different reasoning and grounds. Thus, this decision does not carve out any express law on the phrase "may be taxed"; and*

- *Lastly, the Hon'ble Supreme Court in Turquoise Investments & Finance Ltd. (supra) has not only confirmed the decision of R.M. Muthaiah (supra) but also decision of the M.P. High Court, wherein extensively reliance was placed on the decision of S.R.M. Firm (supra). Thus, this decision of the Hon'ble Supreme Court in a way has confirmed the entire reasoning of the S.R.M. Firm (supra) which, in our opinion, is slightly different from the judgment of the Hon'ble Supreme Court in P.V.A.L. Kulandagan Chettiar (supra) to the extent that the phrase "may be taxed" was not expressly dealt with by the Hon'ble Supreme Court as the reasoning of the High Court was affirmed on different ground. Thus, the later decision of the Hon'ble Supreme Court in Turquoise Investments & Finance Ltd. (supra) can be said to be the view*

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expressed by the decision in S.R.M. Firms (supra) by the Madras High Court.

In this background, that the three High Courts have expressed their views and which have been affirmed by the Hon'ble Supreme Court in some context or the other, specially the decision of Turquoise Investments & Finance Ltd. (supra), wherein the Apex Court has approved these decisions completely, then as a judicial precedence, one has to accept that the phrase "may be taxed" has to be inferred as allocating the taxing right to the source country only on the income earned in such country and the country of resident is completely precluded from taxing the same income."

66. Since the year under consideration before the coordinate bench in the aforesaid decision was the assessment year 2003-04, the coordinate bench following the decision of the Tribunal in Essar Oil Ltd v/s ACIT, [2013] 42 taxmann.com 21 (Mum-Trib.) came to the conclusion that the amendment w.e.f 01/04/2004, by which sub-section (3) to section 90 has been brought in the statute, whereby there was a clear departure from the earlier position, is not applicable to that year. However, since the amendment vide Finance Act, 2003 to section 90 was held to be effective from 01/04/2004 and thus applicable from the assessment year 2004-05, therefore the year under consideration will be governed by the aforesaid amended provisions and Notification no. 91 of 2008 dated 28/08/2008 issued under section 90(3) of the Act is also applicable. We find that the coordinate bench of the Tribunal in Technimont (P.) Ltd. v/s ACIT, [2020] 116 taxmann.com 996 (Mumbai - Trib.), after taking into consideration the aforesaid amendment observed as under:-

*"10**.** It may be recalled that, with effect from 1st April 2004, a new sub-section 3 was inserted in Section 90, and this new sub-section provided that "(a)ny term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf". In exercise of the powers so vested in the Central Government, vide notification no. 91 of 2008 dated 28th August 2008, it was notified as follows:*

In exercise of the powers conferred by sub-section (3) of section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies that where an agreement entered into by the Central Government with the Government of any country outside India for granting relief of tax, or as the case may be, avoidance of double taxation, provides that any income of a resident of India "may be taxed" in the other country, such income shall be included in his total income chargeable to tax in India in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), and relief shall be granted in accordance with the method for elimination or avoidance of double taxation provided in such agreement.

11. ***The effect of Hon'ble Supreme Court's judgment in Kulandagan Chettiar's case (supra) thus was clearly overruled by the legislative developments. It was specifically legislated that the mere fact of taxability in the treaty partner jurisdiction will not take it out of the ambit of taxable income of an assessee in India and that "such income shall be included in his total income chargeable to tax in India in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), and relief shall be granted in accordance with the method for elimination or avoidance of double taxation provided***

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in such agreement". A coordinate bench of this Tribunal, in the case of Essar Oil Ltd (supra) also proceeded to hold that this notification was retrospective in effect inasmuch as it applied with effect from 1st April 2004 i.e. the date on which sub-section 3 was introduced in Section 90."

(emphasis supplied)

67. Therefore, in view of the above, we find no merit in the plea of the assessee. Accordingly, the additional ground filed by the assessee vide application dated 23/01/2013 is dismissed.

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

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Revenue's Appeal – A.Y. – 2004–05

69. The Revenue, in its appeal, has raised the following grounds:–

"1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the disallowance of Rs.11,63,19,840/- u/s.43B by relying upon the order of the ITAT in the assessee's case for the AY 1993-94 without appreciating that the department had not accepted the same by filing an appeal u/s.260A.

2. On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the disallowance of Rs.18,61,084/- towards contribution to local organisation, relying upon the CIT(A)'s orders in the assessee's own case for the AYrs. 1999-2000 & 2001-02 which have been contested by the department in further appeal before the ITAT.

3. On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the disallowance of Rs.71,43,397/- made by the AO on account of rural development expenses, relying upon the CIT(A)'s orders in the assessee's own case for the AYrs. 1996-97 & 2001-02 which have been contested by the department in further appeal before the ITAT.

4. On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to treat the production cost of the advertisement films as a revenue expenditure by relying upon his earlier orders for the AYrs. 2002-03 and 2003-04 without appreciating that the department has not accepted the orders by filing appeal with the ITAT.

5. On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the disallowance of Rs.1,95,057/- as incurred towards earning of exempt dividend income by relying upon his decision for earlier years without appreciating that the same have not been accepted by the department by filing an appeal with the ITAT.

6. On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO not to reduce the claim of deduction u/s.80-IA by relying upon his earlier orders on the issue for AYrs. 1996-97 to 2003-04 without appreciating that the department had not accepted the same by filing an appeal to the ITAT.

7. On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to exclude excise duty and sales-tax from the total turnover for the

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computing of deduction u/s.80HHC by relying on the jurisdictional High Court's decision in the case of Sudarshan Chemical Industries Ltd. (245 ITR 769) without appreciating that the department has not accepted the same by filing an SLP.

8. On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to reduce only 90% of Rs.5,82,12,856/- from the business profits being the DEPB income, for the purpose of computing the deduction u/s.80HHC without appreciating that explanation (baa) of section 80HHC does not have any such provision of reducing 90% of such income.

9. On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to allow deduction u/s.80-1A in respect of profits of Rail System Raipur and Hotgi by relying upon his decision for the AYrs. 2003-04 without appreciating that the department has not accepted the same by filing an appeal with the ITAT.

10. The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.

11. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

70. The issue arising in ground no.1, raised in Revenue's appeal is pertaining to the deletion of disallowance under section 43B of the Act.

71. The brief facts of the case pertaining to the issue, as emanating from the record, are: In the computation of income, an amount of Rs.16,82,29,400, has been considered as disallowance under section 43B(a) of the Act by the assessee. However, an amount of Rs.11,63,19,840, was not considered as disallowance under section 43B falling under clause (c) to (f). The assessee contends that the amount of Rs.10,89,50,144, which falls under clause (c) to (f) of section 43B of the Act and which is not payable as on 31/03/2004, cannot be covered by provision of section 43B of the Act. During the assessment proceedings, the assessee submitted that the issue has been decided in its favour by the coordinate bench of the Tribunal for the assessment year 1993–94 and the reference application filed by the Revenue on this issue has been rejected by the Tribunal. The AO, vide order passed under section 143(3) of the Act, did not agree with the submissions of the assessee on the basis that the Revenue has filed an appeal before the Hon'ble Jurisdictional High Court on this issue. Accordingly, the amount of Rs.11,63,19,840, was disallowed.

72. The learned CIT(A), vide impugned order, following judicial precedent in assessee's own case deleted the aforesaid disallowance made by the AO. Being aggrieved, the Revenue is in appeal before us.

73. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 13/06/2023, passed in assessee's own case for the assessment year 2003–04 cited supra, while deciding similar issue in favour of the assessee by following the decision rendered in the preceding year, observed as under:–

> *"73.* Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench, vide order dated 14/12/2021, passed in assessee's own case for the assessment year 2002–03, while following the decision rendered in the preceding year, decided the similar issue in favour of the assessee, by observing as under:–
>
> > *"48. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02 in favour of the assessee. While deciding the issue in favour of the assessee the Coordinate Bench of the Tribunal in ITA.No. 4083/Mum/2003 dated 22.10.2014 held as under: -*
> >
> > > *"31. Ground No. 1 in Revenue's appeal relates to the disallowance u/s 43B of the Act which has been dealt with by the A.O. at para No. 9-9.5 of his order. The ld. CIT(A) dealt with this issue at page No. 2, para 5 of his order and deleted the disallowance by following the order of the Tribunal in earlier years. From the record, we found that the Tribunal has been consistently allowed the issue in favour of the assessee in assessment years 1990-91, 1993-94, 1994-95, 1996-97, 1997-98 & 1998-99. We further found that against the order of the Tribunal, the Department has not filed any appeal before the Hon'ble High Court in assessment years 1996-97, 1997-98, 1995-96 & 1994-95. As the matter has been settled and the ld. CIT(A) deleted the disallowance by following the order of the Tribunal, we do not find any reason to interfere with the order of the Ld. CIT(A) deleting the disallowance made by the A.O. u/s 43-B of the Act."*
> >
> > *49. Respectfully following the above decision, we sustain the order passed by the Ld.CIT(A) and dismiss the Ground No.1 raised by the revenue.*
>
> *74. The learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case and no change in facts and law was alleged in the relevant assessment year. This issue is recurring in nature and has been decided in favour of the assessee in the preceding years. Therefore, respectfully following the judicial precedent in assessee's own case cited supra, ground no.1, raised in Revenue's appeal is dismissed."*

74. In the present appeal, the learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case. This issue is recurring in nature and has been decided in favour of the assessee in the preceding years. Therefore, respectfully following the judicial precedent rendered in assessee's own case cited supra, grounds no.1, raised in Revenue's appeal is dismissed.

75. The issue arising in ground no.2, raised in Revenue's appeal is pertaining to the deletion of disallowance towards contribution to local organisation.

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76. The brief facts of the case pertaining to the issue, as emanating from the record, are: The brief facts of the case pertaining to the issue, as emanating from the record, are: During the year under consideration, the assessee made 24 contributions amounting to Rs.18,61,084, to various local organizations located in and around the areas where the plants/offices of the assessee company are situated. During the assessment proceedings, the assessee submitted that such contributions are not in the nature of charity but are made purely for business consideration. It was further submitted that such contributions are necessary for maintaining a good relationship and to earn the goodwill of the local population which ensures the smooth working of the factories and, therefore, should be allowed as business expenditure. The A.O., vide order passed under section 143(3) of the Act, did not agree with the submissions of the assessee and held that such contributions are essential in the nature of donations and since a specific provision already exists in the Act to take care and govern the allowability of payments made in the nature of donations, only such payments which satisfies the conditions laid down under section 80G of the Act can be allowed as deduction. Accordingly, the AO held that these contributions do not satisfy those conditions and, therefore, are not eligible for deduction.

77. The learned CIT(A), vide impugned order, following the decision of its predecessor-in-office, rendered in assessee's own case deleted the aforesaid disallowance made by the AO. Being aggrieved, the Revenue is in appeal before us.

78. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 13/06/2023, passed in assessee's own case for the assessment year 2003–04 cited supra, while deciding similar issue in favour of the assessee by following the decision rendered in the preceding year, observed as under:–

> *"78. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench, vide order dated 14/12/2021, passed in assessee's own case for the assessment year 2002–03, while following the decision rendered in the preceding year, decided the similar issue in favour of the assessee, by observing as under:–*
>
> > *"52. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02 in favour of the assessee. While deciding the issue in favour of the assessee the Coordinate Bench of the Tribunal in ITA.No. 4083/Mum/2003 dated 22.10.2014 held as under: -*
> >
> > > *"32. With regard to the contribution to the local organization, the issue has been dealt with by the A.O. at page 6 -7, para 10 of his order. The*

ld. CIT(A) deleted the addition/disallowance by dealing the issue at page 3, para 7 of his order wherein he has followed the order of the Tribunal in earlier years.

33. We have considered the rival contentions and we found that the issue has been decided by the Tribunal consistently in favour of the assessee in the assessment years 1986-87 to 1989-90, 1994-95 & 1995-96 to 1997-98. In an appeal further filed by the Revenue before the Hon'ble High Court in assessment years 1988-89, 1994-95, 1995-96, the same has been decided in favour of the assessee. The order of the Tribunal for 2000-01 was not challenged by the Department before the Hon'ble High Court on this issue. Respectfully following the order of the Tribunal and Hon'ble High Court in assessee's own case, we do not find any reason to interfere with the order of the ld. CIT(A)."

53. Respectfully following the above decision, we sustain the order passed by the Ld.CIT(A) and dismiss the Ground No. 2 raised by the revenue. We order accordingly."

79. The learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case and no change in facts and law was alleged in relevant assessment year. This issue is recurring in nature and has been decided in favour of the assessee in the preceding years. Therefore, respectfully following the judicial precedent in assessee's own case cited supra, ground no.2, raised in Revenue's appeal is dismissed."

79. In the present appeal, the learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case. This issue is recurring in nature and has been decided in favour of the assessee in the preceding years. Therefore, respectfully following the judicial precedent rendered in assessee's own case cited supra, grounds no.2, raised in Revenue's appeal is dismissed.

80. The issue arising in ground no.3, raised in Revenue's appeal is pertaining to the deletion of disallowance on account of rural development expenses.

81. The brief facts of the case pertaining to the issue, as emanating from the record, are: During the year under consideration, the assessee incurred expenditure of Rs.71,43,397, towards rural development expenditure. In this regard, the assessee submitted that rural development activities include family welfare expenses, agricultural training, and environment program, supply of horticulture sapling to villagers, self-help training, natural resources management, medical camps, medicine distribution, etc., where the majority of working population employed in assessee's factories/offices are residing. Accordingly, the assessee submitted that the expenditures incurred were for the purpose of business and claimed the same as allowable under section 37(1) of the Act. On the basis that in the assessment year

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2003–04, such expenditure was disallowed, the AO disallowed the expenditure in the year under consideration.

82. The learned CIT(A), vide impugned order, following the decision of its predecessor–in–office in assessee's own case deleted the aforesaid disallowance made by the AO. Being aggrieved, the Revenue is in appeal before us.

83. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 13/06/2023, passed in assessee's own case for the assessment year 2003–04 cited supra, while deciding similar issue in favour of the assessee by following the decision rendered in the preceding year, observed as under:–

> *"83. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench, vide order dated 14/12/2021, passed in assessee's own case for the assessment year 2002–03, while following the decision rendered in the preceding year, decided the similar issue in favour of the assessee by observing as under:–*
>
> > *"60. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02 in favour of the assessee. While deciding the issue in favour of the assessee the Coordinate Bench of the Tribunal in ITA.No. 4083/Mum/2003 dated 22.10.2014 held as under: -*
> >
> > > *"38. Ground No. 6 of Revenue's appeal relates to the disallowance of rural development expenses. The A.O. has dealt with this issue at page 9, para 15 and the ld. CIT(A) has dealt with this issue at page 4-5, para 11 of his order. We found that the issue has been decided by the Tribunal in assessee's own case in its favour in assessment years 1998-99, 1999-00 & 2000-01. We further found that the Department on this ground is not in appeal before the Hon'ble High Court in these years. Respectfully following the order of the Tribunal, we do not find any reason to interfere with the order of the ld. CIT(A) for deleting the rural development expenses amounting to Rs. 66,08,937/-."*
> >
> > *61. Respectfully following the above decision, we sustain the order of the Ld.CIT(A) and dismiss the ground raised by the revenue. We order accordingly."*
>
> *84. The learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case and no change in facts and law was alleged in the relevant assessment year. This issue is recurring in nature and has been decided in favour of the assessee in the preceding years. Therefore, respectfully following the judicial precedent in assessee's own case cited supra, ground no.3, raised in Revenue's appeal is dismissed."*

85. In the present appeal, the learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case. This issue is recurring in nature and has been decided in favour of the assessee in the preceding years.

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Therefore, respectfully following the judicial precedent rendered in assessee's own case cited supra, grounds no.3, raised in Revenue's appeal is dismissed.

86. The issue arising in ground no.4, raised in Revenue's appeal is pertaining to the deletion of disallowance made on account of expenses incurred for making advertisement films.

87. The brief facts of the case pertaining to the issue, as emanating from the record, are: For the year under consideration, the assessee incurred expenditure on advertisement film. During the assessment proceedings, the assessee was asked to furnish the details of expenditure incurred on the production of advertisement films. The assessee was also asked to explain as to why the expenditure incurred on the production of advertisement films should not be treated as capital expenditure. In response thereto, the assessee submitted that it incurred an expenditure of Rs.1,14,02,119, on the production of advertisement films. The AO, vide order passed under section 143(3) of the Act, did not agree with the submissions of the assessee and disallowed the expenditure on the production of advertisement films.

88. The learned CIT(A), vide impugned order, following the decision of his predecessor–in–office, deleted the aforesaid disallowance made by the AO. Being aggrieved, the Revenue is in appeal before us.

89. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 13/06/2023, passed in assessee's own case for the assessment year 2003–04 cited supra, while deciding similar issue in favour of the assessee by following the decision rendered in the preceding year, observed as under:–

> *"97. Having considered the submissions of both sides and perused the material available on record, we find that the Coordinate bench, vide order dated 14/12/2021, passed in assessee's own case for the assessment year 2002–03, while following the decision rendered in the preceding year, decided the similar issue in favour of the assessee by observing as under:–*
>
> > *"94. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02 in favour of the assessee. While deciding the issue in favour of the assessee the Coordinate Bench of the Tribunal in ITA.No. 4083/Mum/2003 dated 22.10.2014 held as under: -*
> >
> > > *"47. The issue in ground No. 13 with regard to deleting the disallowance of expenses incurred for making advertisement films has been dealt with by the A.O. at page 15-16, para 26. The ld. CIT(A) deleted the same*

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after having observed at page 12-13, para 21 of his order. We found that the issue has already been settled by the Tribunal in assessee's own case in A.Y. 1976-77 and no ground was taken by the Department before the Hon'ble High Court. Similar issue has been decided by the Hon'ble Supreme Court in the case of Empire Jute Co. Ltd., 124 ITR 1 (SC). Accordingly, we do not find any infirmity in the order of the ld. CIT(A) deleting the disallowance by observing that advertisement film was made only for advertisement and its useful life is very short and such films do not add to the capital structure of the company."

95. Respectfully following the above decision, we do not find any reason to interfere with the order of the Ld.CIT(A) and dismiss the ground raised by the revenue. We order accordingly."

98. The learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case and no change in facts and law was alleged in relevant assessment year. This issue is recurring in nature and has been decided in favour of the assessee in the preceding years. Therefore, respectfully following the judicial precedent in assessee's own case cited supra, ground no.6, raised in Revenue's appeal is dismissed."

90. In the present appeal, the learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case. This issue is recurring in nature and has been decided in favour of the assessee in the preceding years. Therefore, respectfully following the judicial precedent rendered in assessee's own case cited supra, grounds no.4, raised in Revenue's appeal is dismissed.

91. The issue arising in ground no.5, raised in Revenue's appeal is pertaining to the deletion of disallowance incurred towards earning exempt income.

92. The brief facts of the case pertaining to the issue, as emanating from the record, are: During the year under consideration, the assessee received a exempt dividend of Rs.82,93,13,242. During the assessment proceedings, the assessee submitted that the investments in shares/securities on which tax-exempt dividend is received were made out of internal accruals and own funds. It was further submitted that no borrowings were made for the purpose of making these investments and no expenditures were incurred for earning tax-exempt dividend income. The AO, vide assessment order passed under section 143(3) of the Act, computed the disallowance of Rs.1,95,057, as expenditure incurred for earning exempt income as per section 14A of the Act.

93. The learned CIT(A), vide impugned order, following the judicial precedents rendered in assessee's own case deleted the disallowance made by the AO under section 14A of the Act. Being aggrieved, the Revenue is in appeal before us.

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94. Having considered the submissions of both sides and perused the material available on record, it is evident from the Balance Sheet of the assessee as no 31/03/2004, forming part of the paper book on Page–63, that the assessee has share capital and reserves & surplus of Rs.3610.83 crore, while the investment made is of Rs.2540.65 crore during the year. Therefore, it is sufficiently evident that during the year under consideration, the assessee's own funds are more than investments, including the investments for earning exempt income. We including the investments 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, we find no infirmity in the impugned order in deleting the disallowance made under section 14A. Accordingly, ground no.5, raised in Revenue's appeal is dismissed.

95. The issue arising in ground no.6, raised in Revenue's appeal is pertaining to apportionment of Head Office expenses to the units eligible for deduction under section 80IA of the Act.

96. The brief facts of the case pertaining to the issue, as emanating from the record, are: The assessee company has claimed deduction under section 801A of the Act based on the income of the respective unit. Since the Head Office is a controlling unit which manages the affairs of all the units, proportionate expenditure of the Head Office was deducted from the eligible profits of respective units. Accordingly, the AO reduced the eligible deduction by 0.26% of the turnover of the respective units while computing the deduction under section 80IA of the Act.

97. The learned CIT(A), vide impugned order, directed the AO to exclude the allocation of Head Office expenses to the respective units claiming deduction under section 80IA of the Act by following the decision rendered in assessee's own case in the preceding years. Being aggrieved, the Revenue is in appeal before us.

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98. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 13/06/2023, passed in assessee's own case for the assessment year 2003–04 cited supra, while deciding similar issue in favour of the assessee by following the decision rendered in the preceding year, observed as under:–

> *"109. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench, vide order dated 14/12/2021, passed in assessee's own case for the assessment year 2002–03, while following the decision rendered in the preceding year, decided the similar issue in favour of the assessee, by observing as under:–*
>
> > *"109. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2001-02 in favour of the assessee. While deciding the issue in favour of the assessee the Coordinate Bench of the Tribunal in ITA.No. 4083/Mum/2003 dated 22.10.2014 held as under: -*
> >
> > > *"54. The issue in ground No. 18 pertains to the apportionment of head Office expenses while computing deduction u/s 80IA of the Act.*
> > >
> > > *55. This issue has been dealt with by the ld. CIT(A) vide his order in page 15-16, para 23.5 & 23.6. We found that the issue has been decided by the Tribunal in assessee's own case in its favour in assessment years 1994-95 to 1998-99 and the Department is not in appeal against the order of the Tribunal. Respectfully following the order of the Tribunal, we do not find any reason to interfere with the order of ld. CIT(A) on this issue.."*
> >
> > *110. Respectfully following the above decision, we do not find any reason to interfere with the order of the Ld.CIT(A) and dismiss the ground raised by the revenue. We order accordingly."*
>
> *110. The learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case and no change in facts and law was alleged in relevant assessment year. This issue has been decided in favour of the assessee in the preceding years also. Therefore, respectfully following the judicial precedent in assessee's own case cited supra, ground no.9, raised in Revenue's appeal is dismissed."*

99. In the present appeal, the learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case. This issue is recurring in nature and has been decided in favour of the assessee in the preceding years. Therefore, respectfully following the judicial precedent rendered in assessee's own case cited supra, grounds no.6, raised in Revenue's appeal is dismissed.

100. The issue arising in ground no.7, raised in Revenue's appeal, is pertaining to the exclusion of sales tax and excise duty from the total turnover.

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101. We find that this issue is no longer res integra and has been decided in favour of the assessee by the Hon'ble Supreme Court in CIT v/s Lakshmi Machine Works, [2007] 290 ITR 667 (SC), wherein the Hon'ble Supreme Court held that excise duty and sales tax component cannot form part of the total turnover for computation of deduction under section 80HHC of the Act. Thus, respectfully following the aforesaid decision, ground no.7, raised in Revenue's appeal is dismissed.

102. The issue arising in ground no.8, raised in Revenue's appeal is pertaining to the reduction of 90% of DEPB income from business profit for computing deduction under section 80HHC of the Act.

103. After hearing both the parties, we find that this issue is no longer res integra and has been decided by the Hon'ble Supreme Court in Topman Exports Ltd. v/s CIT, [2012] 342 ITR 049 (SC), wherein the Hon'ble Supreme Court held that 90% of the DEPB income is to be reduced from the business profit for computing deduction under section 80HHC of the Act. Thus, in view of the above, we find no infirmity in the impugned order passed by the learned CIT(A) on this issue. Accordingly, ground no.8, raised in Revenue's appeal is dismissed.

104. The issue arising in ground no.9, raised in Revenue's appeal is pertaining to the claim of deduction under section 80IA of the Act in respect of profit derived from Rail System.

105. The brief facts of the case pertaining to the issue, as emanating from the record, are: During the year under consideration, the assessee claimed a deduction of Rs.12,01,53,521, under section 80IA of the Act in respect of Rail System, Raipur. The AO, vide assessment order passed under section 143(3) of the Act, rejected the claim of the assessee on the basis of the conclusion reached in assessee's own case for the assessment year 2003–04. The assessee also claimed a deduction of Rs.11,85,52,834, under section 80IA of the Act in respect of Rail System, Hotgi. In support of its claim, the assessee filed Form no.10CCB, along with the return of income. The AO found that the claim of the Rail System, Hotgi, is on the line of claim in respect of Rail system, Raipur, which was rejected for the assessment year 2003–04. Accordingly, the AO rejected the claim of deduction under section 80IA of the Act in respect of Rail System, Hotgi.

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106. The learned CIT(A), vide impugned order, following the decision of its predecessor–in–office in the assessment year 2003–04, deleted the disallowance made by the AO under section 80IA of the Act in respect of Rail System, Raipur, and Hotgi. Being aggrieved, the Revenue is in appeal before us.

107. Having considered the submissions of both sides and perused the material available on record, we find that the coordinate bench of the Tribunal, vide order dated 13/06/2023, passed in assessee's own case for the assessment year 2003–04 cited supra, while deciding similar claim in favour of the assessee in respect of Rail System at Raipur, observed as under:–

> *"122. We have considered the submissions of both sides and perused the material available on record. In the present case, it is undisputed that the assessee has a cement plant in Raipur District. It is the claim of the assessee that to facilitate the inward and upward movement of goods, the assessee company developed an infrastructure facility for the rail system and the same satisfies the conditions for deduction under section 80-IA of the Act. We find that the assessee on this aspect made detailed submissions before the AO, which have been recorded in para 21.3 of the assessment order. Similarly, the assessee also made submissions before the learned CIT(A), which have been recorded in para 16.4-16.13 of the impugned order, as under:-*
>
> > *"16.4 The appellant made detailed submission with regard to the issue in dispute before the undersigned. It stated that the appellant company had established a cement plant in Raipur. <u>The nearest available Railway Siding was at a distance of around 20 kilometres from the plant. To facilitate inward and outward movement of goods, the appellant developed infrastructure facility of Rail System</u>. which was made operative in September 1999. The appellant company duly <u>entered into an agreement with Southern East Railway</u>, which is a part of Government of India. It was submitted that <u>there was option available u/s 801A with the appellant to claim deduction for any 10 consecutive years at its own choice</u>. The appellant <u>has opted for claiming</u> the deduction from AY2003-04 onwards. The <u>income offered for tax</u> by the appellant <u>includes income from Rail System</u>.*
> >
> > *16.5 The appellant further submitted that the Rail System is a 'Profit Centre'. The <u>Rail System</u> is engaged in business of <u>providing transportation facility to the cement plant, profit of which is embedded in the profit of the appellant company as a whole</u>. By developing this infrastructure facility, there has been a <u>saving in transportation cost and all over profits of the Company has increased due</u> to such savings. <u>All the businesses</u> of the appellant company are <u>interconnected</u>. <u>interlaced</u> and there is <u>common management, funds and control</u>. Profits of the Rail System are embedded in the overall profit of the company. In support of contention that treatment of a transaction in books of account cannot govern the tax statement, the appellant relied on the decisions of the <u>Supreme Court 82 ITR 363 Kadernath Jute Mfg. Co. Ltd Vs. CIT and 227 ITR 172 Tuticurin Alkali Chemical Ltd</u>.*
> >
> > *16.6 The appellant 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 submitted that Section Itself envisages situation of captive consumption. Reliance was*

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placed 59 ITR 514(Guj.) Anil Starch Ltd. vs CIT. 254 ITR 187(Bom.) CIT vs. Win Laboratories Pvt Ltd and 48 ITR 123(SC) Tata Iron & Steel Co. Ltd. vs State of Bihar.

16.6 Further, it was submitted that the facility of Rail System consists of all that is required to carry on the railway activity in an organised and systematic manner. The activity of Rail System is real and substantial and it is carried on with a said purpose, namely, 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. The profits derived from the Rail System are clearly arising out of the business of developing, operating and maintaining the Rail System.

16.7 The appellant submitted that substantial investment has been made in setting up the Rail System. All the assets are new assets and were not used for any purpose by any person earlier. There is an agreement with the Government for operating and maintaining the Rail System. It employees required personnel directly or through the railway authorities and is bearing the salary cost. relating thereto. 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 was also submitted that the Rail System is not formed by splitting up on 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.

16.8 The appellant submitted that the conditions specified in Section 801A (4)() in respect of an infrastructure facility are fully satisfied in the present case. The Rail System is owned by the appellant company which is a company registered in India. The appellant has entered into an agreement with the Central Government for operating and maintaining the new infrastructure facility. It has started operating and maintaining the infrastructure facility after 1st April 1995.

16.9 The appellant submitted that there is no basis on which the Assessing Officer has mentioned that the legislature's intention was to cover organisations like Konkan Railway, Delhi Metro Corporation, etc. There is no such specific mention in the Act. The appellant relied on the decision of the Bajaj Tempo Ltd vs CIT 156 ITR 188(SC).

16.10 Regarding maintenance of separate books of account, the appellant submitted that there is no such condition for grant of tax holiday benefit. Although separate books of account are not maintained, profit of the eligible business has been computed based on the memorandum books of account and other details maintained by the appellant. The Balance Sheet and Profit & Loss account of the eligible business has been audited by the Chartered Accountant. The appellant has filed along with its Return of Income the form No. 10CCB, duly audited, as per the provisions of Section 801A(7). In the case of CIT vs Dunlop Rubber Co (1) Ltd. 107 ITR 182 (Cal.) it was held that for the purpose of tax holiday benefits it is not necessary that the eligible unit must maintain separate books of account.

6.12 The appellant submitted that the number of employees directly employed in the eligible business is not relevant at all. There is an agreement with the railway authority for operation and maintenance of the Rail System and under the said agreement, the operations and maintenance is to be carried out by the railways and the appellant bears the cost of the employees deputed by the railway authorities for this purpose. It is settled position that in order to compute the number of workers, casual and other workers appointed through the contractors have to be taken into consideration. The number of employees,

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including appointed through the railway authorities, would far exceed 10. The appellant relied 152 ITR 152(Kar.), K.G. Yediyurappa & Co, and 99 Taxmann 229 Vikshana Tdg & Investment Pvt Ltd. In any case, the condition of employing a minumum of 10 workers is not applicable to an infrastructure enterprise.

16.13 The appellant argued that the AO's allegations that it has no control over the operations of the Rail system, is baseless and without merits. Merely because the workers are deputed by the railway under the operations and maintenance agreement, does not mean that the appellant has no control over the Rail System. It is not open for the railway authority to use the faclity for any purpose other than for the purpose of appellant's business. The entire loading and unloading is done under the insistence of and supervision of the appellant. The appellant decides the destination to which the material is to be transported. Entire risk and reward in relation to the Rail Sytem are of the appellant. Therefore, it was submitted that the appellant has effective and total control over the Rail System."

123. After considering the aforesaid submission, the learned CIT(A) vide impugned order came to the conclusion that all the 3 conditions required to be fulfilled as per section 80-IA(4)(i) of the Act are satisfied by the assessee. At the outset, it is pertinent to note that in respect of the same rail terminal at Rawan District, Raipur, deduction under section 80-IA of the Act was allowed in the case of assessee's subsidiary company in UltraTech cement Ltd v/s DCIT, in ITA No. 1412/Mum./2018, etc., vide order dated 14/12/2021, by the coordinate bench of the Tribunal.

124. In the assessment order, the AO held that in the present case, the rail system does not have any agreement with the authorities mentioned above. On the contrary, the learned DR though agreed that the assessee has entered into an agreement with South-Eastern Railway administration on 10/04/2000 for the Rail System at Rawan District, Raipur, however, submitted that the same is subsequent to the commencement of operations on 25/09/1999. The learned DR also submitted that since the infrastructure facility was made operational during the financial year 1999-2000, therefore, the claim of benefit under section 80-IA for the alleged infrastructure facility is to be examined as per the provisions of the Act relevant for the financial year 1999-2000. The learned DR also submitted that as per the provisions of section 80-IA (4)(i)(b) of the Act, as applicable for the financial year 1999-2000, such undertaking was required to be transferred to the Central Government, State Government, local authority or such other statutory body. However, the agreement dated 10/04/2000 does not have any such clause and therefore the same is not in conformity with the provisions of the Act. From the perusal of the record, it is evident that aforesaid submissions made by the learned DR were not the basis for disallowance under section 80-IA of the Act. In this regard, the following observations of the Special Bench of the Tribunal in Mahindra and Mahindra Ltd vs DCIT, [2009] 30 SOT 374 (Mumbai) (SB), becomes relevant:-

"In our considered opinion the learned Departmental Representative has no jurisdiction to go beyond the order passed by the Assessing Officer. He cannot raise any point different from that considered by the Assessing Officer or CIT(A). His scope of arguments is confined to supporting or defending the impugned order. He cannot set up an altogether different case. If the learned DR is allowed to take up a new contention de hors the view taken by the Assessing Officer that would mean the learned A.R. stepping into the shoes of the CIT exercising jurisdiction under section 263. We, therefore, do not permit the learned DR to transgress the boundaries of his arguments."

125. Therefore, on this preliminary basis only, as noted by the Special Bench of the Tribunal in the aforesaid decision, the contention of the learned DR is rejected. Even otherwise, it is an accepted position that the assessee did not make any claim in the first year of its operation and the claim was made for the first time in the year under

consideration, i.e. assessment year 2003-04. Therefore, we are of the considered view that in order to determine the eligibility of the assessee for deduction under section 80-IA of the Act, the provisions of the Act as applicable for this year become relevant. We find that vide Finance Act 2001, w.e.f. 01/04/2002, the provisions of section 80-IA (4) of the Act were amended and the same reads as under:-

"(4) This section applies to—

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

(a) it is owned by a company registered in India or by a consortium of such companies;

(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:"

126. We find that all the aforesaid conditions are satisfied in the present case for claiming deduction under section 80-IA of the Act. As regards the submission of the learned DR that the assessee has constructed a private siding for captive use, we find that similar submission was rejected by the coordinate bench of the Tribunal in the case of assessee's subsidiary company in UltraTech cement Ltd (supra), vide order dated 14/12/2021. Further, even though the agreement was entered on 10/04/2000, and the operations commenced in September 1999, it is pertinent to note that the parties to the agreement have honoured the said agreement, and the rights granted therein were not revoked for this reason and the said agreement was still valid in the year under consideration. In view of the aforesaid findings and respectfully following the decision of the coordinate bench cited supra, we find no infirmity in the impugned order allowing deduction under section 80-IA of the Act to the assessee in respect of profits from the rail system. As a result, ground no.11 raised in Revenue's appeal is dismissed."

108. The learned DR made similar submissions, as were made in the preceding assessment year. The learned DR reiterated that the operations commenced prior to entering of the agreement by the assessee with the concerned Railway Authorities. We find that the coordinate bench of the Tribunal in the preceding year duly considered similar arguments of the learned DR and found no merits in the same. We also find that as per section 80IA(4) of the Act, one of the conditions for applicability of the section is that there has to be an agreement entered with the other Statutory Body for developing or operating and maintaining or developing, operating and maintaining a new infrastructure facilities. No material has been brought on record to show that such an agreement does not exist in the present case and the only plea raised by the learned DR is that such an agreement is post the commencement of operation and, therefore, the assessee does not satisfy the conditions as provided in

section 80IA(4) of the Act for availing the benefit of the said section. However, we find that the language of the section does not support the submissions so made by the learned DR, as there is no specific requirement in the section that such an agreement should be prior to the operation. We find that the said section only requires that there has to be an agreement, which condition as noted by the coordinate bench of the Tribunal in the preceding year is duly satisfied. In the absence of any allegation of change in facts and law as compared to the preceding year, we find no reason to deviate from the view so taken by the coordinate bench in the preceding year. Therefore, respectfully following the decision of the coordinate bench cited supra rendered in assessee's own case, we find no infirmity in the impugned order in allowing deduction under section 80IA of the Act to the assessee in respect of profits from Rail System, Raipur, and Hotgi. As a result, ground no.9, raised in Revenue's appeal is dismissed.

109. Grounds no.10, being general in nature, thus no separate adjudication is required.

110. In the result, the appeal by the Revenue is dismissed.

111. To sum up, the appeal by the assessee is partly allowed for statistical purposes, while the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 23/06/2023

Sd/-
AMARJIT SINGH
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 23/06/2023

<u>Copy of the order forwarded to</u>:

(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